



**UNIVERSITY of the  
WESTERN CAPE**

**FACULTY OF LAW**

**REGULATING THIRD PARTY FUNDING IN ARBITRATIONS HELD WITHIN  
SOUTH AFRICA**



**UNIVERSITY of the  
WESTERN CAPE**

A Mini Thesis submitted in partial fulfillment of the requirement for the degree of Legum  
Magister (LLM), Faculty of Law, University of the Western Cape, South Africa

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June 2018

## DECLARATION

I, Lyn Lawrence declare that ‘Regulating Third Party Funding in Arbitrations held within South Africa’ is my own work and has not been submitted before for any degree or examination in any other University or academic institution. All sources I have used or quoted have been acknowledged and correctly referenced.

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Signature:



Date: 14 June 2018



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Date: 14 June 2018

## DEDICATION

This mini-thesis is dedicated to Henry and Avril Erasmus.



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## ACKNOWLEDGEMENTS

To my supervisor, Professor Patricia Lenaghan, thank you for your guidance throughout my entire LLM. Your intellectually stimulating class environment contributed significantly to my growth as a legal scholar and the completion of this mini-thesis. I appreciate your patience, your advice and constant support.

To my family, Kim and Clayton Hendricks, a mere thank you cannot express how grateful I am for everything that you have done and continue to do for me. I therefore promise to always do my best so that your sacrifices are not in vein.

Thank you to the friends that became family whilst completing my LLB at the University of the Western Cape, Kula Waldeline Simson, Mayday Martina Karugarama, Odwa Tabata and Peter Terracina. Your constant support and shared love for the legal profession has helped keep me motivated throughout my LLM.

To Tinashe Kondo and Kim Siebritz thank you for your endless editing, advice and guidance. It has contributed tremendously to the completion of my LLM modules and mini-thesis. I am grateful for the impact you have had on my development as a legal scholar.

To the University of the Western Cape's Graduate Lecturing Assistance Program thank you for providing me with the opportunity to pursue an LLM. Thank you for the growth and work experience I gained in the process. The lessons I have learnt, not only from my colleagues but from the Law Faculty will be invaluable in my future endeavours.

To the Law Faculty of the University of the Western Cape thank you for providing students, such as myself, with an opportunity to further our education. The support and guidance offered by the lecturers and staff contribute enormously to our legal careers and our futures. The friendships, mentors, memories and experiences gained will remain a part of me long after I leave the doors of learning. For that I am eternally grateful.

## LIST OF ABBREVIATIONS

ALF	Association of Litigation Funders
CIETAC HKAC	China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center
CJC	Civil Justice Council
EU	European Union
IBA	International Bar Association
ICC	International Chambers of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IMF	IMF (Australia) Ltd
LCIA	London Court of International Arbitration
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NPC	National Potato Co-operative Ltd
PCA	Permanent Court of Arbitration
PWC	Price Waterhouse Coopers Inc
SCA	Supreme Court of Appeal
SICA	Singapore Arbitration Center
TPF	Third Party Funding
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States
Washington Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other State

## KEY WORDS AND PHRASES

Arbitration

Claimholder

Funding Agreement

Funder

Hong Kong

Regulate

Respondent

South Africa

Third Party Funding

United Kingdom



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# CHAPTER 1

## INTRODUCTION AND BACKGROUND TO THE STUDY

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### 1.1 BACKGROUND TO THE STUDY

The decision by countries to relax the common law doctrines of maintenance and champerty to accommodate Third Party Funding (TPF) in dispute resolution has sparked a worldwide debate.<sup>1</sup> The controversial practice of funding disputes in exchange for a share of a successful outcome or settlement has left courts and administering institutions in a compromising position.<sup>2</sup> South Africa joined the debate in 2004 after the Supreme Court of Appeal (SCA) relaxed the application of the doctrines in favour of TPF.<sup>3</sup>

The SCA found that domestic courts have the necessary mechanisms to protect themselves against any repercussions of TPF without the assistance of the doctrines.<sup>4</sup> The SCA limited their search to the abilities of the courts and did not consider the effect TPF could have on other dispute resolution processes such as arbitration. This study seeks to discover whether arbitration can protect itself against the repercussions of TPF. It further questions the possibility of adopting regulations to aid in the protection of arbitration should the current mechanisms be insufficient.

Since the SCA's decision, the TPF industry has grown significantly in South Africa reinforcing the idea of protecting dispute resolution processes. In 2017 one of the first South African TPF investment companies, Taurus Capital Holdings (Pty) Ltd, opened its doors in Johannesburg.<sup>5</sup> A TPF company that not only funds commercial litigations but also other forms of dispute resolution including arbitration. It has also attracted international TPF companies for example IMF (Australia) Ltd (IMF), the respondent in the 2004 SCA case.<sup>6</sup> IMF originated in Australia

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<sup>1</sup> Nieuwveld LB and Shannon V *Third-Party Funding in International Arbitration* (2012) Kluwer Law International 4 (hereinafter Nieuwveld LB and Shannon (2012)). The common law doctrines and the case law that led to their relaxation will be discussed under chapter 3.

<sup>2</sup> Brabandere ED and Lepeltak J 'Third-Party Funding in International Investment Arbitration' (2012) 27 *ICSID Review* 379 (hereinafter Brabandere ED and Lepeltak J (2012)).

<sup>3</sup> *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* (448/2003) [2004] ZASCA 64 para 44 (hereinafter *Price Waterhouse Coopers* [2004]).

<sup>4</sup> *Price Waterhouse Coopers* [2004] para 39.

<sup>5</sup> Taurus Capital Holdings (Pty) Ltd website available at <http://tauruscapital.co.za> (accessed 15 August 2017).

<sup>6</sup> (451/12) [2015] ZASCA 2.

and is responsible for funding hundreds of claims since its creation in 1989.<sup>7</sup> IMF and Burford Capital, another international TPF company,<sup>8</sup> have expressed a keen interest in expanding their business operations in South Africa.<sup>9</sup> TPF companies such as Taurus Capital Holdings (Pty) Ltd, IMF and Burford Capital are not the only entities offering TPF. Corporations, banks, insurance companies as well as hedge funds are expanding their business practices to benefit from this growing industry.<sup>10</sup>

TPF is the practice of purchasing legal claims with the intention of making a profit off of successful outcomes or settlements.<sup>11</sup> It begins with the conclusion of a Funding Agreement between a Funder and a Claimholder. The terms of which provide that the Funder will fund the Claimholder's claim in exchange for a portion of a successful outcome or settlement.<sup>12</sup> The Funder should have no direct interest in the substantive aspects of the claim, his interests should be limited to the funding and return.<sup>13</sup> TPF is an investment meaning that the Claimholder is not liable to repay the Funder if the claim is unsuccessful.<sup>14</sup> It is therefore in the best interest of the Funder to conduct due diligence on the facts of the case, the legal arguments, and the likelihood of success prior to concluding the Funding Agreement.<sup>15</sup>

TPF has grown considerably in arbitration mainly due to an increase in arbitration disputes, the growing costs associated with arbitration, the availability of funds for Claimholders, the high value of claims, enforceability of awards and expert arbitrator's.<sup>16</sup> In addition, the relaxation of the doctrines in certain jurisdictions has also aided in TPF's growth.<sup>17</sup>

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<sup>7</sup> Hensler DR 'Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?' (2014) 63 *DePaul Law Review* 520.

<sup>8</sup> Barker GR 'Third- Party Litigation Funding in Australia and Europe' (2012) 8 *Journal of Law, Economics and Policy* 506 (hereinafter Barker GR (2012)).

<sup>9</sup> Barker GR (2012) 491.

<sup>10</sup> Yoo J 'Protecting Confidential Information Disclosed to Alternative Litigation Finance Entities' (2014) 27 *The Georgetown Journal of Legal Ethics* 1005.

<sup>11</sup> Shepherd JM and Stone JE 'Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Funding' (2015) 47 *Arizona State Law Journal* 944 (hereinafter Shepherd JM and Stone JE (2015)).

<sup>12</sup> Trusz JA 'Full Disclosure? Conflicts of Interest Arising from Third- Party Funding in International Commercial Arbitration' (2013) 101 *The Georgetown Law Journal* 1655 (hereinafter Trusz JA (2013)).

<sup>13</sup> Brabandere ED and Lepeltak J (2012) 397.

<sup>14</sup> Veljanovski C 'Third-Party Litigation Funding in Europe' (2012) 8 *Journal of Law, Economics and Policy* 417 (hereinafter Veljanovski C (2012)).

<sup>15</sup> Brabandere ED and Lepeltak J (2012) 382.

<sup>16</sup> Trusz JA (2013) 1651. Park WW and Rodgers C 'Chapter 1: The Arbitration Agreement and Arbitrability, Third-Party Funding in International Arbitration: The ICCA Queen- Mary Task Force' in Klausegger C and Klein P et al (eds) *Austrian Yearbook on International Arbitration 2015* (2015) 113 (hereinafter Park WW and Rodgers C (2015)).

<sup>17</sup> Goldsmith A and Melchionda L 'Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (but Were Afraid to Ask)' (2012) 76 *International Business Law Journal* 54.

The discussion on TPF needs to be accompanied by an explanation of the arbitration process to better understand its popularity within arbitration disputes. Arbitration is a process whereby two parties consent to have their dispute decided by one or more arbitrators in a less formal setting than litigation.<sup>18</sup> The key differences between litigation and arbitration are privacy and party autonomy.<sup>19</sup> Arbitration proceedings are private whereas litigation proceedings are open to the public. The parties control the arbitration procedure whereas there are prescribed procedural rules in litigation. Arbitrations also require the parties to select the applicable law, place, evidentiary and procedural rules as well as the arbitrators among other aspects.<sup>20</sup> These differences in the level of control parties have, has made arbitration a popular choice for dispute resolution.

TPF's role in dispute resolution, particularly arbitration, has been met with both praise and concern. TPF has received praise for promoting due process and access to justice especially for Claimholders who are unable to pursue a legitimate claim due to financial constraints.<sup>21</sup> TPF has also become a strategic option for Claimholders who would like to institute a claim without adversely affecting their financial interests.<sup>22</sup> Added to these benefits is the additional resources provided by the Funder, which include expert advice and references to improve the likelihood of success.<sup>23</sup>

Despite its praise TPF has not been without criticism. Critics have accused TPF of promoting frivolous claims<sup>24</sup> and preventing settlements if it does not provide a sufficient return on the Funder's investment.<sup>25</sup> TPF has led to an increase in ethical concerns including conflicts of

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<sup>18</sup> Choi M 'Third-Party Funders in International Arbitration: A Case for Protecting Communication Made in Order to Finance Arbitration' (2016) 29 *The Georgetown Journal of Legal Ethics* 886 (hereinafter Choi M (2016)).

<sup>19</sup> Choi M (2016) 886.

<sup>20</sup> Alrashid MN, Wessel J and Laird J 'Impact of Third Party Funding on Privilege in Litigation and International Arbitration' (2012) 6 *Dispute Resolution International* 128.

<sup>21</sup> Abrams DS and Chen DL 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (2013) 15 *University of Pennsylvania Journal of Business Law* 1075 (hereinafter Abrams DS and Chen DL (2013)).

<sup>22</sup> Stoyanov M and Owczarek O 'Third-Party Funding in International Arbitration: Is it Time for Some Soft Rules?' (2015) 2 *BCDR International Arbitration Review* 174 (hereinafter Stoyanov M and Owczarek O (2015)).

<sup>23</sup> Abrams DS and Chen DL (2013) 1087.

<sup>24</sup> Park WW and Rodgers C (2015) 113.

<sup>25</sup> Von Goeler J *Third-Party Funding in International Arbitration and its Impact on Procedure* (2016) International Arbitration Law Library: Kluwer Law International 95 (hereinafter Von Goeler J (2016)).

interest, a Funder's ability to adversely affect claims for his own benefit<sup>26</sup> and public policy considerations for profiting off of legal claims.<sup>27</sup> The Funding Agreement has also given rise to several concerns including its disclosure during proceedings, unequal bargaining powers between contracting parties and unreasonable contractual terms.<sup>28</sup>

In South Africa, there are currently no guidelines or rules in arbitration to address these concerns, other than those governing conflicts of interest, evidence and party representation.<sup>29</sup> The mechanisms referred to in the SCA judgment will only apply when an arbitration matter is brought within the jurisdiction of the courts.<sup>30</sup>

This study seeks to answer whether South Africa should adopt regulations to protect arbitration from the potential adverse effects of TPF. For example, regulations that require the disclosure of Funding Agreements either in its entirety or provisions relating specific terms such as amount, the agreed upon return and the level of control afforded to the Funder.<sup>31</sup> This could decrease the concerns relating to conflicts of interest, the Funder's influence over decision-making and unfair contractual terms.

The rapid growth of TPF is not unique to South Africa<sup>32</sup> and it remains largely unregulated across jurisdictions.<sup>33</sup> The United Kingdom (UK) relaxed the doctrines to allow different forms of funding such as TPF.<sup>34</sup> The UK Court of Appeal has expressly recognised TPF as desirable for the administration of justice.<sup>35</sup> The UK has not however adopted any legislation to regulate TPF instead they have developed a code for Funders to follow.<sup>36</sup> Similarly to South Africa, the UK has endorsed TPF in litigation but has not offered any guidance with respect to

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<sup>26</sup> Flake CR 'Third Party Funding in Domestic Arbitration: Champerty or Social Utility?' 2015 *Dispute Resolution Journal* 119.

<sup>27</sup> Shamir J 'Saving Third- Party Litigation Financing' (2016) 1 *Northwestern Interdisciplinary Law Review* 162.

<sup>28</sup> Yeoh D 'Thirty Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?' (2016) 33 *Journal of International Arbitration* 116.

<sup>29</sup> Sahani VS 'Judging Third-Party Funding' (2016) 63 *UCLA Law Review* 399 (hereinafter Sahani VS (2016)).

<sup>30</sup> Shepherd JM and Stone JE (2015) 919.

<sup>31</sup> Trusz JA (2013) 1652.

<sup>32</sup> Stoyanov M and Owczarek O (2015) 171.

<sup>33</sup> Glickman DR 'Embracing Third-Party Litigation Finance' (2016) 43 *Florida State University Law Review* 1043 (hereinafter Glickman DR (2016)).

<sup>34</sup> Barker GR (2012) 459, 467.

<sup>35</sup> Gayner O and Khouri S 'Singapore and Hong Kong: International Arbitration Meets Third Party Funding' (2017) 40 *Fordham International Law Journal* 1038 (hereinafter Gayner O and Khouri S (2017)).

<sup>36</sup> Gayner O and Khouri S (2017) 1039.

arbitrations.<sup>37</sup> Singapore and Hong Kong also relaxed the doctrines however they elected to adopt legislation to regulate TPF within their respective jurisdictions.<sup>38</sup>

It is no secret that instituting a legal action of any kind has become increasingly expensive allowing the market for TPF to flourish with little to no regulation across jurisdictions.<sup>39</sup> It is therefore the aim of this mini-thesis to ascertain whether South Africa should consider regulating the growing industry of TPF, specifically within arbitration.

## 1.2 PROBLEM STATEMENT

The SCA endorsed the practice of TPF without providing any guidelines on how it should be regulated. The SCA alluded to existing court mechanisms but these mechanisms do not necessarily extend into the ambit of arbitration that is largely a party controlled process. The study therefore attempts to examine the existing mechanisms in South Africa along with those adopted in the UK, Singapore and Hong Kong to determine whether TPF requires regulation in South Africa. The mini-thesis will attempt to answer the following questions:

- Should South Africa regulate TPF in arbitration?
- Who would be responsible for creating the regulations, the judiciary, the legislature or should an international institution, such as the United Nations Commission on International Trade Law (UNCITRAL), adopt a uniform set of rules?
- Would adopting regulations stifle the development of TPF in South Africa?

## 1.3 AIM OF MINI-THESIS

The aim of the mini-thesis is to examine the practice of TPF in dispute resolution. More specifically whether it should be regulated in arbitrations held within South Africa. It examines the approaches taken by three other jurisdictions namely the UK, Singapore and Hong Kong. All three are common law jurisdictions that have foregone the doctrines in favour of TPF. The UK has adopted a self-regulating approach by avoiding the adoption of stringent rules that could stifle the growth of TPF. Singapore and Hong Kong are renown arbitration venues and have adopted legislation to regulate TPF to uphold their respective reputations. These

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<sup>37</sup> Stoyanov M and Owczarek O (2015) 174.

<sup>38</sup> Bao C 'Third Party Funding in Singapore and Hong Kong: The Next Chapter' (2017) 34 *Journal of International Arbitration* 387 (hereinafter Bao C (2017)).

<sup>39</sup> De Morpurgo M 'A Comparative Legal and Economic Approach to Third- Party Litigation Funding' (2011) 19 *Cardozo Journal of International and Comparative Law* 346.

jurisdictions will provide guidance for South Africa particularly during the reform of its arbitrations laws.

#### **1.4 SIGNIFICANCE OF STUDY**

This study is important because South Africa cannot avoid the growth of arbitration and more specifically TPF locally and internationally. There are different forms of arbitration, national, commercial, investment and private to mention a few. There is evidence of TPF in all forms. South Africa is in the process of reforming its arbitration laws and TPF should form part of this process.

#### **1.5 RESEARCH METHODOLOGY**

This mini-thesis will adopt the desktop research methodology. It will research and analyses primary sources that includes statutes, case law and international conventions as well as secondary sources that includes journal articles, books and the internet. It will analyse the different approaches adopted by South Africa, UK, Singapore and Hong Kong with respect to TPF. It will not follow the traditional structure of a comparative study. The countries other than South Africa will be discussed to ascertain the best approach to regulating TPF. These countries were selected due to the similarities shared between their legal jurisdiction and South Africa's legal jurisdiction. Their practices, experiences and outcomes will be invaluable for South Africa that has yet to address the issue of TPF.

#### **1.6 CHAPTER OUTLINE**

This mini-thesis consists of five chapters, including this one.

**Chapter 2** focuses on the definition and characteristics of TPF. It differentiates TPF from other existing funding mechanisms. This is followed by an analysis of the Third-Party Process, which includes the negotiation and creation of the Funding Agreement. It details the effect of TPF on arbitration and the developments that have been made to address these effects.

**Chapter 3** begins with a brief discussion on the common law doctrines of maintenance and champerty. Followed by a review of TPF in the UK, Singapore and Hong Kong. All three are common law jurisdictions however they have each adopted different methods of regulating TPF. The review will include a discussion on why these jurisdictions elected to abandon the doctrines in favour of TPF by relying on case law, ethical codes and statutes.

**Chapter 4** discusses the recent developments in arbitration and TPF in South Africa. The discussion will include an analysis of recent case law and legislation. It will further attempt to answer the questions posed under the aim of the mini-thesis.

**Chapter 5** provides a summary of what was discussed in previous chapters. It will also conclude the mini-thesis with recommendations on the way forward for South Africa.



## CHAPTER 2

### THIRD PARTY FUNDING AND ITS IMPACT ON ARBITRATIONS

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#### 2.1 INTRODUCTION

At the outset, the main concern with TPF was whether it is legal.<sup>40</sup> This concern was overcome by the relaxation of common law doctrines through judicial decisions<sup>41</sup> spurring the growth of the TPF industry. The TPF industry is relatively new in arbitrations but this has not stopped non-funded parties from raising concerns related to funding during arbitrations.<sup>42</sup> These concerns range from endangering the efficiency of arbitrations<sup>43</sup> due to request for the disclosure of the Funder's identity, disclosure of the Funding Agreement, the rejection of reasonable settlements and postponements.<sup>44</sup>

The purpose of this Chapter is to illustrate that TPF has become an established industry within arbitration and that the concerns mentioned above including the lack of regulation are not unfounded. It attempts to define and identify the main characteristics of TPF to differentiate it from other funding mechanisms. This is followed by an analysis of the Third Party Process, which includes the creation of the Funding Agreement. It also includes a section on the effect of TPF on arbitration and the developments that have been made to address these effects.

#### 2.2 DEFINING THIRD PARTY FUNDING

Despite its growing popularity TPF remains an elusive term that cannot be unanimously defined by domestic courts, legislatures or international bodies that regulate or administer arbitrations around the world.<sup>45</sup> This has not however deterred attempts at formulating an acceptable definition. International bodies such as the International Chambers of Commerce

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<sup>40</sup> Darwazeh N and Leleu A 'Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding' (2016) 33 *Journal of International Arbitration* 125 (hereinafter Darwazeh N and Leleu A (2016)).

<sup>41</sup> These judicial decisions will be discussed under chapter three and four.

<sup>42</sup> Osmanoglu B 'Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest' (2015) 32 *Journal of International Arbitration* 325 (hereinafter Osmanoglu B (2015)).

<sup>43</sup> Kidd J 'To Fund or Not To Fund: The Need for Second- Best Solutions to the Litigation Finance Dilemma' (2012) 8 *Journal of Law, Economics and Policy* 627 (hereinafter Kidd J (2012)).

<sup>44</sup> Glover JM 'A Regulatory Theory of Legal Claims' (2017) 70 *Vanderbilt Law Review* 250.

<sup>45</sup> Shahdadpuri KH 'Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory' (2016) 12 *Asian International Arbitration Journal* 78 (hereinafter Shahdadpuri KH (2016)).



(ICC), the International Bar Association (IBA) as well as the European Union (EU), have made the following attempts.

Derains defined TPF in a 2013 ICC Dossier as:

‘[A] scheme where a party unconnected to a claim finances all or part of one of the parties’ arbitration costs, in most cases the claimant. The funder is then remunerated by an agreed percentage of the proceeds of the award, a success fee, or a combination of the two or through more sophisticated devise. In the case of an unfavourable award, the funder’s investment is lost.’<sup>46</sup>

The IBA Guidelines on Conflicts of Interest defines TPF as:

‘Any person or entity that is contributing funds or material support to the prosecution or defense of the case and that has a direct economic interest in the award to be rendered in the arbitration.’<sup>47</sup>

In the EU’s proposal for Investment Protection and Resolution of Investment Disputes (Proposal) with the United States (US) the following definition was suggested:

‘[N]atural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.’<sup>48</sup>

The difficulty in selecting a definition extends to this mini-thesis. The first difficulty is that these three examples are not the only ones in existence. The second difficulty is that there are specific terms that deem a definition appropriate but when read holistically it does not meet all the requirements. For example, Derains definition seems the most appropriate because it makes express reference to ‘arbitration costs’ however the definition is three sentences long whereas the Proposal is one sentence long and contains almost the same information. Perhaps the approach adopted by Lévy is more convenient, instead of deciding on a definition Lévy identified characteristics that are common amongst them and are read as follows:

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<sup>46</sup> Osmanoglu B (2015) 325.

<sup>47</sup> International Bar Association ‘The IBA Guidelines on Conflict of Interest in International Arbitration Revised 2014’ available at [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed 13 September 2017).

<sup>48</sup> European Commission ‘Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce, Chapter II Investment’ available at [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf) (accessed 10 September 2017).

