



UKCA[®]
AND PARTNERS
ADVOCATES & SOLICITORS

Third Party Funding in Arbitration

June 20, 2021

Presented by:

Mayank Kumar

Edited by: N. Raja Singh, Partner

PHONE

+91 11 410 35 343

+91 11 410 35 342

EMAIL

contact@ukca.in

www.ukca.in

ADDRESS

E-2, Kailash Colony,
New Delhi – 110048

WHAT IS THIRD PARTY FUNDING ?

- Third-party funding means when an independent entity or third person undertakes to fund the litigation cost on behalf of the claimant or defendant in litigation. In return, he recovered a portion of the money should it succeed in the dispute.
- It is non-recourse funding.
- TPF can cover legal counsel's fee, court/tribunal's fee, cost of expert witnesses, pre-deposit, adverse costs order, and other dispute-related expenses.

Who can seek funding?

Any party in the litigation, Law firms can also seek funding on behalf of parties for security and certainty of their fee.

A single case or a group of the case, i.e., Portfolio Funding

Who are the Funders?

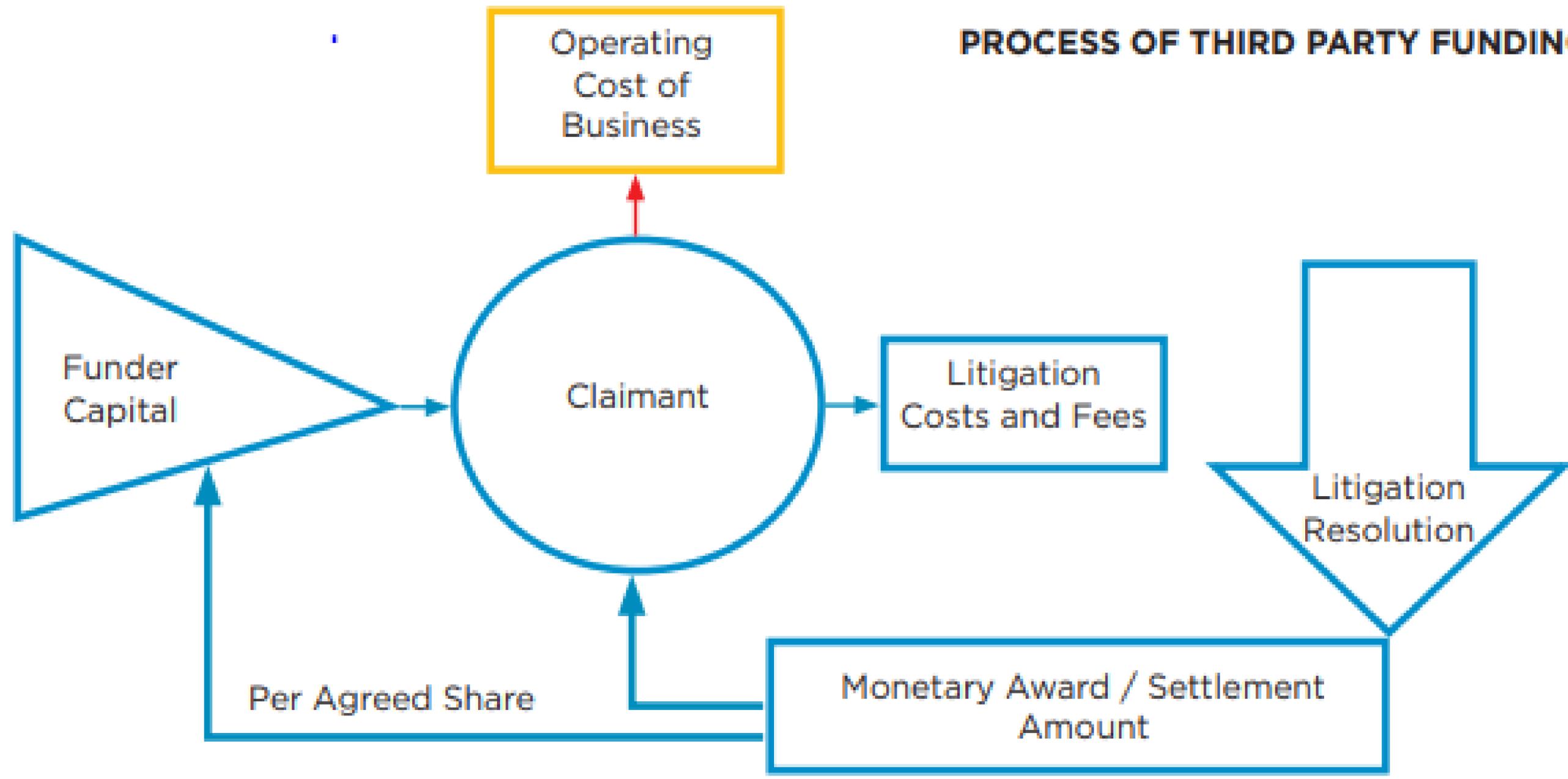
Specialist third-party funders, investment banks, hedge funds, insurance companies, and pension funds also invest in legal claims as an asset class.

