

# Third-Party Litigation Funding: Overview (India)

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Practice note: overview | Law stated as at 01-Jun-2024 | India

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A Practice Note providing an overview of the law on third-party litigation funding in India. It addresses who can seek funding, when and how to apply for funding, whether it can be used with other funding arrangements, the legal and ethical constraints that might affect funding agreements, issues related to disclosure, confidentiality, and attorney-client privilege, and the range of legal costs and expenses that the funding companies agree to cover. It also highlights recent developments in this field.

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Global legal counsel are often required to evaluate and assess their options for funding a civil case, particularly in jurisdictions where litigation is expensive and involves budgetary constraints, or where they would like to reduce the financial risk of pursuing a claim given the uncertainties associated with litigation outcomes.

Third-party litigation funding, also known as external dispute financing or third-party funding, is where a third party (with no prior connection to the litigation) agrees to finance all or part of the legal costs of the litigation, in return for a portion of any proceeds the funded litigant recovers by settlement or collection of a damages award. The use of third-party funding in international arbitration has been growing over the last several years in many jurisdictions, including the UK, US, continental Europe, Australia, Hong Kong, and Singapore. The mechanism is gaining more popularity and acceptance in civil and commercial litigation.

This Note provides an overview of the law on third-party litigation funding in India, including:

- Who can seek funding.
- When to apply for funding.
- Whether it can be used with other funding arrangements.
- The legal and ethical constraints that might have an impact on funding agreements.
- The issues related to disclosure, confidentiality, and attorney-client privilege.
- The factors to consider when seeking funding.
- The terms of funding agreements.
- The legal costs and expenses that third-party funders usually cover.

It also highlights recent developments that could influence the future landscape of third-party funding in India.

For more information on third-party funding for international arbitration, see [Practice Note, Third-party funding for international arbitration claims: overview](#).

## Legal Position

India's position on third-party funding is generally pro funders but the law is judge-made and at a nascent stage of development.

Historically, English common law treated "maintenance" and "champerty" as a tort and crime. Indian legal traditions have grown out of and are founded on English traditions and the English common law. However, the rule against champerty and maintenance did not form part of Indian law. In the early Privy Council decision, *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876), the court held that:

"... a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, per se, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression,

that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But 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 the Privy Council's decision, *Valluri Ramanamma v Marina Viranna* (1931), the court held:

"It has long been held that in India agreements to finance litigation in consideration of having a share of the property if recovered, are not per se opposed to public policy. They may be so if the object of the agreement is an improper one, such as abetting or encouraging unrighteous suits, or gambling in litigation; or their enforcement against a party may be contrary to the principles of equity and good conscience, as unconscionable and extortionate bargains...."

The above case law presents the Indian approach in a nutshell. While third-party funding is permitted, the agreement will be "carefully watched" and judged if it meets the threshold of "public policy." Under Indian law, an agreement "opposed to public policy" is liable to be declared unlawful (section 23, Indian Contract Act, 1872). If the funding agreement is found to be unconscionable or inequitable, it runs the risk of being declared invalid as against public policy. Funding agreements that appear to be gambling in litigation, or abetting or encouraging unrighteous suits will similarly be invalid on public policy grounds.

While Indian law does not prohibit third-party funding, it leaves room for a later challenge. The problem is compounded as there are few relevant decided cases. Moreover, only Supreme Court cases can be said to be laying definitive law. Privy Council decisions (highlighted above) are persuasive but not binding on the Supreme Court (although they are binding on all High Courts). A High Court decision is not binding on another High Court.

There is no legislative or regulatory framework governing third-party funding. Third-party litigation funding is rare, although funders have started testing the waters.

## Recent Development

A groundbreaking judgment was recently delivered by a two-judge bench of the High Court of Delhi (*Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc. and Ors.* 2023 SCC Online Del 3191). The High Court not only acknowledged third party funding to be legitimate, but also elevated it as "*essential to ensure access to justice*". It acknowledged that the costs of pursuing legitimate claims, especially in arbitrations, can be significant and third-party funders "*play a vital role in ensuring access to justice*". The case concerned whether a third-party funder could be made liable for awarded costs in the absence of the successful party being able to recover those costs from the party funded. The High Court distinguished the position under English law (where, based on legislation, third party funders can be made liable for a costs order). In the absence of any corresponding legislative provision in India, the third-party funder would not be liable under Indian law. The court clarified that the third-party funder cannot be considered a party to the arbitration by reason of the act of funding and therefore cannot be liable for

any adverse outcome for the funded party. The judgment also acknowledges the need for legislative intervention and relevant rules formulated for transparency and disclosure of funding arrangements.

