

# Trending in international dispute resolution

## Unlocking the potential of third party funding in dispute resolution



## Introduction

High costs of arbitration and litigation are a major concern, and can result in financial constraint or distress for companies seeking redressal for wrongs caused by others. It may deter companies from pursuing meritorious claims, as the cost may exceed a disputant's budget given the uncertainty of the length of the proceedings. Even banks, the most common source of external funding, do not fund litigation proceedings directly due to the uncertainty of the resolution and financial outcome.

In a recent survey report by the Singapore International Dispute Resolution Academy<sup>1</sup> (SIDRA), cost was ranked the third most important consideration in selecting a dispute resolution mechanism. In fact, mediation was deemed as the most cost-satisfactory dispute resolution mechanism, given the high cost concerns around other mechanisms of dispute resolution - arbitration and litigation (Exhibit 1).

In the same survey, corporate or client users<sup>2</sup> (53%) emerged as more mindful of costs in the selection of dispute resolution mechanism than the professional legal users<sup>3</sup> (44%), reflecting the worry around the direct impact such expenses may have on the financials, debt covenants and liquidity measures of companies (Exhibit 2).

To address the cost concern associated with arbitration and litigation, third party funding (TPF), a form of financing for legal cases, was first introduced in leading global dispute resolution centres including London, New York and Geneva, before being legalised in Asia's major hubs, Singapore and Hong Kong.

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- (1) The Singapore International Dispute Resolution Academy (SIDRA) is a research centre within the Singapore Management University School of Law. PwC assisted [Singapore International Dispute Resolution Academy \(SIDRA\)](#) in conducting the [International Dispute Resolution Survey \(IDRS\) 2020](#), which aims to understand how Dispute Resolution stakeholders, including corporate executives, in-house legal counsels, lawyers and legal advisers, make decisions around resolving cross-border disputes. Over 300 respondents across 46 countries participated in the survey, conducted between January to July 2019. The full survey report was published on 3 July 2020. In this publication the survey is referred to as SIDRA Survey 2020.
  - (2) Based on the respondent profile of the SIDRA Survey 2020, Client Users consist of corporate executives and in-house counsel.
  - (3) Based on the respondent profile of the SIDRA Survey 2020, Legal Users consist of lawyers and legal advisers.

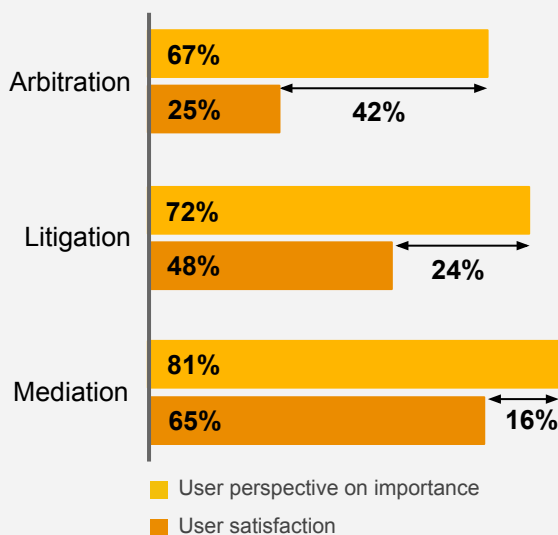
TPF is not simply for the impecunious. It is a means by which companies can unlock value from existing decisions and ongoing cases. Companies can avoid the risk of investing in lengthy cases, and the associated financial impacts of such investments, while continuing to pursue meritorious cases. Furthermore, it allows a company to pursue cases that would otherwise be abandoned, potentially transforming a legal department from a cost center into a revenue generating department.

We believe that TPF should be considered when planning out a dispute resolution strategy. This publication analyses the major benefits of TPF in dispute resolution and highlights key considerations around getting it right.



