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Third party funding for dispute resolution

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Third party funding for dispute resolution

A comparative study of England, Hong Kong, Singapore,
the Netherlands and Mainland China

Beibei Zhang
2019

Ulrik Huber Institute for Private International Law
Groningen, the Netherlands

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Third party funding for dispute resolution

A comparative study of England, Hong Kong, Singapore,
the Netherlands and Mainland China

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. C. Wijmenga
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on
Thursday 5 December 2019 at 9.00 hours

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Groningen, 1 November 2019

Beibei Zhang

In memory of my grandfather, Zhang Tonggui

To my husband and best friend, Wang Haitao

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Abbreviations

AA	Arbitration Act (Chapter 10)
ATE Insurance	After-the-Event Insurance
ALF	Association of Litigation Funders
ADR	Alternative Dispute Resolution
BAC	Beijing Arbitration Commission
BTE insurance	Before-the-Event Insurance
BW	Burgerlijk Wetboek
CIETAC	China International Economic and Trade Arbitration Commission
CPR	Civil Procedure Rules
CJC	Civil Justice Council
CFA	Conditional Fee Agreement
DBA	Damages Based Agreement
EU	European Union
FSA	Financial Service Authority of the UK
GZAC	Guang Zhou Arbitration Commission
HKLRC	Law Reform Commission of Hong Kong
HKSAR	Hong Kong Special Administrative Region
IAA	International Arbitration Act (Chapter 143A)
LEI	Legal Expenses Insurance
ICCA	International Council for Commercial Arbitration
ICC	International Chamber of Commerce
IBA	International Bar Association
LC	Legislative Council of Hong Kong
NAI	Netherlands Arbitration Institute
PRC	People's Republic of China
Rv	Wetboek van Burgerlijke Rechtsvordering

SPC	Supreme People's Court of the People's Republic of China
SIArb	Singapore Institute of Arbitrators
SIAC	Singapore International Arbitration Centre
TPF	Third Party Funding
UNCITRAL	United Nations Commission on International Trade Law
WCAM	Wet collectieve afwikkeling massaschade
Wft	Wet op het financieel toezicht

CHAPTER 1 INTRODUCTION

1.1 Background

Third Party Funding (TPF) is often defined as the provision of funding to parties in litigation and arbitration by a third party on a non-recourse basis in exchange for a proportion of the final proceeds.¹ In essence, it is a special type of investment, insulated from lending, insurance, claim assignment, legal aid, and other funding methods.² In the jurisdictions that are included in this thesis, TPF has never been subject to the rules of its alternatives. Some of these jurisdictions have seen the introduction of regulations specifically directed at TPF.

TPF is no longer a new topic in the discussion of dispute resolution. Recent years have witnessed a shift in focus from the issue of whether to permit TPF to the issue of how to regulate TPF. The rise of TPF indicates that the legal practice has been struggling with the problem of lack of funding. On the one hand, the parties face the increasing costs of legal proceedings. On the other hand, they live in a time of financial austerity where the shrinkage of public funds in dispute resolution brings forth a desperate desire for external private funding. Fueled by a large market demand, the TPF industry has been expanding rapidly. Since its establishment, Burford Capital has grown into a US\$ 5 billion company with more than US\$ 3.2 billion in investment portfolio as of 2018.³ Other funders such as Juridical, Fulbrook Capital, Woodsford Litigation Funding, Omni Bridgeway, DS Legal Capital are also recurring players in the TPF industry who have had substantial growth in business.

It is hard to deny that TPF has enabled the parties to pursue legal claims that would otherwise not see their day in court or in arbitration, and therefore, has an effect of facilitating access to justice. TPF has

¹ Nick Rowles-Davies, *Third Party Litigation Funding* (Oxford University Press, 2014), 4; Catherine Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014), 182-85; *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98G; *Civil Law Act of Singapore (Chapter 43)*, section 5B(10); "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," (2018), 50.

² Duarte Henriques, "Third-Party Funding: A Protected Investment?," *Spain Arbitration Review* 2017, no. 30 (2017).

³ Burford Capital, "The Burford Annual: A report on our business in 2018 and the state of legal finance," (2018), 3.

also helped the parties take the costs of pursuing legal claims off the balance sheet. In some jurisdictions, it is deemed as the driving force behind the development of the international arbitration industry, as best illustrated by the recent legal reforms in Hong Kong and Singapore. Although it is agreed that TPF should have an enhanced position in settling commercial disputes, more attempts have been made to eliminate the deleterious effects of TPF. For the funder, access to justice is a side effect or simply a by-product of the funding activities. The primary goal of investing in legal claims has always been to extract as much financial benefit as possible from the funded cases. Thus, it is reasonable to assume that the funders are likely to abuse the process to maximize their commercial gains. Even without abusive practices, the involvement of TPF has changed the equilibrium of dispute resolution, which has attracted the attention of regulators. It is observed that the risks of TPF could be more alarming in one area of law than in others. For instance, TPF in collective litigation is riskier compared to TPF in individual cases, so it is more likely to be subject to stricter court scrutiny and statutory requirements.

This thesis contributes to comparative research on cross-border TPF by examining the differences in understanding and regulating TPF in England, Hong Kong, Singapore, the Netherlands and Mainland China (also referred to as “China”).⁴ All of these jurisdictions have evolved to the stage where law is not only an aspiration and an ideal but also a necessity for good governance and general welfare. Access to justice is established as an individual right which bears public value and serves as the mutual consent that lays the ground for comparison. By comparing the ways that TPF is operated and regulated in different jurisdictions, it becomes possible to raise the awareness of the pros and cons of TPF and also to generalize the minimum standards that could be more widely applied for the practice of TPF.

England has one of the most developed TPF markets in the world.⁵ So far, TPF has become a key element of commercial proceedings in

⁴ Mainland China, also known as China mainland or the Mainland, refers to mainland area of People’s Republic of China, excluding Hong Kong, Macau and Taiwan.

⁵ Lisa Bench Nieuwveld and Victoria Shannon, *Third-Party Funding in International Arbitration*, 2 ed. (© Kluwer Law International; Kluwer Law International, 2017), 101.

England, whether in litigation or in arbitration.⁶ Before TPF emerged, English law had already provided various non-party funding options for dispute resolution. These funding options serve the same purpose as TPF but are treated differently from TPF in regulation. In dealing with the risks of TPF, England introduced the first industrial self-regulation for third party funders which greatly influenced many other jurisdictions such as Hong Kong. In parallel to that, TPF in England is regulated by case law on an ad hoc basis. Hong Kong and Singapore permitted TPF in arbitration just recently, i.e. Singapore from 10 January 2017 and Hong Kong from 1 February 2019. The development of TPF in the world has triggered amendments to statutory laws in these two jurisdictions. In the process of the legal reform, considerations have been given not only to the individual right to access to arbitration but also to the public interest of maintaining their position as leading arbitration centers in the world. The Netherlands has been selected in the present research as a representative of the civil law family. The examination of Dutch law has revealed how a civil law jurisdiction conceives TPF, especially TPF for collective litigation. Because of the shared civil law tradition, the Dutch experience with TPF is likely to generate insights that could be useful for China. Both the Netherlands and the abovementioned common law jurisdictions are included in this research as models for China in dealing with issues associated with TPF. Comparing foreign laws helps understand and improve the domestic ones.⁷

In the recent past, new third party funders have emerged in China,⁸ which has raised questions about how TPF should be defined under Chinese law, where TPF is permitted, what the procedural implications of TPF on the funded proceedings are and whether TPF should be regulated. In Chapter 6, the author analyzes these questions based on empirical materials, while continuously looking beyond the Chinese borders using the results of this comparative study for applicable solutions.

⁶ Rowles-Davies, *Third Party Litigation Funding*: 2.

⁷ Alfredo Narváez Medécigo, *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico* (Springer, 2016), 4.

⁸ "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," 4.

This thesis is designed to serve two goals: to strike a comparison between the selected jurisdictions in relation to the legal aspects of TPF-related issues and to present a balanced view in the Chinese context on the benefits and the risks of TPF in order to formulate a feasible package addressing issues associated with TPF.

1.2 Methodology

Without a reflection on the features of the research subject, the discussion of methodology would be superficial.⁹ The author believes that the study of TPF can hardly be parochial since TPF is a cross-border phenomenon, especially when it is reviewed in the commercial context. Imagine an English funder, as a member of the Association of Litigation Funders (ALF), funds legal claims filed by a Singaporean company against a Chinese company before an arbitral tribunal seated in Hong Kong. The funded proceedings could invoke several sets of domestic and international legal instruments. The international character of TPF requires some agreements in perspective throughout the legal community. A uniform regulation may be unrealistic, but it is necessary to acquire knowledge as to how the issues related to TPF are handled in other jurisdictions. This work employs a comparative legal research method as the key research method. Comparative legal research is not simply formulating a literal comparison between the provisions contained in the law.¹⁰ It implies a “toolbox” instead of a “fixed methodological road map”.¹¹

In this “toolbox”, the following legal research methods are employed: historical method, empirical method, functional method, and contextual method. The discussions in this thesis are not confined to TPF at the present time. Whenever the author must go outside the context of her own time, the historical research method is inevitable. In researching TPF in China which is relatively underexplored, an empirical method is used to obtain first-hand materials. In the process of analyzing legal elements from foreign jurisdictions, the research largely relies on functional and contextual methods. The underlying

⁹ Mark van Hoecke, "Methodology of Comparative Legal Research," *Law and Method* December 2015.

¹⁰ James Gordley, "Comparative Legal Research: Its Function in the Development of Harmonized Law," *The American Journal of Comparative Law* 43, no. 4 (1995): 555.

¹¹ van Hoecke, "Methodology of Comparative Legal Research."

idea is that legal concepts must not be disconnected from the rules of the legal systems to which they belong.

The author conducted the empirical research on TPF in China with full awareness of the perils of empirical research method. Empirical legal research is a latecomer in the legal academy. It originated from the US in the 1990s.¹² So far, there has been no universally accepted definition of this form of research.¹³ In fact, it is still a question of whether empirical research is feasible in the law area. However, there is no lack of articles presenting empirical research results. The *Journal of Empirical Legal Studies* alone has already published works on a wide range of legal topics. A recent example regarding non-party funding is the study conducted by Jared A Ellias on bankruptcy claim trading.¹⁴ It addressed the potential conflicts between the integrity of the legal procedure and the commodification of the claims through “a hand-collected sample of trading in 506 bonds issued by 204 large firms that filed for bankruptcy between 2002 and 2012”.¹⁵ As to TPF in particular, the 2015 International Arbitration Survey has adopted the empirical method to explore issues associated with TPF in international arbitration.¹⁶

1.3 Research questions in context

Although the author attempts to deliver a thorough analysis of TPF through comprehensive comparative research, certain decisions as to the scope of the research must be made to avoid the extension of this research to the extent that it becomes unmanageable. The scope of the research can be looked at from two aspects: first, what are the key

¹² *Empirical Legal Analysis: Assessing the performance of legal institutions*, ed. Chang Yun-chien (Routledge, 2014), 1; *The Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert Kritzer (Oxford University Press, 2010), 1.

¹³ *The Oxford Handbook of Empirical Legal Research*: 4.

¹⁴ Jared A Ellias, "Bankruptcy Claim Trading," *Journal of Empirical Legal Studies* 15, no. 4 (2018).

¹⁵ *Ibid.* In this article, the author researched whether the trading associated with the robust secondary market had undermined bankruptcy government by forcing managers to negotiate with shifting groups of activist investors and concluded it had not.

¹⁶ Queen Mary University of London; and White & Case LLP, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," (2015).

issues that this work has addressed? Second, what is the context within which the research questions are addressed?

1.3.1 The key research questions

For comparative purposes, the same research issues have been discussed in the study of each jurisdiction. This line of issues serves as the pattern for comparison.

- a. What is the background against which TPF emerged and developed? Chapters 2 to 6 start with a general introduction of the definition of TPF under the specific domestic law, the legal tradition or the legal environment, the reason why this jurisdiction is important to this work and the key components of the domestic law that are relevant to TPF. The efforts aim to set the scene for the discussion about not only the symptoms of TPF but also the reasons why TPF is treated by law in a certain way in a specific jurisdiction.
- b. Where is TPF permitted? As a preliminary issue, it is important to clarify the scope of TPF or the platform for TPF. This question is particularly interesting in this research since, among the chosen jurisdictions, there is a marked divergence as to the area where TPF is allowed. England allows TPF across all civil cases since the 1960s.¹⁷ Hong Kong permits TPF in arbitration, both international and domestic, since 2019 through the amendment to the Arbitration Ordinance. Singapore however only permits TPF in international arbitration in accordance with the 2017 amendment to the Civil Law Act. Civil law jurisdictions such as the Netherlands do not have the legal tradition to prohibit TPF, even with the knowledge that TPF is risky. This divergence reveals differences in the understanding of TPF and its procedural impact. It also has a bearing on the legal environment and the legal tradition.
- c. What are the procedural implications of TPF? All the chosen jurisdictions agree, albeit with different emphases, that TPF has both pros and cons. When addressing the second research issue regarding why TPF is permitted, the author has highlighted the benefits of TPF. The discussion of this research question focuses

¹⁷ Rowles-Davies, *Third Party Litigation Funding*: 5-6.

on the negative impact of TPF. It has been observed that such impact varies by jurisdiction and by procedure, depending not only on the capacity of third party funders but also the provisions contained in domestic laws and rules concerning the practice of TPF. To understand the impact of TPF on the arbitration procedure, attention must be paid to international instruments with contemplations of the risks of TPF.

- d. How is TPF regulated? This research has found distinctive legal attitudes towards TPF for litigation which seem resistant to the unification of the regulation of TPF. In each chosen jurisdiction, the regulation of TPF for litigation is shaped by endemic components such as the understanding of access to justice, the costs of dispute resolution, due process considerations, the conflicts of interest management capacity of the legal profession, the existing safeguards against procedural abuses, etc. In arbitration, however, there are some international trends in dealing with TPF that can be observed. In the chapter dedicated to China, the question of whether and how TPF should be regulated has not been settled on the official side. The way forward in dealing with the risks of TPF is carefully predicted with considerations given to empirical materials about the use of TPF in practice and the concerns of the practitioners about the potential negative effects of TPF.
- e. What are the questions and challenges lying ahead? The answer to these questions requires an effort to pull the threads together and to anticipate the future. It also requires an effort to identify the research limitations of this work. Through these efforts, the author aims to set up the importance of the current work and, more importantly, the research continuity. Questions for future research are those that the author does not plan to follow up on in this research for various reasons, such as the time limit, the length limit or the lack of empirical materials, but are particularly interesting and valuable to the development and the regulation of TPF in individual jurisdictions.

1.3.2 The commercial context

TPF for commercial cases is the central focus of this work. The primary reason is that TPF is most relevant to commercial disputes and the mainstream funders are operating their business predominately in the

commercial area.¹⁸ The second reason is to avoid moral hazard components. In practice, third party funders appear reluctant to invest in cases with “human elements”, such as cases “involving family law, defamation, or injuries to the claimholder”.¹⁹ The financing of commercial disputes might raise fewer concerns compared to financing other types of disputes. From an academic perspective, TPF for cases with “human elements” deserves a different mode of analysis as the funding arrangements may face supreme regulatory measures.

With the above being said, there is a strong need to ask what is meant by the word “commercial”. Traditionally, this would mean commercial disputes arising from the trade of goods. In modern literature, however, “commercial” is used in a rather wide sense. According to Redfern and Hunter, “relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road”.²⁰ In line with Redfern and Hunter’s point of view, “commercial” is treated by this work as an unresolvable ambiguity since it is almost impossible to accurately describe what “commercial matters” encompass at this moment. Instead, the author tries to elaborate on the feature of commercial situations and the implication of this feature on the research subject.

Legal research on commercial matters can better accommodate a comparative legal method. In the commercial world, legal systems are ‘mixed’ in the sense that they have been influenced by a variety of other systems. It is a widely recognized working theory of dealing with commercial problems that the feeling of dissatisfaction with the

¹⁸ Cento Veljanovski, "Third-Party Litigation Funding in Europe," *Journal of Law, Economics & Policy* 8, no. 3 (2012): 418; Rachael Mulheron, "Third party funding and class actions reform," *Law Quarterly Review* 131, no. Apr (2015): 319.

¹⁹ Jennifer A. Trusz, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration," *The Georgetown Law Journal* 101, no. 6 (2013): 1655.

²⁰ Redfern and Hunter, *Redfern and Hunter on International Arbitration*, 6 ed. (Oxford University Press, 2015), 11.

solution in one's own system is what drives one to inquire whether other legal systems have produced better solutions. In the commercial context, it is natural to ask why a foreign jurisdiction has tackled the same problem in a different way or why a foreign jurisdiction does not feel the need to deal with a particular problem. Nevertheless, it is crucial to note that the above does not imply that non-commercial cases are supposed to be entirely excluded. These cases are brought into discussions whenever it is necessary to explain TPF as a legal concept or to elaborate on the alternatives to TPF.

1.4 Why this research?

What makes this research compelling is the following features: first and foremost, it is unfolded with a focus on the recent developments in the regulation and the theory of TPF in the chosen jurisdictions. These enhance the interest in conducting not only a cross-national comparison but also a comparison between the past and the present. Secondly, the jurisdictions of comparison present different approaches to the understanding and the regulation of TPF. In this work, both new and well-developed TPF markets share a likeness in their commercial importance. They are all required to respond to the demand for access to justice in the commercial realm. Some of them share the same legal tradition that has significant implications on TPF, in which there is a strong need to ask why TPF is understood and treated differently and whether it is possible to reach some consensus among them. Thirdly, the research fills the gap in the understanding of the TPF practice in China. So far, the development of TPF in China has not been translated into wide academic coverage. The omission of China from previous literature is not necessarily due to a lack of academic enthusiasm but might also be related to the absence of empirical research materials. With the assistance of a Chinese third party funder and other legal practitioners in Shenzhen, China, the author has obtained some first-hand materials about the Chinese TPF market and the related legal concerns about TPF through a three-month empirical research. Although this empirical research is far from systematic, it provides sufficient data to offer a snapshot of the practice of TPF in China and to justify some suggestions that have been made for future legal reforms.

1.5 Structure

This thesis consists of seven chapters. Chapter 1 clarifies the background, the research subject, the methodology, the main research questions and the outline of the thesis. Chapters 2 to 6 discuss respectively TPF in England, Hong Kong, Singapore, the Netherlands, and China. Chapter 7 presents the concluding remarks. All of these chapters are unified by the theme that the study of TPF and the related legal issues in the targeted jurisdictions should be contextual and conducted from a comparative perspective.

CHAPTER 2 TPF IN ENGLAND

2.1 Introduction

England represents one of the most developed TPF markets. It contributes to the discussion of TPF in three main aspects: (1) the philosophical basis for TPF; (2) the business models of TPF; (3) the regulatory measures against the risks of TPF. Access to justice has been at the forefront of action and debate in England for a while, specifically the costs of access to the court.²¹ To facilitate access to justice, efforts have been made to introduce not only TPF but also various alternative funding options such as conditional fees agreement (CFA), damages-based agreement (DBA), legal expenses insurance (LEI) or before-the-event insurance (BTE insurance), after-the-event insurance (ATE insurance), legal aid, etc.²² The existing English law allows these funding options in civil disputes whether they are settled by litigation or arbitration.²³ It is safe to say at this moment that the benefits of non-party funding have overridden the fear of the evil of maintenance and champerty in civil proceedings in England. Commercial cases with high potential returns are particularly attractive to third party funders. Commercial claims represent the main focus of the TPF industry in the UK, according to a report issued in 2012.²⁴

Under English law, TPF refers to a type of investment that enables third party funders to fund the legal costs of dispute resolution in part or whole, in exchange for a proportion of the final proceeds.²⁵ This

²¹ Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," (2010), 10.

²² Damages-based agreement is often referred to as "contingency fees" in academic discussions. See: N. H. Andrews, *Andrews on Civil Processes: Court Proceedings* (Intersentia, 2013), 560.

²³ There is no statutory law for TPF in England. According to Rachael Mulheron, TPF is currently governed by (1) the ALF code of conduct, (2) the ALF rules, (3) sporadic judicial oversight of litigation funding agreement. See: Rachael Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments," *Cambridge Law Journal* 2014, 570.

²⁴ Christopher Hodges, John Peysner, and Angus Nurse, "Litigation Funding: Status and Issues," (2012), 15.

²⁵ There is no legislative definition for TPF in England. To understand what TPF means, it is useful to look to the Jackson report where TPF is "the funding of litigation by a party who has no pre-existing interest in the litigation, usually on the

funding option normally bears the following characteristics: (1) funding from a third party with no connection to the funded proceedings other than the TPF agreement; (2) funding on a non-recourse basis; (3) funding with commercial motives; (4) funding that is regulated separately.²⁶ In England, TPF could be provided by a wide range of investors whose businesses do not necessarily focus on funding legal claims.²⁷ TPF is a funding option of its own. It has never been the intention of English legislators to put TPF and its alternatives in the same category under the same regulation.²⁸ The above definition of TPF applies to both litigation and arbitration. The difference between TPF for litigation and TPF for arbitration largely lies in the impact of the funding arrangement on the funded procedure and the way TPF is regulated, which will be elaborated in sections 3 and 4 of this chapter. Some commentators have adopted a broad definition of TPF as an umbrella term which covers all types of legal capital deployed to fund the realization of assets that are contingent on the resolution of some forms of legal processes.²⁹ This cover-all definition however is incompatible with the current practice of TPF and the regulator's intention to regulate TPF separately from other traditional funding options, and therefore, ought not to be adopted by this chapter.

Previously in England, all types of external funding for dispute resolution were prohibited in accordance with the law of maintenance and champerty.³⁰ This law was first introduced in 1275 through the Statute of Westminster to prevent the oppression of the weak by the

basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often as a percentage of the recovery sum; and (ii) the funder is not entitled to payment should the claim fail." See: Rupert Jackson, "Review of civil litigation costs: Final Report," (2009), xv.

²⁶ Ibid.

²⁷ The Association of Litigation Funders, "Statement from the Association of Litigation Funders of England and Wales regarding the Court of Appeal Judgment in *Excalibur*," <http://associationoflitigationfunders.com/wp-content/uploads/2016/11/ALF-Excalibur-Press-Release-181116-.pdf>.

²⁸ Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," 11.

²⁹ Christopher P. Bogart, "Deeply flawed: A perspective on the ICCA-Queen Mary Task Force on third-party funding," (2017); Hodges, Peysner, and Nurse, "Litigation Funding: Status and Issues," 10-11.

³⁰ The Law Commission, "Proposals for reform of the law relating to maintenance and champerty," (1966), 4-5.

great lords who trafficked in lawsuits and to bar lawyers from abusing the litigation process.³¹ Criminal and civil liability of the maintenance and champerty prohibition was not abolished until the 1960s when the English authorities realized that the retention of the prohibition of maintenance and champerty might be inconsistent with the developments in the practice of litigation.³² Around that time, England went through several access to justice movements due to the change of the conditions in the society accompanied by developments of law, modifications to the theory of justice, the rise of external funding for civil disputes, etc.³³

Nowadays, there is little doubt that the rule of law implies that it is the state's obligation to facilitate access to justice.³⁴ But the untrammelled pursuit of substantive justice funded by public money could be too expensive for the state who has other fiscal responsibilities.³⁵ What further complicates the scene is that the meaning of "access to justice" has never been straightforward. It remains unclear to what extent the right to access to the court proceedings should be promoted. Besides, it is debatable whether access to arbitration can be equated to access to justice.³⁶ The Civil

³¹ Lord Neuberger, "From Barretrie, Maintenance and champerty to litigation funding-Burford Capital funding first annual lecture," (2013), 6; "The Civil Aspects of Champerty and Maintenance," *Columbia Law Review* 17, no. 4 (1917): 333-34; Rowles-Davies, *Third Party Litigation Funding*: 25.

³² The Law Commission, "Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965," 5; *Criminal Law Act 1967*, section 14.

³³ The Law Commission, "Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965," 5; John Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding* (Palgrave Macmillan, 2014), 2-3.

³⁴ It is a question to what extent the state is required to fulfill its obligation of funding access to justice. See: John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, 2014), 140.

³⁵ *Ibid.*, 139-40; Hodges, Peysner, and Nurse, "Litigation Funding: Status and Issues," 15-16.

³⁶ Patricia Zivkovic, "Impecunious Parties in Arbitration: An Overview of European National Courts' Practice," *Croatian Arbitration Yearbook* 23(2016). Sometimes, access to arbitration could be a denial of access to the court system or access to justice. Domestic laws have different approaches to this issue. The English court tends to believe that by agreeing to arbitration, parties waive the requirement implicit in article 6 of the Human Rights Convention. See: *Paczy v Haendler & Natermann GmbH*, [1980] F.S.R. 526; Lou Naugle, "Duress – effect on arbitration agreement," in *Lexology* (2007).

Justice Council (CJC) pointed out some elements of access to justice that might be useful for demystifying access to justice in the English context: access to justice at least implies (1) a meritorious case, (2) the participants having at the outset access to means of funding their case, (3) the lawyers on each side having at the outset access to reasonable remuneration, (4) the availability of an efficient and properly resourced court system.³⁷ Given the above, it is conceivable that English law is geared to ensure that the parties are provided with as many funding options as possible so that they can stand on an equal footing in dispute settlement.³⁸ TPF is accepted as a vehicle of access to justice in litigation.³⁹ In arbitration, the access to justice argument for TPF is also valid. Though in reality, TPF is often used for reasons other than access to justice.⁴⁰

TPF may have negative effects on the funded proceedings and on the participants of the proceedings. Therefore the English authorities have acknowledged the necessity to regulate TPF. Currently, the idea is to regulate TPF through a regulatory framework consisting of the relics of the champerty prohibition, case law and a voluntary code,⁴¹ which has a significant impact on jurisdictions outside of England, particularly Hong Kong and Singapore.⁴² At present, the government does not plan to introduce more safeguards against the risks of TPF any time soon because it is satisfied with the existing regulatory regime and they have not seen specific concerns regarding the behavior of third party funders.⁴³

Arbitration as an autonomous dispute resolution regime is allowed to develop its own rules to deal with TPF. It is observed that TPF is able

³⁷ Civil Justice Council, "Improved Access to Justice – Funding Options & Proportionate Costs," 7.

³⁸ Sorabji, *English Civil Justice after the Woolf and Jackson Reforms*: 164.

³⁹ Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," 86.

⁴⁰ Scholars have found that TPF is used by some parties to fund their litigation. Others deem as TPF as a "way of managing their cash flow". See: Veljanovski, "Third-Party Litigation Funding in Europe," 421.

⁴¹ Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments," 570.

⁴² The law reform commission of Hong Kong, "Report on third party funding for arbitration," (2016), 50.

⁴³ Lord Hodgson of Astley Abbots, "Civil Proceedings: Third Party Financing: Written question - HL4216."

to facilitate access to arbitration. But the increase in the complexity of the TPF-related issues has posed a great challenge to the administration of arbitration cases. The question is how far the autonomy of arbitration could go in the context of TPF. For instance, in *Essar v Noscot*, the English court has upheld the tribunal's decision that the costs of TPF are covered by the party's costs and therefore are recoverable.⁴⁴ It remains uncertain whether the specific circumstances of *Essar v Noscot* have distinguished this case from other cases where the tribunals are faced with the question of whether to order recoverable costs of TPF.⁴⁵ In any case, arbitration is treated as a separate form of formal dispute resolution by England law. The English Arbitration Act is designed to be a complete code as to the conduct of arbitration. Because of that, TPF for arbitration deserves a different mode of analysis.

This chapter is designed to address the following issues: a. The platform for TPF (where TPF is permitted and what has been changed over time in English law with regard to the legal attitudes towards non-party commercial funding); b. The procedural implications of TPF; c. The regulation of TPF; d. The question lying ahead.

2.2 The Platform for TPF

Currently, TPF is permitted in all civil cases regardless of whether they are settled by litigation or arbitration. Before TPF emerged, there were already various funding options available to the disputing parties. It took a while for the English legislators and courts to overcome the fear of maintenance and champerty to permit non-party commercial funding. It is the task of this section to not only identify the areas where TPF is allowed but also explain what has been changed over time in English law regarding the legal attitudes towards TPF.

TPF is permitted and promoted in litigation based on the notion that it is in the public interest to provide litigants with as many funding options as possible in order to make access to justice easier.⁴⁶

⁴⁴ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm).

⁴⁵ Jeffrey Sullivan, "Essar v. Norscot: Are The Costs Associated With Third Party Funding Recoverable?," *Transnational Dispute Management* 15, no. 4 (2018).

⁴⁶ Jackson, "Review of civil litigation costs: Final Report," 334; Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales,"

Nevertheless, the benefits of TPF are not confined to access to justice. Third party funders help the party strengthen their balance sheet and facilitate the funded proceedings through services such as case management, risk assessment, and strategic decision making. Besides, the use of TPF is politically preferred since it eases the pressure on public expenditure in promoting access to justice. Moreover, the English authority also expects TPF to filter out some unmeritorious cases and to increase the efficiency of the judicial system because the funders rigorously vet the risks which they are taking on.⁴⁷ Nonetheless, it remains to be seen whether this expectation is realistic. In commercial arbitration, TPF is not only promoted but also glorified.⁴⁸ The popularity of TPF for arbitration is all the greater in light of the benefits that TPF enables more access to arbitration and that it contributes to the growth of the English arbitration industry.⁴⁹

2.2.1 How did English law prepare itself for the use of TPF in litigation?

The prohibition on maintenance and champerty was the main legal barrier for the permission of TPF and other funding options in litigation. Only after the law replaced concepts of maintenance and champerty with modern public policy considerations did the permission of external funding for litigation become possible. One of the most important public policy considerations relevant to TPF for litigation is access to justice which implies that meritorious claims should not be deterred by financial strains.⁵⁰ The litigant's right to access to justice did not come naturally. England has experienced several "access to justice" movements which were accompanied or largely motivated by the change of legal ethics and the shifting of social conditions. Despite the efforts to promote access to justice, the right to bring claims to court or arbitration can never be absolute. It is buffeted by other competing principles and considerations such as the fear of abusive proceedings and the erosion of the legal profession. This section aims to present a balanced view of access to justice and to

para. 268.

⁴⁷ Jackson, "Review of civil litigation costs: Final Report," 117.

⁴⁸ Rogers, *Ethics in International Arbitration*: 179.

⁴⁹ Mary Jordan, Andrew Matheson, and Emma Brown, "Why Third Party Funding is on the rise in England & Wales," in *Global Arbitration News* (2018).

⁵⁰ TPF is considered as a vehicle of access to justice in England. See: Khaldoun Qtiashat and Ali K. Qtiashat, "Third party funding in arbitration: questions and justifications," *International Journal for the Semiotics of Law* (2019).

explain the interaction between TPF and access to justice in the context of the English litigation, with the awareness that access to justice is the main driving force for TPF. It also sheds light on the reasons other than access to justice for promoting TPF.

2.2.1.1 The abolition of criminal and civil liability under English law for maintenance and champerty

Champerty and maintenance were introduced in the Middle Ages to prevent the disruption of justice by rich or powerful persons.⁵¹ To recap the reasons for the introduction of the maintenance and champerty prohibition, Lord Neuberger has said maintenance and champerty were first formally declared to be unlawful in 1275 by the Statute of Westminster with the purpose to “prohibit court officials from providing maintenance on its own or by way of champerty” and “bar lawyers from abusing the litigation process”.⁵²

In medieval England, maintenance was not confined to the provision of funding for lawsuits by outsiders.⁵³ It was officially defined as “the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognized by the law as justifying his interference.”⁵⁴ Champerty was “a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give to the maintainer a share in the subject-matter or proceeds thereof, if the action succeeds”.⁵⁵ Historically, maintenance and champerty were criminal offences, torts, and unlawful arrangements.⁵⁶ They were described by Jeremy Bentham as “the sword of a baron, stalking into court with a rabble of retainers at his heels...”⁵⁷

⁵¹ *Giles (Respondent) v Thompson (Appellant)*, [1993] UKHL 2, [1994] 1 AC 142, [1993] 3 All ER 321.

⁵² Neuberger, "From Barretrie, Maintenance and champerty to litigation funding-Burford Capital funding first annual lecture," para. 15.

⁵³ The Law Commission, "Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965," 3.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Neuberger, "From Barretrie, Maintenance and champerty to litigation funding-Burford Capital funding first annual lecture."

As will be explained in the following paragraphs, over time, the reasons for the prohibition of maintenance and champerty faded away, leading to the shrink of the scope of the maintenance and champerty prohibition.⁵⁸ After intensive discussions, maintenance and champerty ceased to be criminal and tortious in England under section 14(2) of the Criminal Law Act 1967.⁵⁹ But the relics of the maintenance and champerty prohibition still have a role to play in regulating TPF today.⁶⁰ The legal basis lies in section 14(2) of the Criminal Law Act 1967: “The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.”⁶¹ As an effect of this provision, champertous behaviors of the funder can still give rise to civil liabilities.⁶² The funding contract is likely to be held unenforceable if it is tainted by champertous factors.⁶³

English scholars usually attribute the shrink of the law of maintenance and champerty to the following reasons: first, there are some circumstances in which litigation may be funded for justifiable

⁵⁸ Lord Mustill has said in *Giles* case that “the crimes of maintenance and champerty are so old that their origins can no longer be traced...” See: *Giles (Respondent) v Thompson (Appellant)*, [1993] UKHL 2, [1994] 1 AC 142, [1993] 3 All ER 321.

⁵⁹ Section 14 of the English Criminal Law Act 1967 provides that “(1) No person shall, under the law of England and Wales, be liable in tort for any conduct on account of tis being maintenance or champerty as known to the common law. except in the case of a cause of action accruing before this section has effect. (2) The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.”

⁶⁰ Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments," 580-88.

⁶¹ *Criminal Law Act 1967*, section 14(2).

⁶² Mulheron has identified six of these factors in the one of her articles: independent advice, an absence of conflicts of interest, no improper control, improperly stirring up litigation, not taking too high a proportion of the “spoils”, and a willingness to meet liability under the funding agreement. See: Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments," 582. The English court is empowered to supervise the funding arrangement. In *Giles* case, for instance, the issue facing the Court of Appeal was whether the agreements between the plaintiffs and the care hire companies are champertous. See: *Giles v Thompson*, 1993 WL 963259.

⁶³ Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments," 581.

reasons.⁶⁴ Second, public policies used to justify the law of maintenance and champerty have been altered.⁶⁵ Third, tort in the common law sense does not fit the litigation funding scene.⁶⁶ Tortious liability requires proof of damages while the damages caused by legal claim funding are normally impossible to prove.⁶⁷ Fourth, the rise of legal costs has met the ever-increasing awareness of access to justice.⁶⁸ Last but not least, the changing landscape of the legal service market has brought a different understanding of legal ethics.⁶⁹

2.2.1.2 The evolving concept of access to justice

In contemporary society, it is frequently asked, how? at what price? and for whose benefit? the legal system really works. These fundamental questions for a long time have discomforted the English judiciary and the legislators since pursuing legal claims is generally expensive in England.⁷⁰ As John Sorabji has said, the lack of access to justice is a part of the crisis of the English legal system which has the potential to undermine the very function of various legal institutions: "The English civil justice system since the 1980s has been subject to the criticism that it is unable to deliver justice; that it is in 'a state of crisis' caused by excessive litigation cost and delay. These long-standing problems render access to the justice system the preserve of the wealthy few."⁷¹ To remedy the situation, the introduction of

⁶⁴ Ibid.; Wenxiong Zhuang, "The Subsumation of Maintenance and Champerty Under Third Party Orders," *Singapore Journal of Legal Studies* (2014): 382-83; The Law Commission, "Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965."

⁶⁵ David Smith and Rachel Gibson, "Champerty and maintenance - old doctrines in a modern funding world," *Journal of Housing Law* 14, no. 4 (2011): 86.

⁶⁶ Zhuang, "The Subsumation of Maintenance and Champerty Under Third Party Orders," 381-82.

⁶⁷ Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments," 581.

⁶⁸ Sorabji, *English Civil Justice after the Woolf and Jackson Reforms*: 12.

⁶⁹ Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments."

⁷⁰ Lord Woolf identified in his Access to Justice report that litigation in England is "too expensive" and that "the costs often exceed the value of the claim". See: Lord Harry Woolf, "Access to Justice- Final Report," (website of department for constitutional affairs 1996).

⁷¹ Sorabji, *English Civil Justice after the Woolf and Jackson Reforms*: 12.

various funding options that have the potential to ensure a level playing field for litigants seems to be inevitable.⁷²

Despite the practical difficulties of implementing access to justice, it is well established in English law that access to justice amounts to a type of human right.⁷³ An agreement has been reached on that adequate access to institutions for dispute resolution should be guaranteed in the modern welfare state.⁷⁴ In light of that, the English court has the willingness not only to recognize TPF as a legitimate means of financing but also to facilitate the funding process. In case law, it is not rare that the English court decides that the counter-arguments, such as that TPF could disrupt the legal proceedings, are supposed to give way to access to justice considerations. In *Giles v Thompson*, for instance, the Court of Appeal held that, “in current conditions, the denial of access to justice for want of financial resources may fairly be regarded as a more potent threat to the wellbeing of society than the risks of perverting the administration of justice which rightly exercised our medieval forebears.”⁷⁵ In *Arkin v Borchard*, the court went one step further to strike a balance between the interest of the funded party and that of the funder in order to keep commercial funding viable: “if the funder is potentially liable for the entirety of the defendant’s costs should the claim fail, the exposure would be ‘too great to render funding on contingency basis of recovering a viable

⁷² When maintenance and champerty were abolished as crimes and torts in 1960s, it was agreed that the law of maintenance and champerty still had a living presence in legal profession. As the result, a solicitor was prohibited from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant. See: *Giles (Respondent) v Thompson (Appellant)*, [1993] UKHL 2, [1994] 1 AC 142, [1993] 3 All ER 321. As the conditions changed, the English authorities decided to introduce lawyer funding to access to justice. See: Andrew Hogan, “Conditional fees: problems solved and problems yet to come,” *Journal of Personal Injury Law* 2006, no. 1 (2006): 42.

⁷³ Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*: 7; *Thai Trading Co v Taylor*, [1998] Q.B. 781. In *Thai Trading* case, Millett Judge referred to access to justice as the “fundamental human right which ought to be readily available to all”, in justifying the funding arrangement between the solicitor and his client.

⁷⁴ Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*: 2.

⁷⁵ *Giles v Thompson*, 1993 WL 963259.

commercial transaction' and thereby access to justice would be denied".⁷⁶

The idea that every citizen should be on an equal footing in pursuing legal claims did not come naturally. To explain how it came about, it is not necessary to go too deep in history. It suffices to start from the access to justice movements in England post-WWII. The first wave happened in the 20th century with the notion that access to justice should be delivered by the modern welfare state.⁷⁷ This gave rise to the contemplation of the Legal Aid Act 1949.⁷⁸ The second wave was demonstrated by the surge of collective litigation and legal aid.⁷⁹ The third wave started in the late 1970s, is most relevant to the introduction of external funding for dispute resolution.⁸⁰ This wave saw the commodification of legal services, the increase of entrepreneurial lawyers, and the flourish of informal models of dispute resolution.⁸¹ These changes had not only domestic causes but also remote triggers such as Britain's military engagement in the Middle East and the influence of legal reforms in other jurisdictions.⁸² In this context, innovative funding options for civil dispute resolution proliferated to allow legal actions even those for public and collective interests.⁸³ The access to justice movements in England are comprised of the worldwide movement in the direction of recognizing access to justice as a human right with public policy value.⁸⁴

The interaction between access to justice and TPF in contemporary times is an interesting one. With little doubt, access to justice is the

⁷⁶ *Arkin v Borchard and others*, [2005] EWCA Civ 655, para. 39.

⁷⁷ Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*: 10.

⁷⁸ *Ibid.*, 2.

⁷⁹ *Ibid.*, 17.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, 18.

⁸² *Ibid.*

⁸³ Bryant Garth and Mauro Cappelletti, "Access to justice: the newest wave in the worldwide movement to make rights effective," *Buffalo Law Review* 27(1978): 222; Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*: 15.

⁸⁴ Garth and Cappelletti, "Access to justice: the newest wave in the worldwide movement to make rights effective," para. 17; Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*: 19; *Arkin v Borchard and others*, [2005] EWCA Civ 655, para. 17.

main driving force for TPF in England.⁸⁵ The quintessential scenario for access to justice is that every citizen should be on an equal footing in pursuing legal claims. Yet the meaning and implications of access to justice are still nebulous under English law, leading to the question to what extent access to justice should be promoted. In practice, the implementation of access to justice is politically loaded and is often hindered by the socio-economic situation.⁸⁶ One can only say that promoting access to justice means to remove some barriers, whether societal, psychological, economic or legal, to ensure that the rule of law is able to accommodate itself to the changing society.⁸⁷

According to the Ministry of Justice, access to justice has at least two important implications. One is the right of the claimant to have sufficient funds to pursue the claim. The other is the right of the defendant to resist the claim without the fear of disproportionate adverse costs.⁸⁸ However, TPF is normally found on the side of the claimant, which brings about the suspicion that TPF creates a new imbalance between the claimant and the defendant.⁸⁹ One person's access to justice could be another person's compensation culture.⁹⁰ In addition to that, the fact that TPF is used by the funded parties for various reasons, not only to ease financial pains in pursuing the claims but also to strengthen the balance sheet or to optimize case management, raises the question of whether the original intention of introducing TPF, namely to create more access to justice, will still

⁸⁵ Jackson, "Review of civil litigation costs: Final Report," 117.

⁸⁶ Estelle Hurter, "Access to justice: to dream the impossible dream," *Comparative and International Law Journal of Southern Africa* 44, no. 3 (2011): 414.

⁸⁷ *Ibid.*

⁸⁸ Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," 7.

⁸⁹ Nadia Darwazeh and Adrien Leleu, "Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding," *Journal of International Arbitration* 33, no. 2 (2016): 128-29.

⁹⁰ Compensation culture as a phrase first appeared in British newspapers in mid-1990s, according to James Hand. In legal discussions, it is an amorphous term and can be applied to a range of claims including claims related commercial activities. In the UK, debates have never been settled on the issue of whether the compensation culture exists. The British perception of compensation culture is generally negative. Compensation culture, which is often referred to as "American-style litigiousness", indicates an increase in claims with low quality that undermines the efficiency of the judicial system. See: James Hand, "The compensation culture: Cliche or cause for concern?," *Journal of Law and Society* 37, no. 4 (2010).

stand.⁹¹ Beyond all that, it is constantly asked whether access to funding will ultimately lead to access to justice and whether access to funding has created an unnecessary drain on the precious legal resources.⁹² Many have argued that the obsession with the idea of access to justice has contributed to the increase in the number of frivolous claims, especially in collective litigation.⁹³ What can be soundly argued at this moment is that TPF is able to facilitate access to proper legal services in individual cases where the expenses of the substantive litigation would have otherwise prevented the legal claims from being brought to court.⁹⁴ It is questionable whether TPF serves access to justice in the broad sense.⁹⁵

2.2.1.3 The rise of TPF in litigation

It is important to note that, TPF is a latecomer in the litigation funding industry.⁹⁶ Prior to the rise of it, there were various other funding options which have been available for years. In the 1990s, the attempt to broaden access to justice and legal services pushed the English authorities to contemplate lawyer funding. CFA was introduced in 1990 and officially became available to a small group of cases in 1995.⁹⁷ DBA went into existence later on as a funding option that could further motivate efficient working.⁹⁸ ATE insurance seemed to be inevitable

⁹¹ Rowles-Davies, *Third Party Litigation Funding*: §1.56.

⁹² Michael Abramowicz, "Litigation Finance and the Problem of Frivolous Litigation," *DePaul Law Review* 63, no. 2 (2014). Gray Chan has accurately pointed out that "legal costs constitute only one facet to the all-embracing notion of 'access to justice'". See: Chan Gary, "Re-Examining Public Policy: A Case for Conditional Fees in Singapore?," *Common Law World Review* 33, no. 2 (2004): 138.

⁹³ Jackson, "Review of civil litigation costs: Final Report," 331.

⁹⁴ PJ Kirby, "Third party funding: access to justice or access to profits?," in *Lexology* (2017); Abramowicz, "Litigation Finance and the Problem of Frivolous Litigation," 196.

⁹⁵ It could be argued that there is a tension between the narrow and broad concepts of access to justice. In this regard, it is useful to look to Iain Ramsay's perception on access to justice in the context of consumer redress. He pointed out that "the narrow dimension equates access to justice with access to legal institutions, whereas a broader approach is concerned with the general conditions of justice in society". See: Charles E. F. Rickett and Thomas G. W. Telfer, eds., *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003), 19.

⁹⁶ Hodges, Peysner, and Nurse, "Litigation Funding: Status and Issues," 30.

⁹⁷ *Courts and Legal Services Act 1990*, section 58; "The Conditional Fee Agreements Order 1995," section 2.

⁹⁸ Hodges, Peysner, and Nurse, "Litigation Funding: Status and Issues," 26-27.

after CFA became a reality.⁹⁹ This insurance allows the parties to be insured against the risk of losing. It is particularly useful in safeguarding the opponent's right to recover costs from the CFA- or DBA-funded party.¹⁰⁰ LEI came long before ATE insurance. It covers a wide range of legal problems relating to both commercial and non-commercial matters. TPF's rise reflects the belief that it can further the access to justice value thus underpinning the traditional funding options.

Although TPF is a recent development in England, it has grown into an industry of its own.¹⁰¹ When it became popular, the notion that non-party funding falls foul of the law of maintenance and champerty and therefore is unlawful had already been reversed.¹⁰² It is believed that English law can make good use of commercial funding as long as the safeguards are ready for the potential risks. For regulatory purposes, commercial funding is distinguished from non-commercial funding.¹⁰³ The former is subject to more stringent judicial supervision.¹⁰⁴

Lord Justice Jackson favored the use of TPF in litigation in his report issued in 2009.¹⁰⁵ He put forward five reasons why TPF should be promoted:

“(i) Third party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus, third party funding promotes access to justice.

(ii) Although a successful claimant with third party funding foregoes a percentage of his damages, it is

⁹⁹ Ibid., 18.

¹⁰⁰ Ibid.

¹⁰¹ Kirby, "Third party funding: access to justice or access to profits?."; Ranjan K. Agarwal and Doug Fenton, "Beyond access to justice: litigation funding agreements outside the class action context," *Canadian Business Law Journal* 59(2017): § II.2.

¹⁰² Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," 86.

¹⁰³ *Hamilton v Al-Fayed (Costs)*, [2002] EWCA Civ 665.

¹⁰⁴ Ibid.

¹⁰⁵ Jackson, "Review of civil litigation costs: Final Report."

better for him to recover a substantial part of his damages than to recover nothing at all.

(iii) The use of third party funding (unlike the use of conditional fee agreements (“CFAs”)) does not impose additional financial burdens upon opposing parties.

(iv) Third party funding will become even more important as a means of financing litigation if success fees under CFAs become irrecoverable.

(v) Third party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases. This benefits the opposing parties.”¹⁰⁶

All of these reasons come down in the camp of access to justice. In parallel to his positive perception of TPF, Jackson proposed the funder’s liability for advance costs as a balance of the funder’s control over the proceedings and its share from the final recovery.¹⁰⁷ In academic discussions, some of the above benefits face challenges. For instance, there is a substantive reservoir of suspicion as to whether third party funders only fund legal claims well established in fact and in law and therefore can help filter out unnecessary claims.¹⁰⁸

The author has observed that reasons favoring TPF are not limited to what Lord Justice Jackson has listed. As Bogart has noted, those reasons can be added that TPF represents a more flexible form of funding which has application outside the concept of access to justice.

¹⁰⁶ Ibid., 117.

¹⁰⁷ In the *Arkin* case, Lord Phillips MR held that “a professional funder, who finances part of a claimant’s costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided”. See: *Arkin v Borchard and others*, [2005] EWCA Civ 655. Lord Justice Jackson disapproved this idea by saying that “it is perfectly possible for litigation funders to have business models which encompass full liability for adverse costs”, and “it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat”. See: Jackson, “Review of civil litigation costs: Final Report,” 123.

¹⁰⁸ Westminster Legal Policy Forum, “Third party litigation funding and the future of the voluntary code,” (2012), 36.

In practice, third party funders do more than the provision of funding.¹⁰⁹ Professional third party funders often help their clients with case management, budget management, disclosure exercises, case strategy design, etc.¹¹⁰ TPF is used by parties not only to facilitate access to justice but also to strengthen the balance sheet.¹¹¹ In addition to the above, the funders help lawyers deal with the financial pressure of working on a contingency basis. For the government, TPF is a useful tool to make dispute resolution mechanisms more affordable without increasing public expenditure.

2.2.2 When and why TPF is permitted in arbitration?

The reforms of abolishing maintenance and champerty and allowing external funding for dispute resolution were largely taking place in litigation. In history, the issues of whether and how these reforms impacted arbitration represented a great deal of uncertainty in England.¹¹²

In 1998, Sir Richard Scott from the Chancery Division (a division of the English High Court) was required to decide in *Bevan Ashford v Geoff Yeandle* whether the law of champerty was applicable to arbitration.¹¹³ At that time, CFA was allowed by section 58 of the Court and Legal Services Act 1990 and the related rules to be used in a group of specified proceedings, namely personal injury cases, insolvency actions and cases before the European Commission of Human Rights and the European Court of Human Rights.¹¹⁴ CFA outside of this specified area represented a legislative lacuna. Against this background, Sir Richard Scott put forward the following views: "Arbitration is a form of litigation...The law of champerty has its origins in, and must still be based upon, perceptions of the requirements of public policy. I find it quite impossible to discern any difference between court proceedings on the one hand and arbitration

¹⁰⁹ Bogart, "Deeply flawed: A perspective on the ICCA-Queen Mary Task Force on third-party funding."

¹¹⁰ *Ibid.*; Rowles-Davies, *Third Party Litigation Funding*: 109-11.

¹¹¹ Burford Capital, "2018 Litigation Finance Survey."

¹¹² Bench Nieuwveld and Shannon, *Third-Party Funding in International Arbitration*: §3.03.

¹¹³ *Bevan Ashford v Geoff Yeandle*, [1998] 3 WLR 172(1998).

¹¹⁴ "The Conditional Fee Agreements Order 1995," section 2.

proceedings on the other that would cause contingency fee agreement to offend public policy in the former case but not in the latter”.¹¹⁵

Leading up to the final decision, Sir Richard Scott paid attention to cases where the adverse views on the disputed issue were presented.¹¹⁶ Justice Steyn in *Giles v Thompson*, for instance, has held in favor of the distinction between litigation and arbitration in terms of the application of the law of maintenance and champerty: “The head of public policy, which condemns champerty, has only done so in the context of civil litigation”, and therefore, “it would involve a radical step to extend the doctrine to private consensual arbitration.”¹¹⁷ Sir Richard Scott, however, considered that the *Giles* case bore limited relevance to the present case since it did not deal with a CFA.¹¹⁸ He went on to discuss a decision made by the Hong Kong court that it was inappropriate to extend champerty from the public justice system to the private consensual system which is arbitration.¹¹⁹ Sir Richard Scott questioned this decision as it was in his view out of focus—the real issue was not whether champerty should be extended to arbitration but whether it applied to arbitration. Sir Richard Scott took the view that the law of champerty was applicable to arbitration, but this did not lead to the decision that the CFA for arbitration was illegal or unenforceable. He believed that it would be absurd if he upheld a CFA for use in court proceedings but condemned an identical CFA for use in an arbitration case. Accordingly, he handed down the final decision that it was lawful for a CFA to apply in a case which was to be solved by arbitration.¹²⁰

The *Bevan* case is in large measure a “retreat” according to some commentators.¹²¹ The court failed to attach sufficient importance to the difference between litigation and arbitration when applying the law of maintenance and champerty. According to Jern-Fei Ng, “parties

¹¹⁵ *Bevan Ashford v Geoff Yeandle*, [1998] 3 WLR 172(1998).

¹¹⁶ *Giles v Thompson*, 1993 WL 963259; *Giles (Respondent) v Thompson (Appellant)*, [1993] UKHL 2, [1994] 1 AC 142, [1993] 3 All ER 321.

¹¹⁷ *Giles v Thompson*, 1993 WL 963259.

¹¹⁸ *Bevan Ashford v Geoff Yeandle*, [1998] 3 WLR 172(1998).

¹¹⁹ *Cannonway Consultants Limited v Kenworth Engineering Ltd*, [1995] 1 HKC 179.

¹²⁰ *Bevan Ashford v Geoff Yeandle*, [1998] 3 WLR 172(1998); Sir Geoffrey Vos, ed. *White Book 2019* (2019), volume 2, section 7A1.

¹²¹ Jern-Fei Ng, “The role of the doctrines of champerty and maintenance in arbitration,” *Arbitration* 76, no. 2 (2010).

to arbitration are accorded a greater degree of latitude in relation to procedural matters than parties engaged in litigation. It would therefore not be artificial for rules which apply to the latter to be excluded from the former. The principle of party autonomy is the cornerstone upon which arbitration rests and in circumstances where the parties to arbitration may have agreed, whether expressly or implicitly, to an arrangement by one or more of their number that savors of champerty or maintenance, such an arrangement ought not to be rendered nugatory by the sort of public policy" which the courts in the *Bevan* case had in mind.¹²² The mixed signals emerging from court decisions and academic discussions continued confusing practitioners in England until the introduction of section 27 of Access to Justice Act 1999 which clarified that "conditional fees are permitted in all sort of dispute resolution proceedings except criminal proceedings and family proceedings" which implied further relaxation on the rules against maintenance and champerty in dispute resolution proceedings.¹²³

Currently, with the absence of the concepts of maintenance and champerty, England not only allows but also glorifies TPF for arbitration, as observed by Catherine Rogers.¹²⁴ Case law could not be more clear on that maintenance and champerty are too outdated and therefore can be safely ignored in an arbitration seated in England.¹²⁵ It is widely accepted that access to arbitration is equated to access to justice,¹²⁶ although the state does not have the constitutional responsibility to make arbitration affordable.¹²⁷ On this notion, the English court has held in a previous case that the positive view on TPF for arbitration is within the overarching consideration of what justice requires.¹²⁸ Beyond that, the use of TPF is in line with the pro-

¹²² *Ibid.*, 210.

¹²³ Michael Zander, *Cases and Materials on the English Legal System*, 10 ed. (Cambridge University Press, 2007), 634; Jackson, "Review of civil litigation costs: Final Report," 167.

¹²⁴ Rogers, *Ethics in International Arbitration*: 179.

¹²⁵ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm), para. 31.

¹²⁶ Christine Sim, "Using Costs Orders to Regulate Third Party Funding," *Asian Dispute Review* 2018, no. 1 (2018).

¹²⁷ David Williams and John Walton, "Access to arbitration vis-à-vis access to justice," *Arbitration* 80, no. 4 (2014): 433.

¹²⁸ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm), para. 32.

arbitration policy in England. This policy underpins the efforts of maintaining London as the world's leading arbitration center. If the use of TPF is favored by parties to arbitration, it is less likely to be hindered by English law. Apparently, the champerty prohibition or other public policy considerations hostile to TPF do not accord well with the notion that the claimant enjoys party autonomy in arbitration to seek assistance from external funders to fund their proceedings.¹²⁹ Fueled by the pro-arbitration policy, the English court upholds TPF as an inevitable part of the arbitration proceedings. In *Essar v Noscot*, for instance, the English court regarded the success fee of TPF as part of the costs of arbitration that can be recovered from the losing side.¹³⁰ This case will be discussed in greater detail later in this chapter.

2.3 The Procedural Implications of TPF

In England, the permission of TPF is accompanied by regulatory safeguards and judicial supervision due to the fact that TPF is not risk free. In practice, despite that TPF is generally permitted, the funding arrangements need to be tested on an individual case basis against public policy concerns. The courts are required to contemplate whether the funding agreement contains champerty factors that could negatively impact the funded procedure.¹³¹ As indicated by the ALF code of conduct, in conducting the funding activities, the funders need to take some anti-champerty actions to safeguard the funded proceedings and the interest of the funded parties, in spite of the absence of the statutory fiduciary duty of the funder.¹³² Under English law, one can hardly assume the legitimacy of the TPF agreement without a careful investigation of the impact of such agreement on the parties and the funded proceedings.

However, there is ambiguity over the impact of TPF. On a macro level, TPF gives rise to consequences divorced from individual rights. It promotes access to justice as a public value. But it creates suspicion on whether TPF threatens the regulatory framework of the legal

¹²⁹ Timothy Liang, "Champerty: Relic of a Bygone Era," *Singapore Law Review*, no. 32 (2014): 184.

¹³⁰ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm).

¹³¹ Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments," 582.

¹³² *Ibid.*

profession and on whether it contributes to disproportionate costs of dispute resolution.¹³³ On the micro level, there is little doubt that TPF enables legal claims that otherwise have to be dropped by the parties. Whereas, TPF causes concerns about whose claim it is,¹³⁴ if the funder's commercial motives are the primary driver of the case.¹³⁵ In some cases, TPF could lead to an unfair settlement or generate an unnecessary financial burden for the opposing party, etc.¹³⁶

In both litigation and arbitration, TPF interacts with the funded procedure in a wealth of aspects. However, this section will only cover issues that allow this work to express the contradicting ideas from the jurisdictions of comparison more directly.¹³⁷ These issues regard the impact of TPF on the court's decision on interim measures, the funder's control on the conduct of the case, the impact of TPF on the costs of dispute resolution and on the final recovery of the funded party. In the context of arbitration, the same research issues are handled with a different mode of analysis. But before examining how the funded procedure is affected by TPF, a review of the larger picture with the main alternatives to TPF is required for a deeper understanding of who are competing and cooperating with third party funders in the legal service market. Other than that, the alternative funding options serve as a "yardstick" which helps assess the procedural impact of TPF.

2.3.1 The alternatives to TPF and their procedural implications

In England, TPF is an industry with a short history of existence, but the idea of funding legal claims through non-party funding

¹³³ Abramowicz, "Litigation Finance and the Problem of Frivolous Litigation."

¹³⁴ Maya Steinitz, "Whose Claim Is This Anyway? Third-Party Litigation Funding," in *University of Iowa Legal Studies Research Paper* (2011).

¹³⁵ Darwazeh and Leleu, "Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding."

¹³⁶ Westminster Legal Policy Forum, "Third party litigation funding and the future of the voluntary code."

¹³⁷ To that end, this work has carefully filtered out some issues that are only valid in England or in common law jurisdictions. For instance, the extension of CFAs confronts questions as to the role and the function of barrister in civil litigation. These questions do not fall into the scope of this book since they are not valid in China and the Netherlands where a divided legal profession does not exist. See: Peter Kunzlik, "Conditional fees: the ethical and organizational impact on the bar," *The Modern Law Review* 62, no. 6 (1999): 856.

mechanisms has been there since the 1960s or earlier.¹³⁸ Prominent examples include CFA, DBA, legal insurance and claim assignment. These funding mechanisms and TPF share certain similarities. Therefore, many concerns over the procedural impact of these mechanisms are also valid in the context of TPF.

2.3.1.1 CFA

Before TPF, CFA was one of the most important solutions to the problem of lack of funding in England.¹³⁹ CFA enables clients and lawyers to enter into an agreement that reflects their mutual interests according to individual circumstances and allows the state to drastically reduce the scope of legal aid.¹⁴⁰ Under section 58(2) of the Courts and Legal Services Act 1990, CFA is defined as “an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specific circumstances.” It should be noted that section 58 of the 1990 Act only gives a pass to CFA. The specific area where CFA was permissible was to be determined by the Lord Chancellor.¹⁴¹ In practice, CFA means that lawyers do not receive a fee if they lose, but they can charge an uplift in addition to the base fee if they win. The “uplift” or the “success fee” amounts to a percentage of the base fee. CFA is analogous to TPF since they are both established on a contingency basis. Many concerns that arise in the discussion of CFA are also relevant in the context of TPF.

Although criminal and civil liability for maintenance and champerty has been abolished since the 1960s, lawyers were not allowed to play a part in funding legal claims until 1990 when section 58 of the Court and Legal Services Act 1990 entered into effect. Apparently, the permission of CFA requires discussions beyond the law of maintenance and champerty.¹⁴² CFA was designed to serve the purpose of

¹³⁸ The Law Commission, “Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965,” 5.

¹³⁹ Michael Zander, “The Government’s Plans on Legal Aid and Conditional Fees,” *The Modern Law Review* 61, no. 4 (1998): 539.

¹⁴⁰ Ministry of Justice, “Proposals for Reform of Civil Litigation Funding and Costs in England and Wales,” 11.

¹⁴¹ “The Conditional Fee Agreements Order 1995,” section 2; *Courts and Legal Services Act 1990*, section 58.

¹⁴² Michael Zander, “Will the revolution in the funding of civil litigation in England eventually lead to contingency fees?,” *DePaul Law Review* 52, no. 2 (2002): 261-62.

facilitating people's right to access to the court system.¹⁴³ Nevertheless, through the Conditional Fee Agreement Order 1995, the Lord Chancellor only allowed CFA in cases with regard to personal injuries, insolvency or ECHR applications, due to the lack of knowledge about the potential consequences of CFAs.¹⁴⁴ Not until 1998 did the government propose to extend the use of CFA to all civil proceedings except family.¹⁴⁵

After CFA became a reality, the English judiciary soon realized that this funding option can cause serious concerns although in literature it was noted that these concerns lack consistency.¹⁴⁶ Some have argued that speculative lawyer funding agreements lower the dignity of the legal profession.¹⁴⁷ Others blame CFA for the increase of satellite litigations.¹⁴⁸ These concerns are considered a justification for safeguards to ensure that contingency lawyers are still able to fulfill their duties and that excesses in litigation can be prevented.¹⁴⁹ Suspicions grew when the success fee of CFA became recoverable.¹⁵⁰ Lord Justice Jackson accused recoverable CFA success fees as a major contributor to the disproportionate costs of litigation.¹⁵¹ As an effect of

¹⁴³ Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*: 3.

¹⁴⁴ *Ibid.*, 28.

¹⁴⁵ Jackson, "Review of civil litigation costs: Final Report," § 2.4.

¹⁴⁶ The risks of conditional fees are hard to be measured, which could be largely attributed to the fact that "the legal ethical framework has never been fully articulated". See: Kunzlik, "Conditional fees: the ethical and organizational impact on the bar," 851; Hogan, "Conditional fees: problems solved and problems yet to come."; Frank Burton, "Conditional fees: is there still an ethical dimension?," *Journal of personal Injury litigation* 1998, March(1998).

¹⁴⁷ Max Radin, "Maintenance by champerty," *California Law Review* 24, no. 1 (1935).

¹⁴⁸ Hogan, "Conditional fees: problems solved and problems yet to come," 40. Satellite litigation could be entailed by different reasons. Among others, it became a concern that the insurers who were responsible to pay "excessive basic costs and a grossly disproportionate uplift" agreed by the parties to the CFA clogged the courts with challenges to the CFA, in particular the size of the uplifts. See: Keith Ashby and Cyril Glasser, "The Legality of Conditional Fee Uplifts," *Civil Justice Quarterly*, no. 24(Jan) (2005): 132.

¹⁴⁹ The law Society in England and Wales, "Conditional Fee Agreements Guidance," (2014).

¹⁵⁰ Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," 11.

¹⁵¹ Jackson, "Review of civil litigation costs: Final Report," xvi; Solicitors Regulation Authority, "SRA Code of Conduct," (2011), IB(1.17).

the Jackson reform, the success fee of CFA ceased to be recoverable since 2013.¹⁵²

CFA entered into existence against the background that English law firms shifted from traditional partnerships owned and run by lawyers to companies that could be financed, purchased and managed by non-lawyers.¹⁵³ There is a clear trend that the legal service is diversifying. Law firms have realized the necessity to adopt innovative business models and to involve other professionals in order to be more competitive in the legal service market.¹⁵⁴ These changes added new features to the English legal service market. In Richard L Abel's words, "by the end of the 20th century, the British legal profession has been stripped of most of its 19th century rules".¹⁵⁵ At the same time, the government facing financial austerity seeks to shift the burden of facilitating access to justice from public funds to private persons. Legal claims with increasing value become the new investment destination for both lawyer-investors and non-lawyer investors. Despite the combined worry that CFA might be implemented as an exploitation of litigants for the benefits of the lawyer investors and a distraction of the main task of legal professionals, CFA continues to exist. In England, the risks of non-party funding may trigger discussions on the regulatory measures but are unlikely to justify the denial of the use of private non-party funding in general.

2.3.1.2 DBA

DBA is not an indigenous funding option in England. It originated in the American legal landscape.¹⁵⁶ Despite the sentiment against the American litigation culture,¹⁵⁷ English law upholds DBA as a motive

¹⁵² *Legal Aid, Sentencing and Punishment of Offenders Act*, section 44; *The Conditional Fee Agreements Order 2013*, Explanatory note.

¹⁵³ Since 2007, English law has allowed alternative business structures to enable non-lawyers and lawyers to form companies, invest or be involved in managing companies and providing legal services. See: Ministry of Justice, "Legal Services: removing barriers to competition: Consultation on proposals to make amendments to the Legal Services Act 2007," (2016), para. 16.

