THIRD-PARTY FUNDING IN INDIA

Survey Report 2021

MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

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The information contained in this report shall not be construed as a legal advice on the subject matter.

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MNLU Mumbai's Centre for Arbitration and Research (CAR) seeks to carry out research in arbitration law and practice, contribute to policy discussion, and provide a platform for the training of arbitration professionals. CAR wishes to emphasise research and training in contemporary and emerging issues of arbitration law, specifically in niche practice areas, often unexplored by academia, but highly relevant for practitioners, such as construction arbitration, maritime arbitration, investment arbitration, sports arbitration, etc.

CAR was founded under the patronage of Vice-Chancellor Prof. (Dr.) Dilip Ukey. CAR's Faculty Coordinator is Mr. Chirag Balyan, Assistant Professor of Law at MNLU Mumbai.

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Preface

This report is product of a journey of more than 18 months. The starting point being the Oxford Style Debate on “Third Party Funding of Dispute Resolution: Is India Ready Today?” which was organized by the Centre for Arbitration and Research at MNLU Mumbai on 25 July 2020. The debate acted as a stimulus to work more deeply in this area. I am grateful to everyone who was part of that debate and in particular, Mrinal Jain with whom I had co-organised the debate. In fact, the recurring theme of this report is also whether, India is ready for the third-party funding or not.

I am thankful to all the third-party funders who have participated in the survey and gave their valuable time as well as responses. Dilip Massand painstakingly connected me with each of the funder. If not for his support, this project would not have seen the light of the day. He took it upon himself to see that questionnaire is vetted by Eric Blinderman and is not just sent globally to all funders but is also filled by them.

After our survey work made some progress, I pitched the idea to our Hon’ble Vice-Chancellor Prof. (Dr.) Dilip Ukey for sanctioning the project as a Minor Research Project by the University. Prof. Ukey with his zeal to promote the research in no time approved the project. The production of this report is funded by the University thanks to the Research Seed Money Policy which Prof. Ukey introduced in the University in his very first year of tenure.

I am also thankful to our Registrar, Prof. (Dr.) Anil G. Variath; and my dear friend Mr. Sajid Sheikh. Both of them made sure that there were no administrative hurdles in carrying out the project. Mr. Ashok Chikte who is my dear friend and an English teacher at the University graciously agreed to proof-read the galley version of the report.

I am also grateful to all the expert peer-reviewers for giving their time and intellectual inputs to this report. Their comments have greatly enhanced the quality as well as credibility of the report.

At end, I am thankful to both the researchers - Salomi Kalwade and Nilanjan Dey for their tireless efforts and support in preparing this report. Salomi is associated with this project from the very beginning. In fact, I first floated the idea of doing this project to Salomi who not just enthusiastically encouraged the idea but also stood as a pillar till the completion of report. Nilanjan's crucial involvement started after the data collection stage. Both of them could live up to my demanding expectations and played a tremendous role in preparing this report. My student Apeksha Chauhan also assisted with research on TPF during her tenure as an intern at the Centre.

I cannot thank enough to almighty and my family for their unwavering support.

Chirag

About the Report

The high costs involved in enforcing the rights, especially through litigation or arbitration may be deterring for the parties. Therefore, globally, Third Party Funding ('TPF') is being increasingly utilised by the firms in resolution of commercial disputes. TPF allows a firm to use its own capital to further the business objectives and utilize the non-recourse funding obtained from a third-party funder in the resolution of disputes. In times of economic downturn, TPF also empower firms with limited liquidity to be able to file and contest their claims. At occasions, firms may have to make a choice of either to stay solvent or to file a claim and they may not enforce their rights to avoid insolvency. Thus, TPF as a separate asset class and an equaliser in justice delivery can be a game changer.

However, as elucidated in this report, there are many aspects of TPF which lacks clarity. The unclarity on the legal landscape can be a reason for the reluctance by both the funders as well as the parties to utilise TPF. The potential of TPF cannot be fully realised in India unless, there is a coherent and clear legal framework. In order to improve business climate, it is vital for India to have a clear stand on TPF like Singapore and Hong Kong.

This report examines the state of TPF in India by reviewing the existing legal framework. The report assesses the adequacy as well as the efficacy of the current legal framework by two methods.

First, it studies the existing model of TPF in other jurisdictions and then evaluates the Indian laws on the touchstone of international best practices.

Second, it seeks to gather the perception of third-party funders about the state of TPF in India by conducting a survey. Based on a comparative analysis and empirical data, the report suggests the way forward for TPF in India.

This report aims to address the lacunae by suggesting plausible remedies that could be adopted to deal with these issues. This report further categorically assesses the existing legal system and to understand the breadth of applicability of legal principles and precedents set by courts and the attitude of the legislature when dealing with the dispute and problems governing the funding industry.

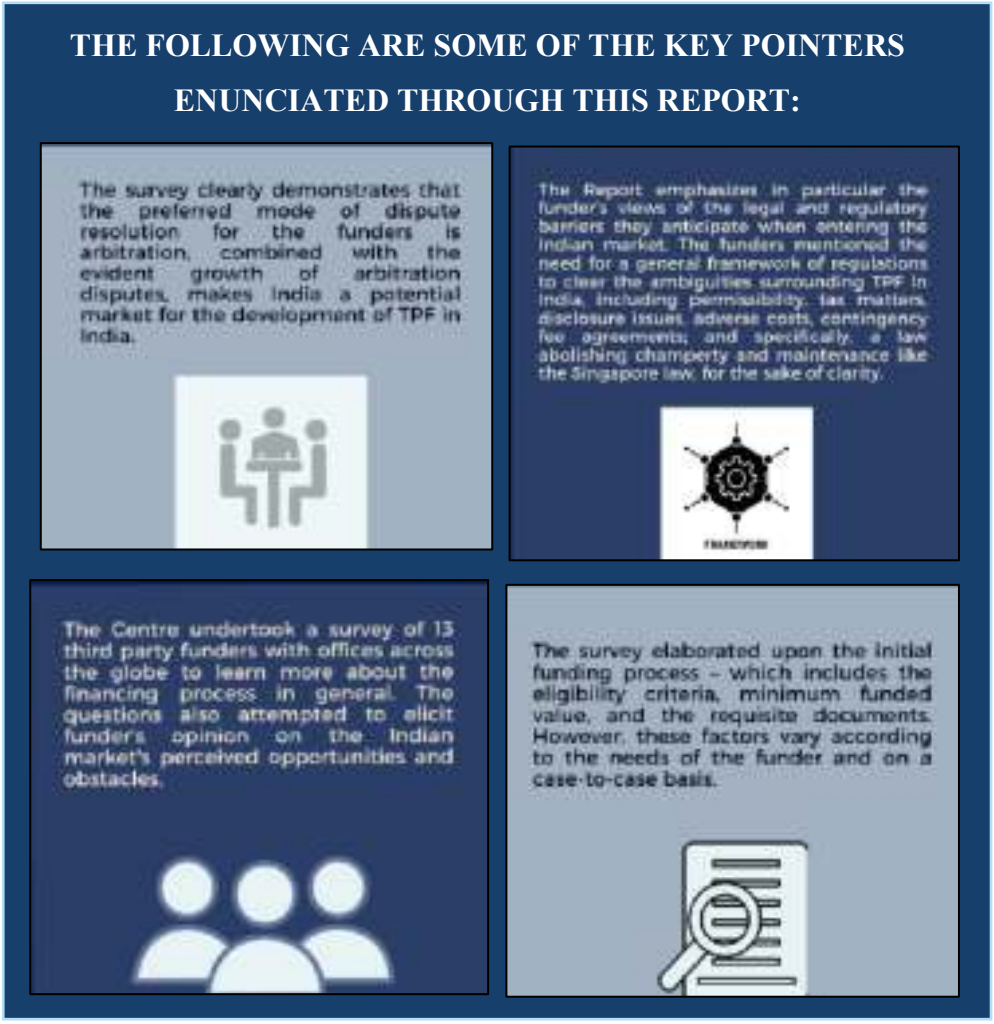
The key objective of this report is to examine the Indian legal landscape on third party funding from a theoretical as well as empirical approach. The report attempts to understand the funding environment in India from the funders viewpoint in order to assess the present state of affairs. The report also examines the existing Indian statutes and case laws. On the strengths of theoretical examination, best practices in other countries and the funders requirement, this report aims to suggest reforms in this area of law.

Thus, developing on the two methods of doctrinal research and empirical data, this report focuses on expanding industry specific knowledge, build a hypothesis, and reach a broad conclusion and suggesting statutory amendments.

Executive Summary

The demand for TPF in dispute resolution has witnessed a steady growth in recent years. Entities are looking for ways to manage risk and reduce legal budgets by availing non-recourse funding and allocating those resources to other business priorities instead. TPF is especially useful for the Indian market considering the exponential increase in the international arbitration involving Indian parties, the exorbitant costs involved in arbitration and the economic distress brought about by the COVID-19 crisis. Moreover, businesses tend to perceive dispute resolution funding as an ordinary corporate expense.

Our doctrinal research aims to map the various issues that policymakers will likely face in promoting and regulating TPF in India, particularly owing to the tension created by the current opportunity for dispute resolution funding in India and the impediment posed by legal and regulatory ambiguities in the jurisdiction. For the TPF industry to flourish, it is crucial to give it statutory recognition, and this can be done by following the leads of other jurisdictions. Furthermore, this study examines the necessity of a legislative change in India to remove roadblocks for the TPF industry's expansion.



The report also studies the legal position of funding in India. TPF arrangements presuppose a history of judicial recognition, but they must also pass the public policy test. Courts have used numerous factors to determine the validity of TPF, such as the transaction's object, extortionate or unconscionable terms, a disproportionate share of the outcome, the funder's control over the proceeding, and the presence of undue influence. The only exception drawn out is contingency fee arrangements with

advocates, as these arrangements have been found to be impermissible. The survey also inferred that, funders are interested in expanding TPF in India, particularly for international arbitral disputes involving Indian companies.

There are several hurdles to the legitimacy of TPF in India.

1. The foreign exchange regulations (FEMA) would hit offshore repatriation of funders.

2. There are also questions about the tax regime regulating the income of funders due to the uncertainty around TPF being a current account or capital account transaction.

3. the Securities and Exchange Board of India (SEBI) has issued regulations for the Alternative Investment Funds (AIF), pursuant to which, foreign-owned or controlled investment managers/sponsors managing AIFs, are required to comply with Foreign Direct Investment (FDI) guidelines for their capital investments in Special Purpose Vehicles (SPVs).

While the Arbitration and Conciliation (Amendment) Act of 2015 and the Commercial Courts Act of 2015 go a long way toward expediting commercial and arbitration-related disputes, there remain issues concerning enforcement and costs in disputes involving TPFs continue to remain unsolved.

Yet, all is not lost. The efforts by the government and the judiciary and a well-coordinated framework will still be able to guarantee the effective proliferation of the TPF industry. Emphasis is laid on confidentiality concerns in the report when suggesting changes, as there is no statutory protection for client-attorney privilege or terms of the TPF agreement till date.

Further provisions are required to regulate disclosures of TPF in proceedings to ensure transparency and impartiality of the proceeding and independence of arbitrators. Furthermore, the prohibition of contingency fee agreements (CFAs) has also become a microscopic barrier for funders who seek to align interests by ensuring that the claimant's counsel has skin in the game.

Judicial pronouncements cannot always resolve policy principles around TPF since they are limited to the narrow issues in dispute before the court. Thus, as rigid and unclear laws stifle the financing business in India, legislation and/or regulation is required to strike a balance between party autonomy and public policy.

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FOREWORD

Litigation in India, and even abroad, has been a tortuous and expensive procedure for obtaining relief. In a developing country like India, the time and expense involved in pursuing a litigation, whether in the courts of law or even in arbitral fora, often prove deterrent. Although, costs are awarded to the successful party, the costs recovered are hardly commensurate with the time and money lost. A bigger deterrent is that a party seeking justice may not have the wherewithal required to set the wheels of justice in motion. The Civil Procedure Code has a procedure for filing of suits *in forma pauperis* in case of indigent parties. However, that may not possible for one who may not really be indigent, but not possessed of sufficient means.

Third Party Funding was conceived of as a method by which a person without access to the initial money required to pursue litigation could be advanced such money under an agreement to reimburse the amount advanced with accretion as may be agreed, out of the fruit of litigation upon success.

That third party funding has an inbuilt profit motive, is indubitable. It has also been criticised as gambling in litigation. In India, where we follow the English traditional legal doctrines of maintenance and champerty, Third Party Funding could even be considered unlawful and unethical. Third Party Funding might become important in commercial causes where the stakes are high and the initial amounts to be spent are also huge. Third Party Funding has, therefore, become popular with insurers who enter into agreement with a party to recover the money if the claim succeeds in award of money. However, in India there has

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[illegible]

been no legislative effort made to streamline the process. There is an odd judgment of a High Court, an outlier than path maker, to suggest that third party funding is permissible in India. But that may not be the last word on the law. There are several policy issues which may be thrown up by third party funding. Foreign Exchange Regulations, Capital Market regulations, Insurance Regulations and Tax issues would need to be considered and reconciled before Third Party Funding can be permitted by legislation. Unless the legislature steps in enacts a comprehensive legislation, Third Party Funding in India may continue to be a matter only for theoretical discussions and research by academics.

Maharashtra National Law University Mumbai Centre for Arbitration and Research has conducted a survey of Third Party Funding in India and produced this comprehensive report which analyses the manifold issues that arise in connection with Third Party Funding. The report is a result of a structured questionnaires circulated to several global Third Party Funders and an in depth analysis of their responses. The report attempts to present a comprehensive view of how Third Party Funding works in other jurisdictions and presents the challenges that might be thrown up to Third Party Funding in India. It contains an excellent survey and analysis of the extant practice and law on the issue. It would prove useful to serious study and research on the subject and a good addition to any library.

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My congratulations and best wishes to the producers of this report with the hope that the Central Government takes serious note of lack of clarity on the subject in India and takes expeditious steps to come up with a suitable legislation to fill the gap.

29th November 2021

(B.N. Srikrishna)

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I. INTRODUCTION

Third party funding ('TPF') is an arrangement where a party not involved in a dispute bears the costs of either party to the dispute, provided the former gets a share of the damages or compensation that the latter receives, if successful. Thus, there is a profit motive that is central to such a funding agreement.[1]

Third parties providing financial resources to pursue disputes is not a novel phenomenon and has been familiar to the legal world in various forms for several years. Disputes may be funded in the form of financial institution loans, corporate financing, before-the-event litigation insurance, after-the-event litigation insurance, contingency fee arrangements, inter-corporate funding, or legal aid.[2] The distinctiveness of what is now referred to as the practice of third-party funding is its nature as an investment.[3]

[1] Meenal Garg, Introducing third party funding in Indian Arbitration, 6 Nluj Law Review 71, 73 (2020).

[2] Rachel Howie, Geoff Moysa, Financing Disputes: Third party Funding in Litigation and Arbitration, 57Alberta Law Review 465, 466 (2019). ["Howie & Moysa"]

[3] Profile Investments, Evolution of the Third party Funder, April 27 2020, *available at* <https://www.lexology.com/library/detail.aspx?g=fcd6f277-5754-4fa0-958f-d1e1701c8730>

This form of TPF originated in Australia in the 1990s[4] and reflects a shift from the impulse of assisting a disadvantaged disputant to a view of legal claims as financial assets, "which can potentially be monetized or used as collateral in order to secure finance."[5]

As an asset class, it is independent of the traditional stock market.[6] This was first seen in Australia, where certain statutory powers enabled insolvency practitioners to contract for the funding of lawsuits.[7] This has grown, over the years, into an industry consisting of commercial entities whose primary business is financing disputes.[8]

Although conversations around TPF are often about access to justice for small and medium-sized businesses, the funding industry needs to be understood as one that views litigation like any other corporate expense. Thus, these entities may be looking for ways to manage risk, reduce

[4] Oliver Gayner, Susanna Khouri, Singapore and Hong Kong: International Arbitration meets Third party Funding 40 Fordham Intl. Law Journal 1033, 1035 (2017).