What kind of litigations are funded?

Litigations relating to commercial contracts, international commercial arbitration, class action suits, tortious claims and personal injury claims, anti-trust proceedings, insolvency proceedings, and other like claims, that have a greater chance of winning it with a substantial monetary award.

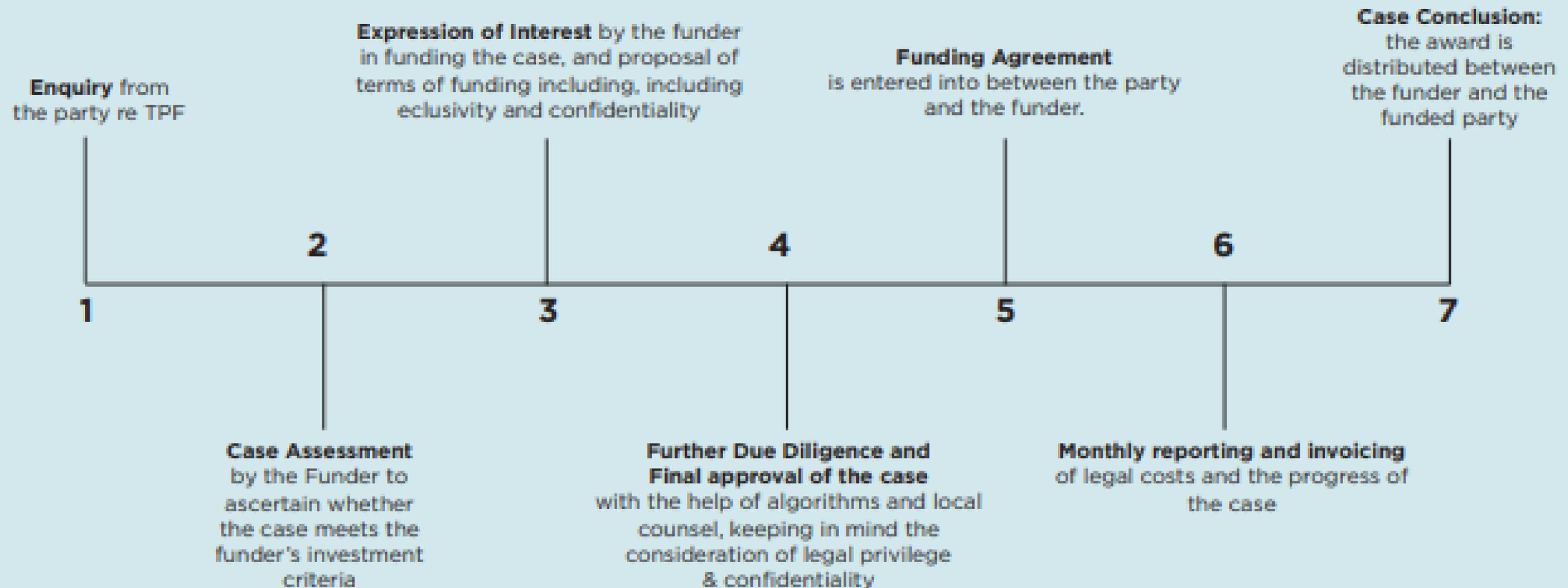
MODEL OF THIRD PARTY FUNDING ?

PROCESS OF THIRD PARTY FUNDING



Steps involved in the Funding Process.

Raising Third Party Funding - a brief overview of the process



STANDARD TERMS OF A THIRD PARTY FUNDING AGREEMENT

Following terms are generally found in the Third Party funding Agreement:

Duties of parties:

To carry out all necessary acts with reasonable care and skill; to continue diligently with the advice of the lawyers; to cooperate with the funder; to request consent of the funder where it is required to incur costs, dispose of claims, discontinue the proceedings, enforce the judgment; to report all material events to the funder, etc.

