



**INSOLVENCY
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An Indian Institute of Excellence in Insolvency

JOINT STUDY
ON
**PRICE DISCOVERY IN
DISTRESSED ASSETS**

**THIRD-PARTY FUNDING
IN INSOLVENCY**

**INSOLVENCY LAW ACADEMY & BURFORD CAPITAL
RESEARCH PROJECT REPORT**

Burford

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FOREWORD

The Insolvency and Bankruptcy Code 2016 (IBC) is a blue-chip reform of the 21st Century India. IBC has come a long way since the first firm was admitted into the corporate insolvency resolution process on 17 January 2017, but its full potential is yet to be realised. The objective of any insolvency procedure is to maximise returns for creditors. The mechanism used to achieve that goal depends on circumstances and the availability of assets. Usually, the greatest returns to creditors are achieved by maintaining the business as a going concern. Many impediments continue to stand in the way of maximisation of value marring the progress of IBC. There is an urgent need to address these roadblocks. A Study on the Efficiency of IBC by The Insolvency and Valuation Standards Board of India of The Institute of Chartered Accountants of India (ICA) suggests that the recovery percentage against fair value has declined in recent times noting that either recent resolutions yielded lower recoveries or fair value estimates have increased, leading to a widening gap between expected and actual recoveries.

India has entered an exciting phase in its history. Viksit Bharat is the new buzzword! The next two decades present an unparalleled opportunity for India to emerge as a leading economy of that time, a prospect that arises only once in several centuries. Achieving these lofty goals will require consistent concerted effort and a wide variety of reforms. Efforts are needed to make the process for resolution of distressed assets, within and outside of the IBC, attractive by ensuring optimal price discovery for assets. There is a need to further deepen market for resolution applications to ensure a vibrant market exists and thus offer competitive process and better price discovery.

Optimisation of price discovery is dependent on many factors. State of secondary market for distressed assets, availability of interim finance and use of litigation funding are amongst the elements that influence price discovery. Third party funding (TPF) has a significant nexus with price discovery and can have significant strategic benefits. It is a mechanism to facilitate the recovery of claims by individuals and companies, especially those under financial stress, by funding the costs of legal proceedings. The IBC also allows the liquidator to assign not-readily recoverable receivables, including from avoidance transactions. A litigation funder finances the cost of the litigation in exchange for a share of any recovery made through the proceedings, rather than the claimant paying the costs of the same. It gives an opportunity to the litigation funder to invest in a specific claim according to its potential. Third-party litigation funding is a popular way in many developed economies to overcome this constraint.

Insolvency Law Academy (ILA) has started many studies and initiatives to identify the impediments and grey areas in optimising price discovery for assets in the process for resolution of distressed assets, within and outside of IBC, with focus on secondary market for distressed assets, interim finance and litigation funding. This study, in collaboration with Burford Capital, on third party funding is to provide information on how TPF could be used in India in the context of distressed assets and companies in financial distress, where distressed assets and company claims may be valuable assets that are not being realised, due to the cost and risk factors associated with resolution of legal disputes, be it through litigation or arbitration.

We thank Dr. Sulette Lombard, Associate Professor at the University of South Australia, and Mr. Sanjeev Pandey, Consultant, DSK Legal and Ex-Head of IBC Division, State Bank of India for undertaking this valuable study.

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PART A: INTRODUCTION

Civil litigation is costly – a fact recognised across the globe, and also in India.¹ It has been said that ‘[l]itigation has become a luxury for the rich’.² In a commercial context, it is more likely that entities such as large companies and banks may have the necessary resources to carry the cost burden of litigation. These commercial entities may thus not be prevented from pursuing civil remedies due to the burden of legal costs to the same extent as other parties. However, even for commercial entities, legal costs present an issue, due to the fact that high litigation costs divert funds and resources away from business activities.³ In addition, litigation carries an inherent risk as the outcome may not necessarily be favourable to the claimant; a claimant may well end up in a position where the litigation rendered no benefits due to their claim being unsuccessful, while being burdened with significant legal costs, and potentially also being liable for the costs of the other party to the dispute.

Various methods are employed across jurisdictions to overcome this cost hurdle, including, for example, contingency fee arrangements (also referred to as damages-based agreements (DBAs) in the United Kingdom, for example, and involves lawyers providing services on the basis that they will be entitled to share in the proceeds of a successful action, but will not be entitled to any benefit if the action is unsuccessful);⁴ conditional fee arrangements (in its simplest form this involves lawyers providing services on a no-win no-fee basis, but different from contingency fees in so far as a successful action would allow the lawyer to claim professional fees calculated at hourly rates in the usual way, but not a share of the proceeds of the action);⁵ litigation insurance, including after-the-event insurance (ATE); public interest/government funding bodies; and third-party funding. Third-party funding (TPF), in particular, has become a valuable mechanism to overcome the hurdle of exorbitant legal costs, which led to significant growth in the commercial litigation funding industry.⁶

¹ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 34; Debajyoti Ray Chaudhuri and Radhika Agarwal, ‘Litigation Funding: A Breakthrough for Avoidance Proceedings under IBC’ in *Quinquennial of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India, Oct 2021), Ch 28, 305; Mayank Mishra, Mohit Chadha, Vaishnavi Rao and Swati Mittal, ‘Third Party Funding – Is India Ready?’ *IndusLaw* (July 2021), 1.

² Law Commission of India, Report No 128: Cost of Litigation (1988) (available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080883-3.pdf>), 1, as referred to in Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 35.

³ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 35.

⁴ Contingency fee arrangements are prohibited in some jurisdictions, including India. See also Bar Council of India Rules 1975, Section II, r 20; and cases such as *Re Mr ‘G’, A Senior Advocate of the Supreme Court* 1955 1 SCR 490, [11]; *Bar Council of India v AK Balaji* [2018] INSC 215, [35].

⁵ Conditional fee arrangements are prohibited in some jurisdictions, including India. See also Bar Council of India Rules 1975, Section II, r 20; and cases such as *Re Mr ‘G’, A Senior Advocate of the Supreme Court* 1955 1 SCR 490, [11]; *Bar Council of India v AK Balaji* [2018] INSC 215, [35].

⁶ Part B, par 1 below.

In general, TPF involves an agreement between a plaintiff or claimant and a commercial funder in terms of which the funder undertakes to meet the legal costs of the litigant (typically a claimant) in exchange for a fixed percentage of the proceeds of a successful action.⁷ The funder has no stake in the claim, apart from the contractual arrangement with the litigant. The funder carries the risk of the action being unsuccessful, in which event the funder will be liable for the legal costs, without receiving any benefit. The funder furthermore does not act as the legal representative for the claimant. It would therefore be necessary to arrange lawyers to act for the claimant in the legal proceedings, as a result of which, tripartite contractual arrangements between funder, litigant and lawyer are typical.⁸ While this mechanism is commonly referred to as ‘litigation’ funding, its use extends to legal disputes outside of a traditional ‘litigation’ context, and it can also apply with great success in the context of arbitration. In order to recognise this broad utility, this Research Report (**Report**) will refer to the mechanism as ‘third-party funding’ (TPF) throughout, rather than ‘third-party litigation funding’. This is particularly relevant for the dispute resolution landscape in India, with increased emphasis on the utility of arbitration as a means to resolve legal disputes,⁹ and where TPF could also fulfil an important function in light of the significant costs associated with arbitration.¹⁰

It is also relevant to recognise that while TPF typically refers to financial support obtained from commercial funders, third-party funding could also be obtained from other third-party sources. One such source, which is of particular relevance for the purposes of this Report, is third-party funding obtained from creditors of a company in financial distress. Creditors may potentially be willing to fund legal proceedings involving enforcement of the company’s rights in order to receive a priority distribution in respect of the proceeds of a successful company claim. While the focus of this Report is on commercial third-party funding, brief mention will be made of creditor funding where relevant.

The purpose of this Report is to provide information on how TPF could be used in India in the context of distressed assets and companies in financial distress,¹¹ where distressed assets and company claims may be valuable assets that are not being realised, due to the cost and risk factors associated with resolution of legal disputes, be it through litigation or arbitration. The Report is structured as follows: Part A introduces the Report;

⁷ Funding of claims of defendants is theoretically possible. However, in light of the fact that funders are profit-driven, the likelihood of funding of defendant claims is small.

⁸ Michael Duffy, ‘Two’s Company, Three’s a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory’ (2016) 39(1) *University of New South Wales Law Journal* 165.

⁹ See in general Hiro Naraindas Aragaku, ‘Arbitration Reform in India’, in Anselmo Reyes and Weixia Gu, *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Bloomsbury Publishing, 2018), Ch 11.

¹⁰ Aratrika Deb, ‘Third Party Funding in Investment Arbitration: The India Story’ (2019) 1(1) *GIBS Law Journal* 12 suggests that the ‘credibility of arbitral awards in India have been profusely affected by the unrealistic costs associated with it’.

¹¹ TPF can be used with great success in different contexts. The potential for TPF to be used in India in relation to large commercial disputes involving infrastructure projects is not negligible. TPF is further used extensively in a class action context across the globe. However, due to the nature and focus of this Report on distressed assets and companies in financial distress, detailed consideration of the use of TPF in that context falls outside the scope of the Report, which will focus only on use of TPF in insolvency and in relation to distressed assets.

Part B provides contextual background to explain the litigation funding landscape; to discuss the legal ecosystem for TPF in India; and to explore the differences between litigation and arbitration when considering the use of TPF; Part C discusses the policy justifications for and legitimacy of TPF, along with practical concerns and ethical considerations in relation to the use of this mechanism; Part D focuses on TPF in an insolvency context; Part E considers the regulation of TPF; Part F provides practical insights from industry; Part G provides recommendations; and Part H concludes the Report. The following Appendices are provided: Appendix A – Executive Summary of Recommendations; Appendix B – Comparative Table: TPF in Insolvency; Appendix C – Survey Questions; Appendix D – Reference List.

The legal position is current as of 1 May 2025.

PART B: CONTEXTUAL BACKGROUND

1 Litigation Funding Landscape

Commercial funding of litigation has developed into a significant industry over the last decade or two. In fact, the litigation funding investment market size was estimated at USD17.9 billion in 2022, and according to some is expected to grow from USD19.4 billion in 2023 to USD40.4 billion by 2032,¹² or to USD43.05 billion by 2033, at an anticipated compound annual growth rate of 9.6%, according to a study conducted by Future Market Insights.¹³ According to the same study, the Indian litigation funding market is expected to grow at a compound annual growth rate of 10.6% over the same period.

Commercial litigation funding is a developing industry in India, where there is a small number of funders currently operating, for example, Advok8 and LEGALpay.

It appears that there may be significant scope for development of the litigation funding industry in India for a number of reasons, including the lack of other funding options due to contingency fee arrangements and conditional fee arrangements not being permitted. In addition, India is emerging as a global economic giant.¹⁴ India recorded foreign direct investment of USD 71.35 billion in the 2023 financial year, and USD 70.95 billion in the 2024 financial year.¹⁵ Further, and more specifically, in 2023 corporate legal expenses in India increased by nearly 21% compared to the previous financial year, with companies spending approximately USD7.69 billion in legal expenses for the financial year ending

¹² Market Research Future Report: Litigation Funding Investment Market (available at <https://www.marketresearchfuture.com/reports/litigation-funding-investment-market-22886>).

¹³ Future Market Insights: Litigation Funding Investment Market – Trends & Forecasts 2023-2033 (available at <https://www.futuremarketinsights.com/reports/litigation-funding-investment-market>).

¹⁴ Meenal Garg, 'Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies' (2020) 6(2) *NLUJ Law Review* 71, 87 (electronic copy available at <https://ssrn.com/abstract=3574469>)

¹⁵ India Brand Equity Foundation (IBEF) FDI Report, January 2025 (available at <https://www.ibef.org/economy/foreign-direct-investment#:~:text=India's%20FDI%20inflows%20reached%20record,the%20major%20receivers%20of%20FDI>).

March 2023.¹⁶ Legal expenses include a broad category of expenses, including government fines, stamp duties and so forth and are not restricted to litigation expenses in the strict sense. However, it is estimated that annual litigation expenses are significant.¹⁷ The Indian disputes market has therefore rightly been described as ‘difficult to ignore’.¹⁸

2 Legal Ecosystem for TPF in India

It is important to consider the operation and potential success of TPF against the background of the particular legal ecosystem, as well as market, in which it is operating. It is true that TPF is not prohibited in India as such. However, elements of the legal ecosystem in India may serve to prevent TPF from developing, flourishing and reaching its full potential. This in turn could lead to litigants, commercial entities and society more broadly missing out on the legal and financial benefits that TPF could offer.

The viability of TPF in India therefore depends, among other things, on a legal ecosystem that is conducive to its use. Relevant factors to consider here include, for example, exchange control regulations; foreign investment regulations; prohibition on conditional fee arrangements; and lingering uncertainty about the legality of the mechanism and potential impact of legal principles that, although not directly targeted at TPF, could have an indirect impact.

In relation to foreign investment and exchange concerns, it is worth noting that the asset class where foreign funders are involved is unclear, which could increase hesitation about the use of TPF.¹⁹ Foreign exchange concerns relate to uncertainty about whether a funding transaction and subsequent repatriation of proceeds of successful claims will be regarded as a capital account transaction, or a current account transaction. The Foreign Exchange Management Act, 1999 (**FEMA**) defines a ‘capital account transaction’ as a transaction which ‘alters the assets or liabilities, including contingent liabilities, outside of India of persons resident in India or assets or liabilities in India of persons resident outside India’.²⁰ A ‘current account transaction’ is defined as a transaction ‘other than a capital account transaction’,²¹ and includes, for example, ‘payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business’;²² ‘payments due as interest on loans and as net income from investments’;²³ remittances for living expenses of parents,

¹⁶ Shailesh Kadam & Maulik Vyas, ‘India Inc legal spending rises by 21% to Rs63,807 crore in FY23’ *Economic Times* (26 September 2023) <https://legal.economictimes.indiatimes.com/news/industry/india-inc-legal-spending-rises-by-21-to-rs-63807-crore-in-fy23/103955162> (accessed on 10/01/24).

¹⁷ Nitin Jain, ‘Complex legal cases and rising costs to drive litigation funding in 2023’ *The Times of India* (18 January 2023) <https://timesofindia.indiatimes.com/blogs/voices/complex-legal-cases-and-rising-costs-to-drive-litigation-funding-in-2023/> (accessed on 10/01/24).

¹⁸ Sindhu Sivakumar, ‘Indian Disputes and Third Party Funding’ [2018] *International Arbitration Law Review* 143, 143.

¹⁹ Mayank Mishra, Mohit Chadha, Vaishnavi Rao and Swati Mittal, ‘Third Party Funding – Is India Ready?’ *IndusLaw* (July 2021), 4.

²⁰ Foreign Exchange Management Act, 1999 (**FEMA**), s 2(e).

²¹ FEMA, s 2(j).

²² FEMA, s 2(j)(i).

²³ FEMA, s 2(j)(ii).

spouse and children residing abroad’;²⁴ and expenses in connection with foreign travel, education and medical care of parents, spouse and children’.²⁵ For the first-mentioned, approval of the Reserve Bank of India (**RBI**) would be required,²⁶ while such approval is not required in the latter instance.²⁷

It seems more probable than not, the repatriation of funds obtained under a TPF agreement may be regarded as a capital account transaction, therefore requiring the approval of the RBI for the funds to be released. However, in the absence of clear regulation, it is not inconceivable that the RBI may be reluctant to grant such approval. Funders who have concerns about the impact of foreign exchange regulations under FEMA on repatriation of funds, could potentially set up a domestic fund, although it has been noted that this option does not provide a ‘clear path’ either.²⁸ Foreign exchange regulations present a potential hurdle not only for funders wishing to repatriate funds, but also for foreign claimants who take action against Indian defendants. A case in point is *Cruz City 1 Mauritius Holdings v Unitech Ltd*,²⁹ in which case a foreign entity sought to enforce an arbitral award rendered by an Arbitral Tribunal constituted under the Arbitration Rules of the London Court of International Arbitration in its favour, against an Indian entity (Unitech) in the Delhi High Court. Unitech argued, among other things, that the enforcement of the Award would be contrary to the public policy of India as it violates the provisions of FEMA. The Court held that enforcement of the Award would not offend against public policy, but that any payment to be made by the Indian defendant to the foreign claimant would have to comply with regulatory requirements.³⁰

Where the TPF arrangement is structured as an Alternative Investment Fund (**AIF**) under the Securities and Exchange Board of India (**SEBI**) Regulations, 2012, and the AIF is managed by a foreign-owned or controlled investment manager, its investments in the capital investments of a Special Purpose Vehicle (**SPV**) would furthermore require compliance with Foreign Direct Investment (**FDI**) guidelines. The impact of these measures on the availability and attractiveness of TPF arrangements should be carefully considered.

In light of this, it is not surprising that most funding arrangements are reportedly taking place off-shore; for instance, by Indian claimants who have off-shore arbitrations against off-shore respondents, or foreign claimants against Indian respondents with off-shore assets, to allow all recoveries and payments to be made outside of India.³¹ There is also

²⁴ FEMA, s 2(j)(iii).

²⁵ FEMA, s 2(j)(iv).

²⁶ FEMA, s 6.

