



INDIA
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Session theme:
**India a Potential Market for
Litigation and Arbitration Funding?**

Transcription of Proceedings



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Mr. Bilshan Nursimulu: Good afternoon everyone joining in this session. This is the second session of day four of the India ADR Week. My name is Bilshan Nursimulu. I'm, a Barrister from Mauritius. And, I'm also a member of the Steering Committee of the Young MCIA and very pleased to join the ADR Week virtually from Mauritius. The topic of the session is, the question of whether India is a potential market for litigation and arbitration funding. This session is being hosted by Innsworth Advisors Limited. Innsworth funds high value commercial litigation and arbitration claims across the globe. In a few minutes, I'm going to introduce the speakers. While I'll do that, I've been asked by one of the members, one of the speakers today to do something slightly different. I won't say who, but I've been asked that as I introduce the speakers, I will also ask each one of them to say something about themselves that we won't necessarily find on them if we Google their name. Let me start with, Darshendev Singh. Who is a partner with Lee Hishammuddin Allen and Gledhill. His primary area of practice is commercial dispute resolution with a focus on complex disputes relating to construction, engineering, oil, and gas and infrastructure projects. Darshendev, can I ask you to say something that we won't find on you on Google?

Mr. Darshendev Singh: Thank you, Bilshan. Thank you very much Bilshan, for the introduction. Fun fact about me that wouldn't

find on Google. I love something which is adventurous. And when I was back in the university, I joined the cadet police force. It's a part of a curriculum activity that required us to basically hit into a thick forest. And we were there for a week and we were only given one pair of a green jacket with a green pants. Of course, my mom being my mom, she told me why don't you get some extra t-shirts that you could change the t-shirt while you can wear the same thing which over after three, four days, it started to smell. There was a particular night where we were actually, asleep in the tent. See how the tents were built that there was like a small netting at the top that's for the light to come in and for the air. When I woke up, I saw a huge fat leech right up on the mat. I was, and I was telling to my friend who was actually sleeping next to me. I said, Wow! The guys seem to have had a feast in terms of whole night. I would just ask him, did you get bit or was it me. When I looked down at my thighs it was a huge blood spot. I think he was there and he had been sucking my blood for the rest of the whole night. And, yeah, so he was just finding its way up slowly up after having a good buffet. Yeah, that's something one of the things that happened to me many years ago.

Mr. Bilshan Nursimulu: Thanks, Darshendev. That's definitely something we won't find about you on Google. And the next panelist I am introducing is Sherina Petit, who is the Head of

India practice and the partner in international arbitration at Norton Rose Fulbright. She also leads arbitration practice across Asia, Europe and the Middle East. Sherina, can I ask you the same question, something about you that we won't find on Google?

Ms. Sherina Petit: Thanks. Just as I finished law school at GLC in Bombay, I probably had the largest clientele even more than the senior counsels at the time and that was saving the stray dogs of Mumbai, Navi Mumbai before the Bombay high Court.

Mr. Bilshan Nursimulu: I'm surprised that, that's not on Google. Maybe it will be from now. The next panelist is Shreyas Jayasimha, who is the founding partner of Aarna Law. Shreyas is an advocate, arbitrator and trained mediator based in India and Aarna Law is a boutique, counsel led international and domestic dispute resolution practice. Shreyas, you know, the same question is coming to you. One thing we won't find about you on Google.

Mr. Shreyas Jayasimha: I grew up in a part of my city of Bangalore, playing traditional South Indian drum called Mridangam. And that's instilled the sense of beat which hasn't gone.

Mr. Bilshan Nursimulu: Thanks. That's very interesting to know about you. Last but not the least panelist is Sindhu Sivakumar, who's the Senior Investment Manager with Innsworth Advisors. As I mentioned a while ago, Innsworth funds all types of high value commercial litigation, arbitration claims grants across the globe, including insolvency, intellectual property and investment treaty claims. Before I hand over to Sherina, who's going to be moderating the session today, just want to remind everyone attending that it's being recorded and transcribed. And so Sherina, over to you and I'll see you at the end of this session.

