The Development of Third-Party Funding and Opposing Interests Between Funders and Funded Parties in International Arbitration – A Story of New Opportunities and Challenges

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Vienna, 16 June 2025

Yulianna Huk

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Abstract

This thesis examines opposing interests[2] between funders and funded parties in third-party funding (TPF) arrangements within the international arbitration context. TPF has evolved from a prohibited practice to a multi-billion-dollar industry that provides access to justice while creating systematic power imbalances between commercial funders and dispute parties.

Firstly, the thesis provides an analysis of TPF by examining its historical development, the key stakeholders involved in funding relationships, and the commercial criteria that determine what makes cases “fundable”. This foundation reveals how TPF's market-driven evolution has established commercial logic that does not always align with justice objectives.

Secondly, the analysis identifies three main types of opposing interests that emerge naturally from TPF's commercial structure: strategic and economic tensions arising from conflicting profit and business objectives, settlement dynamics where funder and funded party interests diverge over resolution approaches, and lawyer-client relationship complications that disrupt traditional professional obligations. The thesis also examines contractual mechanisms used to manage these tensions and analyzes regulatory frameworks across major jurisdictions.

The research reveals that current regulatory responses focus primarily on disclosure requirements rather than substantive mechanisms to address opposing interests. While some jurisdictions have developed specific protections, these remain fragmented rather than comprehensive. However, major jurisdictions have begun examining TPF more closely and acknowledging opposing interests, as evidenced by the European Union's comprehensive

[2] In the literature, this phenomenon is variously referred to as “conflicting interests”, “ethical concerns”, or “conflicts of interest” between funder and funded party. However, to avoid confusion with traditional legal conflicts of interest doctrines, this thesis employs the term “opposing interests”.

mapping report on TPF and recent United States legislative developments including new federal laws and congressional committee investigations.

The thesis concludes that opposing interests are structural features of TPF that require management rather than elimination. As the industry matures, these tensions will likely intensify unless balanced regulatory frameworks emerge that preserve TPF's benefits for both funders and funded parties.

Introduction

"*Whether you are a supporter of TPF - believing that it promotes access to justice, or a detractor - believing that it encourages frivolous claims, one thing is clear: TPF is here to stay*".

Tung et al. (2019). S.J.D. Jone Fellas

I. Relevance of the topic

The way people pay for legal battles is changing. Investment strategies and financial engineering have taken root across the arbitration field in the form of TPF (TPF). TPF is defined as an arrangement on a non-recourse basis where an entity with no prior interest in the dispute provides financial support to a party in exchange for a share of the potential proceeds.[3] [4] By its mere definition, one can clearly observe that TPF generates better opportunities for accessing justice for funded parties while simultaneously creating attractive investment returns for funders.

Looking at the numbers, according to the "Study on Mapping Third Party Litigation Funding in the European Union" (request for services JUST/2023/PR/JCOO/CIVI/0016): "In 2019, it was estimated that the European TPLF market size represented approximately 0.8% of the total revenue of the legal services market. This translates to approximately EUR 1 billion from (EU) Member States. This portion is projected to rise in line with the global growth of TPLF, leading to approximately EUR 0.6 billion of additional market revenue in the EU by 2025".[5] In the global context, the litigation funding investment market is experiencing even more substantial growth, suggesting that the market will grow from approximately USD 16 billion in 2024 to

[3] Beibei Zhang, Third Party Funding for Dispute Resolution: A Comparative Study of England, Hong Kong, Singapore, the Netherlands, and Mainland China (Springer Nature 2021) pt Preface.
[4] ICC Institute of World Business Law Meeting, International Chamber of Commerce and ICC Institute of World Business Law, TPF in International Arbitration (2013) ch 7, p. 78.
[5] "Study on Mapping Third Party Litigation Funding in the European Union (Request for Services JUST/2023/PR/JCOO/CIVI/0016) in the Context of the Framework Contract N° JUST/2020/PR/03/0001" (2025) 40 <Third-Party Litigation Funding (TPLF) - European Commission>.

USD 60 billion by 2037, with an annual growth rate of 11.1%.[6] There are several factors explaining such growth: i) the rising volume of legal disputes worldwide, ii) an increasing number of institutional funders entering the market, and iii) improvements in regulation in terms of transparency across jurisdictions including North America, Europe, and Asia Pacific.[7] Considering financial parameters of TPF, most funded claims range from €5-9 million to nearly €300 million,[8] with funders typically receiving between 20% to 30% of any awarded amount.[9] Thus, the popularity of TPF continues to grow, particularly in high-value disputes and in cases where traditional funding may be insufficient and/or unavailable.

But is the TPF arrangement truly a win-win situation for everyone involved? This question frames entire analysis of this thesis, offering to look beyond the surface benefits of TPF and examine the underlying power dynamics at play – the opposing interests of funder and funded party.

While TPF offers undeniable benefits in terms of access to justice, it creates complex tensions between funders and funded parties. A fundamental disagreement exists regarding the level of control funders exercise over proceedings.[10] Most stakeholders outside the funding industry consider that funders do exert significant control over legal proceedings, while most of the funders themselves largely deny this assertion.[11] However, even among funders, some of them acknowledge exercising some form of control, particularly regarding settlement consent, lawyer(s)/arbitrator(s) selection, strategy decisions on proceedings etc.[12] This mismatch between what funders claim and what others, especially funded parties, observe in practice

[6] "$60 Billion Litigation Funding Investment Market Outlook, 2037" GlobeNewswire (October 11, 2024) <https://www.globenewswire.com/news-release/2024/10/11/2961875/0/en/60-Billion-Litigation-Funding-Investment-Market-Outlook-2037-Includes-Strategic-Analysis-of-Burford-Capital-Omni-Bridgeway-Therium-Group-GLS-Capital-Validity-Finance-Parabellum-Cap.html>
[7] Ibid.
[8] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 212.
[9] Ibid., p. 490.
[10] Zhang (n 3) s 2.3.3.2.
[11] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 12.
[12] Ibid., p. 12.

shows the existence of power imbalance between main TPF players. Subsequently, this power imbalance creates opposing interests that leave the funded party vulnerable and, in some instances, disadvantaged, even though both sides are supposed to be working toward the same goal.

On the other hand, it should be acknowledged that funders, despite often having more control and as a consequence power, assume considerable financial risk within TPF arrangements. These entities commit substantial financial resources, potentially losing everything if the case does not succeed.[13] This allows cases to move forward that might otherwise never "see their day before arbitration tribunals".[14] Bearing in mind the financial risk involved on the part of funders, it helps explain why funders seek to maintain a certain level of control over case proceedings. Therefore, a balanced examination must consider both sides: the vulnerable position of funded parties and funders' legitimate need to protect their considerable financial stake. While both parties of TPF share the same goal of case success, their different perspectives on how to achieve this outcome naturally create opposing interests.

Within the TPF industry, opposing interests are partially managed through funding agreements between the parties,[15] but these private arrangements do not always fully address the underlying power dynamics/imbalance. The regulatory response, both at national and regional levels, to these issues and generally regarding other TPF aspects remains fragmented and underdeveloped.[16]

[13] Mohamed F Sweify, Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal (Edward Elgar Publishing 2023) pp. 187–188.
[14] Zhang (n 3), s 1.1
[15] Can Eken, TPF in Investment Arbitration: A New Player in the System (Springer Nature 2024), p. 39.
[16] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 45.

However, does the TPF industry truly require formal regulation if it has functioned and developed more or less organically even before specific regulatory frameworks were ever implemented?

Views on the need for regulation vary among stakeholder groups. The "Study on Mapping Third Party Litigation Funding in the European Union" (request for services JUST/2023/PR/JCOO/CIVI/0016) shows that nearly 60% of stakeholders favor formal oversight, with judges, arbitrators, academics, and businesses strongly supporting regulation, while funders form the main opposition.[17] The funding industry representatives argues that "over-regulation could significantly stifle or even shut down the market".[18] Is regulation invariably as harmful to funders as they claim? There are definitely reasonable grounds for funders' resistance, for instance, potential increased operational costs, limitations on creative funding structures, and competitive disadvantages in cross-border disputes.[19] However, balanced and uniform regulation might actually strengthen market confidence by providing protections for funded parties while not sacrificing the innovation that has made TPF so valuable nowadays.

"The industry has a long way to go. Many challenges - and many opportunities - lie ahead".[20] TPF in international arbitration continues to grow, taking into account the following facts: i) for one interviewed funder, approximately 30% of their total funded cases were arbitration cases;[21] ii) the demand for TPF is much higher than what institutions can provide - for every case that gets funded, about ten (or more) cases are considered but are turned away;[22] iii) more claimants

[17] Study on Mapping Third Party Litigation Funding in the European Union (n 5), pp. 14-15. "The last part of the consultation concerned stakeholder opinions regarding the need for regulation of TPLF at national or EU level. 29% of respondents answered 'yes, at EU level', 25% answered 'yes, both' (EU and national level), 4% answered 'yes, at national level', bringing the total share of respondents who see a need for regulation to 58%. In contrast, 29% of respondents saw no need for regulation and the rest did not know or did not answer."
[18] Ibid., p.494.
[19] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 282.
[20] ICC Institute of World Business Law Meeting, Commerce and Law, (n 4), p. 19.
[21] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 517.
[22] ICC Institute of World Business Law Meeting, Commerce and Law, (n 4), p. 26.

learn about TPF and choose it for its advantages;[23] iv) even companies with substantial financial resources often opt to use TPF in order to allocate more resources to the business development instead.[24]

As shown, TPF becomes more widely used in international arbitration; therefore, addressing opposing interests becomes critical for ensuring the system's integrity while maintaining its benefits for all players. Thus, aim of this thesis is to contribute to the dialogue about opposing interests within TPF arrangements by: identifying the primary sources of tension between funders and funded parties as well as examining how these conflicts are currently managed through contractual and regulatory mechanisms.

II. Research methodology

The research methodology combines legal analysis with real-world observation to examine the opposing interests between funders and funded parties in TPF within international arbitration. Given the lack of academic literature specifically addressing opposing interests within TPF relationships, and because the TPF industry is still emerging, this methodology connects legal frameworks and soft law instruments with actual practice through interviews with industry professionals.

The main component of this research is based on analysis of legal sources that govern TPF in major jurisdictions and international arbitration specifically. This includes examining primary national laws from jurisdictions such as the European Union, Australia, the England and Wales, and the United States, with particular attention to rules that address funder-funded party relationships. The analysis also covers arbitration rules that have incorporated TPF provisions, as well as soft law documents.

[23] Ibid.
[24] Eken (n 15), pp. 25, 162.

To ensure the research remains connected to practical realities, this thesis includes interviews with four industry professionals. These interviews targeted both funders and legal practitioners with experience in TPF arrangements. The interview questions explored participants' direct experiences with managing opposing interests between TPF players, their assessment of current industry practices, and their views on potential regulatory solutions. All interviews followed proper ethical guidelines, including obtaining informed consent and protecting confidentiality.

It is acknowledged that interview data might be influenced by participants' professional interests and could introduce certain biases. Therefore, critical analysis of all data sources was maintained.

