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# Principles Governing the Third Party Funding of Litigation

European Law Institute

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# List of Abbreviations

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|---|---|
| 2014 IBA Guidelines | International Bar Association<br>Guidelines on Conflicts of Interest in International Arbitration (23 October 2014) |
| 2024 IBA Guidelines | International Bar Association<br>Guidelines on Conflicts of Interest in International Arbitration (February 2014) |
| ADR | Alternative Dispute Resolution |
| ALF | Association of Litigation Funders for England & Wales |
| ALFA | Association of Litigation Funders of Australia |
| ALFA Guidelines | Association of Litigation Funders of Australia<br>Best Practice Guidelines for Litigation Funders & Managers (2019) |
| ALRC | Australian Law Reform Commission |
| ATE | After the Event |
| BTE | Before the Event |
| CAT | United Kingdom Competition Appeal Tribunal |
| CAT Rule(s) | Competition Appeal Tribunal Rules 2015 (SI 2015 No.1648) |
| CFAs | Conditional Fee Agreements |
| CFR | Charter of Fundamental Rights of the European Union |
| CJEU | Court of Justice of the European Union |
| Claim Code | Commissie Claimcode, Claimcode 2019 (Dutch Code of Conduct for Foundations and Associations ('Claim Vehicles') (2019) |
| DBAs | Damages Based Agreements |
| Draft EP Directive | European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)) – Annex to the resolution: Proposal for a Directive of the European Parliament and of the Council on the regulation of third party litigation funding |
| E&W Code | Association of Litigation Funders for England and Wales<br>Code of Conduct in England and Wales (2018) |
| EALF | European Association of Litigation Funders |
| ELFA | European Litigation Funders Association |
| ELFA Code | European Litigation Funders Association<br>Code of Conduct (2022) |
| ELI-UNIDROIT ERCP | ELI-UNIDROIT Model European Rules of Civil Procedure (2020) |
| GDPR | Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 |
| HK Code | Hong Kong Secretary for Justice<br>Code of Practice for Third Party Funding of Arbitration (2018) |
| HKIAC Rules | Hong Kong International Arbitration Centre<br>Administered Arbitration Rules (2018) |
| ICC Rules | International Chamber of Commerce<br>Rules of Arbitration (2021) |

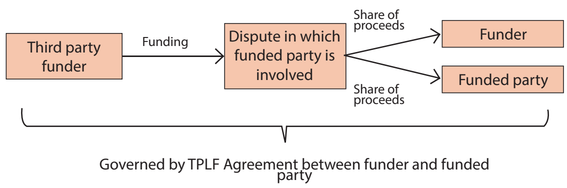
| | |
|---|---|
| ICCA | International Council for Commercial Arbitration |
| ICSID Arbitration Rules | International Centre for Settlement of Investment Disputes Arbitration Rules (2022) |
| ILRC | Irish Law Reform Commission |
| ISDS | Investor-State Dispute Settlement |
| LCIA Rules | London Court of International Arbitration<br>Arbitration Rules (2020) |
| LEI | Legal Expenses Insurance |
| LEI Directive | Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance [1987] OJ L 185/77 |
| NDR | Negotiated Dispute Resolution |
| NZLC | New Zealand Law Commission |
| OGH | Oberster Gerichtshof (Austrian Supreme Court of Justice) |
| QMUL | Queen Mary University of London |
| RAD | Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1 |
| SDGs | Sustainable Development Goals |
| SIArb Guidelines | Singapore Institute of Arbitrators<br>Guidelines for Third Party Funders (2017) |
| Singapore Guidance | The Law Society of Singapore<br>Guidance Note 10.1.1 Third Party Funding (2017) |
| SMEs | Small and Medium-sized Enterprises |
| Solvency II | Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) [2009] OJ L 335/1. |
| TPFA | Third Party Funding Agreement |
| TPLF | Third Party Litigation Funding |
| UNCITRAL | United Nations Commission on International Trade Law |
| VDuG | Verbraucherrechtedurchsetzungsgesetz (German Act Implementing the EU Directive on Representative Actions) |
| VIAC Rules | Vienna International Arbitral Centre<br>Rules of Arbitration and Mediation (2021) |
| VIAC Rules of Investment Arbitration | Vienna International Arbitral Centre<br>Rules of Investment Arbitration and Mediation (2021) |
| VLRC | Victorian Law Reform Commission |
| Voss Report | European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation 2020/2130(INL) Committee on Legal Affairs Rapporteur: Axel Voss (Initiative – Rule 47 of the Rules of Procedure) |

# Executive Summary

These Principles are intended to constitute a blueprint for guidance, decisions or light-touch regulation of the burgeoning Third Party Litigation Funding (TPLF) market. They have been developed by a team from the European Law Institute.

## Introduction to TPLF

TPLF is an arrangement whereby a third party who has no other connection to a dispute conducted in litigation or arbitration finances some or all of the legal costs of a party to that dispute in exchange for a share (whether fixed or by way of percentage) of the proceeds if the claim is successful.




TPLF as addressed by these Principles is a commercial activity, pursued by a funder for financial return. Funders assess the risk, the quality of an investment and the exposure before making an investment. This will involve balancing the financial commitment required with the prospects of a return in the form of a share of the proceeds.

Although not a novel concept, the TPLF market has developed rapidly since the early 1990s. Global assets under management are now thought to be at least USD 15 billion, though this may be a significant understatement.

## TPLF and Access to Justice

TPLF enables claimants who might not otherwise be able to afford the costs of litigation or arbitration to pursue actions that a third party funder considers sufficiently meritorious to be worth funding. This is mutually beneficial: the claimant is provided with access to justice in circumstances where it might not otherwise be able to pursue its claim or defence, while the funder receives a financial benefit.

Third party funders play a functionally vital role in facilitating access to justice in many jurisdictions in the context of class actions/collective redress, where there may be a large number of individual claimants each with relatively small claims on one side, and a well-resourced defendant on the other.

## Concerns about TPLF

TPLF, like any other financial arrangement, carries certain risks and may be subject to unfair practices. Funders may seek to take excessive control over the litigation process or attempt to garner excessively high returns. Conflicts of interest may arise between funders and funded parties. Litigation may even be pursued abusively, in that it is driven by the financial interests of funders. Issues may also arise if courts or counterparties to litigation or arbitration are unaware of the involvement of a third party funder.

Much of the control of TPLF to date has been via statements of best practice and codes of conduct. However, as the volume of funded work has increased, concerns have been expressed about whether this is sufficient. ELI recognises the importance of a degree of continued self-regulation for the TPLF industry – particularly when the industry is developing in a particular jurisdiction, but suggests that there is a limit to the utility of this approach.

A growing number of commentators (most significantly the authors of the Voss Report/Draft EP Directive within the EU) advocate for a scheme of comprehensive regulation. Generally, however, the development of such regulation remains at an early stage. Even so, concerns have been expressed about the effect of prescriptive regulation. Such regulation significantly affects the risk/reward balance for funders and may well lead to funders ceasing to offer funding in the regulated territory – with a consequent impact on access to justice issues. Those risks are sufficiently important that ELI suggests that such regulation is only appropriate where there is an identifiable problem or market failure.

## The Objectives of the Project

ELI has identified four core objectives which lie at the heart of the search for the legitimate and effective use of TPLF. These objectives are:

- Facilitating and increasing access to justice;
- Identifying and meeting valid concerns about TPLF;
- Levelling the playing field internationally between the parties;
- Informing regulatory or legislative responses and assisting courts.

With these objectives in mind, the Principles consider the issues in play and the ways in which a balance can be struck between access to justice and the public interest in the due administration of justice and the interests of those outside the funding relationship.

The Principles have been drafted with the aim of providing aid to litigants, beneficiaries, courts, administrative authorities, arbitration bodies, legislators, funders, and their representative bodies.

## The Suggested Approach

The Principles offer an alternative to both main approaches of codes of conduct and prescriptive regulation. They identify and provide guidance on key issues necessary to ensuring that the TPLF market operates fairly and to the benefit of both funders and funded parties and that TPLF agreements are drafted in a manner consistent with this purpose. They do this by:

- Setting out 12 Key Principles, framed in mandatory terms, regarding the conduct of funders and funded parties. These deal with points of controversy such as: transparency (Principle 5), capital adequacy of funders (Principle 7), funders' fees (Principle 8) and control over proceedings (Principle 10).

- Stipulating a suggested minimum content of TPLF agreements. This attempts to anticipate and ensure provisions are made for potential issues such as the scope and duration of funding, the terms of repayment and the resolution of disputes. It is intended to enable funders and funded parties to draft agreements that are comprehensive and fair.

- Providing sample wordings for TPLF agreements (where appropriate) to deal with particular issues raised in the Principles. For example, the commentary to Principle 7 contains sample wordings addressing capital adequacy.

The Principles also include commentaries discussing the application of these Principles in the context of special types of proceedings, such as arbitration and insolvency proceedings.

This approach has been considered preferable to the alternatives because it helps to level the playing field between funders and funded parties without imposing overly restrictive obligations on either party. It thereby achieves the twin goals of protecting participants while preserving TPLF as an effective means of access to justice. It also allows for flexibility between different jurisdictions and practice areas rather than seeking to impose a one-size-fits-all approach.

# A. Introduction

ELI has identified four core objectives which lie at the heart of the search for the legitimate and effective use of third party litigation funding. These objectives, considered further below, are:

- Facilitating and increasing access to justice;
- Identifying and meeting valid concerns about TPLF;
- Levelling the playing field internationally between the parties; and
- Informing regulatory or legislative responses and assisting courts.

These specific objectives refract, in the light of the specific context, wider concepts of fundamental protected interests, including: (a) the public interest in access to justice; (b) the public interest in the due administration of justice; (c) the position of persons and entities exterior to a dispute or agreement but who may be affected by it.

The ELI Principles for Third Party Funding of Litigation (hereafter 'the Principles') provide a working framework that furthers these objectives concentrating on the issues relevant to TPLF agreements.[1]

Before considering these objectives, and how the draft Principles address them, it is necessary to consider the backdrop against which the issues have arisen. All these issues are discussed in Part A of the document.

Part B contains the main body of the ELI Principles on TPLF, accompanied by brief explanatory comments. The following Appendix outlines the mandatory minimum content for a TPLF agreement.

Part C and Part D provide specific considerations in the form of Commentaries for special types of proceedings and other contexts for TPLF, each addressed separately in those Commentaries.

## I. Backdrop

### 1. What is Third Party Litigation Funding?

Third party litigation funding is generally understood to refer to an arrangement whereby a third party, that is a person or entity who has no other connection to the dispute, finances some or all of the legal costs of a party to the dispute being contested in litigation or arbitration in exchange for a share (whether fixed or by way of percentage) of the proceeds of the successful claim.[2]

TPLF is a commercial business, pursued by the funder for financial return. Although distinct from traditional financing by way of bank loan, it has many similarities to such financial transactions.[3] Funders assess the risk, the quality of the investment (prospects of success) and the exposure together with likely return.

Third party funding is not a novel concept. Funding of litigation by third parties is discernible as far back as ancient Greece and Rome.[4]

In the modern context, a distinction has become significant between arbitration and litigation with litigation further divided between individual claims or cases and class actions. TPLF can be used in all these scenarios.

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[1] The Reporters have attempted to consider all materials emerging up to the date of production of the final draft, in August 2024.

[2] See the definition synthesised by Rachael Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP 2023) 30.

[3] Christopher Hodges, John Peysner and Angus Nurse, 'Litigation Funding: Status and Issues' (2012) Oxford Legal Studies Research Paper 49/2012 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126506> accessed 15 May 2024.

[4] Michael K Velchik and Jeffery Y Zhang, 'Islands of Litigation Finance' (2019) 24 Stanford Journal of Law, Business & Finance 1, 6ff; Gian Marco Solas, *Third Party Funding. Law, Economics and Policy* (Cambridge University Press 2019) 17ff; Max Radin, '*Maintenance by Champerty*' (1935) 24 California Law Review 48, 49.

Although often associated with the US, TPLF's modern origins lie in Australia and (slightly later) in the UK. In the 1990s, Australian legislators took three steps which were to be highly significant. Firstly, a number of them turned away from the doctrines of champerty and maintenance, which had effectively made TPLF unlawful. Secondly, they legalised class actions on an opt-in basis. Thirdly, they passed legislation relating to insolvency, which permitted the financing of litigation which could be characterised as company property.[5]

In the UK, conditional fee agreements and damages based agreements (CFAs and DBAs respectively)[6] were introduced at around the same time (over the course of the 1990s). The Jackson reforms of English commercial litigation[7] gave cautious support to the funding of litigation in England and Wales, following consultation, on the basis that it promotes access to justice by enabling litigants to manage their exposure to costs. Those reforms came into force on 1 April 2013 and provided for litigation funding to be self-regulated. To date, this has been done via the Association of Litigation Funders of England and Wales (ALF), which drafted its Code of Conduct for Litigation Funders (E&W Code).[8] This document sets out standards which are designed to guarantee that funders subscribing to it act within the law and address all of the concerns raised by Lord Justice Jackson in his report.

Litigation funding in the US dates to the current century. Prior to that, funding via contingency fees was the dominant model. There are currently two main forms of TPLF: commercial and consumer litigation funding.[9] Commercial litigation funding usually covers sophisticated business entities in legal disputes against other sophisticated parties. Consumer litigation funding covers torts and personal injury cases in which less sophisticated parties seek financial assistance to pursue their legal claims including the coverage of the plaintiff's living expenses.[10] It is most familiar in the context of single-plaintiff consumer cases with sporadic appearances in the context of class actions/collective redress but is increasingly being seen in other contexts including insolvency.[11] There is also a considerable US presence in the context of funding of international arbitrations.[12]

Internationally to date, TPLF has emerged in a variety of types of litigation, which can include competition claims, insolvency, intellectual property, shareholder claims and arbitration. In some jurisdictions, TPLF occurs across these different types of claims. In others, it is confined to one sub-type. As the Study performed by the European Parliamentary Research Service notes, its use is limited so far in the EU (and indeed remains banned or very limited in some jurisdictions such as Greece and Ireland), but it is expected to play a growing role in the future, particularly in the context of Environmental, social, and governance (ESG)/ climate and environmental litigation.[13] Whereas TPLF is mostly sought after by, and extended to, the plaintiff, in some cases TPLF can also be obtained by the defendant party (see also Principle 2(3)).[14]

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[5] See 'A Brief History of Litigation Finance: The Cases of Australia and the United Kingdom' (2019) 5(6) The Practice: Litigation Finance (September/ October 2019) <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance/> accessed 15 May 2024; Jarrett Lewis, 'Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?' (2020) 33 Georgetown Journal of Legal Ethics 687, 689.

[6] Discussed in more details further in the Commentaries (see Part D.I.).

[7] Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report, Volume One* (Stationery Office 2010).

[8] Association of Litigation Funders of England and Wales (ALF), 'Code of Conduct for Litigation Funders' (January 2018) <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf> accessed 15 May 2024 (E&W Code).

[9] Crowdfunding is an emerging type of funding considered in the Commentaries (see Part C.IV.). It has significant differences to the main forms of funding.

[10] For more on TPLF in consumer litigation, see further in the Commentaries (Part C.I.).

[11] For more, see further in the Commentaries (Part C.II.).

[12] For more, see further in the Commentaries (Part C.III.).

[13] Jérôme Saulnier, Klaus Müller and Ivona Koronthalyova, *Responsible Private Funding of Litigation: European Added Value Assessment* (European Parliament Research Service March 2021) 1.

[14] Emily Samra, 'The Business of Defense: Defense-Side Litigation Financing' (2016) 83 University of Chicago Law Review 2299; Laura Pollard, 'Is Funding Defendants the Future of Disputes?' Fivehundred Magazine (June 2019) 93 <https://www.legal500.com/fivehundred-magazine/editors-views/is-funding-defendants-the-future-of-disputes/> accessed 15 May 2024.

In recent years, some participants in the litigation funding market have moved away from the traditional model towards new structures. Prime amongst these is what is referred to as 'portfolio funding', which is principally a form of lawyer-directed funding (as opposed to client-directed funding),[15] which is a rapid growth area accounting for nearly half of all funding in the US.[16] This growth is evidenced by the consistent ratio of portfolio deals to single-matter deals, maintaining a steady 2:1 ratio.[17] A portfolio essentially allows a client or a law firm to receive funding for multiple cases, often but not invariably, in a variety of practice areas. The outcome ceases to be binary, but the return for each individual case is almost inevitably lower, with the funder's risk (and return) spread across a variety of cases via cross-collateralization. The payment structure is similar to consumer litigation funding, in that the organisation assisting in funding the litigation will receive a portion of the remedy, but the lowering of risk involved means that the funder's fee will tend to be lower than for a single case. Where available, this model offers a route to funding for lower value cases which have traditionally not been attractive to funders: the aggregate value of multiple smaller claims may make funding them economically viable.

Another innovation of recent years has been judgment enforcement and award monetisation: this is a structure by which funders can advance capital to claimants who have obtained an arbitration award or court judgment. This allows claimants to obtain the cash equivalent of a portion of the judgment/award without waiting for the conclusion of potentially lengthy appeal/annulment or enforcement proceedings. The terms of the monetisation will depend on whether it is final and capable of straightforward enforcement, or still subject to further regulatory and legal proceedings.

Litigation funding is now often combined with other related concepts such as After-the-Event (ATE) insurance,[18] or a CFA or DBA.[19]

Innovation is being driven by emulation of the US market and by the growth in the financing of claims for well-capitalised companies and institutions. As a result, sophisticated litigants are now adopting funding as a choice, not because of need; bespoke deals meet the specific funding requirements of clients, to enable them to better manage cash flows and generate greater returns. As reported by funders, 'Companies are … adding funding to their financial and legal armoury – as they increasingly see the benefit of using funding to aid cash flow and improve liquidity'.[20]

Funding is therefore being deployed in increasingly sophisticated and structured ways, many of which are not widely publicised. This creates challenges for legislators and regulators.

Funding also comes in a variety of guises in terms of its operation in different jurisdictions. These range from assignment (used in Australia – and the subject of increasing interest in the EU, eg in Germany and Italy), via full funding of a case which already has a legal team, variable funding (where the funder is involved in assessing the merits), brokerage of funding and lawyer funding.

One question which is repeatedly asked and never

[15] For the distinction between client- and lawyer-directed funding, see Anthony Sebok, 'The Rules of Professional Responsibility and Legal Finance: A Status Update' (2022) 57 Wake Forest Law Review 777, 791.

[16] The number is reported in Charles Agee and Gretchen Lowe, 'Westfleet Advisors Litigation Finance Buyer's Guide' (Westfleet Advisors 2019) 7-8; For the shift from traditional case-by-case investment with clients to portfolio financing with law firms, see Zeqing Zheng, 'The Paper Chase: Fee-Splitting vs. Independent Judgment in Portfolio Litigation Financing of Commercial Litigation' (2021) 34 Georgetown Journal of Legal Ethics 1383, 1387, 1395ff.

[17] Westfleet Advisors, 'The Westfleet Insider: 2023 Litigation Finance Market Report' 6 <https://www.westfleetadvisors.com/wp-content/uploads/2024/03/WestfleetInsider2023-Litigation-Finance-Market-Report.pdf> accessed 15 May 2024.

[18] See further in the Commentaries (Part D.II.).

[19] See Commentaries (Part D.I.).

[20] Kate Gee and Rosie Ioannou, 'Developments in Litigation Funding: What Happens Next?' (*Litigation Finance Insider*, 13 July 2022) <https://www.signaturelitigation.com/kate-gee-examines-developments-in-the-litigation-funding-market-and-what-the-future-holds-for-the-sector-in-litigation-finance-insider/> accessed 15 May 2024.

satisfactorily answered[21] is the size of the litigation funding market globally or in any particular jurisdiction. A recent estimate places the global litigation funding investment market at US$15.8 billion in 2022 and predicts that it is expected to witness a growth rate of around 9% during the forecast period of 2023–2028.[22] Another opts for a 2022 figure of US$13 billion predicting that it will exceed US$35 billion by 2035.[23] At the same time the Irish Law Commission's Consultation paper refers to further estimates in the region of €40–80 billion now – albeit with a considerable reservation as to accuracy.[24] Another report puts the EU share of the litigation funding market at about 15% of the global total, but with strong potential for growth.[25] Funding in the UK is variously estimated at US$1.3 billion or as providing £500 million of legal costs a year.[26] Another approach to value estimates that the top 15 funders in the UK wield £2.2 billion in assets.[27] In the US, a figure of US$15.2 billion under management was given in a 2023 report.[28]

Some sense of the scale of the industry can be gained by a short non-exhaustive list of some of the 'prominent players': Apex Litigation Finance Ltd, Augusta Ventures, Balance Legal Capital, Burford Capital LLC, Calunius Capital, FORIS AG, Harbour Litigation Funding Ltd, IMF Bentham Capital, Juridica Brickell Key, Longford Capital Management LP, Nivalion, Omni Bridgeway, Parabellum Capital, Therium Group Holdings, Vannin/Fortress, Woodford Litigation Funding Ltd. Over forty specialist funders are in operation in the EU and the UK, with 24 in the Netherlands and at least 13 in Germany.[29] These 'prominent players' do not by any means represent the entirety of the market. There are, in addition, non-specialist investment funds investing in the sector on the basis of analysing funding as an alternative asset class.[30] Boutique operations via venture capitalists or individuals are repeatedly glimpsed in individual cases.[31] Business Organisations have suggested that there are at least 100 funders operating in the EU.[32]

Certainly, the TPLF market is increasingly international. Some funders who had established themselves in one jurisdiction have expanded into other jurisdictions. The welcoming climate evinced towards funding in international arbitration where claims, legal teams and panels often involve multiple jurisdictions and legal systems, led to a cross fertilisation of knowledge and ideas relating to litigation funding and adoption of it. The result is that participants in, and capital flows relating to, litigation funding are increasingly global in nature. It has been established to be present in more than 60 jurisdictions across six continents and may well be even more widespread than these figures suggest.[33]

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[21] See Saulnier, Müller and Koronthalyova (n 13) 3; Irish Law Reform Commission (ILRC), 'Consultation Paper on Third Party Litigation Funding' (2023) para 1.26.
[22] RationalStat, 'Global Litigation Funding Investment Market Analysis and Forecast, 2019-2028' (August 2023).
[23] Research Nester, 'Litigation Funding Investment Market: Global Demand Analysis and Opportunity Outlook 2023-2035' (7 August 2023); overview available at <https://www.researchnester.com/reports/litigation-funding-investment-market/2800> accessed 15 May 2024.
[24] ILRC (n 21) para 1.26.
[25] Deminor, 'Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends' (2022) 5 <https://drs.deminor.com/en/litigation-funding-from-a-european-perspective> accessed 15 May 2024.
[26] The latter number is reported by Susan Dunn (Chair of the Association of Litigation Funders of England & Wales) in her witness statement in *PACCAR v CAT* [2023] UKSC 28 [243] (*PACCAR*).
[27] The number is reported in PRC, 'Litigation Funders Backing Class Action Lawsuits as They Put £2.2bn "War Chests" to Work' (20 June 2022) <https://www.rpc.co.uk/press-and-media/litigation-funders-backing-class-action-lawsuits-as-they-put-22bn-war-chests-to-work/> accessed 15 May 2024.
[28] Westfleet Advisors (n 17) 3.
[29] Saulnier, Müller and Koronthalyova (n 13) 8.
[30] International Council for Commercial Arbitration, 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (International Council for Commercial Arbitration 2018) 18.
[31] In *Recovery Partners v Rukhadze* [2022] EWHC 690 (Comm) it emerged that formerly funded individual litigants had themselves invested business gains in a litigation funding agreement supporting other litigants' claims.
[32] Joint Business Statement on Responsible Private Funding of Litigation (June 2022) <https://europeanjusticeforum.org/files/Contents/Documents/Downloads/Joint%20Business%20Statement%20on%20Responsible%20Private%20Funding%20of%20Litigation_June%202022.pdf> accessed 15 May 2024..
[33] Victoria Shannon Sahani, 'Global Laboratories of Third Party Funding Regulation' (2021) 115 AJIL Unbound 34.

## 2. Genesis of the Project

It was against this background that ELI commenced looking at third party funding of litigation as a potential project. ELI noted in addition to the European Parliament's Report on Responsible Private Funding of Litigation (rapporteur MEP Axel Voss) (the 'Voss Report'[34] – the precursor to the 'Draft EP Directive'[35]):

- Rule 237 of the ELI-UNIDROIT Model European Rules of Civil Procedure (ELI-UNIDROIT ERCP) which permits third party litigation funding for a qualified claimant[36] and the note elsewhere, that the regulation of third-party funding is outside their scope but that it 'may … be necessary for European jurisdictions to regulate it'.[37]

- The Directive on Representative Actions (RAD)[38] already contains provisions regarding the use of TPLF in order to protect the interests of consumers.[39]

- In Australia, the Victorian Law Reform Commission (VLRC) produced a consultation paper in 2017 on Litigation Funding and Group Proceedings.[40] This resulted in a report recommending the regulation of litigation funding at national level.[41]

- The United Nations Commission on International Trade Law (UNCITRAL) work on proposals for the regulation of third-party funding in investor-state disputes.[42]

A High-Level Expert Group meeting was held in November 2021 at which the Voss Report and a number of the main issues highlighted by it were discussed.

While noting that the scope of any potential project would have to be carefully defined to avoid an attempt to regulate various different sectors when there already exists a number of layers of regulation at both domestic and transnational levels, it was felt that the potential project could yield useful results. In particular, it might aim at producing a checklist or principles for use by both those using funding and the lawyers advising them. Participants identified the need to assist those involved in third party funding to ensure they consider all important matters.

A Project Proposal and Feasibility Study were approved in September 2022 and the Reporters appointed (together with Professor Henrik Rothe, who unfortunately had to leave the project at an early stage).

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[34] European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation 2020/2130(INL), Committee on Legal Affairs, Rapporteur: Axel Voss (Initiative – Rule 47 of the Rules of Procedure) (Voss-Report).

[35] See European Parliament resolution of 13 September 2022 with recommendations to the Commission on responsible private funding of litigation (2020/2130(INL)). The EP's resolution includes in an Annex a Proposal for a Directive on the regulation of third-party litigation funding ('Draft EP Directive').

[36] According to Rule 237 ELI-UNIDROIT ERCP ('Third-Party Funding'): (1) A qualified claimant may use third-party litigation funding. (2) Rule 245 applies to any such third-party funding agreement. A court may, however, require a qualified claimant to disclose the details of any such funding agreement relevant for the instance at stake to the court and, in so far as appropriate to the parties.

[37] Rule 210 ELI-UNIDROIT ERCP, Comments para 4.

[38] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1 (RAD).

[39] For more see further in the Commentaries (Part C.I.2.).

[40] VLRC, 'Access to Justice – Litigation Funding and Group Proceedings: Consultation Paper' (July 2017).

[41] VLRC, 'Access to Justice – Litigation Funding and Group Proceedings: Report' (March 2018).

[42] An overview of UNCITRAL initiatives on the regulation of TPLF can be found at <https://uncitral.un.org/en/thirdpartyfunding> accessed 15 May 2024.

# II. Objectives

### 1. Facilitating and Increasing Access to Justice

The fundamental premise upon which the Principles are based is that third party funding of litigation improves access to justice and facilitates the private enforcement of the law. The international community has formally identified the aim to 'provide access to justice for all' in Goal 16 of the United Nations' 2030 Agenda for Sustainable Development (Sustainable Development Goals or SDGs).[43] State governments have a responsibility to provide and promote institutions that improve access to justice.

TPLF provides financial resources to litigants who may not otherwise have the means to pursue their legal rights. While many sources emphasise the desirability of States making available adequate legal aid to ensure access to justice for all,[44] experience shows that this is more aspirational than actual. Legal aid is often concentrated in the criminal justice sphere and either does not exist for civil claims or exists in such an attenuated form that it offers no real assistance in a variety of significant civil claim areas. This issue is unlikely to go away in the financial climate which has succeeded the COVID pandemic.[45]

In particular, TPLF has been identified in many jurisdictions as critical in access to justice in collective redress claims.[46] That importance cannot be overstated. In the EU context, this is particularly significant with the implementation of the Representative Actions Directive, which became effective on 25 June 2023. In England and Wales, the effectiveness of group litigation depends largely on the use of TPLF[47] whereas in the Netherlands, every single collective compensation action brought to date has been funded by third party litigation funding;[48] at the same time, the British Institute of International and Comparative Law (BIICL) study notes that in jurisdictions where third party litigation funding is not available, potentially significant consumer collective actions have not been able to be brought.[49] The evidence of a vital improvement in access to justice – and redress for wrongs – in such claims is inescapable. These cases are not confined to competition claims but include mis-selling claims (financial and non-financial), such as the *Dieselgate* litigation, major product liability claims, and data breach claims.[50]

Litigation funding has played a significant role in certain non-consumer group litigation actions. Most notable among these is the *Bates v Post Office* litigation in the UK where a major miscarriage of justice was only discovered via documentary disclosure in funded litigation.[51]

TPLF also offers:

- Greater access to justice in jurisdictions where, legal aid aside, litigation costs are very high, or where access to justice is particularly onerous for particular groups;

- A levelling of the playing field between well-resourced parties and smaller entities which are in dispute with them;[52]

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[43] For more see <https://sdgs.un.org/goals/goal16> accessed 15 May 2024.
[44] See for example Article 47 CFR.
[45] See also Vladyslav Teremetsky and others, 'Access to Justice and Legal Aid for Vulnerable Groups: New Challenges Caused by the COVID-19 Pandemic' 24 (2021) (1S) Journal of Legal, Ethical & Regulatory Issues 1.
[46] See eg European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU)' COM (2018) 40 final 10; British Institute of International and Comparative Law (BIICL), 'Study on the State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation (JUST/2016/JCOO/FW/CIVI/0099)' (November 2017) 19.
[47] *PACCAR* (n 26) [12].
[48] Xandra Kramer and others, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?* (Eleven International Publishing 2024) 65, 85.
[49] BIICL (n 46) 9, 19f.
[50] See also Commentaries (Part C.I.1.).
[51] See also Fiona Maxwell, 'Mr Bates vs the Post Office Sparks Bitter Fight over UK Legal Funding' *Politico* (15 April 2024) <https://www.politico.eu/article/alan-bates-v-post-office-case-inspires-attempted-crackdown-on-uk-legal-funding/> accessed 15 May 2024.
[52] The *Bates* case is a prime example: the Post Office spent £24 million just on disclosure.

- A mechanism for transferring the risk of the uncertain outcome of the dispute to the litigation funder;

- At the least, an additional option on top of other means used to ensure/facilitate access to justice such as mediation, alternative dispute resolution (ADR) and negotiated dispute resolution (NDR), legal cost insurance or grievance systems/ ombudsmen.

The importance of TPLF as a vector for providing increased or improved access to justice is a point which has been repeatedly emphasised in internal discussions within ELI.

### 2. Identifying and Meeting Valid Concerns About TPLF

TPLF therefore enhances access to justice, but it does not come without concerns. As critics of the TPLF model have emphasised, TPLF agreements, like any other financial arrangements, carry certain risks and may be subject to unfair practices.

