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Third Party Funding for Dispute Resolution

A Comparative Study of England, Hong Kong, Singapore, the Netherlands, and Mainland China

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In memory of my grandfather, Zhang Tonggui

To my husband and best friend, Wang Haitao

Preface

In recent years, we have witnessed a remarkable growth in the use of Third-Party Funding (TPF) in Mainland China (hereafter "China") and beyond. Next to this fact, there have been various regulatory measures to prevent the risk of TPF from compromising the integrity of law and the legal profession. The variance in the regulatory measures can be largely attributed to the difference in the developmental stage of the TPF industry. In China, for instance, TPF is in the early stages of its development, and the question of whether TPF should be regulated separately in law and regulation has not yet been settled. Although it is believed in China that TPF serves what the market currently requires, namely, more funding resources for parties in litigation and arbitration cases, there is no consensus yet on whether the benefits of TPF override the risks, and how to deal with said risks. Thereby Chinese third party funders face very limited regulatory barriers for now.

TPF refers to the provision of funding to parties in litigation and arbitration by a third party on a non-recourse basis in exchange for a proportion of the final proceeds. It is adopted by this book that TPF is an investment, insulated from lending, insurance, claim assignment, legal aid, and other funding methods. TPF has become popular because it has facilitated access to justice and had been a source of lucrative business for the funders. The importance of TPF is further highlighted at present as businesses are facing financial pressure due to the toll of the Covid-19 pandemic outbreak. TPF may provide the means for the parties to pursue and maintain expensive dispute resolution procedures, as well as being a way of peeling off legal expenses on companies' balance sheets.

However, as a private funding mechanism driven by commercial interests, TPF has changed the equilibrium in dispute resolution procedures. One of the most outstanding examples is the perceived or actual conflict of interest arising from a prior relationship between the funder and the funded party's lawyers or the arbitrator. Taking note of this risk, some chosen jurisdictions have enacted the mandatory requirement of disclosing TPF arrangements. The problems associated with TPF cannot be analyzed alone as they are tightly integrated with the following factors: Background against which TPF has emerged and developed, the nature of the funded procedure, and the law applicable to third party funders and their funding activities.

Therefore, in the main body of the book, before delving into the heart of the discussion, some preliminary remarks are presented about the legal environment for TPF to arise, the alternative funding options, legal principles and doctrines underlying TPF activities, and so on.

This book represents a comparative study of TPF and its regulation in England, Hong Kong, Singapore, the Netherlands, and Mainland China. Chapters 2–5 concern the chosen jurisdictions beyond Chinese borders and have been structured as follows: The chapter starts with a general description of TPF under a specific domestic law; then it clarifies the scope of TPF or the platform for TPF, as among the chosen jurisdictions, there is a marked divergence as to the area in which TPF is allowed; on this basis, the chapter addresses the procedural implications of TPF and the regulatory measures that have been adopted; it is then concluded with questions surrounding the challenges that lay ahead.

In Chap. 6 where the legal aspects of the Chinese TPF industry are investigated, the starting point is a careful review of the characteristics of Chinese third party funders and their activities. As of the time of this writing, the Chinese TPF market has not been expanded upon in English or Chinese literature. The language barrier may be one reason. The lack of empirical materials may also contribute to this situation. To obtain some first-hand evidence of the TPF market in China, the author conducted empirical studies in Shenzhen, with the assistance of DS Legal Capital, one of the first Chinese third party funders, and some local organizations and authorities. The empirical studies took the form of questionnaire surveys. The first survey saw in a total of 175 responses, and the second saw 18 responses. Because many funding arrangements for commercial disputes are kept in the dark, it is hard, if not impossible, to measure the size of the Chinese TPF market. The author conducted the empirical research to obtain a dataset that serves a humble purpose, namely, to offer an insight into the Chinese TPF market, rather than to grasp the full picture of the Chinese TPF industry.

Making use of the survey results, Chap. 6 of the book portrays the profile of the Chinese third party funders, assesses the penetration of TPF in China, and contemplates two issues with regard to the regulation, thus: a. Should TPF be regulated at this moment in China? b. Where should one start in the regulation of TPF in this jurisdiction? These questions are addressed in light of the changing Chinese legal service market and the Chinese understanding of the concept of access to justice.

