DO'S AND DONT'S OF REGULATING THIRD-PARTY LITIGATION FUNDING: SINGAPORE vs. FRANCE

by Olivier Marquais[*] and Alain Grec[**]

Opting for international arbitration no longer ensures a quicker and cheaper access to justice. By reason of the exponential increase of the costs incurred in arbitration proceedings, a claim constitutes both a financial asset and a burden. A number of products offered by disputes funding firms allows litigants to externalize these costs. Funding cases puts equity capital at risk on a non-recourse basis. Naturally, this follows a well-structured decision-making process involving a budget plan and a deep dive due diligence conducted by experienced litigation and finance teams. Different approaches to regulating the funding activity have emerged. While France adopted a hands-off approach which led to the development of ethical and professional standards by concerned stakeholders, Singapore successfully legislated and developed an inspiring model, allowing the activity to thrive in the litigants' best interests, in record time.

* A New York, Ontario, Paris, Quebec and Luxembourg qualified attorney-at-law in the Litigation and Risk Management practice group of Loyens & Loeff. Olivier's broad practice includes contract drafting, negotiations, advising and representing clients in complex cross-border technology, construction and investment management arbitrations and litigations.
Emails: Olivier.Marquais@loyensloeff.com, agrec@profile-investment.com.

** A director, co-founder and head of the quantum analysis division of Profile Investment, an international, regulated third-party funder specialized in international disputes based in Paris. Prior to founding Profile Investment in 2018, Alain founded and led La Française International Claims Collection from 2009 to 2018. Alain was also Head of the German branch of the banking group Natixis (1994–2002), and Head of Development of its Corporate and Investment Financing bank between 2005 and 2009.

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A. Introduction

Born in the 1990s in Australia, the financing of legal actions by third-party experts ('third-party funding' or 'TPF') has grown exponentially in the past decade and become a common practice in a number of common law and civil law jurisdictions. In the early 2010s, half a dozen funders were likely to consider investing in complex cross-border disputes. Entering 2020, there are now over thirty.

Claiming that international arbitration has played a big role in its growth and internationalization is an understatement, as evidenced by the abundance of literature on the issue. The heterogeneous development of TPF worldwide is mainly due to adverse legislations. In particular, in many common law jurisdictions, the doctrines of maintenance and champerty (which made illicit meddling with other people's litigations for one's personal profit or incitement to litigation) were progressively softened or even abolished over recent years.[1]

Opting for international arbitration no longer ensures a quicker justice. From the filing of a request for arbitration to a final award, an international commercial arbitration will rarely take less than twelve months (and often closer to 18–24 months). Complex disputes involving multiple parties or multiple contracts – and where a number of procedural incidents are likely to occur – may take far longer.

Similarly, international arbitration does not necessarily allow for cheaper proceedings. For an amount in dispute of USD 10 million, the costs[2] of an International Chamber of Commerce ('ICC') arbitration involving three arbitrators approach USD 400,000,[3] but these are only the tip of the iceberg. Lawyers' and experts' fees, as well as anticipated witness and other external costs, represent by far the largest part of the costs incurred in arbitration proceedings. The involvement of technical, quantum and/or delay experts is often necessary to assist in assessing the issues disputed, valuating the claims and the damages suffered. Also, since a practice of international commercial arbitration has emerged often based on (foreign) domestic law, conventional rules and procedures and best practices, and that a body of arbitration law has developed, lawyers have specialized in this niche and lucrative field of practice. Their fees may account for approximatively two-thirds of the costs of resolving the dispute. Further, choosing busy and

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1 Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (21 Dec. 2009).

2 It is generally understood that the costs of an arbitration include registration fees which are often non-refundable, administrative costs charged by the institution to administer the case and arbitrators' fees. A number of arbitral institutions such as the HKIAC, ICC, ICSID, LCIA, SCC, SIAC and the WIPO Center make available online calculators allowing parties to anticipate such costs.

3 L. Flannery, *Arbitration Costs Compared*, GAR (2 Jan. 2019).

expensive brand names arbitrators, and conducting arbitrations like sophisticated litigations, also contribute to increasing these costs significantly. In total, in the authors' experience, a claimant's costs frequently exceeds 10% of the amounts of its claims.

Thus, in order to conduct an arbitration to a final award, a claimant not only needs to mobilize and dedicate substantial amounts to its claim, but also takes a financial risk given the uncertainty of the outcome. Having to enforce the award – if a debtor fails to pay it – further increases this risk. An arbitration claim thus constitutes both a financial asset and a burden. For these reasons, arbitration practitioners witness a growing need for solutions allowing their clients to externalize these costs.

Despite its shortfalls, international arbitration maintains its appeal for several reasons including international enforcement, viable and predictable timeframe, appointment of seasoned professionals with the industry specific experience necessary to best handle technical difficulties and understand the issues at stake, balanced arbitral tribunals and a greater degree of predictability of the outcome as compared to domestic courts in certain jurisdictions. These benefits, as well as the likelihood of high amounts in disputes and of potential returns, make arbitration a particularly suitable area of practice for third-party funders, in particular as a number of jurisdictions have implemented modern arbitration laws and legislation favourable to TPF schemes.