The paradigm is investment-based for funders; as such the drive of maximising their investment returns creates real concerns for many commentators. They note (particularly in the context of collective consumer claims and commercial claims) that the TPLF model may lead funders to seek to exert undue influence over the litigation process or to seek excessively high returns. They point out the potential for funders to focus on high-value, high-merit cases, leaving challenging and low-return cases without funding.[53] They suggest that these factors may create conflicts of interest, increase the costs of litigation generally, lead to frivolous or abusive litigation, create gaps in access to justice; and ultimately, impair the credibility and trustworthiness of the legal system. A soundbite which encapsulates much of what those hostile to litigation funding is given by Sean Kevelighan (CEO, Triple-I): 'Third-party litigation funding (TPLF) has devastatingly become a multi-billion dollar global industry, turning lawsuits into investments at the expense of societal good.'[54]

There is some force in nearly all of the points which feed into this analysis:[55]

- **Conflicts of interest**: Certain funding agreements may create or exacerbate conflicts of interest between the funder and the funded party. This is an issue which is particularly obvious when the question of control of (or influence over) the litigation is considered (a question considered further below). But there are other less avoidable conflicts, such as common interests developing between funders and lawyers engaged in particular types of funded claims, or a right of advice or input on the part of the funder becoming a de facto control in circumstances where a funder has expertise which the funder party lacks. Such issues arise too out of the developing concepts of portfolio and law firm funding, where clients or firms are dependent on funders for a wide range of business.

- **Abusive litigation**: Concerns have repeatedly been raised that a financial incentive to advance mass claims might lead to abusive litigation.[56] Logically, this should not be the case, at least in jurisdictions with a 'loser pays' costs approach. Here it should be the case that funders actually assist the justice system by weeding out unmeritorious claims – as almost inevitably a funder's due diligence process involves a merits review.[57] The evidence suggests this is effective as a check to unmeritorious litigation: the approval rate for proposed cases by litigation funders is remarkably low (with only 3% to 5% of all

[53] An often-seen rule of thumb is that a claim needs to be worth at least millions, and the funder can be expected to take 30% to 40% of recoveries.
[54] Insurance Information Institute (Triple-I), 'What is Third-Party Litigation Funding and How Does It Affect Insurance Pricing and Affordability?' (July 2022) 3 <https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf> accessed 15 May 2024.
[55] These points have in the past been acknowledged as possible problems by funders also; see Hodges, Peysner and Nurse (n 3) 80ff.
[56] See ILRC (n 21) para 3.13 and sources cited there.
[57] Cristina Poncibò and Elena D'Alessandro, *State of Play of the EU Private Litigation Funding Landscape and the Current EU Rules Applicable to Private Litigation Funding* (European Parliament Research Service March 2021) 74.

pitched funding opportunities being accepted in the UK).[58] However, even in such jurisdictions, there remain anecdotal accounts which speak of claims which are speculative in the extreme being initiated with the appearance of being aimed at a 'nuisance value' settlement before the final outcome.[59] This is a commonly cited point as regards some competition and other class action claims and strong views are held on it.[60] However, such analysis as has been carried out does not to date bear out these concerns and anecdotes.[61] And while it is certainly true that many litigants in class/consumer actions would not otherwise have sued, it does not mean that they have not suffered a loss or would not want to recover that loss. The fact that litigation would not otherwise have resulted can simply be a manifestation of the inaccessibility/unaffordability of the justice system for certain litigants or smaller claims.

- **High charges and driving up costs generally**: A central area of concern is the high charges imposed by funders, with reports of amounts claimed by funders sometimes amounting to 50% of the award, and with funders seeing very high percentage returns on investment – sometimes amounting to multiples of the amount provided. This creates concerns as to the erosion of the recovery by litigants, particularly vulnerable litigants.[62] Possible controls on fees is a difficult issue which is dealt with further below (see Principle 8). Overall, however, most commentators regard a system which provides a route to some compensation (albeit not full compensation) as better than one which provides no route at all.[63] But there is a separate concern that funding either drives up budgets or impacts on the levels of fees charged to funders, and these levels of charges themselves create an inflationary pressure on fees charged which leaks into other cases and increases the costs for non-funded litigants in other cases. Some of those involved in funded litigation in the past years anecdotally record an impression that costs in funded cases are higher than the norm and that rising costs of litigation are noticeable. This is, however, an area in which it is particularly difficult to find solid evidence. The first of the two studies conducted for the European Parliamentary Research Service (EPRS) on TPLF and on which the Voss Report relies:[64]

    - o Shows a correlation between higher litigation costs and markets where TPLF is flourishing. But there may be no causal link, or the causation may operate in reverse (high costs of litigation equating to specialised legal markets causing a flourishing of TPLF or high costs of litigation indicating an access to justice gap for small and medium sized enterprises (SMEs) which is filled by TPLF)

    - o Also notes statistical evidence which suggests no causative impact on costs from TPLF.

  The Irish Law Reform Commission (ILRC) has noted the issues referred to here and has indicated that it would welcome analysis on the point in submissions made to it.[65]

- **Gaps**: On one level, TPLF only lessens gaps in funding. There is a widespread problem for justice systems in funding claims and this has

[58] So eg, the latest numbers reported in Rachael Mulheron, 'A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study' (Legal Services Board 28 March 2024) 33 <https://legalservicesboard.org.uk/research/a-review-of-litigation-funding> accessed 15 May 2024.

[59] This may indeed have been the aim in the notorious *Excalibur Ventures LLC v Texas Keystone Inc* litigation in the UK, where inexperienced funders pursued a claim which was described as 'speculative and opportunistic' and failed entirely at vast cost.

[60] Michael B Abramowicz, 'Litigation Finance and the Problem of Frivolous Litigation' (2014) 62 DePaul Law Review 195, 216.

[61] Poncibò and D'Alessandro (n 57) 78 citing Ilja Tillema, 'Entrepreneurial Motives in Dutch Collective Redress' in Willem van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 222; see also Johan Skog, 'Illusory Truths and Frivolous Claims: Critical Reflections on a Report on Litigation Funding by the European Parliamentary Research Service' in Eva Storskrubb (ed) *YSEC Yearbook of Socio-Economic Constitutions 2022: Funding Justice* (Springer 2022) 87.

[62] The classic example being: Ben Butler, 'Victims Get Nothing as Litigation Funder, Lawyers Share the Spoils' *The Australian* (Sydney, 22 August 2016).

[63] See ILRC (n 21) paras 3.39–3.40.

[64] Saulnier, Müller and Koronthalyova (n 13) 11-14.

[65] ILRC (n 21) para 3.47.

led to significant gaps in access to justice in most jurisdictions. By funding meritorious cases, TPLF plugs gaps in access to justice, can free up public money for less economically viable cases, and overall increase access to justice. But at the same time, one very real concern is the extent to which an investment model, while offering access to justice for some, at the same time perpetuates gaps in access to justice. TPLF gravitates towards claims which offer a financial return and within that sub-set of cases, those which generate a significant financial return. However, this leaves cases which sound in declaratory or other non-financial relief without a similar resource. Some such cases can be ones which are of particular moment, of public interest or to vulnerable litigants. There are also issues as regards cases which have smaller sums at stake. Notionally portfolio funding should assist with this gap; but to date, the evidence of this manifesting is lacking.[66]

There are also, as noted, specific areas of concern, in particular as to a potential lack of capital adequacy, transparency and disclosure requirements, control of litigation, ability of funders to terminate the TPLF agreement while a case is ongoing and the level of funders' fees. These topics are specifically dealt with in the Principles and are introduced separately in the Notes to the corresponding Principles.

These concerns have led to some commentators and legislators (most significantly the Voss Report/Draft EP Directive within the EU) advocating for a scheme of comprehensive regulation. However, the regulatory paradigm is not without its own problems, as further explained below.

Either maintaining the status quo or the comprehensive regulation approach have the potential also to impact other public interests, such as that in the due administration of justice or the interests of persons and entities exterior to the agreement but who may be affected by it.

### 3. Levelling the Playing Field Internationally and Between Parties

The concerns which have been expressed are magnified by the fact that, in recent years, the TPLF industry has seen significant growth worldwide, while its development and regulatory framework has remained, to a great extent, incoherent across borders.

The Voss Report suggested that while TPLF is virtually non-existent in most parts of Europe, it is well developed in the US, Canada, the UK, the Netherlands, and Australia. That is not perhaps a fair summary of the position in 2024. The state of TPLF in Europe is best described as patchy and developing. At least 45 funders are known to operate in the EU alone, as of 2022.[67] Estimates of the amount of money involved in funded claims vary wildly but are routinely placed in the billions of dollars. TPLF is also a booming phenomenon in investment arbitration (claims of private investors against States). TPLF is also developing fast in India and China.[68]

Various jurisdictions have adopted – or are in the process of adopting – different approaches to the rapidly expanding TPLF market. The more fragmented, weak or non-existent the regulatory or guidance landscape for TPLF, the greater the potential for abuses. It is, therefore, necessary to find balanced solutions that, on the one hand, can minimise the

[66] However, see Camille Cameron, 'Litigation as "Core Business": Analyzing the Access to Justice and Regulatory Dimensions of Commercially Funded Class Actions in Australia' in Deborah R Hensler, Christopher Hodges and Ianika Tzankova (eds), *Class actions in Context: How Culture Economics and Politics Shape Collective Litigation* (Edward Elgar 2016) 189, 206, who gives the example of an Australian funder which has added a pro bono public portfolio, specifically to fund public interest cases.

[67] See EP resolution of 13 September 2022 (n 35) Preamble J.

[68] Shaneen Parikh and Amoga Krishnan, 'The Slow, but Steady Development of the Third-Party Funding Market in India' (*Chambers and Partners*, 5 March 2024) <https://practiceguides.chambers.com/practice-guides/litigation-funding-2024/india/trends-and-developments> accessed 15 May 2024; Beibei Zhang, *Third Party Funding for Dispute Resolution: A Comparative Study of England, Hong Kong, Singapore, the Netherlands, and Mainland China* (Springer 2021) 159ff; Yating Lin, 'Third Party Funding in Litigation and Arbitration: A Dichotomy in China's Practice' (*Kluwer Arbitration Law*, 24 April 2023) <https://arbitrationblog.kluwerarbitration.com/2023/04/24/third-party-funding-in-litigation-and-arbitration-a-dichotomy-in-chinas-practice/> accessed 15 May 2024.

potential risks of TPLF arrangements and unfair practices in their operation, but, on the other hand, do not impose overly restrictive measures that could compromise the TPLF market's viability. Too strict an approach will only deprive potential litigants of financial resources for accessing justice and enforcing their rights, in the absence of alternatives.

These Principles set out a framework of issues for consideration, supplemented by: (i) a suggested minimum content framework; and (ii) in areas of most controversy, a range of sample wordings sourced or synthesised from existing wordings. The primary aspiration is to offer parties a full insight into the issues which may affect their relationship and a means of navigating through the issues to an agreement which is fair to both sides.

It should be borne in mind that while the primary focus here is as between the funder and the funded party, and there is always a concern about the vulnerable funded party versus the presumptively knowledgeable funder:

- That paradigm is not always appropriate – there exist some very powerful and knowledgeable commercial parties utilising funding for cash flow reasons. They may well be better informed and more powerful than fledgling funders.

- The central dichotomy does not exhaust the possibilities of those whose interests are affected by funding and hence by the Principles. At different points, the Principles touch on relationships with the other parties to the dispute who are not a party to the third party funding agreement (TPFA) (eg, Principle 3) and the public interest via the court or tribunal conducting the litigation which is the subject of funding (eg, Principle 6, Principle 7, Principle 11).

The Principles also aim to assist in the development of regulation, guidance or best practice codes which can ensure a healthy TPLF market supporting access to justice.

### 4. Informing Regulatory and Legislative Responses and Assisting Courts

Although the Principles cannot in and of themselves be enforceable, it is hoped that they may nonetheless form a basis for informing proposals for regulation (including the response to the Draft EP Directive) or any legislative regimes by which individual jurisdictions look to govern TPLF. Part of the response to the UK Supreme Court's decision in *PACCAR*[69] will include a consideration of revisiting the legislation which underpins the existing regime, perhaps in partnership with some form of legislative control,[70] given that a significant portion of the UK TPLF market is in the hands of those who are not members of the UK's ALF and hence not subject to its Code of Practice.[71]

The Principles are also likely to have important indicatively prescriptive application, providing guidance in case of issues or complications. There is also very real scope for courts being asked at some point to intervene in incomplete agreements or to ascertain whether steps taken by one party or another are justified. It is anticipated that the Principles will provide a backdrop of established and best practice(s) which may inform such decisions. In the context of EU consumer actions for example,[72] where the Unfair Contract Terms Directive[73] imposes a requirement of fairness, the Principles will offer a useful yardstick by which fairness may be assessed.[74]

[69] *PACCAR* (n 26); see also Rachael Mulheron, 'Unpacking Paccar: Statutory Interpretation and Litigation Funding' (2024) 83 Cambridge Law Journal 99.

[70] Neil Rose, 'Government Set to Commission Review of Third-Party Litigation Funding' (*Legal Futures*, 2 February 2024) <https://www.legalfutures.co.uk/latest-news/government-set-to-commission-review-of-third-party-litigation-funding> accessed 15 May 2024.

[71] E&W Code (n 8).

[72] For more see further in the Commentaries (Part C.I.).

[73] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1995] OJ L 95/29 (as amended by subsequent Directive 2011/83/EU and Directive (EU) 2019/2161).

[74] See also further in the Commentaries (Part C.I.6.).

## III. The Specific Approach Adopted

The question of the optimum approach to adopt was the subject of much thought and debate. Ultimately the approach adopted by ELI in these Principles is one which was driven by a rejection of the alternatives, foremost amongst which are: [75]

- Codes of conduct
- Regulation
- Synthesis of recommended outcomes.

### 1. Codes of Conduct

An acknowledged step towards achieving a desirable balance between access to justice and risk mitigation is the development of principles derived from best practices, established through research and collaboration between all stakeholders (including industry experts, suppliers, or users of TPLF services, regulators, and other governing bodies). The promotion of such best practices aims to offer guidelines, standards, and safeguards for ethical and responsible behaviour and, hence, to facilitate the use of TPLF arrangements by litigants, funders, and professional advisers. It can help ensure transparency, fairness, and regulatory oversight in the TPLF industry. It is important to have best practices in place to protect the interests of all parties involved (litigants, beneficiaries and third parties, including investors in crowdfunding schemes). The promotion of best practices within the TPLF industry does not only benefit the users of TPLF services but also the industry itself. By establishing and adhering to high standards of ethical and responsible behaviour, the industry can weed out market participants with sub-optimal practises, thereby improving its overall standing.

Much of the control of TPLF to date has been via statements of best practice. In the UK, there is the Code of Conduct of the Association of Litigation Funders (ALF).[76] Other codes of conduct exist in Australia,[77] Hong Kong,[78] the Netherlands[79] and, since 2022, Europe.[80] Singapore has developed a Guidance Note[81] as well as Guidelines for funders intended to provide funding to parties in Singapore-seated international arbitrations.[82]

Consistent with this approach, the Principles recognise the importance of a degree of continued self-regulation for the TPLF industry – particularly when the industry is developing in a particular jurisdiction. This approach offers a balance between flexibility and control which is attractive to funders and is likely to encourage them to participate in a nascent market.

The Principles therefore encourage the further development of codes of conduct and similar governance tools for funders and their associations

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[75] The ILRC breaks the options down into five main models: voluntary self-regulation, enforced self-regulation, court certification of the Third Party Funding Agreement, and regulation via a new or existing regulator; see ILRC (n 21) paras 5.1ff.

[76] E&W Code (n 8).

[77] See eg Association of Litigation Funders of Australia (ALFA) 'Best Practice Guidelines for Litigation Funders & Managers' (January 2019) <http://www.associationoflitigationfunders.com.au/uploads/5/0/7/2/50720401/alfa_best_practice_guidelines.pdf> accessed 15 May 2024 (ALFA Guidelines).

[78] Hong Kong Secretary for Justice, 'Code of Practice for Third Party Funding of Arbitration' (7 December 2018) <https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf> accessed 15 May 2024 (HK Code). Similar discussions and public consultation were also conducted for the introduction of a code of conduct for TPLF in mediation; see Hong Kong Secretary for Justice, 'Proposed Code of Practice for Third Party Funding of Mediation' (16 August 2021) <https://www.doj.gov.hk/pdf/Proposed_CoP_for_TPF_of_Mediation_e.pdf> accessed 15 May 2024.

[79] Commissie Claimcode, Claimcode 2019 (Boom juridisch 2019). The Dutch Claim Code came into force on 1 July 2011 and was amended on 4 March 2019. The Claim Code 2019 now includes a new principle on the relationship between a claim vehicle and a third party funder; for more, see Kramer and others (n 48) 70ff.

[80] See eg European Litigation Funders Association (ELFA), 'Code of Conduct' (29 June 2022) <https://elfassociation.eu/about/code-of-conduct> accessed 15 May 2024 (ELFA Code); Similar plans for establishing a code of conduct for litigation funders have been announced by the European Association of Litigation Funders (EALF) <https://europeanlitigationfunders.com/> accessed 15 May 2024.

[81] The Law Society of Singapore, 'Guidance Note 10.1.1 Third-Party Funding' (25 April 2017) <https://www.mlaw.gov.sg/files/Council_GN_Third_Party_Funding.pdf> accessed 15 May 2024 (Singapore Guidance).

[82] Singapore Institute of Arbitrators, 'SIArb Guidelines for Third Party Funders' (18 May 2017) <https://www.siarb.org.sg/images/SIArb-TPF-Guidelines-2017_final18-May-2017.pdf> accessed 15 May 2024 (SIArb Guidelines).

by offering a list of matters that should be addressed in these codes. Such matters include provisions on ethical conduct, transparency, avoidance of conflicts of interest, and the establishment of effective dispute resolution mechanisms. Ideally, codes of conduct should collect best practices shared in the TPLF industry and that funders, disputants and courts widely believe can support the proper performance of litigation funding. By adhering to and complying with these codes of conduct, funders and their associations can demonstrate their commitment to acting fairly and responsibly when providing TPLF.

However, there is a limit to the utility of this approach. One reason is that the nature and the effects of codes of conduct can vary depending on the circumstances and what their drafters deem suitable on a case-by-case basis. For instance, some recommendations may embody principles that apply across the board regardless of the specific features of the dispute or the funder. Others may reflect behaviours that are adequate in most cases but can be deviated from when they do not fit with the specific features of the case or when their costs exceed their benefits. In this case, the codes of conduct may rely on a 'comply or explain' system, whereby market participants can deviate from recommendations that are unjustified in the specific case if they explain why they do so. Some approaches within codes of conduct can be informed by jurisdiction-specific factors which are less applicable to TPLF relationships in other jurisdictions where funding is used in a different context.

Another reason is that codes of conduct developed by funders tend to be drafted by those market participants who already have fairly high standards. They sometimes take for granted aspects which are very important and which may be neglected by less sophisticated users or funders with less experience. This aspect may come to the fore particularly once a TPLF market has developed and less rigorous operators can see a potential for joining the market for financial reasons. For example, the E&W Code was originally signed up to by all participants in the UK TPLF market; at the time of writing, it has 16 members,[83] with at least 40 and up to 67 funders believed to be active in the jurisdiction. The funders who are operating outside the E&W Code have not committed to any of the points of best practice within the Code.

A third reason, identified by the ILRC in its consultation paper, is that self-regulation is not feasible before some form of market has developed.[84] It is not therefore suitable in jurisdictions where there is no TPLF market at all. Even if prospective funders could be persuaded to be involved, the differing markets which develop in different jurisdictions illustrate the risks of imposing best practice rules not apt to the variety of funded litigation which the market actually yields.

### 2. Regulation

Regulation – generally on the basis of prescriptive rules – is a path which is advocated by many of those who are concerned by the growth and impact of the TPLF market. This project itself only commenced since the call for such regulation within the EU led by the Draft EP Directive; the considerations raised by that Directive are obviously closely considered. ELI has also received detailed correspondence/submissions on this point from others with similar views, such as the US Chamber of Commerce's Legal Reform Committee; for example, it contends that a voluntary code of conduct bears the risk of operating as a distraction that may deprioritise necessary hard-letter regulation. It also suggests that voluntary codes have already been tried and do not appear to work.[85]

Regulation of this sort offers certainty, but in the end, ELI's conclusion is that certainty in this context itself generates problems. For example: regulation which affects the risk/reward balance for funders may well simply lead to funders ceasing to offer funding in the regulated territory. That leads into serious access to

[83] The list with all members is available on the ALF website <https://associationoflitigationfunders.com/membership/membership-directory/> accessed 15 May 2024; see also Mulheron (n 58) 50ff.
[84] ILRC (n 21) paras 5.25–5.26.
[85] This statement is derived from correspondence sent by the US Chamber of Commerce to ELI.

justice issues. Those are sufficiently important that ELI broadly endorses the view that such regulation is only appropriate where there is an identifiable problem or market failure. That is likely to be a jurisdiction-specific question.

Another issue is the aspirational nature of the model usually proposed for regulatory control. Thus, the Draft EP Directive model assumes the existence of resources to fund and adequately run supervisory authorities at national level. The reality is likely to come into conflict with the same issues of national priority, which have resulted in the frequent absence of legal aid to support the litigation which is now funded, and thus created the space in which TPLF has developed. A third issue is the practical consequences within the funded market of increased regulation. Increased regulation will mean increased costs of capital and hence increased costs of funding. TPLF is commercial; it has to offer a return to funders, or it will not be offered.

ELI therefore does not endorse this approach. A one-size-fits-all approach, which is what prescriptive regulation effectively yields, ignores the different contexts in which funding can assist in access to justice and the different risks or other factors which can justify a diverse range of solutions. There are a number of areas in particular where controversies arise: transparency, control, capital adequacy, funders' fees and termination being the most important. Each of these areas has been the subject of considerable academic debate. That debate underpins the approach taken in the Principles and is outlined in the notes to the relevant Principles. But to give two simple examples for the purposes of illustration:

- High-risk and inherently expensive litigation may genuinely justify a considerable fee on the part of the funder.
- In some contexts, a parity of bargaining power between funder and funded party combined with unique experience/expertise of the funder may justify an agreement for control of the litigation.

An overly prescriptive approach to the appropriate contents of the funding agreement will almost inevitably result in a diminishing of access to justice for vulnerable claimants. It might also lead to forum shopping amongst the more sophisticated litigants. It follows from this that if regulation is to be considered in any given jurisdiction, it should either be to address an identifiable – and fixable – problem or to ensure consistency of best practice, ie 'light touch' regulation. This latter is akin to the 'Enforced Self-Regulation' model discussed by the ILRC in its consultation paper[86] and the approach of the Hong Kong government in relation to funding in arbitration.[87]

### 3. The Third Way: Synthesis

A third potential approach is a synthesis of the debates with the aim of producing one or more suggested answers to areas of difficulty. This was the approach initially contemplated. However, while this may be possible in certain areas, there are a number of other areas where either the debate does not permit one to propose a suggested answer – even within a range – or the possible answers are affected by the approach taken to other aspects of the agreement. For example, costs of maintaining a high standard of capital adequacy will increase funder costs and inevitably result in a higher price for the service.

Some thought was given to the possibility of adopting an approach similar to the ELI-UNIDROIT ERCP which defines alternative possibilities, with the choice being left open. Ultimately ELI was persuaded that following this course would lead to similar 'overcertainty' problems to those created by the prescriptive regulatory approach. As explained immediately below, the range of possibilities is instead provided by the use of sample wordings, separate to the Principles, in areas where a large range of possibilities exists.

### 4. The Suggested Approach

ELI instead advocates a complementary approach involving the identification of and provision of

[86] ILRC (n 21) paras 5.35ff.
[87] ibid paras 5.41ff.

guidance on issues which need to be taken into account before entering into a TPLF agreement, together with an Appendix drawing together recommended minimum content.

As already noted, each of the alternative approaches was examined and serious problems with reliance on prescriptive approaches by way of regulation or synthesis were identified. At the same time, at least in more mature markets, voluntary codes of conduct standing alone appear to offer insufficient control to prevent problems emerging.

However, one significant theme did emerge. A key driver for the calls for regulation has been the absence of transparency and the knowledge imbalance between funders and funded parties, particularly where the funded parties are consumers or even small- and medium-sized enterprises (SMEs).[88] When assessing the conditions of the available funding options, one element which was consistent in different jurisdictions was a concern as to the information asymmetry between the contractual parties and the potential imbalance of powers during the negotiations of the TPLF agreement's terms.

This suggests that a workable answer lies not in mandating where the balance lies but making it possible for both parties to the transaction to properly assess the terms which they are discussing. This can, where appropriate, form the basis for 'light touch' as opposed to prescriptive regulation. Such 'light touch' regulation, focussed on mandating minimum content for an agreement (eg, see Appendix) and ensuring transparency in the presentation of the terms (eg, see Principle 5), would still provide considerable assistance in ensuring that funders who currently fall short of best practice standards either align their practices with the standards maintained by best practice funders or remove themselves from this business.

Even without 'light touch' regulation, increasing transparency and understanding the advantages and disadvantages of TPLF (both generally and as embodied in a proposed contract) will facilitate a situation where parties can approach the funding agreement from a levelled playing field, with proper advice and information being available to a funded party in order to enable them to evaluate terms being offered and place then within the continuum of terms which might be available elsewhere. The existence of principles drawing together the different guidance available and evaluating it can assist potential litigants and beneficiaries, at the stage of the negotiation of TPLF agreements, to assess whether the TPLF regime offered to them is fair and which elements should be taken into account when evaluating a TPLF arrangement. The amount of funding and the terms for repayment (Principle 8), transparency and confidentiality (Principle 5) or the level of control retained by the litigant or beneficiary (Principle 10) are particularly important in this context. By considering all these factors, potential litigants and beneficiaries can reach informed decisions about whether to accept a TPLF arrangement and how to negotiate its terms.

This correcting of the information imbalance will also enable more limited regulation to be targeted only at specific areas, allowing the introduction of regulation which is effective without hampering the provision of funding in areas where it is needed and desirable. At the same time, it provides: (i) a backdrop for courts, administrative authorities, and arbitration bodies whose role involves the evaluation of agreements by suggesting a set of default rules for incomplete agreements or that may serve as a benchmark in unfairness control where it arises;[89] and (ii) a matrix and guidance for the increasing move towards development of codes of conduct amongst groups of funders.[90]

Drafting TPLF agreements requires careful consideration of the terms and a thorough understanding of their legal and financial implications. This is at the core of the Principles and is reflected in the Appendix outlining minimum content. It highlights the Principles' role in helping

[88] See also further in the Commentaries (Part C.I.).
[89] For example, in relation to consumer contracts, dealt with further below; see Appendix and Commentaries (Part C.I.).
[90] See also above Introduction (Part A.III.1.).

the contractual parties (funders and beneficiaries) draft TPLF agreements that are complete and fair by guiding them as to what should be included in the agreement (eg, provisions on the scope and amount of funding, the terms of repayment, the rights and obligations of the contractual parties, and the resolution of disputes). By following the Principles' guidance, parties can ensure that their TPLF agreement meets the applicable fairness tests. In this way, TPLF agreements are less likely to be challenged in court. Satellite TPLF litigation, ancillary to the main dispute, prolongs the resolution of the main dispute and delays the enforcement of rights to the detriment of claimants and defendants, who may face uncertainty and further financial losses. Satellite TPLF litigation also undermines legal certainty and hinders economic growth by prolonging the enforcement of contracts and creating an unpredictable legal environment in which funders operate.

The Principles also acknowledge the international backdrop. The reality is that domestic legislators have an impact on TPLF and that for the reasons given above in this context, international consistency cannot be achieved. The Principles repeatedly draw attention to the importance of adhering to applicable legal rules and flag up areas where issues may arise as to the Principles' relationship to existing legislation. The Principles do not aim to replace or amend the applicable national or transnational laws on TPLF. They will merely complement them – unless a particular jurisdiction takes steps to enact them as a part of domestic law. If the content of a Principle conflicts with an applicable legal rule of the *lex fori* or *lex causae*, the provision of the law always takes precedence; the legal rule must be followed and the conflicting provision of the Principle must be disregarded.

## IV. Post-Script: The Importance of Publication, Education and Training

One important point raised repeatedly in discussions is the question of 'What happens if these Principles are not complied with?'. As they stand here, the Principles carry with them no sanctions.

This highlights the fact that the Principles can only be of limited assistance if they stand alone. Once established, the emphasis shifts to individual jurisdictions, where they can be incorporated into legislation or regulation which provides the necessary enforcement mechanisms and sanctions.

However, to the extent these Principles are not incorporated into legislation or regulation which provides for sanctions for breach, they will only yield the anticipated benefits if parties – and particularly vulnerable ones – are aware of them and consequently able to follow the guidance given to them to assist in a level playing field negotiation and the conclusion of a robust and fair agreement. This highlights the need for two aspects:

- Ensuring that proposed funded parties receive genuinely independent legal advice (ie not from the proposed funded lawyer);
- Ensuring that attention is given to publicity, education, and training.

The model proposed has considerable similarities to the model utilised under the umbrella of regulation across Europe for financial advice. It will fit well into the 'light touch' regulation model type seen in that context. In jurisdictions where regulation is not feasible or is premature, it will be important that resources are nonetheless put into safeguarding such measures.

ELI emphasises the comprehensive nature of the Principles and their crucial role as a guiding and supporting tool for various parties involved in TPLF arrangements. These Principles are specifically crafted to aid litigants, beneficiaries, courts, administrative authorities, arbitration bodies, legislators, funders, and their representative bodies. They provide guidelines, standards, and safeguards for ethical and responsible behaviour, thereby facilitating the beneficial use of TPLF arrangements.

# B. Principles

## Part I: General Provisions

### Principle 1: Subject Matter and Purpose

(1) The Principles for Third Party Funding of Litigation ('the Principles') are a set of best practice principles. They are intended to:

a. Enhance access to justice by facilitating the beneficial use of Third Party Funding arrangements by litigants, funders and professional advisers;

b. Provide an outline of potential safeguards for incorporation into Third Party Funding Agreements to prevent abusive litigation and unnecessary disputes and to protect litigants, beneficiaries and third parties from unfair practices;

c. Assist legislators, regulators and courts in their decision-making by providing detailed information and guidance as to consensus on best practice, and the range of potential outcomes on a range of interrelated issues.

(2) The Principles acknowledge the priority of applicable rules of the law which governs the Third Party Funding Agreement and/or the forum and are not intended to amend any such rules. In the event of a conflict between these Principles and applicable law, such law prevails.

***Comments:***

These Principles seek to assist all stakeholders in relation to Third Party Funding arrangements in line with the Project's Objectives. They proceed on the basis that Third Party Funding can play a valuable role in the litigation universe, but only subject to safeguards. The public interest in the due administration of justice and the need to take into account the position of persons and entities exterior to the agreement but potentially affected by it both require this. The interests of those who are not party to the agreement are reflected in Principle 1(b). The wider interests and requirements of the due administration of justice are considered both in Principle 1(b) and 1(c).

At the same time, as Principles, unless they are specifically incorporated into legislation or regulation, they can only operate within the constraints imposed by the applicable procedural (*lex fori*) and substantive (*lex causae*) laws.

### Principle 2: Scope

(1) The Principles are intended primarily for use in the context of litigation proceedings, where a party seeks to enforce private rights (by seeking compensation or other relief) and uses Third Party Litigation Funding.

(2) They may also assist in the context of arbitration and other forms of dispute resolution but the core Principles do not specifically address such proceedings. Particular considerations relating to arbitration and other specific contexts for Third Party Litigation Funding are addressed separately in the Commentaries.

(3) The Principles apply to all third party funded litigation, including situations where a third party is funding the defence of a claim.