¹⁵⁴ *Ibid.*, para. 20.

¹⁵⁵ William LF Felstiner, ed. *Reorganisation and Resistance: Legal Professions Confront A Changing World* (Hart Publishing, 2005), 14.

¹⁵⁶ Zander, "Will the revolution in the funding of civil litigation in England eventually lead to contingency fees?," 259.

¹⁵⁷ Hodges, Peysner, and Nurse, "Litigation Funding: Status and Issues," 26.

for effective work and as a response to the market demand.¹⁵⁸ DBA was first defined in English law by section 58AA of the Courts and Legal Services Act 1990 as “an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that (i) the recipient is to make a payment to a person providing the services if the recipient obtains a specific financial benefit in connection with the matter in relation to which the services are provided; and (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.” The explanatory memo to the DBA regulation 2013 presents a more concise and comprehensible definition of DBA: “A damages-based agreement...is a private funding arrangement between a representative and a client whereby the representative’s agreed fee (“the payment”) is contingent upon the success of the case, and is determined as a percentage of the compensation received by the client”.¹⁵⁹

DBA is officially available to employment tribunal claim since 2009.¹⁶⁰ The use of it was extended to all civil cases as the effect of section 45 of Legal Aid, Sentencing and Punishment of Offenders Act 2012. Even so, DBA for employment matters and DBA for other civil disputes are still subject to different requirements under the Damages-Based Agreements Regulations 2013. DBA was introduced as a supplement to CFA.¹⁶¹ Compared to CFA, DBA is more comprehensive in terms of case assessment and success fee calculation and is, therefore, less likely to give rise to satellite litigations. Lord Justice Jackson upheld the permission of DBAs in all types of civil litigation by saying that litigants should be provided with “the choice of funding methods and the freedom to choose the one that they consider is most appropriate for their case”.¹⁶² TPF is upheld by the English authorities for similar reasons.

¹⁵⁸ Rupert Jackson, "Fixing and funding the costs of civil litigation," *Civil Justice Quarterly* 34, no. 3 (2015).

¹⁵⁹ Ministry of Justice in England and Wales, "Explanatory memorandum to the damages-based agreements regulations 2013 " (2013).

¹⁶⁰ *The Damages-Based Agreements Regulations 2013*; Hodges, Peysner, and Nurse, "Litigation Funding: Status and Issues," 26-27.

¹⁶¹ Hodges, Peysner, and Nurse, "Litigation Funding: Status and Issues," 26.

¹⁶² Jackson, "Review of civil litigation costs: Final Report."

Compared to CFA, DBA seems to bear more analogies to TPF. But DBA still differs from TPF in two important aspects: first of all, DBA is provided by lawyers while TPF is provided by a wider range of investors. Secondly, DBA only concerns the fees for legal services while TPF could cover all costs invoked by the proceedings. It has never been the intention of English law to subject TPF to the regulation of DBA. Nevertheless, the study of DBA is valuable to the discussions on the impact and the regulation of TPF. Both TPF and DBA are criticized for causing unnecessary claims,¹⁶³ distorting the purpose of the litigation procedure, imposing a corrupting influence on lawyers,¹⁶⁴ causing exploitation of the funded party, etc. They both call for regulation against unfairness that could otherwise exist.

2.3.1.3 ATE and BTE insurance

ATE insurance was introduced by the Access to Justice Act 1999.¹⁶⁵ It allows the parties to be insured against the risks of losing.¹⁶⁶ ATE insurance is based on a contract whereby a person (the insurer) agrees to pay money on the adverse consequences of the case in return for payment called premium. Previously, ATE insurance targeted cases related to personal injuries. Currently, it is found very often in commercial litigation.¹⁶⁷ In commercial arbitration, however, the role of ATE insurance is unclear. Some English scholars have observed that TPF is more frequently used in arbitration than ATE

¹⁶³ Jay Tidmarsh, "Realising the promise of costs budgets: an academic analysis," *Civil Justice Quarterly* 35, no. 3 (2016): 220. The parties should not be allowed to litigate without any worry of the costs of the legal service, according to the English authority. See: Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," 231.

¹⁶⁴ For instance, lawyers seek to raise the base fee in order to obtain a higher amount of success fee, which goes beyond the administration of the regulations of the legal profession and lawyer funding.

¹⁶⁵ This Act allowed parties to insure against the risk of having to pay the defendant's costs, should their case be unsuccessful, with an ATE insurance policy. At that time, ATE insurance premium was recoverable as part of the parties' legal costs. See: *Gallery v Gray (No 1)*, [2002] 1 W.L.R. 2000, [2002] UKHL 28; *Access to Justice Act 1999*, section 29. In the UK, the development of ATE insurance has gone hand in hand with the development of CFA. See: Vos, *White Book 2019*, 7A1-60.

¹⁶⁶ The introduction of CFAs motivated the development of ATE insurance. This insurance is designed to cover the opponent's legal fees and disbursements and client's own disbursements. See: Zander, "Will the revolution in the funding of civil litigation in England eventually lead to contingency fees?," 268.

¹⁶⁷ PJ Kirby, "Costs and professional negligence: ATE and third party funding," in *Lexology* (2018).

insurance.¹⁶⁸ But due to the lack of transparency of the arbitral proceedings, this observation has not been verified by reliable empirical materials.

In England, it is wrong to assume that a “no win no fee” lawyer funding arrangement will leave litigants with no bills. Besides, the English litigation costs allocation rule, which enables the successful party to recover its costs from the losing party, is likely to give rise to an unpredictable and substantive financial burden for the losing party with the absence of liability insurance. This has created room for the development of ATE insurance whose effects are twofold: on the one hand, it enables people to sue without the fear of financial burdens, and on the other hand, it secures the successful party’s right to recover the costs of the proceedings.¹⁶⁹

To understand ATE insurance, it is necessary to distinguish it from its “sibling”: LEI or BTE insurance.¹⁷⁰ LEI usually comes before the arise of the disputes and therefore is a form of BTE insurance.¹⁷¹ The titles of the ATE and BTE insurances already highlight the difference: ATE is taken out after the disputes arise while BTE insurance is taken out before the disputes arise. Under BTE insurance agreement, the policyholders pay a premium for summary legal advice, legal representation or other assistance according to the terms of the policy. BTE insurance covers a large range of disputes whether they are civil or non-civil. It has been known in England since the 1970s with a focus on household and motoring,¹⁷² and has been providing access to justice for a huge portion of the population who would not be eligible for legal aid or would not be able to litigate at their own costs.¹⁷³ BTE insurance

¹⁶⁸ Matthew Amey, "Funding international arbitrations," *International Arbitration Law Review* 12, no. 6 (2009): 150.

¹⁶⁹ Jackson, "Review of civil litigation costs: Final Report," 80. According to Lord Justice Jackson, ATE insurance can be taken out by parties on both sides although it is usually for claimants at the time of the report.

¹⁷⁰ LEI is a form of BTE insurance. See: Helen Blundell, "Free to choose? BTE legal expenses insurance and freedom of choice," *Journal of Personal Injury Law* 2(2004): 93.

¹⁷¹ Trinidad Alonso, "Third-Party Funding's Older Sibling: Legal Costs Insurance and The Issue Of Regulation."

¹⁷² Zander, "Will the revolution in the funding of civil litigation in England eventually lead to contingency fees?."

¹⁷³ Blundell, "Free to choose? BTE legal expenses insurance and freedom of choice," 93.

is used as foresight and is designed to cover the legal expenses of the insured, and probably the legal expenses of the opponent, depending on the policy.¹⁷⁴ Concerning the format, BTE insurance can either stand-alone or be sold as an “add-on” to other insurances.¹⁷⁵

To ensure that the money is spent wisely, BTE insurers normally monitor the case closely, especially in the early stages.¹⁷⁶ Nevertheless, the insured can still choose the lawyers and make significant decisions for the case under the supervision of the insurer, which is the result of the transposition of article 4 of the European Council Directive 87/44 EEC.¹⁷⁷ In regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (SI 1159/1990), the following is provided: “where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person).” The key phrase is “any inquiry or proceedings”. It is understood by the insurers that they may appoint their panel lawyers “right up to the stage that legal proceedings commence”.¹⁷⁸ In other words, the insured is allowed to choose his/her own lawyer to represent him/her throughout the legal proceedings. In reality, however, when legal proceedings are commenced, the insurer’s panel lawyers may have been representing the insured for quite some time, a change to a

¹⁷⁴ Jackson, “Review of civil litigation costs: Final Report,” 75.

¹⁷⁵ Herbert M. Kritzer, “Fee regimes and the cost of civil justice,” *Civil Justice Quarterly* 28, no. 3 (2009).

¹⁷⁶ Alonso, “Third-Party Funding’s Older Sibling: Legal Costs Insurance and The Issue Of Regulation.” The insured usually uses the BTE insurers’ panel solicitor for legal advice in the early stages. Once the court action starts, the insurer has to accept the insured’s reasonable choice of solicitor. See: “European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC,” http://www.europarl.europa.eu/doceo/document/TA-8-2019-0222_EN.html; Civil Justice Council, “The law and practicalities of before-the-event (BTE) insurance— An information study,” 152-53.

¹⁷⁷ Jackson, “Review of civil litigation costs: Final Report,” 71; Civil Justice Council, “The law and practicalities of before-the-event (BTE) insurance— An information study,” 152-53.

¹⁷⁸ Civil Justice Council, “The law and practicalities of before-the-event (BTE) insurance— An information study,” 153.

lawyer of the insured's choice is a rare practice, according to the CJC.¹⁷⁹

The above is relevant to TPF in the sense that, when practitioners justify the view that no more regulations are required for the influence of third party funders on the procedure any time soon, they often refer to the BTE insurers' "successful presence" in legal proceedings.¹⁸⁰ However, it calls into question whether this comparison is appropriate. The insurance company, as a repeated player, has developed the skill in the course of identifying and evaluating the compensable claims and often acts as an "alter ego" enforcer of the rights of the insured.¹⁸¹ Moreover, the insurance industry is heavily regulated by domestic laws which guarantee the accountability and capacity of the insurer in providing insurance services to the public. The same accountability and capacity have not been achieved in the TPF market which is at present largely regulated by "soft laws". In England, the official view is that BTE insurance is less controversial than ATE insurance and TPF. Accordingly, the English authority proposes that stand-alone BTE policies should be made more accessible for individuals without concern for regulatory risks.¹⁸²

ATE insurance and TPF generate similar procedural risks. They are relevant to the issue of whether there is a lack of ability of the insured or the funded party in paying the opponent's legal costs, which consults on the decision on security for costs or other interim measures. Both ATE insurers and third-party funders have a stake in the results of the funded case, which triggers conflicts of interest concerns. In light of that, the International Bar Association (IBA)'s Guidelines on Conflicts of Interest urge the tribunal in international arbitration to treat ATE insurers and third-party funders as real parties when undergoing screening for conflicts of interest.¹⁸³ Despite the value of ATE insurance and TPF to access to justice, it is reported that they

¹⁷⁹ Ibid.

¹⁸⁰ Alonso, "Third-Party Funding's Older Sibling: Legal Costs Insurance and The Issue Of Regulation."

¹⁸¹ Keith N. Hylton, "The Economics of Third-Party Financed Litigation," (2011).

¹⁸² Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," para. 266.

¹⁸³ International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration," (2014), Explanation to General Standard 6.

are often only available to claimants,¹⁸⁴ which is likely to create a new imbalance between the two parties.¹⁸⁵ In a sense, they are a form of one-way costs shifting and from time to time have caused the opposing party to capitulate in commercial litigation.¹⁸⁶ The above concerns have given rise to a great number of discussions on the disclosure of ATE insurance and TPF, but have not authorized the denial of the use of these two funding mechanisms. It is widely accepted in England that, in commercial cases, there is no reason why litigants should be prevented from using ATE insurance or TPF if they so wish and at their own expense.¹⁸⁷ Bearing in mind the similarities between ATE insurance and TPF in terms of business models and legal risks, the regulation of ATE insurance is highly relevant to the question whether there is an imminent need to regulate TPF.

2.3.1.4 Claim assignment

In common law tradition, the assignment of legal claims is referred to as “trafficking in litigation”.¹⁸⁸ In *Trendtex Trading Corp v Credit Suisse* (1982) AC 679 HL,¹⁸⁹ Lord Wilberforce from the House of Lords held that it remained a fundamental principle of English law that one should not be allowed to assign a bare right to litigate unless it had “sufficient interest” to justify the pursuit of the proceedings for his own benefits.¹⁹⁰ Other members of the House agreed with his view. Lord Roskill emphasized that the House should look to the totality of the transaction. He said that “if the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee has a genuine commercial interest in taking the assignment and in enforcing it for its own benefit, I see no reason why the assignment should be struck down...”¹⁹¹ Among all relevant factors, the House paid specific attention to the fact that the agreement in question was not entered to recoup the defendant’s losses but to allow for the cause of action to be sold to a third party for the purposes of the

¹⁸⁴ Jackson, "Review of civil litigation costs: Final Report," 80, 118.

¹⁸⁵ *Ibid.*, 80.

¹⁸⁶ *Ibid.*, 82-83.

¹⁸⁷ *Ibid.*, 85, 105.

¹⁸⁸ *Trendtex Trading Corp v Credit Suisse*, [1982] A.C. 679.

¹⁸⁹ *Ibid.*

¹⁹⁰ Greg Tolhurst, *The Assignment of Contractual Rights* (Hart Publishing, 2006), 196.

¹⁹¹ *Trendtex Trading Corp v Credit Suisse*, [1982] A.C. 679.

third party making a profit from the result of the case.¹⁹² On this basis, the assignment was held void for champerty.

Even though there is an increasingly liberal approach to the rules against trafficking in litigation, the objection to claim assignment has not lost its teeth. Compared to TPF, claim assignment requires a more stringent application of the principles of maintenance and champerty, as observed by some practitioners.¹⁹³ To explain this situation, it is useful to look to Greg Tolhurst's observation: "today an overriding policy concern is that of access to justice, the third party funding of litigation and the resulting promotion of suits that may otherwise not have come to court is an important element in providing that access. Although an assignee commencing a claim in its own name may not necessarily be seen as providing the assignor with access to justice..."¹⁹⁴ At present, English law explicitly allows and promotes the practice of TPF by distinguishing it from claim assignment with consideration being given to the procedural impact of these two funding mechanisms: TPF implies the provision of funding without a third party funder completely taking over the proceedings, while claim assignment allows a third party or an assignee to conduct the litigation in the place of the original party.

2.3.2 The procedural implications of TPF in litigation

In terms of the procedural impact of TPF for litigation, England has paid the most attention to ethical issues and costs issues. These issues are not endemic to England, which will become clear in the following chapters. But England has understood some of these issues in a rather different way from other jurisdictions of comparison. The reason goes back to the issues of why TPF was introduced and how English law conceives TPF in combination with how the English litigation procedure is constructed. This part specifically addresses the interaction between TPF and the interim measure, the funder's control

¹⁹² Tolhurst, *The Assignment of Contractual Rights*: 198.

¹⁹³ Herbert Smith Freehills, "Claim assigned to SPV not struck out as champertous," <https://hsfnnotes.com/litigation/2015/05/15/claim-assigned-to-spv-not-struck-out-as-champertous/>.

¹⁹⁴ Herbert Smith Freehills, "Assignment of claim void for champerty," in *Herbert Smith Freehills Litigation Notes* (2011).

on the procedure, the impact of TPF on the costs of litigation and the interests of the funded party.

2.3.2.1 TPF vis-à-vis security for costs

In England, it is possible that the party applied for security for costs against the opposing party's third party funder based on Civil Procedure Rules (CPR) 25.14.¹⁹⁵ The security for costs order against the funder is deemed as a balance to the funder's control on the case and the financial benefits payable to the funder when the case is successful.¹⁹⁶ However, TPF is not enough in itself to justify security for costs.¹⁹⁷ To make the decision, the court is supposed to conduct a thorough examination of all circumstances of a specific case, particularly the role of the funder in the funded proceedings. In *Re RBS Rights Issue Litigation*, for instance, it is held by Hildyard J that, in cases where the funders are "real parties' for the purposes of costs and the economic reality that they are likely to provide the nearest, deepest pockets", it is not unjust that the funder is held liable for security for costs or other adverse costs.¹⁹⁸ To facilitate the application for security for costs, the court is likely to order disclosure of information about third party funders upon the request of the party.

In a recent case, *Sandra Bailey & others v GlaxoSmithKline UK Limited*, the impact of TPF on security for costs was again put at the center of the debate. The court was required to consider whether the *Arkin* case was applicable to the funder's liability for security for costs.¹⁹⁹ Based on a careful comparison, the court reached the conclusion that the "Arkin cap" might be applied by the end but it was irrelevant to an interlocutory application for security for costs and therefore should not be applied in this case.²⁰⁰ In the court's view,

¹⁹⁵ *Sandra Bailey & Others v GlaxoSmithKline UK Limited*, [2017] EWHC 3195 (QB).

¹⁹⁶ The English courts have taken the view that it should not be a surprise that the funder is treated like the real party when the funder's control is significant and the costs of TPF is considerable. *Re RBS Rights Issue Litigation*, [2017] EWHC 463 (Ch)(2017).

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ In the *Arkin* case, the court held that "we consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of opposing party to the extent of the funding provided". See: *Arkin v Borchard and others*, [2005] EWCA Civ 655, para. 41.

²⁰⁰ *Sandra Bailey & Others v GlaxoSmithKline UK Limited*, [2017] EWHC 3195

limiting the funder's liability for security for costs by applying the "Arkin cap" would create an unjust situation,²⁰¹ considering the fact that the claimant's funder, who was not a member of the ALF, was balance sheet insolvent.²⁰² In the process, consideration was also given to factors such as the claimant's ATE insurance policy, in order to determine the appropriate value of an order for security for costs.²⁰³ By the end, with the purpose of granting broad justice to the application for security for costs, the court ordered security in a sum reflecting "50% of the reasonable working figure" that it has adopted. The amount of the security totaled £2.25m.²⁰⁴

Abundant cases before the English courts have shown that judicial intervention is required when the funded case might be a "hit-and-run" operation or other abusive practices.²⁰⁵ One could expect that there will be more security for costs applications in the future.²⁰⁶ Practitioners anticipate that parties would have to address the security for costs issue by other innovative means, such as security for costs bonds.²⁰⁷ In the meantime, they warn that the expenses of these innovative means could give rise to a further increase in the costs of litigation.²⁰⁸

2.3.2.2 The funder's control on the proceedings

To secure their own commercial interests, the funders naturally want to have a control on the funded proceedings, although such control does not mean that they are allowed to distract the funded party's lawyers from their main task. The ALF code of conduct requires the funder to refrain from seeking to influence the funded party's lawyers to cede

(QB), para. 60.

²⁰¹ Ibid., paras 61-62.

²⁰² Ibid.

²⁰³ Christian Tuddenham, "English Court extends funder's liability for security for costs beyond funding commitment," in *Lexology* (2018).

²⁰⁴ *Sandra Bailey & Others v GlaxoSmithKline UK Limited*, [2017] EWHC 3195 (QB), para. 78.

²⁰⁵ *Re RBS Rights Issue Litigation*, [2017] EWHC 463 (Ch)(2017).

²⁰⁶ Robert Wheal and James Holden, "Landmark decision awards security for costs against third-party funder in excess of funder's commitment," <https://www.whitecase.com/publications/alert/landmark-decision-awards-security-costs-against-third-party-funder-excess-funders>.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

control or conduct of the dispute to the funder.²⁰⁹ But, meanwhile, the code allows the funder to provide input to the funded party's decision in relation to the settlement.²¹⁰ Besides, the funder may terminate the funding agreement unilaterally when the preconditions set out in the code are met: "(1) the funder ceases to be satisfied about the merits of the dispute; (2) the funder believes that the dispute is no longer commercially viable; (3) the funder believes that there has been a material breach of the LFA (litigation funding agreement) by the funded party."²¹¹

It is fair to say that, in cases with the involvement of TPF, a tripartite group is inevitable.²¹² Despite the dismay of many regulators of this tripartite group, the funders have reported not only the possibility of such group in practice but also the checks and balances that this group can offer:²¹³ IMF Bentham has said that "some of the potential conflicts" of the proceedings could be mitigated by the participation of third party funders, especially in class action: "IMF's objectives are closely aligned with those of the class members that it funds: namely to achieve the just, quick, inexpensive and efficient resolution of claims through appropriate use of the civil justice system and for the largest settlement or damages award possible having regard to the risks of the litigation. It is hard to object that the funder brings a commercial approach to the conduct and resolution of class actions that aligns closely with the interests of class members."²¹⁴ In light of that, English law allows TPF in class action as long as the funder does not improperly stir up litigation, disrupt the procedure or exploit the funded party.²¹⁵ To balance the funders' influence on the procedure,

²⁰⁹ The Civil Justice Council, "The code of conduct for litigation funders," section 9.1.

²¹⁰ Ibid., section 11.1.

²¹¹ Ibid., section 11.2.

²¹² In case law, the funder's control is a common observation. It is found by the court in *Dymocks Franchise Systems (NSW) Ltd v Todd* [2004] 1 WLR 2807, for instance, that "the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them". On this basis, the court held that "justice will ordinarily require that, if the proceedings fail, he (the non-party or the funder) will pay the successful party's costs." See: *Dymocks v Todd*, [2004] 1 WLR 2807, para. 25; *Re RBS Rights Issue Litigation*, [2017] EWHC 463 (Ch)(2017).

²¹³ IMF Bentham, "Submission to the Victorian Law Reform Commission: Access to Justice – Litigation Funding and Group Proceedings," (2017).

²¹⁴ Ibid.

²¹⁵ TPF plays an important role in class action in England. It is treated differently from lawyer funding in such action. The English authority tends to believe that, as

the courts are empowered to hold the funder reliable for costs when it is necessary.²¹⁶ Apparently, the English court has acknowledged that the professional and ethical rules for lawyers are not sufficient to regulate the control of the funders.

A new challenge to the regulatory framework is the development of law firm finance which has blurred the line between law firms and third-party funders. Traditionally, a partnership was the only legitimate mode of organization within the British legal profession. This has reflected that the clients, the reputation of the law firms and the professional expertise of the legal professionals value the most for a law practice. For that reason, the partners or the owners of the law firms usually have to be aligned with the professional business, which narrows the scope of the investors. The traditional law firm structure was later seen as incompatible with the ever-increasing demand of law firms for capital. This demand increased significantly after the introduction of CFAs and DBAs in English law. As a response to this change, a reform was conducted to allow law firms to link up with outsiders such as insurance companies, financial institutions, and investment companies.²¹⁷ Consequently, many law firms converted to companies with non-party ownership or non-party investment.²¹⁸ Nowadays, third party funders are allowed to fund not only lawyers' cases but also lawyers themselves, which has largely complicated the topic of the control of third party funders on the case and the legal professionals.

2.3.2.3 The impact of TPF on the costs of litigation

Before the rise of TPF, there was already a consensus that "funding" and "costs" are not separate topics because they impact each other.²¹⁹ TPF will certainly have some influence on the costs of litigation. It is a mounting concern whether TPF can give rise to disproportionate costs of litigation which is detrimental to the public interest. Given that third party funders are commercially motivated, access to justice

long as the funders comply with the voluntary code, TPF would be a proper means of funding collective actions. See: Mulheron, "Third party funding and class actions reform," 294.

²¹⁶ *Arkin v Borchard and others*, [2005] EWCA Civ 655.

²¹⁷ Nick Jarrett-Kerr, "Alternative business structures: the long pregnancy," *Legal Information Management* 11, no. 2 (2011): 82.

²¹⁸ *Ibid.*

²¹⁹ Jackson, "Review of civil litigation costs: Final Report," 41.

is only the by-product of commercial funding arrangements for third party funders. It is conceivable that the funders could inflame litigation proceedings in order to maximize their commercial gains. However, the increase in the overall costs of litigation normally can be attributed to a group of complex and interwoven reasons.²²⁰ It is almost impossible to measure the impact of TPF on the costs of litigation on the macro level.

In recent English history, the increase in the overall litigation expenses has been largely attributed by English scholars to access to justice movements and the introduction of various private funding options such as CFA, DBA, and ATE insurance.²²¹ In the 1990s, in order to make the private funding options more attractive, the law was amended to enable the recovery of the ATE insurance premium and the CFA success fees.²²² Lord Justice Jackson brought an end to this practice, claiming that recoverable success fees and ATE insurance premiums contributed to the disproportionate costs of litigation.²²³ At present, TPF's contribution to the overall costs of litigation is rather mysterious and can hardly trigger any disincentives to the use of TPF for litigation.

Although it is hard to establish the case that TPF directly drives up the overall costs of litigation, it is possible to prove in individual cases that the funder advances frivolous claims that cause an unnecessary drain on judicial resources. To cope with this risk, the English courts are empowered to issue costs orders against third party funders when they find that the funders engage in speculative litigation in the hope of landing the occasional large jackpot. The *Excalibur* case is worth mentioning in explaining the circumstances in which the court would like to intervene to award damages caused by problematic funders. In

²²⁰ The English disease of costs, according to Winky, has the following symptoms: "unpredictable, disproportionate, and unlimited". This disease has existed for a long time from the early days of the common law to the present day, despite that there is no lack of reform attempts. See: Winky So, "A brief history of the law of costs-lessons for the Jackson reforms and beyond," *Civil Justice Quarterly* 32, no. 3 (2013): 333.

²²¹ *Ibid.*; Jackson, "Review of civil litigation costs: Final Report," 42.

²²² Zander, *Cases and Materials on the English Legal System*: 633.

²²³ Association of British Insurers, "Ministry of Justice's Consultation Paper – Proposals for reform of Civil Litigation Funding and Costs in England and Wales (CP 13/10): Response from the Association of British Insurers," (2010). para.13

this case, the funded plaintiff, Excalibur, conducted the case in an abusive way and failed on every claim. The court in the first instance ordered the plaintiff and its funders to pay the defendants' costs on indemnity basis for mainly the following reasons: (1) The plaintiff Excalibur is "nothing more than a brass plate" who has advanced and aggressively pursued serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time. (2) Excalibur's claims could not have been pursued without third party funders and have failed on every material issue. (3) The plaintiff's claims imposed an enormous drain on judicial resources; (4) The funders behind Excalibur stood to recover up to seven times their funding should the case win.²²⁴ The Court of Appeal upheld the decision in the first instance.²²⁵

To assess the impact of TPF on the costs of litigation, one has to take the recoverability of the funding costs into account. In theory, the English court has the discretion as to "whether costs are payable by one party to another, the amount and when they are to be paid", according to CPR 44.2.²²⁶ So far, there has been no case showing that the costs of TPF can be recovered from the losing party in litigation. From the court's perspective, TPF should not directly add up to the opponent's financial burden in court proceedings. As Lord Phillips MR has said in the *Arkin* case, the costs of TPF for litigation are something that the funded party is reasonably expected to bear.²²⁷ The question left is whether the costs of TPF will become the exploitation of the funded party.

2.3.2.4 The impact of TPF on the final recovery of the funded party

It is likely that the costs of TPF constitute a significant discount on the funded party's successful results.²²⁸ Currently, the amount of the

²²⁴ *Excalibur v Texas Keystone Inc and others*, [2014] EWHC 3436 (Comm), para. 58.

²²⁵ *Excalibur Ventures LLC v. Texas Keystone Inc & Ors*, [2016] EWCA Civ 1144.

²²⁶ Lara Hofer et al., "Litigation Funding in the United Kingdom," in *Lexology* (2019).

²²⁷ *Arkin v Borchard and others*, [2005] EWCA Civ 655, para. 41.

²²⁸ In *Arkin v Borchard*, the court held that "if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear." See: *ibid*.

investment return payable to third party funders is subject to the funding agreement and is largely determined by the market rates. It calls into question whether the existing regulatory safeguards are sufficient to prevent the funded parties from being unjustly affected by the costs of TPF. If no, should the regulators introduce a cap on the costs of TPF?

The idea of imposing a cap on the funding costs has not been widely accepted so far in England. Arguably, such a cap is not compatible with the fact that the costs of TPF are determined by complex investment calculations and assessments. Prior to the funding agreement, the funder normally pays attention to factors including but not limited to the merits and the value of the claims, the financial status of the opponent, the larger investment portfolio and the time.²²⁹ Apparently, to assess the reasonableness of the costs of TPF, one has to look beyond the legal sphere. Furthermore, introducing a cap on TPF investment returns risks compromising contractual freedom, which may be too high a price to pay for English legislators.

To protect vulnerable funded parties, the ALF code of conduct requires the funder to ensure independent legal advice for the funded party on the terms of the funding agreement.²³⁰ However, this approach calls for suspicion on whether independent legal advisers are capable to protect the funded parties from excessive charges by third party funders. Conceivably, no one understands the reasonableness of the costs of TPF better than the funder. At this moment, parties in the English court proceedings are expected to rely on court supervision to prevent excessive success fees. Funding agreements where the funder's return is significantly greater than the litigant's return risk being voided.²³¹

2.3.3 The procedural implications of TPF in arbitration

Arbitration seated in England floats above the English civil procedural rules for litigation, which allows TPF for arbitration to carve a

²²⁹ Craig Arnott, "Pricing risk, structuring agreements and the cost of legal finance capital," in *Burford Capital* (2018); Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* (Wolters Kluwer, 2016), 16-17.

²³⁰ The Association of Litigation Funders, "Code of Conduct for Litigation Funders," (2018), section 9.1.

²³¹ Hofer et al., "Litigation Funding in the United Kingdom."

distinctive place for itself.²³² It is agreed that TPF for arbitration is not risk free.²³³ Ethical and costs issues which have been raised in litigation are also valid in the context of arbitration. From time to time, the arbitral tribunals are required to take TPF into consideration when dealing with applications for security for costs, due process issues, costs allocation, etc. The applicable laws and rules are not confined to the English common law. This part is designed to deal with the following enquires: whether TPF indicates procedural risks that can justify the application for security for costs, how the funder's control on the funded procedure is conceived in arbitration, how TPF impacts the costs of the arbitral proceedings, whether the costs of TPF are recoverable and how arbitration practitioners have reacted to the recoverable costs of TPF.

2.3.3.1 TPF vis-à-vis security for costs

It could be argued that the presence of TPF is an indication of the lack of ability of the funded party to pay adverse costs if it loses which justifies some sorts of security. In court proceedings, as previously discussed, the English court has the discretion to decide whether and to what extent TPF is relevant to an application for security for costs. In arbitration, however, it is highly debatable whether and how the tribunal could link TPF to costs-related issues. The English Arbitration Act 1996 does empower the tribunal to order a claimant to provide security for the costs of the arbitral proceedings.²³⁴ But it has not sufficiently said how to exercise such power. There is no mention of whether to consider TPF when dealing with applications for security for costs.

In exploring whether TPF and security for costs are interlinked in arbitration, we must look beyond the English common law. A commission of International Chamber of Commerce (ICC) issued a guidance on costs decisions in 2015, in which it is stated that “where a tribunal has reason to believe that third-party funding exists, and such funding is likely to impact on the non-funded party's ability to

²³² The English court in *Essar* case has held that “the ICC regime is not regarded as subservient to the CPR regime on such costs issues”. See: *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm), para. 67.

²³³ Nicolás Costáble and Anthony Lynch, "Applicable Law in Arbitrations Involving Third-Party Funding Agreements," *Spain Arbitration Review* 2017, no. 30: 166.

²³⁴ *English Arbitration Act 1996*, section 38(3).

recover costs if successful, the tribunal might consider ordering disclosure of such funding information as is necessary to ascertain that the process remains effective and fair for both parties.”²³⁵ It is almost impossible to request security for costs based solely on the existence of TPF. But the tribunal may consider the impact of TPF along with other relevant circumstances in deciding whether to grant security for costs.²³⁶ As the balance, the ICC commission also recommends the tribunal to consider making the applicant liable for any costs and damages caused by the measures ordered if the funded party prevails.²³⁷ Making the above instruction, the ICC Commission made it clear that such instruction aims to inform the parties of the possibilities regarding costs rather than to restrict the tribunal’s discretion on costs.²³⁸

2.3.3.2 The funder’s control on the arbitration procedure

The funder’s control on the case raises concerns particularly in paradoxical situations where the interests of the funder diverge from the interests of the funded party. This has become a reason for many to advocate mandatory disclosure of TPF.²³⁹ But even though TPF is disclosed, it is difficult for the tribunal to test whether the funder’s views on the conduct of the funded case are accorded the greater weight.

The involvement of TPF in arbitration is also likely to affect the legal representatives. However, arbitration lacks consistent and explicit provisions for legal representation and professional conduct.²⁴⁰ It is believed that parochial restrictions on the identity and the quality of legal representatives in international arbitration are unwise.²⁴¹ Nonetheless, that does not mean arbitration would not raise issues of

²³⁵ ICC Commission, "Decisions on costs in international arbitration," in *ICC Dispute Resolution Bulletin 2015, Issue 2* (2015), para. 89.

²³⁶ *Ibid.*, paras 89-93.

²³⁷ *Ibid.*, para. 90.

²³⁸ *Ibid.*, 1.

²³⁹ William Stone, "Third Party Funding in International Arbitration: A Case for Mandatory Disclosure?," *Asian Dispute Review*, 64.

²⁴⁰ Gary Born, *International Commercial Arbitration*, 2 ed. (Kluwer Law International, 2014), 2845, 76, 77.

²⁴¹ *Ibid.*, 2845.

professional conduct by legal representatives during the arbitral proceedings.²⁴²

Apart from legal representatives, other participants of the funded proceedings are also likely to be affected by the funders. IBA Guidelines have played a significant role in dealing with some of the related concerns. According to these Guidelines, TPF is a factor to be considered in dealing with conflicts of interest. Arguably, it would be unjust if the funder is allowed to impose control on the proceedings and to benefit from the final recovery, but is treated as a third party that is completely separated from the funded case.

2.3.3.3 The impact of TPF on the costs of arbitration

In the English court proceedings, costs orders against third party funders, although not prevalent, are observable. In arbitration, one can hardly see such order happen due to the nature of TPF and the limitations on the tribunal's mandate. It could be argued that third party funders are the non-party who is irrelevant to costs allocation in the context of arbitration. This makes more sense when TPF is used as part of the funded party's financing plan to strengthen the balance sheet. Apart from the purpose that TPF is used for, the characters of arbitration are another factor that is likely to insulate TPF for arbitration from costs issues. In arbitration, the tribunal's power arises from a complex mix of the consent of the parties and the applicable arbitration laws and rules.²⁴³ That means that the tribunal will find it tough to justifiably rule against non-parties.²⁴⁴

Bearing the above in mind, it is understandable why *Essar v Norscot* brought a shocking wave to the arbitration community. The English court in this case upheld an ICC tribunal's decision to categorize the costs of TPF as part of the "costs of arbitration" within the meaning of section 59 of the English Arbitration Act 1996, which creates substantive and unpredictable financial exposure for the non-funded defendant.²⁴⁵ More alarmingly, the judgment on the reasonableness of

²⁴² Ibid., 2850.

²⁴³ Redfern and Hunter, *Redfern and Hunter on International Arbitration*: 305.

²⁴⁴ It is argued in previous literatures that "the funder is not a party to the action and is not controlling it; the party is the proper obligor for any costs award." See: Christopher P. Bogart, "Overview of Arbitration Finance," in *Third-Party Funding in International Arbitration (ICC Dossier)* (Kluwer Law International, 2013), 55.

²⁴⁵ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016]

the costs of TPF is based on the testimony of a TPF broker,²⁴⁶ which seems to be too arbitrary. Some practitioners have argued that the costs of TPF, which amounts to 300 per cent of the funding or 35 per cent of the damages recovered in Essar case, should be regarded as damages that need to be proved and debated.²⁴⁷ Although it is unclear how the Essar case will be taken by the English court in future cases, the decision in Essar case is illustrative of the possibility that TPF may have a significant impact on the costs of arbitration.

Beyond the above, the costs of TPF that can be recovered from the opponent are likely to have an impact on the price of ATE insurance for arbitration or other liability insurances. In England, the ATE insurance market plays a large role in protecting parties on both sides from adverse costs liabilities. But as the costs of arbitration become unpredictable, ATE insurers would naturally like to ask for a higher charge for the protection they provide. This could drive up the costs of arbitration.

2.3.3.4 Recoverable success fees of TPF

In *Essar v Norscot*, the English court decided that the sole arbitrator did not exceed his power in ordering recoverable costs of TPF. By implication, the tribunal seated in England has the right to determine not only the reasonableness of the costs of TPF but also the recoverability of such costs.²⁴⁸ No matter whether it will become a prevalent practice, this case added to the distinction between the English court proceedings and England-seated arbitration. Now that the costs of TPF are likely to be recovered, the tribunal and the court should adopt a careful way of testing the reasonability of such costs. Many have criticized that the sole arbitrator and the English court in Essar case have not done enough on that end.²⁴⁹

EWHC 2361 (Comm).

²⁴⁶ Ibid., para. 22.

²⁴⁷ Digvijay Dam, "A Critical Analysis of Third Party Funding (TPF) in Arbitration," in *International Law Square* (2017); Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), §15.2.2.

²⁴⁸ Maximilian Szymanski, "Recovery of Third Party Funding Ordered by ICC Tribunal and Confirmed by the English High Court – An Under-Theorised Area of the Law," in *Kluwer Arbitration Blog* (2016).

²⁴⁹ Dam, "A Critical Analysis of Third Party Funding (TPF) in Arbitration."

Frequently, the arbitral tribunal distinguishes the “costs of arbitration” from the “costs of the parties for presenting the case”.²⁵⁰ Costs for presenting the case, even without the costs of TPF, constitute the largest part of the overall costs.²⁵¹ The costs of the parties may not be reasonable and therefore are not always fully recoverable. National laws and arbitration rules usually allow the tribunal to limit the recoverable costs in accordance with the circumstances of the cases. Section 65 of the English Arbitration Act, for instance, states that “unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of arbitration, or part of the arbitral proceedings, shall be limited to a specified amount.” It implies that the losing party is not necessarily reliable for all the costs of TPF. But it is unlikely for the tribunal to intervene in the funding agreement between the party and the funder.

2.4 The Regulation of TPF

In England, the practice of TPF is largely subject to case law and self-regulation namely the ALF code of conduct. This code was proposed by Jackson as a voluntary code with requirements for third party funders and limitations on the funding activities.²⁵² The English approach of regulating TPF is often referred to as the “light touch” approach which rules out the compulsory regulation of third party funders. Currently, the government has no plan to move away from this approach since TPF is in its early stage and has not caused a serious disruption.²⁵³

Research questions that have motivated this discussion are: how TPF is regulated in England and why certain regulatory measures have been adopted. These questions are addressed in litigation and arbitration separately. As far as TPF for arbitration is concerned, the applicable laws and rules are not confined to the English common law. Peeling away the layers of ambiguity about the regulation of TPF for

²⁵⁰ Christoph Stippl and Gunnar Pickl, "Chapter II: The Arbitrator and the Arbitration Procedure - Limiting Costs in Arbitration," in *Austrian Arbitration Yearbook 2009*, 215.

²⁵¹ *Ibid.*, 214.

²⁵² Jackson, "Review of civil litigation costs: Final Report," 118; Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," 86.

²⁵³ Lord Hodgson of Astley Abbotts, "Civil Proceedings: Third Party Financing: Written question - HL4216".

arbitration is a difficult task since there is little consensus on how to deal with TPF for arbitration at this moment. Plus, arbitration cases with the involvement of TPF are not always publicly available due to the private nature of commercial arbitration.

2.4.1 The safeguards in litigation against the risks of TPF

In litigation, the court is empowered to regulate all participants in the proceedings. However, the standards for exercising this power are somewhat opaque when it comes to TPF.²⁵⁴ In deciding TPF-related issues, the court may consider the ALF code of conduct, specifically whether the funder is a member of ALF and, if yes, whether it has complied with the ALF code of conduct. Nonetheless, the ALF code is only a voluntary code which adds limited value to the court's decision. Overall, the English approach of regulating TPF for litigation is rather light. There is no mandatory regulation specifically for third party funders or their funding activities. Some funders are authorized by the Financial Service Authority (FSA) and therefore are subject to some extra regulations. But FSA regulations are not designed for TPF, therefore, can hardly have a significant impact on the practice of TPF. This part concentrates on the role of case law and that of the ALF code of conduct in regulating TPF since they are the two most important components of the regulatory framework for TPF in English court proceedings. In the process, the following questions have been asked: what are the legal considerations for and against the disclosure of TPF? how does the English court exercise its power to regulate TPF through cost orders? what the ALF code of conduct has offered? and what is the effect of this code?

2.4.1.1 Limited disclosure of TPF

The general rule is that, when they try the case, the English court has access to all relevant evidence in the possession or the control of the parties. The procedural issues related to disclosure are subject to the CPR. CPR 31.2 defines "disclosure" as when "a party discloses a document by stating that the document exists or has existed". There are also procedures that allow the court to obtain information or documents from non-parties.²⁵⁵ CPR 31.17 provides that an

²⁵⁴ For instance, it has not been settled the extent to which the commercial funders should be held liable for adverse costs liability. *Arkin v Borchard and others*, [2005] EWCA Civ 655; *Davey v Money*, 2019 WL 01670926.

²⁵⁵ *Civil Procedural Rules*. Rule 31.17

application could be made to the court for “disclosure by a person who is not a party to the proceedings”. The application has to meet two conditions: (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; (b) disclosure is necessary in order to dispose fairly of the claim or to save costs. The scope of disclosure under English law is often regarded as wide and burdensome, even after the CPR was reformed to restrict the scope of disclosure.²⁵⁶ Normally, TPF is subject to disclosure in the court proceedings,²⁵⁷ nevertheless, the extent to which TPF should be disclosed is debatable.²⁵⁸

In common law, legal privileges created exceptions to the general disclosure obligation.²⁵⁹ English law provides three types of privileges: legal advice privilege, litigation privilege, and common interest privilege. On the surface, they seem to be wide enough to encompass the following documents related to TPF: 1) the funding agreement; 2) the communication between the funder and the funded party; 3) some of the communications usually covered by the legal professional privilege (the funder may need to access to lawyer-client communications).²⁶⁰ It is often argued by third party funders that common interest privilege is able to protect the communications between the funded party and the third party funder.²⁶¹ But there is little case law in which this view is endorsed.²⁶² Normally, when

²⁵⁶ Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England*, 2 ed. (Springer, 2018), 74 and 75.

²⁵⁷ TPF is not by its nature privileged. The court can, for instance, order the disclosure of the name and address of the third party funder based on CPR r 25.14 upon the party's request for security for costs. See: *Re RBS Rights Issue Litigation*, [2017] EWHC 463 (Ch)(2017); *Reeves v Sprencher and others*, [2007] EWHC 3226 (Ch)(2007).

²⁵⁸ *Reeves v Sprencher and others*, [2007] EWHC 3226 (Ch), para. 23 (2007).

²⁵⁹ Privilege is a common law concept which is unheard in civil law. In the common law, the most widely understood privilege is a legal right of the party in litigation to withdraw certain documentations from the legal proceedings. See: Meriam Alrashid, Jane Wessel, and John Laird, "Impact of Third Party Funding on Privilege in Litigation and International Arbitration," *Dispute Resolution International* 6, no. 2 (2012): 102.

²⁶⁰ Maura MacIntosh, "Common interest privilege: common misconceptions," in *Practical Law Dispute Resolution Blog* (2016).

²⁶¹ "Litigation Funding," ed. Steven Friel and Jonathan Barnes (2017), 28.

²⁶² Nidia Hubuck, "Third party funding and the pitfalls of privilege," in *Lexology* (2017).

decisions on costs require the investigation of the funding arrangement, the court will order the disclosure of not only the name and address of the funder but also the key terms of the funding agreement.²⁶³ For instance, in the *Excalibur* case, the court relied on section 51 of the Senior Courts Act 1981 to order all third party funders to jointly and severally be liable to pay the costs of the successful defendants on an indemnity basis.²⁶⁴ Leading up to the final decision, the court examined when the funding agreements were entered and what the funders planned to gain.²⁶⁵

The discussion on whether and to what extent external funding for dispute resolution should be disclosed began even before TPF entered the picture. The disclosure of lawyer funding and ATE insurance has been at the center of the discussion for a while. In the case *Hollins v Russell*, the court has held that a costs judge should normally require the receiving party to disclose the CFA to the paying party for the purpose of costs proceedings in which a success fee is claimed.²⁶⁶ When the disclosure of ATE insurance is concerned, the English court in some previous cases took the position that “ATE insurance is not by its nature privileged, but where disclosure is ordered some appropriate redactions may be justified and necessary to preserve legal advice privilege.”²⁶⁷

Although the English court has a general case management power that can entertain the application for disclosure of funding arrangements, they tend to be cautious in order to eliminate tactical actions. To that end, the court must examine all relevant circumstances. Instead of ordering the disclosure of the funding agreement itself, the court could require the party to whom the application for disclosure is made to submit a witness statement setting out whether it has sufficient financial means to pursue the case.²⁶⁸ This approach implies a balance between the applicant’s right

²⁶³ Deepa Khandhia, "Confidentiality and privilege: do claimants waive privilege when discussing the case with third-party funders? An analysis of best practices," in *Lexology* (2016).

²⁶⁴ *Excalibur Ventures LLC v. Texas Keystone Inc & Ors*, [2016] EWCA Civ 1144.

²⁶⁵ *Ibid.*, para. 16.

²⁶⁶ *Hollins v Russell*, [2003] 1 W.L.R. 2487(2003).

²⁶⁷ *Re RBS Rights Issue Litigation*, [2017] EWHC 463 (Ch), paras 104, 09 (2017).

²⁶⁸ *XYZ v Various Companies (also known as PIP Breast Implant Litigation, Re)*, [2013] EWHC 3643 (QB), [2013] 11 WLUK 632(2013).

to be paid if it wins and the opponent's right to protect privileged and confidential information that is not supposed to be disclosed.²⁶⁹

2.4.1.2 Costs liability for third party funders

The primary goal of third party funders is to generate as many investment returns as possible for themselves, which creates the risks of distortion of the judicial system that calls for regulatory safeguards. These risks drive English law to distinguish commercial funding from pure funding or non-commercial funding,²⁷⁰ so that enhanced judicial supervision can be imposed on the former.²⁷¹ The English courts keep a close eye on the external funding agreements especially when the party claims that external funding is relevant to cost liability.²⁷²

In regulating TPF through costs orders, the compensation-based argument apparently overrides the deterrence rationale. As has been explained by the English court in *Excalibur* case, an order for indemnity costs against the funders is not “to impose a penalty on unsuccessful litigation” but “to afford the successful party a more generous criterion for assessing which of his actual costs should be paid by his opponent because of the way in which the latter or those in this camp, have acted”.²⁷³ From the court's perspective, the very fact that the funder seeks to derive financial benefit from the pursuit of the claim is enough to justify the costs liability for this funder.²⁷⁴ In litigation, third party funders are not the only non-party who is likely to be held liable for adverse costs. In cases where the lawyers play a role in encouraging speculative claims, the court may issue wasted costs orders against these lawyers or to suggest that the supervisory

²⁶⁹ *Ibid.*

²⁷⁰ *Hamilton v Al-Fayed (Costs)*, [2002] EWCA Civ 665.

²⁷¹ Kirby, “Third party funding: access to justice or access to profits?.”; Bench Nieuwveld and Shannon, *Third-Party Funding in International Arbitration*: 115.

²⁷² *Globe Equities Ltd v Globe Legal Services Ltd*, 1999 WL 477655(1999).

²⁷³ *Excalibur v Texas Keystone Inc and others*, [2014] EWHC 3436 (Comm), para. 60.

²⁷⁴ In the first instance of *Excalibur* case, the court held that “the pursuit of objectively hopeless claims which required much time, labour and expense to refute is itself a ground for indemnity costs both against the litigant and his funder”. See: *ibid.*, para. 97. The Court of Appeal upheld the above decision with the understanding that “the funder is seeking to derive financial benefit from pursuit of the claim just as much as is the funded claimant litigant, and there can be no principled reason to draw a distinction between the two” in terms of the liability for indemnity costs. See: *Excalibur Ventures LLC v. Texas Keystone Inc & Ors*, [2016] EWCA Civ 1144, para. 24.

authorities order other sanctions.²⁷⁵ The underlying notion is that the court should regulate the output of the rise of disproportionate costs by assigning liability to those they hold responsible for unnecessary claims or procedures.

2.4.1.3 The code of conduct and other scattered regulations

The idea to draw up a voluntary code for third party funders was proposed by Jackson.²⁷⁶ He considered that this code could form a good basis for voluntary self-regulation of the TPF industry.²⁷⁷ This idea was well received by the CJC who published the code of conduct for third party funders in conjunction with the ALF in November 2011.²⁷⁸ Nevertheless, only those who have subscribed to the ALF membership have to comply with the ALF code of conduct, which has largely restricted the effect of this code. Given the nature of the code, a violation will not directly result in any legal consequences. To enhance compliance, the ALF has the authority to fine members for up to the amount of £500.²⁷⁹ This however is far from enough to prevent any non-compliance.

The ALF code has addressed a wide range of issues such as the capital capacity of the funders, the limit of the costs of TPF, the promotional literature of the funder, the funder's duty to the ALF and to the funded procedure, the cost liability of the funder, the withdrawal of the funder, etc.²⁸⁰ The code of conduct has received a great deal of attention in court proceedings. The courts have considered whether the funder is a member of the ALF and whether it has subscribed to the ALF code of conduct, with the intention to test the qualification of the funder.²⁸¹ In a later chapter on TPF in Hong Kong, the details of the ALF code of

²⁷⁵ *Joyce Whitfield v Revenue & Customs Commissioners*, [2016] UKFTT 685 (TC).

²⁷⁶ Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," para. 269.

²⁷⁷ *Ibid.*, para. 270.

²⁷⁸ The ALF is an independent body that has been charged by the Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. For details, see: <http://associationoflitigationfunders.com/about-us/>.

²⁷⁹ Justice for Profit campaign, "Third Party Litigation Funding in the UK: a market analysis," 2.

²⁸⁰ The Association of Litigation Funders, "Code of Conduct for Litigation Funders."; *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer*, (Kluwer Law International, 2017), 22.

²⁸¹ *Excalibur Ventures LLC v. Texas Keystone Inc & Ors*, [2016] EWCA Civ 1144, para. 2.

conduct will be revisited, with the purpose to strike a balance between the ALF code of conduct and the Hong Kong code of practice.²⁸²

Beyond the voluntary self-regulation, some funders are authorized and regulated by the FSA in the UK.²⁸³ Third party funders who have conducted business internationally are likely to be regulated by regulations and laws from other jurisdictions.²⁸⁴ But there is still no mandatory and well-documented baseline for all funders operating their business in England, which has limited the ability of English regulators to take guidance. There are many factors that have contributed to the current situation. One of the most obvious among them is that there are currently various institutions all different in size and nature which are allowed to fund litigation in England, and it is hard to tailor a baseline that fits all. The other one could be that the practice of TPF has not justified the need for a widely applied mandatory baseline in the eyes of English regulators.

2.4.2 The safeguards in arbitration against the risks of TPF

TPF for arbitration remains largely unregulated in England. The abovementioned court-based safeguards are not available in arbitration since the arbitral tribunal's authority is limited by the consent of the parties and the applicable rules and laws.²⁸⁵ The English arbitration legislation has not directly addressed TPF. From the available case law, it is observable that the court struggles with the question to what extent the autonomy of the tribunal needs to be upheld in the context of TPF. Third party funders are divided in terms of the way they conduct arbitration funding. The ALF members who have subscribed to the ALF code of conduct have some rules to go by while other funders are left to define their own conducts. The author sees the ALF code of conduct as of little help in arbitration since this code is an "English creation" which "does not purport to deal with international issues arising in international arbitration".²⁸⁶ Some

²⁸² Secretary for Justice of HKSAR, "Hong Kong Code of Practice for Third Party Funding in Arbitration," (2019).

²⁸³ Westminster Legal Policy Forum, "Third party litigation funding and the future of the voluntary code," 13.

²⁸⁴ Ibid.

²⁸⁵ Bench Nieuwveld and Shannon, *Third-Party Funding in International Arbitration*: 118-19.

²⁸⁶ Stone, "Third Party Funding in International Arbitration: A Case for Mandatory Disclosure?," 68.

consistencies about how TPF should be treated in arbitration has been achieved by “soft laws” from arbitration institutions and international organizations.²⁸⁷ In reality, the application of such soft laws depends largely on the consent of the parties and the will of the tribunal.

There is a case to be made that TPF should be disclosed at the earliest possible time in arbitration. Some have argued that there is a seemingly growing trend pointing towards mandatory disclosure of TPF.²⁸⁸ However, English law is silent on the disclosure of TPF for arbitration. When cost issues are concerned, it is normally within the discretion of the tribunal to decide whether and to what extent TPF is relevant to these issues. The English court tends to uphold the tribunal’s decision on costs issues unless there is serious irregularity within the meaning of section 68 of the English Arbitration Act 1996. In the funded arbitration procedure, the funders do not owe the same fiduciary duties to the case as legal counsels, which results in difficulties for the tribunal and the court to monitor the behaviors of the funders. The IBA Guidelines on Conflicts of Interest in International Arbitration remedy the situation by requiring the tribunal to lessen apparent conflicts of interest caused by the involvement of third party funders. These guidelines have gained widespread legitimacy across jurisdictions.²⁸⁹ However, there are cases where the parties challenge or omit the application of these Guidelines.²⁹⁰

2.5 The question lies ahead: Is an enhanced regulation required?

There is no doubt that TPF is and will continue to be an important part of the English legal landscape. The struggle is whether enhanced regulation is needed as the industry expands and as the TPF models diversify.²⁹¹ The Code of Conduct is often criticized for a lack of

²⁸⁷ For instance, the ICC arbitration rules and the IBA Guidelines on Conflicts of Interest in International Arbitration.

²⁸⁸ Marius Nicolae Iliescu, "A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact," in *Kluwer Arbitration Blog* (2016).

²⁸⁹ Anushka Mittal, "Can A Party Challenge The Application Of The IBA Guidelines On Conflict of Interest?," in *Kluwer Arbitration Blog* (2018).

²⁹⁰ *Ibid.*

²⁹¹ Antje Baumann and Michael M. Singh, "New Forms of Third-Party Funding in International Arbitration: Investing in Case Portfolios and Financing Law Firms,"

effectiveness and failure to address some key issues associated with TPF such as disclosure. In fact, the English authorities have never treated this code as a permanent solution.²⁹² Lord Justice Jackson noted in his report on the costs of civil litigation in 2009 that “if the use of third party funding expands, there may well be a need for full statutory regulation.”²⁹³ The government promised to keep a close look at the practice of TPF. They are ready to investigate matters further should the need arise. But, at this moment, they have no plan to move away from the light touch approach. Those who are satisfied with the current regulatory framework tend to argue that, with the judicial supervision in place, there is no need to introduce extra regulation to TPF for now and in the foreseeable future.

In common law jurisdictions where the law can be found in cases,²⁹⁴ it is true that the court constantly brings flexibility and nuance to the oversight and supervisory roles in relation to TPF. However, judicial oversight has its limits.²⁹⁵ It cannot guarantee timely disclosure of TPF that allows parties on both sides to make well-informed procedural decisions and to engage efficiently in settlement negotiations. Besides, judicial supervision is absent when disputes do not arise. Furthermore, it is not able to provide timely and comprehensive regulatory reform. Indeed, in an area involving various funding models and complex interaction between funding and the funded proceedings, judicial supervision will continue to play an important role to make sure the English legal system can accommodate a wide range of participants and disputes.²⁹⁶ However,

Indian Journal of Arbitration Law VII, no. 2 (2018).

²⁹² Mathew Secomb, Philip Tan, and Thomas Wingfield, "Third Party Funding for Arbitration: An Opportunity for Singapore to Lead the Way in Regulation," *Asian Dispute Review* 18, no. 4 (2016): 184.

²⁹³ Jackson, "Review of civil litigation costs: Final Report," 121.

²⁹⁴ John Gardner, "Some Typles of Law," in *Common Law Thoery* (Cambridge University Press, 2007), 66-67.

²⁹⁵ It is argued that, when professional and industry parameters are concerned, the parliament rather than the judiciary has to be involved. See: Gary Chan Kok Yew, "Champerty, Professional Legal Ethics and Access to Justice for Impecunious Clients," *Singapore Journal of Legal Studies* (2014): 214.

²⁹⁶ As Victoria Sahani has suggested, “funders do not conduct funding in isolation. Several actors are required in order for funding to take place, including attorneys, clients, opposing parties, decision makers, and funders. Thus, regulating funders alone or trying to regulate funders by regulating lawyers are both ineffective strategies.” See: Victoria Sahani, "Harmonizing third-party funding regulation,"

it is necessary to cultivate a national regulation with light measures to enhance transparency and legal certainty in the TPF industry, to defuse fear of the potential risks of the funding activities and to eliminate the worry about the ALF code's lack of effectiveness. By implementing this widely applied regulation, England is likely to lead the way of fostering cross-border collaboration on regulatory goals and ideals.

The impetus for England to reform its regulation may also derive from the need to maintain London's status as the world's leading arbitration center. When *Essar v Norscot* hit the arbitration community as a shock wave, many were concerned that this case had created a new imbalance between the claimant and the defendant and may drive arbitration users away from London.²⁹⁷ Scholars and legal professionals tend to believe that, without well-defined and well-regulated TPF, this case should be limited to its particular facts otherwise the integrity of arbitration would be endangered.²⁹⁸ A regulation with mandatory but minimum requirements might help prevent the next shock wave and bring England in line with other jurisdictions where mandatory rules of TPF have been integrated into the law. Yet further research is needed to verify the above theory.

2.6 Takeaways

England represents one of the most developed TPF markets in the world. It currently permits TPF for all civil cases, whether in litigation or in arbitration. Under English law, TPF refers to a type of investment that enables third party funders to fund the legal costs of dispute resolution in part or in whole, in exchange for a proportion of the final proceeds. It is not the only funding option in the English legal landscape. It merely supplements, not replaces, the alternative funding options such as insurance, legal aid, and lending. The juxtaposition of TPF and its alternatives is underpinned by the belief

Cardozo Law Review, 2015/03/10/ 2015.

²⁹⁷ Duarte Henriques, "The *Essar v. Norscot* Case: A Final Argument for the 'Full-Disclosure-Wingers' of TPF in International Arbitration," in *Kluwer Arbitration Blog* (2016); Wolfgang Kühn and Hanneke van Oevenren, "The Full Recovery of Third-Party Funding Costs in Arbitration: To Be or Not to Be?," *Journal of International Arbitration* 35, no. 3 (2018): 316.

²⁹⁸ Kühn and van Oevenren, "The Full Recovery of Third-Party Funding Costs in Arbitration: To Be or Not to Be?," 308.

that it is in the public interest to provide the parties with as many funding options as possible, but this is on the supposition that the risks of these funding options are well controlled by law. The growth of the English TPF market is preceded by the abolition of criminal and civil liability of maintenance and champerty and is motivated mainly by the desire for access to justice. Other reasons include to ease financial burdens on public expenditure, to enhance the efficiency of the judicial proceedings, to implement the pro-arbitration policy and to carry forward mercantilism. Although England has been struggling with the potential procedural abuses, its experience with TPF has shown that TPF could be a solution to the problem of lack of funding in commercial cases without causing a serious disruption of justice that goes beyond the administrative capacity of the legal system.

It is agreed in England that TPF is not risk free. In litigation, regulators have paid attention to the ethical issues and the cost issues. Primarily, TPF is often taken into consideration by English courts in dealing with applications for security for costs. In some cases, the courts were convinced that the funded case might be a hit-and-run operation if the funder was not tied up with the funded proceedings through costs orders. In addition to that, the funder's control on the proceedings has also triggered concerns. Even though the funder is motivated by legitimate commercial interests to exercise some control over the case, such control could become excessive and therefore constitute a detriment to the integrity of the judicial system and the independence of lawyers. English law does allow a certain degree of control by the funder as long as the funder does not improperly stir up litigation, disrupt the procedure or exploit the funded party. Whereas, standards for identifying "improper control" by the funder remain unclear. From the English perspective, professional and ethical rules for lawyers are not sufficient in keeping the funder's control appropriate, and therefore, judicial supervision is required to prevent procedural abuses caused by third party funders. Furthermore, TPF is found to have an impact on the financial interests of the parties on both sides. It has the potential to influence the overall costs of the proceedings, the costs liabilities of the parties, and the final recovery of the funded party. The English court is authorized to supervise such influence, although it is questionable whether they are able to fulfill the task.

In arbitration, the impact of TPF deserves a different mode of analysis. Under the influence of the pro-arbitration policy, English law allows arbitration to flow above the domestic procedural rules for litigation, which enables TPF for arbitration to carve a special place for itself. The involvement of third party funders could generate discussions on security for costs, the adverse costs of third party funders, the recoverability of the success fee, the funder's control on the conduct of the proceedings, conflicts of interest, etc. So far, little consensus has been reached on how severe the risks of TPF for arbitration are and to what extent TPF is relevant to the funded arbitral proceedings. Seemingly, there is a growing trend towards disclosure of TPF. One could argue that a clear obligation to disclose TPF in the early stage of arbitration may shorten the list of possible things that would go very wrong.

It will become clear later in this work that the above issues are not endemic in England. However, England has developed a unique regulatory approach in dealing with these issues, taking into account public policies and, more importantly, the status of the TPF industry. Currently, TPF is subject to case law and the ALF code of conduct. In arbitration, courts and tribunals have to look to international instruments (e.g. the IBA Guidelines on Conflicts of Interest), soft laws (e.g. the ALF code of conduct), and general legal principles (e.g. the principle of fairness), other than case law and self-regulation. The above approach is often referred to as the light touch approach, consisting of no statutory regulation specifically for third party funders. The underlying notion is that the regulation should be compatible with the conditions of the TPF industry and should reflect the practical concerns. If TPF is in its very early stage where it is not prevalent and its procedural impact is not well-evidenced by empirical materials, excesses in regulation should be avoided. The government has said in 2016 that they have no plan to walk away from the light touch approach any time soon since TPF is relatively young and they are not aware of any specific concerns about the activities of third party funders. But it is still frequently asked whether the existing regulation of TPF is sufficient to resist the risks of TPF. This question becomes more valid when new cases have sprung up demonstrating that inexperienced third party funders fail to conduct thorough due diligence before funding a claim or to fulfill their procedural obligations.

CHAPTER 3 TPF IN HONG KONG

3.1 Introduction

This part starts with the unique position of Hong Kong in dealing with the world and China. Hong Kong inherits the common law tradition from England in the colonial era. It has a strong sense of rule of law and always aims to promote itself as the world's leading center for dispute resolution. In the meantime, Hong Kong has strong ties with China in terms of trade and culture. Over the years, Hong Kong law has played an important role in improving the legal system in China, especially in the commercial realm. It is reasonable to expect that legal reforms as to TPF on one side will have a great impact on the other. Hong Kong moved to amend the law to allow TPF for arbitration in 2017.²⁹⁹ The key provisions of the bill went into effect in February 2019 shortly after the code of practice for TPF was issued.³⁰⁰ These new developments have made Hong Kong even more relevant to this research.

Hong Kong is a Chinese city with English legal tradition. It became a British colony in 1843 according to the Treaty of Nanking as the result of China's loss in the Opium Wars.³⁰¹ For quite a long time after that, British and native Chinese living in Hong Kong were subject to different laws.³⁰² The law-making body established in colonial Hong Kong was the governor being assigned to govern the city on behalf of Britain.³⁰³ The extent to which English law could be applied to Hong Kong was not clear until the year of 1966 when the Application of English Law Ordinance entered into force.³⁰⁴ Section 8 of this

²⁹⁹ Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 came into force on 23 June 2017, with certain sections came into effect at a later date.

³⁰⁰ The Government of the HKSAR, "Code of Practice for Third Party Funding of Arbitration issued,"

<https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm>.

³⁰¹ *Introduction to the Hong Kong Criminal Justice System*, ed. Harold Traver and Mark S. Gaylord (Hong Kong University Press, 1994), 2.

³⁰² Rimsky Yuen, "Speech by the Hon Rimsky Yuen SC for the Dr Mok Hing Yiu Memorial Lectureship at St Hugh's College, University of Oxford on 25 May 2017 (Thursday): The Development of Common Law in Hong Kong: Past, Present and Future," <https://www.doj.gov.hk/eng/public/pdf/2017/sj20170525e3.pdf>.

³⁰³ *Ibid.*, para.15.

