

THE NETHERLANDS

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1.1. TPF Regime in the Netherlands

1.1.1. Is TPF commonly used in your Jurisdiction? If yes, since when (is it a new trend or a well-established practice)?

There are no specific Dutch rules on Third-Party Funding in international arbitration. Dutch law, thus, does not prohibit Third-Party Funding in international arbitration.¹

Furthermore, Dutch law does not forbid the assignment of a cause of action to a Third-Party Funder² and there are no rules restricting maintenance and champerty like in England and Wales.³

Below we will address the relevant facts and applicable rules with regard to Third-Party Funding in the Netherlands.

¹ V. Shannon & L. Bench Nieuwveld, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn: Kluwer Law International 2012, Chapter 8.01.

² Please note that in class action court proceedings, a Third-Party that wants to bring actions on behalf of others must establish a non-profit association in order to be able to represent the claimants (article 907 of the Class Action Act of 1994), see also A. Knigge & J.W. de Jong, *Class/collective actions in the Netherlands: overview*, in Omar Shah (red.), *Class and Collective Actions Global Guide*, Thomson Reuters 2017, and Shannon & L. Bench Nieuwveld, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn: Kluwer Law International 2012, Chapter 8.08.

³ Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report*, London: 2009, ¶2.13.

1.1.2. Please shortly describe the TPF market in your jurisdiction. Is it dominated by local or international Funders, which type of Funders are active, which cases get typically funded? Is there any source on Funders (like the overview published by the German Bar)?

Reported Use of Third-Party Funding and Alternative Financing Options

There are no statistics or case law available yet that report on the use of Third-Party Funding in international arbitration.⁴ With regard to mass tort claims in domestic litigation, however, it is reported to be a growing field in the Netherlands.⁵

Furthermore, in the Netherlands it is possible to obtain a legal expense insurance, both before-the-event insurance (“BTE”) and after-the-event-insurance (“ATE”), although ATE is not used as widely as BTE. The number of companies that take out a BTE is reported to be increasing in the Netherlands.⁶

1.2. General Duties of Counsel

1.2.1. Are there any rules in your Jurisdiction (ethical or otherwise) governing duties of counsel in connection with TPF?

Rules of Conduct for Counsel and Third-Party Funding

There is no specific set of rules in the Netherlands that regulates the relationships and possible conflicts between lawyers, clients and the Third-Party Funder.

At the end of 2016, a bill was submitted to the Dutch parliament introducing collective claims for damages in The

⁴ V. Shannon & L. Bench Nieuwveld, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn: Kluwer Law International 2012, Chapter 8.01.

⁵ Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report*, London: 2009, P. 576.

⁶ Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report*, London: 2009, p. 576.

Netherlands.⁷ Further to that proposal, there is discussion in the Dutch parliament⁸ and the Dutch legal community⁹ about Third-Party Funding. The explanatory memorandum to the aforementioned proposal states that Third-Party Funding can enable parties to initiate proceedings and access to justice but also mentions that if the availability of such funding is too wide it will result in excessive litigation. Therefore, a balance must be found according to the Dutch legislator. No specific rules, however, have been proposed on how to regulate Third-Party Funding. The Dutch government first wants to see how Third-Party Funding will develop in the Netherlands before it will start with any experiments regarding such regulations.¹⁰

The available published case law on the use of Third-Party Funding is very limited. The Amsterdam Court of Appeal upheld in 2011 a Third-Party Funding agreement, which provided that the third-party had a veto right with respect to settlements.¹¹ Furthermore, according to this decision, parties may also agree that if the claimant does not want to settle the litigation on terms that the Third-Party Funder finds appropriate, the claimant shall reimburse all costs of the funder and also the amount the Third-Party Funder would have received in case of a settlement. If the claimant is a consumer, the Third-Party Funder has, according to the Amsterdam Court of Appeal, a special duty of care to inform the claimant of the particulars of the Third-Party Funding agreement and especially the fee structure. The Amsterdam Court of Appeal also decided that a Third-Party Funding agreement or a

⁷ Parliamentary Papers 2016/17, 34608, 2. See also A. Knigge & J.W. de Jong, *Class/collective actions in the Netherlands: overview*, in Omar Shah (red.), *Class and Collective Actions Global Guide*, Thomson Reuters 2017.

⁸ Parliamentary Papers 2016/17, 34608, 3, 11 - 12. Parliamentary Papers 2016/17, 34608, 5.

⁹ J.J. Dammingh en L.M. van den Berg, *Procesfinanciering door derden: een oplossing of een probleem?*, TCR 2017, p. 78-87.

¹⁰ Letter State Secretary of Security and Justice, 8 November 2013, Parliamentary Papers 2013/2014, 31753, 35.

¹¹ Amsterdam Court of Appeal 13 December 2011, ECLI:NL:GHAMS:2011:BU8763.

certain provision of such agreement can be held void if it is unreasonably burdensome to the consumer if, for example, the parties' agreement provided for excessive compensation to the Third-Party Funder.¹² This, however, depends on the facts of the particular case.