²⁷ FEMA, s 5.

²⁸ Shaneen Parikh, ‘Light the Beacons – It Is Time to Test Third-Party Funding in India’ (2021), 3 (available at <https://www.cyrilshroff.com/wp-content/uploads/2021/05/Light-the-beacons-%E2%80%93-it-is-time-to-test-third-party-funding-in-India-.pdf>).

²⁹ [2017] 239 DLT 649.

³⁰ *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2017] 239 DLT 649, [118.3]. See also Sindhu Sivakumar, ‘Indian Disputes and Third Party Funding’ [2018] *International Arbitration Law Review* 143, 148.

³¹ Shaneen Parikh, ‘Light the Beacons – It Is Time to Test Third-Party Funding in India’ (2021), 4 (available at <https://www.cyrilshroff.com/wp-content/uploads/2021/05/Light-the-beacons-%E2%80%93-it-is-time-to-test-third-party-funding-in-India-.pdf>).

a lack of clarity regarding the permissibility of foreign investment in the form of third-party funding of disputes.³²

The prohibition on conditional fee arrangements further entails that the flexibility to structure legal finance by way of a combination of third-party finance and an undertaking by the claimant lawyer to only claim their professional fees in the case of a successful outcome (a factor which could significantly reduce the cost of third-party funding), is not available in India. This factor could potentially make it more challenging to structure TPF arrangements in a way that would, from a funder perspective, be commercially viable.

Another factor that could impede the growth of TPF in India is systemic problems in the justice delivery system. In this regard, commentators identify, among other things, the negative impact of delays in the civil justice system.³³ In spite of the establishment of 15 specialised National Company Law Tribunals (**NCLT**) to deal exclusively with commercial matters, a significant backlog of cases remains an issue. Commentators note that as of 31 March 2022, the NCLTs were dealing with a pending case load of 21,089 cases, with more than half of these arising out of the Insolvency and Bankruptcy Code, 2016 (**IBC**) – legislation that is particularly pertinent to the topic of this Report.³⁴

Also relevant is the unpredictability of enforcement success; and uncertainty in relation to recoverability.³⁵ Unpredictability is caused by benches of the NCLT having expressed contradictory views on the same issue.³⁶ This is problematic from the perspective of commercial funders who rely on information and use of sophisticated algorithms to predict probability of success, in order to decide whether to fund claims, or not. Where there is significant uncertainty in respect of outcome due to lack of a consistent approach in respect of the same matters, the risk in funding the claim increases, which could ultimately make funding of claims unattractive.

3 TPF in Litigation v TPF in Arbitration

Litigation is not the only means to resolve a dispute, and parties to a dispute may use arbitration as a means to resolve the dispute instead. Resolution of a dispute through arbitration rather than litigation may offer potential benefits, particularly in relation to

³² Cyrill Shroff, 'Third Party Funding in India', (available <https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf>).

³³ Amrit Mahal, 'Third-Party Funding for Avoidance Actions: The Key to Trapped Recoveries for Creditors' (available at <https://www.iiiglobal.org/file.cfm/12/docs/gold%20amrit%20mahal%20%20tplf%20for%20avoidance%20actions.pdf>), 9; Sindhu Sivakumar, 'Indian Disputes and Third Party Funding' [2018] *International Arbitration Law Review* 143, 143.

³⁴ Amrit Mahal, 'Third-Party Funding for Avoidance Actions: The Key to Trapped Recoveries for Creditors' (available at <https://www.iiiglobal.org/file.cfm/12/docs/gold%20amrit%20mahal%20%20tplf%20for%20avoidance%20actions.pdf>), 10.

³⁵ REFERENCES.

³⁶ Amrit Mahal, 'Third-Party Funding for Avoidance Actions: The Key to Trapped Recoveries for Creditors' (available at <https://www.iiiglobal.org/file.cfm/12/docs/gold%20amrit%20mahal%20%20tplf%20for%20avoidance%20actions.pdf>), 10.

time and costs. These arbitration benefits are potentially to be strengthened, should the proposed changes to the Arbitration and Conciliation Act 1996 eventuate.³⁷

Third-party funding is also possible in arbitration proceedings. The Supreme Court's interpretation of section 45 of the Arbitration and Conciliation Act, 1996 in *Chloro Controls (1) Pvt Ltd v Severn Trent Water Purification Inc*³⁸ is particularly relevant in this regard. In this case, the Court found that 'if the performance of the principal agreement depends on the execution, performance, or assistance of an ancillary that collectively impacts the dispute, then the transaction in such cases should be viewed as a composite one to serve the interests of justice'.³⁹ This case has been perceived as opening the door to recognition of TPF in arbitration.⁴⁰ The validity of TPF in India has also been implicitly recognised in the more recent decision of *Tomorrow Sales Agency Ltd v SBS Holdings Inc*.⁴¹ It is also significant that the High-Level Committee tasked to review the institutionalisation of arbitration in India identifies the value of TPF, and legislation supporting its use, as one of the ways in which growth of arbitration could be achieved.⁴²

However, it is important to note critical points of difference between the arbitration context and the litigation context. Due to these points of difference, third-party funding issues in litigation (as discussed above), may manifest differently in the context of arbitration.

A first point of distinction is the fact that the jurisdiction of the arbitral tribunal is restricted to the dispute that is referred to it by the parties,⁴³ whereas the Court has the inherent power to make such orders 'as may be necessary for the ends of justice or to prevent abuse of the process of Court'.⁴⁴ This factor has important implications in so far as third-party funding is concerned. In a litigation context, the inherent powers of the Court equip it with the ability to fulfil a quasi-regulatory function in respect of the litigation funding agreement. However, due to the limitations placed on its jurisdiction an

³⁷ The Government proposed changes to the Arbitration and Conciliation Act, 1996 towards the end of 2024. The proposed changes under the Arbitration and Conciliation (Amendment) Bill, 2024 seek to, among other things, facilitate timely conclusion of arbitration proceedings; reduce court intervention; introduce the notion of an "Appellate Arbitral Tribunal"; etc.

³⁸ 2013 (1) SCC 641.

³⁹ Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 61.

⁴⁰ Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 61.

⁴¹ 2023 SCC OnLine Del 3191.

⁴² Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 43 (available at <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>). Commentators interpret this as an indication of general support for use of TPF in arbitration proceedings; see, eg, Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 62.

⁴³ The Arbitration and Conciliation Act, 1996, s 34(2)(a)(iv) expressly provides for judicial discretion to set aside an arbitral award that 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration', or that 'contains decisions on matters not submitted to arbitration'. See also Meenal Garg, 'Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies' (2020) 6(2) *NLUJ Law Review* 71, 79 (electronic copy available at <https://ssrn.com/abstract=3574469>).

⁴⁴ Civil Procedure Code, 1908, s 151.

arbitral tribunal does not necessarily have the same capacity to consider or give a finding regarding a funding agreement,⁴⁵ thus limiting its ability to fulfil a similar regulatory function.

A second point of distinction is that arbitration is based on party autonomy, with parties to the dispute in a position to contractually agree on the parameters of the arbitration proceedings.⁴⁶ The arbitration agreement could include, for example, provisions regarding the right of parties to engage third-party funders and the extent to which disclosure of such agreements is required. The fact that parties to an arbitration agreement could include aspects in relation to third-party funding of the dispute in an arbitration agreement is an important factor to consider when entering into such an agreement. It is also an important factor to consider should any attempts be made to regulate TPF.

For the sake of completeness, it should also be mentioned that free legal aid is available in respect of litigation proceedings, but not arbitration,⁴⁷ due to the Legal Service Authorities Act, 1987 only being applicable with respect to ‘a suit or any proceeding before a court’.⁴⁸ However, in light of the strict eligibility requirements that apply in respect of entitlement to legal services,⁴⁹ it is unlikely that this third point of distinction will have a significant impact in so far as commercial proceedings are concerned.

PART C: JUSTIFICATION, LIMITATIONS AND CONCERNS

1 Policy Justification for and Legitimacy of TPF

1.1 Access to Justice

TPF offers obvious benefits – it allows litigation that may not otherwise have been possible due to lack of resources on the part of the plaintiff. On that basis, it is seen as enhancing access to justice, consequently resulting in this being one of the most often-mentioned benefits of TPF.⁵⁰ The ‘access to justice’ benefit is particularly apparent in the context of funded class actions, where impecunious and vulnerable claimants, such as tort victims or consumers, would likely not have been able to pursue claims for damages

⁴⁵ Meenal Garg, ‘Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies’ (2020) 6(2) *NLUJ Law Review* 71, 79 (electronic copy available at <https://ssrn.com/abstract=3574469>).

⁴⁶ Meenal Garg, ‘Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies’ (2020) 6(2) *NLUJ Law Review* 71, 85 (electronic copy available at <https://ssrn.com/abstract=3574469>).

⁴⁷ Meenal Garg, ‘Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies’ (2020) 6(2) *NLUJ Law Review* 71, 86 (electronic copy available at <https://ssrn.com/abstract=3574469>).

⁴⁸ As per the definition of ‘case’ under the Legal Service Authorities Act, 1987, s 2(a).

⁴⁹ The Legal Service Authorities Act, 1987, s 12 for eligibility criteria to qualify for legal aid.

⁵⁰ See, eg, Syed Zubair Ahmed ‘Access to Justice: Litigation Financing and the New Developments’ (2017) 4(1) *International Journal of Accounting and Financial Management* 88-99; Meenal Garg, ‘Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies’ (2020) 6(2) *NLUJ Law Review* 71, 73 (electronic copy available at <https://ssrn.com/abstract=3574469>).

or compensation were it not for commercial funding being available. TPF thus also enhances enforcement of rights, and achieves increased accountability.⁵¹

In the context of proceedings related to financial distress, it may enable recovery of distressed assets, without the creditor being exposed to the risk of and costs of unsuccessful litigation. In the context of debtors involved in bankruptcy proceedings, it enables recovery actions on behalf of the insolvent company, thus potentially increasing funds available for distribution among creditors. The benefits of TPF in this context have been recognised across the globe, and also in India.⁵²

However, TPF does not fully address concerns about the rising cost associated with resolution of legal disputes, as TPF is primarily available to claimants, and not necessarily to defendants.⁵³ Commercial litigation funders are further motivated by commercial incentives, and are therefore understandably selective about the litigation that they will support. Funders are, for example, unlikely to support litigation where the chances of a successful outcome are perceived to be low, or where the amount of the claim is not sufficiently high to justify the costs. In fact, it has been suggested that commercial funders have a high rejection rate due to this, with suggestions that the rejection rate exceeds 80% of cases in which funding was sought from funders.⁵⁴ Only some claimants and very few defendants will therefore have access to commercial funding.

These factors cause some to question the extent to which the ‘access to justice’ policy justification could contribute to legitimisation of commercial third-party funding in jurisdictions where there are concerns about the legality of this mechanism. As such, arguments that third-party funding is against public policy could potentially outweigh arguments in favour of its use based on the notion of enhanced access to justice. This concern is amplified in jurisdictions where common law doctrines in respect of champerty and maintenance may be present.

1.2 Doctrines of Maintenance and Champerty

The common law doctrines relating to the torts and/or crimes of champerty and maintenance have long been seen as a legal impediment to the use of TPF in those

⁵¹ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 46.

⁵² Debajyoti Ray Chaudhuri and Radhika Agarwal, ‘Litigation Funding: A Breakthrough for Avoidance Proceedings under IBC’ in *Quinquennial of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India, Oct 2021), Ch 28, 306.

⁵³ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 37.

⁵⁴ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 37; see also Amrit Mahal, ‘Third-Party Funding for Avoidance Actions: The Key to Trapped Recoveries for Creditors’ (available at <https://www.iiiglobal.org/file.cfm/12/docs/gold%20amrit%20mahal%20-%20tplf%20for%20avoidance%20actions.pdf>), 13-17 for more information on factors that may influence funding decisions.

jurisdictions where these doctrines are/were relevant.⁵⁵ Maintenance refers to '[the support of] litigation in which one has no lawful interest',⁵⁶ whereas champerty is a specific form of maintenance that involves 'giving finance to support another person's litigation for ultimate reward'⁵⁷ – the reward typically being the opportunity to share in the proceeds of a successful action. This definition clearly captures the typical commercial funding arrangement. These doctrines initially evolved with a view to 'protect and enhance the purity of public justice'.⁵⁸

Indian jurisprudence has never explicitly incorporated the prohibition against champerty as part of its public policy framework in the same way as in other common law jurisdictions such as Australia, the United Kingdom and Singapore. This creates a more permissive environment for litigation funding arrangements. There is a historical basis for this as India which has predominantly followed Hinduism – a way of life under which the concepts such as 'maintenance and champerty' are not considered a taboo.

Furthermore, there are clear suggestions, both in terms of legislation and case law, that the approach to TPF in India is favourable and that the doctrines of champerty and maintenance will not prevent accessing TPF. For example, a degree of statutory acceptance of TPF is apparent in the way in which the Civil Code of Procedure, 1908 recognises TPF in some states - Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh – by their respective state amendments to Order XXV - Security for Costs, Rule 3. This rule explicitly envisages a situation of a plaintiff who has 'for the purpose of being financed in the suit transferred or agreed to transfer any share or interest in the property in the suit to a person who is not already a party to the suit'. Even though TPF is not similarly recognised in other states, there is no legislation expressly prohibiting the use of TPF. However, it is worthwhile noting that the recognition under the Civil Code of Procedure, 1908 mentioned above, extends only to those agreements that allow for a transfer of a '*share or interest* in the property in the suit',⁵⁹ and does not appear to capture transfer or assignment of the cause of action.

The Supreme Court of India also seems to have adopted a favourable stance in respect of TPF. Statements of the Court, such as the obiter statement in *Re Mr 'G', A Senior Advocate of the Supreme Court*,⁶⁰ is indicative of this. In dealing with this case (involving contingency fees), the Supreme Court opined that the English doctrines of champerty and maintenance do not apply in India, and that a TPF type arrangement would not be

⁵⁵ Champerty and maintenance were the subject of Imperial statutes dating as far back as the 13th century, and also existed as independent common law torts and crimes: Law Reform Committee of South Australia, "Maintenance, Champerty, Malicious Prosecution and Abuse of Process" (South Australian Government, 1987). A similar legal position existed in India; see also Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 60.

⁵⁶ Trischa Mann (ed), *Australian Law Dictionary* (OUP, 3rd ed, 2018).

⁵⁷ Trischa Mann (ed), *Australian Law Dictionary* (OUP, 3rd ed, 2018).

⁵⁸ Adrian Walters, "Foreshortening the Shadow: Maintenance, Champerty and the Funding of Litigation in Corporate Insolvency" (1996) 17(6) *Company Lawyer* 165, 166.

⁵⁹ Emphasis added.

⁶⁰ 1955 1 SCR 490.

against ‘public policy’, as long as it does not involve a legal practitioner. The Court stated as follows:

Now it can be accepted at once that a contract of this kind would be legally unobjectionable if no lawyer was involved. *The rigid English rules of champerty and maintenance do not apply in India, so if this agreement had been between what we might term third parties, it would have been legally enforceable and good...*It follows that there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals in such a transaction per se, that is to say, when a legal practitioner is not concerned.⁶¹

A similar sentiment was expressed by the Supreme Court more recently in the well-known case of *Bar Council of India v AK Balaji*,⁶² a case dealing with the issue of whether foreign law firms or lawyer are permitted to practice law in India. The Court indicated, once again by way of an obiter statement, that ‘[t]here appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation’.⁶³

On the face of it, it therefore appears as if doctrines of champerty and maintenance will not hinder development or use of TPF in India. Commentators agree that TPF is permitted in India.⁶⁴ It should be kept in mind, however, that the statements of the Supreme Court of India referred to above, were all made obiter.

Ideally, the legality of TPF should be recognised in legislation to remove any lingering doubts as to its legitimacy. In the interim, it would be useful to keep in mind the parameters suggested by the Privy Council in one of the first cases referring to TPF, *Ram Coomar Coondoo v Chunder Canto Mookerjee*,⁶⁵ where it is stated that a TPF type arrangement is not necessarily against public policy, unless found to be extortionate and unconscionable; not made with the bona fide object of assisting a claim believed to be just; or for improper objects, such as for the purpose of gambling in litigation.

2 Practical Concerns and Ethical Considerations

The benefits of TPF are obvious. In addition to the policy benefits described above, TPF has numerous commercial benefits, including management of litigation risks, efficient allocation of capital for enforcement of legal rights, and consequently allowing resources being ‘freed up’ to be used for purposes of core business activities instead.⁶⁶

⁶¹ *Re Mr ‘G’, A Senior Advocate of the Supreme Court* 1955 1 SCR 490, [11]; emphasis added.

⁶² [2018] INSC 215.

⁶³ *Bar Council of India v AK Balaji* [2018] INSC 215, [35]. See also *Damodar Kilikar v Oosman Abdul Gani* 1961 KLJ 356.

⁶⁴ Priya Jagadeesh, ‘Litigation Funding’ (2020) 3(1) *International Journal of Legal Science and Innovation* 202, 203.

⁶⁵ (1876-77) 4 IA 23.

⁶⁶ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 46.

However, TPF arrangements also raise a number of ethical concerns and practical uncertainties. These concerns relate to the impact of TPF on the legal system, concerns about the terms of the funding agreement, concerns pertaining to the nature of the funder, and uncertainty as to how the civil procedure system will treat certain aspects where commercial funders are involved in a dispute.