- a. Claimholder has instituted or is in the process of instituting a claim
- b. The Claimholder seeks funding from a Funder
- c. In return for funding the Funder is entitled to a share of the profits or any other agreed upon arrangement if successful.<sup>49</sup>

The two parties identified in the definitions and under the characteristics are the Claimholder and the Funder. The Claimholder is the party with the claim or alternatively if the Respondent is being funded the Respondent is the party responding to a claim. In most instances, it is the Claimholder that receives funding because the incentive for the Funder to fund a Respondent is not as strong. If the Respondent is successful there is no large award after the proceedings the Funder would therefore receive a poor return on his investment.<sup>50</sup> This mini-thesis will therefore assume that the Claimholder is always the party receiving the funding.

It is unclear who qualifies as the Funder. In most instances, once a claim has been instituted, the Claimholder will approach numerous banks, hedge funds, insurance companies, financial institutions or individuals for funding.<sup>51</sup> These individuals or entities become the Funder mentioned in the definitions and characteristics. The limitations on who can act as a Third Party Funder is also unclear and often requires the analysis of existing case law and rules.

There are identifiable limitations when relying on definitions, characteristics or case law. For one a Funder should not be involved in the dispute, this is evident from *Derains* in ‘unconnected to the claim’ and the Proposal in ‘not a party to the dispute.’ In the SCA, it was found that TPF conducted in bad faith is invalid.<sup>52</sup> These limitations were identified using primary and secondary sources from different legal jurisdictions. This makes it very difficult to identify which rules should be followed when seeking or providing funding. It also supports the argument that maybe it is time to regulate the TPF industry.

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<sup>49</sup> Lévy L and Bonnan R 'Chapter 7: Third-Party Funding Disclosure, Joinder and Impact on Arbitral Proceedings' in Bernardo M, Sanz-Pastor C and Dimolitsa A (eds) *Third-Party Funding in International Arbitration International Chamber of Commerce Dossier Volume 10* (2013) 78 (hereinafter Lévy L and Bonnan R (2013)).

<sup>50</sup> Shannon V 'Harmonizing Third-Party Litigation Funding Regulation' 2015 *Cardozo Law Review* 864 (hereinafter Shannon V (2015)).

<sup>51</sup> *Sahani VS* (2016) 392.

<sup>52</sup> *Price Waterhouse Coopers* [2004] para 27.

## 2.3 DIFFERENTIATING BETWEEN THIRD PARTY FUNDING AND OTHER FORMS OF FUNDING MECHANISMS

TPF is often used as a term to refer to all forms of funding available to the Claimholder collectively. The previous section however defined and characterised TPF as a funding mechanism that exists independently from any other funding mechanism. It is therefore important to differentiate between TPF and other forms of funding mechanisms. This will provide a clearer understanding of what separates TPF and why its novelty is so fascinating to those who operate within the realm of arbitration.

The funding mechanisms that will be discussed in the following paragraphs include legal expenses insurance, contingency fee agreements, conditional fee agreements and legal loans. Each subsection of this section will be dedicated to one of these funding mechanisms. It will provide a brief explanation of the funding mechanism and the characteristics that separate it from TPF. Not these funding mechanisms may be available in South Africa however the funded party may originate from a jurisdiction where it is available. It is common for arbitrations that are administered in South Africa to have parties from different legal jurisdictions. It is therefore important to differentiate between those funding mechanisms as well.

### 2.3.1 Legal Expenses Insurance

In certain legal jurisdictions, the insurance law allows the creation of insurance contracts whereby the insurer provides legal expenses insurance to the insured for a fee.<sup>53</sup> Legal expenses insurance contracts contain subrogated terms that allow the insurer to institute or defend the insured against all covered claims.<sup>54</sup> Once a dispute arises the insurer will defend the dispute, cover the costs and in certain instances, if the insured is held liable, the costs of the other party.<sup>55</sup>

There are usually two types of legal expenses insurance contracts; one purchased to cover a potential dispute or the other purchased to cover an existing dispute.<sup>56</sup> In South Africa the

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<sup>53</sup> Steinitz M 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95 *Minnesota Law Review* 1295 (hereinafter Steinitz M (2011)).

<sup>54</sup> Steinitz M (2011) 1296.

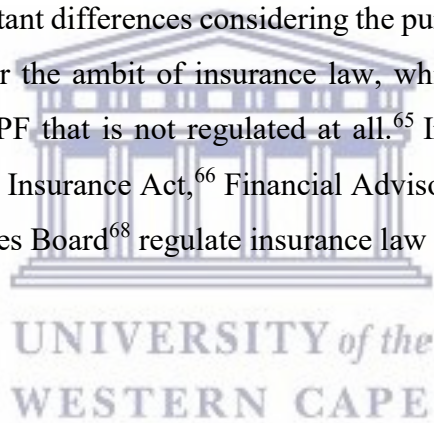
<sup>55</sup> Scherer M and Goldsmith A 'Third Party Funding in International Arbitration in Europe: Part 1- Funder's Perspectives' (2012) 2 *International Business Law Journal* 207 (hereinafter Scherer M and Goldsmith A (2012)).

<sup>56</sup> Haydock J 'the provision of legal expenses insurance in South Africa' available at <https://www.ensafrica.com/news/the-provision-of-legal-expenses-insurance-in-South-Africa?Id=524&STitle=commercial%20litigation%20ENSight> (accessed 14 September 2017).

Short-Term Insurance Act governs this form of insurance.<sup>57</sup> There are also several insurance companies that offer ‘Legal Plans’ for clients namely Clientele,<sup>58</sup> Hollard<sup>59</sup> and LegalWise,<sup>60</sup> to mention a few.

There are similarities between legal expenses insurance and TPF. They both involve a contractual agreement between two parties and they both provide funding, that is often not readily available, to the funded party.<sup>61</sup> TPF however remains an investment that occurs once a dispute has arisen whereas legal expenses insurance often precedes a dispute and the insurers involvement is automatic if the claim is covered.<sup>62</sup> The differences do not stop there; the insurer plays a more active role in the dispute whereas the Funder should not form part of the dispute.<sup>63</sup> Their interests also vary; the insurer is concerned with the entirety of the dispute whereas the Funder is limited to the outcome.<sup>64</sup>

Perhaps one of the most important differences considering the purpose of this these is that legal expenses insurance falls under the ambit of insurance law, which is a regulated industry in South Africa in contrast to TPF that is not regulated at all.<sup>65</sup> In addition to the Short-Term Insurance Act the Long- Term Insurance Act,<sup>66</sup> Financial Advisory and Intermediary Services Act<sup>67</sup> and the Financial Services Board<sup>68</sup> regulate insurance law within South Africa.



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<sup>57</sup> Short-Term Insurance Act 53 of 1998.

<sup>58</sup> Clientele ‘Legal Plans’ website available at

[https://www.clientele.co.za/legal/products?source=googlesearch&gclid=Cj0KCQjw9afOBRDWARIsAJW4nvx7Q\\_ZXWhe5zf5BuXj9geopNIN-3Ib1Hy7IO2TILNVQ3Stcf7fN3gAaAkw\\_EALw\\_wcB](https://www.clientele.co.za/legal/products?source=googlesearch&gclid=Cj0KCQjw9afOBRDWARIsAJW4nvx7Q_ZXWhe5zf5BuXj9geopNIN-3Ib1Hy7IO2TILNVQ3Stcf7fN3gAaAkw_EALw_wcB) (accessed 24 September 2017).

<sup>59</sup> Hollard ‘Legal Plan’ website available at [http://legal-plan.hollard.co.za/?utm\\_source=google&utm\\_medium=cpc&utm\\_campaign=cpc\\_google\\_legal\\_generic&ls=cpc\\_google\\_legal\\_generic](http://legal-plan.hollard.co.za/?utm_source=google&utm_medium=cpc&utm_campaign=cpc_google_legal_generic&ls=cpc_google_legal_generic) (accessed 24 September 2017).

<sup>60</sup> LegalWise website available at <https://www.legalwise.co.za> (accessed 24 September 2017).

<sup>61</sup> Silver C ‘Litigation Funding Versus Liability Insurance: What’s the Difference?’ (2014) 63 *DePaul Law Review* 619 (hereinafter Silver C (2014)).

<sup>62</sup> Silver C (2014) 624.

<sup>63</sup> Steinitz M and Field AC ‘A Model Litigation Finance Contract’ (2014) 99 *Iowa Law Review* 722 (hereinafter Steinitz M and Field AC (2014)).

<sup>64</sup> Steinitz M and Field AC (2014) 722.

<sup>65</sup> Steinitz M and Field AC (2014) 722.

<sup>66</sup> Long- Term Insurance Act 52 of 1998.

<sup>67</sup> Financial Advisory and Intermediary Services Act 37 of 2002.

<sup>68</sup> Financial Services Board website available at <https://www.fsb.co.za/Pages/Home.aspx> (accessed 1 November 2017).

### 2.3.2 Contingency Fee Agreements

Contingency Fee Agreements are arrangements concluded between a lawyer and their client whereby the lawyer agrees to forego his legal fees or reduce it in exchange for a share of the damages or settlement.<sup>69</sup> The lawyer is only entitled to this share if the dispute is decided in their clients favour, if not the client is not liable to cover any of his losses.<sup>70</sup> The client is not absolved of all risk because even though their legal costs are covered their claim may still be unsuccessful potentially holding them liable for the other party's costs.<sup>71</sup> It is therefore important for the lawyer to conduct a thorough investigation into the case before deciding to enter a contingency fee agreement with a client.<sup>72</sup>

Like the funding mechanisms discussed previously this is a contractual relationship that exists between two parties. The lawyer also has an economic interest in the outcome of the case like the Funder in TPF. Personal experience has also shown that contingency fee agreements between Claimholders and lawyers during arbitrations remain confidential.<sup>73</sup> The Respondent can request its disclosure however it is dependent on the arbitral tribunal to grant such a request. The argument for disclosure should be strong because it has the potential to prolong proceedings by creating opportunities for further issues to be identified and arguments to be presented. This is similar to Funding Agreements its disclosure is dependent on the arbitral tribunal and only after a request has been made by the non-funded party.<sup>74</sup>

Perhaps the biggest difference between contingency fee agreements and TPF is that the lawyer is providing a service whereas the Funder is investing in an asset.<sup>75</sup> This is not the only difference but for purposes of this mini-thesis it is necessary to mention at least one more. Lawyers who enter contingency fee agreements are regulated by ethical and legal rules that prevent, for example a conflict of interest; Funders are not regulated by either of these rules.<sup>76</sup> In South Africa, for example, the Contingency Fees Act regulates contingency fee agreements.<sup>77</sup>

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<sup>69</sup> Emons W 'Conditional versus contingent fees' (2007) 59 *Oxford Economic Papers* 89 (hereinafter Emons W (2007)).

<sup>70</sup> Kidd J (2012) 636.

<sup>71</sup> Kidd J (2012) 636.

<sup>72</sup> Steinitz M 'How Much Is That Lawsuit in the Window? Pricing Legal Claims' (2013) 66 *Vanderbilt Law Review* 1889.

<sup>73</sup> Experience gained while interning at the International Institute for Conflict Prevention and Resolution.

<sup>74</sup> Sahani VS (2016) 420.

<sup>75</sup> Steinitz M (2011) 1294.

<sup>76</sup> Steinitz M and Field AC (2014) 721, 722.

<sup>77</sup> Contingency Fees Act 66 of 1997.

### 2.3.3 Conditional Fee Agreements

Conditional fee agreements originated in the UK it allows lawyers to enter into an agreement with their client whereby the lawyer will either charge no fee or a reduced fee in exchange for a larger than normal fee if the claim is successful.<sup>78</sup> If the claim is unsuccessful the client is not liable to pay any further fees.<sup>79</sup> This differs from contingency fee agreement in that the lawyer is entitled to an increase in fees instead of a share of the damages or settlement if the claim is successful.<sup>80</sup> There are jurisdictions where both forms of agreements exist.<sup>81</sup> The similarities and differences between this form of funding and TPF are similar to those discussed under contingency fee agreements therefore it will not be repeated. In South Africa, the Contingency Fees Act<sup>82</sup> also regulates this form of funding mechanism. Section 2(1)(b) provides that subject to section 2(2) a legal practitioner is entitled to higher than his normal fees if the case is successful.<sup>83</sup>

### 2.3.4 Legal Loans

Legal loans refer to regular bank loans taken out by individuals to cover their legal expenses.<sup>84</sup> It is perhaps the most unpopular of the funding mechanisms because the funded party is liable to pay back the loan with interest once the dispute is concluded.<sup>85</sup> The repayment process is subject to rules and regulations.<sup>86</sup> It remains however an option for party's looking for funding. The difference between this form and TPF is that the Claimholder's financial position is more important than the merits of the case. The bank will evaluate the Claimholder's financial position before granting the loan whereas the Funder will focus on the merits of the claim. In South Africa, the National Credit Act<sup>87</sup> regulates legal loans.

The funding mechanisms, excluding TPF, are subject to rules and regulations that prescribe the way the funding is provided and concluded. Without similar provisions in place for TPF a

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<sup>78</sup> Melamed P 'An Alternative to the Contingent Fee? An Assessment of the Incentive Effects of the English Conditional Fee Arrangement' (2006) 27 *Cardozo Law Review* 2436.

<sup>79</sup> Emons W (2007) 89.

<sup>80</sup> Moorhead R 'Conditional Fee Agreements, Legal Aid and Access to Justice' (2000) 33 *UBC Law Review* 476.

<sup>81</sup> Emons W (2007) 90.

<sup>82</sup> Contingency Fees Act 66 of 1997.

<sup>83</sup> Contingency Fees Act 66 of 1997 section 2(1)(b).

<sup>84</sup> Sahani VS (2016) 402.

<sup>85</sup> Sahani VS (2016) 392.

<sup>86</sup> Shannon V (2015) 895.

<sup>87</sup> National Credit Act 35 of 2005.

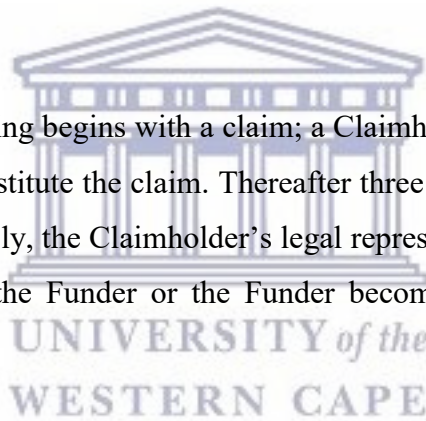
general practice has developed among those active in the industry. The following section attempts to outline this general practice.

## **2.4 THE PROCESS OF THRID PARTY FUNDING**

Previous sections of this chapter dealt with defining TPF and differentiating it from other funding mechanisms. The purpose of this next section is to establish how TPF operates. Obtaining information on the TPF process is particularly difficult because there are no guidelines, Funding Agreements are confidential, arbitrations are confidential and there is a limited amount of resources available on the process.<sup>88</sup> Regardless of these limitations, a general practice has developed in the absence of regulatory guidelines. This general practice can be split into two categories namely, case assessment and the Funding Agreement. All the components of TPF, those that have already been discussed or are yet to be discussed, can be divided between these two categories.

### **2.4.1 Case Assessment**

The process of obtaining funding begins with a claim; a Claimholder has a claim but does not have the financial means to institute the claim. Thereafter three circumstances can lead to the involvement of a Funder namely, the Claimholder's legal representative approaches a Funder, the Claimholder approaches the Funder or the Funder becomes aware of the dispute and approaches the Claimholder.<sup>89</sup>



The first circumstance is perhaps the most popular because most countries allow legal representatives to advise Claimholders about the possibility of TPF.<sup>90</sup> Its popularity is further supported by the fact that most Claimholders may not have any knowledge about TPF and unless the claim is well known the Funder will not be aware of its existence. For the remainder of this section it will therefore be assumed that the Funder became aware of the claim after being approached by the Claimholder's legal representative.

Before approaching a potential Funder the legal representative should ensure that the Funder has sufficient capital to not only fund the claim but also cover additional costs or liabilities that

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<sup>88</sup> Von Goeler J (2016) 77.

<sup>89</sup> Von Goeler J (2016) 13.

<sup>90</sup> Nieuwveld LB and Shannon V (2012) 52.

could arise throughout the arbitration.<sup>91</sup> The most efficient manner in which a legal representative can obtain this information is to conduct thorough due diligence on the Funder.<sup>92</sup> Once the legal representative has conducted the due diligence on a suitable Funder they will begin to create a package that will be presented to the Funder.<sup>93</sup> The package varies depending on the case and the legal representative compiling. The package usually includes the type of claim, parties involved, key documents, evidence of the claim, legal advice and opinions, projected costs and possible recovery.<sup>94</sup> A Funder does not have to be approached at the beginning of a case. There are instances where the dispute is already in progress but the Claimholder's funds are being depleted threatening the continuation of the claim. In such cases the Claimholder's legal representative can approach a Funder. If the Funder is approached at the outset of the case or at a later stage the process remains the same.

After receiving the package, the Funder will review it.<sup>95</sup> If the Funder believes it has the potential to be successful he will conduct his own investigation prior to agreeing to fund the claim.<sup>96</sup> Each Funder has their own unique way of investigating a claim however conducting due diligence, in-house or externally, has become a common practice.<sup>97</sup> For it to be thorough the Funder needs the Claimholder and his legal representative to provide additional information and documents.<sup>98</sup>

There are multiple reasons why a Funder should conduct due diligence prior to agreeing to fund a claim. At the outset, the Funder should take into consideration that it will be difficult to predict the length of the dispute and therefore the return of the Funder's investment if the claim is successful.<sup>99</sup> The arbitral proceedings itself provides additional concerns for the Funder

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<sup>91</sup> Quickguides 13 Jan 2017 'Third party funding in international arbitration' available at <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/> (accessed 9 September 2017).

<sup>92</sup> Quickguides 13 Jan 2017 'Third party funding in international arbitration' available at <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/> (accessed 9 September 2017).

<sup>93</sup> Scherer M and Goldsmith A (2012) 214.

<sup>94</sup> Quickguides 13 Jan 2017 'Third party funding in international arbitration' available at <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/> (accessed 9 September 2017).

<sup>95</sup> Scherer M and Goldsmith A (2012) 214.

<sup>96</sup> Shahdadpuri KH (2016) 83.

<sup>97</sup> Goldsmith A 'Third-Party Funding in International Dispute Resolution' (2012) 25 *International Law Practicum* 148 (hereinafter Goldsmith A (2012)).

<sup>98</sup> Scherer M and Goldsmith A (2012) 214.

<sup>99</sup> Seidel S 'Chapter 2: Third-party investing in international arbitration claims to invest or not to invest? A daunting question' in Bernardo M, Sanz-Pastor C and Dimolitsa A (editors) *Third-Party Funding in*



because most of the proceeding is controlled by the parties, including the selection of the legal and arbitration rules that will govern the procedure.<sup>100</sup> Predicting the amount that could be awarded is also a challenge. The arbitral tribunal makes this decision and precedent does not bind them, the Funder could end up making a substantial loss even if the claim is successful.<sup>101</sup>

In addition to the actual arbitral proceeding, the Funder also should investigate the financial position of the other party. If the claim is successful, the Funder needs to be certain that the reward is recoverable without any inconveniences that could include approaching a domestic court to enforce the award.<sup>102</sup> It is also in the Funder's best interest to ensure that the other party's jurisdiction is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) so that enforcement of the award is possible.<sup>103</sup>

The Funder also should investigate the Claimholder's legal representatives, by reviewing their history and experience. If the Funder is not satisfied with the Claimholder's legal representatives the funding may be conditional on their replacement.<sup>104</sup> The Funder should also enquire about the amount of times the claim was presented to other Funders and the reason it was rejected.<sup>105</sup>

After reviewing the different parties involved in the claim the Funder should review his own limitations. This could include his current investments, expected returns on current investments, ability to manage the portfolio, ability to fund until its completion, estimated cost to fund, the possibility that the claim could be unsuccessful and whether collateral is necessary.<sup>106</sup> Another consideration for the Funder is whether the arbitration will be conducted institutionally or ad hoc because the pricing, rules and laws differ depending on how the arbitration will be administered.<sup>107</sup>

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*International Arbitration International Chamber of Commerce Dossier Volume 10* (2013) 25 (hereinafter Seidel S (2013)).

<sup>100</sup> Seidel S (2013) 16.

<sup>101</sup> Seidel S (2013) 25.

<sup>102</sup> Veljanovski C (2012) 420.

<sup>103</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1968 (1968) 7 ILM 1046.

<sup>104</sup> Goldsmith A (2012) 149.

<sup>105</sup> Von Goeler J (2016) 21.

<sup>106</sup> Von Goeler J (2016) 21.

<sup>107</sup> Shahdadpuri KH (2016) 80.

With all these considerations, due diligence can take a substantial amount of time to conduct and can result in additional costs for all parties involved.<sup>108</sup> During the investigative period the Funder can therefore request an exclusivity agreement.<sup>109</sup> An exclusivity agreement guarantees that no other Funder will be given the opportunity to invest in the claim while the Funder conducts the investigation.<sup>110</sup> This is not however a requirement. It is important to reiterate that there are no guidelines that exist when it comes to TPF and that each Funder has their own unique way of conducting themselves during this period.

In addition to an exclusivity agreement, the Funder, Claimholder or their respective legal representative can insist on the signing of nondisclosure agreements.<sup>111</sup> The purpose of which is to ensure that all information shared between the parties, whether the Funder agrees to fund the case or not, remains confidential.<sup>112</sup> Once the Funder has completed the investigation and agrees to fund the claim the parties will begin to discuss the terms of the Funding Agreement.

#### **2.4.2 The Funding Agreement**

The Funding Agreement is concluded between the Claimholder and the Funder and there is no template of what should be included therein.<sup>113</sup> The terms of the Funding Agreement is decided on a case-by-case basis because the requirements of each investment is unique. The Funding Agreement should ideally include the parties to the agreement, the amount being funded, other financial considerations such as security for costs and liability for adverse costs, monitoring of the claim, confidentiality, dispute resolution mechanisms, Funder's level of control, termination for material breach, the Funders return, readjustment of funding and the applicable law that governs the contract.<sup>114</sup>

When drafting the Funding Agreement each one of these terms will require further elaboration. For example, funding, will it cover all costs up until the disputes conclusion, partial costs, or specific costs such as expert witness or adverse costs.<sup>115</sup> Will the funding cover legal representatives, evidentiary costs, fees of arbitrators, arbitral institution, administrative costs,

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<sup>108</sup> Goldsmith A (2012) 148.

<sup>109</sup> Scherer M and Goldsmith A (2012) 215.

<sup>110</sup> Goldsmith A (2012) 149.

<sup>111</sup> Von Goeler J (2016) 17.

<sup>112</sup> Von Goeler J (2016) 17.

<sup>113</sup> Von Goeler J (2016) 73.

<sup>114</sup> Scherer M and Goldsmith A (2012) 215-218.

