

THIRD PARTY FUNDING FOR DISPUTE RESOLUTION

by Beibei Zhang

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In recent years, the use of third-party funds (TPF) in mainland China and beyond has grown significantly. Under the third-party funding model, the risks and costs of litigation or arbitration are transferred to parties outside the case. The parties with economic difficulties have a better chance of obtaining legal justice. However, the financial motives of third-party funders are not always in the interest of the parties or the courts' need to review the cases efficiently and impartially. Therefore, appropriate regulatory measures against the potential risks of TPF are necessary. By comparing recent developments and historical backgrounds in the field of TPF in different countries, this book reveals differences in regulatory approaches to TPF in selected jurisdictions. In combination with China's legal tradition, social conditions and empirical research, the author also offers suggestions on how to solve legal issues related to TPF in China. Against the background that the development of TPF in China is still in its infancy and China's Arbitration Law is being revised, this book not only helps Chinese legislators formulate regulations on TPF, but also provides a great guiding tool for litigation and arbitration parties.

Keywords: Third-Party Funding, Litigation, Arbitration, Mainland China, Regulatory Measures, "Light Touch"

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1. Introduction

Third-party funding (TPF) may be defined as “the provision of funding to parties in litigation and arbitration by a third party on a non-recourse basis in exchange for a proportion of the final proceeds - essentially a kind of investment.”¹ While gaining popularity in various jurisdictions, TPF provides cash-strapped parties with access to justice in dispute resolution, allowing them to compete on a level playing field with the counterparties. However, TPF has also been subject to challenges that cite the potential for abusive litigation and the impact on the autonomy of parties in arbitration. To minimize the negative effects of TPF and to ensure that TPF can play a positive role, it is essential to regulate and guide TPF appropriately.

This book, written by Assistant Professor Dr. Beibei Zhang of Shandong University, is a comparative study of TPF and its regulation in England, Hong Kong, Singapore, the Netherlands, and mainland China. As stated at the preface, the author aims to explain the most recent developments in the area of TPF and, more importantly, the legal theories associated with the regulatory attempts in selected jurisdictions. By revealing the differences in regulatory measures adopted by the chosen jurisdictions for TPF, the author tries to fill the gaps in understanding the TPF market in China and seeks to propose regulatory methods for funding activities in China based on empirical information.

2. England

In Chapter 2, the author selects England, one of the most developed TPF markets, as the research object. Chapter 2 makes a detailed analysis of the development and application of TPF in England from three perspectives: (1) the philosophical basis of TPF; (2) the business model of TPF; and (3) the regulatory measures against the risks of TPF in England.² The author further explains the changes in legislative and judicial attitudes toward TPF from a historical perspective.

TPF is allowed to be used in all civil cases in England, whether they are settled through litigation or arbitration. The wide use of TPF in England lays a foundation for a comparative study of litigation and arbitration involving TPF which gives readers a chance to grasp the basic concepts related to TPF.

In discussing the rationality of system design, the analysis of law and economics is a very favorable research approach. The dispute resolution process is a kind of economic activity, in which the cost is the main consideration for the choice of dispute resolution. While the author uses cases such as the *Excalibur* case to explain whether TPF results in excessive costs or harm to the parties, this section merely shows the reasons for the judgments.

In terms of regulations, England has developed a unique “light touch” approach to regulating TPF. Courts and tribunals therefore must consider international instruments, soft law, and general legal principles, rather than case law and self-regulation.³ The “light touch” regulation implies regulatory flexibility, giving judges and arbitrators more discretion. However, this situation may also lower the predictability of the parties and increase the uncertainty of cases. How to determine the boundaries of “light touch” regulation is a point at issue. The author may present clearer views.

