THIRD-PARTY LITIGATION FUNDING IN INDIA: A LEGAL VACUUM OR A REGULATORY OPPORTUNITY

Debashreeta Purohit, Faculty of Law, The Maharaja Sayajirao University of Baroda

ABSTRACT

A financial mechanism known as Third Party Litigation Funding (hereinafter referred to as TPLF) allows an outside party, usually a private investor or business organization, to pay for a litigant's legal fees in exchange for a share of the money made from the lawsuit, which is dependent on its success. With its roots in the ancient theories of champerty and maintenance, TPLF has undergone substantial development, particularly in countries like Australia, the United States, and some regions of Europe, where it is now more widely acknowledged as a means of improving access to the legal system. With confidentiality and ethical protections in place, TPLF agreements often specify the identities of investors, funding amounts, and control rights in litigation strategy. The increasing participation of a wide range of investors, including as hedge funds, insurance companies, and even crowdfunding websites, highlights the way in which legal claims are treated as financial assets. In India, TPLF is still in its infancy, but if judicial supervision and regulatory clarity develop together, it has the potential to democratize access to the legal system, especially in high-stakes commercial and arbitration conflicts. By reducing the financial burden on litigants with limited resources, assisting public interest cases, and facilitating the advancement of complicated claims like intellectual property rights and insolvency, Third Party Litigation Funding (TPLF) can improve access to justice in India. Laws would control investor involvement in court cases, guarantee transparency, and shield plaintiffs from exploitation.The author of the said research paper has briefly discussed the concept and history of TPLF along with this the author has attempted a comparative analysis with respect to functioning of TPLF in United Kingdom, Australia and Singapore.

1. INTRODUCTION

India's justice delivery system encompasses multi-tiered structure which is comprised of stakeholders, judiciary, law enforcement, legal aid etc. All these institutions aims to deliver efficient administration justice and ensure fairness while resolving disputes, enforcing laws and to protect the rights of citizens. Several courts and tribunals have been established not only for the better enforcement of justice but also to bring transparency and to clear backlog pending cases. But still financial burden and risk of case bearing unsuccessful often comes in between the pursuit of justice and in order to serve justice 'Third Party Litigation Funding' (hereinafter referred as TPLF) act as a blessing in disguise. It is a compelling innovation which permits those who seek legal remedy with some external investors who in behalf of them manage the cost of litigation in exchange for a pre-fixed professional fee contingent upon the success of a litigation. This practice not only act as a savior for financial arrangement but it signifies a shift concerning to an equitable legal system where the strength of one's case matters than the depth of another's pocket[1]. It also prompts that access to justice should not always be privilege to those who can afford it but it is available to all irrespective of their financial status. The said arrangement also facilitates the equal right to seek justice.

In India the intricate nature of legal disputes mainly related to commercial contracts, insolvency cases, international commercial arbitration and extraordinary cost of arbitration has led many litigants and parties to avail the benefit of the TPLF. There is no legislation with respect to TPLF in India but the court has reviewed such agreements in various cases as a public Policy. But this is high time as it should be regulated alike other countries in order to remove legal uncertainties and other potential concerns with respect to investors. Also without regulation there is a high probability that investors might obtain unfair advantage from exploiting the plaintiff for the financial gain. The author of the said research paper has briefly discussed the concept and meaning of TPLF mechanism and how it was originated. The author has also enumerated the legality of TPLF in India and have attempted to do comparative analysis with the countries like United Kingdom, Singapore and Australia.