<sup>115</sup> Veljanovski C (2012) 422.

security for costs and costs for insurance or will it be limited.<sup>116</sup> Another example is the provision detailing what should occur once the dispute is concluded. If the claim is unsuccessful the Funder will not be entitled to any return on his investment. If the claim is successful there are usually three options available to the Funder a multiple of the investment, a percentage of the award or settlement or a combination of the two.<sup>117</sup>

In the UK, there is the Association of Litigation Funders (ALF) and they are subject to a Code of Conduct for Litigation Funders.<sup>118</sup> The current members include Balance Legal Capital LLP, Burford Capital Limited, Calunius Capital LLP, Harbour Litigation Funding Ltd and Therium Capital Management Ltd, to mention a few.<sup>119</sup> This code of conduct as well as the reason for its creation will be discussed in greater detail in the following chapter of this mini-thesis. It does however provide some form of guidance for those who are considering embarking on the process that has been described in this section.

## **2.5 THE EFFECT OF THIRD PARTY FUNDING ON THE ARBITRATION PROCESS**

The previous section detailed the process that leads to the involvement of a Funder in an arbitration claim. Ideally their involvement should not have any effect on the arbitral proceeding but this is not the case. This section attempts to identify issues that have arisen since the increase in use of TPF in arbitrations. These issues include a conflict of interest, party autonomy, security for costs, added party, effect on evidence and an increase in resources.

### **2.5.1 Conflict of Interest**

There are many parties involved in the arbitration process namely, the Claimant, Respondent, arbitrators, administrators, legal representatives, witnesses and expert witnesses. To ensure that the integrity of the arbitration process is upheld it is important to prevent a conflict of interest between the parties particularly those with substantial decision-making power. The arbitrators decide the outcome of the dispute and the legal representatives play an important role in presenting a strong case therefore these two parties will be the focus of the following section.

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<sup>116</sup> Von Goeler J (2016) 28.

<sup>117</sup> Veljanovski C (2012) 424.

<sup>118</sup> Association of Litigation Funders 'Code of Conduct for Litigation Funders' available at <http://associationoflitigationfunders.com/documents/> (accessed 29 August 2017).

<sup>119</sup> Association of Litigation Funders 'Code of Conduct for Litigation Funders' available at <http://associationoflitigationfunders.com/documents/> (accessed 29 August 2017).

### 2.5.1.1 Arbitrator

The impartiality and independence of the arbitral tribunal is often referred to as the cornerstone of the arbitration proceeding.<sup>120</sup> TPF can affect an arbitrator's impartiality and independence directly or indirectly. This section attempts to illustrate how this is caused by providing a brief overview of arbitrators, extracts of rules that require an arbitrator's impartiality and independence as well as an examination of arbitration cases that dealt with concerns relating to a conflict of interest.

Arbitrators are usually nominated or appointed due to their expertise, reputation, availability, efficiency, language, fees, qualifications, experience or their understanding of an area of law.<sup>121</sup> An arbitral tribunal can consist of a sole arbitrator or a panel of three; the disputing parties or the administering institution determines their selection and the amount.<sup>122</sup> Arbitrators are bound by the arbitration agreement, the legal rules of the applicable jurisdiction, the arbitration rules selected by the parties or that of the administering institution and ethical rules.<sup>123</sup> Unlike litigations where the presiding officers hold office for a certain amount of time arbitrators often have other full time professions and decide cases only when called upon to do so. This overlap in professions usually leads to a conflict of interest. For example, an arbitrator can be acting in a capacity other than arbitrator for the Funder, especially if he is a part of a firm that represents a Funder's interests or is counsel for another pending dispute that involves the Funder.<sup>124</sup>

International organisations and administering institutions alike have adopted rules to ensure the impartiality and independence of arbitrators. UNCITRAL, the International Centre for Settlement of Investment Disputes (ICSID), the ICC and the IBA are a few examples of bodies that have adopted rules to ensure an arbitrator's impartiality and independence.

For example, Article 14 (1) of the ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention) provides that:

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<sup>120</sup> Darwazeh N and Leleu A (2016) 132.

<sup>121</sup> Heilbron H *A Practical Guide to International Arbitration in London* (2013) 35 (hereinafter Heilbron H (2013)).

<sup>122</sup> Heilbron H (2013) 19.

<sup>123</sup> Blackaby N and Partasides C et al *Redfern and Hunter on International Arbitration* 6 ed (2015) 318.

<sup>124</sup> Darwazeh N and Leleu A (2016) 133.

‘Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.’<sup>125</sup>

The mere existence of these rules is not enough to ensure an arbitrator’s impartiality and independence. Mechanisms have been implemented to ensure that these rules are adhered to. Once appointed an arbitrator will be asked to confirm his independence and impartiality, an obligation he must maintain throughout the arbitration.<sup>126</sup> An example of the obligation to maintain the impartiality and independence can be found in General Standard 1 of the IBA 2014 Guidelines on Conflict of Interests:

‘Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.’<sup>127</sup>

Most administering institutions require the confirmation to be in writing before the appointment is confirmed.<sup>128</sup> For example Article 14 of the ICC provides that:

‘The Secretary General may confirm...provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections.’<sup>129</sup>

The IBA 2014 Guidelines on Conflict of Interests contains a ‘traffic lights’ approach to help arbitrator’s identity actual or potential conflicts when deciding what should be disclosed.<sup>130</sup> There is a red list that is divided into two parts ‘a non-waivable red list’ and ‘a waivable red list,’ an orange list and a green list.<sup>131</sup> If the arbitrator still has some doubts after consulting

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<sup>125</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965 (1965) 575 UNTS 159.

<sup>126</sup> Heilbron H (2013) 52.

<sup>127</sup> International Bar Association ‘The IBA Guidelines on Conflict of Interest in International Arbitration Revised 2014’ available at [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed 13 September 2017).

<sup>128</sup> Heilbron H (2013) 52.

<sup>129</sup> International Chamber of Commerce ‘Arbitration Rules’ available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (accessed 13 September 2017).

<sup>130</sup> Heilbron H (2013) 51.

<sup>131</sup> International Bar Association ‘The IBA Guidelines on Conflict of Interest in International Arbitration Revised 2014’ available at [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed 13 September 2017).

these lists the IBA 2014 Guidelines on Conflict of Interests provides that the arbitrator should disclose.<sup>132</sup>

If the arbitrator fails to make the necessary disclosures and either party discovers circumstances that affect the arbitrator's impartiality and independence there are measures that can be taken. One of these measures is contained in Article 12 (2) of the UNCITRAL Model Law on International Commercial Arbitration; it provides that an arbitrator can be challenged after his appointment if there are 'justifiable doubts as to his impartiality or independence.'<sup>133</sup> Article 13 provides that the parties or arbitral tribunal shall determine the challenge procedure.<sup>134</sup> There is the possibility that the arbitrator will be unaware of his affiliation with the Funder, especially if the Claimholder withholds the Funding Agreement from the arbitral proceedings. There is however no clear way of knowing if the arbitrator is truly unaware.<sup>135</sup>

TPF has introduced new challenges for these rules and those that rely on them despite the mechanisms and procedures that have been created. It is difficult to prevent a conflict of interest if the Claimant has not disclosed the involvement or the identity of the Funder. Some argue that the only way to avoid a conflict of interest is if the Funder's involvement and identity is disclosed.<sup>136</sup> This is a genuine concern for the arbitration community and evidence can be found in the following arbitration cases.

The Permanent Court of Arbitration (PCA) as well as ICSID is two examples of international arbitration institutions that have administered cases where issues pertaining to TPF arose. These two international institutions have a long-standing history in the field of arbitration. They also publish their arbitration cases unlike most institutions that withhold cases due to confidentiality considerations. An analysis of these cases provides a trend in the decisions by arbitral tribunals. Arbitral tribunals are under no obligation to follow the decisions of previous cases because precedent does not exist in arbitration. This has not prevented arbitral tribunals and legal

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<sup>132</sup> International Bar Association 'The IBA Guidelines on Conflict of Interest in International Arbitration Revised 2014' available at [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed 13 September 2017).

<sup>133</sup> UNCITRAL Model Law on International Commercial Arbitration, 1985 (1985) 24 ILM 1302 Article 12(2) (hereinafter UNCITRAL Model Law)).

<sup>134</sup> UNCITRAL Model Law Article 13.

<sup>135</sup> Osmanoglu B (2015) 326.

<sup>136</sup> Osmanoglu B (2015) 339.

representatives from relying on previous decisions to motivate their own decisions and positions.

The PCA recently administered two cases that involved TPF *Guaracachi v. Bolivia*<sup>137</sup> and *South American Silver Limited v. Bolivia*.<sup>138</sup> In *Guaracachi v. Bolivia*, the Respondent requested the production of the Funding Agreement despite knowing the identity of the Funder, Salvia Investment Ltd.<sup>139</sup> The Respondents argued that disclosure was necessary to address their concerns relating to a conflict of interest and security for costs.<sup>140</sup> The latter will be further discussed in a later section. The Claimant refused to produce the Funding Agreement alleging that it was ‘irrelevant and immaterial to the outcome of the dispute.’<sup>141</sup>

The arbitral tribunal, chaired by Jose Miguel Justice, decided against ordering the production of the Funding Agreement.<sup>142</sup> The arbitral tribunal was not convinced by the Respondent’s argument that it was necessary to produce the Funding Agreement to prevent a conflict of interest.<sup>143</sup> They did however state that neither of the arbitrators had any involvement with Salvia Investment Ltd.<sup>144</sup>

Similarly, in *South American Silver Limited v. Bolivia*, the Respondent requested security for costs and disclosure of the Funding Agreement.<sup>145</sup> The arbitral tribunal denied the request but ordered the Claimant to disclose the identity of Funder so that any conflicts of interest could be identified.<sup>146</sup>

ICSID also recently administered two cases in which the disclosure of the Funder was in dispute, *Eurogas v. Slovakia*<sup>147</sup> and *Sehil v. Turkmenistan*.<sup>148</sup> In *Eurogas v. Slovakia* the

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<sup>137</sup> *Guaracachi v. Bolivia* PCA Case No. 2011-17 Procedural Order No. 13 21 February 2013 (hereinafter *Guaracachi* (2013)).

<sup>138</sup> *South American Silver Limited v. Bolivia* PCA Case No. 2013-15 Procedural Order No. 10 and 11 January 2016 (hereinafter *South American Silver* (2016)).

<sup>139</sup> *Guaracachi* (2013) para 5, 8.

<sup>140</sup> *Guaracachi* (2013) para 6.

<sup>141</sup> *Guaracachi* (2013) para 2.

<sup>142</sup> *Guaracachi* (2013) para 8.

<sup>143</sup> *Guaracachi* (2013) para 8.

<sup>144</sup> *Guaracachi* (2013) para 9.

<sup>145</sup> Darwazeh N and Leleu A (2016) 135.

<sup>146</sup> Darwazeh N and Leleu A (2016) 135.

<sup>147</sup> *Eurogas v. Slovakia*, ICSID Case No. ARB/14/14 Decision of the tribunal 17 March 2015 (hereinafter *Eurogas* (2015)).

<sup>148</sup> *Sehil v. Turkmenistan*, ICSID Case No. ARB/12/6 Procedural Order No. 2 23 June 2014 (hereinafter *Sehil* (2014)).

Respondent requested the identity of the Funder to address concerns relating to a conflict of interest.<sup>149</sup> During the hearing the arbitral tribunal ordered the Claimants to disclose the identity of the Funder, which they did.<sup>150</sup>

In *Sehil v. Turkmenistan*, the Respondent requested the arbitral tribunal to order the Claimant to disclose whether they were being funded and if they were to disclose the terms of the Funding Agreement.<sup>151</sup> The arbitral tribunal acknowledged that it has the inherent power to grant such a request but needed justifiable grounds under which to grant it.<sup>152</sup> The arbitral tribunal went on to create the following factors to consider when deciding whether to grant such a request:

- a. 'To avoid a conflict of interest for the arbitrator as a result of the third party funder;
- b. For transparency and to identify the true party to the case;
- c. For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration;
- d. If there is an application for security for costs if requested; and
- e. To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives.'<sup>153</sup>

Hereafter the arbitral tribunal found that the Respondents failed to convince them that the information was relevant under either of these factors but allowed the Respondents to make the same request at a later stage should it become relevant.<sup>154</sup> The same request was made and the arbitral tribunal ordered the Claimant to disclose the identity of the Funder as well as the nature of the Funding Agreement.<sup>155</sup> The arbitral tribunal's decision was motivated by the Respondents concerns that should they be successful the Claimant would be unable to cover the costs.<sup>156</sup>

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<sup>149</sup> *Eurogas* (2015) para 105.

<sup>150</sup> *Eurogas* (2015) para 108.

<sup>151</sup> *Sehil* (2014) para 11.

<sup>152</sup> *Sehil* (2014) para 9.

<sup>153</sup> *Sehil* (2014) para 10.

<sup>154</sup> *Sehil* (2014) para 11.

<sup>155</sup> Thomas E 'ICSID tribunal orders claimants to disclose details of third-party funder' available at <https://www.dlapiper.com/en/us/insights/publications/2015/07/international-arbitration-newsletter-q2-2015/icsid-tribunal-orders-party-to-disclose-details/> (accessed 19 September 2017).

<sup>156</sup> Thomas E 'ICSID tribunal orders claimants to disclose details of third-party funder' available at <https://www.dlapiper.com/en/us/insights/publications/2015/07/international-arbitration-newsletter-q2-2015/icsid-tribunal-orders-party-to-disclose-details/> (accessed 19 September 2017).



The trend arising out of these PCA and ICSID cases is that requests for disclosure will only be granted when the non-funded party has established justifiable grounds for its disclosure. *Sehil v. Turkmenistan* provided the most beneficial information for non-funded parties who request the disclosure of information pertaining to the Funder. The factors created by the arbitral tribunal are an indication of what could be considered justifiable grounds for disclosure.

### **2.5.1.2 Legal Representative**

The relationship that exists between the Claimholder, the Claimholder's legal representative and the Funder can also result in a conflict of interest. The legal representative has a duty to act in the best interest of the Claimholder however the Funder's interest can impede on this duty when he is responsible for paying the legal representatives fees. It is therefore highly recommended that the Claimholder's legal representative remove himself from the negotiation of the Funding Agreement to avoid aggravating these competing interests.<sup>157</sup>

The Claimholder's legal representative has the difficult task of harmonising competing interests. For example the acceptance of settlements, the Claimholder may agree whereas the Funder may not be satisfied with the return.<sup>158</sup> The legal representative is however bound by international and national standards of ethical codes, practices and the laws of the jurisdiction he is licensed to practice within.<sup>159</sup> These often dictate that the legal representative is bound to act in the best interest of the Claimholder therefore any competing interests should be resolved in favour of the Claimholder and not the Funder.<sup>160</sup>

This makes the selection of legal representatives very important. When selecting a legal representative, the Claimholder should not only consider the legal representative's experience in arbitrations but also his experience in obtaining and working with Funders.<sup>161</sup> It is after all the legal representative that should conduct the due diligence and compile the package that will be used to attract Funders. There is still the possibility that despite being thorough in selecting a legal representative that the Funder may provide funding on condition that the legal representative is replaced.<sup>162</sup>

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<sup>157</sup> Shannon V (2015) 881.

<sup>158</sup> Silver C (2014) 639.

<sup>159</sup> Osmanoglu B (2015) 337.

<sup>160</sup> Shannon V (2015) 873.

<sup>161</sup> Heilbron H (2013) 39.

<sup>162</sup> Goldsmith A (2012) 149.

A legal representative's experience is also necessary when trying to maintain confidentiality and the attorney-client privilege.<sup>163</sup> Circumstances may arise that require the legal representative to share confidential information with the Funder. This could arise during the investigative process or during the arbitration process should the Funder request updates on the claims progress. Under either circumstance this would require the legal representative to break the attorney-client privilege. There is very little that prevents the legal representative from obtaining the Claimholder's consent after informing him of the reason why the attorney-client privilege has to be relaxed and the consequences of doing so but whether the legal representative obtains this consent is not always guaranteed.<sup>164</sup> The legal representative should be tactful when handling information whether it is providing the Funder with confidential information to help conduct due diligence, sharing arbitration strategies or compiling progress reports.<sup>165</sup>

The sharing of confidential information with a Funder was an issue in dispute in *Eurogas v. Slovakia*.<sup>166</sup> The Respondent requested that provisions be included in the proceedings to prevent the Funder from getting access to confidential information.<sup>167</sup> The arbitral tribunal found this request unnecessary stating that the Funder would be subject to the 'normal obligations of confidentiality.'<sup>168</sup> What these normal obligations are and whether they are sufficient is still to be determined.



### 2.5.2 Party Autonomy

Party autonomy is the ability of either party to freely select, subject to a few limitations, every element of their arbitration and the arbitration agreement including the choice of the law, the governing arbitral rules, the place and seat of the arbitration.<sup>169</sup> Party autonomy is a key feature in many rules that regulate arbitration for example Article 35 of the UNCITRAL Model Law on International Commercial Arbitration provides that:

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<sup>163</sup> Pardau SL 'Alternative Litigation Financing: Perils and Opportunities' (2011) 12 *UC Davis Business Law Journal* 73.

<sup>164</sup> Kaplan C 'Chapter 6. Third-Party Funding in International Arbitration Issues for Counsel', in Bernardo M, Sanz-Pastor C and Dimolitsa A (editors) *Third-Party Funding in International Arbitration International Chamber of Commerce Dossier Volume 10* (2013) 73.

<sup>165</sup> Giesel GM 'Alternative Litigation Finance and the Attorney- Client Privilege' (2014) 92 *Denver University Law Review* 1032.

<sup>166</sup> *Eurogas* (2015).

<sup>167</sup> *Eurogas* (2015) para 105.

<sup>168</sup> *Eurogas* (2015) para 108.

<sup>169</sup> Engle R 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability' (2002) 15 *The Transnational Lawyer* 334.

‘Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise.’<sup>170</sup>

Article 36 further provides that, ‘[O]ther provisions in the Model Law recognize party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters.’<sup>171</sup>

Party autonomy is threatened when a Funding Agreement contains provisions that allow a Funder to control all or certain aspects of the arbitration<sup>172</sup> or provisions on the acceptance of settlements.<sup>173</sup> These provisions could be the result of unequal bargaining power because the Funder is aware that the Claimholder is dependent on the Funder to institute his claim.<sup>174</sup> Regardless of the Funder’s intention party autonomy is weakened due to his involvement.<sup>175</sup>

Party autonomy is further threatened by provisions that allow the Funder to influence tactical decisions on how the case is presented, including which evidence is presented, settlement negotiations and offers, what arbitrator the client chooses, and the choice of legal representatives.<sup>176</sup> The Funder is ultimately responsible for providing the funding if the Claimholder were to act contrary to the Funder’s interests there is a possibility that funding could be withheld.<sup>177</sup>

Ideally, a Funder should not be an active participant in the arbitration proceeding but this is not always possible. For example, a Funder can request progress reports that contain information pertaining to timelines, budgets, settlement talks and the appointment of legal representatives to monitor the Funder’s investment.<sup>178</sup> The confidential nature of the relationship between the Claimholder and the Funder limits the arbitral tribunal’s ability to control the Funder’s involvement and prevents it from protecting the Claimholder from unfair contractual terms.<sup>179</sup>

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<sup>170</sup> UNCITRAL Model Law Article 35.

<sup>171</sup> UNCITRAL Model Law Article 36.

<sup>172</sup> Shannon V (2015) 865.

<sup>173</sup> Trusz JA (2013) 1657.

<sup>174</sup> Shannon V (2015) 881.

<sup>175</sup> Shahdadpuri KH (2016) 83.

<sup>176</sup> Shannon V (2015) 897.

<sup>177</sup> Trusz JA (2013) 1655.

<sup>178</sup> Trusz JA (2013) 1655.

<sup>179</sup> Darwazeh N and Leleu A (2016) 132.

### 2.5.3 Security for Costs

Security for costs is an interim measure that can be requested by either party and can only be granted by the arbitral tribunal.<sup>180</sup> In most cases the Respondent requests security for costs in the event that they are successful in defending the case and the Claimant is unable or unwilling to cover the costs ordered.<sup>181</sup> The involvement of a Funder therefore raises questions as to who should be held accountable for the security for costs in the event that an arbitral tribunal grants a security for costs request.

This question arose in *South American Silver Limited v. Bolivia*, which was discussed above. In addition to requesting the identity of the Funder and the contents of the Funding Agreement, the Respondents requested security for costs.<sup>182</sup> The Respondents put forth several arguments motivating their request for security for costs. One of their arguments was that the involvement of the Funder was evidence that the Claimant could not afford the arbitration and this posed a risk for Respondent if he successfully defended the claim.<sup>183</sup>

The Claimants acknowledged that their financial situation was dire leading the Respondents to believe that they were likely to become insolvent before the end of the arbitral proceedings.<sup>184</sup> The Respondents relied on a previous arbitral case, *RSM v Saint Lucia*, wherein the arbitrator stated that there is a presumption for security for costs when a Funder is involved and the Claimant bears the onus of proving that it is not necessary.<sup>185</sup> Relying on these arguments the Respondent felt as though the request for security for costs was warranted.<sup>186</sup>

The Claimants argued that the Respondents failed to prove that security for costs was necessary and that all the risks they mentioned in their argument were not sufficient enough to warrant security for costs.<sup>187</sup> Citing previous ICSID and UNCITRAL cases, they argued that security for costs was only granted on one occasion when the Claimant in that case had a history of failing to pay prior cost awards.<sup>188</sup> They further argued that the reluctance of arbitral tribunals

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<sup>180</sup> Tirado J, Stein M and Singh M 'Security for costs in international arbitration' (2013) 3 *Yearbook on International Arbitration* 164 (hereinafter Tirado J, Stein M and Singh M (2013)).

<sup>181</sup> Tirado J, Stein M and Singh M (2013) 164.

<sup>182</sup> *South American Silver* (2016) para 15.

<sup>183</sup> *South American Silver* (2016) para 18.

<sup>184</sup> *South American Silver* (2016) para 22.

<sup>185</sup> *South American Silver* (2016) para 27.

<sup>186</sup> *South American Silver* (2016) para 26.

<sup>187</sup> *South American Silver* (2016) para 31.