## Preliminary Considerations

## Risks and Advantages of Litigation Funding

### Client

Third-party funding assists impecunious parties with deserving cases and therefore promotes justice. It also helps in financial planning and risk hedging and could lead to growth of arbitration in India.

However, parties may lose autonomy and be pressured to settle on unfavourable terms.

### Funder

India is positioned to soon emerge as the third largest economy in the world. Coupled with a population of over 1.4 billion, democracy, and rule of law, it is hardly a jurisdiction that can be overlooked. Funders entering the market now will have an early mover's advantage.

However, Indian courts do not adopt effective case management tools, nor do they award realistic costs. This brings uncertainty in assessments of time and costs. Currently, India does not have comprehensive third-party funding legislation on acceptable funding models and agreements, nor is there a body of case-law which can be relied on. In *Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc.*, the High Court of Delhi recommended legislative intervention for the formulation of an appropriate framework (see [Recent Development](#)).

### Funding for Defendants

There is no bar against defendants seeking third-party funding.

### Costs and Expenses a Funder May Cover

Subject to the third-party funding agreement, any of the following types of costs may be borne by third-party funders:

- Lawyers' fees (in full or in part).
- Professional disbursements.

- Court (or tribunal) fees.
- Security for costs.
- Costs for legal insurance.
- Opponent's costs.

The costs for assessing the application for third-party funding will be agreed by the parties.

## How Does Litigation Funding Work

There is no applicable law governing who will receive funding once agreement is reached, what exactly the funding company will get in return if their claim is successful, or what happens if a claim is unsuccessful, for example. The arrangement will be driven by the parties' agreement. A funder cannot become a party to the proceedings unless it can show that it is a "proper" or a "necessary" party (Order I, Rule 1, *Code of Civil Procedure*, 1908 (CPC), "who may be joined as plaintiffs," and Order I, Rule 3, CPC, "who may be joined as defendants.") In an arbitration, an opposite party can object to the joinder of any party on the ground that it is not a party to the arbitration agreement (see *The Confidentiality Regime in Arbitrations*). See also *Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc.* (*Recent Development*).

## Other Funding Arrangements

See *How Does Litigation Funding Work*.

## Constraints on Litigation Funding

### Actions Not Suitable for Third-Party Funding

Some other impediments to third-party funding include the following.

#### Restriction on Transfer of "Mere Right to Sue"

Section 6(e) of the Transfer of Property Act, 1882 (TPA) provides that "a mere right to sue cannot be transferred." However, an "actionable claim" can be transferred under section 130, TPA. Actionable claims under Indian law include claims recognised by the court either as to unsecured debts or to beneficial interests in moveable property not in possession. While an actionable claim can be transferred, a "mere right to sue" is not transferable. The leading Supreme Court decision on the subject is *Union of India v Sri Sarada Mills Ltd.* (1972), which held at paragraph 14 that:

"A bare right of action might be claims to damages for breach of contract or claims to damages for tort. An assignment of a mere right of litigation is bad. An assignment of property is valid even though that property may be incapable of being recovered without litigation...It is only when there is some interest in the subject-matter that a transaction can be saved...That interest must exist apart from the assignment and to that extent must be independent of it... A bare right of action is not assignable. When, however the right of action is one of the incidents attached to the property or contract assigned, it will not be treated as a bare right of action."

As a fall out of this law, any subrogation or assignment of an insurance claim is brought about by the insurer jointly with the assured. Indeed, the primary party in such actions is the assured party (and the insurance company is the secondary party). Thus, the law is that while a mere right to sue is not transferable, the "right to sue" can be assigned as an incidental, ancillary, and subsidiary right in favour of an assignee along with the right to recover the assigned property.

### **The Confidentiality Regime in Arbitrations**

A 2019 amendment to the Indian Arbitration Act (at section 42-A) inserted a confidentiality provision. The relevant section states:

"Confidentiality of information. Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award."

The provision is overly wide and overlooks the possibility of a funder's involvement (before, during, or after the arbitration). A literal read of the provision means that a party cannot keep its funder informed or updated of the progress and key developments including settlement discussions (thereby rendering third-party funding a non-starter in arbitrations).

Section 42-A of the Indian Arbitration Act is yet to be tested and is likely to be read down to include an exception in favour of third-party funders. However, currently, in the absence of a judicial pronouncement or legislation on the subject, it poses a challenge to funding arrangements.

