

THIRD-PARTY FUNDING IN DISPUTE RESOLUTION PROCEEDINGS^{*}

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Abstract

Third-Party Funding (“TPF”) is the funding of claims by commercial bodies in return for a share of the proceeds. TPF is rapidly used around the world and is a crucial mechanism of enabling meritorious claimants who are financially incapable of affording litigation expenses to gain access to justice.

Despite the fast-changing global trend of TPF in other jurisdictions such as Australia, the United Kingdom and Singapore. However, Thai Law still lacks a clear position; thus, stances regarding this matter remained unclear. This article thus aims to discuss whether the use of TPF should be allowed in the Thai legal system and if so, to what extent.

In responding to the questions stated above, this article applies a comparative study to examine the legal approaches, problems, and solutions concerning TPF from leading jurisdictions, i.e., Australia, the United Kingdom, and Singapore. Besides, the historical background of the Thai judicial approaches on this matter will be examined.

After conducting historically and comparatively analysis, this article found that the prohibition of the involvement of unrelated third-parties in other’s suit was prior developed to protect the purity of the judicial system

^{*} This article is summarized and rearranged from the thesis “Third-Party Funding in Dispute Resolution Proceedings” The Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2018.

from the abuse of the process. However, the current justice system has become more transparent. In the author's opinion an old justification may not be appropriate for the current situation.

For that reason, this article concludes that a TPF contract that encourages access to justice which does not abuse the process should not be prohibited. However, the legislative should be amended to allow the use of TPF and to eliminate any uncertainties that could arise. This article suggests that Thailand should amend the Thai Arbitration Act to grant TPF of arbitral proceedings in, at least, international arbitration as the pioneering approach. Subsequently, the availability of TPF should expand to domestic arbitration before eventually amending the Civil Procedure Code to allow the use of TPF for domestic litigation. Furthermore, the author suggests Thailand to initially implement subordinate legislation, such as ministerial regulations to specify the manner of permissible TPF, as these bodies of law are flexible to amend or adjust.

Keywords: Third-Party Funding, Litigation, Arbitration, Dispute Resolution Proceedings

1. Introduction

Third - Party Funding (“TPF”) is considered as a crucial mechanism of enabling meritorious claimants who are financially incapable of affording litigation expenses to gain access to justice.¹ It enables such claimants to pursue cases they might otherwise be unable to do so, such as class action cases, where the legal cost is too high. In recent decades, the practice of TPF is increasingly acceptable in various jurisdictions such as Australia, the United Kingdom, and Singapore as a crucial means to facilitate access to justice.

Despite such recent expansions of the use of TPF in other countries such as Australia, the United Kingdom, and Singapore, Thai law lacks a clear, direct written rule and stance on whether the funding of claims in return for benefit by third party in dispute resolution proceedings is prohibited. As a result, Thai Courts have long been reluctant to enforce a contract permitting a lawyer to benefit from the result of its client’s dispute on the ground that it contravenes public morals.

With the fast-changing global legal landscape on TPF, it is questionable whether the long-standing judicial position of invalidating contract which permits the third party to benefit from the judgment is still valid, and whether mere sharing of any proceeds as a result of dispute resolution proceedings without any abuse of process can constitute a breach of public policy.

2. Definition of Third-Party Funding

Despite the rapid growth of TPF, its exact definition, however, remains vague. In principle, for a TPF arrangement to come into existence, one of the disputing parties will request financing for their legal

¹ Thibault De Boule, “Third-Party Funding” in *International Commercial Arbitration* (Master of Laws thesis, Ghent University 2013) 18

representation from an unrelated third party.² Typically, the funder generally consents to pay legal fees for one party (usually the claimant's), covering costs for lawyers, professionals, and/or outside counsel, as well as any other additional expenses which may be relevant or necessary in the civil litigation.³ The funds provided are non-recourse loan, where the financier will repaid only when the claim is successful.⁴

To sum up, TPF is an arrangement where a disinterested third party furnishes monetary assistance to a claimant in return for a profit on a non-recourse basis. If the case is successful, the finance provider is entitled to recover its capital invested. Conversely, If the case is unsuccessful, the funder would not be entitled to any reimbursement.