As part of the thesis research, the Nivalion Legal Finance Summit held in Frankfurt in May 2025 was attended, which brought together leading stakeholders from the TPF industry, including major funders, arbitrators, and corporate counsel. The summit's sessions on regulatory developments, practical aspects of working with funders, and panel discussions with major industry players provided an opportunity to observe whether these tensions are actually acknowledged within the industry and how they are being addressed in practice.

The research process integrates findings from these different approaches, comparing interview data with legal frameworks, and analyzing both consistencies and differences between regulatory approaches and actual industry practice.

III. The roadmap of the thesis

This thesis will firstly provide an overview of TPF arrangements by examining their historical emergence and evolution before focusing on the core issue of opposing interests.

Chapter 1 begins with the historical development, showing how TPF evolved from being prohibited under maintenance and champerty doctrines to becoming an accepted commercial practice. The chapter then analyzes how TPF specifically developed within international arbitration, identifies the key stakeholders in funding relationships (funders, funded parties, legal counsel and others), and examines what makes funders view a case as “fundable”. This groundwork is essential because understanding how TPF functions helps explain why opposing interests naturally arise between funders and funded parties.

Chapter 2 addresses the central research question by examining where exactly and why these opposing interests actually occur in practice. The chapter analyzes three key areas where opposing interests most commonly emerge: strategic and economic tensions (where funders seek to protect their investment through various oversight mechanisms), settlement dynamics (where funders' profit objectives may conflict with clients' broader interests in dispute resolution), and lawyer-client relationship tensions (where the traditional attorney-client relationship becomes complicated by funder involvement). Each section examines both the funder's legitimate business concerns and the funded party's position, as well as contractual mechanisms used to manage these tensions. The chapter then reviews the current legal frameworks across major jurisdictions (EU, Australia, England and Wales, and the United States) - chosen as they are leading arbitration seats where TPF regulations directly impact international arbitration practice - to understand what regulatory approaches exist to manage these tensions and whether they adequately address the opposing interests identified in practice.

Chapter 1: The Nature of TPF in International Arbitration

Nowadays, TPF is not just a niche anymore, but rather a way that current international arbitration disputes are structured and approached. Furthermore, it does not only mirror risk management efforts of business entities, but also crafts a strategy for resource allocation that allows companies to focus on their company's core activities.

As a private funding mechanism driven by the commercial interests of funders, TPF introduces different complexities into international arbitration. One example is "the perceived or actual conflict of interest arising from the relationship between the funder and the funded party",[25] which this thesis mainly focuses on. Before moving to more specific aspects of opposing interests between funder and funded party, it is important to understand TPF's fundamental nature and core elements for proper context - including not only its basic definition but also its historical development, the key stakeholders alongside their roles, and what makes a case "fundable".

Therefore, this chapter provides an analysis of TPF's fundamental nature by examining three key aspects. First, it explores the definition and historical development of TPF, tracing its evolution from being a mostly prohibited practice to its widespread usage in the market. Second, it describes the roles and relationships of key stakeholders in the funding relationship, including funders, funded parties, legal representatives, and others. Finally, it analyzes what constitutes a "fundable" case.

After establishing a foundation for understanding how TPF functions, broader questions about opposing interests between funder and funded party will be addressed in subsequent Chapter 2.

[25] Zhang (n 3) s preface.

1.1 Definition and Historical Development in Common and Civil Law Jurisdictions

Starting straight with the definition, TPF refers to a specific type of investment where an entity with no prior interest (at least de jure) in the dispute provides funding to a party in litigation or arbitration on a non-recourse basis, in exchange for a share of the potential proceeds.[26] It serves as an important threshold for differentiating TPF from other funding methods such as traditional loans, insurance, claim assignment, or legal aid, establishing it as a separate financing tool in the dispute resolution area.[27] The "no prior interest" and "non-recourse basis" elements distinguish it from loans (which require repayment regardless of outcome) and insurance (which covers costs without profit sharing). The "share of potential proceeds" criterion separates it from legal aid or claim assignments.

Moving to the historical development - is it not compelling that TPF has transitioned from a prohibited and/or controversial tool to a sought-after mechanism in business and beyond? Indeed, it is the case - TPF has evolved from a prohibited practice rooted in doctrines of maintenance[28] and champerty[29] [30] [31] to become an increasingly sought-after tool across the entire field of international arbitration, with a market that generates billions in revenue. Furthermore, even traditionally conservative jurisdictions are now embracing its use; for instance, Singapore and Hong Kong recently passed legislation permitting TPF in arbitration.[32]

[26] Zhang (n 3) s preface.
[27] Ibid.
[28] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 507.: Maintenance "[is] directed against those who, for improper motive, often described as wanton or officious intermeddling, become involved with disputes of others in which the maintainer has no interest whatsoever, and where the assistance he or she renders to the other parties is without justification or excuse. [It involves] improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse".
[29] Ibid: Champerty "[is] maintenance to which there must be added the notion of a division of the spoils. It is an egregious or aggravated form of maintenance, in which there is the added element that the maintainer stipulates for a share of the proceeds".
[30] Ibid, p. 507.
[31] Eken (n 15), p. 57.
[32] Ibid, pp. 3, 30.

The doctrines of maintenance and champerty have their origins in the United Kingdom,[33] which is the "mother country" for these legal concepts. Both concepts were used as a safeguard against corruption and the exploitation of those who could not afford legal proceedings.[34] These roots have influenced how TPF was viewed and regulated in common law jurisdictions. At the same time, when looking at civil law jurisdictions, they are generally free from the historical constraints of maintenance and champerty doctrines, although with some exceptions,[35] and their focus is primarily on professional attorney ethics rules and claim ownership restrictions.

The birthplace in terms of jurisdiction of TPF is Australia.[36] That occurred in the 1990s, and it has since spread globally.[37] What began as a limited exception to allow funding in insolvency and bankruptcy cases in Australia,[38] has step by step evolved into a funding solution for various types of disputes. Logically, when TPF's benefits became obvious in bankruptcy and insolvency contexts, the artificial barriers preventing its use in other commercial disputes proved to be difficult to justify. The transition was indeed not immediate - initially, Australian courts prohibited TPF under the Australian Courts Act. However, after a series of progressive legal reforms, beginning with i) the New South Wales Law Reform Commission's recommendation to abolish champerty laws in 1967 and culminating in ii) the Maintenance, Champerty and Barratry Abolition Act of 1993,[39] Australia opened the door for TPF. Furthermore, as is typical in common law jurisdictions like Australia, case law played an important role in establishing TPF as well - in 2006, with the Campbells v. Fostif decision,[40] the Australian High Court formally gave clear approval for TPF in legal claims. The Court noted that traditional views of that time are needed to be updated, stating

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33 Sweify (n 13), p.44.
34 Ibid, p.41.
35 Eken (n 15), p. 30.
36 Sweify (n 13), p.45.
37 European Law Institute, "Principles Governing the Third Party Funding of Litigation" (European Law Institute 2024)https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf, p.13.
38 Sweify (n 13), p.45.
39 Ibid, p.46.
40 Ibid, p.46.

that "*to lawyers raised in the era before such multiple claims, representative actions and litigation funding, such fees and conditions may seem unconventional or horrible. However, when compared with the conditions approved by experienced judges in knowledgeable courts in comparable circumstances, they are not at all unusual*".[41] The acknowledgment by a judge who serves as a lawmaker in Australia that what once governed legal practice had now become not just inadequate, but counterproductive to achieving justice was an important step. This allowed this state to be a pioneer in TPF. Nowadays, Australia stands as one of the most developed TPF jurisdictions globally,[42] even with publicly listed TPF companies on the Australian Stock Exchange, for example - Omni Bridgeway Limited (ASX: OBL).[43] [44]

The early development in Australia has influenced other major legal markets in common law jurisdictions, particularly the United Kingdom, Canada, and the United States.

The fact that common law jurisdictions were ready to overturn centuries-old doctrines like champerty and maintenance with regard to TPF suggests that the practical needs for dispute resolution access had reached a critical level by the 1990s. Additionally, that this transformation occurred quite quickly - in roughly two decades, proves once again the demand for access to justice in a business context. While it might seem unnecessary to delve deeply into the historical background of TPF, as it may not appear directly relevant to understanding the aspect of opposing interests between funder and funded party, this is not accurate. It is important to note that although legal doctrines such as champerty and maintenance are no longer a barrier to TPF, they continue to serve a new function by providing grounds to prohibit excessive profiteering and obviously unfair fee arrangements, thereby protecting funded parties. That was initially the actual role of champerty and maintenance.

[41] Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd [2006] HCA 41, 229 ALR 58, 229 CLR 386 para 120. Legal database - View: Cases: Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd - (30 August 2006)
[42] Eken (n 15), p. 26.
[43] Ibid, p. 46.
[44] "OBL Share Price and Company Information for ASX:OBL" <https://www.asx.com.au/markets/company/obl>

How could one complete the TPF development story without addressing civil law jurisdictions? In contrast to common law jurisdictions, civil law jurisdictions did not have direct equivalents to them.[45] At the same time, civil law jurisdictions were not completely free of barriers - for example, the "Quota Litis Pact"[46] in Roman-Dutch law aimed to prevent attorneys and advocates from speculating in litigation.[47] While TPF does not trigger exactly the same as concerns as quota litis (since the funder is not the lawyer, at least in most current situations),[48] the core concerns about speculation in litigation outcomes are similar. Therefore, some civil law jurisdictions at first approached TPF cautiously. A particular example: France illustrates this careful approach through the old "Quota Litis Pact" rule that was designed to prevent lawyers from gambling on court cases. French courts eventually found a middle ground, allowing more flexibility for international arbitration while keeping tighter rules for domestic cases.[49] Germany took a different route by focusing on who actually owns the legal claim.[50] Although, as will be shown later, funders sometimes are pulling the strings behind the scenes. The Netherlands demonstrates how attorney ethics influence TPF development, as the Dutch Code of Conduct for Lawyers prohibits contingency fees[51] despite having no specific statutory TPF regulation.[52] Therefore, despite being free from champerty and maintenance restrictions, civil law jurisdictions still considered questions about the appropriate role of commercial interests in dispute resolution outcomes.

[45] Eken (n 15), p. 170.
[46] RechtEasy.At, "Quota Litis - RechtEasy.at (Erklärung Österreich)" (RechtEasy.at | Finden Sie Die Richtigen Anwälte, Rechtsfragen & Erklärungen, November 30, 2024) https://www.rechteasy.at/wiki/quota-litis/:"when a lawyer agrees with the client on shares of a claim as a fee".
[47] Eken (n 15), p. 170.
[48] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 405.
[49] ICC Institute of World Business Law Meeting, Commerce and Law, (n 4), ch 6, p. 72.
[50] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 2 "The Various Forms of TPF in International Arbitration", p. 7, 12.
[51] Study on Mapping Third Party Litigation Funding in the European Union (n 5), pp. 58, 358, 364.
[52] Zhang (n 3) s 5.1.