³⁰⁴ Cap. 88 Application of English Law Ordinance is not applicable to Hong Kong

Ordinance states that the common law and the rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject such modification thereto as such circumstances may require, save to the extent that they may from time to time be modified or excluded by applicable legislation.³⁰⁵

The situation remained so until 1997 when Hong Kong returned back to the People's Republic of China (the PRC) under the constitutional formula of "one country two systems".³⁰⁶ Accordingly, Mainland China (or "China" in the context of this work) and Hong Kong remain separate jurisdictions.³⁰⁷ Based on article 19 of the Basic Law of the Hong Kong Special Administrative Region (HKSAR), "the Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication". This implies that the court of Hong Kong has jurisdiction over all cases in the region with some exceptions.³⁰⁸

The idea of the rule of law is deeply rooted in the society of Hong Kong since the colonial era. The independence, impartiality, and integrity of the legal system are the key elements to the achievement of Hong Kong. In recent times, the rise of globalization and the increase in the amount of international trade allow Hong Kong to become the world's leading arbitration center. To facilitate international trade and commercial dispute resolution proceedings, the local authorities manage to provide the parties with as many funding options as possible, provided that the relevant legal principles are not compromised.

Special Administrative Region of the People's Republic of China according to the Basic Law of the Hong Kong Special Administrative Region. See: "Cap. 88 Application of English Law Ordinance (Not adopted as the Laws of the HKSAR)," <https://www.elegislation.gov.hk/hk/cap88?pmc=1&m=1&pm=0>.

³⁰⁵ Yuen, "Speech by the Hon Rimsy Yuen SC for the Dr Mok Hing Yiu Memorial Lectureship at St Hugh's College, University of Oxford on 25 May 2017 (Thursday): The Development of Common Law in Hong Kong: Past, Present and Future".

³⁰⁶ H. P. Lee and Marilyn Pittard, eds., *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017), 131.

³⁰⁷ *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, article 19.

³⁰⁸ *Ibid.*

TPF came to the attention of the Hong Kong legislators against an interesting backdrop. Firstly, Hong Kong's competitors are getting edges from the use of TPF. In addition to this, the legal reforms to permit TPF in England and other common law jurisdictions have shown that the risks associated with TPF have not gone beyond the administrative capacity of the legal system. These developments have reduced the fear of TPF among Hong Kong legislators. Moreover, it is attention-drawing that China has launched the Belt and Road Initiative which will bring Hong Kong more arbitration businesses and will motivate more innovations in Hong Kong's dispute resolution industry.³⁰⁹ Besides, Hong Kong seeks to play a more active role in the Chinese legal service market through its engagement in the Guangdong-Hong Kong-Macao Bay Area.³¹⁰ These changes have been taken into consideration by the Legislative Council (LC) in the discussions on TPF.³¹¹ As has been said by Ms Kim Rooney in a LC meeting of the panel on administration of justice and legal services on 26 March 2018, in order to explore the opportunities presented by the Belt and Road Initiative and other new developments in the region, "there should be more promotion of Hong Kong in terms of its legal service and international dispute resolution service, as well as about Hong Kong being an innovator of dispute resolution of all forms..."³¹²

³⁰⁹ Legislative Council of HKSAR Panel on Administration of Justice and Legal Services, "LC Paper No. CB(4)81/18-19," <https://www.legco.gov.hk/yr17-18/english/panels/ajls/minutes/ajls20180326.pdf>; Legislative Council of HKSAR Panel on Administration of Justice and Legal Services, "LC Paper No. CB(4)1268/15-16," <https://www.legco.gov.hk/yr15-16/english/panels/ajls/minutes/ajls20160125.pdf>, para.12; Olga Boltenko, "Resolving Disputes Along the Belt and Road: Are the Battle Lines Drawn?," *Asian Dispute Review* 19, no. 4 (2017): 190.

³¹⁰ Legislative Council of HKSAR Panel on Administration of Justice and Legal Services, "LC Paper No. CB(4)81/18-19".

³¹¹ The Legislative Council of the Hong Kong Special Administrative Region or LegCo (Chinese: 香港特別行政區立法會) is the unicameral legislature of the Hong Kong Special Administrative Region of the People's Republic of China. The main functions of the Legislative Council are to enact, amend or repeal laws; examine and approve budgets, taxation and public expenditure; and raise questions on the work of the government. The Legislative Council is also given the power to endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court, as well as the power to impeach the Chief Executive. See: "The official website of the Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China," <https://www.legco.gov.hk/general/english/about/index.html>.

³¹² Legislative Council of HKSAR Panel on Administration of Justice and Legal

From English law, Hong Kong law inherited the concepts of maintenance and champerty, which has resulted in a long history of legislative hostility against TPF and other non-party commercial funding options. TPF for arbitration and the related proceedings was not permitted by Hong Kong law until 1 February 2019.³¹³ TPF for litigation is still a no-go save some exceptions specified in the amended Arbitration Ordinance and in case law.³¹⁴

It took a few years for TPF for arbitration to become a reality in Hong Kong. In October 2015, the Law Reform Commission of Hong Kong (the HKLRC) initiated public consultation on TPF for arbitration. A final report with the recommendations to permit and to regulate TPF for arbitration was issued in 2016.³¹⁵ On 23 June 2017, the landmark Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 was published in the Government Gazette. The key parts of this amendment officially entered into force on 1 February 2019 after the code of practice was issued. As a result, the introduction of the new Part 10A to the Arbitration Ordinance enables Hong Kong to finally open the way for third party funders to fund arbitration and the related proceedings.

In the amended Arbitration Ordinance, TPF is defined by section 98G as “the provision of arbitration funding for an arbitration—(a) under a funding agreement; (b) to a funded party; (c) by a third party funder; and (d) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.”³¹⁶ Here, “third party funder” refers to a person—“(a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and (b) who does not have an interest recognized by law in the arbitration other than under the funding agreement.”³¹⁷ It is important to notice that

Services, "LC Paper No. CB(4)81/18-19".

³¹³ The Government of the HKSAR, "Code of Practice for Third Party Funding of Arbitration issued".

³¹⁴ *Hong Kong Arbitration Ordinance (Cap. 609)*, Part 10A; Siegfried Adalbert Unruh *v* Hans-Joerg Seeberger, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31.

³¹⁵ The law reform commission of Hong Kong, "Report on third party funding for arbitration."

³¹⁶ *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98G.

³¹⁷ *Ibid.*, section 98J.

“third party funders” within the meaning of section 98J of the Hong Kong Arbitration Ordinance include law firms or lawyers who represent neither of the parties to the funded case.³¹⁸

This chapter first examines the areas where TPF is permitted and the reasons why the practice of TPF is confined to these areas. Then it moves to explain the potential risks of TPF under the law of Hong Kong and the regulatory measures designed to minimize these risks. This chapter also points to a question for future research, namely whether Hong Kong should be more open to TPF for litigation.

3.2 The Platform for TPF

TPF is permitted in “arbitration” which includes not only arbitration proceedings but also a few other proceedings under the Arbitration Ordinance: court proceedings, proceedings before an emergency arbitrator, and mediation proceedings.³¹⁹ It will become clear in this part that TPF for arbitration comes as a result of the development of the public policy in Hong Kong and the international influence. The analysis is geared to cover the modern public policy considerations that compel the amendment of the law of maintenance and champerty as well as the strategic reasons for promoting TPF as a funding mechanism in arbitration. In the process, the following questions have been asked: Where is TPF permitted in Hong Kong? Why is TPF permitted in arbitration? What has deterred the permission of TPF for litigation?

3.2.1 Where is TPF permitted under Hong Kong law?

As aforementioned, the platform for TPF is largely confined to arbitration in Hong Kong. TPF was introduced to arbitration and the related litigation and mediation proceedings by Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.³²⁰ The key provisions of this amendment with the effect of

³¹⁸ In the 2016 bill, TPF does not include the provision of funding from those who practice law, but this was amended at a later time. As the result, legal practitioners are able to participate in arbitration funding as long as they represent neither of the party in the funded case. See: *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016*, section 98G(2); *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017*, section 98J.

³¹⁹ *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98F.

³²⁰ *Arbitration and Mediation Legislation (Third Party Funding) (Amendment)*

abolishing maintenance and champerty as crimes and torts in the specified area and the effect of enabling TPF for arbitration to take place officially entered into force in February 2019.³²¹ Apparently, the amendment mainly targets arbitration,³²² and therefore, has almost zero impact on TPF in litigation. A champertous agreement in litigation is still able to give rise to not only civil liability but also criminal liability under the law of Hong Kong.³²³

According to the landmark case *Unruh v Seeberger*, despite the general prohibition on litigation funding, there are some areas in which the involvement of TPF for litigation might be allowed.³²⁴ These areas include (1) cases where a common interest is found between the funder and the funded party; (2) cases where access to justice considerations prevail; (3) a miscellaneous category including insolvency litigation.³²⁵ However, in practice, the Hong Kong courts rarely find that the above exceptions are well established. The courts hold the view that “public policy issues as to whether criminal and tortious liability for maintenance and champerty should be retained should be left to the legislature”.³²⁶ Normally, a civil court tends to be slow to declare a funding arrangement as an exception to the champerty prohibition since such arrangement could relate to criminal consequences of conduct.³²⁷

3.2.1.1 Why was TPF for arbitration introduced to Hong Kong? Much more than access to justice

In February 2019, the new amendment to the Arbitration Ordinance (Part 10A) entered into effect, which provided the legal basis for the permission of TPF for arbitration. Before the amendment, there was a public consultation being conducted by the HKLRC in 2015.³²⁸ The

Ordinance 2017.

³²¹ Legislative Council of HKSAR, "Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Commencement) Notice 2018," https://www.legco.gov.hk/yr18-19/english/subleg/sub18_260.htm.

³²² *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.*

³²³ *Raafat Imam v Life (China) Co Ltd*, [2018] HKCFI 1852.

³²⁴ *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31, paras 91-98.

³²⁵ *Ibid.*

³²⁶ *Raafat Imam v Life (China) Co Ltd*, [2018] HKCFI 1852.

³²⁷ *Ibid.*

³²⁸ The Law Reform Commission of Hong Kong, "Consultation Paper on Third Party

HKLRC identifies a wide range of potential benefits of TPF for arbitration in chapter 5 of the consultation paper:

- (1) preserves and promotes Hong Kong's competitiveness as an arbitration center;
- (2) benefits to the court system and the use of public resources;
- (3) promotes the use of arbitration;
- (4) allows the funded party to mitigate the risks of conducting arbitration proceedings;
- (5) helps to give parties an objective view of the merits of their own claim;
- (6) helps to precipitate a resolution of a dispute by the other side offering to settle it, thereby saving considerable time and expense;
- (7) promotes effective case management, as the funder will ensure the arbitration procedure is cost-efficient and focuses on key issues;
- (8) assists resource-poor respondents facing several claims;
- (9) helps to screen against unmeritorious claims.³²⁹

Apparently, access to justice is a reason for the introduction of TPF. In HKLRC's words, "Third Party Funding would assist to facilitate the inexperienced claimant in bringing meritorious claims against a respondent with greater experience and resources, thereby promoting access to justice".³³⁰ However, access to justice does not come first in the HKLRC's list of reasons for the permission of the practice of TPF in arbitration. The HKLRC's recommendations with regard to TPF have given considerable weight to the collective interest of maintaining Hong Kong as a competitive arbitration center.³³¹ It is noticed by the HKLRC that "arbitration is becoming increasingly expensive", and therefore, when picking the place where the arbitration should be conducted, a party may enquire the availableness of TPF.³³² The above explains why the author looks beyond the concept of access to justice in order to answer the research question of why Hong Kong has introduced TPF to arbitration. This

Funding for Arbitration," (2015).

³²⁹ Ibid., 112-13.

³³⁰ Ibid., 115.

³³¹ Ibid., 114.

³³² Ibid.

part preliminarily examines the meaning and implications of access to justice under the law of Hong Kong. Then it moves to explain how TPF contributes to the effectiveness of the arbitration procedure. It also sheds light on TPF's alternative funding options and the problem of lack of funding in arbitration.

3.2.1.2 Access to justice

In the previous chapter, access to justice is found as the primary reason for the law to permit TPF in dispute resolution proceedings in England.³³³ In Hong Kong, however, access to justice is only part of the driving force behind the introduction of TPF for arbitration. It would not be too bold to say that access to justice is not the main reason for the permission of TPF, otherwise, TPF for litigation would have been contemplated before TPF for arbitration.³³⁴ In public consultation, there were few respondents opposed to the recommendation to permit TPF for arbitration at this moment because, in their view, "the law applicable to litigation should be revised before the law applicable to arbitration is".³³⁵

The very basic implication of access to justice should be equal justice for all. In practice, however, achieving equal justice for all proves to be a challenging and elusive task since "justice" is a complicated word to explain. The Hong Kong authorities have taken the position that access to justice acquires a broader view than access to courts.³³⁶ In other words, the concept of access to justice should encompass access to private justice through arbitration.³³⁷ In the process of framing the rules for TPF for arbitration, Hong Kong legislators have considered that citizens might be deprived of access to justice due to lack of proper funding in arbitration and therefore the rules that are excessive and

³³³ Ibid., 115.

³³⁴ The law reform commission of Hong Kong, "Report on third party funding for arbitration," §4.12.

³³⁵ Ibid.

³³⁶ For instance, Thomas So, the president of the Law Society of Hong Kong has said that, "for a party who may have the option of going to court or arbitration but who might otherwise be deprived of access to justice due to lack of proper funding, arbitration now becomes a feasible option". See: Thomas So, "Third Party Funding for Arbitration in Hong Kong: A New Chapter to Boost the Access to Justice," *Hong Kong Lawyer* (2017).

³³⁷ Justin d'Agostino and James MacKinnon, "Third Party Funding for Arbitration Looks Set to Arrive in Hong Kong: What You Need to Know," *Asian Dispute Review* 18, no. 1 (2016): 26.

have a potential chilling effect on the use of TPF for arbitration should be avoided as much as possible.³³⁸ In response to the legal reform to the Arbitration Ordinance, many commentators have given praise to the permission of TPF for arbitration by saying that this funding option opens a new chapter to boost access to justice in Hong Kong.³³⁹ Throughout the HKLRC's final report of TPF for arbitration, access to justice has been referred to on several occasions to justify the proposed change of attitude towards TPF. Yet this report does not address the question of whether access to litigation carries the same weight as access to arbitration and whether access to funding is equal to access to justice. Other than that, the concern has been directed towards the risk that the funded legal claim may benefit the funder's investment portfolio more than the interest of the public to access to justice.³⁴⁰

Despite the above, one could argue that, although access to domestic court is normally deemed as a basic human right, access to arbitration for commercial contracts is often a choice of the parties as part of their business plan. Indeed, commercial arbitration is purely voluntary. The state is responsible for offering their citizens access to court for civil disputes. But they are most likely not responsible for access to arbitration.³⁴¹ Article 35 of the Basic Law of the HKSAR confirms that the right to access to court is a fundamental right for citizens in Hong Kong, but it does not touch on whether the right to access to private dispute resolution mechanisms deserves the same status: "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. Hong Kong residents shall have the right to instate legal proceedings in the courts against the acts of the executive authorities and their personnel."³⁴² Even in court proceedings, it is extremely difficult to justify TPF or other funding services by access to justice. Previously, the Hong Kong court has held that the law is constructed to protect

³³⁸ So, "Third Party Funding for Arbitration in Hong Kong: A New Chapter to Boost the Access to Justice."

³³⁹ Ibid.

³⁴⁰ Kirby, "Third party funding: access to justice or access to profits?."

³⁴¹ David A. R. Williams and John Walton, "Costs and access to international arbitration," *Arbitration* 80, no. 4 (2014): 433.

³⁴² *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, article 35.

access to court with proper legal representation but not access to court with ideal or first-choice legal representation.³⁴³

Overall, access to justice does not have one precise, quantitative meaning under Hong Kong law. Nevertheless, in the Hong Kong legislators' view, without proper funding access to justice is an empty concept. Such an intuitive understanding of access to justice should be sufficient to justify the permission of TPF for arbitration for now.

3.2.1.3 TPF facilitates the arbitration procedure

As has been said at the beginning of section 2.2, the HKLRC has taken the view that TPF will help Hong Kong enhance its status as a leading center for arbitration in the world because TPF facilitates not only funding but also case and budget management.³⁴⁴ As previously mentioned, the HKLRC placed weight on the benefits of TPF to attract more arbitration business to Hong Kong, to mitigate the risks of conducting arbitration proceedings, to help the parties to come to an objective view of the merits of the claims, and to precipitate settlement. The benefits of TPF for arbitration are not limited to what the HKLRC has said. According to the ICCA-Queen Mary report on TPF for international arbitration, TPF could also be used to enhance the enforceability of arbitral awards.³⁴⁵

A balanced view of the benefits of TPF for arbitration is appreciated by the HKLRC. With consideration to the then existing legal instruments in Hong Kong and the proposed regulatory measures for TPF, the HKLRC believes that they are allowed to give more weight to the positive impact of TPF than to the negative impact of TPF in the context of arbitration. HKCRC has found that Hong Kong financial services and legal sectors are supervised by experienced bodies with the expertise and the skills to address the general issues arising from the practice of TPF.³⁴⁶ Besides, there is a set of rules for arbitration seated in Hong Kong to deal with the risks of TPF such as conflicts of

³⁴³ *Cyberworks Audio Vedio Technology Ltd*, 2010 WL 1322537 (CFI), [2010] 2 HKLRD 1137, [2010] HKEC 672 [2010] HKEC 672(2010).

³⁴⁴ The Law Reform Commission of Hong Kong, "Consultation Paper on Third Party Funding for Arbitration," 115-16.

³⁴⁵ "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," 83.

³⁴⁶ The law reform commission of Hong Kong, "Report on third party funding for arbitration," 35.

interest.³⁴⁷ Furthermore, the court and tribunal could be expected to play an important role in supervising the funding arrangement.³⁴⁸ Moreover, a code of practice helps set out standards for the practice of TPF. It will be explained in section 4 of this chapter whether the available safeguards can achieve what the arbitration users and the legislators are hoping for.

Arbitration often carries international elements. In modern times, international commercial arbitration was introduced to avoid the constraints of national courts and the required jurisdictional underpinning.³⁴⁹ Bearing this in mind, it is not difficult to understand why Hong Kong legislators are eager to narrow the gap between the practice of TPF for arbitration in other jurisdictions and that in Hong Kong. The last thing the legislators want is to shock the parties to arbitration with endemic rules such as the maintenance and champerty prohibition. It was an urgent matter for the LC to clarify whether and to what extent the ancient English law of maintenance and champerty was applicable to TPF of arbitration in Hong Kong, based on modern public policy concerns and the conditions of the Hong Kong society.³⁵⁰

Arbitration in Hong Kong started in the early days of the colonial era. In history, Hong Kong was hurdled by the lack of up to date arbitration legislation in developing its own arbitration industry. The British government gave the first colonial government of Hong Kong no jurisdiction over civil disputes.³⁵¹ To meet the demand for disputes resolution, the colonial governor tried to recommend arbitration for civil and commercial disputes.³⁵² During that time, despite the large demand for arbitration, the legislative activity for arbitration progressed slowly. The first Arbitration Ordinance in Hong Kong entered into force in 1961 to make provisions for arbitration in respect

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Renata Brazil-David, "Harmonization and Delocalization of International Commercial Arbitration," *Journal of International Arbitration* 28, no. 5 (2011): 445.

³⁵⁰ HKSAR, "Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Commencement) Notice 2018".

³⁵¹ Derek Roebuck and Christopher Munn, "'Something So Un-English': Mediation and Arbitration in Hong Kong, 1841-1865," *Arbitration International* 26, no. 1 (2010): 87.

³⁵² Ibid., 91.

of civil matters. But in terms of keeping pace with reality, the early HKLRC of Hong Kong was criticized for a lack of enthusiasm. John Griffiths, Q.C. said in 1979 that “Hong Kong had all that was required for an international arbitration center except an up to date law.”³⁵³ The legal reform to permit TPF was considered an urgent matter so that the above history does not repeat itself.

The polity to promote arbitration in Hong Kong is now discussed in the midst of the Belt and Road Initiative. In the LC discussion of the development of Hong Kong as an international arbitration center, the legislators paid a great deal of attention to the Belt and Road Initiative, considering it an opportunity for Hong Kong to expand and to restructure its arbitration industry and the related legal services.³⁵⁴ They push the Hong Kong authorities to think “how local and overseas businesses could utilize the attitudes of Hong Kong’s legal and dispute resolution services when they pursued opportunities under the ‘Belt and Road’ Initiative”.³⁵⁵ Here, timing appears to be a compelling force for the introduction of TPF for arbitration.

3.2.1.4 The traditional funding options and the lack of funding in arbitration

To date, the rise of TPF has often been motivated by the funded party’s lack of financial resources to pursue its own claims in continuous proceedings. Therefore, it is worth a brief overview of the traditional funding options available to parties to arbitration cases. Compared to England, Hong Kong has a rather narrow scope of external funding options for dispute resolution. Due to the application of maintenance and champerty and the regulation of the legal profession, contingency fees are still a no-go.³⁵⁶ As to the use of legal insurance, Hong Kong has fallen behind many other common law jurisdictions. ATE insurance, which has been available in England for over a decade and has enabled tens of thousands of parties to offset a considerable portion of their dispute resolution costs, is not popular in Hong Kong.³⁵⁷ The first ATE insurance product was not launched in this city

³⁵³ Neil Kaplan, "Arbitration in Hong Kong," *Journal of International Arbitration* 3, no. 4 (1986): 7.

³⁵⁴ Legislative Council of HKSAR Panel on Administration of Justice and Legal Services, "LC Paper No. CB(4)1268/15-16".

³⁵⁵ Ibid.

³⁵⁶ *Legal Practitioners Ordinance (Cap.159)*, section 64(1)(b).

³⁵⁷ Lockton, "Lockton Companies (Hong Kong) Ltd has launched the first After-the-

until 2009.³⁵⁸ As of now, the market has never seen the use of ATE insurance become prevalent. A loan is less likely to become an attractive funding option for arbitration since the money being advanced has to be repaid despite the outcome of the case. What is available to the parties is often LEI. However, LEI is not problem free and it remains unclear whether and to what extent LEI has increased the possibility for the parties to solve potential disputes through arbitration. The HKLRC has briefly mentioned LEI in its report as a comparison to TPF in terms of disclosure.³⁵⁹ It is not noticed that LEI has become relevant to the issue of whether TPF should be permitted. It seems that the Hong Kong authorities are happy to see the juxtaposition of TPF and LEI in arbitration. It is likely that third party funders agree to pay the insurance premiums on behalf of the funded parties.³⁶⁰

This section sheds light on the legal or market constraints on some alternative funding options to explain how these constraints have blunted Hong Kong's capacity to help those who wish to obtain external funding for arbitration. A review of the alternatives to TPF helps us to better understand the background in which TPF for arbitration evolves in Hong Kong and why TPF is distinctive.

3.2.1.4.1 Champerty by lawyers: the puzzle

Section 64 of the Legal Practitioners Ordinance prevents "any agreement by which a solicitor retained or employed to prosecute any action, suit, or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceedings...".³⁶¹ With the champerty prohibition in place, Hong Kong has adopted a prudent approach to contingency fees.³⁶² The permission of contingency fees has been considered as a too drastic step to take at this moment.³⁶³ Over the years, the legal attitude towards contingency

Event Insurance product (ATE) in Hong Kong," <https://www.businesswire.com/news/home/20090625005913/en/Lockton-Launches-Hong-Kong%E2%80%99s-After-the-Event-Insurance-Product>.

³⁵⁸ Ibid.

³⁵⁹ The law reform commission of Hong Kong, "Report on third party funding for arbitration," 85-86.

³⁶⁰ Ibid., 123.

³⁶¹ *Legal Practitioners Ordinance (Cap.159)*, section 64(1)(b).

³⁶² *Raafat Imam v Life (China) Co Ltd*, [2018] HKCFI 1852, para.55.

³⁶³ Ibid., para.172.

fees has not changed much despite the shrinking scope of maintenance and champerty.³⁶⁴ In a recent case in 2014, a barrister was sentenced to three and a half years of imprisonment because of five counts of champerty.³⁶⁵ In this case, the court held that “there are cogent reasons why maintenance and champerty had retained a particular application and significance in relation to legal practitioners”.³⁶⁶ The court understands maintenance and champerty as the safeguards for the integrity of the legal profession which imply, among other things, that lawyers should manage “to advise his client with unbiased judgement and to present and conduct his client’s case with the utmost care of his client’s interests”.³⁶⁷

As a supplement to the statutory prohibition on lawyer funding, Rule 4 of Solicitors’ Practice Rules provides rigorous legal restraints on profit-sharing arrangements between lawyers and non-lawyers: “A solicitor shall not share or agree to share with any person not being a solicitor practicing in Hong Kong his profit costs in respect of any business whether by way of paying or agreeing to pay a commission on business introduced by any such person not being a solicitor...” When this provision interacts with the new Arbitration Ordinance, however, there might be some unexpected consequences resulting from indirect conflicts between the old school fee sharing regime and the new attitude towards lawyers’ role in funding legal claims.³⁶⁸ The new law allows law firms or lawyers to take a share from the final proceeds of arbitration as a funder, provided that they do not represent either of the parties. These law firms and lawyers are expected to meet the financial capacity requirements for all third party funders.³⁶⁹ Whereas, the current law firm regulation which seems to be excessive has the potential to largely undercut the ability of law firms and lawyers to

³⁶⁴ *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31, paras 89-98.

³⁶⁵ *HKSAR v Mui Kwok Keung*, [2014] 1 HKLRD 116.

³⁶⁶ *Ibid.*, para. 51.

³⁶⁷ *Ibid.*, para. 52.

³⁶⁸ Legislative Council of HKSAR, “Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 Committee stage amendments LC Paper No. CB(3) 645/16-17,” <https://www.legco.gov.hk/yr16-17/english/counmtg/papers/cm20170614cb3-645-e.pdf>; *Hong Kong Arbitration Ordinance (Cap. 609)*, Part 10A.

³⁶⁹ The Government of the HKSAR, “Code of Practice for Third Party Funding of Arbitration issued”; Secretary for Justice of HKSAR, “Hong Kong Code of Practice for Third Party Funding in Arbitration.”

resist financial risks of funding arbitration or to remain financially viable during the funding process.³⁷⁰ To remedy the situation, the members of the LC, urged the Hong Kong Bar Association to reassess the contingent arrangement between clients and their lawyers as well as the financing structure of law firms.³⁷¹

The path to allow champerty by lawyers is not an easy one with the general prohibition on contingency fees in place. In 2017, when this issue was debated, views were divided on whether lawyers could participate as third-party funders. In the Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Bill 2016, section 98G contained a second part which states that “third party funding of arbitration does not include the provision of arbitration funding directly or indirectly by a person practicing law, or providing legal services, whether in Hong Kong or elsewhere”.³⁷² Later on, this part was deleted to reflect the majority view that there was no reason to restrict arbitration funding by a lawyer as long as he/she does not participate as a legal representative.³⁷³ This change sets up the puzzle. It seems that the legislators’ view is skewed towards the idea that lawyers may play a more active role in assisting their clients to deal with financial difficulties in dispute resolution. But there has not been any breakthrough to the legal prohibition on contingency fees and non-lawyer involvement in legal practices.

Despite the puzzle, the inclusion of lawyers into the TPF business bears profound significance. It permits lawyers and law firms to take on an arbitration case not as a legal representative but as an investor. In other words, it allows the expansion of legal services to a non-legal field. In today’s world, apart from being a profession, the practice of law is characterized by competition, investment, technological

³⁷⁰ Pang has pointed out in his article that, “from a law firm’s perspective, perhaps the most significant factor in favour of permitting non-lawyer involvement is that it improves a firm’s access to finance.” See: Melissa K Pang, “Prohibition of non-lawyer control in law firms,” *Hong Kong Lawyer* (2019).

³⁷¹ Legislative Council of HKSAR Panel on Administration of Justice and Legal Services, “LC Paper No. CB(4)81/18-19”.

³⁷² *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016*, section 98G.

³⁷³ Legislative Council of HKSAR, “Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 Committee stage amendments LC Paper No. CB(3) 645/16-17”.

advances, and non-lawyer wisdom. Hong Kong legislators' decision to include lawyers in the category of third-party funders would not be a surprise at all to the legal service industry. The real question to ask is how to institutionalize this new pattern of legal service—the provision of TPF by lawyers and law practices.

Currently, the nut of the argument is still whether lawyers should be allowed to have a direct financial interest in the outcome of the case in which they engage as a legal professional.³⁷⁴ Once such interest is allowed, conflicts of interest are almost inevitable. But the problem of conflicts of interest facing the legal profession is hardly new and cannot be seen in black and white.³⁷⁵ Nowadays, the traditional statement that the lawyer can represent nothing but the interest of their clients is almost immediately contradicted, because lawyers are running their own business in the same way as other businessmen.³⁷⁶ Law firms are not charities nor public institutions. In practice, lawyers are faced with a range of conflicting situations with or without a more flexible fee-sharing arrangement or law firm structure.³⁷⁷ As the legal service industry changes, especially in terms of the size and business model of the service providers as well as the scale and the complexity of the cases, legal ethics which used to be uncontroversial have begun to give rise to practical difficulties.³⁷⁸ Understandably, these changes prompt adjustments to the regulation of the legal profession. With the above in mind, the author tends to believe that lawyers and law firms should be allowed to be more entrepreneurial in conducting business and selling their services to the parties, especially in cities such as

³⁷⁴ The Hong Kong judiciary emphasizes “the importance of solicitors keeping within their usual professional role as litigation attorneys, charging no more than their ordinary fees” in order to avoid being tainted with maintenance and champerty”. See: *Winnie Lo v HKSAR*, [2012] HKCFA 23, para. 112. The Hong Kong bar associated has strongly opposed to contingency fees in a reply to the LRC in 2006. In its view, Hong Kong has not acquired effective safeguards against the potential conflicts of interest associated with contingency fees. See: Hong Kong Bar Association, “The Hong Kong Bar Association’s Position Paper on Conditional Fees: A Response to the Law Reform Commission’s Consultation Paper,” (2006), para. 7.

³⁷⁵ Janine Griffiths-Baker, *Serving Two Masters Conflicts of Interest in the Modern Law Firm* (Oxford Hart Publishing, 2002), 13.

³⁷⁶ *Reorganisation and Resistance: Legal Professions Confront A Changing World*, 8-9.

³⁷⁷ Griffiths-Baker, *Serving Two Masters Conflicts of Interest in the Modern Law Firm*: 2.

³⁷⁸ *Ibid.*, 183.

Hong Kong where international clients for dispute resolution are valued.

3.2.1.4.2 Other funding options on a non-recourse basis

Other than lawyer funding, funding options that allow a potential funded party to pursue legal claims that are otherwise too risky include legal insurance (BTE insurance and ATE insurance), legal aid, and claim assignment, etc.³⁷⁹ All of them, except legal aid, are likely to fall foul of the relics of the law of maintenance and champerty in Hong Kong.

However, legal aid is often out of reach for the parties to commercial arbitration. In Hong Kong, legal aid is available to those before the District Court, the Court of First Instance, the Court of Appeal and the Court of Final Appeal.³⁸⁰ Their cases are subject to the “merits test” and the “means test”.³⁸¹ It should be satisfied that the case has a reasonable chance of success and the applicant’s financial resources do not exceed the statutory limit allowed for the relevant legal aid scheme.³⁸² Legal aid is regarded as the primary means by which the government ensures equal access to justice. Nonetheless, it is unlikely to become a common practice in commercial dispute settlement because of the budget limit of the government and the nature of legal aid itself. Legal aid is mostly incompatible with the situation where the parties use TPF to reduce their legal budgets or to remove the costs of dispute resolution from the balance sheet, seeking instead to spend those costs on running and expanding their business.

Non-party legal claim funding is not necessarily illegal, even before the recent amendment to the Arbitration Ordinance. In Hong Kong, there is a category of funding practices that are possibly deemed as exceptional to the general prohibition on maintenance and champerty. One of the most well-known practices is legal insurance, particularly LEI.³⁸³ According to the Hong Kong Bar Association, litigation costs are mainly financed by three sources: the litigants, the insurance

³⁷⁹ "The Law Reform Commission of Hong Kong Report on Conditional Fees," (2007), 7-8.

³⁸⁰ Ibid., 14.

³⁸¹ Ibid.

³⁸² Ibid., 14-15.

³⁸³ Priya Aswani et al., "Litigation Funding in Hong Kong," in *Lexology* (2019).

companies and the government.³⁸⁴ Whereas, it remains unclear whether legal insurance has been commonly used in arbitration. In practice, legal insurance takes many forms. LEI is one of the most frequently consulted funding options. It is important to note that LEI is nothing close to ATE insurance.³⁸⁵ The ATE insurance policy comes into existence after the rise of the disputes to mitigate the liabilities for loss. It bears more resemblance to TPF than to any forms of legal insurance.³⁸⁶ LEI exists in Hong Kong either as a stand-alone insurance policy or as a top-up to other insurance policies. Under the law of Hong Kong, LEI and TPF remain two separate legal phenomena which are subject to different regulations. The insurance companies cover a larger category of cases, including litigation cases. At times, they could be more engaged in the proceedings than third party funders.³⁸⁷ Compared to TPF, LEI seems to be more readily accessible for defendants.³⁸⁸ In that sense, TPF and LEI do not coincide completely in terms of function. In legal discussions, LEI is less controversial compared to TPF, which is largely attributable to the fact that the insurance industry is heavily regulated.³⁸⁹

3.2.2 What deters the permission of TPF for litigation in Hong Kong?

The reason why TPF is permitted in arbitration but not in litigation mainly lies in the differences in the nature of the proceedings and in the regulatory requirements. Litigation is largely confined to domestic disputes. Therefore, there is no pressure on the law of litigation to be

³⁸⁴ Hong Kong Bar Association, "The Hong Kong Bar Association's Position Paper on Conditional Fees: A Response to the Law Reform Commission's Consultation Paper," 10.

³⁸⁵ *Ibid.*, 30; The Law Reform Commission of Hong Kong, "Consultation Paper on Third Party Funding for Arbitration," 33-34.

³⁸⁶ Alonso, "Third-Party Funding's Older Sibling: Legal Costs Insurance and The Issue Of Regulation."

³⁸⁷ In common law jurisdictions, the funder often refrains from imposing control on the funded proceedings. In Hong Kong, the code of practice provides in section 2.9 that "the third party funder will not seek to influence the funded party's legal representative to give control or conduct of the arbitration to the third party funder except to the extent permitted by law". See: Hong Kong Bar Association, "The Hong Kong Bar Association's Position Paper on Conditional Fees: A Response to the Law Reform Commission's Consultation Paper," 18; Secretary for Justice of HKSAR, "Hong Kong Code of Practice for Third Party Funding in Arbitration."

³⁸⁸ Baumann and Singh, "New Forms of Third-Party Funding in International Arbitration: Investing in Case Portfolios and Financing Law Firms," 31.

³⁸⁹ Aswani et al., "Litigation Funding in Hong Kong."

changed to attract more international clients. As a matter of fact, Hong Kong has a tradition of distinguishing litigation from arbitration in the discussion of external funding for legal claims.³⁹⁰ The ancient law of maintenance and champerty is always applicable to litigation. But, for a long time in history, this law's application to arbitration was unclear.³⁹¹ The distinction between litigation and arbitration was always born in mind by Hong Kong legislators when they contemplated the permission of TPF. They presented the following view in the LC discussion: "In view of the complexity of the issues involved in the proposed abolition of the common law offences of champerty and maintenance in Hong Kong, including those regarding the practice of recovery agents and litigation funding companies, and given the fundamental difference between litigation and consensual dispute resolution", a cautious approach should be taken in respect of TPF for litigation which should only be considered after experience is gained from the operation of the new amendment to Arbitration Ordinance to allow TPF for arbitration.³⁹²

3.2.2.1 Litigation differs from arbitration in terms of funding

In light of section 98K and 98L of the Arbitration Ordinance, maintenance and champerty were abolished as common law offences and torts in arbitration.³⁹³ This has almost no influence on the application of the law of maintenance and champerty in litigation. To understand what maintenance and champerty are, it is useful to look to the case *Winne Lo v HKSAR*.³⁹⁴ In this case, maintenance is defined as "the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognized by the law as justifying his interference".³⁹⁵ In the same case, champerty is said to be "a particular kind of maintenance, namely maintenance of an action in consideration of a

³⁹⁰ *Cannonway Consultants Limited v Kenworth Engineering Ltd*, [1995] 1 HKC 179; *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31.

³⁹¹ *Cannonway Consultants Limited v Kenworth Engineering Ltd*, [1995] 1 HKC 179; Legislative Council of HKSAR Panel on Administration of Justice and Legal Services, "LC Paper No. CB(4)1268/15-16".

³⁹² Legal Council Panel on Administration of Justice and Legal Services, "LC Paper No. CB(4)908/18-19(01)," <https://www.legco.gov.hk/yr18-19/english/panels/ajls/papers/ajls20190527cb4-908-1-e.pdf>.

³⁹³ *Hong Kong Arbitration Ordinance (Cap. 609)*, sections 98K and 98L.

³⁹⁴ *Winnie Lo v HKSAR*, [2012] HKCFA 23, para. 10.

³⁹⁵ *Ibid.*

promise to give to the maintainer a share of the subject matter or proceeds thereof, if the action succeeds.”³⁹⁶ On the surface, they look the same as maintenance and champerty under English law. Nevertheless, compared to England, Hong Kong takes a much more conservative view on the scope of maintenance and champerty.³⁹⁷ England abandoned maintenance and champerty in the 1960s as the effect of section 14 the Criminal Law Act 1967: “no person shall, under the law of England and Wales, be liable in tort for any conduct on account of its being maintenance and champerty as known to the common law...” While currently in Hong Kong, champerty can still trigger tortious and criminal liabilities in litigation.³⁹⁸

The traditional view is that the law of maintenance and champerty is sufficient to void external funding arrangements for litigation,³⁹⁹ although the criminal and tortious liability of maintenance and champerty is not supposed to be further expanded.⁴⁰⁰ In arbitration, however, this was not necessarily true. In this regard, *Cannonway Consultants Limited v Kenworth Engineering Ltd* is highly relevant because of the decision made by Kaplan J in 1995 that the law of maintenance and champerty does not apply to arbitration proceedings.⁴⁰¹ In this case, the defendant Kenworth entered into a consultancy agreement with the plaintiff Cannonway, whereby Cannonway was appointed to assess the potential claims and to progress a final account. In return, Kenworth would pay Cannonway a certain percentage of all further payments received. But later, Kenworth refused to pay for the consultancy services and asserted that the consultancy agreement was void because it was an agreement of champerty. Kaplan J disagreed with Kenworth by pointing to the lack of societal conditions for the maintenance and champerty prohibition and the features of the arbitration procedure. He said that: “the law of champerty was introduced in the Middle Ages to curb the activities of powerful noblemen at a time when the judiciary were far from independent and predictable” and “such factors had never applied in

³⁹⁶ *Ibid.*

³⁹⁷ *Cannonway Consultants Limited v Kenworth Engineering Ltd*, [1995] 1 HKC 179.

³⁹⁸ *Winnie Lo v HKSAR*, [2012] HKCFA 23, para. 84.

³⁹⁹ *Ibid.*; *Raafat Imam v Life (China) Co Ltd*, [2018] HKCFI 1852; *Beijing Tong Gang Da Sheng Trade Co Ltd v Allen & Overy*, [2015] 3 HKLRD 247(2015).

⁴⁰⁰ *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another*, [2007] 1 SLR 989, [2006] SGCA 46, para 36.

⁴⁰¹ *Cannonway Consultants Limited v Kenworth Engineering Ltd*, [1995] 1 HKC 179.

Hong Kong...”⁴⁰² He also took into consideration that the head of the public policy, which condemns champerty, has only done so in the context of civil litigation but not arbitration.⁴⁰³ In his view, it would involve a radical new step to extend the doctrines of maintenance and champerty to private consensual procedures such as arbitration.⁴⁰⁴

Apparently, it could be argued under the law of Hong Kong at the time of the Cannonway case that litigation differs from arbitration by nature, and therefore, it would not be artificial to distinguish litigation from arbitration in terms of funding. As inspiring as it is, the Cannonway case had a limited binding effect on cases coming later. In the year 2007, Hong Kong’s Court of Final Appeal in the case *Unruh v Seeberger* left the question of whether the law of maintenance and champerty was applicable to arbitration open, despite the ruling in Cannonway case.⁴⁰⁵ Nevertheless, this case did not negate but rather reaffirmed the difference in the nature of litigation and arbitration. After TPF was permitted by the recent amendment to arbitration legislation, the distinction between litigation and arbitration has been further highlighted.

3.2.2.2 Litigation implies tighter restrictions on TPF

There is little doubt that litigation is a public procedure subject to “due process” requirements defined by national laws, whereas arbitration floats above such laws. But this does not mean that “due process” is less important in arbitration than it is in litigation. The state delegates jurisdictional power to the arbitral tribunal to issue a final and binding decision to settle civil disputes. Such delegation comes as a type of trade-off in the form of standards of quality applicable to arbitration.⁴⁰⁶ In the arbitral procedure, “due process” implies a complicated category of constraints on the exercise of power by the tribunal and on the conduct of other participants which might include third party funders, in terms of both fairness and transparency. Overall, the concept of “due process” has been given different

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

⁴⁰⁵ *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31.

⁴⁰⁶ Matti Kurkela, Santtu Turunen, and Conflict Management Institute, *Due process in international commercial arbitration*, 2 ed. (Oxford University Press, 2010), 1-2.

meanings in different procedures, which is a contributor to the difference between the regulatory requirements for litigation and those for arbitration.

It is understandable that, in some litigation procedures, regulatory requirements are relatively higher than others.⁴⁰⁷ For instance, domestic law normally distinguishes between commercial cases from cases involving public interests, with the consideration that the public interest might require contemplation of a higher court and invite complex discussions.⁴⁰⁸ The distinctive features that appear in some litigation procedures but not in others might have a significant impact on the decision of whether to permit TPF and other funding options. Because of these features, legislators are likely to limit the use of a funding option to a certain area of litigation. In England, for instance, contingency fees as one of the main financing sources of litigation are limited to civil cases save some class actions.⁴⁰⁹ In Chapter 5, it will be seen that the Dutch court distinguishes non-party commercial funding in individual litigation cases from that in class actions in regulation.⁴¹⁰

Arguably, the concerns about the potential risks of TPF for litigation in certain procedures do not contribute much to the argument for the prohibition on TPF for litigation. The author tends to believe that the distinctive features of litigation are not alone sufficient to justify the tortious and criminal liabilities for TPF in litigation.⁴¹¹ These features could only justify a different mode of analysis for TPF in litigation in discussions and a different set of regulatory safeguards against the potential abuses. As commercial litigation involving high costs

⁴⁰⁷ The law reform commission of Hong Kong, "Report on third party funding for arbitration," 49.

⁴⁰⁸ Public law cases contain "public interest in the elucidation of public law by a higher court, in addition to the interests of the individual parties". See: Council, "The Future Funding of Litigation - Alternative Funding Structures," 41.

⁴⁰⁹ Ibid., 31; Mulheron, "Third party funding and class actions reform," 294.

⁴¹⁰ Quentin Declève, "Fortis's Settlement: A Comparative Case Study of Securities Class Action Mechanisms in Europe and the United States," *Business Law International* 18, no. 51 (2017); *Fortis v Shareholders* ECLI: NL: GHAMS: 2018: 2422; *Fortis v Shareholders* ECLI: NL: GHAMS: 2017: 2257; Jonathan Richman and Ianika Tzankova, "Dutch Court Approves Collective Settlement of Fortis Shareholders' Claims.," Tom Vos, "€1,2 billion settlement in Fortis case rejected by Dutch Court," in *Corporate Finance Lab* (2017).

⁴¹¹ Clive Bowman and Kate Hurford, "Is It Time to Abolish Maintenance and Champerty As a Crime and Tort in Hong Kong?," *Hong Kong Lawyer* (2015).

becomes common, TPF should be deemed as an indispensable part of commercial cases, specifically those with international elements. Currently, Hong Kong legislators take the view that the possibility of TPF for litigation should at least wait until TPF for arbitration proves to be beneficial to the parties and the Hong Kong society.⁴¹² They did not completely negate the possibility that TPF for litigation will become a reality in the future in Hong Kong. The issue of whether Hong Kong should be more open to TPF for litigation will be discussed more in section 5 of this chapter.

3.3 The Procedural Implications of TPF

As aforementioned, Hong Kong has been prudent in abolishing the common law offences of maintenance and champerty in order to allow TPF for arbitration, with considerations being given to the procedural implications of TPF among other factors. The positive implications have been discussed in length in addressing the question of why TPF is permitted. This part has its focus on the negative effects of TPF. In the context of arbitration, the following issues have been addressed: unnecessary arbitration proceedings, excessive control of the funder on the funded case, predatory success fees, threat to the legal privilege and the confidentiality of arbitration, conflicts of interest, undue delays, the disqualification of the funders, arbitrary termination of the funding agreement, inadequate complaints procedure, money laundry, etc. In litigation, TPF is only permitted in exceptional circumstances where access to justice or other legal reasons in favor of TPF prevail. Therefore, the analysis of the interaction between TPF and litigation under the law of Hong Kong is only possible in a rather narrow area.

3.3.1 The procedural implications of TPF on arbitration

In contemplating the legal reform to the Arbitration Ordinance to permit TPF, the possible impact of TPF on the arbitration procedure is the main inquiry. It is agreed in Hong Kong that TPF for arbitration should be allowed for reasons elaborated in part 2 of this chapter, but only when proper safeguards are ready. Section 98M regarding the relics of the law of champerty has already implied the concerns of the risks of TPF. With this provision, the abolition of common law offences and torts of maintenance and champerty does not affect “any rule of

⁴¹² Legal Council Panel on Administration of Justice and Legal Services, “LC Paper No. CB(4)908/18-19(01)”.

law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".⁴¹³ The code of practice is another demonstration of the potential negative impact of TPF on the funded procedure.⁴¹⁴

According to the HKLRC consultation paper and the final report on TPF for arbitration, the procedural risks of TPF include the following: (1) the risk of unnecessary arbitration proceedings; (2) the potential for third party funders to exercise too great a level of control over arbitration proceedings; (3) the risk of excessive costs of TPF; (4) potential breaches of legal professional privilege; (5) potential breaches of the confidentiality of arbitration; (6) the risk of conflicts of interest; (7) the risk that the disclosure of TPF may unduly influence the tribunal or prevent the proper settlement of a case; (8) the risk of arbitrary termination of the TPF agreement by the funders; (9) the risk of insufficient capital capacity of the funders; (10) the risk that an inadequate complaints procedure may give limited resources to aggrieved funded parties; (11) the risk of money laundry.⁴¹⁵ The legislation and the code of practice have not addressed all of the above issues. The possible reason is that some of the issues are attributable to longstanding problems which could not be solved overnight by the regulation of TPF alone.

The code of practice contains requirements for the funder's financial situation which is essentially important for the safety of the funded procedure. But the code does not guarantee that the funding is from a professional investment institution. Neither does it guarantee that the funder always assesses the merits of the prospective funded cases carefully and is able to filter out frivolous or unnecessary claims. The funder's control over the proceedings is another concern of the regulators. It gives rise to the question of who is the real beneficiary of the case. Conflicts of interest have drawn a great deal of attention from not only the legislators of Hong Kong but also various international institutions. The integrity of the legal system is in danger if there are improper connections between the funder and other

⁴¹³ *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98M.

⁴¹⁴ Secretary for Justice of HKSAR, "Hong Kong Code of Practice for Third Party Funding in Arbitration."

⁴¹⁵ The Law Reform Commission of Hong Kong, "Consultation Paper on Third Party Funding for Arbitration," 120-28.

participants of the funded proceedings. The inclusion of lawyers into the TPF business has further complicated the scene. It is worth asking whether the “due process” could be safeguarded with all the complex relations that lawyers have with the tribunal, the parties, and the funders.⁴¹⁶ In practice, conflicts of interest have at least the following causes: first, the interest of the funder and that of the funded party are not always on the same line. Second, the funder may impose instruction on the lawyers’ conduct of the case or have a collaborative relationship with lawyers which may encourage the violation of the ethical and professional rules for lawyers. Furthermore, the funder may have a relation with the arbitrator that casts doubt on the impartiality of the tribunal.

The disclosure of the TPF arrangement is considered a “must” by Hong Kong legislators since the lack of transparency of the funding agreement could deter effective supervision and regulation of TPF.⁴¹⁷ This is in line with the international trend of enhancing TPF’s transparency in arbitration with the understanding that only if TPF is disclosed could the tribunal be well informed of the impact of TPF on the procedure.⁴¹⁸ However, the disclosure of TPF triggers concerns about legal privileges. It is arguable that “doctrines of litigation privilege and common interest privilege are likely to cover Third Party Funding arrangement such that disclosure of privileged information

⁴¹⁶ Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 contains provision (section 98G) with the effect of excluding legal practitioners from the TPF business. Nonetheless, this provision was deleted later. See: *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016*, section 98G(2). The Hong Kong government raises concern as to whether the deletion of 98(2) will infringe the public interest that lawyers should focus on their provision of professional services to their clients and should not place themselves in a conflict of interest position by engaging in the business of TPF. See: Legislative Council of HKSAR, “Report of the Bills Committee on Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, LC Paper No. CB(4)1161/16-17,” <https://www.legco.gov.hk/yr16-17/english/bc/bc102/reports/bc10220170614cb4-1161-e.pdf>.

⁴¹⁷ Arbitration Ordinance provides that the funded party is obliged to disclose the funding agreement in writing and at the appropriate time. See: *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98U.

⁴¹⁸ Trusz, “Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration.”; Tripp Haston and Fritz Spainhour, “Toward Disclosure of Third-Party Litigation Funding in Class Actions,” in *Lexology* (2017); Iliescu, “A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact.”

to funders is unlikely to waive privilege over such communications”.⁴¹⁹ This argument however has not stopped Hong Kong legislators from implementing mandatory disclosure obligations. It only compelled the legislators to limit the scope of disclosure. With the purpose to preserve legal privileges and to prevent unnecessary disclosure, the funded party is only required to give written notice of the fact that TPF exists and the name of the funder to other parties and the tribunal unless the tribunal orders otherwise.⁴²⁰ Yet the law has not provided guidance to legal practitioners as to how to advise their clients on the disclosure of TPF and the related effects. It also calls into question whether and in what circumstances the tribunal or court could ask for wider disclosure of TPF.⁴²¹

In addition to the above, the legislators have paid attention to the risk of arbitrary termination of the TPF agreement by the funder. If the funder finds that the funding is no longer financially viable, they may decide to withdraw from the funding arrangement. It is unlikely to argue that the withdrawal is illegal in law. Therefore, instead of blocking the exit for the funder, the legislators recognize the funder’s right to terminate the funding agreement and they grant the funded party the same right as a balance.⁴²² This approach is highly controversial and may give rise to some unexpected results. In the case where the funded party terminates the funding agreement improperly, the funder’s right to pursue the funded party is highly likely to be a “hollow” one due to the financial struggle of the funded party.⁴²³ More about this will be discussed in section 4 of this chapter.

⁴¹⁹ The law reform commission of Hong Kong, "Report on third party funding for arbitration," 76.

⁴²⁰ *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98U.

⁴²¹ Christine Sim, "Third Party Funding in Asia: whose duty to disclose?," in *Kluwer Arbitration Blog* (2018).

⁴²² In Hong Kong, the TPF agreement must state the conditions on which the funder could terminate such agreement. In addition, it must provide that the funded party may terminate the funding agreement if “it reasonably believes that the third party funder has committed a material breach of the Code or the funding agreement which may lead to irreparable damage.” See: The Government of the HKSAR, "Code of Practice for Third Party Funding of Arbitration issued".

⁴²³ Woodsford Litigation Funding, "Response to Consultation on the Hong Kong Draft Code of Practice for Third Party Funding of Arbitration and Mediation," <https://woodsfordlitigationfunding.com/woodsforfs-response-to-hong-kongs-consultation-on-the-draft-code-of-practice-for-third-party-funding-of-arbitration-and->

Currently, the risks associated with TPF that are left unaddressed by the Hong Kong authorities include the risk of money laundry, the risk of breaches of privilege and the risk of excessive costs of TPF. Money laundry is apparently above the subject of this work. It is not an issue that only arises from the practice of TPF and could be tackled by the regulation of TPF alone. Privilege is an extremely complex issue in the context of arbitration, whose ambit has never been static. As a common law term, privilege is not entirely compatible with arbitration in which people often come from different legal traditions.⁴²⁴ The involvement of TPF adds an extra layer of complexity to the question of how to understand and to treat privilege properly in arbitration.⁴²⁵ Regarding the costs of TPF, it is hard or impossible for the law to impose a limit on such costs at this moment. The previous chapter has said that one of the steps taken by the English court to prevent excessive costs of TPF is to invite views from TPF brokers to testify on the reasonableness of the amount of the costs of TPF.⁴²⁶ In Hong Kong, the amount of the costs of TPF is currently subject to the agreement of the funded party and the funder. In case this issue is seized by the court, it is a question for the court whether the above English approach is convincing. Hong Kong legislators have paid attention to the argument against the statutory limit on the costs of TPF. By imposing such a limit, the law risks infringing contract freedom and creating a chilling effect on the TPF market. Conceivably, the costs of TPF should be reviewed in line with the recoverability of such costs. If such costs are not recoverable in arbitration and therefore have little impact on the other side, the regulators can take a non-inference approach for now. Otherwise, the costs of TPF might need to be capped so that the equilibrium between the claimants and the defendants will not be wrecked.

3.3.2 The interaction between TPF and litigation in exceptional cases

In litigation, parties could file an application for a declaration of the funding arrangement, expecting the court to make such arrangement

mediation/.

⁴²⁴ Michelle Sindler and Tina Wüstemann, "Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup?," *ASA Bulletin* 23, no. 4 (2005): 610-11.

⁴²⁵ *Ibid.*, 611.

⁴²⁶ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm).

an exception to the law of maintenance and champerty. In deciding whether to make such a declaration, the court is required to contemplate the impact of TPF on the procedure, among other factors. In practice, however, the court is not always willing to entertain such an application. In a recent case, *Raafat Imam v Life (China) Co Ltd* (兆卓(中國)有限公司), Deputy Judge Johnny Fee has expressed his concern that “if the Declaration were granted, it would open the floodgates for litigants and potential funders to seek the court's ‘legal advice’ on other funding arrangements...”⁴²⁷ TPF used to be allowed in a category of exceptional situations excluded from illegal champerty: (a) where a third party can prove that it has legitimate interest in the outcome of litigation; (b) where a party can persuade the court that it should be permitted to obtain TPF to enable it to have access to justice; (3) a miscellaneous category of proceedings including insolvency proceedings.⁴²⁸ After 1 February 2019, this category was enlarged to cover some arbitration-related litigation proceedings, according to the amended Arbitration Ordinance.⁴²⁹ Cases illustrating the interaction between TPF and the extended category have not become available as of the time of this work.

Those hoping for the clarity and precision about TPF for litigation should thank *Unruh v Seeberger* in which exceptions to the law of champerty were carved out.⁴³⁰ In this case, Mr. Unruh and Mr. Seeberger entered into the Memorandum of Agreement (the MoA) which entitled Mr. Unruh to a special bonus. Subsequently, Mr. Seeberger refused to pay the bonus and argued that the MoA was champertous and therefore was void and unenforceable. The claim requires the court to have a thorough examination of the law of maintenance and champerty in Hong Kong and the underlying public policies in order to determine the validity of the MoA.⁴³¹ The case was first tried by the High Court and then was appealed to a higher

⁴²⁷ *Raafat Imam v Life (China) Co Ltd*, [2018] HKCFI 1852.

⁴²⁸ *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31; Legislative Council of HKSAR, “Report of the Bills Committee on Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, LC Paper No. CB(4)1161/16-17”.

⁴²⁹ *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98F.

⁴³⁰ *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31.

⁴³¹ *Ibid.*, para. 86.

court.⁴³² Leading up to the final decision, the Court of Appeal has distinguished early and modern definitions of maintenance and champerty.⁴³³ The court upheld the view that “the prohibition of maintenance and champerty is a matter of public policy and involves a value judgment that certain conduct should be considered ‘officious intermeddling’ in someone else’s litigation or ‘trafficking in litigation’ which deserves to be made unlawful”, but “the content of that value judgment has fundamentally changed”.⁴³⁴ According to the Court of Appeal, there are three types of exceptional circumstances where TPF is likely to be legal in the modern context: cases where there is a common interest between the funded party and the funder, cases where external funding is included for access to justice considerations, and a miscellaneous category of practices including but not limited to the sale and assignment by a trustee in insolvency cases.⁴³⁵

In the common interest category, there must be “certain relationships” that “have been judicially recognized as involving persons with a legitimate common interest in the outcome of litigation sufficient to justify one of them in supporting the litigation conducted by another without engaging the prohibition against maintenance and champerty.”⁴³⁶ From this description, it is still not crystal clear what common interest means. Apparently, the TPF agreement itself is not sufficient to justify the existence of the “common interest” otherwise TPF for litigation would be permissible. Given the above, it is almost impossible at this moment to study the impact of TPF permitted as the “common interest” exception.

The access to justice category is rather easy to be understood. The Hong Kong citizens can deprive the right to access to a court system from Article 85 of the Basic Law.⁴³⁷ Yet using access to justice reason to justify TPF is not always an easy task in practice partially because of the fact that access to justice is not static nor self-explained.⁴³⁸ This has recently been illustrated by the case *Raafat Imam v Life (China)*

⁴³² Ibid.

⁴³³ Ibid., para. 86.

⁴³⁴ Ibid.

⁴³⁵ Ibid., paras 89-98.

⁴³⁶ Ibid., para. 92.

⁴³⁷ Ibid., para. 95.

⁴³⁸ Ibid., para. 97.

Co Ltd (兆卓(中國)有限公司) in which the plaintiff claims that he does not have sufficient financial means to pursue the action without the benefit of a TPF agreement.⁴³⁹ The court however refused to declare the TPF agreement legitimate on the grounds that there was a real risk that the plaintiff may easily become a figurehead in the conduct of the litigation and that the litigation may be controlled by some unknown third parties.⁴⁴⁰ Approaching the final conclusion, the court has considered that access to justice is a procedural right and as an exception to the law of champerty that is hard to be defined. It is apparent that the plaintiff should not be required to bear “extraordinary risks with his family’s illiquid assets”, but a balanced view is required to be made on whether it is just to allow the plaintiff to enter into a TPF agreement. To that end, the court took a closer look at the financial situation of the plaintiff. It discovered the fact, among others, that the purpose that the plaintiff entered into the funding agreement was to litigate with his first-choice counsel. However, in the court’s view, the exception to the champerty prohibition is to ensure “access to justice” rather than “access to ideal or preferred legal representation”. The court’s position has raised questions. Aside from the apparent question that whether the court’s interpretation of access to justice is well-founded, it is questionable whether a court is able to judge the financial situation of the funded party.

To explain the “miscellaneous category”, the Court of Appeal of Hong Kong referred to cases in other common law jurisdictions, such as *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* before the Australian court in 2006 in which the right of the liquidator to sell the claims of a company in insolvency proceedings was considered by the court as beneficial for both private and public interests.⁴⁴¹ Beyond insolvency, it is not clear under the law of Hong Kong how to justify that a practice belongs to the “miscellaneous category”. The Hong Kong court is well aware that TPF for insolvency cases comes with

⁴³⁹ *Raafat Imam v Life (China) Co Ltd*, [2018] HKCFI 1852.

⁴⁴⁰ *Ibid.*, para. 134.

⁴⁴¹ *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31, para. 98; *Campbells Cash and Carry Pty Limited v Fostif Pty Limited*, *Australian Liquor Marketers Pty Limited v Berney*, *IGA Distribution (Vic) Pty Limited v Whelan & Hawking Pty Limited*, *Queensland Independent Wholesalers Pty Ltd v Murray*, *IGA Distribution (SA) Pty Limited v Neindorf*, *Composite Buyers Pty Limited v Williamson*, *IGA Distribution Pty Limited v Gow*, [2006] HCA 41.

risks. The court's primary concern is that the funding agreement might affect the liquidator's discretionary power to prosecute and conduct the funded proceedings.⁴⁴²

The legacy of the *Unruh* case was that it prepared the Hong Kong judiciary for the acceptance of commercial funding on a larger scale. From the reasoning, it is apparent that the carve-outs serve as a balance between the public interest of safeguarding litigation procedure and the countervailing public interests such as equal access to justice. Despite the question of whether the carve-outs are well-conceived, this case demonstrates that, in the post-1976 times, the law of Hong Kong has taken a different path than England and some other common law jurisdictions with regard to commercial funding for dispute resolution. In exceptional situations where TPF for litigation is permitted, the Hong Kong courts' attention has been largely paid to the control of the funder on procedural decisions. It is unacceptable to the Hong Kong court that third party funders become the real master of the case.

3.4 The Regulation of TPF: A comparative study of the Hong Kong version of the light touch approach

The regulation of TPF for arbitration in Hong Kong is scattered in the Arbitration Ordinance, case law and the code of practice.⁴⁴³ The idea underpinning the regulatory framework is that the TPF industry should be regulated by the light touch approach at this stage, given that this industry is in its very early development and the impact of TPF has not become apparent to Hong Kong legislators.⁴⁴⁴ This part is designed to obtain an in-depth understanding of the above regulations, with the emphasis on the Hong Kong code of practice. To that end, a comparison is conducted between the Hong Kong code of practice and the ALF code of conduct in England. The Hong Kong code of practice bears strong resemblances to the ALF code of conduct in England, although the ALF code is a pure voluntary or self-regulating code with

⁴⁴² *Cyberworks Audio Vedio Technology Ltd*, 2010 WL 1322537 (CFI), [2010] 2 HKLRD 1137, [2010] HKEC 672 [2010] HKEC 672, para. 9 (2010).

⁴⁴³ The Government of the HKSAR, "Code of Practice for Third Party Funding of Arbitration issued"; Secretary for Justice of HKSAR, "Hong Kong Code of Practice for Third Party Funding in Arbitration."

⁴⁴⁴ The law reform commission of Hong Kong, "Report on third party funding for arbitration," 18, 49, 50, 56.

no equivalent to the Hong Kong advisory body overseeing compliance. It will become clear in the following chapter that Singapore has seen the introduction of various guidelines directed at third party funders, arbitrators and legal practitioners by professional institutions. However, unlike the codes in Hong Kong and England, these guidelines contain no mechanism to ensure compliance by anyone and are not all designed for third party funders. For this reason, they have not been included in this section for comparison. So far, the Singapore authority has not assumed leadership in forging any code of conduct specifically for third party funders.

As a preliminary issue, the Hong Kong code of practice and the ALF code of conduct aim to regulate the behavior and qualification of third party funders in order to safeguard the integrity of the legal system. They both consider the interests of all participants of the funded proceedings, despite the differences in their content and binding effect. This part will pay close heed to the following issues that are at the core of the comparative discussion of TPF: the nature and the scope of the code, the capital capacity of the funder, the protection of vulnerable funded parties, the funder's control on the proceedings, disclosure, and non-compliance.

3.4.1 Scope and Nature

Before comparing the two codes, we should pay attention to not only the difference in the content of the codes but also the difference in the scope of the regulated TPF. TPF is allowed in both litigation and arbitration in England, while it is largely confined to arbitration and the related proceedings in Hong Kong. Many public policies that have an important role to play in litigation may be absent in arbitration, which can explain some of the differences between the regulation of TPF in Hong Kong and that in England.

The Hong Kong code also differs slightly from the ALF code in terms of nature. On 30 August 2018, the Department of Justice of Hong Kong launched a two-month public consultation to seek views on the draft of the Hong Kong code. This draft contains standards and practices which all third party funders are expected to comply with when carrying on activities in connection with TPF of arbitration in Hong

Kong.⁴⁴⁵ After intensive discussion, the Hong Kong code finally entered into force on 1 February 2019.⁴⁴⁶ It is effective to third party funders within the meaning of Section 98J of Part 10A of the Hong Kong Arbitration Ordinance: “A third party funder is a person—(a)who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and (b)who does not have an interest recognized by law in the arbitration other than under the funding agreement.”⁴⁴⁷ It is important to note, despite the attempt to ensure the efficacy of this code, the Hong Kong authorities have no intention of making this code subsidiary legislation.

In comparison, the ALF code comes as a complete voluntary code. As stated in a previous chapter, the ALF Code was first published by the CJC, an agency of the UK's Ministry of Justice in November 2011. This code also sets up standards for litigation funders. But only those who have subscribed to the ALF membership have to comply with these standards. Apparently, the application of this code is quite limited.

3.4.2 Capital adequacy

Capital adequacy is one of the most important elements of the regulation of third party funders. In practice, whether TPF is appreciated depends on several factors, one of which is whether the funder is financially strong enough to bear the costs of the proceedings. The cost exposure of the funders in the funded proceedings varies from one case to another. In England, the court may hold the funder liable for a large amount of adverse costs liabilities. For instance, in the Excalibur case, various inexperienced funders were found to be jointly and severally liable for almost £32 million.⁴⁴⁸ In Hong Kong, the court also has this power, but they can only exercise this in a narrow area

⁴⁴⁵ *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017*, section 98P. It is stated in this section that the authorized body (the Security for justice) “may issue a code of practice setting out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration”.

