

Third Party Funding: A Conceptual and Comparative Legal Perspective

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Introduction

It is a widely acknowledged fact that litigation is a financially demanding endeavour.¹ In fact, one of the primary concerns within legal systems, across the globe, is the substantial financial burden that litigation places on the parties who seek to enforce their rights through the legal forums. Though precise and authoritative data is scarce, a 2015 survey-study conducted by Daksh India² has indicated that the fee for an advocate per hearing can range anywhere from as low as Rs. 100 to Rs. 10,00,000 or even more per hearing.³

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¹ A plethora of academic literature have recognized this issue. See., e.g., LAW COMMISSION OF INDIA, REPORT. NO. 128, COST OF LITIGATION 1 (1988); *Litigation Expenses: High Cost of Justice*, INDIA LEGAL: STORIES THAT COUNT (Dec. 04, 2017), <https://www.indialegalive.com/special-story/litigation-expenses-the-long-quest-and-high-cost-of-justice/>; Sishir Tripathi, *Huge Cost of Litigation has Turned Justice into a Dream for the Weaker Sections in India*, FIRST POST (Aug. 17, 2016), <https://www.firstpost.com/india/huge-cost-of-litigation-means-denial-of-justice-to-the-poor-in-india-2961484.html>; Syed Asif Iqbal, *Cost of Litigation: A Socio-Economic Concern*, LEGAL DESIRE (Mar. 22, 2018), <https://legaldesire.com/cost-litigation-socio-economic-concern/>;

² DAKSH INDIA, ACCESS TO JUSTICE SURVEY 2015-16, at 17 (2016), <https://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf>.

³ For a comparative study of the approximate fee charged per appearance by Senior Counsels of the Supreme Court, See *Litigation Expenses: High Cost of Justice*, INDIA LEGAL: STORIES THAT COUNT (Dec. 04, 2017), <https://www.indialegalive.com/special-story/litigation-expenses-the-long-quest-and-high-cost-of-justice/> (highlighting that the fee of well recognized Senior Counsels of the Supreme Court used to range anywhere between Rs. 75,000 to Rs. 25, Lakhs per appearance in 2017); See also DAKSH INDIA, ACCESS TO JUSTICE SURVEY 2015-16, at 17 (2016), <https://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf>.

Additionally, the parties have to bear an average cost of Rs 1,039 per case per day for attending court hearings plus an average cost of Rs. 1,746 per case per day due to loss or pay/business.⁴ At a macro level, the study has estimated that litigation costs Rs. 80,537 crore per year to the economy.⁵ Given the high rate of inflation, these figures would be considerably higher in the present times and would continue to increase. This rapidly escalating cost of litigation presents a socio-economic concern that impedes affordable access to justice.⁶ Moreover, the substantial expenses associated with litigation is in itself a major reason that dissuades parties from enforcing their rights and remedies through legal process.⁷ The Law Commission of India in its 128th Report has recognized the enormous financial burden and risk which the parties involved in litigation have to undertake.⁸ The Report goes on to state that “Litigation has become a luxury for the rich”.⁹ However, even for the affluent corporate sector, the substantial expenses associated with litigation results in diversion of funds and resources away from primary and potential business activities.¹⁰

In this context, the exploration of alternative approaches to alleviate the financial burden of litigation becomes pertinent. Third Party funding (TPF) is one such¹¹ financial mechanism that is designed to mitigate the

⁴ Shruti Naik, *The Cost of Litigation – What Alternatives Do We Have?*, DAKSH INDIA (Nov. 16, 2016), <https://www.dakshindia.org/cost-litigation-alternatives>.

⁵ DAKSH INDIA, *supra* note 2.

⁶ See Syed Asif Iqbal, *Cost of Litigation: A Socio-Economic Concern*, Legal Desire (Mar. 22, 2018), <https://legaldesire.com/cost-litigation-socio-economic-concern/>.

⁷ See Padmini Baruah et al., *Pathways to Justice: Surveying Judicial and Non-Judicial Dispute Resolution in India*, in DAKSH INDIA, JUSTICE, ACCESS AND THE NATION’S APPROACHES (2017).

⁸ LAW COMMISSION OF INDIA, REPORT. NO. 128, COST OF LITIGATION 1 (1988).

⁹ *Id.*

¹⁰ See CYRIL AMARCHAND MANGALDAS, THIRD PARTY FUNDING IN INDIA 1 (2019), <https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf>.

¹¹ Other forms of dispute funding models include insurance, loans, corporate financing, equity-based financing, inter-corporate funding etc. See INTERNATIONAL COUNCIL FOR COMMERCIAL

financial risks associated with litigation. TPF is basically a financial arrangement between a party to the dispute and an external party, either a natural person or a legal entity, who is not a party to the dispute (hence the phrase Third Party). Via this arrangement, the third party provides financial or material support to one of the parties to the dispute to cover the cost of the litigation. Depending on the outcome of the litigation, the third party, providing such funds, would be entitled to remuneration or reimbursement.¹² Therefore, in order to mitigate the financial burden of litigation, TPF serves as a solution. It benefits both the impecunious, who do not have the financial resources to pursue litigation or arbitral proceedings, and the corporate sector, which is often hesitant to pursue meritorious claims in order to preserve the cash flow required to run business operations, thereby helping in corporate risk management.

Although TPF is not a novel concept, earlier, such financial arrangements would have attracted the application of the doctrines of Maintenance and Champerty, particularly in common law jurisdictions.¹³ Furthermore, engaging in such funding arrangements could have also resulted in criminal sanctions.¹⁴ The Doctrine of Maintenance prohibited funding of legal proceedings by third parties, whereas the doctrine of champerty prohibited third parties from receiving a share from the proceeds of the

ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION, ICCA REP. NO. 4, at 33-36 (2018).

¹² Rishi Kumar Dugar, *Arbitration Cost's Going the Litigation Way - Is Third Party Funding of Arbitrations the Way Forward in India to Curtail Huge Arbitration Costs*, SCC ONLINE (Mar 20, 2018), available at <https://www.sconline.com/blog/post/2018/03/20/arbitration-costs-going-the-litigation-way-is-third-party-funding-of-arbitrations-the-way-forward-in-india-to-curtail-huge-arbitration-costs/> (Last visited on July 21, 2022).

¹³ LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 1* (2d ed. 2017).

¹⁴ See Lisa Bench Nieuwveld, *Third Party Funding – Maintenance and Champerty – Where it is Thriving?*, KLUWER ARBITRATION BLOG (Nov. 7, 2011), <https://arbitrationblog.kluwerarbitration.com/2011/11/07/third-party-funding-maintenance-and-champerty-where-is-it-thriving/>.

litigation.¹⁵ However, with the decriminalization and relaxation in the application of these doctrines, coupled with escalating costs associated with arbitration, and the budgetary constraints of the companies, the TPF industry has witnessed a rapid exponential growth. It has now become a mainstream global industry presently valued at 13 billion US Dollar with projections expecting it to cross 24 US Billion Dollar by 2028.¹⁶ This phenomenal growth in the TPF has attracted a diverse array of new funders to the global litigation finance market.¹⁷

Although, on a cursory glance TPF may appear as a robust solution for escalating litigation costs, however, it is intricately entwined with various limitations. Firstly, TPF is primarily sought by claimants, though in some jurisdictions, law firms also take recourse to TPF. Despite challenges relating to the reimbursement of funders in case of successful defence of the respondents, third-party funding for the respondents is also evolving.¹⁸ Secondly, it is pertinent to note that the rejection rate of TPF remains notably high, exceeding 80%. This is due to the diverse factors that the funding party has to consider before granting approval.¹⁹ These factors include the presence

¹⁵ UK, Law Commission, *Proposals for Reform of the Law Relating to Maintenance and Champerty* (1966).

¹⁶ See RESEARCH NESTER, *LITIGATION FUNDING INVESTMENT MARKET: GLOBAL DEMAND ANALYSIS AND OPPORTUNITY OUTLOOK 2028* (2021); See also Research Nester, *Global Litigation Funding Investment Market to Cross USD 13 Billion in 2021*, GLOBE NEWSWIRE (Feb. 04, 2021), <https://www.globenewswire.com/news-release/2021/02/04/2169925/0/en/Global-Litigation-Funding-Investment-Market-to-Cross-USD-13-Billion-in-2021-Rise-in-Pending-Claims-Insolvency-and-Bankruptcy-Due-to-COVID-19-and-Interest-in-ROI-Among-Investors-to-.html>.