2. MEANING AND CONCEPT OF THIRD-PARTY LITIGATION

Third Party litigation funding is a procedure where the third party who is an investor (basically

[1]Jayne R. Reardon, Alternative Business Structures: Good for the Public, Good for the Lawyers, 7 ST. Mary's legal malpractice & ethics 304-322 (2017).

a private commercial entity) offers the litigation cost to the plaintiff or plaintiff's counsel in return for a certain fixed amount of proceeds which results from the litigation. The plaintiff does not owe the funder any money if the lawsuit is unsuccessful because the funder's investment is only reimbursed if the case is successful. TPLF is initiated with the drafting of an agreement where the identities of investors are mentioned, the amount invested has to be entered, and the funder's authority on any strategic control over the litigation is also mentioned. It has grown significantly in popularity and become an important part of the judicial system in many jurisdictions, giving litigants access to justice, especially when the expenses of the case are considerable. This technique makes it possible for parties to pursue their claims even when they might otherwise be discouraged by the expense of litigation. The idea is particularly pertinent in places where litigants face huge financial risks or where legal fees might be extremely expensive. TPLF has derived its roots from the doctrines of champerty which is envisioned to forbid rich party from meddling in legal disputes in which they had no interest at all[2]. But after the due course of time, as the justice system evolved, especially in UK and USA, the said doctrine was relaxed and then third party litigation funding emerged.

The claimants are recipients of third party litigation funding who receive a monetary fund if they win a case, since this third party litigation funding is based on a contingent share. But there is certain modification as witnessed with time that insurance and risk transfer arrangements are for both the claimants as well as defendants- this is done to protect against potential loss. The investors are also comprised with investment banks, insurance companies, pensions and hedge funds. The reason behind this is, legal claims are witnessed as a financial asset class like real estate as they provide high returns especially when the case gets succeed. Some investors have a ready capital fixed for legal claims and some raise funds case by case. This flexibility permits more participation of investors based on the risk. Technology has also played an eminent role in this, through the help of technology the investors are now using crowdfunding models where several small investor can fund a legal case. Legal counsel fees, court/tribunal fees, expert witness costs, pre-deposits, adverse costs orders, and other costs associated with a dispute can all be covered by TPLF. In lower courts alone, litigants spend up

[2]J Kalajdzic, PK Cashman and AM Longmoore, Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding, 61 American Journal of Comparative Law, 93,-96 (2013).

to INR 30,000 crores on legal fees, according to a 2015–16 survey.[3]

A standard form of litigation financing agreement requires the plaintiff to cooperate with the investor, act with reasonable care and skill, carefully follow legal advice, and obtain the investor's authorization before incurring significant expenditures, ending the action, reaching a settlement, or enforcing a judgment. Additionally, the side has to notify the investor of any significant developments. The investor is next in charge of examining the case and paying the agreed-upon legal fees; in certain countries, this may also entail communicating with the legal counsel. The agreement specifies a waterfall structure for allocating proceeds in the event that the claim is successful, usually giving the investor's cost recovery and promised return priority. The funded party will then get the remaining funds. The terms of the agreement specify when it may be terminated as well as the repercussions. It outlines the steps for assessing and reacting to offers, as well as whether to move further with the litigation or end it, in the event that a settlement is proposed. The presence and conditions of the agreement, the funder's identity, the litigation strategy, and the anticipated results are all covered by the rigorously maintained confidentiality; disclosures are only permitted when mandated by law. Last but not least, if necessary for case management or review, the funder may transmit pertinent data to third parties like experts, witnesses, or insurers, so long as the transfers adhere to applicable data protection rules and retain the requisite degree of secrecy.

Now the major question is does all the dispute will come under the umbrella of TPLF? The answer is no, the dispute which arises only from Arbitration, commercial contracts, tortious claims, insolvency cases, anti-trust proceedings claims are dealt under the umbrella of third party litigation as it yields a substantial monetary award.

3. HISTORY OF THIRD PARTY LITIGATION FUNDING

As mentioned earlier the conception of third party litigation has derived its origin from the roots of two major doctrines known as Doctrine of Champerty and Doctrine of maintenance[4]. These two doctrines were designed to protect the legal system from any abuse by any outside influences. The Doctrine of maintenance refers to support of a suit by someone who has no

[3]Amita Katragadda, Shruti Khanijow, Ayushi Singhal, Third Part Funding in India, available at https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf (Last visited on 1st of May, 2025).