⁴⁴⁶ Secretary for Justice of HKSAR, “Hong Kong Code of Practice for Third Party Funding in Arbitration.”

⁴⁴⁷ *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98J.

⁴⁴⁸ The Association of Litigation Funders, “Statement from the Association of Litigation Funders of England and Wales regarding the Court of Appeal Judgment in Excalibur”.

where external funding is allowed. In arbitration, such power is not available for the tribunal. Arbitrators risk going beyond their mandate if they rule against third parties directly.⁴⁴⁹ Noticeably, arguments in favor of costs orders against third party funders have been put forward in academic discussions on arbitration. For instance, Christine Sim has argued that the fact that the funder chooses to fund the claims in arbitration implies that this funder has given its implied consent to the arbitration agreement.⁴⁵⁰ However, this view has not been widely accepted by the arbitration community. Costs orders against third party funders entail discussions on the potential contradiction between such order and the foundation of arbitration and can hardly become a prevalence any time soon. The above aims to explain that the Hong Kong code has highlighted the importance of the funder's financial capacity for reasons other than the funder's liability for adverse costs.

Article 2.5 of the Hong Kong code of practice requires the funder to "pay all debts when they become due and payable and cove all of its aggregate funding liabilities under all of its funding agreements for a minimum period of 36 months".⁴⁵¹ To do that, the funders must maintain access to a minimum of HK\$20 million of capital. With the purpose of facilitating the supervising process, the code requires the funder to be subject to a continuous disclosure obligation.⁴⁵² The disclosure should be made to the funded party and to the "advisory body".⁴⁵³ However, the standards for the financial capacity of the funders have not been well explained or justified by regulators.

The ALF has said that financial risks of funding legal claims are not easily managed by "anyone other than professional funders, staffed by experienced litigation and arbitration experts, who 'live and breathe' the asset class".⁴⁵⁴ Even so, the ALF code contains a minimum capital

⁴⁴⁹ But it is possible under some arbitration rules that the tribunal takes into consideration issues related to TPF when deciding costs-related issues. For instance, tribunal may pay attention to the funding arrangement and the financial capacity of the funders in dealing with the application for security for cost.

⁴⁵⁰ Sim, "Using Costs Orders to Regulate Third Party Funding," 14-15.

⁴⁵¹ Department of Justice, "Draft Code of Practice for Third Party Funding of Arbitration and Mediation," (2018), article 2.5.

⁴⁵² Ibid.

⁴⁵³ Ibid.

⁴⁵⁴ The Association of Litigation Funders, "Statement from the Association of

requirement for funders. In the 2013 rules, it was £2 million. In the 2016 rules, it increased to £5 million. There is a lack of transparency in the decisions on these numbers. For outsiders, the decisions seem to be rather arbitrary. In addition to a minimum capital requirement, the ALF conducts continuous oversight on the financial capacity of its members. The Rules of the ALF state in rule 3.15.3 that a funder is required to be audited annually by a recognized national or international audit firm and to provide the Association with a copy of audit opinion given by the audit firm and reasonable evidence from a qualified third party that the funder, the funder's subsidiary, or associated entity satisfies the minimum capital requirement prevailing at the time of annual subscription.⁴⁵⁵

In England, where third party funders are likely to be held liable for adverse costs order, the introduction of the financial standards for third party funders makes more sense. In Hong Kong where adverse costs liability is unlikely to happen at this moment in most of the funded cases, financial capacity requirements merely serve contractual commitments made by funders.⁴⁵⁶ Nevertheless, both jurisdictions share the difficulty of ensuring that the financial requirements in the regulation or the law can objectively reflect the financial exposure of the funder in the funded proceedings.

3.4.3 Independent legal advice

The Hong Kong code provides that "the third party funders must take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice on the funding agreement before entering into it."⁴⁵⁷ While in the draft code, the funder is required to "take reasonable steps to ensure that the funded party has received independent legal advice".⁴⁵⁸ The Security for Justice of Hong Kong has changed its mind to believe that it should be up to the funded party

Litigation Funders of England and Wales regarding the Court of Appeal Judgment in *Excalibur*".

⁴⁵⁵ the Association of Litigation Funders of England and Wales, "Rules of the Association," (2018), rule 3.15.3.

⁴⁵⁶ Jean E. Kalicki, "Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 1 of 2)," in *Kluwer Arbitration Blog* (2012).

⁴⁵⁷ The Government of the HKSAR, "Code of Practice for Third Party Funding of Arbitration issued".

⁴⁵⁸ Department of Justice, "Draft Code of Practice for Third Party Funding of Arbitration and Mediation," section 2.3(1).

whether to seek independent legal advice. Nevertheless, they seem to have overlooked the question of whether legal advice providers or lawyers are capable to advise on the funding agreement.

Under the ALF code of conduct, however, the funder is obliged to take reasonable steps to ensure that the funded party shall have received independent advice on the terms of the litigation funding agreement.⁴⁵⁹ Many professional funders operating in England advocate that the ALF code should recognize the funded party's freedom to choose whether independent legal advice on the TPF agreement is required. The real problem is again that lawyers are not trained to deal with investment issues.⁴⁶⁰ The author tends to believe that it is not efficient for the law to rely on independent legal advice to ensure that the funded party is treated fairly in the funding agreement. One might recall that, in *Essar v Norscot*, the English court called a TPF broker instead of a legal adviser to testify for the reasonableness of the costs of TPF, which hearted the discussion on whether the costs of arbitration should be recoverable as part of the costs of arbitration.⁴⁶¹ The case has demonstrated that the efficacy of the "independent legal advice" requirement is doubtful.

3.4.4 Control

Whether and to what extent the funder is allowed to control the proceedings is a highly debated issue. It is agreed that the funder should not take steps to induce a lawyer to breach its duties to the funded party and the funded procedure. But does that mean that the funder should have absolutely no control over the proceedings? Not necessarily. In an earlier chapter, we have learned that the ALF code prevents the funder from seeking to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder.⁴⁶² In practice, the ALF members often assure their clients that they have no control over litigation. For instance, Woodsford in its Practice Guide states that the funded party has complete control over

⁴⁵⁹ The Civil Justice Council, "The code of conduct for litigation funders," section 9.1.

⁴⁶⁰ Maurice Blackburn Lawyers, "Submission to the Victorian Law Reform Commission: Access to Justice-Litigation Funding and Group Proceedings," (2017), §20.2.

⁴⁶¹ *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm).

⁴⁶² The Association of Litigation Funders, "Code of Conduct for Litigation Funders," section 9.3.

all decision making and the funder should not interfere in any way with the attorney-client relationship.⁴⁶³

The Hong Kong code considers not only the funder's control on the funded party and its lawyers but also the funder's control on the arbitration body and the arbitration institution involved. In section 2.9 of this code, the funding agreement shall set out clearly (1) that the third party funder will not seek to influence the funded party and its legal representatives to give control or conduct of the arbitration to the third party funder except to the extent permitted by law; (2) that the third party funder will not take any steps that cause or are likely to cause the funded party's legal representative to act in breach of professional duties; (3) that the third party funder will not seek to influence the arbitration body and any arbitral institution involved. It is reiterated in section 2.6 regarding conflicts of interest that the funder should refrain from taking any steps that cause or may cause the funded party's legal representative to act in breach of its professional duties.⁴⁶⁴

In England, improper control risks violating the law of champerty, yet many commentators tend to believe that the risks of the funder's control have been overstated.⁴⁶⁵ In litigation and arbitration, the party always delegates case management to third parties such as lawyers, a claim management company, an audit company, an accountant, etc. None of them have been accused of imposing improper control on the case. Moreover, the participation of the funder in the proceedings can be justified by the fact that the funded party needs the funder's expertise in case management, budget management and negotiation with lawyers and the opposing party. Surely, safeguards should be ready to prevent arbitration from being hijacked to become a "gambler's Nirvana" for funders. In other words, the financial interest of the funder should not become the main driving force for the proceedings in any case.

⁴⁶³ Woodsford Litigation Funding, "A Practical Guide to Litigation Funding," (2018).

⁴⁶⁴ The Government of the HKSAR, "Code of Practice for Third Party Funding of Arbitration issued".

⁴⁶⁵ Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments," 582-83; Bogart, "Deeply flawed: A perspective on the ICCA-Queen Mary Task Force on third-party funding."

From another aspect, the restrictions on the funder's control from the code of practice can hardly prevent the funder from having control over the proceedings. In practice, the funder imposes control through a contractual arrangement, case budgeting or the termination right. Take the termination right as an example. Both the Hong Kong code and the ALF code allow the funder to unilaterally terminate the funding agreement on the grounds which have been specified in these codes, if the funder remains liable for all funding obligation accrued to the date of termination. Under the ALF code, the funder may terminate the funding agreement in the event that the funder (1) reasonably ceases to be satisfied with the merits of the dispute; (2) reasonably believes that the dispute is no longer commercially viable; (3) reasonably believes that there has been a material breach of the funding agreement by the funded party.⁴⁶⁶ In the Hong Kong code, similar grounds are provided: "The funding agreement must state whether (and if so, how) the third party funder may terminate the funding agreement in the event that the third party funder: (1) reasonably ceases to be satisfied about the merits of the arbitration; (2) reasonably believes that there has been a material adverse change of prospects to be the funded party's success in the arbitration or recovery on success; or (3) reasonably believes that the funded party has committed a material breach of the funding agreement."⁴⁶⁷ The funder's termination right already implies a level of influence imposed by the funder on the funded proceedings. But as long as the grounds for termination are reasonable, the due process risk may be safely ignored.

To balance the funder's right to terminate the funding agreement, the Hong Kong code has offered the funded party the same right if it reasonably believes that the funder has committed a material breach of the code and the funding agreement may lead to irreparable damage.⁴⁶⁸ This move faces challenges from third party funders who consider the funded party's right to terminate the funding agreement as a disincentive for the TPF industry in Hong Kong. For instance, in response to the public consultation of the draft code, Woodsford tried

⁴⁶⁶ The Civil Justice Council, "The code of conduct for litigation funders," section 11.2.

⁴⁶⁷ The Government of the HKSAR, "Code of Practice for Third Party Funding of Arbitration issued".

⁴⁶⁸ *Ibid.*, section 2.16.

to draw the Hong Kong authority's attention to the fact that the funded party was often impecunious or even broke, and therefore, the funder's right to pursue the funded party is often a "hollow one".⁴⁶⁹ But the Hong Kong Security for Justice was not convinced by this argument. As a result, the funder is operating in Hong Kong under strong supervision from not only the authority but also the funded party. It remains uncertain whether a new imbalance between the funder and the funded party will be created by the asymmetry in financial status.

In the author's judgment, the effect of self-regulation in terms of limiting the funder's control over the proceedings is skeptical. Despite this, the author does not object the rationale behind the restriction of the funder's control over the proceedings— to prevent erosion of due process by the financial incentives of non-party investors. The author aims to argue that the funder's involvement in the funded procedure is not necessarily bad, especially when the funder shares costs liabilities. In law, the funder's participation or control over the proceedings can be justified as either a derivative of the funded party's role in the arbitration or as a measure of exercising the funder's own right to access to justice, although safeguards are required to prevent the funders from abusing the proceedings.

3.4.5 Disclosure

The Hong Kong code differs from the ALF code in terms of the disclosure of TPF to the funded party. The Hong Kong Arbitration Ordinance makes it an obligation of the funded party to disclose information about the TPF arrangement to the tribunal and the opponent in sections 98U and 98V.⁴⁷⁰ Accordingly, the Hong Kong code requires the funder to remind the funded party of its obligation under the law to disclose the funding arrangement.⁴⁷¹ The primary purpose of disclosure is to minimize the risks of conflicts of interest, according to the HKLRC.⁴⁷²

⁴⁶⁹ Woodsford Litigation Funding, "Response to Consultation on the Hong Kong Draft Code of Practice for Third Party Funding of Arbitration and Mediation".

⁴⁷⁰ *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017*, sections 98U and 98V.

⁴⁷¹ The Government of the HKSAR, "Code of Practice for Third Party Funding of Arbitration issued".

⁴⁷² The law reform commission of Hong Kong, "Report on third party funding for arbitration," 42.

The ALF code does not provide anything regarding disclosure. Whether and to what extent the funder and the funded party should inform other participants about the existence of the funding agreement is uncertain. What is certain is that, in litigation, the English court has the power to order disclosure of the information about the funding arrangement to facilitate decisions on costs.⁴⁷³ It is also within the authority of the court to limit such disclosure as appropriate.⁴⁷⁴ In arbitration seated in England, however, the disclosure of TPF is largely subject to the tribunal's discretion.

3.4.6 Non-compliance

The Hong Kong code relies on section 98S of the Arbitration Ordinance to deal with non-compliance. Because of the voluntary nature of the code, a failure to comply with a provision of the code does not, of itself, render any person liable to any judicial or other proceedings.⁴⁷⁵ However, such failure is admissible in evidence in the funded proceedings. By contrast, there is no legal basis in English law that a non-compliance of the ALF code is admissible in evidence. In fact, many funders operating in the UK are not ALF members and therefore are not bound by the ALF code of conduct.

As has been said in the previous chapter, the ALF code is a voluntary code that is currently only applicable to the ALF members. The funded party and other relevant parties are only given the opportunity to file complaints to the ALF if there are breaches of the code of conduct by the ALF members.⁴⁷⁶ The ALF has the authority to fine its members for up to £500, which, in the author's view, is highly disproportionate. This amount is far from sufficient to properly discourage non-

⁴⁷³ The English court can rely on CPR 25.14 to order disclosure of information about TPF if the applicant demonstrates that: (1) an application for security for costs against the funders is a real possibility on realistic grounds and not simply posited as a possibility for some tactical purpose without any real intention of pursuing it, and (2) that application at least has a realistic prospect of success and is not merely speculative or fanciful. See: *Re RBS Rights Issue Litigation*, [2017] EWHC 463 (Ch)(2017); The law reform commission of Hong Kong, "Report on third party funding for arbitration," 84.

⁴⁷⁴ *Re RBS Rights Issue Litigation*, [2017] EWHC 463 (Ch)(2017).

⁴⁷⁵ *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017*, section 98S(1).

⁴⁷⁶ Association of litigation Funders of England & Wales, "Association of Litigation Funders of England & Wales: A procedure to govern complaints made against Funder Members by funded litigant."

compliance with the code of conduct. Other sanctions include a private warning, a public warning, publication of the option, suspension of membership of the ALF for a period of time and expulsion from membership of the ALF.⁴⁷⁷

3.5 The Question lies ahead: Should litigation be more open to TPF?

In Hong Kong, TPF at present is largely limited to arbitration. So far, the Hong Kong legislators have not taken substantial steps to contemplate the possibility of lifting the prohibition on litigation funding. In recommending changes for TPF in arbitration, the HKLRC was tasked to review TPF in arbitration and therefore it has filtered out materials regarding litigation funding.⁴⁷⁸ In legislative discussions and academic commentaries, a consensus is clear that the regulation of litigation funding (especially funding in class actions) requires a different way of analysis and implies higher regulatory requirements.⁴⁷⁹ It is an unsettled issue at this moment whether TPF should be allowed on a larger scale in litigation. This part intends to shed light on this question and to map out possible fields for future research.

There is no sign in Hong Kong that TPF for litigation will be permitted any time soon. When in the *Cyberworks* case, for the first time the Hong Kong court endorsed the lawfulness of a third party funding in the context of claims by insolvent companies,⁴⁸⁰ many commentators expected this case to lead to further development of TPF for litigation in Hong Kong. The author, however, believes that this expectation is based on an incorrect analysis of the *Cyberworks* judgment. Looking closely at the final decision, the court relies on section 199(2)(a) of the Companies Ordinance which gives the liquidator power to sell the property of the company. Although it is not explicitly stated in statutory law that “property” includes a cause of action, case law has referred without criticism to the practice of assigning a cause of action

⁴⁷⁷ *Ibid.*, section 25.

⁴⁷⁸ The law reform commission of Hong Kong, “Report on third party funding for arbitration,” para. 2.4.

⁴⁷⁹ *Ibid.*, para. 4.12.

⁴⁸⁰ *Cyberworks Audio Vedio Technology Ltd*, 2010 WL 1322537 (CFI), [2010] 2 HKLRD 1137, [2010] HKEC 672 [2010] HKEC 672(2010).

vested in the estate of a bankrupt person.⁴⁸¹ This case did not present any fresh thinking of the prohibition on TPF for litigation. It is merely a re-elaboration of the right of the liquidator under the company law.

Arguably, the prohibition on litigation funding is another “due process paranoia” that may prevent civil dispute resolution proceedings from being more affordable and efficient. The reasons are as follows.

1. The origin of the law of maintenance and champerty has little relevance to Hong Kong.

As mentioned in previous chapters, the Law of maintenance and champerty originated from medieval England when the King’s officers were under the threat of rich barons.⁴⁸² The involvement of litigation funding at that time often gave rise to the danger of the oppression of the poor by the rich through the means of legal proceedings. This law was exported to Hong Kong by virtue of Section 3 of the Application of English Law Ordinance (Cap. 88).⁴⁸³ After 1997, this ordinance ceased to be valid but the law of maintenance and champerty remained applicable under article 8 of the Basic Law: “The laws previously in force in Hong Kong, that is, the common law, the rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravenes this law, and subject any amendment to the legislation of the Hong Kong Special Administrative Region.”⁴⁸⁴

The understanding of maintenance and champerty in Hong Kong and that in England already took separate paths during the colonial era. When English law gave up maintenance and champerty as crimes and torts in the Criminal Law Act 1967, there was nothing in the law of Hong Kong that was equivalent to this Act. After 1967, enforcement of

⁴⁸¹ *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31.

⁴⁸² The Law Commission, “Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965,” 3.

⁴⁸³ Joseph Li and Maria Da Luz, “Hong Kong Law on Maintenance and Champerty,” <http://www.hk-lawyer.org/content/hong-kong-law-maintenance-and-champerty>; *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31, para.78.

⁴⁸⁴ *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*. article 8

champertous contracts still gave rise to tortious and criminal liability in Hong Kong.⁴⁸⁵ This is confirmed by Ribeiro J in the Unruh case: “in our jurisdiction (Hong Kong), where no equivalent to the 1967 Act exists, such authorities (the rules relating to maintenance and champerty in Hong Kong) bear not only on the enforcement of the contracts but also on the potential tortious and criminal liability.”⁴⁸⁶

Section 98K and 98L of the Arbitration Ordinance of Hong Kong finally came into force with the effect that the common law offences and torts of maintenance and champerty do not apply to TPF of arbitration. This came over fifty years later after English law abolished maintenance and champerty as tortious and criminal wrongs. Currently, the champerty prohibition still has an active role to play in litigation and in managing the legal profession. For outsiders and many Hong Kongers, it is a bit strange why Hong Kong, who has never experienced the ancient struggle of England with the oppression of the poor by the English barons, is so obsessed with the ancient law of maintenance and champerty. Today, Hong Kong has one of the strongest court systems in the world and the court judges are well trained to safeguard the integrity of the law. The society is more open to the idea that legal claims can be sold and invested. Legal services are largely commodified. A widely applied champerty prohibition does not fit in this scene. It holds back the development of commercial means of paying for the conduct of the proceedings. The ultimate test of the legality of litigation funding should be whether it goes beyond the administrative capacity of the law and therefore deserves to be excluded. Running the test requires a more liberal approach to allow the court to take consideration of the modern public policies and all circumstances of the case, rather than an ancient law from a foreign land.

2. The stay of the champerty prohibition creates more problems than the problems it solves.

For now, the plaintiff's alleged impecuniosity as a trigger for the access to justice exception is subject to the review of the court in litigation. As previously mentioned, the Hong Kong court is only ready to

⁴⁸⁵ *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*, [2007] 2 HKLRD 414, [2007] HKCFA 10, (2007) 10 HKCFAR 31, para. 81.

⁴⁸⁶ *Ibid.*

facilitate access to justice, but not access to the plaintiff's ideal legal representation.⁴⁸⁷ However, the immediate question is whether the court has the capacity to determine whether the plaintiff is financially capable to pursue the case. Even though the court is capable of doing so, the standards for the plaintiff's "impecuniosity" are far from clear in the law. A conservative interpretation of the exceptions to the champerty prohibition elicits an inappropriate denial of access to justice. It also inevitably undermines the parties' freedom to choose proper legal representation and case management services. Besides, the overall regulative effect of the champerty prohibition is not clear right now due to the lack of coherence in interpreting the champerty prohibition and the changes to the legal services landscape. Also, in the changing legal service market, capital flows from outside investors to dispute resolution proceedings are possible through various vehicles such as insurance, loan, union membership funds, etc. It is suspicious whether the champerty prohibition can really prevent the convergence of legal service and external capital.

3. External funding has already formed a part of the litigation procedure.

As previously mentioned, there are three exceptional circumstances where litigation funding is permitted: cases with a common interest; cases where access to justice consideration prevails; and a miscellaneous category (including insolvency case). The use of litigation funding in insolvency cases is already relatively mature.⁴⁸⁸ After the new amendment to the Arbitration Ordinance went into operation, the use of TPF in litigation has been enlarged marginally. Prior to TPF, the law has already accepted in litigation procedure some alternative funding options provided by outsiders such as insurance and equity investment into a vehicle that holds only the claims and will use that capital to pay legal fees.⁴⁸⁹ The law of maintenance and champerty ignores the substance of funding transactions and focuses instead on the form of these transactions, which results in the double-standard that is not well justified in fact and in law. In the author's

⁴⁸⁷ *Raafat Imam v Life (China) Co Ltd*, [2018] HKCFI 1852, para.152.

⁴⁸⁸ *Cyberworks Audio Vedio Technology Ltd*, 2010 WL 1322537 (CFI), [2010] 2 HKLRD 1137, [2010] HKEC 672 [2010] HKEC 672(2010).

⁴⁸⁹ Bogart, "Deeply flawed: A perspective on the ICCA-Queen Mary Task Force on third-party funding."

point of view, it makes sense that TPF and its alternative funding options are subject to different regulations due to the divergence of the features of the funding option. But it is not fair to allow one in litigation and to prohibit the other in the same procedure.

4. Looking beyond and looking ahead

In both common law and civil law jurisdictions, litigation funding is on the rise. As of now, England has reformed its law to allow various funding mechanisms, as explained in the previous chapter. Some states of Australia and the US have done the same. Later in the work, it will become clear that TPF also plays an essential role in the civil law jurisdictions, especially in collective redress proceedings. In the Netherlands, out of the differences in regulating litigation funding, there is a consensus that it is outdated to assume that TPF for litigation is generally inimical to the due administration of justice.

As the author sees it, whether the permission of TPF for litigation can be further expanded depends on whether the regulatory requirements for TPF of litigation can be met. It also relies on what the litigation funding industry is developed on and is able to offer. Prior to any changes, the legislators in Hong Kong should be well informed that TPF is not only for parties in financial distress but also for those in need of case management and budget management services. In fact, Hong Kong legislators readily think of TPF as a tool to facilitate case management and budget management in dispute resolution in contemplating TPF for arbitration. As the funding models diversify, third party funders target not only individual parties but also law firms. They can facilitate cash flows to law firms to make the latter more competent. Beyond that, TPF may have a role to play in non-court procedures such as the investigation phase of insolvency cases. Besides, the funders can provide market-based solutions to various problems inherent in the legal system, for instance, the problem of overcharging for legal representation. Any attempt to regulate TPF should take into consideration the function and nature of TPF and the procedure in which TPF is involved.

The right way forward in the author's view is to consider the possibility of allowing TPF in litigation. This is not an intent to follow the trend but rather an expression of the changes to the content of justice and to the conditions of society. To introduce TPF for litigation, the abolition

of maintenance and champerty prohibition on a larger scale is necessary. Litigation funding should not be confined to the exceptional circumstances set up by the Unruh case. Whether there is an “official intermeddling” should be decided by the court with the assumption that the funding agreement is permissible. The author tends to argue that “official intermeddling” as a legal term is too aged and infirm. The upcoming laws and regulations should not focus on the ability of the court to resist outside intervention but rather on the risks of the increase in entrepreneurial litigation and the close involvement of litigation funders in the legal process. Once the law of maintenance and champerty is replaced by modern public policy safeguards, a supervisory body is required to nip problems in the bud. Details of the safeguarding regulation of TPF for litigation are left to future research.

3.6 Takeaways

Hong Kong permitted TPF in arbitration and the related proceedings through a recent amendment to the arbitration legislation, while TPF is still largely prohibited in litigation. The permission of TPF for arbitration is considered as a necessity to maintain Hong Kong as a preferable arbitration hub. It also serves the need to enhance access to justice and is expected to reduce the workload of the court. In arbitration practice, TPF supplements, not replaces, alternative funding options. It is believed by Hong Kong legislators that it is in the public interest to encourage the use of various external funding options as long as the integrity of the funded proceedings and the integrity of the legal profession are well-safeguarded. In litigation, three categories have been identified by case law as exceptions in which TPF is likely to be allowed: the common interest category, the access to justice category and a miscellaneous category with practices such as the sale and assignment of claims by a trustee in insolvency cases. The possibility of a wider permission of TPF for litigation has not been sufficiently debated.

TPF does not come without risks, which has entailed heated debates on the regulation of TPF. It is suggested by the HKLRC that the regulation should be geared to respond to the following risks: the funder’s excessive control over the proceedings, unreasonable costs of TPF, conflicts of interest, ill-conceived settlements, arbitrary termination of the funding agreement, the financial incapacity of the funder, etc. The idea underpinning the regulatory framework for TPF in Hong Kong is to regulate TPF with the light touch approach. It is

well noted by the legislators that overzealous regulation could stymie the benefits of TPF for arbitration. With considerations being given to the modern public policies and the current conditions in the TPF market, Hong Kong legislators have decided to combine statutory requirements with the code of practice for third party funders to minimize the risks of TPF. It remains to be seen whether the regulatory measures can serve their purposes and whether TPF could be extended to a wider range of proceedings. Currently, materials as to the impact of TPF on litigation are scarce due to the general prohibition on the practice of TPF for litigation. In exceptional circumstances where TPF for litigation is found to be valid, the courts have paid close attention to the funder's control on the conduct of the proceedings. The bottom line seems to be that the funder's financial interest cannot become the main driving force for the funded litigation proceedings.

CHAPTER 4 TPF IN SINGAPORE

4.1 Introduction

As a former British colony, Singapore has adopted a common law system since 1826.⁴⁹⁰ After the nation became independent from Britain in 1959,⁴⁹¹ legal practitioners grappled with the question of whether and to what extent English law should be applied to local problems in Singapore. This question was not well addressed until 1993 when the Application of English Law Act was passed by the Singapore Parliament. As the effect of this Act, the English common law (including the principles and rules of equity) continues to be applied but only to the extent that it had become part of Singaporean law before the Application of English Law Act entered into force.⁴⁹² With the English common law tradition, Singapore becomes an interesting comparison to Hong Kong and England in the context of TPF. Conceivably, Singapore, as the world's leading dispute resolution center, has also influenced jurisdictions outside of the common law world regarding the use and the regulation of TPF for international arbitration.

The legal system of Singapore with both colonial and national narratives is unique in terms of the perception of the rule of law and the key legal principles.⁴⁹³ Its uniqueness lies largely in the readiness of Singapore to instrumentally appropriate legal reforms and procedures.⁴⁹⁴ According to Mr. K. Shanmugam, the Minister of Law of Singapore, "the precepts of law must be applied with "hard-nosed practicality".⁴⁹⁵ It is of no use to "have beautiful laws, embodying the noblest ideals, only to do something else in practice".⁴⁹⁶ Singapore

⁴⁹⁰ Sam Bonifant and Louise Vaughan, "Singapore- jurisdiction: application of English Law Act 1993," *Journal of International Banking Law* 9, no. 3 (1994): N55.

⁴⁹¹ Jothie Rajah, *Authoritarian rule of law: legislation, discourse and legitimacy in Singapore* (Cambridge University Press, 2012), 25.

⁴⁹² *Application of English Law Act (Chapter 7A)*, section 3.

⁴⁹³ Lee and Pittard, *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity*, 287.

⁴⁹⁴ Rajah, *Authoritarian rule of law: legislation, discourse and legitimacy in Singapore*: 41.

⁴⁹⁵ K. Shanmugam, "The rule of law in Singapore," *Singapore Journal of Legal Studies* 2012(2012): 358.

⁴⁹⁶ *Ibid.*

upholds the notion that “the truest test of the success of the law, of the Rule of Law, lies in the benefits it produces for society and individuals”.⁴⁹⁷ Despite the one-party rule regime which does not fit the western version of democracy, Singapore has scored quite well in producing order and justice in the relationship between the citizens themselves and between citizens and the state. Some have argued that Singapore offers glimmering proof that an authoritarian government can construct a rule of law system sufficient to satisfy the demands of society and the economy.⁴⁹⁸ Although the nature of Singapore’s political system is up for debate, this city-state has a decent rule of law system that is able to accommodate the actual needs of the Singaporean citizens, in particular the need to access to justice.

As has been repeatedly said in previous chapters, the rule of law is the fundamental element which implies the state’s responsibility to promote access to justice. In Singapore, having access to justice means that the parties to disputes are capable of “vindicating his legal rights within the parameters of the legal system, whether to initiate or to defend a claim in the courts”.⁴⁹⁹ However, the scale and the complexity of cases have increased to the point where the parties often find it hard to initiate and to maintain the proceedings. In order to facilitate access to justice, Singapore like other common law jurisdictions is willing to make exceptions to the law of maintenance and champerty in order to allow external funding for dispute resolution.⁵⁰⁰ In particular, Singapore views TPF as a solution to the financial difficulties facing users of international arbitration.⁵⁰¹ The legislators of Singapore are

⁴⁹⁷ Ibid.

⁴⁹⁸ Tom Ginsburg and Tamir Moustafa, *Rule by law: the politics of courts in authoritarian regimes* (Cambridge University Press, 2008), 73.

⁴⁹⁹ Gary, "Re-Examining Public Policy: A Case for Conditional Fees in Singapore?," 136.

⁵⁰⁰ *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju*, [2013] SGHC 135, para. 82.

⁵⁰¹ It is said by Senior Minister of State for Law of Singapore, Indranee Rajah SC, that TPF provides businesses “an additional financing and risk management tool when engaged in the relevant categories of proceedings”. She continued saying that the TPF practice included the financing of valid claims which otherwise had to be given up because of financial restraints. See: "Parliamentary Speeches and Responses: Second Reading Speech by Senior Minister of State for Law, Indranee Rajah SC, on the Civil (Amendment) Bill 2016," <https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/second-reading-speech-by-senior-minister-of-state-for-law--indra3.html>.

well informed that TPF is an edge from which its competitors in the arbitration community have benefited from for quite long. As said by Indranee Rajah SC (the Senior Minister of State for Law) in the Parliament speech, “today, third-party funding has become a feature in other leading arbitration centers, including London, Paris, and Geneva.”⁵⁰² Singapore’s status as the world’s leading international arbitration center might be compromised if it remained reticent on TPF. It is in this context that TPF assumes its significance in international arbitration seated in Singapore.

In 2016, the Ministry of Law published a public consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016, in order to seek views from both local and overseas stakeholders on the permission and the regulation of TPF for international arbitration.⁵⁰³ TPF officially became a reality in Singapore in 2017 when the amendment to the Civil Law Act entered into effect.⁵⁰⁴ As a result, the Civil Law Act abolishes maintenance and champerty as torts and legalizes TPF and professional third party funders in the prescribed classes of dispute resolution proceedings: “(a) international arbitration proceedings; (b) court proceedings arising from or out of or in any way connected with international arbitration proceedings; (c) mediation proceedings arising out of or in any way connected with international arbitration proceedings; (d) application for a stay of proceedings referred to in section 6 of the International Arbitration Act (Cap. 143A) and any other application for the enforcement of an arbitration agreement; (e) proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act”.⁵⁰⁵

Under the law of Singapore, TPF refers to “the funding of proceedings by an unconnected entity to a dispute in return for financial gains”.⁵⁰⁶

⁵⁰² Ibid.

⁵⁰³ Ministry of Law in Singapore, “Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016,” <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-the-draft-civil-law--amendment--bill-2016.html>.

⁵⁰⁴ *Civil Law Act of Singapore (Chapter 43)*, sections 5A and 5B.

⁵⁰⁵ *Civil Law (Third-Party Funding) Regulations 2017*, regulation 3.

⁵⁰⁶ Ministry of Law in Singapore, “Public Consultation to Seek Feedback on the Third-Party Funding Framework,” <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-to-seek-feedback-on-the-third-party-funding-framework.html>.

The funder is a commercial entity who is willing to pay for some or all of the claimant's legal fees and expenses.⁵⁰⁷ The funder's return is contingent on the results of the case and is calculated as a percentage share of the final recovery or a multiple of the amount the funder invests.⁵⁰⁸ Singapore has adopted a unique approach to the regulation of this new funding option. The regulatory framework is often categorized by commentators as a "light touch" statutory regulatory approach with the disclosure of TPF at its heart to promote transparency of the funding arrangement and to prevent conflicts of interest.⁵⁰⁹ However, in comparison to Hong Kong and England, Singapore's approach in dealing with TPF-related issues is rather strict and conservative. The legislators largely rely on statutory measures to resist potential abuses. Apart from statutory rules, professional institutions issued various guidelines, directed at arbitrators, third party funders and legal practitioners, with the aim of allowing only the best practice of TPF in the permitted areas.

Singapore matters to this research not only because of the fact that it has developed a unique approach to regulating TPF but also because it has many admirers across the world who are seeking to learn from the Singaporean model of law including the approach adopted by Singapore in dealing with issues associated with TPF.⁵¹⁰ China is one of these admirers.⁵¹¹ Singapore's legal reforms often attract attention from China, particularly the reforms taking place in international arbitration.⁵¹² Singapore is one of the five top leading arbitration centers in the world and the second most preferred arbitration seat in Asia-Pacific.⁵¹³ It is reasonable to assume that Singapore's legal reforms regarding TPF will inform other jurisdictions who look to

[consultation-third-party-funding.html](#).

⁵⁰⁷ The Law Society of Singapore, "Guidance Note 10.1.1 Third-Party Funding," (2017), section 4.

⁵⁰⁸ *Ibid.*, sections 5-6.

⁵⁰⁹ Mathew Secomb and Adam Wallin, "The Third Party Litigation Funding Law Review - Edition 2- Singapore," in *The Law Reviews* (2018); *SI Arb Guidelines for third party funders*, (2017/05/18/), section 1.2.

⁵¹⁰ Rajah, *Authoritarian rule of law: legislation, discourse and legitimacy in Singapore*: 6.

⁵¹¹ *Ibid.*, 5-6.

⁵¹² Peng Hou, "Financing arbitration in mainland China: Hong Kong's legislation as a model," *Arbitration International* 34(2018).

⁵¹³ Queen Mary University of London, "2018 International Arbitration Survey: The Evolution of International Arbitration," (2018).

develop their own regulation of TPF.⁵¹⁴ This chapter firstly specifies the area where TPF is permitted. Then it explains the reason why TPF has been largely confined to international arbitration. On this basis, it presents an analysis of the procedural implications of TPF and the regulatory measures. Finally, there is a brief mention of the question that lies ahead.

4.2 The platform for TPF

In January 2017, the Parliament passed the bill to amend the Civil Law Act allowing TPF for international arbitration and the related proceedings.⁵¹⁵ This change was driven by two important notions: first, the legal system could not deliver the expected results unless aggrieved applicants have a real way to access to justice.⁵¹⁶ Second, a prosperous arbitration industry needs to be fueled by various financing options.⁵¹⁷ Singapore engaged in a race of permitting TPF against Hong Kong and many other arbitration hubs in the world.⁵¹⁸ The city-state brands itself as a trusted and neutral venue of international arbitration. The official view is that Singapore cannot afford to ignore TPF which has become a feature of international arbitration.⁵¹⁹ This part begins by explaining the considerations taken in making the decision to permit TPF in the specified areas. Then it moves to the law of maintenance and champerty and the related public policy concerns which explain why TPF in litigation is still generally prohibitive.

4.2.1 International arbitration: The testing ground for TPF?

So far, TPF is permitted in Singapore in the following areas according to the Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017: "(a) international arbitration proceedings; (b) court

⁵¹⁴ Secomb, Tan, and Wingfield, "Third Party Funding for Arbitration: An Opportunity for Singapore to Lead the Way in Regulation," 187.

⁵¹⁵ *Civil Law (Amendment) Act 2017 (No.2 of 2017)*.

⁵¹⁶ "Parliamentary Speeches and Responses: Second Reading Speech by Senior Minister of State for Law, Indranee Rajah SC, on the Civil (Amendment) Bill 2016".

⁵¹⁷ *Ibid*.

⁵¹⁸ Kabir Singh, Sam Luttrell, and Elan Krishna, "Third-party funding and arbitration law-making: the race for regulation in the Asia-Pacific," in *Kluwer Arbitration Blog* (2016).

⁵¹⁹ "Parliamentary Speeches and Responses: Second Reading Speech by Senior Minister of State for Law, Indranee Rajah SC, on the Civil (Amendment) Bill 2016"; Rogers, *Ethics in International Arbitration*: §5.10.

proceedings arising from or out of in any way connected with international arbitration proceedings; (c) mediation proceedings arising out of or in any way connected with international arbitration proceedings; (d) application for a stay of proceedings referred to in section 6 of the International Arbitration Act and any other application for the enforcement of an arbitration agreement; (e) proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act”.⁵²⁰

Before the reform, Singapore’s authority realized that international arbitration had become an area “where legal costs can be substantial” and “where there is a growing body of reputable professional funders”.⁵²¹ TPF for international arbitration is expected to serve both the public policy of strengthening Singapore’s position as a premier international arbitration hub and the private interest of individuals to engage in international arbitration without the fear of excessive financial burdens.⁵²² Nevertheless, the reason why TPF is only permitted in international arbitration but not in the rest of the proceedings, such as domestic arbitration and litigation, has not been well explained by the legislators in the recent legal reform. It seems that Singapore is trying to test out TPF in international arbitration before introducing it to other proceedings. The Minister of Law in a public consultation on the regulatory framework for TPF has said that the expansion of TPF might be possible after it is evidenced that TPF is well received by international arbitration.⁵²³

It is important to note that arbitration under the law of Singapore is a dual-track system,⁵²⁴ which makes it possible for Singapore to confine TPF to international arbitration as a temporary measure. The Arbitration Act (the AA) applies to domestic arbitration while the International Arbitration Act (the IAA) applies to international arbitration and non-international arbitration in respect of which the parties have a written agreement for Part II of the IAA and the United

⁵²⁰ *Civil Law (Third-Party Funding) Regulations 2017*, section 3.

⁵²¹ "Parliamentary Speeches and Responses: Second Reading Speech by Senior Minister of State for Law, Indranee Rajah SC, on the Civil (Amendment) Bill 2016".

⁵²² *Ibid.*

⁵²³ Ministry of Law in Singapore, "Public Consultation to Seek Feedback on the Third-Party Funding Framework".

⁵²⁴ Michael Hwang, Lawrence G. S. Boo, and Yewon Han, "National report of Singapore," in *ICCA International Handbook on Commercial Arbitration* (2018), 1.

Nations Commission on International Trade Law Model Law on International Commercial Arbitration (the UNCITRAL Model Law) to apply.⁵²⁵ Compared to the AA, the IAA contains less court supervision on arbitration proceedings.⁵²⁶ The dual-track system is a latecomer. When arbitration legislation was first introduced in Singapore in 1953, it resembled the English Arbitration Act 1950.⁵²⁷ The law of arbitration was split when the IAA 1994 was introduced.⁵²⁸ As a result of this change, the UNCITRAL Model Law was adopted to govern international arbitration but not domestic arbitration.⁵²⁹ The “split” of the arbitration legislation happened against the background that the government geared the law and the policy to promote Singapore as a venue for international arbitration, with the awareness that international arbitration hearings were very mobile.⁵³⁰ The adoption of the UNCITRAL Model law could be a quick way for Singapore to join the “club” of leading international arbitration centers. In addition to that, the IAA was expected to offer empirical evidence which could be consulted on the issue of whether to extend the UNCITRAL Model Law to domestic arbitration.⁵³¹

Strategic considerations have played an important role in deciding whether to allow TPF in international arbitration.⁵³² Legislators in Singapore are keenly aware that the stumbling block towards TPF might hurt not only Singaporean citizens’ right to access to justice but

⁵²⁵ Ibid.

⁵²⁶ Ibid., 2; *International Arbitration Act of Singapore (Chapter 143A)*, (2002), section 5; *Arbitration Act of Singapore (Chapter 10)*, section 3.

⁵²⁷ Philip Kimbrough, “National Report for Singapore,” in *Yearbook Commercial Arbitration 1986* (1986), 29.

⁵²⁸ Mohan R. Pillay, “The Singapore Arbitration Regime and the UNCITRAL Model Law,” *Arbitration international* 20, no. 4 (2004): 356-57.

⁵²⁹ Ibid., 357; UN Commission on International Trade Law, “The UNCITRAL Model Law on International Commercial Arbitration.” UNCITRAL Model Law emerged against the background of globalization on development of uniform laws. It is a model instrument for arbitration legislation. It aims for ensuring that the law of different countries has a “similar recognizable structure and essential elements”. For countries, the adoption of the UNCITRAL Model Law is a “fast and effective way of joining the international arbitration club”. See: Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Australia, Hong Kong and Singapore* (Kluwer Law International, 2016), 4-21.

⁵³⁰ Pillay, “The Singapore Arbitration Regime and the UNCITRAL Model Law,” 358.

⁵³¹ Ibid., 357.

⁵³² “Parliamentary Speeches and Responses: Second Reading Speech by Senior Minister of State for Law, Indranee Rajah SC, on the Civil (Amendment) Bill 2016”.

also the economy and trade of the state.⁵³³ However, one could argue that the decision to only permit TPF in international arbitration is not well justified. It is a valid question why TPF is not allowed to be tested out in domestic arbitration. More about this issue will be discussed in section 5 of this chapter.

4.2.2 TPF for litigation in exceptional situations

TPF for litigation is prohibited in Singapore save some exceptions. However, the scope of these exceptions is not entirely clear. The only unquestionable thing is, according to section 3 of the TPF regulations 2017, TPF in “courts proceedings arising from or out of or in any way connected with international arbitration proceedings” is allowed.⁵³⁴ Other than that, the legality of the TPF agreement for litigation is largely subject to the court’s discretion with consideration to the circumstances of the case. As previously mentioned, in explaining why TPF in Singapore is permitted in international arbitration and the related proceedings but not in others, one must look beyond legal factors. Nonetheless, this work is designed to address the legal aspects of TPF. In the context of litigation, the discussion has put its focus on the law of maintenance and champerty since it is the primary legal reason why the general prohibition on TPF for litigation has survived.⁵³⁵

4.2.2.1 The law of maintenance and champerty in Singapore

Singapore inherited the doctrines of maintenance and champerty from England during the colonial era.⁵³⁶ In the process of decolonization, Singapore as a sovereign state is allowed to craft its own legal system through the Application of English Law Act and the related subsidiary legislations.⁵³⁷ This Act does not allow the application of the English Criminal Law Act 1967, and as a consequence, England and Singapore have taken different paths in implementing the law of maintenance

⁵³³ Ibid.

⁵³⁴ It is worth nothing that, in the 2016 bill, the scope was “courts proceedings arising from or out of the international arbitration proceedings”. This provision was modified to what it is today to expand a bit the use of TPF in court proceedings. See: *Civil Law (Third-Party Funding) Regulations 2016*.

⁵³⁵ "Parliamentary Speeches and Responses: Second Reading Speech by Senior Minister of State for Law, Indranee Rajah SC, on the Civil (Amendment) Bill 2016".

⁵³⁶ Zhuang, "The Subsumation of Maintenance and Champerty Under Third Party Orders," 378-79.

⁵³⁷ Ibid., 377-78.

and champerty.⁵³⁸ In other words, the abolition of criminal and civil liability of maintenance and champerty in English law in 1967, along with the safeguards implemented after the abolition, do not apply in Singapore.⁵³⁹ The watershed event with the purpose of reforming the law of maintenance and champerty in Singapore happened in 2017 when new provisions were introduced to the Civil Law Act with the effect of abolishing the tort of maintenance and champerty.⁵⁴⁰ Despite that, only in the prescribed categories of proceedings is a TPF contract permitted.⁵⁴¹ In other words, even though the tort of maintenance and champerty has been abolished, contracts affected by maintenance and champerty will continue to be contrary to public policy or otherwise illegal, save the exceptions that the law has made for TPF in international arbitration and the related proceedings.⁵⁴²

Singapore used to be one of the jurisdictions advocating that there should be no difference between the application of the maintenance and champerty prohibition in litigation and that in arbitration.⁵⁴³ In case law, maintenance is understood as “the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognized by the law as justifying his interference”.⁵⁴⁴ Champerty is a form of maintenance in consideration of “a promise to give maintainer a share in the proceeds or subject matter of the action”.⁵⁴⁵ In the *Otech* case in 2007, the court held that “the law of champerty stems from public policy considerations that apply to all types legal disputes and claims whether the parties have chosen to use the court process to enforce their claim or have resorted to a private dispute resolution system like

⁵³⁸ *Ibid.*, 377.

⁵³⁹ "Disqualifying Counsel for Conflict of Interest in International Arbitration: Tribunals' Powers and Limits," *Revista Brasileira de Arbitragem* XII, no. 46; Chiann Bao, "Third Party Funding in Singapore and Hong Kong: The Next Chapter," *Journal of International Arbitration* 34, no. 3 (2017); Singapore Academy of Law, "Report of the law reform committee on litigation funding in insolvency cases," (2014), 5.

⁵⁴⁰ *Civil Law Act of Singapore (Chapter 43)*, section 5A.

⁵⁴¹ "Parliamentary Speeches and Responses: Second Reading Speech by Senior Minister of State for Law, Indranee Rajah SC, on the Civil (Amendment) Bill 2016".

⁵⁴² *Ibid.*

⁵⁴³ *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another*, [2007] 1 SLR 989, [2006] SGCA 46.

⁵⁴⁴ *Re Vanguard Energy Pte Ltd*, [2015] SGHC 156, para.12-13.

⁵⁴⁵ *Ibid.*, paras 12, 33.

arbitration”.⁵⁴⁶ The court states that it would be artificial to “differentiate between litigation and arbitration proceedings” and to advocate that “champerty applies to the one because it is conducted in a public forum and not to the other because it is conducted in private”.⁵⁴⁷ This court took the position with good knowledge of the contradicting comments on the application of the law of maintenance and champerty to arbitration.⁵⁴⁸ This case was reversed in 2017 when the law gave a pass to TPF for international arbitration, while TPF for domestic arbitration, litigation, and mediation unrelated to international arbitration, and proceedings before the Singapore International Commercial Court remains illegal.

Currently, the law of maintenance and champerty still has an active role to play in dealing with not only TPF but also the legal profession, leading to the regulation of TPF and a purist attitude towards legal professionalism. Accordingly, this law prevents lawyers from charging on a contingency basis.⁵⁴⁹ The legal foundation of the contingency fee prohibition lies in section 107 of the Legal Profession Act and section 18 of the Legal Profession (Professional Conduct) Rules 2015 which provide that legal practitioners or law practices are not allowed to enter into any negotiations with a client—“(a) for an interest in the subject matter of litigation or of any other contentious proceedings; or (b) except to the extent permitted by any applicable scale of costs, for remuneration proportionate to the amount which may be recovered by the client in the proceedings.”⁵⁵⁰ Despite the legal hostility towards contingency fees,⁵⁵¹ the necessity of this funding mechanism is demonstrated in case law. In this regard, *Law Society of Singapore v Kurubalan* is highly relevant.⁵⁵² The law society went against *Kurubalan* in this case since “he entered into a champertous

⁵⁴⁶ *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another*, [2007] 1 SLR 989, [2006] SGCA 46, para. 38.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*, paras 31-38.

⁵⁴⁹ A solicitor is subject to the law of maintenance and champerty. See: *Legal Profession Act of Singapore (Chapter 161)*, section 107; Gary, “Re-Examining Public Policy: A Case for Conditional Fees in Singapore?,” 133.

⁵⁵⁰ Chan Kok Yew, “Champerty, Professional Legal Ethics and Access to Justice for Impecunious Clients,” 206.

⁵⁵¹ *Ibid.*, 207.

⁵⁵² *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju*, [2013] SGHC 135.

agreement which provided for payment to the respondent of either 30% or 40% of the amount recovered".⁵⁵³ Having examined the circumstances of the case, the court demonstrated their sensitivity to the need for access to justice: "it would be permissible and even honorable for an Advocate and Solicitor to act for an impecunious client in the knowledge that he would likely only be able to recover his appropriate fees or disbursements if the client were successful in the claim and could pay him out of those proceeds or if there was a costs order obtained against the other side".⁵⁵⁴ But due to the fact that the law applicable to the legal profession explicitly prohibits a champertous agreement between lawyer and client, the court has laid down the decision that the respondent should be banned from practice for a period of six months.⁵⁵⁵ The case did not bring an end to the discussion on contingency lawyer fees, but it did draw the legal community's attention to the demand for contingency fees and the related access to justice considerations. As a response to the change of the conditions of the society and of the legal service market, a committee authorized by the Minister for Law conducted a comprehensive review of the entire legal service sector in Singapore in 2007, in which contingency fees were examined and recommended.⁵⁵⁶ But such recommendation has not been translated into reality.⁵⁵⁷

Despite that the ancient law of maintenance and champerty in both litigation and arbitration have some degree of survival in Singapore, which might hold back the development and expansion of the practice of TPF, the attempt to expand the platform for TPF remains noticeable.⁵⁵⁸ The law of maintenance and champerty represents an area where one can expect developments in the future.

⁵⁵³ Ibid., para. 2.

⁵⁵⁴ Ibid., para. 82; Chan Kok Yew, "Champerty, Professional Legal Ethics and Access to Justice for Impecunious Clients," 210.

⁵⁵⁵ *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju*, [2013] SGHC 135, para. 3.

⁵⁵⁶ "Report of the Committee to Develop the Singapore Legal Sector," (2007).

⁵⁵⁷ Ibid., 32-35.

⁵⁵⁸ In 2018, the Ministry of Law of Singapore invited views from the public on, among others, the issue of whether there is a need to expand the safe harbor for funding of international arbitration cases into new areas. See: Ministry of Law in Singapore, "Public Consultation to Seek Feedback on the Third-Party Funding Framework".

4.2.2.2 The myth of TPF for litigation

In litigation, TPF still falls foul of the law of maintenance and champerty and is therefore illegal.⁵⁵⁹ Nevertheless, the courts have from time to time restricted the application of the law of maintenance and champerty to uphold legitimate interests and public policies.⁵⁶⁰ For instance, in *Re Vanguard Energy Pte Ltd* [2015] SGHC 156,⁵⁶¹ the court has found that section 272(2)(c) of the Companies Act (Cap. 50) has created an exception to the prohibition on champerty.⁵⁶² In this case, a company in the winding-up proceedings entered into an assignment agreement with third parties to fund the company's litigations. Under this agreement, part of the final recovery will be sold to the assignees. The question at stake is whether the assignment agreement offends maintenance and champerty and is therefore illegal. After examining all relevant circumstances, the court decided that a liquidator's exercise of the power of sale under section 272 of the Company Act does not trigger champerty liability.⁵⁶³ The court made this decision with the views that whether TPF was champertous should be determined depending on circumstances and that litigation had an especially useful role to play in insolvency situations. In 2018, the High Court of Singapore reconfirmed the permissibility of TPF for insolvency cases in the case *Re Fan Kow Hin*.⁵⁶⁴ In the court's view, fruits of litigation are the property of the estate which may be assigned by the trustee.⁵⁶⁵ At the time of the above decisions, TPF for insolvency cases represented a certain degree of uncertainty since it had not been

⁵⁵⁹ *Civil Law Act of Singapore (Chapter 43)*, sections 5A and 5B.

⁵⁶⁰ Liang, "Champerty: Relic of a Bygone Era."

⁵⁶¹ In this case, the Singapore High Court has for the first time approved a TPF agreement in insolvency case. Vanguard was placed under compulsory liquidation in November 2014. It did not have sufficient financial capacity to pursue the potential claims that had been identified. The liquidator of Vanguard hence filed an application to the court for the approval of the TPF arrangement. See: *Re Vanguard Energy Pte Ltd*, [2015] SGHC 156; Clive Bowman and Kate Hurford, "Re Vanguard Energy Pte Ltd [2015] SGHC 156 – Litigation Funding Now Permitted in Singapore Insolvency Cases," *international Corporate Rescue* 13, no. 2 (2016).

⁵⁶² *Re Vanguard Energy Pte Ltd*, [2015] SGHC 156.

⁵⁶³ *Ibid.*

⁵⁶⁴ The trustees of the bankruptcy estate of Fan Kow Hin initiated an action to bring insolvency claw-back claims against a few defendants. To maintain the proceedings, the trustees sought TPF and filed an application to the court for the approval of the TPF agreement. The court considered the nature of claw-back claims and the law of maintenance and champerty before making decision on the application. See: *Re Fan Kow Hin*, [2018] SGHC 257.

⁵⁶⁵ *Ibid.*, para. 5.

properly codified and elaborated in general terms.⁵⁶⁶ Insolvency, Restructuring and Dissolution Act 2018 rescued the situation through express empowerment of judicial managers and liquidators to assign the proceeds of actions to third party funders in exchange for the funding service.⁵⁶⁷

It is also possible for TPF to be allowed for legitimate commercial interests. In the case *Lim Lie Hoa and another v Ong Jane Rebecca* before the Court of Appeal in 1997, disputes arose from the assignment of the right to sue from the respondent to a company named Gomar Leasing.⁵⁶⁸ The Court of Appeal found that the assignment of the right to sue was not champertous because such right was ancillary to the assignment of property and there was a genuine interest in the assignment.⁵⁶⁹ Leading up to the final decision, the court drew inspiration from *Trendtex Trading v Credit Suisse* before the English court where both the Court of Appeal and the House of Lords were in the agreement that a commercial interest sufficient to enable a party to maintain a suit was enough to enable a party to assign the whole cause of action.⁵⁷⁰ Regardless of this case, the absence of the criteria for the establishment of the “commercial interest argument” has created practical difficulties for the use of TPF in litigation.⁵⁷¹

4.3 The procedural implications of TPF

Since the statutory permission of TPF is currently confined to international arbitration, this part has its focus on the impact of TPF in this specific area. Attention is paid to the issues that have been considered not only by the legislators but also by various professional institutions such as the Law Society of Singapore, the Singapore Institute of Arbitrators (SI Arb), the Singapore International Arbitration Center (SIAC). These issues include the disclosure of TPF,

⁵⁶⁶ Singapore Academy of Law, "Report of the law reform committee on litigation funding in insolvency cases," 2.

⁵⁶⁷ Oon & Bazul LLP, "Insolvency, Restructuring and Dissolution Bill passed," in *Lexology* (2018); Norton Rose Fulbright, "Singapore's efforts to become an international hub for debt restructuring," (2019).

⁵⁶⁸ *Lim Lie Hoa and another v Ong Jane Rebecca*, [1997] 1 SLR(R) 775.

⁵⁶⁹ Liang, "Champerty: Relic of a Bygone Era," 187; *Re Fan Kow Hin*, [2018] SGHC 257, para. 24.

⁵⁷⁰ *Trendtex Trading Corp v Credit Suisse*, [1982] A.C. 679.

⁵⁷¹ Singapore Academy of Law, "Report of the law reform committee on litigation funding in insolvency cases," 5.

the qualification of third party funders, the funder's impact on legal professionals, conflicts of interest, the funder's control on the proceedings, the threat of TPF to confidentiality of case materials and the legal privilege, the funder's costs liabilities, the termination of the funding agreement, etc. In dealing with the impact of TPF on litigation, an "increasing liberal and qualified approach" is taken by the Singaporean courts.⁵⁷² As previously mentioned, TPF is prohibitive in litigation save some exceptions. However, in practice, it is far from clear how to justify exceptions to the general prohibition on TPF for litigation. Neither is it clear what the court should look to in cases where TPF is allowed in litigation proceedings. The author focuses on the court's concerns about TPF for insolvency proceedings since it currently represents most of the practice of TPF for litigation. It remains unclear whether the same concerns arise in other litigation proceedings with the involvement of TPF.

4.3.1 The impact of TPF on international arbitration

Compared to England, Singapore is less experienced in dealing with non-party funding because Singapore has adopted a more stringent approach to the implementation of the law of maintenance and champerty, which leads to the prohibition on most non-party funding options for dispute resolution. When dealing with the issues of whether to permit TPF and where to permit it, Singapore has kept an eye on the experience of other jurisdictions as well as its own conditions to understand what the potential negative effects of TPF on the funded procedure are. After comprehensive study and public consultation on the draft of the Civil Law Act amendment bill which was designed to allow TPF for arbitration,⁵⁷³ it was found that the following procedural issues called for statutory safeguards: the disclosure of TPF, the qualification of third party funders, the funder's impact on legal professionals, and conflicts of interest. There are other issues, such as the funder's control on the proceedings, the threat of TPF to the confidentiality of arbitration and the legal privilege, the impact of TPF on costs, etc., which have been dealt in the TPF guidelines issued by various professional institutions.

⁵⁷² Liang, "Champerty: Relic of a Bygone Era," 200.

⁵⁷³ Ministry of Law in Singapore, "Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016".

Singapore acknowledges the significant role of the funder in the funded proceedings. The fact that only professional third party funders with their principal business in funding legal claims are allowed in Singapore has already voiced Singapore's doubt on the view that the funder is merely a risk bearer who has no control of the procedure whatsoever. In international arbitration practice, arbitral tribunals may hope that the arbitration procedure remains unaffected by TPF.⁵⁷⁴ Nonetheless, they are constantly called upon to decide on issues that are affected by the presence of third party funders.⁵⁷⁵ Besides, in dealing with matters such as confidentiality and conflicts of interest, the tribunal may need the participation and cooperation of the funders.⁵⁷⁶ It is questionable whether inexperienced and unprofessional third party funders know how to engage in the funded proceedings with other participants and whether they are capable of fulfilling their duties under the funding agreement. These risks justify not only the disclosure of TPF but also the introduction of various qualification requirements for third party funders.

Looking to other jurisdictions, Singapore realized that even professional third party funders could impose improper control on the procedure, sometimes through legal professionals. Under Singaporean law, legal professionals are allowed to inform their clients of the availability of TPF and to advise on the funding agreement. They are also allowed to introduce TPF to their clients.⁵⁷⁷ As a safeguard, a line between "practice of law" and "law-related business services" has been drawn by Singaporean legislators. The notion is that the TPF practice should not enable legal practitioners to have their own financial interest in the case, directly or indirectly through third party funders.⁵⁷⁸ The statutory law is supplemented by the SIArb Guidelines for Third Party Funders which require the funder to refrain from inducing or taking any steps to compromise the integrity of the legal profession.⁵⁷⁹ Other than that, the funder is allowed to impose control

⁵⁷⁴ Rogers, *Ethics in International Arbitration*: §5.12.

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid., §5.13; International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration," Explanation to General Standard 6.

⁵⁷⁷ The Law Society of Singapore, "Guidance Note 10.1.1 Third-Party Funding," section 15.

⁵⁷⁸ Chan Kok Yew, "Champerity, Professional Legal Ethics and Access to Justice for Impecunious Clients," 207.

⁵⁷⁹ *SIArb Guidelines for third party funders*, section 6.1.

on the proceedings. The level of control is largely subject to the funding agreement at present.

Conflicts of interest could arise not only from the improper connection between the lawyers and the funders but also the funders' relations with other actors in the game, which are tackled by both domestic regulations and international "soft laws" that are designed to promote the best practice in international arbitration.⁵⁸⁰ According to the IBA Guidelines on Conflicts of Interest in International Arbitration, for instance, third parties who have a controlling influence on the party or have a direct financial interest in the outcome of the case may be considered effectively to be the real party.⁵⁸¹ The conflicts of interest concern was received well by Singapore, which lays the ground for the introduction of mandatory disclosure.

Professional institutions have taken a wider view of the risks of TPF. SIArb Guidelines concern about the risk of unfair funding agreements due to information asymmetry. These Guidelines require the funder to advise "the party interested in funding" to obtain "independent legal advice on the terms of the Funding Contract".⁵⁸² Other than that, the funder shall not, according to the above guidelines, "induce or take any steps that cause or are likely to cause the funded party's legal practitioner to act in breach of their professional duties".⁵⁸³ This however has not ruled out the possibility that the funder provides input on the funded party's decisions in relation to settlement.⁵⁸⁴

The SIAC Practice Note on Arbitrator Conduct in Cases Involving External Funding has added value to the discussion in mainly two aspects.⁵⁸⁵ First of all, it emphasizes on the impartiality and independence of the arbitral tribunal, with the awareness that the participation of third party funders could give rise to justifiable doubts about the integrity of the tribunal. Other than that, it focuses on the impact of TPF on costs. A balanced view of such impact has been taken

⁵⁸⁰ International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration."

⁵⁸¹ Ibid., Explanation to General Standard 6.

⁵⁸² *SIArb Guidelines for third party funders*, 2.1.2.

⁵⁸³ Ibid., 6.1.1.

⁵⁸⁴ Ibid., 7.1.1.

⁵⁸⁵ Singapore international Arbitration Centre, "SIAC Practice Note on Arbitrator Conduct in Cases Involving External Funding," (2017).

by SIAC. Although the tribunal may consider the existence of TPF in apportioning the costs of arbitration, TPF alone shall not be taken as an indication of the financial status of a disputant party.⁵⁸⁶

The Law Society of Singapore has specifically focused on the potential threat posed by TPF on confidentiality and legal privileges. The legal practitioners subject to the Law Society's Guidance Note should advise their clients on the common interest privilege attached to the documents disclosed to the funders and on the confidentiality agreement with the funders before disclosing any documents.⁵⁸⁷ Common interest privilege is developed by common law to enable disclosures of the case materials and the related communications to third parties without the waiver of the original privilege.⁵⁸⁸ The attachment of common interest privilege to cases with the involvement of TPF is said to be justified by the fact that the funded party and the third party funder have a "common interest" in the confidentiality of the communication.⁵⁸⁹ To further secure the documents disclosed to third party funders, the funded parties may consider signing a non-disclosure and common interest agreement with third party funders. According to this agreement, third party funders undertake the obligation to hold the case materials and other related information from the funded party in complete confidence and will not disclose such materials and information to any other parties without the consent of the funded party.

The involvement of TPF inevitably creates complications in the relation between the lawyer and the client and in the disclosure of the case materials to the tribunal and the opposing party. Despite the above guidance provided by the Law Society of Singapore, the problem remains, however, whether a procedural motion to enquire into the existence and content of the TPF agreement could overcome the "privilege defenses raised by the funded party".⁵⁹⁰ What further complicates the situation is that privilege is almost unheard of in civil

⁵⁸⁶ Ibid., sections 9, 10, 11.

⁵⁸⁷ The Law Society of Singapore, "Guidance Note 10.1.1 Third-Party Funding," section 13.

⁵⁸⁸ Alrashid, Wessel, and Laird, "Impact of Third Party Funding on Privilege in Litigation and International Arbitration," 107.

⁵⁸⁹ Ibid., 108.

⁵⁹⁰ von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure*: 137.

law jurisdictions and it varies from one common law jurisdiction to another. In international arbitration, there are “limited authorities” concerning the appropriate treatment of privileges.⁵⁹¹ Some commentators have argued that common interest or confidentiality agreement between the funder and the funded party is in principle not adequate to prevent the opposing party from making an application to the tribunal in order to gain access to documents in the funder’s possession that are relevant to the matters in issue.⁵⁹²

4.3.2 The interaction between TPF and litigation in exceptional circumstances

In Singapore, the public value of access to justice has to be balanced by the need to preserve the purity of justice.⁵⁹³ In striking such balance, it is observed that an “increasing liberal and qualified approach” has been taken by the Singaporean courts, especially in the context of TPF.⁵⁹⁴ Nonetheless, the general rule remains that TPF as a form of champerty falls foul of “public policy”.⁵⁹⁵ Currently, TPF is only allowed to interact with litigation in exceptional cases. To define “public policy”, Singapore’s courts look not only to the local conditions but also cases from other common law jurisdictions. In the *Otech* case, for example, the Court of Appeal of Singapore referred to the English case *Re Trepca Mines Ltd (No.2)* to explain why in principle TPF is an enemy of “public policy”: “The reason why the common law condemns champerty is because of the abuses to which it may give rise to. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law ...”⁵⁹⁶ However, *Re Trepca Mines* came in the 1960s prior to

⁵⁹¹ “Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration,” 119.

⁵⁹² Stone, “Third Party Funding in International Arbitration: A Case for Mandatory Disclosure?,” 65; MacIntosh, “Common interest privilege: common misconceptions.”; Hubbuck, “Third party funding and the pitfalls of privilege.”

⁵⁹³ Singapore Academy of Law, “Report of the law reform committee on litigation funding in insolvency cases,” 1-2.

⁵⁹⁴ Liang, “Champerty: Relic of a Bygone Era,” 200.