Exhibit 1: Disparity between importance of cost and satisfaction for dispute resolution

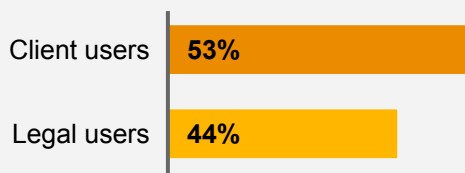
Cost factor of dispute resolution mechanisms



- Arbitration users deem cost as important, yet it has the lowest cost satisfaction.
- Disparity between importance of cost and satisfaction is the largest for arbitration, followed by litigation and mediation.
- Mediation is the most cost-satisfying proposition among the dispute resolution mechanisms.

Source: SIDRA Survey 2020

Exhibit 2: Influence of cost factor on selection of dispute resolution mechanism by respondent user profile



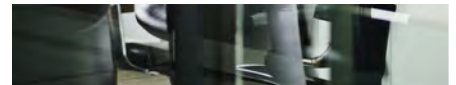
- Client users are more mindful of costs when selecting a dispute resolution mechanism, reflecting concerns around the direct impact such expenses on the company financials.

Source: SIDRA Survey 2020

# Third party funding - a solution to cost concerns

TPF traditionally enables a party to a dispute to enter into an agreement with a third party funder to obtain financing for part or all of the cost of the proceedings without recourse. In the event that a claim is successful, the third party funder then typically receives a share of the proceeds.

TPF models have evolved over time and parties can agree on alternative funding arrangements that still preserve the sanctity of the legal process. The availability of TPF provides support not only for companies that cannot afford representation, but also for parties that may have the resources but simply do not desire to divert cash from the normal operations of the business, especially at times like the current economic downturn. At the same time, TPF enables parties to get a third party assessment of the case, possibly signalling the strength of the underlying legal arguments.



## Unlocking the benefits of engaging third party funders

Reducing financial risks	Increasing value propositions
<ul style="list-style-type: none"><li>Minimise financial risks of disputes by reducing, or eliminating, cash investment in ongoing legal cases</li></ul>	<ul style="list-style-type: none"><li>Increase profitability by using external funding to pay for dispute related costs, enabling the company's cash to be used for revenue generating investments</li></ul>
<ul style="list-style-type: none"><li>Protect business from adverse cost risks if the case is unsuccessful</li></ul>	<ul style="list-style-type: none"><li>Utilise a TPF's experienced resources to perform case monitoring functions leading to greater prospects for success and recovery</li></ul>
<ul style="list-style-type: none"><li>Reduce cost by having legal fees and expenses managed and paid by a third party</li></ul>	<ul style="list-style-type: none"><li>Benefit from revenue recognition through monetisation of litigation related assets, such as ongoing cases, judgments or awards subject to an appeal or pending enforcement, when done on a non recourse basis</li></ul>
<ul style="list-style-type: none"><li>Protect the company's financial statements from contingent liability risk, while leveraging contingent assets, which typically sit off balance sheet, to bring cash onto the balance sheet</li></ul>	<ul style="list-style-type: none"><li>Obtain better terms and realise greater budget, cash generation, or risk management goals through portfolio financing for multiple disputes, including those that would not otherwise qualify for funding on a standalone basis</li></ul>

## Choosing the right funding partner

When considering TPF, companies need to look beyond the repayment terms and evaluate the funding partner as well.

### Key considerations for choosing the right funding partner

01

Resources and experience to see a case through to conclusion

02

Proven track record of working on diverse commercial disputes or disputes related to specific relevant industries/needs

03

Global presence and expertise in complex commercial disputes if the case is multi-jurisdictional in nature

04

Progressive approach to designing solutions to the company's needs

To maximise the value, companies should actively engage with the TPF partners to seek clarity on the alternative funding arrangements available and seek professional advice on the best approach to fund the dispute resolution proceedings.







# The legalisation of third party funding in Singapore

In 2017, the Civil Law Act of Singapore abolished civil liability for the tort of maintenance and champerty, giving way to the legalisation of TPF for international arbitration and related court or mediation proceedings. Permission for TPF had since been extended to include domestic arbitration, prescribed proceedings in the Singapore International Commercial Court and mediations arising out of these proceedings.<sup>4</sup> The framework provides parties with additional financing and risk management opportunities as well as ensure better access to justice.