2.1 Concerns Regarding Impact on Legal System

Concerns regarding the impact on the legal system envisage a proliferation of litigation due to enhanced availability of funding, or an increase in vexatious proceedings.⁶⁷ These concerns have proved largely groundless, due to the fact that funders typically conduct proper due diligence and will exercise sound commercial judgment in determining which claims should be funded.⁶⁸ In fact, as has been mentioned above, the opposite appears to have occurred with commercial funders tending to reject a significant portion of applications for funding.

2.2 Concerns Regarding Terms of Funding Agreement

Concerns about the terms of the funding agreement emphasise matters such as funders charging exorbitant premiums; funders negotiating for the right to take control of legal proceedings or settlement arrangements; and nature of the funding arrangement, namely, whether the agreement provides for an assignment of a share of the proceeds of the successful action, or for the assignment of the actual cause of action itself.

As the funding arrangement is nothing other than a contract, these are matters that are open to negotiation and there is nothing to prevent the funder from attempting to negotiate the best possible terms from a commercial perspective – a right which could be exercised to the detriment of the plaintiff where the funder’s directions during proceedings are not taken into account. In this respect, it is worth noting that while lawyers are bound by rules of professional conduct aimed at ensuring that they deal fairly with their clients, funders are not subject to similar obligations.⁶⁹ It is therefore, not inconceivable that the claimant may well end up agreeing to terms that is not in their best interest, due to the inequality of bargaining position.

2.2.1 Funding Premium

With TPF jurisprudence is still developing in India. It is not surprising that the Indian judiciary has, as yet, had little to no opportunity to engage in an in-depth analysis of certain aspects of TPF. One such matter which has not yet been explored in any detail, relates to the size of the funding premium.

⁶⁷ Meenal Garg, ‘Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies’ (2020) 6(2) *NLUJ Law Review* 71, 86 (electronic copy available at <https://ssrn.com/abstract=3574469>).

⁶⁸ Aratrika Deb, ‘Third Party Funding in Investment Arbitration: The India Story’ (2019) 1(1) *GIBS Law Journal* 12.

⁶⁹ Cyrill Shroff, ‘Third Party Funding in India’, (available <https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf>).

The size of the funding premium is relevant in so far as an ‘exorbitant’ or ‘unfair’ funding premium could potentially render the funding agreement void on the basis that it is against public policy,⁷⁰ due to the operation of s 23 of the Contract Act, 1872. In terms of this provision

the consideration or object of an agreement is lawful, unless...the Court regards it as immoral, or opposed to *public policy*...Every agreement of which the object or consideration is unlawful is void.⁷¹

Considering the statement of the court in *Ram Coomar Coondoo v Chunder Canto Mookerjee*⁷² mentioned above, namely that a TPF type arrangement may be against public policy, where it is found to be extortionate and unconscionable, the importance of the funding premium being ‘fair’ is obvious. However, whether a funding premium is ‘fair’ or not, may be difficult to determine as it would depend on factors such as the risk undertaken by the funder; expected duration of litigation; probability of success; and so forth.⁷³

In the absence of clear guidance on this point, it is challenging to establish the boundaries of what would constitute an acceptable funding premium. The complexity involved in determining the litigation risk, with obvious consequential impacts on the funding premium, exacerbates this issue. This aspect has proven to be very contentious in other jurisdictions, with the question often being posed as to whether there should be a limit, or ‘cap’ on the amount that a funder could charge.

2.2.2 Funder Control over Proceedings or Settlement

A further concern is that funders may negotiate for the right to take control of legal proceedings or settlement arrangements, potentially compromising the autonomy of claimants in this regard.⁷⁴ It is possible that funders could potentially even negotiate terms that would allow them to terminate the funding agreement and withdraw funding⁷⁵ – a right which could be exercised to the detriment of the plaintiff where the funder’s directions during proceedings are not taken into account.

Funder control concerns also exist in the sphere of arbitration, and question the extent to which the funder may be involved in choice of arbitrator.⁷⁶

⁷⁰ As was illustrated in *Harilal Nathal v Bhailal Pranlal Shah* (1940) 42 BOMLR 165, for example.

⁷¹ Emphasis added.

⁷² (1876-77) 4 IA 23.

⁷³ Sindhu Sivakumar, ‘Indian Disputes and Third Party Funding’ [2018] *Arbitration Law Review* 143, 145-146.

⁷⁴ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 47.

⁷⁵ Priya Jagadeesh, ‘Litigation Funding’ (2020) 3(1) *International Journal of Legal Science and Innovation* 202, 206.

⁷⁶ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 47; Meenal Garg, ‘Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies’ (2020) 6(2) *NLUJ Law Review* 71 (electronic copy available at <https://ssrn.com/abstract=3574469>).

2.2.3 Nature of Funding Agreement

It is further important to consider the nature of the funding arrangement. A funding arrangement could involve the 'sale' of the bare cause of action to a funder in exchange for an agreed upon amount (assignment of the right to bring action), or an arrangement in terms of which the funder will provide financial support for the legal proceedings in exchange for a funding premium, typically expressed as a percentage of the amount of an award in the case of a successful outcome.

In the first instance, the 'sale' of the claim to the funder will result in the funder being substituted as a party to the proceedings. Such an arrangement will provide some clarity around questions such as control of proceedings and liability for adverse cost orders, or an obligation to provide security for costs – since the funder takes the place of the claimant, the funder is entitled to take control of proceedings, and will also be exposed to potential liability under an adverse cost order. From the perspective of the claimant in such an instance this structure could be beneficial, as the benefit (amount that funder pays for the claim to be assigned) is available immediately - there is no need to be engaged in lengthy dispute resolution proceedings, and there is no exposure to an adverse cost order.

However, there is a question as to whether the assignment of a bare cause of action would be permitted in light of the content of section 6(e) of the Transfer of Property Act, 1882. In terms of this provision '[a] mere right to sue cannot be transferred'. The Supreme Court of India furthermore expressed a negative view in respect of the assignment of a bare right of action, in case of claims for damages based on breach of contract or tort.⁷⁷ Parties to a funding agreement would therefore have to take care as to how they structure the agreement, particularly in the case of claims for damages based on breach of contract or tort.

2.2.4 Disclosure of Funding Agreement and/or Its Terms

There is furthermore uncertainty as to how typical rules of the civil dispute resolution framework will apply in cases where third-party funders are involved. Questions that arise in this context include whether there is an obligation on the funded party to disclose that they obtained third-party funding, and if so, to what extent the terms of the funding agreement should be made available to the other party.

2.2.5 Funder Liability for Adverse Cost Orders

Funder liability for adverse cost orders could also be uncertain. Adverse cost orders may be granted against the unsuccessful litigant. However, as the funder is not a party to the proceedings, it is possible that such orders may not apply to them. This issue has to some extent been resolved in certain states (Maharashtra, Uttar Pradesh, Tamil Nadu, Gujarat, Odisha, Andhra Pradesh and Madhya Pradesh) where express recognition of TPF resulted in amendments to the Code of Civil Procedure, 1908. As a result, in these states

⁷⁷ *Union of India v Sri Sarada Mills Ltd* 1973 AIR 281.

the Court has the power to order that a funder be joined as a party, and provide security for costs.⁷⁸ The fact that this is a power given to the *court* indicates that the possibility of funder liability for adverse cost orders and obligation to provide security for costs can only occur in the context of legal proceedings by way of litigation, and not in the context of arbitration proceedings.

In an arbitration context, the Arbitration and Conciliation Act, 1996 provides that parties are entitled to secure their costs as an interim measure,⁷⁹ in accordance with section 31A(1) of the Act which governs attribution of costs. However, this protection applies exclusively in respect of parties to the dispute and the Act lacks a mechanism to impose liability for costs on a funder, or to compel a commercial funder to provide security for costs.⁸⁰

The recent judgment in *Tomorrow Sales Agency Private Limited v SBS Holdings Inc*⁸¹ illustrates this point. In this case, involving an appeal by the funder (TSA) against the order of a Single Judge, the Delhi High Court refused to hold a third-party funder liable for an adverse cost order resulting from arbitration proceedings. The funder of the unsuccessful claimant was neither a party to the arbitration agreement, nor a party to the arbitral proceedings. The Court emphasised the consensual nature of arbitration,⁸² and expressly stated that '[a]lthough, the Arbitral Tribunal may allocate costs amongst parties; *it cannot award costs against a third-party funder*'.⁸³ It is instructive noting the Court's implicit support for TPF in this case – the Court indicated:

Third-party funding is essential to ensure access to justice. In absence of third-party funding, a person having a valid claim would be unable to pursue the same for recovery of amounts that may be legitimately due...The cost for pursuing claims in arbitration are significant...[a] person without the necessary means would have no recourse, in the absence of third party funders. Third party funders play a vital role in ensuring access to justice. It is essential for third-party funders to be fully aware of their exposure. *They cannot be mulcted with liability, which they have neither undertaken nor are aware of. Any uncertainty in this regard, would dissuade third party funders to fund litigation.*⁸⁴

However, it is important to note the warning of the Court that it is 'also necessary to ensure that there is transparency and that the party funding is not exploitative'.⁸⁵

⁷⁸ The Code of Civil Procedure, 1908; Order XXV, Rules 1 and 2. See also Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 61.

⁷⁹ Arbitration and Conciliation Act, 1996, ss 9 and 17.

⁸⁰ Aratrika Deb, 'Third Party Funding in Investment Arbitration: The India Story' (2019) 1(1) *GIBS Law Journal* 12.

⁸¹ 2023 SCC OnLine Del 3191.

⁸² *Tomorrow Sales Agency Private Limited v SBS Holdings Inc* 2023 SCC OnLine Del 3191, [38].

⁸³ *Tomorrow Sales Agency Private Limited v SBS Holdings Inc* 2023 SCC OnLine Del 3191, [43];

⁸⁴ *Tomorrow Sales Agency Private Limited v SBS Holdings Inc* 2023 SCC OnLine Del 3191, [73]-[74]; emphasis added.

⁸⁵ *Tomorrow Sales Agency Private Limited v SBS Holdings Inc* 2023 SCC OnLine Del 3191, [75].

This is once again an aspect that could be provided for in terms of the funding agreement between the parties – to ensure certainty regarding funder liability for adverse cost orders, it is important to stipulate such liability in the funding agreement. Inexperienced litigants, or their legal advisors who have little exposure to or experience with TPF, may overlook factors such as these.

2.3 Concerns Regarding Capacity and Identity of Funder

The nature or identity of the funder is also relevant in regard to some of the concerns mentioned above, as well as concerns regarding conflicts of interest. Relevant here are concerns in relation to the financial capacity of the funder and their ability to meet their financial obligations under the terms of the funding agreement. This concern extends to adverse cost orders. If it were to be accepted, or contractually provided, that funders could incur liability for adverse cost orders, a subsequent concern is whether the funder is sufficiently capitalised to be able to satisfy such (additional) obligations.

The identity of the funder is furthermore relevant in relation to the prohibition against contingency fees. In this regard it is necessary to recognise that there is no express regulation to prevent lawyers from holding a significant financial stake in a commercial funder, and thus being able to indirectly subvert the prohibition against conditional or contingency fees.

The identity of the funder could also be relevant in relation to conflict-of-interest concerns in an arbitration context. It is possible that that a funder could have a pre-existing relationship with a member of the Arbitral Tribunal, placing a question mark over the independence and impartiality of the arbitrator – a factor which could potentially lead to a challenge to an arbitral award.⁸⁶ However, this will only be known if there is disclosure of the funding agreement and identity of the funder. This is something that could potentially be mandated in the case of arbitration, through extension of disclosure requirements under section 12 of the Arbitration and Conciliation Act, 1996,⁸⁷ although this has not been settled.

Provisions of the Arbitration and Conciliation Act, 1996 that set out the grounds upon which an arbitral award could be set aside, may open the door to TPF arrangements being attacked, specifically in respect of issues around disclosure of the TPF agreement, or identity of the funder. Challenges related to these matters could potentially be brought under section 34 (setting out the grounds upon which an application could be made for setting aside an Indian arbitral award) or section 48 (setting out the grounds upon which enforcement of a foreign arbitral award may be refused, at the request of the party against whom it is invoked) of the Arbitration and Conciliation Act, 1996.⁸⁸ In terms of

⁸⁶ Priya Jagadeesh, 'Litigation Funding' (2020) 3(1) *International Journal of Legal Science and Innovation* 202, 205; Mayank Mishra, Mohit Chadha, Vaishnavi Rao and Swati Mittal, 'Third Party Funding – Is India Ready?' *IndusLaw* (July 2021), 3.

⁸⁷ Aratrika Deb, 'Third Party Funding in Investment Arbitration: The India Story' (2019) 1(1) *GIBS Law Journal* 12.

⁸⁸ Sindhu Sivakumar, 'Indian Disputes and Third Party Funding' [2018] *International Arbitration Law Review* 143, 148 acknowledges that to date there has been no challenges under these provisions, but warns that the 'risk remains'.

these provisions, an arbitral award could be set aside where the Court finds that ‘the arbitral award is in conflict with the public policy of India’.⁸⁹ Explanation 1 for each of the respective provisions clarifies the public policy aspect as follows:

For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only 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.⁹⁰

The above concerns and uncertainties have led to questions being raised about the fact that TPF is operating largely unregulated in most jurisdictions, including India,⁹¹ and has resulted in a call for targeted regulation, and attempts at regulating the industry in some instances.⁹²

PART D: TPF AND INSOLVENCY ASPECTS

1 TPF Opportunities in Insolvency

TPF could be of significant value in the context of insolvency administration processes, such as the corporate insolvency resolution process (**CIRP**) or liquidation of the corporate debtor, and also in relation to realising distressed assets.

TPF could be useful in an insolvency administration context to maximise the value of assets available for distribution to creditors. The corporate debtor may have contingent assets, such as claims against counterparties. In addition to claims against counterparties as a result of typical commercial disputes, the insolvency law framework provides unique opportunities to increase assets available for distribution, thus maximising value to creditors, through mechanisms such as claims based on the avoidance provisions,⁹³ and actions against directors for breach of the duties that they owe to the corporate debtor.

⁸⁹ Arbitration and Conciliation Act, 1996, s 34(2)(b)(ii); s 48(2)(a), (emphasis added).

⁹⁰ Arbitration and Conciliation Act, 1996, Explanation 1 in relation to ss 34(2)(b)(ii) and 48(2)(a), as amended in terms of the Arbitration and Conciliation (Amendment) Act, 2015, s 18(l) (in respect of s 34) and s 22 (in respect of s 48(2)(a)). See also Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 64.

⁹¹ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 62.

⁹² Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 64; Debajyoti Ray Chaudhuri and Radhika Agarwal, ‘Litigation Funding: A Breakthrough for Avoidance Proceedings under IBC’ in *Quinquennial of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India, Oct 2021), Ch 28, 310; Aratrika Deb, ‘Third Party Funding in Investment Arbitration: The India Story’ (2019) 1(1) *GIBS Law Journal* 12.

⁹³ Amrit Mahal, ‘Third-Party Funding for Avoidance Actions: The Key to Trapped Recoveries for Creditors’ (available at <https://www.iiiglobal.org/file.cfm/12/docs/gold%20amrit%20mahal%20%20tplf%20for%20avoidance%20actions.pdf>), 3, suggests that avoidance claims ‘can be among the most valuable assets of an

The IBC provides for four types of voidable transactions,⁹⁴ namely preferential transactions,⁹⁵ under-valued transactions,⁹⁶ fraudulent transactions,⁹⁷ and extortionate credit transactions.⁹⁸ As is typically the case with legal principles in relation to voidable transactions, the relevant provisions of the IBC create the opportunity for setting aside transactions in insolvency where these transactions have no commercial purpose, were performed just to benefit some creditors, or to obstruct the insolvency or liquidation procedure.⁹⁹ Ultimately, any value gained by the setting aside of these transactions would be regarded as part of the liquidation estate,¹⁰⁰ and would thus, generally be for the benefit of the creditors of the company in financial distress. The usual distribution rules will apply to any such recoveries, as a result of which any costs pertaining to the resolution process or liquidation should be paid in full, before other creditor claims can be considered.¹⁰¹

However, funding is required in order to ‘realise’ these assets through the mechanism of legal proceedings. Lack of funding to support legal proceedings may prevent a resolution professional (RP) or a liquidator from reaping the benefits offered in terms of mechanisms such as the avoidance provisions.¹⁰² It is true that the resolution professional or liquidator may look to company creditors to obtain funding for such legal proceedings. That said, creditors are often risk-averse and conscious of competing interests among themselves, thus, making them reluctant to provide such funding.¹⁰³ In

insolvent debtor’, and notes that in 2023, applications for avoidance claims pending before the National Company Law Tribunals involved claims worth INR 2.8 trillion (at 14).

⁹⁴ Sumant Batra, *Corporate Insolvency Law and Practice* (EBC Lucknow, 2017), Ch 33 for a detailed overview of these types of transactions.

⁹⁵ Insolvency and Bankruptcy Code, 2016, s 43. See also *Jaypee Infratech Ltd Interim Professional v Axis Bank Ltd* (2020) 8 SCC 401 for an analysis of the elements of s 43.

