Recently, the attention for litigation funding has increasingly grown in the Netherlands. As litigation funding is something new and relatively unknown, people often react reserved and have a preconceived opinion about it, as they say in the Netherlands ‘onbekend maakt onbemind’ (ignorance breeds contempt). Although this is understandable, it is not justified.

What is Litigation funding
Before discussing the history and market trends of litigation funding, I will briefly define litigation funding. Litigation funding is an agreement in which a person or corporation with a claim, agrees to share a certain portion of the revenues with a third party; the Litigation Funder, who agrees in turn to pay all costs for the legal proceedings or arbitration.
There is therefore a reward that depends on the outcome of the legal proceedings or the arbitration (no cure no pay), more specifically a reward consisting of a certain percentage of the revenues of the claim (contingency fee) for that third party.

**Common law countries**

One will not be surprised to learn that litigation funding originates from and has further developed in the entrepreneurial system of the common law countries. However, it has an element of surprise, since litigation funding had been illegal as of the Middle Ages. From the view that the credibility and the integrity of civil legal proceedings should be preserved, a legal prohibition on “champerty and maintenance” existed. Maintenance refers to the prohibition for a third party to interfere with and encourage a legal proceeding. Champerty is the superlative degree. This refers to maintenance however in addition this third party has pecuniary interests with the legal proceedings. In the last few decades the prohibition on maintenance and champerty has substantially been reduced, and more often the prohibition has totally been set aside. Nowadays, the prohibition is seen as a relic of the past. Although litigation is not automatically seen as a “good” thing, more and more it is not necessarily seen as a “bad” thing. Nowadays maintenance and champerty only limit litigation funding to the extent that the third party, for instance the funder, is not allowed to control the legal proceedings.

As of 1976 litigation funding has been allowed in the United Kingdom, when champerty was removed from the civil code. In the United States and Australia the prohibition on maintenance and champerty has also completely been removed from civil codes or have significantly been reduced by way of judgments. As a result of these developments the global market for litigation funding has risen into a complete industry. Moreover, there are listed litigation funders and parties who at their turn act as an intermediary between the plaintiff and litigation funders. Although some critical remarks towards litigation funding have been voiced, the general tendency in science as well as legal practice in the United Kingdom is positive. The most important paper about litigation funding is the essay written by Lord Justice Jackson in 2010, commissioned by the government, in which he researched costs for litigants in the UK legal system and dedicated one whole chapter to litigation funding. The essay discusses five reasons why litigation funding should be looked upon as favourable. Four of the five reasons are not necessarily related to a jurisdiction and therefore are also applicable to civil law countries. First, the essay states that (i) litigation funding is for some of the plaintiffs the only possible way to start legal proceedings, and thus litigation funding increases access to justice. Second (ii), the essay states that although a plaintiff is required to share a certain percentage of the revenues with the funder. On the other hand without litigation funding such plaintiff would not have had any revenues at all. Third (iii), the essay mentions that litigation funding will not lead to additional costs for the plaintiff. Finally (iv), litigation funding provides a first screening for successful claims. A claim without any chance on success will not be funded. A huge increase of “frivolous claims” is therefore not to be expected. Lord Justice Jackson states in his essay that the market for litigation funding is not fully grown yet and therefore any legislation on this matter would be premature. He expresses himself in favour of self-regulation.
Litigation funding is more subject to discussion in the United States. The chamber of commerce of the United States is extremely negative about litigation funding, especially in class actions. In scientific literature and legal proceedings however the tendency towards litigation funding is generally positive. All in all it is not to be expected that there will be a prohibition on litigation funding. In fact, due to the “punitive damages” phenomenon, the stakes and the costs for litigants are very high in the United States, and therefore it is expected that litigation funding will only grow further.

In Australia litigation funding has a more profound history than in the United Kingdom and the United States. Australia is known for its progressive view on litigation funding. In legal proceedings access to justice is seen as the main benefit of litigation funding. In a more recent (though controversial) verdict the High Court decided to maintain an agreement in which the legal funder initiated the legal proceeding and took the lead. The High Court deemed the agreement not to be in conflict with social decency. With this verdict Australia has left the ancient prohibition on champerty and maintenance far behind.

