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The emergence and evolution of third party funding around the world: A transnational perspective

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Abstract
Historically, as per the "antique laws", the doctrine of maintenance and Champerty barred a disinterested party from financing the litigation or execution of any agreement between the plaintiff and a party to finance the suit in return of a share of the recovery. Although, the doctrine is dual-headed involving both maintenance (funding another's lawsuit) and Champerty (funding another's lawsuit in exchange for a share of the proceeds), the modern legislations and precedents have amalgamated it and now coined it under the common Champerty rubric. While its origins were in feudal France, the doctrine was developed in England under the common law system and later spread to other common law countries like Australia and USA. It was considered professionally unethical for a party to get into an agreement with a lawyer or solicitor with a contingency fee arrangement or for a lawyer to financially assist his clients. However, the modern laws have taken a different view, as the concept is rapidly evolving and has now become a global phenomenon.
This paper attempts to discuss the origin or emergence of the concept of financing the litigation and dispute resolution cases and how third party funding turned into a global phenomenon from being a single-country practice. Lastly, the authors will elucidate the trends and challenges of the funding concept vis-à-vis the present outlook of the countries around the world.

Keywords: litigation finance, litigation funding, lawsuit finance, third party funding, TPF, third party litigation funding, TPLF, litigation, dispute resolution, arbitration, commercial law

Introduction

Litigation Finance or funding, also known as "third party funding" is a concept of monetizing legal claims pending in litigation or dispute resolution matters, either domestic or international, wherein an unrelated third party invests money in return for a portion of any financial recovery from the matter. As the costs of litigation and arbitration can be overwhelming, this arrangement exists to provide resources to a litigant who has a potentially viable and valuable claim. Typically, third party funding is provided by special funds, hedge funds, investment banks, private companies and insurance companies who may gain upon successful outcome of the case. However, with the rapid evolution of the concept, new entities such as insurance companies and law firms are also stepping in as potential funders.
Historically, as per the "antique laws", the doctrine of maintenance [1] and champerty [2] barred a disinterested party from financing the litigation or execution of any agreement between the plaintiff and a party to finance the suit in return of a share of the recovery. Although, the doctrine is dual-headed involving both maintenance (funding another's lawsuit) and champerty (funding another's lawsuit in exchange for a share of the proceeds), the modern legislations and precedents have amalgamated it and now coined it under the common Champerty rubric. While its origins were in feudal France, the doctrine was developed in England under the common law system and later spread to other common law countries like Australia and USA [30]. It was considered professionally unethical for a party to get into an agreement with a lawyer or solicitor with a contingency fee arrangement or for a lawyer to financially assist his clients. However, the modern laws have taken a different view, as the concept is rapidly evolving and has now become a global phenomenon.
This paper attempts to discuss the origin or emergence of the concept of financing the litigation and dispute resolution cases and how third party funding turned into a global phenomenon from being a single-country practice. Lastly, the authors will elucidate the trends and challenges of the funding concept vis-à-vis the present outlook of the countries around the world.

Emergence of litigation finance

The origin of the modern day concept can be traced back to Australia where it began and later to United Kingdom, where through the act 1967 Criminal Law Act, the Maintenance and Champerty offences were rendered neither crimes nor torts.
The first step towards financing of litigation disputes in Australia was when the Court ruled that Maintenance and champerty were obsolete as crimes [4] in the Australian Common Law system. This paved way for enactment of legislations in New South Wales, South Australia, Victoria and the Australian Capital Territory [5].
In the case of UK, the informal development in the field began by the financing of litigations by legal aid funds which were followed by litigation funding by trade unions and insurance companies. Later, the Criminal Law Act clarified the position of law as stated above.
The emergence of this new funding phenomenon can also be attributed to its advantages. Litigation in today's time is a costly

affair all around the world. The long hearings owing to the huge backlog, multiple discoveries and huge attorney fees has made it even more tougher for the litigants to pursue even their rightful claims. Hence, litigation funding can provide the claimants with the requisite capital injections for litigation fees, expert witness and reports, and lawyer fees which may provide the claimant an effective way of receiving relief before the Courts. On the other hand, litigation funding is a relatively safer option for the investor as it involves relatively lesser risk as compared to other option being uncorrelated to the market.