This book aims at explaining the most recent developments in the area of TPF and the legal theories associated with the regulatory attempts. It, through a comparative method, reveals the difference in the regulatory measures for TPF adopted by the chosen jurisdictions. It fills the gap in understanding the Chinese TPF market. It also helps the Chinese legislators formulate regulations surrounding the issue of TPF based on empirical materials. Last but not least, this book highlights considerations that need to be taken into account by practitioners in dealing with TPF-related matters. The above has made this work compelling.

The doctoral research that I have conducted at the University of Groningen lays the foundations for this book.

Jinan, China Beibei Zhang
July 2020

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Abbreviations

AA	Arbitration Act (Chapter 10)
ADR	Alternative Dispute Resolution
ALF	Association of Litigation Funders
ATE Insurance	After-the-Event Insurance
BAC	Beijing Arbitration Commission
BTE insurance	Before-the-Event Insurance
BW	Burgerlijk Wetboek
CFA	Conditional Fee Agreement
CIETAC	China International Economic and Trade Arbitration Commission
CJC	Civil Justice Council
CPR	Civil Procedure Rules
DBA	Damages Based Agreement
EU	European Union
FSA	Financial Service Authority of the UK
GZAC	Guang Zhou Arbitration Commission
HKLRC	Law Reform Commission of Hong Kong
HKSAR	Hong Kong Special Administrative Region
IAA	International Arbitration Act (Chapter 143A)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
LC	Legislative Council of Hong Kong
LEI	Legal Expenses Insurance
NAI	Netherlands Arbitration Institute
PRC	People's Republic of China
Rv	Wetboek van Burgerlijke Rechtsvordering
SIAC	Singapore International Arbitration Centre
SIArb	Singapore Institute of Arbitrators
SPC	Supreme People's Court of the People's Republic of China

TPF	Third-Party Funding
UNCITRAL	United Nations Commission on International Trade Law
WCAM	Wet collectieve afwikkeling massaschade
Wft	Wet op het financieel toezicht

Chapter 1
Introduction

"Whether you are a supporter of third-party funding—believing that it promotes access to justice, or a detractor—believing that it encourages frivolous claims, one thing is clear: third-party funding is here to stay". Tung et al. (2019).
—Jone Fellas

Abstract Third-party funding (TPF) refers to a special type of investment that is insulated from lending, insurance, claim assignment, legal aid, and other funding methods. Recent years have seen academia shift its focus from the question of whether to permit TPF to the issue of how to regulate it. To date, TPF regulation is jurisdiction-specific and in flux, allowing the author to conduct research into this funding method from a comparative perspective and with reference to both its recent developments in the chosen jurisdictions and empirical evidence from China. This chapter introduces the key concepts; the research method; and the purpose, scope, and structure of the book.

1.1 Background

Third Party Funding (TPF) is often defined as the provision of funding to parties in litigation and arbitration by a third party on a non-recourse basis in exchange for a proportion of the final proceeds.[1] In essence, it is a special type of investment, insulated from lending, insurance, claim assignment, legal aid, and other funding methods.[2] In the jurisdictions that are included in this book, TPF has never been subject to the rules of its alternatives. Some of these jurisdictions have seen the introduction of regulations specifically directed at TPF.

TPF is no longer a new topic in the discussion of dispute resolution. Recent years have witnessed a shift in focus from the issue of whether to permit TPF to the issue

[1] Rowles-Davies (2014), Rogers (2014); *Hong Kong Arbitration Ordinance (Cap. 609)*, section 98G; *Civil Law Act of Singapore (Chapter 43)*, section 5B(10); "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," (2018), 50.

[2] Henriques (2017).

B. Zhang, *Third Party Funding for Dispute Resolution*,
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of how to regulate TPF. The rise of TPF indicates that the legal practice has been struggling with the problem of lack of funding. On the one hand, the parties face the increasing costs of legal proceedings. On the other hand, they live in a time of financial austerity where the shrinkage of public funds in dispute resolution brings forth a desperate desire for external private funding. Fueled by a large market demand, the TPF industry has been expanding rapidly. Since its establishment, Burford Capital has grown into a GBP 1.194 billion company with a multi-billion-dollar portfolio and a global business as of July 2020.[3] Other funders such as Juridical, Fulbrook Capital, Woodsford Litigation Funding, Omni Bridgeway, DS Legal Capital are also recurring players in the TPF industry who have had substantial growth in business.