3. Hong Kong

Chapter 3 focuses on Hong Kong, a Chinese city with the common law tradition. Hong Kong has strong trade and cultural ties with mainland China, whose laws have played an important role in improving China’s legal system. Therefore, studying the application and development of TPF in Hong Kong helps to fill the gap in understanding the TPF market in mainland China. Compared with England, Hong Kong allows TPF to participate in arbitration, but TPF is still largely barred from litigation. As the TPF industry in Hong Kong is at an early stage of development, it is regulated in a relatively relaxed manner. The author has made a comparison between the Hong Kong code of practice and the Association of Litigation Funders Code of Conduct in England, including the nature and scope of the codes, the capital capacity of the funder, the protection of vulnerable funded parties, disclosure, non-compliance, and the funder’s control on the proceedings. TPF may pose the risks, so that a “light touch” approach similar to the one in England may be adopted to regulate TPF. In the author’s view, Hong Kong should further promote the application of TPF in litigation, and the legislature should pay due attention to “the risks of the increase in entrepreneurial litigation and the close

involvement of litigation funders in the legal process.”⁴ Readers may find it more persuasive with empirical analysis, such as statistics.

4. Singapore

Singapore, also a former British colony and the world’s leading international arbitration center, has attached great importance to the development of TPF in recent years. The statutory permission of TPF is currently confined to international arbitration in Singapore. In Chapter 4, the author discusses various issues, such as the circumstances in which TPF is allowed to be applied, the procedural implications, and the regulation of TPF for international arbitration in Singapore. Compared with Hong Kong and England, Singapore has a more restrictive and conservative approach to dealing with TPF-related issues.⁵

This approach is mainly reflected in the legislature’s reliance on mandatory statutory measures, including the qualification requirements for third-party funders⁶ and the mandatory disclosure of TPF, among others, to counteract potential abuses. Some professional institutions issued various guidelines, which target arbitrators, third-party funders, and legal practitioners. The main reason for the “limited but targeted” regulation is that Singapore has taken a conservative attitude toward the regulation of the legal industry for a long time. To maintain its position, Singapore takes the lead in testing TPF in the field of international arbitration. As a result, the development of TPF in Singapore is inhibited to some extent by strict legal regulation with a too limited scope of application. It proves that the development of institutions and industries are mutually reinforcing. The relatively developed arbitration industry in Singapore will force the legislature to take the lead for introducing TPF in the field of international arbitration; gradually expand the scope of application of TPF; and improve the regulatory system of TPF.

5. The Netherlands

Chapter 5 brings the Netherlands, a civil law country, into the discussion. Here, readers are offered the latest development, both substantive and procedural, in

the regulation of TPF, especially in class action lawsuits in the Netherlands. This chapter is relevant to China because the Netherlands is also a civil law country as mainland China and the TPF rules in the Netherlands provide a sample for China to effectively manage TPF. However, this chapter fails to highlight the special aspects of TPF regulation in the Netherlands under civil law system. On the one hand, the civil law system has the tradition of making statutory law its main legal source. The Netherlands currently has no regulations specifically for TPF; it relies instead on the rules and principles contained in the civil law legislation to deal with the risks of class action lawsuits. TPF in other areas of law remains largely unregulated. Therefore, it is still doubtful whether the Netherlands can be chosen as a typical country to study TPF in the civil law system. On the other hand, the civil law system usually adopts the inquisitorial trial mode and the syllogism deductive reasoning mode when the courts adjudicate cases. What are the positive or negative impacts of these typical civil law characteristics on the process of expanding the scope of application of TPF? There is a lack of in-depth and profound analysis of these issues.

6. China

Chapter 6 is the key chapter of the book. With particular detail, the chapter examines the possible development path of TPF in China, the problems TPF may face, and how to solve them. At present, most of the research on China's TPF industry remains at the theoretical level without empirical evidence. Through empirical research methods such as a questionnaire survey, the author studies the development status of TPF in China and provides empirical evidence for verifying theoretical research through charts, which bear a great deal of qualitative value. However, the author sets up "occupation filters" in the questionnaire so that "some of the findings based on too few responses have lost statistical value."⁷ In the empirical analysis of "TPF in the eyes of adjudicators," for example, the author received only 12 responses from judges and assistants⁸ and four responses from arbitrators.⁹ To make the results statistically significant and to enhance the persuasive power of empirical evidence, the author may administer additional questionnaires on these issues.