***Comments:***

These Principles are intended to be applicable to TPLF arrangements as defined in Principle 3. They primarily address the situation where funding is provided to a party to the litigation either directly or through a representative organisation (as is common in consumer collective actions). These principles may not apply fully in the context of related situations and funding arrangements. Hence, some issues are not engaged in the same way in the context of Third Party Funding Agreements in arbitration. Particular considerations apply in consumer litigation. Similarly, some aspects of the Principles require adjustment in the context of other related funding arrangements, for instance when the legal representative's remuneration is conditional on the outcome of the litigation, such as Conditional Fee Agreements/Damages Based Agreements (CFAs/DBAs).[91] Again, different facets are engaged in the context of investment-based crowdfunding.[92] The application of the concepts dealt with in the Principles to those agreements is considered in the Commentaries.

The reference to funding of a defence rather than a claim is intended to ensure that, where the same is permitted by the *lex fori* (ie the laws of the jurisdiction in which an action is brought), that fact does not render these Principles inapplicable. This is in light with the fact that, while Third Party Funding was developed and primarily occurs in the funding of claims, in some jurisdictions (particularly those including the US and the UK, where it has been adopted as a means of financing commercial disputes), it is increasingly widely encountered supporting defendants as well as claimants.[93]

## Principle 3: Definitions

(1) The following definitions are used:

a. **Funded Party:** the person or entity that is: (a) party to the relevant litigation; and (b) receives the benefit of the Third Party Funding under the Third Party Funding Agreement.

b. **Third Party Funder:** a person or entity with no pre-existing interest in, or connection with, the subject matter or the Funded Party that provides the Third Party Funding under the terms of the Third Party Funding Agreement.

c. **Third Party Funding:** the provision on a commercial basis (ie for a financial return) of financial support for the conduct of any form of dispute resolution process in exchange for a share of the proceeds of any successful outcome, where the provider or ultimate source of such financial support is not a party to the dispute resolution process but the recipient is a party.

d. **Third Party Funding Agreement:** the contract between the Third Party Funder (and where applicable any relevant subsidiary or associated entity) and the Funded Party and/or their representative, pursuant to which the Third Party Funding is provided.

e. **Litigation Proceedings:** the process of taking legal action to resolve a dispute between two or more parties within a national or transnational court system, in a fair and impartial way, and in accordance with the law.

***Comments:***

The 'Funded Party' is not defined by reference to whether or not it is a party to the 'Third Party Funding Agreement' but rather by reference to whether it receives the benefit of that agreement. This seeks to ensure that fairly common alternative funding arrangements, such as arrangements under which funding is provided to litigant's legal representatives, are included. In other words, the provision of Third Party Funding may be made directly to the party

[91] See further in the Commentaries (Part D.I.).
[92] Investment-based crowdfunding aligns most closely with the Principles as it engages with questions of reward in similar ways; see further in the Commentaries (Part C.IV.).
[93] Samra (n 14).

to the relevant dispute resolution process, their representative lawyers, or any other person or entity affiliated with the party to the funded dispute.

The definition of 'Third Party Funder' is aimed at true third party funders. Consistent with the approach taken in the E&W Code, the definition of 'Third Party Funder' is not intended to extend to the ultimate source of funds in circumstances where that entity is different from the party providing the funds pursuant to the terms of the Third Party Funding Agreement. As set out in more detail below, where the funds are not directly provided by the Third Party Funder, it will, however, be necessary for the Third Party Funder to provide information regarding the source of the funds used.[94] The definition of funding is confined to commercial funding (that is funding for a financial return). Absent this limitation, the term might be seen to cover standard internal group funding where the parent or related group company is not otherwise in the litigation funding business (eg, where a parent company provides financial assistance/support to a subsidiary, and it is known that such funding will be used to defend or pursue a claim). That scenario is not intended to fall within the Principles. Nor is the scenario where funding is provided by campaigning organisations or 'conscience funders' (who provide funding and may seek a limited return but not for commercial purposes). What does fall within the Principles is commercial funding even where it is provided by those whose main business is not litigation funding.

The definition of a 'Third Party Funding Agreement' is also not intended to cover such overlapping concepts as Conditional Fee Agreements or Damages Based Agreements (CFAs and DBAs), which law firms commonly enter into, and which are considered separately in the Commentaries.[95]

# Part II: Basic Principles of Third Party Litigation Funding

## Principle 4: Promotional Materials

(1) A Third Party Funder must ensure that any promotional materials it provides are comprehensive, clear and not misleading.

(2) A Third Party Funder must, as a minimum, include in any promotional materials provided publicly or to an individual a prominent statement that any party considering entering into any Third Party Funding Agreement should seek independent legal advice (ie legal advice from a lawyer with no connection to the Third Party Funder) prior to doing so.

(3) A Third Party Funder should also include in its promotional materials a list of sources of information (such as these Principles) regarding the issues involved in a third party funding agreement.

***Comments:***

There may be views that promotional materials fall outside the scope of these Principles. However, the reality is that such materials form a vitally important part of the continuum leading to the conclusion of the Third Party Funding Agreement, particularly in the case of a Funded Party who lacks litigation experience. The significance of promotional materials is reflected in the fact that a number of codes already deal with this issue and any regulation would (as with financial services regulation) inevitably target this stage. This Principle, therefore, derives from requirements already in play in some of the codes of conduct to which reference is made.

[94] See also Principle 5(1)(a) and 5(1)(b) and respective Comments.
[95] See Commentaries (Part D.I.).

Principle 4(1): this reflects the Hong Kong Secretary for Justice Code of Practice for Third Party Funding of Arbitration (2018) (HK Code) and Association of Litigation Funders for England and Wales Code of Conduct in England and Wales (2018) (E&W Code). There are, however, issues as to what 'comprehensive' means in this context. This highlights the importance of Principles 4(2) and 4(3) which should ensure that the main areas where issues can arise are conveyed to the prospective Funded Party.

Principle 4(2): This draws on the requirement in the E&W Code for the agreement to record the giving of advice and the requirement in the Singapore Institute of Arbitrators Guidelines for Third Party Funders (SIArb Guidelines) (para 2.1.2) requiring the Funder to take reasonable steps to ensure that the Funded Party has received independent legal advice. There is a real issue as to the meaning of 'independent' legal advice. It is not always the case that the proposed lawyer to be instructed for the claim can be seen as the 'independent' legal advisor. For example, there may be a material connection to the proposed Funder either via portfolio funding or a flow of repeat instruction lawyers acting for Funded Parties; this may well result in a financial conflict of interest or make it inappropriate for them to provide advice to the Funded Party on the Funding Agreement. The Principle refers both to promotional materials which are provided generally to the public and those specifically prepared for one individual.

Preferably the agreement should record the fact of advice having been given and evidenced (and, for example, the factual basis for the agreement as to the funding level agreed). But at a minimum, a prospective Funded Party must be advised in clear terms that it should obtain independent legal advice.

Principle 4(3): Because of the knowledge imbalance that may exist between funders and clients, it is desirable for funders to also provide information which enables a prospective Funded Party to understand the issues and make informed decisions (with the aid of independent legal advice) as to the balance to be struck in the agreement. It is to be hoped that funders will direct attention to the Principles and any relevant codes of conduct.

There may also be a view that it is possible to differentiate as to who the Funded Party is, eg consumer, business, consumer or business organisation, etc with the requirements for unfairness control being stricter if an individual is the Funded Party.[96] However, at the level of the Principles, and with regard to the importance of consumer protection in this context, it is considered preferable to flag the importance of this point generally, with the possibility of contextual changes being introduced into individual agreements.

The same overarching principle also applies to the Third Party Funding Agreement; however, the more granular requirements at this level are broken down in the following Principles.

## Principle 5: Transparency

(1) The Third Party Funder should provide the following information to the Funded Party prior to execution of the Third Party Funding Agreement:

   a. The identity (including the address of the registered office) of the Third Party Funder;

   b. The identity of the person or legal entity that is intended to be the source of the funds to be provided;

   c. Any details as to actual or potential conflicts of interest which are required by the law of the Third Party Funding Agreement or the law of the forum or pursuant to the draft contract.

[96] This can be the case, eg, for consumers in the EU context with the application of the Unfair Contract Terms Directive (ie Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1995] OJ L 95/29, as amended by subsequent Directive 2011/83/EU and Directive (EU) 2019/2161); for more, see further in the Commentaries (Part C.I.6).

(2) The Funded Party should provide the following information to all other parties to the litigation and to the court:

a. The fact that the litigation is being funded by a third party;

b. The identity (including the address of the registered office) of the Third Party Funder.

(3) The information in subsection (2) should be provided by the following date:

a. If the Third Party Funding Agreement is made prior to the commencement of the litigation, at the earliest available opportunity after commencement of the litigation.

b. If the Third Party Funding Agreement is made after the commencement of the litigation, within 14 days of the execution of the Third Party Funding Agreement.

(4) Where a Third Party Funding Agreement is subject to any law which requires disclosure of information regarding the Third Party Funding Agreement, the terms of the funding agreement should: (i) refer to the relevant provision of law; and (ii) set out the extent of disclosure required by that law.

(5) In all cases, the Third Party Funding Agreement should clearly set out the nature and extent of the Funded Party's disclosure obligations under the terms of the agreement and the applicable law of the Third Party Funding Agreement and (where known) the *lex fori*.

***Comments:***

**The issue of transparency**

Transparency is an area which covers fairly broad ground and a number of discrete sub-issues. These include:

- To what extent should the other party to the litigation know of the existence of funding, the identity of the funder or the terms of the funding?
- To what extent should the court be given the same information?
- Where any such order is appropriate, at what stage of the proceedings should the information be made available?

The point is controversial as regards all levels of disclosure. Funders generally oppose disclosure. On the other side, the majority of academic commentators (including the ILRC and the sources cited there) favour disclosure of the fact of financing to the opponent. This approach ensures that the other party understands the nature of the adversary it meets, helps minimise conflicts of interest and ensures that appropriate security or non-party costs orders can be made. It also directly targets the growing tendency to file interlocutory applications seeking to ascertain the funding position.

Disclosure to the court/decisionmaker attracts support, but less consistently. For those who say that such disclosure is desirable to allow the judiciary to monitor any oppressive terms and guard against any improper incursion by the funder on the lawyer-client relationship, there are those (including many in the judiciary) who would say that this is not the role of the judiciary, and if they have no such role, the need for disclosure is questionable. Further disclosure of the fact of the funder cannot offer a safeguard unless the terms are disclosed. Similar problems arise regarding disclosure where the funder controls the litigation; the question of control cannot be ascertained without looking at the terms.

It might also be said that the argument that there may be a tactical advantage to disclosure (in that the fact of a funding agreement indicates not merely financial support, but also a third party assessment of merits) misses the point; this is not part of the role of civil procedure rules. This argument is also predicated on the robustness of the funder's merits analysis, which can be a false point since that will generally be an analysis undertaken at an early stage and often with very limited information.

What is in practical terms key is the identity of the funder, as this may have implications both for conflicts issues and security for costs. Security is normally granted on the basis of the financial situation of a litigant (see eg ELI-Unidroit ERCP

Article 243); and such disclosure can short circuit a potential application. It may, however, lead to further issues if the funder falls within a category which is itself vulnerable to applications for security. This has become increasingly important with nominal funders often utilising funds from other sources. While defining the funder in the Principles as the direct funder (see Principle 3(1)(b)), the Principles acknowledge and highlight that knowledge of the fact that the actual origin of the funds is someone other than the funder is also important for a funded party. This is because the terms of the agreement between the direct nominal funder and the indirect actual funder may have implications for the funded party if they do not align with the terms of the funding agreement.

There is, however, fairly strong support for disclosure to the court of the agreement itself where the court has a supervisory function – as is the case in some jurisdictions in relation to some or all of class, group or consumer litigation.[97] Such disclosure will be mandated by the law applicable to the Funding Agreement or by the *lex fori*. Where there is no currently mandated disclosure, there is unlikely currently to be a process for such disclosure in place.

The ability of courts to seek further disclosure was supported by some project participants. This cannot be a matter for the Principles, being jurisdiction-specific, but it raises an interesting point about the ability and desire of courts to supervise funded litigation, which can at times take up large amounts of court time and resources. Individual jurisdictions may wish, or need, to review whether existing disclosure rules offer the courts sufficient possibilities to seek further disclosure from funders as to terms or underlying financial capacity. This may be a particular concern in group/consumer actions and where certification or approval forms part of the process (eg regarding admissibility requirements or legal standing of the claimant) such orders may be considered appropriate but also necessary.

Disclosure of the agreement itself to the defendant is more hotly contested due to the alleged risk of strategic benefit to the defendant and the costs of disclosure, which could potentially be very high. A further related concern (which may well be justifiable) is the scope for satellite litigation taking up court time and resources. One can readily imagine that this might occur if a defendant, who is not receiving third party funding, was unhappy about the level of funding available to the plaintiff. This could be due to concerns about creating an imbalance in resources, the potential for prolonged litigation, or the funder's aggressive litigation strategy. Additionally, the defendant might be concerned about the level of information as to the capital adequacy of the funder. Those scholars who see disclosure as a means to reduce inefficiencies or to encourage competition in funder fees do not address the kinds of litigation consequences which may well occur in high stakes litigation.

One issue, very much to the fore in some jurisdictions (such as the US), is the potential for judicial conflicts of interest if funders are not disclosed. This concern is even more pressing in arbitral proceedings, where protecting the impartiality of arbitrators is essential. Consequently, there has been a growing push for disclosure of the existence of funding and the identity of the funder in arbitration.[98]

**The Principle**

This Principle regulates the disclosure that the Funded Party and Third Party Funder must make to each other, to other parties to the litigation, and to the court.

There is consensus that minimum transparency standards are necessary to ensure that the justice system prioritises redress for injured parties over the interests of private investors, issues effective orders, and monitors conflicts of interest (Draft EP Directive, Recitals 13, 20, 22). However, the extent of the required disclosure is contentious, as explained in the Introduction.

[97] See also further in the Commentaries (Part C.I.4.).
[98] For disclosure and transparency issues in arbitration proceedings, see further in the Commentaries (Part C.III.1).

Principle 5(1) deals with disclosure by the prospective Third Party Funder to the Funded Party. The basic necessity is transparency vis-à-vis the Funded Party as to the identity of the funder (which may have implications for the provision of security for costs), but also as to the source of the funds – for example, as to whether the individual or entity providing the funds is affiliated to the nominal funder – a matter which is covered in some detail in the E&W Code (paras 5, 11–13) and as to the nature of its business.

This may be of considerable practical significance because: (i) there may be relevant terms as between the funder and the provider of the funds which bear on the risks of termination; and (ii) different fund providers will have different approaches to issues which can arise during the course of the funding relationship. This is therefore provided for in both Principle 5(1) and 5(2). A similar approach is taken in the European Litigation Funders Association (ELFA) Code (para 2(b)). Such disclosure may enable a prospective funded party to evaluate the respective advantages of two different potential funding offers.

There are varied approaches as regards disclosure of actual or potential conflicts. This is dealt with separately under Principle 6 by reference to the entire period of the Third Party Funding Agreement, but the position as to conflict disclosure at the time of contracting fits under this head at Principle 5(1)(c).

Under the Draft EP Directive (Article 13), the Third Party Funder must disclose links to any party, legal professional, or other person in any way involved with the litigation that may reasonably be perceived as giving rise to a conflict of interest. This disclosure is said to be necessary to allow the Funded Party to ensure that its interests are prioritised appropriately during the litigation.[99] The formulation adopted here prefers an approach of requiring such disclosure as provided for by the applicable law and to the extent provided for in the intended contract but leaves room for the parties of the Funding Agreement to reach a different balance on conflicts disclosure to that contemplated by the Draft EP Directive.

On disclosure of the fact of funding (Principle 5(2)(a)), while it is acknowledged that this is a contentious area, the Principles reflect the weight of academic commentary and the approach of the ILRC (as well as the approaches of Hong Kong (Article 98T), Singapore (Rule 49A Legal Profession (Professional Conduct) Rules) and ICSID (Rules and Regulations Rule 14)) in considering this to be good practice, at least as regards the other party.

Although, as already noted, the case for disclosure to the Court is less strongly supported in the sources (at least outside the consumer/collective action context, in which it is often a functional part of relevant legislation – see for example the RAD), in reality, this fact will inevitably very often be disclosed to the court by one or other party. This approach also has the merit of bringing practice closer to consistency across the different areas of funding, bearing in mind the near consensus in favour of disclosure to the court in the context of consumer litigation. Further, it may be relevant and helpful for the court to be able to anticipate the need to deal with issues relating to funding as well as the standard issues raised by the litigation itself. Funding is different in this respect from other sources of funding (such as bank loans) in that (at least in some jurisdictions) it generates time consuming interlocutory disputes. Finally, one problem which afflicts funded cases (outside of the regulated consumer context such as the RAD) is the lack of robust information about the prevalence of funding. Disclosure to the court ensures that there is a basis for the courts to monitor this.

Under Principle 5(2)(b), the Funded Party must disclose the identity of the Third Party Funder to the court and to the other parties to the litigation. While disclosure of the fact of funding may go no further than to inform the counterparty of the nature (ie resources) of its adversary, the identity of the funder is key. It is necessary that the identity of the Third Party Funder is disclosed to the other parties to enable them to seek effective costs and security orders. That the identity of the Third Party Funder is disclosed to the Court is also necessary in order to prevent conflicts of interest

[99] ibid.

which may arise. Disclosure only to other parties, who are unlikely to have comprehensive knowledge of such connections, is insufficient to guard against this risk. Although it is not a matter for the Principles, being jurisdiction-specific, the courts may wish to ensure they have in place civil procedure rules with sufficient flexibility to enable them to require further disclosure as appropriate.

Principle 5(3) may well be overridden by specific rules of the *lex fori*; however, the purpose of its inclusion is to emphasise the need for early information on this and to enable the proposal of a default structure.

Principle 5(4) is directed to cases where a law applicable to the TPLF agreement requires disclosure of further facts regarding the funding relationship (as in Singapore, noted by the SIArb Guidelines, para 8.1). It is important that both parties (and more particularly the Funded Party) are aware of those requirements at the time of entering into the agreement. This is achieved through the requirement to note the relevant provision and its contents. This provision is not dissimilar to HK Code para 2.10. It may be that there are different disclosure requirements imposed by the *lex fori* of the dispute. Where this is known, this may well be a matter which should also be clarified. However, the *lex fori* often may not be known at the time when the funding agreement is concluded.

Principle 5(5) is directed to ensuring that any order requiring disclosure of the Third Party Funding Agreement does not take a Funded Party by surprise.

## Principle 6: Avoidance and Management of Conflicts of Interest

(1) Third Party Funders should take appropriate measures to ensure that conflicts of interest do not arise. In particular, the Funder should ensure that it has in place procedures which cover:

   a. The detection of potential conflicts of interest;

   b. How any conflicts of interest will be managed pending resolution;

   c. The avoidance of conflicts of interest on the part of the Funded Party's legal practitioner(s).

(2) The Third Party Funding Agreement should set out in clear terms the steps which the Funder is taking to avoid actual or potential conflicts of interest. In particular:

   a. The Third Party Funding Agreement should set out the steps which the Third Party Funder is taking to avoid any direct or indirect financial or other conflict of interest;

   b. The Third Party Funding Agreement should set out the steps which the Third Party Funder is taking to avoid any conflict of interest arising on the part of the Funded Party's legal practitioner(s).

(3) The Third Party Funding Agreement should also clearly set out:

   a. The nature and extent of any disclosure requirements in respect of actual or potential conflicts of interest;

   b. The procedure by which any actual or potential conflicts of interest which do arise are to be managed;

   c. Whether specified courts, administrative authorities or arbitration bodies: (i) are empowered as a matter of law; or (ii) are empowered by the agreement of the parties to assess compliance with the requirements of the Third Party Funding Agreement as to conflicts in cases where any justified doubts arise with respect to such compliance.

***Comments:***

**The issue of conflicts of interest**

With regard to conflicts of interest, two main areas of concern have been highlighted. The first relates to the funder's conflicts through other business or the business of the ultimate source of funds (where that is not the funder). The second, which has raised more concern, is the scope for conflicts amongst the legal team. For example, issues arise as to:

- Whether a solicitor/barrister can have an interest in a funder;
- Whether the structure of the agreement motivates the funder or lawyer to prioritise settlement ahead of fighting to the end;
- Conflicts created by repeat business: where lawyers are repeat instructees with funders, there is a risk that the lawyer might favour the funder's interests over those of the client in any situation where there is a tension between the two;
- Whether conflicts can arise by reason of funders funding opposing parties in different cases. This could arise as a result of the treatment of specific common issues or where the funder's involvement could create conflicts of interest for the attorneys, arbitrators or judges in the case.

There are controversies as to the extent to which conflicts can be avoided (possible in relatively simple situations) or whether conflicts are inherent, particularly in a developed TPLF market; and if so, how they can best be managed.

**The Principle**

This Principle seeks to avoid, and where this is not possible, to manage conflicts of interest. This is to the benefit of all parties involved but is particularly important for the protection of funded parties.

Some jurisdictions and authorities would suggest that the appropriate approach is a complete avoidance of conflicts (see Draft EP Directive, Article 13; Article 10(1)–(2) RAD), and such an approach, supplemented by a non-exhaustive list of measures that should be taken to ensure that conflicts of interest do not arise, can be incorporated into an agreement.[100]

However, the more dominant view internationally, particularly in jurisdictions with a well-developed TPLF market, is that some conflicts are inherent, and the better approach is to identify them and make provision for managing them. This is the approach taken for example by the HK Code.

Principle 6(1) sets out the underlying rule that a Third Party Funder must take appropriate measures to ensure that conflicts of interest do not arise. The obligation thus expands on that set out in the HK Code (para 6(1)), which requires that the funder must 'maintain, for the duration of the funding agreement, effective procedures for managing any conflict of interest that may arise in relation to activities undertaken by the third party funder in relation to the funding agreement'. The taking of appropriate measures to avoid conflicts will generally require that a Third Party Funder has in place an appropriate system to ensure that it does not enter into Third Party Funding Agreements which either do, or may in the future, give rise to a conflict of interest.

It has not been thought necessary to require the Third Party Funder to be able to produce documentation proving the existence of such a system (as under HK Code, para 2.7).

Principle 6(2) identifies the main areas in which conflicts are likely either to arise or to be capable

[100] See also further in the Commentaries (Part C.I.4.).

of arising and which may therefore need discrete treatment: conflicts between the funder's diverse interests and between the lawyers' diverse interests. The likelihood of such conflicts and the different handling they require means that it is not sensible simply to urge funders to avoid conflicts.

As to the former, it will be necessary to consider the financial interests of the persons or entities that are the ultimate source of funds as well as those of the contractual Third Party Funder.

As to the conflicts with lawyers, the Singapore Guidance (para 35) notes that:

> The risk of conflict is real because: (a) In many cases, the claimant retains the lawyer but the funder pays the lawyer's fees; and (b) Funding agreements may provide that the funder can give input on decisions, even where the lawyer is retained by the claimant. (c) So for example, where the claimant wishes to settle but the funder does not, the lawyer may feel pressure to accede to the funder so as to gain repeat business.

There is also the question of repeat work brought to particular lawyers by particular funders.

While some commentators suggest that this is a matter which should be confined to professional standards boards, such concerns are taken seriously by many reputable funders; and it is correct in principle that the Funded Party should have information about this up front, rather than being left with a limited professional conduct recourse after the event. Such concerns have led to the stipulation in the E&W Code (para 9.2) that 'A Funder will … not take any steps that cause or are likely to cause the Funded Party's [lawyer] to act in breach of their professional duties'. There is a very similar provision in the Singapore Guidance (para 37(c)). It is, however, dubious whether such a provision adequately covers the problem, and parties may wish to consider how more specific protection can be incorporated. One possibility is to provide that the agreements (funding and retainer) stipulate that: (i) the lawyers who have the conduct of the proceedings owe their full professional and fiduciary duties to the litigants; and (ii) in the event of a conflict of interest between the litigants and the funder, the lawyers may continue to act solely for the litigants even if the funder's interests are adversely affected by them doing so.

It should be noted that while this Principle identifies the main conflicts of interest, they are not the only ones which may arise. Much funded litigation is of a type which requires expert evidence; many funders have very close relationships with experts in these fields, with the consequence that those experts may find themselves in a position of conflict not dissimilar to that of lawyers.

Principle 6(3) is designed to ensure that there are clear procedures in place for the disclosure and management of conflicts of interest. The parties are encouraged to specify a dispute resolution mechanism appropriate for the resolution of any issues as to compliance with these procedures. The timing of resolution for a dispute of this nature may be critical and hence a factor in the process chosen.

***Sample Wordings:***

1) Third Party Funders should take reasonable measures to ensure that conflicts of interest do not arise. In particular:

    a. Third Party Funders should not fund claims against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent;

    b. Third Party Funders should not have a direct economic interest in the bringing or the outcome of the proceedings that is apt to divert the proceedings away from the protection of the interests of the litigants or beneficiaries;

    c. The Funded Party's legal representatives should not have any direct economic interest in the Third Party Funder;

    d. Third Party Funders should not fund claims against a defendant in which the funding provider has a direct or indirect economic interest or a defendant that is a competitor of the funding provider;

2) [Singapore Guidance: as regards lawyers retained for the dispute]:

    a. The Third Party Funder acknowledges that the lawyer is bound by their professional and fiduciary obligations to the claimant;

b. The Third Party Funder further acknowledges that if there is a conflict of interest between the Third Party Funder and claimant, the lawyer acts solely for the claimant and may continue to do so only in that capacity;

c. The Third Party Funder shall not induce the claimant's lawyer to breach their professional duties;

d. The Third Party Funder shall not seek to influence the lawyer to cede control or conduct of the dispute to the funder or any other party;

e. It is the claimant's choice whether to disclose to the Third Party Funder any written opinion that their lawyer has prepared on the merits of the case. The lawyer will share such opinion only if the claimant consents. In any case, Third Party Funders should engage independent counsel to assess the claim.

3) If the Third Party Funder has a conflict of interest, reasonably believes that a conflict of interest may arise or is aware of circumstances that would give a reasonable person cause for concern that a conflict of interest exists or may arise, it should disclose that information to the Funded Party insofar as it is able to do so consistent with its confidentiality obligations. Minimum disclosure requirements are likely to include at least the following:

a. Details of any arrangements that exist (or other relevant connection) between the Third Party Funder and any other undertaking involved in the present proceedings or related to a party involved in the present proceedings;

b. Details of any arrangements, financial or otherwise, between the Third Party Funder and any party in any way involved with the litigation that may reasonably be perceived as having the potential to give rise to a conflict of interest;

c. Details of any other Third Party Funding agreements in which the Third Party Funder is funding a claim which takes a contrary position (whether on matters of fact, law or otherwise) to that taken in the present proceedings.

4) [HK Code] The Third Party Funder must:

a. At all times throughout the duration of the Third Party Funding Agreement, maintain effective procedures for managing any conflict of interest that may arise in relation to activities undertaken by the Third Party Funder in relation to the Third Party Funding Agreement;

b. Maintain and follow procedures covering:

i. Review of its business operations with a view to identifying and assessing potential conflicts before and after the conclusion of a Third Party Funding Agreement;

ii. Review of its business operations so as to identify any pre-existing relationships between it, a lawyer, a Funded Party or another party to the litigation;

iii. Managing and disclosing any conflicts identified;

iv. Avoidance of steps that cause or may cause the Funded Party's legal representative to act in breach of its professional duties.

c. Ensure that:

i. Its procedures are set out in writing and either made publicly available on the Third Party Funder's website or are provided to the funded party in advance of the conclusion of any Third Party Funding Agreement;

ii. Its procedures are reviewed at least every 24 months.

5) [HK Code, E&W Code] The Third Party Funder shall not take any steps that cause or are likely to cause the Funded Party's legal representatives or witnesses to act in breach of their duties to the court or tribunal, as the case may be; or to endanger the proper administration of justice.

## Principle 7: Capital Adequacy of Funders

(1) Third Party Funders have a responsibility to plan and manage their finances effectively so that they are able to meet their financial commitments when they become due and payable.

(2) A Third Party Funding Agreement should make provision for capital adequacy by reference to:

a. Whether capital adequacy is to be maintained for the funded dispute only or for aggregate liabilities over a particular period;

b. The extent to which such liabilities cover: (i) appeal costs; (ii) adverse costs orders; and (iii) enforcement (including the extent to which such cover is limited for example by reference to the amount of the funding provided);

c. The period of time for which aggregate liabilities are to be covered;

d. If capital adequacy is to be demonstrated prior to entry into the agreement, and if so how;

e. When and how the funder must disclose its own concerns or the concerns of any auditor, regulator or bank as to capital adequacy and the steps to be taken thereafter;

f. When and how concerns on the part of the funded party as to capital adequacy are to be: (i) notified; and (ii) satisfied;

g. The records required to be maintained by the funder for the purposes of any request;

h. How any dispute about capital adequacy is to be resolved;

i. Any agreed consequences of breach of the capital adequacy requirement.

(3) No Third Party Funding Agreement should fail to contain at least a provision that the Third Party Funder must at all times maintain the capacity to fund the sum or stages specified in the agreement.

***Comments:***

**The issue of capital adequacy**

A central problem is the one created by the possibility of a funder experiencing a financial shortfall, particularly if the litigation funding agreement assumes multiple tranches of funding or if the funder is responsible for adverse costs and such costs are incurred. At the most basic level, such financial shortfall may lead to a zero-cost recovery for the other party at the conclusion of the litigation. It can also lead to a case being derailed part way through leaving both the Funded Party and their opponent exposed on costs (and in the case of the Funded Party having potentially refused other offers of funding which would have continued to the end of trial).

There is a fairly general consensus among commentators that some provision needs to be made for capital adequacy, but a limited understanding of the difficulties involved and the wide range of solutions to the problem. In terms of the problems involved, these can differ from jurisdiction to jurisdiction dependent on the costs of litigation, the recoverability of costs, and whether the courts have imposed any limitation on the amount recoverable from funders.[101] Added to that, quite aside from problems of how adequacy is assessed prospectively, the economic consequences have to be factored in. There are serious economic implications involved in the ring-fencing of capital, for example, and this can very seriously affect pricing – increasing the costs of TPLF to the detriment of the Funded Party in terms of access to justice. It can also affect the willingness of funders to enter a particular market, and thus impede competition.

In this connection, insurance has come to play an increasing role. Funders are increasingly turning to insurers for a range of capital adequacy-related covers: own costs, security for costs cover, after the event or, judgment protection insurance, sovereign default. This has – or can have – an obvious impact on the need for corresponding capital to be maintained. It follows that where disclosure is called for, it may be necessary to comprehend the existence, scope and extent of any insurance arrangements that the Third Party Funder has entered into with regard to the protection of its investment and whether this extends to payment in respect of security for costs or other foreseeable costs.

At the same time, there are those who suggest that any capital adequacy requirements (and particularly disclosure of these) privilege the opponent of the Funded Party, since in general litigants take the risk of the other side's impecuniosity unless the requirements for security for costs are met.

Once one accepts a requirement for steps to be taken to ensure capital adequacy, questions then arise as to the extent of this requirement – whether it needs to extend beyond fees to disbursements, or beyond judgment to appeals and enforcement. There are also issues as to whether capital adequacy needs to cover the particular dispute, or the aggregate of current disputes, or the portfolio run by the Third Party Funder; and over what period this must be maintained. Moving beyond this, there emerge issues as to how a Funded Party is to be satisfied on such points.

Beyond the funding agreement, there are questions about whether jurisdictions should make specific provision for facilitating security for costs in funded disputes. For example, the Australian Law Reform Commission (ALRC)[102] and the New Zealand Law Commission (NZLC)[103] have recommended a statutory presumption that third party funders will pay security for costs. This approach appears to be tacitly endorsed by the ILRC, which describes it as a pragmatic approach.[104] Elsewhere there remain disputes about whether the ordering of security is discretionary, based on the fact of funding, or requires the satisfaction of other criteria such as the *dominus litis* test.[105]

**The Principle**

This Principle is intended to ensure that funders maintain adequate capital or capacity to meet their liabilities in respect of funded claims. This is essential to the proper operation of the third party funding system and to ensuring effective access to justice for funded parties; should a Third Party Funder become unable to meet its funding obligations, opposing parties may be unable to recover their costs, lawyers may be unable to obtain payment, and judicial resources may be wasted on incomplete litigation.