B. The functioning of TPF

1. *Defining the Scope of the Activity*

Although this contribution focuses on TPF as applied to arbitration proceedings, providing funding for disputes is, in essence, an ancient practice which finds its origin in the insurance industry and with close ties to the maritime sector. 'Clubs' (i.e. mutual insurance associations co-owned by their policyholders, mostly based out of the UK) have historically provided their members with Freight, Demurrage and Defense ('FD&D') insurance in conjunction with their usual Protection & Indemnity ('P&I'). FD&D will typically cover for the legal fees, court or arbitration fees incurred in certain disputes relating for example to Charter Parties. Other mechanisms allowing to externalize some of the financial risks of legal proceedings include After the Event ('ATE') Insurance and Export Credit Insurance. For example, after it has paid out to an insured party the monies due pursuant to an indemnity policy, French credit insurer COFACE ('*Compagnie Française d'Assurance pour le Commerce Extérieur*') will step into the insured's shoes and pursue any rights and remedies available to it, including legal claims. By reason of this

subrogation mechanism, and for the whole turnover polices, COFACE will run the proceedings and bear all related costs to the compensated part of the debt, and will act with a power of attorney from the insured party for the uninsured portion of the debt which is not compensated by the credit insurer. Also, in certain jurisdictions, lawyers are allowed to work on a partial or full contingency fee basis. This 'no win-no fee' arrangement is widely used by personal injury lawyers and employment lawyers in the United States and achieves a similar outcome since it externalizes legal fees. Other examples may include an association or non-profit organization contributing to legal fees for non-economic and mostly ideological, environmental or political reasons. TPF has thus taken a number of opportunist forms.

However, the term 'TPF' was never used to describe these practices and was coined in relation to the emergence of third party experts which occupation consists solely in providing funds in the hope of a greater economic return. Such entities are composed of experienced litigation and finance teams and have a structured decision-making process to determine whether to dedicate resources to a case. While funders will conduct their activities differently from one to the other given the many ways to operate, thus making the practice rather heterogeneous, historical players are unregulated hedge fund like structures, providing funding on a risk-based pricing basis, screening the market for opportunities and assessing them in a risk/reward basis.

TPF is contractual. In most countries where the practice exists, it is not currently subject to statutory regulation.[4] To capture the broad range of potential funding arrangements, the International Council for Commercial Arbitration ('ICCA') -Queen Mary College task force on TPF defines the activity as follows:

> *In its simplest form, third-party funding involves an entity, with no prior interest in the legal dispute, providing financing to one of the parties (usually the claimant). Typically, this financing is offered on a 'non-recourse' basis, meaning that the funder has no recourse against the funded party if the case is unsuccessful. Under this model, the funder's recourse for repayment of the capital advanced and return on the capital invested is limited only to the claim proceeds recovered, if any.*[5]

In an overly simplified example of a claimant with a USD 10M claim requiring an investment of USD 1M to see the case to its end, a funder would bear the total estimated costs of the procedure in exchange for a stake of the proceeds. The funder would seek to recover an amount calculated on a

4 For example, under French law, a funding contract qualifies as a *sui generis* agreement as discussed *infra.*

5 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, International Council for Commercial Arbitration, ICCA Reports No. 4, Apr. 2018, at 8.

multiple of the invested capital and/or a percentage of the proceeds. It is often said that funders target a remuneration of three to four times the invested amounts, thus allowing the client to keep the lion's share of the amounts recovered.

2. *Allowing Non-frivolous Claims to Materialize*

Third-party funders typically provide claimants but also, as the case may be, respondents, with a variety of options to finance the costs of carefully selected cases in exchange for a share in the proceeds exceeding their initial investment. This shifts the risks to the funder which will only get paid if the case is successful and the amount of the award is effectively paid or settled, while the client suffers no financial consequences if its case loses. Third-party funders however do not foster the filing of frivolous claims and will mostly back the strongest cases since they put their own money (or their investors') at risk.

A funder has a number of direct stakeholders including its investors, the funded party and the funded party's counsel. It owes its fiduciary duty to its investors, for whom it shall ensure a satisfactory return on investment, while being connected to the funded party and its counsel by contract. By reason of the private and almost always confidential character of international arbitration proceedings, external capital providers do not have access to information of the cases financed.

Funders have no connection to the cases financed. Further to signing a strict confidentiality agreement and with the assistance of the funded party's counsel, they typically assess cases on the merits, consider evidence and possible counterclaims, jurisdiction and limitations period, before conservatively evaluating the quantum, the possible returns and the realistic chances of a quick recovery against the estimated required budget. This procedure is particularly useful as it is aligned with the assessment that the funded party would need to perform prior to launching any claims in order to determine its chances of success.

