REPORT OF THE LAW REFORM COMMITTEE

ON

LITIGATION FUNDING IN INSOLVENCY CASES

SINGAPORE ACADEMY OF LAW

LAW REFORM COMMITTEE

FEBRUARY 2014

Authors/Sub-committee Members:

Ashok Kumar (Chairman)
Chou Sean Yu (Vice-Chairman)
Valerie Thean
Damien Coles
Blossom Hing
David Chan
Loke Shiu Meng
Darius Tay
Samuel Ng

About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

About the Report

See Executive Summary below.

Comments and feedback on this report should be addressed to:

Law Reform Committee
Attn: Law Reform Co-ordinator
Singapore Academy of Law
1 Supreme Court Lane, Level 6, Singapore 178879
Tel: +65 6332 4459
Fax: +65 6334 4940
Website: www.sal.org.sg

TABLE OF CONTENTS

I. Executive Summary

1 This paper is a result of the deliberation of a Subcommittee comprising the persons set out in accordance with the terms of reference set out below ("the Subcommittee").

A. Subcommittee's Terms of Reference

2 Mandate of the Subcommittee:-

(a) To consider the current law on champerty and maintenance relating to litigation and insolvency cases in general in Singapore and other relevant jurisdictions.

(b) To consider if legislation, protocols or any other platforms should be proposed to confirm that litigation funding is permitted in insolvency cases *ie* liquidations, judicial managements, schemes of arrangement, and receiverships and managements (both appointed pursuant to security instrument or by the Court), subject to limitations and/or regulations.

(c) To consider and make the appropriate recommendations on legislation, protocols or any other platforms to the Law Reform Committee of the Singapore Academy of Law.

3 Members of the Subcommittee:-

(a) Ashok Kumar (Chairman)
(b) Chou Sean Yu (Vice-Chairman)
(c) Valerie Thean
(d) Damien Coles
(e) Blossom Hing
(f) David Chan
(g) Loke Shiu Meng
(h) Darius Tay
(i) Samuel Ng

B. Summary of recommendations

4 The Subcommittee has considered law reform to allow litigation funding in cases of formal insolvency (such as in judicial management and liquidation proceedings) as well as approved schemes of arrangement ("Schemes") under s 210 of the Companies Act (Cap 50) ("CA"),[1] and recommends such reform to allow litigation

[1] Cap 50, 2006 Rev Ed.

funding in cases of formal insolvency within a regulated framework that strikes a balance between the competing policies of access to justice and purity of justice in Singapore. While it is evident that being able to pursue such actions enables the Insolvency Professional (*ie* liquidators, judicial managers) to better protect creditor interests in a formal insolvency and to provide a better distribution of dividends to creditors, these access to justice issues must be balanced with the issues concerning maintenance and champerty.

5 Having considered the arguments in case law, papers and other academic texts, the Subcommittee feels that where litigation funding is concerned, codification is the best means by which a balance may be struck between the competing policies and should therefore be considered under the CA until the Insolvency Act is passed. Additionally, the Subcommittee believes that it will be premature at this stage to extend litigation funding to Schemes until it is clear whether s 210 of the CA will be incorporated into the Insolvency Act in its current or modified form. For the time being, it is recommended that the law reform should apply only to Insolvency Professionals comprising liquidators and judicial managers, and that such funding arrangement should be Court-approved and regulated in order to eliminate abuse.

II. Reasons for the Traditional Approach

6 The traditional common law doctrines of champerty and maintenance make it illegal for third parties to interfere or be involved in legal proceedings. In brief, these rules were developed to protect vulnerable litigants,[2] and uphold the purity of justice by preventing the judicial system from becoming a site for speculative business ventures.[3] More importantly, the Courts have been cautious in guarding against the abuse of the Court process, fearing that "the champertous maintainer might be tempted, for his own personal gain, to inflame damages, to suppress evidence, or even to suborn witnesses".[4]

---

[2] See also Christopher Hodges, John Peysner & Angus Nurse, *Litigation Funding: Status and Issues, Research Report*, January 2012, Centre for Socio-Legal Studies, Oxford at 12, <http://www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf> (accessed 10 May 2013) ["*Hodges*"].

[3] Standing Committee of Attorneys-General, Discussion Paper, *Litigation Funding in Australia* (May 2006) <http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/litigationfundingdiscussionpapermay06.pdf> (accessed 10 May 2013) ["*Standing Committee Discussion Paper*"].

[4] *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 219-220 *per* Lord Denning.

III. Champerty and Maintenance in the UK, Australia, Hong Kong and Singapore

A. Then: Champerty and Maintenance as Torts and Crimes

7 The UK Criminal Law Act 1967 (Chapter 58) abolished the offences and torts of maintenance and champerty in the UK,[5] though champertous agreements remain unenforceable for being contrary to public policy or otherwise illegal.[6] Many Australian jurisdictions[7] have also made maintenance and champerty obsolete as crimes and torts[8] though, as in the UK, champerty remains relevant when considering the illegality and enforceability of maintenance agreements between the plaintiff and funder.[9] In Singapore, the common law position on champerty and maintenance has been adopted via s 3 of the Application of English Law Act ("AELA").[10] This Singapore position will be discussed in greater detail below.

8 In both England and Australia, exceptions to the blanket prohibition against the law on champerty stemmed from the strong public policy consideration of access to justice. The key problem was that the cost of legal action, rather than the merits of the claim, had become a determining factor in litigation.[11] The fiscal burden of legal aid meant that it was a less desirable option, and litigation funding concomitantly became an increasingly attractive option to address the widening denial of access to justice problem.

9 In contrast to the developments in the UK and Australia, maintenance and champerty remain criminal offences and torts in Hong Kong by virtue of Article 8 of the Basic Law.[12] The position in Hong Kong will be discussed further below in [26]–[28].

---

[5] Sections 13(1) and 14(1) of the UK Criminal Law Act 1967 abolished champerty and maintenance as crimes and torts respectively. See also *Hodges*, *supra* note 2, at 12.

[6] See section 14(2) of the UK Criminal Law Act 1967. See also *Hodges*, *supra* note 2, at 12.

[7] From 1969 to 2002, Victoria, South Australia, New South Wales (NSW) and the Australian Capital Territory (ACT), abolished the common law crimes and torts of maintenance and champerty. The Australian states of Queensland, Western Australia and Tasmania still retain the traditional common law position towards maintenance and champerty.

[8] *Standing Committee Discussion Paper*, *supra* note 3, at 5.

[9] Michael Legg, Louisa Travers, Edmond Park & Nicholas Turner, *Litigation Funding in Australia* at 7 <http://ssrn.com/abstract=1579487> (accessed 10 May 2013)["*Legg*"].

[10] Cap 7A, 1994 Rev Ed. ["*AELA*"].

[11] Woolf, *Access to Justice: Final Report, By the Right Honorable the Lord Woolf, Master of the Rolls* (July 1996).

[12] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art 8.

B. Now: Champerty as a Principle of Enforceability

10 Champerty is currently regarded as a public policy consideration when determining the enforceability of a funding contract between the litigant and funder.[13] Considering the approach adopted by the UK and Australia that analyses the policies of purity of justice and litigant protection in light of the access to justice as being imperative,[14] it is suggested that litigation funding should no longer be viewed purely as an outright act of funding. Rather, a more flexible judicial attitude, as reflected by the UK and Australian approaches, appropriately recognises that the mischief sought to be addressed by the rules prohibiting champerty and maintenance have either become extinct, or may be adequately addressed via other mechanisms, such as the abuse of process. As Mason P commented in *Fostif Pty Limited v Campbells Cash and Carry*:[15]

> "The considerations of public policy which once found maintenance and champerty so repugnant have changed over the course of time. The social utility of assisted litigation is now recognised and the provision of legal and financial assistance viewed favourably as a means of increasing access to justice."[16]

11 Today, the financing of litigation in these jurisdictions is not in itself sufficient to constitute maintenance, and a share in the proceeds is not automatically champerty.[17] Rather, Courts in these jurisdictions are called to inquire into the nature of funding in order to determine whether the facts and circumstances reveal an improper motive or a tendency to act in an unethical manner that would "sully the purity of justice".[18] In allowing third party assistance, these jurisdictions have promoted legal representation and facilitated access to justice, which would otherwise have been sacrificed.