[4]Bluebird Partners, L.P. v. First Fidelity Bank, N.A., 731 N.E.2d 581, 585 (N.Y. 2000) and Osprey, Inc. v. Cabana Ltd. Partnership, 532 S.E.2d 269, 273 (S.C. 2000).

direct interest in the suit. The another doctrine i.e. Doctrine of Champerty refers to a specific type of maintenance which include a third party consenting to support another person suit in interchange for some share of interest only if the case flourishes. The major objective to frame these doctrine was to prevent the corruption of legal proceedings and prohibition of frivolous suit. However, the need for access to justice increased along with the development of the legal system, and some restrictions were loosened. A new method of financing third-party litigation was introduced in the late 20th century.

For the first time, the High Court of Australia created and implemented the idea of third-party lawsuit funding. Third-party lawsuit funding, according to the Honorable Court, is not an abuse of process and can legitimately and significantly increase access to justice.[5] Litigation funding has been a method of raising money for insolvency lawsuits in Australia since 1995. With time, litigants in securities and antitrust class action lawsuits have begun to use litigation finance.[6] The United States of America followed the footsteps of Australia and enacted it as legislation. Likewise, in Europe: Germany, Netherland and Switzerland also started to warrant third party litigation funding especially in matters of Cross-Border disputes and collective redress mechanisms.

4. LEGAL STATUS AND ROLE OF JUDICIARY IN THIRD PARTY LITIGATION FUNDING IN INDIA

Despite the lack of formal TPLF legislation in India, this practice is not entirely new. The courts are the proof that we have witnessed several case laws where many opportunistic investors have occupied unorganized market resulting in the allocation of the particular assets involved in the subject matter of the case. There is no central legislation with respect to this practice but there are certain states who have legally recognized this concept by the virtue of amendment to the Code of Civil Procedure Code, 1908 (Hereinafter referred to as CPC). The state which follow the legally specified arrangement of TPLF are- Gujarat, Maharashtra, Madhya Pradesh, and Uttar Pradesh. The states have enforced and authorized TPLF by specific provisions under Order XXV, Rules 1 and 3 of CPC. The said provisions permit the court to entail third party investors to be involved in the suit if they consents by depositing a necessary amount of costs.

[5]*Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd,* [2006] HCA 41.
[6]Michael Legg, Edmond Park, Nicholas Turner & Louisa Travers, The Rise and Regulation of Litigation Funding in Australia, 38 N. KY. L. REV. 625-628 (2011).

While other states have yet to adopt comparable amendments, no national legislation expressly prohibits TPLF.[7]

Following its revision in 2015, India's Arbitration and Conciliation Act 1996 was amended to include the 5th and 7th Schedules, which include several factors that would help determine if there may be legitimate doubts about the independence or impartiality of an arbitrator.[8] That "the arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute," the Schedules recognize that. In such a scenario, the arbitrator cannot act unless this condition is expressly waived. An additional interpretation can be made that some instances might be supported by a party unrelated to the dispute. The Indian government established a high-level group to examine the institutionalization of arbitration procedures in the country, and the committee's 2017 report supported TPLF of arbitrations. That being said, TPLF is not expressly covered by the Arbitration and Conciliation Act 1996. However, the same factors that apply to TPLF in litigation are assumed to apply in arbitration in the absence of particular laws and court rulings.

TPLF is in its initial phase in India, the practice is yet to gain prevalent acceptance.

The courts of India have eventually reviewed the terms of the TPLF agreement to certify with fairness and have inspected them under public policy.[9] Accordingly, the Privy Council in one of the landmark judgment held that agreement done by an investor funding the litigation in return for a share is permissible but they must not undermine the very principle of public policy.[10] The same principle has been repeatedly echoed in various other judgments such as **Harilal Nathalal Talati v Bhailal Pranlal Shah[11]** where the Hon'ble Bombay HC declared a TPLF agreement to be unconscionable and exorbitant, therefore nullifying it. Additionally, the Hon'ble SC ruled that the two major doctrines related to TPLF i.e. Doctrine of maintenance and doctrine of champerty does not apply in India.[12] Current cases provide more evidence of

[7]K Agrawal and N Dixit, Civil Justice in India, 3 Brics Law Journal, 71–93 (2016), available at SSRN: https://ssrn.com/abstract=2925358 (last visited on 4th of May,2025).