Evolution of third party funding

The evolution of Third Party Funding can be ascertained from the fact that what started as a small scale arrangement to support the needy litigants in their potentially viable claims or as a state funded exception to the rule of archaic laws, was recently valued globally at US$ 10,916.3 Mn in 2018 and is Expected to Reach US$ 22,373.3 Mn by 2027 Growing at a CAGR of 8.3% Over the Forecast Period Owing to Litigation Funding Investments Being Uncorrelated With Market Cycles [6]

As the world is moving towards commercialization and globalization [7], the economies have been developing to operate together as one system. This mass globalization has in turn increased not only trade and business but also the cross border disputes. Hence, other than being totally unaffected by the market fluctuations, disputes are seen as one of the major investment options by major litigation funds as a lucrative investment option as they can earn good returns. As per the author, another catalyst for the rapid growth of the concept is the promotion of mediation and settlement treaties around the world. The option of settlement substantially lowers the risk for the investors as upon a favourable settlement, they have recourse to the agreed shared of award. The funds can be used to invest in all types of cases, including but not limited to, commercial, corporate, class action and even cases related to disputes with regards to personal rights of the parties like partition and diverse cases.

The sector is growing in leaps and bounds as the trend around the world is moving towards accepting the concept as opposed to obsolete notions. This has given advent to the rise of big investment firms incorporated solely for the purposes of financing litigations and potential claims. Other than the big investment firms, crowdfunding [8] sources have also been established with the purpose of bringing together potential third-party funders or investors and the needy litigants.

Over the last two centuries, Litigation Finance has been on a boost in many countries like Australia, UK, USA, India etc. however, other countries like Singapore Hong-Kong still have certain reservations with regards to enforcement of the litigation funding contracts.

Litigation fundind around the globe

Australia

Australia can be regarded as the modern birth place of the concept of Third Party Funding or Litigation Funding/Finance. The declaration of the concept of maintenance and champerty as obsolete was the first step towards formal recognition of the concept of third party funding. Even though the restrictions were relaxed, yet there existed ambiguity with respect to applications of the rules which was clarified by Federal Court in 1996 in *Movitor* Pty Ltd (receivers and managers appointed) (in liq) v Sims [9]. The Federal Court held that an agreement in which an insurance company would fund a liquidator's cause of action against the directors of the liquidated company fell within an exception to the prohibition on champertous agreements. This exception was that a trustee in bankruptcy may lawfully assign the bankrupt's causes of action. The liquidator, having statutory powers to dispose of the property of the company, was allowed to dispose of a cause of action on terms that the insurance company was to share in part of the profits, so long as it was not making a grossly excessive profit. This decision legitimized third-party funding arrangements and created an opportunity for litigation funders to develop their business model in Australia. However, it was limited to raising capital to provide funding for insolvency practitioners [10].

In 1992, the Federal Court of Australia Act 1976 (Cth) (the "Federal Court Act") was amended to introduce Part IVA which established a federal representative proceedings (class action) regime. The Trend was followed by other states, the state of Victoria [11] amended the act in the year 2001 followed by New South Wales [12] and Queensland [13] enacting the amendments in 2011 and the latest amendment bill was enacted by Western Australia [14].

The proposed reasons for introduction of class action regime to the Federal Court of Australia was access to justice, effective resolution of dispute, reduction in multiplicity of litigations and cost reduction of both claimants and the Court. So, far the regime has proven to beneficial and has stood upto the expectations [15].

In the year 2016, the verdict in *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Pty Ltd* [16], marked a new chapter in Litigation funding with the legalization of a "common fund order or CFO". In the case of the applicant brought the class action on its own and on behalf of an "open class" comprising all persons who acquired an interest in QBE shares and who claimed to have suffered loss as a result of QBE's conduct. The action was funded, but not all class members had entered into a funding agreement to repay the funder a share from the proceeds of the judgment. Thereafter, the applicant brought an interlocutory application pursuant to section 33ZF of the Federal Court Act which had the effect of applying the terms of the funding agreement to all class members including people who had not entered into an agreement with the funder. (a "common fund order" (CFO)).