<sup>188</sup> *South American Silver* (2016) para 32.

to grant security for costs requests was due to the high threshold created by existing arbitral rules.<sup>189</sup>

The arbitral tribunal acknowledged that they have the power to grant the Respondents request for security for costs.<sup>190</sup> Relying on previous arbitral cases such as *Eurogas v Slovak Republic* and *RSM v Saint Lucia*, also used by the Respondent, the arbitral tribunal found that security for costs should only be granted under ‘exceptional circumstances.’<sup>191</sup> The arbitral tribunal rejected the request for security for costs because no ‘exceptional circumstances’ were proven.<sup>192</sup> The arbitral tribunal did however acknowledge that the Claimant stated that the Funding Agreement did not cover security for costs and if the issue were to arise the arbitral tribunal would make a decision.<sup>193</sup>

#### 2.5.4 Additional concerns

In addition to the concerns already discussed, TPF raises questions pertaining to cost orders, evidence and extending the duration of arbitrations. Courts, particularly in South Africa and the UK, have been faced with issues relating to cost orders and whether they can be awarded against a Funder.<sup>194</sup> These cases and the decisions rendered by the courts will be discussed under chapter 3 and chapter 4 respectfully. With respect to evidence the amount of funding provided by the Funder has a direct effect on the legal representative’s ability to prepare witnesses, find expert witnesses, present and collect evidence.<sup>195</sup>

Non-disclosure of a TPF can lead to the prolonging of the arbitration process. The benefit of the arbitration proceedings includes its ability to save resources particularly time and money. These benefits are adversely affected when TPF is not disclosed at the outset because it can lead to complaints of bias, the reappointment of the arbitrator or the entire panel and requests

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<sup>189</sup> *South American Silver* (2016) para 37.

<sup>190</sup> *South American Silver* (2016) para 48.

<sup>191</sup> *South American Silver* (2016) para 61.

<sup>192</sup> *South American Silver* (2016) para 85.

<sup>193</sup> Darwazeh N and Leleu A (2016) 135.

<sup>194</sup> *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others* (48226/12) [2015] ZAGPJHC 62 (hereinafter *Gold Fields* [2015]) and *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) (hereinafter *Essar Oilfields* [2016]). Both cases will be discussed in the upcoming chapters.

<sup>195</sup> Shannon V (2015) 899.

for documents.<sup>196</sup> The current evidentiary rules in arbitrations do not require the disclosure of Funding Agreements.<sup>197</sup>

## 2.6 THE DEVELOPMENT OF ARBITRATION TO ACCOMMODATE THIRD PARTY FUNDING

The TPF industry has existed for several years now however its regulation remains a challenge particularly in arbitrations. The development of the regulation of TPF has occurred on three levels, all of which has been discussed at some point or another during this chapter. These three levels include the general practice of arbitrators that has development during arbitrations, the revision of existing organisation rules and the rules adopted by different countries.

The first development is the general practice adopted by arbitrators that are the decision makers in arbitration proceedings. Arbitrators have the power to compel party's to disclose the involvement of a Funder either on their own accord or at the request of the non-funded party.<sup>198</sup> Initially, it was unclear if arbitrators would rely on this power due to confidentiality considerations and the relevancy of the Funding Agreement to the issues in dispute.<sup>199</sup> This uncertainty was overcome after recent cases saw arbitrators compelling parties to disclose the identity of their Funder and in some instances the details of the Funding Agreement at the request of non-funded parties.<sup>200</sup> Arbitrators have cautioned that these decisions are not made lightly and that parties requesting any information pertaining to TPF have to provide 'exceptional circumstances' for doing so.<sup>201</sup>

The second development is the revision of organisational rules. Perhaps the only organisation to successfully adopt rules to address concerns relating to TPF is the IBA. The IBA Guidelines on Conflict of Interests was revised in 2014 due to its popularity in the arbitration community and its need to address issues that have arisen after the release of the original.<sup>202</sup> In the IBA

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<sup>196</sup> Sahani VS (2016) 402.

<sup>197</sup> Sahani VS (2016) 420. There have however been recent developments in Singapore and Hong Kong. Both of which will be elaborated on under chapter three.

<sup>198</sup> Lévy L and Bonnan R (2013) 78.

<sup>199</sup> Lévy L and Bonnan R (2013) 78.

<sup>200</sup> Thomas E 'ICSID tribunal orders claimants to disclose details of third-party funder' available at <https://www.dlapiper.com/en/us/insights/publications/2015/07/international-arbitration-newsletter-q2-2015/icsid-tribunal-orders-party-to-disclose-details/> (accessed 19 September 2017).

<sup>201</sup> *Guaracachi* (2013) para 8.

<sup>202</sup> Voser N and Petti AM 'The Revised IBA Guidelines on Conflicts of Interest in International Arbitration' (2015) 33 *ASA Bulletin* 8.

Guidelines on Conflict of Interests the co-chairs of the arbitration committee acknowledged that TPF was one of these issues and the revised guidelines tried to address it as best as it could.<sup>203</sup>

The explanation of General Standard 7 of the IBA Guidelines on Conflict of Interests provides that:

‘The parties’ duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.’<sup>204</sup>

Institutions that administer arbitrations have not revised or adopted rules that address concerns relating to TPF. This could be because institutional rules do not consider how a Claimholder is funding their claim.<sup>205</sup> In addition, developing institutional rules to mandate the disclosure of Funding Agreements could become time-consuming and result in the creation of additional issues that would ultimately take away from the speedy nature of arbitral proceedings.<sup>206</sup>

There are however rules that place certain obligations on the parties. For example, the London Court of International Arbitration (LCIA) Arbitration Rules Article 32.2 provides that:

‘For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat.’<sup>207</sup>

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<sup>203</sup> International Bar Association ‘The IBA Guidelines on Conflict of Interest in International Arbitration Revised 2014’ available at

[https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed 13 September 2017).

<sup>204</sup> International Bar Association ‘The IBA Guidelines on Conflict of Interest in International Arbitration Revised 2014’ available at

[https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed 13 September 2017).

<sup>205</sup> Lévy L and Bonnan R (2013) 79.

<sup>206</sup> Lévy L and Bonnan R (2013) 81.

<sup>207</sup> LCIA Arbitration and ADR Worldwide ‘LCIA Arbitration Rules (2014)’ available at

[http://www.lcia.org/dispute\\_resolution\\_services/lcia-arbitration-rules-2014.aspx](http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx) (accessed 13 September 2017).

This obligation imposed on parties could prevent them from engaging in any bad faith practices.

The third development is the creation and adoption of rules by countries. In 2017, Singapore and Hong Kong enacted legislation to regulate TPF within their respective jurisdictions.<sup>208</sup> Both countries were motivated to enact legislation to remain competitive in the international arbitration market.<sup>209</sup> Not all countries have taken the route of adopting legislation in the same manner as Singapore and Hong Kong. Other countries prefer a more hands-off approach by providing soft rules to avoid stifling the development of the industry.<sup>210</sup> The UK, for example, has adopted a self-regulation approach by adopting a Code of Conduct for Funder's who operate within its jurisdiction.<sup>211</sup> This third development will be discussed in greater detail under chapter 3 of this mini-thesis.

## 2.7 CONCLUSION

The purpose of this chapter was to illustrate that TPF has become an established industry within arbitration and that concerns regarding its lack of regulation are not unfounded. It described the difficulty that has arisen with attempts to define TPF. It also included a discussion on other forms of funding such as legal insurance, contingency fee agreements, conditional fee agreements and legal loans. The purpose of which was to distinguish these forms of funding from TPF.

The TPF process also illustrated the complexity of the industry with all the investigations and negotiations that takes place prior to the signing of the Funding Agreement. This complexity has developed overtime with the growth of the industry. The argument for regulation was also strengthened under this chapter. Particularly when potential adverse effects of TPF on arbitration were identified with examples of recent arbitration cases as evidence. The development of general practices, organisational rules and domestic laws to address these potential adverse effects were also included in the chapter and will be further elaborated on in chapter 3.

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<sup>208</sup> Bao C (2017) 387.

<sup>209</sup> Gayner O and Khouri S (2017) 1033.

<sup>210</sup> Shannon V (2015) 904.

<sup>211</sup> Gayner O and Khouri S (2017) 1038.



## CHAPTER 3

### THIRD PARTY FUNDING IN COMMON LAW JURISDICTIONS

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#### 3.1 INTRODUCTION

Countries and administering institutions have both had to grapple with the growth of the TPF industry.<sup>212</sup> The previous chapter briefly discussed the general practices and the interpretation of existing administering institution rules by arbitral tribunals.<sup>213</sup> In this chapter the focus will be on the development of TPF in the UK, Singapore and Hong Kong. These countries were selected because they share certain similarities and differences with South Africa. The similarities include the common law doctrines of maintenance and champerty and a rapidly growing TPF industry. The difference is that these countries have taken proactive steps to regulate the TPF industry whereas South Africa has not.

The common law doctrines of maintenance and champerty were created to protect the judicial system from undue influence.<sup>214</sup> This protection was accomplished by barring third parties from financing litigation claims.<sup>215</sup> As the judicial system developed its dependence on the doctrines decreased becoming almost obsolete.<sup>216</sup> That was until the emergence of TPF. The TPF industry is the practice of financing legal claims by a third party.<sup>217</sup> This practice conflicts with the common law doctrines of maintenance and champerty. Legal representatives of non-funded parties have therefore relied on the doctrines when contesting the legality of TPF.<sup>218</sup>

The aim of this mini-thesis is to determine whether the regulation of TPF in South Africa is necessary particularly in the context of arbitrations. This cannot be effectively answered without reviewing the different regulatory options already in existence. It is not uncommon for countries to look to each other for guidance when it comes to regulating an emerging industry

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<sup>212</sup> Xinglong Y 'Third Party Funding under Investor-State Arbitration: Respondent State's Risks and Recent Developments in ASEAN and Hong Kong' (2017) 6 *Ramkhamhaeng Law Journal* 179 (hereinafter Xinglong Y (2017)).

<sup>213</sup> See section 2.5 and 2.6.

<sup>214</sup> Glickman DR (2016) 1052.

<sup>215</sup> Glickman DR (2016) 1052.

<sup>216</sup> Glickman DR (2016) 1053.

<sup>217</sup> See section 2.2.

<sup>218</sup> *Price Waterhouse Coopers* [2004] para 20.

such as TPF.<sup>219</sup> Considering the unique features of each legal jurisdiction this chapter analyses the different approaches implemented by each country. It will begin with a brief overview of the common law doctrines of maintenance and champerty. Followed by an analysis of TPF in the UK, Singapore and Hong Kong by using the recommendations by Law Commissions, case law and legislation to mention a few.

### 3.2 THE COMMON LAW DOCTRINES OF MAINTENANCE AND CHAMPERTY

The common law doctrines of maintenance and champerty were adopted to protect the medieval judicial systems from private individuals who sought to influence the outcome of disputes to protect their own interests.<sup>220</sup> This malicious conduct threatened the independence of the Courts and those that used it to resolve bona fide disputes.<sup>221</sup> The common law doctrines of maintenance and champerty have existed for many years therefore there are many definitions for them.

For purposes of this mini-thesis the definitions contained in *Black's Law Dictionary*<sup>222</sup> will be used. The definitions contained in this dictionary is very similar to the explanation provided by South Africa's SCA in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd.*<sup>223</sup> It defines maintenance as the 'improper assistance in prosecution or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case or meddling in someone else's litigation.'<sup>224</sup> Champerty is a form of maintenance<sup>225</sup> and is defined as 'an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgement proceeds.'<sup>226</sup>

It is no surprise that TPF, at first glance, offends the common law doctrines of maintenance and champerty. At the outset, Funders have no interest in a claim that is until they decide to invest in the claim thereby creating a commercial interest. The Funder is 'meddling in someone

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<sup>219</sup> Kalajdzic J, Cashman P and Longmoore A 'A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding' (2013) 61 *The American Journal of Comparative Law* 93.

<sup>220</sup> *Price Waterhouse Coopers* [2004] para 30.

<sup>221</sup> *Price Waterhouse Coopers* [2004] para 33.

<sup>222</sup> Garner BA *Black's Law Dictionary* (2009) Thomson Reuters (hereinafter Garner BA (2009)).

<sup>223</sup> *Price Waterhouse Coopers* [2004] para 25.

<sup>224</sup> Garner BA (2009) 1097.

<sup>225</sup> Baker T 'Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding' (2013) 23 *Widener Law Journal* 231.

<sup>226</sup> Garner BA (2009) 1097.

else's litigation' and if their assistance is not given in good faith their investment can be considered 'improper assistance.' It is still a topic of discussion whether investing in a claim to gain a substantial return can ever be considered acting in good faith.<sup>227</sup> With respect to the definition of champerty the connection is a lot clearer, the Funder is an 'intermeddler' because TPF is the act of providing funds in exchange for a share of the proceeds.

If at first glance TPF offends the common law doctrines of maintenance and champerty the logical response is why has the industry continued to gain momentum. The following sections of this mini-thesis will detail how the UK, Singapore and Hong Kong allowed the industry to grow despite its potential to offend the common law doctrines of maintenance and champerty.

### 3.3 UNITED KINGDOM

The doctrines of maintenance and champerty originated in the UK and formed part of its common law and statutory law.<sup>228</sup> Its applicability diminished over the years especially after the Law Commission recommended that it be abolished.<sup>229</sup> Following this recommendation the Criminal Law Act was amended in 1967. The amendment abolished the doctrines as a crime<sup>230</sup> and a tort.<sup>231</sup> The amendment did however include a saving clause, at the recommendation of the Law Commission, section 14 (2) provides that: 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.'<sup>232</sup> This means that the doctrines of maintenance and champerty continue to exist as a rule of public policy despite their abolishment as a crime and a tort.<sup>233</sup>

The interpretation of this amendment resulted in inconsistent precedent across the UK.<sup>234</sup> Lord Mustill in *Giles v Thompson (Giles)*<sup>235</sup> attempted to alleviate this inconsistency by creating a three-step enquiry:

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<sup>227</sup> This thesis will not be addressing this concern in detail.

<sup>228</sup> *Giles v Thompson* [1993] UKHL 2 p 153 (hereinafter *Giles* [1993]).

<sup>229</sup> *Massai Aviation Services v Attorney General of Bahamas* [2007] UKPC 12 para 12.

<sup>230</sup> Criminal Law Act 1967 section 13(1).

<sup>231</sup> Criminal Law Act 1967 section 14(1).

<sup>232</sup> Criminal Law Act 1967 section 14(2).

<sup>233</sup> *R (Factortame) Ltd v Transport Secretary, (No 8)* [2002] EWCA Civ 932 para 31 (hereinafter *Factortame* [2002]).

<sup>234</sup> *Giles* [1993] p 154.

<sup>235</sup> [1993] UKHL 2.

‘At the first the agreement is analysed to see whether the company... agrees to involve itself in the litigation in a way which yields a financial benefit from a successful outcome. If so, the agreement is champertous and prima facie unlawful. At the second stage it is considered whether the third party has an interest in the transaction which legitimates what would otherwise be unlawful. Finally, it is asked whether aside from special rules concerning champerty, the relationship has features which make it contrary to public policy, and hence unenforceable.’<sup>236</sup>

With respect to TPF the enquiry would be the same. Will the Funder receive a financial benefit from a successful outcome? If yes, the Funding Agreement is champertous and prima facie unlawful. This enquiry is relatively easy because the answers can be obtained by reviewing the Funding Agreement. The following two enquiries are a lot more challenging to answer because it requires an analysis of the surrounding circumstances. Is there a legitimate reason for the funding that would make the Funding Agreement lawful despite the prima facie unlawfulness? Are there any other considerations that would make the Funder’s involvement or the Funding Agreement contrary to public policy and therefore unenforceable? In most instances these two enquiries can only be determined through case law.

After creating the three-step enquiry Lord Mustill stated that he preferred to look at the circumstances holistically.<sup>237</sup> This is accomplished by determining if the agreement violates the doctrines.<sup>238</sup> Followed by an enquiry as to whether there exists a legitimate reason for the third party’s involvement separate from his own potential benefit.<sup>239</sup> If a legitimate reason exists then the agreement would not be unlawful or contrary to public policy.

It cannot be overlooked that despite the amendment and the interpretation the court’s dependency on the doctrines diminished as is evident in the comments made by presiding officers. For example, in *Hill v Archbold*,<sup>240</sup> the presiding officer stated that:

‘Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the state itself. Comparatively few litigants bring suits, or defend them, at their own expense.’<sup>241</sup>

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<sup>236</sup> *Giles* [1993] p 164.

<sup>237</sup> *Giles* [1993] p 164.

<sup>238</sup> *Giles* [1993] p 164.

<sup>239</sup> *Giles* [1993] p 164.

<sup>240</sup> [1968] 1 QB 686.

<sup>241</sup> *Hill v Archbold* [1968] 1 QB 686 para 494, 495.

Similarly, in *Giles* Lord Mustill quoted from a previous judgement: ‘[T]he law on maintenance and champerty has not stood still, but has accommodated itself to changing tunes: as indeed it must if it is to retain any useful purpose.’<sup>242</sup> This has left room for the growth of the TPF industry in the UK.

The growth of TPF increased rapidly after more cases were decided in its favour. The cases of importance are *R (Factortame) Ltd v Transport Secretary (No 8) (Factorame)*,<sup>243</sup> *Arkin v Borchard Lines Ltd (Arkin)*<sup>244</sup> and *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd (Essar Oilfields)*.<sup>245</sup> The remainder of this section will be dedicated to discussing these cases.

In *Factortame*, the court had to decide whether the court below erred in deciding that an agreement was not champertous.<sup>246</sup> The agreement in question was concluded between the Respondent and a firm of accounts.<sup>247</sup> The terms of the agreement entitled the firm of accountants to a portion of the settlement received<sup>248</sup> in exchange for services that included expert witnesses.<sup>249</sup> The court below awarded a cost order against the Appellant in favour of the Respondent so that the firm of accounts could receive their portion.<sup>250</sup>

The Appellant refused to adhere to the cost order alleging that the court below erred in its judgment and that the agreement was indeed champertous and therefore unenforceable.<sup>251</sup> The court found that the Respondent had no choice but to enter into the agreement with the firm of accountants.<sup>252</sup> The Respondent instituted the litigation to recover losses he had sustained and he risked losing the litigation due to a lack of funds.<sup>253</sup> Entering into the agreement allowed him access to justice motivating the court to rule that the court below did not err in their decision.<sup>254</sup>

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<sup>242</sup> *Giles* [1993] p 164.

<sup>243</sup> [2002] EWCA Civ 932.

<sup>244</sup> [2005] EWCA Civ 655.

<sup>245</sup> [2016] EWHC 2361 (Comm).

<sup>246</sup> *Factortame* [2002] para 1.

<sup>247</sup> *Factortame* [2002] para 12.

<sup>248</sup> *Factortame* [2002] para 12.

<sup>249</sup> *Factortame* [2002] para 23.

<sup>250</sup> *Factortame* [2002] para 1.

<sup>251</sup> *Factortame* [2002] para 1.

<sup>252</sup> *Factortame* [2002] para 91.

<sup>253</sup> *Factortame* [2002] para 91.

<sup>254</sup> *Factortame* [2002] para 91.

Access to justice was re-established as an exception to the doctrines in *Gulf Azov Shipping Co Ltd v Chief Humphrey Irikefe Idisi (Gulf Azov Shipping)*.<sup>255</sup> The court stated that: ‘Public policy now recognises that it is desirable, to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.’<sup>256</sup>

The decision of the court in *Factortame* and the quotation from *Gulf Azov Shipping* is consistent with Lord Mustill’s judgment. The agreements may have been champertous and therefore prima facie unlawful. The agreements were however considered lawful because there was a legitimate interest separate from the third party’s potential benefit. The legitimate interest was access to justice, without the agreement the Claimholder would not have been able to pursue his legitimate claim. It can therefore be concluded that TPF and more specifically Funding Agreements that may be prima facie unlawful are lawful under UK law. This is on condition that it promotes access to justice or another legitimate interest. This conclusion is not without merit because shortly thereafter came a new series of case law. The issues were no longer limited to the legality of agreements that were prima facie unlawful but rather the issues that arose in connection to a growing acceptance of Funding Agreements.

The most notable of these cases was *Arkin v Borchard Lines Ltd (Arkin)*<sup>257</sup> decided by the Court of Appeal in 2005. Several issues arose in this case that addressed the concerns raised in chapter 2.<sup>258</sup> This includes distinguishing between TPF and other funding mechanisms as well as security for costs.

The Claimant, Mr. Arkin, did not have the financial means to institute his claim against the Defendants.<sup>259</sup> The Claimant therefore entered into a conditional fee agreement with his lawyers and obtained additional funding from a Funder, Managers and Processors of Claim Ltd.<sup>260</sup> It was agreed that the funds received from the Funder would be used to cover expert

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<sup>255</sup> [2004] EWCA Civ 292.

<sup>256</sup> *Gulf Azov Shipping Co Ltd v Chief Humphrey Irikefe Idisi* [2004] EWCA Civ 292 para 54.

<sup>257</sup> [2005] EWCA Civ 655.

<sup>258</sup> See section 2.5.

<sup>259</sup> *Arkin v Borchard Lines LTD and Others* [2005] EWCA Civ 655 para 1 (hereinafter *Arkin* [2005]).

<sup>260</sup> *Arkin* [2005] para 1.

witnesses and other services such as secretarial services.<sup>261</sup> The terms of the Funding Agreement between the Claimant and the Funder were as follows:

‘[A]greed remuneration was 25% of recoveries from the litigation up to £5 million and 23% thereafter. In addition they were to receive any payments in respect of costs of witnesses in relation to quantum recovered from the defendants. If the initial expert’s report suggested that the damages recovered would be inadequate to enable [the Funder] to cover their costs, they had an option to withdraw from the agreement... agreement provided that [the claimant] should have the conduct of the proceedings, but would need the consent of [the Funder] to any settlement or compromise. In the event of dispute, the decision of leading counsel acting for [the claimant] was to prevail.’<sup>262</sup>

These terms are consistent with those discussed under chapter 2;<sup>263</sup> it details the return, ability to withdraw, what should occur if a dispute arises and the level of control. After the funds were obtained the claim was instituted, it was unsuccessful and the Defendants requested a cost order against the Funder.<sup>264</sup> This is further evidence that the awarding of costs is not unique to arbitrations and that it is a genuine concern for the TPF industry.

The court below found that the Claimant would not have been able to pursue his claim had he not received the additional funding from the Funder.<sup>265</sup> The court below denied the request and the case was sent to the Court of Appeal.<sup>266</sup> The court below and the Court of Appeal were left to reconcile two competing interests, the Claimants right to access justice and the Defendants right to claim costs for successfully defending the case.<sup>267</sup>

The Court of Appeal considered it unjust to deny a Defendant his right to a cost order after he had successfully defended a claim therefore absolving the Funder from all liability.<sup>268</sup> At the same time the court was wary of deterring Funders from investing in claims out of fear of “disproportionate costs consequences” if they granted the cost order.<sup>269</sup> This is particularly concerning for situations where the Funder only provides funds for a small portion of the dispute for example covering the costs of expert witnesses.<sup>270</sup> The possibility that such a Funder

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<sup>261</sup> *Arkin* [2005] para 13.

<sup>262</sup> *Arkin* [2005] para 13.

<sup>263</sup> See section 2.4.2.

<sup>264</sup> *Arkin* [2005] para 2.

<sup>265</sup> *Arkin* [2005] para 16.

<sup>266</sup> *Arkin* [2005] para 2.

<sup>267</sup> *Arkin* [2005] para 30.

<sup>268</sup> *Arkin* [2005] para 38.

<sup>269</sup> *Arkin* [2005] para 38.