In recent times, we have seen an upturn in requests for legal funding in Singapore. It is important to first understand the guidelines and recommended practices of TPF<sup>(5)(6)</sup>.

## Key guidelines to know

- 01 Confidentiality and privilege:** It is recommended to enter into a confidentiality or non-disclosure agreement prior to disclosing any documents to a TPF. The agreement should also clarify that further disclosure of information related to the dispute can only be done with consent from the funded party.
- 02 Scope of funding:** The amount of funding, how the amount may vary as well as the investment return if appropriate should be agreed upon and specified in the agreement. Additionally, the type of costs that will be funded and other arrangements should be set out in detail.
- 03 Managing conflicts of interest:** Contractual terms should include procedures to address how potential conflicts of interest shall be resolved. These include the TPF's acknowledgment that the lawyer's duties are owed to the funded party and the TPF must not induce a lawyer to breach his or her duties or cede control of the dispute to the TPF. Additionally, where a TPF funds more than one party in the same proceedings, it should notify the funded parties of any potential conflict that arises during the case. The guidelines also envisage the basis of disclosure of the funding arrangements to the court or tribunal.
- 04 Control of proceedings and TPF's level of involvement in decision-making:** The nature and scope of the TPF's role should be specified. It is recommended that a dispute resolution provision is included for conflict management between the TPF and the funded party.
- 05 Termination of the funding agreement:** Termination provisions are important in order to identify the situations in which it may be terminated by either party and clarify the extent to which a TPF remains liable for accrued obligations.

(4) Minister (Law and Home Affairs) K Shanmugam, Opening Ceremony of Law Society at Maxwell Chamber Suites (speech, 10 Oct 2019), <https://www.mlaw.gov.sg/news/speeches/speech-by-minister-k-shanmugam-at-opening-ceremony-of-lawsoc-at-maxwell-chambers-suites>

(5) The Council of the Law Society of Singapore, April 25, 2017, The Law Society of Singapore Guidance Note 10.1.1 Third-Party Funding. [https://www.mlaw.gov.sg/files/Council\\_GN\\_Third\\_Party\\_Funding.pdf](https://www.mlaw.gov.sg/files/Council_GN_Third_Party_Funding.pdf)

(6) Singapore Institute of Arbitrators, May 18, 2017, SI Arb Guidelines for Third Party Funders. [https://www.siarb.org.sg/images/SI Arb-TPF-Guidelines-2017\\_final18-May-2017.pdf](https://www.siarb.org.sg/images/SI Arb-TPF-Guidelines-2017_final18-May-2017.pdf)



## Best practices in engaging TPF

- 1 Gain in-depth understanding of the new enacted framework and its potential impact on your existing decisions as well as ongoing cases.
- 2 Adhere to guidelines issued by recognised practitioners and institutions, such as The Law Society of Singapore<sup>7</sup> and Singapore Institute of Arbitrators (SIArb)<sup>8</sup>.
- 3 Consult and proactively clarify your understanding of the recommended best practices with professional experts.

(7) The Council of the Law society of Singapore, Apr 25, 2017.

(8) Singapore Institute of Arbitrators, May 18, 2017.

## Contacts

### Michael Peer

Partner, Head of Disputes Advisory  
PwC South East Asia Consulting  
+65 9663 9089  
[michael.peer@pwc.com](mailto:michael.peer@pwc.com)

### Dmitry Kosarev

Forensics Director  
PwC South East Asia Consulting  
+65 9671 1326  
[dmitry.kosarev@pwc.com](mailto:dmitry.kosarev@pwc.com)

### Christine Soon

Forensics Senior Manager  
PwC South East Asia Consulting  
+65 9620 7135  
[christine.ly.soon@pwc.com](mailto:christine.ly.soon@pwc.com)