

Litigation Funding

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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REGULATION**Overview****Is third-party litigation funding permitted? Is it commonly used?**

There is no express statutory or regulatory bar to third-party funding (TPF) of litigation in India. Though no formal legislation expressly legalises or regulates TPF in India, judicial precedents indicate its permissibility, albeit with certain caveats and conditions. The concept of 'financer' of a suit has been referenced in amendments made to Order XXV, Rules 1 and 2 of the Indian Code of Civil Procedure 1908 (the Code), by certain states such as Madhya Pradesh, Maharashtra, Orissa and Uttar Pradesh. Further, provisions have been made where the funder may be added as a party to the suit, and in certain circumstances, the court may demand security from the funder to cover a defendant's costs.

The existing jurisprudence has evolved from Indian courts' decisions since 1876 that have considered validity, scope and applicability of TPF. Most recently, in 2017, the Supreme Court of India in *Bar Council of India v AK Balaji* (2018) clarified that TPF arrangements are not barred in India and the only restriction that appears to exist is for a lawyer to fund his or her client's case. TPF arrangements may be examined by the courts for being extortionate, unconscionable and against public policy. The first known legal precedent on TPF is from 1876, where the Privy Council in *Ram Coomar Condo v Chunder Canto Mukherjee* (1876) analysed its legality and upheld the TPF arrangement. The Privy Council also stated that a TPF arrangement would be considered illegal if it is demonstrably unconscionable, or extortionate, or entered into for an improper object or to foment litigation that is unrighteous. Later, in 1955, the Supreme Court of India in *Re: Mr 'G', a Senior Advocate* (1955) held that the rigid English law rules of champerty and maintenance do not apply in India, and further held that 'A contract where one party agrees to fund litigation for certain benefits would be legally unobjectionable if no 'lawyer' was involved and it was between third parties'.

A 2017 report by a high-level committee set up by the government of India to review the institutionalisation of arbitration mechanisms in India endorsed TPF of arbitrations. However, the Arbitration and Conciliation Act 1996 (the Arbitration Act) does not specifically provide for TPF. In the absence of specific legislation and judicial pronouncements concerning TPF in arbitration, the same considerations that apply to TPF in litigation are expected to apply.

Nonetheless, TPF is given a boost in the Indian landscape by way of certain recent legal developments that ensure that the performance of a contract is regarded as primary, which in turn attracts funders' confidence and resultantly more funding. For instance, a recent amendment to the Specific Relief Act 1963 has made specific performance of a contract a mandatory relief as against a discretionary relief. Further, despite the fact that the Arbitration Act has no mention of TPF, its provisions pertaining to fast-track arbitration as well as implementation of stricter and shorter deadlines for the passing of awards work towards establishing a TPF-friendly regime.

Law stated - 19 October 2022

Restrictions on funding fees**Are there limits on the fees and interest funders can charge?**

In India, there is no specific legislation that regulates the fees and interest a funder can charge for TPF arrangements. All TPF arrangements would be subject to Indian law, specifically the Contract Act 1872 (the Contract Act). Courts may scrutinise the TPF agreement to test its validity and legality, and to ascertain if it is unconscionable, extortionate or opposed to public policy (eg, made with an improper object such as gambling on litigation or abetting an unrighteous suit). In a TPF litigation arrangement where the funder's share was three-quarters of the claimant's property on a successful outcome, the Andhra Pradesh High Court (in *Nuthaki Veukataswami v Katta Nagireddy* (1962)) rejected it as unreasonable, unfair and *ex facie* extortionary.

Specific rules for litigation funding

Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

In a few Indian states – Gujarat, Madhya Pradesh, Maharashtra, Orissa and Uttar Pradesh – third-party ‘financer’ of litigation has statutory recognition through amendments to the Code. Besides this, there are no specific legislative or regulatory provisions that regulate TPF arrangements in litigation (or arbitration) across India.