<sup>270</sup> *Arkin* [2005] para 39.

would be liable to cover a cost order would deter him from investing and prevent access to justice.<sup>271</sup> The court therefore took it upon itself to devise an outcome that would allow the Defendant to claim costs without deterring the Funders.<sup>272</sup>

The application of the approach is limited to a Funder who has agreed to fund a portion of the dispute therefore facilitating access to justice.<sup>273</sup> In a case where the agreement is found in violation of the common law doctrines of maintenance and champerty the Funder will be held liable for the cost order in full.<sup>274</sup> This leaves open the question whether an agreement is champertous if the Funder agrees to fund the dispute in its entirety. The court clarifies this question somewhat by stating that an agreement will not be considered champertous where the Claimant remains the party with the primary interest and control of the dispute.<sup>275</sup> Despite being kept informed of the decision-making the court found that the Funder in this case did not influence or attempt to control the decision-making of the Claimant and his legal representative.<sup>276</sup> The agreement was therefore not champertous and the developed approach by the court was applicable to the Funder.

The approach adopted by the court is that a Funder ‘should be potentially liable for costs of the opposing party to the extent of the funding provided.’<sup>277</sup> The court motivated its decision by stating that a Defendant should be allowed to recover costs from a Funder whose assistance allowed the continuation of a dispute that ultimately lacked merit.<sup>278</sup> The result of this decision is that Funders will be more cautious when providing funding in order to limit their exposure thus preventing frivolous claims.<sup>279</sup> The Funder in this case was liable to pay £1.3 million of the Defendant’s costs.<sup>280</sup> The result of this judgment potentially alleviated concerns of an increase in frivolous claims, a concern that was discussed under chapter 1. Funder’s have an incentive to conduct thorough due diligence and avoid funding disputes that lack merit. If they do not, they could potentially lose their return in addition to being liable to part or all the Defendants costs.

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<sup>271</sup> *Arkin* [2005] para 39.

<sup>272</sup> *Arkin* [2005] para 38.

<sup>273</sup> *Arkin* [2005] para 40.

<sup>274</sup> *Arkin* [2005] para 40.

<sup>275</sup> *Arkin* [2005] para 40.

<sup>276</sup> *Arkin* [2005] para 14.

<sup>277</sup> *Arkin* [2005] para 41.

<sup>278</sup> *Arkin* [2005] para 41.

<sup>279</sup> *Arkin* [2005] para 42.

<sup>280</sup> *Arkin* [2005] para 45.



The cases discussed prior to *Arkin* focused on interpreting the new role of the doctrines in UK law after its reform. The interpretation that emerged from *Giles* was that an agreement could be considered lawful despite being prima facie unlawful. This was on condition that a legitimate interest existed apart from a third party's potential financial benefit. *Factortame* and *Gulf Azov Shipping* added to the interpretation by identifying access to justice as a legitimate interest. The purpose of *Arkin* was to bring the discussion closer in line with how these developments affect the TPF industry. In addition to relying on access to justice the court in *Arkin* also identified additional considerations for those operating within the TPF industry. This included ensuring that the Claimholder's interest remains the primary concern, that the Funder does not exercise control over the dispute and that cost orders can be awarded against Funders to deter frivolous claims.

This mini-thesis is concerned with TPF in arbitrations however due to its confidential nature obtaining information about TPF in arbitrations is difficult.<sup>281</sup> Case law that deals with appeals from arbitral decisions represent an ideal opportunity to ascertain information that would ordinarily be considered confidential. This was precisely what occurred in *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd (Essar Oilfields)*.<sup>282</sup> In *Essar Oilfields*, decided in 2016, the court had to decide an application brought in terms of the Arbitration Act 1996 to set aside a partial award rendered by a sole arbitrator.<sup>283</sup> The Claimant, against whom the costs were awarded, sought to set aside the award because the arbitrator included the costs owed to the Defendant's Funder.<sup>284</sup> The Defendant entered into an agreement with a Funder whereby they agreed that the Funder would fund the arbitration in exchange for 300 percent of the funding or 35 percent of the recovery, whichever was the greater, if successful.<sup>285</sup> The Claimant alleged that the provisions used by the arbitrator to award these costs were not intended to include TPF therefore the arbitrator acted beyond his power when making the award.<sup>286</sup>

After analysing the relevant provisions the court found that the arbitrator was acting well within his powers when he interpreted the provisions to include the costs of the Funder.<sup>287</sup> The court

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<sup>281</sup> See section 2.4.

<sup>282</sup> [2016] EWHC 2361 (Comm).

<sup>283</sup> *Essar Oilfields* [2016] para 1.

<sup>284</sup> *Essar Oilfields* [2016] para 6.

<sup>285</sup> *Essar Oilfields* [2016] para 5.

<sup>286</sup> *Essar Oilfields* [2016] para 6.

<sup>287</sup> *Essar Oilfields* [2016] para 70.

further stated that the arbitrator was extremely critical of the Claimants attempts to prevent the Defendant from pursuing the arbitration.<sup>288</sup> These attempts left the Defendant with no other choice but to seek the assistance of the Funder.<sup>289</sup> It is therefore no surprise that in this instance the arbitrator elected to exercise his discretion and award the costs of the Funder.<sup>290</sup> This case supports the arbitration cases discussed under chapter two. The arbitral tribunal has the discretion to decide matters relating to TPF despite there being no explicit rules detailing the role of the Funder in arbitrations.

It can be concluded after a review of the above case law that Funding Agreements are lawful in UK. There are however certain requirements for it to be considered lawful. These include a legitimate interest other than a financial benefit for the Funder an example is access to justice. In addition, the Claimholders interest should remain the primary concern and the Claimholder should retain control over the proceedings. Furthermore, the courts and arbitral tribunals have the power to award cost orders against a Funder or include money owed to a Funder in an award. Despite these developments, it became abundantly clear, particularly after *Arkin* that some form of regulation had to be put in place. This was necessary to prevent the courts or arbitral tribunals from addressing every concern raised in relation to TPF.

In 2007, two years after *Arkin v Borchard Lines Ltd*, the Civil Justice Council (CJC) of the UK's Ministry of Justice Agency compiled a report on litigation funding.<sup>291</sup> The report detailed the courts acceptance of TPF due to its ability to promote access to justice.<sup>292</sup> In response to this acceptance TPF became a self-regulated industry within the UK. In response to the report came the creation of the ALF and the publication of the Code of Conduct for Litigation Funders (Code) by the CJC in 2011.<sup>293</sup> The purpose of the Code remains the supervision of a self-regulated TPF industry despite its revision in 2014.<sup>294</sup> The Code itself has received a substantial

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<sup>288</sup> *Essar Oilfields* [2016] para 69.

<sup>289</sup> *Essar Oilfields* [2016] para 69.

<sup>290</sup> *Essar Oilfields* [2016] para 69.

<sup>291</sup> Courts and Tribunals Judiciary 'Improved Access to Justice- Funding Options and Proportionate Costs' available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/CJC+Improved+access+to+Justice+-Funding+options+and+proportionate+costs.pdf> (accessed 11 October 2017).

<sup>292</sup> Courts and Tribunals Judiciary 'Improved Access to Justice- Funding Options and Proportionate Costs' available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/CJC+Improved+access+to+Justice+-Funding+options+and+proportionate+costs.pdf> (accessed 11 October 2017).

<sup>293</sup> The Law Reform Commission of Hong Kong 'Consultation Paper' available at <http://www.hkreform.gov.hk/en/publications/tpf.htm> (accessed 17 October 2017).

<sup>294</sup> *Osmanoglu B* (2015) 337.

amount of criticism for its lack of detail and non-binding nature.<sup>295</sup> Another criticism is that the Code refers expressly to litigation but not to arbitration despite all the ALF members funding both methods of dispute resolution.<sup>296</sup> These criticisms were raised by both the U.S. Chamber Institute for Legal Reform<sup>297</sup> and the European Justice Forum.<sup>298</sup>

There are a few notable rules in the Code that provide some guidance for the concerns that were raised in the previous chapter in relation to arbitrations.<sup>299</sup> These concerns include conflicts of interest, party autonomy, security for costs and cost orders. Rule 7, 9, 10 and 11 of the Code provide guidance on these concerns. Rule 7 and 9 offers clarity on concerns relating to a conflict of interest particularly between the Claimholder's legal representative and the Funder.

There are concerns that the legal representative will provide the Funder with confidential information prior to or during the dispute that may become public knowledge.<sup>300</sup> Rule 7 of the Code provides that a Funder must adhere to confidentiality requirements imposed by any law, confidentiality agreement or non-disclosure agreement.<sup>301</sup> Furthermore there are concerns that the Funder may unduly influence the legal representative because the Funder is covering his fees.<sup>302</sup> Rule 9 requires the Funder to ensure that the funded party receives independent advice prior to the execution of a Funding Agreement, avoid any conduct that would result in the funded party's legal representative breaching his professional duties, the Funder must ensure that he does not impede on the funded party's ability to control the dispute and maintain adequate resources to fund the claim.<sup>303</sup> Rule 7 and 9 therefore alleviate concerns relating to a conflict of interest between the legal representative and the Funder.

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<sup>295</sup> Osmanoglu B (2015) 337.

<sup>296</sup> Kalicki JE 'Third-Party Funding in Arbitration: Innovations and Limits in Self-Regulation (Part 2 of 2)' available at <http://arbitrationblog.kluwerarbitration.com/2012/03/14/third-party-funding-in-arbitration-innovations-and-limits-in-self-regulation-part-2-of-2/> (accessed 24 November 2017).

<sup>297</sup> U.S. Chamber Institute for Legal Reform 'Comments on the Code of Conduct for Litigation Funders' available at [http://www.instituteforlegalreform.com/uploads/sites/1/CJC\\_Code\\_of\\_Conduct\\_Comments.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/CJC_Code_of_Conduct_Comments.pdf) (accessed 24 November 2017).

<sup>298</sup> European Justice Forum 'Costs of litigation' available at <http://europeanjusticeforum.org/faq/current-issues/costs-of-litigation.html> (accessed 24 November 2017).

<sup>299</sup> See section 1.1 and 2.5.

<sup>300</sup> See section 2.5.1.2.

<sup>301</sup> Association of Litigation Funders 'Code of Conduct for Litigation Funders' available at <http://associationoflitigationfunders.com/documents/> (accessed 29 August 2017).

<sup>302</sup> See section 2.5.1.2.

<sup>303</sup> Association of Litigation Funders 'Code of Conduct for Litigation Funders' available at <http://associationoflitigationfunders.com/documents/> (accessed 29 August 2017).

Courts and arbitral tribunals alike have been tasked with deciding whether a Funder should be held liable for security for costs or a cost order.<sup>304</sup> Rule 10 provides that the ALF now has the power to determine if the Funder is liable to the funded party to cover among other costs, adverse costs and security for costs.<sup>305</sup> Party autonomy is considered an important aspect of arbitration and there are concerns that a Funder will impede on a Claimholders right to control the dispute.<sup>306</sup> Rule 11 provides that the ALF shall state whether the Funder may provide any input in a funded party's decisions pertaining to settlement.<sup>307</sup> The Code also provides a complaint procedure should a dispute arise between a Funder and the funded party.<sup>308</sup>

The criticism of the Code is not unwarranted for example Rule 10 and 11 grant the ALF a substantial amount of decision-making power. If one considers that the ALF is made up of the Funders that are providing the funds, there exists a potential risk of a lack of independence and impartiality when making these decisions. Nonetheless, the Code remains the latest development to date with respect to the regulation of TPF in the UK.

The Code may be the latest development however it does not mean that there is no room for improvement. The U.S. Chamber Institute for Legal Reform and the European Justice Forum criticised its lack of detail and nonbinding nature. It was previously stated in this mini-thesis that after *Arkin* it became clear that some form of regulation had to be put in place. This was necessary to prevent the courts or arbitral tribunals from making every decision and at the same time decreases the number of disputes related to Funding Agreements.<sup>309</sup> The nonbinding nature does very little to help achieve this intended goal because users of the TPF are not bound by the Code.

However, a more pertinent concern is the power granted to the ALF. Perhaps the UK should consider creating an independent body to oversee the implementation of the Code and grant this body the power to make decisions. Prior to the creation of the ALF the courts and arbitral

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<sup>304</sup> See section 2.5.

<sup>305</sup> Association of Litigation Funders 'Code of Conduct for Litigation Funders' available at <http://associationoflitigationfunders.com/documents/> (accessed 29 August 2017).

<sup>306</sup> See section 2.5.2.

<sup>307</sup> Association of Litigation Funders 'Code of Conduct for Litigation Funders' available at <http://associationoflitigationfunders.com/documents/> (accessed 29 August 2017).

<sup>308</sup> Association of Litigation Funders 'Code of Conduct for Litigation Funders' available at <http://associationoflitigationfunders.com/documents/> (accessed 29 August 2017).

<sup>309</sup> See section 3.3.

tribunals decided decisions relating to agreements. Most of these decisions are now controlled by the ALF per Rule 10 and 11.

### 3.4 SINGAPORE

Traditionally Singapore inherited the common law doctrines of maintenance and champerty from the UK.<sup>310</sup> It continued to exist with only a few impediments up until 2017 when Singapore enacted new legislation to legalise TPF.<sup>311</sup> This section will detail the events that led to the creation of new legislation.

The applicability of the common law doctrines of maintenance and champerty arose in the *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another* case in 2007.<sup>312</sup> The Respondent entered into agreements with a government owned entity in Pakistan that required the Respondent to upgrade gas plants.<sup>313</sup> The agreements were subsequently suspended causing the Respondent to suffer significant losses.<sup>314</sup> In an attempt to institute proceedings against the entity the Respondent entered into an agreement with the Appellant.<sup>315</sup> The Respondent abandoned the claim after he was convinced that the claim was unlikely to succeed and that a settlement would most likely keep him eligible for future projects.<sup>316</sup> After the settlement was concluded the Appellant alleged that he was entitled to a share of the proceeds as per the amendments made to the agreement.<sup>317</sup> The Respondent refused and the Appellant sued for breach of contract.<sup>318</sup>

The Singapore Court of Appeal was left to consider a number of issues including whether the agreement was champertous and therefore contrary to public policy.<sup>319</sup> The Respondent alleged that the agreement was champertous because it provided that the Appellant was entitled to a portion of the settlement in exchange for his assistance.<sup>320</sup> The Appellant offered two

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<sup>310</sup> Zhuang W 'The Subsumation of Maintenance and Champerty Under Third Party Orders' 2014 *Singapore Journal of Legal Studies* 392.

<sup>311</sup> Bao C (2017) 387.

<sup>312</sup> [2007] 1 SLR 989.

<sup>313</sup> *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another* [2007] 1 SLR 989 para 1 (hereinafter *Otech Pakistan* [2007]).

<sup>314</sup> *Otech Pakistan* [2007] para 2.

<sup>315</sup> *Otech Pakistan* [2007] para 3.

<sup>316</sup> *Otech Pakistan* [2007] para 5.

<sup>317</sup> *Otech Pakistan* [2007] para 7.

<sup>318</sup> *Otech Pakistan* [2007] para 7.

<sup>319</sup> *Otech Pakistan* [2007] para 31.

<sup>320</sup> *Otech Pakistan* [2007] para 33.

arguments in response however the court only focused on the second that the common law doctrines of maintenance and champerty does not apply to arbitrations as it does in litigations.<sup>321</sup> After reviewing case law, originating from the UK and Hong Kong, the court decided that they see no reason to differentiate between the two mechanisms and that the doctrines should apply during both procedures.<sup>322</sup>

In 2011, the Singapore Ministry of Law considered the appropriateness of allowing TPF in international arbitrations when it held a public consultation on the amendments to Singapore's International Arbitration Act.<sup>323</sup> Singapore's International Arbitration (Amendment) Act was enacted in 2012 however it made no mention of TPF.<sup>324</sup>

The common law doctrines of maintenance and champerty arose once more in the 2013 case *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju*.<sup>325</sup> The Respondent in this matter was an advocate and solicitor of the Supreme Court of Singapore who had admitted to entering into a champertous agreement.<sup>326</sup> The other party to the champertous agreement lodged a complaint against the Respondent and shall therefore be referred to as the Complainant.<sup>327</sup> The Respondent entered into a champertous agreement with the Complainant who had sustained injuries in a motor vehicle accident in Australia.<sup>328</sup> The Complainant wished to pursue a claim in Australia and sought the help of the Respondent.<sup>329</sup> Contingency fee agreements are illegal in Singapore therefore the champertous agreement stated that the Respondent would be acting in his personal capacity.<sup>330</sup> The Respondent obtained legal counsel for the Complainant in Australia and accompanied her to Australia.<sup>331</sup>

The Complainant was successful and in terms of the champertous agreement she was entitled to pay the Respondent forty percent of her winnings.<sup>332</sup> This high percentage, in addition to

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<sup>321</sup> *Otech Pakistan* [2007] para 34.

<sup>322</sup> *Otech Pakistan* [2007] para 38.

<sup>323</sup> Bao C (2017) 393.

<sup>324</sup> Bao C (2017) 393.

<sup>325</sup> [2013] SGHC 135.

<sup>326</sup> *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] SGHC 135 para 3 (hereinafter *Law Society of Singapore* [2013]).

<sup>327</sup> *Law Society of Singapore* [2013] para 56.

<sup>328</sup> *Law Society of Singapore* [2013] para 8.

<sup>329</sup> *Law Society of Singapore* [2013] para 7.

<sup>330</sup> *Law Society of Singapore* [2013] para 34.

<sup>331</sup> *Law Society of Singapore* [2013] para 13.

<sup>332</sup> *Law Society of Singapore* [2013] para 14.

other questionable conduct by the Respondent, prompted the Complainant to seek independent legal advice that led to the complaint in terms of the Legal Profession Act (Cap 161, 2009 Rev Ed).<sup>333</sup> An Inquiry Committee heard the complaint, condemned the actions of the Respondent and found that he acted in his capacity as advocate and solicitor.<sup>334</sup> A Disciplinary Tribunal subsequently suspended him for twelve months however in this case the court reduced the suspension to six months.<sup>335</sup>

Whilst deciding the appropriate sanction to impose on the Respondent, the court acknowledged that there is a growing trend towards accepting champertous agreements in many jurisdictions and that this development had not yet occurred in Singapore.<sup>336</sup> This is despite there being continued talks of law reform to allow such agreements particularly in arbitrations.<sup>337</sup> The court stated that, 'In international arbitration, TPF is a significant issue especially as it is largely unregulated as compared to the position of third party Funders in the domestic sphere.'<sup>338</sup> The court further stated that if champertous agreements are properly regulated it could improve access to justice significantly.<sup>339</sup> The court however ended these discussions by declaring that these considerations should be left to Parliament and not the courts because they are far better equipped to create regulations.<sup>340</sup> A year later the Law Reform Committee of the Singapore Academy of Law issued a report that recommended the reform of existing law to allow Third Part Funding.<sup>341</sup>

In June 2016 Singapore's Ministry of Law began its public consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulation 2016 in an attempt to legalise TPF.<sup>342</sup> This was followed by Parliament's acceptance of the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulation 2016 in January 2017 and its subsequent acceptance into law in March of the same year.<sup>343</sup> Both are limited to international arbitrations however the Minister of Law has stated that if it is successfully

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<sup>333</sup> *Law Society of Singapore* [2013] para 56.

<sup>334</sup> *Law Society of Singapore* [2013] para 20.

<sup>335</sup> *Law Society of Singapore* [2013] para 3.

<sup>336</sup> *Law Society of Singapore* [2013] para 64.

<sup>337</sup> *Law Society of Singapore* [2013] para 46, 61.

<sup>338</sup> *Law Society of Singapore* [2013] para 67.

<sup>339</sup> *Law Society of Singapore* [2013] para 46.

<sup>340</sup> *Law Society of Singapore* [2013] para 46.

<sup>341</sup> *Bao C* (2017) 394.

<sup>342</sup> *Xinglong Y* (2017) 197.

<sup>343</sup> *Gayner O and Khouri S* (2017) 1033.

implemented it will be expanded into other areas of law.<sup>344</sup> The motivation behind the swift adoption of legislation is accredited to Singapore's attempt to remain competitive as a place for international arbitration.<sup>345</sup> The Queen Mary 2015 International Arbitration Survey found that international arbitration users regarded Singapore as one of the most preferred places for arbitrations in the world.<sup>346</sup>

Civil Law (Amendment) Act 2017 (Amendment) was amended to include section 5A and 5B.<sup>347</sup> Section 5A abolishes the common law doctrines of maintenance and champerty as a tort under Singapore law.<sup>348</sup> It further provides that despite the abolishment of these doctrines it does not apply to the part of the law that declares a contract contrary to public policy or illegal.<sup>349</sup> This saving clause is similar to the one contained in section 14 (2) of the UK's Criminal Law Act 1967.<sup>350</sup> Section 5B further legalises Funding Agreements<sup>351</sup> in prescribed procedures.<sup>352</sup> The Amendment bestows upon the Minister of Law the power to adopt regulations to give effect to section 5A and 5B.<sup>353</sup> As already mentioned above, the Minister of Law exercised this power on 1 March 2017 when the Civil Law (Third-Party Funding) Regulations 2017 (Regulations) came into operation.<sup>354</sup>

The Regulations identifies the prescribed procedures mentioned in section 5B of the Amendment.<sup>355</sup> The Regulations prescribes that the legalisation of TPF is limited to international arbitrations<sup>356</sup> and all other procedures connected to an international arbitration such as court proceedings<sup>357</sup> or mediations.<sup>358</sup> The Regulations also details the requirements necessary to qualify as a Funder<sup>359</sup> these includes funding a dispute that a Funder is not a party

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<sup>344</sup> Gayner O and Khouri S (2017) 1033.

<sup>345</sup> Gayner O and Khouri S (2017) 1034.

<sup>346</sup> Queen Mary University of London '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' available at <http://www.arbitration.qmul.ac.uk/research/2015/> (accessed 10 October 2017).

<sup>347</sup> Civil Law (Amendment) Act 2017.

<sup>348</sup> Civil Law (Amendment) Act 2017 section 5A(1).

<sup>349</sup> Civil Law (Amendment) Act 2017 section 5A(2).

<sup>350</sup> Criminal Law Act 1967 section 14(2).

<sup>351</sup> Civil Law (Amendment) Act 2017 section 5B(2).

<sup>352</sup> Civil Law (Amendment) Act 2017 section 5B(1).

<sup>353</sup> Civil Law (Amendment) Act 2017 section 5B(8).

<sup>354</sup> Civil Law (Third-Party Funding) Regulations 2017.

<sup>355</sup> Civil Law (Third-Party Funding) Regulations 2017 section 3.

<sup>356</sup> Civil Law (Third-Party Funding) Regulations 2017 section 3(a).

<sup>357</sup> Civil Law (Third-Party Funding) Regulations 2017 section 3(b).

<sup>358</sup> Civil Law (Third-Party Funding) Regulations 2017 section 3(c).