It is hard to deny that TPF has enabled the parties to pursue legal claims that would otherwise not see their day in court or in arbitration, and therefore, has an effect of facilitating access to justice. TPF has also helped the parties take the costs of pursuing legal claims off the balance sheet. In some jurisdictions, it is deemed as the driving force behind the development of the international arbitration industry, as best illustrated by the recent legal reforms in Hong Kong and Singapore. Although it is agreed that TPF should have an enhanced position in settling commercial disputes, more attempts have been made to eliminate the deleterious effects of TPF. For the funder, access to justice is a side effect or simply a by-product of the funding activities. The funder's primary goal of investing in legal claims has always been to extract as much financial benefit as possible from the funded cases. This prompts the fear of an unaccepted inference with the overall integrity of the arbitration proceedings. Even without abusive practices, the involvement of TPF has changed the equilibrium of dispute resolution, which has attracted the attention of regulators. It is found that the risks of TPF could be more alarming in one area of law than in others. For instance, TPF in collective litigation is riskier compared to TPF in individual cases, so it is more likely to be subject to stricter court scrutiny and statutory requirements. Another example: TPF for arbitration presents unique characteristics that do not exist in the context of litigation. The complexity of the TPF associated problems, combined with the "deep held longstanding values" and "vaguely defined notions" that exist in domestic laws and bear relevance to TPF, has plagued the regulators since the very beginning.[4] For now and in the foreseeable future, a realistic likelihood of uniformity in dealing with TPF and its problems is slim.

Against this background, this book contributes to comparative research on TPF by examining the differences in understanding and regulating TPF in England, Hong Kong, Singapore, the Netherlands, and Mainland China (also referred to as "China").[5] Before dealing with the issue of why these jurisdictions are chosen for this research,

[3] "Burford Capital Annual Report 2019," 4; "Burford Capital London Stock Exchange Information," https://www.bloomberg.com/quote/BUR:LN.

[4] Tung, Fortese, and Baltag, *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy*, 307.

[5] Mainland China, also known as China mainland or the Mainland, refers to mainland area of People's Republic of China, excluding Hong Kong, Macau and Taiwan.

we have to first turn to the contradictions in comparative law. There are countless comparative studies which have delivered and continued delivering outstanding results while hardly wasting a word on the selection of jurisdictions to be investigated. According to many eminent comparative scholars, for instance, Zweigert and Kötz, the selection of the legal systems for comparison often depends on the researcher's "experience and instinct", rather than "any rigid guidelines".[6] The antithesis to the above view, however, considers that comparative law is increasingly recognized as an important reference point for legislative decision making. Therefore, the selection of jurisdictions must be conducted on a point of caution especially in the research with the intent to present legal reform suggestions. In this regard, considerations should be given to, at least, the jurisdiction's basic sense of justice, legal traditions, legislative construction, distinctive features of the approach to dealing with the subject, and the context in which this approach is implemented. With that said, it is hoped that the author's effort of setting out to address the issue of why a comparative study was initiated based on the materials from the said five jurisdictions will lead to a wider debate on the design of the comparative legal research. It is worth noting that the selection of the said five jurisdictions makes this work interesting and compelling, but it also represents the work's limitation. There are other jurisdictions where the business of TPF is expanding so that they start providing more and more evidence that could confirm (or deny) many of the arguments surrounding TPF-related issues. They certainly deserve to be explored by future research,

In this work, the selection of jurisdictions is highly influenced by the history and the developmental status of TPF. The chosen jurisdictions have evolved to the stage where law is not only an aspiration and an ideal but also a necessity for good governance and general welfare. It is acknowledged that access to justice is established as an individual right which bears public value and may be facilitated by the involvement of third party funders. Meanwhile, letting TPF stand will not constitute a violation of the fundamental principles of procedural justice. The foregoing serves as the mutual consent that lays the ground for comparison. By comparing the ways that TPF is operated and regulated in the five major legal systems, it becomes possible to raise the awareness of the pros and cons of TPF and also to generalize the minimum standards that could be more widely applied for the practice and regulation of TPF.

England has one of the most developed TPF markets in the world[7] and is one of the jurisdictions where TPF initiated, and therefore, is selected for comparison.[8] So far, TPF has become a key element of commercial proceedings in England, whether in litigation or in arbitration.[9] Before TPF emerged, English law had already provided various non-party funding options for dispute resolution. These funding options serve the same purpose as TPF but are treated differently from TPF in regulation. In dealing with the risks of TPF, England introduced the first industrial self-regulation for third party funders which greatly influenced many other jurisdictions such as

[6] Kischel (2019).