---

[13] The legislation in the UK and Australian jurisdictions which have abolished champerty and maintenance as torts and crimes each state that the abolition of the torts and crimes of champerty shall not affect:

- UK: "…any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."
- Victoria: "…any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as being otherwise illegal… on the ground that its making or performance involved or was in aid of maintenance of champerty."
- South Australia: "any rule of law relating to the avoidance of a champertous contract as being contrary to public policy or otherwise illegal."
- ACT: "any rule of law about the illegality or avoidance of contracts that are tainted with maintenance, or are champertous."

[14] Alexander F H Loke, "Mounting Hurdles in Securities Litigation" (2010) Sing. Acad. L. J., 660 at para 59. ["*Loke*"].

[15] [2005] NSWCA 83 ["*Fostif (C.A.)*"].

[16] *Id*, at [91].

[17] *Hodges*, *supra* note 2, at 48.

[18] *Loke*, *supra* note 14, at [54], referring to *R (Factortame Ltd) v Secretary of State for Transport, Environment and the Regions (No. 8)* [2002] 3 WLR (CA) at [84].

C. Champerty and Maintenance in Singapore

12 The early English position on champerty and maintenance was adopted in Singapore through s 3 of the AELA.[19] Section 3 of the AELA clarified that the English common law that was already part of the law of Singapore immediately before 12 November 1993 would continue to be part of the law of Singapore. This common law of Singapore prior to 12 November 1993 was the common law received in 1826 via the Second Charter of Justice as modified according to the rules of *stare decisis* in Singapore, and included, *inter alia*, the common law on champerty and maintenance. Although champerty and maintenance are no longer criminal offences post the codification of Singapore's criminal law, their status as torts remain untouched by the UK Criminal Law Act 1967 (Chapter 58), which is not applicable in Singapore.[20]

13 Apart from their status as crimes or torts, Singapore law on champerty and maintenance has received minimal attention and would greatly benefit from judicial and governmental clarification. Though it is clear that champerty and maintenance are applicable as principles of enforceability, there remains ambiguity as to the actual approach of the Singapore Court and the Courts have yet to lay out precise policies and considerations that arise when examining whether an agreement is champertous.

14 In the High Court decision of *Jane Rebecca Ong v Lim Lie Hoa*[21] Chao Hick Tin J (as he then was) stated:[22]

> "[B]y virtue of the English Criminal Law Act 1967 neither maintenance nor champerty is a crime or tort in England. However, champerty and/or unlawful maintenance will still be struck down as being against public policy. That is also the law in Singapore."

15 On appeal, the Court of Appeal in *Lim Lie Hoa and another v Ong Jane Rebecca* ("*Rebecca Ong*")[23] declined to make as definite a statement as Chao J did. Although the Court eventually held that the funding arrangement was not champertous, it did so after finding that the legitimate interest exception applied in the case. This was

---

[19] *AELA*, *supra* note 10. Section 3 reads:

> **Application of common law and equity**
>
> (1) The common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before 12th November 1993, shall continue to be part of the law of Singapore.
>
> (2) The common law shall continue to be in force in Singapore, as provided in subsection (1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require.

[20] While it is not the position of this Subcommittee that the torts of champerty and maintenance should be abolished, the Subcommittee recommends that a statutory exception be created for litigation funding in insolvency. See Parts VIII and IX below.

[21] [1996] SGHC 140 ["*Jane Rebecca Ong*"].

[22] *Id*, at [16].

[23] *Lim Lie Hoa and another v Ong Jane Rebecca* (1997) 1 SLR (R) 775 ["*Jane Rebecca Ong (C.A.)*"].

because the funder had a pre-existing interest in financing the present proceedings in the hope that the plaintiff-respondent would recover funds which would enable her to discharge her liabilities incurred when loans were made out to her for living expenses, business ventures and the commencement of earlier maintenance enforcement proceedings against her husband.[24] That said, it is the view of the Subcommittee that this legitimate interest exception is not sufficient in the context of insolvency – this will be dealt with later below in Part VI.B.

16 In the 2007 decision of *Otech Pakistan Pvt Ltd v Clough Engineering Ltd*,[25] the Singapore Court of Appeal reinforced the applicability of champerty and maintenance laws in both litigation and arbitration proceedings governed by Singapore law.[26] The Court recognised as a "well-established doctrine" the fact that "a champertous contract offends public policy and is therefore unenforceable".[27] It further stated that "[p]ublic policy is offended by [a champertous] agreement because of its tendency to pervert the due course of justice".[28]

17 However, and significantly, the Court then proceeded to cite with approval Lord Denning's statement in *Re Trepca Mines Ltd (No 2)*,[29] which was made in 1963 prior to the abolishment of champerty law:[30]

> "The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame damages, to suppress evidence, or even to suborn witnesses. *These fears may be exaggerated; be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law…*"
>
> [emphasis added]

18 The choice of this particular statement of public policy by Lord Denning, which was made prior to the abolishment of champerty law in England, is poignant. To what extent has the law of champerty developed in Singapore, and to what extent is it – or should it be – applicable?

---

[24] *Id*, at [51].

[25] (2007) 1 SLR(R) 989 ["*Otech*"].

[26] *Id*, at [36].

[27] *Id*, at [32].

[28] *Ibid.*

[29] [1963] Ch 199.

[30] *Otech*, *supra* note 25, at [32], citing *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 219-220.

IV. Recent Emergence of Third Party Litigation Funding in the UK, Australia and Hong Kong

19 Litigation funding emerged as a means of affording access to justice for individuals and businesses that would otherwise be unable or unwilling to shoulder the financial burdens and risks of litigation.[31] Though third party litigation funding has not been statutorily codified in England or in any Australian jurisdiction, there has been strong judicial and governmental support of the litigation funding industry. Australian Courts have therefore interpreted statute to allow litigation funding in the insolvency context, while English Courts have explored and resolved various issues that arise in the course of litigation funding, such as the application of the adverse party costs rule; public advisory bodies have also expressed support for the industry as evinced by reports, publications and efforts to provide a framework of regulation.

A. Development of Litigation Financing in the UK

20 Up till 2005, third party litigation funding in the UK remained relatively underdeveloped as investors remained cautious about the effects that principles of champerty and maintenance had on the enforceability of maintenance agreements in general civil litigation.[32]

21 The winds of change came shortly after with a 2007 report on litigation funding, where the Civil Justice Council ("CJC")[33] stated that English Courts had in fact regarded third party funding as acceptable in the interests of justice, particularly where the prospective claimant was unable to fund his claim by other means.[34] It also concluded that third party litigation funding had already been established in England and Wales[35] following the English Court of Appeal's decision in *Arkin v Borchard Lines Ltd & Ors*.[36] There, the Court recognised the value of litigation funding in providing access to justice when it opined that "[a]ccess to justice will be denied"[37] should litigation funders be made fully liable for adverse party costs. Balancing the two principles of the desirability of the funded party obtaining access to justice, and that of

---

[31] *Wayne Attrill*, Ethical Issues in Litigation presented at Globalaw Asia Pacific Regional Meeting, Auckland (16 February 2009) at p 1. <http://www.claimsfunding.eu/uploads/media/Ethical_Issues_Paper.pdf> (accessed 10 May 2013) ["*Attrill*"].

[32] The Civil Justice Council, *The Future Funding of Litigation – Alternative Funding Structures* (June 2007) at para 127, <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/costs-and-funding> (accessed 10 May 2013) ["*CJC*"].

[33] The Civil Justice Council is an advisory public body tasked with overseeing and coordinating the modernization of the civil justice system. <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc> (accessed 10 May 2013).

[34] *CJC*, *supra* note 32, at [124].

[35] *CJC*, *supra* note 32, at [21].

[36] [2005] 1 W. L. R. 3055 ["*Arkin*"].