Though there is no bar to third-party funding, funders need to be aware of the impediments and structure their contracts accordingly. They should also ensure that the underlying agreement is seen to be just and fair and not a one-sided harsh bargain which can be later challenged as violating public policy or unconscionable.

### **Ethical Constraints**

A major impediment in third-party funding in India is that lawyers cannot fund litigation (directly or indirectly). They are prevented from working on contingency fees or entering into a profit-sharing agreement. This restriction flows from the Rules of Professional Conduct (RPC) prescribed by the Bar Council of India (Bar Council of India Rules framed under the Advocates Act, 1961 (Part VI, Chapter II, Standards of Professional Conduct and Etiquette), which automatically applies to all lawyers authorised to practice in India. The following restrictive duties apply. An advocate:

- Must not act or plead in any matter in which they themselves are pecuniarily interested (Rule 9, RPC).
- Must not, at any time, be a party to fomenting (provoking) litigation. (Rule 18, RPC).
- Must not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof (Rule 20, RPC).
- Must not buy or traffic in or stipulate to or agree to receive any share or interest in any actionable claim (Rule 21, RPC).
- Must not, directly or indirectly, bid for or purchase, either in their own name or in any other name, for their own benefit or for the benefit of any other person, any property sold in the execution of a decree or order in any suit, appeal, or other proceeding in which they were in any way professionally engaged (Rule 22, RPC).

The Supreme Court of India commented on these restrictions applicable to lawyers while hearing a matter concerning entry of foreign lawyers in India and practice of law in India. By way of an obiter, the Supreme Court in *Bar Council of India v A.K. Balaji* (2018) held 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."

At the same time, the Supreme Court held: "There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation."

Indian lawyers are bound by the RPC prescribed by the Bar Council of India (a statutory body with statutory powers). These rules provide that a lawyer is also an officer of the court and not a mere mouthpiece of their client. They must exercise their own judgment in matters of submissions before court.

Further, a lawyer can only accept instructions from their client (or their client's agent).

## Attorney-Client Privilege and Confidentiality

Attorney-client privilege rules are codified in India and fall within a narrow ambit (section 126, Evidence Act). The communication in question must be made "in the course and for the purpose of employment" as an attorney. The privilege extends to the agents of the attorneys including their clerks, interpreters, and other staff. Moreover, not only is the communication privileged, the rules of the Bar Council of India prohibit an advocate from "directly or indirectly" breaching the obligations imposed on them under section 126 of the Evidence Act. The privilege can be waived but the waiver must be express. An inter se sharing of the communication by the attorney or the client with a third-party funder would not amount to a waiver. Sharing a client-attorney communication with a funder is for a specific and limited purpose connected with litigation. It is not putting privileged material before the court or bringing it in the public realm. As a matter of good practice, the communication should be marked "confidential" to indicate the absence of a waiver. Once a communication is marked "confidential" there is no need for a non-disclosure agreement. Confidentiality and privileged are not interdependent and therefore it is only a matter of good practice (see Expert Evidence: Law and Practice by Hodgkinson, third edition, para 7-009).

## Role of Claimant's Counsel

The role of a claimant's counsel is entirely client driven. Indian lawyers would typically not be proactive, nor would they interface with the funder, unless specifically instructed. All instructions regarding the application process must come from the client.

## Choosing a Funding Company: Factors to Consider

An Indian entity looking for litigation funding would be well advised to avoid ambulance chasers or funders asking for a blanket sign off. The entity funded would typically wish to retain a final decision-making right in relation to settlement. Litigating parties looking for funders are likely to favourably consider established players who are familiar with the Indian market and its pitfalls. The last thing a party seeking funds for litigation would want is to get sucked into another litigation.

## Deciding to Fund a Claim: Factors to Consider

The funding company should be aware that India is a vast and diverse jurisdiction and courts can have widely differing ground realities. There are courts where the action would lie before the lower courts and where the official language would not be English and there are courts where the same action would lie directly before the High Court, with English as the court language. There are certain jurisdictions where the courts are known to be relatively more efficient and the judges familiar with sophisticated commercial litigation (compared to courts situated in less commercially developed areas). An offshore funding company would need "hand holding" and mature legal advice before deciding on its India strategy.