Law stated - 19 October 2022

Legal advice

Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

There are no specific professional or ethical rules that apply to lawyers advising clients in relation to cases with TPF. The professional conduct rules – namely, Bar Council Rules, Part VI, Chapter II on Standards of Professional Conduct and Etiquette framed by the Bar Council of India (BCI) under section 49(1)(c) of the Advocates Act 1961 that are applicable to all ‘advocates’ in India, restrict advocates from:

- acting or pleading in a matter in which they have pecuniary interest (Rule 9);
- fomenting litigation (Rule 19);
- seeking fee contingent on the outcome of litigation or sharing proceeds of any litigation (Rule 20);
- buying, trafficking, stipulating for, or agreeing to receive any share or interest in any actionable claim (Rule 21); and
- participating in bids in the execution of decrees or orders in any suit or proceeding in which they are professionally engaged (Rule 22).

In *Bar Council of India v AK Balaji*, the Supreme Court observed that even practices that are performed outside a court setting (eg, client counselling, drafting legal opinions and instruments, etc) and tendering advice to clients will also be governed by the rules framed by the BCI.

Law stated - 19 October 2022

Regulators

Do any public bodies have any particular interest in or oversight over third-party litigation funding?

There are no specific public regulatory bodies in India that have oversight of or known interest in TPF of litigation. However, in instances where one of the parties to the TPF arrangement is a foreign entity, TPF transactions would understandably involve the inflow and outflow of foreign exchange or investment, so the Foreign Exchange Management Act 1999 (FEMA) would be applicable and the Reserve Bank of India would have regulatory oversight. Such TPF arrangements and transactions must comply with the provisions of FEMA. TPF agreements may also attract the oversight and scrutiny of Indian courts if they are in contravention of the Contract Act.

Law stated - 19 October 2022

FUNDERS' RIGHTS

Choice of counsel

May third-party funders insist on their choice of counsel?

At present, there is no legislation or judicial dictum that prohibits third-party funders from choosing counsel in a proceeding. The choice of counsel, being a critical decision, may be negotiated between the third-party funder and the funded party, so long as the third-party funding (TPF) arrangement is in compliance with Indian law. It must be ensured that the counsel selected does not have any financial interest in the outcome of the proceeding, or conflict of interest with the parties or arbitrators (or both).

Law stated - 19 October 2022

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

By and large, most court hearings and proceedings in India are open to the public and can be attended by any person including funders. This is also true with the rise of video conferencing and live-streaming of court proceedings particularly in the post-covid-19 scenario

Under Indian law, only parties to a lawsuit have the right to participate. For states like Gujarat and Maharashtra with amendments to the Code, third-party funders can be impleaded as a party to the proceeding in civil causes of action. In other states, third-party funders may be impleaded as a party whose presence before the court is necessary to enable the court to effectively adjudicate the case. However, the court will have to be convinced that the funder is either a proper or necessary party to the case.

The situation with regard to arbitral proceedings is more stringent as it is a confidential process. Typically, only parties to the arbitral dispute are permitted to participate and attend the hearing or settlement meetings. Section 42-A of the Arbitration and Conciliation Act 1996 mandates the arbitrators, arbitral institution and the parties to maintain the confidentiality of the proceedings, except in cases where an award is required to be disclosed necessarily for enforcement. Third-party funders may not be permitted to either attend or participate in arbitral proceedings (and (or) underlying settlement proceedings) unless the parties consent to it.

Law stated - 19 October 2022

Veto of settlements

Do funders have veto rights in respect of settlements?

This will be the subject matter of inter se contractual agreement between the funder and the funded party. Funders may have a specific contractual right of veto in respect of settlements in the TPF agreement, subject to the validity of the TPF agreement under Indian law.

Law stated - 19 October 2022

Termination of funding

In what circumstances may a funder terminate funding?

The grounds permitting termination of a TPF agreement would depend upon the TPF agreement itself, subject to its validity under Indian law.

Law stated - 19 October 2022

Other permitted activities

In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Since there are no regulatory laws in India that rigidly prescribe and proscribe what a third-party funder can and cannot do during litigation or arbitration, it is all the more important for funders to have a robust contractual arrangement. The contractual arrangement will, however, always remain subject to the Contract Act 1872 and the judicial precedents that have struck down TPF agreements for being extortionate, unconscionable and against public policy.