[5] International Council of Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third party Funding in International Arbitration (2018), ["ICCA- Queen Mary Task Force Report"] p.37.

[6] Cyril Shroff and Amita Gupta Katragadda, Third party funding Of Litigation in India: An Asset Class in Waiting, Bloomberg Quint Opinion, *available at* <https://www.bloombergquint.com/opinion/third party -funding-of-litigation-in-india-an-asset-class-in-waiting>

[7] G. Solas, Third Party Funding: A Comparative Legal and Factual Overview in Third Party Funding: Law,Economics and Policy 38, 40 (1st ed., 2019) ["Solas"]

[8] Sameer Jain, Jayashree Parihar and Anant Gupta, Third Party Funding in International Arbitration: An Indian Perspective, 20 December 2019, *available at* <https://www.mondaq.com/india/trials-appeals-compensation/ 875506/third party -funding-in-international-arbitration-an-Indian-perspective>

legal budgets, take the cost of pursuing arbitration off-balance sheet, or pursue other business priorities instead of allocating resources to financing an arbitration matter.[9] Thus, funding is not only for those that are impecunious.[10]

This also helps explain the growth in demand for TPF in the world. The global institutional funding industry is estimated to have more than US$ 10 billion in capital to invest as of April 2018.[11] For instance, Burford Capital is a global finance firm with US$ 4.5 billion committed to the legal market as of 2020, which is five times greater than the corresponding figure at the end of 2016.[12]

TPF can be beneficial for the Indian market. There has been an exponential growth of international arbitration involving Indian parties and Bilateral Investment Treaty (BIT) claims against India.

Indian parties are leaning towards arbitration as a preferred dispute resolution method but the majority of them prefer Singapore as a seat (for international disputes) and not

[9] ICCA- Queen Mary Task Force Report, p.20. It notes, "*The use of funding offers the client the ability tominimise risk, does not have any negative effect on their cash flow, and ensures payment of lawyers.*"

[10] Hiroo Advani and Chaiti Desai, Third Party Funding, *available at* <https://www.scconline.com/blog/post/2021/04/20/third party -funding/>

[11] ICCA-Queen Mary Task Force Report, p.30.

[12] Burford Capital 2020 Annual Report, p.viii, *available at* <https://www.burfordcapital.com/media/2080/fy-2020-report.pdf >

India.[13] Indian users of SIAC account for more than 50% of its total foreign users.[14]

The cost of arbitration is rising substantially as the fees of the arbitrator, legal costs, and other charges weigh heavily on the shoulders of the disputant. Listed Indian companies had spent around 5.3 billion dollars in 2020 on legal expenses.[15] This makes India a potent market for the third-party finance. If employed properly, TPF could benefit parties with meritorious claims, unable to bear the cost of such arbitration. TPF has particularly become relevant because of the circumstances brought about by COVID-19, leading to economic distress, and increasing disputes.[16] Especially as India has not made attempts to regulate third party funding yet.

There still exists debate around the permissibility of TPF, as to what extent it should be permitted and whether there exists a need to regulate the same.

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[13] Meenal Garg, Introducing third party funding in Indian Arbitration: A tussle between conflicting policies,6(2) NLUJ Law Review 71 (2020).

[14] Tan Hai Song, SIAC data confirms International Arbitration is Booming in Singapore, *available at* <https://www.pinsentmasons.com/out-law/news/siac-data-confirms-international-arbitration-is-booming-in-singapore>

[15] Maulik Vyas & Shailesh Kadam, The Economics Times, India Inc's legal expenses jump 9 percent to Rs.38,754 crore in FY20, *available at* <https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-legal-expenses-jump-9-per-cent-to-rs-38754-crore-in-fy20/articleshow/78319291.cms?from=mdr>

[16] Baker McKenzie, COVID-19: Implications for the future of Dispute Resolution, *available at* <https://www.bakermckenzie.com/-/media/files/insight/publications/2020/04/covid19-implications-for-the-future-of-dispute-resolution_v5.pdf>

Further, the degree of regulation in a jurisdiction determines the scope of funding available in that jurisdiction. This brings up the question of whether a jurisdiction should enact a statute to regulate TPF or let the funding industry organically develop a self-regulatory mechanism.

The legal position on the permissibility of having funding agreements is also quite unclear. However, several concerns around TPF and the absence of clear statutory provisions on the scope and terms of such arrangements might have hindered its growth in India. This is precisely where this report locates its purpose.

Given the friction generated between the present opportunity for the growth of dispute resolution funding in India and the challenges posed by the legal and regulatory ambiguities, this report seeks to provide a map of the various issues that policy makers will confront in promoting and regulating TPF in India.

A. METHODOLOGY

The Report employs doctrinal and empirical methods to collect the data. Empirical data is collected from a survey of eleven third party funders headquartered in different jurisdictions. The Report does not disclose the specific responses of the funders, unless the information is already in the public domain, or the funder has given us express permission to do so. The survey intends to understand the

funders outlook in respect of the Indian market. It is limited to arbitration in most of the capacity.

Further, the aim of the survey is to gather feedback from the funding community on broadly two sets of issues: firstly, questions around the general working principles of the funder, including their preferred jurisdictions, their procedures for scrutinizing a funding request, the costs they cover, etc.; and secondly, the possible legal and regulatory changes that could potentially instil further confidence in the Indian market.

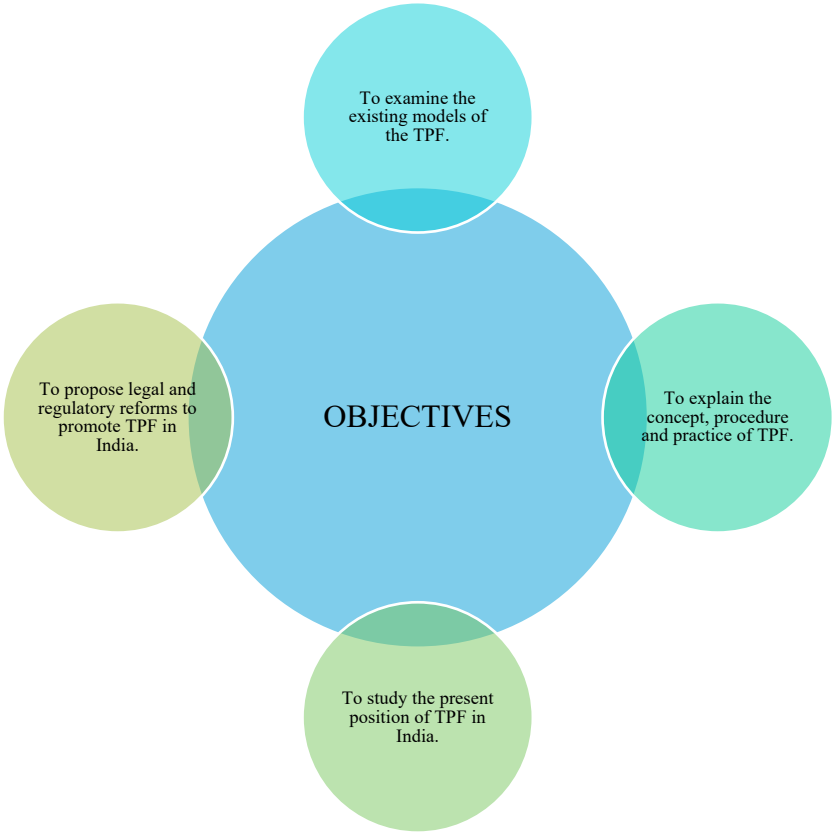
The survey is divided into three parts (See, Annexure-1). Part-1 contains general questions. Part-2 contains questions about the procedure followed by the funder for TPF. Part-3 contains India specific questions. In particular, the funders were asked a few questions. The questions aim to bring out the Respondents perception on TPF in the disputes market in India, with specific focus on the anticipatory regulatory challenges and any reformatory changes that India shall adopt to promote TPF. The Questionnaire is divided into two parts: - Question No. 1-13 addresses the general conceptual understanding of third-party funding from the funder's perspective. While Question No. 14 -16 explicitly deal with TPF in Indian Arbitration cases.

This Report analyses the funder's perspective as to the key issues and questions surrounding third party funding. It uses such analysis to provide a set of suggestions to address the fundamental questions around funding in India.

This report builds on the available data on the subject matter with the qualitative data study conducted through the survey. It is to be noted, that the survey covered funders from different jurisdictions, which gives the report a holistic approach.

Of the funders that we reached out to for the survey, Burford Capital and PG3 did not participate in the survey. However, Burford Capital informed that their annual report, which is available in the public domain could be referred to for the present research. Accordingly, the annual report of Burford Capital is relied upon wherever necessary. PG3 did not participate in the survey either because they "…don't invest directly in single disputes and don't have insights in the specifics of arbitration investments…" PG3 is an example of a third-party funder who invest only in class actions and litigation cases.

The hope is that the survey result and analysis will provide valuable direction in India's policy discussions on TPF. Although various states have amended the Code of Civil Procedure, 1908 to include litigation funding, there still exists a gap on variety of issues pertaining to TPF. These issues have been identified in the report and a reform proposal has been suggested.



B. Scope of Report

The prime focus of this Report is TPF in arbitration including, litigation supporting arbitration and other ADR methods used in conjunction with arbitration. While there is some discussion on litigation funding, it is only to understand the existing practice of funders and compare their preferences between litigation, arbitration, mediation, and expert determination. While the scope of this report is limited to arbitration, an integrated approach is adopted when analyzing the challenges engulfing TPF. Importantly, the questionnaire survey of different third-party funders

gives an empirical shape to the report, as third-party funders are one of the major stakeholders and contributors to the development of the TPF industry in India. This Report aims to draw clear recommendations after taking into account varied factors surrounding TPF in India. Apart from the doctrinal aspect of the report, emphasis is drawn to the empirical aspect as well. Third party funders outlook with respect to TPF, especially in India, has been taken into consideration when analyzing the statutory changes required for the furtherance of the TPF Industry in India. The following were the questions enumerated in the survey forms which the respondents (TPF) have answered:

** Refer to annexure I for the survey questionnaire*

II. BACKGROUND: APPROACHES TO REGULATION OF TPF

Over time, several approaches to boost and regulate TPF have been adopted in various jurisdictions. Broadly speaking, three alternative approaches to regulate TPF in international arbitration have emerged as a result of the recent global attitude in favour of TPF. Some countries have legislation in place governing TPF, while other jurisdictions have judicial precedents encouraging the TPF industry.[17] The third method is self-regulation, in which certain non-mandatory code of conduct is introduced by bodies like the Association of Litigation Funding in the United Kingdom.

It is also necessary to evaluate the elements that might elucidate certain concerns that might arise when defining TPF, like donation funding, vindictive funding as in the Gawker case or funding by an individual or parent company and such practices would be detrimental to the growth of TPF in India.

[17] James Rogers, Alison G. FitzGerald, Cara Dowling, Emerging approaches to the regulation of third party funding, October 2017, *available at* <https://www.nortonrosefulbright.com/en-in/knowledge/publications/4f5fb25c/emerging-approaches-to-the-regulation-of-third party -funding>

Two of these approaches have been broadly examined in this report, i.e., Statutory Regulation and Self-regulation.[18] While this is not the focus of the report, this chapter shall also provide a brief glimpse into the challenges of defining TPF in dispute resolution

A. Statutory Regulation

So far, two countries have introduced legislation regulating TPF - Singapore and Hong Kong. Nigeria currently has a bill under consideration.[19]

Singapore was the first country to codify provisions on TPF and give it a statutory standpoint. Singapore in 2017 amended its law and permitted TPF to certain types of dispute resolution proceedings.[20] The Singapore Court of Appeal, in the case of Otech Pakistan Pvt Ltd v Clough Engineering Ltd, and anr.[21] held that save for certain situations, the doctrine of champerty will apply to all types

[18] Id., at note 17. Singapore and Hong Kong are the only countries that have enacted legislation to govern TPF. While, UK Australia, USA, Switzerland, France and a sew other countries. Moreover, a bill has been introduced by Nigeria to regulate its TPF industry.
[19] Arbitration and Mediation Bill, 2019 (Nigeria).
[20] Civil Law (Amendment) Act 2017 was passed by Parliament on 10 January 2017. See A. Henderson and D. Waldek, "Singapore Arbitration Update: Third Party Funding and New SIAC Rules 2016", Herbert Smith Freehills Arbitration Notes (1 July 2016), *available at* <https://hsfnotes.com/arbitration/2016/07/01/singapore-arbitration-updatethird party -funding-and-new-siac-rules-2016/>
[21] Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another, [2007] 1 SLR(R) 989.

of disputes, including arbitration proceedings.[22] Public comment were solicited on a proposed Draft Civil Law (Amendment) Bill 2016, followed by amendments to the Legal Profession Act[23] and Civil Law (TPF) Regulation 2016[24], to allow third party funding in international arbitration, subject to certain restrictions and requirements.

This was the beginning to the regime regulating TPF in Singapore was initiated.[25] Singapore introduced Civil Law (Amendment) Act, 2017 to regularise TPF in arbitration and mediation. The definition of TPF is found in the Civil Law (Amendment) Act, 2017 ("the Civil Law Act"), along with certain provisions are also laid down. Regulation 4 of the Civil Law (Third party Funding) Regulations of 2017 defines a qualifying third party funder as an entity which "carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the Third Party Funder is not a party" and "has a paid-up share capital of not less than S$ 5 million or the equivalent amount in foreign currency or not

[22] Clifford Chance, Third party funding in Singapore: out of the shadows and into the light, July *2016*, *available at* <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/07/thirdparty-funding-in-singapore-out-of-the-shadows-and-into-the-light.pdf> There are statutory exceptions to the doctrine of Champerty and maintenance, being The Singapore Companies Act that permits the liquidator to sell to a third party funder. The second exception is the Third party funding Regulation.

[23] Section 107 of the Legal Profession Act (Cap. 161) was amended, and subsection (3) was included.

[24] Civil Law (Third party funding) Regulations 2016, *available at* <https://www.mlaw.gov.sg/files/TPF-AnnexB.pdf/>

[25] Victoria Shannon Sahani, Judging Third party funding, 63 UCLA L. REV. 388 (2016).

less than S$ 5 million or the equivalent amount in foreign currency in managed assets".[26]

The definition in this regulation is explicitly restricted to professional funders and thus does not extend to non-commercial funders like individuals or parent companies. Moreover, a minimum threshold of paid-up capital is also given for a funder to qualify for funding a party to the proceeding. Section 5 B of the Civil Law Act defines TPF contract. This definition provides that the funder is entitled to a return on the positive outcome of the proceeding in favour of the funded part.[27] Thus, a clear exclusion is made in respect of pro-bono funding or After the Event (ATE) and Before the Event (BTE) insurance.[28] Moreover, the traditional types of funding like ATE or BTE funding did not attract doctrinal implications under tort.[29] This could likely also be the reason for restricting the definition to a modern

[26] Section 2 of the Civil Law (Amendment) Act 2017 to amend the Civil Law Act (Chapter 43 of the 1999 Revised Edition) (the "Act") and to make a related amendment to the Legal Profession Act (Chapter 161 of the 2009 Revised Edition), passed 10 January 2017 and assented by the President on 3 February 2017 ("Civil Law (Amendment) Act 2017"). Section 2 of the Civil Law (Amendment) Act 2017 defines TPF as; A "third party-funding contract" is defined as: "a contract or agreement by a party or potential party to dispute resolution proceedings with a Third-party Funder for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled.".

[27] Section 5B (10) of the Civil Law Act, 2017, "third-party funding contract" means a contract or agreement by a party or potential party to dispute resolution proceedings with a Third party Funder for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled.

[28] ICCA-QMLA report, at pg. 57.