Funding proceedings does not only come down to providing financial support to pursue claims against an alleged wrongdoer. A reliable and experienced funder with a strong track-record and a staff comprised of experienced litigators provides potential claimants with a cold, hard and objective financial assessment of the case as well as considerable debt collection expertise. It may make recommendations as to an eventual settlement or enforcement strategy while never providing legal advice, which generally falls within the domain of licensed attorneys.

In the case of an impecunious or weakened claimant, funders allow access to justice when cases would otherwise not materialize. This is particularly

true in a David versus Goliath situation, in both commercial and investor-states arbitrations, where the backing of a funder contributes to levelling the plain field. The same applies for liquidators or judicial administrators who, despite having a solid case to launch, lack the financial means to do so. In the case of a large well-funded company, resorting to TPF amounts to a business decision: shall it tie up the totality of the required funds in risky years-long proceedings and receive the totality of the proceeds, or deflect some (or all) of the financial risk to a third-party that will only get paid if the case wins, thus freeing funds for another investment?

C. The funder's decision to finance a case

1. *Finding Cases*

Finding cases is one of the funder's two great challenges. First, in order to identify a suitable case, it will have reviewed tens of others, if not more. It is often said that only 5% of the cases reviewed are financed. Second, a funder must ensure access to stable and sufficient equity capital to finance the costs of the proceedings (including possible enforcement costs) and timely accompany the funded party through any unexpected development up to the payment of the proceeds, but also to finance its own (often significant) internal costs.[6]

Before putting equity capital at risk on a non-recourse basis, a funder seeks to be convinced that a case has *excellent* chances of success, that the damages sought will be sufficient to achieve the targeted remuneration and that the amount of the award will be paid voluntarily or is recoverable through enforcement proceedings. This requires a funder to conduct a rigorous assessment of the underlying strengths and weaknesses of the claims, procedural hurdles and availability of evidence (including witnesses), each time a case is presented to it. Further, cautious funders will invest funds in accordance with their internal investment policy and ethical requirements, consider reputational risks at all stages, determine the funding commitments against available capitals according to the risks and concerns identified and reassess as needed in light of developments during the lifetime of the case.

Failing to steer the practice with sufficient reliability and predictability, to identify enough quality cases or to ensure the availability of

6 These include for example the costs of sourcing potential cases, conducting thorough due diligence, assessing the budget of a case and any cost management fees incurred during the lifetime of the funded case.

capitals for the required periods, will quickly drive a funder out of business. It is thus often said that the TPF market regulates itself.

2. *Determining the Terms of the Budget Plan*

In the decision making process, funders will define the budget required (i.e. their investment in the case) relying on a budget plan provided by the funded party's external legal advisors ('counsels') and any expert assessment available (for example on damages), and adopt a cautious and conservative approach. Such approach excludes insufficiently supported heads of claim, assuming the longest duration of proceedings and difficulties in recovery. Indeed, underfinancing a case would require the funder and the funded party to return to the drawing board to reopen negotiations and agree on more funding during the proceedings, thus resulting in a waste of time, effort and resources. At this stage, a funded party's bargaining power against the funder would be reduced, in particular if it requires funding to defend counterclaims. Therefore, funders often base the budget to allocate to the case on capped figures committed by the different stakeholders, in particular counsels and experts, taking into account other costs as provided by institutions' calculators for administrative and arbitrators' fees.

In international arbitration proceedings, the budget of a case typically includes counsels' fees, the arbitral tribunal's fees, the administrative fees, any experts' fees and anticipated costs of enforcement. In the case of Profile Investment, conducting the due diligence process, establishing the budget necessary to unlock the value of a claim and measuring the investment against the minimum expected returns takes at least a few weeks and usually not more than two months if detailed and reliable case documentation is available. To facilitate their due diligence, certain funders make use of online platforms, automated tools and algorithms to gather and assess relevant information about a case.

3. *Conducting the Due Diligence and Negotiating the Terms of the Funding Agreement*

The deep dive due diligence phase conducted by Profile Investment and performed by in-house experts, in accordance with anti-money laundering and financing of terrorism regulations, usually takes under six weeks and includes:

(1) A comprehensive counsel-driven case assessment on jurisdiction and legal merits with full disclosure of facts and behaviours including

relevant documentation and how a respondent may be anticipated to behave in the proceedings;

(2) A thorough analysis of the different heads of claim to assess their provable strength and substance, of the reliability of the documented evidence and availability of experts and witnesses;[7]
(3) A conservative valuation of the amounts likely to be recovered;
(4) An examination of any ethical considerations that may have arisen in the context of the contract bidding and execution, regarding the background of the dispute or the ultimate beneficiaries of any award to be rendered.[8]
(5) Anticipated enforcement strategies if the debtor does not voluntarily pay the awarded amount, an assessment of the respondent's mid-term solvency, its payment history and where its assets may be located at the time of the award;
(6) An assessment of the experience and qualification of the funded party's counsels and appointed experts; and
(7) A determination of budget heads and of a global budget plan proportionate to the realistic underlying claim amount, ideally on the basis of a one to ten ratio.