Duties of the funder:

To review the case; to cover the agreed costs; etc. In some jurisdictions, funders may also have the duty to liaise with the lawyers

Distribution of Proceeds following successful claim:

Includes the waterfall of distribution of a successful claim, the definition of proceeds, set-off rights etc. While the stake of the funder is a matter of commercial negotiation, several funds indicate the range of their stake upfront, subject to the risk assessed for each case.

Representation by parties:

Fundamental conditions including the rights of assignment, presence of counterclaims, validity of documents provided, etc

Representation by funders:

Funder's capital adequacy, lack of any relationship with the counter-party, independence regarding the merits, no interest in the merits of the dispute, etc.

Assignment of Claim to funder as security:

The details of assignment of rights to claim costs and all subsidiary rights to the funder. In some agreements, funders may seek the right to on-sell.

 Termination:

The events and circumstances upon which the Agreement can be terminated and its consequences.

 Settlement proposals by court or opponent:

Stipulations as to the plan of action in the case of a settlement proposal, its acceptance, termination, continuance of proceedings etc

 Confidentiality and Disclosure:

Explains the confidential nature of the agreement, for example: the existence of the funding and the identity of the funder, the background of the claim; the procedural status of the claim; the planned strategies and the tactics, the expected recovery, billing arrangements, litigation risk, etc. Agreed process for disclosures where required under law or by regulator

 Data transfer by Funder to third parties:

The circumstances when transfer of data by the funder to any other third party (example, witness, expert, insurance companies, etc.) would be permissible

LEGAL POSITION OF THIRD PARTY FUNDING IN INDIA

- Code of Civil Procedure, 1908 (CPC) does not expressly prohibit TPF disputes in India. However, order XXV, rule 3 of the CPC (as enacted in Maharashtra, Gujarat, Karnataka, and Madhya Pradesh) allows for the impleadment of a third-party financier to the dispute where it is bearing the claimant's costs, subject to a direction from the court.
- Part VI, Chapter II, Section II, Rule 20 of the Bar Council of India Rules (Standard of Professional Conduct and Etiquette) prohibits advocates and solicitors from funding third-party funding in cases where they are representing.

Precedents

- **Ram Coomar Coondoo and Ors. v. Chunder Canto Mookerjee, (1876)L.R. 4 I.A. 23.**

Privy Council held that agreements for third-party funding of disputes would only contravene the public policy of India if they were inherently inequitable, unconscionable and not made with malade objects of supporting a claim.

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

While it is a settled proposition in law that third-party financing of disputes is not against public policy and is unconscionable, the standards applicable to advocates funding disputes of their clients or recovering proceeds from there ought to be different.

- **Jayaswal Ashoka Infrastructures ... vs. Pansare Lawad Sallagar, Thr. Its ... on 7 March 2019 (in appeal)**

It has effectively held that law graduates may engage in the business of litigation finance, provided they are not advocates registered under the Advocates Act 1961 and thus can enter into damages-based agreement otherwise barred under the Bar Council of India Rules.

➤ **Suganchand v. Balchand , AIR 1957 Raj 89**

Rajasthan HC observed that while champertous agreements are prime facie legal under Indian law, they would become unenforceable if the following conditions are satisfied:

a) *if they are extortionate and unconscionable so as to be inequitable against the party;*

b) *if they are made not with the bona fide object of assisting a claim believed to be just and obtaining a reasonable recompense therefor, but for improper objects as:*

c) *for the purpose of gambling in litigation; or*

d) *of injuring or oppressing others by abetting and encouraging unrighteous suits.*

➤ **Nuthaki Venkataswami v. Katta Nagi Reddy (died) & Others, Appeals No. 176 & 406 Of 1956.**

In the instant case, the agreement envisioned the financier to retain 3/4th of the claimant's property should its claim be successful before the court. Refusing to recognize such an agreement, the Court, relying upon established precedents held that such an arrangement of sharing of profits was not held to be fair or reasonable in any other case and, as such, was unconscionable and ex facie extortionary.

➤ **Bar Council of India v. AK Balaji, 2018 SCC OnLine SC 214.**

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.