Funders may attend court proceedings and hearings. In Indian states that permit funders to be impleaded as parties, they may even participate in such hearings as a party. Terms in the TPF agreement may be included to enable them to prepare and liaise with counsel on the progress and overall strategy of the case.

Law stated - 19 October 2022

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

Lawyers in India are forbidden from entering into conditional or contingency fee agreements. The code of conduct and practice of lawyers in India is regulated by the Bar Council of India, which under section 49(1)(c) of the Advocates Act 1961 has framed rules by which advocates ought to conduct themselves. Rule 9 of the Bar Council Rules, Part VI, Chapter II on Standards of Professional Conduct and Etiquette prohibits an advocate from acting or pleading in a matter in which he or she has a pecuniary interest. Similarly, Rule 20 precludes an advocate from seeking fees contingent on the outcome of a litigation or sharing in the proceeds of any litigation. Rule 21 prohibits advocates from receiving shares or interest in all actionable claims, and Rule 22 expressly prevents advocates from participating in bids in the execution of decrees and orders.

Even courts in India have held contingency fee agreements to be void for being in violation of public policy and the standards of professional conduct of lawyers, amounting to professional misconduct (*Re: Mr 'G', a Senior Advocate (1955)*; *B Sunitha v The State of Telangana (2017)*). The bedrock of this approach is the fiduciary nature of the relationship between a lawyer and client, which requires a high degree of fidelity and good faith, and an absence of conflicting interests.

However, it is worth noting that the Delhi High Court in *Spentex Industries Ltd v Quinn Emanuel Urquhart & Sullivan* , did not ascertain the legal validity of the law relating to the contingency fee charged by Quinn Emmanuel as the agreement in question was not governed by Indian law.

Law stated - 19 October 2022

Other funding options

What other funding options are available to litigants?

In relation to contractual disputes, pre-litigation funding options are not well known. Typically, the beneficial provisions on funding would be present in statutes that are beneficial – namely, for the protection of certain citizens’ rights. For example, under section 125(3) of the Companies Act 2013, the legal expenses incurred in class action lawsuits under sections 37 and 245 by members, debenture holders or depositors (as sanctioned by the National Company Law Tribunal) may be reimbursed from the Investor Education Protection Fund managed by the central government of India.

The most widely accessible form of funding available to litigants is through the state. The Constitution of India recognises the concept of free legal aid. Article 39A directs the state to provide and ensure equal opportunity for all to be represented in the legal system. The provision directs the state to enact legislation to provide free legal aid so that no citizen is denied by reason of economic hardship, and this was achieved through the Legal Services Authorities Act 1987. The right to free legal services and aid is also recognised as an essential, fundamental right guaranteed under the right to life and personal liberty under article 21 of the Constitution of India. The Supreme Court in *MH Hoskot v State of Maharashtra* (1978) opined that providing free legal aid is the state’s duty.

The provision of free legal aid currently only applies to conventional litigation, and there are no mechanisms for the provision of legal aid to indigent persons who have agreed to resolve their disputes via alternative mechanisms such as arbitration. Currently, a case titled *Rishabh Dheer v Union of India* (Writ Petition (C) No. 11085/2019) is pending before a single-judge bench of the Delhi High Court, with the prayer seeking an extension of the benefits of legal aid services to those parties who are engaged in arbitration.

Recent trends indicate that there has been an increase in crowdfunding of litigation in India, as an alternative to private and state funding. Based on the information available in the public domain, it is unclear whether crowdfunding platforms for litigation finance cover alternative dispute resolution mechanisms as well.

At present, there is limited meaningful insurance protection that can cover litigation expenses for individual litigants across India for conventional or alternative dispute resolution proceedings. For commercial and professional entities, legal expenditure could be covered under liability insurance, where coverage is provided for third-party loss or damage caused unintentionally by the policyholder.

Law stated - 19 October 2022

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

How long does a commercial claim usually take to reach a decision at first instance?