When a funder finds that a case meets its predetermined (economic and other) criteria, it negotiates with the future claimant the terms of a Litigation Funding Agreement ('LFA') laying out the conditions for funding and the terms of the collaboration, and defining what constitutes a successful outcome.[9] The LFA is generally tripartite and will always reflect the risks taken considering the specific characteristics of each case, the relationship between the funder, the funded party and its counsels, making clear that the funder remains a third-party to the claim and providing for all parties' respective duties and obligations.

Given the small percentage of cases funded, it is reasonable to assume that funders' due diligence is often similar and that one case is likely to meet

7 Profile Investment would for example consider whether a claimant would be a good witness at an evidentiary hearing.

8 This seeks to confirm the absence of ethically questionable issues and behaviours (e.g. corruption, conflicts of interest, undue enrichments, etc.) while allowing for reputation risk management. Because of the issues that they may raise, Profile Investment deliberately excludes a number of sectors which do not comply with its ethical principles. These include weapons, tobacco, gambling, alcohol and pornography industries as well as cases related to the manufacture or distribution of addictive substances.

9 When funding a respondent's' case, a funder may define an amicable settlement – or any solution allowing to preserve its reputation, lower the amount allegedly owed or change the nature of the compensation sought – as a successful outcome.

several funders' standards. This is true to some extent and a potential claimant is likely to receive several offers from several funders. However, the conditions offered by funders may vary substantially depending on the weight given to each criteria identified at the due diligence phase and depending on the business model adopted. It should be noted that a funder may reject a case that meets all its criteria. This may happen when a funder needs to diversify its investments and that a case – which it otherwise deems worth funding – is too similar to other investments.

As mentioned *supra*, a number of funders seek to include in the LFA a remuneration equal to the greater of three to four times the amounts invested and of a percentage of the proceeds. Thus, in the event that the proceeds are lower than expected, the funder will have at least tripled or quadrupled its investment (assuming that the proceeds allow for it). This remuneration structure reflects a 'price the risk' selection model pursuant to which a few number of cases will be sufficiently remunerative to ensure the profitability of the business and cover the losses incurred in a majority of riskier cases. Law firms would tend to refer non-straightforward cases to such funders and seek to reduce any success fees. Profile Investment's model, however, is 'merits driven' as it invests in cases which it believes are extremely strong on the merits, quantum and recovery, and only seeks to be remunerated on the basis of a multiple of its investment. This approach is most preferred by law firms which tend to refer cases with the highest prospects to such funders and agree to higher success fees. The authors believe that the 'pricing the risk' model will be less favoured in the future and that the industry is moving towards a more thorough due diligence and 'merits driven' approach so that only the most meritorious cases get funded.

As the TPF market considerably matured over the past decade, there is now a variety of options available and all funders do not compete to finance the same cases. Indeed, certain funders exclusively finance cases on the merits while others prefer to offer to buy an already rendered final award at a discount and handle recovery (for example when a claimant has already won an award which would require lengthy enforcement proceedings in challenging jurisdictions). Also, rather than financing the costs of the dispute, a funder may offer to finance the claimant's business expenses while the claimant itself covers the litigation/arbitration costs. In such cases, a funder shall cautiously approach its role in the claimant's affairs as a tribunal may consider it a party to the proceedings if it plays a predominant role in the claimant's management. Further, in the event that a law firm has a number of claims to bring forward, a funder could consider 'portfolio funding' and essentially finance the law firm as a whole for a predetermined period.

D. The funder's relationship with external counsels

1. *The External Counsel's Advisory Work*

With the exception of sophisticated entities with general counsels who have considerable litigation experience, potential claimants are often not aware of the availability of TPF schemes. In practice, when discussing whether to commence proceedings and when the high costs may dissuade a client from doing so, it falls upon its external counsel to suggest contacting one or more funders. It is in the practicing attorneys' best interests to get familiar with the TPF industry since a funder's involvement allows a client to bring its claims forward while fully securing its external counsels' remuneration so that they may fully concentrate on the case. Thus, all three parties' interests are aligned.

Before spending considerable resources financing a litigant's claims, a funder needs to conduct a thorough analysis of all circumstances surrounding the claims and be convinced of its value, as discussed *supra.* For these reasons, external counsels must be ready to spend considerable time at the due diligence stage addressing funders' concerns and preparing a budget for the case, with no guarantee that the funder will accept to take the case. They must repeat the exercise for each funder approached and often speak with several funders simultaneously, which may be very time consuming.

When exploring the TPF market on behalf of a client, external counsels are expected to report on and explain the variety of financing options available. Ideally, their clients would have the choice between several financing options and funders to compare offers and practices. As the funding market has considerably matured in the past decade, clients now benefit from a sound competition and a variety of products. Clients then turn to their external counsels for advice on their options, during the negotiations and on the drafting of the LFA. Since the funding most often includes the financing of external counsels' fees, a risk of conflict of interest exists and clients may want to consider obtaining independent legal advice to ensure that only their interests are considered.