Common law systems were mainly trapped by their own history and were looking for a way to begin developing modern TPF frameworks. Meanwhile, civil law jurisdictions enjoyed more freedom in terms of historical baggage, which allowed them to approach TPF as a purely commercial and ethical question rather than a historical one.

Perhaps one of the most interesting observations is that both legal systems arrived at the same destination through different routes. Common law countries address concerns about excessive profiteering and unfair arrangements that can overly control the funded party - the same concerns that civil law systems addressed from the beginning through their focus on professional ethics and claim ownership constraints.[53] [54] Regardless of historical starting points, the core tensions in TPF are between access to justice and commercialization of disputes, as well as fear of potential abuses on the part of the funder, which remain equally important in both legal families.

It would be difficult to move on without understanding the more recent application of TPF and its importance in today's realities.

Take the 2008 financial crisis - it fundamentally changed how businesses think about legal funding. Suddenly, financial institutions that had never considered TPF began viewing it as an attractive investment opportunity with potentially high returns, while companies facing cash crunches discovered they could pursue legitimate claims without exhausting the remnants of their budgets.[55] The crisis helped the business world recognize TPF as more than just a funding mechanism, but rather way of strategic resource allocation.

[53] Zhang (n 3) s 5.3.3.2.
[54] Lisa Bench Nieuwveld and Victoria Shanon, TPF in International Arbitration (Kluwer Law International 2012), p.39.
[55] Tereza Ševčíková, "Investment Arbitration Reform: TPF in Investment Arbitration" (2022) COFOLA International 2022. Current Challenges of Resolution of International (Cross-Border) Disputes <https://doi.org/10.5817/cz.muni.p280-0231-2022-8>, p. 209.

Then came COVID-19, and TPF's importance reached a new peak. Companies that had never imagined needing external funding found themselves cash-strapped but still holding potentially valuable legal claims.[56] In particular, small and medium-sized enterprises benefited, as TPF enabled them to access justice that would otherwise have been financially out of reach.

What makes this particularly compelling is how even financially stable companies began using TPF - not because they could not afford dispute resolution processes, but because they recognized the value of risk-sharing and resource management during uncertain times.[57]

Putting it all together, TPF has proven itself as three distinct tools: a crisis-driven business survival mechanism, an optimal resource allocation strategy, and a justice access enabler, especially for SMEs. Each of these applications creates different dynamics between funders and funded parties, which becomes crucial when examining their opposing interests.

Perhaps when TPF is used as an optimal resource allocation tool by financially stable companies, it creates “the healthiest” relationship between funder and funded party since both parties enter the arrangement from positions of strength and strategic choice rather than desperation. The funded party has alternatives and leverage, while the funder deals with a sophisticated counterpart who understands the commercial implications and outcomes of each step. However, the other applications of TPF should be kept in mind as they involve more vulnerable funded parties who may have less bargaining power and fewer alternatives, potentially creating more complex and problematic dynamics.

[56] Dr. Dean Lewis, “Jurisdiction Guide to Third Party Funding in International Arbitration” (Pinsent Masons, 2021) <https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration> accessed May 7, 2025.

[57] Crina Baltag and Mark Feldman, Reforming Arbitration Reform: Emerging Voices, New Strategies and Evolving Values (Kluwer Law International BV 2025), p. 50.

1.2 Development of TPF in International Arbitration

Considering that this thesis focuses on TPF in international arbitration, its development in this specific field deserves to be mentioned. The TPF story in international arbitration begins relatively recently, though it is difficult to determine precisely when the first cases were funded as disclosure requirements were not adopted by arbitral institutions for some time.[58] The first publicly known funded case in investment arbitration appeared in 2007, followed quickly by the first Stockholm Chamber of Commerce funded case the same year and the first Permanent Court of Arbitration funded case in 2011.[59] What happened next? By 2013, approximately two-thirds of investment arbitration cases involved claimants seeking funding from major funders.[60] The high costs in investment arbitration - with average expenses approaching USD 10 million, made TPF particularly attractive,[61] since it helped level the playing field between individual investors and well-resourced states. On the other hand, investment cases present higher risks due to their complexity, longer duration, and substantial costs compared to other types of claims.

The practice gained particular traction in Anglo-Saxon countries,[62] while continental European jurisdictions initially viewed it with suspicion. The industry increasingly developed after 2010[63] when professional funders entered the market and companies began understanding that

After almost a decade of TPF operating in a regulatory vacuum, the legal community clearly saw TPF's growing importance when major arbitration institutions around the world started updating their rules, in particular to deal with TPF. It was like a domino effect that began early with SIAC and CIETAC introducing TPF provisions in their 2017 investment arbitration rules,

[58] Eken (n 15), p. 31.
[59] Ibid.
[60] Ibid.
[61] Ibid., p. 1.
[62] ICC Institute of World Business Law Meeting, Commerce and Law, (n 4), back cover.
[63] Ibid., ch 3, p.35.

followed by Hong Kong's HKIAC in 2018, then BAC in 2019, and CAM in 2020. It was picked up with the major 2021 ICC Rules and Vienna's VIAC rules, followed by ICSID's comprehensive 2022 amendments to its Arbitration Rules introducing Rule 14 for mandatory funder disclosure, and most recently Singapore's SIAC updating to mandatory disclosure in January 2025.[64] [65] While some rules require only simple disclosure of funder presence and identity, others go further by granting tribunals the power to order disclosure of TPF arrangements themselves. Rule 14 of the Arbitration Rules falls into this latter category.[66] Crucially, under Rule 14 funding agreement itself remains confidential unless tribunals exercise powers to order "further information regarding the funding agreement". When multiple major arbitration centers formally recognize TPF, it demonstrates that it had become an accepted part of how international disputes are structured. The development continues today, focusing on increasing transparency requirements and addressing potential conflicts of interest.

This institutional response was paralleled by developments at the bilateral treaty level, where states began incorporating TPF provisions into their investment agreements. Recent bilateral initiatives have taken two approaches - some treaties adopt a prohibition of TPF, such as the Argentina-United Arab Emirates BIT (Art. 24),[67] while others emphasize mandatory disclosure requirements, as seen in the Australia-Indonesia CEPA (Art.14.32),[68] the EU-Singapore FTA

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[64] Alberto Favro, "New ICSID Arbitration Rules: A Further Step in The Regulation of TPF" (Kluwer Arbitration Blog, 2022) <https://arbitrationblog.kluwerarbitration.com/2022/06/03/new-icsid-arbitration-rules-a-further-step-in-the-regulation-of-third-party-funding/> accessed May 10, 2025.

[65] Klaus Oblin and Lucija Daolio, "Disclosing Dollars, TPF In Arbitration" (Mondaq, 2025) <https://www.mondaq.com/austria/arbitration-dispute-resolution/1601166/disclosing-dollars-third-party-funding-in-arbitration> accessed May 10, 2025.

[66] ICSID, "ICSID CONVENTION, REGULATIONS AND RULES" <https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf>

[67] Jus Mundi, "Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates (2018)" <https://jusmundi.com/en/document/treaty/en-agreement-for-the-reciprocal-promotion-and-protection-of-investments-between-the-argentine-republic-and-the-united-arab-emirates-argentina-united-arab-emirates-bit-monday-16th-april-2018?pdf=true>.

[68] Jus Mundi, "Australia-Indonesia Comprehensive Economic Partnership Agreement (2019)" <https://jusmundi.com/en/document/treaty/en-indonesia-australia-comprehensive-economic-partnership-

(Art. 3.8),[69] and the EU-Canada CETA (Art. 8.26).[70] [71] This treaty-level engagement showcases that TPF regulation extends to broader policy considerations in international investment law.

TPF's journey in international arbitration was quick and smooth - just six years from one of the first known funded cases in 2007 to two-thirds of investment arbitration claimants seeking funding by 2013. It shows that the legal and business communities needed TPF as a solution, but it also meant regulation was always playing catch-up. After years of operating in a legal gray area, various issues indeed bubbled up to the surface; one of them is the opposing interests between funder and funded party that will be examined in the following chapter. While TPF helps solve the massive cost problem in arbitration, it simultaneously turned legal disputes into investment commodities, which causes subsequent issues. Furthermore, the whole development was driven by market forces rather than legal principles. In essence, while the TPF system is shaped by commercial logic rather than justice ideals, it is up to funded parties to decide how and what to use TPF arrangements for.

1.3 Key Stakeholders in the Funding Relationship

The TPF ecosystem involves several key actors whose relationships and interactions frame how funding arrangements operate in practice. The main stakeholders include litigation funders who provide the capital, funded parties seeking financial support for various reasons, legal counsel who represent funded parties and interface with funders, arbitrators who manage

agreement-2019-indonesia-australia-comprehensive-economic-partnership-agreement-2019-monday-4th-march-2019>.

[69] Jus Mundi, "Free Trade Agreement between the European Union and the Republic of Singapore (2018)" <https://jusmundi.com/en/document/treaty/en-eu-singapore-comprehensive-free-trade-agreement-eu-singapore-fta>.

[70] Jus Mundi, "Comprehensive Economic and Trade Agreement between Canada and the European Union (2016)" <https://jusmundi.com/en/document/treaty/en-comprehensive-trade-and-economic-agreement-between-canada-and-the-european-union-canada-eu-ceta-2016-sunday-30th-october-2016>.

[71] Bourgeois Arnaud, "TPF" (Jus Mundi, 2024) <https://jusmundi.com/en/document/publication/en-third-party-funding> accessed June 4, 2025.

proceedings, arbitral institutions that establish procedural frameworks, insurance providers offering risk coverage, brokers who facilitate funding arrangements, and regulatory bodies that oversee the industry. Understanding how these stakeholders interact and what influences their decisions is crucial before examining the tensions and opposing interests that emerge between funders and funded parties.

At the center of any funding arrangement stands the funder. Nowadays, funders operate as commercial enterprises that approach legal disputes through investment lens, conducting thorough financial analysis before committing any resources.[72] These organizations range from specialized litigation finance firms to established financial institutions, insurance companies, and law firms that have expanded their practices into direct funding.[73] What distinguishes contemporary funders is their systematic approach to risk evaluation, typically requiring success probabilities of at least 60-70% for the case before committing capital and expecting substantial returns on their investments.[74] This showcases how funding operates, transitioning from its original focus on providing access to justice toward serving broader business and investment objectives.

On the other side of TPF arrangements, there is the funded party, which represents perhaps the most diverse stakeholder group. While TPF initially emerged to assist financially constrained clients, today's funded parties include mid-sized companies pursuing claims against larger

[72] "Third-Party Litigation Financing: Market Characteristics, Data, and Trends" (U.S. GAO) <https://www.gao.gov/products/gao-23-105210>
[73] "Third Party Funding in International Arbitration" (Ashurst, 2022) https://www.ashurst.com/en/insights/quickguide-third-party-funding-in-international-arbitration/ accessed May 2, 2025.
[74] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 213.

competitors, and large-scale commercial entities looking to optimize their financial strategies by transferring dispute resolution risk to others.[75] [76]

It might seem that the list of stakeholders ends with funders and funded parties; this is not quite the case, as other participants including legal counsel, arbitrators, arbitral institutions, brokers, and insurance providers also play important roles in shaping TPF arrangements.