⁹⁶ Insolvency and Bankruptcy Code, 2016, s 45. See also *IDBI Bank Ltd v Jaypee Infratech Ltd* 2018 SCC Online NCLT 13984, for an example of a case in which this provision was applied to set aside a transaction as an undervalued transaction.

⁹⁷ Insolvency and Bankruptcy Code, 2016, s 49. See also *Mr Thomas George v K Easwara Pillai* 2021 SCC Online NCLAT 4636 regarding the fraudulent transaction provision.

⁹⁸ Insolvency and Bankruptcy Code, 2-16, s 50. See also *Shinhan Bank v Sugnil India Pvt Ltd* 2019 SCC Online NCLT 27541, for an example of a case in which a transaction has been set aside on the basis that it is extortionate.

⁹⁹ Debajyoti Ray Chaudhuri and Radhika Agarwal, ‘Litigation Funding: A Breakthrough for Avoidance Proceedings under IBC’ in *Quinquennial of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India, Oct 2021), Ch 28, 307.

¹⁰⁰ Insolvency and Bankruptcy Code, 2016, s 36(3)(f).

¹⁰¹ Insolvency and Bankruptcy Code, 2016, s 53(1)(a).

¹⁰² Amrit Mahal, ‘Third-Party Funding for Avoidance Actions: The Key to Trapped Recoveries for Creditors’ (available at <https://www.iiiglobal.org/file.cfm/12/docs/gold%20amrit%20mahal%20-%20tplf%20for%20avoidance%20actions.pdf>), 2 notes that lack of adequate funds to meet the costs of litigation serves to disincentivise insolvency professionals from investigating and reporting avoidance transactions; see also Debajyoti Ray Chaudhuri and Radhika Agarwal, ‘Litigation Funding: A Breakthrough for Avoidance Proceedings under IBC’ in *Quinquennial of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India, Oct 2021), Ch 28, 308.

¹⁰³ Ashwin Bishnoi, ‘Third Party Litigation Funding: Opportunities under the IBC’ in *Quinquennial of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India, Oct 2021), Ch 29, 315; see also Amrit Mahal, ‘Third-Party Funding for Avoidance Actions: The Key to Trapped Recoveries for Creditors’ (available at <https://www.iiiglobal.org/file.cfm/12/docs/gold%20amrit%20mahal%20-%20tplf%20for%20avoidance%20actions.pdf>), 4.

this scenario, TPF provides the opportunity to pursue enforcement of these types of claims – something which may not otherwise have been possible.

TPF further provides indirect benefits in addition to asset value maximisation, in that it may discourage well-resourced respondents from exploiting gaps in the adjudicating process to drain (possibly) limited funds on the part of the insolvency professional; allow insolvency professionals to obtain litigation support (other than funding) from commercial funders who are sophisticated litigants, in the form of case strategy and negotiation; and so forth.¹⁰⁴

2 Assignment of Cause of Action v Assignment of Proceeds

The specific nature of the third-party funding arrangement could potentially cause an issue. As discussed, third-party funding arrangements could take one of two forms – the agreement could involve a ‘sale’ of the bare cause of action to the funder for an agreed upon amount (assignment of cause of action), or the agreement could provide that the funder is to provide financial support for litigation in exchange for the funding premium, typically expressed as a percentage of the amount of the award. The last-mentioned option (assignment of proceeds of successful action, or part thereof) does not present any obvious difficulty and would be available to both the RP and the liquidator.

However, the same does not necessarily hold true for the first-mentioned option – the assignment of the cause of action. In that case, the extent to which the option (assignment) is available or permissible would depend, first, on whether the company is subject to a resolution process or liquidation, and second, on whether the action involves a company action, or an office holder action. The discussion below provides an analysis of the impact of the relevant provisions of the IBC in this regard.

2.1 Power of Liquidator v Power of Resolution Professional to Deal with Company Property (Company Actions)

The IBC defines ‘property’ of a company as follows:

‘property’ includes money, goods, *actionable claims*, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.¹⁰⁵

Of particular relevance, for the purposes of this discussion, is the inclusion of a company’s ‘actionable claims’ under the definition of ‘property’.

A liquidator of a company is furthermore entitled to -

¹⁰⁴ Amrit Mahal, ‘Third-Party Funding for Avoidance Actions: The Key to Trapped Recoveries for Creditors’ (available at <https://www.iiiglobal.org/file.cfm/12/docs/gold%20amrit%20mahal%20-%20tpf%20for%20avoidance%20actions.pdf>), 11.

¹⁰⁵ Insolvency and Bankruptcy Code, 2016, s 3(27)

...sell the immovable and movable property *and actionable claims* of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels.

[Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.]¹⁰⁶

On the basis of the above, one can therefore conclude that the liquidator, in exercising their power of sale in respect of company property, which includes actionable claims of the company, would be permitted to 'sell' (assign) company claims to a third-party funder, provided that the funder is not ineligible to be a resolution applicant.¹⁰⁷ This may appear contrary to section 6(e) of the Transfer of Property Act 1882, which provides that '[a] mere right to sue cannot be transferred', indicating that assignment of the bare cause of action is prohibited. However, under the definition of 'transfer of property' in terms of section 5 of the Transfer of Property Act, 1882, nothing in the Act 'shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals. The liquidator's power of sale of company property under the IBC would therefore take precedence over the prohibition in the Transfer of Property Act, 1882.

The RP is not necessarily able to do the same, as is apparent from the way in which section 25 of the IBC describes the powers and duties of the RP. Contrary to the position of the liquidator who is statutorily empowered to 'sell' company property, the RP has a statutory duty to 'preserve and protect the assets of the corporate debtor'.¹⁰⁸ The RP is further tasked with taking 'custody and control of all the assets of the corporate debtor',¹⁰⁹ but without express statutory authorisation to 'sell' the assets of the company.

It is true that sale of company assets by the RP may potentially be achieved through the operation of the 'catch-all' provision under s 25(2)(k), which indicates that the RP may perform any 'other actions as may be specified by the Board'. On that basis, it could be argued that the RP may also be able to 'sell' or 'assign' a bare cause of action, but only where an additional hurdle has been Insolvency and Bankruptcy Board of India (**IBBI**) overcome, namely that the action has been specified by the IBBI.

However, the provision in section 25(2)(b) raises doubt about the potential success of such an argument. In terms of this provision the RP '*shall...represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings*'.¹¹⁰ This express statutory

¹⁰⁶ Insolvency and Bankruptcy Code, 2016, s 35(1)(f).

¹⁰⁷ Insolvency and Bankruptcy Code, 2016, s 29A provides information in regard to whom would be regarded as 'not eligible' to be a resolution applicant.

¹⁰⁸ Insolvency and Bankruptcy Code, 2016, s 25(1).

¹⁰⁹ Insolvency and Bankruptcy Code, 2016, s 25(2)(a).

¹¹⁰ Emphasis added.

obligation might therefore be interpreted as a blanket prohibition preventing the RP from ‘selling’ the bare cause of action to a third-party funder where the assignment entails that the person to whom the cause of action is assigned would be exercising the legal rights pertaining to the cause of action.

2.2 Company Actions v Office Holder Actions

It is important to note that the discussion above pertains exclusively to *company* actions. The enforcement of company claims is, of course, not the only avenue available for increasing assets available for distribution, and the avoidance provisions discussed previously provide another useful mechanism to achieve value maximisation for creditors. An important distinction between legal proceedings on the basis of company claims and legal proceedings based on avoidance provisions, is that claims under avoidance proceedings vest in the office holder, whether it be the RP or liquidator, and not the company. These types of claims can therefore not be ‘sold’ as company property as per the previous discussion, which means that the prohibition in respect of transfer of a right to sue under section 6(e) of the Transfer of Property Act, 1882 may apply to avoidance claims. This places a significant restriction on the ability of the RP or liquidator to deal with these types of ‘assets’, which could cause delays.

The challenges inherent to realising certain classes of assets (like those mentioned in the previous paragraph), with a consequent impact on duration of liquidation, have been recognised in a 2020 Discussion Paper released by the IBBI.¹¹¹ The Discussion Paper expressly identifies, for example, sub-judice receivables (which could include the right of the corporate debtor to bring action) and assets underlying avoidance transactions, as such assets. Noting that these types of assets are ‘not easily realisable’ and that they are associated with an ‘indefinite waiting time frame’, the Discussion Paper attaches the term ‘not readily realisable assets’ (NRRAs) to these assets.¹¹²

The Discussion Paper suggests certain recommendations, including that statutory recognition should be provided for the assignment of NRRAs. This recommendation resulted in amendment of the IBBI (Liquidation Process) Regulations, 2016. Of particular relevance for the purposes of this Report is the insertion of regulation 37A, which states:

A liquidator may assign or transfer a not readily realisable asset through a transparent process, in consultation with the stakeholders’ consultation committee in accordance with regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the corporate debtor.

Regulation 37A continues to define a ‘not readily realisable asset’ as -

¹¹¹ Insolvency and Bankruptcy Board of India, Discussion Paper on Corporate Liquidation Process (26 August 2020) (available at <https://ibbi.gov.in/uploads/whatsnew/2020-08-26184542x70yo1bc5a2ba5d43fda2a51fa372bf5bc76c.pdf>).

¹¹² Insolvency and Bankruptcy Board of India, Discussion Paper on Corporate Liquidation Process (26 August 2020), 1 (available at <https://ibbi.gov.in/uploads/whatsnew/2020-08-26-184542-x70yo-1bc5a2ba5d43fda2a51fa372bf5bc76c.pdf>).

...any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions referred to in sections 43 to 51 and section 66 of the Code.

This regulation opens the door to assignment of avoidance causes of action to a third-party funder – an arrangement which would previously have been prohibited. The right to assign is subject to the same proviso mentioned in the previous paragraph, namely eligibility of the assignee to submit a resolution plan.

It is important to note the limitations of this regulation, in that assignment of avoidance causes of action is only possible in a liquidation context, and not in the context of the resolution process.¹¹³ An amendment to extend permissibility of assignment of avoidance causes to the resolution process context would be a positive development. Commentators note the variance in risk appetite and incentive for potential assignees (creditor, successful bidder selected by the Committee of Creditors (**COC**) through a bidding process, or commercial funder) and the fact that being able to leverage all of these options would provide the insolvency professional with ‘the greatest chance of maximising recoveries from avoidance claims’, also in the context of the resolution process.¹¹⁴

2.3 Power and Rights of Creditors in respect of TPF Agreement

The IBC restricts the powers of the RP to some extent, through the operation of s 28 which indicates that the approval of the COC is required for certain actions. However, section 28 does not expressly require COC approval for entering into agreements (including TPF agreements). From a legal technical perspective, the RP is therefore not required under the IBC to obtain COC approval for entering into funding agreements, or to disclose such agreements to the COC. The liquidator appears similarly free from any such constraints – even though the IBC provides that the liquidator has the *power* to consult any of the stakeholders who are entitled to a distribution under s 53, the Act makes it clear that ‘any such consultation shall not be binding on the liquidator’.¹¹⁵

The application of the Code of Conduct for Insolvency Professionals may facilitate disclosure to creditors, in so far as it requires an insolvency professional to ‘disclose all costs towards the insolvency resolution process costs, liquidation costs...to all relevant stakeholders’.¹¹⁶ Litigation expenses, including obligations incurred under a TPF

¹¹³ Ashwin Bishnoi, ‘Third Party Litigation Funding: Opportunities under the IBC’ in *Quinquennial of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India, Oct 2021), Ch 29, 318.

¹¹⁴ Amrit Mahal, ‘Third-Party Funding for Avoidance Actions: The Key to Trapped Recoveries for Creditors’ (available at <https://www.iiiglobal.org/file.cfm/12/docs/gold%20amrit%20mahal%20-%20tpf%20for%20avoidance%20actions.pdf>), 6.

¹¹⁵ Insolvency and Bankruptcy Code, 2016, s 35(2) (emphasis added).

¹¹⁶ Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, First Schedule, [27].

agreement, may be captured by this rule, thus requiring insolvency professionals to disclose certain elements of the TPF arrangement to creditors.

PART E: REGULATION OF THIRD-PARTY FINANCE

Many commentators are of the opinion that TPF should be regulated in some way.¹¹⁷ However, recognising the need for and benefits of targeted regulation still leave many questions unanswered. Aspects that merit discussion in this regard include, for example, what form the ‘regulation’ should take; the types of matters that should be regulated; whether calls for regulation are aimed at regulation of *litigation funding entities*, or regulation of *litigation funding agreements*, and so on. The discussion below will address some of these questions.

1 Method of Regulation

Regulation in a TPF context typically takes the form of formal, targeted regulation; self-regulation in the form of Codes of Conduct; hybrid options; and/or judicial oversight of TPF agreements.¹¹⁸

1.1 Formal Regulation

Examples of formal, targeted regulation can be found in Singapore and Hong Kong, where regulations were adopted to govern TPF in an arbitration context. In Singapore, the Civil Law (Amendment) Act, 2017 (**Singapore Civil Law Amendment Act**) was adopted to explicitly abolish maintenance and champerty.¹¹⁹ At the same time, and similar to other jurisdictions where these doctrines have been abolished, the notion that a TPF agreement could still be void where it is contrary to public policy or otherwise illegal has been retained.¹²⁰ The Singapore Civil Law Amendment Act also expressly provides that a TPF agreement in relation to ‘prescribed proceedings’ is not ‘contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty’.¹²¹ The accompanying Civil Law (Third-Party Funding) Regulations, 2017 (**Regulations**) describes ‘prescribed dispute resolution proceedings’ and also sets qualifications for third-party funders. In terms of the Regulations, prescribed proceedings (in other words, proceedings where it would be permissible to use TPF) were initially restricted to

¹¹⁷ Sairam Bhat and Vikas Gahlot, ‘Third Party Funding: A Conceptual and Comparative Legal Perspective’ (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 64; Aratrika Deb, ‘Third Party Funding in Investment Arbitration: The India Story’ (2019) 1(1) *GIBS Law Journal* 12; Debajyoti Ray Chaudhuri and Radhika Agarwal, ‘Litigation Funding: A Breakthrough for Avoidance Proceedings under IBC’ in *Quinquennial of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India, Oct 2021), Ch 28, 310; Meenal Garg, ‘Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies’ (2020) 6(2) *NLUJ Law Review* 71, 87 (electronic copy available at <https://ssrn.com/abstract=3574469>).

¹¹⁸ Tran Hoang Tu Linh and Bui Trung Hieu, ‘Third-Party Funding in Commercial Arbitration in ASEAN: Dealing with Conflicts of Interest’ (2023) 16(1) *Contemporary Asia Arbitration Journal* 97, 112-117 or general discussion on regulation of TPF in ASEAN.

¹¹⁹ Civil Law (Amendment) Act, 2017 (Singapore), s 5A(1).

¹²⁰ Civil Law (Amendment) Act, 2017 (Singapore), s 5A(2).

¹²¹ Civil Law (Amendment) Act, 2017 (Singapore), s 5B(2).

proceedings in relation to international arbitration.¹²² However, the Regulations were amended in 2021 and the categories of proceedings for which TPF is permitted were extended to include proceedings in relation to domestic arbitration proceedings, as well as proceedings commenced in the Singapore International Commercial Court (SICC).¹²³ The Regulations also prescribe the rights of funders and exceptions to those rights, including a requirement that third-party funders are required to have a paid-up share capital of at least \$5 million.¹²⁴

In Hong Kong, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, 2017 (**Arbitration Ordinance**) similarly abolished the common law offences and torts of champerty and maintenance in relation to arbitration proceedings,¹²⁵ with a similar stipulation to the one in Singapore and other jurisdictions, that principles in relation to contracts that are contrary to public policy or otherwise illegal continue to apply.¹²⁶ A purpose of the Arbitration Ordinance, in addition to ensuring that ‘third party funding of arbitration is not prohibited by particular common law doctrines’,¹²⁷ is to ‘provide for measures and safeguards in relation to third party funding of arbitration’.¹²⁸ For the latter purpose, the Arbitration Ordinance provides that an authorised body may issue a code of practice that will set out practices and standards with which third party funders of arbitration are expected to comply.¹²⁹

1.2 Codes of Conduct

Subsequent to the adoption of the Arbitration Ordinance referred to above, a Code of Practice for Third Party Funding of Arbitration was released in Hong Kong in 2019 (**Hong Kong Code of Practice**).¹³⁰ The Hong Kong Code of Practice applies to all third party funders as described in s 98J of the Arbitration Ordinance.¹³¹ The Hong Kong Code of Practice, among other things, prescribes standards and practices for third party funders,

¹²² Civil Law (Third-Party Funding) Regulations, 2017, Reg 3 limits ‘prescribed proceedings’ to

- (a) international arbitration proceedings;
- (b) court proceedings arising from or out of or in any way connected with international arbitration proceedings;
- (c) mediation proceedings arising out of or in any way connected with international arbitration proceedings;
- (d) application for a stay of proceedings referred to in section 6 of the International Arbitration Act (Cap. 143A) and any other application for the enforcement of an arbitration agreement;
- (e) proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act.

¹²³ Civil Law (Third-Party Funding) (Amendment) Regulations, 2021.