2. *Bringing a Third-Party in the Proceedings*

External counsels must be aware that adding a third party to the proceedings, in particular when its investment is at risk, may change the dynamics of the case and how it may be conducted. As some funders may be overprotective over their investments, counsels must be wary of any wording in the LFA granting the funder too much control over the strategy.[10] Ideally, a hands-off approach is preferred. Having approved the choice of the funded party's counsel in the

10 In the authors' opinion, a funder's approval should not be required to enter into settlement talks.

early stage of the financing process, the funder should give it a lot of freedom to establish the strategy in collaboration with its client and not seek to run the case. It is however reasonable for external counsels to report to the funder on a regular basis, to share drafts and be open to suggestions and contributions from experienced funders. Profile Investment provides for the details of the collaboration with external counsels in the LFA to clarify each party's role and expectations, in the best interest of the client.

External counsels must also be aware of unscrupulous and unexperienced opportunistic players seeking to make a quick return, attempting to step into litigants' shoes (e.g. imposing the strategy and forcefully instructing them and/or their counsels) or backing largely unmeritorious claims.[11] Although the TPF market has a tendency to self-regulate and quickly squeeze them out, the case has often gone forward and the harm is thus already done. These have alarmed the arbitration/litigation community and raised concerns over the likelihood of conflicts of interests and inappropriate behaviours since the early 2010s. Other concerns relate to the origin and availability of the capitals committed – often raised by organized fund raisers targeting private and institutional investors or state-owned investment funds – and Know Your Customer ('KYC') compliance.

Thankfully, a number of funders pay extreme attention to providing state of the art funding options governed by cautiously drafted LFAs, communicating extensively and with great transparency about their methods and seeking ways to gain trust and respectability. These may include listing on a stock exchange, adopting the Code of Conduct of the Association of Litigation Funders of England & Wales, publishing the terms of any internal charter of conduct and procedures, and submitting their corporate structure, processes, risk management and policies to very rigorous EU regulations for the financial sector. *The authors discuss these investment management and corporate structuring considerations elsewhere.*[12]

Measures taken by funders will not, on their own, be sufficient to address these concerns and go hand in hand with the rules and legal framework put in place by domestic jurisdictions. Modern jurisdictions looking to regulate the funding activity now frequently look at Singapore as a model.

11 In *Excalibur Ventures LLC v. Texas Keystone LLC* [2016] EWCA Civ 1144, the England and Wales Court of Appeal confirmed that funders who enabled to conduct a litigation were liable to indemnify defendants when the claim was '*essentially speculative and opportunistic* […], *was based on no sound foundation in fact or law and it has met with a resounding, indeed catastrophic, defeat*'.

12 Olivier Marquais and Alain Grec, Investment Management and Corporate Structuring Considerations for Third-Party Litigation Funders, in Matthias Scherer (ed), ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2020, Volume 38).

E. The singaporean model

1. *The Funding Bill and Accompanying Regulations*

Since the creation of the Singapore International Arbitration Center ('SIAC') in 1991, Singapore has come a long way in establishing itself as a global dispute resolution hub.[13] With the objective to further strengthen its position, the Singapore Parliament introduced the Civil Law (Amendment) Bill in 2016 (the 'Funding Bill') introducing measures allowing TPF in arbitration. The Singapore government sent a permanent representative to the ICCA-Queen Mary College dedicated the TPF and liaised, in its legalization preparation works, with Luxembourg regulated funder Profile Investment.

The Funding Bill and accompanying regulations became law on 1 March 2017 and, for '*prescribed dispute resolution proceedings*' are concerned, abolished the common-law torts of champerty and maintenance[14] and confirmed that funding of claims was not contrary to public policy or otherwise illegal and provided. '*Prescribed dispute resolution proceedings*' include international arbitration proceedings and related court and mediation proceedings.[15] On 8 August 2019, the Minister for Law announced that the TPF framework would be extended to domestic arbitration proceedings and certain prescribed proceedings in the Singapore International Commercial Court ('SICC').[16] TPF contracts thus remain unenforceable and the torts of maintenance and champerty continue to be contrary to public policy or illegal, except insofar as these proceedings are concerned.

The Regulations lay out the requirements to be a '*qualifying Third-Party Funder*' under the law. The funding of the costs of dispute resolution proceedings shall be the funder's principal business, it shall have a paid-up share capital of not less than SGD 5 million and these funds must be invested pursuant to a TPF contract to enable the funded party to meet the costs,

13 According to the official release of its latest Annual Report, SIAC received 402 new cases from parties in sixty-five jurisdictions in 2018, with a total sum in dispute for all new case filings to USD 7.06 billion, Singapore International Arbitration Center, *SIAC's 2018 Cases Exceed 400 for Second Year Running, reaffirming its Global Appeal*, Press release of 6 Mar. 2019.

14 '*Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely, maintenance of an action in consideration of a promise to give a maintainer a share in the proceeds or subject matter of the action* […]', *Re Vanguard Energy Pte Ltd* [2015] SGHC 156, para. 33.