QBE opposed the application on a number of grounds, including that the court would inevitably make a "funding equalisation order" (FEO) [17]. The Full Court of the Federal Court explained that FEO is not necessarily the most appropriate way to achieve equality of treatment between funded and unfunded group members and made orders in favour of setting up CFO. This made the funding more convenient for the Funding groups as they no more had to create books of class members.

The latest development in the litigation funding landscape is that, the Justice Legislation Miscellaneous Amendments Bill 2019 was introduced to the Victorian Legislative Assembly that proposes amendments to give the court the power to make "Group Costs order".

That the pro-litigation funding trend in Australia and its endorsement by the policymakers is an indication that the Third-Party Funding in Australia is not only here to stay but will spike over the coming years.

United Kingdom

The UK has a sophisticated market for Third Party Funding, the concept being permissible as per law. TPF is seen as a vehicle of access to justice in the UK and hence is endorsed and supported by the Judiciary and Policymakers/Legislators alike. The analysis of TPLF reveals that the global assets under management by litigation funds active in the UK are over £1.5 bn, up 743% from 2009 (£180 m) [18]. As per the figure provided by Augusta Ventures, the value of court cases and cash directly held by UK litigation funders saw a boom from £378 million at year end 2015 to £1.9 billion last year thereby marking an increase of around 400 per cent in the past five years [19].

Third Party funding originated in the United Kingdom around the same time as that in Australia, however, the major two reasons for the boom in the concept. First can be traced to the decriminalization of the concepts of maintenance and champerty by amendment in the Criminal Law Act of 1967 and second is attributed to passing of the Act [20] which made it legal for clients and lawyers to enter into conditional fee agreements (CFAs). Prior to CFA the concept of "No win, no fee" was prohibited. Another reason for widespread growth of the concept was Access to Justice Act, 1999. The main purpose of this act was to provide for alternate ways of third party funding. That the act introduced the concept of "loser pays" as per which the opponent or losing party to pay would have to pay for the successful party's attorney's fees. Furthermore, the act also introduced After the Event (ATE) Insurance, as per which the party could insure the case in an event a party would have to pay the attorney fee's in case of an unsuccessful claim. The introduction of these new alternatives to litigation funding literally made every aspect of the case a potentially an investing opportunity for the funders irrespective of the outcome of the case [21].

That the pro-litigation funding approach was also supported by the Courts of U.K and in 2002, the Court of Appeal held all kinds of litigation funding permissible except for such third party funders who tried to impose influence over the judicial system or cases. It was held that all professional funders who upheld the dignity and integrity of the judicial system were legal [22].

Other than the voluntary code of conduct for litigation funders, developed by the Ministry of Justice Working Group and which was first published in November 2011, there exists no legislation that formally regulates the third party funding in England and Wales.

United States of Amercia

The Doctrine of Third Party Funding reached the United States as an influence from the United Kingdom, financers drew influence from the practices in UK and started investing in potentially viable claims. The regulations relating to Litigation Funding in the US are mostly state related laws or procedural state laws. Apart from different states legislations and judicial precedents, there is absence of a purely federal law regulating TPF. The Supreme Court of US in 1978 summarized the nuances regarding the archaic-sounding terms: "Maintenance is helping another prosecute a suit; Champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or Champerty" [23]. There exists variation amongst the fifty states regarding application of third party funding. Some states uphold the common law doctrines of Champerty and maintenance, while others engage in a relaxed form of enforcement, and the remainder have abolished the doctrine altogether. According to a survey conducted in 2010, 28 of 51 states permit Champerty [24]. In 2019, the US Congress introduced the Litigation Funding Transparency Act of 2019, with the aim of requiring disclosure of funding along with funding agreement in any federal class action or federal multi-district litigation (MDL) proceeding.