<sup>359</sup> Civil Law (Third-Party Funding) Regulations 2017 section 4.



to.<sup>360</sup> Surprisingly, the Amendment and Regulations do not address any concerns that have been discussed in the previous chapter such as control and security for costs. The Amendment serves to abolish the common law doctrines of maintenance and champerty whereas the Regulations serves to supplement the provisions contained in the Amendment.

In addition to reforming domestic laws the Singapore Arbitration Center (SICA) has released public consultations on the Draft SIAC Investment Arbitration Rules in 2016 to provide their tribunals with specific guidelines if TPF is involved in arbitral proceedings.<sup>361</sup>

After a discussion on the UK and Singapore the following conclusions can be drawn. The UK opted for a self-regulating TPF industry with the adoption of a non-binding Code. Prior to making this decision the doctrines of maintenance and champerty underwent a legal reform. Followed by numerous cases that attempted to re-establish the role of these doctrines in UK Law. Singapore opted for the enactment of legislation to regulate TPF in international arbitrations. The reform came because of recent cases that brought the doctrines to the forefront of discussions after many years of disuse. Singapore's ultimate motivation for legalising TPF was to remain a competitive arbitration jurisdiction. A comparative analysis of these two approaches will be further discussed after an analysis of the third and final country.

### 3.5 HONG KONG

Hong Kong was a UK colony up until 1997, which meant that the common law doctrines of maintenance and champerty formed part of its law.<sup>362</sup> Their existence continued even after Hong Kong officially became a part of China.<sup>363</sup> The following paragraphs detail in a similar manner as the previous two countries the development of the doctrines and the legalisation of the TPF industry.

The applicability of the doctrines, within the jurisdiction of Hong Kong, was brought before the High Court in *Cannonway Consultants Ltd v Kenworth Engineering Ltd (Cannonway Consultants)* decided in 1995.<sup>364</sup> Judge Kaplan noted that, "it might seem a little odd that at the end of 1994 a Hong Kong judge is being asked to decide apparently for the first time whether

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<sup>360</sup> Civil Law (Third-Party Funding) Regulations 2017 section 4(1)(a).

<sup>361</sup> Xinglong Y (2017) 200.

<sup>362</sup> Bao C (2017) 389.

<sup>363</sup> Bao C (2017) 389.

<sup>364</sup> (1995) 1 HKC 179.

the law of champerty applies in Hong Kong given that this law was introduced in the Middle Ages...when the judiciary were far from independent and predictable.”<sup>365</sup> Following this statement the court was left to decide, whether the common law doctrine of champerty is applicable in Hong Kong and if so does it apply to arbitration.<sup>366</sup>

The court found that the doctrine is still applicable even though its application has diminished over the years.<sup>367</sup> The court further stated that it would be improper for a judge of first instance to depart from settled law and that such a decision should be left to the Final Court of Appeal.<sup>368</sup> The court also found that it would be improper to extend the doctrine into the realm of arbitration considering that it operates in the public justice system, which arbitrations do not fall under.<sup>369</sup> Furthermore, the court noted that most arbitrations occur cross-border between international commercial entities who are not bound by these doctrines in their respective jurisdictions, extending the doctrines would deter them from resolving their disputes in Hong Kong.<sup>370</sup>

This question finally made its way to the Court of Final Appeal during the *Unruh v Seeberger (Unruh)*<sup>371</sup> case decided in 2007. The Defendant entered into a Memorandum of Agreement with the Plaintiff after acquiring the Plaintiff’s successful watch company.<sup>372</sup> The Memorandum of Agreement entitled the Plaintiff to a bonus should he successfully defend, in addition to a number of other requirements, an arbitration pending against the acquired company.<sup>373</sup> The Plaintiff alleged that he met these requirements but the Defendant refused to pay the bonus.<sup>374</sup> In response the Defendant argued that the Memorandum of Agreement was champertous and therefore ‘void and unenforceable.’<sup>375</sup> The High Court and the Court of Appeal rejected this argument and ordered the Defendant to pay the Plaintiff.<sup>376</sup> Leave of

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<sup>365</sup> *Cannonway Consultants Ltd v Kenworth Engineering Ltd* (1995) 1 HKC 179 para 1 (hereinafter *Cannonway Consultants* (1995)).

<sup>366</sup> *Cannonway Consultants* (1995) para 11.

<sup>367</sup> *Cannonway Consultants* (1995) para 17.

<sup>368</sup> *Cannonway Consultants* (1995) para 17.

<sup>369</sup> *Cannonway Consultants* (1995) para 22.

<sup>370</sup> *Cannonway Consultants* (1995) para 25.

<sup>371</sup> (2007) 10 HKCFAR 31.

<sup>372</sup> *Unruh v Seeberger* (2007) 10 HKCFAR 31 para 20 (hereinafter *Unruh* (2007)).

<sup>373</sup> *Unruh* (2007) para 20.

<sup>374</sup> *Unruh* (2007) para 4.

<sup>375</sup> *Unruh* (2007) para 5.

<sup>376</sup> *Unruh* (2007) para 6.

appeal was granted to the Court of Final Appeal leaving the court to decide several issues including those related to champerty.<sup>377</sup>

The court had to determine whether the Memorandum of Agreement was champertous and therefore ‘void and unenforceable.’<sup>378</sup> The Plaintiff put forth three reasons why it should not be considered champertous two of which should be mentioned.<sup>379</sup> The Plaintiff argued that even if it is considered champertous in terms of Hong Kong law the arbitration was decided in a jurisdiction where the common law doctrines of maintenance and champerty do not exist therefore it couldn’t be considered champertous.<sup>380</sup> The Plaintiff further argued that maintenance and champerty do not apply to arbitrations.<sup>381</sup> It can only be assumed that counsel for the Plaintiff relied on decision of *Cannonway Consultants*.<sup>382</sup>

To address the arguments, put forth by both parties the court sought to determine if maintenance and champerty are still a feature in Hong Kong law. This was achieved by detailing the origin of maintenance and champerty from its creation in English law to its adoption into the Hong Kong common law and its subsequent inclusion in statute.<sup>383</sup> The court, after reviewing case law, found that under Hong Kong law maintenance and champerty remains a criminal offence, torts and contrary to public policy in limited instances.<sup>384</sup>

After a further review of foreign jurisdiction the court acknowledged that the application of maintenance and champerty has shrunk to such an extent that conduct that was once considered to fall under these doctrines are now allowed.<sup>385</sup> The court therefore found no merit in the arguments put forth by the Defendant.<sup>386</sup> With regards to the arguments put forth by the Plaintiff the court found that a court should not struck down an agreement that is champertous according to Hong Kong law if it is to be performed in a jurisdiction that has not adopted the

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<sup>377</sup> *Unruh* (2007) para 10.

<sup>378</sup> *Unruh* (2007) para 75.

<sup>379</sup> *Unruh* (2007) para 76.

<sup>380</sup> *Unruh* (2007) para 76.

<sup>381</sup> *Unruh* (2007) para 76.

<sup>382</sup> (1995) 1 HKC 179.

<sup>383</sup> *Unruh* (2007) para 77.

<sup>384</sup> *Unruh* (2007) para 78.

<sup>385</sup> *Unruh* (2007) para 91.

<sup>386</sup> *Unruh* (2007) para 117.

common law doctrines<sup>387</sup> and the court elected to leave open the question pertaining to its applicability to arbitrations.<sup>388</sup>

Perhaps the most important statement to come from this judgment and the reason its discussion is important to this mini-thesis is the following:

‘The continued retention by Hong Kong of criminal and tortious liability for maintenance and champerty may not be justified and this question merits serious legislative attention. This makes it particularly inappropriate for Hong Kong to seek to impose its current public policy against maintenance and champerty on mature commercial parties (who are likely to include foreigners) who have chosen to arbitrate in a jurisdiction which does not recognize those concepts and who may accordingly have made arrangements in Hong Kong to finance the arbitral (or judicial) proceedings without being aware of any constraints.’<sup>389</sup>

Following the decisions of *Cannonway Consultants* and *Unruh* it was accepted that the common law doctrines of maintenance and champerty continued to exist despite its limited use. The remaining uncertainty was whether they applied to arbitrations particularly international arbitrations where one party’s domestic laws did not include the doctrines. Both courts believed this warranted further investigation and development by the appropriate body. Despite this opinion no changes were made and these two cases was followed by *Winnie Lo v HKSAR*, an appeal against an attorney’s conviction of conspiracy to commit champerty.<sup>390</sup> On appeal it was overturned however the court reaffirmed the continued existence of the common law doctrines of maintenance and champerty.<sup>391</sup>

The following year the Chief Justice and the Secretary for Justice asked the Law Reform Commission of Hong Kong to carry out the following review:

‘To review the current position relating to Third Party Funding for arbitration for the purposes of considering whether reform is needed, and if so, to make such recommendations for reform as appropriate.’<sup>392</sup>

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<sup>387</sup> *Unruh* (2007) para 122.

<sup>388</sup> *Unruh* (2007) para 123.

<sup>389</sup> *Unruh* (2007) para 119.

<sup>390</sup> *Winnie Lo v HKSAR* (2012) 15 HKCFAR 15 para 1 (hereinafter *Winnie Lo* (2012)).

<sup>391</sup> *Winnie Lo* (2012) para 22.

<sup>392</sup> The Law Reform Commission of Hong Kong ‘Consultation Paper’ available at <http://www.hkreform.gov.hk/en/publications/tpf.htm> (accessed 17 October 2017).

In 2015 the Law Reform Commission of Hong Kong responded to this request by creating the Third Party Funding for Arbitration Sub-Committee (Sub-Committee) that published a Consultation Paper proposing the legalisation of TPF.<sup>393</sup> The Sub-Committee reasoned in their publication that the review was necessary due to Hong Kong's reputation as a major international arbitration hub and the possibility that users may be funded.<sup>394</sup> This is in line with the Queen Mary 2015 International Arbitration Survey that ranked Hong Kong as one of the most preferred places for arbitrations in the world.<sup>395</sup> In addition, the court's decision not to answer the question whether the common law doctrines of maintenance and champerty applies to arbitrations, in *Unrah v Seeberger*, created uncertainties for arbitration users and potentially deterred them from pursuing arbitrations in Hong Kong.<sup>396</sup>

Following the conclusion of the consultation period that began with the publication of the Consultation Paper, the Sub-Committee released their final report in late 2016.<sup>397</sup> The report analyses the responses received from the public to the Consultation Paper and the final recommendations of the Sub-Committee.<sup>398</sup> The final recommendations will be briefly discussed. The Sub-Committee recommended that the Arbitration Ordinance should be amended and codes created to legalise the use of TPF.<sup>399</sup> They further recommended that the amendments and codes should not be stringent for at least the first three years in an attempt to adhere to their international obligations and Hong Kong's needs.<sup>400</sup> The Advisory Committee on the Promotion of Arbitration (Advisory Committee) created in 2014 by the Hong Kong Department of Justice will most likely conduct a report after the initial three-year period to investigate the implementation and possible improvements to these regulations and codes.<sup>401</sup>

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<sup>393</sup> Xinglong Y (2017) 197.

<sup>394</sup> The Law Reform Commission of Hong Kong 'Consultation Paper' available at <http://www.hkreform.gov.hk/en/publications/tpf.htm> (accessed 17 October 2017).

<sup>395</sup> Queen Mary University of London '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' available at <http://www.arbitration.qmul.ac.uk/research/2015/> (accessed 10 October 2017).

<sup>396</sup> The Law Reform Commission of Hong Kong 'Consultation Paper' available at <http://www.hkreform.gov.hk/en/publications/tpf.htm> (accessed 17 October 2017).

<sup>397</sup> The Law Reform Commission of Hong Kong 'Report' available at <http://www.hkreform.gov.hk/en/publications/rtpf.htm> (accessed 17 October 2017).

<sup>398</sup> The Law Reform Commission of Hong Kong 'Report' available at <http://www.hkreform.gov.hk/en/publications/rtpf.htm> (accessed 17 October 2017).

<sup>399</sup> The Law Reform Commission of Hong Kong 'Report' available at <http://www.hkreform.gov.hk/en/publications/rtpf.htm> (accessed 17 October 2017).

<sup>400</sup> The Law Reform Commission of Hong Kong 'Report' available at <http://www.hkreform.gov.hk/en/publications/rtpf.htm> (accessed 17 October 2017).

<sup>401</sup> Bao C (2017) 396.

These recommendations led to the creation of a bill followed by the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ord. No. 6 of 2017 that was enacted by the Legislative Council on the 23 June 2017.<sup>402</sup> Its purpose is described as the following:

‘An Ordinance to amend the Arbitration Ordinance and the Mediation Ordinance to ensure that third party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty; and to provide for related measures and safeguards.’<sup>403</sup>

The Arbitration Ordinance first came into effect in 2011; it governs both domestic and international arbitrations particularly in instances where Hong Kong is the place of arbitration.<sup>404</sup> The Arbitration Ordinance has been amended to include Part 10A titled ‘Third Party Funding of Arbitration.’<sup>405</sup> Part 10A is divided into 6 Divisions namely, “Purposes,<sup>406</sup> Interpretation,<sup>407</sup> Third Party Funding of Arbitration Not Prohibited by Particular Common Law Offences or Tort,<sup>408</sup> Code of Practice,<sup>409</sup> Other Measures and Safeguards<sup>410</sup> and Miscellaneous.”<sup>411</sup>

Section 98G under Division 2 of the Arbitration Ordinance defines TPF as:

‘Third party funding of arbitration is the provision of arbitration funding for an arbitration- (a) under a funding agreement; (b) to a funded party; (c) by a third party funder; and (d) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.’<sup>412</sup>

In addition to defining Third Part Funding Division 2 provides definitions of a funding agreement,<sup>413</sup> a funded party<sup>414</sup> and a third party Funder.<sup>415</sup> Division 3 legalises TPF by

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<sup>402</sup> Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ord. No. 6 of 2017 Part 1 (hereinafter Arbitration and Mediation Legislation).

<sup>403</sup> Arbitration and Mediation Legislation Part 1.

<sup>404</sup> The Law Reform Commission of Hong Kong ‘Consultation Paper’ available at <http://www.hkreform.gov.hk/en/publications/tpf.htm> (accessed 17 October 2017).

<sup>405</sup> Arbitration and Mediation Legislation Part 2.

<sup>406</sup> Arbitration and Mediation Legislation Division 1.

<sup>407</sup> Arbitration and Mediation Legislation Division 2.

<sup>408</sup> Arbitration and Mediation Legislation Division 3.

<sup>409</sup> Arbitration and Mediation Legislation Division 4.

<sup>410</sup> Arbitration and Mediation Legislation Division 5.

<sup>411</sup> Arbitration and Mediation Legislation Division 6.

<sup>412</sup> Arbitration and Mediation Legislation section 98G.

<sup>413</sup> Arbitration and Mediation Legislation section 98H.

<sup>414</sup> Arbitration and Mediation Legislation section 98I.

<sup>415</sup> Arbitration and Mediation Legislation section 98J.

expressly stating that the common law doctrines of maintenance and champerty<sup>416</sup> as well as the tort of maintenance and champerty<sup>417</sup> does not apply to TPF in arbitrations.

Division 4 allows authorised bodies to create a code of practice that Funders are required to follow when funding a Claimant.<sup>418</sup> It further details what the authorised body should include in a code of practice.<sup>419</sup> For example section 98P (1)(b) requires the code of practice to ensure that the Funding Agreement includes the amount of control the Funder will have over the arbitration, if the Funder will be responsible for cost orders or security for costs and the requirements for termination.<sup>420</sup> A downside to this Division is that Funders who do not comply with the code of practice are not necessarily held liable.<sup>421</sup> The authorised body referred to in the Arbitration Ordinance is the Advisory Committee on the Promotion of Arbitration (Advisory Committee) created in 2014 by the Hong Kong Department of Justice.<sup>422</sup>

Section 98U under Division 5 provides that a written notice must be given by the funded party to the other party and the arbitration body upon the conclusion of a Funding Agreement.<sup>423</sup> This serves to notify them of the Funding Agreement existence and the identity of the Funder.<sup>424</sup> The downside is that once again the funded party will not necessarily be held liable if they fail to comply with the provision.<sup>425</sup>

The Law Reform Commission of Hong Kong and the Hong Kong Legislative Council are not alone in their attempts to regulate TPF. In 2016, the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center (CIETAC HKAC) released a public consultation on the Guidelines for Third Party Funding for Arbitration.<sup>426</sup> Cited as CIETAC Hong Kong TPF Guidelines it serves to encourage parties to adhere to the “principles of international best practice” when it comes to funding a dispute being administered at CIETAC HKAC.<sup>427</sup> The CIETAC Hong Kong TPF Guidelines provides assistance with concerns

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<sup>416</sup> Arbitration and Mediation Legislation section 98K.

<sup>417</sup> Arbitration and Mediation Legislation section 98L.

<sup>418</sup> Arbitration and Mediation Legislation section 98O.

<sup>419</sup> Arbitration and Mediation Legislation section 98P.

<sup>420</sup> Arbitration and Mediation Legislation section 98P (1)(b).

<sup>421</sup> Arbitration and Mediation Legislation section 98R (1).

<sup>422</sup> Bao C (2017) 396.

<sup>423</sup> Arbitration and Mediation Legislation section 98U (2).

<sup>424</sup> Arbitration and Mediation Legislation section 98U (1).

<sup>425</sup> Arbitration and Mediation Legislation section 98W.

<sup>426</sup> Xinglong Y (2017) 200.

<sup>427</sup> China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center ‘CIETAC

relating to confidentiality, control, the disclosure of the Funding Agreement, conflicts of interest and security for costs.<sup>428</sup> The CIETAC Hong Kong TPF Guidelines is relatively short and remains a guide that is not binding to anyone considering or using TPF.<sup>429</sup>

### 3.6 COMPARATIVE OF DIFFERENT APPROACHES

The TPF industry was threatened by the continued existence of the common law doctrines of maintenance and champerty in the UK, Singapore and Hong Kong. Following the relaxation of the doctrines and the subsequent acceptance of the TPF industry all three countries adopted their own method of regulation. The UK was the first of the three to regulate the TPF industry by creating the ALF and a Code in 2011. Singapore and Hong Kong followed by adopting legislation in 2017 to maintain their reputation as leading arbitration jurisdictions. There are four notable areas of comparison namely, its applicability, binding effect, powers conferred on authorising body, and its effectiveness in addressing concerns already mentioned.

The first comparison is the form of dispute resolution that is covered by the regulation. The UK's code applies to Funders in general regardless of whether they are funding litigation or arbitration. The code does not expressly mention arbitration but it can be inferred because most members of the ALF fund both forms of dispute resolution. Singapore's recently enacted legislation applies solely to international arbitrations. The Ministry of Law has stated that its expansion is dependent on the successfulness of the legislation. Hong Kong recently enacted legislation applies to both domestic and international arbitrations. It is understandable that Singapore and Hong Kong have adopted a narrower area of application than the UK. They were after all motivated by their competitiveness in arbitration whereas the UK did not necessarily have the same goal in mind.

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Hong Kong Arbitration Center Guidelines for Third Party Funding Arbitration' available at [http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen\\_US%5Cindex&userLocale=en\\_US](http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen_US%5Cindex&userLocale=en_US) (accessed 16 October 2017).

<sup>428</sup> China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center 'CIETAC Hong Kong Arbitration Center Guidelines for Third Party Funding Arbitration' available at [http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen\\_US%5Cindex&userLocale=en\\_US](http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen_US%5Cindex&userLocale=en_US) (accessed 16 October 2017).

<sup>429</sup> China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center 'CIETAC Hong Kong Arbitration Center Guidelines for Third Party Funding Arbitration' available at [http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen\\_US%5Cindex&userLocale=en\\_US](http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen_US%5Cindex&userLocale=en_US) (accessed 16 October 2017).



The second comparison is the binding effect of each method. The UK's Code has received criticism from the US and EU countries for adopting a self-regulatory approach. The Code is not binding on users of the TPF industry therefore it does very little to prevent an increase in disputes relating to TPF. Singapore's legislation is binding on all international arbitrations and any procedures connected thereto. Hong Kong perhaps has a combination of the approaches adopted by both the UK and Singapore. Hong Kong enacted legislation however it prescribes the creation of a code that is not necessarily binding. This approach is subject to review after three years therefore this position may change.

The third comparison is who is effectively in charge of ensuring that the regulations are implemented and if necessary adhered to. This mini-thesis criticised the powers conferred on the ALF by the UK's Code. The ALF is made up entirely of Funders and they have the power to make decisions including what costs should be covered by a Funder. This is essentially the meaning of self-regulation but it does very little to build confidence in the industry when the decisions are made by the same people who are subject to the Code. Singapore's legislation bestows the decision-making powers on the Minister of Law whereas Hong Kong's legislation provides for the creation of an authorising body.

The fourth comparison is the effectiveness in addressing concerns that have been raised including those relating to conflict of interest, party autonomy, security for costs and cost orders. It is difficult to determine the effectiveness of each method particularly with Singapore and Hong Kong because their respective legislations were very recently enacted. All three methods do however provide some guidance on these concerns.

### **3.7 CONCLUSION**

The purpose of this chapter was to analyse the development of TPF in the UK, Singapore and Hong Kong. The common law doctrines of maintenance and champerty and their subsequent relaxation were a common feature of all three legal jurisdictions. This is where the similarities ended particularly when it came to regulating TPF. The UK opted for a self-regulation approach with the creation of the ALF and Code. Singapore enacted legislation to regulate TPF however its application is limited to international arbitrations alone. Its expansion into domestic arbitration is dependent on the implementation of the newly adopted law. Hong Kong also opted to enact legislation however it applies to both international and domestic arbitrations. In addition, Hong Kong has opted for a relaxed approach to regulating the industry. Despite

enacting legislation, the legislation only prescribes the creation of a code that is not necessarily binding on TPF users.

This chapter identified three potential approaches that South Africa could use if they were to consider regulating TPF. It is however important to note that each approach was adopted to suit the needs of each country. South Africa's needs may not be the same for example it is not considered an international hub for arbitrations. Chapter four seeks to consider regulating TPF from South Africa's perspective. Detailing its own adoption and subsequent relaxation of the doctrines as well as the challenges it faces with regards to regulating TPF. This chapter has however strengthened the argument in favour of regulation not only for the Claimholder but also for the Funder. The cases discussed above indicated a refusal to return the Funders investment when the claim was successful. It also identified unethical behaviour from legal representatives when it came to providing the Funder with information.



## CHAPTER 4

### THIRD PARTY FUNDING IN SOUTH AFRICA

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#### 4.1 INTRODUCTION

The aim of this mini-thesis is to consider the regulation of TPF in arbitrations held within South Africa. It is difficult to ascertain the level of TPF occurring within arbitrations in South Africa due to its confidential nature. In previous chapters' evidence of TPF in arbitrations have been obtained through published arbitral decisions, appeals of arbitral decisions heard in courts, particularly in the UK, Singapore and Hong Kong, and secondary sources compiled by professional.<sup>430</sup> Neither of these sources had a direct connection to South Africa. This creates significant shortcomings when trying to identify the effect TPF has on arbitrations held specifically within South Africa.