Legal counsel has a complex role, acting as the main point of contact between clients and funders while managing professional duties that can sometimes conflict. Most clients depend on their lawyers for advice about funding opportunities, making legal advisors' key gatekeepers in the process.[77] However, lawyers must balance their primary obligation to clients with the realities of funder involvement, as regular communication and consultation with funders naturally influences case development. In order to maintain ethical boundaries, it is advisable that counsel providing guidance on funding arrangements be independent from those representing the client in the dispute, since the latter usually receive compensation from the funder and may face conflicting interests when evaluating the funding agreement itself.[78]

Arbitrators and tribunals have taken on new responsibilities as TPF has grown in international dispute resolution. These decision-makers now handle challenges including overseeing disclosure requirements, spotting potential conflicts of interest, and maintaining procedural fairness when funding arrangements may not be obvious to all parties.[79] At the same time, oversight is generally limited, as usually only the fact of funding and the identity of the funder are disclosed, while the specific terms and conditions of funding contracts remain confidential.

[75] Sweify (n 13), p. 14.
[76] ICC Institute of World Business Law Meeting, Commerce and Law, (n 4), p. 35.
[77] Zhang (n 3) s 6.3.3.1.
[78] Eken (n 15), p. 180.
[79] Nieuwveld and Sahannon (n 54), p. 26.

Therefore, TPF functions through a complex network of interactions where multiple parties have legitimate but often opposing interests. The success of funding arrangements depends not only on the commercial terms between funders and funded parties, but also on how effectively all stakeholders manage their respective roles within a framework of professional, commercial, and ethical obligations. It also important when considering the tensions that can arise within funding relationships, as each stakeholder group may pursue objectives that, while individually reasonable and legitimate, can sometimes oppose to the goals or obligations of other participants of TPF.

1.4 What Makes Case "Fundable"

Not all legal disputes are created equal in the eyes of funders. While claimants see a prospect of justice and defendants see problems, funders see spreadsheets, risk assessments, and potential returns on investment. This section will examine which specific elements funders analyze to turn a risky legal gamble into an attractive investment opportunity in their minds.

Understanding what makes a case attractive to funders is crucial before diving into opposing interests between funders and funded parties, since these very same criteria that determine fundability often become the source of tension when funder commercial interests clash with their clients' legal objectives. For instance, a funder that invested in cases with strong settlement potential might advocate for early resolution to ensure capital recovery, while the funded party might prefer to continue the dispute resolution process.

When funders evaluate a potential case, they are essentially using a commercial filter that considers several key elements: the financial value of the claim, the probability of success, the duration and associated costs, the defendant's ability to pay, and the quality of the legal team and evidence.[80] Together, these elements frame what funders call as a "fundable" case.

The most fundamental barrier to funding is case value. Funders typically establish minimum claim thresholds that immediately exclude a vast number of disputes from consideration. This threshold ranges from USD 1 million to USD 14 million,[81] with many preferring cases worth USD 50-99 million or more.[82] This creates what can be described as an access hierarchy where smaller disputes, regardless of their legal merit, face systematic exclusion from the funding ecosystem.

Indeed, it is not only the value of the claim itself that plays a main role. Funders apply an investment-to-claim ratio that reveals their profit expectations. This ratio ranges from 1:5 to 1:10, meaning every dollar invested must generate five to ten dollars in potential returns.[83] Some funders require even more favorable ratios.[84] Thus, only well-capitalized parties can afford TPF, despite its theoretical purpose of democratizing access to justice.

This financial screening works with what funders commonly call the "70% rule"[85] - their requirement for minimum success probabilities. Under TPF logic, legal uncertainty must be quantified and minimized.

Moving forward, the emphasis on documentary evidence over potential discovery perfectly illustrates this risk-averse approach.[86] Funders prefer cases where outcomes can be predicted

[80] "Third Party Funding in International Arbitration" (Ashurst, 2022). https://www.ashurst.com/en/insights/quickguide-third-party-funding-in-international-arbitration/ accessed May 2, 2025.
[81] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 701.
[82] Ibid, p. 648.
[83] Ibid. p. 464.
[84] Ibid, p. 12.
[85] ICC Institute of World Business Law Meeting, Commerce and Law, (n 4), p. 154.
[86] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 2 "The Various Forms of TPF in International Arbitration", p. 4.

with near-certainty based on existing evidence, rather than cases that might develop strength through the legal process itself. The numbers reveal just how selective this process is: funders typically accept only 10% of applications, with some reporting even lower acceptance rates.[87]

Time adds another layer to this commercial calculation. Cases expected to exceed 2.5 years often face automatic rejection, as funders prefer quicker returns on their investment.[88] These time calculations differ significantly between commercial and investment arbitration contexts. However, it is a fact that funders usually prefer commercial arbitration cases since they move faster due to being less complex compared to investment disputes, and the risk that awards will not be enforced is considerably lower.[89] Investment arbitration cases, with their sovereign immunity complications and enforcement challenges against states, present both longer timelines and greater collection risks that many funders find unattractive.

Another key aspect that is always evaluated is "recovery prospects" - defendants' ability to satisfy potential outcomes. Funders conduct thorough analyses of respondents' financial health, asset locations, and enforcement prospects across different jurisdictions.[90] They prefer cases against defendants with substantial, easily accessible assets in enforcement-friendly jurisdictions.[91] Therefore, disputes involving well-capitalized defendants are more likely to receive funding, while claims against parties with limited resources or complex jurisdictional challenges may be declined, regardless of the underlying legal merits of the case.

Beyond that, funders employ due diligence processes that examine multiple layers of risk assessment. Specialists analyze everything from audited financial statements to expert reports

[87] Ibid, pp. 4, 5.
[88] Valentina Frignati, "Ethical Implications of TPF in International Arbitration" (2016) Volume 32 Arbitration International https://doi.org/10.1093/arbint/aiw011, p. 509.
[89] Eken (n 15), p. 146.
[90] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 2 "The Various Forms of TPF in International Arbitration", p. 4.
[91] Ibid.

on potential damages.[92] This analysis extends even to behavioral considerations, including whether defendants are likely to "fight to the bitter end" or favor settlement negotiations, incorporating these psychological factors into their overall risk calculations.[93] Thus, legal disputes are assessed primarily as investment opportunities rather than being judged solely on their legal merits.

Bringing it all together, cases are evaluated as investment products with measurable risk-return profiles.

What might emerge from this analysis is potentially a paradox. The very criteria that make cases "fundable" often indicate that funding may not be necessary in the first place.[94] High-value disputes with strong evidence, favorable jurisdictions, and well-capitalized defendants are precisely the types of cases that commercial parties might pursue regardless of funding availability. Meanwhile, smaller claims, uncertain cases, and disputes involving less privileged parties may face systematic exclusion from this funding ecosystem.

In conclusion, fundability criteria become particularly important when we consider how they shape the relationship between funders and funded parties. The same commercial logic that determines whether a case receives funding continues to influence how that case is managed once funding is secured. This creates the foundation for the opposing interests that define much of the TPF landscape - that will be explored in the next chapter.

Conclusion to Chapter 1

This chapter has laid the groundwork for understanding TPF by examining how it evolved from a banned, or at least controversial, practice to a commercial industry that nowadays influences

[92] Ibid.
[93] Report of the ICCA-Queen Mary Task Force on TPF in International Arbitration (2018), p. 73.
[94] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 3 "Litigation Funding in International Arbitration", p. 4.

international dispute resolution. The historical analysis reveals how both common and civil legal systems overcame barriers to develop TPF, driven primarily by market forces rather than legal principles.

It is equally important to understand the stakeholder network within TPF that involves multiple parties with different goals that go beyond simple agreements between funders and clients. This becomes even more complex when examining what makes cases “fundable”, as it reveals an important contradiction: the business criteria that decide whether cases get funding continue to shape approaches to managing cases once funding is secured. High-value claims with good chances of winning receive funding, while smaller or riskier cases are often rejected, creating a system where commercial logic rather than legal merit increasingly determines access to dispute resolution.

With this foundation in place, an examination of opposing interests becomes possible. These opposing interests are not accidental outcomes but natural consequences of how TPF has developed and operates in practice.

Chapter 2: Opposing Interests Between Funder and Funded Party in TPF Arrangements

As TPF has gained acceptance across jurisdictions, the question has shifted from whether to allow TPF to how to regulate it effectively. The apparent win-win nature of TPF arrangements masks a more complex reality of opposing interests and power dynamics.

The commercial nature of TPF arrangements means that funders often seek to exercise various forms of control over the proceedings,[95] whether through explicit contractual provisions or more subtle forms of influence.[96] This control can manifest in multiple ways - from veto rights over settlements to budget constraints on legal strategy.[97] Meanwhile, funded parties must navigate these challenges while trying to maintain genuine control over their claims.[98]

These tensions are not merely theoretical but have practical implications for case management, settlement decisions, and the attorney-client relationship.[99] Importantly, the vulnerability in TPF arrangements does not flow in just one direction. While funded parties may find themselves disadvantaged by power imbalances, circumstances can also arise where funders require protection from opportunistic behavior or contractual breaches by funded parties. As will be demonstrated through case law analysis in subsequent subchapters, the reality of opposing interests is more nuanced than simple funder dominance.

This chapter examines the most common ways in which the interests of funders and funded parties can diverge, focusing primarily on strategic and economic interests, settlement dynamics, and lawyer-client relationship tensions. We will look at the causes of these opposing interests and their practical manifestations, as well as how they might potentially be resolved

[95] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 3 “Litigation Funding in International Arbitration”, p. 8.
[96] Sweify (n 13), p 86.
[97] Ibid, p.5.
[98] Study on Mapping Third Party Litigation Funding in the European Union (n 5), pp. 154, 341.
[99] Ibid.

through contractual mechanisms within funding agreements. After that part, the chapter concludes by examining regulatory approaches in the European Union, Australia, England and Wales, and the United States to determine whether any specific norms exist to regulate opposing interests in TPF arrangements.

2.1 Strategic and Economic Tensions

Unlike opposing interests that arise at specific moments, strategic and economic tensions in TPF are a continuous challenge that exists throughout the entire funded relationship. These tensions begin when potential funded parties apply for TPF during exclusivity periods when applicants cannot approach other funders,[100] then develop during the active dispute resolution process, and continue even during distribution of proceeds when parties assess whether things have actually gone as planned or not.[101] The reason for that is very simple - funders' profit-maximization goals are systematically opposed to funded parties' broader interests, for instance: business relationship preservation, reputational protection, long-term strategic advantage, and so forth - that extend far beyond immediate monetary recovery.