[37] *Id*, at [39].

the successful party being able to recover his costs,[38] the Court held that the "just solution" would be to make professional funders professionally liable for the costs of the opposing party to the extent of the funding provided.[39]

22 The CJC further recommended that properly regulated third party funding should be an acceptable option for mainstream litigation.[40] Most recently in November 2011, the CJC published a Code of Conduct for Litigation Funders.[41] The Association for Litigation Funders in England and Wales ("ALF") was also established to promote best practice in the litigation funding industry, improve the uses and applications of litigation funding as an additional resource for access to justice, and oversee compliance of ALF members with the Code's provisions. As at November 2011, the UK has approximately ten active third party litigation funders, with the total funds raised and invested in the UK approximating around £457 million.[42]

B. Development of Litigation Financing in Australia

23 Third party litigation funding has been a feature of Australian civil litigation since the mid-1990s and has enjoyed wide judicial acceptance. Despite more than 20 challenges from 1998 to 2006, the Courts have not struck down a third party funding agreement, though some proceedings were stayed to allow alteration of the funding contracts and provision of sufficient information to the plaintiffs in order that there be informed consent to the terms of the arrangement.[43]

24 These legal developments have set the basis for a lucrative litigation funding industry with approximately six to seven litigation funding companies,[44] the largest of which is IMF (Australia) Ltd ("IMF"). Though there are no statistics on the size of the entire litigation funding market, annual reports from IMF are telling of the industry's economic potential:

(a) IMF's net income from litigation funding was $35,246,957 in 2009 garnered through the resolution of eight major cases, with each having a budgeted fee to IMF of over $0.5 million.[45]

---

[38] *Id*, at [31].

[39] *Id*, at [41].

[40] *CJC*, *supra* note 32, at p 12.

[41] Association of Litigation Funders of England and Wales: Code of Conduct for Litigation Funders. <http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCode+of+Conduct+for+Litigation+Funders+(November+2011).pdf> (accessed 17 May 2013) ["*Code of Conduct*"]

[42] Cento Velijanovski, *Third Party Litigation Funding in Europe*, *Case Note* (December 2011) at 1, column 1 <http://www.casecon.com/data/pdfs/Casenote62TPLFDec2011.pdf)> (accessed 10 May 2013).

[43] *Standing Committee Discussion Paper*, *supra* note 3, at p 4.

[44] Simon Dluzniak, *Litigation Funding and Insurance* (March 2009), <http://www.imf.com.au/pdf/Paper%20-%20Dluzniak.pdf> (accessed 10 May 2013).

[45] IMF (Australia) Ltd, *Annual Report (2009)*, at 4 <http://www.imf.com.au/pdf/AnnualReport2009.pdf> (accessed 10 May 2013).

(b) In 2010 it posted a net income of $18,718,276, the dip owing to the deferment of major cases to subsequent years and the loss of one case.[46]

(c) In 2011, the IMF performed the best since its inception with a net income of $37,956,774 through the resolution of seven cases.[47]

25 In particular, the IMF's portfolio of claims in insolvency investments is substantial at $144 million in 2006, $132 million in 2007 and $132 million again in 2008.[48] In addition litigation funding has become an "Australian export" with IMF funding extending to proceedings in South Africa, New Zealand, the United States and the UK.[49]

C. Development of Litigation Financing in Hong Kong

26 While the issue has been mentioned, it is still unclear how Hong Kong will approach litigation funding. While there are possibilities for law reform, the position in Hong Kong is far from settled. What is clear is that the Hong Kong Courts have accepted the common law exceptions to maintenance and champerty rules. In *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*,[50] the Court of Final Appeal recognised several exceptions to the common law rule.[51] These are:

(a) The "common interest" category, whereby persons with a legitimate interest in the outcome of the litigation are justified in supporting the litigation;

(b) Cases involving "access to justice" considerations; and

(c) A miscellaneous category of practices accepted as lawful, such as the sale and assignment of an action commenced in a bankruptcy by a trustee in bankruptcy to a purchaser for value.

27 At the Court of Final Appeal, the common law position rendering maintenance and champerty criminal offences and torts have only recently been

---

[46] *Ibid*.

[47] *Ibid.*

[48] Wayne Attrill, Litigation Funding: Access to Justice in a Time of Economic Crisis, presented at Globalaw Asia Pacific Regional Meeting, Auckland (20 February 2009) at 8 (noting the spread of IMF investments from 2006-2008) <http://www.imf.com.au/pdf/Globalaw%20Conference%20-%20Feb%202009.pdf> (accessed 10 May 2013).

[49] Michael Legg, Edmond Park, Nicholas Turner & Louisa Travers, *The Rise and Regulation of Litigation Funding in Australia* (2011) 38 N. Ky. L. Rev. 625 at 629.

[50] [2007] HKCU 246.

[51] *Id*, at [92], [95], and [98].

questioned by Justice Riberio PJ in *Winnie Lo v HKSAR*[52] ("*Winnie*") by Justice Riberio PJ, who stated:

> "As a postscript, I wish to raise for consideration the question whether and to what extent criminal liability for maintenance should be retained in Hong Kong.[53] Eventually the Court decided that litigation funding was a matter relating largely to policy, which should be decided by Parliament instead of by the Courts:
>
> The issues are, however, of some complexity, and may involve taking a different view in respect of maintenance as opposed to champerty; and of criminal as opposed to tortious liability. It is in my view a fit topic to be referred to the Law Reform Commission."[54]

28 Nevertheless, it bears highlighting that the reservations of the Hong Kong Courts against litigation funding revolve around issues of confidentiality and the potentially excessive control that a litigation funder may have over proceedings. In *Akai Holdings Ltd v Ho Wing On Christopher* ("*Akai*"),[55] Stone J criticised the industry preference for the funder to be given influence over the strategic conduct of the litigation and decisions regarding settlement, and made clear its reservations against the funder's ability to cease funding at any time at its sole discretion.[56] The Court was also concerned that litigants may have to disclose sensitive commercial information to the funders, considering the funders' economic imperatives. Furthermore, the funders remain unascertained third parties over which Courts had no effective control.

V. Criticisms of Litigation Funding

29 Critics of litigation funding argue that it promotes frivolous litigation through the funding of weak and unmeritorious cases on terms that are unfavourable to vulnerable litigants.[57] The ethical issues raised by litigation funding can be broadly grouped into two key areas:[58]

(a) Purity of justice and the proper allocation of Court resources; and

(b) The litigant-funder relationship.

---

[52] [2012] 1 HKCFA 23 ("*Winnie*").

[53] *Id*, at [177].

[54] *Id*, at [179].

[55] [2009] HKCFI 2049.

[56] *Id*, at [138].

[57] Cento Velijanovski, Third Party Litigation Funding in Europe, *Journal of Law, Economics and Public Policy* (forthcoming) at 43, <http://ssrn.com/abstract=1971502> (accessed 10 May 2013).

[58] *Fostif*, *infra* note 100, at [90].

A. Purity of Justice

30 The purity of justice policy is concerned that litigation funding will create "trafficking in litigation" where funders stir up disputes or encourage recourse to Courts which would have been absent but for their intervention.[59] Court proceedings are designed to resolve controversies between two parties who deal directly with each other and with the Court and it cannot and should not turn into means through which third parties make money by creating, multiplying and stirring up disputes.[60]

31 Further, the concern is that public confidence in and public perceptions of the integrity of the legal system may be damaged by litigation in which causes of action are treated as items to be dealt with commercially and profited from.[61]

B. Litigant-Funder Relationship

32 The concern here is about the fairness of the bargain struck between the funder and the funded, with emphasis on the unequal financial power creating unequal bargaining power. The potential vulnerability of funded litigants raises consumer protection issues since these plaintiffs may not have legal knowledge and may not be well placed to negotiate a funding contract, assess its terms and conditions, or retain control over the proceedings.