1.2.2. Does your Jurisdiction apply a “host country system” (typically in the EU) or a “home country system” (typical in US) when subjecting counsel to ethical duties? In other words, will a foreign counsel have to abide by the ethical rules of your Jurisdiction or can he/she rely on those of his/her home jurisdiction?

According to article 16d of the Dutch Act on Advocates, foreign attorneys who act on behalf of a client in the Netherlands must observe the same rules of conduct, as laid down in the Dutch Act on Advocates and the Dutch Code of Conduct of the Netherlands Bar Association (“Code of Conduct”), that apply to attorneys that are registered in the Netherlands. The following Dutch rules of conduct are important to keep in mind when a Third-Party Funder is involved.

First, article 10a (1) of the Dutch Act on Advocates provides that an attorney has to put the interests of his clients above all other interests. The same obligation is more specifically codified in article 7 (1) and (2) of the Code of Conduct, which prohibits an attorney from participating in legal proceedings when there is a conflict of interest. Such conflict could arise if an attorney acts for both the claimant and the Third-Party Funder. For example, the willingness of the claimant and the Third-Party Funder to settle a case can easily differ.¹³ In such event the interests of the claimant and the third party are not aligned. According to the Commentary on the Code of Conduct, an attorney should refrain from

¹² See also W.H. van Boom & J.L. Luiten, *Procesfinanciering door derden*, THEMIS 2015/5, ¶4.5.

¹³ W.H. van Boom & J.L. Luiten, *Procesfinanciering door derden*, THEMIS 2015/5, ¶4.6.

representing such conflicting interests.¹⁴ The primary task of an attorney is the interest of his client.¹⁵ Therefore, if a client seeks advice regarding the possible engagement of a Third-Party Funder, the attorney in question should advise the client of the risks and benefits of such engagement and keep an eye on the interest of his client.

Second, article 29 of the Code of Conduct states that an attorney must ensure that there is no misunderstanding regarding his role (i.e. as counsel for his client) when he is in contact with third parties like a Third-Party Funder.

Third, article 5 of the Code of Conduct provides that self-interest of the attorney can never be a determining factor. Therefore, the attorney should never put his commercial interests above the interest of the client. If – for example – the Third-Party Funder is a repeat player and, thus, could provide the attorney with other cases in the future, this element can never be a determining factor in making the strategy for the case of the client.

Fourth, article 6 of the Code of Conduct and articles 10a (1)(e) and 11a of the Dutch Act on Advocates provide that an attorney can only share information with third parties when (i) there is no objection of the client, and (ii) if the information sharing is compatible with sound professional practice. An attorney, thus, cannot share information with a Third-Party Funder without prior approval of the client.

¹⁴ Commentary on the Code of Conduct, p. 1.

¹⁵ Commentary on the Code of Conduct, p. 1.

1.3. Cost Regime in the Netherlands

1.3.1. How are cost of litigation (counsel fees and expenses) typically allocated in your Jurisdiction? Will each side pay its own legal fees or are there cost shifting rules under which a party which loses the case will be required under an adverse costs order to reimburse all or some costs of the other side under a “loser pays” or “costs follow the event” system?

The costs system for litigation is based on the principle that the losing party shall pay the costs.¹⁶ In arbitrations, a tribunal may rule that the losing party pays the costs of the arbitration and, thus, the tribunal is not obliged to rule so.¹⁷

In both arbitration and litigation, the court and tribunal have wide discretionary power to shift costs if a party wins the case only partially. In litigation, the courts will in principle follow the unofficial and non-binding fixed tariffs list except where there is an abuse of power by a party¹⁸ or in IP litigation.¹⁹ Usually, the awarded costs in litigation only cover a small part of the legal costs made by the winning party. In arbitrations, the tribunal is fully autonomous in its decision to award costs. For domestic arbitrations, arbitrators sometimes apply a certain points system to calculate the costs. Institutes like the NAI and the Court of Arbitration for the Building Industry in the Netherlands provide these non-binding points systems to the arbitrators.²⁰ These points systems are, however, less likely to be used in international

¹⁶ Article 237 Wetboek van Burgerlijke Rechtsvordering [Rv] [Dutch Code of Civil Procedure] [DCCP].

¹⁷ See for example article 56 of the Rules of the Netherlands Arbitration Institute [NAI], an institute that frequently administrates arbitrations with seat in the Netherlands.

¹⁸ Dutch Supreme Court 6 April 2012, NJ 2012, 233.

¹⁹ Article 1019 DCCP.