[8]I Mital, Third Party Funding of Litigation in India – Placing the Gun on Another Shoulder?, Lexology, available at https://s3.amazonaws.com/documents.lexology.com/2102ff39–0025- 4652-be9c-74434baf3c6a.pdf 2018 (last visited on 4th of May,2025).

[9] Cyril Shroff, Third Party Litigation Funding in India, available at https://www.cyrilshroff.com/wp-content/uploads/2019/06/ Third-Party-Funding-in-India.pdf, 8-10 (2019).

[10]Ram Coomar Coondoo vs. Chunder Canto Mookerjee, (1876-77) 4 IA 23.

[11]AIR 1940 Bombay 143.

[12]Re: 'G', A senior Advocate of the Supreme Court, AIR 1954 SC 557, 559.

the Indian courts' cautious but developing stance on TPF. The Delhi High Court distinguished itself from the English Arkin and Excalibur cases in **Tomorrow Sales Agency Pvt Ltd v. SBS Holdings Inc.**[13] by declining to impose a security for costs against a third-party funder. The court observed that, unlike English law, which has a well-established authority to impose costs on third-party funders, Indian laws does not expressly grant courts this authority.

According to the Hon'ble SC in the case of **Bar Council of India v. AK Balaji**[14], there doesn't seem to be any restriction on third parties financing legal proceedings and receiving reimbursement following the litigation's conclusion. The court further emphasized that while the Bar Council of India Rules prohibit Indian advocates from engaging in contingency fee arrangements, non-lawyers are not expressly prohibited from contributing third-party cash. This decision showed the potential of TPLF in India, especially with the right kind of control.

Contingent Contracts are governed under Sec 31 of the Indian Contract Act, 1872. The said provision states that a contingent contract is that contract which depend upon some contingency to do or not to do something if some event, collateral to the contract, happens or does not happen. These kind of agreement are valid and enforceable as per Indian Contract Act and can be witnessed in contracts like insurance where the performance of contract depends upon a future uncertain event. Even if the contingent contracts stands valid and enforceable, an Advocate is barred from making contingency fee agreement with his client as per Rule 20 of Bar Council of India Rules, enclosed under The Advocates Act, 1961. The bare reading of the said provision is mentioned below- 'An advocate cannot set a fee that is dependent on how the case turns out or consent to a portion of the case's earnings.'

Preventing conflicts of interest and maintaining the ethical standards of the legal profession are the goals of this regulation. Hence, even if the contract act grants contingent contract in general but the contingency fee arrangements in between advocate and his clients are not at all enforceable in India. The non-lawyers such as private investors, hedge funds, pension funds etc can however perform a contingent contract and can provide funds to support the legal claims of the plaintiff and this is how the said practice has been surpassed by the lawyers.

[13]2023 SCC Online Del 3191.
[14]AIR 2018 SC 1382.

5. THE URGENCY TO REGULATE THE THIRD PARTY LITIGATION FUNDING

There are numerous advantages which can give reason to implementation of laws with respect to third party litigation funding in India. The author has discussed the advantages in detail in below mentioned points.

- Often the small businesses, underprivileged communities and individual's gets discouraged from pursuing their legal claims due to the steep legal fees, court fees including the risk of cost orders which make them unfeasible for access to justice. In order to overcome this problem, third party litigation funding play an eminent role in addressing the inconsistency by assisting the claims to ensue without any legal expense. According the report of National Judicial Data Grid, 2023, there are 40 million cases which are pending across the states of India partially due to financial burden encountered by the litigants[15]. Lack of resources forces claimants to postpone or abandon lawsuits, which further exacerbates these backlogs. By facilitating quicker filings and better-prepared lawsuits, which may result in quicker settlements or judgments, third-party litigation funding can lessen this burden. Litigation financing also creates an even playing field for defendants with more resources and claimants with less money, supporting the idea that riches shouldn't be a barrier to accessing justice.