At the same time, this should not be seen as criticism of funders ultimately acting improperly. Quite the contrary, these tensions naturally arise when both parties are acting in good faith within their roles. Funders, operating as financial institutions with fiduciary duties to their own investors, are structurally obligated to pursue maximum returns, diversify risk across portfolios, and plan when to invest and get returns.[102] [103] Their good faith efforts to fulfill these obligations naturally lead them to favor strategies that maximize monetary recovery within the shortest timeframes.[104] Changing focus on funded parties, they act in good faith toward their

[100] Information obtained through confidential interview with third-party litigation funder.
[101] Information obtained through confidential interview with third-party litigation lawyer.
[102] Eken (no 15), p.136.
[103] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 3 "Litigation Funding in International Arbitration", p. 14.
[104] Zhang (n 3) s 6.5.2.

own stakeholders and thus they must consider factors beyond immediate financial gain. In arbitration, that is particularly relevant - investment arbitration claimants may prioritize future host state relationships over maximum recovery, while commercial arbitration parties often try to preserve business partnerships above aggressive litigation tactics that funders might prefer. The tension arises not from improper conduct, but from the very design of the funding relationship itself. While abuse and opportunistic behavior occur, opposing interests between funders and clients are natural.[105]

One of the best ways to understand these tensions in practice is through examining the contractual architecture that creates them. Among the most common and telling examples are waterfall provisions, which establish the priority order for distributing settlement proceeds or awards between parties involved in TPF arrangements.[106] Just like water flows from the top of a waterfall to the bottom, payments in a waterfall provision flow in a hierarchical order. To illustrate this concept, that is helpful to examine the typical priority structure of waterfall provisions to see precisely where opposing interests emerge. A typical waterfall provision establishes four (sometimes three) distinct priority levels: first, recovery of the funder's dispute resolution costs and expenses; second, repayment of the funder's initial investment; third, the funder's profit or return (often calculated as a multiple of investment or percentage of recovery); and finally, distribution of any remaining proceeds to the funded party.[107] This means that in case of settlement, what the funded party considers adequate (covering their actual losses) may fall short of the funder's profit threshold, creating systematic disagreement.[108] For instance, in a USD10 million settlement, the waterfall might allocate USD

[105] Sweify (n 13), p 102.
[106] Study on Mapping Third Party Litigation Funding in the European Union (n 5), pp. 97, 336, 493, 650.
[107] Ibid.
[108] "Demystifying Legal Finance – A Practical View into Working with Third-Party Funders" (Nivalion Legal Finance Summit 2025, Frankfurt, 22-23 May 2025).

2 million to cover litigation expenses, USD 3 million to repay the funder's initial investment, USD 2 million as the funder's profit, leaving only USD 3 million for the funded party.

At first glance, the waterfall provisions might appear to belong to settlement dynamics rather than strategic and economic tensions. However, this is not the case. These provisions create ongoing opposing interests that affect the entire relationship, not merely settlement negotiations. Different payout levels influence every major decision during dispute resolution process - how much to spend on experts, whether to pursue aggressive discovery, which dispute resolution strategy to choose. Unlike settlement dynamics that focus on negotiation processes, waterfall provisions create continuous disagreements about how to run the case. Subsequently, the funded party may want to limit expenses knowing they only get paid last, while the funder's appetite for aggressive strategies is shaped by their need to reach target returns.

On top of that, these tensions are further evident by so-called Material Adverse Change (MAC) clauses that grant funders the right to withdraw funding when cases develop unfavorably.[109] [110] These clauses can be triggered by various circumstances: court's ruling against key arguments or discovery revealing damaging evidence; changes in case viability, including when the probability of success drops below agreed thresholds or when defendants become insolvent, affecting recovery prospects; and also, such as changes in national law.[111] [112] [113]This leaves funded parties in a position where they may lose financial support mid-way through dispute resolution process.

[109] Financial Poise, "Commercial Litigation Funding: A Guide for Plaintiffs & Commercial Litigators Seeking Funding in the United States" (Financial Poise, January 15, 2025) <https://www.financialpoise.com/commercial-litigation-funding-a-guide-for-plaintiffs-commercial-litigators-seeking-funding-in-the-united-states/>
[110] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 414, 467.
[111] Ibid.
[112] Information obtained through confidential interview with third-party litigation funder.
[113] European Law Institute, "Principles Governing the Third Party Funding of Litigation" (European Law Institute 2024)https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf, p.53.

In essence, what appears as partnership toward same goal from one angle may reveal itself as systematic tension from another when the conditions are right. The well-designed TPF contracts are thus needed to minimize these potential tensions.

2.1.1 Contractual Mechanisms for Balancing Strategic and Economic Interests

Having established that funders and funded parties naturally have opposing interests, this section explores how well-crafted contractual provisions can help to balance these tensions. The goal is not to completely eliminate tensions - that is impossible given how TPF arrangements work - but rather to create TPF agreements that recognize both parties' legitimate needs while keeping the funding relationship workable.

Starting with the waterfall provisions discussed above, nowadays more sophisticated funding agreements have waterfall mechanisms that adjust distribution priorities based on case developments or achievement of certain case targets.[114] Comparing with traditional fixed waterfalls that follow the same hierarchy regardless of circumstances, adaptive ones modify the distribution formula in response to specific "triggers". These adjustments typically depend on criteria such as case duration, recovery size, or procedural milestones.[115] For instance, a funder might accept lower return multiples for cases that resolve quickly while requiring higher returns for extended litigation that holds capital longer. Similarly, the distribution percentage might change based on whether the recovery exceeds certain thresholds. To illustrate it even more clear, that is worth looking at one of the provisions from the funding agreement between BioCardia, Inc., and BSLF, LLC.[116] Provision 1 in Exhibit B provides for an investment return formula based on actual funding plus the greater of 50% of remaining litigation proceeds up to

[114] Information obtained through confidential interview with third-party litigation funder.
[115] Information obtained through confidential interview with third-party litigation funder.
[116] "This Litigation Funding Agreement between BioCardia, Inc., ('Litigant') and BSLF, LLC ('Funder')" (US SEC Government) <https://www.sec.gov/Archives/edgar/data/925741/000143774920007637/ex_181285.htm> accessed June 4, 2025.

3x the actual funding, or 30% of remaining litigation proceeds. This choice between percentage and multiple creates adjustment based on case outcome size. From the mathematical point of view, in very large recoveries, the 30% option gives the funder more money than the 3x cap would allow, while in smaller recoveries - 3x multiple is better. Although the mechanism automatically selects whichever option is greater for the funder, it provides funded parties with more predictable outcome.

These adaptive mechanisms are not only tied to recovery value but can also be tied to case duration. [117]

Some might view these mechanisms as giving funders too much of control since the funded party will have to evaluate their next moves based on what is stated in the waterfall provisions. However, as long as the provisions are clearly stated in the funding agreement and transparent, with the funded party fully understanding what they are agreeing to, such structures remain acceptable. Parties can discuss their preferred strategies during negotiations and build adaptive waterfall provisions accordingly, allowing them to construct agreements that reflect their mutual expectations about case duration, risk tolerance, and strategic priorities.

Moving on, funding agreements also address the MAC clause tensions mentioned earlier through fair termination procedures. The termination decisions should be based on objective criteria rather than subjective funder views. Leading funders use "extraordinary circumstances" standards with specific examples.[118] This means funders cannot simply decide they do not like how a case is going - they need concrete legal reasons, such as a court dismissing key claims or discovery of evidence that fundamentally undermines the case.

[117] Information obtained through confidential interview with third-party litigation funder.
[118] Information obtained through confidential interview with third-party litigation funder.

Industry standards also require advance notice before termination.[119] During this notice period, both sides must consult in good faith about the situation.[120] However, unlike in commercial contracts, funded parties usually are not able to "cure" legal outcomes because court rulings and discovered evidence usually cannot be undone. The goal is to allow funded parties have time to seek alternative funding or adjust their strategy. Additionally, some funding agreements also include dispute resolution clauses that require expert determination to resolve disagreements about termination decisions, preventing funders from making unilateral decisions.[121]

Indeed, the contractual mechanisms discussed here are only the two most common approaches to balancing opposing interests - there are many others. However, following conclusion can be made: TPF arrangements work best when both sides acknowledge their different interests upfront and build structures that consider the real-world uncertainties. Given that the TPF industry is quite small, reputation matters a lot, which explains why funders are more eager to develop adaptive mechanisms that respond to how cases actually unfold rather than using "one-size-fits-all" arrangements.[122] Being seen as inflexible or unfair can quickly damage a funder's ability to attract cases.[123] These reputational interests push the industry toward more balanced contractual solutions.

2.2 Settlement Dynamics

Funders' involvement can both encourage and discourage settlement, depending on the specific terms of the funding agreement and the stage of proceedings.[124] On one side, a funded party

[119] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 527.
[120] Information obtained through confidential interview with third-party litigation lawyer.
[121] Information obtained through confidential interview with third-party litigation funder.
[122] Eken (no. 15), pp. 137, 138.
[123] Information obtained through confidential interview with third-party litigation funder.
[124] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 3 "Litigation Funding in International Arbitration", pp. 7, 8.

having a deep-pocketed funder might be less eager to settle, while the opposing party in the dispute, knowing about the funding, might be more motivated to settle early.[125]

The timing of settlement can also impact the funder's returns, as many agreements include structure that can create natural incentives for early settlement (for example: 35% of award for funder if it settles in year 2, 40% - in year 3), as funded parties may seek to minimize the funder's share of the recovery.[126] Some funders even explicitly encourage settlement through their fee structures, offering discounts for early resolution.[127] [128]At the same time while the funded party might have various reasons for wanting to settle, including business relationships or reputational concerns, the funder's interest is purely financial.[129]

Industry practitioners interviewed for this thesis also noted that information asymmetry creates additional tension in settlement negotiations, as funders' limited case knowledge (despite thorough due diligence) affects their ability to evaluate settlement offers. This makes regular reporting requirements crucial for bridging information gaps between the parties.[130]

It might also be the case that funders may exercise significant control over settlement decisions to protect their investments. The Burford v. Sysco case demonstrates how funders themselves can become vulnerable to behavior by funded parties that undermines the funding arrangement.

The dispute arose from Burford's financing of Sysco's litigation against food suppliers, where the initial funding agreement contained prohibitions against Sysco assigning away its claims. However, Sysco breached this fundamental term by entering into unauthorized side deals that transferred some of its claims to third parties, i.e. reducing the pool of assets from which Burford could expect recovery.[131] This violation caused a renegotiation of their relationship,

[125] Ibid.
[126] Eken (n 15), p. 121.
[127] Ibid.
[128] Report of the ICCA-Queen Mary Task Force on TPF in International Arbitration (2018), p. 26.
[129] Eken (n 15), p. 9.
[130] Eken (n 15), p. 140.
[131] Baltag and Feldman (n 57), p. 55.

with Burford securing both a larger economic stake in the remaining unassigned claims and explicit veto power over future settlements as compensation for the anticipated proceeds it had lost in past. The subsequent agreement required that Sysco "shall not accept a settlement offer without [Burford's] prior written consent, which shall not be unreasonably withheld"[132] [133]- a classic example of funder control over settlement decisions. This provision emerged directly from Sysco's earlier misconduct. Even with these new contractual protections in place, the relationship continued to deteriorate as settlement negotiations with food suppliers proceeded.[134]

Burford's allegations were that Sysco undervalued settlement offers and structured deals to minimize the funder's recovery. Despite having contractual veto rights, Burford initiated arbitration proceedings to prevent what it viewed as prejudicial settlements, while Sysco was trying to block those arbitration proceedings and launching a public relations campaign characterizing Burford as abusively forcing continued litigation.[135]

The irony of the situation became apparent when Burford emphasized that its original funding agreements typically did not include settlement veto powers, and that such control had only become necessary due to Sysco's breach of the initial arrangement.[136] This all reveals how funder control over settlements often emerges as a defensive response to funded party misconduct. The resolution of that case was Sysco's assignment of all claims to a Burford entity.[137]

[132] Ibid.
[133] Kuznia, R. (2025, June 3). Litigation Financier's battle against Sysco provides food for thought. DarrowEverett LLP. https://darroweverett.com/sysco-vs-burford-litigation-financing-case-analysis/
[134] Baltag and Feldman (n 57), p. 55.
[135] Ibid.
[136] Baltag and Feldman (n 57), p. 55.
[137] Ibid.