33 Further, the introduction of a litigation funder complicates the claimant's decision-making process since the funder may, as part of the terms of funding, be involved in assessing the viability of the claim and affect the direction of litigation proceedings, especially in relation to decisions that have cost consequences (for example, the inclusion of potential defendants, making of procedural applications *etc*).[62]

34 Moreover, various conflicts of interest may arise in the course of litigation, which may lead to the subordination of the litigant's legitimate interests in favour of the funder's financial demands.[63] For instance, the litigant's acceptance or rejection of a settlement offer may be heavily influenced by the terms of the funding agreement such a minimum settlement quantum,[64] or a plaintiff may be prone to accept a cheap settlement offer in order to stop the accrual of interest even if his attorney advises that a favourable judgment resulting in higher recovery is likely.[65]

---

[59] *Attrill*, *supra* note 31, at p 8.

[60] *Fostif*, *infra* note 100, at 266. Minority judgment by Callinan and Heydon JJ.

[61] *Ibid*.

[62] *Loke*, *supra* note 14, at [66].

[63] *Attrill*, *supra* note 31, at p 8.

[64] *Ibid*.

[65] *Dietsch*, *infra* note 101, at 692.

VI. The Insolvency Context: A Convergence of Policies

35 The insolvency context is a unique one in which the policies of purity of justice and access to justice coincide. The involvement of Insolvency Professionals vastly reduces the fears that litigation funding might sully the purity of justice and mitigates the inequality of bargaining power between the funder and the funded.[66] Further, litigation funding, is beneficial to the judicial system in providing financial equality and financial discipline, as well as in encouraging enforcement of the law.

A. The Role of Insolvency Professionals

36 Despite the concerns over the litigant-funder relationship, advantage taking by the funder does not present a serious concern in the insolvency context, and key to this is the interposition of an Insolvency Professional between the funded and the funder. The fear that vulnerable litigants may lose control of their proceedings to large litigation funding companies is radically lessened in the insolvency context for the following reasons:

(a) Though the inequality of bargaining power exists, the vulnerability of insolvent litigants is reduced since they are advised by Insolvency Professionals who are well-versed in the relevant legal issues and in assessing and negotiating contracts.[67] Effective bargaining means that litigation funders do not dictate the terms of the agreement.[68]

(b) Insolvency Professionals have professional reputations to uphold, which is done through the maintenance of a good track record.[69]

(c) As trustees of the estate, Insolvency Professionals owe a fiduciary duty to the insolvent's creditors and are therefore under an obligation to retain control over the litigation proceedings.[70]

37 Against the backdrop of these considerations, it is highly unlikely that a litigant's interests will be overridden by the financier's interests or instructions.

---

[66] *Loke*, *supra* note 14, at para 73.

[67] *Standing Committee Discussion Paper*, *supra* note 3, at p 8.

[68] *Loke*, *supra* note 14, at para 73.

[69] *Loke*, *supra* note 14, at para 73.

[70] *Standing Committee Discussion Paper*, *supra* note 3, at p 8.

B. Inadequacy of Common Law and Statutory Exceptions

38 At common law, the primary exception to the prohibition against maintenance and champerty is the "common interest" exception established in the seminal case of *Trendtex Corporation v Credit Suisse* ("*Trendtex*").[71] In that case, the House of Lords held that an assignee who can show that he has a genuine commercial interest in the enforcement of another's claim and takes an assignment of that claim to the extent of his interest is entitled to enforce the assignment.[72] As to what constitutes "genuine commercial interest", the English Court of Appeal clarified in *Simpson v Norfolk and Norwich University Hospital NHS Trust* ("*Simpson*")[73] that it must be an existing interest "of a legitimate kind".[74] An example the Court raised was the scenario in *Giles v Thompson* ("*Thompson*"),[75] in which the plaintiffs had been involved in separate road traffic accidents, resulting in personal injuries and damage to their cars. While their cars were being repaired, they hired replacement vehicles under agreements which authorised the hire company to pursue proceedings against the defendants in their names. The House of Lords, in rejecting the defendants' contention that the agreements savoured of maintenance, reasoned that the hire companies had an interest in the success of the litigation since it could be expected to put the plaintiffs in a better position to pay the charges owed to the hire companies.[76] This exception, however, is a limited one that is inadequate to cover third party funding. This is demonstrated by the decision in *Trendtex* itself.

39 In *Trendtex*, a trading company had assigned to Credit Suisse the whole of its residual interest in a claim for US$14m against a Nigerian Bank for damages of breach of contract. The assignment agreement expressly provided that Credit Suisse may sell the claim to a third party for US$800,000, and the claim was eventually settled for US$8m. In holding that the assignment was void for champerty, Lord Wilberforce, with whom the rest of the House of Lords agreed, reasoned at p 694 of the judgment:

> "The vice, if any, of the agreement lies in the introduction of the third party. It appears from the face of the agreement not as an obligation, but as a contemplated possibility, that the cause of action against [the Nigerian Bank] might be sold by Credit Suisse to a third party, for a sum of US$800,000. This manifestly involves the possibility, either by the third party or possibly also by Credit Suisse, out of the cause of action. In my opinion this manifestly "savours of champerty" since it involves trafficking in litigation – a type of transaction which, under English law, is contrary to public policy."

---

[71] [1982] AC 679 ("*Trendtex*") (HL).

[72] *Id*, at 703.

[73] [2012] QB 640 ("*Simpson*").

[74] *Id*, at [19].

[75] [1994] 1 AC 142.

[76] *Simpson*, *supra* n 73, at [19].

40 Outside *Trendtex*, assignments have been permitted in limited circumstances, such as where the action was incidental to the enjoyment of property (*ie* where the assignee can demonstrate a legitimate property interest in the subject matter of the action);[77] where Insolvency Professionals sell or assign a cause of action to a creditor of the bankrupt in order to realize the bankrupt's assets for the benefit of creditors;[78] and where an insurer may pursue actions that the insured would have against third parties in respect of the losses indemnified.[79]

41 Given on the above explanation of the "genuine commercial interest" exception in the common law, one ought then ask the question: who could such *legitimate* third parties be in the context of insolvency litigation funding? Based on the decisions in *Trendtex* and *Rebecca Ong*, the only plausible third parties in an insolvency context whose funding would not fall foul of the rules against champerty and maintenance would be the existing creditors of the company.

42 This has in fact already been covered by s 328(10) of the CA, which allows liquidators to borrow from existing creditors in order to fund actions to pursue voidable transactions or misfeasance by company officers. A lending creditor may apply to Court for preferential distribution, in consideration of the risks run by it in offering funding.[80] Liquidators can record in the loan documentation that any recovery should first be applied to repay the borrowed money in full before any general distribution is made to other creditors.

43 Since s 328(10) of the CA already allows for funding by creditors, the *Trendtex* exception is arguably of little utility. In any case, would these creditors even be able and willing to fund the action? The Subcommittee has considered this question and has answered it in the negative. While s 328(10) of the CA does allow for the raising of funds through existing creditors, this is an arguably restrictive approach that assumes that such creditors will be willing and able to make such a contribution. This may not hold true in reality however, given that there are often multiple creditors in insolvency contexts, each possibly having only a relatively small investment that makes it unviable for them to take on the large risks attached to the financing of the entire litigation. Additionally, the added burden of adverse party costs in the event that the suit is lost creates a further disincentive.

---

[77] *Ellis v Torrington* [1920] 1 KB 399, where Scrutton LJ stated that the assignee of a cause of action was not guilty of maintenance or champerty by reason of the assignment because he was buying not in order to obtain a cause of action but in order to protect the property which he had bought.

[78] In *Guy v Churchill* (1888) 40 Ch D 481, a trustee in bankruptcy assigned a right of action to a creditor of the bankrupt on the terms that the creditor would prosecute the action at his own expense but would pay the trustee 25% of any recoveries from the action net of the creditor's costs of prosecuting the proceeding. This assignment was held to be lawful and not a champertous arrangement.

[79] *Compania Colombiana de Seguros v Pacific Steam Navigation Co.* [1965] 1 QB 101.

[80] Lee Eng Beng, "Insolvency Law" (2006) 7 SAL Annual Review 273 at para. 15.33. ["*Lee Eng Beng*"].

44 Indeed, it would appear then that the common law exceptions are inadequate to facilitate the access to justice so required in insolvency proceedings. To facilitate better access to justice, developments to allow third party funding would have to take place.