[29] id., at p.106.

form of third party funder, i.e. a funder in a commercial sense. The 2017 amendment has abolished the tort of maintenance and champerty but have clearly maintained that these doctrines are applicable to contracts that are illegal or against public policy, with a clear exception to TPF agreements.[30]

The Legal Profession (Professional Conduct) Rules 2015 in Art 49A provides that at the time of the commencement of the proceedings, disclosure of an existing TPF contract must be disclosed at the commencement of the proceedings It is evident from the above analysis that the definition of TPF in Singapore has a narrow scope. It excludes funding for any purpose other than that of commercial gain. Third party funder under the Regulation. In 2019, Singapore's Minister of Law announced that the TPF will be stretched to domestic and related arbitration and to certain proceedings in the Singapore International Commercial Court (SICC) connected to these proceedings. Though changes are yet to be implemented.[31]
In addition to these legislative amendments, certain guidelines have been issued by the Law Society of

[30] Rebecca Mulder and Marc Krestin, Third party funding in international arbitration: to regulate or not to regulate? *available at* <https://youngicca-blog.com/third party -funding-in-international-arbitration-to-regulate-or-not-to-regulate/> *See also,* Olivier Marquais and Alain Grec, Do's and Dont's Of Regulating Third party litigation Funding: Singapore Vs. France, *available at* <https://www.loyensloeff.com/media/478484/marqm-june-2020.pdf>

[31] Jurisdiction Guide to Third Party Funding in International Arbitration, *available at* <https://www.pinsentmasons.com/out-law/guides/third%20party%20-funding-international-arbitration>

Singapore, SIAC32 and Singapore Institute of Arbitrators (SIArb). These guidelines provide the procedural bedrock for the above substantive provisions.[33]

The Law Society of Singapore issued a Guidance Note on Third party funding, 2017 which sets out best practices for lawyers who refer, advise, or act for clients who obtain TPF.[34] Moreover, the guidelines also lay down the level of involvement by the funder and to specify the permissible nature and scope of the funder's role in the funding agreement.[35]

Like Singapore, Hong Kong had previously prohibited TPF, which has been overturned by the ordinance amending the Arbitration ordinance (Cap. 609) and the Mediation Ordinance (Cap.620).[36] The Hong Kong Arbitration and Mediation Legislation (Third party Funding) (Amendment) Ordinance 2017 came into force in 2019. It is relevant to

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[32] Appendix 2. SIAC Investment Arbitration Rules 2017', in John Choong, Mark Mangan, et al., A Guide to the SIAC Arbitration Rules (Second Edition), 2nd edition (© Oxford University Press; Oxford University Press 2018) pp. 355 – 374.

[33] Gitanjali Bajaj, Ernest Yang and Queenie Chan, Third party funding in the Asia-Pacific region, Global Arbitration Review (GAR), *available at,* <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/third party -funding-in-the-asia-pacific-region#endnote-029-backlink>

[34] The Law Society of Singapore, Guidance Note 10.1.1 on Third party funding, 25 April 2017, at C-4, *available at* <https://www.lawsociety.org.sg/wp-content/uploads/2020/03/Third party -Funding-GN-10.1.1.pdf>

[35] *Id,* at note 34.

[36]Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance No. 6 of 2017, *available at* <https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf>

note that this ordinance is only applicable to funding in arbitration (including arbitration-related court proceedings) and mediation.

The position of TPF in litigation is yet to be addressed. Hong Kong adopts a broader connotation of the TPF definition compared to the Singapore legislation. TPF under this ordinance is not restricted to commercial funders and includes other models of funding such as funding by lawyers and law firms (unless they act for a party in the arbitration). However, contingency fee arrangements are expressly prohibited by the Ordinance.[37] In December 2018, the Secretary of Justice, which is an authorized body under the Ordinance has also issues the Code of Practice for TPF of arbitration.[38]

B. SELF-REGULATION

England and Wales have adopted a unique model of self-regulation through a voluntary Code of Conduct for Litigation Funders (Code).[39] The Association of Litigation

[37] Carolina Carlstedt, And then there were three… Third Party Funding In Hong Kong, 1st February, 2019, *available at* <http://arbitrationblog.practicallaw.com/and-then-there-were-three-third party -funding-in-hong-kong/>

[38] Code of Practice for Third Party Funding of Arbitration, notice under S. 98P of the Arbitration Ordinance, dated 7th December, 2018, *available at* <https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf >

[39] See Article (2.4) of the Code of Conduct for Litigation Funders (January 2014), *available at* <http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-ofconduct-Jan-2014-Final-PDFv2-2.pdf> (last accessed 29 October 2016); *See also,* B. OSMANOGLU, "Third

Funders (the ALF) is an independent body that has been charged by the Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. The ALF published the Code in 2014. England follows a self-regulatory model for governing TPF.

ALF plays a vital role in the growth of TPF in England as most funders are members of this association. The definition of TPF under the Code is very similar to the definition of TPF under the Singapore legislation. Funding is restricted to commercial funders, many of whom are also founding members of the ALF. Moreover, the Code also lays down certain mandatory requirements for funders.

Having taken note of these two models of regulation, it is important to note an important hurdle: the evolving forms of TPF, that is, the question of how a jurisdiction defines TPF.[40]

The working definition in the ICCA-Queen Mary Task Force Report[41] and the definition in the Hong Kong legislation

party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest", 32 Journal of International Arbitration (2015) p. 325 at p. 338.

[40] Chapter 3 of the ICCA- Queen Mary Task Force Report comprehensively discusses various definitions of TPF, with their scope, ambit, and back draws. The report analyses various definitions of TPF, funder and funding agreement from the existent legislations and rules of several arbitral institutes, books of various scholars, bilateral and other treaties.

[41] L. Bench Nieuwveld and V. Shannon Sahani, Third party funding in International Arbitration, 2nd edn. (Kluwer 2017), p. 2; William Park & Catherine A. Rogers, Third party funding in International Arbitration: The ICCA Queen-Mary Task Force, No. 42-2014 Penn State Law Legal Studies Research Paper Series (2014), *available at* <https://scholarship.law.bu.edu/faculty_scholarship/16>

encompass a broader view of the existing funding models and any new models that might emerge in the ever-evolving models of funding in numerous regions and jurisdictions.[42] Instances include when TPF is used for politically motivated funding to set a precedent ,as in the case of Quasar de Valores SICAV S.A. et al. v The Russian Federation.[43] In this case, the Group Menatep Limited, the funder, who also had a significant share and the parent company of Yukos Universal Limited, had funded the Quasar de Valores case to create a favourable precedent.[44] Although, the tribunal denied any recovery of cost by the third party funder as there was no legal duty on the part of the claimant to hand over any recovery on account of costs to the Group Menatep Limited.[45]

Some of the benefits of introducing legislation may be noted here. The Consultation Paper of the Third-Party Funding for Arbitration Sub-committee of the Law Reform Commission of Hong Kong[46] provides an insight into why

[42] Daurte G. Henriques, Third party funding – In Search of a Definition, *available at* <https://www.bch.pt/ARIA_DefiningTPF.pdf> *See also*, The ICCA-Queen Mary University of London Task Force Report.
[43] Quasar de Valores SICAV S.A. et al. v The Russian Federation, SCC Arbitration No. 24/2007, Award of 20 July 2012, *available at* <http://cisarbitration.com/wp-content/uploads/2013/02/Quasar-de-Valores-SICAN-S.A.-v-the-Russian-Federation-SCC-Arbitration-Award-dated-20-July-2012.pdf> *See also*, Victoria Shannon Sahani, Revealing Not-for-Profit Third party funders in Investment Arbitration, *available at* <https://oxia.ouplaw.com/page/565>
[44] id.
[45] Id., at para. 223.
[46] Consultation Paper of the Third Party Funding for Arbitration Sub-committee of the Law Reform Commission of Hong Kong, *available at* <https://www.hkreform.gov.hk/en/docs/tpf_e.pdf>

legislation addressing the scope of funding and other attendant concern is important and perhaps even necessary:

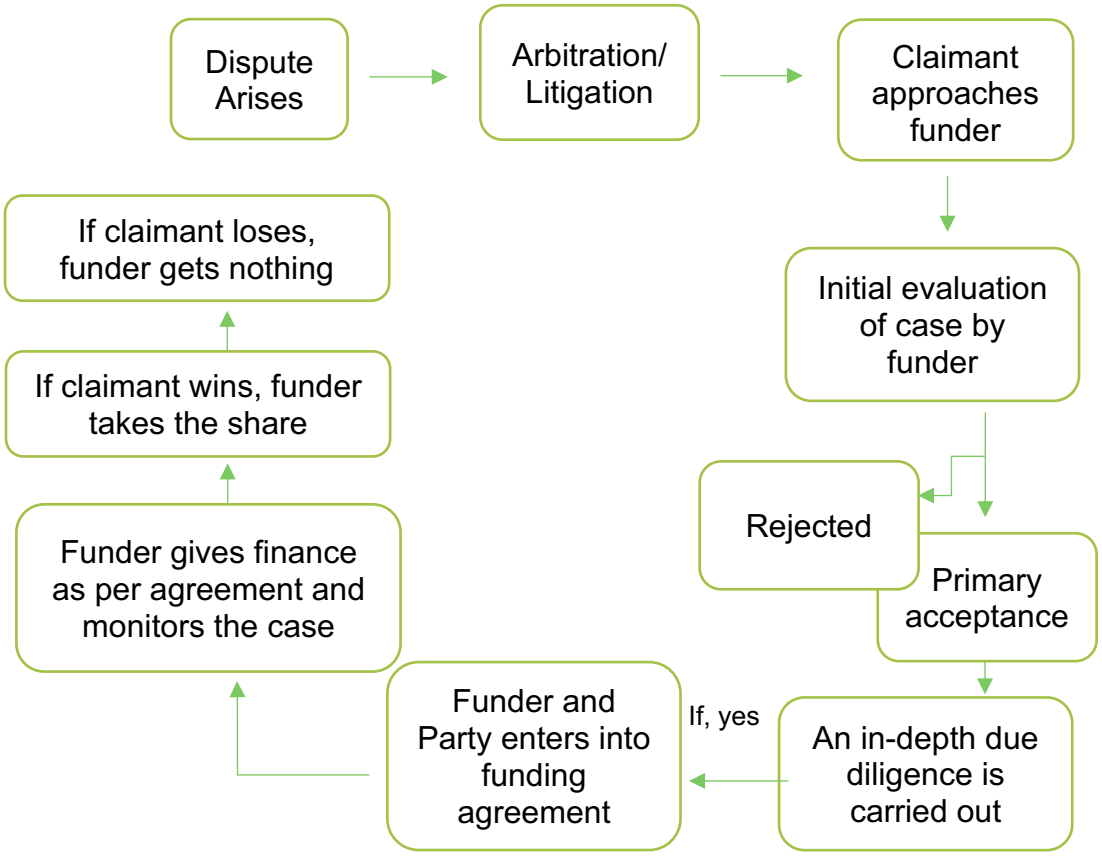
(a) There is no critical mass of Third-Party Funders in Hong Kong;
(b) Third-party funders are generally not incorporated in Hong Kong, nor do they generally have a place of business in Hong Kong;
(c) Hong Kong is generally a jurisdiction that promulgates statutory codes or regulations to protect matters in the public interest.[47] These concerns hold true for India as well.

Singapore and Hong Kong have implemented domestic legislation by introducing and amending prevalent legislation to include TPF. These legislations play an important role in eliminating hurdles that the TPF industry faces.[48] These hurdles include common law doctrines of maintainability and champerty and attorney ethics codes in civil law jurisdictions, or whether ATE Insurance should be included in the definition of TPF.

[47] Ibid at p.130-31
[48] Third Party Funding of Dispute Resolution – Is India Ready Today?, Oxford Style Debate.

III. SURVEY RESPONSES - PROCEDURE OF THIRD PARTY FUNDING

In this chapter, the report discusses the results of the survey by contextualising them in theoretical literature. This chapter specifically deals with the questions on the process of TPF, while the next chapter deals with the challenges of TPF in India.



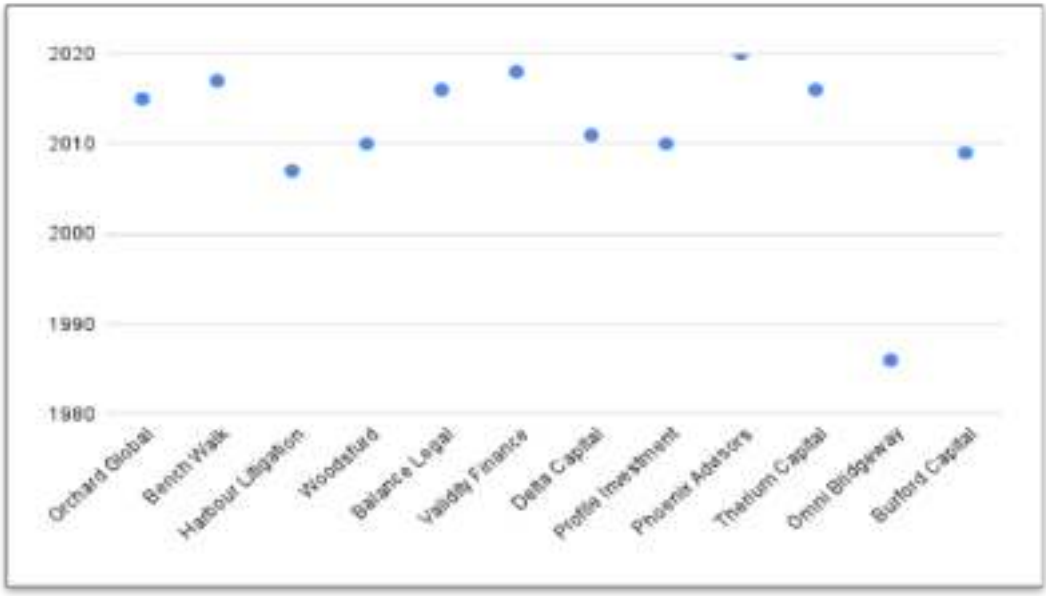
The above flowchart elucidates the process of TPF from the initial evaluation of the claim to the entry into of a funding agreement and eventually the final stage of returns on success.

Through a systematic approach of the survey, this report investigates the outlook of third-party funders towards funding of arbitration cases in India. The funders were required to answer 16 questions. The final chapter of this report proposes some regulatory and legal reforms for the advancement of the TPF industry in India. While this chapter notes the responses to questions 1-13. The next chapter deals with responses to questions 14-16, which specifically deal with funders perspective on funding in India.

A. COMMENCEMENT OF FUNDING BUSINESS

Question 1:
In which year did your company start funding cases?

This question received 10 responses. The following chart maps out the year in which the respondent companies started funding cases. The relevant data for Burford Capital was acquired from their website. Omni Bridgeway is the oldest amongst the funders surveyed, as they had started



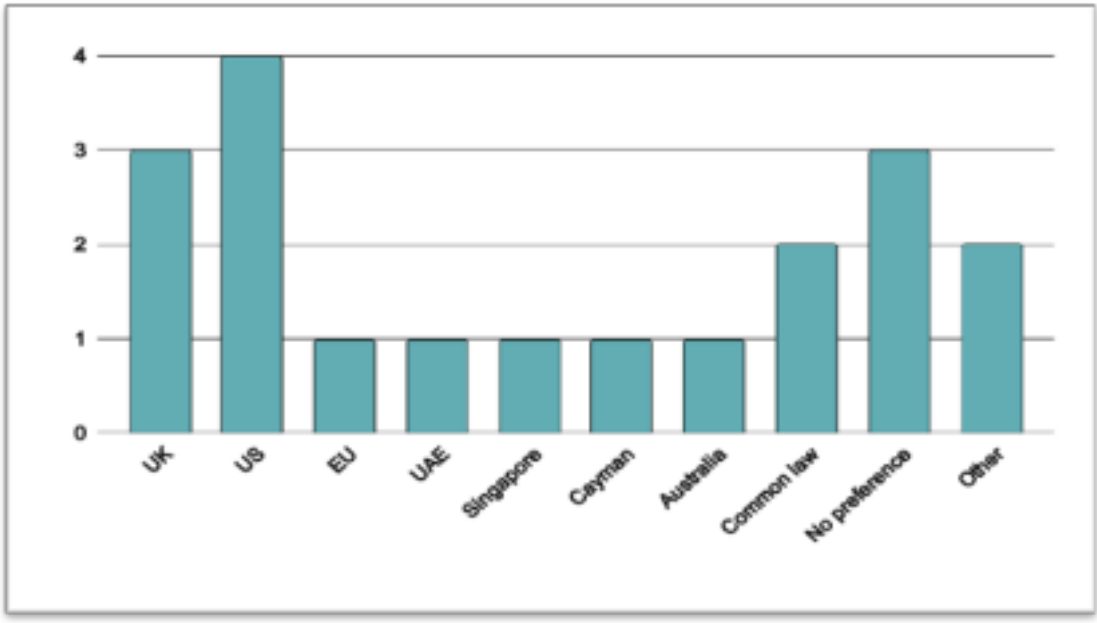
their funding business in 1986, whereas Phoenix Advisors is the newest, starting in 2020. Whilst a majority of respondents (8) began their funding business in the last decade (2011-2020), three funding firms, namely Harbour Litigation funding, Bufford Capital and Profile Investors, started their funding business in 2007, 2009 and 2010, respectively.