⁵⁹⁵ *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another*, [2007] 1 SLR 989, [2006] SGCA 46, para. 32.

⁵⁹⁶ *Ibid.*

the abolition of criminal and civil liability of maintenance and champerty in England. It is reasonable to ask to what extent the public policy arguments presented by this case are relevant to the present situation in Singapore.⁵⁹⁷

In contemporary times, it is hard to deny that TPF might benefit litigation in multiple aspects if the appropriate safeguards are available, which has been elaborated in length in previous chapters. In Singapore, it is evident that TPF has an important role to play in insolvency cases. Third party funders enable the insolvency professionals to better fulfill their obligation and to facilitate the enforcement of the law.⁵⁹⁸ In the meantime, the negative effects of TPF in insolvency cases have triggered many discussions. When the Singapore Academy of Law proposed the codification of TPF for insolvency claims, they also proposed limits and regulations on the funding activities after a careful study of previous cases and literature regarding TPF for litigation.⁵⁹⁹ The Academy of Law has examined the following procedural risks: the erosion of the integrity of the judicial system, the rise of frivolous claims, the exploitation of the funded party, the funder's control on the procedure, and conflicts of interest. These risks have also been highlighted by case law. In *Re Fan Kow Hin*, for instance, the Singapore High Court presented the view that, as long as the involvement of the funder did not invite the question who pursued the case, the assignment of the fruits of litigation in insolvency cases should not be considered as champerty.⁶⁰⁰ Clearly, the funder's control on the proceedings was one of the top concerns of the court. This is in concert with what has been held in *Re Vanguard Energy Pte Ltd*. Namely, to decide whether TPF contradicts with existing public policies that are directed to protect the due administration of justice, consideration should be given to the interests of the vulnerable litigants.⁶⁰¹

4.4 The regulation of TPF for international arbitration:

⁵⁹⁷ *Re Trepca Mines Ltd (No.2)*, Ch. 199(1963).

⁵⁹⁸ Singapore Academy of Law, "Report of the law reform committee on litigation funding in insolvency cases," 12-13; *Re Fan Kow Hin*, [2018] SGHC 257, para. 5.

⁵⁹⁹ Singapore Academy of Law, "Report of the law reform committee on litigation funding in insolvency cases."

⁶⁰⁰ *Re Fan Kow Hin*, [2018] SGHC 257, para. 21.

⁶⁰¹ *Re Vanguard Energy Pte Ltd*, [2015] SGHC 156, para. 43.

limited but targeted

On 1 March 2017, the Civil Law Act of Singapore was amended to allow TPF in international arbitration.⁶⁰² The amendment serves multiple purposes: first, it abolishes the maintenance and champerty as torts,⁶⁰³ which lays the ground for the permission of TPF for international arbitration. Second, it provides legal certainty and safeguards to the practice of TPF. The Minister for Law, as authorized by section 5B(8) of the Civil Law Act, has made subsidiary legislation to clarify the area where TPF is permitted and to set out qualification requirements for third party funders.⁶⁰⁴ There are also related amendments to the Legal Profession Act and the Legal Profession (Professional Conduct) Rules to spell out the role and duties of legal professionals in the funded procedure.⁶⁰⁵ Beyond statutory regulations, there are various guidelines issued by professional institutions with the aim to promote best practices of TPF. The author has paid attention to the Law Society of Singapore Guidance Note 10.1.1 for Third Party Funding, the SIArb Guidelines for Third Party Funders, and the SIAC Practice Note directed at arbitrator conduct in cases involving external funding. So far, there has been no industrial code of practice applicable to all third party funders operating in Singapore,⁶⁰⁶ even though the call for such code is not unreasonable.

As a preliminary issue, under the amended Civil Law Act, the TPF agreement is defined as “a contract or agreement by a party or potential party to dispute resolution proceedings with a Third-Party Funder for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled”.⁶⁰⁷ This definition says that TPF is a funding option of its own and should be treated separately in regulation. In forging the standards for the practice for TPF, Singapore’s approach is rather straightforward. The regulators rely heavily on statutory regulations

⁶⁰² *Civil Law Act of Singapore (Chapter 43)*, section 5B.

⁶⁰³ *Ibid.*, section 5A.

⁶⁰⁴ *Civil Law (Third-Party Funding) Regulations 2017*.

⁶⁰⁵ The Law Society of Singapore, “Guidance Note 10.1.1 Third-Party Funding,” section 10.

⁶⁰⁶ Ian Choo, “Third-Party Funding in Singapore: The Quest for an Ethics Code in International Arbitration,” in *Transnational Notes* (2018).

⁶⁰⁷ *Civil Law Act of Singapore (Chapter 43)*, para. 82.

in dealing with the key issues of TPF. This section isolates the following regulatory measures that distinguish Singapore from other jurisdictions of comparison: the qualification requirements for third party funders, the mandatory disclosure of TPF, and the ethical and professional rules for legal professionals in cases with the involvement of TPF. This section also explains how professional guidances issued by various institutions supplement the statutory regulation of TPF.

4.4.1 The qualification of third party funders

Many have argued that there is a trend pointing towards minimum requirements for third party funders despite the objections from the funders.⁶⁰⁸ This message is well received by Singapore. In this jurisdiction, the qualification of third party funders is at the core of the regulation of TPF.

In subsidiary legislation, namely the Civil Law (Third-Party funding) Regulations 2017, it is provided that the qualifying third party funders must (1) carry the principal business of funding the costs of dispute resolution proceeding; (2) have a paid-up capital of not less than \$5 million or the equivalent amount in foreign currency or not less than \$5 million or the equivalent amount in foreign currency in managed assets.⁶⁰⁹ Failure to comply with any of the above requirements will render contractual liability, meaning that the rights of the funder under or arising out of the TPF contract affected by or connected with the disqualification or non-compliance are not enforceable by action or other legal proceedings.⁶¹⁰

The Civil Law (Third-Party Funding) Regulations 2016 proposed three requirements for qualifying third party funders: (a) the funder carries on the principal business, in Singapore and elsewhere, of the funding

⁶⁰⁸ Iliescu, "A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact." The funders have expressed concern about the chilling effect of the reequipments for third party funders on the business of TPF. For instance, Woodsford has responded to the Singapore Ministry of Law's public consultation on the TPF bill by saying that any conditions beyond those contained in the ALF code of conduct may not be necessary: Woodsford Litigation Funding, "Response to Singapore Ministry of Law's public consultation on the draft Civil Law (Amendment) Bill 2016 and Civil Law (Third-Party Funding) Regulations 2016," (2016).

⁶⁰⁹ *Civil Law (Third-Party Funding) Regulations 2017*, section 4(1)

⁶¹⁰ *Civil Law Act of Singapore (Chapter 43)*, section 5B(4).

of the costs of dispute resolution proceedings to which the Third-Party Funder is not a party; (b) the Third-Party Funder has access to funds immediately within its control, including within a parent corporation or the Third-Party Funder's subsidiary, sufficient to fund the dispute resolution proceedings in Singapore; (c) the funds referred to in paragraph (b) must be invested pursuant to a third-party funding contract, to enable a funded party to meet the costs (including pre-action costs) of prescribed dispute resolution proceedings.⁶¹¹ These requirements were modified by the 2017 regulations to make it less onerous for the funders.⁶¹² Particularly, the modification allows the funders to fund part of the costs of the proceedings, instead of the entirety of the costs.

However, even after the modification, the conditions on qualifying third party funders seem to be rather arbitrary with the absence of sufficient back-up of empirical research on the financial exposure of the funders in the funded proceedings. Besides, the lack of effective supervisory and auditing system signals the neglect of the fact that neither the financial risks nor the capital capacity of the funders is static throughout the lifecycle of the funding arrangement. With the awareness of this loophole, SI Arb has set out some extra requirements for third party funders in its Guidance:

"4. Financial obligations

4.1 Until the conclusion of the prescribed dispute resolution proceedings or the lawful termination of the funding, a Funder shall take all reasonable steps to ensure that it will continue to meet the qualifications and other requirements of a qualifying third party funders; and a Funder shall notify the Funded Party and its legal practitioner expeditiously if the Funder reasonably foresees or believes that it will no longer be able to meet the qualifications and other requirements of a qualifying Third Party Funder;

⁶¹¹ *Civil Law (Third-Party Funding) Regulations 2016.*

⁶¹² *Civil Law (Third-Party Funding) Regulations 2017.*

4.2 A Funder shall undertake to be audited regularly by a reputable audit firm;

*4.3 At all times, a Funder shall maintain access to adequate financial resources to meet the obligations of the Funder, its subsidiaries and associated entities to fund all disputes that they have agreed to fund, and shall ensure that the Funder, its subsidiaries, and associated entities maintain the capacity: (a) to pay all debts when they become due and payable; (b) to cover aggregate funding liabilities under all of their Funding Contracts.”*⁶¹³

The difference is striking between the approach taken by Singapore and the approach taken by England and Hong Kong in dealing with the qualification of third party funders. Previous chapters have said that third party funders in England and in Hong Kong must look to the ALF code of conduct in England and the HK code of practice respectively for qualification requirements for the funders. These requirements are voluntary, leading to no direct legal consequences. In comparison, the requirements for third party funders form a part of the statutory law in Singapore. Despite the difference in the effect of the requirements, all of the above jurisdictions acknowledge the importance of the qualifying criteria. They are in the agreement that inexperienced funders might not be able to manage the risks in litigation funding.⁶¹⁴

4.4.2 The disclosure of TPF: Who is obliged to disclose and to what extent?

As elaborated previously, Singapore considers the disclosure of TPF as a necessity for managing conflicts of interest and other procedure activities that require the involvement of third party funders. In order to guarantee timely and sufficient disclosure of TPF, Singapore amended the Legal Profession (Professional Conduct) Rules 2015 to impose disclosure obligation on legal professionals. As of 1 March 2017, when conducting any dispute resolution proceedings before a court or

⁶¹³ *SI Arb Guidelines for third party funders*, section 4.

⁶¹⁴ The Association of Litigation Funders, "Statement from the Association of Litigation Funders of England and Wales regarding the Court of Appeal Judgment in *Excalibur*".

tribunal, a legal practitioner is duty-bound to disclose the existence of the TPF agreement and the identity of the funder to the court or tribunal and to every other party to those proceedings.⁶¹⁵ This requires the legal practitioners to check with its client at the outset of the proceeding whether there is a third party funder who has engaged or will engage in the case.⁶¹⁶ As to the timing, the disclosure must be made according to the Legal Profession (Professional Conduct) Rules "(a) at the date of commencement of the dispute resolution proceedings where the third-party funding contract is entered into before the date of commencement of those proceedings; or (b) as soon as practical after the third-party funding contract is entered into on or after the date of the commencement of the dispute resolution."⁶¹⁷

When promoting the transparency of TPF, considerations have also been given to the risk of excessive disclosure, leading to the limitation on the scope of disclosure. Under the law of Singapore, legal practitioners are only obliged to disclose the identity and the address of the funder. It is a question whether and to what extent the tribunal has the authority to request a much detailed disclosure of the TPF arrangement. Conceivably, to determine the scope of disclosure, one should first consult the purpose of the disclosure. If the purpose is to prevent conflicts of interest, limited disclosure might be enough since the arbitrators and the legal practitioners know whether they have a potential conflict with the funder. If the purpose is to inform the opposing party the potential financial exposure of engaging in the proceedings, the scope of disclosure determined by Singaporean law seems to be too narrow. However, justifying a full or a detailed disclosure is not an easy task. Arguably, the wide disclosure of TPF is likely to give rise to frivolous challenges of the arbitrators, unfounded requests for security for costs, or other tactical delays and abuses.⁶¹⁸ At this moment, it may be wise for Singapore to stay with the eclectic

⁶¹⁵ *Legal Profession (Professional Conduct) Rules 2015*, rule 49A.

⁶¹⁶ The Law Society of Singapore, "Guidance Note 10.1.1 Third-Party Funding," section 13.

⁶¹⁷ *Legal Profession (Professional Conduct) Rules 2015*, rule 49(2).

⁶¹⁸ "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," 86.

approach— implementing a limited but mandatory disclosure requirement through subsidiary legislation.

Disclosure of TPF is a comparison point that the author would like to highlight. In Chapter 2, it is noted that English legislation has not addressed the issue of disclosure. The ALF code of conduct in England is also silent on this issue. As a result, mandatory disclosure of TPF for arbitration is still an academic deliberation rather than a definite legal standing in England,⁶¹⁹ despite that many practitioners hold the view that disclosure of TPF to adjudicators is overall positive.⁶²⁰ Under the Hong Kong Arbitration Ordinance, disclosure of TPF is limited and should be made at an appropriate time, namely (a) on or before the commencement of the arbitration or (b) within 15 days after the funding is made.⁶²¹ Nevertheless, unlike Singapore, Hong Kong imposes the disclosure obligation on the funded party instead of on legal practitioners.⁶²² Some have argued that the disclosure of TPF might be more tightly enforced in Singapore since the obligation is directly imposed on legal professionals.⁶²³ The author objects this view with considerations being given to the reality that the arbitral tribunal appreciates the funded party's duty to disclose the funding arrangement which is subject to its supervision.⁶²⁴ Besides, it is debatable that the disclosure obligation of legal practitioners is likely to disadvantage the local legal professionals in the international arbitration business. Singapore has allowed foreigners to represent parties in Singapore-based international arbitration, with the purpose to support the parties' full freedom to select their own representatives.⁶²⁵ The parties may choose foreign legal practitioners over local legal practitioners to avoid the disclosure of TPF.

Beyond statutory requirements, arbitral tribunals in Singapore might rely on arbitration rules and international instruments to deal with disclosure-related issues. Prior to the amendment to the legal

⁶¹⁹ Westminster Legal Policy Forum, "Third party litigation funding and the future of the voluntary code."

⁶²⁰ *Ibid.*, 20.

⁶²¹ *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98U.

⁶²² *Ibid.*

⁶²³ Sim, "Third Party Funding in Asia: whose duty to disclose?."

⁶²⁴ *Ibid.*

⁶²⁵ Born, *International Commercial Arbitration*: 2838-39; Gary Born, *International Arbitration: Cases and Materials*, 2 ed. (Kluwer Law International, 2015), 1029.

profession legislation, the disclosure of TPF has been integrated into the 2017 SIAC Investment Arbitration Rules. It is provided in Rule 24(1) that “the tribunal may order parties to disclose third party funding arrangements which may include the identity of the funder and any other pertinent details which the tribunal requires disclosure of”.⁶²⁶ Although the extent to which TPF is disclosed is replete with controversies, there is little doubt that the disclosure of TPF is essentially important in investment arbitration. Investment arbitration cases are attractive to the funder because of the high case value. Although investment arbitration is not the primary focus of this work, it is worth mentioning the legal considerations as to the disclosure of TPF for investment arbitration since the same considerations are also valid in the context of commercial arbitration. In investment arbitration proceedings, the disclosure of TPF could exceed the existence of the funding agreement and the identity of the funder. It is not rare that the non-funded defendants use TPF as an excuse to ask for security for cost or even annulment of the final award, which may require a wider review of non-party funding arrangements.⁶²⁷ In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.*, for instance, the respondent sought annulment of the arbitral award on the ground, among others, that the tribunal departed from a fundamental rule of procedure by allowing the third party funder, Burford Capital, to be the principal beneficiary, together with King & Spalding, of the proceeds of the arbitral award.⁶²⁸ The respondent filed the request for all available information regarding the matter and the content of the funding agreement at the early stage.⁶²⁹ The tribunal however did not grant this request as it did not consider the request was well justified.

⁶²⁶ Singapore International Arbitration Centre, "Singapore Investment Arbitration Centre Investment Arbitration Rules (draft)," (2016); Singapore International Arbitration Centre, "Investment arbitration rules of the Singapore International Arbitration Centre," (2017).

⁶²⁷ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic (ICSID Case No. ARB/09/1) Decision on Argentina's Application for Annulment.*

⁶²⁸ *Ibid.*, para. 165.

⁶²⁹ *Teinver S.A. and Others v. Argentine Republic*, ICSID Case No. ARB/09/1 Decision on Jurisdiction, 74-75; Dominik Horodyski and Maria Kierska, "Third Party Funding in International Arbitration – Legal Problems and Global Trends with a Focus on Disclosure Requirement," *Zeszyty Naukowe Towarzystwa Doktorantów UJ* 4, no. 23 (2018).

Without explicit instructions in law or arbitration rules, the tribunal does not always entertain the party's request for disclosure.

The disclosure obligation integrated into the law of Singapore does not come without suspicion. For those who compare third party funders to an equity funder or a super counselor, there is no need for disclosure at all.⁶³⁰ The fact that insurers have been "back-stage" for quite a while to enable claimants to pursue the claims without disclosure adds value to the argument against the transparency of the TPF agreement.⁶³¹ From the author's perspective, treating the funder as an equity investor is not a satisfactory approach due to the different investment structures adopted by the equity investor and the third party funder. Nor is it appropriate to treat the third party funder as a counselor or the legal representative, especially in Singapore, for mainly two reasons. First, under Singaporean law, the mission of legal representatives is confined to the provision of legal services and the conducts of the legal representatives are put under heavy statutory regulation.⁶³² Second, the tribunal's authority against third party funder and that against the counsel of the party are fundamentally different.⁶³³ As for insurance, the disclosure of legal costs insurance has never become a prevalent practice in arbitration seated in Singapore even though legal costs insurance bears resemblance to TPF.⁶³⁴ It remains to be seen whether the disclosure obligation will be extended to legal costs insurance.⁶³⁵

4.4.3 The relation between third party funders and lawyers

Singapore amended its legal profession legislation to regulate the relation between third party funders and legal practitioners with the purpose to prevent the latter from being distracted from their main task. The amendments have been made to the Legal Profession Act and its subsidiary legislation, the Legal Profession (Professional

⁶³⁰ Bogart, "Deeply flawed: A perspective on the ICCA-Queen Mary Task Force on third-party funding."

⁶³¹ Ibid.

⁶³² "Report of the Committee to Develop the Singapore Legal Sector."

⁶³³ Alban Dautaj, "The Ethical Paradox Put to Play by Guerilla Tacticians," in *Kluwer Arbitration Blog* (2018).

⁶³⁴ Alonso, "Third-Party Funding's Older Sibling: Legal Costs Insurance and The Issue Of Regulation."

⁶³⁵ Herbert Smith Freehills, "SIAC Investment Arbitration Rules," in *Herbert Smith Freehills Arbitration Notes* (2017).

Conduct) (Amendment) Rules 2015.⁶³⁶ Section 107 of the Legal Profession Act makes it clear that this Act does not prevent a solicitor from—

“(a) introducing or referring a Third-Party Funder to the solicitor’s client, so long as the solicitor does not receive any direct financial benefit from the introduction or referral;

(b) advising on or drafting a third-party funding contract for the solicitor’s client or negotiating the contract on behalf of the client; and

*(c) acting on behalf of the solicitor’s client in any dispute arising out of the third-party funding contract.”*⁶³⁷

To prevent any abuses, the Legal Profession (Professional Conduct) Rules 2015 explicitly prohibits legal professionals from having financial or other interests in a third party funder:

“49B.—(1) A legal practitioner or a law practice must not, directly or indirectly, hold any share or other ownership interest in a Third-Party Funder—

(a) which the legal practitioner or law practice has introduced or referred to a client of the legal practitioner or law practice in relation to dispute resolution proceedings; or

(b) which has a third-party funding contract with a client of the legal practitioner or law practice.

(2) A legal practitioner or a law practice must not receive any commission, fee or share of proceeds from

⁶³⁶ *Legal Profession Act of Singapore (Chapter 161)*, section 107; *Legal Profession (Professional Conduct) Rules 2015*, Rule 49A; *Legal Profession Act of Singapore (Chapter 161)*.

⁶³⁷ *Legal Profession Act of Singapore (Chapter 161)*, section 107(3A).

the Third-Party Funder mentioned in paragraph (1)..."

Apparently, the Singapore legislation cannot stand the blurred line between legal professionals and third party funders, although it approves the role of the legal professionals in facilitating the use of TPF.⁶³⁸ In this regard, the approach taken by Singapore is in sharp contrast with the approaches taken by Hong Kong and England. One might recall what has been introduced in Chapter 3, that Hong Kong allows arbitration funding provided by a person "practicing law or providing legal services" as long as this person does not represent either of the parties.⁶³⁹ Unexpectedly, Hong Kong law includes lawyers and law practices in the TPF industry without specifically addressing the financial connections between legal practitioners and third party funders in the Legal Practitioners Ordinance. The Hong Kong Law Society endorses the permission of TPF for arbitration as well as the related regulatory approach. They have said that the professional rules for legal practitioners and the code of practice for third party funders are enough to resist the potential conflicts of interest and other abuses.⁶⁴⁰ England allows legal practitioners to practice on a contingency basis. There is no prohibition on fee sharing or referrals between lawyers and third party funders as long as the independence and the professional judgment of lawyers are not compromised.⁶⁴¹ To explore why Singapore has taken a rather strict approach in regulating the legal profession in the context of TPF, one has to look beyond the context of TPF. Indeed, this approach is adopted to reflect the understanding that the lawyer's duties are owed to the client, not the funder. But more likely, this approach is the result of Singapore's long-standing conservative perceptions on the regulation of the legal profession.

⁶³⁸ Solicitors are allowed to inform their clients the availability of TPF and to advice on the funding agreement. They may also act on behalf of their clients in any disputes arising out of the third-party funding contract. See: *ibid*.

⁶³⁹ Legislative Council of HKSAR, "Report of the Bills Committee on Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, LC Paper No. CB(4)1161/16-17"; *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017*.

⁶⁴⁰ Law Society of Hong Kong, "Re: Bills Committee on Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016."

⁶⁴¹ *Solicitors Regulation Authority Handbook (version 19)*, (2017), Chapter 9.

Like other jurisdictions, Singapore is well informed of the changes in the landscape of the legal service.⁶⁴² It believes that the authority should respond to the call for the liberation of the practice of law.⁶⁴³ However, the process of change is very slow. In order to preserve the purity of legal practice, lawyers were traditionally prohibited from allying with non-party investment and non-party management. Not until 2014 did the Ministry of Law authorize a committee to review the possibility of alternative business structures for law practices.⁶⁴⁴ The watershed event happened in 2014 when the Ministry of Law submitted the Legal Profession (Amendment) Bill 2014 to establish the Legal Regulatory Authority and a framework for entity regulation as well as permitting alternative business structures for law firms. Subsequently, the amendment was made to the Legal Profession Act on 18 November 2015 with the effect that the law practices were allowed to form Legal Disciplinary Practices (LDP) where non-lawyers were allowed to own equity and/or share the profits of the LDP, subject to the limits contained in the Legal Profession Act.⁶⁴⁵ But if the investment is from a third party funder, law practices should be careful otherwise their ability to manage conflicts of interest might be compromised. The law has prohibited legal professionals or law practices from having any share or other financial interests with the third party funder which they have introduced to their client or which has a funding contract with their clients.

Over the years, many attempts to liberate the practice of law have been denied by legislators. As a result, contingency fees are still a no-go in Singapore. Under the existing law, lawyers are prohibited from forging “partnership” with their clients. Here, “partnership” means not only the cooperation between lawyers and non-lawyers in the law firm business but also the alliance of their interests in an individual case through a contingency fee arrangement.⁶⁴⁶ In a report issued in 2007

⁶⁴² Ministry of Law in Singapore, "New Regulatory Framework for legal practice in Singapore," <https://www.mlaw.gov.sg/news/press-releases/new-regulatory-framework-for-legal-practice-in-Singapore.html>.

⁶⁴³ Ibid.

⁶⁴⁴ Ibid.

⁶⁴⁵ Ministry of Law in Singapore, "Circular on the establishment of the legal services regulatory authority," (2015).

⁶⁴⁶ *Legal Profession Act of Singapore (Chapter 161)*, section 107(3). It clarifies that the champerty prohibition applies to lawyers. Therefore, no solicitor shall (a) purchase or agree to purchase the interest or any part of the interest of his client or

on lawyers' remuneration on a contingency basis, it was said that "the cost of justice had sometimes proven to be prohibitive for individual litigants".⁶⁴⁷ The report suggests that access to justice is part of the public policy and should be promoted by allowing the practice of contingency fees.⁶⁴⁸ It sets out the following reasons in support of its proposition: (1) contingency fees will help the legal profession in Singapore to access to international clients; (2) it is able to ease the burden of public funds; (3) it may benefit small and medium businesses.⁶⁴⁹ The committee who issued this report also considers that the increase in the number of the cases should not be a concern since the contingency lawyers have a direct financial stake in the outcome of the case, therefore they have no interest in bringing frivolous claims.⁶⁵⁰ However, Singaporean legislators did not immediately accept the proposals for introducing contingency fees. They seek to do more assessment of the risks of a contingency agreement, such as conflicts of interest, the rise of frivolous claims, the rise of costs of dispute resolution, etc., before making any changes.⁶⁵¹

With the above being said, it should not be surprising that the legal profession law was amended to build a "wall" between legal professionals and third party funders. In the author's view, it is likely that the Singapore approach is more efficient than the approaches taken by England and Hong Kong in dealing with the threat posed by TPF to the legal profession, since the former is directed at lawyers and is able to give rise to direct legal consequences while the latter are comprised of voluntary rules contained in the Hong Kong code of practice and the ALF code that merely advise the funders to not induce lawyers to violate their professional duties.⁶⁵² The author believes that

of any party in any suit, action or other contentious proceeding brought or to be brought or maintained; or (b) enter into any agreement by which it is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding.

⁶⁴⁷ "Report of the Committee to Develop the Singapore Legal Sector," 30.

⁶⁴⁸ Ibid.

⁶⁴⁹ Ibid., 31.

⁶⁵⁰ Ibid.

⁶⁵¹ "Speech by Senior Minister of State for Law, Indraneel Rajah, during the Committee of Supply Debate 2017,"

<https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/speech-by-senior-minister-of-state-for-law--indraneel-rajah--duri0.html>.

⁶⁵² Oscar Suárez Bohórquez and Lena Stoll, "Third Party Litigations funds and the

the Singapore approach which is implemented through clear and tailor-made ethical provisions for lawyers is more likely to be appreciated by arbitration users who always seek to guarantee that their interests will take priority and not only be considered as a tool for lawyers and funders to obtain “windfall”.

4.5 The question lies ahead: Should TPF for domestic arbitration be allowed?

Currently, TPF is confined to international arbitration and the related proceedings in accordance with regulation 3 of the Civil Law (Third-Party Funding) Regulations 2017.⁶⁵³ It confuses the practitioners why domestic arbitration has been excluded. In fact, even the authority who has proposed the distinction between TPF for international arbitration and that for domestic arbitration does not have a compelling answer to this question. In April 2018, the Ministry of Law in Singapore initiated a public consultation on the practice of TPF. Respondents were asked whether they were of the view that there was “a need to expand the safe harbour for funding of international arbitration cases into new areas...” and if yes, where and why.⁶⁵⁴

Understandably, at this moment the permission of TPF for litigation is deterred since it has to be preceded by plenty of discussions on the public policies and procedural concerns that only arise in litigation. But it is difficult to explain why TPF is not allowed to be tested out in domestic arbitration. Maintaining Singapore’s reputation as one of the leading arbitration seats in the world only explains why TPF is permitted in international arbitration but not why TPF for domestic arbitration is excluded.⁶⁵⁵ If a more coherent and reasonable regulation of TPF is to form, the urgency to permit TPF for domestic

lawyer’s ethics,” in *Leiden Law Blog* (2018).

⁶⁵³ *Civil Law (Third-Party Funding) Regulations 2017*, regulation 3.

⁶⁵⁴ Ministry of Law in Singapore, “Public Consultation to Seek Feedback on the Third-Party Funding Framework”.

⁶⁵⁵ Varun Mansinghka, “Third-Party Funding in International Commercial Arbitration and its Impact on Independence of Arbitrators: An Indian Perspective,” *Asian International Arbitration Journal* 13, no. 1 (2017): 100; Ministry of Law in Singapore, “Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016”.

arbitration should be carefully assessed with considerations being given to the following situations.

First of all, regulation 3 of the Civil Law (Third-Party Funding) Regulations 2017 has limited effect in confining TPF to international arbitration and the related proceedings. Although Singapore has a dual tack regime with the IAA governing international arbitration and the AA governing domestic arbitration, the parties are free to opt out of one regime into the other.⁶⁵⁶ In fact, the bifurcation of the arbitration legislation is not designed to serve the distinction between funding for international arbitration and that for domestic arbitration. The difference between the IAA and the AA is that the former carries more international standards and less common law characteristics.⁶⁵⁷ Over the years, many efforts have been made to ally the domestic regime with the international one and vice versa.⁶⁵⁸ Although there are still differences between the two regimes. Arguably, domestic arbitration is less likely to give rise to procedural concerns since there is closer judicial supervision on the arbitration procedure.⁶⁵⁹ As such, if the legislators have to fine-tune the regulation of TPF for arbitration exclusively for one regime without affecting the other, shouldn't they start from domestic arbitration where they can make good use of the judicial authorities in monitoring and regulating the practice of TPF? Besides, if TPF is considered a tool to facilitate access to arbitration,⁶⁶⁰ its absence in domestic arbitration has created, if not insurmountable problems, at least some difficulties for parties who require external funding.

Second, compared to other jurisdictions, Singapore's approach in dealing with TPF is rather stringent and straightforward. As introduced previously in this chapter, Singapore employs statutory measures instead of soft laws in dealing with some key issues related to TPF. This should have made Singapore more confident in permitting TPF at least on the same scale as other jurisdictions of

⁶⁵⁶ Charles Lim, "The Developmental Life Cycle of International Arbitration Legislation — Singapore IAA Case Study," *Asian International Arbitration Journal* 7, no. 1 (2011): 8.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ *Ibid.*, 9.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ V. K. Rajah, "The case for Singapore to take the lead in international arbitration ethics," *Asian International Arbitration Journal* 14, no. 1 (2018): 48.

comparison. However, the reality is that the platform for TPF in Singapore is much narrower compared to others. England permits TPF across all civil cases, whether they are settled by litigation or by arbitration. Hong Kong has recently permitted TPF in both international and domestic arbitration proceedings. Civil law jurisdictions such as the Netherlands and China have never had a general prohibition on TPF, which will be introduced in greater detail in the following chapters. It is a valid question to ask whether the distinction between international and domestic arbitration made by Singaporean legislators in permitting TPF can stand-still.

4.6 Takeaways

Due to the law of maintenance and champerty and the related public policy concerns, Singapore has long been hostile towards non-party funding options for dispute resolution. TPF was not permitted until 2017 when the Civil Law Act was amended to pave the way for TPF for international arbitration. This change serves mainly two purposes: to enhance access to justice in international arbitration and to maintain Singapore's position as one of the world's leading arbitration centers. TPF only interacts with litigation in exceptional cases where the courts find it necessary to restrict the application of the law of maintenance and champerty to uphold legitimate interest and modern public policies. It is so far well established in litigation that TPF should be permitted when it serves the purpose of section 272(2)(c) of the Company Law or when the TPF agreement contains "legitimate commercial interests".

It is understood that TPF endangers the integrity of the law unless proper safeguards are ready. Singapore has paid attention not only to its own conditions but also the experience of other jurisdictions to understand what the potential negative effects of TPF on the funded arbitration procedure are. The regulators have reached agreement on that considerations should be given to the following issues associated with TPF at this stage: the disclosure of TPF, the qualification of third party funders, the funder's impact on legal professionals, conflicts of interest, the funder's control on the proceedings, the threat of TPF to confidentiality of case materials and the legal privilege, the impact of TPF on the costs order, etc. Some of these issues are currently managed by statutory measures while others are covered by guidance issued by various professional institutions. In litigation, the discussions on the impact of TPF are scarce. From previous cases, it

can be seen that the courts have focused largely on the control of the funder over the conduct of the insolvency proceedings.

As to the regulation of TPF for international arbitration, three regulatory measures distinguish Singapore from other jurisdictions of comparison: the qualification requirements for third party funders, the mandatory disclosure of TPF, the ethical and professional rules for legal professionals in cases with the involvement of TPF. Under the Civil Law (Third-Party funding) Regulations 2017, only professional third party funders who focus their business on funding the costs of dispute resolution are allowed to engage in international arbitration. They must comply with a group of requirements set out in the above Regulations. Failure to comply with these requirements will render direct legal consequences. Disclosure is at the core of the regulation of TPF in Singapore. In order to guarantee timely disclosure of TPF, Singapore amended the Legal Profession (Professional Conduct) Rules 2015 to impose a disclosure obligation on legal practitioners. As of 1 March 2017, when conducting any dispute resolution proceedings before a court or tribunal, a legal practitioner is duty-bound to disclose the existence of the TPF agreement and the identity of the funder to the court or tribunal and to every other party to these proceedings. Beyond that, some extra provisions have been added to the Legal Profession (Professional Conduct) Rules 2015 with the effect of preventing the legal practitioners from having financial or other interests in a third party funder who the legal practitioners have introduced or referred to the client or who has a funding contract with the client. By doing so, Singaporean legislators have expressed the view that it is not sufficient to rely only on traditional professional and ethical rules for legal practitioners in managing the potential risks of TPF.

CHAPTER 5 TPF IN THE NETHERLANDS

5.1 Introduction

Traditionally, civil law does not have much to say about TPF. At no point in the Dutch litigation or arbitration procedure has the legality of TPF been raised.⁶⁶¹ In fact, before TPF emerged, there were already various non-party funding options available to the parties in dispute resolution, for instance, Legal aid and LEI.⁶⁶² At present, TPF is found to be a supplement to the traditional funding options and is favored by Dutch legislators in collective redress proceedings where problems such as lack of awareness of the rights, lack of finance and psychological reluctance are likely to be severe.⁶⁶³ It is important to note that TPF is hardly a new phenomenon in the Dutch context.⁶⁶⁴ Third party funders, who are often described as “professional, (inter)nationally operating investment companies or financing companies affiliated with the insurance industry”,⁶⁶⁵ have been

⁶⁶¹ The European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, "Collective redress in the Member States of the European Union," (2018), 33.

⁶⁶² Ianika Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," *Journal of Law, Economics & Policy* 8(2012): 549; Bench Nieuwveld and Shannon, *Third-Party Funding in International Arbitration*: 190-91; Ben van Velthoven and Carolien M. Klein Haarhuis, "Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands," *Journal of Empirical Legal Studies* 8, no. 3 (2011).

⁶⁶³ "Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade) (Kamerstuk 33126 nr. 3)."; European Commission, "Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC," (2018), 8-9.

⁶⁶⁴ J. J. Dammingh and LM van den Berg, "Procesfinanciering door derden: een oplossing of een probleem?," *Tijdschrift voor Civiele Rechtspleging* TCR 2017. Cento Veljanovski has reported that, "while not entirely new, the emergence of TPLF has recently been put in the spotlight with the entry of dedicated firms investing in commercial litigation in the U.K., Europe, and further afield." See: Veljanovski, "Third-Party Litigation Funding in Europe," 405.

⁶⁶⁵ Mr. dr. A. van der Krans, "Third party litigation funding: De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen," *Onderneming en Financiering* 2018-2(2018).

operating the business of funding legal claims in the Netherlands for few decades.⁶⁶⁶

As a preliminary issue, it has to be explained how to understand TPF under Dutch law. TPF is often referred to as “process financing” or “third party litigation funding” by Dutch scholars.⁶⁶⁷ It is conceived as an investment arrangement under which third party investors pay the costs of the proceedings in exchange for a portion of the final proceeds.⁶⁶⁸ TPF could be provided by various institutions. Unlike Singapore, the Netherlands does not require the funders to have their primacy business in funding legal claims. In collective litigation, funders could be external funders or representative organizations who fund the claims for their own benefits.⁶⁶⁹ TPF has been distinguished from LEI and other funding options in legal discussions.⁶⁷⁰ In accordance with the laws of the Netherlands, these funding options are not subjected to the same level of scrutiny and regulation, which will be elaborated in greater detail later in this chapter. So far, the development of TPF in collective litigation has drawn a lot of attention from Dutch legislators. In 2012, the Minister for Safety and Justice reported to the Parliament on TPF and claim culture.⁶⁷¹ TPF is defined by the Minister as an arrangement under which third party funders agree to fund the costs of the dispute resolution proceedings and in

⁶⁶⁶ Bench Nieuwveld and Shannon, *Third-Party Funding in International Arbitration*: 191; Omni Bridgeway introduction; Marc Krestin and Rebecca Mulder, “Third-Party Funding in International Arbitration: To regulate or Not to Regulate?,” in *Kluwer Arbitration Blog* (2017).

⁶⁶⁷ H. B. Krans and F. Q. van de Pol, “Vrije advocaatkeuze en rechtsbijstandverzekeringen,” *Tijdschrift voor Civiele Rechtspleging* TCR 2018(2018).

⁶⁶⁸ van der Krans, “Third party litigation funding: De voordelen, aandachtspunten en aanbevelingen om risico’s te beheersen.”

⁶⁶⁹ Representative organizations refer to a foundation (stichting) or an association (vereniging) within the meaning of article 3:305a of the BW. The amended BW requires representative organizations to have sufficient means to bear the costs of instituting the legal claims. They either fund the claims by themselves or with the help of external third party funders.

⁶⁷⁰ Balie Provincie Antwerpen, “Financiering door derden van vorderingen in het kader van geschillenbeslechting,” <https://jubel.be/financiering-door-derden-van-vorderingen-in-het-kader-van-geschillenbeslechting/>.

⁶⁷¹ “Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade)(Kamerstuk 33126 nr. 6),” (2012).

return share a percentage of the final recovery if the case is successful, which is similar to the definition of TPF proposed by scholars.⁶⁷² The Minister is well informed that TPF is able to ease the financial pains of the parties in pursuing legal claims, whereas it does not come without risks.⁶⁷³ In the recent proposal for the amendment to the Civil Code (BW) and the Code of Civil Procedure (Rv) with the purpose to facilitate the settlement of mass claims, the discussions of the risks of TPF for collective litigation are followed by a few prospective regulatory measures.⁶⁷⁴ Thus far, these measures have not all been translated into reality.⁶⁷⁵ The legislative history will be revisited in section 5.4.

Currently, there is no regulation specifically for TPF in the Netherlands.⁶⁷⁶ However, this lack of specific rules for TPF does not mean that TPF is completely unregulated under Dutch law. Observably, TPF is reviewed by the court in class actions for due process reasons.⁶⁷⁷ Dutch law seems to have empowered the court to take an active role in assessing the impact of TPF on the funded collective litigation procedure and the interests of the collective parties.

⁶⁷² Ibid., §4.1.

⁶⁷³ Ibid.

⁶⁷⁴ "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Kamerstuk 34608 nr. 6)," (2018).

⁶⁷⁵ The proposal addresses TPF directly with concerns over improper influence of the funder, excessive costs of TPF, and other abusive practices conducted by the funder. The related provisions in the amended law however are silent on TPF. Instead, they are directed at representative organizations. See: "Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade)(Kamerstuk 33126 nr. 6)," §4.2-4.5; Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A," (2019).

⁶⁷⁶ "Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade)(Kamerstuk 33126 nr. 6)."; The European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, "Collective redress in the Member States of the European Union," 33.

⁶⁷⁷ Krestin and Mulder, "Third-Party Funding in International Arbitration: To regulate or Not to Regulate?."

A good illustration is *Fortis v Shareholders* in which the court decided to adjust the compensation payable to third party funders who also acted as the representative organization in order to ensure that the collective parties had been properly represented and their interests had been sufficiently safeguarded.⁶⁷⁸ In this case, the legal basis for judicial supervision on funding arrangements mainly lies in the BW and the Dutch Act on Collective Settlement of Mass Claims (the WCAM).⁶⁷⁹ More details about this case can be found in sections 3 and 4 of this chapter.

Parliamentary files 34608 contain the most recent official discussions of TPF in the Netherlands.⁶⁸⁰ The legislators have given considerations to the role of the third party funder in collective litigation and the necessity for the court to test whether the funder has had an improper influence on the procedure or other participants.⁶⁸¹ Among other things, it has been proposed that the law should be amended to introduce more stringent rules for representative organizations who might act as third party funders or represent the interests of third party funders in collective litigation proceedings. This proposal could face challenges from those who see TPF as no different from insurance or claim assignment and on this basis are opposed to a separate set of rules for TPF. Nonetheless, some of the proposed safeguards have been approved by the Senate in March 2019. As a result, representative organizations are more tightly controlled in order to resist the risks of non-party financial incentives in settling mass claims.⁶⁸² At around the same time, the EU parliament was in the midst of discussing a proposal for a directive on representative actions for the protection of the collective interests of consumers, which is likely to lead to enhanced regulatory measures for the

⁶⁷⁸ *Fortis v Shareholders* ECLI: NL: GHAMS: 2017: 2257.

⁶⁷⁹ *ibid.*

⁶⁸⁰ "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Kamerstuk 34608 nr. 6)," §4. This proposal officially became law on 1 April 2019 according to Staatsblad van het Koninkrijk der Nederlanden 2019, 130. This law will enter into force at a time to be determined by Dutch legislators. See: <https://zoek.officielebekendmakingen.nl/stb-2019-130.html>.

⁶⁸¹ *Ibid.*

⁶⁸² Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."

practice of TPF in the member states.⁶⁸³ This chapter will offer a detailed analysis of not only the proposed regulatory measures but also the underlying rationale. Claimcode 2019 as a self-regulation of representative organizations in collective litigation also closely interacts with TPF. It however differs from the English code of conduct and Hong Kong code of practice in two main aspects: first, Claimcode is not directed at third party funders. It addresses external TPF available for representative organizations. Second, Claimcode contains no mechanism ensuring enforceability.

The Netherlands is an important jurisdiction to research in order to reveal how civil law conceives TPF. Besides, it is believed that the Dutch approach in dealing with TPF provides valuable insights for China. The questions posed to China include whether Chinese law should follow suit in terms of creating more opportunities to pursue mass claims, and more importantly, whether and how the use of TPF for mass disputes needs to be balanced by appropriate safeguards. Preliminary answers to these questions can be found in chapter 6. In this chapter, the author first looks to the demand for TPF in the Netherlands as well as the dogmatic and ethical objections that scholars and practitioners have put forward against the use of TPF. Then she reviews the impact of TPF with the focus on TPF for collective litigation. This is followed by an introduction to the 2019 amendment of the civil law legislation and the potential impact of this amendment on the conduct of TPF.⁶⁸⁴ After that, the related EU legislative actions are discussed as they will have an impact on the future of TPF in the Netherlands. Claimcode 2019 has recently presented a new principle with regard to TPF and therefore is included into the discussion. Based on the above efforts, the author concludes this chapter with a question for future research regarding the approach in dealing with representative organizations as a special type of third party funders.

⁶⁸³ EUR-Lex, "COM (2018) 184: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC," <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52018PC0184>.

⁶⁸⁴ Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."

5.2 The platform for TPF

TPF does not raise concerns in terms of legality in most civil law jurisdictions.⁶⁸⁵ It is acknowledged by the Dutch authorities that non-party funding mechanisms, such as TPF, legal aid, and LEI, constitute an essential precondition for the proper functioning of the legal system.⁶⁸⁶ The Dutch perceptions of TPF are underpinned by access to justice which is said to be one of the most significant components of the TPF equilibrium.⁶⁸⁷ However, with the potential negative effects of TPF in mind, Dutch legislators manage to form a balanced view on TPF. It is stated in parliament 34608 No.6 that the desirability of TPF must be considered on a case-by-case basis. It is proposed that certain abuses need to be avoided as much as possible by enhancing court scrutiny on cases with the involvement of TPF. This part is designed to reveal the implications of access to justice under Dutch law as well as the balancing factors.

5.2.1 Access to justice under Dutch law and its implications on TPF

Access to justice is one of the elements of Dutch law that is significant to TPF, although it has never been well-defined as a legal term. Normally, access to justice is taken on as a legal principle implying equal access to various necessities such as legal advice, legal aid, a neutral judicial body, etc.⁶⁸⁸ The right to access to justice is deemed as a human right under Dutch law, which is in line with article 6(1) of the European Convention on Human Rights (the ECHR) that: "in the determination of his civil rights...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Of course, the effect of article 6(1) depends largely on the financial capacity of the parties and the national laws of the member states.

⁶⁸⁵ Wieger Wielinga et al., "Third Party Litigation Funding: A Civil Law Perspective (Part 1 of 4: The Challenges and Opportunities for Litigation Funding)," *Litigation Finance Journal* (2018).

⁶⁸⁶ Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 549.

⁶⁸⁷ "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Memorie van Toelichting) (Kamerstuk 34608 nr. 3)," (2016).

⁶⁸⁸ S. Dekker, "Rechtsbijstand: Brief van de minister voor rechtsbescherming," (2018).

It is generally accepted in the Netherlands that access to justice cannot be guaranteed if the legislators fail to provide optimum conditions for settling disputes through judicial means.⁶⁸⁹ But this does not follow that the right to access to the court system is or should be absolute. From the Dutch perspective, litigation should be the last resort for the parties to disputes.⁶⁹⁰ In reality, access to justice is subjected to at least the following limitations: market-oriented lawyers' fees,⁶⁹¹ court fees,⁶⁹² the deficits of the subsidized legal aid system,⁶⁹³ the risk of adverse costs. Equal access to justice is likely to be illusory for those who are above the income limits for the eligibility of the subsidized legal aid but have difficulty in paying the commercial rates of the legal service.⁶⁹⁴ Even when the parties can afford the costs of the proceedings, the quality of the legal service often lacks transparency, leading to difficulties for the parties as a layperson to tell whether they have received qualified legal service that is worth the money they have paid.⁶⁹⁵ In this landscape, TPF is likely to be more attractive than ever to policymakers as it can be expected to, on the one hand, supervise the conduct of lawyers and provide case management services, and on the other hand, reduce the parties' fear of the costs of dispute resolution.

In collective litigation, access to justice could be easily jeopardized without external funding.⁶⁹⁶ Not-for-profit organizations are not

⁶⁸⁹ M. ter Voert and C. Klein Haarhuis, "Paths to Justice in the Netherlands 2014."

⁶⁹⁰ Christopher Hodge, Stefan Vogenauer, and Magdalena Tulibacka, *The costs and funding of civil litigation: a comparative perspective* (Oxford ; Portland, Or. : Hart Pub., 2010), 404.

⁶⁹¹ The European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, "Collective redress in the Member States of the European Union," 31.

⁶⁹² "Third-Party Funding in Singapore: The Quest for an Ethics Code in International Arbitration," 2.11-2.12.

⁶⁹³ A Survey has shown that 67% of the Dutch population experienced one or more justiciable problems in the five year survey period. Respondents who were higher educated, employed, and aged between 25

and 45 reported more problems than the lower educated, retired and the youngest and oldest age groups. See: B. van Velthoven and M. ter Voert, "Paths to justice in the Netherlands," (2004).

⁶⁹⁴ Dekker, "Rechtsbijstand: Brief van de minister voor rechtsbescherming."; Verbond van Verzekeraars, "De toekomst van de rechtsbijstandverzekeraar: hoe ziet deze er uit in 2025?," (2017).

⁶⁹⁵ Dekker, "Rechtsbijstand: Brief van de minister voor rechtsbescherming."

⁶⁹⁶ Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 553-54; I.

always financially capable of meeting the demand of the affected persons.⁶⁹⁷ Such organizations have been very cautious in initiating proceedings due to limited capital resources.⁶⁹⁸ Unsurprisingly, this has become an impetus for commercial funders to take part.⁶⁹⁹ It is worth noting that, in collective litigation, the lack of funding is not the only barrier for access to justice. The Dutch funder Omni Bridgeway, for instance, has identified in its report to the European Commission a few other characters of collective litigation that have the potential to diminish the effectiveness of the remedies: first of all, there is a lack of awareness of the harms; secondly, collective litigation usually involves a great deal of complexity of the factual circumstances of the cases; thirdly, collective litigation involves variations within the applicable national laws.⁷⁰⁰ It remains a question whether the participation of third party funders is likely to remedy the situation.

Both in academic and in practical areas, it has been argued that access to justice cannot be sufficiently guaranteed unless commercial entities are permitted a role.⁷⁰¹ This view is well received by Dutch legislators

W. Opstelten, "Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade) 33126 nr. 6," (2012). It is observed by the Dutch authority that, without TPF, collective actions can hardly occur. M.B.M. Loos, "Individuele handhaving van het consumentenrecht bij de burgerlijke rechter," *Tijdschrift voor Civiele Rechtspleging* 2011.

⁶⁹⁷ Charlotte Pavillon, "Public interest litigation in the Netherlands: Recent developments in the collective enforcement of consumer rights" (paper presented at the In the Name of the Consumers? Public Interest Litigation in Europe, 2014), §3.1.

⁶⁹⁸ As Charlotte Pavillon has observed, the Dutch consumer association (*Consumentenbond*) is far from meeting the need of the affected persons to access to justice because the lack of funding along with some other reasons. See: *ibid.* M.B.M. Loos has presented a similar observation: the costs of conducting legal proceedings are without a doubt the largest barrier for submitting a consumer dispute to the court. See: Loos, "Individuele handhaving van het consumentenrecht bij de burgerlijke rechter."

⁶⁹⁹ Pavillon, "Public interest litigation in the Netherlands: Recent developments in the collective enforcement of consumer rights."

⁷⁰⁰ Omni Bridgeway, "Response to the European Commission: towards a coherent European approach to collective redress," (2011): 3-4.

⁷⁰¹ Verbond van Verzekeraars, "De toekomst van de rechtsbijstandverzekeraar: hoe ziet deze er uit in 2025?." In 2017, the limit for receiving subsidised legal aid is a fiscal annual income of € 26,000. And it is inconceivable that this limit will be reduced in the future in accordance with the report from the Association of Dutch Insurers. Omni Bridgeway, "Response to the European Commission: towards a

who are willing to integrate and to regulate TPF in collective litigation so that the Dutch legal system can accommodate the increase in the value, scale, and complexity of mass claims.⁷⁰² Admittedly, TPF is not the only way to enhance access to justice. There are at least two possible methods of resolving the problem of cost burden that can be identified in Dutch law: cost avoidance solutions and cost spreading solutions. Recently, Dutch law has been reformed to allow the parties to pursue the proceedings without legal representation in certain cases,⁷⁰³ which is an illustration of cost avoidance solutions. To spread costs, TPF is only one of the tools that could be used. As previously mentioned, before TPF emerged, the Netherlands relied on legal aid and LEI to enable parties to bring their claims to the court or arbitral tribunal. Legal aid is publicly funded and bears little relevance to commercial cases. LEI is nevertheless a commonly consulted resort and has played a significant role in the commercial realm and beyond.⁷⁰⁴ However, it is an accepted fact in the Netherlands that LEI is unable to come close to achieving the ideal of equal justice for all.⁷⁰⁵ Contingency fees are prohibitive in the Netherlands except in personal injury cases, and therefore, have a very limited impact on access to justice.⁷⁰⁶ Precisely, Dutch lawyers are allowed to charge on

coherent European approach to collective redress," 4.

⁷⁰² De Minister voor Rechtsbescherming, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) nr. 9," (2018).

⁷⁰³ Loos, "Individuele handhaving van het consumentenrecht bij de burgerlijke rechter."

⁷⁰⁴ van Velthoven and Haarhuis, "Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands," 590.

⁷⁰⁵ *Ibid.*, 588.

⁷⁰⁶ Not until 2014 did the government decide to launch an experiment in personal injury cases to allow lawyers to charge on "no win no fee" basis. The aim according to the Minister was to offer more access to justice in personal injury cases where the costs of lawyers could be prohibitively high for many parties. The Netherlands Bar Association was required to evaluate the effect of this experiment at the proper time. See: Minister Dekker, "Beantwoording Kamervragen over no cure no pay-verbod binnen de advocatuur," <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/08/15/antwoorden-kamervragen-over-het-bericht-het-no-cure-no-pay-verbod-binnen-de-advocatuur-moet-worden-opgeheven>.

There are many calls for the use of result-based remuneration for lawyers. Critics have said that the Netherlands has not paid enough attention to other jurisdictions' experience of dealing with result-based remuneration for lawyers. At present, there is no sign that contingent lawyer funding will be available in all civil dispute

contingency basis, but not for all the costs of their service.⁷⁰⁷ The rule is laid down in the by-laws of the Dutch Bar Association. There is no sign that Dutch law will expand the permission of contingency fees any time soon.⁷⁰⁸ The above observations serve the purpose of obtaining a balanced and comprehensive view of the interaction between access to justice and TPF in the Dutch context.

5.2.2 The competing component: the fear of claim culture

The idea of promoting TPF in order to facilitate access to justice faces challenges from the fear of claim culture.⁷⁰⁹ The Minister for Security and Justice, I. W. Opstelten, has addressed this fear in the context of collective litigation in 2012, as recorded by parliamentary file 33126 no. 6.⁷¹⁰ As a preliminary issue, the minister understands claim culture as a group phenomena instead of an individual phenomenon, which contains a great deal of uncertainty.⁷¹¹ On this basis, he said that excesses in collective litigation are a possibility that could be deemed as a signal for claim culture, however with a reservation about the existence of such culture in the Netherlands. The Minister's words do not in any way suggest that TPF contributes to an increasing claim culture. On the contrary, he suggested that the issue of whether there was an increasing claim culture required more empirical evidence. Nevertheless, the above does not negate that, to prevent the risk of claim culture, attention should be paid to the risks of TPF and the possible safeguards. It has always been on the agenda of the Dutch authorities to guard the legal system against excessive litigation that could lead to the overburden of the judicial system.⁷¹² Back in 1999,

resolution proceedings any time soon due to the lack of statistics regarding how much valuable contingent lawyer funding could add to the Dutch legal system. See: *ibid.*

⁷⁰⁷ Dutch Bar Association (NOvA), "Legal Profession Bye-law," Part 7.4. Contingency Pay.

⁷⁰⁸ Minister Dekker, "Beantwoording Kamervragen over no cure no pay-verbod binnen de advocatuur".

⁷⁰⁹ Dammingh and van den Berg, "Procesfinanciering door derden: een oplossing of een probleem?."

⁷¹⁰ Opstelten, "Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade) 33126 nr. 6."

⁷¹¹ *Ibid.*

⁷¹² Tweede Kamer der Staten-Generaal, "26 630 Claimcultuur nr. 1," <https://zoek.officielebekendmakingen.nl/kst-26630->

Minister Korthals presented his view in parliamentary file 26630 on the development in litigation behavior in order to bring some coherence into the fragmented discussions about claim culture.⁷¹³ He defined claim culture as a culture in which citizens frequently challenged each other for a large amount of compensation for damages suffered.⁷¹⁴ He also identified some factors that demonstrated that claim culture was taking place, although it was not possible at that time to quantify the actual change. With the passage of time, however, it is questionable whether Korthals's findings still bear relevance to the current situation.

In academic discussions, it is reported by some scholars that TPF slightly increases the level of litigation in the Netherlands.⁷¹⁵ But this has never been well-evidenced or become a reason for a crackdown on TPF.⁷¹⁶ The potential risk of the increase in the number of cases has only triggered discussions on the necessity of judicial supervision on the quality of the funded proceedings.⁷¹⁷ Currently, it is a preponderant view among Dutch legislators and scholars that claim culture seems to imply more than unnecessary claims and the ambiguity in the meaning of claim culture has led to controversy on whether claim culture exists in the Netherlands.⁷¹⁸ Nevertheless, this view does not remove the concern, about how to prevent claim culture without denying the parties' right to access to justice. In the context of TPF, the concern could be further specified to how to settle disputes

1.html?zoekcriteria=%3fzkt%3dUitgebreid%26pst%3dTractatenblad%257cStaatsblad%257cStaatscourant%257cGemeentebld%257cProvinciaalblad%257cWaterschapsblad%257cBladGemeenschappelijkeRegeling%257cParlementaireDocumenten%26vrt%3dclaimcultuur%26zkd%3dInDeGeheleText%26dpr%3dAlle%26sdt%3dDatumPublicatie%26ap%3d%26pnr%3d30%26rpp%3d10%26_page%3d29%26sorttype%3d1%26sortorder%3d4&resultIndex=282&sorttype=1&sortorder=4.

⁷¹³ Ibid.

⁷¹⁴ Ibid.

⁷¹⁵ von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure*: 90.

⁷¹⁶ Krestin and Mulder, "Third-Party Funding in International Arbitration: To regulate or Not to Regulate?."

⁷¹⁷ Ianika Tzankova, "Wetsvoorstel collectieve schadevergoedingsactie: een oplossing voor welk probleem ook alweer?," *Tijdschrift voor Vergoeding Personenschade* TVP 2017.

⁷¹⁸ Ibid., section 2.2.

between parties through legal proceedings without excessive costs of the opposing parties or procedural abuses.

Not only in the Netherlands but also in other jurisdictions of comparison, the interaction between TPF and claim culture has never been a clear-cut issue. Even so, the concept of claim culture, which at least implies the risk of excesses in litigation and the lack of merits of the claims,⁷¹⁹ has become not only an integral part of policy discourse but also a reason for amending the law.⁷²⁰ From a comparative perspective, the Dutch legal system appears to be better protected from the risk of claim culture, compared to England.⁷²¹ As observed by Tzankova, Dutch law has no lack of instruments to guarantee legal efficiency and to prevent excessive burdens on the judiciary, without the parties being affected.⁷²² On this basis, she posed the question whether stricter requirements on representative organizations and their conducts are necessary and beneficial, with considerations being given to the risk that these requirements might have a chilling effect on the use of TPF which is likely to lead to insufficient financing of the Dutch collective redress proceedings.⁷²³ At the other end of the spectrum, some scholars are taking one step further to argue that TPF is likely to do the opposite of contributing to the claim culture.⁷²⁴ According to Van der Krans, for instance, the funders are commercially motivated to filter out unreasonable legal claims.⁷²⁵ The above views have not given sufficient weight to the risks of TPF in the eyes of Dutch legislators. The year of 2019 has seen more safeguards being adopted by Dutch law and the industrial self-regulation for representative organizations with the purpose to secure the integrity

⁷¹⁹ Ibid., section 2.1.

⁷²⁰ The fear of claim culture is sometimes described as the fear of the “US style litigation” and commerce in private law enforcement. See: *ibid.*; van der Krans, “Third party litigation funding: De voordelen, aandachtspunten en aanbevelingen om risico’s te beheersen,” 4.1.

⁷²¹ Marieke van Hooijdonk and Peter Eijssvoegel, *Litigation in the Netherlands: Civil Procedure, Arbitration, and Administrative Litigation*, 2 ed. (Wolters Kluwer Law & Business, 2012), 2.5.

⁷²² Tzankova, “Wetsvoorstel collectieve schadevergoedingsactie: een oplossing voor welk probleem ook alweer?.”

⁷²³ Ibid.

⁷²⁴ van der Krans, “Third party litigation funding: De voordelen, aandachtspunten en aanbevelingen om risico’s te beheersen.”

⁷²⁵ Ibid., 4.1.

of the law in cases with the involvement of TPF.⁷²⁶ These safeguards supplement various existing legal instruments such as the cost-shifting rule, lawyers' ethical rules, fixed litigation costs, and the general prohibition on full contingency fees.

5.3 The procedural implications of TPF

Although TPF is not addressed in Dutch law through a separate set of rules, Dutch legislators are well informed of the potential risks of TPF, especially those in collective litigation.⁷²⁷ With the belief that collective litigation is the illustration of the vulnerability of the legal system,⁷²⁸ discussions on the negative effects of TPF are largely confined to the area of collective litigation in the Dutch context. In a letter to the Parliament in 2012, the Minister for Safety and Justice expressed his concerns about the lack of guarantees regarding the quality and the transparency of the funding agreement in collective settlement, the financial well-being of the funder, and the management of conflicts of interest.⁷²⁹ He also paid attention to the risks of claim culture, blackmail settlements, and predatory funding activities.⁷³⁰ Beyond the risks listed by the Minister, the court has ruled against excessive success fees payable to the representative organizations who funded legal claims with commercial motives for the reason that such fees would be an unacceptable erosion of the interests of the real parties.⁷³¹ Bearing aforementioned risks in mind, Dutch legislators sought to regulate financial incentives in mass claims by amending the civil

⁷²⁶ Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."; "Claimcode 2019."

⁷²⁷ Opstelten, "Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade) 33126 nr. 6."

⁷²⁸ Marko Djinoić and Ana Vlahek, "Uncharted Waters: An analysis of Third Party Litigation Funding in European Collective Redress," (US Chamber Institute for Legal Reform, 2019), 60.

⁷²⁹ Opstelten, "Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade) 33126 nr. 6."

⁷³⁰ Third party funder could work aggressively with media to damage the opposing party's reputation, which is likely to lead to blackmail settlements. See: *ibid.*, 4.1.

⁷³¹ *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257.*

legislations. The amendment will have a direct effect on third party funders who act on behalf of the parties as representative organizations.

This section examines parliament discussions on the procedural implications of TPF on collective settlements which have led to the above amendment. Then it moves to the proposal for the EU directive on representative actions for the protection of the collective interests of consumers which contains EU legislators' perceptions about the impact of TPF and may have a significant influence on Dutch law once it is adopted.⁷³² But before digging into the details of the impact of TPF, it is necessary to introduce two elements of the Dutch legal system that help to set the scene for the discussions on such impact: funding options alternative to TPF and the costs rule of dispute resolution. In the discussion, litigation is distinguished from arbitration. The features of these two types of dispute resolution methods add value to the discussion on the interaction between TPF and the funded procedure.

5.3.1 The alternative funding options

As aforementioned, TPF is different from other financing methods such as legal aid, LEI, claim assignment, contingency fees in terms of business model. Claim assignment, which transfers a third party to the owner of the claims, is technically not a form of non-party financing, and therefore, does not need to be elaborated in detail in this context. Contingency fees are currently only allowed by Dutch law in a very narrow area as an experiment. In most cases, Dutch lawyers charge on hourly rates. Among TPF's alternative funding options, LEI and legal aid are the most frequently consulted resorts and therefore are the main focus of this part. The inquiry running through the discussion is what role these two funding options play in settling commercial disputes.

⁷³² European Commission, "Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC."; Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."

5.3.1.1 Legal aid: far out of the reach of commercial parties

Legal aid was introduced in the Netherlands in 1958.⁷³³ It mainly focuses on cases relevant to “the less well-endowed in society”.⁷³⁴ Nonetheless, legal aid does not guarantee completely free of charge legal services for everyone in all litigation cases. The fields where legal aid applies include labor/employment, family, contract/consumer, social security, housing, criminal, immigration, administrative and some civil cases involving personal matters or public interests.⁷³⁵ Eligibility for legal aid is not only subject to the level of income but also the availability of other means.⁷³⁶ Legal persons are usually not eligible for legal aid. In commercial cases, however, most of the players are legal persons such as enterprises. Besides, the protection that legal aid can offer is rather limited. For this reason, this funding method is not a structural solution to the problem of funding legal claims in the commercial realm. Currently, the Dutch government seeks to further limit the scope of legal aid,⁷³⁷ and therefore, one could hardly expect legal aid to play a larger role in facilitating access to justice.

5.3.1.2 LEI: TPF’s main alternative

LEI is one of the most widely used legal services in the Netherlands.⁷³⁸ As a preliminary point, the Dutch LEI distinguishes itself from the English ATE insurance. The former is taken out before the disputes arise in order to cover the legal costs of the insured, while the latter is taken out after the disputes arise in order to cover the risk of having to pay the opponent’s legal costs.⁷³⁹ ATE insurance is almost unheard of in the Netherlands for some apparent reasons. For one, the legal costs in the Netherlands are relatively well-controlled compared to England. Besides, contingency fees, which give rise to the demand for

⁷³³ van Velthoven and Haarhuis, "Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands," 589.

⁷³⁴ Ibid.

⁷³⁵ Willem de Boer, "Legal aid in the Netherlands," <https://amsterdam-mamas.nl/articles/legal-aid-netherlands>.

⁷³⁶ Ibid.; Legal aid board, "legal aid in the Netherlands: a broad outline," (2015), 6-7.

⁷³⁷ Maurits Barendrecht et al., "Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?," (2014), 87.

⁷³⁸ Voert and Klein Haarhuis, "Paths to Justice in the Netherlands 2014."

⁷³⁹ Richard Lewis, "Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice?," *The Modern Law Review* 74, no. 2 (2011): 272-73.

ATE insurance, are prohibitive under Dutch law except in a small category of cases concerning personal damages.⁷⁴⁰

As of now, the Dutch LEI has evolved into a stand-alone funding option for a wide range of disputes.⁷⁴¹ Under the LEI policy, the insurer bears the costs of the legal proceedings and provides other services directly linked to insurance cover.⁷⁴² Empirical research has shown that, after a claim is filed by the policy holder, the insurer first attempts to deal with the problem by itself.⁷⁴³ If it does not suffice, the client can choose a lawyer to represent him to settle the dispute.⁷⁴⁴ The insurer has an impact on the conduct of the insured procedure, which gives rise to the question of whether LEI compromises the procedural rights of the insured.⁷⁴⁵ In 2018, some concerns were submitted to the government with regard to the procedural implications of LEI: (1) whether the insurance company has imposed too much impact on the independence of the legal profession; (2) whether there is an effective regulatory framework for LEI in the Netherlands; (3) whether the insurer has excessive control on the choice of lawyers.⁷⁴⁶ It remains to be seen whether the above concerns will give rise to further regulation on the behaviors of the insurers.