Thus, this case illustrates that while funders may indeed exercise substantial control over settlement decisions, such control often reflects their attempts to protect themselves against funded party opportunism.

2.2.1 Contractual Mechanisms for Balancing Interests

Modern funding agreements often include dispute resolution mechanisms specifically for settlement disagreements, such as binding expert determination,[138] expedited mediation, or even arbitration.[139] This helps preserving the commercial relationship between funder and funded party.[140] Some agreements also include provisions requiring consultation and good faith negotiations before any settlement decisions are made.[141]

Funding agreements typically address settlement in details, often including specific provisions about the consequences of accepting or rejecting settlement offers.[142] For example, some agreements stipulate that if the funded party wants to continue despite a reasonable settlement offer, they must reimburse the funder as if the settlement had been accepted.[143] Conversely, if the funder wants to continue but the funded party prefers to settle, similar provisions may apply.[144]

Industry practitioners interviewed for this thesis pointed to several other contractual mechanisms that exist to address settlement tensions. One of them involves threshold-based control systems, where funders exercise different levels of authority depending on settlement amounts: below a predetermined minimum threshold, the funder has the right to terminate the

138 Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 2 “The Various Forms of TPF in International Arbitration”, p. 9.
139 Information obtained through confidential interview with third-party litigation funder.
140 Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 2 “The Various Forms of TPF in International Arbitration”, p. 9.
141 Ibid.
142 Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 2 “The Various Forms of TPF in International Arbitration”, p. 11.
143 Ibid.
144 Ibid.

TPF agreement if a settlement is accepted by the funded party; above this threshold, various options may apply, such as requiring the funded party to consult with the funder, mandating mutual agreement, or granting the funded party more autonomy.[145] [146]In case of disagreement, where mutual agreement is mandated, determined dispute resolution mechanism will apply.

It appears that threshold-based systems with, for instance, expedited mediation in case of disagreement is the most balanced approach, as parties can agree on mutually acceptable thresholds while negotiating the TPF arrangements. At the same time, expedited mediation offers a cost-effective way to resolve disagreements. This allows parties to have a certain level of predictability regarding their next steps and options for potentially acceptable solutions.

Portfolio funding arrangements[147] that is quite popular in international arbitration are also used as a mechanism for reducing settlement-related tensions. As noted by one experienced practitioner, when funders operate capital across multiple disputes for the same party, they can afford to be "more lenient" on individual case settlements since risks are diversified across the entire portfolio. This approach allows funders to prioritize the overall relationship and long-term returns rather than maximizing recovery on individual case, though it also has disadvantages described in next subchapter.[148] [149]

Additionally, some funding agreements have provisions for appointing independent third-party lawyers to provide neutral assessments of settlement options when disputes arise. While this can be costly, it offers an objective evaluation about whether a particular settlement offer is

[145] Information obtained through confidential interview with third-party litigation lawyer.
[146] Sweify (n 13), p 98.
[147] Report of the ICCA-Queen Mary Task Force on TPF in International Arbitration (2018), p. 38 "Portfolio arrangement can be structured in many way there are two major types of arrangements: (1) finance structured around a law firm, or department within a law firm, where the claim holders may be various clients of the firm; or (2) finance structured around a corporate claim holder or other entity, which is likely to be involved in multiple legal disputes over a relatively short period of time."
[148] Ibid.
[149] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 650.

reasonable. However, interviewed practitioners note that this mechanism may be ineffective if either party to decides not to cooperate.[150]

In general, the success of any particular mechanism depends on the parties' willingness to negotiate realistic thresholds and maintain good faith cooperation during the funding relationship.

2.3 Lawyer-Client Relationship Tensions

The TPF also creates tensions in the traditional lawyer-client relationship, challenging both the legal representation and professional obligations. Charles Kaplan even described the tensions between lawyer, funder, and funded party as a *ménage à trois*.[151]

A fundamental concern exists regarding the lawyer's independence and impartiality. When lawyers know their fees will be paid by funders, they may be incentivized to the make case look better during initial assessments to secure funding and additional business.[152] This situation becomes even more complex in cases of repeat business between lawyers and funders.[153] Tensions also arise over lawyer selection, as this creates particular challenges when lawyers already represent clients who then seek funding, since funded parties are unlikely to accept changing their legal counsel to accommodate funder preferences.[154] The problem is even bigger when lawyers receive commissions for referring clients to specific funders.[155] This issue becomes particularly pronounced in portfolio funding arrangements, where funders may also

[150] Information obtained through confidential interview with third-party litigation lawyer.
[151] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 3 "Litigation Funding in International Arbitration", p. 8.
[152] Ibid.
[153] Ibid.
[154] Information obtained through confidential interview with third-party litigation lawyer.
[155] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 3 "Litigation Funding in International Arbitration", p. 8.

provide financing to law firms themselves, creating multiple layers of financial relationships that can compromise lawyer independence.[156]

What about legal fees under TPF arrangements? The structure of legal fees under funding arrangements creates additional complications for lawyer independence. When funders cap legal fees, lawyers may lack proper incentives to advocate for their clients, potentially making them more likely to side with funders. [157]

Moreover, while lawyers are professionally obligated to act in their clients' (funded party) best interests, funders may seek to influence strategic decisions to protect their investment.[158] This can create situations where lawyers find themselves caught between their professional duties and the practical reality of funder influence.[159] For instance, when funders and clients disagree about settlement terms or strategic decisions, lawyers may be forced into the role of informal mediators.[160] [161]

Some jurisdictions now require lawyers to inform clients about funding options and provide advice about associated benefits and risks.[162] Moreover, jurisdictions such as Hong Kong and Singapore prohibit lawyers from having financial interests in TPF arrangements, with Singapore also prohibiting referral fees.[163]

In conclusion, the main challenge for the legal profession is to craft frameworks that preserve professional obligations while accommodating the commercial realities TPF arrangements.

[156] Information obtained through confidential interview with third-party litigation lawyer.
[157] Information obtained through confidential interview with third-party litigation lawyer.
[158] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 3 “Litigation Funding in International Arbitration”, p. 9.
[159] Ibid.
[160] Ibid.
[161] Study on Mapping Third Party Litigation Funding in the European Union (n 5), p. 614.
[162] Jonas Von Goeler, TPF in International Arbitration and Its Impact on Procedure (2016) ch 3 “Litigation Funding in International Arbitration”, p. 9.
[163] Zhang (n 3) ss 3.2.1.4, 4.4.3.

2.3.1 Contractual Mechanisms for Balancing Interests

Managing the relationship between two parties is challenging enough, but when it involves three - the lawyer, the funded party, and the funder - it becomes even more complicated.

As one experienced lawyer representing funded parties noted, the three parties should work together transparently with a clear understanding that lawyers must prioritize their ethical obligations to the client above any obligations owed to the funder.

The most important aspect of managing these relationships involves proper lawyer compensation structures. Interviewed TPF practitioners suggest that lawyers should be partially invested in case outcomes through success fees or bonuses to maintain proper alignment with client interests rather than funder wishes. They consider that this addresses a problem where capped legal fees without performance incentives may cause lawyers to lack motivation for advocacy for a funded party, potentially making them more likely to side with funders in conflicts. However, this approach can also create additional problems. First, some jurisdictions prohibit contingency fees and outcome-based compensation for lawyers, making such arrangements legally impermissible. [164] Second, when lawyers have financial stakes in outcomes, they may be incentivized to pursue unnecessarily aggressive or prolonged litigation strategies to maximize recovery, potentially against the client's broader business interests. Third, lawyers' financial interests in maximizing recovery may conflict with clients' preferences for early settlement or risk-averse strategies, basically replacing one type of misalignment with another.

Some of the interviewed practitioners recommend incorporating dispute resolution mechanisms specifically for professional conflicts that may arise between ethical duties of

[164] European Law Institute, "Principles Governing the Third Party Funding of Litigation" (European Law Institute 2024)https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf, p.71.

lawyer and funder expectations. At the same time, unlike settlement dynamics and strategic and economic tensions where conflicts can be balanced primarily through contractual provisions, lawyer-client relationship tensions also require regulatory oversight. Professional conduct rules and bar regulations should play a main role in managing these tensions by establishing ethical boundaries and prohibiting certain behaviors that could compromise lawyer independence.

The lawyer-client relationship tensions in TPF represent perhaps the most complex aspect of managing opposing interests. Unlike purely commercial disputes between funders and funded parties, these tensions involve also questions of professional ethics and legal practice that cannot be resolved through contractual mechanisms alone.

2.4 The Legal Landscape of TPF: Emerging Frameworks for Managing Competing Interests

This subchapter examines the regulatory approaches to TPF focusing on managing opposing interests between funders and funded parties across four key jurisdictions: the European Union, Australia, England and Wales, and the United States. These jurisdictions were selected because they represent some of the world's most developed economies with the most advanced TPF markets and regulatory frameworks. While this thesis focuses on international arbitration, the examination of national regulatory frameworks remains relevant because national TPF regulations often apply to international arbitration proceedings, either through the law of the arbitral seat governing procedural matters or through other connecting factors.

2.4.1 European Union

The European Union's approach to regulating third-party litigation funding might be described as “from regulatory vacuum to modest and largely theoretical safeguard efforts”.

The regulatory story in EU begins with Directive (EU) 2020/1828 in 2020,[165] which introduced the first EU-wide provisions addressing TPF through Article 10 prohibiting funding that would "divert the representative action away from the protection of the collective interests of consumers" and barring actions "against a defendant that is a competitor of the funding provider".

While focused on consumer collective actions, this directive acknowledged that TPF arrangements might create opposing interests. Building on these concerns, MEP Axel Voss prepared what became known as the "Voss Report" - formally titled "Report with recommendations to the Commission on Responsible private funding of litigation" - which was issued on 17 June 2021 and amended on 25 July 2022.[166] This report expanded the regulatory scope beyond consumer law to include "any voluntary arbitration procedure" and proposed comprehensive EU-wide regulation of TPF.

The European Parliament then adopted this report as a resolution on 13 September 2022, formally requesting the European Commission to propose legislation based on Voss's recommendations. The resolution and its annexed draft directive represent the Parliament's official position calling for harmonized EU regulation of TPF across all types of legal proceedings, including arbitration.