There is a debate – or at least a divergence of practice – as to whether Third Party Funders should be required to hold or demonstrate a right to sums which are sufficient to fund the specific dispute or the aggregate of current live disputes over a particular

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[101] This was an approach suggested in *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655 [41]. It has subsequently been rejected in England and Wales but remains a potential issue elsewhere.

[102] Australian Law Reform Commission (ALRC), 'Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (ALRC Report 134, December 2018) paras 6.48ff <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess_2.pdf> accessed 15 May 2024.

[103] New Zealand Law Commission (NZLC), 'Class Actions and Litigation Funding' (Report 147, May 2022) paras 15.1ff and Recommendation R109 <https://www.lawcom.govt.nz/assets/Publications/Reports/NZLC-R147.pdf> accessed 15 May 2024.

[104] ILRC (n 21) para 6.52.

[105] See the review in *Travelers Insurance Company Ltd v XYZ* [2019] UKSC 48 [95]-[103].

period. There is also a debate as to whether there should be a limit on adverse costs payable by the Third Party Funder with reference to the amount funded. Some questions have also been raised as to whether specific consideration needs to be given to the position of smaller funders.

The range of debate and the issues which arise indicate that potential users may be assisted by seeing a range of Sample Wordings dealing with the issues. These are set out below these Comments, and largely derive either directly from existing guidelines and codes of practice or a synthesis of such wordings, with some further drafts being sourced from actual agreements to which ELI has had access.

While some wordings focus on maintaining adequacy for the funded dispute only (single dispute adequacy), international guidelines/codes of practice almost uniformly require that Third Party Funders maintain capacity to pay all debts at the point they are to fall due and a capacity to fund aggregate liabilities arising within a set period of time (aggregate liabilities adequacy) (E&W Code, para 9.4; HK Code, para 3.5; see also ELFA Code, para 6; Draft EP Directive, Article 6(1); SIArb Guidelines, para 4.3).

The sample wording requires that Third Party Funders maintain sufficient financial capability to meet the aggregate funding liabilities arising under all of their agreements in the next 24/36 months. Both the E&W Code (para 9.4) and the HK Code (para 3.5) require 36 months. Article 6(1)(c) Draft EP Directive, a requirement which appears subsequently to have been abandoned, requires 24 months.

The requirement of reasonable foreseeability is introduced as a potential route to aid clarity as to the Third Party Funder's obligation.

Another area where differences in practices exists is in relation to the elements included in the aggregate figures – in particular, the approach taken to adverse costs, appeal costs and enforcement costs, if not dealt with head on, provides fertile ground for dispute. The 'aggregate' liabilities *prima facie* include adverse costs orders, etc (the size of which may need to be reasonably estimated) that it is reasonably foreseeable a Third Party Funder will be required to pay under the terms of those Third Party Funding Agreements having regard to the progress of the relevant disputes.

Thus, under this formulation, if there is any doubt as to whether it is reasonably foreseeable that a funder will be required to pay an adverse costs order in the coming 24 months and, if the Third Party Funder were liable so to pay it would no longer have adequate capital requirements for the purposes of this Principle, the Third Party Funder should inform the Funded Party of that risk. Third Party Funders (and Funded Parties being asked to consider alternative wordings) should be aware that extensive cost liabilities are likely to be reasonably foreseeable notwithstanding that the progression of litigation is uncertain or costs consequences are discretionary. They should also be aware that the timescale for recovering judgment debts is often unpredictable.

The requirement to immediately inform the Funded Party of any concerns as to the ability to maintain capital adequacy (funder notification requirement) is akin to a continuing disclosure requirement such as that imposed under many of the codes: (E&W Code, para 9.4.3; HK Code, para 2.5(4); SIArb Guidelines para 4.1). It is to be noted that the HK Code (para 2.5(4)(b)) includes a requirement that the funder gives a specific undertaking that the funded party should be promptly informed in the event that an audit opinion provided for any audit period is qualified or expresses any question as to the ability of the third party funder to continue as a going concern. Thought may also have to be given to whether specific requirements as to: (i) the regularity of audit; and (ii) the status of the auditor are appropriate (audit requirement). The E&W Code (para 9.4.4) requires annual audits by a 'recognised national or international audit firm'. The HK Code (para 2.5(3)(b)) allows for 'reasonable evidence from a qualified third party' which can include a third party administrator or bank and the SIArb Guidelines (para 2.5) take a similar approach.

The Funded Party does not have a right to require that the Third Party Funder demonstrates its capital adequacy except insofar as is provided for in the Third Party Funding Agreement. This is because a general requirement to this effect would be difficult to impose with sufficient clarity and because only the most diligent Funded Parties would be likely to exercise such a right. However, in line with Article 6(1) Draft EP Directive, the Principles require that this be considered within the agreement.

Some codes require that Third Party Funders maintain access to a set amount of capital at all times; Third Party Funders must maintain access to £5 million under the E&W Code (para 9.4.2) and HK$20 million under the HK Code (para 2.5.(2)). Such a requirement is not adopted here on the basis that it may place a disproportionate burden on small funders and impose a large barrier to entry to the funding market.[106] In addition, the sums settled upon are likely (as in the case of the E&W Code) to be overtaken by events; the £5 million provided for there is now widely seen as inadequate.

***Sample Wordings:***

[Single Dispute Adequacy]

- The Third Party Funder shall not enter into a Third Party Funding Agreement unless, at the time of agreement, it:
  - o [Either] reasonably believes that it will be able to meet all reasonably foreseeable liabilities arising under or in connection with that Third Party Funding Agreement at the point at which they fall due.
  - o [or]
    - Where the Third Party Funder's commitment is expressed in the Third Party Funding Agreement with reference to a specific sum, the Third Party Funder must at all times maintain the capacity to fund that sum;
    - Where the Third Party Funder's commitment is expressed in the Third Party Funding Agreement with reference to the phases of the proceedings or stages of the dispute, the Third Party Funder must at all times maintain the capacity to fund those phases of the proceedings or stages of the dispute;
    - Where the Third Party Funder's commitment is expressed in the Third Party Funding Agreement with reference only to the dispute or proceedings, the Third Party Funder must at all times maintain the capacity to fund all foreseeable stages of the dispute or phases of the proceedings. This will include, where applicable, trial (including adverse costs), appeal and enforcement.

[Aggregate Liabilities]

- The Third Party Funder shall, at all times, maintain the financial capacity to meet all reasonably foreseeable aggregate liabilities (including where applicable trial [including adverse costs], appeal and enforcement) arising within the next (24/36) months under or in connection with all Third Party Funding Agreements to which it is a party.

[Third Party Funder Notification Requirement]

- If, at any time:
  - o [Either] the Third Party Funder or any auditor, regulator, or bank reasonably suspects that the Third Party Funder does not have the capacity described in Section (2) [or an objective assessor would or might reasonably have such concerns];
  - o [Or] an audit opinion provided for any audit period is qualified or expresses any question as to the ability of the Third Party Funder to continue as a going concern; the funded party should be promptly informed and the Third Party Funder must disclose this fact to the Funded Party as soon as is reasonably practicable and in any event within [14] days.

[106] See also NZLC (n 103) para 15.14.

[Funded Party Audit]

- At the time of entering into a Third Party Funding Agreement and: (i) in the event of any notification by the Funder under paragraph [x] above; (ii) in the event of any material change of circumstance in relation to the litigation which is likely to have an impact on the cost of the litigation, a Funded Party is entitled to request a Third Party Funder to demonstrate that it will have adequate funds to maintain such capacity.

[Records]

- The Third Party Funder shall:
    - o Maintain sufficient financial records to facilitate compliance with any financial inspection or audit required under the applicable law or the Third Party Funding Agreement;
    - o Take reasonable further steps to enable it to comply with any request under paragraph [x] above.

## Principle 8: Funders' Fees

(1) It is essential that the Funded Party is aware, prior to entry into a Third Party Funding Agreement, of:

a. The fees that the Funded Party is likely to be charged (in whatever form those fees are charged and including, for the avoidance of doubt, a summary of the basis on which the fees are to be calculated, including any relevant factual/legal context); and

b. The costs and fees in relation to the funded proceedings that the Funded Party will or is likely to bear itself.

(2) The Third Party Funder should accordingly explain the following matters in clear and simple language to the Funded Party prior to entering into the Third Party Funding Agreement:

a. The nature of the funding to be provided, ie whether it will take the form of a lump-sum payment, drawdowns and/or direct payment by the Third Party Funder of costs and expenses;

b. The expenditures which the Third Party Funder agrees to fund (whichever method of funding is employed), including whether the Third Party Funder agrees to bear the costs of any appeal or the enforcement of any award;

c. Whether there is any cap on the Third Party Funder's total financial commitment;

d. The reasonably foreseeable expenditures relating to the funded proceedings which the Funded Party will have to bear;

e. Whether the Third Party Funder agrees to make any payment that is ordered in respect of security for costs;

f. Whether the Third Party Funder agrees to make any payment ordered in respect of adverse costs;

g. Whether there is any limitation on the circumstances in which the Third Party Funder will make any of the above payments, including, for example, where the Funded Party has not made proper disclosure in respect of any aspect of the funded proceedings or where the order for adverse costs is related to the Funded Party's conduct in the proceedings;

h. The fees that the Third Party Funder will charge and/or the proportion of any successful recovery that the Third Party Funder will claim as well as the priority of payments in the event of success.

i. This may be expressed as a figure or a proportion of recoveries (including on a per-claim or per-issue basis) or a multiple of costs basis or combination thereof (eg, the greater of x% or multiple);

ii. The information may also be expressed with reference to the range of realistic outcomes based on facts known about the claim at the time of entering into the agreement.

(3) The Third Party Funder should be capable of providing evidence of its explanation of these matters to the Funded Party or of such matters having been explained to the funded party by an independent lawyer.

(4) It is not sufficient that these matters are included in the Third Party Funder's standard terms or conditions: they must specifically be explained to the Funded Party. The Third Party Funder should seek the Funded Party's express confirmation that it has understood these matters and wishes to proceed with the funding notwithstanding.

(5) The relevant factors which inform the agreed basis for the Third Party Funders' fees should be set out in the Third Party Funding Agreement.

***Comments:***

**The issue of funders' fees**

Funders' fees present a particularly contentious and intractable issue.[107] There are less contentious aspects: the need for clarity as to the fee structure seems to be almost universally acknowledged.

But once one looks at the question of overall return to funders, matters become highly polarised. The courts and commentators are instinctively wary of the possibility of very high returns to the funder, both in terms of the temptation to 'stray from the path of rectitude' and in terms of eviscerating the recovery of the claimant. The instinctive reaction is to attempt to find a reasonable percentage charge, beyond which no agreement should go. A wide variety of possible structures have been posited, from maximum percentage return[108] via returns on investment, multiples of amount invested, benchmarking against equity returns, or hybrids of these.[109]

There is, however, a very powerful suite of arguments that a rules-based approach – and still more the blunt instrument of a percentage cap – will be inappropriate because in any case, a funder's fee is likely to be a reflection of the level of risk undertaken (which will vary). Pricing is a sophisticated exercise that involves various factors (not just the application of a mere percentage on proceeds), including a healthy ratio between budget (funding sought) and expected realistic proceeds.[110] It follows from this that there are very real difficulties with the approach of setting a percentage limit as the accuracy of the percentage will be known only at the end of the litigation when the statement of account is made depending on various factors (duration, multiple on commitment, cost reimbursement, amount of proceeds). Those on the funder side say, with some force, that capping returns will disincentivise investment in novel or high-risk disputes.

Some commentators favour court control with fees being approved in advance or ruled on after the event. But any consideration of the cases and of sample agreements across a range of business indicates the difficulty of this approach, even if comparator material were readily available for any given case. The potential for satellite litigation and the inflation of costs is obvious. Other commentators have suggested broad benchmarks; but that does not avoid the problems of the range of agreements and factors which can interrelate.

Funders typically argue that their fees are justified by reference to specific factors relevant to each case. This is the key to the problem, and one which has not been openly grappled with to date. If that is right, the factors relevant to pricing/fees should be capable

107 For the funders' fees in consumer litigation scenarios, see also further in the Commentaries (Part C.I.5.).

108 The Study conducted for the EPRS tentatively suggests 30%; see Saulnier, Müller and Koronthalyova (n 13) 22. The EP Draft Directive aims at a 40% price cap on funders' fees (subject to extraordinary circumstances, see also below in text).

109 The New Zealand Law Commission (Report 147, 2002) 17.58 reviews the various suggestions.

110 See also Rachael Mulheron, *The Modern Doctrines of Champerty and Maintenance* (Oxford University Press 2023) 111f.

of being identified, both for the Funded Party to understand, and to enable any court review to be an informed one.

There are also issues as to structures. Fee structures may in some cases be used as a means of encouraging rational decision-making or early settlement by the client. For example, in a tranche structure, initial payments may attract lower interest rates with later payments made at higher interest rates. Whether this structure is appropriate or reflects undesirable pressure being put on a litigant may be fact-specific. Other structures used include reducing lawyer rates and offering success fees so that they have 'skin in the game'. There are also obvious potential issues with this in terms of conflicts if this structure is not disclosed to, and understood by, the Funded Party.

Particular issues may require to be dealt with for consumer proceedings[111] where the consumers are themselves the contractual party of the Funder in a Third Party Agreement[112] due to greater power imbalance/likely lack of sophistication of class action members. Similar power imbalances may also affect Small and Medium-sized Enterprises (SMEs), which do not benefit from the protective consumer protection regimes and stricter control of contractual terms.

**The Principle**

This Principle concerns the fees charged by a Third Party Funder. This is an area of significant controversy. As observed by Lord Phillips MR in *Factortame*,[113] the higher the share of the spoils 'the greater the temptation to stray from the path of rectitude': fees thus also give rise to ethical issues.

Proposals have been made in various jurisdictions to set a specific percentage cap on the proportion of successful recovery that a Third Party Funder may claim. See, eg, Article 14(4) of the Draft EP Directive, which invalidates (absent exceptional circumstances) a Third Party Funding Agreement which entitles a Third Party Funder to a share of any award which would dilute the share available to the claimant and intended beneficiaries to less than 60%. More recently in the context of collective redress, Germany has introduced legislation stipulating that litigation funding is inadmissible if the funder is promised an economic share of more than 10% of the of the amount to be paid by the defendant.[114] However, in the implementation of the RAD, to date not all Member States have implemented price caps for funders fees (eg Austria, Netherlands). In the absence of explicit statutory provisions in many jurisdictions, limitations on funders' fees are to date being imposed by reference to general contract law principles or by reference to public policy factors. Approaches include intervention when fees are deemed to contravene public policy or good morals or other standards of reasonableness, fairness, or proportionality. In such cases, courts have been called to decide on an ad hoc basis whether the agreed funders' fees exceeded acceptable boundaries, leading to varying outcomes even within the same jurisdiction. Such a flexible and context-dependent approach is evident for example in the Netherlands: in the *Vattenfall* case a maximum 25% cap was suggested, while in the *TikTok* case the court proposed a different metric suggesting that a five-times-investment maximum might be a more appropriate practical approach.[115]

Australia has taken a more generous view. In the case law, 33% was acceptable in *Campbells Cash & Carry Pty v Fostif Pty Lyd*.[116] The Australian Law Reform Commission faced a very wide range of

[111] See also further in the Commentaries (Part C.I.).
[112] ie, contrary to the conventional European model where consumers are represented by consumer organisations, who are the client of the funders.
[113] *R (Factortame Ltd and Others) v Secretary of State for Transport* [2002] EWCA Civ 932 [85].
[114] Art 4(2) no 3 VDuG (*Verbraucherrechtedurchsetzungsgesetz* – Act implementing the EU Directive on Representative Actions).
[115] A maximum of 25% was deemed reasonable and proportionate in *Stichting Nuon-Claim v Vattenfall* [2023] Rb. Amsterdam, 25 October 2023, ECLI:NL:RBAMS:2023:6683 (Vattenfall); A five-times-investment maximum was suggested in *Stichting Onderzoek Marktinformatie v TikTok* [2023] Rb. Amsterdam 25 October 2023, ECLI:NL:RBAMS:2023:6694 (TikTok); for more, see Eduardo Silva de Freitas, Xandra Kramer and Jos Hoevenaars, 'Second Act in Dutch TikTok Class Action on Privacy Violation: Court Assesses Third Party Funding Agreements' (*conflictoflaws.net*, 2 December 2023) <https://conflictoflaws.net/2023/second-act-in-dutch-tiktok-class-action-on-privacy-violation-court-assesses-third-party-funding-agreements/> accessed 15 May 2024.
[116] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 (*Fostif*).

submissions on this point;[117] the Australian Draft Treasury Law proposes a rebuttable presumption of unreasonableness if more than 30% is diverted in collective actions.[118]

The Ontario Courts in *Schenk* found 50% to be reasonable in certain circumstances on the basis of an analogy with the statutory cap on lawyers' contingency fee recovery (which was set at 50%).[119] There is also legislation which applies in Scotland which, in broad terms, caps funders' fees at 50%.[120]

A critical point, which does not appear to be fully considered by the drafters of the Draft EP Directive, is that there are internationally a wider range of contexts in which TPLF operates. Assumptions which are appropriate to contexts where the Funded Party may be seen as vulnerable may be less apposite in the context of (say) funding of commercial disputes between high-net-worth individuals or significant corporations. This range of possibilities is clearly acknowledged in the academic literature worldwide. For example, one view from South Africa suggests that funders 'should be restricted in the amount of success fees they may be entitled to, depending on the type of cases undertaken'.[121] In Canada, there is a distinction made between class action fees and private litigation fees.[122] In New Zealand, the view has been expressed that 'review of the size of the funder's success fee by the court is also likely to be problematic' given the heterogeneity of agreements and different cases taken on.[123]

In view of the very different factors which apply in relation to different types of proceedings and litigants and the drafters' intention for these principles to be universally applicable, it has not been considered appropriate in these Principles to adopt a prescriptive approach.

Instead, the focus is on ensuring: (i) clarity as to fee structures; and (ii) provision of information to enable any dispute to be decided on appropriate information.

As to the former, this reflects the requirements in other guidance such as the HK Code (para 2.3(3)), the Draft EP Directive (Article 12) and the SIArb Guidelines (para 3.1.4) for clear and concise explanation of funding structures. Principle 8(2) is intended to be as comprehensive as possible in relation to the matters that must be explained by the Third Party Funder. It is considered that comprehensive explanation in this manner is likely to benefit all parties and reduce the risk of subsequent disputes as to the scope of funding. While Principle 8(2)(h) offers alternatives methods of explaining what the Third Party Funder will receive, there is much to be said for an approach whereby the Funded Party is aware of what it will receive at the end under various scenarios – for example early settlement, proceedings with a duration of several years, proceedings with and without appeal.

As demonstrated by Principle 8(3), this Principle requires the Third Party Funder to do more than merely refer the Funded Party to materials setting out the fee arrangement. The Third Party Funder must act proactively to ensure that the Funded Party understands the nature of the arrangement. It is anticipated that this will be by both oral explanation and dedicated correspondence, the importance of which is clearly flagged, and which is in the simplest terms possible.

The academic debate summarised above informs the proposal at Principle 8(5) to try to set out the relevant factors in the minds of the parties as a basis for any later review/challenge. This is also informed by the suggestion for broad benchmarks posited in

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[117] ALRC (n 102) para 170.

[118] Australian Government, 'Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation Funders', proposed new Section 601LG, sub-section 5 <https://treasury.gov.au/sites/default/files/2021-09/c2021-211417-exposure-draft-funders.pdf> accessed 15 May 2024.

[119] *Schenk v Valeant Pharmaceuticals International Inc.* 2015 ONSC 3215 (*Schenk*); see also Ranjan K Agarwal and Doug Fenton, 'Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context' (2017) 59 Canadian Business Law Journal 65, 89ff.

[120] The Civil Litigation (Expenses and Group Proceedings (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 (SSI 2020/110), reg 2 (indeed the legislation caps the success fee at a lower rate still for claims for damages for personal injuries or employment tribunal claims).

[121] Mpho Justice Khoza, 'Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective' (2018) 21 PER [online] 16 <https://perjournal.co.za/article/view/3426> accessed 15 May 2024.

[122] Rachel Howie and Geoff Moysa, 'Financing Disputes: Third-Party Funding in Litigation and Arbitration' (2019) 57 Alberta Law Review 465, 479.

[123] Vince Morabito and Vicky Waye, 'Reining in Litigation Entrepreneurs: A New Zealand Proposal' (2011) New Zealand Law Review 323, 360.

literature;[124] Principle 8(5) is also designed to address the criticism that broad benchmarks would simply result in satellite disputes. Principle 8(5) therefore reflects the advisability of an agreed basis being included in the Third Party Funding Agreement. This is particularly important where the returns to the funder exceed the thresholds indicated either in the Draft EP Directive or in the Australian draft law, as such higher returns are more likely to be the subject of challenge/intervention.

Factors which feed into the level of a funder's fee which is justifiable are likely to include the following:

- Is the claim based in whole or in part on a binding precedent?
- Does the case require a novel interpretation of the law which is likely to require: (i) significant findings of relevant fact; and/or (ii) appeals?
- On a scale of 1–10 how difficult is the case to build? Is this due to the nature of the facts or the parties involved?
- Does the dispute involve a high risk of loss?
- What is the down-side risk to the funder?
- What is the expected timeline to a clear outcome?
- Are there potential relevant changes in the law in the lifetime of the funded dispute which can affect the prospects of success?
- Is the Funded Party: (i) an individual of limited means; and/or (ii) lacking experience in litigation?
- Are there procedural hurdles and consequent costs?
- Are there issues as to enforceability?
- Other funder side issues such as:
  - o cost of capital
  - o costs of insurance
  - o comparison of the risks and returns offered by funding to those offered by other investments
  - o duration risk._

## Principle 9: Confidentiality

(1) The Third Party Funder shall maintain the confidentiality of all information and documentation relating to the dispute to the extent permitted by law and subject to the terms of any confidentiality or non-disclosure agreement between the Third Party Funder and the Funded Party.

(2) Where the ultimate source of funding is not party to the Third Party Funding Agreement and it is agreed that the person or entity in question should have access to confidential information, the Third Party Funder should, as part of the Third Party Funding Agreement, agree to be responsible for ensuring that such subsidiary, person or associated entity preserves such confidentiality.

***Comments:***

This Principle sets out Third Party Funders' confidentiality duties. There is wide consensus in international codes and guidelines that the confidentiality of all information and documentation should be maintained by Third Party Funders to the full extent permissible under the applicable law (see eg, E&W Code para 7; ELFA Code para 4; HK Code para 2.8; SIArb Guidelines paras 2.2 and 5.1).

[124] Michael J Trebilcock and Elizabeth Kagedan, 'Economic Assessment of Third-Party Litigation Funding of Ontario Class Actions' (2014) 55 Canadian Business Law Journal 54, 82.

There is a need for careful consideration to be given to whether and to what extent the person or entity which is the ultimate source of the funds (whether a subsidiary or associated company of the Third Party Funder or other third party) is bound by these confidentiality obligations. To the extent that the parties to the Third Party Funding Agreement conclude that confidential information may be passed to the relevant entity, the Third Party Funding Agreement should seek to ensure compliance by the relevant person or entity with the confidentiality obligations which apply to the contracting parties. This should be done either by making that entity a party to the Third Party Funding Agreement, or by the Third Party Funder undertaking to be responsible for any breaches on the part of the subsidiary/associated entity. Principle 9(2) reflects the 'undertaking' route seen in the E&W Code (para 7) and in the HK Code (para 2.1).

## Principle 10: Case Management (Control)

(1) The Funded Party shall – save in exceptional cases – be the ultimate decision-maker in relation to the funded proceedings. Any derogation from that principle must be clearly stated within the Third Party Funding Agreement.

(2) The Third Party Funder shall not seek to influence or control decisions regarding the relevant proceedings except insofar as expressly provided for by the Third Party Funding Agreement.

(3) The Third Party Funding Agreement should set out the nature and the scope of the Third Party Funder's involvement in the proceedings and any appeals. The Third Party Funding Agreement should specifically:

a. Set out whether and if so how, the Third Party Funder is to be involved in or have control of litigation decisions;

b. Set out whether, and if so how, the Third Party Funder is to be involved in making decisions in relation to settlements;

c. Include a dispute resolution clause setting out how any disputes in respect of: (i) the Third Party Funder's rights to be involved; and (ii) the acceptability of settlement offers are to be resolved.

(4) Where the Third Party Funding Agreement expressly confers on the Third Party Funder the right to control one or more material aspects of the funded litigation, the Funded Party must be expressly informed of this prior to entering into the Third Party Funding Agreement.

(5) The Third Party Funder shall be regularly informed as the litigation progresses of:

a. The progress of the proceedings;

b. Any reports/statements of factual or expert witnesses;

c. The way in which the funds provided under the Third Party Funding Agreement are being spent;

d. The level of costs liability or potential costs liability under the Third Party Funding Agreement as soon as reasonably practicable after these costs have been identified.

***Comments:***

**The issue of control**

Control can manifest in many ways. Third Party Funders have an obvious legitimate interest in protecting their investment;[125] but how far can that interest be permitted to go? The most vibrant debate is whether it is appropriate for a Third Party Funding Agreement to require consent of the Third Party

[125] NZLC (n 103) paras 17.5ff, noting that removing funders from any form of control will make them less likely to provide funding.

Funder to any settlement. The approach appears to be slightly jurisdiction-specific and may be related to attitudes to control in the context of related concepts such as insurance.[126] Many commentators and jurisdictions take a firm approach that the Funded Party must have ultimate control, and indeed that the Funder should take no active part in such decisions.

But even short of control of settlement, control in the sense of significant influence on the process more generally is also contentious. The consensus in Australia and some other jurisdictions seems to be that funders can have some level of control, but ultimate decision-making should rest with the funded party, while Canada and a variety of other jurisdictions are opposed to even limited control.

On control in the sense of input and influence on litigation, this is a nuanced argument. An experienced funder may well have valuable litigation experience which can assist in running a case well and tactically astutely.[127] This may positively benefit an inexperienced litigant or group of litigants and may save them costs. More difficult is the question of ultimate control, but there is a case to be made even here. New Zealand's and English courts (perhaps reflecting the developed law in insurance regarding claims control clauses) appear not to object where the agreement is one between commercial parties, though the New Zealand courts have also put down a marker by reference to the control which is reasonable to protect the money staked by the funder.[128]

Control also has a two-way street aspect: it is important that a 'hands off' funder is able to see what work has been done and that the invoices are reasonable.[129]

**The Principle**

This Principle concerns the extent to which the Third Party Funder may control or influence the funded proceedings whether in terms of case management or settlement. This is one of the central controversies in third party funding. This Principle limits the extent to which such powers can be ceded to Third Party Funders. It is undesirable that, as stated verbatim in Article 14(2) Draft EP Directive, the Third Party Funder can 'influence the decisions of a claimant in the course of proceedings in a manner that would benefit the litigation funder itself at the expense of the claimant'. Similar concerns are echoed in the RAD regarding all decisions, including settlement decisions, with Article 10(2) emphasising that these should not be 'unduly influenced by a third party in a manner detrimental to the collective interests of consumers'.[130] The default position must be that Third Party Funding Agreements should leave the Funded Party 'in control of the conduct of the litigation'.[131]

It is expected that in nearly all cases, Third Party Funding Agreements will not permit the Third Party Funder to control the proceedings, whether in order to comply with the requirements of the applicable law (which may prohibit Third Party Funder control by operation of the doctrine of champerty or otherwise) or as a result of the parties' negotiations.

Principle 10(1) therefore states that any derogation from that starting point should be regarded as exceptional and needs to be clearly agreed, delineated and recorded in the Third Party Funding Agreement.

Principle 10(2) covers the subject of control or influence in relation to decisions during the course of litigation, on which there is a spectrum of approaches. The most stringent international proposals and guidelines invalidate clauses purporting to transfer any case management powers to Third Party Funders (Draft EP Directive, Article 14(2)). Others state that the Third Party Funder must only exercise control ceded expressly in the Third Party Funding Agreement (E&W Code para 9.3; SIArb Guidelines para 6.1.4; HK Code

[126] Jonathan T Molot, 'A Market in Litigation Risk' (2009) 76 University of Chicago Law Review 367, 380.
[127] The ILRC (n 21) para 6.31 puts it this way: 'a third-party funder responsibly monitoring and reviewing their investment and developing a case strategy in collaboration with the funded party'.
[128] *PricewaterhouseCoopers v Walker* [2017] NZSC 151 [122], [2018] 1 NZLR 735 [122].
[129] Rachael Mulheron and Peter Cashman, 'Third-Party Funding of Litigation: A Changing Landscape' (2008) 27 Civil Justice Quarterly 312, 334f.
[130] See also further in the Commentaries (Part C.I.3. and C.I.4.).
[131] *Arkin v Borchard Lines* [2005] EWCA Civ 655 [40] per Lord Phillips MR in the English Court of Appeal.

para 2.9(1)). The latter option is broadly adopted here on the basis that, so long as each party is aware of the effect of the terms negotiated, the parties' ability to decide who will be involved in, or exercise, case management powers should not be limited.

One aspect which is important is that 'involvement' may cover a wide range of matters and there are a number of these where an experienced funder's expertise may be of considerable assistance to the Funded Party. Such matters include those highlighted by the Singapore Guidance (para 41), namely:

a. Assisting with choice of solicitor(s);

b. Assisting with choice of arbitrator(s) and/or mediator(s);

c. Assisting with strategic or tactical decisions;

d. Considering advice from, and providing instructions to, the claimant's solicitor(s);

e. Managing litigation expenses; and

f. Providing input on decisions about whether to settle the claim and on what terms.

It is also considered that these Principles should not prevent a Third Party Funder from controlling proceedings or settlement in appropriate cases where that is permitted by the applicable law. However, any terms conferring a power on the Third Party Funder to determine the acceptability of a settlement offer should be set out clearly and unequivocally in the Third Party Funding Agreement (see the ELFA Code para 3; E&W Code para 11.1).

Under Principle 10(3), the Third Party Funding Agreement must also set out a dispute resolution mechanism to apply in the event of disagreement over the exercise of the Third Party Funder's rights and in particular over the acceptability of a settlement. Such mechanisms may, non-exhaustively, require that disputes be determined by an independent arbitrator or that the Funded Party retains an overriding power to decide (Singapore Guidance para 41). An expedited timeline is likely to be necessary and provision for this should normally be made. Parties are further encouraged to agree upon resolution mechanisms to be used in the event of disputes on other matters. The parties may, for example, nominate a competent court and/or arbitrator and empower that body to make determinations about the Third Party Funding Agreement, assess its compliance with these Principles, and take appropriate remedial action.

Where the role of the Third Party Funder moves beyond 'involvement' to control, it is also essential that the Funded Party should be specifically made aware prior to entering into the Third Party Funding Agreement of the fact of the Third Party Funder's right to control proceedings or aspects relating to the proceedings (and the practical implications of the same). In order to achieve this, Principle 10(4) makes clear that it is not sufficient that the Third Party Funder's rights are set out in the Third Party Funding Agreement: the Funded Party's attention must be specifically drawn to this fact and its implications (including as regards settlement) must be explained to the Funded Party.