B. Preference of Jurisdiction for Funding

Question 2:
Does your company have a preferred jurisdiction or region?

Response Analysis

Of the 11 responses received for this question, four respondents mentioned specific countries, while Respondent 5 mentioned the UK, Australia and common law jurisdictions. Respondent 3 mentioned common law jurisdictions. Two respondents stated they had no specific preferences, while Respondent 11 mentioned they operate in civil and common law jurisdictions (they have been considered in the category of 'no preference').



Respondent 2 stated that they prefer jurisdictions where enforcement would not be an issue, while Respondent 4 stated their preference for common and civil law jurisdictions with transparent and efficient court systems. Respondent 6 mentioned the US and international arbitrations. In their answers to a later question, two respondents expressed interest in the Indian market, a common law jurisdiction, contingent on appropriate reforms. No funder has mentioned any activity with reference to funding Indian arbitration case. Further either does India have any domestic funders. Thus, for India to have sophisticated opportunities for funding, it is imperative for funders to have India as a place of incorporation or a stronger regime supporting funders interest and rights.

C. MONETARY THRESHOLD FOR FUNDING

Question 3:
What is the minimum value of dispute your company funds?

A fair agreement is an agreement whose commercial value can be assessed prior to the result. The value ascribed to a claim is a function of multiple factors –

Legal *- chances of success on the merits, establishing the quantum as opposed to liability, how long the process might take.*

Economic *- the economic value of the claim itself, obviously assuming liability is established. The calculation of damages must be consistent with the legal and factual position.*

Commercial *- chances and timing of successful enforcement and the final recovery*

Many of the factors as described above may be unknown. For instance, there are two frameworks of calculating damages that are prevalent – lost profits approach (profits that would be earned but for the breach) and reliance loss measurement (cost incurred under the contract). Being

aware of the preferred or stipulated approach in a jurisdiction is important.

For example, a case with USD 10m damages and a budget of USD 1m would have a ratio of 10:1. A ratio of 10:1 is typically what litigation funders in the industry look for.

Damages are assessed as on a particular date, and one must therefore acknowledge and agree on that date with the prospective. Therefore, it becomes critical for any damages calculations to be consistent with the date you're assuming in your assessment, and therefore the claim must be assessed as of that date.

When calculating a fair market value, if it is an investment arbitration and we take a lost profit under a breach of investment treaty case, one must make reasonable assumptions and undertake to implement an approach that can be substantiated through evidence, whether technical, economic, financial evidence or market evidence. Assumptions must be benchmarked against available information around the industry a party is working in or the company one's working for.

TPF is essentially a form of non-recourse funding where the third-party funder essentially bears some or all the costs of running the case, and in exchange, takes a share in the results if the case is successful. Clearly, for any form of financing, due diligence is crucial, and the funder would

want to be satisfied with the legal, factual and economic considerations and risk of the case.

Among the economic considerations, a very important element is the quantification of the economic losses or damages. This will inform the value of the claims pursued and, therefore, any returns that the litigant and the funder might reasonably anticipate. This is where clearly the funder and the client, or the counsel require certain help. Sometimes, the calculation of losses is not straightforward. It is in that case where a damages expert or a quantum expert can be quite relevant and important to the overall process.

Experts can help you identify and substantiate your claims independently, objectively, and in doing so, they often also offer economic, financial, or technical evidence and analysis which is otherwise is not available to the parties or eventually to the tribunal or the court.

Such evidence and analysis are often quite critical in the context of establishing and assessing damages.

The assistance of an expert informs the funding process itself and the funding arrangements and their terms. It provides an independent assessment, which in turn provides additional comfort from experts on the figures being claimed. This often forms part of the early case assessment that the funder and the counsel undertake; and

is usually supported by a memo or early preliminary analysis, which again gives more comfort in the final decision the funder will make.

Response Analysis

For this question, 8 respondents provided a figure, while 3 respondents (Respondents 2, 10, 11) stated they have no minimum threshold.

All three of the latter specified that they consider the:

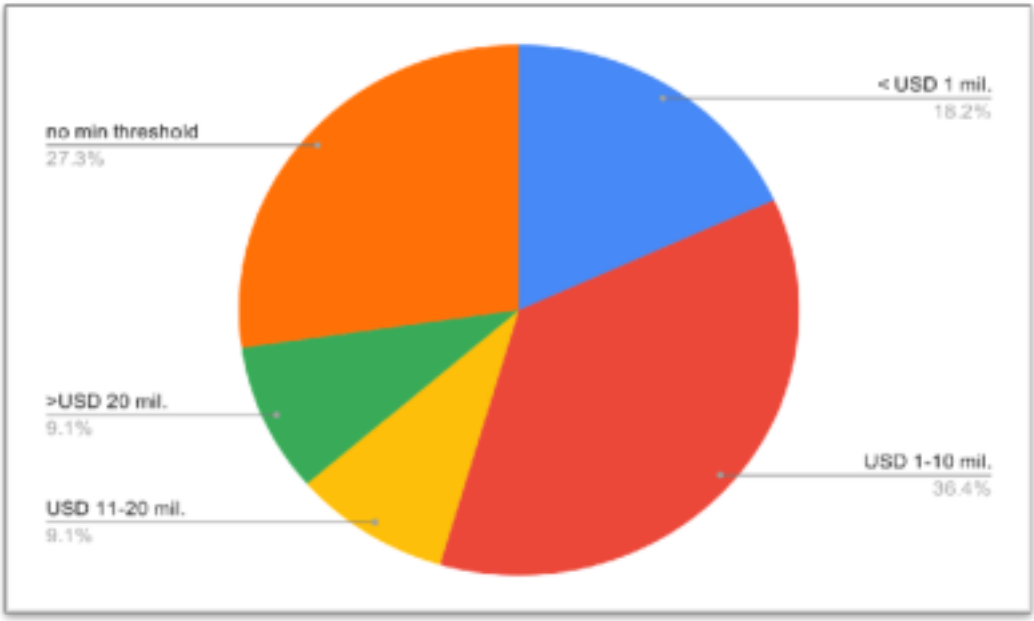
a. ratio of budget to damages as the relevant factor, which is required to be 1:10 for all of them.
b. respondent 8 additionally stated they consider the ratio of budget to funding to be more important in this regard, which is 1:8 for them.

A dispute of certain value is eligible for funding or not will depend upon:

Whether, there is any legal threshold for the minimum amount of dispute value?

Whether, the funder has put any threshold?

if there is no prefixed threshold then - ratio of budget to damages or/and ratio of budget to funding may be considered.



Note: In the graph, of the 8 respondents specifying a figure, two responses were received in British pounds (Respondents 4 and 5, who stated £4 million and £5 million respectively) and one in euros (Respondent 8, who stated 5 million euros). The rest were given in USD. All figures were converted (and rounded to the first decimal place) to US dollars for purposes of the chart. The chart provides the percentage of respondents who provided a figure within the relevant ranges.

D. Eligibility Criterion for Getting Funding

Question 4:
Are there any eligibility criteria that a party must meet for getting funded with reference to arbitration disputes?

The factors mentioned specifically on recovery were timing and the defendant's ability to pay. As to enforcement, one respondent stated that the defendant should have assets in a jurisdiction where enforcement is likely to succeed. Two of the three responses mentioned budget-damages ratio should be 1:10.

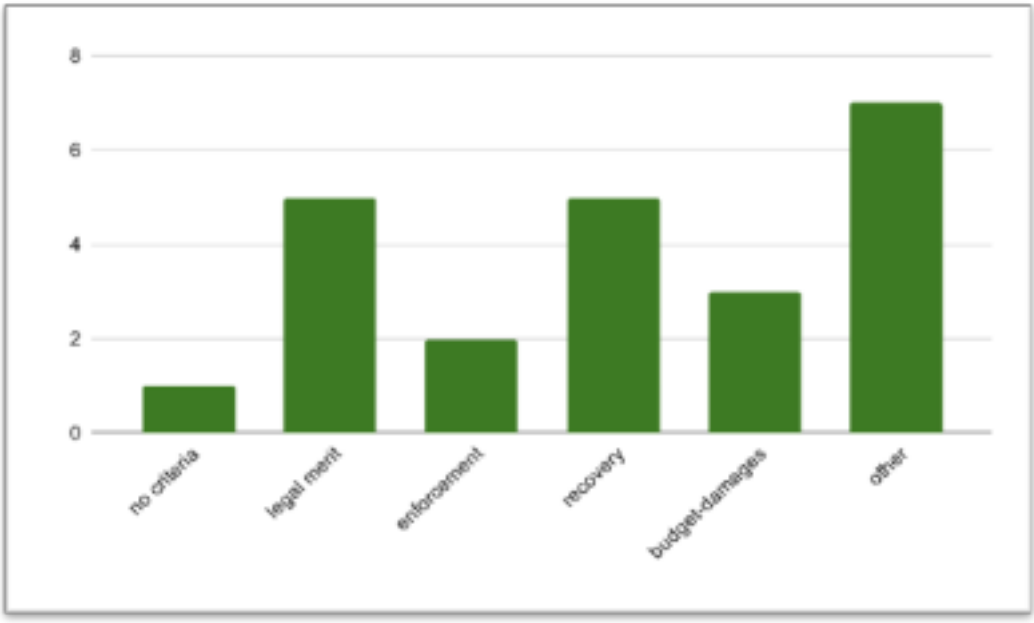
The other factors mentioned by some respondents were:

a) Demonstrable basis for value of claim (not just loss of opportunity case); realistic the budget to include any adverse cost provision
b) Recovery - the respondent must be able to meet a settlement or award
c) Assets in Europe as security for funding agreement
d) International arbitrations must be conducted under known rules/conventions
e) Strong likelihood of success on the merits, with the timing of recovery not to exceed 3 years
f) Minimum investment USD 3 million, Minimum damages USD 25 million
g) Compliance with ethical, AML & KYC criteria
h) Good lawyers

i) Costs to claim size

Response Analysis

10 responses were received for this question, with Respondent 1 providing no response.



E. Scrutiny of Request for Funding

The two set of questions in this part are concerned with the funding agreement and the process of due diligence that any claim for funding undergoes. Before examining the response of the funders on these issues, the background has been provided in the following paragraphs.

The sky is the limit when it comes to how to structure a financing arrangement. It should be practical, in the sense that it should work for the claimant, the funder, other parties involved, etc. It is also important to ensure that the structure is enforceable, and all the parties are able to perform their obligations. Beyond these essential requirements, there are many variations that may be implemented.

The simplest structure is a single case funding arrangement where the funder and the claimant have a bilateral agreement, where the funder is to pay the legal fees and expenses associated with the litigation. Another route is a portfolio arrangement, where litigation financing involves investment in a set of claims either held by a claimant or by a law firm.

Aggregating claims can make the funding arrangement much cheaper because investing in a portfolio is comparatively less risky for a funder than investing in a single claim with a binary outcome. Portfolio financing can be a way of getting defence funding because you can add in a few defences matters as respondent to the overall portfolio. You can also use it as a way to get funding for

operating costs, overhead expenses if you're a law firm and so on. So long as you've got enough cases as claimant with high enough value that can be used to offset all these other costs.

Another route is funding tied to a non-monetary win. A win that you know basically allows the party to hold some right or asset, which is then tied to an income stream that can be used to share with the funder, and this is again very helpful in defence funding. Let's take a very simple breach of a distribution agreement kind of a scenario, where the defendant is the distributor and say there's a wrongful termination by one of the parties.

Now, when at the end of the day, for the defendant here might be the right to actually continue to distribute that product in a particular geography, it's very easy here for a funder to tie in the funding to the income that's ultimately coming from the distribution, and this can be used by claimants and defendants.

There is always an initial due diligence period where funders will want to understand the basis of the claim, any likely defences and its likely value and who the respondent is and a rough estimate of the costs of pursuing the case and through to a conclusion. This is typically achieved through a short briefing memo or a discussion with the client and the legal team.

This initial due diligence is the basis of indicative terms to make sure the funder and claimant are aligned on the

commercial terms. While the term sheet is not binding per se, some clauses of the term sheets are often agreed to be binding between the parties. For example, many investors insist that the moment you sign the term sheet, you enter into an exclusivity period with them, which means for the next 15 or 30 or 45 days, whatever you agree, you do not negotiate or deal with other funders.

Till this stage, you can contact as many funders as you want, but approaching each funder means additional costs for the client. Therefore, it is more of a commercial decision on behalf of the client- which funders and how many funders they want to approach. But beyond that, you can be approaching multiple funders at the same time. Once the term sheet is signed, the exclusivity period kicks in., In that period, you usually only discuss with the funder with whom you sign the term sheet, and in parallel to this step, the funder would also do due diligence.

This is followed by a deep dive into due diligence, and the duration of this step depends on the complexity of the case at hand. At this point, funders sometimes invest ‘seed capital’ to help ensure the viability of the case; this is often focused on the quantification of damages. Sometimes recovery in terms of prospects of enforcing against the respondent requires developing multi-jurisdictional and multi-asset enforcement strategies that involve some intelligence gathering. Some funders even look at how your tribunal has reacted to some issues in previous cases.

After the due diligence, the funder will go to their investment committee for approval of the investment. This committee usually consists of retired judges, sitting arbitrators and senior people within the funding industry. If they agree that the investment is a sound investment, the funders enter into a funding agreement and collaborate with the claimant on the case going forward.

There can be several reasons for rejecting a request for funding – doubts about the jurisdiction of the tribunal, difficulty in substantiating a quantum, track record of opposite party in terms of payments, whether the opposite party will remain in existence in the next few years, ethical environment of a case, and so on.

Question 5:
What steps do you take when scrutinizing a request for funding an arbitration dispute?

Response Analysis

11 responses were received to this question. Respondent 3 referred to their response to the previous question on eligibility criteria and stated their requirement of a written legal analysis of the strengths and weaknesses of the claim. Respondent 10 referred to their response to the question of eligibility criteria, as well.

Broadly, the eligibility criterion includes, assessment of budget, quantum, legal merits of the case, jurisdiction, questions of recoverability and enforcement, detailed internal due diligence and expert evaluation. Legal team of the funded party and the ethical standing are also important considerations.

Respondents 5 and 10 mentioned the legal team of the funded party as a relevant consideration. Consistent with their response to the previous question, Respondent 8 mentioned ethical standing.

Question 6:

What standard form of documents are usually referred to when carrying out the due diligence by your funding company?