The Voss Report, however, generated criticism from arbitration practitioners and industry participants. [167] The requirement for "complete and unredacted" disclosure of funding agreements was seen as potentially undermining the commercial confidentiality essential to

[165] Consolidated text: Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance): EUR-Lex - 02020L1828-20241213 - EN - EUR-Lex
[166] REPORT with recommendations to the Commission on Responsible private funding of litigation | A9-0218/2022 | European Parliament
[167] Baltag and Feldman (n 57), p. 56.

arbitration.[168] Moreover, such disclosure fails to recognize the competitive nature of the already developed TPF market, where funders compete by crafting sophisticated funding mechanisms tailored to specific client needs. Secondly, the proposed 40% cap on funder returns have strong opposition,[169] with critics arguing it constituted interference that could "relocate" finders to other jurisdictions. This has special weight in arbitration, where parties can select seats based on regulatory attractiveness.

The EU Commission's subsequent decision was to conduct a comprehensive mapping study, that was performed and published on 21 March 2025.[170] It shows acknowledgment of these concerns and the need for practice-oriented regulation, which is indeed a good sign. This study identified key opposing interests including settlement control conflicts, control over proceedings where funders seek influence over strategic decisions, and lawyer-client relationship tensions. To address these conflicts, the study proposed professional independence safeguards to prevent funders from holding law firm ownership, settlement control mechanisms requiring independent assessment, and additional safeguards such as mandatory codes of conduct for funders.[171]

Additionally, the EU Parliament's 2022 resolution on responsible private funding of litigation aims to address opposing interests mainly through the fiduciary duty requirement.[172] It stipulates that "third-party funders should be bound by a fiduciary duty of care requiring them to act in the best interests of a claimant," which is particularly relevant in arbitration where

[168] Alberto Favro, "European Parliament Resolution on TPF: A Step Too Far? - Kluwer Arbitration Blog" (Kluwer Arbitration Blog, January 30, 2023) <https://arbitrationblog.kluwerarbitration.com/2023/02/16/european-parliament-resolution-on-third-party-funding-a-step-too-far/>
[169] Favro (n 112).
[170] "Third-Party Litigation Funding (TPLF)" (European Commission) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/third-party-litigation-funding-tplf_en>
[171] Study on Mapping Third Party Litigation Funding in the European Union (n 5), pp. 52, 54, 213, 284, 174, 416.
[172] "Document Summary | Legislative Observatory | European Parliament" (European Union, 2025 - Source: European Parliament) <https://oeil.secure.europarl.europa.eu/oeil/en/document-summary?id=1716196>

funders often possess better procedural expertise.[173] The prohibition states that “funders cannot have undue control over the legal proceedings they fun” since “such control over the legal proceedings must be the responsibility of the claimant and their legal representatives”,[174] allowing funded party to have autonomy, though the control boundary remains hardly defined.

While TPF previously operated without specific safeguards to address the tension between funders' profit motives and clients' justice needs, the EU has finally recognized the need for regulation. The 2022 Voss Report, despite facing criticism, showed an attempt to grapple.

Furthermore, the Commission's decision to conduct mapping research before creating any final directive or regulation shows commitment to understanding real-world practice rather than imposing theoretical frameworks. The future success of TPF regulation will depend on whether this groundwork translates into workable rules that can in particular manage opposing interests without undermining the legitimate benefits that TPF can provide to both funders and funded parties.

2.4.2 Australia

The regulatory story begins with the High Court's landmark 2006 decision in Campbells Cash and Carry Pty Ltd v Fostif Pty Limited, which legitimized TPF by ruling it was “not an abuse of process or contrary to public policy”. Yet this judicial approval did not leave TPF in an unregulated grey zone - nowadays, TPF regulatory framework administered by multiple authorities including the Australian Securities and Investments Commission (ASIC) and overseen by Australian courts.[175] [176]

[173] “Document Summary | Legislative Observatory | European Parliament” (European Union, 2025 - Source: European Parliament) <https://oeil.secure.europarl.europa.eu/oeil/en/document-summary?id=1716196>
[174] Ibid.
[175] Luff, D., & Geisker, J. (2021, November 22). In review: third party litigation funding in Australia. Lexology. https://www.lexology.com/library/detail.aspx?g=027a73ce-ed6e-47b4-a241-60918e945f2d
[176] Al-Daraji, W. (n.d.). Third party funding regulation in Australia. International Bar Association. https://www.ibanet.org/article/b2482aae-ea07-4a8f-ab7a-6dd6eec4cbc3

ASIC, Australia's corporate regulator, oversees TPF through the Corporations Act 2001. Additionally, ASIC developed Regulatory Guide 248, which sets out the requirements for funders to maintain arrangements for addressing potential, actual or perceived conflicts of interest and opposing interests, including disclosure obligations to funded parties, and requirements that any settlement before proceedings commence must receive counsel approval.[177]

Notably, for arbitration specifically, funding agreements generally need not be disclosed to opposing parties or tribunals, reflecting the private nature of arbitration proceedings.[178]

Generally, Australia's regulatory approach to TPF acknowledges the potential for opposing interests between funders and funded parties, but precise mechanisms to manage them in practice. While ASIC's Regulatory Guide 248 establishes some protections - such as requiring counsel approval for pre-proceedings settlements, these is only partial management rather than a comprehensive mechanism.

Furthermore, the distinction between these forums - where TPF disclosure is increasingly required in courts but generally not in arbitration - creates regulatory inconsistency that could incentivize forum shopping.

2.4.3 England and Wales

The way England and Wales regulates third-party litigation funding developed quite differently from other jurisdictions. Rather than imposing strict government regulation, England chose a more flexible approach through industry self-regulation. This led to the creation of the Code of

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[177] Ibid
[178] Bajaj, G., Yang, & Chan. (n.d.). TPF in the Asia-Pacific region. Global Arbitration Review. https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/third-party-funding-in-the-asia-pacific-region

Conduct for Litigation Funders in November 2011 (updated in 2018),[179] along with the Association of Litigation Funders of England and Wales (ALF).[180]

The Code advises to manage these opposing interests in several practical ways. First, it protects the independence of legal professionals by preventing funders from interfering with lawyers' professional duties or trying to take control of legal strategy. This addresses a real concern that funders, with their financial expertise and significant stake in the outcome, might be tempted to override legal judgment in ways that could harm the client's interests. The Code makes clear that while funders can provide valuable input, they cannot compromise the lawyer-client relationship or professional standards.

Settlement decisions are perhaps the most obvious area where interests can diverge. The Code requires funding agreements to be transparent about the funder's role in settlement discussions. More importantly, when disputes arise between funders and clients about settlements or other major decisions, the Code establishes an independent resolution process using Queen's Counsel - senior barristers who can provide expert, neutral judgment that both parties must accept.

The Code also prevents funders from using their financial power inappropriately by limiting when they can withdraw from cases. While funders can terminate agreements if a case loses merit, becomes commercially unviable, or if the client seriously breaches the agreement, they cannot simply walk away when it suits them. When funders do terminate agreements, they must still pay for costs they have already committed to cover.

However, the Code's approach has limitations inherent in any self-regulatory system. The Code does not provide detailed guidance for situations where funder and client interests diverge on

[179] "CODE OF CONDUCT for LITIGATION FUNDERS" (The Association of Litigation Funders of England & Wales, 2018) <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>
[180] Dr. Dean Lewis. (2024, September 13). Jurisdiction guide to third party funding in international arbitration. Pinsent Masons. https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration#Australia

litigation strategy beyond settlement and termination issues. Since enforcement relies primarily on industry compliance and reputation rather than legal sanctions, questions remain about how effectively these protections work when serious conflicts actually arise.

Future binding regulation could build on the Code's framework by incorporating adding enforcement powers, expanding coverage to address emerging conflict scenarios, and providing clearer guidance on substantive issues that the Code leaves undefined.

2.4.4 United States

The United States lacks a federal regulatory framework for third-party litigation funding.[181] That has created a system where regulation occurs through different approaches in each of the states. Additionally, arbitration specific - the Federal Arbitration Act remains silent on TPF matters.

Multiple states have proposed different TPF disclosure legislation. Federal courts have created inconsistent disclosure requirements through local orders due to gaps in Federal Rules.[182]

This regulatory gap puts a lot of pressure on individual attorneys, who are the ones courts see and hold responsible for cases and potentially managing opposing interests. When attorneys sign funding agreements that might give funders some control over litigation, they risk facing sanctions if things go wrong, often without clear guidance about what boundaries are acceptable.

[181] Winston & Strawn, "Product Liability & Mass Torts Digest" (Winston & Strawn - Third-Party Litigation Financing Under the Spotlight: Judicial Conference Subcommittee Formed to Explore Disclosure Rules) <https://www.winston.com/en/blogs-and-podcasts/product-liability-and-mass-torts-digest/third-party-litigation-financing-under-the-spotlight-judicial-conference-subcommittee-formed-to-explore-disclosure-rules>

[182] "Litigation Funding 2025 - USA | Global Practice Guides | Chambers and Partners" <https://practiceguides.chambers.com/practice-guides/litigation-funding-2025/usa/trends-and-developments>

Recognition of these regulatory gaps prompted federal action in October 2024. After a decade of considering whether and how to regulate litigation finance, the US Judicial Conference's Advisory Committee on Civil Rules agreed to create a subcommittee to examine whether nationwide disclosure rules are necessary.[183] Additionally, the pending Litigation Transparency Act of 2025 (H.R. 1109), reintroduced by Representatives Darrell Issa and Scott Fitzgerald in February 2025, would establish mandatory federal disclosure requirements for all civil litigation, including arbitration as it covers "any civil action".[184] The bill requires disclosure within 10 days of filing or executing funding agreements and would apply to any party with contingent payment rights, with exceptions for standard attorney fee arrangements and low-interest loans.

National security concerns might seem unrelated to the traditional concept of opposing interests,[185] but they are equally compelling because foreign funders may prioritize geopolitical objectives over client "welfare".

Concluding, the federal regulation will likely take a few more years to implement since the U.S. Judicial Conference's Advisory Committee on Civil Rules only recently created a special subcommittee in October 2024 to examine whether nationwide disclosure rules are necessary. Currently, the main emphasis remains on attorney ethics and making lawyers responsible for managing and preserving control on the side of the funded party.

[183] Raymond N, "US Judicial Panel to Examine Litigation Finance Disclosure" Reuters (October 10, 2024) <https://www.reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10/>

[184] "Text - H.R.1109 - 119th Congress (2025-2026): Litigation Transparency Act of 2025" (Congress.gov | Library of Congress) <https://www.congress.gov/bill/119th-congress/house-bill/1109/text/ih>

[185] "ISSA Introduces Discussion Draft of Legislation Reforming Third-Party Financed Civil Litigation | Representative Darrell Issa" (Representative Darrell Issa, July 29, 2024) <https://issa.house.gov/media/press-releases/issa-introduces-discussion-draft-legislation-reforming-third-party-financed>

Based on current legislative trends, including the pending Litigation Transparency Act of 2025 that would require disclosure within 10 days of filing or executing funding agreements, it appears that if federal regulation does emerge, it will be mostly focused on disclosure requirements of funding agreements rather than more comprehensive restrictions.