- Public Interest Litigation (hereinafter referred to as PIL) is considered as a keystone of social justice which empowers the citizens and organizations to seek judicial intervention on the subjects concerning a huge range of public in large. Nevertheless, PILs frequently need significant financial resources to remain viable, even as they fulfill important democratic and constitutional roles. It may be challenging for grassroots groups, non-governmental organizations, and public-spirited individuals to successfully pursue such lawsuits due to legal bills, court-related expenses, expert testimony, extensive field investigations, and research-intensive paperwork. This gap can be bridged by TPLF by delivering financial help. High-impact cases that could not otherwise be filed because of a lack of funding can now be pursued thanks to TPLF.

[15]National Judicial Data Grid, available at https://doj.gov.in/the-national-judicial-data-grid-njdg/#:~:text=The%20National%20Judicial%20Data%20Grid%20(NJDG)%20%7C%20Department%20of%20Justice%20%7C%20India.&text=The%20inclusion%20of%20feature%20specifying%20the%20reasons,of%20redressing%20the%20burgeoning%20pendency%20of%20cases (last visited on 7th of May, 2025).

Furthermore, PILs can be pursued with more experienced legal teams and stronger evidence backing if financing is more readily available, which raises the possibility of victory and the execution of court orders. This guarantees that justice is more inclusive and sensitive to the demands of the vulnerable while also bolstering public interest advocacy.

- Certain areas of laws such Intellectual Property Rights and medical negligence cases habitually encompass technical evidence, lengthy arguments and lengthy litigation, making it both intricate and financially oppressive. For individuals, small businesses, or startups who may have valid claims but lack the funds to support the litigation, these considerations make it challenging to pursue such claims. TPLF can be extremely helpful in this situation. TPLF allows claimants in these industries to pursue meritorious claims without being discouraged by financial limitations by paying litigation costs up front. It levels the playing field by enabling smaller organizations or institutions to take on larger ones, especially in IPR conflicts where the protection of rights is essential for innovation and company expansion. Thus, by encouraging accountability, defending the rights of individuals and businesses, and making sure that legitimate claims are not stifled because of exorbitant litigation expenses, TPLF serves as a catalyst for justice in complicated legal realms.

- Professionals in insolvency, especially liquidators, must work under tight financial conditions while trying to recover value for creditors. To maximize gains, it may be essential to pursue legal claims such those pertaining to preferential transactions, fraudulent trading, or asset recovery; nevertheless, this type of litigation is frequently expensive and time-consuming. A workable alternative is provided by TPF, which relieves the debtor's estate of the financial burden associated with litigation. The funder assumes the risk and pays the legal fees in the event that the action is lost because TPF is normally non-recourse, shielding the estate from additional financial depletion.

- TPLF can help with the initial settlement. Before making an investment, investors perform thorough due diligence, indicating to defendants the strength of the claim. In order to prevent drawn-out litigation, this may persuade defendants to reach an early settlement. Additionally, funders advocate for settlements to lower their risk and benefit all parties.

- Many people consider TPLF to be an investment opportunity. It can involve both Indian and foreign parties, and under the current Non-Banking Financial Institutions regime, the Reserve Bank of India may be in charge of regulating it. Additionally, the Code may be amended to establish uniformity to state rules governing third-party funding.

- TPLF if gets legislated it will bring transparency and establish boundaries to prevent conflict of interests. Without the legislation, investors may employ the undue influence in litigation, settling dispute or even in selecting the advocate, which can highly compromise the independence of the proceedings and harm the interests of claimant.

- One of the reason behind opting for TPLF by several claimants is financial burden and due to this they might not fully comprehend the financial and legal ramifications of the contracts they sign. Hence, legislation will protect them from being exploited by ensuring them fair terms of contracts, proper disclosures, along with access to independent legal counsel.