¹⁷ International Arbitration Survey: Improvements and Innovations in International Arbitration, Queen Mary University of London, 14, (2015)

¹⁸ Matthew Denney, *Portfolio Finance May Minimize Litigation Funding Risks*, Law360 (Feb. 20, 2018), available at <https://www.law360.com/articles/1013718/portfolio-finance-may-minimize-litigation-funding-risks> (Last visited on July 21, 2022).

¹⁹ Hiroo Advani and Chaiti Desai, *Third Party Funding*, SCC ONLINE (Apr 20, 2021), available at <https://www.scconline.com/blog/post/2021/04/20/third-party-funding/> (Last visited on July 21, 2022).

of a strong and valid claim, along with a feasible margin of recovery between the budget allocated for the expenses and costs, and the amount of monetary damages to be recovered.²⁰ In this context, issues related to conflict of interest, confidentiality breach, unnecessary and unwarranted interference of funders in legal proceedings, and many more, can potentially arise in third party funding arrangements.

In India, third party funding was widely believed to be invalid and against the doctrine of public policy.²¹ This perception, however, is not stricto sensu true as illustrated by the decisions such as *Ram Surap v. Court of Wards*²² and *Raja Rai Bhagwat Dayal Singh v Debi Dayal Sahu*.²³ However, undeniably, it is the 2018 decision of Supreme Court of India in *Bar Council of India v. A. K. Balaji*,²⁴ that has played a pivotal role in changing this perspective. It has renewed academic and industry discussions and has led to a proliferation of academic literature on Third Party Funding.²⁵ A cursory review of the emerging literature in this area reflects a wide support for facilitating growth and regulation of TPF through law in order to tackle escalating litigation expenses. However, there are numerous issues and challenges that any law regulating TPF must address. The authors in the

²⁰ Tobey Butcher, *Is Arbitration Portfolio Financing Going to Grow in 2018?*, KLUWER ARBITRATION BLOG (Feb. 2, 2018), <http://arbitrationblog.kluwerarbitration.com/author/tobey-butcher/> (Last visited on July 21, 2021).

²¹ See Mayank Mishra et al, *Third Party Funding – Is India Ready?*, INDUS LAW (July 15, 2021), <https://induslaw.com/app/webroot/publications/pdf/alerts-2021/Infolex-Article-Third-Party-Funding.pdf>; Arunadhri Iyer & Ashwin Mathew, *Third Party Funding of Litigation – A Damocles or a Welcome Step*, SCC ONLINE BLOG (Mar. 27, 2021), <https://www.sconline.com/blog/post/2021/03/27/litigation-2/>.

²² *Ram Surap v. Court of Wards*, [1939] ILR 1 (PC).

²³ *Raja Rai Bhagwat Dayal Singh v Debi Dayal Sahu*, (1908) 10 Bom LR 230.

²⁴ *Bar Council of India v. A. K. Balaji*, (2018) 2 SCC 39 (stating that “there appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation”).

²⁵ See, e.g., MNLU Mumbai – CAR, *Third Party Funding in India: Survey Report (2021)*; CYRIL AMARCHAND MANGALDAS, *THIRD PARTY FUNDING IN INDIA 1* (2019).

present article discusses some of these conceptual and legal issues through a comparative lens.

The present paper is structured as follows. Firstly, in Section II, the authors provide a conceptual overview of the Third-Party Funding. This section explores TPF at a basic conceptual level without focusing on any specific jurisdiction. The points covered in this section include: the scholarly efforts for a precise and comprehensive definition of TPF, fundamental questions related to TPF and advantages and disadvantages of TPF. In Section III, the authors conduct a comparative analysis of the evolution of regulations pertaining to third party funding in common law jurisdictions of Australia, Singapore, Hong Kong and the United Kingdom. In Section IV, the authors examine the current legal landscape in India with regard to TPF, including the application of the test of public policy. Finally, in Section V, the authors provide certain suggestions to strengthen the TPF regime in India and to promote the growth of TPF industry in the country, and to safeguard against the potential misuse of TPF as an exploitative tool violating public policy.

Conceptual overview of Third-party funding

Before dwelling into the nuanced legal issues and challenges, the authors in this section of the paper provide a conceptual overview of Third-Party Funding. The authors in this section first addresses the elusive quest for defining TPF, and then discusses some basic questions relating to TPF such as (conceptually speaking) – who can be a third-party funder, who can receive third party funding, what kind of litigation and litigation costs are covered, how TPF is facilitated etc.

Understanding V. Defining Third-party funding

Third Party funding is known by various names such as: Litigation financing,²⁶ Pre-Settlement Funding,²⁷ Third Party Litigation Funding (TILF),²⁸ external dispute financing²⁹ etc. In its simplest sense, it can be understood as a financial arrangement between a person, either natural or juristic, who is not a party to a dispute (hence the name Third Party), and a party to the dispute. The third party agrees to provide financial or material support to the litigating party in return of a share of the monetary reward of the litigation, if the litigation is successful.³⁰ At this juncture, it is pertinent to note to highlight the difference between Third Party Funding and Lawsuit loan/Litigation Loan. Third party funding is generally described and understood as *no risk funding* or *a non-recourse debt*³¹ – meaning thereby

²⁶ See, e.g., CYRIL AMARCHAND MANGALDAS, *THIRD PARTY FUNDING IN INDIA 1* (2019), <https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf>; Ashish Rukhaiyar, *Delhi-Based Startup Launches Litigation Financing Product for Retail Investors*, BUSINESS TODAY, <https://www.businesstoday.in/latest/corporate/story/delhi-based-startup-launches-litigation-financing-product-for-retail-investors-303771-2021-08-10> (last updated Aug. 10, 2021).

²⁷ See, e.g., Jennifer Schell, *Pre-Settlement Funding*, ANNUITY, <https://www.annuity.org/structured-settlements/pre-settlement-funding/> (last updated Apr. 11, 2023).

²⁸ See, e.g., Dormaan Jamshid Dalal, *Third Party Litigation Funding and the Law in India*, SCC BLOG (Apr. 11, 2022), <https://www.sconline.com/blog/post/2022/04/11/third-party-litigation-funding/>; US GOVERNMENT ACCOUNTABILITY OFFICE, *THIRD PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA & TRENDS* (2022), <https://www.gao.gov/assets/gao-23-105210.pdf>; INSURANCE INFORMATION INSTITUTE, *WHAT IS THIRD-PARTY LITIGATION FUNDING AND HOW DOES IT AFFECT INSURANCE PRICING AND AFFORDABILITY?* (2022), https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf.

²⁹ See Sumet Kachwaha & Ankit Khushu, *Third-Party Litigation Funding: Overview (India)*, PRACTICAL LAW UK PRACTICE NOTE (Thomson Reuters, 2023), https://kaplegal.com/wp-content/uploads/Third-Party_Litigation_Funding_Overview_India-2023-1.pdf.

³⁰ See CYRIL AMARCHAND MANGALDAS, *THIRD PARTY FUNDING IN INDIA 2* (2019), <https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf>.

³¹ A Non-Recourse debt (NRD) “is debt for which an individual has no personal liability. For example, a lender may take the property pledged as collateral (which in case of TPF is the amount awarded at the end of the litigation) to satisfy a debt, but has no recourse to other assets of the borrower. See *Glossary of Tax Terms*, OECD, <https://www.oecd.org/ctp/glossaryoftaxterms.htm> (last visited Apr. 13, 2023); See also CFI Team, *Non-Recourse Loan*, Corporate Finance Institute, <https://corporatefinanceinstitute.com/resources/commercial-lending/non-recourse-loan/> (last

that the repayment of the amount is contingent upon the success of the case. That is to say that the litigant is only obligated to repay the funder if he/she wins the litigation. If the litigant loses the case, the funder loses its money, and the litigant cannot be obligated to repay the funds received.³² Whereas under a Lawsuit loan or litigation loan, the litigant is liable to repay the loan, even if they lose their lawsuit,³³ with interest (which can be at high rates and will accrue while the loan is outstanding).³⁴

Although the basic concept of third party funding is relatively simple to comprehend, providing a precise definition for it remains an elusive and challenging task.³⁵ Furthermore, there is a wide disagreement, even among funders, regarding the definition of TPF.³⁶ This complexity arises due to the fact that financial support for a dispute by a non-party *is an operation* that can be carried out in a variety of ways, involve a diverse set of actors, serve

updated Jan. 18, 2023); (“Non-Recourse Loan is a loan type that places restrictions on a lender’s ability to pursue a borrower’s assets in the event of default); *See generally* Kiah Treece, *Recourse Loans v. Non-Recourse Loans*, Forbes Advisor, <https://www.forbes.com/advisor/loans/recourse-loans-vs-non-recourse-loans/> (last updated Aug. 12, 2020); *Nonrecourse*, Cornell Law School, <https://www.law.cornell.edu/wex/nonrecourse> (last updated Sept. 2021), India Ratings & Research, *Treatment of Non-Recourse Debt: Special Report* (2012).