In addition to empirical evidence, the author compares the development status of TPF in China with the status in England, Hong Kong, Singapore, and the Netherlands, respectively. On the one hand, the comparison and related analysis fill the gap in understanding TPF markets and possible regulatory approaches. On the other hand, this part sums up the previous chapters and makes the book more systematic and logical. For example, on the transparency of the TPF arrangements in arbitration, the arbitral tribunal seated in England has never been deterred from making an inquiry into the existence of TPF and the identity of the funder. Hong Kong and Singapore are ready to force disclosure of financing agreements through statutory laws, but the disclosure obligations are imposed on different subjects. The author believes that China's legislature should take lessons from the above legislative experience and consider stipulating the above details about disclosure in the arbitration law or rules.¹⁰ As China's TPF is still in its infancy, it is impossible to explain all the problems clearly, even though the author makes an attempt to use historical, empirical and functional methods, as well as other tools to "pull the threads together and to anticipate the future."¹¹

Moreover, the author puts forward corresponding solutions to the problems that China's TPF may face, but some ideas need to be developed further. When it comes to the regulation of TPF in arbitration, for example, the author thinks that "there is a need for an explicit requirement for the disclosure of TPF in the arbitration law."¹² But more important thing to consider is "whether they [the legislators] want to set out disclosure rules in the arbitration law or to leave them to the arbitration rules."¹³ The author seems to prefer "soft law," such as arbitration rules, to enhance the flexibility of TPF rules. Against the background that China's Arbitration Law is being revised, TPF has become a highly topical issue on the legislative agenda. What aspects of TPF are appropriate or should be included in China's Arbitration Law or arbitration rules? The book may be more valuable with the answers to these questions.

Finally, the author's view on the future regulatory changes concerning TPF in China seems to be too optimistic. The author is convinced that TPF is permissible in China and this will be confirmed by either legislation or judicial guidance by the Supreme People's Court (SPC) in the near future.¹⁴ In 2022, however, two cases on the legality of funding activities demonstrate that China intends to establish a bifurcated regulatory regime for TPF. In *WeAnd v. Shanghai Xuding*, the courts

decided that the funding arrangement violated the public interest and good morals. In another case concerning arbitration funding, *Sunan Ruili Airlines Co., Ltd. v. Guoyin Aircraft Leasing Co., Ltd.*, the court in Wuxi, Jiangsu province, approved not only the legal effect of the concerned TPF agreement, but also the funder's right to obtain case information throughout the funding activities so that the funder's contractual profits could be secured. Moving forward, China may need to re-examine non-party funding and its compatibility with the public interest and morality. This book may be a good reference.

7. Conclusion

This is a rich and well-organized book that sets a solid benchmark for extensive research from a variety of perspectives and provides a great tool for exploring and understanding complex topics relating to TPF. In general, TPF has the function of improving the overall societal welfare and providing cash-strapped parties with access to justice. China is rich in resources for dispute resolution. Litigation capital companies, such as DingSong Legal Consulting Co., Ltd., have appeared in mainland China and the TPF industry has gradually begun to develop. Therefore, it is indispensable to moderately regulate and guide TPF.

The book's extensive use of case studies, legal analyses and web materials makes it appealing to readers, especially those who wish to have a clear understanding of the TPF business. The language of this book is clear and neat, and people will not have a sense of monotony at any stage of reading. Many of the questions raised by the author are worthy of continuous exploration and in-depth discussion, which can give readers more inspiration. In terms of its coverage and wealth of practical detail, this book is certainly a timely addition to existing TPF resources.

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REFERENCES

1. ZHANG BEIBEI, *THIRD PARTY FUNDING FOR DISPUTE RESOLUTION, A COMPARATIVE STUDY OF ENGLAND, HONG KONG, SINGAPORE, THE NETHERLANDS, AND MAINLAND CHINA 1* (2021).
2. *Id.* at 11.
3. *Id.* at 52.
4. *Id.* at 90.
5. *Id.* at 96.
6. *Id.* at 213. For example, Section 4 of the Civil Law (Third-Party Funding) Regulations 2017 only allows “professional third-party funders” to fund international arbitration.
7. *Id.* at 172.
8. *Id.* at 176.
9. *Id.* at 178.
10. *Id.* at 201.
11. *Id.* at 212.
12. *Id.* at 201.
13. *Id.* at 201.
14. *Id.* at 210.