Response Analysis

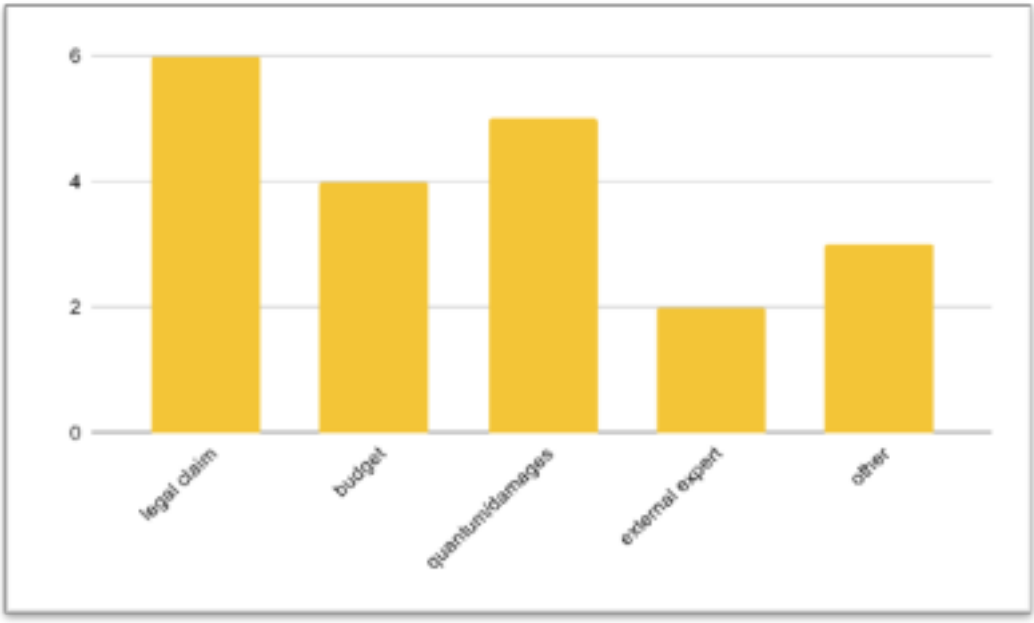
10 responses were received for this question, with Respondent 10 considering the question not applicable to them. Respondent 6 stated that they do not typically refer to a standard form of documents.

"We use proprietary documentation developed over 1000s of cases, including confidentiality agreements, due diligence

checklists, indicative term sheets and funding agreements."

Documents including legal claim, as specified by the respondents, included pleadings, memos provided by the legal team, evidence, as well as contracts and correspondence between the parties. External expert reports on damages and enforcement were mentioned by two respondents. Other documents mentioned were investment memoranda, case management plans, collection analyses, other dispute-specific documents, confidentiality agreements, due diligence checklists, indicative term sheets and funding agreements.

Respondent 11, being in the funding industry since 1986, makes use of proprietary documentation developed over 1000s of cases.



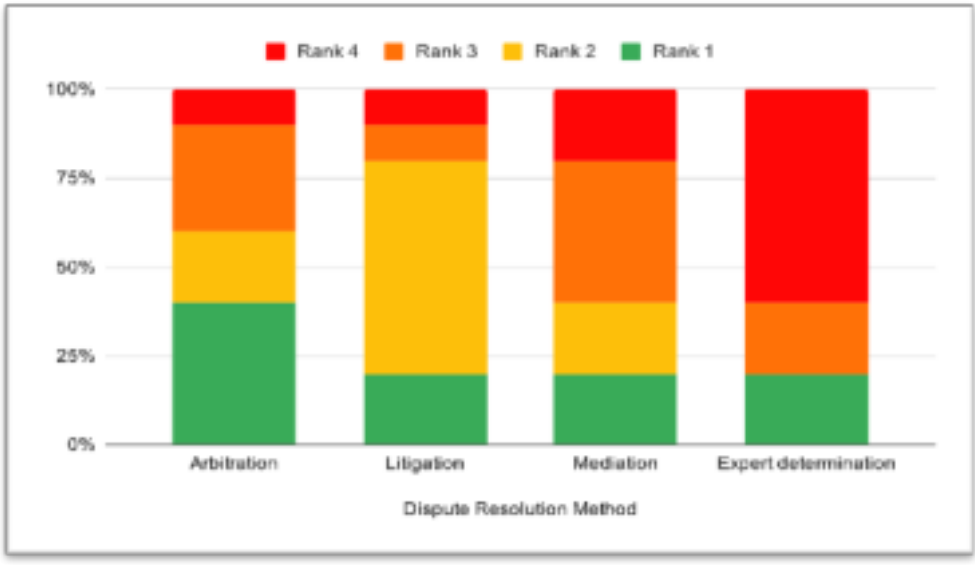
F. Preference of Dispute Resolution Methods by Funders

Question 7:

What is your preference of dispute resolution method when funding? (rank from 1-4; where rank 1 being the highest and rank 4 being the lowest) – Arbitration, Litigation, Mediation and Expert Determination.

Response Analysis

11 responses were received for this question. Respondent 1 stated that their preference depends on the specific case details. The remaining 10 responses ranked the four dispute resolution methods.



The following bar graph shows the ratio of preference (first to fourth, with colours as given in the legend) votes

received by each dispute resolution method. For instance, green represents the first preference votes, yellow represents the second preference and so on. The juxtaposition provides a visual mapping of their comparative evaluation by the respondents.

As the above bar graph depicts, arbitration was ranked the highest by the majority of respondents (four, 40%).

Litigation and arbitration were both ranked the lowest by only one respondent each, while expert determination was ranked the lowest by a majority (six, 60%). Litigation received second preference by a majority (six, 60%), while mediation received third preference by a majority (four, 40%). Funder's aversion to settlement is partly evidenced by the generally lower preference for mediation (only 20% mark it as first, 10% mark it as second).

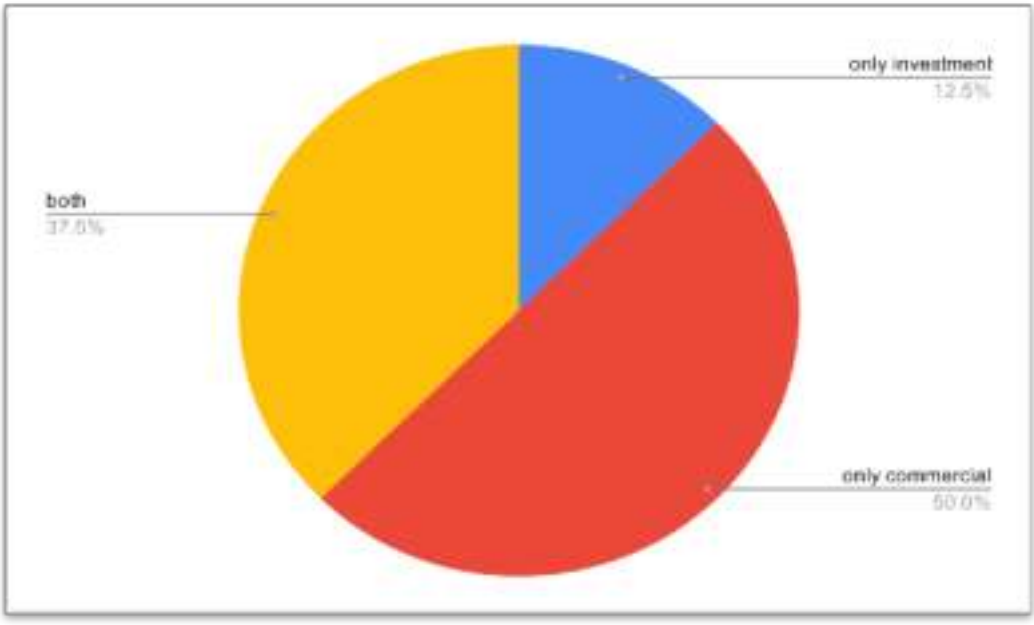
Question 8:
Which kind of arbitration disputes does your company usually fund?

Response Analysis

10 responses were received for this question. Two of them specified arbitral institutions. This means that whether, arbitration is ad hoc or institutional can also be a determinative factor in getting funded. If it is ad hoc, whether, some rules are at play or not such as that of

UNCITRAL. Further, in institutional arbitrations, funders may prefer funding those arbitration cases wherein administering institution has historically shown both efficiency and decisiveness and their rules are updated and matches industry standards. Respondent 3 mentioned ICC, LCIA, ICSID, etc, while Respondent 6 mentioned AAA, ICC, ICSID and UNCITRAL.

One respondent prefers investment arbitration and specifically mentioned investment treaty cases. Of the four respondents who exclusively prefer commercial arbitration, one specifically mentioned infrastructure. Two of the three respondents preferred both specified investor-state arbitrations.



G. Case Load and Success Rate of Funded Disputes

Question 9:
How many arbitration cases (including litigation related to arbitration) has your company funded till date? (Please state separately for funding in non-arbitration cases) and;

Question 10:
What is the percentage of successful arbitration cases that your company has funded? (Please provide separate statistics for success in non-arbitration cases)

Response Analysis

10 responses were received for each question. Three (Respondents 4, 5, 6) stated the information to be confidential for both questions. Respondent 11 directed the answer to regular reporting on their website. Respondent 9, who have started funding in 2020, stated that they had funded one case so far.

Respondent 2 stated, as of February 2021, it has funded over 100 cases, including arbitration and otherwise, and their percentage of success was "really high".

Respondent 3 has funded 10 cases and had a 20% success rate. Respondent 7 stated the number of cases to be more than 36 but did not disclose the percentage of success. Respondent 8 stated the number to be more than 50, and their percentage of success to be over 85%. Respondent 10 cited confidentiality on both questions but stated they have over an 80% success rate on funded matters.

One may note that respondents with a higher number of cases have found a higher percentage of success.

H. Costs

Question 11

What type of costs are usually covered by your company when funding a case?

Response Analysis

11 responses were received for this question. Broadly, all responses stated that the costs covered include legal fees, arbitrator fees, institutional fees, expert fees, travel costs and other associated disbursements, insurance costs. Respondents 6 and 11 also provide working capital to support their corporate clients. Respondent 7 covers third party costs and insurance premiums. Respondents 3 and 4 cover adverse costs as well.

> *"Lawyers' fees, arbitrator fees, institutional fees, expert fees, travel costs and other associated disbursements. We will also fund working capital in some cases to support our corporate clients."*

I. ARBITRATION V. LITIGATION

Question 12:
Are there different parameters for financing litigation in comparison to arbitration?

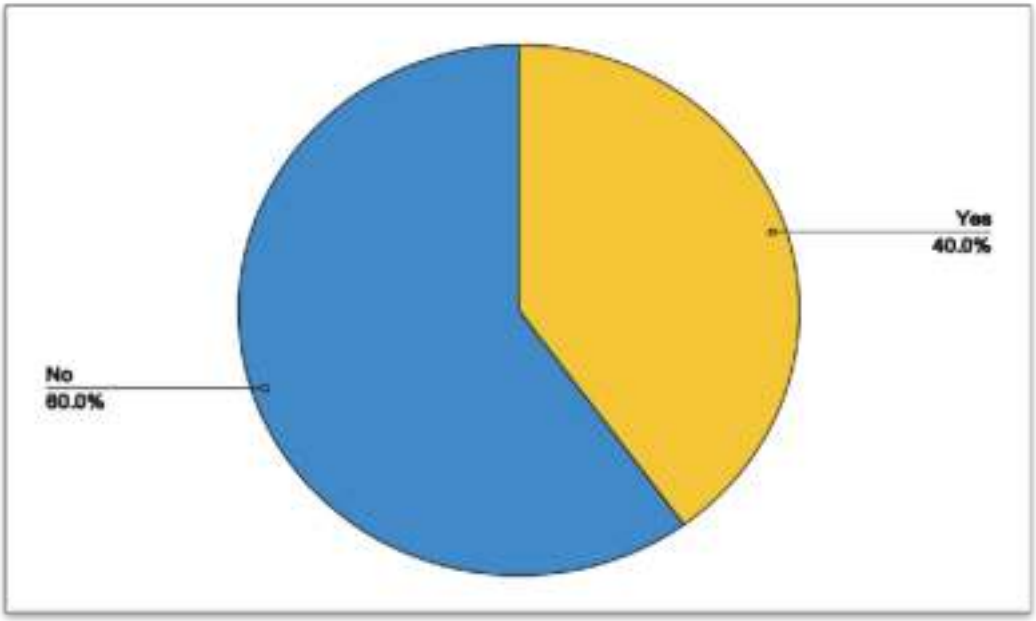
Response Analysis

10 responses were received for this question. While answering the question in the negative, Respondent 3 mentioned that they did not appreciate the absence of an appeal in arbitration, especially in the context of their lower success rate in arbitration as compared to litigation.

Of the respondents who considered that there were different parameters, they mentioned: quality of tribunal, the seat of the arbitration, applicable rules, applicable law (and whether they are arbitration-friendly), potential conflicts of interests (lawyers/ arbitrators), time spent on assessing enforcement, and other factors related to jurisdiction and enforcement which may impact the overall risk assessment.

One respondent stated that for litigation, they select only reliable and efficient jurisdictions (time frame predictability, efficient dissuasion against abusive appeal, reliable judicial system, and case law).

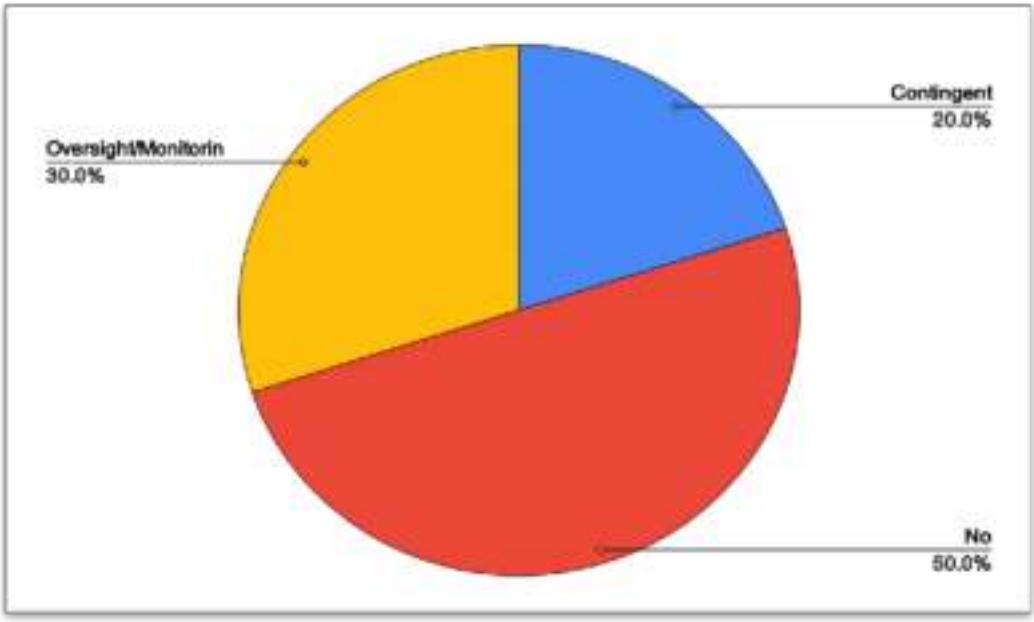
Given below is the graph with respect to the responses


Yes
40.0%
No
60.0%

J. Role of Funder in Arbitration Proceeding

Question 13:
Do you play any role during the arbitration proceeding? If yes, then what role?

10 responses were received for this question



These responses, coupled with arbitration being the first preference for a majority of respondents, aid in making the case for introducing funding for arbitration in India in the absence of litigation funding.

Respondents 7 and 11 considered their role to be contingent on some factors:

Both parties mention that the role of the funder depends on the agreement with their client. This ethical dilemma surrounding this question, which can be resolved by legislation in the absence of self-regulation, is sorted here by a contractual basis for interference.