³² *See What’s the Difference Between a Settlement Loan and Pre-Settlement Legal Funding*, High Rise Financial, <https://www.highriselegalfunding.com/faqs/whats-the-difference-between-a-settlement-loan-and-pre-settlement-legal-funding/> (last visited Apr. 13, 2023).

³³ *See What’s the Difference Between a Settlement Loan and Pre-Settlement Legal Funding*, High Rise Financial, <https://www.highriselegalfunding.com/faqs/whats-the-difference-between-a-settlement-loan-and-pre-settlement-legal-funding/> (last visited Apr. 13, 2023).

³⁴ *See* Amy Bell, *What is a Lawsuit Settlement Loan?*, INVESTOPEDIA, <https://www.investopedia.com/personal-finance/what-lawsuit-settlement-loan/> (last updated Jan. 10, 2023).

³⁵ *See* Stavros Brekoulakis & Catherina Rogers, *Third Party Financing in ISDS: A Framework for Understanding Practice and Policy* 5 (Academic Forum on ISDS Concept Paper 2019/11, July 31, 2019); *See also* Hussein Haeri et al., *Third Party Funding in International Arbitration*, GLOBAL ARBITRATION REVIEW (Dec. 30, 2022), <https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/4th-edition/article/third-party-funding-in-international-arbitration#footnote-151>.

³⁶ Some have even argued that TPF is not capable of definition. *See* Michele Destefano, *Non-Lawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup*, 80 FORDHAM L. REV. 2791, 2794 (2012).

myriad purposes and utilize a spectrum of legal and financing mechanisms.³⁷ Moreover, the challenges are further compounded because the existing financial models are rapidly evolving and new models are regularly being introduced.³⁸ One of the most frequently cited definition is the one provided by the Association of Litigation Funders UK which states:

Litigation funding is where a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money and nothing is owed by the litigant.³⁹

Another recent functional definition of TPF has been formulated by the ICCA-Queen Mary Task Force, which states:

The term *third-party funding* refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,

³⁷ Hussein Haeri et al., *Third Party Funding in International Arbitration*, GLOBAL ARBITRATION REVIEW (Dec. 30, 2022), <https://globalarbitrationreview.com/guide/the-guide-to-arbitration/4th-edition/article/third-party-funding-in-international-arbitration#footnote-151>.

³⁸ See Stavros Brekoulakis & Catherina Rogers, *Third Party Financing in ISDS: A Framework for Understanding Practice and Policy* 5 (Academic Forum on ISDS Concept Paper 2019/11, July 31, 2019)

³⁹ See *Litigation Finance*, ASSOCIATION OF LITIGATION FUNDERS, <https://associationoflitigationfunders.com/about-us/litigation-finance/> (last visited Apr. 13, 2023).

- (a) Funds or other material support in order to finance part of all of the cost of the proceedings, either individually or as part of a specific range of cases, and
- (b) Such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant of in return for a premium payment.⁴⁰

However, this does not constitute a legal definition of the term but rather is a broad working formula that illustrates the diverse forms that can be taken by TPF. Several key points are highlighted in this definition, such as, (i) the possibility of TPF being provided directly to the law firm representing the litigant; (ii) it can also be provided to the affiliate of the party; (iii) it can be either finance part of the cost or all of the cost; (iv) it can be case to case basis or can cover a range of cases; (v) it can be either in exchange of remuneration from the monetary reward of the case or it can be through a premium payment (akin to insurance).

Some Fundamental questions related to TPF

The first and foremost question that arises is: Who can receive Third Party Funding? Conceptually speaking, since, third party funding is fundamentally premised on expectation of share in the monetary award, hence, it is the claimants (including counter claimants) who are typically the beneficiaries of such funding as they may stand to receive a monetary award in case the

⁴⁰ INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION, ICCA REP. No. 4, at 50 (2018).

litigation is successful.⁴¹ The recipient of such funding can be either an individual (natural person), a corporate entity or even a government agency.⁴² However, due the recent trends involving the coverage of litigation costs by means of insurance and other risk transfer mechanisms, both claimants and defendants can avail the benefit of such funding through these avenues.⁴³

The second pivotal aspect of TPF revolves around the identity of the funder i.e. Who can be a Funder? Generally, TPF is provided by “specialised third-party funders” including investment banks, hedge funds, insurance companies, and pension funds.⁴⁴ These funders may either have readily investable capitals at their disposal or alternatively, they may secure funds on a case-to-case basis in an ad hoc manner.⁴⁵ Moreover, litigation funders are progressively utilizing technology to develop crowdfunding platforms for offering TPF.⁴⁶ However, most jurisdictions do not allow lawyers & Law firms to fund the litigation of their clients. Another thought-provoking question that requires consideration, in order to prevent abuse of TPF is, whether a competitor can fund disputes against his/her competition.

The third fundamental question regarding TPF is related to the kinds of disputes and expenses that can get funding i.e. What kind of disputes and costs can be funded through TPF? To ensure financial viability and

⁴¹ See AMARCHAND MANGALDAS, *supra* note 30 at 2.

⁴² Hussein Haeri et al., *Third Party Funding in International Arbitration*, GLOBAL ARBITRATION REVIEW (Dec. 30, 2022), <https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/4th-edition/article/third-party-funding-in-international-arbitration#footnote-151>.

⁴³ See AMARCHAND MANGALDAS, *supra* note 30 at 2.

⁴⁴ See *Id.*; See also Anant Garg & Sreejita Mitra, *Regulating Third Party Funding in Arbitration Proceedings in the Indian Context*, Bar & Bench: The Viewpoint (Dec. 13, 2022), <https://www.barandbench.com/law-firms/view-point/regulating-third-party-funding-in-arbitration-in-the-indian-context>.

⁴⁵ See AMARCHAND MANGALDAS, *supra* note 30 at 2..

⁴⁶ The Largest TPF funder. It has an investment portfolio of approximately 2.4 Billion US Dollars and market capitalization of approximately 3.2 Billion US Dollars. In India, such crowdfunding platforms are yet to establish on a commercial scale.

profitability of TPF, it is usually provided to cases with a well-calculated potential for securing a substantial monetary award, and hence funders do not usually support cases that do not involve claims (or counter claims) for compensations or damages.⁴⁷ Hence, disputes such as commercial contracts, international commercial arbitration, class action lawsuits, high value tort claims such as medical malpractice, personal injury cases, anti-trust or insolvency proceedings are considered lucrative by funders due to their potential profitability.⁴⁸ Additionally, TPF typically encompasses various expenses related to lawyer's fee, court or tribunal's fee, expert-witness payments, pre-deposit, adverse costs, and other expenditure associated with the dispute.⁴⁹ The extent of cost coverage can vary, ranging from full to partial costs, and the exact coverage of costs will be contingent upon the specifics contained in the TPF agreement between the funder and the litigant.⁵⁰

Another crucial aspect in understanding TPF is the mechanism adopted for its implementation. TPF, at its core, is an agreement between two parties. These agreements may be tailored on a case-by-case basis (referred to as single case funding) or may be structured in the form of portfolio funding encompassing multiple claims from a single client.⁵¹ These agreements may

⁴⁷ See *Third Party Funding in International Arbitration*, ASHURST (Jun. 15, 2022), <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>.

⁴⁸ See AMARCHAND MANGALDAS, *supra* note 30 at 2..

⁴⁹ See *Id*; See also Anant Garg & Sreejita Mitra, *Regulating Third Party Funding in Arbitration Proceedings in the Indian Context*, Bar & Bench: The Viewpoint (Dec. 13, 2022), <https://www.barandbench.com/law-firms/view-point/regulating-third-party-funding-in-arbitration-in-the-indian-context>.

⁵⁰ Sumet Kachwaha & Ankit Khushu, *Third-Party Litigation Funding: Overview (India)*, PRACTICAL LAW UK PRACTICE NOTE (Thomson Reuters, 2023), https://kaplegal.com/wp-content/uploads/Third-Party_Litigation_Funding_Overview_India-2023-1.pdf.