These shortcomings do not however detract from the evidence that the TPF industry operates in both litigations and arbitrations held within South Africa. An example of this evidence is found in domestic case law and the mandates of Funder's that operate within South Africa's jurisdiction.<sup>431</sup> South Africa is therefore not immune to the effects that have been felt by other jurisdictions since the growth of the TPF industry more specifically within arbitrations. These effects include concerns related to conflicts of interest, party autonomy, security for costs and cost orders.<sup>432</sup> South Africa has also recently reformed its laws on international arbitrations; this will most likely attract international users that are funded.<sup>433</sup> It is therefore important for South Africa to keep up to date with international trends in arbitration.

The developments of the TPF industry in South Africa are best obtained through the analysis of case law. Court decisions are public and often contain evidence of what is ordinarily contained in Funding Agreements. In recent years, these decisions have also altered the laws that apply to TPF. Parties involved in arbitrations may not be bound by previous arbitral

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<sup>430</sup> See section 2.4, 2.5 and 3.2.

<sup>431</sup> See section 1.1.

<sup>432</sup> See section 2.5.

<sup>433</sup> Parliament of the Republic of South Africa 'National Assembly Passes International Arbitration Bill' available at <https://www.parliament.gov.za/press-releases/national-assembly-passes-international-arbitration-bill> (accessed 6 November 2017).

decisions or case law however they are subject to the existing laws of South Africa. Changes to these laws whether it is by the courts or the Legislature should be analysed.

The previous chapter detailed in chronological order the effect a country's case law had on the development of the TPF industry and the subsequent affect it had on arbitration. The purpose of this chapter is to review the development of TPF in South Africa. This will include a discussion on existing case law, the most significant being *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*.<sup>434</sup> This case is of importance because the SCA legalised Funding Agreements by relaxing the common law doctrines of maintenance and champerty.

In addition to case law there will be a discussion on existing and pending legislation. The existing legislation being the Arbitration Act 42 of 1965 and the pending International Arbitration Bill. The review of these two legislations will provide an overview of the current arbitration regulations in existence in South Africa. The intended outcome of the review of case law and legislation is to obtain a better understanding of whether the regulation of TPF in South Africa is truly necessary.

## **4.2 THE DEVELOPMENT OF THIRD PARTY FUNDING AND THE COMMON LAW DOCTRINES OF MAINTENANCE AND CHAMPERTY IN SOUTH AFRICA**

The development of TPF and the common law doctrines of maintenance and champerty<sup>435</sup> in South Africa can be accredited to the dispute between the National Potato Co-operative Ltd (NPC) and Price Waterhouse Coopers Inc (PWC). TPF and the common law doctrines came to the forefront of the dispute in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*, the facts of the dispute are as follows. NPC suspected their general manager of misconduct and commissioned a law firm to investigate.<sup>436</sup> The preliminary findings found that there was misconduct and that NPC's auditors, Price Waterhouse, should have identified it.<sup>437</sup> This led to an investigation into a potential claim against Price Waterhouse who had since

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<sup>434</sup> (448/2003) [2004] ZASCA 64.

<sup>435</sup> See section 3.2 for definitions.

<sup>436</sup> *Price Waterhouse Coopers* [2004] para 2.

<sup>437</sup> *Price Waterhouse Coopers* [2004] para 3.

undergone a merger forming PWC.<sup>438</sup> Before its completion NPC came under financial constrain and required alternative means of funding to proceed with the investigation.<sup>439</sup>

NPC obtained funding from Farmers Indemnity Fund Pty (Ltd) (Funder), a shelf company whose shares were held by NPC's attorney.<sup>440</sup> The shares were later distributed amongst members of NPC and an investment company.<sup>441</sup> They concluded a Funding Agreement that entitled the Funder to 45% of a successful outcome or settlement.<sup>442</sup> It was further agreed that the Funder would contribute R1.5 million to cover the costs associated with instituting a claim against PWC and left open the possibility of additional funding.<sup>443</sup> Thereafter NPC instituted a claim of damages against PWC for breach of contract.<sup>444</sup> In 2002 the trial commenced but the issues were soon diverted to deal with PWC's claim that the Funding Agreement was champertous and therefore contrary to public policy.<sup>445</sup> The court below ruled against PWC leading to the appeal.<sup>446</sup>

At the outset the court acknowledged that agreements that are contrary to public policy are void and unenforceable.<sup>447</sup> In determining whether the Funding Agreement concluded between NPC and the Funder was indeed contrary to public policy the court returned to the common law doctrines of maintenance and champerty.<sup>448</sup> The common law doctrines were inherited from the English legal system and any agreements found in violation of them were considered contrary to public policy.<sup>449</sup> The court found that in South Africa these agreements were looked upon with disfavour unless it could be determined that the financial assistance was offered in good faith and the return was reasonable.<sup>450</sup> This exception was allowed out of fear that a Claimant would be denied the opportunity to institute a bona fide claim due to financial constraints.<sup>451</sup>

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<sup>438</sup> *Price Waterhouse Coopers* [2004] para 4.

<sup>439</sup> *Price Waterhouse Coopers* [2004] para 5.

<sup>440</sup> *Price Waterhouse Coopers* [2004] para 6.

<sup>441</sup> *Price Waterhouse Coopers* [2004] para 9.

<sup>442</sup> *Price Waterhouse Coopers* [2004] para 16.

<sup>443</sup> *Price Waterhouse Coopers* [2004] para 16, 17.

<sup>444</sup> *Price Waterhouse Coopers* [2004] para 19.

<sup>445</sup> *Price Waterhouse Coopers* [2004] para 20.

<sup>446</sup> *Price Waterhouse Coopers* [2004] para 21.

<sup>447</sup> *Price Waterhouse Coopers* [2004] para 23.

<sup>448</sup> *Price Waterhouse Coopers* [2004] para 25.

<sup>449</sup> *Price Waterhouse Coopers* [2004] para 25. South Africa, Singapore and Hong Kong inherited the doctrines from the UK. This common feature was a motivating factor for the selection of the countries featured in this thesis.

<sup>450</sup> *Price Waterhouse Coopers* [2004] para 27.

<sup>451</sup> *Price Waterhouse Coopers* [2004] para 27.

The court further stated that case law concerning the application of the common law doctrines diminished over time but the view that these agreements should not be encouraged remained.<sup>452</sup> The court was left to decide whether this view should change in light of developments in the law particularly the adoption of the Constitution and the right to access to courts contained therein.<sup>453</sup> TPF has the ability to help fulfil this right by providing funding to people who ordinarily would not have the financial means to institute a claim. Prior to focusing on developments in South African law the court analysed the position in the UK.<sup>454</sup> The court relied on Lord Mustill's decision in *Giles v Thompson* where the court had to decide on the applicability of the common law doctrines.<sup>455</sup> Lord Mustill's found that the common law doctrines were outdated and needed to adjust to changing times to remain relevant.<sup>456</sup>

Thereafter the court considered the initial reasons for adopting the doctrines and whether it was still a concern.<sup>457</sup> The reasoning behind the adoption of the doctrines was to protect the civil justice system.<sup>458</sup> The court found that South Africa's civil justice system has developed to such an extent that it no longer requires the protection of the doctrines.<sup>459</sup> The court used the legalisation of contingency fee agreements as an example of the Legislature's agreement that the court has the ability to protect itself.<sup>460</sup>

In conclusion the court ruled that funding a legitimate claim in exchange for a share of the proceeds is not contrary to public policy unless it abuses due process.<sup>461</sup> The court identified three instances in which due process could be abused namely, frivolous claims, claims instituted to pursue an alternative motive and claims instituted to prejudice the defendant.<sup>462</sup> The court found that NPC's claim did not amount to an abuse of due process therefore PWC's appeal was dismissed.<sup>463</sup> This ruling relaxed the application of the doctrines ultimately legalising TPF and more importantly Funding Agreements.

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<sup>452</sup> *Price Waterhouse Coopers* [2004] para 28.

<sup>453</sup> *Price Waterhouse Coopers* [2004] para 29.

<sup>454</sup> *Price Waterhouse Coopers* [2004] para 31.

<sup>455</sup> See section 3.3.

<sup>456</sup> See section 3.3.

<sup>457</sup> *Price Waterhouse Coopers* [2004] para 32.

<sup>458</sup> *Price Waterhouse Coopers* [2004] para 32.

<sup>459</sup> *Price Waterhouse Coopers* [2004] para 39.

<sup>460</sup> *Price Waterhouse Coopers* [2004] para 45.

<sup>461</sup> *Price Waterhouse Coopers* [2004] para 52.

<sup>462</sup> *Price Waterhouse Coopers* [2004] para 50.

<sup>463</sup> *Price Waterhouse Coopers* [2004] para 51.

There are three concerns arising out of this judgment that requires further discussion. The first is the composition of the Funder, Farmers Indemnity Fund Pty (Ltd). The shares initially belonged to NPC's attorney before being transferred to the members of NPC and an investment company. The judgement did not question this composition but given the discussion, in this mini-thesis, related to conflicts of interest this composition raises a few questions.<sup>464</sup> Firstly, it is recommended that a legal representative should not be involved when it comes to concluding a Funding Agreement with a Funder. The legal representative's role is limited to compiling a package and sending it to a potential Funder. In this case the attorney was the initial holder of all the shares of the company that funded the dispute. Secondly, a portion of the shares was transferred to the members of NPC. This means that the same people that owned NPC were essentially funding NPC. Indicating that they had an interest in the outcome of the dispute. This could be considered a violation of due process. A Funder should have no interest in the case per the definitions and case law of previous chapter.<sup>465</sup>

The second concern arising out of this dispute was the court using contingency fee agreements as an example of their ability to protect itself against the potential abuse of Funding Agreements. The court stated that 'The legislature has expressly recognised that the civil justice system is strong enough to withstand the abuses which could arise as a result of contingency fee agreements...it has made such agreements legal within carefully circumscribed limits and subject to regulation by the professions' controlling bodies and the Minister of Justice.'<sup>466</sup>

Chapter two detailed the differences between Funding Agreements and contingency fee agreements.<sup>467</sup> Contingency agreements are regulated by legislation and are concluded between clients and their legal representatives. Legal representatives obtain a share of a successful outcome or settlement in exchange for their legal services. Legal representatives are bound by legislation and ethical codes the creation of which was not the work of the courts. The court itself states that contingency fee agreements operate within 'carefully circumscribed limits,' 'subject to regulation' and mentions the overseers of its implementation. There are significant differences between Funding Agreements and contingency fee agreements. Funders obtain a

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<sup>464</sup> See section 2.4 and 2.5.1.2.

<sup>465</sup> See chapter 2 and 3.

<sup>466</sup> *Price Waterhouse Coopers* [2004] para 45.

<sup>467</sup> See section 2.3.2.

share due to their financial interest and there is no regulation in place that binds them. Therefore, the courts argument that it has the necessary mechanisms to protect itself against Funding Agreements in the same manner as it protects itself against contingency fee agreements is lacking in merit.

The third concern with this judgement is that the court relaxed the doctrines without adopting any mechanisms to cover potential loopholes that may occur. The reason for this could be accredited to that fact that the court was not immediately faced with any loopholes. The previous two concerns are however clear examples of potential loopholes. The composition of the Funder creates a potential conflict of interest and contingency agreements were only legalised after legislation was enacted. The court spent a substantial amount of time on the composition of the Funder and contingency fee agreements therefore the issues were before it. The court should have at least suggested that the Law Commission or the Legislature conduct a further investigation into the matter.

The developments of TPF continued in *Price Waterhouse Coopers Inc and Others v IMF (Australia) Ltd and Another* heard in the North Gauteng High Court.<sup>468</sup> The case was heard almost a decade after the previously discussed case. Prior to deciding this case the same court compelled NPC to provide security for costs.<sup>469</sup> The funding for which was obtained from Hillcrest Litigation Services, a Funder operating in Australia, because NPC was no longer being funded by Farmers Indemnity Fund Pty (Ltd).<sup>470</sup> By the time this application reached the court Hillcrest Litigation Services had terminated their Funding Agreement with NPC.<sup>471</sup> NPC had subsequently entered into a Funding Agreement with IMF the result of which led to this application.<sup>472</sup>

PWC requested that IMF be joined as a second applicant to the on-going dispute between themselves and NPC.<sup>473</sup> They argued that IMF's joinder was imperative because the security was not enough to cover a cost order if they were successful in defending the dispute.<sup>474</sup> They

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<sup>468</sup> 2013 (6) SA 216 (GNP).

<sup>469</sup> *Price Waterhouse Coopers Inc and Others v IMF (Australia) Ltd and Another* 2013 (6) SA 216 (GNP) p 217 (hereinafter *PWC and Others* (2013)).

<sup>470</sup> *PWC and Others* (2013) p 217.

<sup>471</sup> *PWC and Others* (2013) p 217.

<sup>472</sup> *PWC and Others* (2013) p 217.

<sup>473</sup> *PWC and Others* (2013) p 216.

<sup>474</sup> *PWC and Others* (2013) p 218.



feared that NPC would not have the means to cover any shortfall and in such case IMF should be held liable.<sup>475</sup> They believed that the only way to ensure IMF's liability was to join them as a party to the dispute.<sup>476</sup> In response IMF argued that the shortfall and the cost order were speculative and did not warrant their joinder.<sup>477</sup> IMF further argued that the Funding Agreement compelled them to cover any adverse costs an obligation they were not absolved from even if the Funding Agreement was terminated.<sup>478</sup>

The court agreed with PWC in their determination that the security would be insufficient to cover a cost order and that NPC would not have the means to cover any shortfall.<sup>479</sup> The court further agreed with PWC that joining a Funder to a dispute requires the court to develop the common law because it had not been considered before.<sup>480</sup> PWC relied on *Arkin v Borchard Lines Ltd*, a case that was discussed in detail under chapter three, to persuade the court that they should develop the common law.<sup>481</sup>

In *Arkin v Borchard Lines Ltd* the Defendants requested a cost order against the Funder after successfully defending a claim against the funded party.<sup>482</sup> The court was concerned that awarding a cost order against a Funder that only funded a portion of the claim would discourage Funder's from funding legitimate claims thereby adversely affecting access to justice. The court further acknowledged that the Defendant was entitled to a cost order after successfully defending the claim.<sup>483</sup> In order to reconciled these two competing interests the court ruled that the Funder should be held liable to 'the extent of the funding provided.'<sup>484</sup> This means that the Funder would not be liable for the entire cost order.<sup>485</sup> The Funders contribution would be limited to the amount of funding he provided.<sup>486</sup> The difference between these two cases is that in *Arkin v Borchard Lines Ltd* the Defendant had successfully defended the claim and the issue before the court was the awarding of a cost order against the Funder. At this point in the dispute PWC had not successfully defended the claim and the request was for the joinder of the Funder

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<sup>475</sup> *PWC and Others* (2013) p 218.

<sup>476</sup> *PWC and Others* (2013) p 218.

<sup>477</sup> *PWC and Others* (2013) p 219.

<sup>478</sup> *PWC and Others* (2013) p 219.

<sup>479</sup> *PWC and Others* (2013) p 221.

<sup>480</sup> *PWC and Others* (2013) p 222.

<sup>481</sup> *PWC and Others* (2013) p 221.

<sup>482</sup> See section 3.3.

<sup>483</sup> See section 3.3.

<sup>484</sup> See section 3.3.

<sup>485</sup> See section 3.3.

<sup>486</sup> See section 3.3.

to cover a potential shortfall in a cost order. The similarity between the two cases was deciding the inherent powers of the court when it came to holding a Funder liable for a cost order.

In *Arkin v Borchard Lines Ltd* the dispute had already been concluded therefore adding the Funder as a party to the dispute would have been a delayed request. In the PWC case the case was still on going and the joinder of the Funder would be a precautionary measure if the security for cost was insufficient. The UK court ruled that it had the inherent power to hold the Funder liable for a cost order. This persuaded the court that it too had the inherent power to join the Funder therefore developing the common law.<sup>487</sup> In conclusion the court added that this should be viewed as a protective measure against champertous agreements that are now valid in South Africa.<sup>488</sup>

This case resulted in two developments for TPF in South Africa. The first, and more obvious, is the ability to join a Funder to a dispute. The second, and perhaps less obvious, is the ability to hold a Funder liable for security for costs and cost orders. Chapter two identified security for costs and cost orders as a potential concern with the growth of the TPF industry.<sup>489</sup> This judgement has since cleared up the concern in the South African context. A non-funded party can request that a Funder be held liable for either order. The effect has since been felt across South African courts the most notable being *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and Another, and Four Related Applications*<sup>490</sup> and *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others*.<sup>491</sup> A brief discussion of these two cases will be included in the following paragraphs before returning to the NPC dispute.

*EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and Another, and Four Related Applications*<sup>492</sup> included a number of applications that dealt with the ownership of an immovable property.<sup>493</sup> One of these applications considered the liability of a Funder if a cost order is awarded in favour of the non-funded party.<sup>494</sup> The Funder, Naidoo entered into a

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<sup>487</sup> *PWC and Others* (2013) p 222.

<sup>488</sup> *PWC and Others* (2013) p 222.

<sup>489</sup> See section 2.5.

<sup>490</sup> 2014 (1) SA 141 (WCC).

<sup>491</sup> (48226/12) [2015] ZAGPJHC 62.

<sup>492</sup> 2014 (1) SA 141 (WCC).

<sup>493</sup> *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and Another, and Four Related Applications* 2014 (1) SA 141 (WCC) para 1 (hereinafter *EP Property* (2014)).

<sup>494</sup> *EP Property* (2014) para 3.

Funding Agreement with Marais.<sup>495</sup> Marais was the alleged owner of the immovable property until an arbitrator found that his ownership was obtained fraudulently and that EP Property Projects (Pty) Ltd was in fact the rightful owner.<sup>496</sup> The terms of the Funding Agreement entitled Naidoo to ownership of the claim and part ownership of the immovable property if the claim is successful.<sup>497</sup> Naidoo and Marais instituted a claim contesting the arbitrators finding leading to a continuation of the dispute.<sup>498</sup>

The court found that Naidoo's ownership of the claim already made her a party to the litigation therefore she can be held liable should the claim be unsuccessful.<sup>499</sup> In addition, the court found that this is not an unreasonable finding considering that Naidoo is funding a mala fide claim that has little likelihood of success.<sup>500</sup> The SCA reaffirmed this decision in *Naidoo v EP Property Projects (Pty) Ltd*.<sup>501</sup> Both courts distinguished between a commercial and a pure Funder however as previously stated this will not be discussed in this mini-thesis. The question that arises with this case is whether a Funder should be a party to the proceeding or joined at a later stage to be held liable. The court cleared this up itself by stating that a court has the discretion to award costs against a non-party.<sup>502</sup>

The joinder of a non-party Funder was brought before the court in *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others (Gold Fields)*.<sup>503</sup> This case resulted from a pending certification application whereby a group of mineworkers seek to claim damages for contracting silicosis while being employed in the mines.<sup>504</sup> The Applicants, in this case, requested that the Funder be added to the certification application in the event that it is unsuccessful and a cost order is awarded.<sup>505</sup> In support of their request, the Applicants argued that the Funder already exercises control over the dispute and has a financial interest in its outcome.<sup>506</sup> They further argued that the court should supervise

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<sup>495</sup> *EP Property* (2014) para 68.

<sup>496</sup> *EP Property* (2014) para 84.

<sup>497</sup> *EP Property* (2014) para 68.

<sup>498</sup> *EP Property* (2014) para 84.

<sup>499</sup> *EP Property* (2014) para 86.

<sup>500</sup> *EP Property* (2014) para 86.

<sup>501</sup> (444/2012) [2014] ZASCA 97.

<sup>502</sup> *Gold Fields* [2015] para 84.

<sup>503</sup> (48226/12) [2015] ZAGPJHC 62.

<sup>504</sup> *Gold Fields* [2015] para 2.

<sup>505</sup> *Gold Fields* [2015] para 10.

<sup>506</sup> *Gold Fields* [2015] para 10.

this level of involvement and by adding the Funder as a party it would bring the Funder within the ambit of the courts supervision.<sup>507</sup>

Before detailing the courts finding it is necessary to explain how the Funder became involved in this dispute. The mineworkers' claim is expected to be the most complex in South African history in both facts and law.<sup>508</sup> Due to this complexity the costs associated with the dispute far exceeds the mineworker's means<sup>509</sup> despite entering into a contingency fee agreement with their legal representatives.<sup>510</sup> Motley Rice LLC, a US law firm specialising in class actions, was approached to fund the claim on behalf of the mineworkers.<sup>511</sup> Motley Rice LLC agreed to fund the dispute and offer additional consultation services.<sup>512</sup> They did not however enter into a Funding Agreement with the mineworkers instead they concluded the Funding Agreement with the legal representatives.<sup>513</sup> The terms of which entitle them to, pending a successful outcome, payment for their consultation services and 75% of the contingency fee received by the legal representatives.<sup>514</sup> This is another development in what is considered common practices in the TPF industry.<sup>515</sup> The Funding Agreement is ordinarily concluded between the Funder and the funded party. This case shows a new trend whereby law firms are entering the funding agreements with the Funder.

In its findings, the court stated that the purpose of the Funder is to provide the mineworkers with access to justice a right that is entrenched in the Constitution.<sup>516</sup> It further stated that this purpose conflicts with the current Applicants ability to recover costs in the pending certification application.<sup>517</sup> To harmonise these competing interests the court analysed the Funding Agreement to determine the level of control granted to the Funder and their financial interest. After analysing the Funding Agreement, the court found that the Funder did not have a substantial amount of control over the dispute and the financial return is only due at the end of the entire dispute granted it is successful.<sup>518</sup> The court found that there is no financial benefit

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<sup>507</sup> *Gold Fields* [2015] para 10.

<sup>508</sup> *Gold Fields* [2015] para 7.

<sup>509</sup> *Gold Fields* [2015] para 7.

<sup>510</sup> *Gold Fields* [2015] para 9.

<sup>511</sup> *Gold Fields* [2015] para 8.

<sup>512</sup> *Gold Fields* [2015] para 8.

<sup>513</sup> *Gold Fields* [2015] para 66.

<sup>514</sup> *Gold Fields* [2015] para 65.

<sup>515</sup> See section 2.4.

<sup>516</sup> *Gold Fields* [2015] para 59.

<sup>517</sup> *Gold Fields* [2015] para 62.