6. THIRD PARTY LITIGATION FUNDING IN UNITED KINGDOM, SINGAPORE AND AUSTRALIA

It's been intriguing to observe that the recent TPF phenomena appears to have arisen in response to a clear market need for access to justice, primarily from the business sector.[16] Indeed, TPF has seen some success in recent years in the major common law jurisdictions as well as in a few civil law nations. This analysis now concentrates on the nations where TPF has grown more dramatically in recent years as a result. Before spreading to other common law jurisdictions like Singapore and Hong Kong, TPF first appeared in a number of them, including Australia, Canada, England and Wales, and the US. Prior to this development, there were a number of legislative and case law modifications intended to remove or relax the bans on funding or otherwise sustaining litigation for profit, which were primarily found in maintenance and champerty.

A. UNITED KINGDOM

After the third party litigation funding has achieved a level of intricacy and complete

[16]C Hodges, J Peysner and A Nurse, Third-Party Litigation Funding and Claim Transfer: Trends and Implications for the Civil Justice System, 2 Rand Institute for Civil Justice Program, Conference Proceedings, 2010.

recognition in England and Wales, the President of Hon'ble SC of UK- Lord David Neuberger, has pronounced it as 'the life blood of the justice system'.[17] One of the world's most developed TPLF marketplaces in terms of regulation is England. The Criminal Law Act of 1967 eliminated the felonies associated with the torts of maintenance and champerty, marking the beginning of TPLF's contemporary existence in England and Wales. Many professional third-party funders are currently active; they have already established an association and introduced a voluntary code of conduct to self-regulate their operations. Since then, there has been an increasingly open evolutionary path that began in the 2000s[18]. TPF could have a detrimental impact on both the proceedings' participants and the sponsored proceedings. Thus, the need to regulate TPLF has been recognized by the English authorities. TPLF and other litigation finance strategies are formally included in the administration of justice and work together to provide access to justice without necessarily transferring its (perhaps disproportionate and unpredictable) expenses to the general public. In addition to TPLF, several alternative funding options have been proposed to improve access to justice. These include conditional fees agreements (CFA), damages-based agreements (DBA), legal expenses insurance (LEI), before-the-event insurance (BTE insurance), and after-the-event insurance (ATE insurance).[19]

The advent of TPLF has been led by the Criminal Law Act and other subsequent legislation, where the courts and legal practitioners started identifying the same as valuable commercial instrument which is proficient of improving the access of justice. The shift with respect to TPLF in UK has been witnessed by the case of Arkin, where the court of Appeal has unequivocally deliberated and sanctioned this practice.[20] According to these conclusions, the court also had the opportunity to establish a basic principle regarding the adverse cost risk: a funder's liability to the other party is limited to the amount of its own funding. The court further stated that no professional funder would likely be willing to provide the required funding if they were considering paying for a specific portion of an impoverished claimant's costs, like the cost of expert testimony, and they could be held accountable for the full cost of the defendant's expenses in the event that the claim was unsuccessful. Funding on a contingency

[17]Neuberger, David, From Barretry, Maintenance And Champerty To Litigation Funding, The Harbour Litigation First Funding Lecture (2013).

[18]NH Andrews, Accessible, Affordable, and Accurate Civil Justice– Challenges Facing the English and Other Modern Systems, University of Cambridge Faculty of Law Research Paper, Available at SSRN: http://ssrn.com/abstract=2330309, (last visited on 7th of May, 2025) 2013.

[19]Beibei Zhang, Third Party Funding for Dispute Resolution- A Comparative Study of England, Hong Kong, Singapore, the Netherlands and Mainland China, 4 Springer Nature Publications, 2021.

[20]Arkin v. Borchard Lines Ltd & Ors [2005] EWCA Civ 655 (26 May 2005).

basis of recovery won't be a feasible business deal because of the excessive exposure. There will be no access to justice.

The function of TPLF in the legal system has been continuously shaped by other courts in the interim. The case law pertaining to TPLF was reported in **London & Regional (St George's Court) Ltd v. Ministry of Defence**[21], where the court held that providing litigation services in exchange for a promise of a portion of the proceeds does not, by itself, make that promise unenforceable.