⁵¹ See Anant Garg & Sreejita Mitra, *Regulating Third Party Funding in Arbitration Proceedings in the Indian Context*, Bar & Bench: The Viewpoint (Dec. 13, 2022), <https://www.barandbench.com/law-firms/view-point/regulating-third-party-funding-in-arbitration-in-the-indian-context>.

incorporate standard clauses prescribing the respective duties of the involved parties (i.e. the litigant and the funder), claim distribution arrangements, termination provisions, prescribe restrictions on settlement proposals, and provisions related to confidentiality & disclosure etc.⁵²

Advantages and disadvantages of Third-party funding

Third party funding is beneficial to both business and funders, also it is beneficial to the legal system as a whole as well. From a Business perspective TPF assists in management of litigation risks;⁵³ it facilitates the efficient allocation of capital for enforcing legal rights, it enables the released resources (that were previously earmarked for legal expenses) to be utilized pursuing core business activities. Additionally, TPF also facilitates the pursuit of claims that otherwise would not have been addressed. Further, and quite significantly, since TPF operates as a “non-recourse” debt with no associated capital cost, it can augment operational profits.⁵⁴

For Funders, TPF presents the opportunity for comparatively high returns on investment and diversification of their investment, which are not susceptible to market fluctuations. Additionally, it supports and facilitates cause funding.⁵⁵ From a Legal System’s perspective, TPF enhances access to justice, strengthens the enforcement of rights, and fosters greater accountability. Hence, TPF can serve as a great equalising force⁵⁶ that creates

⁵² See AMARCHAND MANGALDAS, *supra* note 30 at 2.

⁵³ See *Third Party Funding in International Arbitration*, ASHURST (Jun. 15, 2022), <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Jayesh H et al., *Third Party Funding: A Savior to the Distressed Claimant who Needs to Litigate but is Strapped for Cash*, INTERNATIONAL BAR ASSOCIATION, <https://www.ibanet.org/article/C1A6C5EF-2CD9-40E9-B01C-7CAA6EEDFC3C> (last visited Apr. 13, 2023).

a level playing field between economically unequal parties, and thus helping in mitigation of imbalance of financial power in litigation.⁵⁷

However, the above-mentioned advantages of TPF coexist with certain ethical concerns which cannot be overlooked. Firstly, since the funder's return on his investment are connected to the success and failure of the case, funders are naturally inclined to support and fund those cases that have strong prospects of success.⁵⁸ Hence, genuine meritorious cases but with less predictable outcome, where funding is required, may not get funding. Secondly, there is high risk of undue financial influence by the funders over litigants, potentially compromising their autonomy in dispute settlement.⁵⁹ The autonomy of the litigant to consider a settlement may be subjected to the approval of the funder.⁶⁰ Thirdly, in relation to arbitration proceedings, the funder's involvement in choice of arbitrator, and arbitrator's personal gravitas with the funding party may influence the final damages awarded and thereby hinder the sanctity of the proceedings.⁶¹ Lastly, TPF can turn out to be an expensive endeavour as the successful claimant may be required to pay a significant share of the damages recovered to the funder. This raises an intriguing question i.e. whether funding costs itself can be recovered from the defendant.⁶²

⁵⁷ *Id.*

⁵⁸ See *Litigation Finance*, ASSOCIATION OF LITIGATION FUNDERS, <https://associationoflitigationfunders.com/about-us/litigation-finance/> (last visited Apr. 13, 2023); See also *See Third Party Funding in International Arbitration*, ASHURST (Jun. 15, 2022), <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>.

⁵⁹ See Garg & Mitra, *supra* note 51.

⁶⁰ See ASHURST, *supra* note 47.

⁶¹ See Garg & Mitra, *supra* note 51.

⁶² See ASHURST, *supra* note 47.

Recognition, growth and regulation of third-party funding in other jurisdictions

Common law has played a significant role in shaping the global landscape of Third-Party funding, with both positive and negative effects. The evolution of common law's perspective from condemning agreements akin to 'maintenance and champerty'⁶³ to be a facilitator of TPF agreements is a noteworthy development in itself. As stated earlier, the doctrine of Maintenance prohibited individuals without a bona fide interest in the lawsuit from providing financial assistance to litigants.⁶⁴ In contrast, the doctrine of champerty prevented agreements between officious inter-meddlers in a lawsuit and a litigant by which the inter-meddler helps pursue the litigant's claim as consideration for receiving part of any judgement proceeds. These two well recognized common law doctrines prevented funding of litigation by unconnected third parties in common law jurisdictions. However, recently, common law jurisdictions, even United Kingdom from where these doctrines emerged, have relaxed the applications of these doctrines and recognised TPF as a valid form of agreement with some regulations. In this section, the authors examine the TPF landscape in Australia, Singapore, Hong Kong and United Kingdom.

Australia

⁶³ See Garg & Mitra, *supra* note 51 (the condemnation of maintenance and champerty agreements by the common law has been the main reason that has constrained the growth of TPF especially in common law jurisdictions).

⁶⁴ *Id.* (on the ground that "meddling in someone else's litigation" is not allowed).

TPF has been permitted in Australia, and has been in existence for over two decades.⁶⁵ Through Legislative enactments doctrines of Maintenance and Champerty have been abolished both as crimes and torts in New South Wales, South Australia, Victoria, and Australian Capital Territory.⁶⁶ However, Queensland, Western Australia, Tasmania and the Northern Territory are yet to enact such explicit legislation.⁶⁷ Furthermore, the decisions of the Australian High Court in the cases of *Campbells Cash and Carry Pvt. Ltd. v. Fostif Pvt. Ltd.*⁶⁸ and *Mobil Oil Australia Pty Ltd. v. Victoria*⁶⁹ have clarified and confirmed that TPF is neither against Australia's public policy nor it can be deemed to be an abuse of the legal process.⁷⁰ This has led to a boom in the TPF Industry in Australia and it has played a significant role in federal class action suits providing funding for almost 50% of class action suits.⁷¹ The key factors that contribute to the growing popularity of TPF in Australia include (i) Fee-Shifting Litigation approach, whereby the losing party is generally held responsible to pay the legal costs and other expenses of the winning party; (ii) Prohibition on Lawyers from entering into contingency fee arrangements with their clients; thus they cannot provide funding to the

⁶⁵ Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 95 (2013).

⁶⁶ See the Civil Law (Wrongs) Act, 2002, § 221 (ACT); the Maintenance, Champerty and Barratry Abolition Act, 1993, §§ 3-4,6 (NSW); the Criminal Law Consolidation Act, 1935, sch. 11, cll. 1(3), 3 (SA); the Wrongs Act 1958, § 32 (Vic); the Crimes Act 1958, § 322A (Vic).

⁶⁷ See PINSENT MASONS, JURISDICTION GUIDE TO THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 5 (2021).

⁶⁸ *Campbells Cash and Carry Pvt. Ltd. v. Fostif Pvt. Ltd.*, (2006) CLR 386 (Aus).

⁶⁹ *Mobil Oil Australia Pty. Ltd. v. Victoria* (2002) 211 CLR 1 (Austl.).

⁷⁰ *Campbells Cash and Carry Pvt. Ltd. v. Fostif Pvt. Ltd.*, (2006) CLR 386 (Aus).

⁷¹ See Joseph J. Stroble & Laura Welikson, *Third Party Litigation Funding: A Review of Recent Industry Developments*, 87 DEFENSE COUNSEL JOURNAL 1, 3 (2020).

clients.⁷² However, recently the Australian law reform commission has recommended that such prohibition be uplifted.⁷³

Further, in response to the thriving TPF industry and to ensure transparency and enhance accountability within TPF, the Australian government has implemented the Corporations Amendment (Litigation Funding) Regulations, 2020.⁷⁴ These regulations require funders to obtain an Australian Financial Services License (AFSL) and comply with Managed Investment Scheme (MIS) regulations.⁷⁵ However, there are no specific regulations governing the exact or maximum amount of fee which a funder can charge. But, given that TPF is essentially a contractual arrangement, the general principles of contract and consumer protection law relating to unconscionability, unfair contractual terms, misleading and deceptive conduct will apply to TPF agreements with regard to the amount of fee charged by funders.⁷⁶ The funders, however, are still able to claim exemption from funding disclosure on the ground of legal professional privilege provided under Evidence Law.⁷⁷

Singapore

⁷² *Id.*

⁷³ Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 95 (2013).

⁷⁴ The Corporations Amendment (Litigation Funding) Regulations, 2020.

⁷⁵ *Id.*

⁷⁶ See *Clyne v. NSW Bar Association*, (1960) 104 CLR 186, 203; See also PINSENT MASONS, JURISDICTION GUIDE TO THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 5 (2021).

⁷⁷ The Evidence Act, 1995, § 119 (NSW).