<sup>518</sup> *Gold Fields* [2015] para 78.

to be gained in the certification application therefore joining the Funder, as a party would be premature.<sup>519</sup>

Returning to the NPC dispute, which reached its conclusion in 2015 after the North Gauteng High Court's decision, was appealed before the SCA.<sup>520</sup> On appeal, the SCA had to decide whether the North Gauteng High Court erred in deciding that the auditors breached their contractual obligations to NPC causing them to suffer damages.<sup>521</sup>

For purposes of understanding this judgement it is necessary to state that NPC was no longer in existence and neither was the auditors that were accused of breaching their contractual obligations.<sup>522</sup> NPC merged with another co-operative in 2000 and continued to exist for the sole purpose of pursuing its claim against the auditors.<sup>523</sup> The Appellant PWC merged with the accused auditors, Price Waterhouse, which led to PWC acquiring their debts and liabilities including this dispute.<sup>524</sup>

In 2009 NPC entered into a Funding Agreement with IMF whereby it was agreed that IMF would take over funding the claim.<sup>525</sup> If the claim were successful IMF would be entitled to a full reimbursement, a management fee for its services and more than half of the gross proceeds of the litigation.<sup>526</sup> Pending the outcome of the dispute counsel for NPC and IMF informed the SCA that IMF stood to be the sole beneficiary of the dispute.<sup>527</sup> IMF did however incur additional risk in 2013 when the auditors insisted that IMF be added as a party in the event of a cost order being awarded in the auditors favour.<sup>528</sup>

In the judgment, Wallis JA stated that:

‘It may strike the reader as odd that an entity such as NPC should remain in existence solely for the purpose of conducting litigation, a major beneficiary of which is intended to be a party unconnected with the dispute and unconnected, so far as the court can discern, with this country.

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<sup>519</sup> *Gold Fields* [2015] para 111.

<sup>520</sup> *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another* (451/12) [2015] ZASCA 2 (hereinafter *PWC* [2015]).

<sup>521</sup> *PWC* [2015] para 1.

<sup>522</sup> *PWC* [2015] para 9.

<sup>523</sup> *PWC* [2015] para 9.

<sup>524</sup> *PWC* [2015] para 14.

<sup>525</sup> *PWC* [2015] para 10.

<sup>526</sup> *PWC* [2015] para 10.

<sup>527</sup> *PWC* [2015] para 10.

<sup>528</sup> *PWC* [2015] para 10.

Indeed it is wholly unclear who, other than IMF, stands to gain from the litigation that has taken up so much court time over so a protracted a period. It is debatable whether that is a desirable state of affairs. It is one thing to enable an impecunious litigant to obtain legal relief to which that litigant is entitled. It is another matter altogether to have a situation where an outsider to a dispute, motivated solely by considerations of profit, may be the sole beneficiary of a judgment. That is something that may have to engage this court on another occasion. Litigation exists for the proper settlement of disputes in society in the interests of the parties to those disputes. It comes at a social cost. It is undesirable that outsiders driven purely by commercial motives should be able to take over these disputes for their own benefit. When that occurs it is difficult to see how the constitutional guarantee of access to courts is engaged. It may perhaps be necessary at some future date to consider the precise ambit of our earlier decision in this regard and to what extent it permits a departure from the previous law in relation to champerty.<sup>529</sup>

The motivation behind the acceptance of the TPF industry in the UK<sup>530</sup> and South Africa<sup>531</sup> was its ability to promote access to justice. The quote by Wallis JA, particularly, ‘it is wholly unclear who, other than IMF, stands to gain from the litigation’ calls into question whether the TPF industry truly improves access to justice.

NPC instituted a claim to recover financial losses with the assistance of three different Funders over a period of almost fifteen years. Despite a successful outcome, NPC was no longer in operation and the only beneficiary was the Funder, IMF. IMF was not the Claimholder, they did not suffer financial losses that led to a merger with another co-operative and they did not have to endure a court proceeding that lasted for almost two decades.

This outcome led Wallis JA to caution that the court should be concerned when ‘an outsider...[is] the sole beneficiary.’ IMF cannot however be the sole cause for the potentially unfair outcome of this case. IMF agreed to fund the dispute in accordance with the terms of the Funding Agreement. The Defendants, PWC instituted most of the disputes and the Claimholder was obligated to be a part of them. These disputes ultimately raised the amount owed to IMF by NPC.

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<sup>529</sup> *PWC* [2015] para 12.

<sup>530</sup> See Chapter 3.

<sup>531</sup> *Price Waterhouse Coopers* [2004] para 51.

This outcome makes it difficult to understand how TPF facilitates access to justice. Did NPC receive justice despite not recovering the losses it sustained? It is evident that Wallis JA shares this opinion in the following extract, ‘it is difficult to see how the constitutional guarantee of access to courts is engaged.’ He suggests that ‘It may perhaps be necessary at some future date to consider the precise ambit of our earlier decision in this regard and to what extent it permits a departure from the previous law in relation to champerty.’ The problem with relying on the courts to develop the regulation of TPF is that TPF continues to grow whereas the courts are limited by the cases that are brought before them. It could take another decade for the SCA to revisit their decision while TPF continues to grow and expand into other areas of law.

This is where the regulatory measures adopted by the countries discussed under chapter three are imperative to the discussion on the regulation of TPF, particularly in arbitrations. South Africa differs from these countries in that the courts developed the laws that prohibited the expansion of TPF however they failed to adopt any further regulatory measures to cover any loopholes created by this development. In the UK, the ALF was established to self-regulate the TPF industry.<sup>532</sup> In addition to the ALF the UK created a Code that regulates the conduct of the Funders.<sup>533</sup> Singapore and Hong Kong opted for the enactment of legislation and limited its application to arbitrations.<sup>534</sup> South Africa should decide whether it should adopt any of these approaches or consider something entirely new. There have been significant developments in South Africa’s arbitration laws over the past few years. The following section will detail these developments in the hope of establishing if the regulation of TPF could be included in these developments.

### **4.3 ARBITRATION IN SOUTH AFRICA**

The cases discussed above have a substantial impact on arbitrations held within South Africa due to the power granted to the court by its arbitration laws. The arbitration laws are currently under reform however the Arbitration Act 42 of 1965 (Arbitration Act) governed both domestic and international arbitrations until recently.<sup>535</sup> Following the recommendations of the South

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<sup>532</sup> See section 3.3.1.

<sup>533</sup> See section 3.3.1.

<sup>534</sup> See section 3.4 and 3.5

<sup>535</sup> South African Law Commission (Project 94) Report on Arbitration: An International Act for South Africa (1998) p 23 (hereinafter South African Law Commission (1998)).

African Law Commission the National Assembly accepted the International Arbitration Bill<sup>536</sup> and in December 2017 the International Arbitration Act 15 of 2017 (International Arbitration Act) came into force and regulates all international commercial disputes.<sup>537</sup> The purpose of the International Arbitration Act is to adopt the UNCITRAL Model Law into South African law, to regulate international commercial arbitration independently from any other forms of arbitration and to repeal the Protection of Business Act 99 of 1978 and the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.<sup>538</sup>

South Africa however continues to be criticised for its lackluster approach to developing their arbitration laws, their failure to keep on par with international developments and the extensive powers granted to the courts.<sup>539</sup> Section 21 of the Arbitration Act, titled ‘General powers of the court,’ is one example of the extensive powers granted to the court under the Act.<sup>540</sup> The court has the authority to grant orders for security of costs, the discovery of documents, examination of witnesses, production of evidence, interim measures and ensuring the compliance with an award.<sup>541</sup> The courts wide-ranging powers means that the decisions discussed under this chapter would have a direct impact on arbitrations in South Africa, particularly decisions relating to the joinder of a Funder, security for costs and cost orders.

The adoption of the UNCITRAL Model Law in the International Arbitration Act indicates that the involvement of the court will be limited.<sup>542</sup> The scope of the International Arbitration Act is limited to international commercial arbitration. Unfortunately, none of the cases discussed, in the previous paragraphs of this chapter, fall within the realm of international commercial arbitration. It is nonetheless a positive step in the reform of South Africa’s arbitration laws and it warrants a brief discussion on the changes that will be implemented with regards to the courts role in international commercial arbitration.

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<sup>536</sup> Parliament of the Republic of South Africa ‘National Assembly Passes International Arbitration Bill’ available at <https://www.parliament.gov.za/press-releases/national-assembly-passes-international-arbitration-bill> (accessed 6 November 2017).

<sup>537</sup> Chidede T ‘International arbitration legislation now in force – Implications for South Africa and cross-border businesses’ available at <https://www.tralac.org/discussions/article/12663-international-arbitration-legislation-now-in-force-implications-for-south-africa-and-cross-border-businesses.html> (accessed 2 February 2018).

<sup>538</sup> Parliament of the Republic of South Africa ‘National Assembly Passes International Arbitration Bill’ available at <https://www.parliament.gov.za/press-releases/national-assembly-passes-international-arbitration-bill> (accessed 6 November 2017).

<sup>539</sup> South African Law Commission (1998) p 21, 23.

<sup>540</sup> Arbitration Act 42 of 1965 s 21.

<sup>541</sup> Arbitration Act 42 of 1965 s 21.

<sup>542</sup> South African Law Commission (1998) p 24.



The International Arbitration Act limits the authority of the courts by adopting the UNCITRAL rules in its entirety. The rules relating to security of costs and cost orders have changed somewhat in that once the arbitral tribunals grant such orders they are binding on the parties and their decision cannot be easily overturned by the court.<sup>543</sup> This change may not be considered significant given that the arbitral tribunal had the discretion to award these orders previously. The importance of this change cannot however be overlooked because it has altered the role of the court. Previously, the parties could approach the court to by-pass the arbitral tribunal and have these orders granted by the court. The parties could also challenge the arbitral tribunals' decisions before the arbitration had concluded. Article 5 expressly states that 'In matters governed by this Law, no court shall intervene except where so provided in this Law.'<sup>544</sup> The International Arbitration Act may have addressed concerns relating to the powers of the court but it is silent on TPF.

#### 4.4 CONCLUSION

Compared to its development in other jurisdictions<sup>545</sup> the regulation of TPF in South Africa could be considered premature. There are not many cases dealing with TPF, its presence in arbitrations is relatively unknown and it is not responsible for the recent developments in arbitration law. This results in an argument that the courts should continue to be observed, particularly in arbitration challenges, before any regulatory measures are adopted.<sup>546</sup> The challenge with observing court decisions is that TPF may be present however it may not form part of the dispute.<sup>547</sup> This means that the terms of the Funding Agreement and ethical considerations will all go unchecked unless a dispute arises that directly relates to the funding.

The lack of case law may be an argument that regulation is premature but the growth in Funders since the relaxation of the common law doctrines is not lacking. Neither is the growth in international Funders without any connection to South Africa benefitting from domestic disputes. South Africa is not a leading arbitration venue such as the jurisdictions discussed in the previous chapter but the attempts to reform our arbitration laws may signal a change. A reform that could potentially extend to TPF whether it is through the adoption of statutes or

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<sup>543</sup> International Arbitration Act 15 of 2017 Article 17.

<sup>544</sup> International Arbitration Act 15 of 2017 Article 5.

<sup>545</sup> The UK, Singapore and Hong Kong.

<sup>546</sup> Sahani VS (2016) 403.

<sup>547</sup> Sahani VS (2016) 403.

ethical codes. Either way we cannot ignore the fact that TPF exists in South Africa and poses potential risks for users of arbitration and their need to be protected.

The final chapter of this mini-thesis will return to the questions raised in this chapter. It will include a discussion on the measure that should be adopted to regulate TPF. Wallis JA, for example, suggested that the SCA might have to revisit their previous decision to relax the common law doctrines. Further examples were identified in chapter three which included a discussion on a self-regulatory approach or the enactment of legislation. The final chapter will also address who should be responsible for any potential developments and the possibility of including regulatory measures in the recently reformed arbitration laws. These questions will conclude the mini-thesis and answer the questions included under the aim of the mini-thesis in chapter one.<sup>548</sup>



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<sup>548</sup> See section 1.2.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

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#### 5.1 INTRODUCTION

It can no longer be denied that TPF is an established industry that funds legal disputes around the world. The aim of this mini-thesis was to examine the practice of TPF within the ambit of arbitration. More specifically whether it should be regulated within South Africa. There were additional questions posed if it was discovered that regulation is necessary. These questions ranged from who should be responsible for the regulation to would such regulation stifle the growth of TPF.

Each chapter, included in this mini-thesis, served a specific purpose. The purpose was to provide the necessary information to determine whether South Africa should regulate TPF. Chapter 1 introduced the topic, the aim of the mini-thesis as well as an outline of the chapters. Chapter 2 detailed what TPF is, which was important considering its relatively new presence in the legal field, and the potentially adverse effects it will have on arbitration. Chapter 3 followed this by reviewing the decisions taken by the UK, Singapore and Hong Kong to regulate TPF. Chapter 4 then took a closer look at TPF within South Africa. Collectively, these chapters provided the necessary information to achieve the aim of this mini-thesis. Information that will be used in this chapter to provide recommendations for South Africa to consider.

#### 5.2 CONCLUSION

The following subparagraphs will summarise the findings of each chapter before the recommendations of the mini-thesis are discussed.

##### 5.2.1 Chapter 2

Chapter 2 served several purposes namely defining TPF,<sup>549</sup> differentiating TPF from other funding mechanisms,<sup>550</sup> an overview of how TPF operates<sup>551</sup> and the difficulties that have arisen since its growth.<sup>552</sup> TPF is a relatively new concept in South Africa therefore this chapter

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<sup>549</sup> See section 2.2.

<sup>550</sup> See section 2.3.

<sup>551</sup> See section 2.4.

<sup>552</sup> See section 2.5.

provided the reader with the necessary information to understand why the aim of this mini-thesis is important.

### 5.2.2 Chapter 3

Given the concerns raised in chapter 2, chapter 3 sought to find guidance from other jurisdictions on how to address these concerns most effectively. The UK, Singapore and Hong Kong were selected due to their shared use of the common law system as well as being at the forefront of developments in the TPF industry.<sup>553</sup> They are among the few countries that have taken proactive steps to address the concerns raised under chapter 2. It was therefore only logical to look to these jurisdictions when trying to determine whether South Africa should regulate TPF. Overall the chapter provided three potential routes for South Africa to follow, self-regulation,<sup>554</sup> binding legislation<sup>555</sup> and non-binding legislation.<sup>556</sup> It is however important to note that a fourth route still existed and that was no regulation at all.

### 5.2.3 Chapter 4

Chapter 4 brought the discussion within the ambit of South Africa by analysing recent case law that addressed, albeit to different extents, the use of TPF within South Africa.<sup>557</sup> Another important aspect of this chapter was determining the presence of arbitration in South Africa.<sup>558</sup> The popularity of arbitration within South Africa is relatively unknown beyond the scope of labour law. It was therefore imperative to ascertain whether regulating TPF in arbitration is even necessary if arbitration is not widely used within South Africa. The discussion on the arbitration legislation therefore provided further motivation that the regulation of TPF is important for South Africa to consider.<sup>559</sup>

South Africa has not taken any steps to regulate the TPF industry. The following and concluding section of this mini-thesis will therefore offer recommendations on the appropriate route for South Africa to follow.

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<sup>553</sup> See section 3.1.

<sup>554</sup> See section 3.3.

<sup>555</sup> See section 3.4.

<sup>556</sup> See section 3.5.

<sup>557</sup> See section 4.2.

<sup>558</sup> See section 4.3.

<sup>559</sup> See section 4.3.

### 5.3 RECOMMENDATIONS

The aim of this mini-thesis was to consider whether TPF should be regulated in South Africa particularly within arbitration. The SCA relaxed the application of the common law doctrines of maintenance and champerty in 2004 to allow TPF.<sup>560</sup> Since this decision TPF has grown substantially in South Africa, attracting both domestic and international Funders that offer funding for litigation and arbitration disputes.

To gain a general understanding of TPF in South Africa this mini-thesis analysed existing case law under section 4.2. The analysis of case law was necessary due to the limitations in researching the potential effects TPF has on arbitrations in South Africa, these limitations were included in section 4.1. Arbitrations are confidential in nature meaning that the existence of the arbitrations, the parties, the arbitrators and the decisions are not available to the public. The case law provided insight into several issues including, conflicts of interest, security for costs, cost orders, the joinder of a Funder, the growth in international Funders funding local disputes, the terms contained in Funding agreements, the funding of mala fide disputes, the potentially unfair outcomes of funded claims and the prolonging of disputes. It can only be assumed that these issues coupled with the issues identified in international arbitrations are sufficient to argue for the regulation of TPF in arbitrations.

The regulation of TPF is necessary to protect users of the arbitration process. TPF is a relatively new industry that is not well known or understood by users of arbitration. This creates additional concerns that are unique to arbitrations and have not been identified in the previous paragraph. Ordinarily the Funder and the Funding Agreement would remain confidential during the arbitration proceedings. This could result in potential prejudices during the arbitral proceeding for both parties. The funded party could have entered into a Funding Agreement that disproportionality favours the Funder. In that the Funder has the power to exercise a substantial amount of control over the proceedings or a claim to an unfair portion of the award or settlement. The non-funded party is also at risk. Depending on the amount of control afforded to the Funder, the Funder may reject a reasonable settlement offer because it does not provide a satisfactory return on his investment. The Funder or the funded party could also intentionally prolong proceedings until the non-funded party can no longer afford to proceed

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<sup>560</sup> See section 4.2.

with the arbitration. There is also a significant imbalance in resources leading to a potentially unfair bias towards the non-funded party.

The TPF industry is not the only recent development in arbitrations held within South Africa. South Africa has recently reformed its international arbitration law to include the UNCITRAL Model Law. This reform is due to an attempt by South Africa to conform to international arbitration standards. If it is successfully implemented it will attract international arbitration users who are funded. It is therefore in the best interest of South Africa to keep up to date with developments in international arbitration. This may be regarded as a step in the right direction for South Africa, but the limited scope of the International Arbitration Act cannot be overlooked. It only applies to international commercial arbitration therefore excluding most arbitration proceedings that are held within South Africa.

The issues identified in case law, the protection of arbitration users and recent developments in arbitration laws strengthens the argument for the regulation of TPF in South Africa. The remaining considerations are what method of regulation should South Africa adopt, who should implement these regulations and would these regulations stifle the growth of the TPF industry.

### **2.1.1 Recommendation 1**

Section 1.1 of the mini-thesis questioned the method South Africa should adopt in regulating TPF. This mini-thesis identified three possibilities namely, regulation through court decisions, self-regulation through the adoption of ethical codes and the enactment of legislation. With regards to the first option, regulation by the courts, Wallis JA suggested that the SCA should reconsider their decision in relaxing the doctrines. This mini-thesis has already expressed concern, under section 4.2, that relying on the court to revisit their decision or develop the industry on a case-by-case basis would be time consuming. TPF is developing at a rate much faster than the passing of judgements.

The second option, the creation of ethical codes to allow Funders to regulate themselves was adopted by the UK and is not without concern.<sup>561</sup> The possibility that a conflict of interest could arise by allowing the Funders to regulate themselves cannot be ignored.

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<sup>561</sup> See discussion under section 4.3.

The third option is perhaps the most promising, but it still poses problems of its own. The lengthy procedure involved in the enactment of legislation cannot be overlooked. For example, the South Africa Law Commission recommended the reform of the arbitration laws in 1998. It has taken the legislature two decades to implement these recommendations, the scope of which is limited.<sup>562</sup> Singapore and Hong Kong have however implemented legislation in a reasonable amount of time. In addition, South Africa's recent attempts to conform to international standards, albeit limited, could signal a change in its attitude towards arbitrations development.

### **2.1.2 Recommendation 2**

Enacting legislation is the appropriate approach for South Africa to adopt. The contents of this proposed legislation are somewhat troubling. The authorities in Singapore and Hong Kong conducted an in-depth investigation and compiled reports prior to the adoption of their respective legislations. It is therefore imperative for the authorities, particularly the South African Law Commission, to investigate prior to the enactment of legislation. This investigation should include a discussion on existing case law, the role of TPF in arbitrations held within South Africa, public consultations and possible recommendations. The product of this investigation should be a report that is submitted to Parliament for their consideration. If Parliament believes the TPF industry requires regulation South Africa has settled law on how the process would be carried out. The questions pertaining to who would regulate is therefore answered.

Parliament should enact legislation that will govern TPF within South Africa and it is my strong belief that this legislation should follow the route taken by Singapore. The legislation must include the appropriate steps that need to be taken and it should be binding. This is not an impossible task considering that Parliament has successfully implemented legislation for contingency fee agreements and other existing funding mechanisms that were discussed under chapter two of this mini-thesis.

In further support of the creation of legislation is the fact that South Africa is not a leading destination in international arbitrations. Parliament's decision to enact the International Arbitration Act has the potential to change this. Should this change come about South Africa will become vulnerable to the threats of TPF identified in this mini-thesis. The International

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<sup>562</sup> See section 3.6.

Arbitration Act limits the role of the courts and it does not include provisions for TPF. The UNCITRAL Model Law was created before TPF became the global phenomenon that it is today. The UNCITRAL Model Law is therefore ill equipped to deal with the threats of TPF. Countries such as Singapore and Hong Kong were forced to adopt legislation, ancillary to their current robust arbitration regulations, to protect themselves and arbitration users against the dangers of TPF. It is only right that South Africa does the same. It is not enough to amend the International Arbitration Act because it is limited to commercial arbitrations. The case law discussed under this mini-thesis rarely dealt with commercial arbitrations. The potential threats of TPF exists beyond the realm of commercial arbitration and should be governed by a stand-alone piece of legislation.

A non-binding code of conduct could cause several problems for South Africa. It could potentially result in an increase in court cases. Particularly in disputes where there is no contractual term allowing for the use of the code of conduct and the parties dispute its application. Further to this, it will require a regulatory body to ensure that it is kept up to date, that it is effective and that it is being used. The code of conduct may work for the UK and Hong Kong but its success may not be reciprocated in South Africa given these considerations.

### **2.1.3 Recommendation 3**

The last question posed by this mini-thesis, under section 1.2, is whether the adoption of regulations would stifle the growth of the TPF industry. This answer is entirely dependent on the content of the legislation. Singapore adopted binding legal terms whereas Hong Kong opted for legislation that requires the creation of a code that's terms are not binding. It is therefore up to the creators of the legislation to consider these possibilities and perhaps rely on the experience of the countries discussed in this mini-thesis to help decide.

The TPF industry cannot continue to exist within South Africa without being regulated. The evidence from domestic and international courts as well as international arbitrations is a clear indication that some form of regulation is necessary. This mini-thesis suggests that the South African Law Commission conduct a thorough investigation. They have the necessary authority to obtain information that may be confidential to the public. They also have the authority to create a report on their findings including recommendations for Parliament to consider. After the conclusion of their investigation and the publication of their report Parliament should enact legislation to regulate the TPF industry.

**Word Count: 29 804**



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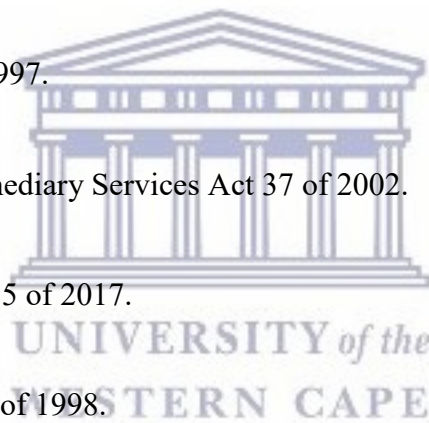
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