At present, Dutch legislators consider the impact of the insurer on the insured proceeding as inevitable and legitimate, as long as such impact does not completely deprive the insured of the right to choose and to instruct their lawyers.⁷⁴⁷ The legal basis lies in section 4:65 of

⁷⁴⁰ Hodge, Vogenauer, and Tulibacka, *The costs and funding of civil litigation: a comparative perspective*: 407. A CFA is often underpinned by ATE insurance. See: Hodges, Peysner, and Nurse, "Litigation Funding: Status and Issues," 18.

⁷⁴¹ van Velthoven and Haarhuis, "Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands," 590.

⁷⁴² *Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance.*

⁷⁴³ van Velthoven and Haarhuis, "Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands," 591.

⁷⁴⁴ *Ibid.*

⁷⁴⁵ R.J.J. Eshuis and T. Geurts, "improving access to the court: evaluation of the increment of the small claims limit for civil commercial cases at the Dutch courts in 2011."

⁷⁴⁶ Minister Dekker, "ragen van het lid Groothuizen (D66) aan de Minister voor Rechtsbescherming over de regulering van rechtsbijstandverzekeringen (ingezonden 28 juni 2018) Antwoord van Minister Dekker (Rechtsbescherming) (ontvangen 22 augustus 2018)."

⁷⁴⁷ *Appellant v ABVAKABO FNV*, ECLI:NL:GHDHA:2014:3749(2014).

the Act on Financial Supervision (Wft) which requires that the insurance contract to guarantee that the insured person may entrust the promotion of its interests to a lawyer or another expert of its choice that is competent by law.⁷⁴⁸ This Act plays an important role in regulating LEI. It falls in line with the LEI EU directive. Apart from the procedural rights of the insured, the Wft also takes care of the issue of conflicts of interest and confirms the right of the insured to be informed of its various procedural rights. Section 4:69 provides that the insurer shall guarantee that whenever a conflict of interest arises or there is a difference of opinion on the settlement of the disputes, the insured person is informed of the right to choose the lawyers and the right to solve difference through arbitration proceedings or other proceedings providing guarantees similar in terms of objectivity.⁷⁴⁹ The Wft is not applicable to TPF since third party funders fall out of the category of the “financial service provider” within the meaning of article 1:1 of the Wft.⁷⁵⁰ Nevertheless, the above concerns over LEI and the related regulatory measures should be kept in mind when comparing LEI to TPF.

5.3.2 The costs rule of dispute resolution

It is one of the tasks of this section to take a quick glance at the costs rule in the Netherlands which lays the groundwork for the discussion of the impact of TPF on the funded procedure. Not much has been said by Dutch law about the costs of arbitration since arbitration is an autonomous procedure largely flowing above domestic laws. The Arbitration Act of the Netherlands (codified in book four of the Rv) does not directly address issues related to the costs of arbitration. The Netherlands Arbitration Institute (NAI) Arbitration Rules provide that the arbitral award should contain the “determination and order to pay the arbitration costs...”⁷⁵¹ These Rules have defined the scope of the costs of arbitration in article 52. However, this provision only becomes relevant when parties decide that the NAI Rules are applicable to their case. In arbitration practice, the amount and the allocation of the costs of arbitration are subject to rules and principles

⁷⁴⁸ *Wet op het financieel toezicht*, section 4:65.

⁷⁴⁹ *Ibid.*, section 4:69.

⁷⁵⁰ Redbreast Litigation Finance, “Procesfinanciering: wie controleert de procedure en hoe om te gaan met (potentiële) belangenconflicten?,” (2017).

⁷⁵¹ Netherlands Arbitration Institute, “Netherlands Arbitration Institute Arbitration Rules,” (2015), article 44(f).

that lack coherence and transparency.⁷⁵² In academic discussions, little consensus can be found on the costs of arbitration other than that the costs of arbitration can be substantial.⁷⁵³

The story of the costs of litigation is far more different. The national law answers in detail at least two questions: how much and who pays. According to some Dutch scholars, the costs of litigation in the Netherlands are high,⁷⁵⁴ although these costs are not as soaring as the costs in England.⁷⁵⁵ Previous studies have shown that the rise of litigation costs in recent history can be attributed to many reasons.⁷⁵⁶ The international influence is said to be one of the reasons.⁷⁵⁷ In Peter Joy's words, the Netherlands is "a small country with a big trading heart".⁷⁵⁸ As its role as the commercial crossroads grows, the Netherlands becomes a market that many international law firms do not want to ignore.⁷⁵⁹ The involvement of international law firms has not only imposed competitive pressures on local Dutch law firms but has also triggered reforms to the rules for the legal service market. One of the results is that lawyers' fees are no longer fixed at a statutory hourly rate.⁷⁶⁰ The other reason for the increase in litigation costs could be that the law has not provided sufficient incentives for lawyers to work efficiently.⁷⁶¹ Classic contingency fees are generally prohibited under Dutch law.⁷⁶² Precisely, Dutch lawyers can charge on a contingency basis, but not for all of the costs of litigation. Compared to

⁷⁵² Piotr Nowaczyk and Konrad Czech, "Rethinking costs and costs awards in international arbitration: a call for less criticism of arbitration costs, but improvement of costs allocation practices," *ASA Bulletin* 33, no. 3 (2015): 497-98.

⁷⁵³ *Ibid.*, 494-96.

⁷⁵⁴ Mark Tuil has said that "the general opinion is that litigation costs are too high and are an obstacle to effectuating claims". See: Mark Tuil, "Litigation costs in the Netherlands," in *Rotterdam Institute of Private Law Working Paper Series* (2010), 2.

⁷⁵⁵ Frans van Dijk, "improved performance of the Netherlands judiciary: assessment of the gains for society," *International journal for Court administration* 6, no. 1 (2014): 6.

⁷⁵⁶ In Willem van Boom's view, the involvement of public funding in post-World War II period bears some relevance. See: *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge, 2017), 5.

⁷⁵⁷ Tweede Kamer der Staten-Generaal, "26 630 Claimcultuur nr. 1"; Peter Joy, "Small country with a big trading heart," *European Lawyer* 1, no. 3 (2000): 51.

⁷⁵⁸ Joy, "Small country with a big trading heart."

⁷⁵⁹ *Ibid.*, 50.

⁷⁶⁰ *Ibid.*, 51.

⁷⁶¹ Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 555.

⁷⁶² Dutch Bar Association (NOvA), "Legal Profession Bye-law," Part 7.4.

contingency fees allowed in England and in the US, the Dutch uplift fee has less effect in ensuring that lawyers operate on an economical basis.

In terms of costs allocation, the Netherlands does not approve the English “winner-takes-all” approach.⁷⁶³ English law allows the successful party to recover all the costs of the proceedings which could be substantive and unpredictable. As has been said in chapter 2, there was even a time when the losing party has to pay for the successful party’s costs for CFA and ATE insurance under English law.⁷⁶⁴ Recoverable CFA success fees and ATE insurance premiums were ended by the Jackson reform recently because they were contributing factors for the disproportionate costs of litigation.⁷⁶⁵ From the Dutch perspective, litigation is not and should not be free for the parties.⁷⁶⁶ On this notion, Dutch law finds it impossible to burden only one of the parties with all of the costs of the proceedings.⁷⁶⁷ Under article 237 of the Rv, the successful party is able to recover only a proportion of the overall costs of pursuing the case from the opponent, save some exceptions.⁷⁶⁸ This costs rule is based on a scheme of fixed costs,⁷⁶⁹ making litigation the last resort for the parties who have disputes with others.⁷⁷⁰ As Tuil has said, litigation costs are supposed to be used in

⁷⁶³ van Velthoven and Haarhuis, "Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands," 590. The English cost-shifting rules lack of a scheme of fixed costs and therefore are more likely to allow high or even disproportionate costs. See: Jackson, "Fixing and funding the costs of civil litigation," 333; So, "A brief history of the law of costs- lessons for the Jackson reforms and beyond."

⁷⁶⁴ I.R. Scott, "'Success fees' and after-the-event insurance premiums as recoverable costs," *Civil Justice Quarterly* 21(2002).

⁷⁶⁵ Herbert Smith Freehills, "Conditional Fee Agreements (CFAs)/After-The-Event (ATE) Insurance," <https://hsfnotes.com/litigation/jackson-reforms/conditional-fee-agreements-cfas-after-the-event-ate-insurance/>.

⁷⁶⁶ Hodge, Vogenauer, and Tulibacka, *The costs and funding of civil litigation: a comparative perspective*: 404; Tuil, "Litigation costs in the Netherlands," 2.

⁷⁶⁷ Hodge, Vogenauer, and Tulibacka, *The costs and funding of civil litigation: a comparative perspective*: 415-17.

⁷⁶⁸ Ibid. Richard Nash, "Financing access to justice: innovating possibilities to promote access for all," *Hague Journal on the Rule of Law* 5, no. 1 (2013): 103. Dutch law is geared to increase the level of irrecoverable costs in order to encourage settlement early on and to deter the initiation of the proceedings.

⁷⁶⁹ Hodge, Vogenauer, and Tulibacka, *The costs and funding of civil litigation: a comparative perspective*.

⁷⁷⁰ Ibid., 404.

the Netherlands as an incentive for parties to use litigation “after all other options have been exhausted”.⁷⁷¹ Van Boom has enhanced Tuil’s view based on considerations of the greater public interest: “In an imaginary universe where litigation came free of charge, perhaps the number of spurious summons and vexatious claims would impose excessive burdens on both courts and defendants...”⁷⁷²

The costs rule interacts with TPF in many aspects. On the one hand, the costs of dispute resolution could be too expensive for some individual litigants. They therefore need the assistance of third party funders to initiate and maintain the proceedings. It has been argued by Dutch scholars and has been accepted by the legislators that the costs of litigation could be more daunting in collective litigation than in other proceedings, as collective litigation involves a group of claimants, each with relatively small claims, often confronting a strong defendant or a few strong defendants who are likely to be well-funded and experienced in court proceedings.⁷⁷³ In cases involving a foreign party, the final judgment will likely be enforced in a jurisdiction other than the Netherlands, which elicits substantive costs. On the other hands, the costs rule in Dutch law has constructed with due regard to both access to justice and judicial efficiency. Therefore, one could argue that the Dutch legal system is better protected from the negative effects of TPF. The new amendment to the BW and the Rv has enabled rather moderate regulatory measures, with the focus on representative organizations who fund the claims by themselves or with the help of external funders. The idea of creating a regulatory umbrella which regulates the TPF market is not appealing in the Netherlands.

5.3.3 The procedural implications of TPF in litigation

TPF has both positive and negative effects on commercial litigation. First of all, it could be a solution to the problem of lack of funding.⁷⁷⁴ In a survey report in 2011, about 50 per cent of the commercial cases in the € 5,000-€ 25,000 segment passed through the court undefended.⁷⁷⁵ In those undefended cases, the parties were certain

⁷⁷¹ Mark Tuil and Louis Bisscher, *New trends in financing civil litigation in Europe: a legal, empirical and economic analysis* (Edwrad Elgar Publishing, 2010), 404.

⁷⁷² *Litigation, Costs, Funding and Behaviour: Implications for the Law*, 5.

⁷⁷³ Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 554.

⁷⁷⁴ Eshuis and Geurts, "improving access to the court: evaluation of the increment of the small claims limit for civil commercial cases at the Dutch courts in 2011."

⁷⁷⁵ *Ibid.*

that the returns were not worth the costs.⁷⁷⁶ To replace these short-term risk-averse behaviors with long term managerial courage, Dutch law has been amended to lower the threshold for access to the court system, that is, to allow the parties to defend themselves without a legal representative.⁷⁷⁷ In other words, the parties in these commercial cases are no longer obliged to hire lawyers. But even after the above effort, TPF is still needed in the commercial realm.⁷⁷⁸ Apart from facilitating access to justice, it is expected to filter out unnecessary cases or to reduce excessive procedures. Research has shown that parties are “structurally 10 per cent points too optimistic about their probability of success”.⁷⁷⁹ Third party funders might be able to prevent the parties from overestimating the merits of the claims.

In previous chapters, the abovementioned benefits have also been discussed, which lays the ground for policies to promote the practice of TPF. It is not necessary for this section to further explore these benefits. The focus here is on the negative procedural implications of TPF, which have triggered the discussions on the supervision and the regulation of TPF activities. The research issues in this section are carefully selected by a comparative value standard. These issues include the risk of frivolous claims, the funder’s control on the proceedings through lawyers or representative organizations, and the reasonableness of the costs of TPF. The discussions are expected to generate insights that will be useful for China. What has been found also serves as a comparison to the situations in other chosen jurisdictions.

5.3.3.1 The risk of frivolous claims

In earlier chapters, one of the most commonly cited risks of TPF is the increase in the number of frivolous claims. The Netherlands is not insulated from this risk. As previously mentioned, preventing unnecessary claims inflamed by commercial funders is always on the agenda of Dutch legislators. Arguably, third party funders, who are commercially motivated and are not bound by any professional or ethical rules, are likely to omit the quality of the claims. With the

⁷⁷⁶ Ibid.

⁷⁷⁷ Ibid.

⁷⁷⁸ Rogers, *Ethics in International Arbitration*: §5.08.

⁷⁷⁹ Frank van Tulder, “In the shadow of the Dutch courts: Individual and social costs and benefits of litigation,” (2016), 18.

absence of the qualification requirements for third party funders, it also calls into question whether the funders have sufficient capacity to assess the merits of the claims even if they are willing to.

It is important to emphasize that frivolous claims are not a sudden event with a specific cause of action. They emerged gradually and are closely intertwined with the changing landscape of society.⁷⁸⁰ Any regulation aimed at preventing third party funders from encouraging frivolous claims should be backed up by empirical materials regarding the extent to which TPF is relevant to the problem of frivolous claims. In fact, although frivolous claims counteract the efficiency of the legal system, they are not necessarily illegal nor procedurally sanctionable in the Netherlands or in any other jurisdictions of comparison. To elaborate, it is useful to look to a recent case that has potentially affected many people in the Netherlands who often travel by train during peak times.⁷⁸¹ In 2017, NS, the operator of the Dutch national train system, was dragged to court because many of those who traveled during peak times did not have a seat. Behind the lawsuit, there was a company called ConsumentenClaim who specialized in managing and funding mass disputes. In this case, ConsumentenClaim acted on behalf of more than 10,000 travelers who believed NS did not fulfill its obligation to deliver qualified services. The total amount of the damages required by the claimants amounted to €5.7 million. On 6 June 2018, the court dismissed the claims with the view that the legal basis of the lawsuit was weak. In the court's view, the train ticket as the contract between NS and the passenger only grants the right to be transported but not the right to have a seat during peak times.⁷⁸²

One way of looking at this case is that, even though the passengers lost, their claims still bear some value and cannot be considered as a "frivolous case". Likely, such a case will push NS and other service providers in the Netherlands to make more efforts and investments to improve their services, which is socially desirable.⁷⁸³ The other perception is that the speculative aspect of this lawsuit triggers the question of whether the filing of the lawsuit fits what justice generally

⁷⁸⁰ Tweede Kamer der Staten-Generaal, "26 630 Claimcultuur nr. 1".

⁷⁸¹ *NS v Passengers* ECLI: NL: RBMNE: 2018: 2463.

⁷⁸² *NS v Passengers* Search result - view document ECLI: NL: RBMNE: 2018: 2463 No. C / 16/437273 / HA ZA 17-345 (United States 6 June 2018).

⁷⁸³ Tweede Kamer der Staten-Generaal, "26 630 Claimcultuur nr. 1".

requires. With the third party funder present, the parties and their lawyers tend to be less careful when assessing the claims. They are no longer desperately eager to know if they have strong claims because there is nothing to lose if the claims fail. This explains why external financing of litigation is considered by some Dutch scholars as an element of the legal system that could encourage “claim culture” with “frivolous claims” as one of the symptoms.⁷⁸⁴ In the above case, no request for full compensation has been submitted. NS received an amount of recoverable costs determined by the court, which may not be sufficient to cover all costs of litigation. The case was dismissed without any sanctions against the lawyers or the funders who encouraged and maintained the proceedings. Apparently, the downside of third party funders in the case of loss is quite limited, with fixed recoverable legal costs.⁷⁸⁵ From a theoretical perspective, the case may be subject to further investigation with consideration being given to the details of the funding agreement, especially the allocation of the final recovery between the funder and the funded parties.

Through horizontal comparison, the risk of frivolous claims fueled by third party funders could be more severe in one area than in the other. For instance, frivolous lawsuits cause damages in dispute settlement concerning intellectual property rights. This has generated suspicion on whether intellectual property space needs TPF or not.⁷⁸⁶ Patent trolling, as a demonstration of excesses in litigation, has an effect of hindering the innovation of new technologies and imposing substantive financial burdens on small technical businesses.⁷⁸⁷ Patent trolls are those “extracting rents from other firms by exploiting the fact that imperfections in the legal system make credible threat of an infringement suit sufficient to induced many targeted firms to settle, irrespective of whether the asserted patents are actually valid and

⁷⁸⁴ Michael Faure, Ton Hartlief, and Niels Philipsen, "Funding of personal injury litigation and claims culture: Evidence from the Netherlands," *Utrecht Law Review* 2, no. 2 (2006).

⁷⁸⁵ Hodge, Vogenauer, and Tulibacka, *The costs and funding of civil litigation: a comparative perspective*: 404-05.

⁷⁸⁶ Justin Daniels, "Perception versus reality in patent litigation funding," in *Burford Capital* (2016).

⁷⁸⁷ Lauren Cohen, Umit G. Gurun, and Scott Lominers, "Empirical evidence on the behavior and impact of patent trolls," in *Patent Assertion Entities and Competition Policy* (Cambridge University Press, 2017), 30.

infringed”.⁷⁸⁸ To eliminate the effect of patent trolling, domestic laws have paid attention to the actors operating within the patent landscape, especially non-practicing entities acting as the third party funder for patent litigation.⁷⁸⁹

Another area where frivolous claims are likely to be rather influential is collective litigation.⁷⁹⁰ It is evident that the number of massive litigations is on the rise in the Netherlands.⁷⁹¹ It is argued that non-party funding or “commercial litigation vehicles” serve as a contributing factor.⁷⁹² So far, the Dutch civil legislation has been amended to implement some safeguards against the risks of non-party funding.⁷⁹³ The amendment, which was approved by the Dutch Senate in March 2019, introduces enhanced admissibility for representative organizations who may either fund the case directly or represent the investment interests of an external third party funder. Among others, the amendment aims to achieve the result that the collective litigation proceedings are not mainly driven by the financial interests of non-party investors.⁷⁹⁴ This corresponds with the actions taken by the EU legislators to prevent TPF from influencing the judgment of the representative organization on matters such as the merits of the claims and the way of conducting the proceedings.⁷⁹⁵

⁷⁸⁸ Ibid., 27.

⁷⁸⁹ Ibid.

⁷⁹⁰ Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 553-54.

⁷⁹¹ Jeroen Kortmann, "The Netherlands: a “hotspot for class actions”?,“ *Global Competition Litigation Review* 4, no. 1 (2011): 17.

⁷⁹² Ibid.

⁷⁹³ Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."

⁷⁹⁴ Huib Schrama and Mijke Sinninnghe Damsté, "Class action for damages in the Netherlands," in *Lexology* (2019).

⁷⁹⁵ European Commission, "Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC." It is stated prior to the proposed text that “the proposal aims to modernize and replace Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests”.

5.3.3.2 The funder's control on the procedure through legal professionals and representative organizations

One of the “rule of law” objections against TPF is that third party funders interfere with the relationship between the party who has the claim and the lawyer. It is questionable whether lawyers are still able to fulfill their obligations in cases with the involvement of TPF. In earlier chapters, we have noticed that this issue has triggered abundant attention from common law jurisdictions. It has even motivated the amendment to the Legal Profession Act and the related subsidiary legislation in Singapore. Singaporean legislators made this move with the view that traditional rules for the legal profession are not sufficient to resist the threat posed by TPF. In the Netherlands, suspicion also arises from the fact that third party funders “can operate under a full power of attorney (a mandate) so that they are coterminous with the client and can instruct a lawyer”.⁷⁹⁶ Occasionally, the funders choose to adopt the common law model by avoiding or minimizing their impact on the procedure.⁷⁹⁷ Mainstream funders understand that they have to refrain from inducing the funded party's lawyers to break their ethical rules. But there is no legal consequence according to Dutch law if they do otherwise.

Another objection to TPF is based on the funders' influence on the procedural decisions of representative organizations in collective litigation. The Dutch legislators agree with the EU legislators that safeguards should be ready to ensure that representative organizations work for the best interests of the parties concerned instead of the interests of the funders.⁷⁹⁸ Those who do not worry about the funder's influence often refer to the fact that, under the LEI policy, the insurers have a role to play in the conduct of the procedure. This control of insurers has given rise to discussions on the integrity of the

⁷⁹⁶ In both academic and practical contexts, the concern is raised on the risk that client can do nothing against an unreasonable procedural decision made by the funder. John Peysner, “Playing the man not the ball”, in *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge, 2017), footnote 80; van der Krans, “Third party litigation funding: De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen.”; “Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Kamerstuk 34608 nr. 6).”

⁷⁹⁷ “Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration,” 28.

⁷⁹⁸ Gian Marco Solas, “Third party funding and the EU's competition law damage claims: main legal issues,” *Global Competition Litigation Review* 12, no. 1 (2019): 32.

legal profession and that of the legal system, but it has not resulted in the complete denial of the insurer's control on the insured procedure. Similar to the insurance scenario, it would be unrealistic and unjust to completely deny the influence of third party funders. They have their legitimate commercial interests in the case as well. Plus, their input on how to conduct the proceedings and whether to settle the case has from time to time benefited the funded parties and the judicial system. The question left is to what extent should the control of third party funders be regulated or restrained.

This section addresses the funders' influence on the funded procedure through lawyers and representative organizations. As a preliminary issue, representative organizations refer to the "ad hoc organizations with their own financial interest that are established before or after a particular mass damage event to 'assemble a 'voice', increase leverage, and obtain some form of compensation for the represented individuals".⁷⁹⁹

5.3.3.2.1 Third party funders' control through lawyers

The discussion of the control of third party funders on the funded procedure and the participants is associated with the ethical rules of lawyers. In previous chapters, we have discussed at length about TPF being a distraction for lawyers. This concern is also valid in the Netherlands. The issue of whether the impact of the funding arrangement has gone beyond the administrative capacity of the regulatory framework for the legal profession is a hot topic of debate in the context of non-party funding options including but not limited to TPF. Currently, the established consensus is that the combination of TPF and result-based remuneration for lawyers leads to pressure on the independence of lawyers and therefore should be avoided.⁸⁰⁰ As a matter of fact, Dutch law prohibits complete result-based remuneration for lawyers in most cases including commercial cases.⁸⁰¹

⁷⁹⁹ *Litigation, Costs, Funding and Behaviour: Implications for the Law*, 228.

⁸⁰⁰ "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Memorie van Toelichting) (Kamerstuk 34608 nr. 3)," §5.

⁸⁰¹ There is a on-going experiment of result-related lawyer remuneration in cases of personal injuries and death claims. The term of this experiment was extended in January 2019 for another five years. See: Nederlandse Orde van Advocaten, "Experiment resultaatgerelateerde beloning verlengd," <https://www.advocatenorde.nl/nieuws/experiment-resultaatgerelateerde-beloning->

Nonetheless, it is unclear whether the prohibition on lawyer funding or contingency fees is broad enough to prohibit lawyers from benefiting from the success-based remuneration of the litigation funder.⁸⁰² There has been no answer from Dutch law to this question so far. The answer from the EU legislators is no, at least in representative actions for consumer disputes. Accordingly, in the legislative proposal on a directive on representative actions for the protection of consumers, it is suggested that “member states should prevent law firms from establishing qualified representative entities”.⁸⁰³ Apparently, on the EU level, the preponderant view is that the regulation of the legal profession is not sufficient to resist the risk of self-dealing or to prevent lawyers from benefiting unjustly from the results of the case through third party funders.

With TPF being involved, a “three-party relationship” may arise between the lawyers, the funded party, and the funder, which can cause conflicts of interest.⁸⁰⁴ Ideally, the lawyers work for the best interest of the funded parties. But in reality, third party funders, who have substantial financial stakes in the outcome of the case, might seek to influence the conduct of the lawyers to achieve a result that is favorable to them.⁸⁰⁵ As law firm financing from third party funders is proliferating, the line between the interest of the law firm and that of the third party funder is blurred, which poses some additional challenges to the self-regulation regime of the legal profession. For the time being, Dutch law has not responded to the control of third party funders even though such control might constitute a countertrend to

verlengd.

⁸⁰² Peter Bert, “Litigation Funding and Success Fees: A Risky Combination,” in *Dispute Resolution in Germany* (2012); “Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Memorie van Toelichting) (Kamerstuk 34608 nr. 3),” §5.

⁸⁰³ “European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC”.

⁸⁰⁴ Redbreast Litigation Finance, “Procesfinanciering: wie controleert de procedure en hoe om te gaan met (potentiële) belangenconflicten?”

⁸⁰⁵ Anthony Duggan, Jacob Ziegel, and Jassmin Girgis, “Litigation Investment and Legal Ethics: What are the Real Issues?,” *Canadian Business Law Journal* 55(2014): section III; Solas, “Third party funding and the EU’s competition law damage claims: main legal issues,” 32.

the current dominant tenet of the Dutch legal practice that lawyers should promote the interest of the client and avoid situations where they could be distracted from this task.

Some Dutch scholars justify the control of third party funders through lawyers or other participants by saying that Dutch law does not prevent a claim for damages being priced and sold.⁸⁰⁶ Others have argued that LEI offers an example that the control of third parties on the proceedings does not go beyond the administrative capacity of the Dutch legal system and therefore should be tolerated by law.⁸⁰⁷ Previous cases have shown that the influence of the LEI insurers is acceptable from the Dutch perspective as long as the court is allowed to play a significant role in managing conflicts of interest associated with LEI. In practice, the insurers often outsource their legal works to external lawyers of the insured's choice, as requested by article 4:67 of Wft. But this does not in any way deprive the insurers of the right to limit the amount of costs paid to the lawyers. Many Dutch insurance companies have introduced costs maxima which might compromise the insured's right to choose lawyers. They could also offer a bonus to those who choose lawyers affiliated with insurance companies. For instance, DAS applies the new policy condition that those who want to use a legal assistance provider of the insurance company can have a deduction of EUR 250 per procedure and some reimbursements.⁸⁰⁸

In the author's view, although it is hard to object that LEI is a sibling of TPF,⁸⁰⁹ it is not a tenable argument that TPF should be treated in the same way as LEI in terms of the extent to which the funding providers are allowed to engage in the procedure. In the Netherlands, insurers are subject to a licensed regime and a set of separate and strict regulations.⁸¹⁰ Additionally, when the insurers offer LEI products, they are required to fulfill the duty to take care of the interests of the insured, especially when they have to instruct the

⁸⁰⁶ Redbreast Litigation Finance, "Procesfinanciering: wie controleert de procedure en hoe om te gaan met (potentiële) belangenconflicten?."

⁸⁰⁷ Dammingh and van den Berg, "Procesfinanciering door derden: een oplossing of een probleem?."

⁸⁰⁸ "Vrije advocaatkeuze nog steeds illusoir," (2018).

⁸⁰⁹ Alonso, "Third-Party Funding's Older Sibling: Legal Costs Insurance and The Issue Of Regulation."

⁸¹⁰ G. C. Maas, "Costs and financing of legal assistance," (2007).

lawyers in charge of the insured procedure.⁸¹¹ Based on the above, it is plausible that the control of third party funders requires more restrictions in law.⁸¹² More research is needed in order to have a clear sense of how the involvement of third party funders should be restricted without having a chilling effect on the TPF industry.

5.3.3.2.2 Third party funders' control through representative organizations

In parliament document 34608 No. 3, the Dutch legislators expressed its concern over the possibility that third party funders have full control over the method in which the collective litigation is settled.⁸¹³ This concern has recently led to the introduction of article 3:305a(2)(c) of the BW, with the effect that the eligibility requirements for representative organizations have been tightened up with regard to governance, financing, and representativeness.⁸¹⁴ From the wording of this new provision, it seems that Dutch law does not entirely exclude the involvement of third party funders on the proceedings, as long as "the control of the legal proceedings lies to a sufficient extent with the representative organization".⁸¹⁵ The legislators have taken the position that the influence of the TPF agreement should be viewed on a case-by-case basis, meaning that the court is empowered to test whether third party funders have exercised improper influence on

⁸¹¹ Verbond van Verzekeraars, "De toekomst van de rechtsbijstandverzekeraar: hoe ziet deze er uit in 2025?." The Association of Dutch Insurers emphasized in a report on the further development of legal costs insurance in the Netherlands that the insurers are obliged by their social role to move with the expectations and needs of the insureds.

⁸¹² The independence of the legal counsels is described as a benchmark that needs to be considered when contemplating the regulation of TPF. See: Rogers, *Ethics in International Arbitration*: 194.

⁸¹³ "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Memorie van Toelichting) (Kamerstuk 34608 nr. 3)."

⁸¹⁴ Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."; Tzankova, "Wetsvoorstel collectieve schadevergoedingsactie: een oplossing voor welk probleem ook alweer?."

⁸¹⁵ Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."

representative organizations or lawyers.⁸¹⁶ On the EU level, the same concern was also expressed when contemplating legal reforms to the law applicable to collective litigation. In the 2018 proposal for an EU directive on representative actions for the protection of the collective interests of consumers, article 7 is designed to prevent third parties from influencing procedural decisions made by representative organizations.⁸¹⁷ It will become clear later in this chapter that the proposed EU directive deals with the funder's control in a more straightforward and stringent manner.⁸¹⁸

It is important to stress that the funder's control is not the only threat to the quality of the services provided by representative organizations. In the Netherlands, commercial representative organizations either have their own financial interests in the outcome of the case or benefit from the investment returns of external third party funders.⁸¹⁹ To fulfill their duties in law, these organizations are required to have sufficient financial capacity to fund the legal claims they represent.⁸²⁰ Even if they do not ally with external third party funders, it is questionable whether they have been too distracted by their own financial interests from the main task of representing massive parties.⁸²¹ To address this concern, the court needs to conduct a thorough examination of a host of issues such as the governance of representative organizations, the objectives and business models of these organizations and so on.⁸²² In particular, the court considers the

⁸¹⁶ "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Kamerstuk 34608 nr. 6)."

⁸¹⁷ European Commission, "Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC."

⁸¹⁸ The Dutch lawyer questions whether the amended Dutch law is able to meet the minimum requirements contained in an upcoming EU directive. See: Jeroen Kortmann, "Overview of Legislative Proposal on Collective Action (NL) – Update June 2019," in *Stibbe* (2019).

⁸¹⁹ *Litigation, Costs, Funding and Behaviour: Implications for the Law*, 229.

⁸²⁰ Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A," article 305a(2)(c).

⁸²¹ *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*; Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 559.

⁸²² *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*.

amount of success fee payable to representative organizations to be of relevance.⁸²³

5.3.3.3 The impact of TPF on the recovery of the funded party

The discussion of the impact of TPF on the recovery of the funded party is confined to collective redress proceedings. The study of such impact in other areas of law is dampened by the lack of empirical materials. The aggregation of similar interests benefits the efficiency of the judicial system and the larger public interest. Traditionally, aggregation is only possible if “no individual issues need to be decided”.⁸²⁴ On this notion, awarding of money damages was not allowed in Dutch collective action. This will no longer be the case after the new amendment to the BW and the Rv enters into force.⁸²⁵ According to the new law, the Dutch collective redress proceedings can either result in a court judgment with awarded damages or a settlement held to be binding by the court with agreed damages.⁸²⁶

Under article 7:907 of the BW, in the event that a settlement agreement is reached through negotiation, the parties need to file an application for a binding declaration to the court.⁸²⁷ Once the court declares the settlement agreement binding, the agreement binds everyone except those who opt-out.⁸²⁸ Notably, the court is empowered to reject the settlement agreement if the interests of the real parties have not been sufficiently represented by the representative organizations or the amount of the damages is unreasonable.⁸²⁹

To illustrate the impact of TPF on the final recovery of the funded party and the court’s role in dealing with this impact, it is useful to look to a recent case before the Amsterdam Court of Appeal, *Fortis v*

⁸²³ Ibid.

⁸²⁴ Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 560.

⁸²⁵ Carlijn van Rest and Bas Keizers, "A Collective Action for Damages in the Netherlands is a fact!," <https://www.hoganlovells.com/en/pdfdownload?page={92D87E18-C5AD-4071-AF72-1105F132FBC1}&p=1>.

⁸²⁶ Ibid.

⁸²⁷ Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 561.

⁸²⁸ Declève, "Fortis's Settlement: A Comparative Case Study of Securities Class Action Mechanisms in Europe and the United States," 56; *Burgerlijk Wetboek*, book 7, article 907(2).

⁸²⁹ *Burgerlijk Wetboek*, book 7, article 907(3).

Shareholders.⁸³⁰ In this case, disputes arising from Ageas and four claimant organizations (VEB, Deminor, SICAF and Stichting FortisEffect) regarding misrepresentation were settled on 14 March 2016 for the amount of EUR 1,203,700,000.⁸³¹ Ageas is the legal successor of Fortis.⁸³² According to the settlement agreement, the representative organizations share a proportion of the final recovery. To be specific, VEB receives €25 million, Deminor €10.5 million, FortisEffect €7 million and SICAF €2.5 million.⁸³³ Shortly afterward, parties from both sides filed the request for a binding declaration under article 7: 907 of the BW.⁸³⁴ On 16 June 2017, the court reached the conclusion that the settlement agreement did not comply with article 7:907 on a number of points so it was not eligible for a binding declaration.⁸³⁵

Among others, the court has found that the level of “fees” payable to the representative organizations is out of proportion.⁸³⁶ In other words, the court considered that the profits for the representative organizations in the 2016 settlement agreement constituted unacceptable erosion of the interests of the affected parties. The representative organizations raised two counterarguments to justify the compensation payable to them: first, the distribution of damages between the affected parties and the representative organizations bears little relevance to the main disputes and therefore should not be subject to the court’s review.⁸³⁷ Second, even if such distribution is supposed to be reviewed by the court, the collective proceedings would not possibly be initiated and maintained without the funds from the representative organizations and therefore the organizations entitle an amount of “success fee” beyond the costs of representative services.⁸³⁸

⁸³⁰ *Fortis v Shareholders ECLI: NL: GHAMS: 2018: 2422; Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257.*

⁸³¹ *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*, para. 2.3.

⁸³² *Ibid.*

⁸³³ *Ibid.*, paras 8.32-8.34.

⁸³⁴ *Ibid.*, para. 2.1.

⁸³⁵ *Fortis v Shareholders ECLI: NL: GHAMS: 2018: 2422*, para. 3.1; *Burgerlijk Wetboek*, article 7:907(3).

⁸³⁶ *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*, para. 8.35.

⁸³⁷ *Fortis v Shareholders ECLI: NL: GHAMS: 2018: 2422*, para. 5.17.

⁸³⁸ *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*, para. 8.39.

In the court proceedings, there are no standards available based on which the reasonableness of such “profits” can be tested.⁸³⁹ The court has acknowledged that compensation for incurred costs and for the risks of funding the proceedings is not yet a reason to assume that the interests of the injured parties are insufficiently represented.⁸⁴⁰ Such compensation is currently market-based and is a matter for the parties and the representative organizations to negotiate.⁸⁴¹ The court has recognized that it benefits the public interest to allow representative organizations to be motivated by a share from the final outcome.⁸⁴² But the funding arrangements should be disclosed and the representative organizations should be required to justify the reasonableness of the profits they are entitled to under the settlement agreement. Beyond that, the representative organizations are obliged to explain their business models as concretely as possible.⁸⁴³ All these statements and explanations are supposed to be substantiated by documents.⁸⁴⁴ Upon the request of the court, the parties renegotiated the settlement agreement and disclosed more details of the funding agreements and the funders. In 2018, the court finally approved the settlement agreement except for the request for the remuneration of one of the representative organizations (VEB).⁸⁴⁵

Despite judicial supervision on non-party funding in collective litigation is not entirely unreasonable, the above case has given rise to the question of whether the court is capable of judging the reasonableness of the success fee of TPF.⁸⁴⁶ Arguably, no one understands better than the funder about the financial exposure of funding collective litigation. Besides, one could argue that judicial supervision on the profits payable to the funders may lead to an unexpected result, namely that fewer cases will be eligible for funding.⁸⁴⁷ Furthermore, restrictions on the success fee of TPF risk

⁸³⁹ *Fortis v Shareholders ECLI: NL: GHAMS: 2018: 2422*, para. 5.17.

⁸⁴⁰ *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*, para. 8.39.

⁸⁴¹ *Fortis v Shareholders ECLI: NL: GHAMS: 2018: 2422*, para. 5.13.

⁸⁴² *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*, para. 8.39.

⁸⁴³ *Fortis v Shareholders ECLI: NL: GHAMS: 2018: 2422*, para. 5.13.

⁸⁴⁴ *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*, para. 8.40.

⁸⁴⁵ *Fortis v Shareholders ECLI: NL: GHAMS: 2018: 2422*, §11.

⁸⁴⁶ van der Krans, "Third party litigation funding: De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen."

⁸⁴⁷ Ibid.

infringing contract freedom, as has been elaborated in previous chapters.

5.3.4 The procedural implications of TPF in arbitration

The Netherlands has a long-standing tradition of alternative dispute resolution (ADR).⁸⁴⁸ Arbitration is said to be one of the most important ADR methods.⁸⁴⁹ TPF is considered a useful tool for parties seeking access to arbitration.⁸⁵⁰ Nevertheless, the scale of the demand for TPF in arbitration in the Netherlands remains unclear, which is largely attributable to the fact that the costs of arbitration have limited bearing on the legal regime of the seat of arbitration. Besides, in reality, TPF for arbitration is used for various reasons including but not limited to impecuniosity. The Netherlands has little to offer to the discussion of the impact of TPF for arbitration and related safeguards because of the following reasons. First of all, it is debatable whether Dutch authorities have the obligation to make arbitration affordable and whether they are able to do so. The adjustment to the costs of arbitration requires more than the amendment to the domestic cost rules. Second, without the mandatory disclosure obligation, many TPF arrangements are still kept in the dark in arbitration,⁸⁵¹ which has made the assessment of TPF for arbitration and its impact on the procedure very difficult. Beyond the Dutch borders, there are many discussions about the potential risks of TPF for arbitration, as elaborated in preceding chapters. These discussions are also relevant to arbitration seated in the Netherlands.

5.4 The regulation of TPF

Currently, the Netherlands does not have any specific regulations for TPF.⁸⁵² It relies on rules and principles contained in the civil law legislation to deal with the risks of TPF, especially TPF for mass claims. Many previous studies have taken a policy-neutral perspective

⁸⁴⁸ Hodge, Vogenauer, and Tulibacka, *The costs and funding of civil litigation: a comparative perspective*: 403.

⁸⁴⁹ *Ibid.*

⁸⁵⁰ Krestin and Mulder, "Third-Party Funding in International Arbitration: To regulate or Not to Regulate?."

⁸⁵¹ The funders do not risk breaking any Dutch law by non-disclosure. See: Willem van Boom, "Third-Party Financing in international Investment Arbitration," (2011): 32-33.

⁸⁵² Krestin and Mulder, "Third-Party Funding in International Arbitration: To regulate or Not to Regulate?."

based on the assumption that no change in policy or in law with respect to TPF should occur any time soon.⁸⁵³ The recent development in Dutch law has however reflected a slight change of attitude towards the regulation of TPF. The risks of TPF for class action have evidently alarmed the legislators, resulting in amendments to the BW and the Rv directed at representative organizations who fund the case directly or ally with external funders.⁸⁵⁴ On the European level, the legislators are attempting to tighten up requirements for third party funders. It remains to be seen how Dutch law will be affected by the proposed EU directive. We have noticed that the Dutch and EU legislators are in line with each other about the potential negative effects of TPF that require regulatory safeguards. But the approach they adopt to deal with these negative effects is not the same. This section is designed to show that the legislators seek to enhance the transparency of the funding agreement to enable the courts to supervise TPF, but how to supervise remains debatable.

As an initial matter, the main focus of this part is TPF for mass claims since it draws the most attention from Dutch legislators. TPF for individual litigation cases and arbitration cases will be briefly mentioned to make the picture complete. Collective litigation involves the interests of a massive group or even the public. It is understandable that the law introduces stricter rules for participants.⁸⁵⁵ The recent amendment has offered more benchmarks that need to be considered by the court when assessing non-party funding arrangements between the parties and the representative groups, and between parties and external third party funders. In other areas of law, the idea of regulating has not yet become appealing in the Netherlands,⁸⁵⁶ due to the fact that TPF is not prevalent for the time being and many concerns about TPF have not been verified by

⁸⁵³ Ibid.

⁸⁵⁴ Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."

⁸⁵⁵ Pavillon, "Public interest litigation in the Netherlands: Recent developments in the collective enforcement of consumer rights."

⁸⁵⁶ Members of the Groothuizen, "NADER GEWIJZIGD AMENDEMENT VAN HET LID GROOTHUIZEN TER VERVANGING VAN DAT GEDRUKT ONDER NR. 18 (34608 nr. 22)," (2019).

empirical materials.⁸⁵⁷ The situation may also be relevant to the fact that the prohibition on non-party funding has been abandoned in civil law jurisdictions a long time ago,⁸⁵⁸ which is in contrast to the situation in common law jurisdictions where such prohibition remained valid until recently.⁸⁵⁹ Arguably, the use of TPF arouses fewer concerns in civil law jurisdiction than in common law jurisdiction.

5.4.1 The regulation of TPF in litigation

The Netherlands relies on civil law and civil procedure law to deal with the risks of TPF for collective litigation. TPF for other areas of law remains largely unregulated. For funders who also act as representative organizations, the Claimcode, which contains requirements for the quality, governance, and behaviors of representative organizations, is applicable. The relevant laws and rules have given weight to the role of the court in supervising the funding agreement and ensuring compliance. In line with this, the court is allowed to request a wide disclosure of not only the funding arrangements but also the business models of the funders, in order to facilitate supervision.⁸⁶⁰ In the process, the court may examine the counsel's fees and the compensation payable to non-party investors to ensure that these fees are not exploitative.⁸⁶¹ The regulatory framework for non-party funding in the Netherlands aims to strike a balance between guaranteeing access to justice and preventing an undesirable claim culture.⁸⁶² Here the recent amendments to Dutch law applicable to mass claim settlement as well as the upcoming EU directive on consumer protection are addressed. It has been highlighted the difference between the Dutch approach and the approach adopted by the EU directive in dealing with the risks of TPF. The transparency of the funding agreement and the reasonableness of

⁸⁵⁷ Krestin and Mulder, "Third-Party Funding in International Arbitration: To regulate or Not to Regulate?."; "Claimcode 2019."

⁸⁵⁸ Veljanovski, "Third-Party Litigation Funding in Europe," 406.

⁸⁵⁹ Ibid.

⁸⁶⁰ Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 563; *Fortis v Shareholders ECLI: NL: GHAMS: 2018: 2422*; *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*.

⁸⁶¹ Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands," 563.

⁸⁶² Krestin and Mulder, "Third-Party Funding in International Arbitration: To regulate or Not to Regulate?."; Groothuizen, "NADER GEWIJZIGD AMENDEMENT VAN HET LID GROOTHUIZEN TER VERVANGING VAN DAT GEDRUKT ONDER NR. 18 (34608 nr. 22)."

the compensation to the funders are at the core of the discussion on the regulation of TPF in the Dutch context, and therefore, are the main focus of this part.

5.4.1.1 Legal instruments enhancing the transparency of TPF for collective redress

In assessing whether the settlement agreement between the mass group and the defendant(s) is reasonable, the court must look to TPF, whether it is provided by representative organizations or outside third party funders. The existing laws are sufficient to trigger the disclosure of not only the identity of the funder but also the funder's business models and the details of the funding arrangements such as the rationales for the investment returns payable to the funders, as has been explained in *Fortis v Shareholders*.

In the context of TPF for collective litigation, there is little room to argue against the transparency of TPF. The legal basis for the request for disclosure lies in article 7:907 of the BW with regard to the court's responsibility to ensure that the interests of the mass group have been properly represented and safeguarded in the settlement agreement. The Claimcode for representative organizations also plays a role in enhancing the transparency of the TPF agreement.⁸⁶³ The aim, among others, is to promote the transparency of representative organizations through self-regulation.⁸⁶⁴ In the *Fortis* case,⁸⁶⁵ the court has taken this code into consideration. However, although the court has found that Deminor, FortisEffect, and SICAF as commercial organizations fail to comply with the Claimcode, it still allows them to proceed along with other non-commercial organizations since the Claimcode does not constitute mandatory restrictions on representative organizations.⁸⁶⁶

In the proposed EU directive, it is suggested that representative organizations bear the obligation to provide sufficient information about the TPF arrangement, in order to allow the court to assess whether there is a conflict of interest and to avoid any abusive

⁸⁶³ *Fortis v Shareholders* ECLI: NL: GHAMS: 2017: 2257, para. 8.39.

⁸⁶⁴ Rijksoverheid, "Nieuwe code voor claimstichtingen," <https://www.rijksoverheid.nl/actueel/nieuws/2019/03/04/nieuwe-code-voor-claimstichtingen>.

⁸⁶⁵ *Fortis v Shareholders* ECLI: NL: GHAMS: 2018: 2422; *Fortis v Shareholders* ECLI: NL: GHAMS: 2017: 2257.

⁸⁶⁶ *Fortis v Shareholders* ECLI: NL: GHAMS: 2017: 2257, para. 8.33.

litigation.⁸⁶⁷ To enhance compliance, the member states are required to ensure that the court is empowered to assess circumstances and consequently require the representative organizations to refuse the relevant funding.⁸⁶⁸ Furthermore, the court should be empowered to reject the standing of the representative organization as it deems necessary.⁸⁶⁹

5.4.1.2 Judicial supervision on the amount of the success fee of TPF for collective redress

The amount payable to third party funders is subject to judicial review based on article 7:907 of the BW.⁸⁷⁰ In the Fortis case, for instance, the court vehemently criticized that the “fees” payable to the representative organizations were excessive. From the court’s perspective, it is not against the public interest that these organizations charge beyond representation service costs, with consideration being given to the free-riding problem and the demand for funding in collective litigation. Nonetheless, it should remain unchanged that the main task of representative organizations is to represent the interest of the collective parties. Therefore, the court feels the need to void excesses in the compensation payable to the representative organizations for the investment risks they have borne. It is however questionable whether the court is in a good position to judge the reasonableness of the success fee generated from non-party funding arrangements and whether the amount of success fee should be subject completely to the parties’ consent.

⁸⁶⁷ European Commission, "Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC."; "European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC".

⁸⁶⁸ European Commission, "Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC," article 7.

⁸⁶⁹ Ibid.

⁸⁷⁰ Conditions for approval of a settlement by the court include: (1) the amount of compensation should be reasonable and (2) the mass group have been sufficiently represented by representative organizations. These conditions are sufficient to justify the judicial supervision on the amount of success fees payable to the third party funders. See: *Burgerlijk Wetboek*, article 7:907.

The court's authority on the success fee seems to counter to the notion that TPF is an investment.⁸⁷¹ Normally, the success fee of TPF is paid out of the final damages. It is market-oriented and is supposed to be negotiated by the funder and the funded party. The structure of success fees differs from one case to another, as do the commercial rationales.⁸⁷² It is a risk-reward payment and therefore no one can understand better than third party funders about whether such payment is reasonable. In previous chapters, the risk of the funding agreement being exploitative is one of the most commonly cited concerns about TPF. One might recall that, in order to put the funded party's interest at the fore, the ALF imposes an obligation on the funder to take reasonable steps to ensure that the funded party has received independent advice on the terms of the funding agreement.⁸⁷³ Beyond that, the English court seeks to balance the benefits obtained by third party funders with liabilities for the loss of the case. In the Netherlands, the funder's costs liability remains a mysterious topic. There is no sign that such liability will become a prevalence any time soon.

The Claimcode contains restrictions on the amount of compensation payable to third party funders. It requires the representative organizations and those associated with these organizations to have no profit motive in their activities.⁸⁷⁴ When a third party funder is involved, the representative organization must ensure that it has the capacity to avoid any conflicts of interest between itself and the funder so that it can guarantee that the interests of the real parties are well preserved. Nevertheless, the above does not prevent the representative organization from receiving compensation according to market rates for the services it has provided including the funding service.⁸⁷⁵

The Claimcode however adds limited value to eliminating excesses in success fees of TPF primarily due to that this code does not directly give rise to legal consequences. The ambiguity in the requirements

⁸⁷¹ Veljanovski, "Third-Party Litigation Funding in Europe," 417.

⁸⁷² *Ibid.*, 423.

⁸⁷³ The Association of Litigation Funders, "Code of Conduct for Litigation Funders," section 9.1.

⁸⁷⁴ "Claimcode 2019."

⁸⁷⁵ *Ibid.*

regarding the payment to representative organizations has also compromised the functionality of this code. It is provided in the code that the representative organizations may be paid within certain limits for their services including both the representative service and the funding service. However, there is no sufficient elaboration about such “limits”.

5.4.2 The regulation of TPF in arbitration

The Arbitration Act of the Netherlands is silent on TPF. It does not require mandatory disclosure of TPF or its interaction with other participants. Neither has it shed light on the impact of TPF on interim measures. For the time being, participants of the arbitration proceedings seated in the Netherlands are expected to rely on arbitration rules and international guidelines in dealing with issues concerning TPF.

5.5 The question lies ahead: Is there more to do to regulate TPF in collective redress proceedings?

The Fortis case has brought an interesting question to the center of the discussion, that is, whether entrepreneurial/commercial representative organizations who act as third party funders or ally with external funders in collective litigation are a threat to the integrity of the proceedings.⁸⁷⁶ Under the existing civil law, representative organizations and third party funders could be an alter ego to each other, which creates problems that puzzle the Dutch court. The court in the Fortis case refers to the Claimcode in assessing the business models and the profits of the representative organizations.⁸⁷⁷ The Claimcode requires representative organizations to act for the best interest of the parties they represent, without seeking profit for their own account.⁸⁷⁸ However, Dutch law has not integrated the key elements of this code, which means representative organizations do not risk breaking the law for operating for profit. Although the court encourages compliance of the Claimcode, it has to let representative organizations who have substantive financial stakes in the outcome of the case continue along with non-commercial organizations. The court is empowered to decide on the reasonableness of the success fee

⁸⁷⁶ *Litigation, Costs, Funding and Behaviour: Implications for the Law*, 229.

⁸⁷⁷ *Fortis v Shareholders ECLI: NL: GHAMS: 2017: 2257*, para. 8.40.

⁸⁷⁸ Claimcode Commissie, "ClaimCode," (2011), Principle II.

payable to commercial representative organizations based on common sense as well as knowledge of both the legal reasoning and the market rates of TPF.

The Claimcode was designed for representative organizations within the meaning of article 3:305 and article 7:907 of the Dutch Civil Code.⁸⁷⁹ It serves the purpose to lead the best practice of representation in collective litigation.⁸⁸⁰ The Claimcode was first introduced in 2011 with requirements for the quality and transparency of the representative organizations.⁸⁸¹ The most updated version was published in early March 2019.⁸⁸² The new code reiterates that representative organizations should not be motivated by profit, although they are entitled to compensation for the services they provide.⁸⁸³ Beyond that, the new version has introduced a principle regarding the relation between representative organizations and external third party funders which bears significant relevance to this context. Accordingly, representative organizations are allowed to ally with external third party funders in order to strengthen the financial status of the parties, provided that the external funding agreement is not contrary to the interests of the funded parties and that the conflicts of interest issues are properly managed. Primarily, the representative organizations should be able to remain independent from any third party funders. Besides, they are obliged under the Claimcode to check the capital capacity, the track record, and reputation of the third party funder prior to the TPF agreement. Furthermore, the funding agreement should not contain any provisions that allow third party funders to have complete control over the proceedings especially the settlement process.

The recent amendment to the BW and the Rv seeks to codify only some of the elements of the Claimcode.⁸⁸⁴ As a result of the amendment,

⁸⁷⁹ Jim van Mourik and Eddy Bauw, "De Claimcode van 2011 tot 2019," *Utrecht University Repository* (2019).

⁸⁸⁰ Rijksoverheid, "Nieuwe code voor claimstichtingen".

⁸⁸¹ Ibid.; Commissie, "ClaimCode."

⁸⁸² "Claimcode 2019."

⁸⁸³ Albert Knigge and Huib Lebbing, "Claim Code 2019," in *Houthoff* (2019).

⁸⁸⁴ Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."

representative organizations are bound by stricter requirements for the structure and the governance of the organization. But the law has not said enough about the representative organizations' own financial stakes in the outcome of the case and the relation between representative organizations and external third party funders. In managing the financial incentives of the representative organizations, the Claimcode remains voluntary and therefore has a limited effect on the practice.⁸⁸⁵ Under the amended law, the representative organizations can still obtain a stake from litigation on a contingency basis and in cooperation with individual attorneys or law firms. They are free to choose the funding structure and to include third party funders if it is necessary. The success fees generated from the funding agreement are still by and large governed by market forces. The gap between Claimcode and statutory laws has not been well justified. Anecdotal evidence shows that the gap is allowed in order to prevent excessive rules for the participants in collective litigation at this stage.⁸⁸⁶

There is another gap between Dutch law and the EU directive that needs to be explained and bridged. Some Dutch practitioners have said that, although the proposed directive states that it will be "without prejudice to other forms of redress mechanism provided for in national law", "it is naïve to think that the minimum requirements set by a European Directive will leave the Dutch collective action regime entirely unaffected".⁸⁸⁷ Specifically, the Dutch legislators will have to pay attention to article 7 of the proposed directive, which provides that: the representative organization may be declared inadmissible by the national court if it is found that the third party funder (a) influences procedural decisions made by the representative organization, including decisions on settlement, or (b) provides financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependent.⁸⁸⁸ Under the amended Dutch law, however, the influence

⁸⁸⁵ van Mourik and Bauw, "De Claimcode van 2011 tot 2019."

⁸⁸⁶ Ibid.

⁸⁸⁷ Kortmann, "Overview of Legislative Proposal on Collective Action (NL) – Update June 2019."

⁸⁸⁸ "European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC". In the original proposal, it is explained the purposes of article 7: this

of TPF on the procedure is not entirely illegal depending on the form and the extent of the control.⁸⁸⁹ The new article 3:305 of the BW gives weight to the importance that the control of the legal claim lies with the parties to a sufficient extent. But it did not entirely rule out the influence of third party funders. Other than that, the amended law has dealt with the potential conflicts of interest between representative organizations and third party funders.⁸⁹⁰ Yet, it omits the relation between the funder and other participants. In the future, there might be a necessity for Dutch legislators to go beyond the relationship between the funder and the representative organization in regulating conflicts of interest.

Without doubt, representative organizations are the cornerstone of the Dutch collective litigation proceedings.⁸⁹¹ The law expects these organizations to prioritize the interests of the affected parties. But in reality, these organizations' financial incentives may ironically rule that out. Bearing this in mind and in consideration of the new developments on the European level, future research has to strike a better balance between the presence of "entrepreneurial representative organizations" and the integrity of collective litigation proceedings. Divergent thinking may be required on the question of

provision "requires that qualified entities should be fully transparent about the source of funding of their activity in general and specifically regarding the funds supporting a specific representative action for redress in order to enable courts or administrative authorities to assess whether there may be a conflict of interest between the third party funder and the qualified entity and to avoid the risk of abusive litigation for example between competitors, as well as to assess whether the funding third party has sufficient resources in order to meet its financial commitments to the qualified entity should the action fails." See: European Commission, "Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC," (2018).

⁸⁸⁹ Ministry of Justice and Security, "Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie) 34608 nr. A."

⁸⁹⁰ In dealing with conflicts of interest, the Claimcode 2019 adds values. The principle of independence and the necessity to avoid conflicts of interest have not been fully included in law. However, this code is short of binding force and therefore has limited effect on the practice. See: "Claimcode 2019," Principle III – Externe financiering.

⁸⁹¹ For that reason, the court is reluctant to rule against the admissibility of the representative organizations. See: *Litigation, Costs, Funding and Behaviour: Implications for the Law*, 234.

whether it is feasible to rationalize the financial incentives of representative organizations with procedural liabilities if Dutch law is not ready to push for more statutory regulations for such organizations or other types of third party funders.

5.6 Takeaways

Professional third party funders have been operating their business of funding legal claims in the Netherlands for a few decades and therefore TPF is hardly a new phenomenon in the Dutch context. TPF is understood by both Dutch scholars and legislators as a form of investment by third parties in dispute resolution. It is distinguished from LEI, legal aid and other funding options in terms of business model and regulation. In the TPF equilibrium, there are a number of contradicting legal components. Two of the most frequently cited are access to justice and claim culture. A lack of access to justice can be roughly equated to a lack of resources to settle disputes through judicial means properly. However, too wide availability of financing options is likely to give rise to negative effects. Overall, Dutch legislators have given more weight to access to justice than to the looming risk of claim culture, although the concept of claim culture remains as a factor of consideration in the TPF calculus and has the potential to impact the rules for TPF in the future.

As to the risks associated with TPF and the necessary safeguards, TPF for collective litigation is at the center of the discussion. It is conceivable that in collective litigation where problems such as lack of awareness of the rights, lack of finance and psychological reluctance are likely to be severe, TPF has a significant role to play. But the involvement of TPF has triggered concerns on the risk of excessive litigation, the funder's control on the procedure, the impact of TPF on the final recovery of the funded parties, etc. As of the time of this writing, these concerns have not resulted in any regulations directed specifically at third party funders in collective litigation or other dispute resolution proceedings. Nevertheless, it is noted by Dutch legislators that safeguards are required to prevent non-party financial incentives from distorting the purpose of the proceedings. The existing law in the Netherlands has granted the court the authority to deny settlement agreements for mass disputes under which the interests of the funded parties have not been sufficiently protected. To exercise such authority, the court is allowed to look into the details of the

funding arrangement, particularly, the impact of third party funders on the procedure.

A bill, which has introduced more stringent requirements for representative organizations in terms of governance, funding, business model, procedural behaviors, etc., has been approved by the Dutch Senate in March 2019. As a consequence, representative organizations are obliged to disclose the funding arrangement for the claims that they represent, which offers the court the opportunity to investigate the influence of third party funders on the funded case. This is in line with the EU legislators' attempt to regulate TPF in representative actions regarding consumer disputes.⁸⁹² It is proposed that the EU directive regulates TPF in order to offer more protection to consumers. The proposed provision concerns the disclosure of the funding agreement as well as the quality and behaviors of the funders. Once the proposal is adopted, it will become a question of how Dutch law should be amended to meet the EU standards for the practice of TPF.

The Dutch experience has shown that the regulation of TPF is needed to ease the concern on the capacity of the legal profession and court procedures to adapt to mass claims. Beyond the realm of collective redress, the regulation of TPF does not require a sense of urgency in the Dutch context. This explains why there has not been any official response to the call for a code of conduct for third party funders in all proceedings.⁸⁹³

⁸⁹² Rickett and Telfer, *International Perspectives on Consumers' Access to Justice*, 19.

⁸⁹³ van der Krans, "Third party litigation funding: De voordelen, aandachtspunten en aanbevelingen om risico's te beheersen," section 6.

CHAPTER 6 TPF IN CHINA

6.1 Introduction

Previous chapters have shown that TPF has gained a certain degree of prevalence in both litigation and arbitration. The development of TPF represents a trend of venture capitalists and legal service providers joining forces to form a new type of service that can help parties overcome risk aversion and financial constraints. In other jurisdictions of comparison, this new service has stirred up discussions on some key issues facing the judicial system: the lack of funding, access to justice, the impact of financial incentives of non-parties on the funded procedure, the regulation of non-party funding, etc. As the global TPF industry grows, Chinese parties are likely to encounter an opponent funded by TPF in cases both inside and outside of China, which compels them to obtain a better understanding of TPF.

In China, the use of TPF is not only a result of international influence but also a response to the internal problems of the Chinese legal system, particularly the lack of funding.⁸⁹⁴ Indeed, the severity of the problem of financial constraints varies from one area of law to another. But in all these areas, the common reason for the problem is that Chinese law does not provide enough in order to help properly fund litigation and arbitration. For instance, in 2005, when shareholder derivative action was introduced by the Chinese company law, there was a high expectation for this change.⁸⁹⁵ It was hoped that it could contribute to company management by enabling small shareholders to better protect their own rights and interests through litigation.⁸⁹⁶ But this expectation has not been fulfilled since the law does not provide efficient funding options for small shareholders to initiate and to

⁸⁹⁴ Hou, "Financing arbitration in mainland China: Hong Kong's legislation as a model," 612-13.

⁸⁹⁵ *Company Law of People's Republic of China*, article 152; Hui Huang, "中国股东派生诉讼制度：实证研究及完善建议 (Shareholder Derivative Action in China: An empirical Study and the Reform Proposals)," *人大法律评论 (Renmin University Law Review)* 1(2014).

⁸⁹⁶ Zhong Zhang, "Making Shareholder Derivative Actions Happen in China: How Should Lawsuits be Funded?," *Hong Kong Law Journal* 38(2008); Huang, "中国股东派生诉讼制度：实证研究及完善建议 (Shareholder Derivative Action in China: An empirical Study and the Reform Proposals)," 257-59.

maintain the lawsuit.⁸⁹⁷ Small shareholders are often found underrepresented and financially weak.⁸⁹⁸ It is apparent that the lack of funding does undermine the efficacy of law in China, despite the calls for empirical work and academic debates on whether TPF is the “panacea” for the above struggle.

Notwithstanding the lack of funding, it is a legitimate question whether the Chinese legal system is suitable for a large flux of private money. Thinking about this question might prevent one from advocating without hesitation that the law and the policy should be geared to attract as much commercial funding as possible to the legal market. Concerns about the enthusiasm for TPF are largely caused by the risk that the funder may distort the funded procedure for its own financial gains. The argument for proportionate justice has also decreased the zeal for TPF, which further complicates the scene. A court-based system influenced by claim culture might not be preferred by legislators.⁸⁹⁹ In this regard, China can learn lessons from the Netherlands. It is elaborated in Chapter 5 that the Dutch approach of dealing with TPF has always taken into consideration the danger of claim culture, although there is still little consensus on how to understand claim culture.

TPF emerges in China from a changing society where, on the one hand, people from different fields have an increasing need to invoke the law to protect their rights; and on the other hand, small and medium sized investors lack investment opportunities.⁹⁰⁰ The legal sector has been regarded by many investors as the next popular investment destination. The Chinese funders that the author has interviewed understand TPF in the same manner as their colleagues in other jurisdictions. They conceive TPF as the provision of funding on a non-recourse basis from which substantive returns will be generated.

⁸⁹⁷ Zhang, "Making Shareholder Derivative Actions Happen in China: How Should Lawsuits be Funded?," 526; Huang, "中国股东派生诉讼制度：实证研究及完善建议 (Shareholder Derivative Action in China: An empirical Study and the Reform Proposals)," 240.

⁸⁹⁸ Huang, "中国股东派生诉讼制度：实证研究及完善建议 (Shareholder Derivative Action in China: An empirical Study and the Reform Proposals)," 260.

⁸⁹⁹ Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*: 6.

⁹⁰⁰ Jiazhao G. Wang, Hongwei Xu, and Jun Ma, eds., *Financing the Underfinanced: online lending in China* (Springer, 2015), viii.

These funders are staffed with financiers and lawyers who deal with legal claims as assets that can be traded and invested.

China is a civil law jurisdiction where there is no prohibition on the practice of TPF, which allows Chinese third party funders to explore their way to better funding services. Previous chapters have said enough about the risks of TPF in both litigation and arbitration. TPF could be a threat to the integrity of the legal procedure and that of the legal profession. Although the risks of TPF have not triggered wide academic coverage or legal reforms in China, the Chinese legal system is not insulated from these risks. The empirical research that the author has conducted demonstrates that the participants of the legal proceedings have concerns about the involvement of TPF and the absence of the regulation of TPF. So far, these concerns remain unaddressed.

For reasons that are not entirely clear, the Chinese TPF industry is not well known by the outside world. The ICCA-Queen Mary report is the first research project that has shed light on the practice of TPF in China.⁹⁰¹ Nonetheless, it is rather general and descriptive and lacks empirical evidence. In addition to this report, what is available is no more than a few papers of theoretical analysis of TPF in China. To fill the information gap, empirical research was conducted by the author from October 2017 to December 2017 with assistance from DS Legal Capital, some local insurance companies, and the local authorities in Shenzhen, China. Two questionnaire surveys have been carried out to grasp the current practice of TPF in China. It is important to note that the results of the empirical research are far from systematic due to the status quo of the market and the size of the pool of the respondents. The dataset only serves a humble purpose, namely, to offer an insight into the Chinese TPF market. In addition to empirical evidence, this chapter is constructed to analyze the following issues: how China conceives the global expansion of TPF, how TPF impacts the Chinese legal system, whether and to what extent TPF should be regulated under Chinese law. The above efforts are made with the hope of

⁹⁰¹ "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration." The author of this book has contributed to this report together with the senior legal counsel of DS Legal Capital, Mr. Hu Xian. Due to the length limit, however, the contribution had to be rather general and descriptive.

providing knowledge that will be consulted on when future legal reforms in China are made regarding TPF.