The Funded Party's legal representative (or if none exists, the Funder itself) should therefore draw the Funded Party's attention to any terms of the Third Party Funding Agreement which cede case management powers to the Third Party Funder.

Such powers include, non-exhaustively, those conferring the power to determine how the case is pursued, which interests are prioritised, and the acceptance of any outcome, award, or settlement (Draft EP Directive, Recital 28).

The legal representative/funder should take particular care to draw to the Funded Party's attention any terms which confer on the Third Party Funder a unilateral ability to agree to a binding settlement. The legal advice referred to in these notes should be provided either directly to the Funded Party prior to the execution of the Agreement and/or, in the case of a proposed group claim, clearly signposted on any website soliciting subscriptions to that group claim.

Principle 10(5) seeks to protect the Third Party Funder and ensure a cooperative and mutually beneficial relationship by requiring that the Third Party Funder be kept informed of developments in the funded proceedings and the manner in which funds are spent.

# Principle 11: Termination of Third Party Funding Agreements

(1) Termination of a Third Party Funding Agreement may have a significant prejudicial effect on the parties and on any funded proceedings. It is accordingly important that the parties' termination rights are clearly recorded in the Third Party Funding Agreement and that the Funded Party is advised specifically both in respect of its right to terminate (and any restrictions or conditions affecting such withdrawal) and the circumstances in which the Third Party Funder will become entitled to terminate the agreement.

(2) To the extent that the Third Party Funding Agreement sets out the parties' contractual termination rights, the Third Party Funding Agreement should also be clear as to:

a. The extent to which those contractual rights oust or exclude rights which arise by operation of law;

b. Any objective criteria by reference to which entitlement to terminate is to be judged (eg in relation to how reasonableness of belief in, or assessment of, the merits is to be judged).

(3) The Third Party Funding Agreement should also clearly set out the consequences of the exercise of contractual termination rights, including the extent to which obligations survive or are created by the termination.

(4) In particular, the Third Party Funding Agreement should set out clearly the extent to which the Third Party Funder will remain liable for commitments made in respect of:

a. Phases of the proceedings which have completed but in respect of which payment has not yet been made (eg in circumstances where a costs order has not yet been made against the Funded Party in respect of an unsuccessful phase);

b. Phases of the proceedings which are in progress;

c. Phases of the proceedings which have not yet commenced.

(5) Third Party Funding Agreements should not confer on Third Party Funders broad discretionary rights to terminate the Agreement. Where a discretion is conferred, or where a right to terminate for particular conduct on the part of the Funded Party is conferred, it is essential that this is clearly set out in the Third Party Funding Agreement and that the consequences of the same are explained to the Funded Party prior to entering into the Agreement.

***Comments:***

**The issue of termination**

Termination rights are contentious and critical because a withdrawal of funding may cause serious prejudice in several respects. A Funded Party may be left unable to obtain a remedy and face orders for costs which it is unable to pay. If there has not been disclosure of the Third Party Funding Agreement, the other party or parties to the litigation or arbitration may unexpectedly find that their costs are irrecoverable as against the Funded Party. The court or tribunal system may also have wasted time and resources.

It will often not occur to a Funded Party that there is any possibility of termination of the Third Party Funding Agreement short of the close of the litigation. Yet almost inevitably, Third Party Funding Agreements make some provision for termination, which raises the spectre of a Funded Party being left without funding part way through the litigation – meaning that it is unable to pursue the remedy which it seeks, or to pay outstanding costs orders. Such a situation impacts also on the other party to the litigation, and termination rights are one of the reasons why there is such interest on the part of a Funded Party's opponent to be privy to the terms of funding.

Termination rights are inevitable in some form, and they may indeed arise as a matter of applicable law outside the ambit of the contract itself. While the Draft EP Directive (Article 15) seeks to preclude this by prohibiting funder withdrawal, there are, as the ILRC notes, considerable difficulties with this approach – not least that it writes prospective funded parties a blank cheque to mis-sell their case to the funder –[132] with the correlate that it will be a powerful disincentive to funders to fund litigation in jurisdictions where this is the rule, thereby depriving many of access to justice.

**The Principle**

This Principle therefore proceeds on the basis that termination rights should be provided for, albeit carefully. It provides guidance in relation to the parties' termination rights under a Third Party Funding Agreement. It is intended to ensure that a Funded Party is given an adequate framework for discussion and agreement of termination rights.

Existing guidance and regulation tend to specify the types of circumstances in which termination is permitted. See, eg the contrasting approaches of:

(a) Para 11(2) E&W Code, which posits potential options to terminate in the event that the funder, its subsidiary or associated entity: (i) reasonably ceases to be satisfied about the merits of the dispute; (ii) reasonably believes that the dispute is no longer commercially viable; and (iii) reasonably believes that there has been a material breach of the funding agreement by the funded party.[133]

(b) Article 15 Draft EP Directive, which prohibits unilateral termination by the litigation funder without the claimant's informed consent – unless a court or administrative authority grants permission. The Principle set out above seeks to take a less prescriptive approach. The reasons for doing so are: (i) to preserve the parties' freedom to contract on terms that are appropriate to the proceedings in question; and (ii) to avoid a conflict between these principles and any applicable law in relation to termination for breach. The focus of the Principle is accordingly on achieving clarity in relation to the circumstances in which termination will be permitted.

Principle 11(1) emphasises the importance of this area and its need for: (i) specific treatment in the Third Party Funding Agreement; and (ii) explanation to the funded party.

Principle 11(2) –(4) sets out a structure which is the obverse of the broad discretion, and which provides a framework for agreement and explanation of specific, carefully delineated rights. Principle 11 (2)(b) in particular highlights the fact that where a right to withdraw is given to the Funder based on an assessment of the merits of the case, there should be carefully drafted provisions dealing with the test for that.

Principle 11(5) seeks to discourage the granting to the Third Party Funder of broad discretionary rights to terminate the Third Party Funding Agreement. The Singapore Guidance (para 43) is to similar effect.

The structure provided by the Principle can be tailored by reference to the kinds of specific issues set out in the Sample Wordings below.

***Sample Wordings:***

[Contractual requirements]

The Funded Party confirms that it has been advised specifically both in respect of:

a. The right to terminate [and of the conditions at clause x affecting such withdrawal] and;

b. The circumstances in which the Third Party Funder will become entitled to terminate the Third Party Funding Agreement.

[132] ILRC (n 21) paras 6.62ff.

[133] Additionally, the HK Code (paras 2.13–2.14) provides that third party funding agreements must not contain a 'discretionary right' for third party funders to terminate third party funding agreements and sets specific circumstances where withdrawal is permitted.

The rights set out herein are intended to oust (to the extent permissible) any provisions affecting termination of Third Party Funding Agreements at common law or imposed by statute.

[Termination by the Funded Party]

The Third Party Funding Agreement must provide that the Funded Party may terminate the Third Party Funding Agreement if it reasonably believes that the Third Party Funder has committed a material breach of [any applicable code or law – to be identified or] the Third Party Funding Agreement.

[Termination by Funder: SIArb Guidelines]

The Third Party Funder may terminate the Funding Agreement in the event that the Third Party Funder:

a. Reasonably ceases to be satisfied about the merits of the claim;

b. Reasonably believes that there has been a material adverse change of prospects to the Funded Party's success in the proceedings;

c. Reasonably believes that there has been a material adverse change of prospects to the Funded Party's being able to reach any agreement with the other party(ies) to the proceedings to resolve in whole or in part the dispute in question; or

d. Reasonably believes that the Funded Party has committed a material breach of the Funding Agreement.

In relation to sub-paragraphs (a) to (d) above, reasonableness of belief will not be deemed to be satisfied unless a full written advice from [retained/third party] lawyers has been obtained to that effect.

[No discretionary termination: HK Code]

There is no discretionary right for the funder to terminate the Third Party Funding Agreement in the absence of the circumstances described in paragraph [x].

[Surviving obligations]

If either party terminates the funding agreement, the funder is to remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach on the part of the Funded Party as mentioned in paragraph [x]. [SIArb para 2.15, HK Code]

Unless specifically agreed otherwise, or if the Funded Party is in breach of the Funding Agreement, if a Funding Agreement is terminated by the Funder, all amounts provided by the Funder until the termination will remain invested for the benefit of the claim. [ELFA Code para 3(d)].

## Principle 12: Dispute Resolution and Review by Courts or other Authorities

(1) A Third Party Funding Agreement should specify a dispute resolution mechanism for any dispute arising out of the Third Party Funding Agreement. In particular, the Third Party Funding Agreement should:

a. Specify an appropriate (fair, independent and transparent) resolution mechanism in respect of any conflicts of interest or potential conflicts of interest that may arise;

b. Specify any issues in respect of which an expedited dispute resolution mechanism is required, and the appropriate expedited procedure, including timeline.

(2) A Third Party Funding Agreement should specify:

a. Any aspects of the Third Party Funding Agreement which, by reason of its governing law or the jurisdiction in which the funded dispute is conducted, are subject to review by the courts or other administrative authorities, either on their initiative or by reason of a challenge by the other party to the proceedings;

b. Any information which, by reason of that review, either party must prepare or provide to the other party/the court or other administrative authority.

***Comments:***

The primary issue here is that of dispute resolution. The Principle is designed to ensure that the Third Party Funding Agreement clearly sets out the way in which disputes are to be resolved. Principle 12(1)(b) addresses areas where expedited dispute resolution may be necessary (an example might be a dispute as to entitlement to withdraw funding part way through proceedings, which would impact on the timeline or continuation of the funded dispute).

Principle 12(2) addresses the need for clarity as to likely court supervision outside the context of dispute resolution. Parties may have very different expectations on this point. Some jurisdictions require court supervision in specific types of proceedings (such as group litigation). The Draft EP Directive sees a role for supervisory authorities (which may be courts) more generally in: (i) approving funders (Article 5), supervising capital adequacy (Article 6), termination (Article 15), disclosure (Article 16). There is also reference to 'supervising the activities of litigation funders' (Article 4).

# APPENDIX: Minimum Content of Third Party Funding Agreements

(1) The Third Party Funding Agreement shall identify:

a. The ultimate source of the funds provided (including the address of the registered office of that entity);

b. The Third Party funder (if different);

c. The Funded Party.

(2) The Third Party Funding Agreement shall state the sum to be funded. This may be expressed as a maximum figure, a proportion of total costs and/or with reference to defined phases of litigation proceedings.

(3) The Third Party Funding Agreement shall state:

a. The fees that the Funded Party is likely to be charged (in whatever form those fees are charged and including, for the avoidance of doubt, the basis on which the fees are to be calculated);

b. The costs and fees in relation to the funded proceedings that the Funded Party will, or is likely, to bear itself.

(4) The Third Party Funding Agreement shall contain a provision that the Third Party Funder must at all times maintain the capacity to fund the sum or stages of the relevant proceedings specified in the agreement.

(5) The Third Party Funding Agreement shall state the extent of the Third Party Funder's liability. This must include a statement of whether or not (and to what extent) the Third Party Funder is liable for or in respect of:

a. Any order for the payment of the opponent's costs;

b. Any agreement by settlement to pay the opponent's costs;

c. An order or agreement to give security for the opponent's costs;

d. Any other foreseeable financial liabilities such as disbursements and counsel fees and After-the-Event (ATE) insurance premia.

(6) The Third Party Funding Agreement shall state whether, and if so, how and to what extent;

a. The Third Party Funder may participate in decision-making in relation to the conduct of the litigation (including settlement and any appeals);

b. The parties each have rights of termination of the Third Party Funding Agreement.

(7) The Third Party Funding Agreement shall set out the acknowledgement of both parties that the Funded Party has a need for independent advice on the content of the Third Party Funding Agreement and the circumstances in which it can be terminated and the way in which that need has been met, identifying the source of that advice.

(8) The Third Party Funding Agreement must include a dispute resolution provision.

(9) Any Funding Agreement must either be executed in writing in the language in which the Funded Party receives legal advice or be accompanied by a signed translation into that language.

***Comments:***

This Appendix is designed to capture the absolute necessities for the content of a Third Party Funding Agreement. Many of the requirements set out here are recorded in the Principles (Part II), where the Comments also contain Sample Wordings. The purpose of this Appendix is to collect the core requirements referred to in the Principles in a single place.

Paragraph 1 reflects the requirement at Principle 5 for disclosure of the ultimate source of funds. In this it follows both the E&W Code and the ELFA Code.

Paragraph 2 is a necessity both in terms of certainty and as a building block for an assessment of capital adequacy. It also reflects a number of the considerations which fall within Principle 8.

Paragraph 3 is a reflection of Principle 8.

Paragraph 4 installs as a bare minimum a provision for single dispute capital adequacy, as discussed in relation to Principle 7 and dovetailing with Paragraph 2.

Paragraph 5 draws together a number of the issues which arise in relation both to capital adequacy and Third Party Funder's fees.

Paragraph 6 highlights the need for explicit sections dealing with the difficult and important questions of the Third Party Funder involvement/control and rights of termination (Principle 10 and Principle 11).

Paragraph 7 reflects the fact that, in general, it will be necessary for the Funded Party to receive independent legal advice as to the terms of the Third Party Funding Agreement. Careful thought needs to be given to whether a letter confirming advice from the lawyer instructed in the dispute is adequate (as per E&W Code para 9.1), or whether a letter from the Funder Party confirming receipt of such advice is adequate (as per HK Code para 2.4).

Paragraph 8 highlights the importance of having an agreement as to how disputes are to be resolved. This is dealt with in more detail at Principle 10(3).

Paragraph 9 deals with execution and the steps necessary to ensure that a Funded Party has understood the terms of the Third Party Funding Agreement.

Bearing in mind Paragraph 7, this section does not include provision for the inclusion of 'Key Features' ie a requirement to set out and explain clearly all the key features and terms of the proposed Third Party Funding Agreement (HK Code para 2.3(3)). Such an approach (which broadly reflects Principle 4) must however represent best practice.

# C. Special Types of Proceedings

## I. Consumer Litigation

### 1. Introduction

Consumer litigation funding covers torts and personal injury cases, as well as claims based on contract law, in which unsophisticated parties seek financial assistance to pursue their legal claims. For example, it has recently been in the media in the context of the 2015 *Volkswagen* scandal (also known as *Dieselgate* or *NOx Emissions*), which prompted litigation in several jurisdictions[134] and at transnational level.[135] Similarly, TPLF often, but not inevitably, involves group litigation. This should not come as a surprise as it is precisely in the context of relatively small economic damage to consumers (frequently referred to as 'scattered' or 'dispersed' damage)[136] together with the typical consumer's' rational apathy, where the need for access to justice becomes more pressing.[137] And it is precisely this legal and economic environment that has created a fertile ground for the development of the TPLF market, at least in Europe.[138]

What is also important to stress is that consumer law is a very broad concept lacking in homogeneity. This can be easily seen alone in the EU context by examining the over 60 acts of consumer law mentioned in Annex I of the Representative Actions Directive (RAD). RAD has a wide scope and covers different subject matters such as product liability, privacy law, package travelling, warranty law, claims based on unfair or untransparent contract terms, and much more. Talking about consumer law and TPLF hence also requires a certain degree of generalisation; some of the acts which are cited in Annex I of the RAD also apply to non-consumers (eg the GDPR[139] or the Air Passengers Rights Regulation[140]).

Moreover, significant jurisdiction-specific variations combined with local markets' economic conditions add multiple layers of complexity in understanding the dynamics that shape the uneven development and different formations of the TPLF market in consumer litigation. Legal characteristics to mention are here, eg, public versus private enforcement of consumer rights, the litigation climate, deterrent, punitive and treble damages, extensive pre-trial discovery, costs of litigating, the 'loser-pays' principle, the prohibition of 'no win, no fee' agreements. In Europe, for instance, which has traditionally been known for its robust public enforcement of consumer law, TPLF is primarily employed for aggregated consumer litigation. Unlike Europe, the USA boasts a different litigation landscape with a stronger reliance on private enforcement mechanisms, where contingency fees provide for the funding mechanism for consumer class actions and various forms of TPLF are widely used in other consumer contexts, in particular in individual hit-and-

[134] Deborah R Hensler and others, 'The Globalization of Mass Civil Litigation: Lessons from the Volkswagen "Clean Diesel" Case', RAND Corporation 2021 <http://www.rand.org/t/RRA917-1> accessed 15 May 2024; Katharina van Elten and Britta Rehder, 'Dieselgate and Eurolegalism: How a Scandal Fosters the Americanization of European Law' (2022) 29 Journal of European Public Policy 281; Beate Gsell and Thomas Möllers (eds), *Enforcing Consumer and Capital Markets Law: The Diesel Emissions Scandal* (Intersentia 2020).

[135] Until 2022, the CJEU had dealt with at least eight cases involving the interpretation of European Regulations and Directives related to the *Dieselgate* scandal and EU consumer law infringements.

[136] Michael Faure and Franziska Weber, 'Dispersed Losses in Tort Law – An Economic Analysis' (2015) 6 Journal of European Tort Law 163.

[137] Louis Visscher and Michael Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 Journal of Consumer Policy 455, 456f.

[138] ibid.

[139] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 (GDPR).

[140] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L 46/1.

run or personal injury cases.[141] By contrast, TPLF is hardly used for individual cases in Europe as the potential financial returns are not significant enough to attract funders, absent also a punitive-damages legal culture. Also, at least in certain EU Member States, eg Germany, consumers often have legal insurance, making external funding in many cases unnecessary.[142] *Vice versa*, the widespread use of various forms of contingency fee representation and TPLF in the USA has largely eliminated the need for litigation insurance.[143]

However, there are two important exceptions regarding funding for individual cases in Europe: TPLF plays a role in individual cases relating to high-stakes product liability as well as in the area of violations of the Air Passenger Rights Regulation. In the latter case, large numbers of similar claims (without being aggregated in any way) are enforced by legal-tech businesses which very often cooperate with funders.[144] The reasoning behind this exception is that the enforcement of claims under the Air Passenger Regulation does not pose particular legal challenges for legal-tech businesses due to the similar fact pattern for all consumers, ie a delayed or cancelled flight and the same amounts of damages under the Regulation. The EU law conformity of this type of enforcement of consumer rights has been very recently affirmed by the Court of Justice of the European Union (CJEU) in the context of air passenger rights.[145]

In other parts of the world, eg in Australia,[146] TPLF seems to be used for individual as well as collective cases.[147] The same seems to be the case in Canada.[148] Nevertheless, and despite the scarcity of available resources, not all qualified entities that are allowed to bring representative actions or other forms of group litigation on behalf of EU consumers rely on TPLF. Some, such as the Austrian Consumer Organisation (*Verein für Konsumenteninformation,* VKI)[149] or Dutch consumer organisations[150] do so, while others, like the German Federal Consumer Organisation (*Verbraucherzentrale Bundesverband,* vzbv) appear to have sufficient public funding to operate without the need for TPLF.[151]

Finally, in many EU jurisdictions (eg Germany, Netherlands, Austria, Italy), TPLF in consumer cases appears under the bundling of claims and assignment models when also -legal-tech is used. These models allow a more cost and time-efficient collection and management of aggregated claims.[152] Typical examples can be found in the context of the *Dieselgate153* or other debt collection services.[154]

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[141] See eg Austin T Popp, 'Federal Regulation of Third-Party Litigation Finance' (2019) 72 Vanderbilt Law Review 727, 736ff.

[142] According to the official statistical data of the German Federal Statistical Office, approx 50% of all German households have legal insurance; see also Peter Gottwald, 'Funding Civil Litigation Through Legal Expenses Insurance in Germany' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman* (OUP 2020) 199.

[143] Philippa Beasley and Ben Summerfield, 'The Users of Litigation Finance – Who, Where, When and Why?' in Steven Friel (ed) *The Law and Business of Litigation Finance* (Bloomsbury Professional 2020) 319, 325.

[144] Astrid Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica International 14, 19.

[145] More particularly, the CJEU very recently ruled that airlines cannot restrict consumers' rights to use such legal- tech businesses in order to enforce their rights under the Air Passenger Rights Regulation; see CJEU, Case 173/2023 *Eventmedia Soluciones SL v Air Europa Líneas Aéreas SAU*, ECLI:EU:C:2024:295 (11 April 2024).

[146] Beasley and Summerfield (n 143) 324.

[147] Regarding collective litigation, it is reported that from 1992 to 2013, only 15% of class actions in the Federal Court of Australia were funded. This percentage increased to 64% between 2013 and 2018, peaking at 78% in the final year. However, from 2019 to 2021, the proportion of funded class actions dropped to 41%, before slightly rising to 44% by mid-2022. These fluctuations are attributed to regulatory uncertainties and changes in government policy; see Steven Friel and Jonathan Barnes (eds), Litigation Funding 2023 (Woodsford) 44 <https://woodsford.com/wp-content/uploads/2023/02/LexGTDT-Litigation-Funding-2023-Full-book.pdf> accessed 15 May 2024 (Woodsford Report 2023).

[148] For an overview, see Howie and Moysa (n 122).

[149] Woodsford Report 2023 (n 147) 55.

[150] Xandra Kramer and Ilja Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2020) 2 Revista Ítalo-Española de Derecho Procesal 165; Dennis Horeman and Machteld de Monchy, 'Unlocking the WAMCA: A Practical Guide to the New Collective Action Regime in the Netherlands' (2nd edn, De Brauw Blackstone Westbroek 2022) 18-19 <https://dwbxnuhxoazve.cloudfront.net/OLD/pdfs-old/UNLOCKING-THE-WAMCA-Second-Edition.pdf> accessed 15 May 2024.

[151] Astrid Stadler, 'German Collective Actions: Is Litigation Funding in a Dead End?' in Xandra Kramer and others (eds) *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 259, 260.

[152] Ibid.

[153] The most active profit-oriented legal online platform in the *Dieselgate* in Germany has worked closely together with a well-known American law firm and American/British investors; see van Elten and Rehder (n 134) 291.

[154] David Markworth, 'Coding a Collective Consumer Redress Vehicle in Germany' (2023) 12 Journal of European Consumer and Market Law 89.

## 2. Regulation of TPLF in Consumer Law Cases in the EU

Funding of consumer disputes in representative actions is the only[155] area of TPLF for which regulations on an EU level exist, namely due to certain provisions in the RAD. While the RAD is a fully harmonised Directive, the provisions regarding funding provide only for a minimum harmonisation, allowing Member States to go beyond the standard set in the RAD. This was recently the case in Germany where the statute implementing the RAD regulates TPLF in a way which is stricter than the RAD itself (cf below).

The implementation deadline for the RAD passed in December 2022. Several Member States are, or were, late in implementing the RAD, prompting the Commission to issue warnings of potential legal actions against Member States. It is consequently too early to tell what impact the RAD will have on the funding of representative actions. In any event, the RAD is only applicable to representative actions as defined in Article 4 RAD – basically actions brought by qualified entities on behalf of a group of consumers for a violation of consumer law acts cited in Annex I of the RAD. Member States are hence free to regulate TPLF outside the scope of the RAD differently as suggested in the RAD.

As mentioned in the Introduction the criticism invoked by the Voss Report and reflected in the Draft EP Directive was very much focused on TPLF in consumer cases (as opposed to commercial cases) claiming that regulation is required to protect consumers. One criticism which has been made of this statement is that it overlooks the fact that consumers are – as illustrated above – hardly ever the clients of funders. The European Commission has deferred any further action in this area until a study looking at the implementation of the RAD in Member States is carried out. As for countries outside the EU or the US[156], it seems that no specific rules exist for consumer law settings per se but that rather, if at all, special provisions for certain questions (eg disclosure) for certain types of proceedings (eg class or competition actions) which, however, are not limited to consumers.

## 3. Balancing of Interests of the Parties

As mentioned above, much of the impetus driving the criticisms of TPLF came from the idea that consumers might be taken advantage of by funders who will act solely in their own (financial) interest, not only neglecting consumer interests but also exploiting them.[157] Although this point is important, the reality is that funders usually do not conclude contracts with consumers. Within the EU, consumer organisations are the clients of funders, not consumers themselves.[158] Consumer organisations are repeat players when using TPLF in order to enforce consumers rights. In addition, statistics show that at least medium-sized and larger funders generally refrain from accepting individual consumers as clients (as noted, this might be different in the USA for smaller funders in hit-and-run and similar cases).[159]

The argument that consumer law cases need extra strict regulation of TPLF is one which is directed at a small minority of cases where consumers are the clients of funders. Even in these cases, consumers are represented by lawyers and therefore do not enter into the agreement without any protections – subject to there being no conflicts of interest arising from repeat instructions or funding structure. In these disputes, the issues raised in Principle 6 will be directly and acutely engaged.

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[155] It is important to note that Regulation (EU) 2019/1150 (which introduces rules governing the relationship between online platforms and their business users, as well as mechanisms for redress in the case of potential infringements in such B2B settings) also addresses limited TPFL questions. Article 14(3)(d) specifically pertains to judicial proceedings initiated by representative organisations and public bodies related to TPFL and outlines associated disclosure obligations.

[156] In the US, numerous states have passed legislation intended to protect consumers who obtain funding; for an overview, see Ronen Avraham, Anthony J Sebok and Joanna Shepherd, 'The Whac-A-Mole Game: An Empirical Analysis of the Regulation of Litigant Third Party Financing' (28 May 2024) University of Texas Law, Legal Studies Research Paper (forthcoming), Cardozo Legal Studies Research Paper 26/2024 <https://ssrn.com/abstract=4852085> accessed 29 May 2024.

[157] Such concerns are particularly reflected in the EP Draft Directive, which is based on the assumption that the interests of plaintiffs and funders do not always align (see also Recital 13); For a critical perspective on this assumption, see Caroline Meller-Hannich and Beate Gsell, 'Die Regulierung Privater Prozessfinanzierung in der EU' (2023) AnwaltsBlatt Online 160, 163; Beate Gsell, Caroline Meller-Hannich and Astrid Stadler, 'Prozessfinanzierung in Deutschland vor dem Hintergrund Europäischer Regelungsinitiativen' (2023) 78 JuristenZeitung 989, 993.

[158] See also Susanne Augenhofer and Adriani Dori, 'The Proposed Regulation of Third Party Litigation Funding – Much Ado About Nothing?' (2023) Zeitschrift für das Privatrecht der Europäischen Union 198, 206; Kramer and Tillema (n 150) 171ff.

[159] Ronen Avraham and Anthony Sebok, 'An Empirical Investigation of Third Party Consumer Litigant Funding' (2019) 104 Cornell Law Review 1133.

In the more likely event that a case is brought by a consumer organisation, the involvement of a funder will have an additional benefit for consumers: Funders will only fund cases with merit. Hence the involvement of a funder not only fosters enforcement, enabling organisations to bring claims which they would otherwise not be able to, but also means a due diligence of the case is performed. It is also worth noting that the RAD states on several occasions that qualified entities under the RAD must prove their independence of funders (eg Recitals 25 and 52). However, it nowhere states the same requirement when the qualified entity is funded by the government.

### 4. Transparency and Conflicts of Interest

The RAD introduces two layers of disclosure directed to conflicts of interest. The first involves the recognition of a consumer organisation as a qualified entity: Such entity must disclose its source of funding according to Article 4(3) lit e and f and demonstrate that it is not unduly influenced by its source of funding. The second arises during the representative action. According to Article 10(1) of the RAD, Member States are to ensure 'that conflicts of interests are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers'. Subsec 2 *leg cit* specifies that Member States in particular shall ensure that:

(a) the decisions of qualified entities in the context of a representative action, including decisions on settlement, are not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action; (b) the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent.

The impact of this provision seems doubtful; it seems highly unlikely that a qualified entity would cooperate with a competitor of the defendant given the negative effect such a behaviour would have on the reputation of the consumer organisation. Furthermore, Article 10(2) RAD instructs Member States to ensure that courts can 'assess compliance with paragraphs 1 and 2 in cases where any justified doubts arise with respect to such compliance. To that end, qualified entities shall disclose to the court or administrative authority a financial overview that lists sources of funds used to support the representative action'. In most cases, qualified entities will disclose a cooperation with a funder voluntarily and not only towards the court but to the public as the approval of the funder can be seen, as mentioned above, as extra due diligence. By contrast, the defendant does not have to disclose its source of funding or, more generally speaking, its financial situation.

The Draft EP Directive of course goes further, extending the disclosure requirement to a full disclosure of financial resources, also towards the defendant. This provision aims to enable the defendant to evaluate the plaintiff's financial capability to pursue legal action. Germany, in transposing Article 10 of the RAD, has created a similar disclosure rule requiring qualified entities to provide the court with a copy of the funding agreement even if there is no doubt by the court that the funder does not unduly influences the proceedings (cf section 4(3) VDuG).

These approaches have been criticised as creating an unjustifiable disparity: outside the German legislation just referred to, plaintiffs who possess adequate financial resources or who have secured alternative means of funding litigation, without involvement from a litigation funder, are exempted from this disclosure obligation. Nor do defendants have to meet a similar standard of transparency. There is therefore force in the argument that the EP Draft Directive, and to some extent the RAD, creates an unjustifiable disadvantage for claimants who choose or are compelled to utilise litigation funding services.

While disclosure rules for TPLF have been discussed in other jurisdictions and partly introduced by law or recognised by courts,[160] there seem to be no specific disclosure rules for consumer law cases per se. In some

[160] See Principle 5 (and respective Comments).

jurisdictions, there are specific disclosure rules for class actions (which are in, eg, the USA and Canada open not only to consumers).[161] For example, in the US, the District Court for the Northern District of California decided that a party must disclose a funder's identity (only) in class action cases.[162] In Canada, the Ontario Class Proceedings Act was recently amended and now contains a section on TPLF agreements (Section 33.1(1)). The new Act (Section 33.1(4)) stipulates the mandatory notification of such funding agreements to defendants. Notably, any information deemed to potentially provide a tactical advantage to the defendant must be redacted.[163] This amendment demonstrates a tightening of judicial oversight and an enhancing of transparency concerning third-party funding within class action proceedings.[164] In the UK, as part of the process for certifying a class representative in a proposed collective action, the funding arrangements will have to be considered and certified as suitable.[165] In Austria, by contrast, the Supreme Court, in a litigation on a collective action brought by a consumer organisation, held that the defendant party has no legitimate interest in obtaining disclosure of the TPLF agreement and, more specifically, cannot rely on the TPLF agreement to challenge the action brought by the plaintiff.[166]

### 5. Capping of Funders' Fees

Neither the RAD nor national regulations in the UK, US, Canada, Australia or Israel contain specific caps on funders' fee in consumer law settings.[167] The EP Draft Directive, however, introduces a price cap on funders' fees, setting the limit to be 40% of the total sum awarded to the plaintiff. Higher fees are only not declared void when they are justified because of extraordinary circumstances (Article 14(4)). The EP Draft Directive, however, fails to define such 'extraordinary circumstances' which allow for higher fees. The German legislator, when implementing the RAD, opted for a price cap, limiting the funder's fee to a mere 10% of the sum awarded and hence making it rather uninteresting for funders to become involved with consumer organisations within the scope of application of the RAD.[168] Again, it needs to be borne in mind in this context that consumers are not clients of the funders under the RAD and in most funded consumer law cases within the EU.[169] It is perhaps worthy of note that in the above-mentioned legal-tech cases for violations of the Air Passenger Regulation, consumers usually pay 20–30% of the awarded amounts as a fee.