15 Regulation 3 of the Civil Law (Third-Party Funding) Regulations.

16 Ministry of Law, *Public Consultation on Conditional Fee Agreements in Singapore* para. 3 (27 Aug. 2019).

including pre-action costs, of the proceedings.[17] Funders which fail or cease to comply with these requirements cannot enforce their rights arising under TPF contracts[18] while the rights of other parties – such as the funded party – are preserved under the TPF contract.[19]

At the Second Reading of the Funding Bill on 9 January 2017, Ms. Indranee Rajah SC, then Senior Minister of State for Law, stated that if Singapore shall remain one of the five most preferred seats of arbitration in the world, it had to remain responsive and constantly adapt to business needs, including the financing of valid claims which may not otherwise be pursued because of financial constraints. Keeping in mind the benefits on Singapore law firms and lawyers and the need to keep up with other leading arbitration centres such as London, Paris and Geneva where TPF has already become a common feature, it was necessary to adopt an appropriate regulatory framework. This required adjusting the rules governing lawyers' ethical obligations to take account of the TPF industry, in particular in relation to financial interest and disclosure.

2. *Further Amendments and Soft Laws*

The Legal Profession Act ('*LPA*') was amended to clarify that lawyers are allowed to introduce or refer funders to their clients so long as they do not receive any direct financial benefit from the introduction or referral,[20] advise on, draft or negotiate a TPF contract and act on behalf of a client on any dispute arising out of the TPF contract.[21] Also, the Legal Profession Rules 2017 ('LPPC Rules') prohibit a legal practitioner from holding any share or ownership interest in a funder which it has introduced to a client or which has a TPF contract with its client, and from receiving a commission, fee or share of the proceeds from a funder in which it hold a share or ownership interest.[22] With respect to disclosure, Rule 49A of the LPPC Rules provides that practitioners conducting dispute resolution proceedings must disclose to the court or tribunal, as well as to any other party to the case, the existence of the TPF contract and the identity of the funder at the date of commencement of the proceedings or as soon as practicable thereafter. However, lawyers may not disclose the terms of the arrangement.

17 Regulation 4 of the Civil Law (Third-Party Funding) Regulations.

18 Section 5B(4) Civil Law Act (Ch. 43).

19 Section 5B(7) Civil Law Act (Ch. 43).

20 Direct financial benefit do not include legal fees to be paid for the provision of legal services. These may be paid by the funded party or the funder on its behalf.

21 New s. 107(3A)(b) and (c), Legal Profession Act (Ch. 161).

22 Rules 49B(1) and 49B(2), Legal Profession (Professional Conduct) Rules 2017.

An issue however is that section 107(1) LPA continues to prohibit solicitors from accepting conditional fee agreements ('CFAs').[23] These constraints originate in the common law as derived from England and Wales as a way to protect vulnerable litigants and to guard against potential misconduct and conflict of interest for lawyers.[24] Such prohibition may be deemed inappropriate for certain funders which seek to align interests by ensuring that both the funder and the funded party's counsel have a stake in the game. As this places Singapore lawyers at a disadvantage towards foreign lawyers not subject to similar restrictions, the Singapore Ministry of Law ('MinLaw') is taking active steps to introduce a framework to allow CFAs for international and domestic arbitration proceedings, certain prescribed proceedings in the SICC and mediation proceedings arising out of or in any way connected with such proceedings.[25] One of MinLaw's declared objectives is to align the prospective CFA framework with the (newly expanded) TPF framework to better serve the needs of commercial parties and their counsel.[26] By addressing openly the concerns of the TPF industry in its Public Consultation, MinLaw shows foreign jurisdictions that regulating the activity is an ongoing process likely to require frequent adjustments over time.

All stakeholders in the Singapore dispute resolution ecosystem welcomed the passing of the Civil Law (Amendment) Act and the Civil Law (Third-Party Funding) Regulations 2017, and a number of key players in the private sector simultaneously contributed instruments of soft law with a view to establish best practices. These include the SIAC Third-Party Funding Practice Note for arbitrators, the Singapore Institute of Arbitrators (SIArb) Guidelines for Third-Party Funders and the Singapore Law Society's Guidance Note for practitioners. Immediately after the passing of the law, a number of funders opened offices in Singapore[27] and the first funded cases where brought to arbitration before the SIAC and the ICC as early as 2018.

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23 Section 107(1) LPA provides that '*no solicitor shall (a) purchase or agree to purchase the interest or any part of the interest of his client or of any party in any suit, action or other contentious proceeding brought or to be brought or maintained; or (b) enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding*'.

24 Ministry of Law, *supra* n. 15, para. 4.

25 MinLaw published a Consultation Paper on CFAs on 27 Aug. 2019 and invited members of the public to provide feedback on its proposal.