C. No Frivolous Litigation

45 Like any other profit-making business, litigation funding companies are focused on the generation of profit. This means that litigation funding companies analyze cases as investments, consider the risks involved and invest according to the projected rate of return.[81] In *In the Matter of ACN 076 674 875*[82] the New South Wales Supreme Court stated that there is the commercial certainty that a litigation funder would not, acting rationally, prosecute litigation at its expense unless there were a reasonable prospect of a verdict or settlement. Seeing full well the commercial context in which litigation funding companies operate, it would go against commercial sense for them to take up unmeritorious claims where the risk of loss is high and the projected rate of return low.

46 In fact, there is an alignment of the funder's economic interests with the Court's social objectives. In assessing whether the costs to be incurred in pursuing a claim are worthwhile,[83] litigation funders perform the valuable function of streamlining potential claims. By rooting out unmeritorious claims at the outset, litigation funders in fact assist in preventing wasteful litigation. Further, these benefits continue into the Court proceedings proper since the litigation funder would seek to achieve the best result with minimum resources, thereby assisting the efficiency imperative of the civil justice system.[84]

D. Benefits Offered by the Litigation Funding Industry

47 Crucially, provision of funds means that Insolvency Professionals is better placed to fulfill his statutory obligations and this encourages the enforcement of the law, in particular s 272(2)(c) of the CA.[85] In a 2006 discussion paper, the Standing Committee of Attorneys-General in Australia stated the benefits of litigation funding in the insolvency context:[86]

> "In the insolvency context, litigation funding plays an important role in permitting creditors to pursue wrongdoers or actions where this would otherwise be impossible due to lack of funds. The funding reduces risks for the creditors and the Insolvency

---

[81] *Dietsch*, *supra* note 100, at 706.

[82] [2002] NSWSC 578 at [24].

[83] *Loke*, *supra* note 14, at [47].

[84] *Id*, at [66].

[85] *CA*, *supra* note 1.

[86] *Standing Committee Discussion Paper*, *supra* note 3, at 7.

> Professionals in undertaking the litigation – because losses are insured against, they know that they are not 'throwing good money after bad'."

48 In particular, Insolvency Professionals are invested with a range of powers in aid of maximizing the funds available for distribution in the liquidation. These include the power to undo completed transactions of the company involving preferences and powers which enable the liquidator to take a range of compensatory proceedings against persons who have misconducted themselves in the management of the company.[87]

49 In addition, litigation funders set budgets for legal costs as a matter of business and in the interest of minimizing risks. In so doing they instill an element of financial disciplines in the claims process.[88] Further, third party litigation funding provides financial equality between creditors *inter se.* This is as opposed to a private funding arrangement where the funding creditor would enjoy preference in recovery.[89]

VII. Liquidators' Powers of Sale as Solution?

50 Having discussed the stance taken in various jurisdictions on litigation funding and the laws on champerty and maintenance, the next question is one of methodology: how may such litigation funding be permitted? In this regard, there is an observable trend of foreign Courts interpreting existing legislation to permit third party litigation funding. This usually takes place by giving a broad reading to the type of property that may be sold by the liquidator under his statutorily-conferred powers of sale.

A. The UK

51 In the UK, a liquidator has statutory powers under s 165(3) (voluntary winding up) or s 167(1)(b) (Court ordered winding up) of the Insolvency Act 1986 and paragraph 6 of Schedule 4 of the Insolvency Act 1986 to sell properties of the company. Recognising the unique circumstances of an insolvent company, the English Courts have chosen to give a liberal reading to the statutory provisions, in particular the term "property" of the company,[90] to allow the assignment of bare causes of action (which would normally be regarded a champertous transaction and not be allowed)[91] as well as of proceeds of causes of action.[92] Such a right of assignment is qualified; it applies only to causes of action belonging to the company and not those personal to the liquidator, with examples of the latter being the right to unwind antecedent transactions

---

[87] *Movitor*, *infra* note 96, at [23].

[88] *Loke*, *supra* note 14, at [47].

[89] *Standing Committee Discussion Paper*, *supra* note 3, at 7.

[90] *Empire Resolution Ltd v MPW Insurance Brokers Ltd* [1999] BPIR 486, [14] per HHJ Thornton QC.

[91] *Norglen Ltd v Reeds Rains* [1998] 1 BCLC 176 ["*Norglen*"].

[92] *Trendtex Trading Co Ltd v Credit Suisse* [1980] QB 629 at p. 674.; *Re Oasis Merchandising Services Ltd* [1995] 2 BCLC 493 at p.498c-h.

at an undervalue, preferences, extortionate credit transactions, and other situations where it is clear that the right belongs to the liquidator personally.

52 As succintly summed up by Lord Hoffman in *Norgen Ltd v Reeds Rains*:[93]

> "The position of liquidators and trustees in bankruptcy is however quite different. The Courts have recognised that they often have no assets with which to fund litigation and that in such case the only practical way in which they can turn a cause of action into money is to sell it, either for a fixed sum or a share of the proceeds, to someone who is willing to take proceedings in his own name. In this respect they are of course no different from many other people. But because trustees and liquidators act on behalf of creditors, the Courts have for the past century construed their statutory powers as placing them in a privileged position."

B. Australia

53 Litigation funding in Australia originated in 1995 from the statutory powers of sale held by liquidators,[94] which allowed them to contract for the funding of lawsuits if such lawsuits can be characterized as company property.[95] In *Movitor Pty Ltd (in liq) v Anthony Milton Sims*,[96] the Court held that the liquidator's power of sale under s 477(2)(c) of the Corporations Law permitted him to "sell or otherwise dispose of, in any manner, all or any part of the property of the company in aid of performing his duty of realizing the company's assets".[97] Champerty and maintenance would be less applicable here, as powers of sale over the insolvent's property upon the liquidator are conferred by statute, and such transactions are immune from any rule of law otherwise applicable that would make the sale unlawful.[98]

54 Additionally, this statutory power of sale also extends to the proceeds of successful litigation:[99]

> "*Since a share in the fruits of an action belonging to an insolvent company is 'property of the company' for the purposes of s 477(2)(c) the Corporations Law*, that section authorises the Insolvency Professionals to *make an agreement to pay a percentage of such recoveries in return for assistance in running the action,* because the section

---

[93] *Norglen*, *supra* note 91, at 186 d-f.

[94] Specifically, these statutory powers refer to a receiver's powers of disposal over a company's property: ss 420(2)(b) and (g) of the *Corporations Act 2001* (Cth); and Insolvency Professionals' powers of disposal: s 477(2)(c) of the *Corporations Act 2001* (Cth).

[95] *Hodges*, *supra* note 2, at 48 and *Legg*, *supra* note 9, at 4.

[96] (1996) 64 FCR 1320 ("*Movitor*").

[97] *Id*, at [22].

[98] *Id*, at [23].

[99] *Id*, at [29].

> empowers the Insolvency Professionals not only to sell, but to 'otherwise dispose of, in any manner' any part of the property of the company."
>
> [emphasis added]

55 That said, judicial acceptance of litigation funding is ultimately fundamental to the development of third party litigation funding since the Court's consistent support has led to investor confidence and reduced unpredictability in the litigation financing industry. In *Campbells Cash and Carry v Fostif Pty Ltd*,[100] the High Court of Australia declared that third party litigation funding arrangements were not champertous and expressly stated that fears of adverse effects on the litigation process did not warrant a broad public policy against litigation financing.[101]

C. Hong Kong

56 In Hong Kong, the Court in *Re Cyberworks Audio Video Technology Ltd* ("*Re Cyberworks*")[102] has held that the liquidator's assignment of a cause of action to a litigation funding company was a lawful exception to the prohibition on maintenance and champerty[103] even though the litigation funder had no financial interests in the litigation, and was only pursuing the claims for its own commercial gains. The reasoning was because s 199(2)(a) of the Companies Ordinance[104] enables a liquidator to sell a cause of action vested in a company over which he has been appointed. However, the liquidator's power to sell "does not extend to a cause of action that is vested in them as liquidators, such as unfair preferences".[105]

57 After *Re Cyberworks*, the Court in *Geoffrey L Berman v SPF CDO I, Ltd*,[106] affirmed that the assignment of a cause of action by a liquidator to a third party litigation funder was "not inconsistent with the common law rules prohibiting maintenance and champerty".[107] More significantly, Harris J, who also decided *Re Cyberworks*, suggested that the central question to be answered by the Court when assessing the assignment of a chose in action was "whether or not there is a proper commercial purpose to the transaction, which gives rise to no risk of the corruption of the judicial and litigation process".[108] Applying the reasoning, the Court held that the assignment was valid because, *inter alia*, the company could not recover

---

[100] [2006] HCA 41 ["*Fostif*"].