Resp. 7: Varies depending on case, applicable laws and rules, terms of funding agreement, Desire or claimant and counsel, value we can provide

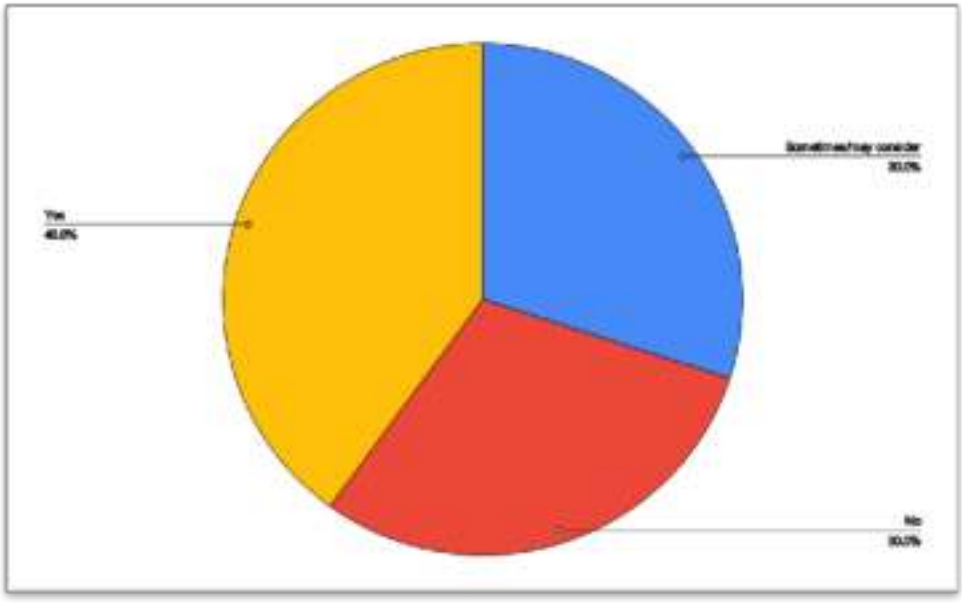
Resp.11: Yes, this will depend on the agreement with the funded client, in some cases, we provide active project management. In others, we are more passive

K. PURCHASE OF ARBITRAL AWARD

Question 14:
Does your Company purchase Arbitral Awards?

Response Analysis

Purchasing awards is a practice especially being seen in investment arbitration, where the party, awaiting enforcement of the award, decides to "sell" a part or whole of the award in order to cut losses.[49] There are enforcement concerns with this practice, where courts may only hold the original parties to have the right to seek enforcement of an award. 10 responses were received for this question.



[49] Grigori Lazarev, "Assignment of Arbitral Awards", Practical law Arbitration Blog < http://arbitrationblog.practicallaw.com/assignment-of-arbitral-awards/> (last accessed 07:41 PM, 12 Jun 2021)

IV. EXISTING POSITION OF THIRD PARTY FUNDING IN INDIA

This chapter begins by noting the legal position of funding in India. Then it notes the responses to the three survey questions pertaining to the Indian jurisdiction. Finally, the chapter notes some of the challenges of funding in India, borrowing from both the doctrinal study and the survey analysis.

This section studies judicial pronouncements of Indian courts to map out the scope of permissible third-party funding arrangements in India and the provisions in the current legal regime that would govern such agreements.

India never borrowed the doctrines of champerty and maintenance from the UK, a position that was clarified as far back as 1876. That position has been affirmed and elaborated on in the subsequent decades. As recently as 2018, the Supreme Court has acknowledged that TPF agreements would prima facie be legal. There are two relevant legal positions here. The first is the prohibition of contingency fee arrangements for advocates in India,[50] and

[50] Rule 20, Section II, Chapter II, Part VI of the Bar Council of India Rules (Standard of Professional Conduct and Etiquette). See also Rule 9, 18, 21, 22.

the test of public policy for contracts[51] and arbitral awards.[52]

This section is divided into three parts. The first one traces Indian case law to note the contours of TPF arrangements that the courts have seen and approved. The second part briefly addresses the relevance of Section 34 of the Arbitration and Conciliation Act for TPF arrangements. The final part notes the statutory recognitions of TPF so far.

A. CHAMPERTY AND MAINTENANCE

In the feudal period, English courts made champerty illegal since litigants were "allocating virtueless claims to wealthy and influential individuals who were generally more effectual in the court proceedings in exchange for an interest in a favourable judgment".[53] This doctrine has been the foremost reason for the hostility of many common law jurisdictions against TPF Arrangements. India, however, had rejected the applicability of the doctrine here, in the Privy Council case of *Ram Coomar Coondoo v. Chunder Canto Mookerjee*.[54] The case concerned agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered. Sir Montague E. Smith, ruling that the doctrines of champerty and maintenance have no applicability in India, explained:

[51] Section 23, Indian Contract Act, 1872
[52] Section 34 and 48, Arbitration and Conciliation Act, 2015.
[53] Fahad Bin Siddique, Champerty v. Third Party Funding in Arbitration, 3 SCLS Law Review 66 (2020).
[54] Ram Coomar Coondoo v. Chunder Canto Mookerjee, 1876 SCC OnLine PC 19.

> *"They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into, at least, comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of India, it ought not to be held that they had been introduce[d] there as specific laws upon the general introduction of British law."*[55]

Sir Smith went further to write that such agreements could easily be *"in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner"*.[56]

The judgment explicitly stated that such agreements would not per se be opposed to public policy – which was an argument made before the court – and laid down the situations where they would be invalid –

a) when found to be extortionate and unconscionable, so as to be inequitable against the party
b) when found to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as
    i. for the purpose of gambling in litigation, or

[55] Ibid, at p.46
[56] Ibid, at p.47

ii. of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy.[57]

In *Damodar Kilikar and Ors. v. Oosman Abdul Gani*,[58] the Kerala High Court ruled that it was settled law that champertous agreements, so long as they rest on general grounds of policy should be regarded as part of the Indian law as well and taken into account on the grounds of equity, justice and good conscience.

In another case,[59] the Kerala High Court ruled that a champertous agreement is illegal only when the object of the agreement is illegal or if the conditions of the agreement are violative of the principles of equity, justice and good conscience or the agreement discloses an unconscionable bargain. Whether a transaction is unconscionable or not will depend on the facts of each case.

B. Funding Agreements and Public Policy under Section 23 of the Indian Contract Act

This position was affirmed in *Ram Lal v. Nil Kanth*.[60] However, the agreement here was initiated by a money-lender who misrepresented the need for extensive litigation

[57] Ibid; This test is reiterated in subsequent judgments. For eg., see Suganchand v. Balchand 1956 SCC OnLine Raj 127, ¶11.
[58] Damodar Kilikar and Ors. v. Oosman Abdul Gani,1961 KLJ 356, ¶13.
[59] Jessy Babu v. State of Kerala CRP No. 933/2002.
[60] Ram Lal v. Nil Kanth, 1893 SCC OnLine PC 7.

to a group of illiterate people The fee paid to the advocate was found by the court to be excessive and disproportionate. Hence, the agreement was held invalid on the grounds of being violative of public policy.[61]

In *Harilal Nathalal Talati v. Bhailal Pranlal Shah*,[62] the plaintiff had entered into an agreement with the defendant's uncle to bear the costs of a suit to partition the defendant's property. In turn, the plaintiff was to get half the share of the partitioned property regardless of whether the partition happens through court or private settlement.

The matter was ultimately heard by an arbitrator who ruled against partition. The Bombay High Court noted the excessive control over the proceeding that the plaintiff had, the expenditure incurred by him and the disproportionate share of the outcome and held the agreement to be extortionate and unconscionable.

Citing the judgment in Ram Coomar Coondoo, the Bombay High Court in *Lala Ram Sarup v. Court of Wards*[63] noted that the claimant was a poor man who could only pursue the litigation through someone else's help.

It further noted there was no element of undue influence in the funding agreement. Upholding the agreement's validity, it provided certain standards and considerations when evaluating the validity of a TPF arrangement:

[61] Ibid, p.115
[62] Harilal Nathalal Talati v. Bhailal Pranlal Shah, AIR 1940 Bom 14.
[63] Lala Ram Sarup v. Court of Wards, (1940) 42 Bom LR 307.

> *"It is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier. Though it is clearly not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging of the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial; and if the financier must need (sic) risk losing his money he may well be allowed some chance of exceptional advantage."*[64] *(emphasis supplied)*

Thus, the ratio of the share of the compensation between the litigant and the funder and the presence of undue influence are relevant factors in deciding the validity of TPF contracts.

The Andhra Pradesh High Court, in *Nuthaki Veukataswami v. Katta Nagireddy*,[65] observed that the quantum of the share which the financier should get in the fruits of the decree had been held by courts to be a matter of vital importance in judging the fairness or otherwise of a financing agreement. They ruled that the provision in the

[64] Ibid, at p.357.
[65] Nuthaki Veukataswami v. Katta Nagireddy, 1962 SCC OnLine AP 100.

agreement that the plaintiff should have a ¾th of the share in the property was not fair and reasonable.

The Madhya Pradesh High Court, in *Kamrunnisa Widow of Mirza Beg v. Pramod Kumar Gupta*,[66] ruled that an agreement to purchase the entire 1/6th share of the appellant is against justice and equity and, therefore, no relief for specific performance of the contract should be granted to the respondent. The Court elaborated on the principle of equity that it employed to eventually reach its verdict:

> *"Although, the result of litigation is speculative, but nothing would satisfy the conscience of the Court injustice and equity when as a consequence of an agreement the financier gets the entire property won in hard fought litigation and the person who fought the litigation gets only the money under the agreement for financing the litigation. … What did the appellant gain? Was her effort worthwhile? … the financier may be allowed to get some exceptional advantage, but he cannot be allowed to get the entire property."*[67]

The next notable judgment that dealt with TPF was the Supreme Court's ruling in *Rattan Chand Hira Chand v. Askar Nawab Jung*.[68] Opining on the question of TPF contracts being against public policy, the Court explained what would be against public policy, and their own role in updating the concept:

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[66] Kamrunnisa Widow of Mirza Beg v. Pramod Kumar Gupta, AIR 1997 MP 106.
[67] Ibid, at ¶15.
[68] Rattan Chand Hira Chand v. Askar Nawab Jung, (1991) 1 SCR 327.

> *"I am in respectful agreement with the conclusion arrived at by the High Court. It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. It is contrary to the concept of public policy to contend that it is immutable, since it must vary with the varying needs of the society. What those needs are would depend upon the consensus value judgments of the enlightened section of the society. These values may sometimes get incorporated in the legislation, but sometimes they may not. It is … not only necessary but obligatory on the courts … to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them …"*[69] *(emphasis supplied)*

However, the Supreme Court had to rule against the validity of the agreement, but not because of it being a third-party funding arrangement. The agreement had a clause about using influence over government authorities to get a favourable court verdict, and the Supreme Court ruled that the funding arrangement was not severable from this clause. Since this clause was clearly contrary to public policy, the Court declared the agreement to be void.

[69] Ibid, at ¶17

The Kerala High Court in *Jessy Babu*[70] opined that whatever tends to injustice of lead to operation, restraint of liberty, commerce and natural or legal right; or obstructs justice; or tends to lead to the violation of a statute and whatever is against the good morals when made the object of a contract is against a public policy and therefore void.

C. Contingency Fee Arrangements

The Supreme Court, in its judgment of *'G' Senior Advocate*, *in re*,[71] clarified that TPF arrangements would be legally unobjectionable if no lawyers were involved. Here, there was a champertous agreement between an advocate and client. The Court explained that the reason advocates were excluded from entering into TPF arrangements was to protect the integrity, dignity and honour of the profession.[72] Reiterating the prohibition of contingency fee arrangements, the judgment of *Bar Council of India v. AK Balaji*[73] unequivocally stated that there *"appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation"*.[74]

The Court also ruled that if foreign lawyers conduct arbitration proceedings in India, either under rules of institutional arbitration or the Arbitration Act, they would be

[70] Jessy Babu, CRP No. 933/2002.
[71] In Re; MR, 'G' Senior Advocate, AIR 1954 SC 557.
[72] See also B. Sunitha v. State of Telengana (2018) 1 SCC 638; Re: NF Bhandara, 3 Bom L.R. 102.
[73] Bar Council of India v. AK Balaji, (2018) 5 SCC 379.
[74] Ibid, at ¶38

governed by the code of conduct applicable to the legal profession in India. It is paramount to mention that, for the first time Singapore is considering a framework for CFAs.

On 1st November 2021, the Ministry of Law (MinLaw) tabled the Legal Profession (Amendment) Bill for consideration in the Singapore Parliament.[75] Subsequently, India may draw reference from other jurisdiction when looking into the opportunities and obstacles concerning CFAs.

D. RECENT JUDGMENTS

Two recent High Court judgments have dealt with TPF agreements in their 'modern' forms. One was the Bombay High Court's judgment in *Jayaswal Ashoka Infrastructure (P) Ltd. v. Pansare Lawad Sallagar*.[76] In this case, the plaintiff-firm and the defendant had a TPF arrangement, where the former had funded the latter's arbitration proceeding. The defendant, however, refused to fulfil their obligations under the agreement once they succeeded in the arbitration. The defendant's argument was that a partner of the plaintiff-firm had represented the defendant in the arbitration proceedings as a counsel, and hence the

[75] Proposed Framework for Conditional Fee Agreements, 1st Nov 2021, *available at* <https://www.mlaw.gov.sg/news/press-releases/2021-11-01-proposed-framework-for-conditional-fee-agreements>. *See also*, No Win No Fee: Contingency Fee Lawyers in Singapore, Singapore Legal Advice, 2nd November, 2021, *available at* <https://singaporelegaladvice.com/law-articles/contingency-fee-lawyers-singapore/>

[76] Jayaswal Ashoka Infrastructure (P) Ltd. v. Pansare Lawad Sallagar, 2019 SCC OnLine Bom 578.

agreement was a contingency fee arrangement, which was against public policy as under Section 23 of the Indian Contract Act, 1872. The Bombay High Court ruled that the partner, who was a qualified advocate, acting as counsel in the arbitration couldn't be considered equivalent to representation before a court.[77] Thus, the agreement was held to be valid. This judgment has been challenged before the Supreme Court and remains pending.[78]

The other case is *Spintex Industries v. Quinn Emmanuel*, CS(OS) 568/2017, where the Delhi High Court had to rule on another allegation of contingency fee arrangement. The Court observed:

> *"Another plea raised by the learned counsel for the plaintiff was that the agreement in question involves payment of contingency fees and such an agreement would be void in India. The plea is misplaced. A perusal of the Engagement Letter dated 20.05.2013 shows that there is a component of fixed fee also which was spelt out being USD 750,000 payable at different stages. Other costs have also to be recovered. Hence, the entire contract is not based only on the contingency fees."*[79]

Ultimately, the Court noted that it did not have jurisdiction over the question since the agreement was governed by laws prevailing in the US, where contingency fee arrangements were valid.

[77] Ibid, at p.694
[78] SLP (C) 017904/2019.
[79] Spintex Industries v. Quinn Emmanuel, CS(OS) 568/2017, ¶39

E. Relevance of 'Public Policy' Principles in the Arbitration & Conciliation Act

Sections 34 and 48 of the Arbitration Act, 1996 provide grounds to challenge an arbitral award for being in contrary to public policy. While §34 is relevant for domestic arbitrations, §48 applies to foreign-seated arbitration.

Both sections provide that an arbitral award is in conflict with public policy if:

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
(ii) it is in contravention with the fundamental policy of Indian law; or
(iii) it is in conflict with the most basic notions of morality or justice[80]

The statute bars any challenge to the arbitral award that goes into the merits of the dispute.[81] Additionally, domestic arbitral awards can be challenged on grounds of patent illegality.[82]

Challenges to arbitral awards on grounds of public policy could be initiated due to non-disclosure of TPF agreements or conflict of interest due to any connection between the

[80] Section 34(2)(b) and Section 48(2)(b), Arbitration and Conciliation Act, 2015.
[81] *Id*.
[82] Section 34(2A), Arbitration and Conciliation Act, 2015.

arbitrator and the third-party funder. The presence of a third-party funder's influence over the process could compromise the proceeding's independence.

F. Relevant Statutory Provisions

The first provision that explicitly recognizes third party litigation funders is the amendment to Order XXV Rule 1 of the CPC 1908, enacted by Maharashtra, Karnataka, Gujarat, and Madhya Pradesh. The amended provision permits third party funders to be impleaded in a dispute where it bears the claimant's costs if the court so allows. The Bombay High Court also requires the disclosure of any funding arrangements for public interest litigation.[83]

Section 6(e) of the Transfer of Property Act, 1882 prohibits the transfer or assignment of a mere right to sue. An assignment of unliquidated damages for an alleged breach of contract would not entitle the assignee to sue.[84] In *Union of India v. Sri Sarada Mills*,[85] the Supreme Court explained the rationale of the provision:

> *"… the law will not recognise any transaction which may savour of maintenance of champerty. It is only when there is some interest in the subject-matter that a transaction can be saved from the imputation of maintenance. That*

[83] Bombay High Court Public Interest Litigation Rules, 2010, paragraph 3(2) of the annexed format for PIL petitions.
[84] Abu Mahomed v. SC Chunder, ILR 36 Cal 345, ¶3.
[85] Union of India v. Sri Sarada Mills, (1972) 2 SCC 877.