26 Ministry of Law, *supra* n. 15, para. 7.

27 These include IMB Bentham, Woodsford Litigation Funding, Harbour Litigation Funding, Burford Capital and Litigation Capital Management. Omni Bridgeway opened its Singapore office in 2015 as its activities mostly focus on the financing of enforcement proceedings. On 15 Oct. 2019, IMF Bentham and Omni Bridgeway have announced their merger.

F. The absence of a regulatory framework in France

1. *The Shortfalls of French Law*

All jurisdictions have not been as straightforward as Singapore in approaching the TPF activity. This is the case of France which provided no legislative guidance, and case law on the subject is very limited.[28]

This led the ICC France Working Group to identify, in 2014, the external counsel's confidentiality obligations as a potential hurdle for the development of the TPF industry. Communicating about the client's file would amount to a breach of its ethical duties and expose it to disciplinary and penal sanctions.[29] However, by reason of its expertise, knowledge of the file, independence and degree of sophistication, a funder's preferred interlocutor throughout the dispute will always remain the litigant's external counsel. The funder will expect it to disclose, as early as the due diligence phase and with the client's approval, information covered by legal privilege ('*secret professionnel*').

Under French law, legal privilege reflects the necessary balance between one's individual rights and the superior interest of justice. It guarantees to the client that its attorney will not disclose protected information to third-parties while safeguarding it against outside interference, in particular from public authorities likely to seek access to information shared confidentially.[30] As legal privilege is general, absolute and a matter of public order,[31] a French attorney may not be released of its obligations not to disclose information covered by legal privilege, even if it is in the client's interest and at its request.[32] Thus, on the one hand, the obligations governing the legal privilege do not allow an attorney to communicate with the funder about the client's file. On the other hand, it would be unreasonable to force a client – who is not bound by legal privilege[33] – to take the lead on communications with the funder by reason of its limited perspective of its own file and potential lack of contentious expertise.

Such overly strict confidentiality obligations were an obstacle to the development of TPF in France. They decreased Paris's value as a potential seat of

28 The Versailles Court of Appeal implicitly recognized the legality of a LFAs as of 2006, qualifying them as *sui generis* agreements, Versailles Court of Appeal (1 June 2006), *Société Foris c./SA Veolia Propreté*, RG 05/01038.

29 Groupe de travail de ICC France, *Projet de Guide Pratique sur le Financement de l'Arbitrage par les Tiers (Third Party Funding)* 14 (2014).

30 J. M. Burguburu, *Contenu et limites du secret professionnel*, Rapport au Congrès UIA de Dresde (Nov. 2012).

31 Article 2.1 of the National Regulations of the lawyers' profession ('*Règlement Intérieur National*').

32 Cass 1ere civ, 6 Avril 2004, n 00-19.245.

33 Cass 1ere civ 30 Avril 2009, n 08-13.956.

arbitration as compared to certain other TPF friendly jurisdictions and placed French attorneys at a disadvantage towards their foreign counterparts who were not bound by the same obligations. For these reasons, and in the absence of formal guidance or regulations, authors invited attorneys to decide themselves whether to strictly abide by their ethical duties or, to some extent, move away from them to the extent necessary to achieve efficiency, having considered all inherent risks.[34]

When faced with seemingly irreconcilable interests, French law has been capable of showing flexibility to accommodate the needs of international arbitration on several occasions. First, while French lawyers are prohibited from concluding pure contingency fee arrangements with their clients ('*pacte de quota litis*'), the Court of Appeal ruled against the application of this principle in international arbitrations proceedings when such agreements are voluntarily entered into and not abusive, since they are internationally recognized and accepted in numerous countries regardless of the legal system.[35] Second, ethical obligations prohibiting French lawyers from preparing witnesses for cross examinations also placed French lawyers at a disadvantage. When competing arbitration jurisdictions attempted to marginalize Paris on this ground, the arbitration commission of the Paris Bar submitted a report to the Paris Bar Council ('*Conseil de l'Ordre des Avocats du Barreau de Paris*') advising to adopt common law working practices to maintain Paris as a leading seat of arbitration in Europe and promote French arbitration law. This led the Paris Bar Council to conclude unanimously that preparing witnesses fell within a French lawyer's duties as it was a common practice in international arbitration proceedings.[36] It seemed equally appropriate to adjust ethical obligations to encourage TPF in France, insofar as arbitration proceedings are concerned.

2. *Stakeholders' Concerns and Initiatives*

Because of the constant rise of the TPF practice in France,[37] coupled with a number of ethical questions rising from the addition of a third-party to the client-attorney relationship and the lack of formal regulations, stakeholders felt a pressing need to address the issue:

34 '*Il appartiendra le* cas échéant aux protagonistes *d'observer rigoureusement les préceptes déontologiques ou de s'en dégager peu ou prou au nom de l'efficacité, tous risques afférents dument pris en compte*', C. Kessedjian (dir), *Le financement de contentieux par un tiers, Third Party Litigation Funding*, Editions Panthéon Assas (2012), Collection « Colloques », 207 at ISBN 979-10-90-429-21-5, para. 94.