¹²⁴ Civil Law (Third-Party Funding) Regulations, 2017, Reg 4. See also Mayank Mishra, Mohit Chadha, Vaishnavi Rao and Swati Mittal, ‘Third Party Funding – Is India Ready?’ *IndusLaw* (July 2021), 3.

¹²⁵ Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, 2017, ss 98K and 98L.

¹²⁶ Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, 2017, s 98M.

¹²⁷ Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, 2017, s 98E(a).

¹²⁸ Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, 2017, s 98E(b).

¹²⁹ Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, 2017, s 98P.

¹³⁰ Hong Kong Secretary of Justice, Code of Practice for Third Party Funding of Arbitration (Hong Kong) (available at <https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf>).

¹³¹ Hong Kong Secretary of Justice, Code of Practice for Third Party Funding of Arbitration (Hong Kong), [1.2] (available at <https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf>).

stipulates capital adequacy requirements, requires proper procedures for management of conflicts of interest, and sets out requirements as to the contents of the funding agreement. Capital adequacy requirements indicate that a third-party funder must maintain capacity to pay all debts when they become due and payable, cover all of its aggregate funding liabilities under all of its funding agreements for a minimum period of 36 months, and maintain access to a minimum of HK\$20 million of capital.¹³²

Another well-known example of a Code of Conduct is the Association of Litigation Funders of England and Wales Code of Conduct (**ALF Code of Conduct**). The ALF Code of Conduct requires funders, among other things, to maintain adequate financial capacity, so as to be able to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months,¹³³ and to maintain access to a minimum of GBP5 million (or other amount as stipulated by the Association).¹³⁴ The ALF Code of Conduct also regulates control, indicating that funders are prevented from taking control of litigation or settlement negotiations,¹³⁵ and that funders must behave reasonably and may only withdraw funding in specific circumstances.¹³⁶

The Hong Kong Code of Practice is materially similar to the English Code of Conduct. However, an important distinction is that compliance with the Hong Code of Practice is overseen by a government advisory body, while the ALF Code of Conduct is a completely voluntary, self-regulating code.

1.3 Hybrid Approach

The ‘Principles Governing the Third Party Funding of Litigation’ (**Principles**) provided by the European Law Institute suggests a hybrid approach in respect of regulation of TPF.¹³⁷ The Principles set out twelve Key Principles regarding the conduct of funders and funded parties, framed in mandatory terms, and also stipulate a suggested minimum content to be included in TPF agreements.¹³⁸ Preference for this approach is justified on the basis

¹³² Hong Kong Secretary of Justice, Code of Practice for Third Party Funding of Arbitration (Hong Kong), [2.5] (available at <https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf>).

¹³³ Code of Conduct for Litigation Funders (January 2018), [9.4.1.2], (available at <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>).

¹³⁴ Code of Conduct for Litigation Funders (January 2018), [9.4.2], (available at <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>).

¹³⁵ Code of Conduct for Litigation Funders (January 2018), [9.3], (available at <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>).

¹³⁶ Code of Conduct for Litigation Funders (January 2018), [11.2], (available at <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>).

¹³⁷ European Law Institute, Principles Governing the Third Party Funding of Litigation (December 2024) (available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf).

¹³⁸ European Law Institute, Principles Governing the Third Party Funding of Litigation (December 2024), 11 (available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf).

that it helps to ‘level the playing field between funders and funded parties without imposing overly restrictive obligations’, thereby ‘protecting participants while preserving TPLF as an effective means of access to justice’.¹³⁹

1.4 Judicial Oversight

In the absence of any form of broadly applicable regulation targeted specifically at commercial funders, judicial oversight may serve to fill the ‘regulatory gap’. This ‘method’ of regulation creates the opportunity for the Court to scrutinise TPF agreements and pronounce on the validity of the agreement. Such a measure would rely on legislation that would facilitate judicial oversight of the TPF agreement.

Examples of this form of oversight can be found in Australia and Canada. Australian liquidators of insolvent companies regularly make applications to Court for the approval of TPF agreements. This is due to the operation of s 477(2B) of the Australian Corporations Act 2001 (Cth), which requires a liquidator of an insolvent company to obtain either court or creditor approval for entering into agreements that would continue for more than three months. This provision clearly captures TPF agreements which will exceed the three-month period mentioned in the provision. In Canada, judicial oversight occurs due to the requirements in relation to court approval for restructuring plans under the Companies Creditors Arrangement Act (**CCAA**).¹⁴⁰ As TPF agreements are categorised as ‘interim finance’ for the purposes of the CCAA,¹⁴¹ TPF agreements in a restructuring context is subject to court approval.¹⁴²

The utility of judicial oversight as a means to ‘regulate’ TPF agreements depends on factors such as whether Court approval is mandatory, and also the extent of the Court’s purview. The Australian judiciary, for example, has limited scope to pronounce on the merits of a TPF agreement, but merely acts to determine whether the entering into the TPF agreement is a proper exercise of the liquidator’s powers.¹⁴³ It also relies on Courts having sufficient capacity to deal with these applications promptly, as well as some form of legislative mandate.

[ng_the_Third_Party_Funding_of_Litigation.pdf](#)).

¹³⁹ European Law Institute, Principles Governing the Third-Party Funding of Litigation (December 2024), 11 (available at

https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf).

¹⁴⁰ RSC 1985, c C-36.

¹⁴¹ 9354-9186 *Quebec Inc v Callidus Capital Corp* 2020 SCC 10 (*Bluberi*).

¹⁴² Jasmine Girgis and Sulette Lombard, ‘Insolvent Litigation Funding and the Interests of Unsecured Creditors: A Canadian/Australian Comparative Perspective’ (2025) 36 *International Company and Commercial Law Review* 4.

¹⁴³ Michael Duffy and Sulette Lombard, ‘A Comparative Analysis of Litigation Funding in Insolvency Claims and in Class Actions: One Coin, Two Sides?’ (2024) 47 *University of New South Wales Law Journal* 941, 969; Jasmine Girgis and Sulette Lombard, ‘Insolvent Litigation Funding and the Interests of Unsecured Creditors: A Canadian/Australian Comparative Perspective’ (2025) 36 *International Company and Commercial Law Review* 4, ; Sulette Lombard and Christopher Symes, ‘Judicial Guidelines for Insolvent Litigation Funding Agreements’ (2020) 28 *Insolvency Law Journal* 165, 170-171.

In light of potential limited capacity of the Indian judiciary to deal with approval of TPF agreements, an absence of legislation mandating such approval, as well as the potential for increased use of TPF in an arbitration context, rather than formal court proceedings, it is recommended that mandatory judicial approval of TPF agreements as a means to regulate such agreements will not render optimum benefits.

2 Evaluation of Existing ‘Indirect’ Regulatory Measures and Role of Regulatory Institutions

Equally important to the form or method of regulating TPF, is the content of any proposed regulations. In this regard it is important that TPF matters to be regulated (or regulatory content) should not be considered in isolation. In order to identify regulatory gaps, it is necessary to consider the extent to which the existing legal framework may already provide some form of ‘indirect’ regulation. In other words, certain legal rules, although not targeted at TPF, may already operate to regulate this mechanism to some extent. It is only possible to draw certain conclusions about the method and extent of targeted regulation that is required, once the efficacy of existing ‘indirect’ measures have been evaluated. This requires a jurisdiction-specific approach. At the same time, it is important to recognise the need for a context-specific approach - the use of TPF in insolvency may raise different issues and could require a different regulatory approach, compared to use of TPF in class actions, for example, due to the unique nature of the insolvency context and regulatory environment. In this regard, it is also important to consider the function that could be fulfilled by regulatory institutions such as the IBBI and adjudicatory bodies. On the flip-side, it should further be recognised that certain regulations may unintentionally inhibit the use or growth of TPF. In order to create a legal environment where appropriate use of TPF can flourish, it is equally important to remove these barriers to its development. These matters will be considered below.

2.1 ‘Public Policy’ Constraints

In the Indian context, the Court referred to the relevance of public policy considerations on numerous occasions when discussing the legality of TPF arrangements, usually in the context of whether TPF arrangements offend against doctrines of champerty and maintenance.¹⁴⁴ As mentioned previously, a number of obiter statements indicate that the doctrines of champerty and maintenance will not necessarily be a bar to TPF arrangements. However, TPF arrangements may be regarded as against public policy in particular instances, for example when these arrangements are perceived to be extortionate and unconscionable.¹⁴⁵ Public policy considerations may therefore operate to some extent to ‘regulate’ the parameters of TPF arrangements.

That said, public policy is a ‘dynamic, variable and uncertain concept’ and 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

¹⁴⁴ See above discussion in Part C, [1.2] and cases referred to there.

¹⁴⁵ *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876-77) 4 IA 23.

deemed to be contrary to public policy'.¹⁴⁶ Attacking the validity of a funding agreement on the basis that its terms are against public policy, consequently carries with it a lot of uncertainty.

2.2 Indirectly Relevant Legislation

TPF arrangements could be affected by way of legislation that, although not directly targeted at TPF, may fulfil a 'regulatory' function to a degree. This could be due to the scope and operation of the legislation, as well as legislative emphasis on public policy principles. Examples of such legislation include the Contract Act, 1872, the Arbitration and Conciliation Act, 1996 and the Code of Civil Procedure, 1908. The extent to which some of the provisions of these Acts may potentially serve to address some of the concerns in relation to TPF arrangements was discussed above. Even though these provisions could fulfil a 'regulatory' function of some sort in so far as TPF arrangements are concerned, their application to the TPF context has not been explored or tested by the Courts in any detail. Uncertainty around these aspects may hamper TPF to develop or to be embraced by litigants in a jurisdiction where TPF is still in a nascent stage.

2.3 Insolvency Measures and Context

There is some measure of protection for creditor interests by way of legal duties imposed on insolvency professionals.¹⁴⁷ Duties imposed under the Code of Conduct for Insolvency Professionals may go some way to require insolvency professionals to remain impartial, objective and independent when entering into TPF agreements.¹⁴⁸ The Code of Conduct for Insolvency Professionals also require Insolvency Professionals to exercise due care and diligence in the performance of their task.¹⁴⁹ An argument could be made that blind agreement to an excessive funding premium, or not negotiating with more than one funder, may be contrary to this obligation. Liquidators of an insolvent company further holds the liquidation estate 'as a fiduciary for the benefit of all the creditors'.¹⁵⁰ In addition, the nature of the role of the insolvency professional indicates that they are likely commercially-sophisticated litigants, and would thus not be as vulnerable as the typical class action plaintiff. The professional knowledge and experience of the RP or liquidator, combined with legal obligations, could therefore fulfil an important function in so far as protection of creditors' interests are concerned.

In this context, it is also important to recognise the role of the IBBI as insolvency regulator. The IBBI not only regulates the insolvency *profession*, but also has the discretion to develop regulations in respect of the conduct of the insolvency *processes*

¹⁴⁶ Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 63, with reference to *P Rathinam v Union of India*, AIR 1994 SC 1844.

¹⁴⁷ Sumant Batra, *Corporate Insolvency Law and Practice* (EBC Lucknow, 2017), Ch 9 for more information on the regulation of Insolvency Professionals.

¹⁴⁸ Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, First Schedule.

¹⁴⁹ Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, First Schedule, [27A].

¹⁵⁰ Insolvency and Bankruptcy Code, 2016, s 36(2).

under the IBC.¹⁵¹ As part of its role as regulator of the profession, the IBC has the power to, among other things, prescribe the curriculum for the examination of insolvency professionals, and issuing guidelines. TPF has not been a focus of the IBC up to now. As a result, TPF does not currently feature in the curriculum and no guidelines have been issued about TPF yet. However, in light of the role and powers of the IBBI, it is clear that it has the capability to fulfil a valuable function in raising awareness about the utility of TPF in the insolvency context among RPs and liquidators, and providing guidelines as to appropriate use of the TPF mechanism.

2.4 Regulations that Inhibit Use of TPF

Even though not directly targeted at TPF, some regulations may inhibit the use of TPF or growth of the TPF industry in India. A relevant example here is FEMA, as discussed above.¹⁵² Even though the RBI has the discretion to approve release of funds obtained by way of a 'capital account transaction', regulatory uncertainty in respect of TPF transactions may cause the RBI to be reluctant to do so. Enhanced regulatory clarity, and a potential exemption in respect of TPF, will be useful in this regard.

2.5 Summary

The measures described above provide a useful form of checks and balances. However, the above discussion indicates that current 'regulatory' measures are very much a patchwork of rules, that their application is narrow and on an *ad hoc* basis, that there is uncertainty regarding their application in a TPF context, and that many regulatory gaps remain. It is true, for example, that a TPF agreement that provides for an exorbitant funding premium and that allows the funder an unacceptable amount of control over proceedings, may be perceived as contrary to public policy, and could potentially be void. However, there is uncertainty as to what would be considered as an 'exorbitant' funding premium, or what degree of 'control' would be unacceptable. A further question is how these 'protections' could be accessed by the aggrieved party. It is unlikely that the impecunious plaintiff or insolvency professional who relies on the funder to enable them to proceed with recovery proceedings, desires for the funding agreement to be voided by the Court on the basis that the funding premium is exorbitant.

A different approach is therefore required, and it is not surprising that there have been calls for regulation to clarify some of these aspects.

3 Content of Regulation

A distinction should be made between regulation of TPF agreements, and regulation of funders themselves.

In respect of TPF agreement matters that may require regulation, commentators suggest adoption of a mechanism to check excessive fees;¹⁵³ statutory restriction or a legally

¹⁵¹ Sumant Batra, *Corporate Insolvency Law and Practice* (EBC Lucknow, 2017), Ch 6 for further detail.

¹⁵² See Part B [2].

¹⁵³ Aratrika Deb, 'Third Party Funding in Investment Arbitration: The India Story' (2019) 1(1) *GIBS Law Journal* 12.

mandated clause in funding agreements to regulate the extent to which funders can interfere with, or exercise control over proceedings,¹⁵⁴ or selection of arbitrators;¹⁵⁵ strict rules regarding a funder's right to terminate the funding agreement; and rules pertaining to confidentiality and disclosure.¹⁵⁶

Regulation of funders, rather than the TPF agreement, requires consideration of aspects such as financial capacity of funders¹⁵⁷ and conflicts of interest measures.¹⁵⁸ Relevant in this regard is also a prohibition on lawyers and law firms from having a significant financial stake in third-party funders.¹⁵⁹

4 Evaluation and Recommendations

As indicated previously, various calls have been made for regulation of TPF in India in some way, whether it be formal regulation,¹⁶⁰ or self-regulation.¹⁶¹ Many of those advocating for formal regulation do so as regulation is seen as a way to 'eliminate the ambiguities associated with this concept in the current regulatory environment', ultimately 'to support the TPF infrastructure'.¹⁶² There appears to be broad agreement that regulatory uncertainty may deter parties from accessing TPF and hamper its development in India:

...the presence of professional third-party funders can benefit the commercial dispute resolution landscape in India. Unfortunately, the

¹⁵⁴ Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 65.

¹⁵⁵ Aratrika Deb, 'Third Party Funding in Investment Arbitration: The India Story' (2019) 1(1) *GIBS Law Journal* 12.

¹⁵⁶ Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 64, 67.

¹⁵⁷ Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 66.

¹⁵⁸ Tran Hoang Tu Linh and Bui Trung Hieu, 'Third-Party Funding in Commercial Arbitration in ASEAN: Dealing with Conflicts of Interest' (2023) 16(1) *Contemporary Asia Arbitration Journal* 97, for more detailed discussion on this particular point.

¹⁵⁹ Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 65.

¹⁶⁰ Sairam Bhat and Vikas Gahlot, 'Third Party Funding: A Conceptual and Comparative Legal Perspective' (2023) 5(2) *CMR University Journal for Contemporary Legal Affairs* 34, 64; Aratrika Deb, 'Third Party Funding in Investment Arbitration: The India Story' (2019) 1(1) *GIBS Law Journal* 12; Debajyoti Ray Chaudhuri and Radhika Agarwal, 'Litigation Funding: A Breakthrough for Avoidance Proceedings under IBC' in *Quinquennial of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India, Oct 2021), Ch 28, 310; Meenal Garg, 'Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies' (2020) 6(2) *NLUJ Law Review* 71, 87 (electronic copy available at <https://ssrn.com/abstract=3574469>).

¹⁶¹ See, e.g., Meenal Garg, 'Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies' (2020) 6(2) *NLUJ Law Review* 71, at 90 (electronic copy available at <https://ssrn.com/abstract=3574469>).

¹⁶² Priya Jagadeesh, 'Litigation Funding' (2020) 3(1) *International Journal of Legal Science and Innovation* 202, 207.

regulatory uncertainty surrounding TPF in the country means that leading funders currently hesitate to fund India-related disputes and Indian parties. The need of the hour is therefore to accord explicit regulatory sanction to the practice in India.¹⁶³

As discussed, doctrines in relation to champerty and maintenance do not present a real barrier to the use of TPF in India. Yet, reservations about the legitimacy of the TPF mechanism appears to persist.¹⁶⁴ Explicit regulation to confirm the legitimacy of TPF, similar to the targeted regulation in Singapore and Hong Kong in relation to use of TPF in arbitration, may be a step in the right direction to remove any doubt in respect of the legality of TPF. However, it is suggested that any regulation to confirm the legitimacy of TPF should not be restricted to arbitration proceedings as in Singapore and Hong Kong, but should also confirm the legality of the use of TPF in a broader context, to validate its use in the context of insolvency proceedings such as voidable transactions. Any such regulation could confirm, similar to the position in Singapore and Hong Kong once again, that TPF agreements contrary to public policy principles will not be valid.