Until 2017, champerty and maintenance doctrines were enforceable in Singapore, treating TPF a tort.⁷⁸ However, with the enactment of the Civil Law Amendment Act, 2017 and the Civil Law (Third Party Funding) Regulations 2017, these common law torts were abolished and TPF was permitted upon fulfilment of certain conditions. Firstly, TPF can only be provided by an eligible funder, and secondly, it can be provided only for the prescribed proceedings.⁷⁹ Section 5A of the Civil Law Act, 1909 abolished maintenance and champerty whereas Section 5B affirmed that TPF contracts are neither illegal nor contrary to public policy. Section 5B(10) of the Act, provides the definition of Third party funding contract which is as follows:

[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 entitled⁸⁰

Only Professional funders are permitted in Singapore. To be eligible as a third party funder, firstly, the funder must carry on principal business wherein the place where the dispute is being funded and secondly, the funder must have paid-up share capital of not less than 5 Million Dollars.⁸¹ Further, the class of disputes in which TPF is permitted are: international arbitration proceedings, court and mediation proceedings arising out of international

⁷⁸ Nadia Darwazeh & Adrien Leleu, *Disclosure and Security For Costs or How To Address Imbalances Created By Third-Party Funding*, 33 J. INT'L ARB. (2016); See also *Hastie Group Ltd. v. Moore*, [2016] NSWCA 305.

⁷⁹ The Civil Law (Third Party Funding) Regulations 2017, § 3 (Singapore).

⁸⁰ The Civil Law Act, 1909, § 5B (10).

⁸¹ The Civil Law (Third Party Funding) Regulations 2017, § 4 (Singapore).

arbitration proceedings and related applications (such as application for enforcement of awards etc.).⁸²

Apart from these restrictions, Singapore provided a great flexibility to the TPF contracts in terms of remuneration fee, conditional fee etc.,⁸³ Similar to Australia, lawyers in Singapore are also prohibited from entering into TPF contracts with their clients. However, they are allowed to introduce or refer third party funders to their clients but without receiving any “direct financial benefit” from such introduction or referral.⁸⁴ Additionally, lawyers are also allowed to advise their client (or act on their behalf) regarding TPF contracts as long as they do not derive any direct financial gain apart from their legal service fees.⁸⁵

Hong Kong

In Hong Kong also, the applications of maintenance and champerty doctrines, has previously restricted the use of Third Funding Agreements.⁸⁶ However, the recent legal decisions including, cases like *Winni Lo v. HKSAR*,⁸⁷ *Cannonway Consultants v. Kenworth Engineering*⁸⁸ and *Unruh v. Seeberger*⁸⁹ paved the way for acceptance of TPF in Hong Kong. The enactment of the Arbitration and Mediation (Third Party Funding)

⁸² *Id.* § 3.

⁸³ The Civil Law Act, 1909 § 5.

⁸⁴ PINSENT MASONS, JURISDICTION GUIDE TO THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 5 (2021).

⁸⁵ Legal Profession (Professional conduct) Rules, 2015 Rule 49B (Singapore).

⁸⁶ Shubhangi Nangunoori, Third Party Arbitration Funding – Comparative Analysis and Indian Perspective, LEXFORTI (Jun. 02, 2022), <https://lexforti.com/legal-news/third-party-arbitration-funding-comparative-analysis-and-indian-perspective/>.

⁸⁷ *Winni Lo v. HKSAR*, (2012) 15 HKCFAR 15 (observing that extent of applicability of doctrines of maintenance and champerty has watered down).

⁸⁸ *Cannonway Consultants v. Kenworth Engineering*, [1995] 1 HKC 179 (holding that doctrines of maintenance and champerty have no application in international arbitration matters).

⁸⁹ *Unruh v. Seeberger*, (2007) 10 HKCFAR 31 (holding expressly that TPF in foreign seated arbitration is valid).

(Amendment) Ordinance in 2017,⁹⁰ created an exception to the general ban on champerty and maintenance. Section 98G of this ordinance defines Third Party funding of arbitration as:

“Third party funding of arbitration is the provision of arbitration funding for an arbitration –

- (a) Under a funding agreement
- (b) To a funded party
- (c) By a third-party funder, and
- (d) In return for the third-party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.”⁹¹

Section 98H of the Ordinance further mandates that the TPF agreement must be documented in writing.⁹² Additionally, Section 98J stipulates that the third-party funder should not have any legally recognized interest in the arbitration other than the one outlined in the funding agreement.⁹³

The regulation of TPF in Hong Kong, is further reinforced by the Code of Practice for Third Party Funding of Arbitration (2018),⁹⁴ which lays down the practices, standards and other obligations of TP funders. Third party funders in Hong Kong are legally obligated to have a Hong Kong address and must maintain access to capital of at least 20 million HK Dollars (equivalent to US Dollar 2.6 million). They must also demonstrate the capacity to cover

⁹⁰ Arbitration and Mediation (Third-Party Funding) (Amendment) Ordinance, No. 6 (2017) (H.K.). The ordinance entered into force on Feb. 01, 2019.

⁹¹ *Id.*, § 98G.

⁹² *Id.* § 98H.

⁹³ *Id.* § 98J.

⁹⁴ The Code was enacted under Section 98P of the The Arbitration and Mediation (Third-Party Funding) (Amendment) Ordinance, 2017.

all debts and their aggregate funding liabilities for a minimum period of 36 months.⁹⁵ Furthermore, they are required to ensure that their promotional materials are not misleading and must take reasonable steps to inform the funded party of their right to seek independent legal advice regarding the funding agreement.⁹⁶ The code also sets several standards that the funders must adhere to, including disclosure of conflict of interest, maintaining the confidentiality of proceedings, and regulations pertaining to certain clauses of TPF agreement (such as clauses concerning autonomy of the funded party, liability for costs, grounds for termination, dispute relating to funding agreement).⁹⁷

However, similar to other common law jurisdictions, Hong Kong also prohibits conditional fee arrangements. This means that lawyers in Hong Kong are barred from entering into TPF agreements.⁹⁸ However, the Hong Kong Law Reform Commission is actively considering proposals for amendments to facilitate various forms of Outcome Related Fee Structures (ORFS), such as conditional fee arrangements,⁹⁹ damages-based agreements (DBAs)¹⁰⁰ and hybrid DBAs,¹⁰¹ especially in arbitration proceedings.¹⁰² This initiative is aimed to enhance Hong Kong's competitive edge as a prominent arbitration centre.

⁹⁵ Code of Practice for Third Party Funding of Arbitration (2018), § 2.5(2).

⁹⁶ Code of Practice for Third Party Funding of Arbitration (2018) § 2.1, 2.3.

⁹⁷ Code of Practice for Third Party Funding of Arbitration (2018).

⁹⁸ PINSENT MASONS, JURISDICTION GUIDE TO THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 13 (2021).

⁹⁹ *Id.*, at footnote 52. Conditional Fee arrangements mean that the lawyer charges no or low fee during the course of the proceedings and be paid a success fee if the client's claim succeeds.

¹⁰⁰ *Id.*, at footnote 53. DBA means a lawyer charges no fee during the course of the proceedings and receives payment as a percentage of the sum awarded if the client's claim succeeds.

¹⁰¹ *Id.* at footnote 54 Hybrid DBA means that a lawyer receives fees (usually at a discounted hourly rate) during the course of the proceedings and receives payments as a percentage of the sum awarded or recovered if the client's claim succeeds.

¹⁰² PINSENT MASONS, JURISDICTION GUIDE TO THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 13 (2021).

United Kingdom

The UK is the birthplace of the maintenance and champerty doctrines. These doctrines originated in medieval England.¹⁰³ However, over time they came to be viewed as archaic and outdated with their usage no longer considered to be in line with modern legal landscape. Consequently, the use of Third-Party Funding agreements gradually gained acceptance. In the case of *Ram Chandoo v. Chunder Mookerjee*,¹⁰⁴ The Privy Council has expressly stated that “TPF agreements are not inherently contrary to public policy”. This perspective was further reinforced in 1908 by the case of *British Cash and Parcel Conveyors v. Lamson Store Service Co*, which expressly declared these doctrines as obsolete and outdated in England.¹⁰⁵ Further, enactment of the Criminal Law Act of 1967 marked a significant milestone by abolishing these two doctrines as both crimes and torts.¹⁰⁶ However, it is essential to note that in cases where public policy is being violated, the abolition will not operate as a bar on the determination of wrongdoing.¹⁰⁷

As a result of these legal relaxations, the TPF market experienced rapid growth in the United Kingdom. Since 1967, TPF agreements pertaining to arbitration and mediation (and related court proceedings) have been permitted.¹⁰⁸ Furthermore, the statutory provisions for security for costs under the English law as outlined in the Civil Procedure Rules¹⁰⁹ and the London

¹⁰³ Winfield, *Assignment of Choses in Action in Relation to Maintenance and Champerty*, 35 L. Q. REV 143 (1919).

