

***Third Party Funding (TPF)***  
***“Views and experience of litigation counsel”***

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**Third Party Funding (TPF) from a litigation counsel’s perspective**

According to Cybersettle, an on-line provider, TPF addresses

*“...one of the most basic forms of human interaction:  
settling monetary disputes between two or more parties...”*

TPF is a big business, not just addressing needs of people or of justice:

Cybersettle states by 2009 it resolved over 250,000 claims online, worth \$1.6B.

**Litigation Funding’s philosophical bases:**

Access to Justice (effective ability to access the justice system)

“Level the Playing Field” (*David + TPF can stand up to a Goliath*)

A small claimant can pose a “credible threat” to a large defendant

Can promote, in theory (but not always in practice), an early settlement

But not appropriate for all types of disputes?

E.g., small business disputes, construction cases, personal injury, etc

And not available for doubtful or difficult cases? (*the “70% Rule”*)

While the “factors” on which the TPF decisions are made are known,  
the decision to fund a case or not, is less transparent to users

**Litigation funding’s stated traditional purposes:**

- a. Funding a case through judgment and appeal, and
- b. Covering the risks of an adverse cost award, if the case is lost  
(the new field of ATF insurance, mostly in England)
- c. Funding the recovery/enforcement process, following judgment

But subject to the TPF’s “business model” which will always require:

***Prudent management of financial risk***

## Types of Litigation funding to be considered by a proposed claimant:

1. By Government(S)
  - a. State Legal Aid programmes (if the Claimant qualifies)
  - b. Other governmental support (private claims in criminal actions)
2. By lawyers involved in the case (subject to regulatory/ethical rules)
  - a. US-style contingent fee arrangements
  - b. UK conditional fee arrangements (CFA) since 2000
  - c. Swiss "*pactum de palmario*" agreements
3. By external third parties (TPF's, individual investors, family, others)  
(traditionally this was often prohibited as "*stirring up litigation*")  
The common law rules against champerty & maintenance  
NB: English criminal law was changed in the Criminal Law Act 1967, although pure contingent fee agreements remained contrary to English public policy

## Importance of Effective and Available Litigation Funding

### Access to Justice -- can the claimant bring his/her claim in litigation?

Some recent English judgments dealing with the importance of TPF to a claimant, particularly where the claim arises in a jurisdiction that does not have TPF available:

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*Connelly v RTZ* (House of Lords 1998, Lord Goff)

(a uranium mine case in a Namibian court)

The general rule is that English Courts will not deny a stay to an English case simply due to a lack of financial assistance in a foreign court where the action arose

*Lubbe v. Cape plc* (House of Lords 2000, Lord Bingham)

(asbestos class action from RSA)

The general rule has to be tempered if under the circumstances there will be a substantial denial of justice; and not being able to obtain competent legal representation in the foreign court can be enough, burden of proof is on the claimant.

*Pike and Doyle v. The Indian Hotels Co Ltd* (QBD, English High Court)

Judgment of Mr Justice Stewart of 19 Dec 2013)

Claimants, injured at Taj Mahal Hotel in 26Nov2008 terrorist attack, sued in London. Claimant 1 is 34 year old, now paraplegic.

The Court concluded from evidence: time to judgment in Bombay is 15-20 years and the Claimant could not proceed without TPF, which is not unavailable in Bombay.

The Judge refused to stay the English proceeding in favour of a Bombay forum, as sought by the defendant hotel group.

**Example claims where individuals in Geneva sought TPF:**

- a. Terminated employee vs Swiss bank: Claim- CHF30K
- b. Russian Yacht purchaser vs Monaco Shipyard: Claim- \$1M
- c. Middleman v. RSA Government & Belgian Banks: Claim- \$600M  
(but case pending in 2 courts, 2 languages, military-related)

**Example claim where a small company sought TPF to limit legal risks**

Inventor/technical expert vs an Italian Shipping Co: claim €350K

## **How to find and compare available TPF's and approaches?**

Ethical obligation on lawyers to be informed and to inform clients.

Major Funders often target large litigation firms and barrister chambers (clerks)

For Parties, the inevitable value of persons you know and the internet

## **The litigating party's concerns?**

1. Obtaining fair economic terms (% of the result to cede to the TPF (after costs)?) Under most circumstances, these depend upon:
  - "Difficulty" of the case, chances of success? (prior legal opinion(s))
  - Cost Budget / unforeseen litigation developments?
  - Scope of TPF's coverage: appeal, parallel actions, etc.?
  - Possibility to renegotiate the financing transaction during the case?
2. Assuring control of the litigation (rights of TPF in setting strategy & settlement?)  
The "effective partnership" of the TPF and the Claimant's legal team
3. Assuring confidentiality and fidelity of those involved.

## **Current Conclusions from counsel's point of view**

How much justice can you afford? -- New Yorker cartoon

Geneva, 16 January 2014