ADVANTAGES OF TPF

- Enhances access to justice
- Allows better enforcement of rights, holding accountable those responsible for wrongful acts
- Parties settle based on the merits of the claim and not based on cost or risk-tolerance factors
- TPF enables creation of a financial level playing field between parties, alleviating this structural concern
- Allows the funds released to be used for core business (rather than expenditure on legal costs). Managing working capital
- Discourages deep-pocketed parties from “gaming” the system by burying the counterparty in paper
- **Risk management:** Claimants with the funds to arbitrate may want to lay off some of the risk associated with costly arbitration, and be prepared to give up a proportion of any recoveries to do so. It also enables a company to invest that money elsewhere. Besides, the funded party is relieved of costs pressures and cash-flow issues associated with the legal costs of the arbitration.
- **Validation:** Funders are only interested in good claims. They will, therefore, conduct extensive due diligence and carry out their analysis of the merits before agreeing to provide funding. This objective analysis may assist the claimant to shape its case strategy, and may also encourage early settlement once the other party is made aware that the claim has the backing of a funder.

LIMITATION OF THIRD PARTY FUNDING IN INDIA

- Lack of Legislative framework regulating the TPF agreement nothing to resolve the conflict of Interest between the parties and the funder.
- Class actions suits or representative claims which provide a high likelihood of exemplary damages that attract funders have not gained traction in India. Further, India has hardly any precedent for granting exemplary or 'blockbuster' damages for commercial disputes.
- Factors like roster changes during the case's progress lead to an inherent unpredictability in the system that is not conducive to risk assessment.
- The third-party funders often prefer sharing the risk of their investment with lawyers appearing for the funded party by requiring the lawyers to work on a contingency fee basis. This aligns with the incentives of the lawyers and funders. Therefore, this practice is impermissible in India.
- Third party funders usually use accurate data to carry out a risk assessment analysis before taking up a case. However, such relevant data is a work in progress in India and will take a few years to consolidate.
- Uncertainty of Foreign routed third-party funding under FEMA 1999. There is confusion under which category it would fall Capital or Current.
- Uncertainty of regulations in the disclosure of TPF agreement for Arbitration may lead to conflict.
- Issue of Confidentiality.

THIRD PARTY FUNDING IN ARBITRATION IN FOREIGN JURISDICTIONS

- **England and Wales-** Third party funding is not subject to formal regulation in England and Wales. Self-regulation is preferred in the form of a code of practice. The Code of Conduct for Litigation Funders was finally published in November 2011 together with the formation of the Association of Litigation Funders of England and Wales. The Code is binding on all members of the Association and regulates the funding of “litigation, arbitration or other dispute resolution procedures”.
- **Australia-** Contingency fees are prohibited and so lawyers cannot have a financial interest in any awards received by their clients (that is, they cannot be de facto litigation funders). However, independent third party funders are permitted in both litigation and arbitration.
- **USA-** In the USA, various state legislatures have filed numerous pieces of legislation primarily aimed at consumer-side TPF since the beginning of 2013. There are still no federal laws that are directly related to TPF, nor does the Federal Arbitration Act mention TPF. This means that potential users of TPF in the U.S. must investigate case law and statutes on a state-by-state basis, which is not necessarily positive for the further growth of the TPF industry in the U.S
- **Singapore-** In March, 2017, Singapore promulgated the Civil Law (Amendment) Act, 2017 along with the Civil Law (Third Party Funding) Regulations, 2017 which confirmed that the use of TPF in litigation was not contrary to public policy or illegal, if used by eligible parties and in the categories so reserved for its use.
- **Hong Kong-** It too passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, 2017 to devise regulatory frameworks for the use of TPF in litigation and to ensure that common law doctrines of champerty and maintenance do not preclude the exercise of TPF Agreements in litigation.

WAY FORWARD IN INDIA

- Third-party funding can go hand in hand with Institutional Arbitration to make India a hub of Arbitration.
- Estimation of the overall cost of Arbitration is easier in Institutional Arbitration than in Ad-hoc Arbitration.
- Institutional Arbitration has proven to be faster than Ad-hoc Arbitration.
- TPF of disputes has also been received favorably in the Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India.
- Legislative acknowledgment of TPF
- Increased reliance on TPF in commercial disputes, including on account of shareholders urging a risk transfer model for litigation
- Foreign capital Should be permitted for domestic TPF by regulatory amendment.
- Adoption of a self-regulation model like the United Kingdom.
- Factors for consideration are:
 - Regulation of interference of a funder in the litigation strategy provision for disclosure of funding for all kinds of dispute resolution mechanisms
 - Framing of rules concerning the confidentiality of the communication between the funder and the litigating party.
 - Specific disclosure requirements and protection of disclosed documents by litigation privilege validity and legal recognition of contingency fee as a valid legal fee model

THANK YOU