¹⁰⁴ *Ram Chandoo v. Chunder Mookerjee*, [1876] 2 App Cas 186.

¹⁰⁵ *British Cash and Parcel Conveyors v. Lamson Store Service Co*. [1908] 1 K.B. 1006 (Eng.).

¹⁰⁶ See The Criminal Law Act, 1967, §§ 13, 14. See also Shubhangi Nangunoori, *Third Party Arbitration Funding – Comparative Analysis and Indian Perspective*, LEXFORTI (Jun. 02, 2022), <https://lexforti.com/legal-news/third-party-arbitration-funding-comparative-analysis-and-indian-perspective/>.

¹⁰⁷ *Id*, Section 14(2).

¹⁰⁸ PINSENT MASONS, *JURISDICTION GUIDE TO THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION* 06 (2021).

¹⁰⁹ Civil Procedure Rules, r. 25.12, Apr. 26, 1999 (Eng.).

Court of International Arbitration Rules¹¹⁰ empower courts to demand security in cases involving third party funding, in spite of the doctrine of privity. Additionally, the English Arbitration Act further empowers the courts to dismiss a claim if there is a non-compliance with a peremptory order for security for costs.¹¹¹ This mechanism safeguards the overarching interests of both the claimant, by safeguarding his right to access to justice, as well as the respondents, by protecting his right to financial protection of their costs.¹¹² For instance, in *Essar Oilfields Services Limited v. Norscot Rig Management Pvt. Ltd.*,¹¹³ third-party funding was classified as a part of “other costs” allocated to either parties depending on their conduct during the arbitration proceedings under Section 59(1)(c) of the Arbitration Act, 1996.¹¹⁴

However, unlike Australia, Singapore and Hong Kong, the UK lacks a specific regulation concerning TPF. Instead, the current TPF framework is the outcome of various court decisions from 2002 to 2005.¹¹⁵ Due to lack of a formal statutory regulation, some of the funders have chosen to adopt a mode of self-regulation by establishing an association called the Association of Litigation Funders of England and Wales (ALF).¹¹⁶ This association has adopted and implemented a code known as the Code of Conduct for Litigation

¹¹⁰ London Court of International Arbitration Rules, r. 25(2), Oct. 1, 2014.

¹¹¹ Arbitration Act 1996, c. 23, § 41(6) (Eng.).

¹¹² William Kirtley & Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant is Relying upon Third-Party Funding?*, 30 J. INT'L ARB. 17,19 (2013).

¹¹³ (2016) EWHC 2361 (Comm) (Commercial Court, Queen's Bench Division).

¹¹⁴ The Arbitration Act, 1996, Section 59(1)(c), (UK).

¹¹⁵ R (on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions (No. 2) [2002] EWCA Civ 932; *Arkin v. Borchard Lines Ltd & Others*[2005] EWCA Civ 655 (Arkin)).

¹¹⁶ ASSOCIATION OF LITIGATION FUNDERS, <https://associationoflitigationfunders.com/> (last visited Apr. 13, 2023) (although the membership of the association is voluntary, most funders of England and Wales have joined the association).

Funder, 2018 which outlines the standards of practice and behaviour expected from TP Funders.¹¹⁷

Furthermore, the legal landscape in the UK offers a great deal of flexibility when it comes to TPF agreements. The current regulatory system permits legal practitioners (and other funders) to engage into a wide range of contingent and conditional fee arrangements with clients.¹¹⁸ Moreover, there is no general disclosure obligation for funders, and hence, they are not required to disclose their funding arrangements to either other parties involved, or even to the courts.¹¹⁹ Lastly, the robust non-disclosure clauses enforcement regime of the UK allows the enforcement of broadly framed non-disclosure clauses with the funders, which ensures that communication with the funders can be kept privileged and confidential.¹²⁰

Table 1. Comparison of TPF Regime in Australia, Singapore, Hong Kong and United Kingdom

Country	Recognition of TPF	Statutory Regulation of TPF	Cases in which Third party funding allowed	Are there restrictions on who can be a funder?	Security Measures for Litigants as consumers	Is there a limit on Funder’s Fee
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¹¹⁷ Code of Conduct for Litigation Funders, 2018 (the original code was adopted in 2011 and was revised in 2018).

¹¹⁸ PINSENT MASONS, JURISDICTION GUIDE TO THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 06 (2021).

¹¹⁹ See *In the Matter of Edwardian Group Limited*, [2017] EWHC 2805 (Ch.) (rejecting an application for an order to disclose the identity of the litigation funder, holding that it was irrelevant to the wider dispute).

¹²⁰ PINSENT MASONS, JURISDICTION GUIDE TO THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 06 (2021).

Australia	Yes	Yes (The Corporations Amendment (Litigation Funding) Regulations, 2020).	N/A	Yes – lawyers or law firms cannot charge contingency fee	Yes (General contract law and consumer protection under the Australian Securities and Investments Commission Act, 2001	No
Singapore	Yes (torts of champerty & maintenance have been abolished)	Yes - Civil Law (Third-Party Funding) Regulations, 2017	International & Domestic arbitration and associated cases	Yes – Only Professional funders are permitted, as provided by Regulation 4 of Civil Law (Third-Party Funding) Regulations, 2017. Lawyers cannot act as Third Party Funders	Yes – Professional Regulation s, and Civil Law Regulation s	No

Hong Kong	Yes	Yes - The Arbitration and Mediation (Third-Party Funding) (Amendment) Ordinance, 2017; Code of Practice for Third Party Funding of Arbitration (2018)	International Arbitration and Mediation	Yes – They must provide a Hong Kong Address and must maintain the prescribed funds. Lawyers cannot be Third Party Funders.	Yes - Code of Practice for Third Party Funding of Arbitration (2018)	No
United Kingdom	Yes	No	Relevant Disputes – defined as disputes whose resolution is to be achieved principally through litigation procedures in the Courts of England and Wales.	No. But as prescribed in the Code of litigation Funders. However, lawyers can act as third Party funders.	Common Law test of public policy.	No

Enforceability of third-party funding in India

Following the general tradition within common law systems, in India also the agreements resembling champerty were deemed both illegal as well as tortious.¹²¹ However, within the Indian legal framework, the applicability of these doctrines has only been extended to transactions that exhibited the characteristics of being extortionate, inequitable or unconscionable and were not entered into with a bona fide object.¹²² A constitutional bench of Supreme Court has held that with the exception of advocates,¹²³ champerty contracts involving third parties (non-legal persons) are not per se illegal, and as such these transactions are not against the public policy and public morals.¹²⁴ This position was reiterated and reaffirmed by Hon'ble Supreme Court in the case of Bar Council of India v. A. K. Balaji, wherein the Apex Court clarified that third party funding is legally permissible as long as the party providing funding for the litigation and expecting repayment is "not a lawyer".¹²⁵ Additionally, as per the Indian Contract Act, 1872 a TPF agreement featuring an object or consideration which is extortionate or unconscionable would be unenforceable.¹²⁶

However, it is pertinent to note that the TPF is not entirely unchartered territory in India. In the Engineering, Procurement and Construction (EPC) sector, companies like the Hindustan Construction Company Limited and Patel Engineering have successfully leveraged third

¹²¹ Christopher Hodges et al., *Litigation Funding: Status and Issues* 12 CTR. FOR SOCIO-LEGAL STUD., OXFORD AND LINCOLN L. SCH., U. LINCOLN (2012).

¹²² Ram Coomar Coondoo v. Chunder Canto Mookerjee, 1876 SCC OnLine PC 19.

¹²³ Bar Council of India Rules, 1975, rules 20 & 21.

¹²⁴ *In Re: 'G' A Senior Advocate of the Supreme Court*, AIR 1954 SC 557.

¹²⁵ Bar Council of India v. A. K. Balaji (2018) 5 SCC 379.

¹²⁶ The Indian Contract Act, 1872, §23.

party investors to monetize their litigation claims.¹²⁷ Furthermore, several states like Maharashtra, Uttar Pradesh, Tamil Nadu, Gujarat, Odisha, Andhra Pradesh and Madhya Pradesh have expressly recognised TPF in civil suits and have amended the Code of Civil Procedure (CPC). These amendments grant the Court the power to make the funding entity a party to the case and deposit litigation costs with the court.¹²⁸ This measure is intended to ensure that the funder does not withdraw from fulfilling his commitments (by backing out from paying the amount promised), in the middle of the legal proceedings for any reason, including apprehension of the results of the proceedings.