### 6. Fairness and the Unfair Contract Terms Directive

Another point worth mentioning is that within the scope of EU consumer law the Unfair Contract Terms Directive[170] applies also to funding agreements if consumers are the clients of the funder (or in the case of the UK, the statute which implemented the Unfair Contract Terms Directive). While terms regarding the price (which would be the fee the consumer has to pay, cf above) are not generally covered by the Directive, they are if they fail to pass the transparency test set out in the Directive. All other terms of the agreement are subject to the fairness test of the Directive if the agreement was not negotiated individually between the funder and the consumers; though in some countries, even negotiated terms are subject to the fairness test (either because of a broader implementation of the Directive or because general contract law provides for such test; the latter is

[161] For an overview, see Maya Steinitz, 'Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements' (2019) 53 UC Davis Law Review 1073.
[162] Woodsford Report 2023 (n 147) 275.
[163] Catherine Piché, 'Transparency and Oversight of Class Actions Funding in Canada' in Xandra Kramer and others (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 276, 284.
[164] cf Rachael Mulheron, 'Third Party Funding, Class Actions, and the Question of Regulation: A Topical Analysis' (2022) 2 Mass Claims 5, 13.
[165] The CAT set out a full summary of the legal framework in *Gutmann v First MTR South Western Trains Limited* [2021] CAT 31 [36]–[44] (in particular [37]); see also CAT Rule 78.
[166] OGH 6 Ob 224/12b (27 February 2013); See also Petra Leupold, 'Enforcing Consumer Rights: Collective Redress in Austria and the European Union' (2019) 8 Journal of European Consumer and Market Law 121.
[167] For the US, see also Avraham and Sebok (n 159) 1137f.
[168] Gsell, Meller-Hannich and Stadler (157) 996; Augenhofer and Dori (n 158) 204.
[169] See also above in the Commentaries (Part C.I.3.) and Principle 8 (and respective Comments).
[170] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1995] OJ L 95/29 (as amended by subsequent Directive 2011/83/EU and Directive (EU) 2019/2161).

true also outside the EU). One also must mention the impact the control of standard contract terms might have on the drafting of further funding agreements. This is especially true in jurisdictions where a governmental or consumer body, like the Competition and Markets Authority (CMA) in the UK, has the power to not only prohibit the use of unfair terms by injunctions, but also pro-actively provides guidelines on how to draft fair contract terms.

## II. Insolvency Proceedings

In some jurisdictions, TPLF is primarily used in the insolvency context. These include Denmark[171] and Hong Kong.[172] In others (such as the UK,[173] Singapore,[174] and in various parts of the EU), litigation funding for insolvency claims forms part of a wider market.[175] There has also been a considerable increase in this segment in the US.[176] In Australia, a highly developed litigation funding business has emerged in part from the statutory powers of sale held by liquidators, which allowed them to contract for the funding of lawsuits if such lawsuits can be characterised as company property.[177] In New Zealand, the NZLC review of funded cases identified a considerable share in the insolvency market.[178]

The studies conducted for the European Parliament list 16 funding firms operating in the EU in the sphere of insolvency funding.[179] Commentators underline the importance of this niche sector of the third party litigation funding market.[180]

The backdrop to this form of TPLF is that during the administration of an estate in bankruptcy, one or more claims may be identified against the debtor or a third party which the trustee in bankruptcy considers have good prospects of success and should therefore be pursued in court. However, for obvious reasons, the wherewithal to fund the litigation is lacking. Litigation funding offers an obvious means to pursue such a claim in the interest of the bankrupt estate and creditors.[181]

The benefits in this situation have been analysed by the Standing Committee of Attorneys-General in Australia (2006) and the Singapore Law Reform Committee (2014).[182]

In the latter, approval of litigation funding in this context was recommended to be conditional on:

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[171] Based on the questionnaire results distributed by ELI to members of the Advisory Committee, insolvency cases have been identified in the Danish press as instances where TPLF has been utilised; see also Frederik Kromann Jespersen, 'Litigation Funding in an Insolvency Law Context' (*Skau Reipurth*, 20 January 2021) <https://www.skaureipurth.com/en/insights/litigation-funding-in-an-insolvency-law-context/> accessed 15 May 2024.

[172] In Hong Kong there has to be a 'legitimate commercial purpose'; see *Jeffrey L Berman v SPF CDO I Ltd* [2011] 2 HKLRD 815; see also Solas (n 4) 78f; Zhang (n 68) 56, 76, 89.

[173] Peter Walton, 'Insolvency Litigation Funding - In the Best Interests of Creditors?' (Insolvency Practitioners Association 2020) <https://www.icaew.com/-/media/corporate/files/regulations/insolvency/insolvency-litigation-funding-in-the-best-interests-of-creditors.ashx> accessed 15 May 2024.

[174] In the matter of Section 310 of the Companies Act (Cap 50, 2006 Rev Ed) Castlewood Group Pte Ltd (in creditors' voluntary liquidation) [2022] SGHC 117.

[175] For an overview, see Stefanie Wilkins and Robin Ganguly, 'Litigation Funding in Insolvency' (*South Square*, March 2020) <https://southsquare.com/articles/litigation-funding-in-insolvency/> accessed 15 May 2024.

[176] Alex Wolf, 'Litigation Funders See Growing Opportunities in Bankruptcy Boom' *Bloomberg Law* (31 July 2023) <https://news.bloomberglaw.com/bankruptcy-law/litigation-funders-see-growing-opportunities-in-bankruptcy-boom> accessed 15 May 2024; Emily Slater, 'As US Bankruptcy Filings Increase, Legal Finance Is Set to Play an Important Role' *New York Law Journal* (17 September 2023) <https://www.law.com/newyorklawjournal/2023/09/17/as-us-bankruptcy-filings-increase-legal-finance-is-set-to-play-an-important-role/> accessed 15 May 2024.

[177] *Fostif* (n 116).

[178] NZLC (n 103) para 14.36; NZLC, 'Issues Paper on Class Actions and Litigation Funding' (NZLC IP45, December 2020) paras 14.24ff; Mulheron (n 110) 67f.

[179] Poncibò and D'Alessandro (n 57) 51.

[180] Alex Jay, 'Funding Insolvency Litigation: A New Dawn' (2015) 8(5) Corporate Rescue and Insolvency 183; Christian Toms, 'Types of Litigation and Arbitration that Attract and Are Attractive to Litigation Finance: Part B Insolvency' in Steven Friel (ed) *The Law and Business of Litigation Finance* (Bloomsbury Professional 2020) 249, 267ff; Research Nester (n 23).

[181] The power to assign a cause of action – the approach originally taken in the UK – is another; See *Norgen Ltd v Reeds Rains* [1998] 1 BCLC 176 explaining the powers under s 165(3) (voluntary winding up) or s 167(1)(b) (court ordered winding up) of the Insolvency Act 1986 and para 6 of Schedule 4 of the Insolvency Act 1986.

[182] Standing Committee of Attorneys General (SCAG), Litigation Funding in Australia (Discussion Paper, May 2006) <https://dcj.nsw.gov.au/documents/about-us/engage-with-us/public-consultations/unsorted/litigationfundingdiscussionpapermay06.pdf> accessed 15 May 2024; Singapore Academy of Law, 'Law Reform Committee Report on Litigation Funding in Insolvency Cases' (February 2014) <https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2014-02%20-%20Litigation%20Funding%20in%20Insolvency%20Cases.pdf> accessed 15 May 2024.

- Ensuring that only meritorious cases are funded by a funder with a certain level of financial standing;
- Minimising conflicts of interest between the litigant and funder;
- Allowing the liquidator to retain control over the proceedings;
- Limiting the financial risk to the liquidator;
- Ensuring that the defendant and liquidator are not prejudiced in the event that the litigant's action is unsuccessful, and adverse cost orders are made;
- Protecting the litigant's confidentiality of information and documentation.

It can be seen that, broadly, these concerns reflect those which arise in the standard TPLF context. The unique aspect is the policy-driven ones of limiting financial risk to the liquidator and limiting exposure to adverse costs orders. This is an area in which statutory provisions may overlie any contract.

The main issues which are likely to arise, given the factual background, are control and the level of funder's fees. There are two main forms of TPF for insolvency disputes:

- The assignment model, where the funder takes full control of the litigation. In this model, the funder either monetises the claim up front or pays a modest amount to the insolvency practitioner on taking the assignment supplemented by an agreement as to how any settlement will be shared between the funder and the estate. In the modern context, this appears to be the preferred approach.
- The more traditional form of funding, which allows the insolvency practitioner to retain control but the funder is entitled to a success fee to be paid from any settlement.

Portfolio funding for insolvency practitioners and lawyers handling a portfolio of insolvency claims is increasingly common. Where a claim is not fully monetised up front, this model may also lead to conflicts issues.

## III. Arbitration

In the 2018 QMUL Survey on International Arbitration, cost was ranked by two-thirds of respondents as the worst characteristic of international arbitration.[183] As observed in the literature, this unbroken trend persisted across all editions of the survey from 2006–2018.[184]

It is accordingly not surprising that many believe that third party funding has a critical role to play in arbitration,[185] and that third party funding has been increasingly popular in this context.[186]

A corollary of the growth of third party funding in arbitration is that arbitral rules and associated guidance address its use with increasing frequency.[187] The purpose of this Commentary is not to add to or gloss those rules and guidance but rather to attempt to summarise the key considerations for parties entering into agreements

[183] Queen Mary University of London (QMUL), '2018 International Arbitration Survey: The Evolution of International Arbitration' 8.

[184] Sundaresh Menon, 'Arbitration's Blade: International Arbitration and the Rule of Law' (2021) 38 Journal of International Arbitration 1, 6.

[185] Valentina Frignati, 'Ethical Implications of Third-Party Funding in International Arbitration' (2016) 32 Arbitration International 505, 506f.

[186] Maxi Scherer, Aren Goldsmith and Camille Fléchet, 'Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives' (2012) International Business Law Journal, 207; Maxi Scherer, Aren Goldsmith and Camille Fléchet, 'Third Party Funding of International Arbitration Proceedings – A View from Europe Part II: The Legal Debate' (2012) International Business Law Journal 649. See also the more recent survey of School of International Arbitration (SIA)/Queen Mary University of London, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (2021) 8, which identifies availability of funding as a significant factor in choice of arbitration seat.

[187] Particularly in the light of the valuable guidance found in the 2018 ICCA-Queen Mary Report on Third Party Funding in International Arbitration (https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf) which has been influential in subsequent developments in individual rules.

for third party funding of arbitration in the hope of facilitating fair and effective third party funding. It must always be borne in mind also that both the governing law and the law of the seat may have an impact on the issues which arise.

While many of the principles set out above in respect of the third party funding of litigation are equally applicable to arbitration, the following matters require specific consideration in an arbitration context:

- Disclosure and Transparency
- Security for Costs
- Confidentiality
- Control
- Ancillary proceedings

These matters are expanded upon below.

### 1. Disclosure and Transparency

Protection of the impartiality of arbitrators, who may also continue to act as counsel and who rely (at least in part) on party appointments for their income, is a key concern in arbitration.[188] The 'IBA Guidelines on Conflicts of Interest in International Arbitration' promulgated in 2014 (2014 IBA Guidelines)[189] have recently been the subject of extensive review and consideration on topics including the impact of TPLF,[190] leading to the updated version published in February 2024 (2024 IBA Guidelines).[191] General Standard 2(a) of the 2024 IBA Guidelines requires that an arbitrator decline to accept an appointment or refuse to continue to act if he or she has any doubt as to his or her ability to be impartial or independent. General Standard 3(a) of the 2024 IBA Guidelines requires the arbitrator to disclose facts or circumstances which exist and which 'may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence'.

While Third Party Funders and insurers were previously mentioned in the Explanation to General Standard 6(b) of the 2014 IBA Guidelines, there was no specific conclusion with regard to it. In the updated 2024 IBA Guidelines the drafters ultimately concluded that an interest in or connection with a Third Party Funder involved in the dispute may compromise an arbitrator's perceived independence or impartiality. The explanatory notes to General Standard 6(b) of the 2024 IBA Guidelines state that a Third Party Funder may be considered to bear the identity of the party to the arbitration for the purposes of assessing the arbitrator's independence when the Third Party Funder or insurer exercises a 'controlling influence' over the party or has influence over the conduct of proceedings – including the selection of arbitrators. Consequently, it is arguable that two or more appointments of an arbitrator by parties backed by the same funder within three years would fall within the 'Orange List' of matters which may give rise to doubts as to an arbitrator's impartiality or independence.

The position of the relevant IBA Subcommittee was that the benefits of disclosing third party funding outweighed the detriments and, as a result, the 2024 IBA Guidelines extended the duty of disclosure of a party to any relationship between an arbitrator and a Third Party Funder in General Standard 7(a) of the 2024 IBA Guidelines (see also Explanation to General Standard 7(a)).

It is likely that this approach will pave the way for other institutional or arbitration rules to establish analogous or even stricter disclosure requirements in connection with third party funding.

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[188] See also Principle 5 (and respective Comments).

[189] International Bar Association (IBA), 'IBA Guidelines on Conflicts of Interest in International Arbitration' (23 October 2014) <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> accessed 15 May 2024 (2014 IBA Guidelines).

[190] The IBA Subcommittee identified third party funding as an issue during the preparatory discussions on the reviewed Guidelines. The majority of institutions indicated that this issue should be addressed in the reviewed Guidelines.

[191] International Bar Association (IBA), 'IBA Guidelines on Conflicts of Interest in International Arbitration' (February 2024) <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> accessed 15 May 2024 (2024 IBA Guidelines).

Whether or not this is so, there is a widespread view that an arbitrator should in every case be informed of the identity of a Third Party Funder so that they are able to recuse themselves if they have an interest in, or connection to, the funder. This view is given effect in Article 11(7) of the ICC Rules (2021),[192] which provides that:

In order to assist prospective arbitrators and arbitrators in complying with their duties [of impartiality and independence], each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.

Article 44 of the HKIAC Rules (2018),[193] Article 13a of the VIAC Rules (2021)[194] and Article 20(4) of the Danish Institute of Arbitration Rules (2021)[195] are to similar effect. In an investor-state context, Rule 14 of the ICSID Arbitration Rules (2022)[196] requires the provision of a written notice of third party funding upon registration of the request for arbitration or immediately upon concluding a third party funding arrangement after registration. Investment treaties may contain similar provisions.[197]

Some commentators argue that such disclosure is necessary to ensure that potential objections to an award are removed as early in the proceedings as possible, and accordingly falls within the tribunal's task of ensuring that an enforceable award is rendered.[198]

Difficult issues may arise in circumstances where a party to arbitral proceedings seeks to obtain third party funding after constitution of the arbitral tribunal as the conflicts review needs to extent to the tribunal.[199]

While there is a growing push towards disclosure of the existence of funding and the identity of the funder in arbitration proceedings, there seems to be a consensus that disclosure of the terms of the relevant funding agreement is unnecessary.[200] Article 13a of the VIAC Investment Arbitration Rules (2021)[201] provides (unlike many commercial arbitration counterparts) for the tribunal to order disclosure of details of the TPLF agreement, but such disclosure is only permitted where the tribunal deems it is 'necessary' and the details must be 'specific'.

***Sample Wordings:***[202]

> Upon conclusion of this agreement or commencement of the arbitral proceedings (whichever is sooner), the Funded Party shall disclose to the relevant arbitral institution: (i) that it is receiving third party funding in respect of the dispute; and (ii) the identity of the Funder. To the extent that there is no relevant arbitral institution, disclosure shall be made to the counterparty to the arbitration.

[192] International Chamber of Commerce (ICC), 'Rules of Arbitration' (2021) <https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf> accessed 15 May 2024 (ICC Rules).
[193] Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules (2018) <https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018%20Rules%20book/2018%20AA%20Rules_English.pdf> accessed 15 May 2024 (HKIAC Rules).
[194] Vienna International Arbitral Centre (VIAC), Rules of Arbitration and Mediation (2021) <https://www.viac.eu/images/documents/vienna_rules/VIAC_schieds_mediationsordnung_2021_e_20211110.pdf> accessed 15 May 2024 (VIAC Rules).
[195] Danish Institute of Arbitration, Rules of Arbitration (2021) <https://voldgiftsinstituttet.dk/wp-content/uploads/2021/06/4304611-regler-for-voldgift_04-2021_uk_web.pdf> accessed 15 May 2024.
[196] International Centre for Settlement of Investment Disputes (ICSID), Arbitration Rules (2022) <https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf> accessed 15 May 2024 (ICSID Arbitration Rules).
[197] See eg, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23, Article 8.26.
[198] Sahana Ramesh, 'Third-Party Funding in International Arbitration: Ownership of the Claim, Consequences for Costs Orders, and Regulation' (2020) 36 Arbitration International 275, 282.
[199] So Thomas H Webster and Michael W Bühler, *Handbook of ICC Arbitration: Commentary and Materials* (5th edn, Sweet & Maxwell 2021) para 11-57.
[200] See eg, Omar Puertas Álvarez and others, 'Two's a Crowd, Three's a Party: The Coming of Age of Third-Party Funding in International Arbitration' (2021) 40 Revista del Club Español de Arbitraje 25, 35.
[201] Vienna International Arbitral Centre (VIAC), Rules of Investment Arbitration and Mediation (2021) <https://viac.eu/en/investment-arbitration/content/vienna-rules-investment-2021-online> accessed 15 May 2024 (VIAC Rules of Investment Arbitration).
[202] In this section, Sample wordings generally reflect syntheses of common approaches across the various rules.

> [in the case of a Third Party Funding of Arbitration Agreement entered into after constitution of the tribunal]
>
> The Funder hereby acknowledges that it is not aware of any conflicts of interest in respect of the arbitral tribunal as constituted which may jeopardise its ability to comply with its obligations hereunder. Within [x] days of the signing of this agreement, the Funded Party will disclose to the arbitral tribunal the existence of the agreement and the identity of the Funder. Entry into force of this agreement is conditional upon no objection being raised by the arbitral tribunal to the Funder's involvement.

## 2. Security for Costs

Commentary on the use of third party funding in arbitration often revolves around the question of security for costs. This is because, as a non-party to the arbitration, a Third Party Funder is (absent the development in this context of concepts such as implied consent or specific provision in arbitral rules) unlikely to be subject to the jurisdiction of the tribunal and may therefore not be bound by an order to pay costs at the end of proceedings. In the case of an impecunious claimant, the result may be that the party seeking its costs is left out of pocket.

That risk may be especially high in the context of investor-state proceedings, where pursuit of proceedings may be particularly expensive[203] and there is typically a significant resource imbalance between the state and the investor. The ICSID Arbitration Rules (2022) respond to this by specifically providing at Rule 53(4) that the tribunal should consider the existence of third party funding in deciding whether to make an order for security for costs. It does not appear to be the case that the existence of third party funding will necessarily result in an order for security, however.[204]

As a result of these matters, some funded parties will be reluctant to disclose the existence of third party funding in order to avoid the risk of an order for security. Others will consider that the risk of such matters coming to light in any event means that it is strategically advantageous to provide early disclosure. Some stakeholders will argue that disclosure of third party funding is necessary to protect against prejudice to the defendant by enabling orders for security to be made where appropriate, while others still will say that there is no obligation on a party to disclose its impecuniosity and there should accordingly be no obligation to disclose third party funding.

It is not necessary to take a view on this debate in order to recommend as a matter of best practice that: (i) prospective funders of arbitration proceedings warn prospective funded parties of the risk of an order for security for costs with reference to the law and institutional rules applicable to the arbitration to be funded; and (ii) all third party funding agreements make specific and clear provision as to the funder's liability in respect of an order for security for costs. It should not be the case that a funder encourages the pursuit of arbitration then scales back or terminates its involvement on the making of an order for security unless the funder's right to do so is clearly set out in the third party funding arbitration agreement.

***Sample Wordings:***

> The Funder shall be responsible for satisfying any order against the Funded Party for the payment of security for costs in respect of the funded dispute.

## 3. Confidentiality

In most jurisdictions and under the rules of most major arbitral institutions, arbitration proceedings and awards are confidential (although there is a substantial minority of jurisdictions/institutions where publication is provided for). The common position on confidentiality gives rise to difficult issues in the context of third party funding. With the exception of Article 45.3(e) of

[203] William B Park and Catherine A Rogers, 'Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force' (2014) Penn State Law Legal Studies Research Paper 42/2014, 9 <https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1015&context=faculty_scholarship> accessed 15 May 2024.

[204] *Guaracachi America, Inc. and Rurelec PLC v The Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17 (*Guaracachi America v Bolivia*).

the HKIAC Rules (which permits communication of information regarding the arbitration for the purposes of having or seeking third party funding), there is little explicit guidance on questions such as whether a party to ongoing arbitration proceedings can pass information about those proceedings to an existing or potential Third Party Funder, or whether a party that has obtained an award can share the contents of that award with funders when seeking funding for enforcement proceedings. Under some arbitral rules (such as Rule 30.1 of the LCIA Rules 2020),[205] it seems likely that it would suffice for a funded party to seek an undertaking of confidentiality from a funder, but this is by no means clear.

In light of this ambiguity, it is recommended that, prior to entering into a third party funding arbitration agreement, the prospective parties investigate: (i) the scope of applicable confidentiality obligations under the applicable law and institution rules; and (ii) the likely effect that this will have on the provision of funding. Further, it is important that third party funding arbitration agreements make clear provision as to the funding party's confidentiality obligations in respect of the arbitration and any award.[206] In circumstances where there is no clear guidance in the applicable law or rules, it may also be advisable to make provision for the risk that the passing of information to the Third Party Funder is deemed to be a breach of confidentiality and/or restricted by the tribunal.

***Sample Wordings:***

> The Funder shall be subject to the same confidentiality obligations as imposed upon the Funded Party under the arbitral rules and/or applicable law. The Funder undertakes to maintain the confidentiality of all information that it receives regarding the arbitral proceedings, including the content of any award, except insofar as disclosure is permitted by the arbitral rules and/or applicable law.

> In the event that, after entering into this agreement, the Funded Party is specifically prohibited by the arbitral tribunal from passing information regarding the arbitral proceedings to the Third Party Funder, [the Third Party Funder will have the option to terminate this agreement] / [the Third Party Funder shall be obliged to continue providing funds upon request by the Funded Party's legal representatives notwithstanding that prohibition].

### 4. Control

It has long been doubted whether the common law torts of champerty and maintenance apply to arbitration proceedings.[207]

This, combined with reduced public scrutiny in respect of (typically confidential) arbitration proceedings as compared to (public) litigation proceedings, may mean that there is a greater likelihood of funders taking significant control over the conduct of arbitration proceedings. Perceptions of the appropriateness of such an approach are likely to be divergent: international arbitration draws together practitioners with varying backgrounds approaching such issues from different ethical and legal frameworks.

In these circumstances, it is particularly important that agreements for third party funding of arbitration clearly set out the degree of control that the funder will be permitted to exercise over the proceedings. As a minimum, compliance with the requirements set out in Principle 10(3) should be essential.

***Sample Wordings:***

> The Funded Party shall be required to: (a) keep the Funder informed of the progress of the arbitration; and (b) consult the Funder prior to: (i) taking any step that is likely to significantly

[205] The London Court of International Arbitration (LCIA), Arbitration Rules (2020) <https://www.lcia.org/media/download.aspx?MediaId=955> accessed 15 May 2024 (LCIA Rules).
[206] Frignati (n 185) 512.
[207] See Steyn LJ's comments at page 331 of *Giles v Thompson* [1993] 143 NLJ 284 in the English Court of Appeal and Kaplan J's finding in *Cannonway Consultants Limited v Kenworth Engineering Limited* [1995] 1 HKC 179 in the Hong Kong High Court.

increase the cost of the proceedings; or (ii) entering into any compromise or settlement of the proceedings. However, the Funded Party shall retain full control of decision-making in respect of the arbitral proceedings and shall not be required to comply with any directions or views that the Funder may express upon being so consulted.

The Funded Party shall be required to: (a) keep the Funder informed of the progress of the arbitration; (b) defer to the Funder in respect of decisions relating to the conduct of the claim; and (c) obtain the Funder's express approval prior to entering into any compromise or settlement of the proceedings.

## 5. Ancillary Proceedings

Parties to an arbitration agreement will on occasion have recourse to national courts. They may do so for a variety of reasons aside from the obvious one of enforcement. Parties may seek to stay legal proceedings brought in breach of an arbitration agreement, to seek the appointment by the court of an arbitrator, to obtain injunctive relief in support of arbitral proceedings, to challenge the jurisdiction of a tribunal, and/or to challenge an award.

The possibility of recourse to national courts and the very different approaches taken by national courts to what relief can be provided by the courts raises specific issues which should be dealt with in a third party funding arbitration agreement. In particular, it is important that: (i) the parties to a funding agreement consider the enforceability of that agreement in the context of both arbitration and litigation proceedings; and (ii) the third party funding arbitration agreement makes specific provision for the costs of such ancillary proceedings.

***Sample Wordings:***

The Funder's obligation extends to the provision of funds for ancillary proceedings in national courts which are considered by the Funded Party's legal representatives to be [necessary for the successful pursuit of the arbitration] / [in the Funded Party's best interests as regards the funded dispute].

## 6. Other Matters

### *a. Treaty Provisions in Investor-State Dispute Settlement (ISDS)*

In the context of investor-state arbitration, specific regard will need to be had to the terms of the investment treaty under which a claim is brought. As noted by UNCITRAL, there is a growing trend for investment treaties to include provisions addressing third party funding.[208] Some treaties prohibit third party funding entirely. It is accordingly essential in the context of funding of investor-state arbitration that the funder considers and brings to the attention of the funded party any terms of the relevant treaty that may have an impact on the funding to be provided or the investor's claim more generally.

### *b. Enforcement*

Various commentators state that the buying up of unpaid ICSID awards is the first step in the emergence of the new market in investment arbitration claims.[209] This practice continues to attract commentary and now apparently extends beyond ICSID claims. It is not relevant to the Principles, but is a factor which those involved in third party funding arrangements in the context of arbitration may wish to consider.

[208] UNCITRAL Secretariat, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019) paras 79ff <https://documents.un.org/doc/undoc/gen/v19/104/76/pdf/v1910476.pdf?token=7vxuHc9UAJ6Oueta2r&fe=true> accessed 15 May 2024.

[209] See eg, Dimitrij Euler and Giuseppe Bianco, 'Breaking the Bond: Vulture Funds and Investment Arbitration' (2013) 31 ASA Bulletin 558.

# IV. Crowdfunding of Litigation

A relatively recent development in the funding of litigation by third parties is crowdfunding.[210] Technically, in many cases, it will not be third party funding in the sense envisaged by these Principles, because much crowdfunding is altruistic. However, not all crowdfunding is altruistic. Further, as a form of third party funding, a number of the legal principles which impact the Principles may also impact this model of funding.

## 1. Nature and Scale of Crowdfunding

There are a variety of online platforms which have effectively created the crowdfunding phenomenon. Examples are Kickstarter, GoFundMe, Crunchbase, Indiegogo and Rockethub.

Crowdfunding was initially deployed as a source of funding for a variety of needs such as education, medical expenses, charities, and start-up businesses, as well as artistic endeavours. Technology and ingenuity have managed the transition of the concept to litigation funding.

In the arena of litigation, it facilitates those pursuing litigation to procure funding from interested online communities. It therefore is centred on forms of litigation which have an appeal to a 'casual' and likely non-professional market. There are now specialist platforms for crowdfunding of litigation – most notably CrowdJustice. Such platforms operate as a shop window for causes looking for funding, but also as both a promoter and due diligence of appeals for funding. In return for these portfolios of services it takes a percentage fee – generally about 4–9%. Some, such as LexShares and AxiaFunder, operate more similarly to traditional funders effectively sifting cases based on a merits assessment. LexShares is subject to SEC regulation and Axia has an FCA licence.

Crowdfunding is still very much in its first, development, stage. There are essentially four models:

- Equity-based, where the funder contributed for a financial return in the form of a share in future gain if the cause of action succeeds;
- Debt-based, where the funder expects repayment with interest in the event of success;
- Reward-based, where the funder expects a non-monetary benefit;
- Donation-based crowdfunding.

The first two types are called 'investment-based' crowdfunding. The latter are 'non-investment based' forms of crowdfunding.

## 2. In Which Types of Case is Crowdfunding Being Used?

Recent research has focussed on cases funded through Crowdjustice.[211] These are predominant in the USA and UK. This research provided a sample of 565 cases of which 84% were in the UK. The cases covered a fairly wide range of topics but the majority were in the public law space: human rights, environmental, judicial review, electoral and miscellaneous public interest. Other areas of interest were criminal, inquests, defamation, politics/voting rights and intellectual property. Only a minority of cases have been successful (1:6 ratio) – of those, a disproportionate number were in the UK (93% of the successful cases). The researchers note that crowdfunding case descriptions engage sentiment and emotion and that this correlates to the amount raised.

Crowdfunding is, however, emerging elsewhere: one prominent politician funded a defence of a defamation claim via a crowdfunding site.

[210] During the 1950s and early 1960s, there was a form of crowdfunding civil rights cases. This led to *NAACP v Button*, 371 U.S. 415 (1963), where the US Supreme Court held that third party funding undertaken to promote political and civil rights was protected under the First Amendment.
[211] See eg, Sam Guy, 'Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation' (2023) 86 Modern Law Review 331.

### 3. Interaction with the Principles

#### *a. Fees*

Investment-based crowdfunding aligns most closely with the Principles as it engages with questions of reward in similar ways. Investment-based crowdfunding will analytically engage similar issues on capping of fees/return to those which pertain in relation to standard third party funding. However, in order to preserve access to justice, there may need to be a more relaxed view as to return, given that such cases will probably (*ex hypothesi*) fall outside the remit of standard third party funding. Crowdfunding offers a route for some – but not all – cases where the risk/reward ratio of the litigation makes it unattractive to traditional litigation funders. It therefore provides access to justice where other systems are lacking. To that extent, it can stand outside the constructs which inform the analysis on return outlined in the Principles.

Non-investment-based crowdfunding does not engage public interest issues of return and fees; but there may nonetheless be practical issues if a fund remains after successful litigation concludes.

#### *b. Control and Conflicts*

Because of the multiple funders involved and the tendency for individual donations to be small, crowdfunding provides a way in which issues surrounding funder control and conflicts can be ameliorated.

#### *c. Transparency/Termination/Capital Adequacy*

Issues such as disclosure, termination and capital adequacy remain.

### 4. Unique Issues

#### *a. Transparency in Fundraising*

The use on some unregulated platforms[212] of emotive language in the case descriptions which promote crowdfunding raises an obvious issue as to transparency, which differs from the transparency issues which occur in conventional third party funding. There is a real risk in such cases of causes being mis-sold or over-sold in order to engage attention and funding willingness. Indeed, England's Law Society Gazette has suggested that crowdfunding may be 'the next mis-selling scandal'.[213] There are also issues about transparency as to the need to make provision within the fund for paying adverse costs awards.

Some commentators have also identified the possibility of a 'fabricated crowd' to disguise the identity of a real funder who does not wish to be identified.

#### *b. Merits Issues/Abuse of Process*

There is also a real risk (particularly in non-investment-based cases) of the merits of the claim being sufficiently weak as to amount to an abuse of process. An example was a crowdfunded private prosecution which was dismissed as 'vexatious' (ie abusive) by the Administrative Court of England and Wales[214]. There is just scope for waste not just of the contributors' funds, but also of judicial and administrative resources, which would not have been incurred absent crowdfunding.

Such issues highlight the need for control to be exercised by the platform, even where the causes involved are not seeking investment-based funding. In some jurisdictions, local law (eg via the Digital Services Act which requires platforms to put in place measures to counter illegal goods, services or content online), may provide a framework for this.

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[212] This is unlikely to occur on regulated platforms.

[213] Jolyon Maugham KC, 'Is Crowdfunding the Next Mis-selling Scandal?' (*The Law Society Gazette*, 20 July 2020) <https://www.lawgazette.co.uk/practice-points/is-crowdfunding-the-next-mis-selling-scandal/5105038.article> accessed 15 May 2024.