²⁰ See the memorandum of the NAI *Order to pay costs of legal assistance in NAI arbitral proceedings*. This memorandum can be downloaded at: http://www.nai-nl.org/en/info.asp?id=1056&name=NAI_Arbitration/Costs.

arbitrations, which might be different if it concerns an international arbitration with a minor interest or with a strong Dutch basis.²¹

If a party is insured, most insurance policies provide that any awarded compensation for costs will be for the benefit of the insurer.²²

If there are concerns that a party – that is funded by a Third-Party Funder – will not have sufficient funds to comply with an adverse costs order, a party can request an arbitral tribunal to order a security for costs.²³

1.4. Assuming your Jurisdiction recognizes cost shifting rules

1.4.1. Does your Jurisdiction impose limits on costs reimbursements? What about costs under a conditional fee agreement, ATE insurance fees, or a success fee payable to a Funder?

Fee Arrangements

Attorneys are not allowed to agree on pure “no cure, no pay” arrangements. An attorney can, however, make engagements that permit the attorney to charge a discounted hourly rate with an entitlement to a reasonable success fee if the client wins the case.²⁴ A court can replace conditional or contingent agreements that provide for an excessive compensation with a reasonable compensation.²⁵

²¹ See the memorandum of the NAI, p. 5.

²² See for example the insurance policy of ING Bank, (https://www.ing.nl/media/ING_rechtsbijstandverzekering_tcm162-57502.pdf).

²³ Article 1043b of the Dutch Code of Civil Procedure Act provides that the arbitral tribunal may, at the request of any of the parties, grant provisional relief. More specifically, article 35 of the NAI Arbitration Rules provides that the arbitral tribunal may require any party to provide sufficient security for – *inter alia* – the costs of the arbitral proceedings.

²⁴ V. Shannon & L. Bench Nieuwveld, *Third-Party Funding in International Arbitration*, Alphen aan den Rijn: Kluwer Law International 2012, Chapter 8.07.

²⁵ President of the District Court of The Hague, 16th February 2007, NJ 2003, 34.

1.5. Privilege, Confidentiality and Disclosure

1.5.1. What should counsel do to secure that for the information shared with the Funder confidentiality and privilege are being preserved?

On the basis of Article 165 (2) DCCP and Article 843a DCCP, a person, that by virtue of his office or profession is held to observe secrecy, may invoke privilege.²⁶ Attorneys, doctors and civil-law notaries are considered persons that fall under this provision but, for example, unlicensed in-house-counsel,²⁷ accountants, tax-advisors and mediators are not.²⁸ Although there is no case law available that provides that Third-Party Funders may not invoke privilege on the basis of Article 165 (2) DCCP and Article 843a DCCP, we consider it unlikely that Third-Party Funders are covered by these articles, because we would not consider the profession of Third-Party Funder comparable to that of doctor, attorney or civil-law notary in this respect.

With regard to communication between an attorney and his client, except for documents that are clearly the object of, or have contributed to the commission of a criminal offence, all such communication is protected by privilege.²⁹ Consequently, it is advisable for an attorney to address his client in his communication to the Third-Party Funder as well, in order to be able argue that this communication is privileged.

²⁶ Although the Dutch Arbitration Act does not explicitly provide for privilege, it is believed that the same privilege as in Dutch court proceedings exists in arbitration. See Parliamentary Papers 2012/13, 33611, 3, p. 20 and Meijer, T&C Burgerlijke Rechtsvordering, art. 1041a Rv, Comment e.

²⁷ Ava Borrasso, *Privilege and International Implications against the Backdrop of the Panama Papers*, ABA's Business Law Today, July 2016, p. 4.

²⁸ J. Ekelmans, *De Exhibitieplicht (diss. Groningen)*, Deventer: Kluwer 2010, p. 109.

²⁹ H.W. Wefers Bettink and T.P. Hoekstra, *Legal Privilege and Confidentiality in the Netherlands, Chapter 11, Privilege and Confidentiality: an International Handbook*, Greenwald and Russenberger (eds), Second Edition, International Bar Association 2012, Bloomsbury Professional, p. 216.

Furthermore, the Third-Party Funder, the client and the attorney can also enter into a confidentiality agreement to ensure that the Third-Party Funder treats the documents it receives confidentially.³⁰

Finally, there is no specific rule that provides that an attorney should disclose to an arbitral tribunal or a court that a Third-Party Funder is involved.³¹

³⁰ H.W. Wefers Bettink and T.P. Hoekstra, *Legal Privilege and Confidentiality in the Netherlands, Chapter 11, Privilege and Confidentiality: an International Handbook*, Greenwald and Russenberger (eds), Second Edition, International Bar Association 2012, Bloomsbury Professional, p. 219.

³¹ Article 3:305a (2) (c) of the bill was submitted to the Dutch parliament introducing collective claims for damages in The Netherlands. It provides that the special claim vehicle representing the interests of the parties concerned in a collective action must inform the court that it has sufficient financial resources and the manner in which it complies with this requirement. Therefore, if Article 3:305a of the bill is accepted in its current form, a foundation that is funded by a Third-Party Funder must disclose this in the legal proceedings. *See* Parliamentary Papers 2016/17, 34608, 2.

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