[101] Nicholas Dietsch, *Litigation Financing in the U.S., the UK and Australia: How the Industry has Evolved in Three Countries*, (2011) 38 N. Ky. L. Rev. 687 at 705. ["*Dietsch*"].

[102] *Re Cyberworks Audio Video Technology Ltd* [2010] HKCFI 404 ("*Re Cyberworks*").

[103] *Id*, at [11].

[104] Cap 32, 1997 (HK), s 199(2)(a).

[105] *Re Cyberworks*, *supra* note 102, at [6], citing *Oasis Merchandising Services Limited (in liq)* [1977] 1 AER 1009.

[106] [2011] HKCFI 190 ("*Berman*").

[107] *Id*, at [6].

[108] *Id*, at [27].

the debts that were proposed to be assigned, without further funding.[109]

58 Since the statutory exceptions permitted the entry of liquidators into funding arrangements in the insolvency context, the only question remaining is whether the arrangement is a *bona fide* exercise of the liquidator's statutory power of sale. Accordingly, a transaction is unlikely to be regarded as falling within the exception to the rules relating to maintenance and champerty should the liquidator dispose of the insolvent's cause of action or the fruits of such action in circumstances where the purchaser or funder would gain a grossly excessive profit at the expense of the company.[110]

D. Applicability in Singapore

59 In Singapore, a statutory provision similar to those in other jurisdiction exists in the CA in the form of s 272(2)(c). Under s 272(2)(c), a liquidator's powers of sale extend to the sale of immovable and movable property and choses in action of the company. Since this is the case, an argument can also be made that it should include the powers to sell or assign the chose in action or the fruits of recovery of litigation which the company may have against potential defendants without being in breach of champerty or maintenance laws.[111]

60 Moreover, since s 272(2)(c) of the CA allows a liquidator to dispose of "immovable and movable property" of the company, causes of action may be interpreted as including bare causes of action and the fruits of litigation, and through the interpretation of this statutory provision third party litigation funding can be accepted by the Courts. Similar powers exist for judicial managers under Schedule 11 of the CA.

61 That said, it is the Subcommittee's view that codification is a better method by which third party litigation funding may be achieved, as compared to the use of canons of statutory interpretation. This is discussed in greater detail in Part IX below. Nonetheless, the examples from the various jurisdictions are still useful in that they demonstrate willingness across the board to permit litigation funding.

E. "Sale" of causes of action personal to the liquidator

62 Whither then the causes of action personal to the liquidator, such as those to avoid antecedent transactions and to prosecute wrongful trading? These would not be covered by s 272(2)(c) of the CA which, at most, can only deal with causes of action vested in the company. That said, *ought* they be prohibited from sale, as is the rule in the common law? Indeed, the common law position is that stated by the English Court

---

[109] *Id*, at [29].

[110] *Id*, at [33].

[111] *Lee Eng Beng*, *supra* note 80, at [15.33].

of Appeal in *Re Oasis Mechandising Ltd*,[112] *ie* that such actions do not constitute properties that are subject to the liquidator's power of sale because these causes of action are assets that are recoverable only by the liquidator pursuant to statutory powers conferred on him.

63 In this regard, perhaps it ought to be noted that what can occur in the context of third party litigation funding of causes of action vested personally in the liquidator is not so much a "sale" of the cause of action, but an arrangement where the funder provides the financing for the liquidator to go after a claim in exchange for a share of the fruits of litigation. In other words, the cause of action remains vested in the liquidator, and the only role played by the third party funder is that of a financier who seeks a return on its investment should it bear any fruit. Accordingly, if the concern is one of *control* over proceedings that may somewhat be penal in nature (*eg* wrongful trading actions) and that may therefore require the impartiality of an independent officer of the Court, it bears noting that such control by the liquidator over the proceedings is never lost throughout the entire litigation process under the proposed framework.

64 While such transactions would not come under s 272(2)(c) of the CA since neither the causes of action nor the fruits of the litigation can be said to belong to the company, the Subcommittee feels that any distinction drawn between causes of action vested in the company and those vested in the liquidator may be wholly artificial for the purposes of permitting third party litigation funding, so long as the litigant remains in control of the entire proceedings. In fact, to exclude these personal claims would be unsatisfactory as liquidators are still bound by the same financial constraints in their attempts to pursue a meritorious cause of action, personal or otherwise. Seen in this light, the Subcommittee suggests not only that third party litigation funding be allowed, but that it be extended to include both causes of action belonging to the company, as well as the liquidator's personal claims.

VIII. The Way Forward: Formal Regulation

A. Balancing the two policies

65 Having seen in the UK and Australia the social and economic benefit of litigation funding in the context of formal insolvency, the Subcommittee is of the view that there is a case to recognize and give full effect to the symbiotic relationship between litigation funders and insolvent claimants, thereby increasing access to justice by maximizing returns for creditors who would otherwise often be left without legal redress due to a lack of funds. In light of the countervailing concerns of the purity of justice in such situations where third parties are the funders, the Subcommittee

[112] [1998] Ch 170.

recommends a codification of third party litigation funding in the insolvency. Such codification would also effectively create a neat, clear and limited statutory exception to the torts of champerty/maintenance, which no doubt are also concerned with the purity of justice. To this end, the Subcommittee recommends that such codification be considered under the CA until the Insolvency Act is passed.

66 Statutory codification creates a consistent judicial and governmental approach and reduces the uncertainties and risks that would otherwise arise should the law be developed via case law based on statutory provisions not originally enacted for the purpose of facilitating litigation funding, as is the situation in the UK.[113] With an express statutory exception and consistent judicial application, the problem of satellite litigation, where challenges to the enforceability of the agreement by defendants drags out proceedings and diverts the plaintiff's resources from the true issues of the case, will also be reduced.

B. Lessons from the U.K.

67 The litigation funding industry in the UK is self-regulated via 2 mechanisms:

(a) the Rules of Association for the Association of Litigation Funders of England and Wales ("the Rules");[114] and

(b) the Code of Conduct for Litigation Funders ("the Code").[115]

68 Rule 6.1 of the Rules requires every member of the Association of Litigation Funders of England & Wales ("the Association") to abide by the Code, to the extent that it is applicable to the member. However, membership is not mandatory and a litigation funder is not required to be a member of the Association before it may carry on funding activities. As such, the effect of the regulation is persuasive only. However, funders may naturally be persuaded to join the Association as members in order to increase their own level of trustworthiness. As Jackson LJ observed during a lecture in November 2011, "solicitors will be advising their clients only to enter funding agreements with litigation funders who sign up to the Code and comply with its provisions".[116]

---

[113] *CJC*, *supra* note 32, at [127].

[114] The Association of Litigation Funders of England & Wales: Rules of the Association, available online at <http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FThe+Association+of+Litigation+Funders+of+England+and+Wales+-+Rules+of+the+Association.pdf> (accessed 10 May 2013) ["*Rules of Association*"].

[115] *Code of Conduct*, supra note 40.

[116] Rupert Jackson, *Third Party Funding or Litigation Funding: Sixth Lecture in the Civil Litigation Costs Review Implementation Programme*, 23 November 2011, at para. 4.1, <http://www.harbourlitigationfunding.com/pdfs/tpflflecture5.pdf> (accessed 10 May 2013).