The commercial courts in India adjudicate most commercial disputes between parties, as defined under the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act 2015 (the CC Act). The CC Act provides for strict, specific timelines for the entire lifecycle of the commercial claim, including for statutory appeals. For example, a maximum of five months’ timeline is provided for the mandatory pre-institution mediation and settlement mechanism. If a claim proceeds before the commercial court, its trial is statutorily required to be completed within six months from the first case management hearing. The court is required to pronounce its judgment within 90 days of the conclusion of arguments.

Typically, the timeline for a commercial claim to reach a decision at first instance is six months to two years and would primarily depend on the claim’s nature and complexity, the number of parties involved, the court or forum where it is filed and the court’s or forum’s workload and pendency.

As per the World Bank’s ‘Doing Business’ report for India in 2020, it used to take 1,095 days in completion of trial and pronouncement of judgment of commercial disputes (for Delhi and Mumbai). However, in 2021, as per a report published by the Department of Justice in the Law Ministry, the number of days in disposal of commercial disputes has reduced to 434 in Delhi and 597 in Mumbai.

In arbitrations seated in India, section 29A of the Arbitration and Conciliation Act 1996 (the Arbitration Act) requires awards to be made within 12 months from the date of completion of pleadings under sub-section(4) of section 23 (which states that the pleadings – namely, statements of claims and counterclaim respectively, shall be completed within six months from the date the arbitrator, receives notice of his or her appointment). The 12-month timeline is extendable to six months with the parties' consent.

The CC Act is also applicable to arbitration-related litigation instituted before commercial courts.

Law stated - 19 October 2022

Time frame for appeals

What proportion of first-instance judgments are appealed? How long do appeals usually take?

In India, the law provides for a right of appeal to parties, against the court of first instance's order, under the Code of Civil Procedure 1908 (the Code). In commercial matters (which also includes arbitration-related litigation), the statutory timeline for filing appeals against first-instance judgment is within 60 days. The CC Act provides for a six months' timeline for disposal of appeals. Such statutory right to appeal is almost always exercised by the losing party.

There is limited scope for a challenge to final arbitral awards rendered by arbitral tribunals under the Arbitration Act. Typically, the timelines for challenges or appeals would be governed by the CC Act.

The timelines provided under the Code and the CC Act would not apply to other exclusive fora, which have their own similar appellate procedures and timelines.

Typically, the timeline for a commercial claim to reach a decision at the appellate stage is six months to three years and would primarily depend on its nature and complexity, the number of parties involved, the appellate court or forum where it is filed and such appellate court's or forum's workload and pendency.

Law stated - 19 October 2022

Enforcement

What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

Indian law is a pro-enforcement regime for both court-rendered judgments and arbitral awards. The Code, read with the CC Act, provides for enforcement or execution (or both) of court-rendered judgments in India. The recognition and enforcement of foreign judgments and decrees in India are governed by section 44-A read with section 13 of the Code. A foreign judgment that is conclusive under section 13 of the Code may be enforced by instituting execution proceedings under section 44-A in the case of reciprocating territories (declared by the Central Government of India), or by instituting a civil suit on the judgment in the case of non-reciprocating territories.

The Arbitration Act, under sections 49 and 58, provides for enforcement of foreign awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Geneva Convention respectively. Under sections 48 and 57, enforcement and execution of a foreign award can be challenged on limited grounds, such as:

- the parties to the agreement were under some incapacity;
- the parties were unable to present their case;
- the award was beyond the scope of the arbitration agreement;
- the composition of the tribunal was not in accordance with the arbitration agreement; and

- the subject matter of difference is not arbitrable.

As regards domestic awards, under section 36(1) of the Arbitration Act an award may be enforced in accordance with the provisions of the Code as if it were a decree of the court, once the time for making an application to set aside the arbitral award under section 34 of the Arbitration Act has expired. Domestic awards can be set aside only on the grounds of:

- incapacity of a party;
- inability to present one's case;
- no proper notice of the appointment of an arbitrator was given;
- arbitral award being beyond the scope of the arbitration agreement;
- composition of an arbitral tribunal is not in accordance with the procedure contemplated by the parties;
- the subject matter of a dispute is incapable of settlement by arbitration;
- an arbitral award is in conflict with the public policy of India; and
- the award (in an arbitration other than international commercial arbitration) is vitiated by patent illegality.