Although TPLF is usually allowed in England, it is closely monitored because of the possible hazards. TPLF agreements are evaluated by courts on an individual basis to make sure they don't include any aspects of champerty that can impair the legal proceedings. The ALF Code of Conduct, i.e. a voluntary self-regulatory framework which requires funders to act in a way that safeguards the interests of funded parties, even in the absence of a statutory fiduciary duty. TPF can improve access to justice, but it also brings up issues with funder influence, litigation costs, and regulatory integrity. Individually, TPF makes it possible to pursue claims that may otherwise be dropped, but it also raises concerns about procedural fairness and control.

B. SINGAPORE

Recent changes to the regulatory environment pertaining to this technique in international arbitration and associated court and mediation processes have contributed to TPF's rapid growth in Singapore. In addition to giving funders and litigators operating in the region and with the Singapore International Arbitration Centre (hereinafter referred to as SIAC) a clear legal framework, these legislative reforms were intended to help Singapore maintain its position as a preeminent international arbitration hub.[22]

Common law restrictions on champerty and maintenance have long limited third-party litigation funding in Singapore. These prohibitions were confirmed to apply to arbitration in the 2007 case of **Otech Pakistan v. Clough Engineering**[23]. Through modifications to the Civil Law Act and the adoption of the Civil Law (Third-Party Litigation Funding) Regulations, Singapore established a legal framework for TPLF in international arbitration after a 2011

[21] [2008] EWHC 526 TCC.
[22] C Bao, Third Party Funding in Singapore and Hong Kong: The Next Chapter' 34 Journal of International Arbitration, 387 (2017).
[23] [2007] 1 SLR (R) 989.

review and a 2016 public consultation[24]. These regulations went into force in early 2017. The torts of champerty and maintenance were eliminated by these revisions (Sec. 5A (2)), and Sec. 5B(2) made it clear that TPLF agreements are not null and unenforceable due to public policy. In lieu of amending the International Arbitration Act, the administration hinted at the possibility of extending TPLF to domestic arbitration and litigation in the future.

Professional guidelines as well as statutory laws such as the Civil Law Act and the TPF Regulations 2017 govern TPLF in Singapore. For the purpose of advising clients on TPF, the Law Society of Singapore released a Guidance Note. The SIA Guidelines for Third Party Funders and the Legal Profession Act and Professional Conduct Rules 2015 are just two of the statutes that this note explains lawyers' responsibilities under. In-depth advice is provided on crucial TPLF agreement topics, including confidentiality, funding scope, funder liability for adverse cost orders, managing conflicts of interest, funder participation in proceedings, and termination penalties. The guidelines provide a thorough approach to dealing with real-world ethical and legal concerns in TPLF agreements.

In addition to arbitration, insolvency processes also recognize TPLF. In **Re Vanguard Energy Pte Ltd.**[25], the Singapore High Court affirmed the use of TPLF in the insolvency context as part of the statutory regime, ruling that a liquidator may validly sell a cause of action and its proceeds under sec. 272(2)(c) of the Companies Act.

C. AUSTRALIA

Australia was the first country to introduce third-party litigation funding, and it has since grown into a sophisticated and established sector. Its ascent started in 1995 when insolvency practitioners were able to finance lawsuits thanks to legislative rights. After initially concentrating on insolvency cases, TPLF swiftly branched out into class action and securities litigation, among other fields. The Standing Committee of Attorneys-General stated in a Litigation Funding Discussion Paper that a Litigation Funding Company (henceforth referred to as LFC) is a business that finances litigation expenses and takes on the risk of unfavorable

[24]Civil Law Act (Chapter 43) Civil Law (Third-Party Funding) Regulations 2016 (S 68/2017). Available at www.mlaw.gov.sg/content/dam/minlaw/corp/News/TPF%20-%20Annex%20B.pdf. (last visited on 8th of May, 2025).