3. Traditional Policy Restrictions on the Third-Party Funding Maintenance and Champerty

Historically, the participation of a third party in legal representation was completely forbidden by the common doctrine of the maintenance and champerty:

² Maya Steinitz, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95(4) Minnesota Law Review, U Iowa Legal Studies Research Paper, 1268, 1275 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586053> accessed 2 December 2018

³ Dominik Horodyski and Maria Kierska, 'Third-Party Funding in International Arbitration – Legal Problems and Global Trends with a Focus on Disclosure Requirement' (2017) 19(4) Zeszyty Naukowe Towarzystwa Doktorantów Uniwersytetu Jagiellonskiego 63, 70 <https://www.researchgate.net/publication/323476599_Third_Party_Funding_in_International_Arbitration-Legal_Problems_and_Global_Trends_with_a_Focus_on_Disclosure_Requirement> accessed 2 December 2018

⁴ Tripp Haston and Fritz Spainhour, 'Toward Disclosure of Third-Party Litigation Funding in Class Actions' (2017) Westlaw Journal Class Action <<https://www.bradley.com/insights/publications/2017/04/toward-disclosure-of-third-party-litigation-funding-in-class-actions>> accessed 2 December 2018

Maintenance refers to “the act of a disinterested party to promote, encourage, or maintain a lawsuit.”⁵

Champerty refers to “a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party’s claim in consideration of receiving part of any judgment proceeds.”⁶

The prohibition ensured parties could properly vindicate their rights without fear of special favours being exchanged to benefit any specific party.

4. Third-Party Funding in Foreign Countries⁷

4.1 Third-Party Funding in Australia

TPF was firmly established and proliferated in Australia. By mid-1990s, TPF developed from a supportive legal instrument of insolvency claim into a prosperous legal funder of class action in the service sector.⁸ Moreover, it has been applied in a broad area of civil and commercial cases,

⁵ Leslie Basil Curzon, *Dictionary of Law* (6th edn, Longman 2002) 260

⁶ Black Henry Campbell, *Black’s Law Dictionary* (6th edn, West Publishing 1990) 231

⁷ In this article, the author focused on legal approaches of the leading jurisdiction, such as Australia, the United Kingdom, and Singapore. Firstly, the author uses Australia as a potential source of thought because it is said to be the home to Third-Party Funding as it was firmly established and proliferated in Australia. Secondly, the United Kingdom is the origins of the concepts of maintenance and champerty, which restricts an unrelated third party from supporting the litigation of others; the author chose this jurisdiction to analyse how the Third-Party Funding has developed from strictly prohibited to widely accepted. Lastly, the author uses Singapore as a potential source of idea because the Third-Party Funding industry in Singapore is properly regulated when compared to other jurisdictions such as Australia and the United Kingdom.

⁸ Christopher Hodges, John Peysner and Angus Nurse, ‘Research Report of Litigation Funding: Status and Issues’ (2012) Research Report, Oxford and Lincoln Law School, 48 <https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf> accessed 25 January 2019

including but not limited to claims such as shareholder and investor, product liability, tort, consumer, environmental, and employment.⁹

4.2 Third-Party Funding in United Kingdom

Despite the origins of the concepts of maintenance and champerty, the use of TPF is currently widely accepted in United Kingdom. A critical change introduced was the implementation of the Jackson reform. Lord Justice Jackson was nominated and assigned the duties to examine costs in various fields of civil litigation, because there were concerns about high and disproportionate costs related thereto.¹⁰ Lord Justice Jackson clearly stated that he desired the maximization of alternative options available to fund litigation.¹¹

4.3 Third-Party Funding in Singapore

The watershed moment for TPF in Singapore emerged in 2017. The Singapore Parliament on 10 January 2017 passed the Civil Law (Amendment) Bill (Bill No. 38/2016) (Bill) and the Civil Law (Third-Party Funding) Regulations 2017 (the Funding Regulations). The Bill abolishes the common law torts of maintenance and champerty.¹²

