

## Litigation Funding Agreements – Are they valid in India?

By: Neerav Merchant and Ketaki Pansare, Majmudar & Partners, India

### The UKSC's decision

On July 26, 2023, the United Kingdom's Supreme Court (the "UKSC"), in the matter of *R (on the application of PACCAR Inc and others) (Appellants) v. Competition Appeal Tribunal and others (Respondents)*, [2023] UKSC 28, held that Litigation Funding Agreements ("LFAs"), under which the funder's remuneration is calculated by reference to a share of the damages ultimately recovered, fall within the statutory definition of damages-based agreements ("DBAs") and are, therefore, unenforceable. In the UK, a DBA is *an agreement between a person providing advocacy, litigation or claims management services and the recipient of those services, which provides that: (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.* (Section 58AA(3)(a) of the UK's Courts and Legal Services Act 1990.) As per the UKSC's ruling LFAs (existing and future) must comply with the conditions set out in the Damages Based Awards Regulations, 2013.

The specific issue before the UKSC was whether LFAs constitute DBAs, and to determine this question, the UKSC relied on the interpretation of the foregoing definition of DBAs and, more particularly, on the interpretation of "claims management services." The UKSC held that LFAs can amount to "claims management services", and as a result, can be considered DBAs, requiring compliance with the Damages Based Awards Regulations, 2013, so as to be enforceable.

### What is Third Party Funding?

Globally, LFAs are more commonly known as "Third-party Litigation Funding," "Third Party Funding" ("TPF") or "Litigation Financing." The concept of TPF originates from the common law doctrine of champerty and maintenance. TPF is an arrangement by which a funder, who is not a party to the lawsuit, agrees to help the litigant fund it. It is the non-recourse funding of litigation costs of a party by a funder in exchange for a certain share in the monetary judgement or award of the litigation, if successful. TPF may cover costs of any type of dispute resolution mechanism, be it traditional litigation in courts, arbitration, or mediation. TPF provides a level playing field for both parties and ensures that legitimate rights are not compromised due to paucity of financial resources.

### Indian law position on third party funding

In India, as on date, there is no law regulating TPF. However, Indian law does not prohibit TPF. An old 1876 Privy Council decision in *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, provides guidance in this regard. Here, the court permitted TPF on the grounds of promoting access to justice, but held that:

*“agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them.”*

In 2018, India’s Supreme Court, in *Bar Council of India v. AK. Balaji* [(2018) 5 SCC 379] observed that:

*“In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation. In U.S.A., lawyers are permitted to fund the entire litigation and take their fee as a percentage of the proceeds if they win the case. Third Party Litigation Funding/Legal Financing agreements are not prohibited. In the U.K., Section 58B of the Courts and Legal Services Act, 1990 permits litigation funding agreements between legal service providers and litigants or clients, and also permits third party Litigation Funding or Legal Financing agreements, whereby the third party can get a share of the damages or “winnings”.”*

*(Note: The Rules referred in the court's extract above refers to Rules from Chapter-II, Standards of Professional Conduct and Etiquette, of the Bar Council of India Rules.)*

Basis the decision of the Privy Council in 1876 and the observations made by the Supreme Court in *AK. Balaji’s* case, one can assume that Indian courts recognize TPF agreements; provided, that, the third party is not an Advocate-on-Record and is not participating or appearing in the litigation on behalf of any of the parties to the suit; and that the conditions of a valid contract as per the Indian Contract Act, 1872 are strictly adhered.

Apart from the fact that Indian courts have recognized the concept of TPF, in some states, namely, Gujarat, Madhya Pradesh, Andhra Pradesh, Orissa, Tamil Nadu and Uttar Pradesh, statutory recognition has been given to TPF by the state legislature through amendments to Order 25; Rule 1 of the Code of Civil Procedure, 1908 (the “CPC”). The Bombay High Court, in 1983, also amended Order 25; Rule 2 of the CPC to specifically provide courts with the power to secure costs for litigation by asking the third-party financier to become a party to the suit and deposit the costs in court.

The United States of America and Australia have also recognized TPF. Similarly, in Asia, Singapore and Hong Kong have accepted TPF, but have confined and restricted it to disputes related to international arbitration. On this basis, in 2017, the High-Level Committee report on the Institutionalization of Arbitration Mechanism in India, led by Retd. Justice B. N. Srikrishna, made favorable references to TPF agreements.

## Conclusion

Several prominent third-party funders have been approaching clients in India to offer funding services, primarily, in relation to cross-border arbitrations seated outside India. In a first of its kind in the Indian infrastructure sector, in 2019, Hindustan Construction Company entered into an agreement with a consortium of investors led by BlackRock (a US-based financial institution) to monetize an identified pool of arbitration awards and claims for a consideration of Rs.1750 crores, for which a special purpose vehicle (SPV) was created. Similar arrangements have also been made by companies such as Patel Engineering and Era Infra Engineering. In addition, an Indian startup, LegalPay, founded in November 2019, funds commercial litigation for companies and has funded over 2000 disputes since its inception.

To conclude, third party funding in the resolution of commercial disputes has gained global prominence and considering the number of legal reforms and policy changes in India, it is hoped that India will soon embrace TPF in a bigger way in consonance with the Indian legal system. Perhaps, the Central Government can consider giving statutory recognition to TPF.