> *interest must exist apart from the assignment and to that extent must be independent of it."*[86]

Thus, third party funding agreements have a judicial history of recognition, but they are subject to the test of public policy. Various considerations, like object of transaction, extortionate or unconscionable terms, disproportionate share of outcome, control of funder over proceeding, and presence of undue influence, have been employed by courts in determining the validity of TPF agreements, while maintaining that they are per se valid. The only clear exception drawn out is contingency fee arrangements with advocates.

Further, certain statutory provisions either explicitly recognise or hold the scope for including third party funders. There is nothing in the Indian legal framework that hinders the development of a regulatory regime for third party funding in dispute resolution. On the contrary, the Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India has recommended the enactment of supporting legislations for TPF agreements.[87]

Needless to say, this doesn't indicate in any way that the Indian regime is prepared for dealing with TPF. Without a statutory framework or a self-regulatory mechanism, it would be an intimidating hurdle to address the various

[86] *Id* at ¶14.
[87] Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), p.43

concerns and issues that would arise out of third-party mechanisms, which would only mean more protracted litigation. The threat of that has been a significant deterrent for both the growth of a domestic funding industry or the arrival of foreign TPF investors in India.

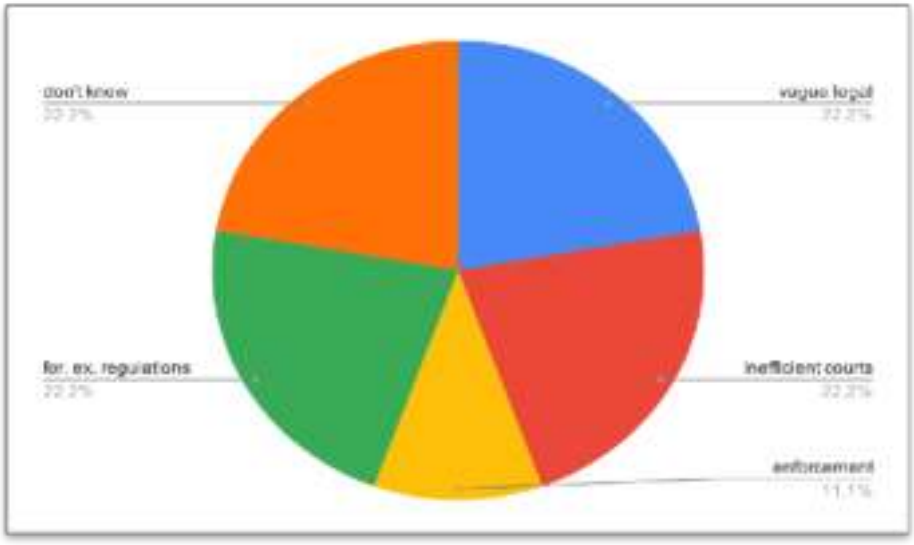
G. Legal or Regulatory Barriers

Question 15:

As a funder, what legal or regulatory barriers do you anticipate facing in the Indian market?

Response Analysis

10 responses were received for this question.



As the above chart shows, two respondents cite the want of a proper legal regime, including tax guidelines. Respondent 3, who mentioned concerns around foreign exchange control, stated they do not see any regulatory concerns and that Indian case law is good. Respondent 2 stated that enforcement was a concern for litigation

funding, not arbitration, in contrast with two other responses who considered inefficiency of courts to be a concern for enforcement in arbitration.

Respondent 8 considers their current status (European regulation for the financial sector) as compliant with the Indian legal and regulatory framework.

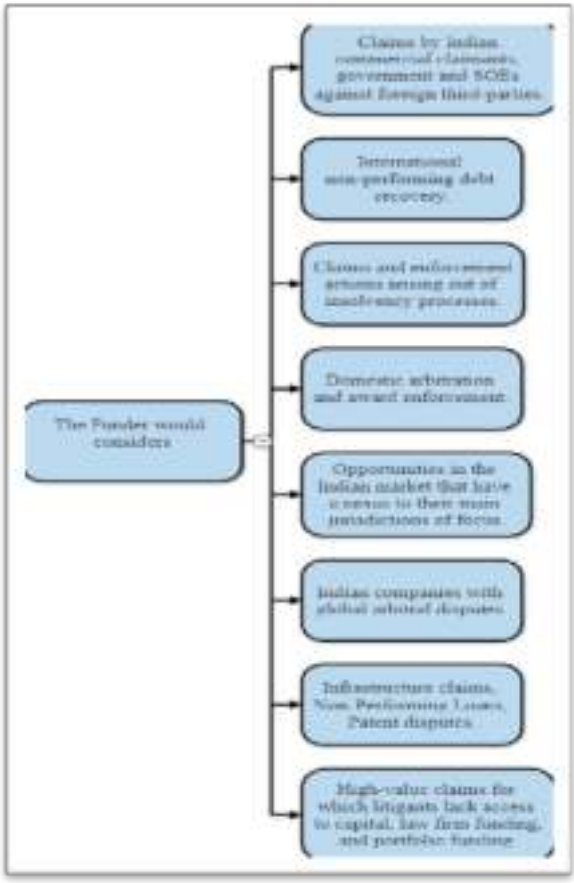
H. Opportunities in Indian Market for Funders

Question 15:

What are the opportunities that your company would consider in the Indian market?

Response Analysis

Of the 11 responses received for this question, Respondent 2 mentioned that they had received plenty of cases from India, and some of them are under review currently. Two responses mentioned that they do not fund in India. The remaining responses (73%) expressed interest in the Indian market.



I. NEED FOR LEGAL OR REGULATORY REFORMS

Question 16

What are the regulatory or legal reforms pertaining to third party funding you would like to see in India?

Response Analysis

10 responses were received for this question. Response 6 reiterated that they do not fund in India, while Responses 3 and 11 had no suggestions. Response 5 reiterated the need for improvement in the court system.

Responses mentioned that there is a need for a general framework of regulations to clear the ambiguities surrounding TPF in India, including the scope of permissibility, tax matters, disclosure issues, adverse costs, contingency fee agreements; and specifically, a law abolishing champerty and maintenance similar to the Singapore law, for the sake of clarity.

Response 4 suggested a self-regulation model.

V. CHALLENGES IN INDIA

This section borrows from the doctrinal study, the survey responses and the Oxford-style debate on TPF of dispute resolution in India, organized by the Centre for Arbitration and Research, MNLU Mumbai, on 25 July 2020.

Beginning from the premise that India is not an open market, there seems to be a broad consensus that the Indian market is not ripe for self-regulation yet. For the funding industry to grow and flourish in India, there needs to be statutory recognition of the practice, and regulatory mechanisms in place that address the several issues that TPF brings in its wake. While courts have generally shown no hostility per se to the idea of TPF, the High-Level Committee's recommendation to recognise and regulate TPF was ignored in the 2019 amendment, which gives some cause of concern about the political will on TPF.

The position of TPF in India is vague to say the least. The growth of TPF will be a double-edged sword. On the one hand, it aids companies to proceed with dispute settlement proceeding by providing financial resources. On the other hand, as a return the funder receives a remuneration or a fixed share, on the presumption that the claim is succeeds.[88] The growth of TPF in India demonstrates an

[88] Coronavirus: Key Legal Issues for India Inc. With Covid-19, Cyril Amarchand Mangaldas, BloombergQuint, *available at*

array of advantages to the Indian economy like the inflow of foreign investment, cost effectiveness, risk sharing and, importantly, the security to proceed with valid claims in arbitration or litigation.[89]

The TPF industry in India is self-regulated, and there exists no mandatory regulation, code or any working committee report focusing the effects of TPF in India. The data and statistics on TPF are too scarce to analyse the existing position of TPF in India. Till date, there is no Indian funder that subscribes to the modern definition of third-party funder, as was discussed in the Definition Chapter.

If the loan or insurance model of TPF is to be considered and taken into the ambit of the TPF market in India, then the position differs. A start-up by the name of LegalPay,[90] established in 2016, is the first litigation finance company in India. The model followed by this company is different in terms that it assists litigants to raise funds through technology-enabled crowdfunding. Moreover, this model of the company evidently deviates from a modern TPF, as the funding is not dependent on the outcome of the final

<https://www.bloombergquint.com/opinion/coronavirus-key-legal-issues-for-india-inc-with-covid-19>

[89]Hiroo Advani , Kanika Arora and Navdeep Dahiya, Understanding the Business of Litigation Funding: The Indian Landscape, 13 November 2020, *available at* <https://www.mondaq.com/india/trials-appeals-compensation/1004648/understanding-the-business-of-litigation-funding-the-indian-landscape>

[90] LegalPay official website. Available at, <https://legalpay.in/about/>. See also, LegalPay LinkedIn Profile, *available at* <https://www.linkedin.com/company/legalpay/?originalSubdomain=in>

decision. Thus, there is a shift from a profit driven motive to a levelling the playing field.

A. Structuring a Litigation Finance Agreement

There are various ways of structuring litigation funding. It can be through funding of single or multiple claims, of a single award, or a decree where the claimant is recovering monies, or multiple decrees put together, or multiple decrees and claims joined together in one portfolio. There can also be funding of insolvency professionals, where they are going and litigating and recovering claims of the company. Further, there is partnering with banks and financial institutions, where funding helps their portfolio to recover money.

If the funding is onshore, there are various structures that can be followed. Non-banking finance company (NBFC) is a model that is already being used for litigation finance onshore. Another option is Alternative Investment Fund (AIF) under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012. The Regulations define an AIF as a fund established or incorporated in India as a privately pooled investment vehicle to collect funds from sophisticated investors, whether Indian or foreign, for investing in accordance with a defined investment policy (Regulation 2(1)(b)(i)). AIFs can, however, only invest in 'investee companies', which are entities in which an AIF makes an investment. Thus, this model would exclude funding of single claims or a portfolio case on a non-recourse basis.

B. Foreign Exchange and Tax regime

A crucial reason for requiring the government to step in is that several legal knots need to be resolved, failing which the Indian legal-financial market is too uncertain a field for funding entities to dip their toes in. One pertinent concern is the tax regime.

The FEMA regulations would hit repatriations of funders abroad. There is uncertainty about the repatriation of proceeds of recovered claims being capital account transactions[91] or current account transactions.[92] This classification would depend on whether TPF is understood as a loan or an investment. If considered an investment, the net income earned would be a part of the current account transaction.

If it is considered a capital account transaction, where it alters the assets and liabilities of funders outside India or a funder who is resident in India, but repatriates' funds, prior approval by the RBI would be required since non-recourse funding agreements aren't recognized as permitted yet.[93] There is also an impending question of the income of such funders being taxed.

If an AIF is managed by a foreign-owned or controlled investment manager/sponsor, its investments in the capital

[91] Section 2(e), Foreign Exchange Management Act, 1999.
[92] Section 2(j), Foreign Exchange Management Act, 1999.
[93] The general rule is that capital account transactions aren't allowed until specifically permitted by the RBI.

investments of an SPV would require compliance with FDI guidelines, which include sectoral caps, pricing restrictions and other conditions.

C. Funders in Dispute Resolution are Not Speculative Investors

These reasons essentially indicate that investors will have to be speculative if they enter the market at the moment. Litigation and arbitration funders are usually far from being speculative investors. Funders aren't here for long-term investments in protracted proceedings, they want big returns with relatively high certainty, especially given these arrangements are usually non-recourse.

D. Concerns Around Enforcement and Costs

Disputes about enforcement of an arbitral award or breach of funding agreement, when litigated over the years, lead to loss of profits. Hence, speedy disposal of disputes arising from TPF is an important concern, especially for funders who are looking to invest in India. This is partly addressed in the Arbitration and Conciliation (Amendment) Act, 2019 and partly in the Commercial Courts Act, 2015. As a funder has categorically stated in the survey.

"Lawyers' fees, arbitrator fees, institutional fees, expert fees, travel costs and other associated disbursements. We will also fund

working capital in some cases to support our corporate clients."

These Acts ensure that commercial and arbitration-related disputes are fast-tracked, given their nature of being document-intensive litigations. Further, one has to apply for a stay on the arbitral award, and the applicant may have to deposit the whole sum of money.[94] Frivolous challenges may also be penalized with costs.[95] Regardless, provisions that pointedly address specific concerns around TPF would go a long way.

The Arbitration Act gives the tribunal discretion to determine who bears the costs of the proceeding (§31(8)); cost, here, includes "any other expenses incurred in connection with the arbitral proceedings and the arbitral award", which could include costs of TPF. This is another uncertainty that needs to be addressed, along with questions of the extent of funder's liability for costs.

E. Confidentiality

Finally, concerns around confidentiality remain. Section 42A of the Arbitration Act prescribes the lower threshold of "parties to the agreement" being bound by confidentiality. This leaves no statutory protection for client-attorney privilege or terms of the TPF agreement. Further provisions are required to mandate disclosures of TPF in proceedings

[94] Section 36(2), Arbitration and Conciliation Act, 2015.
[95] Vijay Karia v. Prysmian Cavi E Sistemi 2020 SCC OnLine SC 177.

to ensure transparency and impartiality of the proceeding and independence of the arbitrator.

India does not have a domestic funding industry, which is a very telling fact. It points to ambiguities and gaps in the law that need to be fixed if TPF is to find its roots in this jurisdiction.

F. ATE Insurance for Adverse Costs

In case the funded party needs to purchase an adverse costs' insurance or ATE (after-the-event) insurance policy, there are uncertainties that would arise. This is because the ATE market has principally run out of the UK, and it hasn't yet grasped the risks or otherwise in India. The general notion is that it is difficult, if not impossible, to procure ATE for domestic cases in India. For international issues, it would be slightly easier. There are general concerns of time and costs associated with ATE, and generally, it is more convenient to have a funder that provides an indemnity.

G. Duties of Legal Counsel - Contingency Fee Arrangements, Privileged Communications and Conflict of Interest

The prohibition of Contingency Fee Arrangements ("CFAs") becomes a hurdle for funders that seek to align interests by ensuring that the claimant's counsel has skin in the game. This prohibition is also an issue for domestic

lawyers, who are disadvantaged vis-à-vis foreign lawyers who aren't subject to the same restriction.

The Singapore Ministry of Law has declared that it is taking steps to introduce a framework to allow its lawyers to enter into CFAs for international and domestic arbitration proceedings, certain prescribed proceedings in the SICC and mediation proceedings arising out of or in any way connected with such proceedings.

In France, the general prohibition of CFAs does not apply to international proceedings since such agreements are voluntarily entered into, not abusive, and are internationally recognized.[96]

India may want to consider a similar regulatory framework. This would require reconfiguring the jurisprudence on this question, where the ethical obligations of the legal profession must be weighed against the best interests of corporates.

The Resolution adopted on 20 and 21 November 2015 by the French National Council of Bars ('Conseil National des Barreaux') emphasized the counsel's independence being a check against the funder's attempt to exercise control over the case. The Paris Bar Council adopted a Resolution on Third party Funding on 21 February 2017, where it emphasized the ethical obligations of counsels towards

[96] Cour d'appel de Paris, 1er Ch. B, 10 juillet 1992.

their clients – this included not advising the funder in any way, only receiving instructions from clients, and not meeting the funder in the absence of clients.

H. Official Recognition and Requirement of Regulation in India

The doctrines of champerty and maintenance offer no roadblock to the recognition and flourishing of TPF in India since they aren't applicable in the jurisdiction. However, statutory recognition of funding practice is valuable. If one follows the lead of Australia, only the official encouragement of TPF led to the funding industry growing there, even when they follow a model of self-regulation.

To bank on judicial pronouncements and reconciliations would not be feasible for stakeholders. This is because several legal provisions need to be amended to make space for the unique characteristics of TPF. What necessitates statutory recognition is that the moment TPF is carried out professionally, there are significant implications of dispute resolution resembling the stock market.