The state of California never adopted the doctrines of maintenance and champerty and there exists no rule regarding disclosure of third party funding a suit. However, for class action litigation in the Northern District of California, the Standing Orders were recently revised requiring the disclosure of 'any person or entity that is funding the prosecution' of 'any proposed class, collective, or representative action' [25]. Accordingly, for class or collective matters in the Northern District, a party's funded status should be disclosed at the initial stages pursuant to Rule 3–15 [26].

New York has permitted third party funding as there exists no formal legislation prohibiting the same. However, there exists a system of check and balances to regulate the concept. New York Supreme Court Justice Shirley Kornreich in her address had referred the concept as a system of making justice accessible for all [27]. It is pertinent to mention herein that as per the NY law, Champerty is prohibited. There has not been a case in recent times where any third party funding was seen as Champerty by the New York Courts. The main purpose of the rule is to prohibit filing of vexatious suits, filed for the purposes of obtaining costs and compensations. The Court of Appeals of New York has weighed the champerty statute in contexts where the party obtains a note or security and then approaches the Court. The court held that the main factor determining the conduct as Champertous or non-champertus is the intent of the party in obtaining the note or security. If a party obtains a note to enforce its right under the note then it is permissible [28] however, if a note is obtained to build a cause of action so as to enable the Plaintiff to bring a suit then the same is champertous [29].

In view of the spiraling graph of TPF, the U.S Chamber Institute for Legal Reform issued a whitepaper in October of 2012, suggested numerous changes to third party litigation funding. Among the suggested changes which are limits or prohibition on investor control of cases, forbidding all contact between the third-party funding group and lawyers without the inclusion of the client, banning law firm ownership of third-party funding groups and full disclosure of funding contracts in litigation [30].

In certain states, there exist limitations on the interest rates that can be charged in Third Party funding. Oklahoma and Maine have signed similar bills regulating the often exorbitant interest rates charged by third-party litigation funding groups. The Colorado Attorney General launched a successful lawsuit against Oasis Legal Finance, aimed at treating the third-party funding group as a traditional lender. Ohio and Maine have also enacted laws that require third-party funding groups to register with state authorities, report the fees charged for such loans, and assurances from the lender, that the funder will not make any decisions that would influence the course of the litigation [31].

In view of the foregoing, Congress has expressed concerns with regards to third party funding lacking in regulation and oversight. Furthermore, Senate Judiciary Committee had expressed their concerns with respect to the industry being ''largely unregulated and operating with no licensing or oversight.'' In fact, the

Senators had requested information for the 2009–2014 period regarding, among other things, (i) the matters in which they invested; (ii) lawyers with whom they have entered into financing arrangements; and (iii) details about the resolution of the matters (*i.e.*, how much money was paid to all parties). Several litigation funding firms including American Legal Finance Association ("ALFA") have often represented the funding as an investment and not a type of loan subject to consumer protection laws.

Gradually, more states have started to adopt a legislative scheme regulating consumer litigation finance arrangements. In August of 2014, Tennessee introduced a scheme for regulation the funding and others have since followed.

In conclusion, despite the rampant growth of the third party funding, the consensus seems to be different from every state. The judiciary emphasizes on disclosure of financing and there exists no blanket legislation. The states have their own set of rules and legislations, hence, US in its true sense has adopted a state-wise approach towards third party funding.

India

As of date, India does not have a legislation prohibiting or regulating Third Party Funding of cases in India. It will not be incorrect to call the Indian legal market as untapped in respect of the concept. However, India being one of the fastest developing economies in the world with more than 40 million cases pending in different courts [32], the legal market in India is becoming one of the most sorts after market for litigation funds and funders alike. Keeping this in mind, the biggest litigation funds in the world are also aiming to enter the Indian market. The concept of TPF is per se not impermissible in India as the rules of Champerty and Maintenance are not applicable as per the law of the land [33]. Although at the moment, there exists no institution or law prohibiting Third Party Funding in India, however, the Apex Court had held that the funding of the litigation by the advocates may be impressible. Furthermore, the Court had held that "There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation [34].