[7] Nieuwveld and Shannon (2017).

[8] Solas (2019).

[9] Rowles-Davies, *Third Party Litigation Funding*, 2.

Hong Kong and Singapore. This has enhanced the importance of England to this work. In parallel to the self-regulation, the English case law also plays a significant role in managing TPF associated issues, especially with regard to whether to loosen the legal restrictions on TPF and other types of profitable legal funding. Hong Kong and Singapore permitted TPF in arbitration just recently: Singapore from 10 January 2017 and Hong Kong from 1 February 2019. The development of TPF worldwide has triggered amendments to statutory laws in these two jurisdictions. In the process of the legal reform, considerations have been given not only to the individual right to access to arbitration but also to the public interest of maintaining their position as leading arbitration centers in the world. It is particularly interesting to investigate the content of the relevant changes in the legislation of these two jurisdictions, as well as the reason for and the effect of these changes. The Netherlands has been selected in the present research as a representative of the civil law family. The examination of Dutch law has revealed how a civil law jurisdiction conceives TPF, especially TPF for collective litigation.

China is included into the discussion for apparent reasons: The book serves the purpose of bridging the gap of understanding the Chinese TPF market and offering suggestions to China's legislators with regard to the regulation of TPF. The recent years have seen new third party funders emerging in China,[10] which has raised questions about the factors that have determined the rise of TPF and the considerations that have to be taken into account by the regulators when managing the legal risks associated with TPF.

The findings of the comparative study serve two goals: to strike a comparison between the selected jurisdictions in relation to the legal aspects of TPF-related issues and to present a balanced view in the Chinese context on the benefits and the risks of TPF in order to formulate a feasible package addressing issues associated with TPF.

1.2 Methodology

Without a reflection on the features of the research subject, the discussion of methodology would be superficial.[11] The author believes that the study of TPF can hardly be parochial since TPF is a cross-border phenomenon, especially when it is reviewed in the commercial context. Imagine an English funder, as a member of the Association of Litigation Funders (ALF), funds legal claims filed by a Singaporean company against a Chinese company before an arbitral tribunal seated in Hong Kong. The funded proceedings could invoke several sets of domestic and international legal instruments. The international character of TPF requires some agreements in perspective throughout the legal community. A uniform regulation may be unrealistic, but it

[10] "Report of the ICCA-Queen Mary task force on third-party Funding in international arbitration," 4.

[11] Hoecke (2015).

is necessary to acquire knowledge as to how the issues related to TPF are handled in other jurisdictions. This work employs a comparative legal research method as the key research method. Comparative legal research is not simply formulating a literal comparison between the provisions contained in the law.[12] It implies a "toolbox" instead of a "fixed methodological road map".[13]

In this "toolbox", the following legal research methods are employed: historical method, empirical method, functional method, and contextual method. The discussions in this book are not confined to TPF at the present time. Whenever the author must go outside the context of her own time, the historical research method is inevitable. In researching TPF in China which is relatively underexplored, an empirical method is used to obtain first-hand materials. In the process of analyzing legal elements from foreign jurisdictions, the research largely relies on functional and contextual methods. The underlying idea is that legal concepts must not be disconnected from the rules of the legal systems to which they belong.

The author conducted the empirical research on TPF in China with full awareness of the perils of empirical research method. Empirical legal research is a latecomer in the legal academy. It originated from the US in the 1990s.[14] So far, there has been no universally accepted definition of this form of research.[15] In fact, it is still a question of whether empirical research is feasible in the law area. However, there is no lack of articles presenting empirical research results. The Journal of Empirical Legal Studies alone has already published works on a wide range of legal topics. A recent example regarding non-party funding is the study conducted by Jared A Ellias on bankruptcy claim trading.[16] It addressed the potential conflicts between the integrity of the legal procedure and the commodification of the claims through "a hand-collected sample of trading in 506 bonds issued by 204 large firms that filed for bankruptcy between 2002 and 2012".[17] As to TPF in particular, the 2015 International Arbitration Survey has adopted the empirical method to explore issues associated with TPF in international arbitration.[18]

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[12] Gordley (1995).

[13] van Hoecke, "Methodology of Comparative Legal Research".