Conclusion to Chapter 2

The opposing interests in TPF are not merely theoretical concerns but fundamental elements that emerge naturally from how these arrangements work, requiring contractual management and in some cases - particularly with lawyer-client relationship tensions - regulatory intervention because professional ethics cannot be governed by private contracts alone.

A clear pattern emerges across all three types of tensions: they intensify as control shifts away from funded parties toward funders. Strategic and economic tensions are the most pervasive, appearing continuously rather than just at specific moments. The waterfall provisions and Material Adverse Change clauses examined show how funders' need to maximize profits systematically oppose to funded parties' broader concerns, such as preserving business relationships. What makes these tensions particularly challenging is that they cannot be eliminated completely, only managed through adaptive mechanisms and transparent contractual frameworks that acknowledge both parties have different interests from the start.

The commercial conflicts become most visible during settlement negotiations, where they turn into immediate financial decisions with real consequences. The Burford v. Sysco case illustrates this perfectly: what began as routine funding arrangements deteriorated into litigation when control mechanisms were triggered. Settlement dynamics reveal that the closer a case gets to resolution, the more acute the tension becomes between funders' purely financial calculations and funded parties' more strategic priorities. Threshold-based control systems and dispute resolution procedures provide workable frameworks, but they only succeed when parties anticipate these pressure points rather than react to them.

Last but not least, lawyer-client relationship tensions are the most complex because they follow a different pattern entirely - they involve external professional obligations that cannot be modified only through contracts. Here, the pattern is clear: the more financially dependent lawyers become on funders, the more their professional independence becomes compromised. Unlike the commercial tensions that can be managed through better contract design, these ethical challenges require regulatory intervention through professional conduct rules.

Examining the regulatory responses, most jurisdictions are still developing their approaches, though most focus primarily on disclosure requirements rather than specific mechanisms to actually regulate opposing interests. Such large TPF markets as the EU and the U.S. have only recently begun to fully recognize the nature of TPF and the potential for opposing interests, and have started to consider how to regulate them. This is evidenced by the EU's mapping report on TPF and the U.S.'s recent federal laws and congressional committee investigations into TPF practices. Some specific mechanisms do exist to regulate opposing interests - such as England's ALF Code provisions, independent Queen's Counsel resolution of funder-client disputes, Australia's ASIC requirements for counsel approval of pre-proceedings settlements - however, these remain fragmented and not comprehensive across the full spectrum of opposing interests that actually emerge in practice. The pattern suggests that jurisdictions learn to regulate TPF by dealing with its problems as they emerge, not by preventing them.

What ties all these patterns together? TPF operates on commercial logic while disputes involve legal, ethical, and strategic considerations. The most successful approaches acknowledge this mismatch upfront rather than trying to force commercial and non-commercial interests into the same framework.

Thesis Conclusion

This thesis set out to examine the opposing interests between funders and funded parties in TPF arrangements. TPF, initially designed to democratize access to justice, has created new forms of power imbalances that require management to preserve both commercial viability and fairness.

The analysis in Chapter 1 shows that TPF evolved rapidly from a prohibited practice to a billion-dollar industry driven primarily by market forces rather than legal principles. This development explains much of what we observe today - TPF operates according to commercial logic because that is how it developed, not because anyone designed it to serve justice ideals. The “fundability” criteria examined demonstrate how commercial screening creates an access hierarchy where only certain types of disputes receive funding, contradicting TPF's supposed democratizing purpose. Moreover, the diversity of stakeholders suggests that TPF has evolved into a complex ecosystem where commercial, professional, and justice interests intersect in ways that create systematic tensions.

Chapter 2's analysis of opposing interests reveals three distinct patterns that all stem from this fundamental commercial nature. Strategic and economic tensions persist because they are built into the structure - funders need returns, clients need broader strategic outcomes, and these interests do not align naturally. Settlement dynamics show that concrete financial conflicts arise precisely when resolution is most needed. Lawyer-client relationship tensions have different pattern because they involve external professional obligations, requiring regulatory rather than contractual solutions alone.

The regulatory analysis shows that most jurisdictions focus on disclosure requirements rather than actually managing opposing interests. In arbitration rules, the same approach prevails.

However, it is not the role of arbitration tribunals to manage opposing interests by requiring parties to have fair arrangements; this is the responsibility of lawmakers.

Opposing interests are likely to be better managed by lawmakers in the coming years, considering the EU mapping report that preceded regulatory development and ongoing U.S. committee developments. The most important ways law can help manage opposing interests include: requiring parties to have efficient dispute resolution mechanisms for conflicts between funders and funded parties, for instance to manage settlement disagreements; requiring funders to clearly state how they may be involved in decision-making while preventing them from taking full control; and most importantly, creating enforceable codes of conduct for lawyers involved in TPF, especially on the funded party side, with clear sanctions in cases of misconduct.

Looking ahead, three developments seem likely. First, opposing interests will intensify as the TPF market grows. Second, regulatory responses will remain reactive and focused on disclosure rather than substantive protections. Third, the best outcome for everyone is that industry and regulators will develop frameworks that preserve TPF's benefits while giving protection for both funded parties and funders.

This thesis demonstrates that opposing interests in TPF are not bugs to be fixed but inherent features of how the system operates. The question is not whether these tensions exist - they do - but whether we are willing to manage them while preserving TPF's benefits. Like any partnership where parties have different objectives, the key is acknowledging those differences honestly and creating fair rules that all parties can accept, rather than hoping the differences will disappear on its own.

Bibliography

Primary Sources

Legislation

ASIC Regulatory Guide 248 (Australia)

Australian Courts Act 1828 9 Geo 4 c 83

Consolidated text: Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC

Corporations Act 2001 (Australia)

Federal Arbitration Act 1925 (United States)

Maintenance, Champerty and Barratry Abolition Act of 1993 (Australia)

Cases

Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd [2006] HCA 41, 229 ALR 58, 229 CLR 386

Glaz LLC, et. al. v Sysco Corporation, Index No. 651289/2023, Dkt. No. 5, Tribunal Award, pp. 60-61, 76 (N.Y. Sup. Ct. 2023)

Burford Motion to Stay, 23-Cv-1451, Doc. No. 27, p. 2 (N.D. Ill. 2023).

Treaties and International Agreements

Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates (2018)

Australia-Indonesia Comprehensive Economic Partnership Agreement (2019)

Comprehensive Economic and Trade Agreement between Canada and the European Union (2016)

Free Trade Agreement between the European Union and the Republic of Singapore (2018)

Arbitration Rules and Institutional Materials

Beijing Arbitration Commission (BAC) Arbitration Rules (2019)

Cámara de Comercio de Medellín (CAM) Arbitration Rules (2020)

China International Economic and Trade Arbitration Commission (CIETAC) Investment Arbitration Rules (2017)

Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules (2018)

International Chamber of Commerce (ICC) Arbitration Rules (2021)

International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules (2022)

Singapore International Arbitration Centre (SIAC) Arbitration Rules (2017, updated January 2025)

Vienna International Arbitral Centre (VIAC) Arbitration Rules (2021)

Legislative Bills and Parliamentary Documents

Dutch Code of Conduct for Lawyers

Document Summary | Legislative Observatory | European Parliament (European Union, 2025)

"Code of Conduct for Litigation Funders" (The Association of Litigation Funders of England & Wales, 2018)

REPORT with recommendations to the Commission on Responsible private funding of litigation | A9-0218/2022 | European Parliament

Text - H.R.1109 - 119th Congress (2025-2026): Litigation Transparency Act of 2025

Secondary Sources

Books

Baltag Crina and Feldman Mark, Reforming Arbitration Reform: Emerging Voices, New Strategies and Evolving Values (Kluwer Law International BV 2025)

Eken Can, TPF in Investment Arbitration: A New Player in the System (Springer Nature 2024)

Nieuwveld Lisa Bench and Shanon Victoria, TPF in International Arbitration (Kluwer Law International 2012)

Sweify Mohamed F, Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal (Edward Elgar Publishing 2023)

Von Goeler Jonas, TPF in International Arbitration and Its Impact on Procedure (2016)

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

Articles

Al-Daraji Wasel, "Third party funding regulation in Australia" International Bar Association

Bajaj Gitanjali, Yang & Chan, "TPF in the Asia-Pacific region" Global Arbitration Review

Bourgeois Arnaud, "Third-party funding" (Jus Mundi, 2024)

Favro Alberto, "European Parliament Resolution on TPF: A Step Too Far?" (Kluwer Arbitration Blog, January 30, 2023)

Favro Alberto, "New ICSID Arbitration Rules: A Further Step in The Regulation of TPF" (Kluwer Arbitration Blog, 2022)

Frignati Valentina, "Ethical Implications of TPF in International Arbitration" (2016) Volume 32 Arbitration International

Kuznia Robert, "Litigation Financier's battle against Sysco provides food for thought" (2025) DarrowEverett LLP

Lewis Dean, "Jurisdiction Guide to Third Party Funding in International Arbitration" (Pinsent Masons, 2021)

Lewis Dean, "Jurisdiction guide to third party funding in international arbitration" (Pinsent Masons, 2024)

Luff David & Geisker James, "In review: third party litigation funding in Australia" (2021) Lexology

Oblin Klaus and Daolio Lucija, "Disclosing Dollars, TPF In Arbitration" (Mondaq, 2025)

Raymond Nate, "US Judicial Panel to Examine Litigation Finance Disclosure" Reuters (October 10, 2024)

Ševčíková Tereza, "Investment Arbitration Reform: TPF in Investment Arbitration" (2022) COFOLA International 2022. Current Challenges of Resolution of International (Cross-Border) Disputes

Reports and Official Publications

"Commercial Litigation Funding: A Guide for Plaintiffs & Commercial Litigators Seeking Funding in the United States" (Financial Poise, January 15, 2025)

"Demystifying Legal Finance -- A Practical View into Working with Third-Party Funders" (Nivalion Legal Finance Summit 2025, Frankfurt, 22-23 May 2025)

European Law Institute, "Principles Governing the Third-Party Funding of Litigation" (European Law Institute 2024)

ICC Institute of World Business Law Meeting, International Chamber of Commerce and ICC Institute of World Business Law, TPF in International Arbitration (2013)

Report of the ICCA-Queen Mary Task Force on TPF in International Arbitration (2018)

Study on Mapping Third Party Litigation Funding in the European Union (Request for Services JUST/2023/PR/JCOO/CIVI/0016) in the Context of the Framework Contract N° JUST/2020/PR/03/0001 (2025)

Winston & Strawn, "Product Liability & Mass Torts Digest" (Winston & Strawn - Third-Party Litigation Financing Under the Spotlight: Judicial Conference Subcommittee Formed to Explore Disclosure Rules)

<u>Other Documents</u>

"This Litigation Funding Agreement between BioCardia, Inc., ('Litigant') and BSLF, LLC ('Funder')" (US SEC Government)