

Client Alert

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International Arbitration Update No. 20

Navigating Third Party Funding — An Opportunity for Japanese Businesses

For Japanese parties involved in cross-border dealings, litigation and arbitration will likely be well known. Indeed, statistics from arbitral institutions suggest that Japanese corporates are increasingly willing to pursue resolution of their disputes through international arbitration, which contrasts with the common perception that Japanese parties are predominantly respondents in disputes, i.e., “on the back foot.”¹

Against this background, third party funding (“**TPF**”) has emerged as a key tool that may be deployed by Japanese parties. As Japanese businesses increasingly engage in cross-border disputes, navigating the intricacies of TPF and understanding how to leverage its potential to a company’s advantage has become crucial.

In this client alert, we delve into the evolving regulatory landscape of TPF in Japan, the practical applications of TPF and the strategic advantages it offers, how TPF is used in other developed jurisdictions and how TPF is already being used in Japan.

1. What is third party funding and why is it used?

TPF is a financial arrangement where a third party — typically a private commercial fund (“**Funder**”) — provides capital to finance all or part of a party’s legal costs in a formal dispute resolution proceeding (such as litigation or arbitration) (collectively, “**Action**” or “**Actions**”). In return, the Funder receives an agreed share of any financial recovery or a multiplier of costs paid. Importantly and as may be clear, the party receiving funding does not ordinarily have to pay the Funder in the event it is unsuccessful in the Action.

TPF offers several advantages, including the following.

- **Financial risk mitigation:** Claimants can pursue an Action without the financial burden of legal costs. Ordinarily, if the Action is unsuccessful, the Funder bears the entirety of the legal costs (so-called “No Win, No Fee”), providing a significant financial safety net for claimants.

This risk mitigation is crucial, especially in a high-stakes Action where the financial burden can be substantial. By transferring this risk to the Funder, claimants are more likely to pursue claims that they might otherwise abandon due to financial constraints.

¹ For example, the statistics of the International Chamber of Commerce International Court of Arbitration (“**ICC**”) for 2023 state that of the 18 Japanese parties involved in new ICC-administered arbitrations, 11 were claimants and 7 were respondents. See https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf



- **Access to justice:** TPF provides access to justice for claimants who might otherwise be unable to afford the costs of an Action.

Here, TPF offers financial resources to claimants who may not otherwise be able to afford to pursue their claims, ensuring that lack of funds does not hinder the pursuit of meritorious cases. This aspect of TPF is particularly important in cases where the claimant is up against a well-resourced opponent, such as a government entity or multinational company.

- **Expertise and resources:** Funders often bring valuable expertise and resources to the table, including preliminary assessments of the case, strategy and enforcement considerations.

Funders typically have extensive experience in TPF and may assist in evaluating the merits of a case, identifying potential obstacles and devising effective strategies to overcome those roadblocks from a commercial standpoint. This expertise can be invaluable to claimants when they are assessing whether to pursue an Action, as well as during any Action that is eventually pursued.

2. How is third party funding used in other jurisdictions?

Globally, TPF is used commonly in Actions.

The TPF market is now well-developed and subject to substantial investment. For example, in 2020, the global addressable market for TPF was around USD 11.2 billion.²

The increase in TPF in recent years appears to be partially due to recent geopolitical events and the coronavirus pandemic. Studies show that the desire to use TPF more than doubled during and immediately following the pandemic (not least due to a desire by companies to lessen the economic and operational impact of their legal issues).³

TPF is used across a range of claims, including but not limited to breach of contract, tort, intellectual property, anti-trust, insurance and tax.

However, in many jurisdictions, there are certain limitations on situations in which TPF can be provided in an Action or how it may be used (as briefly explored below).

(i) England and Wales

In England and Wales, TPF for Actions is generally permissible provided it does not exhibit elements of impropriety, such as disproportionate control or profit or a tendency to corrupt justice.

The TPF industry in England and Wales has seen significant growth, with Funders' assets increasing from GBP 200 million in 2010/2011 to GBP 2.2

² See <https://www.globallegalpost.com/news/europes-share-of-litigation-funding-market-set-to-grow-as-esg-and-human-rights-fuel-cases-report-finds-1928776720>

³ Figures derived from statistics published by EY.



billion in 2021/2022.⁴ This growth likely reflects the increasing acceptance and reliance on TPF as a viable funding mechanism for Actions.