35 Cour d'appel de Paris, 1er Ch. B, 10 juillet 1992.

36 Bulletin du Barreau 2008 no. 9, 4 mars 2008, at 45–46.

37 Despite the lack of clear regulations, a number of funders, mostly located in the UK, have been active in France since 2009–2010.

(1) In 2014, the ad hoc commission of the '*Club des Juristes*' discussed the legal qualifications of the LFA, excluding both the '*contrat d'entreprise*' and the *sui generis* qualification, and concluded that it amounted to a '*contrat composite*' which provisions are found in a number of specific contracts.[38] The ad hoc commission confirmed that TPF raises three fundamental issues concerning attorneys' ethical duties: legal privilege, prohibition of conflicts of interest and of the pure contingency fee arrangements.

(2) In September 2015, the Arbitration Commission of the Paris Bar created a Working Committee tasked with conducting a comprehensive study of the industry and, on 21 February 2016, the Working Committee presented its findings to the Paris Bar Council. The Working Committee Report provides for a detailed analysis of the TPF industry, its history and benefits for the lawyers and their clients, addresses a number of ethical questions for the legal profession, guides lawyers in their relations with funders and makes suggestions for the establishment of an appropriate legal framework. The Working Committee Report notes that, despite the lack of framework (with the exception of guidelines and other codes of conduct constituting '*soft law*'), funders are already active in France, while only few are French.[39]

(3) The French National Council of Bars ('*Conseil National des Barreaux*') issued a Resolution on 20 and 21 November 2015 calling for the establishment of financing funds in France to allow access to justice and making clear that, although there is no legislative framework regulating the TPF practice in France, its development does not contravene French law – in particular the law of 1971 regulating the lawyer's profession.[40] It reminds that the lawyer's independence protects against a funder's attempt to exercise excessive control over the case (e.g. forcing a litigant to settle or abandon the procedure in conditions that did not serve the litigant's best interest). The Resolution also supports the adoption of a text regulating the TFP practice and the LFA in a manner which upholds attorneys' ethical obligations and attorney-client privilege.[41]

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38 *Financement du Procès par les Tiers*, Rapport du Club des Juristes, 15 et seq. (Juin 2014).

39 Rapport du Groupe de Travail de la Commission Arbitrage International, in *Le Financement de l'Arbitrage par les Tiers* ('*Third Party Funding*') 8 (Barreau de Paris 23 Nov. 2017).

40 Loi no. 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques.

41 Conseil National des Barreaux, *Résolution « Financement du procès par les tiers »*, adoptée par l'Assemblée générale des 20 et 21 novembre 2015.

(4) Finally, the absence of legislative guidance led the Paris Bar Council to adopt a Resolution on Third-Party Funding on 21 February 2017 expressly endorsing the practice which is not prohibited by French law, for the benefit of litigants and of their external counsels, while insisting greatly on the lawyers' ethical and professional obligations towards their clients. These include in particular that counsel for the litigant shall not advise the funder in any way, shall only receive instructions from its client and shall refrain from meeting with the funder in the client's absence. Further, this Resolution recommends disclosure of funding arrangements to arbitral tribunals and suggests to administer them through the CARPA ('*Caisse Autonome des Règlements Pécuniaires des Avocats*') traditionally used to handle clients' monies.

G. Conclusion

The rise of litigation funding has gone hand in hand with the rise of the corporate awareness of the industry and a growing amount of businesses have become aware of the opportunity to take legal costs off their books by diverting the litigation uncertainty to a third-party. Since third-party funders aim to provide financial services allowing access to justice while operating at arm's length, the public naturally expects them to comply with a number of basic requirements including competence, experience, reliability, availability of capitals committed and transparency as to governance and origin of the funds. Some of these concerns may be addressed at the funder's corporate and investment management structuring level while others are left to the domestic jurisdictions to set up the framework necessary to prevent inappropriate behaviours and the involvement of certain 'wannabes' in legal disputes.

A hands-off professional obligations-driven approach, as chosen by France, does not necessarily prevent funders from exercising their activities but fails to provide the security expected by the interested parties. Indeed, although the French self-regulation model seems to demonstrate that the absence of formal recognition and regulations of TPF is not an obstacle to the financing of arbitrations seated in Paris, French initiatives remain largely isolated, are not binding and are not specific enough to guide stakeholders. Thus, given the confusion created by a degree of uncertainty and despite a number of foreign funders actively screening the French market, only a handful of funders maintain offices in France.[42]

42 This include Profile Investment *and IVO Capital Partners.*

On the other hand, Singapore legislated, and did so successfully. On the constant lookout for opportunities to strengthen its position as a world leading dispute resolution hub, Singapore identified the relevant issues and hurdles and implemented the necessary regulations and guidance to allow Third-Party Funding to grow and thrive in the best interests of the litigants. In the authors' opinion, a number of jurisdictions would benefit from taking example on the Singaporean legislative approach and model which set up, in record time, a nearly optimal landscape which MinLaw continues to seek to adjust as needed.