

Contents

ACK	page	
List	of abbreviations	XV
1	Introduction	1
	1.1 Background	1
	1.2 Problem Definition and Basic Terminology	4
	1.2.1 TPF	4
	1.2.2 Funding Litigation in the Civil Law and in the Common Law	
	Jurisdictions: Limits and Possibilities	5
	1.2.3 Alternative Litigation Funding	6
	1.2.4 The Litigation Market and the Litigious Rights as Asset Class	8
	1.2.5 TPF in Relation to a Market Failure in Access to Justice, to a	
	Procedural Problem in Dispute Resolution, and to Externalities	9
	1.3 Structure and Methodology	11
	1.3.1 Part I: A Comparative Overview	11
	1.3.2 Part II: An Economic Analysis	12
	1.3.3 Part III: Regulatory and Policy Considerations	13
	PART I: A COMPARATIVE OVERVIEW	15
2	A Historical Overview	17
	2.1 Meddling in Litigation in the Early Civil Law and Common Law	
	Jurisdictions	18
	2.1.1 Meddling in Litigation in the Early Civil Law Jurisdictions	18
	2.1.1.1 Ancient Greece	19
	2.1.1.2 Ancient Rome	20
	2.1.2 Meddling in Litigation in Medieval England: Maintenance	
	and Champerty	24



viii Contents

	2.2 From the Establishment of the Rule of Law to the Recent Financial Crisis	26
	2.2.1 Judicial Independence and the Rule of Law in Common Law Jurisdictions	26
	2.2.2 The Age of Codifications in Civil Law Jurisdictions: Reiteration of the Prohibitions of Roman Origin	28
	2.2.3 Contingency Fees in the United States as First 'Private' Litigation Funding Solutions	30
	2.2.4 Legal Aid for Impecunious Parties as First 'Public' Litigation Funding Solution	31
	2.2.5 Global Trends Affecting Access to Justice and Dispute Resolution	33
	2.3 Concluding Remarks: A Fast-Growing TPF (and Litigation) Market	36
3	Third Party Funding: A Comparative Legal and Factual Overview	38
	3.1 TPF in the Common Law Jurisdictions	38
	3.1.1 Australia	39
	3.1.1.1 Champerty, Maintenance, and the Fostif Case	40
	3.1.1.2 Local Regulation and TPF	42
	3.1.2 Canada	44
	3.1.2.1 Common Law vs. Civil Law and the Institutional Debate	44
	3.1.2.2 TPF and Canadian Class Actions	46
	3.1.3 England and Wales	49
	3.1.3.1 From the Criminal Law Act of 1967 to the Reforms of Justice of the 1990s and 2000s. Paving the Way for TPF	50
	3.1.3.2 Arkin and Other Case Law Shaping the Practice of TPF	
	3.1.3.3 Some Regulatory Indications on TPF from the Jackson	52
	Report and the Association of Litigation Funders'	
	Voluntary Code of Conduct	55
	3.1.3.4 Post-Jackson Reforms and Their Impact on TPF	57
	3.1.4 India	58
	3.1.5 Israel 3.1.6 The United States	59 60
	3.1.6.1 The US Legal and Litigation Finance Market	61
	3.1.6.2 TPF vs. Contingency Fees in US Mass Claims	69
	3.1.7 Singapore	71
	3.1.7.1 The Civil Law Act and the Civil Law (TPF)	/1
	Regulations of 2017	71
	3.1.7.2 The Investment Arbitration Rules of the SIAC	74
	3.1.7.3 Singaporean Soft Regulation on TPF in Arbitration	75
	3.1.7.4 TPF in Singaporean Insolvency	78



Contents	ix
3.1.8 Hong Kong	78
3.1.8.1 Current Regulatory Framework and Potential Developments 3.1.9 South Africa	79 80
3.1.9.1 TPF and South African Jurisprudence: Liability for Costs and	l
Distinction between Commercial Funders and Others	81
3.1.10 Cayman Islands	82
3.2 TPF in the Civil Law Jurisdictions	83
3.2.1 The European Union Context	85
3.2.1.1 TPF and the EU Private Enforcement of Competition Law	87
3.2.1.2 TPF and the EU Collective Redress	
Mechanisms	90
3.2.2 The EU Member States' Experiences with TPF	94
3.2.2.1 Germany	95
3.2.2.2 Austria	104
3.2.2.3 France	104
3.2.2.4 Belgium	111
3.2.2.5 The Netherlands	112
3.2.2.6 Spain	113
3.2.2.7 Italy	114
3.2.2.8 Portugal	116
3.2.3 TPF in Other Civil Law Jurisdictions	117
3.2.3.1 Brazil	117
3.2.3.2 China	118
3.2.3.3 Dubai	118
3.2.3.4 Switzerland	119
3.3 TPF in International Arbitration	119
3.4 Concluding Remarks. Legality of TPF	120
3.4.1 Legality of TPF in Common Law Jurisdictions	121
3.4.2 Legality of TPF in Civil Law Jurisdictions	121
PART II: AN ECONOMIC ANALYSIS	123
The Emergence of the Litigation Market and TPF	125
4.1 The Liberalization of the Litigation Market. Litigious Rights as New	
Asset Class	126
4.1.1 A Market Failure in Access to Justice	130
4.1.2 A Procedural Problem in Dispute Resolution	132
4.1.3 'One-Shotters' vs. 'Repeat Players' in Litigation 4.2 The Actors in the Litigation Market and their	134
Modus Operandi	136
4.2.1 Third Party Funders	137
4.2.1.1 Passive vs. Active TPF Business Models	138
•	,