[14] *Empirical Legal Analysis: Assessing the performance of legal institutions*, ed. Chang Yun-chien (Routledge, 2014), 1; *The Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert Kritzer (Oxford University Press, 2010), 1.

[15] *The Oxford Handbook of Empirical Legal Research*, 4.

[16] Ellias (2018).

[17] Ibid. In this article, the author researched whether the trading associated with the robust secondary market had undetermined bankruptcy government by forcing managers to negotiate with shifting groups of activist investors and concluded it had not.

[18] Queen Mary University of London; and White & Case LLP;, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," (2015).

1.3 Research Questions in Context

Although the author attempts to deliver a thorough analysis of TPF through comprehensive comparative research, certain decisions as to the scope of the research must be made to avoid the extension of this research to the extent that it becomes unmanageable. The scope of the research can be looked at from two aspects: first, what are the key issues that this work has addressed? Second, what is the context within which the research questions are addressed?

1.3.1 The Key Research Questions

For comparative purposes, the same research issues have been discussed in the study of each jurisdiction. This line of issues serves as the pattern for comparison.

a. What is the background against which TPF emerged and developed? Chaps. 2 to 6 start with a general introduction of the definition of TPF under the specific domestic law, the legal tradition or the legal environment, the reason why this jurisdiction is important to this work and the key components of the domestic law that are relevant to TPF. The efforts aim to set the scene for the discussion about not only the symptoms of TPF but also the reasons why TPF is treated by law in a certain way in a specific jurisdiction.
b. Where is TPF permitted? As a preliminary issue, it is important to clarify the scope of TPF or the platform for TPF. This question is particularly interesting in this research since, among the chosen jurisdictions, there is a marked divergence as to the area where TPF is allowed. England allows TPF across all civil cases since the 1960s.[19] Hong Kong permits TPF in arbitration, both international and domestic, since 2019 through the amendment to the Arbitration Ordinance. Singapore however only permits TPF in international arbitration in accordance with the 2017 amendment to the Civil Law Act. Civil law jurisdictions such as the Netherlands do not have the legal tradition to prohibit TPF, even with the knowledge that TPF is risky. This divergence reveals differences in the understanding of TPF and its procedural impact. It also has a bearing on the legal environment and the legal tradition.
c. What are the procedural implications of TPF? All the chosen jurisdictions agree, albeit with different emphases, that TPF has both pros and cons. When addressing the second research issue regarding why TPF is permitted, the author has highlighted the benefits of TPF. The discussion of this research question focuses on the negative impact of TPF. It has been observed that such impact varies by jurisdiction and by procedure, depending not only on the capacity of third party funders but also the provisions contained in domestic laws and rules concerning the practice of TPF. To understand the impact of TPF on the

[19] Rowles-Davies, *Third Party Litigation Funding*, 5–6.

arbitration procedure, attention must be paid to international instruments with contemplations of the risks of TPF.

d. How is TPF regulated? This research has found distinctive legal attitudes towards TPF for litigation which seem resistant to the unification of the regulation of TPF. In each chosen jurisdiction, the regulation of TPF for litigation is shaped by endemic components such as the understanding of access to justice, the costs of dispute resolution, due process considerations, the conflicts of interest management capacity of the legal profession, the existing safeguards against procedural abuses, etc. In arbitration, however, there are some international trends in dealing with TPF that can be observed. In the chapter dedicated to China, the question of whether and how TPF should be regulated has not been settled on the official side. The way forward in dealing with the risks of TPF is carefully predicted with considerations given to empirical materials about the use of TPF in practice and the concerns of the practitioners about the potential negative effects of TPF.

e. What are the questions and challenges lying ahead? The answer to these questions requires an effort to pull the threads together and to anticipate the future. It also requires an effort to identify the research limitations of this work. Through these efforts, the author aims to set up the importance of the current work and, more importantly, the research continuity. Questions for future research are those that the author does not plan to follow up on in this research for various reasons, such as the time limit, the length limit or the lack of empirical materials, but are particularly interesting and valuable to the development and the regulation of TPF in individual jurisdictions.

1.3.2 The Commercial Context

TPF for commercial cases is the central focus of this work. The primary reason is that TPF is most relevant to commercial disputes and the mainstream funders are operating their business predominately in the commercial area.[20] The second reason is to avoid moral hazard components. In practice, third party funders appear reluctant to invest in cases with "human elements", such as cases "involving family law, defamation, or injuries to the claimholder".[21] The financing of commercial disputes might raise fewer concerns compared to financing other types of disputes. From an academic perspective, TPF for cases with "human elements" deserves a different mode of analysis as the funding arrangements may face supreme regulatory measures.