Furthermore, the Supreme Court's interpretation of Section 45 of the Arbitration and Conciliation Act of 1996¹²⁹ in the case of *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.*,¹³⁰ is very relevant in the context of TPF. The hon'ble court in this case has ruled that when the performance of the principal agreement depends on the execution, performance, or assistance of an ancillary agreement that collectively impacts the dispute, then the transaction in such cases should be viewed as a composite one to serve the interests of justice. This interpretation has the potential to bring TPF under the purview of arbitration law in India. It is significant to highlight that in the case of arbitration, there is no specific legal provision that expressly bars TPF and the statute governing arbitration does not address these issues as well. However, even extant provisions of law¹³¹

¹²⁷ Amita Katragadda, Shrey Srivastava and Priyal Modi, *Third Party Funding*, CYRILAMARCHAND BLOGS (June 22, 2020), <https://corporate.cyrilamarchandblogs.com/2020/06/need-to-litigate-third-party-funding/>.

¹²⁸ The Code of Civil Procedure, 1908, Order XXV Rule 1.

¹²⁹ The Arbitration and Conciliation Act, 1996, §45.

¹³⁰ *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.*, 2013 (1) SCC 641.

¹³¹ See the amendments by High Courts of Bombay, Gujarat, Madhya Pradesh and Allahabad in Order 25 of the Code of Civil Procedure, 1908 whereby courts are empowered in those States to compel third-party financiers to furnish security for costs.

and decisions¹³² only deal with whether or not such agreements are enforceable and not the regulation thereof.¹³³ Moreover, it is worth mentioning that TPF has also received favourable attention in the report of the High-Level Committee tasked to review the institutionalisation of arbitration mechanisms in India.¹³⁴

Lastly, as India currently lacks a regulatory framework to govern third-party funding, there exists a great deal of ambiguity with respect to issues such as: Who can provide TPF? To Whom TPF can be provided? In which cases TPF can be provided? etc. However, there have been a few cases that have established the legality of TPF in India as long as it is aligned with public policy. For instance, in *BCI v. A.K. Balaji* (2015), the Court has indicated that there are no apparent restrictions in India, barring lawyers, as to the persons who can finance litigation and subsequently receive repayment based on the outcome.¹³⁵

Third party funding and public policy

As previously emphasized, in India, an agreement is deemed champertous only if it contradicts public policy or if its terms are immoral, unjust or shocking to the conscience of law.¹³⁶ It has been reiterated in several arbitration decisions that TPF agreements are different from Maintenance and Champerty. For instance, in the case *G*, Senior Advocate, *In re*,¹³⁷ the

¹³² *S.V.R. Mudaliar v. Rajabu F. Buhari*, (1995) 4 SCC 15.

¹³³ Arunadhri Iyer and Ashwin Mathew, *Third-Party Funding of Litigation - A Damocles Sword or a Welcome Step*, SCC ONLINE (Mar 27, 2021), available at <https://www.scconline.com/blog/post/2021/03/27/litigation-2/>.

¹³⁴ Report of the High Level Committee to review the Institutionalisation of Arbitration Mechanism in India (2017).

¹³⁵ CHRISTOPHER HODGES ET AL., *LITIGATION FUNDING: STATUS AND ISSUES* 12 (Ctr. for Socio-Legal Stud., Oxford and Lincoln L. Sch., U. Lincoln 2012).

¹³⁶ *Dr.V.A.Babu Legal v. State Of Kerala*, 1995 SCC (5) 457.

¹³⁷ *In Re: 'G' A Senior Advocate of the Supreme Court*, AIR 1954 SC 557.

constitutional bench of the apex court differentiated between litigations involving a champerty contracts with legal professionals and those involving non-lawyers. The Apex court ruled that when only non-legal persons are involved, such transactions do not run counter to public policy.¹³⁸ It furthers the position of law established by the Privy Council, in *Ram Lal v. Nil Kanth*,¹³⁹ wherein it was ruled that "agreements to share the subject of litigation, if recovered in consideration of supplying funds to carry it on, are not in themselves opposed to public policy".

However, it is pertinent to highlight that "public policy" is a dynamic, variable and uncertain concept and has often been described as an "untrustworthy guide" or an "unruly horse" capable of expansion and modification.¹⁴⁰ Anything that obstructs the administration of justice, violates a statute, restrains liberty and natural or legal rights or is in conflict with established ethical and moral principles may be deemed to be contrary to public policy.¹⁴¹ Further, in accordance with the principles of contract law contained in the Contract Act, 1872, any agreement which tends to injure public welfare can be regarded as running counter to public policy.¹⁴²

Lastly, The Arbitration and Conciliation (Amendment) Act of 2015 has provided clarity regarding the circumstances in which an arbitral award would be deemed to be in violation of public policy of India.¹⁴³ The Act lays down three grounds under which arbitral awards are scrutinised for ascertaining whether they are in conflict with the public policy- firstly, it

¹³⁸ Bar Council of India's Standards of Professional Conduct and Etiquette, Ch. II, Part VI, R. 20 and 21; Bar Council of India Rules, 1975 [read with S. 49(1)(c) of the Advocates Act, 1961 read with the proviso thereto].

¹³⁹ *Ram Lal v. Nil Kanth*, 1893 SCC OnLine PC 7.

¹⁴⁰ *Central Inland Water Transportation Co v. Brojo Nath Ganguly*, AIR 1986 SC 1571.

¹⁴¹ *P. Rathinam v. Union of India*, AIR 1994SC 1844.

¹⁴² The Indian Contract Act, 1872, § 23.

¹⁴³ The Arbitration and Conciliation (Amendment) Act, 2015, § 34(2)(A).

should not be affected by corruption or fraud; secondly, it should not contravene the fundamental policy of Indian law and thirdly, it should not be in conflict with the most basic notions of morality or justice.¹⁴⁴ Therefore, if a foreign award is found to transgress any of these three criteria, they will be considered to be against India's public policy and will not be enforced.

Suggestions for regulation of third-party funding in India

Despite the numerous advantages of TPF outlined earlier, there are also several risks and concerns associated with its use. For instance, in an arbitration proceeding, the possibility of existence of some connection between the financier and the arbitrator¹⁴⁵ might lead the respondent blocking the arbitration at the outset or even challenging it on the ground of public policy.¹⁴⁶ It might also result in unnecessary inference in the proceedings and potential erosion of the claimant's autonomy, or breach of confidentiality. Therefore, it becomes imperative to regulate TPFs.

To start with, TPF agreements should be entered into with a "bona fide" objective and a genuine intention of supporting a valid claim. The primary rationale behind third-party funding is that exorbitant costs of litigation or arbitration do not hinder parties with limited financial means from accessing justice to have access to justice.¹⁴⁷ Further, to ensure transparency and prevent conflict of interests among parties, the existence of any TPF agreement, including identity of the funder should be disclosed, as is the practice in Singapore.¹⁴⁸ Additionally, given India's socio-economic

¹⁴⁴ Pierre Tercier and Dilber Devitre, Public Policy Exception - A Comparison of the Indian and Swiss Perspectives, 5 INDIAN J. ARB. L 7 (2016) .

¹⁴⁵The Arbitration and Conciliation Act, 1996 § 12, read with Schedule 5.

¹⁴⁶ The Arbitration and Conciliation Act, 1996, § 34(2)(b)(ii).

¹⁴⁷ Tara Santosuosso & Randall Scarlett, Third-Party Funding in Investment Arbitration : Misappropriation of Access to Justice Rhetoric by Global Speculative Finance, 60 B.C. L. REV. E. SUPP. I-8 (2019).

¹⁴⁸ Legal Profession (Professional Conduct) Rules, 2015, Rule 49A.

context, it is crucial to ensure that lawyers and law firms do not possess any significant financial stake in the TPF agreement.¹⁴⁹

From the funders' standpoint, the TPF agreement could be perceived as an investment which would require an evaluation of the claim's strength and validity, the potential returns that they are likely to receive, and the likelihood of enforcing the award.¹⁵⁰ However, this situation could potentially result in the misuse of financial power leading to undue interference in the proceedings and potential "unfair bargains".¹⁵¹ Hence to safeguard the litigants interests, there should be a restriction upon (by a statute or regulation) and within the TPF agreement (a legally mandated clause) regarding the extent to which the financier can interfere in the proceedings.

Further, it is imperative that a TPF agreement should be in compliance with the general principles of contract law provided in the Indian Contract Act, 1872 and the Consumer Protection Act, 2019 including adhering to the test related to public policy,¹⁵² fairness in contractual terms, absence of unconscionability, and prevention of unjust enrichment, and safeguards against undue influence. An award or an agreement is said to be violating public policy if it is contrary to the fundamental policy, justice or morality, national interests of India or is inherently illegal.¹⁵³ It is pertinent to remember that TPF, in its essence, is in furtherance of morality, justice and ultimately, public policy as it facilitates access to justice and the legal system.