In an effort to ensure that Funders act appropriately, the UK judiciary has established a code of conduct and other related rules for Funders. The code sets out standards of practice and behavior for Funders in England and Wales.⁵ The Association of Litigation Funders oversees the TPF industry and ensures that Funders adhere to the code.

(ii) US

Globally speaking, TPF is most common in the US. It is allowed in most states, provided certain ethical considerations are met.

For example, the courts in New York are generally accepting of TPF for Actions, given that the courts consider generally that such funding promotes adjudication of disputes on the merits of their cases.⁶

During the period from July 2021 to June 2022, Funders invested USD 3.2 billion in new TPF — a 16% increase from the previous year.⁷

(iii) Singapore

In Singapore, TPF is available for certain Actions,⁸ namely the following:

- International arbitration
- Arbitration-related court proceedings
- Proceedings before the Singapore International Commercial Court (“SICC”)
- Cases in the insolvency context

Against this background, the Law Society of Singapore has issued best practices for lawyers advising clients on TPF,⁹ which cover items including: (i) confidentiality; (ii) managing conflicts of interest; (iii) ensuring Funders have an appropriate involvement in disputes (i.e., not an excessive amount of power); and (iv) duty of disclosure of TPF agreements.

3. Is third party funding allowed in Japan?

Given the myriad potential advantages of TPF, Japanese parties may be curious as to whether they may take advantage of TPF in their Actions. Historically, contingency fee arrangements for lawyer’s fees have long been

⁴ See [Litigation Funding – The UK and US rankings 2023 – The Legal 500](#)

⁵ The code of conduct and other relevant documents appear on the websites of both the British government and the Association of Litigation Funders of England & Wales. See, for example, [Documents | Association of Litigation Funders](#).

⁶ See [Third-Party Litigation Financing in the US | Practical Law \(thomsonreuters.com\)](#)

⁷ See <https://www.reuters.com/markets/us/litigation-funders-deployed-32-bln-us-investments-last-year-report-2023-02-16/>

⁸ See <https://practiceguides.chambers.com/practice-guides/litigation-funding-2024/singapore>

⁹ See [Council GN Third Party Funding.pdf \(mlaw.gov.sg\)](#)



used in Japanese domestic litigation, meaning the concepts of TPF should be relatively familiar to Japanese parties.

In Japan, the regulatory landscape for TPF is not clearly established. While there are no explicit prohibitions against TPF, certain legal considerations must be addressed.

(i) **Laws and regulations relating to lawyers**

Legislation and regulations related to lawyers include provisions that may impact TPF agreements. Some common examples and how they may be alleviated are below.

- Article 72 of the Attorneys Act:¹⁰ This article provides that no person other than an attorney (*bengoshi*) or a legal professional corporation (*bengoshi hojin*) may engage in legal services (e.g., the provision of an expert opinion, representation, arbitration or settlement of general legal cases including via litigation) or engage in broker services related to legal cases for purposes of earning compensation.

As such, TPF agreements must ensure that Funders do not provide legal advice or services in connection with Actions.

- Article 73 of the Attorneys Act:¹¹ This article provides that no person may engage in any business where it exercises the rights assigned to it by others through lawsuits or any other means.

Accordingly, TPF agreements must avoid any assignment of claims to the Funder.

- Article 10 of the Trust Act:¹² This article provides that no person may create a trust for the predominant purpose of entrusting litigation to any other person.

As a result, TPF agreements must ensure compliance with this provision.

- Basic Rules on the Duties of Practicing Attorneys ("**Rules**"): ¹³ Several of these rules may be applicable. For example: (i) Article 11 of the Rules prohibits an attorney from receiving an introduction to a client from a person that violates the provisions of Articles 72 to 74 of the Attorneys Act or from a person who has reasonable grounds to suspect that they have violated these provisions and from allowing such a person use the attorney's name; (ii) Article 12 of the Rules prohibits the apportionment of fees in respect of a lawyer's duties to someone who is not an attorney; and (iii) Article 13 of the Rules prohibits an attorney from paying remuneration for receiving a referral of a client and from receiving remuneration for referring a client.

¹⁰ Attorneys Act (Act No. 205 of 1949).

¹¹ *Id.*

¹² Trust Act (Act No. 108 of 2006).

¹³ Basic Rules on the Duties of Practicing Attorneys (Japan Federation of Bar Associations' Rule No. 70 of 10 November 2004).