Although no longer considered as a tort or crime, TPF Agreements remain against public policy and, thus, unenforceable, unless it was entered into by qualifying Third-Party Funders in prescribed proceedings.¹³ To sum

⁹ Jason Geisker and Jenny Tallis, 'The Third-Party Litigation Funding Law Review 2nd Edition: Australia' (*Claims Funding Australia*, 16 November 2018)

<<https://claimsfundingaus.com.au/news/third-party-litigation-funding-law-review-2nd-edition>> accessed 20 January 2019

¹⁰ Hodges (n 8)

¹¹ *ibid*

¹² Civil Law (Amendment) Bill No. 38/2016 (Singapore) Clause 2 new sections 5A(1)

¹³ Indranee Rajah, 'Third Party Funding–Reinforcing Singapore as a Premier International Dispute Resolution Center' (Ministry of Law, Singapore 2017)

up, the enforceability of the TPF Agreements in Singapore requires (1) the funding to be provided by **Qualifying Third-Party Funder**¹⁴ (2) solely with respect to **Prescribed Proceedings**.¹⁵

5. Third-Party Funding in Thailand

Thai courts have had to encounter the issue of involvement by non-related third parties in other's suit almost 100 years ago. The first case can be traced back to B.E.2467 (1924) prior to the codification of the Thai Civil and Commercial Code. At that time, the Thai Supreme Court applied the English law principles i.e., maintenance and champerty, to rescind the agreement whereby allowing a person to instigate the other person to enter into a dispute, with the purpose to obtain benefit therefrom.¹⁶

In the annotation of the Supreme Court Judgment No. 250/2478 Professor Seni Pramroj remarked that If the same issue arises now, Thai court should not adopt the English law principle. This is because whether a contract is enforceable as a matter of Thai law is governed by Section 113 ("currently section 150").¹⁷

<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Civil%20Law%20Amendment.pdf>> accessed 25 January 2019

¹⁴ Pursuant to Civil Law (Third-Party Funding) Regulations 2017,

In order for an unrelated third party to be satisfied Qualifying Third-Party Funder eligible to fund dispute resolution proceedings, it shall:

1. persevere the principal business of funding claims, whether domestically or internationally; and
2. have a minimum amount of 5 million Singaporean dollars in paid-up share capital or managed assets.

¹⁵ Pursuant to Civil Law (Third-Party Funding) Regulations 2017,

Prescribed proceedings in which TPF can be used is limited to international arbitration proceedings and court proceedings arising from or out of or in any way connected with international arbitration proceedings

¹⁶ Supreme Court Decision No. 510/2467 (Thailand)

¹⁷ Supreme Court Decision No. 250/2478 (Thailand)

In the annotation of the Supreme Court Judgment No. 552/2525 Professor Jitti Tingsaphat remarked that Thai law prohibits taking a share in the proceeds from the client's litigation. This is opposed to the lawyer's ethics and applies to any persons other than lawyers. This principle derives from the English common law of champerty and maintenance.¹⁸

5.1 Support or Assistance From Unrelated Third Parties in Another Person's Suit

5.1.1 Current Thai Judicial Attitude and Approach

Despite no explicit laws are prohibiting a disinterested third-party to become involved in others' lawsuit, Thai courts have dealt with this issue for almost a decade. In such cases, if the third party has an interest or relationship with the disputed parties such as being their siblings or relatives, Thai courts tend to permit and enforce the contract.

Conversely, if it appears to the courts that a contract was made by a disinterested third party offering to pay court fees and other costs associated with litigation for another person to enter into a dispute in exchange for the receipt of certain benefits therefrom, the courts would deny enforcing such arrangement, as it is illegal and contrary to public policy.