Apart from ‘formal’ regulation to recognise legitimacy of TPF, it is recommended that the India TPF landscape, at this point in time, will not benefit from formal, prescriptive rules in relation to the use of TPF. While such an approach offers the obvious benefit of certainty, it would require formal enforcement procedures and mechanisms, which may be problematic in a jurisdiction where TPF is in a nascent stage. This form of regulation also often fails to recognise the different contexts in which TPF operates¹⁶⁵ – a matter of particular relevance for this study, as the insolvency context in relation to TPF is very different compared to, for example, the class action context.

It is therefore suggested that India would benefit more from model of self-regulation in relation to TPF. A degree of self-regulation of the industry remains important where the TPF industry is still developing in a jurisdiction,¹⁶⁶ as is the case in India. Such an approach will achieve a balance between certainty and flexibility that is required to create an opportunity for the industry to develop. On that basis, it is recommended that the development of Codes of Conduct, as well as suggested sample wordings for TPF agreements, would be useful at the stage of TPF usage where India is now.

It has to be acknowledged that this form of regulation will not necessarily prevent unscrupulous commercial funders from entering the market – a concern identified in the survey results. For that reason, it is generally true that plaintiffs who seek to engage with

¹⁶³ Sivakumar, Sindhu, ‘Indian Disputes and Third-Party Funding’ [2018] *International Arbitration Law Review* 143, 148.

¹⁶⁴ This has been confirmed by commentary received from Survey Participants.

¹⁶⁵ European Law Institute, Principles Governing the Third-Party Funding of Litigation (December 2024), 24 (available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf).

¹⁶⁶ European Law Institute, Principles Governing the Third-Party Funding of Litigation (December 2024), 22 (available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf).

a third-party funder may be left vulnerable in respect of matters such as funder reputation and financial stability. However, it is important to note that in an insolvency and distressed asset context (the focus of this Report), the commercial sophistication of the plaintiff would make them less vulnerable to be exploited by disreputable funders. Insolvency professionals furthermore have onerous legal obligations that would require them to pay careful attention to these matters.

A very ‘light touch’ regulatory approach is therefore recommended, more as means provide information, reassurance and education, rather than strict regulation of the industry at this stage.

PART F: PRACTICAL PERSPECTIVES

1 The Funder’s Decision-Making Framework

1.1 Risk Assessment Methodology

From a funder's perspective, the decision to invest in litigation requires a sophisticated risk assessment methodology that extends beyond traditional investment analysis. This methodology is explained below.

1.1.1 Legal Merit Analysis

The foundation of any litigation funding decision is a thorough assessment of the legal merits of the claim. This includes aspects such as the strength of legal arguments and supporting evidence, the applicability of relevant statutes and precedents, procedural viability and potential jurisdictional challenges, and counterclaim exposure and defensive vulnerabilities.

Funders typically employ specialized legal expertise, often including former judges or senior counsel, to evaluate these factors with the rigor necessary for informed investment decisions. With the latest developments in Artificial Intelligence and Machine Learning, many funders deploy such advanced technologies and software to more accurately assess the legal merit of a matter.

1.1.2 Economic Viability Assessment

Beyond legal merit, funders also carefully assess the economic parameters of potential investments, for example quantum of potential recovery relative to funding requirements, expected timeline to resolution and recovery, litigation cost projections across various procedural scenarios, and risk-adjusted return calculations considering potential outcomes.

This economic analysis often employs sophisticated financial modelling techniques that account for the unique characteristics of legal risk and uncertainty.

1.1.3 Enforcement and Recovery Analysis for the Indian Market

A distinguishing feature of litigation funding relative to other investment classes is the importance of enforcement and recovery prospects. Relevant here are:

- financial capacity of the respondent/defendant to satisfy a judgment is important as without such capacity of counterparty, getting a favourable court order is an exercise in futility;
- asset identification and potential enforcement mechanisms. In this context, Asset tracing is a very important precursor to litigation funding and once some valuable assets are traced, the funders have to do a cost benefit analysis and select high value assets which can be enforced with lower costs and a high chance of recovery;
- cross-border enforcement considerations are also very important as the legal enforcement of assets in advanced jurisdictions have better chances of enforceability than enforcement of assets in India due to more efficient legal systems supported by established players in a conducive ecosystem;
- historical patterns of compliance or resistance to judicial orders is another very important aspect to be considered.

This aspect is particularly significant in the Indian context, where enforcement timelines can substantially impact investment returns and there is scope of forum shopping leading to delays.

1.2 India-Specific Considerations

The Indian litigation and arbitration landscape presents several distinctive characteristics that funders must incorporate into their decision-making framework:

1.2.1 Timeline Management

Indian litigation and arbitration processes have specific timeline considerations:

- Arbitrations: While statutorily required to conclude within 12-18 months, challenges under Section 34 of the Arbitration and Conciliation Act, 1996 can significantly extend time to final resolution. Further, losing parties generally challenge the Arbitration award in a High Court, which takes time to adjudicate such petitions and delay recovery.
- Commercial Court Proceedings: Though expedited relative to regular civil litigation, commercial disputes still typically require 2-4 years for resolution at the trial court level, with additional time for appeals.
- Execution Proceedings: Converting judgments or awards into actual recoveries presents additional timeline challenges, though courts increasingly require substantial security deposits before granting stays on execution.

These timeline factors directly impact investment return calculations and portfolio management strategies for funders.

1.2.2 Disclosure Requirements

Unlike jurisdictions that have adopted specific disclosure requirements for third-party funding arrangements, India presently lacks mandatory disclosure obligations. This creates both opportunities and risks for funders:

- Less administrative burden and confidentiality protection
- Potential uncertainty regarding judicial treatment of undisclosed arrangements
- Possibility of future regulatory developments requiring retroactive disclosure

Prudent funders typically address these considerations through carefully drafted funding agreements that anticipate potential disclosure requirements.

1.2.3 Judicial Attitudes

The receptiveness of judges and arbitrators to claims backed by third-party funding can vary significantly. Funders must consider:

- Potential implicit biases regarding funded claims
- Jurisdictional variations in judicial familiarity with funding arrangements
- Evolving jurisprudence regarding the relevance of funding arrangements to substantive and procedural determinations

These attitudinal factors remain difficult to quantify but represent important qualitative considerations in the funding decision.

2 Strategic Considerations for Funders in the Indian Market

2.1 Portfolio Development Strategies

Given the unique characteristics of the Indian legal system, funders must adopt strategic approaches to portfolio development that differ from those applied in other markets. These are discussed in more detail below.

2.1.1 Claim Type Diversification

Successful funders typically diversify across claim types with varying risk-return profiles, for example high-certainty, longer-timeline claims, for example enforcement of existing arbitration awards or judgments, offering lower returns but higher probability of success; moderate-risk, moderate-timeline claims, for example ongoing arbitrations with strong documentary evidence; and higher-risk, potentially transformative claims, for example complex contractual disputes with significant quantum potential. This diversification helps manage both risk and cash flow timing across the portfolio.

2.1.2 Respondent Diversification

Indian litigation funding portfolios benefit from diversification across respondent types. Respondent classes typically include public sector respondents, who often present lower counterparty risk but longer enforcement timelines; private sector respondents, who may offer faster resolution but require more rigorous credit assessment; and multinational respondents, who present cross-border enforcement opportunities and challenges. This diversification mitigates specific enforcement risks associated with each respondent category.

2.1.3 Forum Diversification

Given the significant variations in timeline and procedural efficiency across forums, portfolio diversification by adjudicative forum provides important risk management benefits. Commercial arbitration proceedings are generally faster with more limited appeal grounds, commercial court litigation offers a broader discovery but longer timelines, whereas specialised tribunals provide subject matter expertise in areas like competition law or taxation. This approach ensures that procedural delays in any single forum don't create portfolio-wide liquidity challenges.

2.2 Building Specialised Expertise

The complexity of the Indian legal landscape rewards funders who develop specialised expertise in particular domains, namely:

2.2.1 Sector-Specific Knowledge

Infrastructure, real estate, and financial services disputes each present distinct characteristics that impact funding decisions. Funders who develop sector-specific expertise can better assess aspects such as technical complexity underlying disputes, industry-standard practices relevant to liability determination, typical quantum calculation methodologies, and sector-specific enforcement challenges. This specialisation enables more accurate risk assessment and competitive differentiation.

2.2.2 Jurisdictional Expertise

Given India's federal structure and the resulting variations in procedural efficiency, local law amendments, and judicial attitudes, developing specific jurisdictional expertise significantly enhances funder effectiveness, in regard to understanding in particular High Courts' approaches to procedural matters, familiarity with local amendment variations in procedural codes, knowledge of jurisdiction-specific enforcement mechanisms, and relationships with local counsel experienced in particular forums. This expertise allows for more accurate timeline projections and strategic forum selection when available.

2.2.3 Insolvency Process Integration

For funders focusing on the insolvency context, developing specialised knowledge of IBC processes creates significant advantages, such as understanding interaction between CIRP timeline constraints and litigation funding decisions, navigating approval requirements for funding arrangements including from CoC and NCLT, structuring agreements to comply with moratorium provisions, and coordinating claim pursuit with overall resolution or liquidation strategy. This integration expertise allows funders to position themselves as value-added partners rather than simply capital providers.

2.3 Relationship Development

Unlike many jurisdictions where litigation funding operates primarily through law firm relationships, the Indian market presents a more complex relationship ecosystem. The following relationships and networks are important to consider:

2.3.1 Insolvency Professional Relationships

Resolution Professionals and Liquidators serve as key decision-makers regarding pursuit of estate claims. Funders benefit from developing relationships with these professionals to receive early identification of funding opportunities, understand professional concerns regarding funding arrangements, develop standardized documentation tailored to insolvency context, and build reputation for constructive collaboration. These relationships facilitate smoother transaction execution and reduce friction in approval processes.

2.3.2 Committee of Creditors Engagement

Given the CoC's ultimate authority over significant transactions during CIRP, funders benefit from understanding creditor perspectives, for example financial institution risk assessment frameworks, decision-making processes for funding approval, documentation requirements for institutional creditors, and educational needs regarding litigation funding mechanics. This understanding allows funders to structure and present arrangements in ways that address specific creditor concerns.

2.3.3 Legal Community Integration

While direct attorney financing is prohibited, funders still benefit from relationships within the legal community, insofar as the legal community is able to assist with understanding local litigation cost structures, identifying counsel with relevant expertise for specific disputes, developing efficient case management protocols, and building reputation as reliable funding partners. These relationships support both sourcing and execution of funding opportunities.

3 Operational Implementation Models

In practice, several operational models have emerged for implementing litigation funding within insolvency proceedings, namely direct funding of estate claims, SPV structures, and creditor assignment structures. These models are explained in more detail below.

3.1 Direct Funding of Estate Claims

In this model, the funder provides capital directly to the estate, represented by the resolution professional or liquidator, to pursue specific claims. The funding agreement typically provides the funder with priority return of capital plus a success fee from recoveries, with remaining proceeds flowing to the general estate. However, while Liquidation Regulations provide more clarity about liquidator's power to enter litigation funding arrangements, such clarity is not seen in CIRP Regulations. Further, since any major decision during CIRP can be taken by CoC or with consent of CoC, not many litigation funding arrangements have been successful under CIRP.

3.2 Special Purpose Vehicle Structures

As demonstrated in the Hindustan Construction Company and Patel Engineering cases, SPV structures offer particular advantages, namely clean separation of funded claims from other estate assets, simplified governance and decision-making, enhanced flexibility in structuring investor returns, and potential accounting advantages regarding contingent asset treatment.

In this model, beneficial interests in claims are transferred to an SPV in which the funder holds a controlling interest, with the estate retaining a significant economic interest in successful outcomes.

3.3 Creditor Assignment Structures

In some scenarios, particularly during liquidation, creditors may directly assign their rights to pursue certain claims to a funder in exchange for immediate consideration. This creates a clean exit for creditors while allowing specialized litigation investors to pursue complex or long-horizon claims.

4 Case Studies

4.1 Hindustan Construction Company Limited (HCC)

HCC's 2019 transaction with a BlackRock-led consortium represents a paradigmatic example of effective litigation funding in the quasi-insolvency context. Key aspects included:

- Monetization of a diversified portfolio of arbitration awards and claims against government entities (NHAI, NHPC, NTPC) for ₹1,750 crore
- Transfer of beneficial interest to an investor-controlled SPV

- Immediate liquidity allowing debt repayment and working capital replenishment
- Risk transfer to specialized investors better positioned to manage lengthy recovery processes

This transaction demonstrated how litigation funding can function as a financial bridge, preventing insolvency while claims work through dispute resolution processes.

4.2 Patel Engineering

Following a similar model, Patel Engineering's transaction involved:

- Transfer of actionable claims alongside real estate asset rights
- SPV structure with 51% control by Eight Capital group
- Enhanced financial liquidity supporting operational continuity
- Portfolio approach to claim valuation rather than claim-by-claim assessment

This example illustrates how litigation funding can be integrated with broader asset restructuring strategies.

5 Hypothetical Insolvency Litigation Funding Scenario

The discussion below provides a detailed analysis of a hypothetical scenario to illustrate the practical mechanics and potential impact of litigation funding in the insolvency context, based on typical patterns observed in the Indian market.

5.1 Background and Initial Position

Sunrise Infrastructure Development Ltd. (SIDL), a mid-sized infrastructure company with significant government contract exposure, enters Corporate Insolvency Resolution Process with the following claim portfolio:

1. Three arbitration claims against various public sector undertakings, NHA1 totalling ₹425 crore, at various procedural stages
2. Two potential claims against private entities worth approximately ₹180 crore, not yet filed
3. Receivables under disputes with various parties amounting to ₹95 crore

The Committee of Creditors (CoC) comprises primarily banking institutions with aggregate admitted claims of ₹750 crore. The Resolution Professional has identified pursuing the claim portfolio as potentially value-enhancing but faces several constraints:

- Limited estate funds for litigation after maintaining essential operations
- Creditor reluctance to advance additional funds by way of Interim Finance with uncertain recovery
- Procedural deadlines of requiring prompt action to preserve claim viability
- Need for specialized legal expertise beyond budget constraints

5.2 Funder Engagement and Due Diligence

A specialized litigation funder is approached and conducts comprehensive due diligence, which includes:

1. Legal merit assessment:
 - Review of underlying contracts and documentation
 - Evaluation of procedural history and prior determinations
 - Independent expert opinions on technical aspects
 - Analysis of applicable legal precedents
2. Economic viability assessment:
 - Detailed cost projections across multiple scenarios
 - Timeline modeling incorporating procedural variables
 - Quantum analysis including interest and cost components
 - Portfolio diversification benefits across multiple claims
3. Enforcement and recovery analysis:
 - Financial capacity assessment of respondents
 - Historical patterns of award compliance
 - Identification of security mechanisms and enforcement pathways
 - Jurisdictional analysis for multi-state proceedings

This diligence process identifies two arbitration claims and one potential claim with high merit-to-cost ratios and strong recovery prospects.

5.3 Transaction Structure and Implementation

Based on the diligence findings, the funder proposes:

1. Creation of a Special Purpose Vehicle (Claim Recovery SPV)
2. Transfer of beneficial interest in selected high-value claims to the SPV
3. Funding commitment of ₹15 crore for pursuing the selected claims
4. Economic arrangement allocating:
 - First ₹15 crore of recoveries to reimburse funding costs
 - Next ₹10 crore split 60:40 between SIDL estate and funder
 - Recoveries beyond ₹25 crore split 70:30 between SIDL estate and funder
5. Governance structure providing funder approval rights for key litigation decisions while maintaining CoC oversight

The arrangement receives approval from 76% of CoC voting share after detailed presentation on projected recoveries. To get access to some critical documents which are important to arbitrate the matter, the Litigation funder also approaches the Promoter of the company, who agrees to share information and documents in return of some share in recovery of the funder. This arrangement raises the winnability of Arbitration matter.

5.4 Operational Execution

The funding arrangement facilitates:

1. Engagement of specialized legal counsel with sector-specific expertise
2. Retention of technical experts necessary for complex infrastructure disputes
3. Payment of institutional arbitration fees and tribunal costs
4. Development of comprehensive electronic document management system
5. Dedicated claim management team supplementing RP resources

This operational support accelerates claim progression, with the first arbitration concluding within six months of funding implementation.

5.5 Outcomes and Value Creation

Over a 24-month period, the following occurs:

1. First arbitration results in ₹95 crore award plus interest
2. Second arbitration results in partial award of ₹60 crore
3. Third claim settles pre-filing for ₹40 crore
4. Total recoveries of ₹195 crore are distributed:
 - ₹15 crore to funder as cost reimbursement
 - ₹6 crore to funder and ₹4 crore to estate from second tier allocation
 - ₹51 crore to funder and ₹119 crore to estate from third tier allocation
 - Total estate benefit: ₹123 crore

Without funding, these claims would likely have remained unpursued or been compromised for nominal value in the resolution process. The significant enhancement to the estate value improves creditor recoveries by approximately 16% and makes viable a resolution plan that preserves business continuity.