Whether a judgment would involve contentious enforcement proceedings would depend upon the facts and circumstances of the case.

Law stated - 19 October 2022

COLLECTIVE ACTIONS

Funding of collective actions

Are class actions or group actions permitted? May they be funded by third parties?

India has several legal provisions for filing class or group actions. The following are some of the legal sources available:

- Order I, Rule 8 of the Code of Civil Procedure 1908 allows a 'representative suit' to be filed, namely, where several persons have similar interests in prosecuting or defending a civil proceeding, any two or more persons may file/defend the said civil proceeding with the permission of the court;
- section 245 of the Companies Act 2013 prescribes class action by shareholders against the company, its directors, auditors, experts, advisors, etc. It allows a minimum prescribed number of members or depositors to file a class action suit if they are of the opinion that the management or conduct of the affairs of the company is being carried on in a manner prejudicial to the interests of the company or its members or depositors. However, this provision does not apply to banking companies;
- section 35 of the Consumer Protection Act 2019 allows numerous consumers having the same interest to file a complaint in relation to any goods sold or service provided, with the permission of the District Commission. Thus, the deficiency in the good or service as identified by all the consumers must be the same or similar; and
- articles 32 and 226 of the Constitution of India allow filing of public interest litigation (PIL) before the Supreme Court and High Court respectively, for enforcement of the fundamental rights guaranteed under Chapter III of the Constitution of India. The import of PIL is wide, as the petitioner or the person filing the PIL need not necessarily possess the locus standi or be aggrieved by the issue in the PIL.

There is no restriction on third-party funding (TPF) of these collective actions recognised under statutory provisions or by judicial precedent, subject to the TPF arrangement itself being legal and valid.

COSTS AND INSURANCE

Award of costs

May the courts order the unsuccessful party to pay the costs of the successful party in litigation?

May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Courts in India have the discretion to award, inter alia:

- 'general costs' in civil proceedings based on the facts and circumstances of each case;
- 'compensatory costs' against a party if the court is satisfied that the litigation was frivolous and vexatious; and
- costs for causing a delay at any stage of proceedings.

The general rule applicable is 'costs follow the event' – namely, the unsuccessful party is to pay the costs of the successful party. If the court orders that costs should not follow the event, it must record its reasons for doing so. The court is also empowered to decide the quantum of costs and when the costs will be paid. However, courts in India do not often grant adverse costs and parties are made to bear their own costs.

An illustrative list of heads is provided for under section 35(4) of the Code of Civil Procedure 1908 (the Code), which may be interpreted to cover litigation funding costs. In *Salem Advocate Bar Association v Union of India* (2005), the Supreme Court of India held the costs to include time, transport, lodging, etc, other than the litigation costs.

In India, arbitral tribunals have the discretion to award costs, their quantum and the timeline for payment. The general rule is 'costs follow the event', and deviation from this rule must be followed by reasons. The term 'costs' is defined under section 31(8) of the Arbitration and Conciliation Act 1996 (the Arbitration Act) to include 'any other expenses incurred in connection with the arbitral proceedings and the arbitral award', which may be interpreted to include funding costs.

In both litigations and arbitrations, the quantum of costs awarded is at the discretion of the court or tribunal and is subject to the proof presented by the relevant party.

Law stated - 19 October 2022

Liability for costs

Can a third-party litigation funder be held liable for adverse costs?

The liability of the third-party funder to pay adverse costs would depend on the terms of the agreement between the funder and the funded party. Indian law does not proscribe the payment of adverse costs, if the agreement so provides. However, the liability to pay the adverse costs would be inter se the funder and the funded party, unless the funder is a party to the litigation.