Henceforth, In the Thai legal perspective, Public policy is of greater importance than freedom of contract on the grounds that public safety is considered to be the highest law.¹⁹ In case where the object of a juristic act was against a public policy, such an act is void.²⁰

As a result, when the contract is deemed void, third parties who offered to pay all court-related expenses is not entitled to pursue remedies against the other parties. Specifically, he can neither file a lawsuit against

¹⁸ Supreme Court Decision No. 552/2525 (Thailand)

¹⁹ Chaiyos Haemarachata, *Kodmai Whaa Duay Nitikham* [The Law on Juristic Acts] (4th edn, Chulalongkorn University Press 2005), 163 (ไชยยศ เหมะรัชตะ, *กฎหมายว่าด้วยนิติกรรม* (พิมพ์ครั้งที่ 4, สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย 2548) 163)

²⁰ Thai Civil and Commercial Code, s 150

the other party nor claim restitution due to the fact that the objective of the contract is contrary to the law or good morals pursuant to Section 411 of the Civil and Commercial Code.²¹

5.1.2 Analysis

In prohibiting the involvement of unrelated third parties, Thai courts were influenced by the common law notions of champerty and maintenance. On the issue of TPF, Thai court tends to follow their long-standing judicial position to invalidate a contract in permitting a third party to support and benefit from the outcome of a dispute because the contract contravenes public order and good morals.

In the author's opinion, judicial attitude should be shifted to accept the involvement of TPF, because public order or public morals of the people can change, depending on the historical time period and societal norms. The past reason for prohibiting the involvement of unrelated third parties in dispute resolution proceedings is now out of date.

Professor Dr. Ukrit Mongkolnavin explained that the concept of public policy or good morals often changes as time passes and social climate changes, varying from country to country. This concept is also governed by both written and unwritten laws. As it is impossible to have strict laws concerning public policy or good morals, most countries tend to make laws on public policy or good morals flexible, authorizing courts to use their discretion to determine which actions are in contradiction to public policy and/or good morals on a case-by-case basis. Although critics have argued that such an approach is unethical and comparable to a system of judge-made laws, written laws are often rigid and unresponsive to social change. Flexibility is necessary to adapt to the changing needs and circumstances, thus, the abstract nature of laws on public policy or good

²¹ *ibid*, Thai Civil and Commercial Code,

Section 411: A person who has made an act of performance, the purpose of which is contrary to legal prohibition or good morals, cannot claim restitution.

morals is the core characteristic of legal application and enforcement, where the benefits outweigh the drawbacks.²²

Historically, prohibitions on the involvement of unrelated third parties were justified as it protects the integrity of the legal procedure and process from outside influences. However, it has become widely accepted that the current justice system has become more stable. The emergence of a better monitoring system and other laws to control the behaviour of the judicial profession means that such prohibition is no longer necessary. In the author's opinion, past justifications for prohibiting the involvement of unrelated third parties are out of date. Therefore, judicial attitudes should be shifted to accept TPF's Participation in dispute resolution proceedings.

Lastly, the judiciary should bear the responsibility to strengthen access to justice, which is the basis of the existence of courts and the Thai Arbitration Institute. Thus, in the author's opinion, the agreement in which increasing people's access to justice without abuse of process should not be considered contrary to public policy.

5.2 Taking a Share of the Proceeds of Another Person's Suit

5.2.1 Current Thai Judicial Attitude and Approach

In terms of taking shares in the proceeds of another's litigation, Thai courts have a long-standing position not to enforce an agreement that allows an unrelated third party to obtain a portion of the judgment of another's litigation or acquire a direct monetary interest in the final result of the lawsuit. The reason is that such an agreement instigates persons to be in dispute. Therefore, the contractual agreement is void, as it contradicts to public order and good morals according to Section 150 of the Civil and Commercial Code.

²² Aukrit Mongkolnawin, 'Khwaam Sa-ngob Riab Roi Lae Silatham Undee Khong Prachachon' [The Public Order and Good Moral of Citizen] (1975) 32(1) Bot Bundit, Law Journal of the Thai Bar, 15 (อุกฤษ มงคลนาวิน 'ความสงบเรียบร้อยและศีลธรรมอันดีของประชาชน' (2518) 32(1) บทบัญญัติ นิติสารของเนติบัณฑิตยสภา) 15

5.2.2 Analysis

The historical prohibition on sharing part of the proceeds of another person's litigation might no longer be applicable. Under the enactment of the Act Amending the Civil Procedure Code (No. 26) concerning class actions in the year B.E. 2558, Thai courts may award remuneration to the plaintiff's lawyer up to thirty percent of the total amount of damages awarded in the dispute. This is the first time Thai written law permits lawyers to take benefits relating to the outcome of the case. The rationale behind the law is due to the nature of class action suits, where each injured person suffers different amounts of damages. Therefore, it is challenging to fixate the amount the lawyer is entitled to receive at the beginning of the case without knowing whether the injured persons will receive compensation from the class action suit.