¹⁴⁹ *Id.*, Rule 49B.

¹⁵⁰ Joe Tirado et al., *The Costs and Funding of International Arbitration*, in *DEFINING ISSUES IN INTERNATIONAL ARBITRATION* 289 (Julio César Betancourt ed, 2016).

¹⁵¹ Frank Garcia, *Third Party Funding as Exploitation of the Investment Treaty System*, 59 B.C. L. REV. 7 (2018).

¹⁵² Arthad Kurlekar & Gauri Pillai, To be or not to be : the oscillating support of Indian courts to arbitration awards challenged under the public policy exception, 32 *ARB. INT'L* 179-198 (2016).

¹⁵³ *ONGC v. Western Geco International Limited*, (2003) 5 SCC 705.

Therefore, it is critical to ensure that TPF arrangements are not unreasonable or unfairly prejudicial to the opposing party. Further, it is crucial that the underlying motives behind such funding are not malicious, which may include gambling in litigation, oppression of other parties, encouraging unrighteous suits and so on. So long as the terms of the agreements are not unjust or shocking to the conscience of law, they are not opposed to public policy.¹⁵⁴

Next, it should be ensured that the Tribunal and the parties are legally obligated to maintain confidentiality throughout the arbitral proceedings as per the provisions of the Arbitration and Conciliation (Amendment) Act, 2019.¹⁵⁵ There exists a potential risk of the possibility of breach of confidentiality on account of third-party agreements and therefore, it is imperative to implement appropriate measures to prevent such breaches from happening.¹⁵⁶

Furthermore, India should consider establishing a system to regulate the financial capacity of funders. In this regard, a cue can be taken from Singapore and the United Kingdom. In Singapore, Section 4(1)(b) of the Civil Law (Third-Party Funding) Regulations¹⁵⁷ stipulates the minimum paid-up share capital as a requirement for eligibility to offer third-party funding. Similarly, the Code of Conduct of the Association of Litigation Funders of England and Wales¹⁵⁸ mandates its members to maintain capital adequate enough to cover the funding liabilities for at least thirty-six months and have

¹⁵⁴ Ridhima Sharma, *Third Party Funding in International Commercial Arbitration*, 12 *NUALS L.J.* 61 (2018).

¹⁵⁵ *The Arbitration and Conciliation (Amendment) Act, 2019*, Section 43A.

¹⁵⁶ Antje Baumann and Michael M. Singh, *New Forms of Third-Party Funding in International Arbitration: Investing in Case Portfolios and Financing Law Firms*, 7 *INDIAN J ARB. L* 29 (2019).

¹⁵⁷ *Civil Law (Third-Party Funding) Regulations, 2017*, Section 4(1)(b) (Singapore).

¹⁵⁸ *Code of Conduct of the Association for Litigation Funders 2011*, § 9.4 (Eng.).

access to a specified minimum capital amount. Such measures, just like in the banking sector, are critical to ensure the financial stability of TPF market and its participants.¹⁵⁹

Lastly, considering the recent surge in demand for TPF in international arbitration, the absence of clear regulations has made it challenging for India to address the risks associated with TPF. These risks include issues related to transparency, confidentiality of the proceedings, and safeguarding the interests of the litigating parties.¹⁶⁰ India should develop a clear and comprehensive regulatory framework for TPF that included strict rules regarding: (a) the financier's right to interfere; (b) penalties for duress and threat; (c) the right to terminate the funding agreement; and (d) rules regarding confidentiality and disclosures.¹⁶¹ With a clear, well-defined and robust regulatory framework for third-party funding, India will be able to facilitate the growth of the TPF market, ultimately enhancing access to justice. Such a clearly laid down framework would provide incentives for individuals, who might otherwise be hesitant due to financial constraints, and encourage them to pursue litigation or arbitration ensuring that meritorious claims are abandoned.

Conclusion

Though TPF is still small and niche¹⁶² in India, it has gained widespread acceptance in other parts of the world, and is rapidly becoming an

¹⁵⁹ Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe (CCBE), Rule 3.6.

¹⁶⁰ Pranav V. Kamnani and Aastha Kaushal, Indian Journal of Arbitration Law Regulation of Third Party Funding of Arbitration in India : The Road Not Taken, 8 INDIAN J. ARB. L. 151 (2020).

¹⁶¹ James Clanchy, Navigating the Waters of Third Party Funding in Arbitration, 82 (3) INT'L J. ARB, MEDIATION & DISP. MGMT. 222 (2016).

¹⁶² LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 1 (2d ed. 2017).

indispensable part of international arbitration proceedings¹⁶³ With increase in demand for arbitration, the costs involved in the same have also increased.¹⁶⁴ Hence it is imperative for India to adopt and facilitate the practice of third-party funding by formulating down clear regulations. Such regulations would be especially beneficial to small businesses that do not have the budget to allocate funds separately for legal expenses.¹⁶⁵

Furthermore, over the years, arbitration has gained significant prominence on a global scale particularly in cross-border disputes, where international arbitration is the preferred method of dispute resolution. India has also adopted a pro-arbitration stance by embracing and promoting a preference for institutional arbitration.¹⁶⁶ Moreover, the courts in India have delivered crucial decisions on matters regarding remit of public policy,¹⁶⁷ fraud¹⁶⁸ and doctrine of severability¹⁶⁹ in enforcement of arbitral awards including foreign ones. This provides India with well-established set legal principles that could be used to formulate safeguard against misuse of third-party funding arrangements.

Additionally, as the demand for arbitration continues to rise, so do the associated costs.¹⁷⁰ In particular, international arbitration proceedings often

¹⁶³ P. Rathinam v. Union of India, AIR 1994SC 1844.

¹⁶⁴ NICK ROWLES-DAVIES, *THIRD-PARTY LITIGATION FUNDING* 15 (2014).

¹⁶⁵ Jef De Mot et al., *Third-Party Funding and its Alternatives: An Economic Appraisal*, LEIDEN L. SCH. 3 (2016).

¹⁶⁶ Arbitration and Conciliation (Amendment) Act, No. 33 of 2019, Statement of Objects and Reasons.

¹⁶⁷ Shri Lal Mahal v. Progetto Grano Spa, (2014) 2 SCC 433.

¹⁶⁸ WSG v. MSM Satellite, (2014) 11 SCC 639; Swiss Timing v. Organizing Committee, (2014) 6 SCC 677.

¹⁶⁹ Mulheim Pipecoatings v. Welspun Fintrade, (2014) 2 AIR Bom R 196.

¹⁷⁰ Duarte G. Henriques, *Arbitrating Disputes in Third-Party Funding*, 85 INT'L J. ARB., MEDIATION & DISP. MGMT. 171 (2019).

entails exorbitant costs¹⁷¹ which may sometimes exceed millions of dollars.¹⁷² This financial burden prompts the parties to explore funding options even before delving into the substance, strength and validity of their claim.¹⁷³ TPF has emerged as a vital resource in this context.

Lastly, it is critical to address and resolve the existing gaps in third-party funding. TPF can be responsible for the creation of certain imbalances between the parties of a proceeding by way of information asymmetry as there is no obligation to divulge the existence or details of TPF, if any. There is also the risk of arbitral hit and run¹⁷⁴ where frivolous and inflated claims make the arbitration costs unrecoverable.¹⁷⁵ Therefore, it is necessary for India to act pro-actively and enact regulations for TPF.¹⁷⁶ Such a step would not only enhance India's standing as a global arbitration hub,¹⁷⁷ but will also facilitate the growth of the TPF industry in India in a transparent and fair manner.

¹⁷¹ FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 686 (Emmanuel Gaillard & John Savage eds., 1999).

¹⁷² Bernard Hanotiau, *The Parties' Costs of Arbitration*, in 4 EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION 213 (Yves Derains & Richard H. Kreindler eds., 2006).

¹⁷³ Philippe Cavaleros, *In-House Counsel Costs and other Internal Party Costs in International Commercial Arbitration*, 30 ARB. INT'L 145 (2014).

¹⁷⁴ RSM Prod., ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, ¶ 33 (Aug. 13, 2014).

¹⁷⁵ The Arbitration and Conciliation Act, 1996, §12, read with Schedule 5.

¹⁷⁶ DEP'T OF LEGAL AFF., REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALIZATION OF ARBITRATION MECHANISM IN INDIA 43 (2017).

¹⁷⁷ Ravi Shankar Prasad, *Changes in law needed to make India hub of arbitration*, FIN. EXPRESS, (Jul. 18, 2019).