Law stated - 19 October 2022

Security for costs

May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

Under Order XXV of the Code, the courts in India may order the plaintiff to provide security for costs. Order XXV, Rule 1 provides that at any stage of a suit, the court may, either of its own motion or on the application of any defendant, order the plaintiff to provide security for the payment of all costs incurred and likely to be incurred by any defendant. Such an order for security for costs is to be made mandatorily by courts in the case where a plaintiff resides abroad and does not possess any or sufficient immovable property in India. Further, some states (eg, Uttar Pradesh) also mandatorily require the plaintiff to furnish security for costs in the case where the plaintiff is being financed by a person who is not a party to the suit. In other states (eg, Madhya Pradesh and Maharashtra), after impleading a funder, courts may, on their own motion or on application of a defendant, require the plaintiff to furnish security for costs. In some states, including Andhra Pradesh, Orissa and Tamil Nadu, if an element of champerty or maintenance is proved, the court may, on an application by the defendant, order the plaintiff to furnish security for the estimated costs of the defendant.

Only some courts in India can order the third-party funder itself to provide security for costs. In this regard, some states, including Bombay, Dadra, Daman and Diu, Goa, Madhya Pradesh and Nagar Haveli, have inserted a new rule that prescribes that the court may order a third-party funder (of a plaintiff) to be made a co-plaintiff to the civil suit if it consents to this. If such a third-party funder declines to become a co-plaintiff, then the court may on its own motion implead it as a defendant. Once impleaded, the court may order such funder either of its own motion or on the application of any party, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. Moreover, if the funder does not furnish the security, the court may make an order dismissing the suit so far as the funder's right to, or interest in, the property in suit is concerned, or declaring that the funder shall be debarred from claiming any right to, or interest in, the property in suit.

Therefore, courts in some states may order security for costs mandatorily upon becoming aware of the third-party funding (TPF) arrangement, while courts in other states may consider the TPF arrangement as a factor in ordering security for costs. Depending on the rule prevailing in the given state, the demand for security for costs may be from the plaintiff or the funder.

Section 9 of the Arbitration Act allows the courts to grant interim measures before or during the arbitral proceedings or once the final award has been issued but not yet enforced. Section 9(ii)(b) of the Arbitration Act provides that an interim measure may be ordered for 'securing the amount in the arbitration'. This includes the power to grant security for costs. Further, section 17(ii)(b) provides that an interim measure may be granted by an arbitral tribunal for 'securing the amount in dispute in the arbitration'. This provision thus also allows the arbitral tribunals to order security for costs.

The quantum of security to be awarded would depend on the discretion of the court or tribunal, to be exercised on the basis of the facts and circumstances of the case.

Law stated - 19 October 2022

If a claim is funded by a third party, does this influence the court's decision on security for costs?

Yes, if a claim is funded, courts in some states are required to mandatorily order security for costs. By contrast, in other states funding of claims by a third party may be a relevant factor in favour of ordering security for costs, mentioned earlier.

Law stated - 19 October 2022

Insurance

Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

The legality or permissibility of ATE insurance has not been tested in India. Since TPF itself is a nascent concept in the country, the financial viability of ATE is still too much of an unknown for major insurers to offer ATE policies.

However, under the current insurance framework, liability insurance policies for directors, employees and industries are available. These insurance products, which cover advocate fees and litigation expenses, provide before-the-event liability insurance cover.

At present, there is limited meaningful insurance protection that can cover litigation expenses for individual litigants across India for conventional or alternative dispute resolution proceedings. For commercial and professional entities, legal expenditure could be covered under liability insurance, where coverage is provided for third-party loss or damage caused unintentionally by the policyholder.

Law stated - 19 October 2022

DISCLOSURE AND PRIVILEGE

Disclosure of funding

Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Third-party funding arrangements remain largely unregulated in India. The legislation does not explicitly oblige funded parties to disclose the identity of the third-party funder or the funding arrangements to the courts of law, arbitral tribunals or opposing parties.