6 Benefits of Third-Party Funding

6.1 Access to Justice

TPF can play a significant role to help fill the gap of state-provided legal aid, which only assists vulnerable individuals. The availability of TPF enables claimant incapable of bearing the financial burdens of litigation to proceed with their claims and have access to the justice system.

6.2 Mitigation of Risk

TPF provides opportunities to mitigate and manage the risks of litigation by shifting liability for costs to the Third-Party Funder. Thus, TPF Agreement turn potential risks into an asset which can be bargained for.

6.3 Second Opinion from Potential Third-Party Funders

TPF helps reduce the number of groundless cases brought to courts or arbitral tribunals. Before financing potential claims, a Third-Party Funder would naturally analyse the probability of success of the respective applications and the possibility of recovery and returned profits. A Third-Party Funder is unlikely to provide monetary assistance if he does not

consider the prospects of success to be favourable. Third-Party Funder's review can be seeking a second opinion of the merits of a case and the strategic management thereof.

6.4 Encouragement of International Arbitration in Thailand

The implementation of TPF would enhance the competitiveness of Thai arbitral institutions with other arbitral institutions based in other jurisdictions. Additionally, the change will substantially improve the arbitration environment in Thailand such that Thailand may be recognized as an "arbitration-friendly" jurisdiction by foreign investors.

6.5 Support Class Actions

Pursuing class actions requires a significant amount of monetary assistance since the initiation of a class action suit, i.e., gathering potential class members, finding evidence linked to the case, and paying other advance costs. Plaintiffs are required to advance legal expenses in prosecuting the class action. As a result, potential representative plaintiffs may not want to be at risk of such amount in a class-action suit. TPF could be a vital tool to provide all class members monetary assistance and enable a group of meritorious claimants to pursue the class action claim.

7 Legal Issues Arising From the Implication of Third-Party Funders

7.1 Conflicts of Interest

In dispute resolution proceedings, justice is administered by judges and arbitrators. For judges and arbitrators to secure their impartiality while performing their duties, their maintenance of independence is of utmost significance. In particular to the arbitral proceedings, claims to allege a lack of independence and impartiality of the arbitral tribunal are often used to challenge the arbitral award regardless of whether such decision rendered is viewed as right or wrong. Given these circumstances, the relationship between arbitrators and financier of TPF could create significant concerns

about independence and impartiality.²³ This would be self-evident, for example, if the arbitrator worked in a law firm funded by a third party, or if an arbitrator is in a case where the claimant is funded by the same Third-Party Funder that provides financing for an unrelated party in an unrelated dispute, both of which creates doubt about his or her impartiality and independence.²⁴

7.2 Confidentiality and Privilege

Typically, a Third-Party Funder is not a party in the dispute resolution proceedings. As such, their involvement in dispute resolution proceedings may give rise to the issue of whether any information deemed confidential for purposes of the proceedings may be shared with them. To obtain TPF, potentially sensitive information may need to be provided to the potential Third-Party Funder. It is, therefore, important to ensure that the other disputing party is not then able to obtain disclosure of the confidential information on the basis that privilege has been waived. The problem which arises from TPF is that providing confidential information and documents to third-party investors could result in a breach of privilege and confidentiality.

7.3 Undue Control Over the Dispute Resolution Proceeding

Once finance is a subject of dispute, the investor has a direct monetary interest in the final result. As such, risk may arise where the funder may exercise an undue control over the conduct of proceedings. For instance, a funder might pressure a funded party to agree on some condition which is not in the funded party's best interest. Further, if the funded party fail to comply with such request, the funder may withdraw the

²³ Aren Goldsmith and Lorenzo Melchionda, 'Everything You Ever Wanted to Know (But Were Afraid to Ask) - Part Two' (2012) *International Business Law Journal*, 221, 225

²⁴ Duarte Henriques 'Arbitrating Disputes in Third-Party Funding: A Parallel with Arbitration in the Financing Sector' (2018) <<https://ssrn.com/abstract=3285723>> accessed 10 June 2019

monetary assistance leaving the funded party unable to continue the conduct of the proceedings.