A funding company would typically take the following into account:

- The value and complexity of the claim.
- The strength of the claim.
- The stage of the proceedings at which the funding company is asked to get involved.
- Whether there are jurisdiction or limitation related issues.
- Whether there is any possibility of counterclaims, the risks associated with enforcing a judgment.

## Litigation Funding Companies

India is yet to see big international funders entering the market. There are some startups which have emerged (LEGALpay, LitiCap Partners, and Legal Fund) to assist litigants in raising funds.

As per media reports, in March 2019, a third-party funding deal was finalised between a construction company, Hindustan Construction Co. Ltd (HCC) and a consortium of investors led by global investment management firm, BlackRock. Under the



terms of the deal, HCC assigned its beneficial rights in a pool of arbitration claims and awards to the consortium for INR1,750 crores. In a similar deal, Patel Engineering Ltd (another construction company) transferred its interest in litigation claims to investor Eight Capital Group for INR2,168.5 crores. (These deals touch about half a billion dollars investment.)

## Compensation and Quantum of Sharing

Decided cases have not thrown sufficient light on the acceptable methodology for compensating the funder. There are some views expressed on the share in return, which may be permitted. In *Nuthaki Veukatawami v Katta Nagireddy* (1962), the High Court of Andhra Pradesh struck down an agreement under which the litigant agreed to forsake a three-quarters (3/4) share in the suit property in favour of the lender, finding it unconscionable. The court held:

"It, however, remains for us to consider whether the provision in the agreement that the plaintiff should have a 3/4<sup>th</sup> share in the property, is fair and reasonable. It is well settled though it is clearly not conclusive, that the proportion to be retained by the claimant is an important matter when judging the fairness of a bargain made at a time when the result of the litigation was problematical. In numerous cases, which have come before courts, the quantum of the share which the financier should get in the fruits of the decree has always been held to be a matter of vital importance in judging the fairness or otherwise of a financing agreement."

The courts have spoken in different voices regarding a 50:50 success fees sharing agreement. In *Suganchand and Ors. v Balchand* (1956), the High Court of Rajasthan refused to uphold half and half success sharing on the ground that it would be a disproportionate return to the funder and amount to an extortionate and unconscionable bargain.

However, the Supreme Court in *Mr. 'G', A Senior Advocate v Unknown* (1955) struck down an agreement between a lawyer and his client for a 50:50 share of the recoveries, but held that if the agreement had been entered into with a third-party funder (meaning a non-lawyer), "it would have been legally enforceable and good." Thus, in principle a 50:50 share in the recoveries was upheld.

There is no settled jurisprudence in India on the commercially acceptable models or the nature and scope of the funder's role, (including its acceptable stake in the settlement fund). A contract seen to be unconscionable, extortionate, or unjust runs the risk of falling foul of the public policy requirement under Indian law. Funders would be well advised not to drive a one-sided hard bargain (even if accepted in an arms-length negotiation).

## Notification

Currently there is no requirement under Indian law or legal practice to notify an opponent about litigation funding (regarding its existence, the financial terms on which the funder agrees to fund the claim, or the name of the funding company) or to disclose the funding agreement.

## Unsuccessful Claims

The seminal judgment of the Delhi High Court throws light on this by holding that a costs award cannot be pursued against the third-party funder, distinguishing English law on the subject (see *Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc.* at [Recent Development](#)).

## Other Developments

A high-level committee was set up by the Ministry of Law and Justice, under the chairmanship of B. N. Srikrishna (former Judge, Supreme Court of India) to review and suggest reforms in arbitrations. The committee submitted a report in 2017 favouring third-party funding, stating:

“Apart from arbitration legislation, in certain jurisdictions, the enactment of supporting legislation has contributed significantly towards the growth of these jurisdictions as arbitration hubs. For instance, Singapore has recently passed amendments to its Civil Law Act legalising third-party funding for arbitration and associated proceedings. Similarly, Hong Kong recently legalised third-party funding for arbitrations and mediations. The Paris Bar Council has also indicated its support for third-party funding.”

However, these suggestions did not translate into action and were ignored when the Indian Arbitration Act was amended in 2019 and again in 2021.

Currently, there is no legislative move to formalise third-party funding through comprehensive legislation. However, see also *Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc.* which recommends legislation on the subject ([Recent Development](#)).

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### RESOURCE HISTORY

Law stated date updated following periodic maintenance.

This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice on 1 June 2024.

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Updated on 6 June 2023.

Updated on 6 June 2023 to discuss 29 May 2023 High Court of Delhi judgment - *Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc. and Ors, 2023* (SCC Online Del 3191).

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