However, the courts and arbitral tribunals are competent to adjudicate upon and compel disclosure of funding arrangements, should a party file an application for disclosure of the funding arrangement or the court (on its own motion) require any party to make such disclosure. The extent of disclosure of the funding arrangement has not been judicially reviewed as yet.

Law stated - 19 October 2022

Privileged communications

Are communications between litigants or their lawyers and funders protected by privilege?

Section 126 of the Indian Evidence Act 1872 recognises attorney-client privilege and protects the information shared inter se between an advocate and a party, during the course and for the purpose of the advocate's employment. However, there is no corresponding protection offered to the third-party funder and the funded party's relationship. It follows that confidentiality should be protected by entering into non-disclosure agreements, and strict protocols may be devised to ensure conditions of disclosure are specifically formulated.

Law stated - 19 October 2022

DISPUTES AND OTHER ISSUES

Disputes with funders

Have there been any reported disputes between litigants and their funders?

Disputes between litigants and their funders, if any have occurred, are not available in the public domain. Even as third-party funding (TPF) agreements gain more visibility as a viable form of litigation finance, TPF agreements themselves are likely to contain non-disclosure terms that govern disputes between litigants and funders. Hence, it is difficult to ascertain the existence of any disputes.

Law stated - 19 October 2022

Other issues

Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

The TPF regime in India remains largely a green field, with jurisprudence evolved through judicial precedent. As a result of the lack of a codified form of regulation, several issues may arise. For instance:

- since there is no established definition of unconscionability and no standards of extortionate proceeds for TPF arrangements, their validity hangs in the precarious balance of the courts; and
- there is a lack of clarity on the treatment of funds deployed by foreign funders directly in India and their legal treatment under the Foreign Exchange Management Act 1999.

Additionally, there is a growing concern that typically only claims with a high profitability of success are able to obtain funding in India.

Thus, there is a need for a clear law providing for the TPF arrangements that are valid and legal, and prescribing the mechanism of deployment and implementation.

Law stated - 19 October 2022

UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends that should be noted?

There is growing interest in the third-party funding of Indian disputes, specifically arbitration. A lot of movement in the space can be seen in the form of academic webinars, information series and launches of products that support 'interim finance' of insolvency proceedings, and by assignment of 'actionable claims' through restructuring of corporate entities. So far, no active challenge to these has been reported publicly.

In addition, third-party funding (TPF) is expected to gain more momentum in India, especially after the incorporation of TPF guidelines in the 2021 ICC Arbitration Rules. As such, acceptance, and active recognition of TPF by arbitral institutions rules further elevates the status of TPF in the international dispute resolution regime. Following the trend, various domestic legislations as well as arbitral institutions acknowledged the existence and the need for transparency with respect to TPF. It is hoped that India too will soon hop on this trend to give a more prominent recognition to TPF by

way of an express averment in its domestic legislation and regulations.

Further, in the post-covid-19 scenario, the demand for TPF has increased as businesses or individuals are reluctant or unable to put monies in lengthy and expensive litigation and arbitration proceedings. In such a scenario, such businesses or individuals look to external funders to finance their litigation or arbitrations. In fact, The Economic Times , in its article published in September 2022 notes that the white paper released by third-party litigation funding startup LegalPay mentions that between June 2021 to May 2022, it has received over 1,400 proposals for funding disputes for various parties, from across the sectors .

Law stated - 19 October 2022

Jurisdictions

	Australia	Piper Alderman
	Austria	Nivalion AG
	Belgium	Nivalion AG
	British Virgin Islands	Martin Kenney & Co
	Canada	Omni Bridgeway
	France	Nivalion AG
	Germany	Omni Bridgeway
	India	Khaitan & Co
	Israel	Woodsford
	Italy	Fideal S.R.L
	Japan	Miura & Partners
	Luxembourg	Nivalion AG
	Netherlands	De Brauw Blackstone Westbroek
	Spain	PLA Litigation Funding
	Sweden	Nivalion AG
	Switzerland	Nivalion AG
	Thailand	Rajah & Tann Asia
	United Kingdom - England & Wales	Woodsford
	USA - New York	Liston Abramson LLP