This detailed case analysis demonstrates how litigation funding can transform contingent legal assets from speculative value to concrete recoveries within the insolvency process, aligning funder returns with estate value maximization.

6 Illustrations – Calculation of Litigation Funding Costs and Sharing of Recovery

For a litigation funder or third-party funder, the primary objective is to evaluate the potential return on investment (**ROI**) while managing the risks associated with funding litigation. Estimating litigation costs and assessing a funding model for a specific transaction requires a structured approach that balances financial exposure, case merits, and potential recovery. An outline of methods to estimate litigation costs and key considerations for designing a litigation funding model, tailored to a hypothetical transaction (e.g., a commercial dispute or insolvency case under the Insolvency and Bankruptcy Code (IBC), given the context of the provided CV), is provided below.

6.1 Estimating Litigation Costs

Litigation costs can vary widely depending on the case type, jurisdiction, complexity, and duration. Below are different methods to estimate costs effectively, considering the approach, analysis, advantages and challenges in each case.

6.1.1 *Historical Data Analysis*

In terms of this approach the funder may use data from similar cases (e.g., commercial disputes, insolvency proceedings, or debt recovery cases under DRT/SARFAESI in India) to estimate costs. It is advised to review past cases funded by the firm or industry benchmarks for legal fees, court costs, expert fees, and administrative expenses.

For an IBC case, analyse costs from prior insolvency resolutions, including legal fees for insolvency professionals, court filings, and creditor committee expenses. For example, historical data might suggest that IBC cases in India typically cost INR 10–50 lakhs for mid-sized corporate debtors, depending on complexity. Useful tools to facilitate this application include case management software or databases like Manupatra or SCC Online for India-specific litigation cost trends.

The advantage of this approach is that it provides a data-driven baseline, reducing estimation errors. However, there are also challenges, such as the fact that it requires access to reliable data which is difficult to get in many insolvency matters as the incumbent promoter generally tends to hide data. Costs may also vary due to case-specific factors. For an IBC matter under the jurisdiction of NCLT, the uncertainty around litigation time also enhances the risk for litigation funder. Hence, they may estimate higher litigation costs and may also demand a higher share of recovery to cover for higher risk.

6.1.2 *Expert Consultation*

This approach involves the funder engaging with experienced litigators/Law firms, insolvency professionals, or cost consultants to provide detailed cost estimates based on the case's specifics (e.g., claim size, number of parties, jurisdictional requirements). For a transaction involving a stressed asset under IBC, funders also consult an insolvency professional or an insolvency lawyer to estimate costs for resolution processes, including legal representation, valuation reports, and auction-related expenses.

An advantage of this approach is that it leverages expert insights for accuracy, especially for complex cases. However, the consultation fees, which add to upfront costs, as well as the fact that estimates may vary, present challenges.

6.1.3 *Task-Based Cost Breakdown*

This approach envisages the funder generally breaking down the litigation process into phases (e.g., pre-litigation, discovery, trial, appeals) and estimating costs for each

phase. Costs include attorney fees, court fees, expert witness fees, document management, and potential settlement costs.

The application of this approach, using an IBC case, can be illustrated as follows:

- Pre-resolution: Legal due diligence, filing fees (INR 1,50,000–2,50,000 for NCLT filings).
- Resolution Process: Insolvency professional fees (INR 1–5 lakhs/month), CoC meetings, valuation reports, Transaction audit report (INR 15–20 lakhs).
- Litigation/Recovery: Legal representation for NCLT/DRT hearings, enforcement of SARFAESI actions (INR 10–50 lakhs).

An obvious advantage of this approach is that it provides granular insights, enabling better budgeting. However, it is time-intensive and requires detailed case information, which could be challenging.

6.1.4 Scenario Analysis

Under this approach, the funder estimates the costs under multiple scenarios (e.g., best case: quick settlement; base case: standard litigation; worst case: prolonged appeals), and assigns probabilities to each scenario to calculate a weighted average cost.

The application, involving an ABC transaction, uses model scenarios:

- Best Case: Resolution via settlement within 180 days (cost: INR 15–20 lakhs).
- Base Case: Full IBC process with NCLT hearings (cost: INR 50–80 lakhs).
- Worst Case: Appeals to NCLAT/Supreme Court (cost: INR 80–120 lakhs).

An inherent advantage of this approach is that it allows the funder to account for uncertainty and to prepare for contingencies. However, it requires assumptions to be made about case progression and probabilities.

6.1.5 Benchmarking against Claim Size

In terms of this approach, the funder estimates the costs as a percentage of the claim or recovery amount, using industry benchmarks (e.g., litigation costs typically range from 10–30% of claim value in commercial disputes).

For example, for an INR 100 crore stressed asset recovery case, estimated litigation costs at 10–20% will equal INR 10–20 crores, to cover legal fees, expert costs, and administrative expenses.

The advantage of this method is that it is quick and aligns costs with potential recovery. An inherent challenge is that it may oversimplify complex cases with non-linear cost structures.

6.2 Assessing a Litigation Funding Model

A litigation funding model defines how the funder will finance the case, share risks, and recover returns. Below are key considerations and potential models for a transaction (e.g., an IBC resolution or commercial dispute).

6.2.1 *Traditional Funding Model*

Under this structure, the funder covers all litigation costs (legal fees, court costs, expert fees) in exchange for a percentage of the recovery (e.g., 20–40%) or a multiple of invested capital (e.g., 2–3x). For an IBC case, it involves funding the insolvency professional fees, NCLT filings, and legal representation, expecting a share of the recovered amount from the resolution or liquidation process.

An advantage of this model is that it aligns funder and claimant interests, and has a high ROI potential in successful cases. From a funder perspective, the disadvantage is the high risk if the case fails, as the funder bears all costs with no recovery. This makes the model suitable for high-value IBC cases with strong merits (e.g., clear creditor claims, viable resolution plans).

6.2.2 *Hybrid Funding Model*

This model involves combining funding with partial cost-sharing by the claimant to reduce funder risk. For example, the funder covers 70% of costs, and the claimant covers 30%, with a proportional split of recovery (e.g., 60% funder, 40% claimant). To demonstrate the application of this model, in an INR 50 crore IBC case, the funder will fund INR 35 lakhs of the estimated INR 50 lakhs in costs, sharing recovery proportionally.

The advantages are that it reduces funder exposure and encourages claimant commitment, but it may deter claimants with limited resources. It would typically be suitable for mid-sized cases where claimants have some financial capacity.

6.2.3 *Portfolio Funding Model*

This model envisages the funding of a portfolio of cases to diversify risk, rather than a single transaction. Costs and returns are pooled across multiple cases, with the funder taking a share of aggregate recoveries. Its application sees the funder funding multiple IBC cases involving stressed assets across sectors (e.g., textiles, energy, as per Mr. Sharma's experience), spreading risk across diverse resolutions.

Inherent advantages of this model are that it mitigates the risk of loss from any single case, and it provides economies of scale in cost management. However, it requires significant capital and complex portfolio management and would only be suitable for large funders working with institutions handling multiple stressed assets (e.g., banks like SBI).

6.2.4 Contingency Fee-Based Model

Under this model, the funder pays a portion of costs upfront and partners with lawyers working on a contingency fee basis, reducing upfront capital outlay. Recovery is split among the funder, lawyers, and claimant. It is important to note that this model is only available in jurisdictions where lawyers are permitted to offer legal services on a contingency fee basis, which is not the case in India. However, were this model possible, it would apply as follows: in an IBC case, the funder will fund valuation and insolvency professional costs, while lawyers handle NCLT hearings on contingency, sharing 30% of recovery.

The advantage of this model is that it lowers initial investment and leverages lawyer incentives. From a funder perspective, disadvantages include that it reduces funder's control over legal strategy and requires complex fee negotiations. In India, an obvious hurdle to this model is the prohibition on contingency fees. This model would be suitable for cases with strong merits but high legal costs.

6.2.5 Staged Funding Model

This model envisages the funder disbursing funds in phases based on case milestones (e.g., filing, discovery, trial). Funding continues only if the case meets predefined criteria (e.g., favorable interim rulings). To illustrate its application, staged funding of an IBC case could involve INR 10 lakhs for initial filing and due diligence, INR 20 lakhs for resolution process, and INR 20 lakhs for enforcement, contingent on NCLT progress.

From a funder perspective, the advantages of this model are that it minimizes risk by tying funding to case progress, and allows early exit if merits weaken. The disadvantages are that it requires ongoing monitoring and it may delay case progress if funding is paused. It is typically suitable for high-risk or uncertain cases requiring close oversight.

6.3 Key Considerations for the Funding Model

1. **Case merits assessment:** The funder evaluates the strength of the case based on legal merits, evidence quality, and likelihood of recovery. For IBC cases, they assess the debtor's asset value, creditor hierarchy, and resolution plan viability.
2. **Cost-to-recover ratio:** The funder has to ensure that estimated costs are proportional to potential recovery. For example, funding an INR 50 lakh case for an INR 10 crore recovery is viable, but an INR 50 lakh case for an INR 1 crore recovery may not be. Aim for a cost-to-recovery ratio of 10–20%.
3. **Jurisdictional risks:** In India, IBC cases involve NCLT/NCLAT timelines, which can extend beyond the statutory 330 days. Funder usually factors in the delays and appeal risks when estimating costs and returns.

4. Funder's return expectations: Funders usually set a clear ROI targets (e.g., 2–3x invested capital or 20–40% of recovery). They try to balance aggressive returns with competitive terms to attract claimants.
5. Risk-mitigation: Funders also use insurance (e.g., After-the-Event insurance) to cover adverse cost risks. They may also include clawback clauses to recover costs if the claimant settles independently, or diversify funding across multiple cases to reduce exposure.
6. Due diligence: The funder conducts a thorough due diligence on the claimant, legal team, and case facts. For IBC cases, they verify asset valuations, creditor claims, and resolution professional's credentials.
7. Exit strategies: the funder defines exit points (e.g., settlement, adverse rulings) to limit losses. Staged funding or portfolio models can facilitate controlled exits.

6.4 Hypothetical Example: IBC Transaction

Case study: An INR 100 crore stressed asset recovery case under IBC, involving a textile company with viable assets.

Cost Estimation:

- Historical Data: Similar IBC cases cost INR 80–100 lakhs (legal fees, insolvency professional, valuation).
- Task-Based Breakdown: INR 10 lakhs (filing/due diligence), INR 60 lakhs (resolution process), INR 25 lakhs (enforcement/appeals). Total: INR 95 lakhs.
- Scenario Analysis: Best case (INR 40 lakhs, quick resolution), Base case (INR 56 lakhs), Worst case (INR 70 lakhs). Weighted average: INR 51 lakhs (40% best, 50% base, 10% worst).

Funding Model:

- Hybrid Model: Fund 70% (INR 35.7 lakhs), claimant funds 30% (INR 15.3 lakhs).
- Return Structure: Funder receives 30% of recovery (potentially INR 30 crores if full recovery) or 2.5x invested capital (INR 84 lakhs), whichever is higher.
- Risk Mitigation: Stage funding (INR 10 lakhs initially, rest on NCLT approval); secure ATE insurance for adverse costs.

Recommendations:

- Engage Experts: Leverage professionals like Mr. Sharma for IBC-specific insights to refine cost estimates and assess case merits.
- Use Technology: Employ AI tools for cost forecasting and case management to improve accuracy and efficiency.
- Diversify Risk: Combine portfolio funding with staged disbursements to balance high-risk IBC cases with stable commercial disputes.
- Monitor Regulatory Changes: Stay updated on IBC amendments and NCLT timelines to adjust cost estimates and funding terms.

- **Transparent Agreements:** Draft clear funding agreements with claimants, specifying cost caps, return splits, and exit clauses to avoid disputes.

By combining robust cost estimation methods with a tailored funding model, litigation funders try to optimize returns while managing the inherent risks of financing complex transactions like IBC resolutions.

7 Perceptions of Legal and Insolvency Professionals

An anonymous online survey tool was used to obtain valuable practical insights and perspectives from professionals in the insolvency industry. The survey was separated into three distinct versions, depending on the extent of the particular survey participant's experience with litigation and/or legal proceedings involving insolvency, bankruptcy, liquidation or distressed assets, and also the extent to which they have had previous experience with using a commercial funder.

Version 1 was directed at survey participants who have no experience (in their professional capacity) with litigation and/or legal proceedings involving insolvency, bankruptcy, liquidation or distressed assets; version 2 was directed at survey participants who have had experience (in their professional capacity) with litigation and/or legal proceedings involving insolvency, bankruptcy, liquidation or distressed assets, but who have never previously used a commercial funder; and version 3 was directed at survey participants who have had experience (in their professional capacity) with litigation and/or legal proceedings involving insolvency, bankruptcy, liquidation or distressed assets, and who have previously used a commercial funder. The survey was distributed among legal professionals working in banks; lawyers with expertise in insolvency matters; insolvency professionals and insolvency professional entities, as well as asset reconstruction companies. The survey questions aimed to obtain information about survey participants' knowledge and/or experience with TPF.¹⁶⁷

Unfortunately, the survey response rate was quite low, and the results did not provide sufficient data for proper quantitative analysis. The low response rate is possibly due to the low profile of TPF in India, and a similar survey in future, when the mechanism is more familiar and more widely used, would be useful.

Qualitative feedback obtained through comments from survey participants provided useful information and interesting insights. Firstly, just about every single one of the survey participants, including those who indicated that they are very familiar with TPF and how it operates, indicated that they have concerns about the legality of the mechanism in light of the doctrines of maintenance and champerty. If this is a broadly-held concern, it is understandable that there might be hesitation in India to embrace TPF as a funding mechanism. Those who did respond to the survey further indicated (unanimously) that they would like to have more information about TPF. Interestingly, the factor identified by a clear majority of survey participants as something that would make them hesitant to use TPF, is a concern in relation to the extent to which funders would

¹⁶⁷ A sample of survey questions is available below. See Appendix B.

wish to have control over legal or settlement proceedings. Survey participants also favoured regulation of TPF in India.

PART G: RECOMMENDATIONS

The Indian economy is growing at a significant rate – World Bank data suggests that India is ‘one of the fastest growing economies of the world’, ‘is poised to continue on this path’ and remains the ‘world’s fastest growing major economy’.¹⁶⁸ The rapid expansion of the Indian economy is seen as a key driver in a ‘notable upswing’ in the Indian legal services market,¹⁶⁹ and it is not surprising that there are larger volumes of commercial disputes.¹⁷⁰ With legal costs and resolution times in India higher than global standards,¹⁷¹ litigation costs are significant. Methods to fund legal proceedings are limited, however, due to options like contingency fees and conditional fees not being permitted in India. This combination of factors points to the legal services and economic environment in India offering fertile soil for the growth of TPF.

In spite of that, TPF does not yet seem to have taken off to quite the same extent as in other jurisdictions across the globe. This is likely to change, especially in light of recent high-profile funding matters such as the Go First insolvency,¹⁷² the Court’s favourable pronouncements on the use of this mechanism,¹⁷³ and tacit acceptance of the measure by many state legislatures, as indicated by amendments to the Civil Procedure Code in those states.¹⁷⁴

However, at present, there may still be some regulatory barriers to the growth of litigation funding, lack of awareness about the mechanism, uncertainty about its legitimacy, and concerns about particular aspects about TPF. Enhanced growth of TPF could be

¹⁶⁸ World Bank Group Report, 16 September 2024 (available at <https://www.worldbank.org/en/country/india/overview>).

¹⁶⁹ Mordor Intelligence, Report on India Legal Services Market Size & Share Analysis – Growth Trends & Forecasts (2025-2030), (available at <https://www.mordorintelligence.com/industry-reports/india-legal-services-market>).

¹⁷⁰ Sindhu Sivakumar, ‘Indian Disputes and Third Party Funding’ [2018] *International Arbitration Law Review* 143, 143.

¹⁷¹ Nimitt Dixit, ‘Litigation Funding: As Attitudes Shift and Tech Evolves, Litigation Funding is Set to Come of Age in India’, *Asian Legal Business* (4 September 2023) (available at <https://www.legalbusinessonline.com/features/litigation-funding-attitudes-shift-and-tech-evolves-litigation-funding-set-come-age-india>) indicates that cost of litigation in India is approximately 31 percent of the claim value, which is 10 percent higher than global standards.

¹⁷² Krishna Yadav, ‘Go First’s foreign funding push to test India’s insolvency framework’, *mintPremium* (22 October 2024), indicates that this case has ‘sparked a larger debate about third-party funding in India’, available at <https://www.livemint.com/companies/news/go-first-bankruptcy-insolvency-ibc-liquidation-pratt-and-whitney-engines-nclt-airlines-11729573673084.html>; see also Arindam Majumder, ‘Go First bankers hire Burford Capital for litigation against Pratt & Whitney’, *The Economic Times* (25 September 2024), available at <https://economictimes.indiatimes.com/industry/transportation/airlines/-aviation/go-first-bankers-hire-burford-capital-for-litigation-against-pratt-whitney/articleshow/112720350.cms?from=mdr>; and <https://mnacritique.mergersindia.com/news/nclt-seeks-go-first-response-on-coc-decision-to-liquidate-company/>.

¹⁷³ See cases referred to above in Part C, par 1.2.