6.2 The platform for TPF: The looming limitations

In academic discussions and arbitration rules, the term “third party funder” has been used in a very loose and expanded sense.⁹⁰² It refers not only to professional third party funders but also to hedge funds, insurers, lawyers, claim management companies and all others with an interest in investing legal claims. But the Chinese third party funders with their main business focus on funding legal claims in arbitration and litigation tend to consider themselves different from other players in the market.⁹⁰³ They enter into funding arrangements with the funded parties to fund the legal claims and, in return, receive a share from the final recovery. The funded parties only have to pay the funder if the case is successful. They pay nothing if the case is lost. There is currently no prohibition on the practice of TPF under the law of China. However, it would be too hasty to assume that there will be no subversion of the current situation in the future. The entry barrier for contingency fees in cases concerning public interests or mass parties has been encapsulated in Chinese law, which shows that there are concerns over the practice of non-party funding in some areas of law. It is worth asking what this entry barrier implies to TPF. The author has observed that, in the sphere where the permission of TPF is well-established, some proceedings are more in need of TPF than others.⁹⁰⁴ This part highlights two types of cases where TPF has a rather significant role to play.

6.2.1 No explicit legal prohibition on the practice of TPF

At no point in dispute resolution could the legality of TPF be challenged under Chinese law. The practice of TPF is currently not confined to the commercial realm. In previous cases, Chinese third party funders have helped workers to settle employment disputes with

⁹⁰² *International Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission*, article 27.

⁹⁰³ Guigeng Huang, “诉讼投资平台现状调查 (A study of the status quo of litigation investment platforms),” 法人 (Faren Magazine), <http://www.farennews.com/qj/yxdc/22373.html>.

⁹⁰⁴ In England, it is likewise found that “TPF is only relevant to certain situations” though it has the potential to significantly increase access to justice. See: Mulheron, “Third party funding and class actions reform,” 292.

their employers.⁹⁰⁵ In these cases, third party funders were welcomed by both the funded party and the court. The funded party was happy to be relieved from the heavy financial burdens of pursuing the case. The court was satisfied when litigation was transferred to a more “efficient litigant”. Empirical research materials show that the Chinese third party funders feel reluctant to step into the noncommercial field where concerns about funding are more likely to arise.⁹⁰⁶ The funding for commercial cases currently represents the area where the majority of TPF most likely takes place and therefore is the main focus of this part.

In comparison, arbitration seems to be more prepared for TPF than litigation. Even though the existing arbitration law does not address TPF directly, arbitration institutions have introduced provisions to the arbitration rules to define TPF and to deal with the potential risks of TPF, which will be introduced in greater detail later in this chapter.

6.2.2 TPF’s role in cases concerning insolvency and intellectual property rights

There are certain areas in which TPF now plays a significant role, for instance, cases regarding insolvency and intellectual property rights. According to the head of the bankruptcy department of DS Legal Capital, Ms. Zhou Jun, insolvency has the potential to yield large profits for third party funders.⁹⁰⁷ The success fee of TPF is categorized as part of the “insolvency costs” under Chinese law,⁹⁰⁸ which means that the payment to the funder will be prioritized over the payment to ordinary creditors.⁹⁰⁹ Under the Chinese insolvency law enacted in 2006, an enterprise shall be liquidated according to this law when it is unable to pay off debts falling due and when its asset fails to meet debts or it lacks liquidity.⁹¹⁰ In such situations, it is normally difficult to convince the creditors to fund the corporate’s ongoing or potential litigation or arbitration claims. As such, the administrator or the liquidator can either give up the claims or pursue the claim with external funding. In cases with the involvement of TPF, the funders

⁹⁰⁵ Huang, “诉讼投资平台现状调查 (A study of the status quo of litigation investment platforms)”.

⁹⁰⁶ Ibid.

⁹⁰⁷ Interview with Ms. Zhou Jun conducted in Shenzhen China in December 2017.

⁹⁰⁸ *Enterprise Bankruptcy Law of the People’s Republic of China*, articles 41-43.

⁹⁰⁹ Ibid.

⁹¹⁰ Ibid., article 7.

do more than the provision of funding. They can work closely with the liquidator in evaluating the merits of the claims with the purpose to decide whether and how to dispose of the legal claims. The funders could also participate in the reorganization process where they offer funds as well as legal advice to bad asset management and property restructure.

Intellectual property rights protection is also in need of funding. For small and medium corporates who are not well funded or insured, it could be prohibitively expensive to go against infringers in court or in arbitration. Given that the trend of rising costs of dispute resolution will not end soon, some local governments decided to let public funds take the lead in offering legal costs insurance protection to small companies who rely on innovative ideas and technologies. For instance, according to the “Operation Rules of the Intellectual Property Fund Project of Shenzhen Entrepreneurship and Innovation Base for Small and Micro Enterprises (trial)”, small and micro enterprises who own patent rights will be subsidized by the government for purchasing legal costs insurance for intellectual property rights.⁹¹¹ The idea is that, in settling disputes regarding intellectual property, not only insurers but also third party funders are involved to make sure that the patent owners are not greatly distracted by the costs of pursuing legal claims.

6.2.3 The looming entry barrier for TPF

With the absence of the prohibition on external funding for dispute resolution, it appears that TPF is currently permitted across all civil litigation and arbitration cases. However, it could be inferred from the regulation of lawyer funding or contingency fees that, in certain areas of dispute resolution, the involvement of external funding is not preferred.

The 2006 Measures for the Administration of Lawyers' Fees have outlawed contingency fees from the following cases: “(1) cases of marriage or inheritance; (2) cases of asking for social insurances or the minimum living costs; (3) cases of asking for payments for supporting parents or supporting children or for alimonies, pensions for the

⁹¹¹ “深圳市小微企业创业创新基地城市示范专项资金知识产权项目操作规程（暂行）(Instruments for the program of specific funds for protecting intellectual property rights owned by small businesses in Shenzhen (trial)),” (2017), chapter 4.

disabled or the family of the deceased or welfare payments, or compensations for work-related injuries; or (4) cases of asking for payments for labor remunerations, etc.; (5) criminal cases, administrative cases, cases of state compensation, or cases of collective litigation.”⁹¹² The question is whether TPF should also be excluded from the above cases.

The rationale underlying the above carve-outs is presumably that the nature of these cases is not compatible with the commercial incentives of nonparties. Clearly, Chinese law is not ready to commodify certain legal claims regarding family, administrative, criminal matters or claims filed by mass parties. As a matter of fact, some of the excluded cases are likely to be covered by legal aid and therefore the parties’ right to be represented should be relatively safe. However, in some cases such as collective litigation concerning consumer or commercial disputes, the parties have no access to either legal aid or the alternative funding options. Their right to access to justice could be easily denied by financial difficulties. This recalls what we have said in Chapter 5. It is realized by Dutch legislators that in multi-party cases financial distress is often caused by the risk aversion of mass parties and the totality of the procedural costs.⁹¹³ The lack of funding will lead to the situation where the case is handled in a way that less closely tracks the goals of the substantive law.

In the author’s view, TPF should not be brushed aside in collective litigation too quickly. From previous chapters, both common law and civil law jurisdictions have seen that the use of TPF has not gone beyond the administrative capacity of the legal system. In England and the Netherlands, there is a bar for contingency fees for collective litigation. However, there is no similar bar for TPF. Instead of completely excluding TPF from collective litigation, China should look to the reasons why TPF is allowed in collective litigation in these jurisdictions and the regulatory measures that have been implemented to resist the associated risks. Access to justice is said to

⁹¹² 国家发展改革委 (State Development & Reform Commission) and 司法部 (Ministry of Justice), “律师服务收费管理办法 (Measures on Payment of Litigation Fees),” (2006), articles 12 and 13.

⁹¹³ Huang, “中国股东派生诉讼制度：实证研究及完善建议 (Shareholder Derivative Action in China: An empirical Study and the Reform Proposals),” 257-60; Nash, “Financing access to justice: innovating possibilities to promote access for all,” 98.

be one of the most significant components of the TPF equilibrium. It is especially true in collective litigation where a group of claimants, each with relatively small claims, confront a strong defendant or a few strong defendants who are likely to be well-funded and experienced in court proceedings. Arguably, access to justice cannot be sufficiently guaranteed unless commercial TPF is permitted a role.⁹¹⁴ The risks of TPF are enough to justify a certain degree of the court's supervision on the impact of TPF on the procedure but not the complete exclusion of TPF from collective litigation. On the EU level, the importance of TPF has recently been highlighted in consumer mass claims. It is agreed among EU legislators that the use of TPF can benefit consumers as long as the funders do not abuse the funded proceedings.

6.3 The procedural implications of TPF

TPF should be understood as an eclectic choice in the Chinese context as it has both positive and negative impacts on dispute resolution proceedings. The analysis of these impacts invites the introduction of some key elements of the Chinese legal system that have provoked arguments for and against TPF. This part starts from the rule of law and access to justice which are the main thrust of the exploration of TPF. On that basis, it presents empirical materials of the Chinese TPF market as to the business models and the concerns of the participants of the funded proceedings about the use of TPF. This is followed by an analysis of the interaction between TPF and the legal profession, the procedural implications of TPF for litigation as well as the procedural implications of TPF for arbitration.

6.3.1 Key elements of the Chinese legal system

From previous chapters, we have seen that the rule of law and access to justice lay the ground for the development of TPF in the jurisdictions of comparison. China officially called for the rule of law too.⁹¹⁵ It is believed that the rule of law is a “cornerstone for China's future prospects”.⁹¹⁶ The notion has been well received by Chinese authorities that, without the safety valve of access to legal institutions, there will be the possibility of a breakdown of the social order. As far as access to legal institutions is concerned, the substantive capacity

⁹¹⁴ Section 2.1.

⁹¹⁵ Katrin Blasek, *Rule of Law in China: A Comparative Approach* (Springer, 2015), 1.

⁹¹⁶ *Ibid.*, 2.

and ability of the parties to pursue their case in the court is particularly important. To supplement litigation, China promotes arbitration so that the commercial parties can have a more flexible and efficient dispute resolution method. It is noted by the author that China and the jurisdictions of comparison took their developments leading to different theories and concepts of rule of law and access to justice. Therefore, through this part, the author refrains from a comprehensive analysis of all these theories and concepts but focuses instead on the elements of the rule of law and access to justice in the Chinese context that are relevant to TPF.

6.3.1.1 The rule of law in China

The rule of law (法治) in the Western sense has three basic implications: (1) the absolute supremacy of regular law as opposed to the influence of arbitrary power; (2) equality before the law; (3) the law of the constitution consequent to the rights of individuals, as defined and endorsed by the court.⁹¹⁷ The second and third implications directly aim at meeting the expectation of legal remedial effectiveness.⁹¹⁸ Therefore, it is almost inevitable that the rule of law is expounded together with legal facilities to promote access to dispute resolution mechanisms. China does not negate the value of law as an expression of equality and the safeguard for individual rights. It is provided in article 33 of the PRC Constitution 1982 that “all nationalists in the People’s Republic of China are equal before the law”. Article 5 provides some further assurance: “The People’s Republic of China practices ruling the country in accordance with the law and building a socialist country of law.” In the same provision, it is elaborated the supremacy of the constitution and the law: “All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution or the law must be investigated.” From the Chinese perspective, the socialist rule of law with Chinese characteristics is an important ingredient for successful economic and political practices. The rule of law is labeled as one of the “top five drivers” of China’s economic growth.⁹¹⁹

⁹¹⁷ Christopher May and Adam Winchester, eds., *Handbook on the rule of law* (Edward Elgar, 2018), 172.

⁹¹⁸ *Ibid.*, 177.

⁹¹⁹ Blasek, *Rule of Law in China: A Comparative Approach*: 2.

Bearing in mind the emphasis on economic growth, it is not difficult to understand that private law has eclipsed all other types of law in China.⁹²⁰ After the Cultural Revolution, the state has largely improved the civil procedural and substantive laws to meet the litigants' desire to safeguard their rights through judicial means. Many efforts have been made to strengthen the litigants' ability to bring cases to the court.⁹²¹ China's participation in the WTO trade system and the establishment of many other bilateral and multilateral trade relations have largely bridged the gap between the Chinese private law and private law in other jurisdictions. Inside of China, the practice has witnessed an increase in the amount of trade and in the awareness of the right to sue which has driven the development of legal services including legal funding services. In 2006, regulated contingency fees were introduced to meet the financial need of the parties against the background of the rise of the lawyers' fees and the costs of other associated services. In parallel to litigation, arbitration has been developing steadily as an alternative dispute resolution method since the 1990s.⁹²² In recent years, there has been a rapid increase in the number of arbitration cases being filed.⁹²³ The practice has witnessed a large number of commercial cases shift from litigation to arbitration.

The above aims to say that, in discussing TPF for commercial disputes in China and that in the jurisdictions of comparison, one should not be distracted by the differences in political beliefs between China and others. These differences surely have a large impact on the relation between state and its people which results in different political and constitutional structures. But they have not significantly affected the legal principles and policies underlying the disposition of commercial disputes. In the commercial realm, both systems share the objectives of the rule of law, that is, to facilitate commercial dispute resolution and to optimize commercial orders. Plus, in modern China, a Western image of justice and law is widely used.⁹²⁴ As observed by Yuanyuan

⁹²⁰ Chuan Feng, Leyton Nelson, and Thomas Simon, *China's Changing Legal System: Lawyers & Judges on Civil & Criminal Law* (Palgrave Macmillan, 2016), 79.

⁹²¹ *Ibid.*

⁹²² Jingzhou Tao, *Arbitration Law and Practice in China*, 3 ed. (Kluwer Law International, 2012), 1.

⁹²³ Hui Wang, "Third-party funding in arbitration: potential trends and implications for China," *Journal of Business Law* 2(2018): 139.

⁹²⁴ Wejen Chang, "Western and Chinese images of justice," *Peking University Law Review* 1, no. 2 (2013): 446.

Shen in her book “The Limits of the Rule of Law in China”, “through heavy borrowing from the West, China has enacted statutes regarding a range of matters, especially those concerning economic affairs”.⁹²⁵ It is safe to say that TPF is likely to become a useful tool in China as long as proper safeguards are ready.

6.3.1.2 Access to justice vis-a-vis justice for people

The narrative of access to justice has never been simple and straightforward.⁹²⁶ As a legal concept, access to justice is developed out of specific circumstances and conditions and has given rise to questions as to “how to access” and “what is justice”. Whether in China or in other jurisdictions, it is agreed that the judicial system should encompass not only institutions for dispute resolution but also mechanisms that make these institutions accessible.⁹²⁷ Based on this notion, it is appropriate to ask in China how to implement access to justice and what are the required services, leading to the question of whether the state should provide the parties to the dispute resolution procedure with as many funding options as possible. The fact that contingency fees are generally allowed in civil cases but not allowed in cases with public interests and multiple parties implies that in the Chinese context the access to justice arguments do not always prevail. A balanced view is required in promoting legal services motivated by commercial interests.

Access to justice was received by the Chinese academia in the post-Cultural Revolution time as a foreign import and has never officially become a term in Chinese law.⁹²⁸ Instead, Chinese legislators have created the concept “justice for the people” (司法为民).⁹²⁹ There is a

⁹²⁵ Karen G. Turner, James V. Feinerman, and R. Kent Guy, *The Limits of the Rule of Law in China* (University of Washington Press, 2015), 21.

⁹²⁶ Jing Li, “The legal profession of China in a globalized world: innovations and new challenges,” *International Journal of the Legal Profession* (2018): 2; Stefan Wrba, *European Consumer Access to Justice Revisited* (Cambridge University Press, 2014), 3.

⁹²⁷ Access to justice: to dream the impossible dream?, 408

⁹²⁸ *ibid*; Hui Guo, “Why Do We Research “Access to Justice” (2016) 33 *Journal of Chongqing Technology and Business University* 61.

⁹²⁹ 最高人民法院关于印发《关于落实23项司法为民具体措施的指导意见》的通知 (*Guiding Opinions of the Supreme People's Court concerning Implementing the 23 Measures for Justice for the People*); 孔祥稳 (Kong Xiangwen), “接近正义”与“司法为民”中西方两种司法观念之比较 (“Access to justice” and “justice for people” a comparison between the judicial belief of the east and that of the West),” *吉林工程技*

great deal of uncertainty in this concept. Some Chinese scholars have argued that these two terms, access to justice and justice for the people, have both similarities and differences.⁹³⁰ They share the same goal of protecting the rights and interests of people recognized by law. Meanwhile, they emphasize on the accessibility of the judicial system and various necessary legal services.⁹³¹ However, compared to access to justice, “justice for the people” seems to focus more on the collective interest of the people and seems to be more closely intertwined with the political agenda of the state.⁹³² One could argue that “justice for the people” and “access to justice” have different implications since the former is more of a result of “state instrumentalism” while the latter is one of the ultimate goals of the Western democratic system or one of the features that defines Western constitutional democracy.⁹³³

It could also be argued that “justice for the people” refers to both the “narrow” and the “broad” dimensions of access to justice. According to Ramsay, “the narrow dimension equates access to justice with access to legal institutions”, while “the broad dimension is concerned with the general conditions of justice in society”.⁹³⁴ It can therefore be said that “access to justice” is a natural implication of “justice for the people”.⁹³⁵

The author tends to believe that there is no foundational difference between these two terms in the context of TPF. They both urge the law to facilitate individuals’ right to settle disputes through the judicial system, with considerations being given to the proportionality of the costs and the public interest.⁹³⁶ One might recall the “proportionality”

术师范学院学报 (*Ji Lin Engineering Normal University Journal*) 30, no. 12 (2014).

⁹³⁰ 孔祥稳 (Kong Xiangwen), “接近正义”与“司法为民”中西方两种司法观念之比较 (“Access to justice” and “justice for people” a comparison between the judicial belief of the east and that of the West).”

⁹³¹ Ibid.

⁹³² Ibid., 9.

⁹³³ *Justice: the China Experience*, (Cambridge University Press, 2017), 8; Wrba, *European Consumer Access to Justice Revisited*: 16.

⁹³⁴ *International Perspectives on Consumers’ Access to Justice*, ed. Charles Richett and Thomas Telfer (Cambridge University Press, 2009), 19.

⁹³⁵ 符望 (Fu Wang), “从‘接近正义’到‘司法为民’ (From “access to justice” to “justice for the people”),” *法治论丛* (*The Rule of Law Forum*) 20, no. 2 (2005); 翁洪洪 (Weng Honghong), “接近正义与知识产权诉讼第三方资助 (Access to justice and intellectual property right litigation third party funding),” *Intellectual Property*, no. 5 (2018): 57.

⁹³⁶ Sorabji, *English Civil Justice after the Woolf and Jackson Reforms*: 163, 64; John

principle advocated by Woolf and Jackson which has a large impact on the legal cost reforms in England.⁹³⁷ Likewise, Chinese law requires adjudicators to consider a wide range of factors including not only the individuals' right to settle disputes through litigation or arbitration but also the deeper background and future effects.⁹³⁸ In both China and other jurisdictions of comparison, "justice" implies that a state of fairness and equality must be reachable. To achieve that, some procedural questions relating to accessing the judicial system must be asked. One of the questions is how to make use of TPF.

6.3.2 The empirical evidence of the Chinese TPF practice

Although China has a lot of potential for TPF, the Chinese TPF market has not been well described in English literature. The language barrier may be one of the reasons. The lack of legal certainty and academic discussions on TPF might also be contributors to this situation. To the best of the author's knowledge, the first attempt to narrate the development of TPF in China is the Report of the ICCA-Queen Mary Task Force on TPF in International Arbitration which does not contain many empirical materials about the Chinese TPF market.⁹³⁹ Apart from that, there are no more than a few papers dealing with TPF on the theoretical level. In China, TPF has attracted some attention from academia and the practice but remains a relatively underexplored area. To elaborate, it is useful to look to the statistics from DS Legal Capital.⁹⁴⁰ It was reported that there are in total 33 articles on TPF being published in Chinese since 2015 that can be found in the CNKI database.⁹⁴¹ The number of articles has gradually increased over the years. A large proportion of these articles focus on TPF in the context of arbitration and intellectual property rights protection. Overall, these articles have lacked the empirical foundation needed to bring TPF into focus for practitioners.

Sorabji, "Prospects for proportionality: Jackson implementation," *Civil Justice Quarterly* 32, no. 2 (2013): 214.

⁹³⁷ Sorabji, "Prospects for proportionality: Jackson implementation," 214.

⁹³⁸ Chang, "Western and Chinese images of justice," 449.

⁹³⁹ "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," 18.

⁹⁴⁰ DS Legal Capital, "国内第三方资助相关学术研究成果的检索分析报告 (Retrieval analysis report of third party funding related academic researches in China)," <https://mp.weixin.qq.com/s/qNA16TP6nxYbgJ30-O9G9Q>.

⁹⁴¹ Ibid.

In order to obtain some first-hand materials about the Chinese TPF market, empirical research was conducted by the author in Shenzhen with the assistance of DS Legal Capital and the local authorities and legal practitioners from October 2017 to December 2017.⁹⁴² During this time, two surveys were carried out. This empirical research takes the very first steps to add important empirical knowledge into the current research about the TPF practice in China and the associated legal issues. Responses to the survey questionnaires have a completely voluntary basis. WeChat and wjx.cn have been used to reach to a larger group of respondents. The first questionnaire survey saw in total 175 responses from lawyers (63), arbitrators (12), in-house counsels (23), judges or judge assistants (16), governmental officers (12), arbitration institutions (18) and others (31). The second one targeted specifically in-house counsels with companies who have subscribed to the membership of the Legal Executive Board. There were 18 responses received. The survey results do not contain personal data that can be used to trace back to the respondents.

This section will first sketch out the profile of the Chinese third party funders. Then it presents the results of the surveys with regard to the penetration of TPF and the concerns of the practitioners.

6.3.2.1 The profile of the Chinese third party funders

Chinese third party funders approached by the author portray themselves as investment companies focusing on legal claims funding. From the funder's perspective, TPF is a mix of a funding service and a legal counseling service. Not only do they provide capital to the case, but they also help the clients with case assessment, budget management, case strategy structure, and so on. The funders have built cooperative relations with insurance companies and law firms to make it possible to integrate legal insurance, TPF and contingent representation in the same case. The Chinese third party funders adopt the same business models as their counterparts in other jurisdictions of comparison. In China, TPF is treated as an investment that is not bound by the regulations of other funding options, this adds

⁹⁴² It is important to note from the outset that the independence of this research has been treated with great caution in the process. This empirical research constitutes an essential part of the author's PhD project which is funded by the Chinese Scholarship Commission and the University of Groningen. No commercial funds have been accepted.

value to the author's view that TPF in China is comparable to TPF in other chosen jurisdictions.⁹⁴³

With substantive financial stakes in the funded case, it is natural that the funder seeks to investigate the case and to monitor the conduct of the funded proceedings. Prior to the funding agreement, the funders pay more attention to the nature, the legal merits and the value of the claims as well as the financial status of the opposing party. The decision on whether to fund a specific legal claim requires both legal and non-legal considerations. In the absence of regulations on the behaviors of the funders, the Chinese funders are likely to engage in the funded case to the extent that they are the real master of the proceedings.

In the Chinese context, third party funders raise funds from individuals, law firms, institutional investors, venture capitalists, etc. Third party funders normally have full control over the funds in their possession. Control on the part of shareholders is rather minimal, and most of the time only encompasses the basic information and monitoring rights. Despite being minimal, such control has complicated the conflicts of interest issues in dispute resolution.⁹⁴⁴ With regard to the fundraising channels, the funders have to be careful when Chinese law is applied. Illegal fundraising under the law of China is large in scope and can trigger serious criminal consequences. In 2011, the Supreme People's Court (SPC) laid down judicial interpretation "The Interpretation of the Supreme People's Court of Several Issues on the Specific Application of Law in the Handling of Criminal Cases about Illegal Financing" which sets out the characters of illegal fundraising that can trigger the application of the criminal law: (1) absorbing funds without the legal approval of the relevant

⁹⁴³ 国家发展改革委 (State Development & Reform Commission) and 司法部 (Ministry of Justice), "律师服务收费管理办法 (Measures on Payment of Litigation Fees)," article 13.

⁹⁴⁴ The challenges posed by the inter financing plan of the funder has always being a problem in the context of both TPF and lawyer funding, whether it is in China or elsewhere. Against the concerns about the potential conflicts of interest relate to the financing plan of the funder, the funder has argued that the funder raises funds from various sources, which is the internal financing plan that is not necessarily known by the funded party. It is preposterous if the regulation expects the funder to inform the funded party its internal financing decisions. See: Bogart, "Deeply flawed: A perspective on the ICCA-Queen Mary Task Force on third-party funding."

department or under the disguise of lawful business operations; (2) publicizing by means of media, recommendation fairs, leaflets or mobile phone text messages, etc.; (3) promising to repay the principal and interests or make payments in the form of currency, real objects, equalities, etc. within a certain time limit; and (4) absorbing funds from the general public, i.e. unspecified people.⁹⁴⁵ Accordingly, third party funders must not have a large pooling of capital from indefinite investors unless they are publicly listed.⁹⁴⁶

So far, there are no restrictions from Chinese law on the quality or the identity of third party funders. But it would be misleading to say that the funders have no rules to go by. Chinese third party funders often take the form of a limited company.⁹⁴⁷ They must ensure compliance with the corporate law as to the set-up requirements and the corporate governance. The Chinese TPF market is rather isolated from the outside world. Chinese law has made it difficult for foreign third party funders to enter into the Chinese legal service market. As a matter of fact, the legal service market is a forbidden area for foreign investment, according to the Catalogue of Industries for Guiding Foreign Investment jointly issued by the Ministry of Commerce and few other administrative authorities.⁹⁴⁸ At present, it seems to be impossible for foreign third party funders to have a share in the Chinese TPF

⁹⁴⁵ 最高人民法院关于审理非法集资刑事案件具体应用法律若干问题的解释

(*Interpretation of the Supreme People's Court of Several Issues on the Specific Application of Law in the Handling of Criminal Cases about Illegal Fund-raising*). article 1

⁹⁴⁶ Under Chinese law, bringing in new small investors directly from the crowd can be problematic due to the limit on the number of shareholders of the private company. This has forced the company to use "syndication" or "financial vehicle" to conduct fundraising. See: The Korea University Legal Research Institute, "Equity crowdfunding in China: current practice and important legal issues," *The Asian Business Lawyer* 18(2016). 最高人民法院关于审理非法集资刑事案件具体应用法律若干问题的解释 (*Interpretation of the Supreme People's Court of Several Issues on the Specific Application of Law in the Handling of Criminal Cases about Illegal Fund-raising*). article 2

⁹⁴⁷ "深圳前海鼎颂投资有限公司工商登记信息 (Shenzhen Qianhai DS Investmnet Ltd. registration information),"

https://www.qichacha.com/firm_91cd035eff713879f6c81e6c5e8ad64a.html.

⁹⁴⁸ 自由贸易试验区外商投资准入特别管理措施 (负面清单) (*Special Administrative Measures (Negative List) for the Access of Foreign Investment in Pilot Free Trade Zones*); 外商投资产业指导目录 (*Catalogue of Industries for Guiding Foreign Investment*); 外商投资准入特别管理措施 (负面清单) (*Special management measures for foreign investment access (negative list)*).

business. Even without the above limit, foreign companies established outside of China under foreign laws are only allowed to establish a branch in China if the application is approved by the competent authority.⁹⁴⁹ Such a branch does not carry the status of the Chinese legal person.⁹⁵⁰

6.3.2.2 The penetration of TPF in China

From theory alone, the risks of TPF are overridden by the benefits of TPF, which has been elaborated at length in previous chapters. TPF enables individuals and corporates to present their rights to the court or the arbitral tribunal. It levels the playing field so that the parties at a financial disadvantage do not have to be forced into an unfair settlement or to give up their cases. It can also help those companies on the edge of bankruptcy to rehabilitate. Although the focus of this work is on TPF in the commercial context, it is important to notice that the Chinese TPF business is not confined to commercial situations.

Empirical research is required to verify the theoretical impact of TPF and to reveal the particulars of the Chinese TPF market. To that end, two questionnaires have been circulated at different times, as one of the essential components of the empirical research. The first one was sent out on 11 November 2017 through the DS Legal Capital online platform as well as many private WeChat accounts. One month later, 175 responses were received. The respondents were required to choose their occupation before they started answering a series of questions that were designed for the specific occupational group. It has been noticed that, due to the “occupation filters”, some of the findings based on too few responses have lost statistical value. In light of this, the author has carefully distinguished findings that are statistically meaningful from those that are not. Just as important, even when the number of responses from a certain occupational group is not sufficient for statistical analysis, it is still valuable to look at the experience of these respondents with TPF to obtain insights regarding how TPF is conducted and what are the concerns that it has given rise to. The second questionnaire was circulated by the Legal Executive Board and Statistical Society for Foreign Economic Relations and Trade of Shenzhen on 29 November 2017. There are in total 18 corporates who have responded. These corporate respondents diverse in the corporate

⁹⁴⁹ *Company Law of People's Republic of China*, chapter 11.

⁹⁵⁰ *Ibid.*

structure, the size of the corporate and the nature of the cases that they regularly deal with. The data has no lack of details and depth on the topic of TPF and therefore bears a great deal of qualitative value. The findings are useful for a better understanding of corporate users' perceptions of TPF.

Issue 1: Funding sufficiency and funding methods

The question to lawyers in questionnaire 1: In the past 5 years, how often did you encounter a situation where the clients had to drop meritorious claims because of impecuniosity?

The question to lawyers in questionnaire 1: How do you usually help your clients deal with their financial distress in pursuing legal claims?

The question to legal counsels in questionnaire 2: Have you ever given up pursuing legal claims because of financial distress?

A large majority of the lawyer respondents have seen clients drop promising claims because of their financial distress. It is rather apparent that the lack of funding is a reality. But due to the contradicting results from the two questionnaires and the size of the research, it is hard to know how severe the problem of lack of funding is. Despite the existence of this problem, the use of non-party funding is not satisfactorily sufficient. Lawyers are more willing to push lawyer funding than other funding options for unknown reasons. That has probably contributed to the situation that the penetration of TPF is

relatively low. It will become clear in issue 4 that the corporate parties are still heavily relying on self-funding in pursuing legal claims.

Issue 2: TPF in the eyes of lawyers

The question to lawyers in questionnaire 1: How familiar are you with TPF?

The question to lawyers in questionnaire 1: Where did you obtain your knowledge about TPF?

The question to lawyers in questionnaire 1: Do you see TPF different from the traditional funding options?

The question to lawyers in questionnaire 1: Do you favor the use of TPF?

The question to lawyers in questionnaire 1: What is(are) the reason(s) for you to oppose the use of TPF?

The question to lawyers in questionnaire 1: What are the risks of TPF?

Lawyer respondents obtain their knowledge about TPF from various resources, mostly from online information. But, with only about 66% of the lawyer's respondents familiar with TPF, the penetration of TPF among lawyers is far from satisfactory. Among those who know TPF, the majority view is that TPF differs from traditional funding options and should be welcomed as a new funding mechanism. The rest are opposed to the use of TPF because of a variety of reasons. The main reason is that the Chinese TPF market has not been well regulated, which leads to practical uncertainties and risks. Lawyer respondents have put forward a wide range of risks that in their view could impact the procedure and the interests of the participants. These risks concern conflicts of interest, the confidentiality of the funded procedure, lawyer-client relation, the costs liability of the parties, the funder's control on the case, and others.

Issue 3: TPF in the eyes of adjudicators

a. Judge and judge assistants

The question to the judges and judge assistants in questionnaire 1: How familiar are you with TPF?

The question to the judges and judge assistants in questionnaire 1: Are you in favor of the use of TPF?

The question to the judges and judge assistants in questionnaire 1: Do you consider TPF the same as the traditional funding options in dispute resolution?

The question to the judges and judge assistants in questionnaire 1: Do you think TPF should be regulated separately?

The question to the judges and judge assistants in questionnaire 1: Should the funded party be allowed to recover the costs of TPF or the success fee under the TPF agreement from its opponent?

Preliminarily, it is important to note that the number of responses from judges and judge assistants is quite small (12 responses in total), which affects the statistical value of the results. There are judges and judge assistants who are aware of the use of TPF and are willing to endorse the idea of regulating TPF separately from traditional funding options. Views are divided on the issue of whether the costs of TPF could be recovered from the losing side.

b. Arbitrators

The question to arbitrators in questionnaire 1: How familiar are you with TPF?

The question to arbitrators in questionnaire 1: What is your perception of TPF?

The question to arbitrators in questionnaire 1: In the absence of any indication in law or in institutional rules, do you consider yourself being empowered to order disclosure of TPF?

The question to arbitrators in questionnaire 1: Do you take TPF into account when deciding whether to issue a costs order?

The question to arbitrators in questionnaire 1: What risks do you think TPF could potentially cause to arbitration?

The question to arbitrators in questionnaire 1: Do you consider TPF the same as the traditional funding options in arbitration?

The question to arbitrators in questionnaire 1: Do you think it necessary to regulate TPF separately?

There are in total 4 responses obtained from arbitrators. Therefore, the results are statistically meaningless. But these responses are still valuable to be examined for a deeper understanding of how these arbitrators conceive TPF. Among the respondents who are aware of TPF, two of them have found that the use of TPF in arbitration is useful. As to the disclosure of TPF, two arbitrator respondents consider that they should be empowered to order such disclosure. Only one will consider TPF when making costs orders. There is another taking the view that the tribunal is obliged to make inquiries about TPF in the arbitration procedure. Regarding the risks of TPF, most of the respondents are concerned about conflicts of interest. Two of them pay attention to the impact of TPF on the legal profession and the settlement process. One of them concerns the lack of a limit on the total amount of success fees.

c. Arbitration institutions

The question to arbitration institutions in questionnaire 1: In the past five years, how often do you see TPF being used in arbitration?

The question to arbitration institutions in questionnaire 1: What is your perception of the use of TPF in arbitration?

The question to arbitration institutions in questionnaire 1: Are there any cases where arbitrators ordered the disclosure of TPF?

The question to arbitration institutions in questionnaire 1: Did you witness cases where the parties disclosed TPF voluntarily?

The question to arbitration institutions in questionnaire 1: Have you witnessed cases where the opponents of the funded parties found out and reported the existence of TPF to the arbitral tribunal?

The question to arbitration institutions in questionnaire 1: Should the funded party be obliged to disclose TPF in arbitration?

The question to arbitration institutions in questionnaire 1: Should the lawyer or legal representation be obliged to disclose TPF in arbitration?

The question to arbitration institutions in questionnaire 1: In what aspects do you think the arbitration proceedings are influenced by the use of TPF?

The question to arbitration institutions in questionnaire 1: Do you think the regulation of TPF is a necessity at this stage?

There are in total 14 responses from arbitration institutions. Half of the respondents claim that they have seen TPF being used in arbitration in the past five years. A large proportion remains neutral about the impact of TPF. Thirty three per cent of them find TPF useful. The rest either remain neutral or consider TPF as useless or dangerous. Fifty per cent of the respondents who know TPF conceive the disclosure of TPF as a necessity. The funded party's obligation to disclose TPF is preferred by all respondents. Views are divided on the issue of whether lawyers or other legal representatives should bear the obligation of disclosing TPF. In arbitration seated in China, the parties to arbitration may require the disclosure of the opposing party's funding arrangement. In some cases, the funded parties disclose TPF voluntarily. Some of the respondents believe that TPF could impact arbitration in many aspects regarding the impartiality of the arbitral tribunal, the confidentiality of the arbitration procedure, the costs liability of the parties, the enforceability of the arbitral award, the integrity of the arbitration proceedings, the settlement process, the legal representation, etc. A majority of them consider that the regulation of TPF for arbitration should be ready to prevent potential abuses.

Issue 4: TPF in the eyes of the users

The question to legal counsels in questionnaire 1: How familiar are you with TPF?

The question to legal counsels in questionnaire 2: Do you know TPF?

The question to legal counsels in questionnaire 1: How do you usually fund the costs of dispute settlement?

The question to legal counsels in questionnaire 2: How do you usually fund your case?

The question to legal counsels in questionnaire 1: Are you willing to try TPF in the future?

The

question to legal counsels in questionnaire 2: Are you willing to try TPF in the future?

The question to legal counsels in questionnaire 2: Why do you not want to try TPF in the future?

The question to legal counsels in questionnaire 2: What is(are) your concern(s) about TPF?

There are 21 responses from legal counsels to the first questionnaire. To enlarge the sample, a second questionnaire only targeting in-house counsels from company users of TPF was sent out when it became possible. It saw 18 responses. Many legal counsels know TPF. But it is hard to be exact about the proportion due to the contradicting results. It is rather apparent from the results that corporates which the in-house counsel respondents work with rely heavily on self-funding in dispute settlement. A large proportion of the respondents are willing to use TPF in the future. Those who refuse to try have concerns about the following issues: the discount on the successful result, the legality of TPF, the confidentiality of the case, and the funder's control on the

case. In the case that TPF is involved, some of the legal counsel respondents would like to pay attention to the following issues: the legal status of TPF, the amount of success fee, the confidentiality of the case materials, the choice of lawyers and the funder's control on the proceedings.

6.3.3 Analysis

The survey has indicated that TPF is a reality in China and has given rise to concerns.⁹⁵¹ However, as a funding option for dispute resolution, TPF is currently not well known, not even by lawyers. The concerns about the use of TPF have not been translated into any regulatory measures specifically for TPF. Chinese law is silent on TPF. In practice, TPF and the alternative funding options are different in terms of business model and regulation. In empirical research, we have found that it is not the intention of the Chinese third party funders to provide the same services as offered by loan lenders, insurance companies, banks, hedge funds, equity funds, charities, etc. The Chinese legislators have never required third party funders to comply with the regulations of contingency representation or other funding options. The funders that the author has interviewed are registered as limited companies and invest in legal claims in both litigation and arbitration based on market rates. With the above in mind, this part details the legal implications of TPF on the funded procedure. It starts from the interaction between third party funders and lawyers. Then it moves to address the impact of TPF on the litigation procedure and the arbitration procedure respectively.

6.3.3.1 The changing Legal service market: How does TPF interact with lawyers?

To understand the impact of TPF on lawyers, an overview of the changing landscape of the legal service is required. In China, the legal service has become increasingly industrialized.⁹⁵² The market is currently characterized by the following features: the intensive

⁹⁵¹ Contingency fees have not become a satisfactory solution to the problem of lack of funding in China. See: 翁洪洪 (Weng Honghong), "接近正义与知识产权诉讼第三方资助 (Access to justice and intellectual property right litigation third party funding)," 58.

⁹⁵² 李玉福 (Li Yufu), "中国律师业产业化发展的有益探索——中国律师业产业化发展理论研讨会综述 (Exploring the industrialization of the China's Legal professional industry— Summary of the China's legal professional industry development theory proseminar)," *法学论坛 (Legal Forum)*, no. 06 (2001).

competition in the legal service market, the diversity in the content of the legal service and the charging rates free from government control.⁹⁵³ This market has led to ever-increasing billing rates and profits per partner which are currently under a lot of attacks.⁹⁵⁴ It has also resulted in higher expectations for transparency and quality of the legal services from the client's side. In addition to that, the modern time observes a raft of entrepreneurs entering the legal service market in response to the latent demand for access to legal services as well as efficient, predictive and scalable case management and budget management products and services.

As explained in previous chapters, it is a fact that lawyers no longer monopolize the legal market. DeStefano has described the current situation as "too many cooks in the kitchen".⁹⁵⁵ Traditionally, lawyers are trusted to structure the proceedings on behalf of their clients based on their legal knowledge and according to the applicable professional rules. In return, they are paid either on an hourly basis or by a percentage of the final recovery. Nevertheless, as the scale and complexity of legal matters increase, occasionally law firms have to reach beyond national borders and outside the legal sphere to satisfy their client's demand. Lawyers are expected to not only handle legal issues being entrusted to them but also help their clients ease financial pains in maintaining the procedure. In both international and domestic cases, the client's expectation to use external funding has driven law firms to ally with external investors who previously had no role to play in the legal business. The above changes have also taken place in China, which has brought challenges to the traditional

⁹⁵³ Ibid.; Li, "The legal profession of China in a globalized world: innovations and new challenges," 1.

⁹⁵⁴ China has made efforts to liberate the price of legal services in the past few decades. For quite a long time in history, law firms were subject to the "government-suggested price" for the provision of legal services. Such price was determined by the local price control authority and the local judicial authority at the same level, and therefore differed from one province to another. In 2014, the State Development and Reform Commission (国家发展和改革委员会) issued a notice of decontrolling the price of legal service save in some cases closely related to the public or administrative matters. As the result, the price of legal services has been subject to the market since then. See: *国家发展和改革委员会关于放开部分服务价格意见的通知 (Notice issued by the National Development and Reform Commission on Opinions of Releasing the Price of Some Services)*.

⁹⁵⁵ Michele DeStefano, "Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?," *Fordham Law Review* 80, no. 6 (2012).

regulatory regime for the legal profession.⁹⁵⁶ TPF has arguably added on to that challenge.

Chapter 4 addresses Singapore's response to the above challenge. To prevent the improper impact of TPF on the professional conduct of lawyers, Singaporean law prohibits lawyers from having financial interests in third party funders or being paid for referral of clients. In other jurisdictions of comparison, there is no such approach being adopted. The question is which approach is best for China. This is no immediate answer to this question. In the author's view, any attempt to regulate the impact of TPF should be preceded by expansive disclosure of TPF, resulting in empirical materials about the effect of TPF.

The seemingly innocent actions of lawyers in order to save their clients from financial distress using TPF have in fact created a danger zone for lawyers themselves. What further complicates the situation is the blurred line between third party funders and lawyers. With no legal restrictions on the identity of the third-party funders in China, the funders could be lawyers or be controlled by lawyers. There is no mechanism within the law firm that could insulate lawyers who handle the funded case and those who have financial interests in the funder. There is no mechanism either to deal with law firm financing from third party funders. What also remains unregulated is the cooperative relationship between law firms and third party funders which obligates the two to refer clients to each other. Without legislative or judicial guidance, many people might be misled to believe that the alliance or convergence of lawyers and third party funders can deliver the one-stop service that benefits the interest of the funded party eventually.

6.3.3.2 The Impact of TPF on litigation procedure

In litigation, TPF is often kept in the dark. Currently, neither the funder nor the funded party is obliged under Chinese law to disclose the funding arrangement to the opposing party or the court. The law has not instructed the court to make an inquiry about or to supervise the funding arrangement. Therefore, one could know little from the court's rulings on the impact of TPF on litigation proceedings. But we

⁹⁵⁶ Li, "The legal profession of China in a globalized world: innovations and new challenges," 1.

ought not to stop at that, but instead, we should use put together the features of TPF and the procedural rules for litigation to identify and to understand the potential risks of TPF in the Chinese context.

China has adopted some unique costs allocation rules. As a result of that, TPF is unlikely to directly add up to the financial burden of the funded party's opponent. In accordance with article 6 of the Measures on the Payment of Litigation Costs, the costs of litigation include (1) case acceptance fee; (2) application fee; (3) the traffic expenses, accommodation expenses, living expenses, and subsidies for missed work, which incurred by witnesses, authenticators, interpreters and adjustment makers for their appearance in the people's court at the designated dates.⁹⁵⁷ The parties are able to call for witnesses.⁹⁵⁸ However, it is the court's responsibility to summon the witness and to compensate them in advance of the expenses and fees thereby incurred.⁹⁵⁹ By the end of the case, the court has the authority to ask for the witness costs from the losing party based on article 74 of the Civil Procedural Law of the PRC.⁹⁶⁰ The scope of the costs of litigation in Chinese law is rather limited because lawyers' fees have been excluded.⁹⁶¹ As a result, litigants have to bear their own lawyers' fees which usually amount to a large proportion of the total legal costs of litigation.⁹⁶² Despite the general rule that some of the litigation costs could be shifted to the losing party, the winning party bears any fees incurred from agreements this party entered into without the consent of its opponent.⁹⁶³ As such, it is reasonable to assume that the funded parties have to bear the costs of TPF under the Chinese civil procedure law. To the best of the author's knowledge, there has been no case demonstrating that TPF is relevant to cost allocation.

In 2016, the cost rules in China were amended to enable some lawyers' fees to be shifted to the losing side.⁹⁶⁴ The SPC has said that the

⁹⁵⁷ 诉讼费用交纳办法 (*Measures for Payment of Court Fee*), article 6.

⁹⁵⁸ 中华人民共和国民事诉讼法 (*Civil Procrual Law of the People's Republic of China*), article 73, 74.

⁹⁵⁹ *Ibid.*

⁹⁶⁰ *Ibid.*, article 74.

⁹⁶¹ Jianguo Xlao and Xin Tang, "Cost and fee allocation in civil procedure: China national report," *Tsinghua China Law Review* 4, no. 43 (2012): 45.

⁹⁶² *Ibid.*, 46.

⁹⁶³ *Ibid.*

⁹⁶⁴ "Several Opinions of the Supreme People's Court on Further Promoting the

purpose of the change is to enhance the efficiency of the legal system.⁹⁶⁵ From their perspective, the costs order should be used as a tool to optimize the judicial resources and to prevent frivolous and fraudulent claims.⁹⁶⁶ On this notion, the Chinese court is allowed to order the losing party to pay a part or the whole of the successful party's lawyers' fees in light of the circumstances of the case.⁹⁶⁷ But the idea is that the court exercises such power sparingly and only on a compensatory basis.⁹⁶⁸ The above has no impact on TPF. The costs of TPF are still borne by the funded party.

Chinese third party funders might be able to facilitate the application for interim measures, in cooperation with insurance companies. This practice is not free of controversy. Third party funders often agree to cover the premiums of litigation insurance, which gives rise to the concern about whether the funders will incite unnecessary procedural measures using legal insurance. Litigation insurance is a recent development in China and takes more than one form. One of the most recent developments is property preservation insurance. This insurance is often undertaken to protect the insured from the damages incurred by an erroneous application for property preservation filed by the insured. The indemnification normally has to be paid when the following conditions are met: (1) there is a real loss being incurred; (2) such loss is directly caused by the property preservation requested by the insured; (3) the specific amount of loss has been determined by the competent court.⁹⁶⁹ When an application for preservation is filed, instead of submitting a traditional guarantee letter issued by a security company, the party (or the insured) provides the court with an insurance policy. In practice, however, the "niggling procedural details" for the insurance policy to be issued makes such policy a less attractive option in comparison to the guarantee offered by the security company.⁹⁷⁰ More alarmingly, the funder is likely to bring

Efficient Distribution of Complex and Simple Cases and Optimizing the Allocation of Judicial Resources," (2016).

⁹⁶⁵ Ibid.

⁹⁶⁶ Ibid.

⁹⁶⁷ Ibid., item 22.

⁹⁶⁸ Ibid.

⁹⁶⁹ "太平洋财产保险有限公司诉讼财产保全责任保险条款 (Pacific Property Insurance Ltd. Litigation Assets Preservation Liability Insurance Policy),"

<http://www.cntaiping.com/upload/cms/caixian/201605/0511135331c2.pdf>.

⁹⁷⁰ Paul Zhou and Xiaofeng Yu, "Insurance for litigation preservation liability,"

frivolous or tactic interim measures through insurance products or other means, leading to the question whether this funder should be held liable for damages suffered by the opposing party and the insurer caused by unjust interim measures.

Chapter 2 has introduced the English approach to the above question. The English court is empowered to require the funder to pay security for costs in an amount higher than its liability for adverse costs would ultimately be if the court applies the Arkin cap at the end of the litigation proceedings.⁹⁷¹ Meanwhile, if security costs turn out to be unjust and have caused damages for the opposing party, the funder is likely to be held liable for adverse costs.⁹⁷² The Chinese court can hardly see themselves do the same. Currently, the Chinese court is not expected to rule against third parties unless they claim that they have substantive interests in the case.⁹⁷³ The debate over the question of whether the court should be allowed to use costs orders to balance the impact of TPF on the funded litigation procedure is still ongoing. The author believes this question should be addressed when disclosure of TPF is bettered implemented and the impact of TPF is verified by substantive evidence.

TPF affects not only interim measures but also the actual recovery of the funded party. If parties bear the costs of TPF and there is no cap on the number of such costs, it should be asked whether TPF will give rise to an unjust discount on the funded party's successful results. The author tends to believe that "unjust discount" is a possibility, despite that the funders have argued that they have to make the success fees of TPF reasonable to motivate both sides.⁹⁷⁴ The rule of the ALF code of conduct that "independent legal advice" is only accorded to the

China Business Law Journal 7, no. 6 (2016).

⁹⁷¹ *Sandra Bailey & Others v GlaxoSmithKline UK Limited*, [2017] EWHC 3195 (QB).

⁹⁷² The Court held in the *Excalibur* case that payments by a third party to enable a claimant to meet an order for security for costs should not be treated differently from other forms of funding. Accordingly, the English court can order a funder who has only provided funding to a party to meet an order for security for costs to pay adverse costs. See: *Excalibur Ventures LLC v. Texas Keystone Inc & Ors*, [2016] EWCA Civ 1144.

⁹⁷³ *中华人民共和国民事诉讼法 (Civil Procrural Law of the People's Republic of China)*, article 56.

⁹⁷⁴ Natasha Harrison and Fiona Huntriss, "Hedge funds and litigation: a brave new world," *Capital Markets Law Journal* 10, no. 2 (2015): 136.

funded party has implied that the funded party is not always on an equal footing with the funder in individual litigation cases.⁹⁷⁵ The problem of “unjust discount” is more alarming in multi-party litigation where the parties’ control and supervision on the conduct of procedure are limited.⁹⁷⁶ Without judicial supervision, the class members can hardly protect themselves against unreasonable costs of non-party funding, whether they are funded by lawyers, third party funders or other funding providers.⁹⁷⁷ This problem has triggered vigorous debate in other chosen jurisdictions but has not attracted a lot of attention from Chinese regulators and scholars.

It can be argued that TPF has the potential to optimize the relationships between the participants. Theoretically, on the one hand, the funder helps the funded party keep lawyers’ fee reasonable and motivate lawyers to act diligently. On the other hand, the funding agreement compels the funded party to act in a mature and rational manner and to follow the reasonable advice of its own lawyers.⁹⁷⁸ However, the above can hardly be translated into reality if the line between third party funders and funded parties is largely blurred. In China, the funder, who does not have to fulfill any fiduciary duty to the funded case, may not prioritize the interest of the funded party or refrain from infringing due process.⁹⁷⁹ As a result, not only the cornerstone of the legal profession, that a lawyer serves the best interest of his client without conflicts of interest, but also the functionality of TPF is compromised.⁹⁸⁰ In other jurisdictions, it is also observable that, in some situations, lawyers find it difficult to put the interest of their clients first because of their business connections with

⁹⁷⁵ The ALF code of conduct requires the funder to take reasonable steps to ensure that the funded party shall have received independent advice on the terms of the funding agreement prior to its execution. See: The Association of Litigation Funders, “Code of Conduct for Litigation Funders,” section 9.1.

⁹⁷⁶ Theodore Eisenberg, “Attorney Fees in Class Action Settlements: An Empirical Study,” *Journal of Empirical Legal Studies* 1, no. 1 (2004): 30.

⁹⁷⁷ *Ibid.*

⁹⁷⁸ Bench Nieuwveld and Shannon, *Third-Party Funding in International Arbitration*: 24.

⁹⁷⁹ Simone Degeling, “Fiduciaries and funders: litigation funders in Australian class actions,” *Civil Justice Quarterly* 36, no. 2 (2017).

⁹⁸⁰ Bohórquez and Stoll, “Third Party Litigations funds and the lawyer’s ethics.”

third party funders.⁹⁸¹ As elaborated in previous chapters, little consensus has been achieved on how to solve this problem.⁹⁸²

6.3.3.3 The impact of TPF on the arbitration procedure

Arbitration, which came into existence in China at the beginning of the 1990s,⁹⁸³ has a very active role to play in settling commercial disputes. Over the years, the arbitration industry grew steadily.⁹⁸⁴ Arbitration with its seat in China has to comply with the Arbitration Law which was promulgated on 31 August 1994 and was integrated with the international commercial arbitration system in terms of principles.⁹⁸⁵ According to the Chinese Arbitration law, arbitration derives its legitimacy largely from party autonomy and is operated as a private procedure floating above the national procedural laws and regulations for litigation. Against this backdrop, arbitration interacts with TPF differently from litigation.⁹⁸⁶ The distinction between litigation and arbitration not only shapes TPF's market profiles but also influences TPF's regulatory regime construction.⁹⁸⁷

Arbitration has been perceived as being too expensive regardless of the jurisdiction it takes place in.⁹⁸⁸ According to data from the Guangzhou Arbitration Commission (GZAC), if the amount in dispute is RMB 20 million, the administration fee amounts to RMB 147,620 including arbitrators' remuneration.⁹⁸⁹ For the Beijing Arbitration Commission

⁹⁸¹ This is not an endemic problem in China. See: Bert, "Litigation Funding and Success Fees: A Risky Combination." The problem is that it is almost impossible to establish a case in China where the lawyers are punishable because of their connections with third party funders.

⁹⁸² Victoria Shannon Sahani has paid close attention to "funder-law firm partnerships". She pointed out that the consequences of such partnership remained to be seen. See: Victoria Sahani, "Blurred Lines between Third-Party Funders and Law Firms," in *Kluwer Arbitration Blog* (2016).

⁹⁸³ Yifei Lin, *Judicial Review of Arbitration: Law and Practice in China* (Kluwer Law International, 2018), 1.

⁹⁸⁴ Wang, "Third-party funding in arbitration: potential trends and implications for China," 140.

⁹⁸⁵ Lin, *Judicial Review of Arbitration: Law and Practice in China*: 2.

⁹⁸⁶ "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," 18.

⁹⁸⁷ Wang, "Third-party funding in arbitration: potential trends and implications for China," 125.

⁹⁸⁸ Caroline Dos Santos, "Third-party funding in international commercial arbitration: a wolf in sheep's clothing?," *ASA Bulletin* 35, no. 4 (2017): 918.

⁹⁸⁹ "Guangzhou Arbitration Commission fee calculation system,"

(BAC), the number is RMB 147,550.⁹⁹⁰ For the China International Economic and Trade Arbitration Commission (CIETAC), it is RMB 201,550 including arbitrators' remuneration if the parties do not have special requests for the choice of arbitrators.⁹⁹¹ To arbitrate disputes in China, companies should carefully consider whether they are able to afford the costs of arbitration and, even if they are, whether the costs are worth the potential benefits since not all the costs are recoverable. The above has created the demand for external funding. Arbitration funding in the broad sense is not new in China, although TPF for arbitration has recently been introduced.⁹⁹²

Although the Chinese arbitration law has not addressed TPF, arbitration institutions have already paid close attention to TPF and its potential impact on the arbitration procedure. To illustrate, it is helpful to highlight the two largest international arbitration institutions in China, CIETAC and BAC, who have provided safeguards against the risks of TPF in their arbitration rules. CIETAC has included TPF into investment arbitration to cater to those companies with potential cash flow issues. Although this work largely focuses on commercial cases, CIETAC's views on TPF in investment arbitration are still valuable to this discussion since investment arbitration and commercial arbitration under the CIETAC administrative regime share many procedural similarities.

Before examining CIETAC's view on the impact of TPF on arbitration, it is useful to first look at how the CIETAC arbitration rules define TPF. In the CIETAC International Investment Arbitration Rules (For Trial Implementation) (the CIETAC rules), TPF is described in article 27 as "a situation where a natural person or an entity, who is not a party to the dispute, provides funds to a party to the arbitration to cover all or part of that party's costs for the arbitral proceedings, through an agreement with the party accepting the funding."⁹⁹³ This

http://www.gzac.org/WEB_CN/ArbitrationFee.aspx.

⁹⁹⁰ "Beijing Arbitration Commission fee calculation,"

<http://www.bjac.org.cn/page/zc/zcfy.html>.

⁹⁹¹ "China International Economic and Trade Arbitration Commission rates table,"

<http://www.cietac.org/index.php?m=Page&a=index&id=121>.

⁹⁹² Wang, "Third-party funding in arbitration: potential trends and implications for China," 140.

⁹⁹³ *International Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission*, article 27.

definition is far from satisfactory in the author's view since it has missed some of the main features of TPF. It is not obvious from the definition that the provision of TPF is motivated by commercial benefits on a non-recourse basis. Failure to distinguish between non-profitable and profitable funders leads to a great deal of unfairness.⁹⁹⁴ Failure to differentiate TPF from other funding options without a non-recourse basis such as loans has the potential to give rise to ill-suited regulations.⁹⁹⁵ In regulating TPF, CIETAC has focused on the following aspects: the disclosure of TPF and the impact of TPF on costs-related issues.⁹⁹⁶ To catch up to the challenges, BAC has also included a new provision to deal with TPF. The Draft BAC Investment Arbitration Rules dedicates article 39 to the following aspects of TPF: the definition of TPF, the transparency of TPF, and TPF's impact on the costs decision.⁹⁹⁷

As addressed in previous chapters, mandatory disclosure of TPF is currently the trend in arbitration practice.⁹⁹⁸ The underlying rationale is that TPF has significant implications on the arbitration procedure and therefore should be known by the tribunal and the parties on both sides.⁹⁹⁹ TPF is an investment decision pure and simple. To secure their investment interest, the funders proactively control and oversee the conduct of the proceedings.¹⁰⁰⁰ This has provided the immediate context for the introduction of mandatory disclosure. In arbitration seated in China, there is room to argue for the disclosure of TPF. Once the funding agreement is disclosed, the arbitration rules tend to guide the tribunal's attention to the impact of TPF on costs.¹⁰⁰¹ Nonetheless,

⁹⁹⁴ Victoria Shannon Sahani, "Revealing Not-for-Profit Third-Party Funders in Investment Arbitration," in *Investment Claims* (2017).

⁹⁹⁵ Sheri P. Adler, "Alternative Litigation Finance and the Usury Challenge: A Multi-Factor Approach," *Cardozo Law Review* Vol. 34:329: 356.

⁹⁹⁶ *International Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission*, article 27(2)(3).

⁹⁹⁷ Beijing Arbitration Commission, "Public Consultation on Draft BAC Investment Arbitration Rules," <http://www.bjac.org.cn/english/news/view?id=3370>.

⁹⁹⁸ Iliescu, "A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact."

⁹⁹⁹ Gary J. Shaw, "Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit," *Arbitration international*, no. advance access (2016): 12.

¹⁰⁰⁰ Stone, "Third Party Funding in International Arbitration: A Case for Mandatory Disclosure?," 63.

¹⁰⁰¹ *International Investment Arbitration Rules of the China International Economic*

there is little consensus on whether TPF should be considered by the tribunal when contemplating costs allocation or interim measures such as security for costs.¹⁰⁰² Even if it is justified that TPF has a significant impact on arbitration, by marked contrast with the court in litigation, the arbitral tribunal normally has no jurisdiction on third parties. It is less likely that the tribunal plays an active role in supervising or regulating the conduct of third party funders without the consent of the parties and the funders. The scope of the authority of the arbitral tribunal on third party funders has triggered intensive debates in the arbitration community.¹⁰⁰³

Under Chinese law, it seems to be arguable that the tribunal is capable of requiring the funded party to prove its financial capacity if the funder would not cover an award for costs.¹⁰⁰⁴ In other words, TPF might be a factor relevant to decisions on the request for security for costs. Nevertheless, practitioners should not hold too much hope on an adverse cost order directly against third party funders at this moment. In Chapter 2, it is explained that TPF in arbitration seated in England might drastically increase the financial burden when the costs of TPF

and Trade Arbitration Commission, article 27(3); Singapore International Arbitration Centre, "Investment arbitration rules of the Singapore International Arbitration Centre," rule 33.1.

¹⁰⁰² Alexander G. Leventhal, "Towards an Exceptio Fundati? Assessing a (Potentially) Emerging Exception for Third Party Funding in Investment Treaty Decisions on Security for Costs in the Wake of *Armas v. Venezuela*," in *Kluwer Arbitration Blog* (Wolters Kluwer, 2018); Umika Sharma, "Third Party Funding in Investment Arbitration: Time to Change Double Standards Employed for Awarding Security for Costs?," in *Kluwer Arbitration Blog* (2018); Sai Anukaran, "Security for costs in international commercial arbitration: mandate, exercise of mandate, standards and third party funding," *Arbitration* 84, no. 1 (2018); Weixia Gu, "Security for Costs in International Commercial Arbitration," *Journal of International Arbitration* 22, no. 3 (2005).

¹⁰⁰³ Darwazeh and Leleu, "Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding."; Katherine Lynch, "Security for costs in domestic and international arbitration in England and Hong Kong," *Journal of International Arbitration* 12, no. 2 (1995); Gu, "Security for Costs in International Commercial Arbitration."; Anukaran, "Security for costs in international commercial arbitration: mandate, exercise of mandate, standards and third party funding."; Leventhal, "Towards an Exceptio Fundati? Assessing a (Potentially) Emerging Exception for Third Party Funding in Investment Treaty Decisions on Security for Costs in the Wake of *Armas v. Venezuela*."

¹⁰⁰⁴ Leventhal, "Towards an Exceptio Fundati? Assessing a (Potentially) Emerging Exception for Third Party Funding in Investment Treaty Decisions on Security for Costs in the Wake of *Armas v. Venezuela*."

are categorized as part of the costs of arbitration. It remains to be seen whether this approach will be contemplated in arbitration cases located in China.

I tend to believe that the overall impact of TPF on the arbitration procedure goes far beyond costs related issues. In both China and other chosen jurisdictions, TPF for arbitration gives rise to concerns on the potential conflicts of interests,¹⁰⁰⁵ the funder's control of the proceedings,¹⁰⁰⁶ the funder's influence on the conduct of legal representatives,¹⁰⁰⁷ the proportionality of the funder's share from the final recovery, etc.¹⁰⁰⁸ The complexity of the impact raises the question of whether arbitration rules are sufficient in safeguarding the order of arbitration practice against the risks of TPF.

6.4 The regulation of TPF: A predictive perspective

So far, China has not addressed TPF specifically in the law. Nonetheless, that does not mean that the Chinese regulators have taken and will take a lenient attitude towards the practice of TPF. Financing innovations in China are likely to be put under heavy regulations that come as hindsight. In this regard, P2P lending is a relevant example to be mentioned. It operated in China without specific regulation for quite a while before the crackdown.¹⁰⁰⁹ The regulators have realized that P2P lending can generate market mobility while creating systematic market risks.¹⁰¹⁰ In their view, these risks justify tough regulation on the conduct of the P2P lending activities.¹⁰¹¹ In China, TPF has not given rise to problems on a massive scale as of now. By not imposing specific regulation on the

¹⁰⁰⁵ If the tribunal decide to refer to the IBA Guidelines on Conflicts of Interest in International Arbitration, they will have to pay attention to the relation between the third party funder and the members of the tribunal. See: International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration."

¹⁰⁰⁶ "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," 28.

¹⁰⁰⁷ Sahani, "Blurred Lines between Third-Party Funders and Law Firms."

¹⁰⁰⁸ "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," 35.

¹⁰⁰⁹ Chuanman You, "Recent Development of FinTech Regulation in China: A Focus on the New Regulatory Regime for the P2P Lending (Loan-based Crowdfunding) Market," *Capital Markets Law Journal* 13, no. 1 (2017): 86.

¹⁰¹⁰ Ibid.

¹⁰¹¹ Ibid.

funding activities, the Chinese regulators presumably aim to give the TPF industry a lot of room for development until it makes a significant impact that requires regulation or even a crackdown. This part first addresses the issue of whether TPF should be regulated at this stage—a natural extension of the analysis of the impact of TPF on the funded case. On this basis, the author presents views on the scope of the regulation of TPF and the regulatory approaches. In litigation, the regulation of TPF should put its focus on the identity and the quality of the funders. In arbitration, the regulation of TPF ought to be devised to bring the Chinese arbitration law and rules up to the international standards.

6.4.1 Should TPF be regulated at this moment?

Previously, much has been said about the risks of TPF in both litigation and arbitration, which justifies the necessity for TPF to be regulated. England is regulating TPF through case law and self-regulation. Singapore and Hong Kong conducted legal reforms to introduce some benchmarks for the practice of TPF in arbitration. The Netherlands has integrated safeguards into the civil legislation to curtail non-party financial incentives in collective litigation. The question is whether China should follow the motion of regulating TPF.