8 Conclusion and Proposed Solutions

After conducting historically and comparatively analysis, the author concludes that a TPF contract, which strengthens access to justice and does not abuse the process, should be permitted. Additionally, the author suggests for the following means to be implemented in order to approach to the use of TPF in Thailand:

8.1 Judicial Attitude

Judicial attitudes should be shifted to recognize TPF as an acceptable means of strengthening access to justice and mitigating risks associated with pursuing litigation or arbitration.

The first and foremost reason is that the judiciary bears the responsibility to improve access to justice, due to the existence of courts and arbitral institutions. A TPF Agreement is an acceptable means of facilitating people's access to justice and should not be considered contrary to public policy. In particular, the role of TPF can help fill the gaps of the Justice Fund or other legal aid organizations, which only assists vulnerable individuals.

Additionally, previous justifications for prohibiting the involvement of unrelated third parties is now out of date. Historically, the prohibition was designed to prevent an abuse of process and corruption in the legal proceedings. However, these concerns are currently addressed by various forms of law and regulation.

To ensure uniformity in the judiciary system in the judges' exercise of their discretion, it suggests that the President of the Supreme Court may

provide the judges with the guidelines as to how to deal with TPF' issues, by issuing the President of the Supreme Court's guidelines.²⁵

8.2 Legislative Approach

Thailand should consider amending the Thai Arbitration Act to grant TPF of arbitral proceedings in, at least, international arbitration as the pioneering approach. Subsequently, the availability of TPF should be expanded to domestic arbitration before eventually amending the Civil Procedure Code to allow the use of TPF for domestic litigation. The amendments should make it clear that TPF Agreements are permitted and no longer contrary to public order or good morals. The Amendment should also make clear the type of TPF being permitted under the Amendment, namely, the TPF investment. For the avoidance of doubt, this does not include all types of dispute resolution tools involving third parties such as contingent fees and conditional fees.

Additionally, it would be advisable for Thailand to initially implement subordinate legislation, such as ministerial regulations, to specify the manner of TPF permissible, as subordinate law is much more flexible in terms of amendment and adjustment. Additionally, the proposed legislation should address the issues of a qualified funder, a duty of disclosure, conflicts of interest.

8.3 Non-Disclosure Agreement

In the process of obtaining or maintaining TPF, the potential funded party may need to provide the funder with some sensitive information and record relating to the cases in order to ensure the confidentiality of proprietary information or sensitive documents that may be exchanged between funder and funded party before receiving any information, the relevant party shall enter into a non-disclosure agreement.

²⁵ Act Promulgating the Law for the Organization of the Courts of Justice B.E. 2543 (2000) s 5

8.4 Proposed Terms and Conditions of Third-Party Funding Agreement

To avoid any potential practical problems, it is also suggested that a TPF Agreement shall consist of the following:

1. Confidentiality and legal privilege requiring the Third-Party Funder to refrain from disclosing certain sensitive and confidential information;
2. Scope of funding provided; and
3. Conditions of termination of the agreement by a Third-Party Funder.

8.5 Role of Professional Associations

The Lawyers' Council of Thailand as an essential professional organization should play a proactive role in providing expert advice or guidance to lawyers when faced with TPF Agreements to have an awareness of their roles and responsibilities to relevant parties.

8.6 Establishment of Third-Party Funder Association

The author further suggests that a Third-party Funder association be established. In this regard, the prospective funder who wishes to embark on its business in Thailand shall be required to be enlisted as a member of the Association and strictly comply with the Association's code of conduct.

This allows the Association to regulate the TPF industry and guarantee that the funders acquiesce to the proper standard of practice and avoid undue control over the conduct of the proceedings.

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