¹⁷⁴ See discussion above in Part C, par 2.2.5.

achieved by ensuring that the legal ecosystem and regulatory framework in India is conducive to TPF flourishing in the jurisdiction. Targeted law reform measures are likely to make a positive contribution in that respect.

1 Regulation to Encourage Use of TPF

Some of the above hurdles could be removed by adopting formal regulation to confirm the legitimacy of TPF agreements, in so far as these do not operate against principles of public policy. Such a measure appears warranted in light of the perception or concerns of survey respondents about the legitimacy of TPF, as well as the query of a NCLT bench comprising Mahendra Khandelwal and Sanjeev Ranjan in relation to whether TPF is allowed under Indian law.¹⁷⁵

Where the TPF mechanism is not yet that familiar, and while the industry is still developing in India, it is further recommended that a Code of Conduct could fulfil a valuable ‘soft touch’ regulatory function, while serving as a useful source of information in a jurisdiction where many not be familiar with the use of TPF. To that effect, a Code of Conduct could provide a ‘best practice’ set of guidelines, as well as suggest standard terms and conditions to be included in a TPF agreement.

2 Regulation to Remove Barriers to Use of TPF

In addition to limited targeted regulation and a Code of Conduct for third party funders as discussed above, it is suggested that existing regulations that may serve as a barrier to the use and/or growth of TPF may be reconsidered. Of particular relevance here are provisions of FEMA that may deter third party funders from operating in the Indian litigation market.

3 Insolvency Specific Recommendations

There are two insolvency-specific matters that may be relevant to the use and growth of TPF in India. The first relates to the order of distribution of payment of funds in a liquidation or restructuring context, and specifically potential uncertainty in respect of distribution of the proceeds of successful legal proceedings. Costs of legal proceedings in insolvency contexts are usually considered as part of the costs of the liquidation or resolution. In many jurisdictions, including India, such costs enjoy a statutory priority for payment.¹⁷⁶ On that basis, in the context of funded proceedings, it is typically assumed that the funding premium should be afforded this priority, as it is a cost that the liquidator or the RP would otherwise have had to pay as a cost of the resolution or liquidation process. The issue of whether third-party funding of litigation can be considered as liquidation cost under the IBC has been raised by a NCLT bench comprising Mahendra

¹⁷⁵ NCLT seeks Go First response on CoC decision to liquidate company available at (<https://mnacritique.mergersindia.com/news/nclt-seeks-go-first-response-on-coc-decision-to-liquidate-company/>)

¹⁷⁶ Insolvency and Bankruptcy Code, 2016, s 53(1)(a).

Khandelwal and Sanjeev Ranjan in the recent Go First insolvency.¹⁷⁷ Legislative certainty in relation to this point would be beneficial to the use of TPF in an insolvency context.

A further matter relates to a question in regard to the structure of the TPF agreement. As mentioned, TPF agreements could involve an assignment of the cause of action, or assignment of the proceeds (or part thereof) of an action. At present, assignment of the cause of action in respect of avoidance claims under the IBC is only permitted in the context of insolvent liquidation. It is recommended that this allowance be extended to assignment of avoidance claims in a CIRP context.

4 Systemic Issues

The time taken for civil disputes to be resolved may remain an issue that could affect the use of TPF. It is not surprising, therefore, that increasingly attention is given to alternative dispute resolution mechanisms such as arbitration. Consideration could be given to the way in which legal proceedings in insolvency are dealt with, either with a view to improve the time to deal with matters, or with a view to adopt a framework that would facilitate arbitration proceedings.

PART H: CONCLUSION

The advent of commercial litigation funding has had a significant impact on the civil litigation landscape. Its usefulness in various contexts, including that of insolvency, cannot be denied.

Yet, in spite of the obvious benefits that it offers, TPF is not widely used in India. This is likely due to some of the reasons mentioned in this Report, and potentially also because it is still relatively unknown. We hope that this Report will make a useful contribution in offering some suggestions as to how barriers that prevent TPF from flourishing in India could be dealt with, and also to demystify to some extent the operation of this mechanism, thereby contributing to the broader use of TPF in India.

That said, much still needs to be done. Further research on particular aspects, such as a deep-dive into the distinction between litigation and arbitration in so far as the use of TPF is concerned; careful consideration of structural and contextual factors that may impede the growth of TPF; detailed analysis of the relevant principles of the IBC through a TPF lens; TPF in cross-border insolvency matters, with a view to the impact of foreign exchange regulations; and so forth, offer plenty of opportunity for further and valuable research in this area.

Nonetheless, the Report takes an important first step in highlighting some of the relevant aspects in relation to TPF in the context of Indian insolvency proceedings, and aims to make a useful contribution to the existing literature in that way.

¹⁷⁷ Economic Times, NCLT seeks Go First response on CoC decision to liquidate company available at (<https://mnacritique.mergersindia.com/news/nclt-seeks-go-first-response-on-coc-decision-to-liquidate-company/>)

Ultimately, one cannot help but concur that

[g]iven the hints spread across India's statute book about the legality of third party funding, and the experience of leading common law jurisdictions, there is little cause to delay officially acknowledging/clarifying its legality in India (and indeed a compelling case in favour of making it available at the earliest, as a tool for litigants ...) There is every reason for the Indian Government to welcome third party funding and other litigation finance innovations, on the basis of global best practices and experience...This is an opportune and existential time all at once, and India should act now.¹⁷⁸

¹⁷⁸ Shaneen Parikh, 'Light the Beacons – It Is Time to Test Third-Party Funding in India (2021), 4 (available at <https://www.cyrilshroff.com/wp-content/uploads/2021/05/Light-the-beacons-%E2%80%93-it-is-time-to-test-third-party-funding-in-India-.pdf>)

APPENDIX A – Executive Summary of Recommendations

RECOMMENDATION 1 – Confirmation of legitimacy of TPF

Concerns regarding the legitimacy of TPF persist, in spite of doctrines of champerty and maintenance not being a formal impediment against use of this mechanism. These concerns may hinder TPF being used more broadly, resulting in optimum benefits of the mechanism not being attained. Legislative change to confirm the legitimacy of TPF is recommended. Such a step would address the concerns mentioned and could enhance use of TPF in India, with consequent financial benefits for stakeholders.

RECOMMENDATION 2 – Certainty regarding distribution of proceeds of successful litigation outcome

There is uncertainty regarding the distribution of the proceeds of a successful litigation outcome, and in particular, whether the amount payable to a funder is regarded as liquidation cost, thus allowing for a priority upon distribution. Uncertainty in this respect could cause commercial funders to be reluctant to operate in India, and could serve as a barrier to broader use of TPF. Regulatory change to acknowledge the priority of commercial funders in respect of distribution of the proceeds of a successful litigation outcome, and thus removing this uncertainty, is recommended.

RECOMMENDATION 3 – Ensuring that FEMA does not present a barrier to TPF

There may be concern that provisions of FEMA could hinder third-party funders from operating in the Indian litigation market. It is recommended that an analysis of provisions of FEMA through a TPF lens is desirable to determine the extent of barriers to third party funders operating in India, with subsequent legislative change to remove any such barriers. This could potentially contribute to broader use of TPF in India.

RECOMMENDATION 4 – Expanded assignment of avoidance causes

Assignment of avoidance causes is expressly permitted in case of liquidation of an insolvent company, but not in the case of a resolution process. The reason for the distinction is unclear. Legislative change to remove the distinction and to expand permissibility of assignment of avoidance causes also in the case of the resolution process, is recommended.

RECOMMENDATION 5 – Preventing lawyers from operating or holding a stake in commercial funding entities

Conditional fee arrangements and contingency fee arrangements are prohibited in India. However, there is no regulation to prevent lawyers from operating or holding a stake in a commercial funding entity. Such involvement by lawyers would indirectly involve a breach of the prohibition against conditional fee arrangements or contingency fee arrangements. Express regulation to prohibit lawyers from operating or holding a stake in commercial funding entities would prevent the opportunity to indirectly breach this prohibition.

RECOMMENDATION 6 – Self-regulation instead of formal regulation of TPF

The use of TPF in India is at a nascent stage. On that basis, India would be better served by a model of self-regulation in relation to TPF, seeing that the TPF industry is still developing in this jurisdiction. Such an approach will achieve a balance between certainty and the flexibility that is required to create an opportunity for the industry to develop. It allows for TPF to develop organically to suit the conditions in the jurisdiction, and leaves room to address any regulatory gaps further down the track ones these become more apparent, rather than trying to address them pre-emptively. It is therefore recommended that formal regulation in relation to use of TPF should not be adopted at this stage.

RECOMMENDATION 7 – No mandatory approval of TPF agreements by courts

Judicial approval of TPF agreements is mandated in some jurisdictions. In the absence of increased capacity of the courts, it is recommended that such a requirement not be imposed in India, as this may cause unavoidable and extensive delays.

RECOMMENDATION 8 – Code of Conduct

A regulatory vacuum in respect of TPF is not desirable. A model Code of Conduct will fit well with a model of self-regulation and could provide some guidance in respect of the operation of commercial litigation funders. It is therefore recommended that a Code of Conduct be developed to inform the use of TPF in India.

RECOMMENDATION 9 – Template agreement

This Report mentioned a number of concerns in regard to matters such as funding premiums; funder control over proceedings; funder liability for adverse cost orders; and so forth. These are typically matters that are arranged between the plaintiff and the funding body by way of contract. While TPF is relatively unfamiliar in India, it may be useful to provide a template agreement as a means to inform parties about relevant issues in a TPF context, as well as boilerplate provisions as to how those issues are commonly dealt with in a funding agreement. It is therefore recommended that a template agreement that complies with the Contract Act, 1872 be drafted and made available.

RECOMMENDATION 10 – Information and education

TPF is an untapped resource, likely due to industry professionals being unaware of its existence, or unfamiliar with its use. To address this, it is recommended that steps be taken to raise awareness of the existence and utility of TPF, and to provide information resources and education regarding the use of the mechanism. Existing regulatory bodies and entities such as the IBBI are ideally placed to assist with this.

APPENDIX B – Comparative Table: TPF in Insolvency

Issue	Australia	United Kingdom	Singapore	India
Legality	Legal	Legal	Legal in insolvency and international arbitration proceedings	Not expressly illegal; seemingly allowed but unregulated
Regulation	No targeted regulation; judicial oversight in some instances	No targeted regulation; self-regulation (voluntary)	Targeted regulation – international arbitration	Unregulated
Licensing requirements	No formal licensing requirements	No formal licensing requirements	Requirements where operates in international arbitration sphere; no formal requirements for purely insolvent litigation context	No formal licensing requirements
Judicial attitude	Supportive; quasi regulatory function through requirement of mandatory court approval in some instances	Supportive	Conservative, but evolving	Cautious and evolving
Market maturity	Mature and well-developed market	Mature and well-developed market	Developing market	Nascent market
Disclosure requirements	Some degree of disclosure may be required as part of judicial proceedings; extent varies	Some degree of disclosure may be required as part of judicial proceedings; extent varies	Mandatory disclosure	Not mandated
Funder control over proceedings	Some degree of control permitted as	Some degree of control permitted as	Some degree of control permitted as	No express guidelines yet

	per terms of agreement; judicial oversight	per terms of agreement	per terms of agreement, but subject to limitations	
Funder liability for adverse cost orders	Per agreement; Court has power to order non-party (funder) liable for adverse costs	Per agreement; Court has power to order non-party (funder) liable for adverse costs	Per agreement	Uncertain; tribunal or court have discretion to determine who bears costs of proceedings
Capital Adequacy Requirements	No legal requirements	No legal requirements	Statutory capital adequacy requirements	No legal requirements

APPENDIX C – Survey Questions

Litigation Funding Survey 1 –

Participants who have never been involved in bankruptcy/insolvency/ distressed debt type litigation

1. How familiar are you with the concept of commercial litigation funding?
2. Are you in principle supportive of/interested in using commercial litigation funding in bankruptcy/insolvency/distressed debt type litigation, should it be readily available, and supported by clear legal rules on its usage?
3. Do you know of any commercial litigation funders operating in India?
4. In your view, what is/are the main potential barrier(s) to using litigation funding? Please select all that apply.
5. In your view, which issues listed below would you regard as a *legal* impediment that may significantly constrain entering into a litigation funding agreement to support litigation in an insolvency context? Please select all that apply.
6. In your view, should commercial litigation funding be regulated?
7. Please comment below if there are there any other aspects regarding use of commercial litigation funding in bankruptcy/insolvency/distressed debt related litigation that you would like to highlight.

Litigation Funding Survey 2 –

Participants who have experience with bankruptcy/insolvency/ distressed debt type litigation, but who have never used a commercial litigation funder

1. How familiar are you with the concept of commercial litigation funding?
2. Are you in principle supportive of/interested in using commercial litigation funding in insolvency litigation, should it be readily available, and supported by clear legal rules on its usage?
3. Do you know of any commercial litigation funders operating in India?
4. In your view, what is/are the potential barrier(s) to using litigation funding? Please select all that apply.
5. In your view, which issues listed below would you regard as a *legal* impediment that may significantly constrain entering into a litigation funding agreement to support litigation in an insolvency context? Please select all that apply.
6. In your view, should commercial litigation funding be regulated?

7. Are there any other aspects regarding use of commercial litigation funding in bankruptcy/insolvency/distressed debt related litigation that you would like to comment on?
8. How many bankruptcy/insolvency/distressed debt related litigation matters have you been you involved in?
9. Where the bankruptcy/insolvency/distressed debt related litigation involve a company - was the company subject to any formal insolvency process during the litigation proceedings?
10. Please indicate the type of insolvency process the specific company was subject to during the bankruptcy/insolvency/distressed debt related litigation that you have been involved in in your professional capacity.
11. Identify the most common type of bankruptcy/insolvency/distressed debt related litigation that you have been involved in. Please select no more than TWO options from the list below.
12. In how many instances did the bankruptcy/insolvency/distressed debt related litigation result in a successful outcome?
13. Given that you have not used commercial litigation funding in bankruptcy/insolvency/distressed debt related proceedings, how was litigation funded in these proceedings?
14. Please indicate no more than TWO method/s of funding for litigation purposes that you would use most often.
15. In your experience, would commercial litigation funders only be willing to fund proceedings where the value of the potential claim exceeds a certain amount?
16. If you were to enter into an agreement with a commercial litigation funder, please identify the factors that you would consider as important when selecting a commercial litigation funder. Select all that apply.
17. Please identify the TWO factors that you would consider as MOST important when having to select a commercial litigation funder.
18. Please indicate your reasons for not having used a commercial litigation funder previously. Please select all that apply.

**Litigation Funding Survey 3 –
Participants who have experience with using a commercial litigation funder**

1. How familiar are you with the concept of commercial litigation funding?

2. Are you in principle supportive of/interested in using commercial litigation funding in insolvency litigation, should it be readily available, and supported by clear legal rules on its usage?
3. Do you know of any commercial litigation funders operating in India?
4. In your view, what is/are the potential barrier(s) to using litigation funding? Please select all that apply.
5. In your view, which issues listed below would you regard as a *legal* impediment that may significantly constrain entering into a litigation funding agreement to support litigation in an insolvency context? Please select all that apply.
6. In your view, should commercial litigation funding be regulated?
7. Are there any other aspects regarding use of commercial litigation funding in bankruptcy/insolvency/distressed debt related litigation that you would like to comment on?
8. How many bankruptcy/insolvency/distressed debt related litigation matters have you been you involved in?
9. Where the bankruptcy/insolvency/distressed debt related litigation involve a company - was the company subject to any formal insolvency process during the litigation proceedings?
10. If your answer to the previous question was 'YES', please indicate the type of insolvency process the specific company was subject to during the bankruptcy/insolvency/distressed debt related litigation that you have been involved in in your professional capacity. If your answer to the previous question was 'NO', please select 'Not applicable'.
11. Identify the most common type of bankruptcy/insolvency/distressed debt related litigation that you have been involved in. Please select no more than TWO options from the list below.
12. In how many instances did the bankruptcy/insolvency/distressed debt related litigation result in a successful outcome?
13. In how many of the bankruptcy/insolvency/distressed debt related litigation that you have been involved in, did you use a commercial litigation funder?
14. Identify the most common type of bankruptcy/insolvency/distressed debt related litigation that you were involved in and that relied on funding by a commercial litigation funder. Please select no more than TWO options from the list below.

15. In how many instances did the bankruptcy/insolvency/distressed debt related litigation that was funded by a commercial litigation funder result in a successful outcome?
16. When using a litigation funder, what is the usual type of legal arrangement in terms of the funding agreement?
17. In your experience, what is the funding premium (portion of proceeds of a successful outcome expressed as a percentage) typically charged by the funder in exchange for funding the litigation.
18. How were litigation/legal proceedings funded in respect of litigation where you did NOT use a commercial litigation funder?
19. Where you used methods of funding litigation other than commercial litigation funding, please indicate which TWO other methods of funding you would use most often.
20. In your experience, would commercial litigation funders only be willing to fund proceedings where the value of the potential claim exceeds a certain amount?
21. Please identify the factors that you consider as important when selecting a commercial litigation funder. Select all that apply.
22. Please identify the TWO factors that you consider as MOST important when selecting a commercial litigation funder.
23. In using a litigation funder, have you ever had to resort to the dispute resolution clauses in the agreement?

APPENDIX D – Reference List

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