Traditionally, commercial disputes refer to those differences arising from the trade of goods.[22] In modern literature, however, "commercial" is used in a rather broad sense. According to Redfern and Hunter, "relationships of a commercial nature

[20] Veljanovski (2012), Mulheron (2015).

[21] Trusz (2013).

[22] Furmston and Chuah (2013).

include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road".[23] The above has inspired the author not to define "commercial disputes" using exclusive language in this book.

"Commercial" is treated by this work as an unresolvable ambiguity since it is almost impossible to accurately describe what "commercial matters" encompass at this moment. Instead, the author tries to elaborate on the feature of commercial situations and the implication of this feature on the research subject. Legal research on commercial matters can better accommodate a comparative legal method. In the commercial world, legal systems are 'mixed' in the sense that they have been influenced by a variety of other systems. It is a widely recognized working theory of dealing with commercial problems that the feeling of dissatisfaction with the solution in one's own system is what drives one to inquire whether other legal systems have produced better solutions. In the commercial context, it is natural to ask why a foreign jurisdiction has tackled the same problem in a different way or why a foreign jurisdiction does not feel the need to deal with a particular problem. Nevertheless, it is crucial to note that the above does not imply that non-commercial cases are supposed to be entirely excluded. These cases are brought into discussions whenever it is necessary to explain TPF as a legal concept or to elaborate on the alternatives to TPF.

It is a reality in the legal funding industry that the funders distinguish between "commercial cases" and "consumer cases".[24] Commercial and consumer legal funding differ in what they fund, who they fund, and how they operate. With regard to the consequence of the funding arrangement, there are certain legal risks arising in the consumer context that do not exist in the commercial context. Therefore, the regulatory measures that aim to address these risks should not be applied too broadly. Despite all that, the author is not ready to exclude consumer disputes from the scope of the discussion. This book recognized "consumer" as a separate interest, but this does not change the notion that "consumer disputes" are caused by commercial transactions and therefore fall within the category of the widely defined "commercial disputes".

[23] Redfern and Hunter (2015).

[24] Shayna Keyles, "What's The Difference Between Commercial and Consumer Legal Funding?," https://www.balancedbridge.com/blog/commercial-consumer-legal-funding; Laina Miller, "The difference between commercial and consumer litigation funding and why it matters," https://validity-finance.com/insights/commercial-consumer-litigation-funding-explained/.

1.4 Why This Research?

What makes this research compelling is the following features: first and foremost, it is unfolded with a focus on the recent developments in the regulation and the theory of TPF in the chosen jurisdictions. These enhance the interest in conducting not only a cross-national comparison but also a comparison between the past and the present. Secondly, the jurisdictions of comparison present different approaches to the understanding and the regulation of TPF. In this work, both new and well-developed TPF markets share a likeness in their commercial importance. They are all required to respond to the demand for access to justice in the commercial realm. Some of them share the same legal tradition that has significant implications on TPF, in which there is a strong need to ask why TPF is understood and treated differently and whether it is possible to reach some consensus among them. Thirdly, the research fills the gap in the understanding of the TPF practice in China. So far, the development of TPF in China has not been translated into wide academic coverage. The omission of China from previous literature is not necessarily due to a lack of academic enthusiasm but might also be related to the absence of empirical research materials. With the assistance of a Chinese third party funder and other legal practitioners in Shenzhen, China, the author has obtained some first-hand materials about the Chinese TPF market and the related legal concerns about TPF through a three-month empirical research. Although this empirical research is far from systematic, it provides sufficient data to offer a snapshot of the practice of TPF in China and to justify some suggestions that have been made at the end of this work for future legal reforms.

1.5 Structure

This book consists of seven chapters. This chapter clarifies the background, the research subject, the methodology, the main research questions and the outline of the book. Chapters 2 to 6 discuss respectively TPF in England, Hong Kong, Singapore, the Netherlands, and China. Chapter 7 presents the concluding remarks. All of these chapters are unified by the theme that the study of TPF and the related legal issues in the targeted jurisdictions should be contextual and conducted from a comparative perspective.