From the author's perspective, TPF should be regulated in the Chinese context. There are at least two goals that the regulation of TPF could serve. One of them is to facilitate the development of the TPF industry. TPF is neither necessarily evil nor always good. It is a tool that can be used by parties to access justice. From previous chapters, we have seen that the move to permit and to promote TPF often aims to enhance access to justice in litigation and arbitration and to implement the pro-arbitration policy. TPF is also expected to facilitate the legal proceedings. It is hard to see why China should not provide TPF with a reasonable degree of legal certainty. The other goal is to scrutinize the funding activities and to deal with the risks of TPF. There are reasons to believe that TPF only benefits the judicial system when proper safeguards are ready. The regulation of TPF might be intensified as the situation changes. But, at this moment, there is no sufficient evidence justifying heavy mandatory regulations in any way. The current situation only warrants some basic boundaries to the practice of TPF.

The survey has found that the Chinese parties are heavily relying on self-funding in pursuing legal claims at present due to reasons that are not entirely clear. However, in commercial cases, self-funding might frustrate two groups of people: those who do not have the financial capacity to pursue the case and those who do not want to invest a “cow” for a “rabbit”. They need TPF either as a tool to facilitate access to justice or as a financing strategy to strengthen the balance sheet. Before TPF came to China, there were already funding options available for parties in both litigation and arbitration, including loans, lawyer funding, legal costs insurance, etc. The very existence of these alternative funding options has already implied the demand for external non-party funding. Currently, the “Going Out Policy” (走出去战略) might give the parties more reasons to question the viability of self-funding.¹⁰¹² When doing business outside of China, Chinese companies in dispute resolution are likely to confront opponents who seek advice and funding from third party funders.¹⁰¹³ Those companies who are self-funded will probably find themselves in a disadvantaged position where they do not stand on equal footing with the opponents.

Looking beyond the Chinese borders, regulating TPF appears to be a trend.¹⁰¹⁴ We have learned from previous chapters that the issue of whether TPF should be regulated is not elusive at all in other jurisdictions of comparison given the impact of TPF on the procedure and various participants. Regardless of the regulatory strategies, the developments of law in these jurisdictions all point towards a clear direction—to regulate TPF in order to safeguard the integrity of the rule of law. The implications of TPF also concern practitioners in China, as demonstrated by the results of the survey. In response to these concerns, arbitration institutions are trying to create some standards for TPF in arbitration to achieve fairness and to guarantee due process. Even the funders are calling for the regulation of the funding market so that they can have a more reputable and legitimate

¹⁰¹² China Policy, “China Going Global: between ambition and capacity,” (2017).

¹⁰¹³ It is indicated by empirical materials that a large majority of the arbitration participants know about TPF. In international dispute resolution, TPF is on the rise. In the 2018 International Arbitration Survey, 42% of the respondents have encountered non-recourse funding either by having used it or by having seen it. See: Queen Mary University of London, “2018 International Arbitration Survey: The Evolution of International Arbitration.”

¹⁰¹⁴ Iliescu, “A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact.”

industry.¹⁰¹⁵ DS legal capital has proposed a voluntary code of practice for third party funders in arbitration.¹⁰¹⁶ This code is now under public review.¹⁰¹⁷

With the above in mind, the author tends to believe that TPF should be regulated in China. In both litigation and arbitration, there should be a sign of open and legitimate acceptance of TPF as a mechanism for facilitating access to justice. Arguably, the funded party and its lawyers should be required to disclose not only the existence of TPF but also the identity of the third party funder so that the court or the tribunal is able to investigate the extent to which the funder affects the procedure and the interests of the parties. Other than that, there should be some clarification on the area where TPF is allowed as well as how TPF is supposed to be conducted, with the purpose to offer basic legal certainty and to allow the regulatory authorities to glean more data about the prevalence, the structures and the impact of a funding option in a certain field through observation.

6.4.2 How to regulate TPF in China?

From previous chapters, we have learned that the regulation of TPF should be compatible with the features of TPF and the funded procedures. To that end, litigation funding is often separated from arbitration funding in regulation. The Chinese situation requires the same approach. Chinese law upholds the autonomy of arbitration. Because of this, TPF for arbitration deserves not only a different mode of analysis but also a unique regulatory framework. In this section, the author first sheds light on the scope of TPF. On this basis, it is suggested that, in both litigation and arbitration procedures, the focus of the regulation should be largely put on the following two aspects at this stage with the purpose to provide minimum legal certainty: the qualification of third party funders and the disclosure of the TPF agreement.¹⁰¹⁸

¹⁰¹⁵ 鼎颂法律资本研究院 (DS Legal Capital Research Institute), "第三方资助仲裁指引 (征求意见稿)" (Guidelines for Third Party Funding for Arbitration (draft for public discussion)), (2018).

¹⁰¹⁶ Ibid.

¹⁰¹⁷ Ibid.

¹⁰¹⁸ Although legal certainty can come into conflict with other important principles, such as public policy and substantive justice, it has still functioned as a core value and aspiration that "has structured normative debates both at a national, regional

6.4.2.1 The scope of TPF

China is a civil law jurisdiction which does not have a general prohibition on the practice of non-party funding for dispute resolution. Nevertheless, it is rather obvious from the regulation of contingency fees that some categories of cases are more relevant to non-party funding than others in the eyes of the Chinese regulators.¹⁰¹⁹ It is demonstrated by the fact that contingency fees are only allowed in civil cases involving property relationships upon the condition that the party requires contingency representation (or contingency fees) after being informed by the lawyers about the government-guided lawyers' fees.¹⁰²⁰ There are some exceptions being carved out: contingency fees are not allowed in the following circumstances according to article 11 and 12 of the Measures on Payment of Litigation Fee: cases of marriage or inheritance; cases regarding social insurance and the minimum living costs; cases regarding criminal or administrative matters; cases regarding state compensation; class action, etc.¹⁰²¹ Since 2016, the government-guided lawyers' fees have been replaced by the market-oriented lawyers' fees. But the regulation of contingency fees remains unchanged. It becomes debatable whether the use of contingency fees should be expanded as a part of the national deregulation of the legal profession. It also calls in question the applicability of the cap on the uplift of contingency fees.

Contingency fees are generally considered more dangerous than TPF since the former regards not only the risks of the funding activities but also the ethics for legal practitioners. Naturally, contingency fees face more stringent regulations compared to TPF. In the Netherlands where TPF is growing across all civil cases, contingency fees are only tested right now in personal injury cases.¹⁰²² In England, although both contingency fees and TPF are permissible, the law deals with contingency fees with more caution. For instance, contingency fees are carefully capped while the costs of TPF are not.¹⁰²³ Moreover,

and international level". See: *Legal certainty in a contemporary context: private and criminal law perspectives*, ed. Mark Fenwick and Stefan Wróblewski (Springer, 2016), 2.

¹⁰¹⁹ 国家发展改革委 (State Development & Reform Commission) and 司法部 (Ministry of Justice), "律师服务收费管理办法 (Measures on Payment of Litigation Fees)," article 11, 12.

¹⁰²⁰ Ibid.

¹⁰²¹ Ibid.

¹⁰²² Advocaten, "Experiment resultaatgerelateerde beloning verlengd".

¹⁰²³ Terry McGuinness, "No win, no fee funding arrangements," (2016), 7-8.

contingency fees are prohibited in some types of class actions while TPF is not.¹⁰²⁴ In Hong Kong, lawyers' remuneration based on results is completely prohibited by the Legal Practitioners Ordinance, while TPF is allowed in some proceedings.¹⁰²⁵ Given the above, it would not be too bold to argue that TPF should at least be allowed in cases where contingency fees are available. Future legal reforms should not be geared to exclude TPF from the areas where contingency fees are permitted. It has been argued by other scholars that China should consider Hong Kong and Singapore's dual-track approach in order to "first establish arbitration-oriented TPF regimes and afterward evaluate whether or not to expand its scope".¹⁰²⁶ The author disagrees with this view. Despite the fact that TPF for arbitration ought to be treated differently from TPF for litigation, it is not necessary to limit the use of TPF to arbitration. China never struggled with the fear of maintenance and champerty as common law jurisdictions did. The use of TPF in China does not raise concerns about the legality of this funding arrangement.¹⁰²⁷ The dual-track approach to the permission of TPF bears little relevance to China.

Beyond the area where contingency fees are allowed, consideration should be given to the issue of whether TPF should be permitted in class action or collective litigation. Worldwide, there is a consensus that collective litigation is "a legal tool that can be used to improve access to justice".¹⁰²⁸ In some fields where the collective or public interest is concerned, collective litigation might be the most effective way of dispute resolution.¹⁰²⁹ In China, the expansion of modern industries and the use of the internet have led to an increase in the number of mass disputes.¹⁰³⁰ The traditional litigation model designed

¹⁰²⁴ Mulheron, "Third party funding and class actions reform," 294.

¹⁰²⁵ *Legal Practitioners Ordinance (Cap.159)*, section 64.

¹⁰²⁶ Wang, "Third-party funding in arbitration: potential trends and implications for China," 146.

¹⁰²⁷ Wieger Wielinga et al., "Third Party Litigation Funding: A Civil Law perspective (Part 4 of 4: Active Funding – Collective Redress)," <https://litigationfinancejournal.com/third-party-litigation-funding-civil-law-perspective-part-4-4-active-funding-collective-redress/>.

¹⁰²⁸ Stefan Wrzka, Steven van Uytsel, and Mathias Siems, eds., *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (2012: Cambridge University Press), 10.

¹⁰²⁹ *Ibid.*, 11.

¹⁰³⁰ The increase in the number of collective actions is a remarkable feature of the Chinese legal system in recent years. See: Jun Xie, "Access to Collective Litigations

for a two-party dispute does not meet the demand of the mass parties. In many circumstances, collective litigation, whether is promising or is only filed with a slim hope of success, serves as a wake-up call for the industry and the administrative authorities. Now that Chinese law allows collective litigation to expand to lawsuits regarding environmental pollution and consumer protection, an authority or relevant organization as prescribed by law may institute an action in the court. It is questionable whether such authority or organization is financially capable to maintain the proceedings.

The national reports have described the Chinese collective litigation as “not well-developed”.¹⁰³¹ This can, of course, be attributed to various reasons. But it is apparent that the hostility against collective litigation funding is a contributing cause.¹⁰³² In 2007, Chinese scholars have found that court fees may prove to be a stumbling block to class action in China.¹⁰³³ Over the years, the legal service market has only seen a rapid rise of lawyers’ fees but not the rapid increase in the use of the funding services. One can only expect that class action has become more and more difficult for the plaintiffs. Currently, parties to collective litigation only have two funding options: self-funding and legal aid.¹⁰³⁴ The lack of funding may significantly restrict access to justice for those on low and modest incomes who are not qualified for judicial aid or legal aid, in accordance to the report in 2007 as part of the Oxford and Stanford joint project on the globalization of class actions.¹⁰³⁵

The author tends to believe that TPF should have a role to play in collective litigation because it is able to place collective litigation in an excellent vantage point to explore the potential of law, which serves the purpose of the legal system. Whereas, the involvement of TPF triggers concerns about whether the court will be overburdened and whether the purpose of the legal system will be distorted. It also invites suspicion on the potential impact of collective litigation on

in China: A Tough Work," *Journal of Politics and Law* 3, no. 1 (2010): 45.

¹⁰³¹ Susan Ning, Kate Peng, and Sibao Gao, "Private Litigation 2017 (China)," <https://globalcompetitionreview.com/jurisdiction/1004742/china>.

¹⁰³² Xie, "Access to Collective Litigations in China: A Tough Work," 45.

¹⁰³³ Yuan Li, "Class action in China," *Korea University Law Review* 2(2007): 174.

¹⁰³⁴ Michael Palmer and Chao Xi, "Collective and Representative Actions in China".

¹⁰³⁵ Ibid.

industries and society.¹⁰³⁶ But the fact is, the day when third party funders buy up pieces of collective litigation cases may already be upon us not only in China but also in other jurisdictions.¹⁰³⁷ The above concerns cannot reasonably justify the prohibition of TPF for mass claims.¹⁰³⁸ They can only explain the introduction of the regulatory safeguards against the potential abuse of legal proceedings by third party funders. As a preliminary step, TPF for collective litigation should be allowed to grow until there are enough cases through which one could scrutinize the growth, roles, risks, and benefits of this funding mechanism.

6.4.2.2 The regulation of TPF in litigation: where to start?

If TPF is allowed in the same area as contingency fees or a larger area where collective litigation is included, safeguards should be ready to prevent the potential risks. The question is where to start? To answer this question, one should first look to the funder since it plays a key role in the funding arrangement and is currently unregulated. The regulators have to decide on the criteria for a qualified funder. In addition to that, it is necessary to ensure that the court is well-informed of the participation of the third party funders. From earlier chapters, we have seen that timely disclosure of TPF is preferred in both litigation and arbitration since it would eliminate the real and substantive risk of challenges to the funded proceedings. Arguably, disclosure of TPF should form a part of the regulation of TPF in China.

6.4.2.2.1 Who should be allowed to invest in legal claims?

Among jurisdictions of comparison, there is no consensus on who should be allowed to invest in legal claims. In England, Hong Kong and the Netherlands, the funders can be anyone, albeit Hong Kong has set up requirements in the code of practice applicable to all funders.¹⁰³⁹ These requirements aim to ensure that the funders are financially capable of maintaining the proceedings and are prepared to fulfill obligations to the funded arbitration proceedings. England has the

¹⁰³⁶ Gregory L. Fowler, Marc Shelley, and Silvia Kim, "Emerging Trends in International Litigation: Class Actions, Litigation Funding and Punitive Damages," *Dispute Resolution International* 3, no. 2 (2009): 103.

¹⁰³⁷ Brian T. Fitzpatrick, "Can and should the new Third-Party Litigation Financing come to class action?," *Theoretical Inquiries in Law* 19(2018): 123.

¹⁰³⁸ *Ibid.*

¹⁰³⁹ The Government of the HKSAR, "Code of Practice for Third Party Funding of Arbitration issued".

ALF code of conduct. But as previously mentioned, this code is a purely voluntary code which is only applicable to the ALF members. Singapore however merely allows “professional third party funders”, that is, the entities who carry on “the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the Third-Party Funder is not a party”.¹⁰⁴⁰

There is no limitation on the identity or the qualification of the funder for now in China. From the empirical research, we have seen that the Chinese TPF market is rather immature. The penetration of TPF is relatively low. Nevertheless, the ethical issues raised by the involvement of third party funders are not entirely unnoticed. In the funded case, third party funders play an essential role in the decision-making process. This gives rise to due process concerns and poses challenges to the integrity of the legal profession. More worryingly is the blurred line between the funders and the law firms. Partners of the local law firms are likely to be the founder or the shareholder of third-party funders. Some firms have even signed cooperation agreements with third party funders, with the effect that they are obliged to refer clients to each other.

The above does not immediately justify a mandatory licensing regime or a category of eligibility requirements for third party funders in the author’s view. Heavy eligibility requirements would cause more problems than they solve. Even though there is a case for eligibility requirements, it is questionable whether the conceived requirements can accurately reflect the risks of the funding activities. As previously argued by the ALF, the financial risks of funding legal claims are not easily managed by “anyone other than professional funders, staffed by experienced litigation and arbitration experts, who ‘live and breathe’ the asset class”.¹⁰⁴¹ In other words, the requirements for the capacity of the funder might fail to ensure that the funder is well-equipped to fulfill its obligations under the funding agreement and implied by law.

With that in mind, the author is convinced that the Chinese legislators should allow various entities to participate in the TPF business for

¹⁰⁴⁰ *Civil Law (Third-Party Funding) Regulations 2017*, regulation 4.

¹⁰⁴¹ The Association of Litigation Funders, "Statement from the Association of Litigation Funders of England and Wales regarding the Court of Appeal Judgment in *Excalibur*".

now. Without sufficient experience and empirical materials, eligibility requirements risk failing their objectives. The most urgent matter regarding the qualification of third party funders is to insulate third party funders from lawyers with the purpose of avoiding the deterioration of legal professional ethics. Other than that, better disclosure of the connection between law firms and third party funders is required so that the prospective funded parties can make an informed choice about whether to enter into the funding agreement. TPF is here to stay and will probably continue rising. A closed legal environment and an exclusive one-on-one relationship between lawyers and clients do not fit the picture. Even so, there should be no change to the notion that the legal profession should not be distracted by the impact of external investors. Ideally, lawyers are bound to secure the integrity of the legal profession and to avoid the judicial system being overly tainted by commercial motives. However, in reality, some lawyers fail to do so because of the influence of the funders. This leaves the legislators with no option but to take the necessary steps to supervise the business arrangements between the funders and the lawyers.¹⁰⁴²

6.4.2.2.2 The transparency of the funding arrangement

As explained previously, it is not realistic that the law keeps litigation unaffected by TPF. Even though Chinese law gives the funders little chance to burden the opposing party, the Chinese court could still encounter some unfortunate situations that it is required to decide on TPF-related issues, such as when irresponsible funders promote unnecessary cases or take part in litigation fraud, when TPF encourages frivolous cases or tactical interim measures, when third party funders try to force the funded party and its lawyers to concede their control over the case, and when the funding agreement is exploitative and could cause unreasonable discount on the interest of the funded party. Arguably, mandatory disclosure of TPF is one of the

¹⁰⁴² The relation between third party funders and law firms is a complex one. Third party funders are moving from lending to law firms to investing in law firms. Some international third party funders such as IMF Bentham have formed strategic partnerships with law firms. See: Sahani, "Blurred Lines between Third-Party Funders and Law Firms." This is the case in China too. The question of how to insulate third party funders from law firms invites discussions on not only the regulation of the funders but also the regulation of law firms.

most effective approaches to the end of preventing the above situations from happening.

Under English law, the court is empowered to order disclosure of TPF and to limit the scope of disclosure as they see fit.¹⁰⁴³ In collective litigation in the Netherlands, in order to protect the interests of the funded parties, the court has ordered the disclosure of not only the name and the identity of the funder but also the number of investment returns to the funder. It is unacceptable in the view of the Dutch court that this amount is not compatible with the services that the funders have provided or the risks they have taken. China is not an outsider to the potential impact of TPF on the funded procedure. Therefore, it is hard for Chinese law to deny the importance of the disclosure of TPF in litigation. In theory, the Chinese court is empowered to order disclosure of TPF if the funding arrangement gives rise to serious irregularities. But this has not been illustrated by any previous cases.

The idea that the court might take a part in regulating non-party funding is in fact not completely new to the Chinese court. In a previous case, the Chinese court has already held against the illegal windfall for the lawyer funder which would have led to an excessive discount on the interest of the funded party.¹⁰⁴⁴ For instance, in *Long Ying Company v. Jin Qiao Law firm*, a case tried by the Shanghai No.1 Intermediate People's Court in 2008, Long Ying required the court to invalidate the lawyer funding agreement that it signed with Jin Qiao Law Firm.¹⁰⁴⁵ Long Ying claimed that it was defrauded to sign this lawyer's funding agreement based on which the Jin Qiao Law firm was paid a substantial success fee for a small workload and almost no risk of losing.¹⁰⁴⁶ The court held that the lawyer funding agreement was invalid because it constituted an unconscionable contract under the Chinese contract law.¹⁰⁴⁷ It is important to keep in mind that this case does not represent a prevalent practice in China. Normally, the court does not review the reasonableness of the contingency fees or other

¹⁰⁴³ *Civil Procedural Rules*, CPR 25.14; *Senior Courts Act 1981*, section 51.

¹⁰⁴⁴ 隆英公司与金桥律师事务所撤销权纠纷案 (*Long Ying v Jin Qiao Law Firm*), (2008) 沪一中民四(商)终字第574号 ((2008) Hu Yi Zhong Min Si (Shang) Zhong Zi No. 574).

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ *Ibid.*

forms of success fees generated from non-party funding arrangements on its own discretion. Given the complexity of the issues related to TPF arrangements and the nature of TPF, one can hardly see enhanced judicial supervision on TPF any time soon. More has to be done in the future to obtain a keen understanding of the TPF market, which is a necessary prerequisite to regulating this industry. At this moment, the author only proposes the disclosure of TPF in litigation without prescribing any measures to assimilate third party funders into the funded litigation procedure.

6.4.2.3 The regulation of TPF in arbitration: bridge the gap

As China consolidates its position as one of the largest trading parties in the world, arbitration has become more important for both Chinese and foreign businesses.¹⁰⁴⁸ In order to enhance the efficiency of the arbitration system in China, it is always important for China to keep up with international practice.¹⁰⁴⁹ With regard to TPF, aside from the obvious trend of regulating TPF,¹⁰⁵⁰ arbitration practice in both common law and civil law jurisdictions is shifting towards a greater focus on the transparency of the TPF arrangements. In Chapter 2, we have seen that, even without mandatory disclosure requirement in law,¹⁰⁵¹ the tribunal in arbitration seated in England has never been deterred from making an inquiry about the existence of TPF and the identity of the funder, especially when the arbitration rules instruct them to do so.¹⁰⁵² Hong Kong and Singapore are ready to implement mandatory disclosure of the funding agreement through statutory laws. The difference is that Hong Kong law imposes the obligation of disclosure on the funded party while Singaporean law imposes it on the legal practitioner. Dutch law does not explicitly address TPF.¹⁰⁵³ But, the potential conflicts of interest and other risks associated with TPF are supposed to be addressed by the general provisions that

¹⁰⁴⁸ João Ribeiro and Stephanie Teh, "The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law," *Journal of International Arbitration* 34, no. 3 (2017): 460.

¹⁰⁴⁹ *Ibid.*, 462.

¹⁰⁵⁰ Francisco Blavi, "Towards a uniform regulation of third party funding in international arbitration," *International Arbitration Law Review*, 143.

¹⁰⁵¹ Wang, "Third-party funding in arbitration: potential trends and implications for China," 133.

¹⁰⁵² *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm).

¹⁰⁵³ Jeroen Stal, Maarten Drop, and Nick Peters, "Litigation Funding," (2017).

ensure the independence and impartiality of the arbitral tribunal,¹⁰⁵⁴ which implies that TPF may become relevant to the proceedings and is therefore subject to disclosure.

Having considered the Chinese law's emphasis on the independence and the impartiality of the arbitral tribunal, the disclosure of TPF is presumable. But, to achieve a higher level of legal certainty, there is a need for an explicit requirement for the disclosure of TPF in the arbitration law. It is important for the legislators to consider whether they want to set out the details for disclosure in the arbitration law or to leave them to the arbitration rules.

As noted earlier, arbitration is seemingly more prepared for TPF than litigation. But arbitration does not necessarily better accommodate TPF as the author sees it. The arbitration institutions did make a clear call for proper regulations of TPF. However, that message remained overshadowed by the long-ingrained preference for party autonomy. In regulating TPF for arbitration, it could be argued that, although the arbitration law has a role to play, its function should not be overstated. Excessive domestic regulations are likely to become a hindrance to the development of arbitration as a whole. They are also likely to deter the use of TPF. The author believes that Chinese law should refrain from providing too many details about the regulation of TPF at this moment, in order to leave a lot of room for arbitration institutions and international organizations to craft rules for TPF that are non-binding and flexible. In jurisdictions like China where the practitioners still lack an adequate understanding of TPF related risks, "soft law", *inter alia*, arbitration rules, guidance, code of practice, etc., carries a lot of value. It serves the purpose of educating inexperienced practitioners.¹⁰⁵⁵ Of course, the benefit of the "soft law" is not confined to "education". It is an expression of the non-domestic nature of

¹⁰⁵⁴ Krestin and Mulder, "Third-Party Funding in International Arbitration: To regulate or Not to Regulate?," 42.

¹⁰⁵⁵ Soft law in arbitration is often characterized as "non-binding", and therefore is lack of enforcing force. See: Felix Dasser, "Chapter II: The Arbitrator and the Arbitration Procedure, Soft Law in International Commercial Arbitration – A Critical Approach," in *Austrian Yearbook on International Arbitration 2019* (© Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2019), 111.

commercial arbitration.¹⁰⁵⁶ It can enable China to be comprised in the process of unifying the rules for TPF for arbitration.¹⁰⁵⁷

6.5 Questions lie ahead

What does the future hold for TPF in China? This question leads us to contemplate a set of issues, most notably, the two issues identified below which are closely connected to the interests of the funded party and the integrity of funded procedures: whether the success fee of TPF needs to be capped and whether it is necessary to impose fiduciary duties on third party funders. These two issues have attracted a great deal of attention in the jurisdictions of comparison but have not been well answered. China should explore its own way of dealing with these issues with considerations being given to the local conditions and the experience of other jurisdictions.

6.5.1 Should the success fee of TPF be capped?

The success fee of TPF rewards the funders for the risk of the claim funding. It is a disposition of a share of a hypothetical compensation payable to the funded party.¹⁰⁵⁸ However, it could amount to a large percentage of the final recovery and significantly discount the successful result of the funded party. There is nothing in the Chinese civil litigation procedural law that could enable the successful party to recover the costs of TPF from the losing side, and therefore, the concern that the successful party could burden the opposing party can be safely ignored in the Chinese court proceedings. Nonetheless, one could still argue that an excessive success fee is an exploitation of the funded party and therefore should be regulated. In arbitration, the problem is more severe. In the absence of fixed cost rules, it is likely

¹⁰⁵⁶ Alexis Mourre, "Chapter 25: About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration," in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer*, ed. Patricia Shaughnessy and Sherlin Tung (Kluwer Law International, 2017), 241.

¹⁰⁵⁷ A uniform regulatory approach to the regulation of TPF is preferred by international arbitration community. See: Blavi, "Towards a uniform regulation of third party funding in international arbitration." In reality, jurisdictions have been constantly looking beyond their national borders in regulating TPF for arbitration. See: The Law Reform Commission of Hong Kong, "Consultation Paper on Third Party Funding for Arbitration."; Senior Minister of State for Law (Ms Indranee Rajah SC), "Civil Law (Amendment) Bill 2016 Second Reading," (2017).

¹⁰⁵⁸ Henriques, "The Essar v. Norscot Case: A Final Argument for the 'Full-Disclosure-Wingers' of TPF in International Arbitration."

that the success fee of TPF is regarded as part of the costs of arbitration and therefore becomes recoverable. In that case, such a fee could directly add to the party's costs liability.

In previous chapters, we have not seen any hard laws or soft laws imposing a limit on the amount of the success fee of TPF. What we have observed are provisions that allow the court to assess the reasonableness of the success fee of TPF in order to prevent disruption of justice. For instance, it did not take the Dutch court long to realize that the third party funders' unreasonable "windfall" could damage the interests of the funded parties in collective litigation.¹⁰⁵⁹ Dutch law empowers the court to assess whether the amount of the damages payable to the real parties under the settlement agreement is reasonable before they declare this settlement agreement binding. In doing that, the court looks beyond the terms of the settlement agreement to investigate the distribution of damages between the class members and those who have funded the cases.¹⁰⁶⁰ It is important to note that this approach has not been extended to cases other than collective litigation and it targets third party funders who also act as the representative foundation within the meaning of article 3: 305 of the BW.

With no doubt, imposing legislative or judicial limits on success fees risks compromising contract freedom. This explains why the cap on the success fee of TPF has been overtaken by market-based regulatory tools in some jurisdictions. In England, for instance, the ALF code of conduct requires third party funders to "take reasonable steps to ensure that the funded party shall have received independent advice" on the terms of the funding agreement before its execution. The idea is to ensure that the funded party makes well-informed decisions on various issues including the amount of the success fee. In the English regulatory framework, such fee is up to the negotiation between the funder and the funded party and is largely determined by market rates.

¹⁰⁵⁹ *Fortis v Shareholders* ECLI: NL: GHAMS: 2018: 2422; *Fortis v Shareholders* ECLI: NL: GHAMS: 2017: 2257.

¹⁰⁶⁰ Declève, "Fortis's Settlement: A Comparative Case Study of Securities Class Action Mechanisms in Europe and the United States."; *Fortis v Shareholders* ECLI: NL: GHAMS: 2018: 2422; *Fortis v Shareholders* ECLI: NL: GHAMS: 2017: 2257; Richman and Tzankova, "Dutch Court Approves Collective Settlement of Fortis Shareholders' Claims."; Vos, "€1,2 billion settlement in Fortis case rejected by Dutch Court."

In some other jurisdictions, the same approach is implemented with light modifications. As has been elaborated in Chapter 3, Hong Kong regulates the terms of the TPF agreement with the view that it should up to the funded party whether to acquire independent legal advice on the funding agreement. In academic discussions, “independent legal advice” for the funded party is challenged for lack of efficacy. Future research is suggested to contemplate the pros and cons of the above approaches with consideration being given to the Chinese conditions. The author does not suggest the cap on the success fees of TPF until the negative effects of such fees become an issue evidenced by the practice.

6.5.2 Should the funder be subject to fiduciary duty?

Some have envisaged the possibility of imposing a fiduciary duty on third party funders with the view that the funder should be bound by such duty to be less selfish and to have adequate practices for managing the risks that may arise from the funded proceedings.¹⁰⁶¹ Future research should consider the issue of whether the fiduciary duty of the funder should form a part of Chinese law.

It is hard to dispute that in practice the interest of the funder and that of the funded party are largely consociated. Whereas it is equally hard to dispute that the interests of these two parties from time to time diverge. This has triggered conflicts of interest concerns, as previously elaborated. The relation between the funders and the legal practitioners further perplexes the practitioners. One could easily imagine a situation where the legal practitioner’s loyalty to the funder takes precedence over its duty owed to the client (the funded party).¹⁰⁶² This concern is not merely theoretical. In Europe, courts have encountered cases where the partners in the law firm handling matters funded by a litigation funder were, at the same time, silent partners of the litigation funder.¹⁰⁶³ In class actions, it is observed that the representatives of the class members fund the case for profits.¹⁰⁶⁴ The exact same situations can happen in China as there is no clear

¹⁰⁶¹ Degeling, "Fiduciaries and funders: litigation funders in Australian class actions," 251.

¹⁰⁶² Bert, "Litigation Funding and Success Fees: A Risky Combination."

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Declève, "Fortis's Settlement: A Comparative Case Study of Securities Class Action Mechanisms in Europe and the United States."; *Fortis v Shareholders ECLI: NL: GHAMS: 2018: 2422*.

line between lawyers and third party funders whatsoever. The fiduciary duty of the funder is said to be one of the solutions to the above concern.

The fiduciary duty is not well defined in Chinese law.¹⁰⁶⁵ Various fiduciary obligations scatter across lawyers' law, investment law, company law, trust law, etc.¹⁰⁶⁶ Such obligations are currently implemented at different levels. The lawyer-client relationship, for instance, is a typical fiduciary relationship of the highest degree. The funder's fiduciary duty to the funded proceedings is possible but imposing fiduciary duty on the funder is not an easy move. Third party funders often bear fiduciary duties to their investors or shareholders. Accordingly, they are obliged to bring in the best possible return for investors. These duties are in direct contradiction to the proposed fiduciary duty of the funder to the funded procedure and the funded party.

Future research should look at the feasibility of the fiduciary duty of the funder. It should contemplate the alternative approach—implementing bottom-line requirements for third party funders and their shareholders, such as that the funder's commercial interests should not be the main driver of the funded legal proceedings. In any case, due process requires that the funded party has the final word on what is the best way forward for the case. Accordingly, the subordination of justice to the financial interests of third party funders must not be allowed.

¹⁰⁶⁵ "Investor duties and ESG integration in China," (2018).

¹⁰⁶⁶ Jiangyu Wang, "Enforcing Fiduciary Duties as Tort Liability in Chinese Courts," in *Enforcement of Corporate and Securities Law: China and the World*, ed. R. Huang and N. Howson (Cambridge University Press, 2017), 186.

CHAPTER 7 CONCLUSIONS

This work has set out some of the key features of the selected jurisdictions. It identifies substantive differences between TPF in England, Hong Kong, Singapore, the Netherlands, and China with respect to the use, the understanding and the regulation of TPF. It reveals the zeal of promoting and regulating TPF in some of these jurisdictions and the underlying motives. It also reports the concerns of the practice of TPF and the reasons why TPF does not happen in certain areas under certain domestic laws. In the case of China, apart from empirical evidence, some suggestions are presented as to where to start to keep the TPF industry in good order. This chapter first briefly summarizes the key findings in each chosen jurisdiction beyond the Chinese borders. It then conducts an analysis of the standards and approaches that may be valid in China.

7.1 Summary of legal discussions on TPF beyond the Chinese borders

As far as England is concerned, TPF is one of the frequently used non-party commercial funding options and has become a feature of the dispute resolution proceedings seated in England. The impact of TPF is two-sided. In both litigation and arbitration, it creates more access to justice. Scholars have reported that TPF is not only preferred but also glorified in arbitration. The popularity of TPF for arbitration is all the greater in light of the benefits that TPF makes arbitration more accessible and that it contributes to the growth of the English arbitration industry. In the meantime, however, TPF gives rise to concerns over the integrity of the funded procedure and that of the legal profession. Over the years, England has developed a unique regulatory framework for TPF. TPF is primarily considered as a funding option of its own. It has never been the intention of English law to subject TPF to the regulation of other funding options such as lending, CFA, ATE insurance, BTE insurance, etc. At present, TPF is by and large regulated on ad hoc basis by case law. Self-regulation is available but is only applied to the members of the ALF which are currently nine in total. Self-regulation concerns the relation between the funder and the client, the quality of the funder, and the procedural obligations of the funder in the funded proceedings. It is designed to lead the best practice of TPF in England and beyond, and to educate the practitioners about the pros and cons of TPF. TPF for arbitration

is governed by a different set of rules since arbitration seated in England is allowed to flow above the English procedural rules for litigation. However, the extent to which the court should uphold the arbitral tribunal's autonomy in deciding TPF-related issues remains unclear.

Hong Kong law prohibited TPF in both litigation and arbitration until not so long ago. In February 2019, some key amendments to the Hong Kong Arbitration Ordinance went into force. As a result, the common law offences and torts of maintenance and champerty no longer apply to TPF for arbitration. Bearing the potential risks of TPF in mind, Hong Kong authorities have introduced some basic requirements for the practice of TPF. The one that has received public praise and could be borrowed by other jurisdictions is the introduction of the funded party's mandatory obligation to disclose TPF. Once TPF is disclosed, Hong Kong combines statutory law and self-regulation to manage the impact of TPF on the funded procedure. In the process, the Code of Practice for Third Party Funders plays the key role. It resembles the ALF Code of Conduct, but with some crucial differences. For instance, the Hong Kong code of practice applies to all third party funders while the ALF code only applies to the members of the ALF. Overall, the approach adopted by Hong Kong in regulating TPF can still be categorized as a form of the "light touch" approach. A balanced view regarding the impact of TPF is appreciated by Hong Kong legislators to prevent excesses in regulation at this stage.

In Singapore, TPF has become a built-in feature of international arbitration as a result of the 2017 amendment to the Civil Law Act. Despite the shared common law tradition, the regulation of TPF in Singapore differs from that in Hong Kong and England on many fronts. In comparison, Singapore's approach is more conservative. Singapore was surprisingly resistant to the meltdown of the law of maintenance and champerty until recently, even though it has never been bothered by medieval struggles with the rich English barons' meddling in litigation. For the time being, the practice of TPF is mainly limited to international arbitration. The reason why domestic arbitration is left out has not been well elaborated. The best guess is that international arbitration is treated as a testing ground for TPF. The permission of TPF is likely to expand into other areas of law if solid evidence demonstrates that TPF is well received by international arbitration. Singapore by and large relies on statutory legislation instead of self-

regulation in managing the risks of TPF. In some aspects, the regulation of TPF is stricter in Singapore than it is in England and Hong Kong. One of the most outstanding examples is that Singaporean law only allows “professional third party funders” to fund international arbitration.

A civil law jurisdiction where the law of maintenance and champerty is absent is historically less hostile to TPF. In the case of the Netherlands, the juxtaposition of TPF and other alternative funding options such as legal aid and LEI has existed for a long time. Not until recently did Dutch legislators decide to pay attention to the risks of TPF in collective litigation. With considerations being given to the task of facilitating access to justice and the legitimate commercial interests of third party funders, Dutch legislators feel reluctant to impose qualification requirements for third party funders. The central focus of the legal reform is the governance and the behaviors of representative organizations that accumulate, represent, and fund legal claims of the affected persons based on article 305a of the BW. In the areas other than collective litigation, TPF remains largely unregulated. On the EU level, a proposal for regulating TPF in representative actions regarding consumer disputes has been made. It is likely to compel Dutch legislators to further enhance the regulation of TPF in the specified area in the future. The study of TPF in the Netherlands serves three purposes: to inform the readers of the recent developments in the Netherlands as to the regulation of TPF for collective litigation, to serve as a comparison to common law jurisdictions in terms of understanding and regulating TPF as well as to offer valuable lessons to China regarding how to promote the use of collective litigation while effectively managing the risks of TPF.

7.2 The future of TPF in China

Currently, Chinese law is silent on TPF although the arbitration practitioners and the local third party funders are calling for regulation to ensure that they have a more reputable and legitimate industry. In order to fill the gap towards the practice of TPF in China and to identify the related legal concerns, empirical research has been conducted by the author in Shenzhen China from October 2017 to December 2017. The results of this empirical research demonstrate that the use of TPF has triggered warnings of the risks of TPF from various legal practitioners and has stimulated thinking about the possible regulatory approaches. The Chinese third party funders

interviewed by the author conceive TPF in the same way as their foreign counterparts do. China is not immune to the risks of TPF that have entailed many academic discussions beyond the Chinese borders. The legal attitudes in China towards non-party funding could be deducted from the existing Chinese laws and regulations applicable to the alternative funding options to TPF. It is safe to say at this moment that the funding by third parties of legal claims is permitted, although there are some carve-outs that could be justified by public policy reasons or probably political considerations.

The wide focus of this work should allow us to summarize some minimum standards for the practice of TPF that might consult future legal reforms in China. As a preliminary issue, TPF for litigation and TPF for arbitration largely diverge and should be dealt with separately in regulation. Previous chapters have explained that this disintegrated approach in regulating TPF is adopted by not only common law jurisdictions where legislators first seek to test out TPF in arbitration but also civil law jurisdiction where TPF is generally allowed in all sorts of cases. In the Chinese context, there is no reason to object the idea to distinguish litigation from arbitration in handling TPF-related matters. Bearing the above in mind, the author outlines the way forward in a twofold fashion.

In litigation, matters with a sense of urgency relate to the interaction between lawyers and third party funders and the transparency of the TPF arrangement. The court should be empowered and guided to pay attention to the involvement of TPF. In the meantime, the court should be aware of the risks of TPF which suggest that the funders are not completely insulated from the funded proceedings. Specific attention must be given to the conflicts of interest concerns. Despite the above, the court is recommended to refrain from interfering too much into the contractual relationship between the funder and the funded party. In arbitration, it is particularly important to avoid endemic rules for the practice of TPF or the domestic court interference in issues associated with TPF, otherwise the international parties are likely to be driven away. Future legal reforms to the Chinese arbitration law are required to consider the international practice in regulating TPF. But before any changes are made, a higher level of legal certainty in relation to the legality and the disclosure of TPF ought to be created by the SPC or other Chinese authorities.

SUMMARY

Third Party Funding (hereafter TPF) is the main focus of this research. Its alternatives, such as insurance, claim assignment, and legal aid, are mentioned when it is necessary to highlight the features of TPF or to facilitate the understanding of the broader context from which TPF emerges. TPF has complicated connotations. In this thesis, it refers to a type of investment with the following features: a. funding from a third party with no substantive right in the funded case; b. funding on a non-recourse basis; c. funding with commercial motives; d. funding that is regulated separately. Admittedly, TPF can enhance access to justice and optimize the conduct of the proceedings. Nonetheless, the financial motives of third-party funders do not always entertain the interests of the parties and the need of the court to conduct the case in an efficient and just way. Injustice precipitates when there are no proper safeguards against the potential risks of TPF.

This thesis seeks to enrich the cross-border research of TPF by integrating practical and legal complexities associated with TPF in five jurisdictions: England, Hong Kong, Singapore, the Netherlands, and Mainland China. The comparative foundation is that all these jurisdictions have evolved to the stage where the law is not only an ideal but also a necessity for good governance and general welfare. Accordingly, access to justice is recognized as one of the essential principles, although the implementation of access to justice varies from one jurisdiction to another. Despite the above, it would be wrong to assume that access to justice is the only factor that encourages discussions on TPF in the chosen jurisdictions. Indeed, the attempt to promote the enforcement of the law through private funding mechanisms is a natural result of financial austerity in some jurisdictions. However, in others, TPF is the stimulation of a competitive arbitration industry. For private parties, the use of TPF is not necessarily a have-to decision. They may use TPF as a tool to take the costs of dispute resolution off the balance sheet or for other commercial purposes.

This book, which consists of 7 chapters, in its first chapter outlines the background of the research, methodology, main research issues, and research aims. The present research employs the comparative research method as the primary method. Noticeably, this method is understood as a "toolbox" instead of a "fixed methodological road map."

In this "toolbox," one could find a historical method, empirical method, functional method, and contextual method. All of these methods are utilized to achieve two goals: to compare different theories and regulatory measures of TPF from the chosen jurisdictions and to fill the gap in the understanding of TPF and the possible regulatory approaches in China. For comparative purposes, there is a line of questions that have been asked in every chosen jurisdiction. Chapter 2-5 start from the background from which TPF emerged and developed. Then they touch on the questions of why TPF is permitted and what the practice of TPF implies. On this basis, the regulation of TPF is reviewed. Finally, efforts are made to pull the threads together and to anticipate the future. Some questions that lie ahead are highlighted to identify the limitations of this research and, more importantly, set up the research continuity.

The second chapter focuses on TPF in England. England represents one of the most developed TPF markets. It allows TPF in litigation and arbitration. TPF exists together with contingency fees, insurance, and claim assignment, serving the purpose of access to justice. Because of the law of maintenance and champerty, England did not permit the practice of TPF until the 1960s. The relics of the maintenance and champerty prohibition still have an impact on TPF today. The underlying rationale is that TPF may have adverse effects on the funded proceeding and its participants. In litigation, TPF adds an extra layer of complexity to the issue of security for costs. TPF seems to have influenced the court's decision on whether to issue security for costs and on the amount of such security. However, it is hard to say that TPF alone can justify this security. Also, the English judiciary concerns the funder's control on the proceedings. Related to this concern is the question of whether TPF can give rise to disproportionate costs. In arbitration, attention has been paid to not only the English court's views on TPF but also the reaction of the arbitration community to these views. TPF for arbitration is considered as a positive legal development by the English court. In the previous case, the court has upheld not only the practice of TPF in arbitration but also the tribunal's decision that the costs of TPF can be recovered as part of the costs of arbitration. With the risks of TPF in mind, the English judiciary employs ad hoc judicial regulation, statutory limitations based on the law of champerty, and an industrial code of conduct. This regulatory approach is categorized as the "light

touch" approach, which has had a remarkable impact on legal reforms in Hong Kong and Singapore.

The practice and regulation of TPF in Hong Kong have been intensively discussed since 2015 when the Law Reform Commission of Hong Kong initiated the plan to regulate TPF for arbitration. Chapter 3 of this thesis addresses the legislative history, the content, and the impact of the new provisions of the Arbitration Ordinance which came into effect in 2019 to set up the statutory boundaries for TPF of arbitration. As a result of the amendment, the law allows TPF in arbitration and the related proceedings. TPF for litigation is still prohibited unless public policy considerations override the fear of external commercial funding. The amended Arbitration Ordinance addresses the following issues: the definition of TPF, the funded proceedings and third party funders, the permission of TPF for arbitration, the disclosure obligation of the funded party, and the need of a code of practice. The amendment is proposed with the concerns about the impact of TPF on arbitration procedure, especially the lack of transparency of the funding arrangement and the potential conflicts of interest. According to section 98G of the Arbitration Ordinance of Hong Kong, TPF of arbitration is the provision of arbitration funding for an arbitration—(a) under a funding agreement; (b) to a funded party; (c) by a third party funder; and (d) in return for the third party funder to receive a financial benefit only if the arbitration is successful within the meaning of the funding agreement. This fits the working definition of TPF employed by this thesis. For due process reasons, the TPF agreement is subject to limited disclosure and specific formality requirements. By the same token, the amended Arbitration Ordinance utters the need to introduce a code of practice with practices and standards that third-party funders are ordinarily expected to comply with when carrying on activities in connection with TPF of arbitration in Hong Kong. The code of practice was issued by the Secretary for Justice on 7 December 2018. It touches on topics such as promotional materials, the construction of the funding agreement, capital adequacy of the funders, conflicts of interest management, the funder's control on the proceedings, disclosure, the funder's liability for costs, termination of the funding agreement and the complaints procedure.

Chapter 4 brings Singapore into comparison. TPF became the center of discussion since 2016 when the Ministry of Law published a public consultation on the regulation of TPF. Because of the law of

maintenance and champerty, TPF was prohibited across all civil cases until the Civil Law (Amendment) Bill was passed in 2017. However, the amended law confines the practice of TPF to international arbitration only. With the potential impact of TPF in mind, Singapore employs a stricter approach in regulating TPF, compared to Hong Kong and England. It mainly relies on statute and subsidiary legislation to deal with the risks of TPF. Various guidelines have been issued by different institutions on a voluntary basis. Nevertheless, these guidelines do not have a binding effect on anyone. To understand how TPF is regulated in Singapore, the following regulatory mechanisms have to be visited: the mandatory qualification requirements for third party funders, the disclosure obligation of legal practitioners, and conflicts of interest management. The qualification of third party funders is addressed in section 4 of the Civil Law (Third-Party Funding) Regulations 2017 in which it is clarified that a “qualifying third party funder” is a funder who carries on the principal business of the funding of the costs of dispute proceedings to which the funder is not a party. In other words, only external professional third party funders are allowed. Different from Hong Kong law, Singapore law assigns the obligation of disclosure to legal practitioners through the Legal Profession Act. The underlying rationale of this approach is the belief that the disclosure obligation can be better fulfilled if it is imposed on legal professionals. Beyond that, Singapore law draws the line between third party funders and lawyers to uphold the standards for legal services.

Chapter 5 focuses on TPF in the Netherlands. There are two types of third-party funders in this jurisdiction. One is the funders who have no connection to the case other than the funding agreement. The other is the representative organizations that fund the claims for their own benefits. Currently, TPF in the Netherlands is largely unregulated. Discussions on the impact and the potential regulatory mechanisms have mostly happened in the field of mass litigation. Dutch law provides two different collective redress mechanisms: collective action and collective settlement. They serve the purpose to protect the similar interests of a mass group fairly and efficiently. For due process reasons, funding from representative organizations or external funders has to be checked with the court on the reasonableness of the costs of funding and the control of the funder on the procedure. The new amendment to the Dutch Civil Code and the Code of Civil Procedure seeks to specify the standards for court scrutiny. It contains requirements for

representative organizations to ensure that their financial incentives do not harm the parties' interests and that the control of the proceedings will not be conceded to external financiers. Nonetheless, the law does not directly address external funding other than requiring a certain level of transparency of the relationship between external funders and representative organizations. TPF for mass claims is also addressed on the EU level. It remains to be seen how the EU directive will impact Dutch law.

Chapter 6 provides knowledge of TPF in China. Chinese law allows TPF in both litigation and arbitration. The lack of funding for legal costs is one of the reasons motivating the development of the TPF industry. However, it can be observed that the practice of TPF is not risk-free. Empirical evidence points to the concerns about the practice of TPF, which include the scope of the TPF practice, the qualification of third-party funders, conflicts of interest, the confidentiality of the case, and the funder's control on the proceedings and so on. Little consensus has been reached on how to deal with these risks in the context of litigation. The author takes the view that the regulation of TPF for litigation should be put in place for two primary purposes: a. to ensure a certain level of legal certainty; b. to prevent abuse of process by third party funders and the affiliated or associated institutions. This is accompanied by the proposition that the scope of TPF should be allowed in commercial cases, including those with mass disputes. On top of that, TPF for litigation should be regulated separately from TPF for arbitration. The regulation of TPF for litigation should start from the qualification of third-party funders, although it does not have to be a licensing regime or anything similar. The law should impose obligations on the participants of the proceedings to allow necessary court supervision. The extent to which the court will be involved in regulating TPF needs further exploration. Previous cases demonstrate the court's willingness to scrutinize external funding arrangements. It should be questioned whether the same approach can be applied to cases with TPF. Arbitration, with the autonomy theory, allows TPF to carve out a special place for itself. Chinese legislators should pay a sufficient amount of attention to the regulation of arbitration funding in other jurisdictions in order to avoid endemic rules that could surprise international users. The Chinese arbitration community has been prepared by rules and guidelines from arbitration institutions to deal with the challenges posed by TPF. At present, Chinese law should refrain from providing

mandatory regulations with the purpose to leave room for the development of rules that are flexible and internationally oriented.

The book is concluded with a summary of the comparative results and the policy prescription for China. The prescription suggests a modest regulatory approach towards TPF with considerations being given to the minimum standards for the practice of TPF derived from the comparative study as well as the legal tradition and social conditions in China.

SAMENVATTING

De belangrijkste focus van dit onderzoek ligt op procesfinanciering door derden (Third Party Funding of TPF). De alternatieven hiervoor, zoals verzekering, overdracht van vorderingen en rechtsbijstand, worden steeds vermeld wanneer dit nodig is om de kenmerken van TPF te belichten of om het begrip van de bredere context waaruit TPF voortkomt, te vergemakkelijken. TPF heeft ingewikkelde connotaties. Dit proefschrift heeft dit betrekking op een type investering met de volgende kenmerken: a. financiering van een derde partij zonder materieel recht in de gefinancierde zaak; b. financiering vanuit een 'non-recourse basis'; c. financiering vanuit commerciële motieven; d. financiering die afzonderlijk geregeld wordt. TPF kan weliswaar de toegang tot de rechtsgang uitbreiden en het verloop van de procedure optimaliseren, maar de financiële motieven van externe financiers zijn echter niet altijd in overeenstemming met de belangen van de partijen en de behoefte van de rechter om de zaak op een efficiënte en rechtvaardige manier te behandelen. Als er geen goede bescherming is tegen de potentiële risico's van TPF, leidt dit tot onrechtvaardigheid.

Dit proefschrift beoogt bij te dragen aan het grensoverschrijdende onderzoek van TPF door de praktische en juridische complexiteit van TPF-praktijken in vijf rechtsgebieden te vergelijken: Engeland, Hongkong, Singapore, Nederland en het vasteland van China. De vergelijkingsbasis is dat al deze rechtsgebieden zich hebben ontwikkeld tot een stadium waarin het recht niet alleen als een ideaal wordt gezien, maar ook als noodzakelijk wordt beschouwd voor goed bestuur en voor het algemene welzijn. De toegang tot de rechtsgang wordt dan ook erkend als één van de essentiële beginselen, hoewel de implementatie van de toegang tot de rechtsgang per rechtsgebied verschilt. Ondanks het bovenstaande zou het verkeerd zijn om te concluderen dat de toegang tot de rechtsgang de enige factor is die de discussie over TPF in de gekozen rechtsgebieden aanwakkert. De poging om de rechtshandhaving via particuliere financieringsmechanismen te bevorderen is een natuurlijk gevolg van de financiële versoering in sommige rechtsgebieden. In andere rechtsgebieden is TPF echter een stimulans voor een concurrerende arbitragesector. Voor private partijen is het gebruik van TPF niet noodzakelijkerwijs een must. Zij kunnen TPF gebruiken als een instrument om de kosten van geschillenbeslechting van de balans te halen of voor andere commerciële doeleinden.

Dit boek, dat bestaat uit zeven hoofdstukken, schetst in het eerste hoofdstuk de achtergrond van het onderzoek, de methodologie, de belangrijkste onderzoeksvragen en de onderzoeksdoelstellingen. Het huidige onderzoek hanteert de vergelijkende onderzoeksmethode als primaire methode. Deze methode kan worden opgevat als een 'gereedschapskist' in plaats van een 'vaste methodologische route'. In deze 'gereedschapskist' is een historische methode, een empirische methode, een functionele methode en een contextuele methode terug te vinden. Al deze methoden worden gebruikt om twee doelen te bereiken: het vergelijken van de verschillende theorieën en de regulerende maatregelen ten aanzien van TPF in de gekozen rechtsgebieden en om de leemte te vullen ten aanzien van het begrip van TPF en de mogelijke manieren om dit in China te reguleren. Voor vergelijkingsdoeleinden is in alle rechtsgebieden dezelfde reeks vragen gesteld. Hoofdstuk 2.5 begint met de achtergrond waaruit TPF is voortgekomen en zich heeft ontwikkeld. Vervolgens wordt ingegaan op de vraag waarom TPF is toegestaan en wat de praktijk van TPF betekent. Op basis hiervan wordt de regulering van TPF besproken. Ten slotte worden al deze verschillende wegen bij elkaar gebracht om na te denken over de toekomst van TPF. Enkele vragen die voor ons liggen worden belicht om de beperkingen van dit onderzoek in kaart te brengen en, belangrijker nog, om de continuïteit van het onderzoek te waarborgen.

Het tweede hoofdstuk richt zich op TPF in Engeland. Engeland vertegenwoordigt één van de meest ontwikkelde TPF-markten. Hier is TPF toegestaan zowel bij de gewone procesvoering als bij arbitrage. TPF bestaat in combinatie met resultaatafhankelijke honoraria, verzekering, overdracht van vorderingen, met als doel de toegang tot de rechtsgang te bevorderen. Vanwege de Engelse doctrine rond 'maintenance' en 'champerty' (beide het (illegaal) bijstaan van een procesvoerende partij door een buitenstaander met het doel te delen in het voordeel) stond Engeland de praktijk van TPF pas in de jaren zestig van de vorige eeuw toe. De overblijfselen van deze 'maintenance' en 'champerty' hebben ook nu nog een impact op TPF. De achterliggende gedachte is dat TPF nadelige gevolgen kan hebben voor de gefinancierde procedure en de deelnemers ervan. In de procesvoering voegt TPF een extra laag van complexiteit toe aan de kwestie van de zekerheidsstelling voor de kosten. TPF lijkt van invloed te zijn geweest op de beslissing van de gerechten om al dan niet zekerheidsstelling voor kosten te vragen en voor welk bedrag. Het is

echter moeilijk vast te stellen dat enkel TPF deze zekerheidsstelling kan rechtvaardigen. Ook de Engelse rechterlijke macht is bezorgd over de zeggenschap van de financier ten aanzien van de procedure. In verband met deze zorg is de vraag of TPF aanleiding kan geven tot onevenredige kosten. In het kader van arbitrage wordt niet alleen aandacht besteed aan de standpunten van de Engelse rechter ten aanzien van TPF, maar ook aan de reactie van de beroepsgemeenschap van arbiters ten aanzien van deze standpunten. TPF voor arbitrage wordt door de Engelse rechter beschouwd als een positieve juridische ontwikkeling. In een eerdere zaak heeft de rechter niet alleen het werken met TPF in arbitrage bevestigd, maar ook de beslissing van het tribunaal dat de kosten van TPF kunnen worden teruggevorderd als onderdeel van de arbitragekosten. Met de risico's van TPF in het achterhoofd gebruikt de Engelse rechterlijke macht ad hoc juridische regelgeving, beperkingen op basis van het rechtsconcept 'champerty' (zie boven) een beroepsmatige gedragscode. Deze regelgevingsaanpak wordt gecategoriseerd als de 'light touch'-aanpak, die een opmerkelijke invloed heeft gehad op de wetshervormingen in Hongkong en Singapore.

De praktijk en regelgeving van TPF in Hongkong zijn sinds 2015 uitvoerig op de agenda gezet, toen de Commissie voor Wetshervorming in Hongkong het plan voor de regulering van TPF voor arbitrage in gang zette. In hoofdstuk 3 van dit proefschrift wordt ingegaan op de wetgevingsgeschiedenis, de inhoud en het effect van de nieuwe bepalingen van de Arbitrageverordening, die in 2019 in werking is getreden om de wettelijke grenzen van TPF voor arbitrage vast te stellen. Als gevolg van de wijziging staat de wet TPF toe in arbitrage en de daarmee verband houdende procedures. TPF voor procesvoering is nog steeds verboden, tenzij overwegingen van openbare orde zwaarder wegen dan de vrees voor externe commerciële financiering. In de gewijzigde Arbitrageverordening komen de volgende kwesties aan de orde: de definitie van TPF, de gefinancierde procedures en derdenfinanciers, de toestemming voor TPF bij arbitrage, de plicht tot bekendmaking van de gefinancierde partij ende noodzaak van een gedragscode. De wijziging wordt voorgesteld met het oog op de bezorgdheid over de gevolgen van TPF voor de arbitrageprocedure, met name het gebrek aan transparantie van de financieringsregeling en de mogelijke belangenconflicten. Volgens artikel 98G van de Arbitrageverordening van Hongkong is TPF van arbitrage het voorzien in arbitragefinanciering voor een arbitrage: a. in het kader

van een financieringsovereenkomst; b. aan een gefinancierde partij; c. door een derde-financier; en d. de derde-financier ontvangt slechts een financieel voordeel als de arbitrage in de zin van de financieringsovereenkomst met succes is afgerond. Dit past in de werkdefinitie van TPF die in dit proefschrift wordt gehanteerd. Voor de TPF-overeenkomst gelden, om redenen van een behoorlijke procesorde, beperkte openbaarmakingsverplichtingen en specifieke formaliteitsvereisten. Evenzo wordt in de gewijzigde Arbitrageverordening de noodzaak aangegeven om een gedragscode in te voeren met praktijken en normen die derdenfinanciers normaal gesproken geacht worden na te leven bij de uitoefening van activiteiten in verband met TPF van arbitrage in Hongkong. De gedragscode is op 7 december 2018 gepubliceerd door de Minister van Justitie. De code heeft betrekking op onderwerpen als promotiemateriaal, de opzet van de financieringsovereenkomst, de vermogenspositie van de financiers, het beheer van belangenconflicten, de zeggenschap van de financier over de procedure, openbaarmaking, de aansprakelijkheid van de financier voor kosten, beëindiging van de financieringsovereenkomst en de klachtenprocedure.

Hoofdstuk 4 voegt Singapore toe aan de vergelijking. TPF kwam in 2016 in het middelpunt van de aandacht te staan in 2016, toen het Ministerie van Justitie een openbare raadpleging over de regulering van TPF inzette. Vanwege de doctrine betreffende maintenance en champerty (beide het (illegaal) bijstaan van een procesvoerende partij door een buitenstaander met het doel te delen in het voordeel), werd TPF in alle civiele zaken verboden totdat het Wetsvoorstel inzake het Burgerlijk Recht (amendement) in 2017 werd aangenomen. De gewijzigde wet beperkt de praktijk van TPF echter tot internationale arbitrage. Met het potentiële effect van TPF in het achterhoofd, hanteert Singapore een strengere aanpak bij de regulering van TPF, in vergelijking met Hongkong en Engeland. Om de risico's van TPF aan te pakken, wordt voornamelijk gebruik gemaakt van wetgeving en afgeleide wetgeving. Verscheidene instellingen vaardigen op vrijwillige basis verschillende richtlijnen uit. Deze richtlijnen zijn echter voor geen enkele partij bindend. Om beter te begrijpen hoe TPF in Singapore wordt gereguleerd, moet men rekening houden met de volgende regelgevingsmechanismen: de verplichte kwalificatie-eisen voor derdenfinanciers, de openbaarmakingsplicht voor praktijkjuristen, en het beheer van belangenconflicten. De kwalificatie van de derde-financier komt aan de orde in artikel 4 van de

Regelgeving voor Burgerlijk Recht ten aanzien van derdenfinanciering (Civil Law (Third Party Funding) Regulations) van 2017, waarin wordt verduidelijkt dat een "in aanmerking komende derde-financier" een financier is met als belangrijkste bedrijfsactiviteit de financiering van de kosten van een geschillenprocedure waarbij de financier geen partij is. Met andere woorden, alleen externe professionele derdenfinanciers zijn toegestaan. Anders dan de wetgeving in Hongkong wijst de wetgeving in Singapore de verplichting tot openbaarmaking toe aan praktijkjuristen via de Wet op de Juridische Beroepsbeoefening ('Legal Profession Act'). De achterliggende gedachte van deze aanpak is de overtuiging dat de openbaarmakingsplicht beter kan worden vervuld als deze wordt opgelegd aan juridische beroepsbeoefenaars. Daarnaast trekt de wetgeving in Singapore de grens tussen derdenfinanciers en juristen om de standaarden voor juridische dienstverlening te handhaven.

Hoofdstuk 5 richt zich op TPF in Nederland. Er zijn twee soorten derdenfinanciers in dit rechtsgebied. Eén daarvan zijn de financiers die geen andere band hebben met de zaak dan slechts de financieringsovereenkomst. De andere zijn de vertegenwoordigende organisaties die de vorderingen ten gunste van hun eigen achterban financieren. Op dit moment is TPF in Nederland grotendeels ongereguleerd. Discussies over de mogelijk impact en de mogelijke regelgevingsmechanismen vonden vooral plaats op het niveau van collectieve rechtszaken. Het Nederlandse recht voorziet in twee verschillende collectieve verhaalsmechanismen: collectieve rechtszaken en collectieve schikking, om de vergelijkbare belangen van een grote groep eerlijk en efficiënt te beschermen. Om redenen van een behoorlijke procesvoering moet financiering van vertegenwoordigende organisaties of externe financiers bij de rechter worden getoetst op de redelijkheid van de financieringskosten en de zeggenschap van de financier op de procedure. De nieuwe wijzigingswet van het Nederlandse Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering is bedoeld om de normen van toetsing door de rechtbank vast te leggen. Deze stelt een aantal eisen aan vertegenwoordigende organisaties om ervoor te zorgen dat hun financiële beweegredenen de belangen van partijen niet schaden en dat de zeggenschap over het proces niet aan externe financiers wordt overgedragen. De wet gaat echter niet rechtstreeks in op de externe financiering, behalve dan dat er een bepaalde mate van transparantie over de relatie tussen de externe financiers en de

vertegenwoordigende organisaties wordt geëist. TPF voor collectieve vorderingen wordt ook op EU-niveau aangepakt. Het valt nog te bezien hoe de EU-richtlijn de Nederlandse wetgeving zal beïnvloeden.

Hoofdstuk 6 geeft inzicht over de werking van TPF in China. De Chinese wetgeving staat TPF toe zowel bij procesvoering als bij arbitrage. Het gebrek aan voldoende financiering voor juridische kosten is een van de redenen voor de ontwikkeling van de TPF-sector. Er kan echter worden opgemerkt dat de praktijk van TPF niet zonder risico's is. Uit empirisch bewijsmateriaal blijkt dat er bezorgdheid bestaat over de praktijk van TPF, die onder meer betrekking heeft op de reikwijdte van de TPF-praktijk, de kwalificaties van externe financiers, de belangenconflicten, de vertrouwelijkheid van de zaak en de zeggenschap van de financier over de procedure. Er is weinig consensus bereikt over de wijze waarop deze risico's in het kader van procesvoering moeten worden aangepakt. De auteur is van mening dat een regulering van TPF voor procesvoering met twee hoofddoelen moet worden ingevoerd: a. om een zekere mate van rechtszekerheid te waarborgen; b. om misbruik van de procedure door derdenfinanciers en de gelieerde of verbonden instellingen te voorkomen. Hierbij wordt voorgesteld dat TPF moet worden toegestaan in commerciële zaken, met inbegrip van collectieve vorderingen. Bovendien moet TPF voor procesvoering afzonderlijk van TPF voor arbitrage worden geregeld. De regulering van TPF voor procesvoering dient te beginnen met de kwalificatie van derdenfinanciers, hoewel het niet noodzakelijkerwijs een vergunningsregeling of hiermee vergelijkbaar hoeft te zijn. De wet moet de betrokken partijen in de procedure verplichtingen opleggen om het noodzakelijke toezicht door de rechter mogelijk te maken. De mate waarin de rechter betrokken is bij de regulering van TPF moet verder worden onderzocht. Eerdere zaken tonen de bereidheid van de rechter aan om externe financieringsmogelijkheden te toetsen. De vraag moet worden gesteld of dezelfde aanpak kan worden toegepast op zaken met TPF. Bij arbitrage kan TPF, in het kader van de autonomie van partijen, een bijzondere plaats in gaan nemen. Chinese wetgevers moeten voldoende aandacht besteden aan de regulering van de financiering van arbitrage in andere rechtsgebieden om endemische regels te vermijden die internationale spelers wel eens zouden kunnen verrassen. De Chinese arbitragegemeenschap heeft zich kunnen voorbereiden door middel van regels en richtlijnen van arbitrage-instellingen om de uitdagingen van TPF het hoofd te bieden. De Chinese wetgevers moeten op dit moment afzien van het opstellen van

wettelijke regels om ruimte te laten voor de ontwikkeling van flexibele en internationaal georiënteerde regels.

Het boek wordt afgesloten met een samenvatting van de vergelijkingsresultaten en de beleidsaanbevelingen voor China. De aanbeveling beschrijft een gematigde regulerende aanpak van TPF, waarbij de minimumnormen voor de praktijk van TPF worden bepaald die zijn afgeleid van het vergelijkende onderzoek, alsmede de juridische traditie en de sociale omstandigheden in China.

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