69 The reasons why self-regulation was chosen instead of formal regulation were articulated in Chapter 11 of the *Review of Civil Litigation Costs: Final Report* ("*Review of Civil Litigation Costs*").[117] Importantly, formal regulation had been deemed unnecessary at that time due to third party funding still having been in its nascent stages in the UK; moreover, third party funding had also not been regulated in other foreign jurisdictions.[118] That said, Jackson LJ noted that the possibility of full statutory regulation was left open, "if the use of third party funding expands".[119]

70 Indeed, the US Chamber Institute for Legal Reform ("the ILR") has published comments in response to the Code, on why third-party litigation funding threatens to undermine consumer interests and foster litigation abuse ("the ILR report").[120] While not objecting to litigation funding *per se*, it believes that the only way to adequately safeguard the rights of consumers and defendants is to enact a statute that is binding on all litigation funders. The ILR's criticism of the deficiencies in self-regulation may be broadly summarised as follows:

(a) **Under inclusiveness**: With a voluntary association, litigation funders that are not members of the Association will not be bound by the Code. Permitting funders to choose whether or not to comply with the Code would cause it to be ineffectual.

(b) **Lack of enforcement mechanism**: Without a mechanism for disciplining Association members who violate the Code, the Code is unlikely to deter misconduct. Additionally, it would be difficult to enforce compliance with the Code.

(c) **Incentive to make the code weak and ineffective**: Under self-regulation, litigation funders have the incentive to make the Code weak and ineffective. The ILR emphasised this moral hazard by noting the Code's inadequate definition of litigation funding. Other provisions demonstrating similar deficiencies include the following:

i. Clause 7 of the Code of Conduct provides that the Funder must take "reasonable" steps to ensure that the borrower receives "independent" advice on a Litigation Funding Agreement ("LFA").

---

[117] United Kingdom, Ministry of Justice, *Review of Civil Litigation Costs: Final Report*, Chapter 11(Chairman: Sir Rupert Jackson). ["*Review of Civil Litigation Costs*"].

[118] *Id*, at paras 2.3 and 2.4.

[119] *Id*, at para 2.4.

[120] U.S. Chamber Institute for Legal Reform, *U.S. Chamber Institute for Legal Reform Comments on the Code of Conduct for Litigation Funders* (22 December 2011), <http://www.instituteforlegalreform.com/sites/default/files/CJC_Code_of_Conduct_Comments.pdf.> (accessed 10 May 2013).

However, the Code does not require such advice to come from a solicitor other than the borrower's trial counsel, who has an "obvious pecuniary interest" in whether or not the borrower has sufficient funds to pay his fees.

Additionally, although Section 7 requires the Funder to have adequate capital to cover its funding liabilities for 36 months, the obligation may not provide adequate protection for litigants in complex cases.

ii. Clause 9 of the Code of Conduct provides that a LFA may allow a litigation funder to terminate funding if it "reasonably ceases to be satisfied about the merits of the dispute", or if it "reasonably believes that the dispute is no longer commercially viable".

These are unsatisfactory because litigation funders should be required to continue funding disputes until they are finally resolved in order to incentivise them to carefully research the claims they intend to fund. Additionally, allowing termination based on commercial viability would give litigation funders "inordinate control over litigation".

iii. Clause 9(a) also provides that the LFA may allow the litigation funder to "provide input into the litigant's decision in relation to settlements".

This should not be permitted since the interests of the litigation funder and claimant may not necessarily be aligned.

C. Academic views

71 The authors of a January 2012 report published by Centre for Socio-Legal Studies at Oxford, and the University of Lincoln Law School[121] argue that there is "scope to revisit the question of regulating the market" based on evidence evaluated during their research demonstrating the rapid development of the litigation funding industry.[122] Self-regulation does not fully address the requirements of the developing market, or prevent potential harm that may be caused by the development of new litigation funding products and alternative business models that may fall outside the ambit of a voluntary code. Additionally, a voluntary code is inadequate to deal with rogue traders and lacks sufficient penalties for bad practice.[123]

---

[121] *Hodges*, *supra* note 2.

[122] *Id*, at p 142.

[123] *Id*, at p 148.

72 The authors believe that regulatory requirements should be determined with reference to the functional process of the litigation product, which is to facilitate the cost-effective provision of legal services. An appropriate and functional regulatory system for litigation funding would thus require the following features:[124]

(a) Promote good practice within the litigation funding industry, ensuring an appropriate litigation product for the specific type of litigation and client's needs.

(b) Provide for an effective and independent system for handling and investigating complaints and resolving disputes.

(c) Set and maintain minimum standards for information to be provided to claimants about funding arrangements so that they can make informed decisions.

(d) Provide for effective scrutiny of funding arrangements and an effective consumer protection regime.

(e) Ensure the provision of effective legal services and maintain the integrity of the lawyer-client relationship.

73 The Subcommittee agrees with the arguments set out above and recommends that third party funding insolvency cases be formally regulated via the enactment of appropriate legislation, which should set out key principles and basic requirements that are considered minimum protection for the litigant, liquidator, and defendant. The possibility of industry self-regulation may be reconsidered at a later date as the litigation funding industry matures, provided that they are consistent with the principles outlined in the statutory framework.

[124] *Id*, at p 144.

IX. Proposed Framework

74 The proposed framework for regulating litigation funding for insolvency proceedings is premised upon the following key principles:

(a) Ensuring that only meritorious cases are funded, by a funder with a certain level of financial standing;

(b) Minimising conflicts of interest between the litigant and funder;

(c) Allowing the liquidator to retain control over the proceedings;

(d) Limiting the financial risk to the liquidator;

(e) Ensuring that the defendant and liquidator are not prejudiced in the event that the litigant's action is unsuccessful, and adverse cost orders are made, and

(f) Protecting the litigant's confidentiality of information and documentation.

Suggestion	Source	Rationale
Ensuring that only meritorious cases are funded		
1. A funded litigant will be required to seek leave from the High Court before proceedings against the defendant may begin. Leave may be granted subject to the Court's satisfaction that the funding agreement is consistent with all the key principles underlying the framework; and for the beneficial purpose of the liquidation.	Original proposal	
2. The Court must be satisfied that the creditors of the distressed company had been given first choice of funding before third party funders. The right of first refusal should be given to all creditors, and one or more creditors may choose to take up the option of funding litigation. The option for third party funding will only apply after creditors have made the decision not to fund the litigation.	Original proposal	Creditors should be given priority in funding actions brought by the liquidator since they have a direct legitimate interest in the outcome of the litigation and are thus justified in supporting the litigation. This requirement is also consistent with s 328(10) of the CA, which gives the Court discretion to make preferential payment to creditors who have indemnified the insolvent company or the liquidator against the costs of litigation where assets have been recovered, protected, or preserved under the indemnity. This statutory exception to maintenance recognises creditors' interests in an insolvent company's claims against third parties.

Suggestion	Source	Rationale
3. The name of the third party funder and the nature of the cost indemnity arrangement must be disclosed to the Court and the defendant at the earliest instance. Where funding has been obtained at the outset, disclosure should be made upon the commencement of proceedings; where funding has been obtained only in the course of proceedings, disclosure ought to be made once the agreement has been entered into.	Law Council of Australia's Position Paper on Regulation of third party litigation funding in Australia[125]	It is reasonable to expect third party funders to meet a certain threshold of transparency, just as insurers and financial institutions are generally required to fully disclose all costs associated with their policies, derivatives, and products.
4. A threshold value of a S$1 million claim (subject to change by gazetting) must be met before a claim may receive litigation funding, unless otherwise ordered by the Court.	Original proposal	Imposing a minimum threshold before claims may be founded would prevent funders from funding low value claims indiscriminately. It will also help to ensure that funders assess the merits of each claim carefully before providing funding.
5. Litigation funders shall at all times be required to maintain at least S$5m in fully paid-up capital.	Suggestion raised during the review of the International Arbitration Act (IAA)[126]	Requiring a minimum paid-up capital will go some way towards ensuring that the third party funder is an entity of some financial standing.

[125] Law Council of Australia, *Regulation of Third Party Litigation Funding in Australia* (Position Paper, June 2011) at para 74. ["*Position Paper*"]

[126] Ministry of Law, *Review of the International Arbitration Act* (Proposals for Public Consultation, 2011) at para 33(a)(iii).