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Chapter 2
TPF in England

Abstract Mainstream use of TPF is increasing in England. In terms of regulation, England represents one of the most developed TPF markets in the world. England's experience with TPF has shown that TPF can solve the problem of lack of funding in commercial cases without causing a serious disruption of justice that goes beyond the administrative capacity of the legal system. English courts processing security for costs applications likely consider TPF. In some cases, the courts are convinced that the funded case might be a hit-and-run operation if the funder was not involved with the funded proceedings through costs orders. Additionally, the funder's control over the proceedings could attract a court's attention. Procedural concerns associated with TPF are not limited to the above, nor are they limited to England. However, England has developed a unique regulatory approach to dealing with these issues that takes into account public policies and, more importantly, the status of the TPF industry. Its approach relies primarily on case law and the industrial code of conduct.

2.1 Introduction

England represents one of the most developed TPF markets. It contributes to the discussion of TPF in three main aspects: (1) the philosophical basis for TPF; (2) the business models of TPF; (3) the regulatory measures against the risks of TPF. Access to justice has been at the forefront of action and debate in England for a while, specifically the costs of access to the court.[1] To facilitate access to justice, efforts have been made to introduce not only TPF but also various alternative funding options such as conditional fees agreement (CFA), damages-based agreement (DBA), legal expenses insurance (LEI) or before-the-event insurance (BTE insurance), after-the-event insurance (ATE insurance), legal aid, etc.[2] The existing

[1] Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," (2010), 10.

[2] Damages-based agreement is often referred to as "contingency fees" in academic discussions. See: Andrews (2013).

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B. Zhang, *Third Party Funding for Dispute Resolution*,
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English law allows these funding options in civil disputes whether they are settled by litigation or arbitration.[3] It is safe to say at this moment that the benefits of non-party funding have overridden the fear of the evil of maintenance and champerty in civil proceedings in England. Commercial cases with high potential returns are particularly attractive to third party funders. Commercial claims represent the main focus of the TPF industry in the UK, according to a report issued in 2012.[4]

Under English law, TPF refers to a type of investment that enables third party funders to fund the legal costs of dispute resolution in part or whole, in exchange for a proportion of the final proceeds.[5] This funding option normally bears the following characteristics: (1) funding from a third party with no connection to the funded proceedings other than the TPF agreement; (2) funding on a non-recourse basis; (3) funding with commercial motives; (4) funding that is regulated separately.[6] In England, TPF could be provided by a wide range of investors whose businesses do not necessarily focus on funding legal claims.[7] TPF is a funding option of its own. It has never been the intention of English legislators to put TPF and its alternatives in the same category under the same regulation.[8] The above definition of TPF applies to both litigation and arbitration. The difference between TPF for litigation and TPF for arbitration largely lies in the impact of the funding arrangement on the funded procedure and the way TPF is regulated, which will be elaborated in Sects. 2.3 and 2.4 of this chapter. Some commentators have adopted a broad definition of TPF as an umbrella term which covers all types of legal capital deployed to fund the realization of assets that are contingent on the resolution of some forms of legal processes.[9] This cover-all definition however is incompatible with the current practice of TPF and the regulator's intention to regulate TPF separately from other traditional funding options, and therefore, ought not to be adopted by this chapter.

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[3]There is no statutory law for TPF in England. According to Rachael Mulheron, TPF is currently governed by (1) the ALF code of conduct, (2) the ALF rules, (3) sporadic judicial oversight of litigation funding agreement. See: Rachael Mulheron, "England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments," *Cambridge Law Journal* 73, no. 3 (2014): 570.

[4]Hodges et al. (2012).

[5]There is no legislative definition for TPF in England. To understand what TPF means, it is useful to look to the Jackson report where TPF is "the funding of litigation by a party who has no pre-existing interest in the litigation, usually on the basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often as a percentage of the recovery sum; and (ii) the funder is not entitled to payment should the claim fail." See: Rupert Jackson, "Review of civil litigation costs: Final Report," (2009), xv.

[6]Ibid.

[7]The Association of Litigation Funders, "Statement from the Association of Litigation Funders of England and Wales regarding the Court of Appeal Judgment in Excalibur, "http://associationoflitigationfunders.com/wp-content/uploads/2016/11/ALF-Excalibur-Press-Release-181116-.pdf.

[8]Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales," 11.

[9]Bogart (2017); Hodges, Peysner, and Nurse, "Litigation Funding: Status and Issues," 10–11.