Singapore

Singapore has one of the most pro-arbitration regimes in the world today. In pursuance of the same, Singapore's Parliament passed the Civil Law Amendment Act and the Civil Law (Third Party Funding) Regulations [35], vide which common law tort of Maintenance & Champerty were abolished to permit third party funding in International Arbitrations and other such associated proceedings in courts or mediation. As such, the concept of Third Party Funding has been firmly incorporated into Singapore's Arbitration community.

Moreover, the Ministry of Law in 2018 after seeking public consultations on the implementation of the Third Party Funding regulations, in addition to the Civil Law Amendment, expanded the TPF agenda into Singapore International Commercial Court (SICC) and other such proceedings by way of specific rules of court [36] and explicitly made provisions for the apportionment of costs to a non-party, such as a third- party funder.

Furthermore, alongside to the legislative reforms, the rationale in RE FAN KOW HIN (2018) SGHC 257 that funding agreements were not against public policy in bankruptcy and insolvency proceedings is important, as it could be used to allow courts to uphold funding agreements in proceedings not covered by the Civil Law Amendment Act as long as they do not overrule the principles of Champerty and maintenance [37].

Singapore's aim to maintain its position as one of the leading arbitration hubs can be seen culminated in the enactment of the amendment act and the funding regulations that show how welcoming the country is towards the concept.

Hongkong

Hong Kong has lagged behind in terms of the ongoing trend of pro-third party funding regime. Even though Hong Kong has still held onto the doctrines of Maintenance and Champerty in terms of Litigation, TPF was allowed in terms of Arbitration and Mediation vide The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance [38]. Furthermore, the Hong Kong Government also published the Code of Practice of Third Party Funding of Arbitration (the Code). On top of the aforementioned ordinances and code, the Honk Kong government, in pursuance of its goals to make Hong Kong one of the most favored seat in International Arbitration proceedings, the he Hong Kong International Arbitration Centre published a new version of its Administered Arbitration Rules in 2018 (the HKIAC Rules) [39].

Despite instilling a liberal approach towards TPA in Arbitration and Mediation, it can be observed that the Third-Party Funding arrangements in litigation or court proceedings may still attract penal or tortious provisions as per the law of the land. As an exception, The Hong Kong Court in Cyberworks Audio Video Technology Ltd [40] opined that the HonK Kong Courts will permit a funding agreement where it includes an assignment of cause of action by a liquidator. The right to assign causes of action to liquidator is conferred by the section 199 (2) of the Companies (Winding Up & Miscellaneous Provisions) Ordinance (Cap 32), which empowers liquidator's right to 'sell the real and personal property anything in action of the company by public auction or private auction [41]. Furthermore, the Hong Kong Courts may allow facilitation of Third Party Funding mechanism in insolvency proceedings till the time there exists a legitimate commercial purpose [42]. Other than that, the Courts may allow funding of court proceedings in case of common interests or/and where access-to-justice maybe a point of consideration for the party to contest the suit, keeping in mind the litigation costs.

In addition, it has said that if funder raise capital in Hong Kong, could arguably been regulated by the Securities and Futures Commission Ordinance. And, in the situation, if the funds provided by a funder are considered a loan, the funder might be considered a 'money lender' under the Money Lenders' Ordinance and requires a licence to conduct business with the funded party.

In terms of practitioners funding the litigation, the Legal Practitioners' Ordinance and Professional Conduct rules prohibit the funding of court cases. However, it has vitally noted under the eye of the author that Section 980 of the Arbitration Ordinance expressly prohibits lawyers, solicitors, barristers and law firms prevents them from funding cases in which that already acting for any party in relation to the arbitration [43].

Conclusion

The rapid growth of Litigation Finance around the world is a proof of its acceptance into the mainstream litigation realm by different countries and jurisdictions. Leaving apart a few countries, despite there being an absence of regulation and legislation, the concept has found an implied acceptance by the legislators and judiciary across jurisdictions. However, if the concept will stand the test of time without creating complexities or hindrances to justice, that only time will tell.

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b. take into account such circumstances as the court considers relevant, including the conduct of the case;
c. order costs to be paid by a counsel, restricted registration foreign lawyer or registered law expert personally, or by a person who is not a party;
d. order interest on costs; or
e. make any ancillary order, including an order as to the time and manner of payment.

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