4



x Contents

	4.2.2 Lawyers' Funding	155
	4.2.2.1 Arrangements of the Lawyers' Fees Based on Success	156
	4.2.2.2 Other Lawyers' Funding Transactions	158
	4.2.2.3 Lawyers' Funding vs. TPF	159
	4.2.3 LEI	160
	4.2.3.1 LEI vs. TPF	163
	4.3 Concluding Remarks. TPF as a Stand-Alone Industry	164
5	An Economic Analysis of TPF	167
	5.1 Basic Economics of Litigation and TPF	167
	5.1.1 The Claimants' Incentives	168
	5.1.1.1 Impecunious Parties	169
	5.1.1.2 Non-Impecunious Parties	175
	5.1.2 The Defendants' Incentives	184
	5.2 Economics of TPF Transactions	186
	5.2.1 Litigation Costs	189
	5.2.1.1 Organisational and/or Transaction Costs	190
	5.2.1.2 Legal Fees	191
	5.2.1.3 Experts' Fees	192
	5.2.1.4 Court or Arbitration Tribunal Costs	193
	5.2.2 Litigation Risks	194
	5.2.2.1 Solvency Risk	195
	5.2.2.2 Merits Risk	195
	5.2.2.3 Procedural and Enforcement Risk	197
	5.2.2.4 Adverse Costs Risk	198
	5.2.3 Claim Value	199
	5.2.3.1 Bargaining with Clients and Their Lawyers	199
	5.2.3.2 Bargaining with Counterparties	204
	5.2.4 Portfolio Management	213
	5.2.4.1 Managing Costs	214
	5.2.4.2 Mitigating Risks	215
	5.2.4.3 Maximising Value	220
	5.3 Concluding Remarks. Desirability of TPF in a Wider	
	Litigation Market	222
6	Social Impact of TPF	227
	6.1 The Claimants' Perspective	229
	6.1.1 Access to Justice and Equality of Arms	229
	6.1.2 Correction of Wrongs and Effective Recovery	232
	6.2 The Defendants' Perspective	233
	6.2.1 Vexatious Litigation	234
	6.2.2 Overdeterrence	236



	Contents	xi
	6.3 The Legal Systems' Perspective	237
	6.3.1 Competitiveness of the Legal and Litigation Markets	71
	and Optimal Enforcement of Laws	238
	6.3.2 Increase in the Volume of Disputes and of Frivolous	
	Litigation	241
	6.4 The Impact of TPF at a Societal Level	244
	6.4.1 Deterrence of Wrongs	245
	6.4.2 Commoditisation of Justice	246
	6.5 Concluding Remarks: Social Desirability of TPF?	250
	PART III: CONTRACTUAL, REGULATORY AND POLICY CONSIDERATIONS	251
7	TPF Transactions and Related Proceedings	253
	7.1 Dealing with TPF Transactions	253
	7.1.1 Access and Use of Parties' Confidential Information	254
	7.1.2 Structuring a TPF Transaction	258
	7.1.2.1 Funding Terms and Waterfall Agreements	258
	7.1.3 Conflicts in TPF Transactions	261
	7.1.3.1 Conflicts between Funders and the Potential Client	261
	7.1.3.2 Conflict between Funders and Lawyers	261
	7.1.3.3 Conflicts between Funders and Counterparties	263
	7.1.3.4 Conflicts between Funders and Dispute Resolution	
	Professionals	264
	7.2 Dealing with a Funded Proceeding	265
	7.2.1 Disclosure and Court (or Other Authority's) Control	266
	7.2.1.1 In Consumer Claims	266
	7.2.1.2 In Corporate Claims	268
	7.2.2 Conflicts in the Pursuit of the Claim	276
	7.2.2.1 Conflicts in the Control of the Dispute	277
	7.2.2.2 Conflicts Related to Settlements	279
	7.2.2.3 Conflicts Related to the Withdrawal of Funding	281
	7.2.3 Recovery of TPF Costs, Liability for Costs, and Funders'	
	Capital Adequacy	282
	7.3 Concluding Remarks: Addressing a Market Failure and	
	a Procedural Problem	288
8	Regulation of TPF and Other Policy Issues	290
	8.1 Does TPF Need Regulation? If Yes, What Regulation?	290
	8.1.1 Sector-Specific Regulation	292
	8.1.1.1 TPF Regulation	293
	8.1.1.2 Third Party Funders' Regulation	297
	8.2 Other Regulation or Policy Measures Having an Impact on TPF	299



Bibliography

Index

Cambridge University Press 978-1-108-70314-7 — Third Party Funding Gian Marco Solas Table of Contents More Information

xii	Contents	
	8.2.1 Court and Other Controls on TPF	300
	8.2.2 Commercial Arbitration's Regulation on TPF	303
	8.2.3 Investment Arbitration Regulation on TPF	307
	8.2.4 Lawyers' Regulation on TPF	310
	8.3 Public Funding for Private Litigation, Private Funding for Public	
	Litigation, and Other Policy Measures	311
	8.4 Concluding Remarks: TPF and the Future of the	
	Litigation Market	316
9	Conclusions	319

327

347