**Civil Law countries**

In most of the continental European countries the concepts of “champerty and maintenance” are unknown. However, litigation funding is in certain cases subject to discussion and has even lead to legal proceedings. However, also in these countries law courts and legal literature are mainly positive towards litigation funding.

In Germany Foris AG initiated the market for litigation funding in 1998. Since then many litigation funders followed and have been offering their services, as a result of which a mature market has developed. Nowadays German law even requires from lawyers to inform plaintiffs about the possibility of litigation funding.

Up until 2005 litigation funding was prohibited in the region “Zürich”, Switzerland. In 2005, in a case commissioned by an insurance company, a lawyer and his clients, the Swiss *Bundesgericht* deemed the prohibition on litigation funding as an unlawful intervention in the economic freedom and therefore did not maintain the prohibition. As of that date litigation funding has slowly been growing in Switzerland. Especially now with the introduction of the *Schweizerischen Zivilprozessordnung* in 2011, which requires the plaintiff to pay a deposit for the costs for legal proceedings. This rule of law specifically allows a plaintiff to use litigation funding for the purpose of this deposit.

Litigation funding is also known in Austria. Several law courts have decided that litigation funding (by third parties) is permitted.

**The Netherlands**

Back to The Netherlands. Also in The Netherlands litigation funding has already been available for plaintiffs for five years. In Dutch legal literature there are not much publications available regarding litigation funding. Worth reading is the recent essay of professor Van Boom. Van Boom and his co-author discuss the legal qualification of litigation funding. They conclude that litigation funding is legal according to Dutch law. Although they recognize some critical remarks towards litigation funding, they conclude that litigation funding
can be of advantage to ensure access to justice. Please note that litigation funding is currently not regulated in Germany, contrary to Van Boom’s statement.

There are hardly any verdicts regarding litigation funding. There is a verdict of the Amsterdam Court of Appeal regarding the litigation funding in a class action. In this verdict the Court decided that there was “no misuse of litigation or otherwise unlawful or impermissible behaviour in obtaining damages”. There is also a verdict of that same Court of Appeal in which the Court decided that – in short – the agreement containing a no cure no pay clause was in that case acceptable and therefore not in conflict with public order and morality and also could not be nullified by means of deception, abuse of circumstances or delusion.

Conclusion
I complete this essay and will come to the conclusion. Litigation funding is not something new, and has been offered both domestic and abroad for a shorter and longer period of time. In several countries the initial critical remarks have been overcome and it has been proven that litigation funding is a valid instrument to ensure access to justice.

In the Netherlands there has been little discussion on the advantages and disadvantages of litigation funding. A technical discussion regarding litigation funding should be welcomed. Following the developments in surrounding countries one can be sure that litigation funding in The Netherlands “is here to stay!”.

Sara Liesker started LIESKER Litigation Funding (Liesker Procesfinanciering) in 2011 with several (ex)lawyers, after she worked as a corporate lawyer for many years. LIESKER Litigation Funding is the pioneer and market leader in litigation funding in the Netherlands.

1. See for instance the letter of the Secretary of State on Security and Justice, parliamentary year 2013-2014, file number 31 753, number 65, page 3 and page 4. Also see the letter of the Minister on Security and Justice, parliamentary year 2011-2012, file number 33 126, number 6, page 6 etcetera.
4. BGE 131/ 223 E. 4
5. See for instance OGH December 11, 1984, 4 Ob 358-365/83, öbl 1985, 71
6. Since 2011 Liesker Litigation Funding offers litigation funding. Other parties who are active on the Dutch litigation funding market are Omni Bridgeway, Bentham, Claims Funding International and more recent Redbreast.
7. W.H. Boom & J.L. Luijten, Procesfinanciering door derden, RM Themis 2015/5, p. 188-199

More on Litigation Funding in the upcoming Podcast with Sara Liesker
More information about Sara Liesker, or Liesker Litigation go to: http://liesker-procesfinanciering.nl/en/