

## The Stage is Set: Covid19 Market Forces accelerating the inevitable arrival of Third Party Funding of disputes in India

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Unpredictable times accelerate innovation. In a previous article, we discussed how the economic uncertainty created by COVID - 19 and the demand for immediate working capital across all industries has set the stage for adoption of unusual means to pursue legal claims - litigation finance or Third Party Funding ("TPF") of disputes.

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What potential disputes are viable options for TPF in India?

The funders' returns are limited to what can be realised in cash or kind from the litigation's outcome. Typically, the funders are more amenable to funding complex commercial claims— where the costs of the litigation/arbitration are significant and substantial though the merits of the case are dependent on the information in control of the funded party.

The pandemic has ushered an unprecedented (but quite obvious) upsurge in such contractual claims with respect to supply chain disruptions, obligations under material partnership, M&A and JV contracts, allied employment contracts across sectors and industries. Other cases which are fit for TPF are companies in capital intensive industries, especially the ones categorised as non-essential, which may be constrained to seek formal and informal protection from their creditors, and thus lead to more distressed cases requiring legal finance. Investment treaty claims by Indian companies against foreign governments with respect to Covid19 related defaults may also be fit cases for TPF. And these are just at the tip of the massive litigation iceberg.

What is the status of TPF in India?

Besides the two essentials – supply and demand for such litigation financing that depend on economic forces, the questions often faced in context of this rather novel asset class in India are on legality and enforceability of the TPF arrangements.

It comes as a surprise to most that TPF is not a new concept in India and has existed in traditional unregulated markets. This has been possible in India because unlike other common law jurisdictions where legislations were required to remove embargos of champerty and maintenance on TPF arrangements, there is no such express bar under the Indian Contract Act, 1872.

As on date, there are no legal impediments that prevent third-party funding of disputes in India. In fact, (Indian) Code of Civil Procedure, 1908, as applicable to certain states, specifically provides for the role of third party financier in a litigation. The then highest court in India in 1786 in Ram Coomar Coondoo v. Chander Canto Mookerjee has declared that TPF arrangements are

not per se illegal, but must be cautiously entered into. In essence, the TPF contracts should not be the modern equivalents of Shylock's pound of flesh.

What has piqued recent interest in TPF in India is the recent observation of the Supreme Court of India in *Bar Council of India v. AK Balaji* that there "appears" to be no restriction on TPF of disputes in India by non-lawyers. Further, another 2019 Bombay High Court case (though currently in appeal before the Supreme Court) restated with certitude that there is no express restriction on TPF of disputes as long as it is in compliance with the current law, and does not involve a lawyer funding the client's case.

Additionally, the Indian Government's pro-active commercial contract enforcement stance, enactment of arbitration and investor friendly laws, and the recent pro-arbitration stance of the judiciary have improved market sentiment. Summer has followed spring, and reportedly over the past years, Indian parties have received TPF for arbitrating their claims in disputes seated in TPF-friendly jurisdictions, such as the *Essar v. Norscot* case pending enforcement challenge before the Bombay High Court.

#### Indian Landscape and the Way Ahead

Financial Times recently reported that while the funders are cautious about financing the business interruption claimants in insurance claims post COVID-19, they are carefully watching all the other litigation that will come out of the post COVID-19 economic crisis. In the rapidly transforming landscape, the interest in TPF is bound to increase and consequently investment will steadily rise.

As TPF finds its feet in India, simultaneous quest for clarity on the issues such as corporate regulation of TPF, ethical issues regarding disclosure, confidentiality, privilege and privacy, and ethical regulation of the funder and the legal professionals involved in cases with TPF will be sought. Internationally, the development of the legal market for TPF has been self-reinforcing. Trends would indicate that in absence of a strict legal landscape governing the space initially, increased funding opportunities resulted in greater scrutiny of funding arrangements by the courts, which contributed to development of the law and rules surrounding TPF. In India as well, it is expected that the economic forces introducing TPF would inevitably lead to eventual clarity on the inter-se rights and equities of the parties, and the operating and regulatory framework.

It is the reckoning that Cinderella's fairy godmother has arrived. It remains to be seen what Cinderella makes of it before midnight!

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