Suggestion	Source	Rationale
Minimising conflicts of interest		
1. The funder has taken reasonable steps to ensure that the litigant receives independent legal advice on the terms of the funding agreement. The obligation shall be satisfied if the litigant confirms in writing that he has taken advice from a solicitor other than his trial counsel.	Modified from Cl 7(a) of the Code of Conduct[127]	There may be a conflict of interest if independent advice for the litigation funding agreement comes from the litigant's trial counsel, who has a pecuniary interest in whether or not the litigant has sufficient funds to pay his fees.
2. The funder has not taken any steps that caused or was likely to cause the litigant or the litigant's solicitor to act in breach of their professional duties, or cede control or conduct of the dispute to the funder.	Cl 7(b) of the Code of Conduct[128]	

[127] *Code of Conduct*, *supra* note 40.

[128] *Ibid*.

Suggestion	Source	Rationale
Liquidator's retention of control over proceedings		
1. Funders are prohibited from dealing directly with the defendants, and all settlements in funded cases are subject to the supervision of the Courts and would require the Court's approval.	Law Council of Australia's Position Paper on Regulation of third party litigation funding in Australia[129]	There may be little incentive for funders to act in the best interests of the litigant, particularly in settlement negotiations, since profit is their primary motivation.
2. The litigant retains control over the conduct of the funded proceedings. However, the funder's views must be sought in respect of: (a) the appointment of counsel; and (b) any settlement of the funded proceeding.	Modified from Cl 9(a) of the Code of Conduct[130]	These qualifications recognise the need for funders to be consulted in certain key aspects of the funded proceedings, while balancing the policy consideration of preventing a conflict of interest between the funder and litigant regarding how cases should be pursued. In any event, funders should not be allowed to control tactical decisions in litigation. The roles between litigant, lawyer, and funder should remain to protect the integrity of the lawyer-client relationship.

[129] *Position Paper*, *supra* note 125, at para 80.

[130] *Code of Conduct*, *supra* note 40.

Suggestion	Source	Rationale
Limiting financial risk to the liquidator		
1. Parties may not contractually provide for the funder to terminate funding unless the following circumstances were present: Where the funder: (a) Reasonably ceases to be satisfied about the merits of the dispute; or (b) Reasonably believes that the dispute is no longer commercially viable; or (c) Reasonably believes that there has been a material breach of the litigation funding agreement by the litigant.	Cl 9(b) read with Cl 10 of the Code of Conduct[131]	Requiring funders to continue funding's disputes until they are resolved, in the absence of special circumstances, would go towards ensuring that the merits of the funded claims have been carefully researched. At the same time, the funder's legitimate commercial interest in ensuring that funds are not wasted on a claim that is no longer viable, or can be reasonably settled, is taken into account.
2. At all times, a funder must maintain adequate financial resources to meet its obligations to fund all of the disputes that it has agreed to fund. In particular, it will maintain the capacity: (a) to pay all debts when they become due and payable; and (b) b) to cover aggregate funding liabilities under all of its funding agreements for a minimum period of 36 months.	Cl 7(d) of the Code of Conduct[132]	As complex cases may require funding over a long period, requiring funders to maintain a minimum amount of financial resources would provide some protection for litigants and the liquidator against the funder's default.

[131] *Ibid*.

[132] *Ibid*.

Suggestion	Source	Rationale
Preventing prejudice to the defendant and the liquidator		
1. Courts may make adverse cost orders against litigation funders.	Jackson's LJ's recommendation in *Review of Civil Litigation Cost*.[133]	Potential full liability for adverse costs would not stifle third party funding or inhibit access to justice. Rather, it is perfectly possible for litigation funders to have business models that encompass full liability for adverse costs. In claims brought by insolvent companies, there is the additional need to protect the liquidator from adverse costs in the event the case is not successful. Since the litigation funding industry's business model is to take a percentage of any damages awarded to their clients, funders should also accept the risk of paying adverse costs in the event their clients lose.
2. A funder must provide security for the defendant's cost for a minimum period of 12 months, either by way of a bank guarantee or payment in Court.	Modified from Cl 7(d) of Code of Conduct.[134]	Security for costs provides protection for third party defendants and the liquidator (under the Estate Cost Rule) from the funder's default in the event that adverse costs are awarded against the litigant, and from wrongful and/or frivolous claims.

[133] *Review of Civil Litigation Costs*, *supra* note 117, at Chapter 11, para 4.7.

[134] *Code of Conduct*, *supra* note 40.

Suggestion	Source	Rationale
Protecting the litigant's confidentiality		
1. A funder must observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the third party funder and the litigant.	Cl 5 of the Code of Conduct.[135]	To protect sensitive commercial information that the funder may have from being disclosed to unascertained third parties.
2. A funder must observe confidentiality of all information and documentation relating to the funding agreement on the basis of common interest privilege.		To protect the all sensitive information or advice between funder and litigant from being disclosed to the defendant or other unascertained third parties.

[135] *Ibid*.

X. Schemes of Arrangement?

75 In proposing the framework for regulating litigation funding above, the possibility of extending the proposed framework to Schemes of Arrangement ("Schemes") was considered. There is a compelling case for extending the framework with the appropriate adjustments to Schemes in the future. It is to be noted that what is recommended is that third party funding arrangements in Schemes should only apply insofar as funding of litigation is concerned and will not for now extend to third party litigation funding of the Scheme itself.

76 The key justification for extending the proposed framework to Schemes would be to cater for scenarios in which a chose in action is specifically assigned to the Scheme Manager as part of the company's assets, to be realised for the benefit of the creditors. In such a scenario, the position of the scheme manager is no different from a liquidator who has statutory powers of sale of a cause of action,[136] and who arguably has powers to sell or assign the cause of action or the fruits of recovery of litigation.[137] If the scheme creditors are either unwilling or unable to contribute to the legal action, the argument that a restrictive approach to litigation funding may not facilitate insolvent claimants in obtaining access to justice would apply equally to Schemes.

77 However, one major difficulty is that unlike liquidation, a scheme of arrangement is a corporate rescue mechanism that seeks to rehabilitate the company and achieve a better realisation of assets than possible on liquidation.[138] The Courts have recognised the unique nature of Schemes and the need for flexibility, for instance by permitting departure from the *pari passu* principle.[139] As a corollary, however, there is no uniform approach on how a scheme may be structured. Imposing a standard framework to Schemes may therefore be of limited utility.

78 Despite the unique nature of schemes, such limitations can be circumvented with the appropriate framework. One solution might be to provide that the proposed framework is applicable to Schemes only where the scheme manager has been given powers akin to a liquidator's in insolvent winding-up and that those powers are clearly spelt out in the Scheme so that the Court has the opportunity to consider it when sanction for the Scheme is sought. This would ensure that litigation funding is not used for wider scenarios in Schemes as compared to liquidation and judicial management.

---

[136] CA, *supra* note 1, s 272(2)(c).

[137] *Lee Eng Beng*, *supra* note 80.

[138] *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR(R) 384 at [82].

[139] *Id*, at [86].

79 Some useful considerations that could guide the framework for Schemes in the future include the role that the Courts will play in regulation. It is proposed that under an appropriate framework for Schemes, the Scheme Manager would have to have the appropriate qualifications and be sanctioned by the Court. Also, the Scheme Manager would have to get the Court's sanction on the Scheme as well as funding arrangement before the arrangement can be valid as a liquidator or judicial manager would be required to do.

80 Another difficulty is that it is not known whether s 210 of the CA will be modified to fit into the proposed Insolvency Act or retained under Part VII of the CA. Should it be the latter, imposing a statutory framework for litigation funding onto a part of the CA dealing with the arrangements, reconstructions and amalgamation of companies may lead to difficulties in application. As the Court of Appeal has recognised, there may be many situations in which Schemes could be used in the corporate restructuring of solvent companies, or other purposes that have nothing to do with insolvency.[140] To ensure clarity and ease of application, it would be undesirable for the proposed framework to exist in both the CA and the proposed Insolvency Act. For the reasons articulated above, it would be premature to extend the proposed framework to Schemes until the future of s 210 has been determined, although the possibility should be left open.

[140] *Id*, at [85].