[214] *R (Johnson) v Westminster Magistrates Court* [2019] EWHC 1709 (Admin).

#### c. Understanding of Risks

There are issues about the liability of contributors for the costs of the other party if the litigation does not succeed, which may not be understood by the individual funders. Although there may be practical issues about attaching liability to people who funded litigation through a funding platform, because most of those people will remain anonymous, there may well be arguments that they fall within the ambit of rules which make funders liable for costs. It is possible to envisage funding platforms being ordered to disclose the identity of funders, in the same way that funded litigants are. The fact that these small funders have no influence on the litigation (contrary to professional funders) will not necessarily be sufficient to protect them from such liability.

#### d. Other Issues

For funders:

- Disclosure requirements may engage issues of privacy – contributors may not entirely appreciate the extent to which their involvement may become visible to others.

- There may also be issues as to the fairness of any fund distribution to contributors and how that is disclosed.

For lawyers: As Australian commentator Arthur Moses SC has highlighted (as well as the issue of liability for misrepresentations made by the party seeking funding) the fact that:

'lawyers have strict professional, legal and ethical obligations which govern what and how much lawyers may charge for legal services, who they may receive monies from, how such monies are to be handled, and how such monies are to be accounted for. An obvious difficulty with crowdfunded litigation is that it is very difficult for a lawyer to know precisely who has contributed funding and for what purpose'.[215]

There are questions of setting the target for funds higher than it needs to be and 'over-raising' funds which cannot then be returned to donors.

[215] Arthur Moses SC, 'Crowdfunding Litigation: A Problem or a Solution?' (Australasian Lawyer, 17 July 2019) <https://www.thelawyermag.com/au/news/general/crowdfunding-litigation-a-problem-or-a-solution/207467> accessed 15 May 2024.

# D. Related Concepts

## I. DBAs and CFAs

Damages Based Agreements (DBAs) and Conditional Fee Agreements (CFAs) are fee arrangements in which the legal representative's remuneration is conditional on the outcome of the litigation.

- Under a DBA, the legal representative's fee is calculated as a proportion of the sums to be recovered. In the US, this is known as a 'contingency fee arrangement'. The contingency fee arrangement has existed in the USA since the nineteenth century.[216]

- Under a CFA, also known as a 'no win, no fee' or 'success fee' arrangement, the legal representative's fees will similarly only be payable in defined circumstances (typically success), but that fee will not be calculable as a proportion of the damages. Instead, the lawyer's normal fees will be payable plus, in certain cases, a success fee or uplift, calculable as a proportion of the legal representative's fees. CFAs are typically administered by claims management companies, whose role is to 'solicit claims en masse … then, typically, farm them out to solicitors on their panel for a referral fee'.[217]

It is only relatively recently that forms of conditional/contingency fee arrangement have begun to gain traction outside the US. Legislation permitting CFAs in certain proceedings was enacted in England and Wales in 1990,[218] in Victoria, Australia in 1996, and in Singapore in 2022. DBAs or contingency fee arrangements have followed just behind, with such arrangements introduced in some capacity in South Africa in 1997, in Ontario, Canada in 2004, in England and Wales in 2009, and in Victoria, Australia in 2020.

In most European jurisdictions, however, DBAs or contingency fee arrangements remain prohibited.[219] In 2013, the European Commission recommended that Member States should not permit contingency fees on the basis that they risked creating improper incentives for lawyers.[220]

CFAs and DBAs have generally been seen as different from TPLF in two respects. First, the benefit being provided is not direct financing but rather the provision of legal services. This distinction may be less significant than it appears: as Lord Neuberger observed in a 2013 lecture,[221] the legal representative is 'funding the litigation through providing their time and expertise for nothing'. Further it has, at least in England and Wales, currently been held to be 'financial services or assistance' and thus to be (on the wording of the statute in question) 'claims management services' not legal services – bringing

[216] Peter Karsten, 'Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940' (1998) 47 DePaul Law Review 231.

[217] Michael Zander, 'Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees' (2002) 52 DePaul Law Review 259, 280.

[218] The extent to which DBAs have actually been taken up in the UK has been doubted, however, with one author stating 'DBAs appear to be like the Yeti: they are believed to exist in practice but hardly any sightings have been made' so John Peysner, 'Impact of the Jackson Reforms: Some Emerging Themes' (Report prepared for the Civil Justice Council Cost Forum, 21st March 2014) 10 <https://www.judiciary.uk/wp-content/uploads/2014/05/impact-of-the-jackson-reforms.pdf> accessed 15 May 2024.

[219] Jef De Mot, Michael Faure and Louiss Visscher, 'TPF and Its Alternatives: An Economic Appraisal' in Willem H van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 31, 35.

[220] European Commission (EC), Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) [2013] OJ L 201/60.

[221] David Edmond Neuberger, *From Barretry, Maintenance and Champerty to Litigation Funding*, Harbour Litigation Funding First Annual Lecture (8 May 2013) <https://www.supremecourt.uk/docs/speech-130508.pdf> accessed 15 May 2024.

many TPLF agreements governed by English Law within the definition of DBAs.[222] This indicates the narrowness of the gap between the concepts.

Second and more importantly, the party providing the benefit to the litigant in exchange for the contingent reward is classically not a true third party but the legal representative of the litigant. This second factor is critical for several reasons.

- **There is a risk of financial incentives**. There is a risk that conditional/contingency fee arrangements create financial incentives for legal representatives which do not coincide with the interests of the client and/or the legal representative's duty to the court. This point is made by the European Commission in the Commission Recommendation noted above.[223] Lord Neuberger has also stated:

  [The lawyers'] financial interest in a successful outcome means that there may be a strong personal temptation not to be straight with their opponents and with the court. It can also risk putting them in conflict with their clients – the obvious example is accepting an early offer so as to avoid doing a lot of work.[224]

  There is anecdotal evidence of this risk materialising in the US, with lawyers taking on smaller cases, seeking to negotiate a quick settlement and either succeeding or dropping the case.[225]

- **Seriousness of conflicts of interest in the justice system.** The importance of the lawyer within the justice system means that conflicts of interests of these kinds are particularly serious and call for careful regulation. Public perception of lawyers is likely to be bound up with public perceptions of the justice system more widely. In England, the appropriateness of contingency fee arrangements was drawn into sharp and public focus by proceedings in *Nigeria v P&ID*,[226] where it came to light that two legal representatives, who were found to have acted improperly in failing to return privileged documents in an arbitration between the parties, stood to gain up to £3.85 billion under contingency fee arrangements in the event that their client's case was successful.

- **There is no third party involvement.** CFAs and DBAs are effectively bipartite rather than tripartite. Within this bipartite relationship, the lawyer has both an economic interest that may differ from the client and (in most cases) greater knowledge and experience of legal proceedings than the client.[227] While a similar asymmetry may exist between a funder and funded party (and the funder may have incentives that differ from the client's in the same way as a lawyer acting on a conditional/contingency fee arrangement), the tripartite nature of TPLF means that there is an inherent safeguard against exploitation in the involvement of a lawyer who does not have a direct financial interest in the outcome of the proceedings.

It should be noted, however, that 'classic' TPLF may, and often does, exist alongside conditional/contingency fee arrangements, with the funder entering into a conditional/contingency fee with the legal representative. Indeed, CFAs are described as 'ubiquitous' in the litigation funding market 'in large part due to the fact that funders generally prefer to fund only part of a lawyer's fees and that the existence of a CFA demonstrates the firm's risk alignment with the funder'.[228] If such an arrangement exists, the

[222] See the decision of the UK Supreme Court in *PACCAR* [2023] UKSC 28, [2023] 1 WLR 2594. The decision has been highly controversial with legislation to reverse it being a real possibility.

[223] EC (n 220).

[224] Neuberger (n 221) 21.

[225] Richard Moorhead, *Contingency Fees: A Study of their Operation in the United States of America* (Civil Justice Council, November 2008) 16.

[226] *The Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm) (*Nigeria v P&ID*).

[227] Christopher Mendez, 'Welcome to the Party: Creating a Responsible Third-Party Litigation Funding Industry to Increase Access and Options for Plaintiffs' (2021) 39 Mississippi College Law Review 102, 115f.

[228] Ben Summerfield and Emma Shafton, 'Other Methods of Financing Litigation - Part D: Contingency and Conditional Fee Agreements' in Steven Friel (ed) *The Law and Business of Litigation Finance* (Bloomsbury Professional 2020) 247, 248.

safeguard created by the tripartite structure of TPLF will be eroded. Such arrangements may leave a client particularly vulnerable and might call for specific regulation.

What interaction (if any) should then exist between the regulation of CFAs and DBAs and the regulation of TPLF? As the above points demonstrate, caution is required in seeking to draw parallels between TPLF and conditional/contingency fee arrangements. Nevertheless, there are several areas in which existing treatment of conditional/contingency fee arrangements may be instructive in the development of TPLF regulation:

- **Fee caps.** Pursuant to the Damages-Based Agreement Regulations 2013 (DBA Regulations 2013) in England and Wales, the percentage of damages to which the legal representative is entitled under a DBA is limited to 25% in respect of personal injury claims and 50% in other claims (except employment). Similar provisions exist in other jurisdictions. The caps deemed appropriate in respect of legal representatives' percentage recoveries may be of assistance in determining appropriate caps (if any) in the context of TPLF. On one view, higher limits may be appropriate in TPLF which benefits from the inherent safeguards provided by a tripartite system and the involvement of (where applicable) a legal representative with no financial interest in the outcome.

- **Termination.** Detailed provision has been made regulating the termination of DBAs in certain contexts. In England and Wales, for example, Regulation 8 of the DBA Regulations 2013 imposes conditions concerning the termination of DBAs in employment cases. Some are specific to contingency fee arrangements ('If the agreement is terminated, the representatives may not charge the client more than the representative's costs and expenses for the work undertaken…'), but others are of potential relevance in a TPLF context (whether in the development of regulation or as terms of a TPLF agreement): 'The client may not terminate the agreement – (a) after settlement has been agreed; or (b) within seven days before the start of the tribunal hearing'.

- **Minimum content**. The importance of core minimum content has been recognised. Regulation 3 of the DBA Regulations 2013 stipulates the minimum content of DBAs. DBAs are required to specify: (i) the claim or proceedings or parts of them to which the agreement relates; (ii) the circumstances in which the representative's payment, expenses or costs are payable; and (iii) the reason for setting the amount of payment at the level agreed. Regulations of this kind may be helpful to jurisdictions seeking to impose minimum content requirements on TPLF agreements. Regulation 5 of the Legal Profession (Conditional Fee Agreement) Regulations 2022 in Singapore requires inter alia inclusion of terms setting out the particulars of the basis of calculation of the uplift fee and an estimate or range of estimates of the resulting quantum of the uplift fee.

- **Transparency.** Transparency requirements under DBA/CFA regulations are also instructive. Regulation 3(2)(c) of the DBA Regulations 2013 requires the provider to inform the prospective client whether other methods of pursuing the claim or financing the proceedings are available, and, if so, how they apply to the client and the claim or proceedings in question. Similar provision was made in the South African Contingency Fees Act 66 of 1997. Section 3.4.14 of the Legal Professional Act 2004 (Victoria, Australia) requires a law practice providing a costs agreement with an uplift fee to disclose to the client in writing prior to entry into the agreement: (i) the law practice's usual fees; (ii) the uplift fee (expressed as a percentage of those fees); and (iii) reasons why the uplift fee is warranted. Regulation 4 of the Legal Profession (Conditional Fee Agreement) Regulations 2022 (Singapore) requires inter alia that the provider inform the client in writing in plain language of the client's right to seek independent legal advice before entering into the CFA.

## II. Insurance

Cover for legal costs may also be provided by insurance, whether in the form of an add-on to broader liability insurance or by way of specific legal expenses insurance. Legal expenses insurance (LEI) as a commercial insurance product developed in the 1900s.[229]

LEI may be broken down into 'before the event' (BTE) and 'after the event' (ATE) insurance.

- BTE insurance includes all forms of cover taken out prior to the inception of a dispute which provide cover against the costs of legal proceedings payable by the insured party (whether incurred by the insured party or their opponent). This will range from specific BTE legal expenses insurance to family legal protection cover often provided as part of a home and contents insurance policy. The nature and scope of the cover to be provided will depend on the terms of the policy. BTE insurance will often impose a minimum claim threshold and reserve to the insurer the right to scrutinise the prospects of success and potential recovery.[230]

- ATE insurance is issued after a dispute has arisen. Typically, ATE insurance covers a claimant against potential exposure to the other party's costs in the event that the insured party fails in the specific litigation. In the UK, the development of ATE insurance has gone hand in hand with the development of CFAs because ATE insurance is frequently taken out by insureds who have entered into a CFA in respect of their own costs but remain exposed to the other side's costs. Various options are available as to the method of payment of the premium. In particular, it may be deferred or contingent on the outcome of the matter.[231] In cases where premium is deferred or contingent, the ATE insurer is likely to seek to contract for a more active role in the management of the case, and premiums are likely to be higher.

The key difference between these forms of insurance and TPLF is that the insurer is not (at least typically) entitled to a share of the spoils if the insured party is successful in the litigation (albeit that in respect of contingent premium ATE insurance, liability for the premium is conditional on success). As set out below, both BTE and ATE insurance can nevertheless give rise to similar issues to those discussed in the context of TPLF.

### 1. Differences in Approach Across Jurisdictions

LEI is widely available throughout the EU, though is only available outside the EU in limited locations. Directive 87/344/EEC[232] (LEI Directive – now repealed) and Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (commonly known as Solvency II)[233] contain provisions (Articles 198–205) concerning the development of a unified, common LEI market across EU Member States, and provide equal protection of rights.

The take up and availability of LEI differs widely in different jurisdictions. Germany, Japan and Sweden are jurisdictions with a widespread LEI market, whereas Australia, Canada, England and Wales, the Republic of Korea, Scotland and South Africa have more limited markets. Research suggests that a range of factors, including the lack of publicity surrounding LEI and differing costs regimes which affect the risk profile of the business for insurers, are involved in this disparity.[234]

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[229] Willem H van Boom, 'Insuring vs. Investing in Litigation: A Comparative History of Litigation Insurance and Claim Investment' (2020) 8 Comparative Legal History 2, 16.
[230] Cristian Toms, 'Other Methods of Financing Litigation - Part C Insurance' in Steven Friel (ed) *The Law and Business of Litigation Finance* (Bloomsbury Professional 2020) 227, 228.
[231] ibid 232.
[232] Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance [1987] OJ L 185/77 (LEI Directive).
[233] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) [2009] OJ L 335/1.
[234] Anna McNee, *Legal Expenses Insurance and Access to Justice* (International Bar Association 2019).

## 2. Interaction with the Principles

### *a. Control*

There may be debate as regards the litigant's right to instruct its own lawyer. Often, this will simply be a question of construing the relevant policy. Van Boom[235] notes that BTE policies frequently provide for the insurer to choose an appointed representative, with the insured retaining (albeit frequently unaware of) the right to choose another representative if dissatisfied. Perhaps due to the established position of insurers in commerce and the prevalence of subrogation, questions of excessive control over actions by BTE and ATE insurers do not appear to have generated the same concern as control by Third Party Funders. In the EU, the Legal Expenses Insurance Directive (87/344/EEC) and the later Solvency II nevertheless requires that any contract of legal expenses insurance should expressly recognise that the insured should be free to choose the lawyer to represent them in any inquiry or proceedings. However, the degree to which this is reflected in individual jurisdictions is doubtful: the IBA commentary suggests it is complied with in five jurisdictions only.

### *b. Transparency*

Notwithstanding the differences between them, both insurers and third-party funders have an interest in the result of a funded case. As a result, there may be a need for disclosure of the involvement of insurers in certain circumstances. For example, the explanation to General Standard 6 of the IBA Guidelines states that both funders and insurers may have a direct economic interest in the award and may therefore be considered to be the equivalent of the party for the purposes of disclosure by an arbitrator.

### *c. Conflicts of Interest*

Several kinds of conflict may arise.

- As above, conflicts may arise between the insurer and insured by virtue of the insurer's interest in the outcome of the case. Silver gives the example of a situation in which a settlement offer is made at the top-end of an insurer's limit of liability:[236] the insurer will know that it does not stand to lose any more at trial if the claim is successful, while proceeding will give it some chance of not having to pay out at all (if the defence is successful). In such circumstances, the insurer's interest will conflict with that of the insured. Silver's view is that this problem is resolved in US insurance law by the imposition of a duty to settle. In other legal systems, duties of good faith may apply to regulate the insurer's behaviour in such circumstances.

- Legal expenses insurance may also give rise to conflicts of interest where the two parties involved or interested in a dispute are covered by the same insurer.

- Finally, issues may arise as to whether the legal representative's duty is to the insured or the insurer. As Silver (2014) notes at 629, in most jurisdictions, doctrines have evolved to govern lawyers' professional responsibilities in these situations.

The LEI Directive and Solvency II seek to protect insureds where such conflicts do arise. Among other things, the Directive provides that: (i) any contract of legal expenses insurance should recognise that the insured shall be free to choose a legal representative to serve their interests whenever a conflict of interest arises; (ii) arbitration or an equivalent procedure should be available in the event of a difference of opinion between the insurer and insured; and (iii) where a conflict of interest arises, the insured should be informed of the possibility of recourse to this dispute resolution mechanism.

LEI is perhaps of particular interest, quite apart from its relationship to TPLF, as a key mechanism for facilitating access to legal advice and representation for what the IBA refers to as 'the forgotten middle' in some jurisdictions.

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[235] Willem H van Boom, 'Juxtaposing BTE and ATE: the Role of the European Insurance Industry in Funding Civil Litigation' (2010) Oxford University Comparative Law Forum 1 <https://ouclf.law.ox.ac.uk/category/year/2010/> accessed 15 May 2024.

[236] Charles Silver, 'Litigation Funding versus Liability Insurance: What's the Difference?' (2014) 63 DePaul Law Review 617, 645.

# Select Bibliography

This bibliography comprises sources cited in this document, alongside additional materials that could prove valuable for anyone working with these Principles. Considering the extensive literature on third party litigation funding, the goal of this bibliography is to offer a representative selection rather than a comprehensive guide. The included sources reflect the foundational understanding of the team members, taking into account practical constraints of time and resources.

The literature predominantly features English language sources, reflecting the maturity of jurisdictions where litigation funding has been established for a longer period and on a broader scale. In these regions, the body of accompanying literature is more robust. Comparative academic studies often reference English language common law-based jurisdictions or are written directly in English. Additionally, the selection process has prioritised literature that is accessible from a linguistic perspective.

Several sources provide information on major jurisdictions where litigation funding is prevalent. Country-specific overviews are regularly published by jurists from large legal practices, in collaboration with professionals active in the funding community and market analysts. These reports provide valuable insights into the litigation funding landscape of each country. However, it is important to always approach these overviews with caution, as they can quickly become outdated, particularly in the dynamic and rapidly changing landscape of the litigation financing market, especially in the European context.

In England and Wales, recent contributions by prominent scholars include reports and books with extensive case tables and detailed historical analyses.

Similarly, the US, as the largest market for litigation funding, is well-documented with numerous detailed legal and empirical studies. Canada is also covered in the literature.

Countries in the Asia-Pacific region such as Australia, Hong Kong, and Singapore are notable for their detailed discussions on litigation funding practices found in various sources.

For insights into regulatory and policy developments within the European Union, detailed articles provide overviews of legislative evolution. In the Netherlands, discussions often focus on collective redress mechanisms, exploring the potential for establishing litigation funds to support collective actions. Similarly, in Germany, discussions centre around collective action redress mechanisms that heavily regulate third party litigation funding. Comprehensive publications also offer insights into jurisdictions like France, Spain, and Portugal.

As the TPLF market undergoes rapid evolution worldwide, new resources continually emerge to reflect and assess the latest developments. This evolving and expanding literature underscores TPLF as one of the most dynamic fields in litigation, emphasising that any bibliography selection can only capture a snapshot in time rather than comprehensively covering the entire domain.

# Cases Cited

*The Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm) [2023] EWHC 2638 (Comm) (*Nigeria v P&ID*)

*Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655

*Campbells Cash and Carry v Fostif Pty Ltd* [2006] HCA 41 (*Fostif*)

Castlewood Group Pte Ltd (in creditors' voluntary liquidation) [2022] SGHC 117

*Excalibur Ventures LLC v Texas Keystone Inc*

*Giles v Thompson* (1993) 143 NLJ 284

*Gutmann v First MTR South Western Trains Limited* [2021] CAT 31

*Jeffrey L Berman v. SPF CDO I Ltd* [2011] 2 HKLRD 815

*Norgen Ltd v Reeds Rains* [1998] 1 BCLC 176

*PACCAR v CAT* [2023] UKSC 28 [243] (*PACCAR*)

*PricewaterhouseCoopers v Walker* [2017] NZSC 151

*PricewaterhouseCoopers v Walker* [2018] 1 NZLR 735

*R (Factortame Ltd and Others) v Secretary of State for Transport* [2002] EWCA Civ 932 [85]

*Recovery Partners v Rukhadze* [2022] EWHC 690 (Comm)

*Schenk v Valeant Pharmaceuticals International Inc*. 2015 ONSC 3215 (*Schenk*)

*Stichting Nuon-Claim v Vattenfall* [2023] Rb. Amsterdam, 25 October 2023, ECLI:NL:RBAMS:2023:6683 (*Vattenfall*)

*Stichting Onderzoek Marktinformatie v TikTok* [2023] Rb. Amsterdam 25 October 2023, ECLI:NL:RBAMS:2023:6694 (*TikTok*)

*Travelers Insurance Company Ltd v XYZ* [2019] UKSC 48

*Guaracachi v Bolivia* (ICSID, 2013) - *Guaracachi America, Inc. and Rurelec PLC v The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17

CJEU, Case 173/2023 *Eventmedia Soluciones SL v Air Europa Líneas Aéreas SAU*, ECLI:EU:C:2024:295 (11 April 2024)

*Cannonway Consultants Limited v Kenworth Engineering Limited* (1994) [1995] 1 HKC 179 [Hong Kong]

*NAACP v. Button*, 371 U.S. 415 (1963) [USA]

OGH 6 Ob 224/12b (27 February 2013) [AT]

# Books


Cabrillo F and Fritzpatrick S, *The Economics of Courts and Litigation* (Edward Elgar 2008)

Friel S (ed), *The Law and Business of Litigation Finance* (1st edn, Bloomsbury Professional 2020)

Gsell B and Möllers T (eds), *Enforcing Consumer and Capital Markets Law: The Diesel Emissions Scandal* (Intersentia 2020)

Hensler DR, Hodges C and Tzankova I, *Class Actions in Context: How Culture Economics and Politics Shape Collective Litigation* (Edward Elgar 2016)

Horeman D and de Monchy M, *Unlocking the WAMCA: A Practical Guide to the New Collective Action Regime in the Netherlands* (2nd edn, De Brauw Blackstone Westbroek 2022)

Kramer X, Tzankova I, Hoevenaars J and van Doorn K, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?* (Eleven International Publishing 2024)

Kramer X, Hoevenaars J, Kas B and Themelis (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022)

Kramer X, Voet S,Ködderitzsch L, Tulibacka M, and Hess B (eds), *Delivering Justice: A Holistic and Multidisciplinary Approach* (Hart Publishing 2022)

Latham S (ed), *Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd 2021)

Legg M, *Case Management and Complex Civil Litigation* (2nd ed, The Federation Press 2022)

Mulheron R, *The Modern Doctrines of Champerty and Maintenance* (Oxford University Press 2023)

Pitkowitz N (ed), *Handbook on Third-Party Funding in International Arbitration* (2nd edn, JurisNet 2024)

Sebok A J, *Third-Party Litigation Finance: Law, Policy, and Practice* (1st edn, Aspen Publishing 2024)

Simon R and Müllerová H (eds), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?* (Institute of State and Law of the Czech Academy of Sciences 2019)

Solas G M, *Third Party Funding: Law, Economics and Policy* (Cambridge University Press 2019)

Storskrubb E (ed), *YSEC Yearbook of Socio-Economic Constitutions 2022: Funding Justice* (Springer 2022)

Tillema I, *Entrepreneurial Mass Litigation: Balancing the Building Blocks* (Erasmus University 2019)

Uzelac A and van Rhee C H (eds), *Access to Justice and the Judiciary: Towards News European Standards of Affordability, Quality and Efficiency in Civil Adjudication* (Intersentia 2009)

Uzelac A and Voet S (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021)

van Boom W H (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017)

Webster T H and Bühler M W, *Handbook of ICC Arbitration: Commentary and Materials* (5th edn, Sweet & Maxwell 2021)

Zhang B, *Third Party Funding for Dispute Resolution: A Comparative Study of England, Hong Kong, Singapore, the Netherlands, and Mainland China* (Springer 2021)

## Journal Articles / Online Journals / Contributions to Edited Books

Abramowicz M B, 'Litigation Finance and the Problem of Frivolous Litigation' (2014) 62 DePaul Law Review 195

Abel R L, 'An American Hamburger Stand in St. Paul's Cathedral: Replacing Legal Aid With Conditional Fees in English Personal Injury Litigation' (2001) 51 DePaul Law Review 253

Abrams D S and Chen D L, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (2013) All Faculty Scholarship Penn Law 875

Agarwal R K and Fenton D, 'Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context' (2017) 59 Canadian Business Law Journal 65

Aguilar de Carvalho F and Borges Sacoto C, 'Portugal' in S Latham (ed), *Third Party Litigation Funding Law Review* (5th ed, Law Business Research Ltd 2021) 161

Agulló D A, 'Los Contractos de Financiación de Litigios por Terceros (Third-Party Funding) en España' (2022) 9 Revista de Derecho Civil 183

Al-Daraji W, 'Third Party Funding Disclosure in England and Wales and in Australia' (2021) 75(3) Dispute Resolution Journal Volume 31

Álvarez O P, Triadú A, Valentí I, Vidal O and Fernández Araluce A, 'Two's a Crowd, Three's a Party: The Coming of Age of Third-Party Funding in International Arbitration' (2021) 40 Revista del Club Español de Arbitraje 25

Antill S and Grenadier S R, 'Financing the Litigation Arms Race' (2023) 149 Journal of Financial Economics 218

Asschenfeldt K and Ross L, 'Recent Developments of Third Party Joinder in International Arbitration' (2022) 39 Journal of International Arbitration 691

Augenhofer S and Dori A, 'The Proposed Regulation of Third Party Litigation Funding – Much Ado About Nothing? [2023] Zeitschrift für das Privatrecht der Europäischen Union 198

Avraham R, Sebok A J and Shepherd J, 'The Whac-A-Mole Game: An Empirical Analysis of the Regulation of Litigant Third Party Financing' (28 May 2024) University of Texas Law, Legal Studies Research Paper (forthcoming), Cardozo Legal Studies Research Paper 26/2024 <https://ssrn.com/abstract=4852085> accessed 29 May 2024

Avraham R and Sebok A, 'An Empirical Investigation of Third Party Consumer Litigant Funding' (2019) 104 Cornell Law Review 1133

Avraham R, Baker L, and Sebok A J, 'The MDL Revolution and Consumer Legal Funding' (2021) 40 Review of Litigation 143

Avraham R, Baker L A and Sebok A J, 'The Mysterious Market for Post-Settlement Litigant Finance' (2021) 96 New York University Law Review Online 101

Bachmann S, 'The Impact of Third-Party Funding on Security for Costs Requests in International Arbitration Proceedings in Switzerland: Why and How Third-party Funding Should Be Considered Under the Swiss Lex Arbitri' (2020) 38 ASA Bulletin 842

Bagot M H and Henderson D A, 'Not Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration' (2002) 26 Tulane Maritime Law Journal 413

Bao C, 'Third Party Funding in Singapore and Hong Kong: The Next Chapter' (2017) 34 Journal of International Arbitration 387

Baumann A and Singh M M, 'New Forms of Third-Party Funding in International Arbitration: Investing in Case Portfolios and Financing Law Firms' (2018) 7 Indian Journal of Arbitration Law 29

Beasley P and Summerfield B, 'The Users of Litigation Finance – Who, Where, When and Why?' in Friel S (ed) *The Law and Business of Litigation Finance* (Bloomsbury Professional 2020) 319

Bedi S and Marra W C, 'The Shadows of Litigation Finance' (2021) 74 Vanderbilt Law Review 563

Bradshaw R, 'How to Obtain Evidence from Third Parties: A Comparative View' (2019) Journal of International Arbitration 36 629

Bukspan E, 'The Israeli Public Class Action Fund: New Approach for Integrating Business and Social Responsibility', in Fitzpatrick B and Thomas R (eds), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) 528

Burn G and Cheung K, 'Section 44 of the English Arbitration Act 1996 and Third Parties to Arbitration' (2021) 37 Arbitration International 287

Benöhr I, 'Collective Redress in the Financial Sector and the New EU Deal for Consumers' (2019) European Review of Private Law 1345

Boardman M, 'Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation' (2012) 8 Journal of Law, Economics & Policy 673

Burri A and Solas G M, 'Third-party Funding under EU's New Representative Actions Directive' (2022) 15 Global Competition Litigation Review 29

Cameron C and Kalajdize J, 'Commercial Litigation Funding: Ethical, Regulatory and Comparative Perspectives' (2014) 55 Canadian Business Law Journal 1

Cameron C, 'Litigation as "Core Business": Analyzing the Access to Justice and Regulatory Dimensions of Commercially Funded Class Actions in Australia' in Hensler D R, Hodges C and Tzankova I (eds), *Class Actions in Context: How Culture Economics and Politics Shape Collective Litigation* (Edward Elgar 2016) 189

Capper D, 'Litigation Funding in Ireland' [2021] (4) Erasmus Law Review 211

Chaisse J and Kirkwood J, 'Tokenised Funding and Initial Litigation Offerings: The New Kids putting third-party funding on the block' (2022) Law and Financial Markets Review 1

Clermont K M and Currivan J D, 'Improving on the Contingent Fee' (1978) 63 Cornell Law Review 527

Cordina A, 'Is It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe' [2021] (4) Erasmus Law Review 270

De Mot J, Faure M and Visscher L, 'TPF and Its Alternatives: An Economic Appraisal' in van Boom W H (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 31

Euler D and Giuseppe Bianco G, 'Breaking the Bond: Vulture Funds and Investment Arbitration' (2013) 31 ASA Bulletin 558

Faure M and Weber F, 'Dispersed Losses in Tort Law: An Economic Analysis' (2015) 6 Journal of European Tort Law 163

Fernhout F, 'Outcome-Related Fee Agreements in Europe and Hong Kong' in Uzelac A and van Rhee C H (eds), *Access to Justice and the Judiciary: Towards News European Standards of Affordability, Quality and Efficiency in Civil Adjudication* (Intersentia 2009) 13

Freeman Engstrom N, 'Lawyer Lending: Costs and Consequences' (2014) 63 DePaul Law Review 377

Frignati V, 'Ethical Implications of Third-Party Funding in International Arbitration' (2016) 32 Arbitration International 506

Gascón Inchausti F, 'A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November' (2021) 2 Zeitschrift für das Privatrecht der Europäischen Union 61

Glickman D R, 'Embracing Third-Party Litigation Finance' (2016) 43 Florida State University Law Review 1043

Gottwald P, 'Funding Civil Litigation Through Legal Expenses Insurance in Germany' in Assy R and Higgins A (eds), *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman* (OUP 2020) 199

Gsell B, Meller-Hannich C and Stadler A, 'Prozessfinanzierung in Deutschland vor dem Hintergrund Europäischer Regelungsinitiativen' (2023) 78 JuristenZeitung 989