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Accordingly, TPF must be structured so as not to violate these provisions.

In addition to the above, lawyers must ensure that they comply with their other professional obligations (e.g., those related to confidentiality) and that — if applicable, particularly in Actions in foreign jurisdictions — TPF arrangements do not destroy applicable privilege (e.g., attorney-client privilege).

(ii) Financial regulations

Depending on how a TPF agreement is structured, Japanese financial regulations may apply. Accordingly, it may be necessary to consider issues such as the below.

- Money Lending Business Act:¹⁴ It may be necessary to consider, for example, whether TPF, including the provision of funds by way of advance payment, is considered to be the economic equivalent of a "loan" (*kinsen shouhi taishaku*) (i.e., provision and repayment of funds), to which the act applies.
- Financial Instruments and Exchange Act:¹⁵ It may be necessary to consider whether TPF constitutes security (*yukashoken*) under this act, which may give rise to a membership right of the holder to receive dividends of profits or a distribution of assets (referred to as "**invested business**" or "**collective investment scheme interest**"), which could trigger application of certain regulations.
- Other financial regulations: These include, for example, whether the Act Regulating the Receipt of Contributions, Receipt of Deposits and Interest Rates¹⁶ or the Interest Rate Restriction Act¹⁷ applies to the TPF.

Actions in foreign jurisdictions

Notwithstanding the above, TPF may be used freely for Actions that are foreign seated (i.e., Actions outside of Japan), insofar as the Japanese laws and regulations set out above do not apply.

This has been the area in which TPF has been deployed most often by Japanese companies to date (including so-called "Investor-State Disputes").

Distinct from the discussion as to whether TPF is allowed in foreign seated Actions, several arbitral institutions and bodies have transparency requirements when TPF is used in an Action. Far from limiting the use of TPF, however, such rules seek to: (i) avoid conflicts of interest between Funders, the arbitral tribunal and the parties; (ii) increase public trust in the arbitral process; and (iii) remove related issues as to the enforceability of arbitral awards.¹⁸

¹⁴ Money Lending Business Act (Act No. 32 of 1983)
¹⁵ Financial Instruments and Exchange Act (Act No. 25 of 1948)
¹⁶ Act Regulating the Receipt of Contributions, Receipt of Deposits and Interest Rates (Act No. 195 of 1954)
¹⁷ Interest Rate Restriction Act (Act No. 100 of 1954)
¹⁸ See, for example, Article 11(7) of the ICC Rules 2021, which states that a party wishing to use TPF "must promptly inform the Secretariat, the arbitral tribunal and the other



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4. Is third party funding already used by Japanese parties?

In short, yes. While not prolific in its use to date, TPF is gaining traction in Japan and Japan is seen by many Funders to be an untapped market.

For litigation seated in Japan, TPF has been leveraged by international parties. For example, a prominent Funder successfully funded a group of 60 institutional investors in a case involving a listed Japanese company in the Tokyo District Court.

With respect to foreign-seated Actions, Funders have provided TPF to Japanese parties. Some examples of this include the following:

- Action in Switzerland for a number of Japanese institutional investors
- Litigation in the Netherlands and Belgium for a group of Japanese institutional investors
- Arbitration seated in London for a Japanese corporation against a Southeast Asian counterparty
- Investor-state arbitration brought against Switzerland by a number of Japanese investors¹⁹

Taken together, these examples demonstrate the global applicability of TPF for Japanese parties and how useful a tool it may be (whether or not a claimant can “afford” to pursue an Action).

5. Conclusion

TPF offers significant advantages for parties seeking support for Actions. It provides financial resources and allows the mitigation of pecuniary risks, together with offering strategic expertise and insights that enhance the likelihood of a successful outcome.

While certain legal and practical considerations must be navigated, these advantages are clearly not lost on Japanese parties (as can be seen from the examples of existing use set out above).

As TPF continues to evolve and word spreads about it, it is likely to become an increasingly important consideration for Japanese parties, offering new opportunities for claimants and Funders alike.

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If you would like to discuss any of the issues raised in this alert, please do not hesitate to contact us.

parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defenses and under which it has an economic interest in the outcome of the arbitration.”

¹⁹ See <https://www.law.com/international-edition/2024/11/22/japans-mori-hamada-joins-funder-lcm-for-150m-credit-suisse-bonds-claim/>