When coupled with the fact that CFAs are against public policy in India, there is no precedent circumstance or practice in India that would provide any guiding principles to the courts or to arbitral institutions. These changes would require deliberations, being questions of policy and not interpretation. Courts can only address a legal question

when the appropriate dispute comes before it and gives it an opportunity to answer a specific legal problem.

This also means that certain aspects of TPF would never get adequately addressed in courts. For instance, the scope of TPF would have to be determined based on policy principles.

In Singapore, the torts of champerty and maintenance have been abolished, but their application remains intact for contracts that are illegal or contrary to public policy. An exception has been carved out for TPF. In Hong Kong, similarly, TPF has been protected from being hit by common law doctrines. These statutory provisions have provided clarity on the scope of permissible funding as well as qualifications for funders. India should consider putting in place a set of regulations on these questions.

In the Australian case of *Minister for Transport for Western Australia v. Civcon Pty. Ltd*., the principles governing TPF in litigation and arbitration were considered to be the same. This could be problematic, given the private nature of arbitration proceedings. Thus, clarity on this distinction should also be provided.

The funding industry does not lend itself to inflexible and overly prescribed regulation. However, moving beyond corporate use of funding to instances like consumer class actions would reveal concerns like consumer protection tied to funders' involvement. While self-regulation has worked well in jurisdictions like UK and Australia, a useful

rule-of-thumb for a potential Indian regulatory framework would be to recognize the centrality of party autonomy in arbitration and the balancing act between that and public policy considerations. As far as the latter is concerned, judicial decisions in India already provide tests to see if funding agreements violate public policy principles.

To provide them statutory sanctity would be a useful step towards indicating official approval of funding practices. Further, a regulatory framework would also address questions of tax regimes, foreign exchange, and the ethical and professional obligations of counsels of funded parties.

VI. PROPOSED FRAMEWORK FOR GOVERNING TPF IN INDIA

Although the funding industry is receiving substantial traction from all over the globe, though it is still at a very nascent stage. The rise in arbitration disputes coupled with the effects of the COVID-19 pandemic has compelled India to investigate viable options to reduce the financial distress faced by companies.

The final chapter aims to recommend certain legal changes for the advancement of the TPF industry in India. This will help eliminate unnecessary hurdles significant to the Indian common law system. Despite the common law doctrines of champerty and maintenance, various states have introduced amendments to the CPC to expressly permit TPF.[97]

Through the discussion on TPF in India in the previous chapter, it would be reasonable to conclude that there is a positive attitude towards TPF and that it is not contrary to the fundamental policies of Indian law. Further, TPF has also garnered judicial recognition. The judiciary has

[97] Mayank Mishra , Mohit Chadha , Vaishnavi Rao and Swati Mittal, India: Third Party Funding – Is India Ready? 21 July 2021, *available at* <https://www.mondaq.com/india/civil-law/1093690/third party -funding-is-india-ready>

inherently recognised the existence of TPF and permitted it in some form or another. That said, there still exists some vagueness concerning TPF.

The recommendation will rely heavily upon Singapore and Hong Kong law, as they have similar legal history to India.[98] While most jurisdictions have a self-regulated model for governing TPF, two jurisdictions, namely Singapore and Hong Kong, have enacted legislation for governing TPF.[99]

Further, a comparative analysis of various jurisdictions elucidates those countries have taken proactive steps to promote TPF, especially in arbitration and mediation. Similarly, India must adopt a systematic approach to regulate TPF. This will also facilitate India's goal to become an arbitration-friendly jurisdiction and adapt to the evolving tides in the field of arbitration.

A. TPF Regulatory Recommendations

Following elucidation are certain key pointers to be taken into consideration when enacting a regulatory mechanism governing TPF in India.

[98] A. Wadia and S. Rawat, Third party Funding in Arbitration - India's Readiness in a Global Context, *available at* <https://ssrn.com/abstract=3014001>

[99] Norton Rose Fulbright, Emerging approaches to the regulation of third party funding, *available at* <https://www.nortonrosefulbright.com/en-in/knowledge/publications/4f5fb25c/emerging-approaches-to-the-regulation-of-third party -funding>

1. Consultation process:

The TPF industry is still very new, not only in India but also in other jurisdictions. The majority of commercial third-party funders have emerged within the past decade; the market is still relatively small. Further, there exists limited information on the subject matter. This necessitates strong background research to be conducted in the area of study to aid the Parliament to enact relevant law.

A committee may be formed to conduct extensive research and public consultations on the issues including ethical and legal, and after taking into consideration the concerns of stakeholders, coupled with detailed discussion, publish a report. The committee may comprise of various stakeholders including the government (judicial scholar, as the subject matter requires deep dive into the common law doctrine of maintenance and champerty, and the issue of gambling), third party funders, experts of a forensic accountant or quantum expert.

A holistic approach may be arrived at through this consultation process. Moreover, the report may invite public comments to better understand the prevailing perspective among the disputant of the concept and advantage of TPF. During the process of the consultation process, a flexible approach may be adopted consultation to facilitate the development of the TPF industry. This may also help analyse the path the industry adopts in India if it is left to self-unregulated.

Additional information is also needed, given the uniqueness of this practice. The concerns surrounding TPF, the advantages and disadvantages of the practice, the potential abuse, and the impact of TPF on the rights and interests of the parties involved, must be exhaustive studied.

The consultation committee shall also consider a variety of issues, including the need to protect the proceedings' legitimacy by avoiding misuse and the benefit that TPF might provide for claimants with low financial means, notably small and medium-sized enterprises to file claims.[100] Further, the concerns of conflict of interest is required to be addressed by ensuring proper disclosures, by the consultation committee.

2. The legislative route:

Two global arbitration hubs, Singapore and Hong Kong, have dealt TPF in arbitration through legislation. Like India, these two countries also follow the common law system and thus, the historical doctrines of maintenance and champerty were major obstacles to the TPF industry. Though the Indian courts have denied the applicability of these doctrines on several occasions, there still exists a vacuum with regards to their applicability when funding a dispute. In 2021, Indian Association of Litigation Funding(IALF) was set-up to self-regulate the TPF.

[100] Possible reform of investor-State dispute settlement (ISDS), Initial Draft provisions on third party funding, *available at* <https://uncitral.un.org/en/thirdpartyfunding>

Leaving it to it to self-regulate is likely to do more harm by intensifying the belief that it is against India fundamental policy.[101] Moreover, the uncertainty governing TPF might give rise to more litigation, thus making it inefficacious.

TPF is undoubtedly a fast-growing industry in the field of arbitration. It is likely to play a vital role in the development of arbitration in India. To eliminate the ambiguity from, arising and to safeguard the industry clear legislation may be enacted governing funders and funded parties and to protect the interests of the other party.

Two respondents have clearly indicated the need for clarity on legal framework around TPF. Before laying down the provision for TPF, the scope of TPF must be determined by elaborating upon the essential definitions. India may adopt a stricter definition similar to the definition in the Singapore legislation.

TPF, under Singapore law, is restricted to a commercial funder.[102] Thus, only a commercial funder can fund a dispute, at least for a few years. This stance may be later amended to include other forms of funding like insurance or loan. Including other forms of funding to the definition at this stage will unnecessarily give rise to further complications.

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[101] *Id*., at note 1.

[102] Sneh Choudhary supervised by Mr. Daniel Mathew, Third Party Funding in International Arbitration, National Law University Delhi (India) 2019, at pg. 22, *available at* <http://14.139.58.147:8080/jspui/bitstream/123456789/352/1/68LLM18.pdf>

Moreover, certain criteria may be set for a funder to qualify which may include minimum paid-up capital along with maintaining minimum balance when funding a dispute and shall be commercial funding, i.e., having funding as its primary business, or setting a maximum percentage of profit a funder can acquire, to avoid unjust gain. Moving on to the question of soft law or hard law, India could adopt a soft law approach to facilitate the growth of the industry, which can be later modified.[103]

3. Funding may be restricted to alternative dispute resolution (arbitration and mediation):

This report mainly focuses on funding in arbitration. The sixth question deals with preferred dispute resolution method funders prefer; a special emphasis is laid upon funding arbitration cases in India. Hence, the scope of the report is limited, and the question of restricting or permitting funding for dispute resolution methods other than arbitration is one that requires further research.

From the analysis in this report, it would suffice to note here that:

[103] Varun Mansinghka, Third Party Funding in International Commercial Arbitration and its Impact on Independence of Arbitrators: An Indian perspective, Michael Pryles and Philip Chan (eds), Asian International Arbitration Journal, (Singapore International Arbitration Centre (in co-operation with Kluwer Law International, 13 K.L.I 1, 97, 97-112 (2017), *available at* <https://kluwerlawonline.com/journalarticle/Asian+International+Arbitration+Journal/13.1/AIAJ2017005>

(i) the consideration of issues for arbitration don't necessarily extend to mediation and the other modes;
(ii) given the ambiguities in the Indian regulatory mechanism, a systematic, gradual introduction and unfolding of new policies is advisable.

Finally, the burden would also fall upon arbitral institutions to enact codes regulating TPF, as this will guarantee fair play in domestic as well as international arbitration.

4. Contingency arrangements are explicitly barred, however, can a lawyer not involved with the dispute in any manner be permitted to fund the proceeding:

The prohibition of Contingency Fee Arrangements in India is a major doctrinal and practical barrier to the funding industry. This position needs to be revisited with regard to arbitration, taking into account different stakeholder perspectives apart from jurisprudential concerns.

As far as the litigation is concerned, the difference in principle between litigation and arbitration would justify the non-applicability of the rationale of prohibiting CFAs. However, the issue that would need to be addressed is the implications of allowing CFA for arbitration when parties approach the court for challenging the award. However, discussion on allowing lawyers or law firms to fund arbitration cases at this emerging stage is unnecessary.

5. A detailed perusal of TPF agreements is necessary for clarity with respect to issues of disclosure:

A detailed study of TPF agreements and practices around the globe is recommended to clearly delineate questions around disclosure requirements and thereby determine the Indian approach to the same. Further, the funding agreement should be required to be in consonance with the fundamental Indian law of contract and other surrounding laws.

6. Disclosure and Transparency:

Provision mandating partial disclosure should be made mandatory, like in the case of Singapore law, while the arbitral tribunal is be vested with the power to order any further disclosure as deemed necessary. This will help strike a balance between transparency and confidentiality.

The disclosure of the existence of a funding arrangement and the name of the funder may be sufficient. Mandating complete disclosure, including the terms of agreement and the percentage the funder will receive contingent upon the success, will hinder the confidentiality between the funder and the funded party. Most importantly, the legislature must expressly bar any amount of control over the proceeding by the funder, which includes the settlement process.[104]

Question 12 of the survey deals with the degree of involvement of the funder in the proceeding funded. While a majority of funders do not exercise any control or have

[104] Rahul M. Shankha, Third party funding in Arbitration: Time for India to Regulate? July 21,2020, *available at* <http://www.lawstreetindia.com/experts/column?sid=439>

minimum involvement, which is limited to monitoring. Two funders have stated that various factors are considered with respect to the active involvement of the funder. Thus, it can be concluded that the funders surveyed prefer minimal level of involvement.

Considering this data, it may not be necessary to lay down the role of a funder in legislation, as in any case, it is a market practice of minimal participation, and parties can also provide for minimum involvement of the funder in the funding agreement. This view is also in consonance with the analysis drawn in the ICCA- Queen[105] Despite this, the legislature may consider the propensity of some funder to have intrusive participation. To simplify, the degree of intrusion or the role of a third-party funder in a proceeding can be clearly enumerated to avoid any further conflicts.

7. Conflict of interest:

Provisions in the rules of various arbitral institutions around conflict of interest in the appointment of an arbitrator may be considered as a useful reference point in introducing conflict of interest rules in the Indian regulatory regime. Conflict of interest is a vital element to consider when forming laws governing TPF. As even a doubt of conflict of interest may result in the entire proceeding as futile. Stricter

[105] Chapter 2 Overview of Dispute Funding, Report of the ICCA-Queen Mary Task Force on Third party funding in International Arbitration (2018), ["ICCA-Queen Mary Task Force Report"] p.28.

provision must be enacted to regulate any form of conflict that may arise in the proceeding.[106]

8. Amendments to existing laws (FEMA, contract act, and clear provision stating that common law doctrines of maintenance and champerty will not apply to TPF agreements):

Statutes play a significant role in terms of clarity of legal position as well as signalling effect. Suitable amendments to the FEMA and the Contract Act would go a long way in indicating the openness to the legal system to TPF.
Questions 14 and 16 has delved deeper into the legislative changes need for promoting TPF and third-party funder to fund in India. Further, 2 respondents have indicated the need for clarity on foreign exchange regulations. Given that TPF is a risk-averse investment, the clarity of introducing provisions of non-applicability of maintenance and champerty would be an important step toward encouraging funders to enter the Indian market. Further, suitable amendments to the aforementioned statutes would be necessary to set up the regulatory mechanism around TPF arrangements, including questions of disclosure, confidentiality, and so on.

[106] Sumeet Lall, Sidhant Kapoor, and Ananya Pratap Singh, Third party Funding – India's time is now, *available at* <https://www.clydeco.com/en/insights/2020/12/third party -funding-india-s-time-is-now>

Annexure – I

MNLU Mumbai's Centre for Arbitration And Research (CAR)

2021 THIRD PARTY FUNDERS SURVEY

INTRODUCTION

India is a huge dispute market and has tremendous potential for disputes funding as an asset class. The concerns related to high costs and access to justice can be addressed by third party funding. The 2018 Bloomberg survey however shows that 70% of Indian feel that third party funding is illegal.

The present survey intends to understand the funders position in the Indian market. It aims to take feedback from the funding community as to the possible legal and regulatory changes which will instil their confidence in the Indian market. The survey limits itself only to arbitration. The report of the survey will be presented to the Ministry of Law and Justice, of the Government of India.

Any queries about survey can be addressed to Mr. Chirag Balyan, Assistant Professor of Law, MNLU Mumbai at chirag@mnlumumbai.edu.in

QUESTIONS

Name: _____

Designation: _____

Email: _____

INTRODUCTORY QUESTIONS

1. Company Name (Please mention the place of the Headquarter Office): _____
2. In which year did your company start funding cases?

_____

1

MNLU Mumbai's Centre For Arbitration And Research (CAR)

GENERAL QUESTIONS ABOUT THIRD PARTY FUNDING

1. Does your company have a preferred jurisdiction or region?
   - ➢
2. What is the minimum value of dispute your company funds?
   - ➢
3. Is there any eligibility criteria that a party must meet for getting funded with reference to arbitration disputes?
   - ➢
4. What steps do you take when scrutinizing a request for funding an arbitration dispute?
   - ➢
5. What standard form of documents are usually referred to when carrying out the due diligence by your funding company?
   - ➢
6. What is your preference of dispute resolution method when funding? (rank from 1-4, where rank 1 being the highest and rank 4 being the lowest)

Rank	***Preference of Dispute Resolution***
	Arbitration
	Litigation
	Mediation
	Expert Determination

7. Which kind of arbitration disputes does your company usually fund?
   - ➢

2

8. How many arbitration cases (including litigation related to arbitration) has your company funded till date? (Please state separately for funding in non-arbitration cases)

➢

9. What is the percentage of successful arbitration cases that your company has funded? (Please provide separate statistics for success in non-arbitration cases)

➢

10. What type of costs are usually covered by your company when funding a case?

➢

11. Are there different parameters for financing litigation in comparison to arbitration?

➢

12. Do you play any role during the arbitration proceeding? If yes, then what role?

➢

13. Does your Company purchase Arbitral Awards?

➢

QUESTIONS PERTAINING TO INDIA

14. As a funder, what legal or regulatory barriers do you anticipate facing in the Indian market?

➢

15. What are the opportunities that your company would consider in the Indian market?

➢

16. What are the regulatory or legal reforms pertaining to third party funding you would like to see in India?

➢

17. Thank you for your answers. Would you want us to keep your company's name anonymous in the report?

☐Yes

☐No

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