Gsell B, 'The new European Directive on Representative Actions for the Protection of the Collective Interests of Consumers: A Huge, but Blurry Step Forward' (2021) 58 Common Market Law Review 1365

Guy S, 'Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation' (2023) 86 Modern Law Review 331

Higgins T Q, 'Bridging the Gap: Providing "Access to Justice" For Middle-Market Litigants' (2018) 51 Suffolk University Law Review 289

Hodges C, Peysner J and Nurse A, 'Litigation Funding: Status and Issues' (2012) Oxford Legal Studies Research Paper 49/2012 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126506> accessed 15 May 2024

Howie R and Moysa G, 'Financing Disputes: Third Party Funding in Litigation and Arbitration' (2019) 57 Alberta Law Review 465

Ioannidou M, 'Compensatory Collective Redress for Low Value Consumer Claims in the EU: A Reality Check' (2019) European Review of Private Law 1367

Issacharoff S, 'Litigation Funding and the Problem of Agency Cost in Representative Actions' (2014) 63 DePaul Law Review 561

Jay A, 'Funding Insolvency Litigation: A New Dawn' (2015) 8(5) Corporate Rescue and Insolvency 183

Kalajdzic J, Cashman P and Longmoore A, 'Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding' (2013) 61 American Journal of Comparative Law 93

Karsten P, 'Enabling the Poor to Have Their Day in Court: Sanctioning of Contingency Fee Contracts, a History to 1940' (1998) 47 DePaul Law Review 231

Khoza MJ, 'Formal Regulation of Third Party Litigation Funding Agreements? A South African Perspective' (2018) 21 Potchefstroom Electronic Law Journal 1

Kovacic W E, 'Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracts' (1996) 29 LOY. L.A. L. REV. 1799

Kramer X and Tillema I, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2020) 2 Revista Ítalo-Española de Derecho Procesal 165

Kritzer H M, 'Contingency Fee Lawyers as Gatekeepers in the Civil Justice System' (1997) 81 Judicature 22

Lang A C and Hosseini S, 'The Absent Party: An Examination of Third Party Funding of Class Actions in Canada' (2013) 41 Advocates' Quarterly 1

Lee K, 'Common Fund Orders: Where Are We Now, and Where to Next?' (2021) 42 Adelaide Law Review 581

Legg M, 'The Rise and Regulation of Litigation Funding in Australian Class Actions' [2021] (4) Erasmus Law Review 221

Leupold P, 'Enforcing Consumer Rights: Collective Redress in Austria and the European Union' (2019) 8 Journal of European Consumer and Market Law 121

Lewis J, 'Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?' (2020) 33 Georgetown Journal of Legal Ethics 687

Lindsay Simpson W and Mersch G, 'Third Party Litigation Funding in Luxembourg: Current Practice and Future Developments' (2023) 19 Legitech 37 <https://www.loyensloeff.com/third-party-litigation-funding-in-luxembourg.pdf> accessed 15 May 2024

Lyon J, 'Revolution in Progress: Third-Party Funding of American Litigation' (2010) 58 UCLA Law Review 571

Malone M, 'Judicial Scrutiny of Third Party Litigation Funding Agreements in Canadian Class Actions' (2021) 13 Canadian Class Action Review 193

Markworth D, 'Coding a Collective Consumer Redress Vehicle in Germany' (2023) 12 Journal of European Consumer and Market Law 89

Marquais O and Grec A, 'Do's and Dont's [sic] of Regulating Third-Party Litigation Funding: Singapore vs. France' (2020) 16 Asian International Arbitration Journal 49

Meller-Hannich C and Gsell B, 'Die Regulierung Privater Prozessfinanzierung in der EU' (2023) AnwaltsBlatt Online 160

Mendez C, 'Welcome to the Party: Creating a Responsible Third-Party Litigation Funding Industry to Increase Access and Options for Plaintiffs' (2021) 39 Mississippi College Law Review 102

Menon S, 'Arbitration's Blade: International Arbitration and the Rule of Law' 38 (2021) Journal of International Arbitration 1

Misiak H, 'The Collective Interests of Consumers: New Definition, New Weaknesses' (2019) European Review of Private Law 1329

Molavi M, 'Law's Financialization: Litigation Finance and Multilayer Access to Justice in Canada' (2018) 33(3) Canadian Journal of Law and Society/La Revue Canadienne Droit et Société 425

Molot J T, 'A Market in Litigation Risk' (2009) 76 University of Chicago Law Review 367

Morabito V and Duffy M, 'An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions' (2020) New Zealand Law Review 377

Morabito V and Waye V, 'Reining in Litigation Entrepreneurs: A New Zealand Proposal' (2011) N.Z. L. Rev. 323

Mulheron R, 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments' (2014) 73(3) Cambridge Law Journal 570

––– 'Third Party Funding and Class Actions Reform' (2015) 131 Law Quarterly Review 291

––– 'Creating, and Distributing, Common Funds Under the English Representative Rule' (2021) 32 King's Law Journal 381

––– 'Third Party Funding, Class Actions, and the Question of Regulation: A Topical Analysis' (2022) 2 Mass Claims 5

––– 'The Funding of the United Kingdom's Class Action at a Cross-Roads' (2023) King's Law Journal 1

––– 'Unpacking Paccar: Statutory Interpretation and Litigation Funding' (2024) 83 Cambridge Law Journal 99

Mulheron R and Cashman P, 'Third Party Funding of Litigation: A Changing Landscape' (2008) 27 Civil Justice Quarterly 312

Nichols S, 'Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third-Party Litigation Finance' (2015) 5 UC Irvine Law Review 197

Park W W and Rogers C A, 'Third-Party Funding in International Arbitration: The ICCA Queen- Mary Task Force' (2014) Penn State Law Legal Studies Research Paper 42/2014, <https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1015&context=faculty_scholarship> accessed 15 May 2024

Pert L, 'Third-party Litigation Financing and Lawyers' Ethical Obligations' in Friel S (ed), *The Law and Business of Litigation Finance* (Bloomsbury Professional 2020) 65

Piché C, 'Transparency and Oversight of Class Actions Funding in Canada' in Kramer X, Hoevenaars J, Kas B and

Themelis (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 276

Popp A T, 'Federal Regulation of Third-Party Litigation Finance' (2019) 72 Vanderbilt Law Review 727

Puri P, 'Profitable Justice: Aligning Third-Party Financing of Litigation with the Normative Functions of the Canadian Judicial System' (2014) 55 Canadian Business Law Journal 34

Radin M, '*Maintenance by Champerty'* (1935) 24 California Law Review 48

Raghupathi V, Ren J and Raghupathi W, 'Understanding the Nature and Dimensions of Litigation Crowdfunding: A Visual Analytics Approach' (2021) 16 PLoS ONE: e0250522 <https://doi.org/10.1371/journal.pone.0250522> accessed 15 May 2024

––– 'Exploring the Factors that Determine the Success of Litigation Crowdfunding: Implications for Social Justice' (2021) 169 Technological Forecasting & Social Change 1

Ramesh S, 'Third-Party Funding in International Arbitration: Ownership of the Claim, Consequences for Costs Orders, and Regulation' (2020) 36 Arbitration International 275

Ray K, 'Third-Party Funding of Patent Litigation: Problems and Solutions' (1 June 2022) SSRN <https://dx.doi.org/10.2139/ssrn.4125510> accessed 15 May 2024

Richey J G, 'Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation' (2013) 63 Emory Law Journal 489

Resnik J, Curtis D E and Hensler D R, 'Individuals Within the Aggregate: Relationships, Representation, and Fees' (1996) 71 New York University Law Review 296

Rodgers A, Scott P, Sanz A and Brown D M, 'Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know' (*The Antitrust Source*, December 2016) <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/emerging-issues-in-third-party-litigation-funding-what-antitrust-lawyers-need-to-know.pdf?revision=a1382c7b-2b08-403a-91d8-a8b1d5e41670&revision=5247863831177387904> accessed 15 May 2024

Shamir J and Shamir N, 'Third-party Funding in a Sequential Litigation Process' (2021) 52 European Journal of Law and Economics 169

Sahani V S, '"Keep to the Code": A Global Code of Conduct for Third-Party Funders' (2022) 102 Boston University Law Review 2331

––– 'Global Laboratories of Third Party Funding Regulation' (2021) 115 AJIL Unbound 34

––– 'Rethinking the Impact of Third-Party Funding on Access to Civil Justice' (2020) 69 Depaul Law Review 611

––– 'Reshaping Third-Party Funding' (2017) 91 Tulane Law Review 405

––– 'Judging Third-Party Funders' (2016) 63 UCLA Law Review 1

––– 'Hamonizing Third-Party Litigation Funding Regulation' (2015) 36 Cardozo Law Review 862

Samra E, 'The Business of Defense: Defense-Side Litigation Financing' (2016) 83 University of Chicago Law Review 2299

Scherer M, Goldsmith A and Fléchet C, 'Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives' [2012] International Business Law Journal, 207

––– 'Third Party Funding of International Arbitration Proceedings – A View from Europe Part II: The Legal Debate' [2012] 6 International Business Law Journal 649

Sebok A J, 'The Rules of Professional Responsibility and Legal Finance: A Status Update' (2022) 57 Wake Forest Law Review 777

––– 'Selling Attorney's Fees' [2018] University of Illinois Law Review 1207

––– 'Private Dollars for Public Litigation: An Introduction' (2016) 12 New York University Journal of Law and Business 813

Silver C, 'Litigation Funding Versus Liability Insurance: What's the Difference?' (2014) 63 DePaul Law Review 617

Silver C and Hyman D A, 'Third Party Litigation Funding: Panacea or More Problems?' (2023) SSRN Working Paper Series <https://ssrn.com/abstract=4438503> accessed 15 May 2024

Simon R, 'More Efficient Collective Redress Mechanisms? – Will the New Deal Directive on Representative Actions for Protecting the Collective Interests of Consumers Improve the Resolution of Mass Harm Situations in the Visegrad 4 Countries?' (2019) European Review of Private Law 6

Skiba P M and Xiao J, 'Consumer Litigation Funding: Just Another Form of Payday Lending?' (2017) 80 Law and Contemporary Problems 117

Skog J, 'Illusory Truths and Frivolous Claims: Critical Reflections on a Report on Litigation Funding by the European Parliamentary Research Service' in Eva Storskrubb (ed) *YSEC Yearbook of Socio-Economic Constitutions 2022: Funding Justice* (Springer 2022) 87

Springate L and Gardner R, '*Re the Valetta Trust*: Landmark decision reached on the validity of litigation funding in Jersey' (2013) 19 Trusts & Trustees 90

Stadler A, 'German Collective Actions: Is Litigation Funding in a Dead End?' in Kramer X, Hoevenaars J, Kas B and Themelis (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 259

––– 'Third-Party Funding in Collective Redress' in Kramer X, Voet S, Ködderitzsch L, Tulibacka M, and Hess B (eds), *Delivering Justice: A Holistic and Multidisciplinary Approach* (Hart Publishing 2022) 151

––– 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica International 14

––– 'Die Bündelung von Gleichgerichteten Ansprüchen durch Inkassozession – Geschäftsmodelle zur Prozessfinanzierung auf dem Prüfstand: Zugleich Besprechung von LG Düsseldorf, Urteil v. 17. 12. 2013 – 37 0 200/09' (2014) 69 JuristenZeitung 613

Steinitz M, 'Third-Party Funding: Investment Arbitration' in Max Planck Encyclopedia of International Procedural Law [MPEiPro] (Oxford University Press 2021) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3475.013.3475/law-mpeipro-e3475> accessed 15 May 2024

––– 'Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements' (2019) 53 UC Davis Law Review 1073

––– 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95 Minn. L Rev 1268

Summerfield B and Shafton E, 'Other Methods of Financing Litigation - Part D: Contingency and Conditional Fee Agreements' in Obligations' in Friel S (ed), *The Law and Business of Litigation Finance* (Bloomsbury Professional 2020) 247

Tayar J, 'Wait and See: Regulating Ontario's Litigation Lending and Commercial Litigation Funding Markets' (2019) 40 Windsor Review of Legal and Social Issues 178

Teremetsky V and others, 'Access to Justice and Legal Aid for Vulnerable Groups: New Challenges Caused by the COVID-19 Pandemic' 24 (2021) (1S) Journal of Legal, Ethical & Regulatory Issues 1

Tillema I, 'Entrepreneurial Motives in Dutch Collective Redress' in van Boom W H (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 222

Toms C, 'Other Methods of Financing Litigation - Part C Insurance' in Friel S, *The Law and Business of Litigation Finance* (Bloomsbury Professional 2020) 228

––– 'Types of Litigation and Arbitration that Attract and Are Attractive to Litigation Finance: Part B Insolvency' in Friel S (ed), *The Law and Business of Litigation Finance* (Bloomsbury Professional 2020) 249

Torrie V, Implications of the *Bluberi* decision: An Affirmation of Broad Judicial Discretion in CCAAs and a 'Green Light' for Litigation Funding in Canada' (2021) 36 Banking and Finance Law Review 1

Trebilcock M J and Kagedan E, 'Economic Assessment of Third-Party Litigation Funding of Ontario Class Actions' (2014) 55 Canadian Business Law Journal 54

Tzankova I N and Kramer X E, 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands' in Uzelac A and Voet S (eds) *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 97

Van Boom W H, 'Insuring vs. Investing in Litigation: A Comparative History of Litigation Insurance and Claim Investment' (2020) 8 Comparative Legal History 2

––– 'Juxtaposing BTE and ATE: the Role of the European Insurance Industry in Funding Civil Litigation' (2010) Oxford University Comparative Law Forum 1 <https://ouclf.law.ox.ac.uk/category/year/2010/> accessed 15 May 2024

van Elten K and Rehder B, 'Dieselgate and Eurolegalism: How a Scandal Fosters the Americanization of European law' (2022) 29 Journal of European Public Policy 281

Velchik M K and Zhang J Y, 'Islands of Litigation Finance' (2019) 24 Stanford Journal of Law, Business & Finance 1

Veljanovski C, 'Third Party Litigation Funding in Europe' (2012) 8 Journal of Law, Economics and Policy 405

Visscher L and Faure M, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 Journal of Consumer Policy 455

Waye V and Duffy M, 'The Fate of Class Action Common Fund Orders: The Policy, Procedural and Constitutional Issue of a Legislative Revival' (2021) 40 University of Queensland Law Journal 215

Wendel W B, 'Alternative Litigation Finance and Anti-Commodification Norms' (2014) 63 DePaul Law Review 655

Yeazell S C, 'Re-Financing Civil Litigation' (2001) 51 DePaul Law Review 183

Zander P, 'Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees' (2002) 52 DePaul Law Review 259

Zheng Z, 'The Paper Chase: Fee-Splitting vs. Independent Judgment in Portfolio Litigation Financing of Commercial Litigation' (2021) 34 Georgetown Journal of Legal Ethics 1383

## Command Papers and Law Commission Reports

Agee C and Lowe G, 'Westfleet Advisors Litigation Finance Buyer's Guide' (Westfleet Advisors 2019)

American Bar Association Commission on Ethics 20/20, 'White Paper on Alternative Litigation Finance' (2011) <https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf> accessed 15 May 2024

Association of Litigation Funders of Australia (ALFA) 'Best Practice Guidelines for Litigation Funders & Managers' (January 2019) <http://www.associationoflitigationfunders.com.au/uploads/5/0/7/2/50720401/alfa_best_practice_guidelines.pdf> accessed 15 May 2024

Association of Litigation Funders of England and Wales (ALF), 'Code of Conduct for Litigation Funders' (January 2018) <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf> accessed 15 May 2024 (E&W Code)

Australian Law Reform Commission (ALRC), 'Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (ALRC Report 134, December 2018) <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess_2.pdf> accessed 15 May 2024

British Institute of International and Comparative Law (BIICL), 'Study on the State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation (JUST/2016/JCOO/FW/CIVI/0099)' (November 2017)

European Litigation Funders Association (ELFA), 'Code of Conduct' (29 June 2022) <https://elfassociation.eu/about/code-of-conduct> accessed 15 May 2024 (ELFA Code)

Freeman Engstrom D, Ricca L, Ambrose G and Walsh M, 'Legal Innovation After Reform: Evidence from Regulatory Change' (September 2022) Stanford Law School <https://law.stanford.edu/wp-content/uploads/2022/09/SLS-CLP-Regulatory-Reform-REPORTExecSum-9.26.pdf> accessed 15 May 2024

Friel S and Barnes J (eds), 'Litigation Funding 2023 (Woodsford)' <https://woodsford.com/wp-content/uploads/2023/02/LexGTDT-Litigation-Funding-2023-Full-book.pdf> accessed 15 May 2024 (Woodsford Report 2023)

Garber S, 'Alternative Litigation Financing in the United States: Issues, Knowns and Unknowns' (RAND Corp 2010) <https://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf> accessed 15 May 2024

Hambury J and Lewis D, 'Jurisdiction Guide to Third Party Funding in International Arbitration' (*Pinsent Masons*, May 2021) <https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration> accessed 15 May 2024

Hong Kong Secretary for Justice, 'Code of Practice for Third Party Funding of Arbitration' (7 December 2018) <https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf> accessed 15 May 2024 (HK Code)

––– 'Proposed Code of Practice for Third Party Funding of Mediation' (16 August 2021) <https://www.doj.gov.hk/pdf/Proposed_CoP_for_TPF_of_Mediation_e.pdf> accessed 15 May 2024

IBISWorld, 'Litigation Funding in Australia: Market Size, Industry Analysis, Trends and Forecasts (2024-2029)' (April 2024) <https://www.ibisworld.com/au/industry/litigation-funding/5446/#IndustryStatisticsAndTrends> accessed 15 May 2024

Insurance Information Institute (Triple-I), 'What is Third-Party Litigation Funding and How Does It Affect Insurance Pricing and Affordability?' (July 2022) <https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf> accessed 15 May 2024

International Council for Commercial Arbitration, 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (International Council for Commercial Arbitration 2018)

Irish Law Reform Commission (ILRC), 'Consultation Paper on Third Party Litigation Funding' (2023)

Lord Justice Jackson, 'Review of Civil Litigation Costs: Preliminary Report, Volume One' (Stationery Office 2010)

McNee A, 'Legal Expenses Insurance and Access to Justice' (International Bar Association 2019)

Moorhead, 'Contingency Fees: A Study of their Operation in the United States of America' (Civil Justice Council, November 2008)

Moses A SC, 'Crowdfunding Litigation: A Problem or a Solution?' (Australasian Lawyer, 17 July 2019) <https://www.thelawyermag.com/au/news/general/crowdfunding-litigation-a-problem-or-a-solution/207467> accessed 15 May 2024

Mulheron R, 'A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study' (Legal Services Board 28 March 2024) <https://legalservicesboard.org.uk/research/a-review-of-litigation-funding> accessed 15 May 2024

New Zealand Law Commission (NZLC), 'Class Actions and Litigation Funding' (Report 147, May 2022) <https://www.lawcom.govt.nz/assets/Publications/Reports/NZLC-R147.pdf> accessed 15 May 2024

––– 'Issues Paper on Class Actions and Litigation Funding' (NZLC IP45, December 2020) < https://www.lawcom.govt.nz/assets/Publications/IssuesPapers/NZLC-IP45-Summary.pdf> accessed 15 May 2024

Poncibò C and D'Alessandro E, 'State of Play of the EU Private Litigation Funding Landscape and the Current EU Rules Applicable to Private Litigation Funding' (European Parliament Research Service, March 2021)

Peysner J, 'Impact of the Jackson Reforms: Some Emerging Themes' (Report prepared for the Civil Justice Council Cost Forum, 21 March 2014) <https://www.judiciary.uk/wp-content/uploads/2014/05/impact-of-the-jackson-reforms.pdf> accessed 15 May 2024

Queen Mary University of London (QMUL), '2018 International Arbitration Survey: The Evolution of International Arbitration' (White & Case 2018) <https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 15 May 2024

RationalStat, 'Global Litigation Funding Investment Market Analysis and Forecast, 2019-2028' (August 2023)

Research Nester, 'Litigation Funding Investment Market: Global Demand Analysis and Opportunity Outlook 2023-2035' (7 August 2023); overview available at <https://www.researchnester.com/reports/litigation-funding-investment-market/2800> accessed 15 May 2024

Saulnier J, Müller K and Koronthalyova I, 'Responsible Private Funding of Litigation: European Added Value Assessment' (European Parliament Research Service, March 2021)

Singapore Academy of Law, 'Law Reform Committee Report on Litigation Funding in Insolvency Cases' (February 2014) <https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2014-02%20-%20Litigation%20Funding%20in%20Insolvency%20Cases.pdf> accessed 15 May 2024

Singapore Institute of Arbitrators, 'SIArb Guidelines for Third Party Funders' (18 May 2017) <https://www.siarb.org.sg/images/SIArb-TPF-Guidelines-2017_final18-May-2017.pdf> accessed 15 May 2024 (SIArb Guidelines)

Standing Committee of Attorneys General (SCAG), 'Litigation Funding in Australia' (Discussion Paper, May 2006) <https://dcj.nsw.gov.au/documents/about-us/engage-with-us/public-consultations/unsorted/litigationfundingdiscussionpapermay06.pdf> accessed 15 May 2024

UNCITRAL Secretariat, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session' (Vienna, 14–18 October 2019) <https://documents.un.org/doc/undoc/gen/v19/104/76/pdf/v1910476.pdf?token=7vxuHc9UAJ6Oueta2r&fe=true> accessed 15 May 2024

The European Consumer Organisation (BEUC)/NOYB-European Center for Digital Rights, 'Funding of Collective Redress: Financing Options in the EU and Beyond' (September 2022)

The Law Society of Singapore, 'Guidance Note 10.1.1 Third-Party Funding' (25 April 2017) <https://www.mlaw.gov.sg/files/Council_GN_Third_Party_Funding.pdf> accessed 15 May 2024 (Singapore Guidance)

Victorian Law Reform Commission (VLRC), 'Access to Justice - Litigation Funding and Group Proceedings: Consultation Paper' (July 2017)

––– 'Access to Justice – Litigation Funding and Group Proceedings: Report' (March 2018)

Walton P, 'Insolvency Litigation Funding - In the Best Interests of Creditors?' (Insolvency Practitioners Association 2020) <https://www.icaew.com/-/media/corporate/files/regulations/insolvency/insolvency-

litigation-funding-in-the-best-interests-of-creditors.ashx> accessed 15 May 2024

Westfleet Advisors, 'The Westfleet Insider: 2023 Litigation Finance Market Report 6' (Report 2023) <https://www.westfleetadvisors.com/wp-content/uploads/2024/03/WestfleetInsider2023-Litigation-Finance-Market-Report.pdf> accessed 15 May 2024

William D. Henderson W D, 'Legal Market Landscape Report' (2018) <https://www.legalevolution.org/wp-content/uploads/sites/262/2022/01/State-Bar-Study-of-Online-Delivery-of-Legal-Services-July-2018.pdf> accessed 15 May 2024

# Websites / Blogs / Newspapers

*A Brief History of Litigation Finance: The cases of Australia and the United Kingdom*, (2019) 5(6) The Practice: Litigation Finance (September/October 2019) <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance/> accessed 15 May 2024

Barnes J and Friel S, 'Litigation Funding: Spain' (*Lexology*, 24 November 2022) <https://pla-spain.com/wp-content/uploads/2022/12/2023-Litigation-Funding-Spain-1.pdf> accessed 15 May 2024

Butler B, 'Victims Get Nothing as Litigation Funder, Lawyers Share the Spoils' *The Australian* (Sydney 22 August 2016)

Bayrou S, 'The Landscape for Litigation Funding in France' (*Clyde & Co*, 16 November 2023) <https://www.clydeco.com/en/insights/2023/11/the-landscape-of-litigation-funding-in-france> accessed 15 May 2024

Berger I and Boularbah H, 'Belgium' (*Lexology*, 2022) <https://www.loyensloeff.com/gtdt---litigation-funding-2022---belgium-chapter.pdf> accessed 15 May 2024

Borges Sacoto C, Aguilar de Carvalho F, Frias H, Mota Soares L, Magalhães Ramalho L, 'Litigation Funding Comparative Guide', (*mondaq*, 20 November 2023) <https://www.mondaq.com/finance-and-banking/1285392/litigation-funding-comparative-guide> accessed 15 May 2024

Castro P, 'The Third Party Litigation Funding Law Review Mexico' (*Lexology*, 2 January 2024) <https://www.lexology.com/indepth/third-party-litigation-funding/mexico> accessed 15 May 2024

Chan D, 'Three "Pitfalls" for the Unwary: Third-party Funding in Asia' (*Singapore Law Gazette*, November 2018) <https://lawgazette.com.sg/feature/three-pitfalls-for-the-unwary-third-party-funding-in-asia/> accessed 15 May 2024

Cleppe P, 'With Third-party Litigation Funding on the Rise, Courts are Becoming a Venue for Politics' *Euronews* (12 April 2024) <https://www.euronews.com/my-europe/2024/04/12/with-third-party-litigation-funding-on-the-rise-courts-are-becoming-a-venue-for-politics> accessed 15 May 2024

Deminor, 'Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends' (2022) <https://drs.deminor.com/en/litigation-funding-from-a-european-perspective> accessed 15 May 2024

Dodge K, 'Can Third-Party Funding Find the Right Place in Investment Arbitration Rules?' (*Kluwer Arbitration Blog*, 31 January 2022) <https://arbitrationblog.kluwerarbitration.com/2022/01/31/can-third-party-funding-

find-the-right-place-in-investment-arbitration-rules/> accessed 15 May 2024

Fernández D, 'Apple, Google Hit With Collective Claims in Portugal' *Litigation Finance Insider* (30 July 2022) < https://litigationfinanceinsider.com/2022/07/30/> accessed 15 May 2024

Gee K and Ioannou R, 'Developments in Litigation Funding: What Happens Next?' (*Litigation Finance Insider*, 13 July 2022) <https://www.signaturelitigation.com/kate-gee-examines-developments-in-the-litigation-funding-market-and-what-the-future-holds-for-the-sector-in-litigation-finance-insider/> accessed 15 May 2024

Favro A, 'New ICSID Arbitration Rules: A Further Step in The Regulation of Third-Party Funding' (*Kluwer Arbitration Blog*, 3 June 2022) <https://arbitrationblog.kluwerarbitration.com/2022/06/03/new-icsid-arbitration-rules-a-further-step-in-the-regulation-of-third-party-funding/> accessed 15 May 2024

Hensler D R, Kalajdzic J, Cashman P, Gómez M A, Halfmeier A, Tzankova I, 'The Globalization of Mass Civil Litigation: Lessons from the Volkswagen "Clean Diesel" Case', RAND Corporation 2021 <http://www.rand.org/t/RRA917-1> accessed 15 May 2024

Jackson-Grant W, 'Litigation Funding and Insurance for Defendants' (*The Judge Global*, 24 September 2018) <https://www.thejudgeglobal.com/litigation-funding-and-insurance-for-defendants/> accessed 15 May 2024

Kromann Jespersen F, 'Litigation Funding in an Insolvency Law Context' (*Skau Reipurth*, 20 January 2021) <https://www.skaureipurth.com/en/insights/litigation-funding-in-an-insolvency-law-context/> accessed 15 May 2024

Lin Y, 'Third Party Funding in Litigation and Arbitration: A Dichotomy in China's Practice' (*Kluwer Arbitration Law*, 24 April 2023) <https://arbitrationblog.kluwerarbitration.com/2023/04/24/third-party-funding-in-litigation-and-arbitration-a-dichotomy-in-chinas-practice/> accessed 15 May 2024

Llorente C and Soler C, 'A General Introduction to Third Party Litigation Funding in Spain' (*Lexology*, 2 January 2024) <https://www.lexology.com/library/detail.aspx?g=ea0afdd7-d607-4210-ae43-e3fe8aaaa4b1#:~:text=Although%20third%20party%20funding%20(or,reduce%20costs%20and%20manage%20risks> accessed 15 May 2024

Maugham J KC, 'Is Crowdfunding the Next Mis-selling Scandal?' (*The Law Society Gazette*, 20 July 2020) <https://www.lawgazette.co.uk/practice-points/is-crowdfunding-the-next-mis-selling-scandal/5105038.article> accessed 15 May 2024

Maxwell F, 'Mr Bates vs the Post Office Sparks Bitter Fight over UK Legal Funding' *Politico* (15 April 2024) <https://www.politico.eu/article/alan-bates-v-post-office-case-inspires-attempted-crackdown-on-uk-legal-funding/> accessed 15 May 2024

Mellah M, 'Paris Court of Appeal Decided that Third-party Funders Are Not a Party to Arbitral Proceedings' (*Deminor*, 28 March 2022) <https://www.deminor.com/en/blog/paris-court-of-appeal-decided-that-third-party-funders-are-not-a-party-to-arbitral-proceedings> accessed 15 May 2024

Neuberger D E, 'From Barretry, Maintenance and Champerty to Litigation Funding' Harbour Litigation Funding First Annual Lecture (8 May 2013) <https://www.supremecourt.uk/docs/speech-130508.pdf> accessed 15 May 2024

Parikh S and Krishnan A, 'The Slow, but Steady Development of the Third-Party Funding Market in India'

(*Chambers and Partners*, 5 March 2024) <https://practiceguides.chambers.com/practice-guides/litigation-funding-2024/india/trends-and-developments> accessed 15 May 2024

Pollard L, 'Is Funding Defendants the Future of Disputes?' *Fivehundred Magazine* (June 2019) 93 <https://www.legal500.com/fivehundred-magazine/editors-views/is-funding-defendants-the-future-of-disputes/> accessed 15 May 2024

PRC, 'Litigation Funders Backing Class Action Lawsuits as They Put £2.2bn "War Chests" to Work' (20 June 2022) <https://www.rpc.co.uk/press-and-media/litigation-funders-backing-class-action-lawsuits-as-they-put-22bn-war-chests-to-work/> accessed 15 May 2024

Roe D, 'Meme Stocks for Lawsuits? Ryval's Bet on Democratizing Litigation Finance Faces Long Odds' *The American Lawyer* (27 September 2022) <https://www.law.com/americanlawyer/2022/09/27/meme-stocks-for-lawsuits-ryvals-bet-on-democratizing-litigation-finance-faces-long-odds/> accessed 15 May 2024

Rose N, 'Government Set to Commission Review of Third-party Litigation Funding' (*Legal Futures*, 2 February 2024) <https://www.legalfutures.co.uk/latest-news/government-set-to-commission-review-of-third-party-litigation-funding> accessed 15 May 2024

Silva de Freitas E, Kramer X and Hoevenaars J, 'Second Act in Dutch TikTok Class Action on Privacy Violation: Court Assesses Third Party Funding Agreements' (*conflictoflaws.net*, 2 December 2023) <https://conflictoflaws.net/2023/second-act-in-dutch-tiktok-class-action-on-privacy-violation-court-assesses-third-party-funding-agreements/> accessed 15 May 2024

Slater A, 'As US Bankruptcy Filings Increase, Legal Finance Is Set to Play an Important Role' *New York Law Journal* (17 September 2023) <https://www.law.com/newyorklawjournal/2023/09/17/as-us-bankruptcy-filings-increase-legal-finance-is-set-to-play-an-important-role/> accessed 15 May 2024

Wilkins S and Ganguly R, 'Litigation Funding in Insolvency' (*South Square*, March 2020) <https://southsquare.com/articles/litigation-funding-in-insolvency/> accessed 15 May 2024

Wolf A, 'Litigation Funders See Growing Opportunities in Bankruptcy Boom' (*Bloomberg Law* 31 July 2023) <https://news.bloomberglaw.com/bankruptcy-law/litigation-funders-see-growing-opportunities-in-bankruptcy-boom> accessed 15 May 2024

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