[25][2015] SGHC 156.

costs. After deducting its costs, the LFC gets a portion of the money if the case is successful.[26]

A watershed for TPLF in Australia was reached in 2006 with the historic Fostif case (**Campbell's Cash and Carry Pty Ltd v. Fostif Pty Ltd**[27]). Even when the funder actively participated in hiring plaintiffs, choosing attorneys, dictating tactics, and resolving claims, the High Court of Australia decided that TPF was neither an abuse of process nor against public policy. The court decided that TPLF is only an issue when it taints the legal system and that trials should only be halted where there is real or probable misuse. Positive court sentiments and regulatory developments helped the TPF industry in Australia grow dramatically after Fostif. Although they remained vigilant about possible abuses, courts recognized the importance of funder engagement in litigation strategy and began to tolerate it more frequently. Courts have upheld agreements where funders control claims in exchange for a portion of earnings in subsequent decisions such as **Project 28 Pty Ltd (formerly Narui Gold Coast Pty Ltd) v. Barr**[28], emphasizing that funders have the same responsibilities as claimholders. They did, however, start to hone ethical standards, especially with regard to conflicts of interest between donors and attorneys. In **Bolitho v. Banksia Securities**[29], the court determined that, in order to maintain public confidence in the fair administration of justice, attorneys having close relationships to funders should refrain from participating in class lawsuits financed by companies they own, even though there was no legal or professional misconduct.

Legal and regulatory frameworks that hindered claimants' ability to individually pursue certain legal proceedings, especially in class actions, contributed to the robust development of TPLF in Australia. The class action process in Australia permits claims without a certification stage, which makes them simpler to file but riskier because classes could still be dismissed later. No legal aid is available for such cases, and contingency fees are not allowed. Additionally, class representatives, not the entire class, are responsible for adverse expenses. Because of these circumstances, claimants are at more financial risk, which makes TPLF a desirable option.

A loser-pays regulation is also in place in Australia, which discourages self-funded lawsuits and raises the need for outside support. The opt-in mechanism for class actions supports the profitability of TPLF by providing litigation funders with greater assurance over participant

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[26]M Legg, L Travers, E Park and N Turner, Litigation Funding in Australia, 12 UNSW Law Research Paper, Available at SSRN: http://ssrn.com/abstract=1579487 (last visited on 8th of May, 2025).
[27]2006) 229 CLR 386.
[28][2005] NSWCA 240.
[29](2014) VSC 582 (No. 4).

numbers and possible returns. Regulatory rulings were also quite important. Because TPLF agreements were not regarded as financial products in **International Litigation Partners v. Chameleon Mining**[30], strict licensing requirements were avoided. However, the court determined in **Brookfield Multiplex v. ILFP**[31] that some TPLF arrangements qualified as managed investment schemes and needed to be registered with ASIC. The Corporations Amendment Regulation No. 6 of 2012, which exempted TPLF from more extensive financial regulation, with the exception of measures to handle conflicts of interest, was the Australian government's response to concerns about restricting access to justice.

7. CONCLUSION

For foreign investors in particular, the absence of a clear regulatory framework for TPLF in India poses serious difficulties. One major worry is the ambiguity surrounding the repatriation of investments that have been recovered. It is unclear if these transactions are classified as current account transactions, which do not require approval from the Reserve Bank of India (RBI), or capital account transactions, which do. Due to regulatory ambiguity, fund remittances may really be barred in the absence of precise restrictions unless RBI approval is obtained, which is unlikely. Establishing a domestic fund to prevent repatriation problems is similarly difficult. Although litigation claims are not recognized as qualifying investments under AIF regulations, Alternative Investment Funds (henceforth referred to as AIFs) do exist as a mechanism for pooling investments. Even if repatriation is later approved, funders can still have tax problems on their returns. Another obstacle is still the enforcement of claims. India's legal system is still unreliable and slow, even with innovations like the creation of Commercial Courts. Courts, however, have been increasingly pro-enforcement and penalize pointless challenges with fines.

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[30][2012] HCA 45.
[31](2009) 260 ALR 643.