Ms. Sherina Petit: Thank you very much. Good morning, good afternoon and good evening everyone, depending on which jurisdiction you're dialing from. It's my pleasure to be hosting such a topical session today. As part of the MCIA's ADR Week, is India a potential market for litigation and arbitration funding? And a big thank you to our sponsors Innsworth Litigation Funding. I very much hope that you will find the session interesting and knowledgeable from my personal perspective. It's been a pleasure to work alongside and moderate this excellent panel with these esteemed speakers. In terms of structure, what the speakers and I thought we'd do is kick off by giving a short overview of how third-party funding operates across different jurisdictions. Then the first things up, we will move on to a scenario

involving ADR and third-party funding and perhaps have a bit of a role play there. And then have an interactive round of questions that I'll be putting to the panelist followed by questions from you, the audience. So let's keep the session interactive, fun and keep those questions ready. In terms of an overview, I thought I'd just briefly touched on from the UK and then I'll hand over to Darshendev. Now, although third party litigation funding is relatively new in the UK, the uptake has been surprisingly strong and now holds a firmly established space in the UK legal market. In fact, I was reading some statistics and themes that there are more specialists litigation funding companies than in any other jurisdiction. Welcoming response to litigation funding has driven England and Wales to become actually one of the first and only jurisdictions to have something called a Code of Conduct for litigation funding. And this is overseen and enforced by the association of litigation funders. The Code was launched in 2011 and sets out certain standards of practice and behaviour for litigation funders. Although it's not mandatory the Code contains a number of provisions, including but not limited to, funders capital adequacy, managing disputes over termination of funding arrangements, conflicts of interest, including the requirement that it is the client ultimately, who remains in control of the litigation. It's also important to note that the Code was designed to be more of a temporary measure before perhaps

strict statutory regulations are drafted. So, what and who is the third-party litigation funding interested in. Despite a significant growth in recent years, the third-party funding in England and Wales does not extend across all claims. It's primarily, used by commercial claimants in terms of monetary claims, that can be monetized within a short period of time after proceedings and claims such as, therefore, personal injury and other consumer-based claims on economic and policy grounds are not funded. It's true that funders in the UK will generally only fund claimants. However, I think as the UK funding market matures there will be and there looks to be an uptake in the number of defendants that will actually be receiving funding. And that leads to number of requirements that have to be met before funding is given. These include a site of a counterclaim, the defendant having a portfolio of litigation matters supported by the same funder as well as the defendant agreeing to give the funder a stake in a future asset or income, which is expected to flow from the successful defence. About the future of the UK litigation funding market, I think the inescapable narrative is that Covid is no less applicable here. The cashflow pandemic that this disease has caused would greatly impact the prevalence of funding, as financing both existing and future claim is becoming even more difficult for many parties. And therefore, acquiring third party funding seems to be a natural response to the ever-growing pressure to free up cash and take costs of the balance

sheet. And we're finding a lot of clients that are coming to us with the question, can I get funding? So, with this growing presence comes the need for greater regulation and as large swaths of funding remains unregulated. A number of institutions are addressing this issue specifically by seeking to clarify the duties and obligations of third-party funders. So, with the continuing rise of third-party funding and the potential conflict with the arguable limited current regulation, I think the future of litigation funding in the UK is certainly one to keep an eye on. Darshendev, moving to you. Is third party funding permitted for arbitrations seated in Malaysia? And how prevalent is it? It would be great to hear your insights, on this.

Mr. Darshendev Singh: Thank you Sherina. I would say unfortunately, third-party funding has not been introduced in Malaysia. Having said that, the very reason is because I think we are still stuck with the Doctrine of Champerty and Maintenance. But there has been a move by the Malaysian Bar and the AIAC, their powers to introduce, or at least amend the arbitration and all the relevant legislation to introduce third party funding in Malaysia. As an arbitration practitioner myself, I do see a dire need for third party funding to be introduced in a jurisdiction. Particularly when it comes to international arbitration in light of the fact of, it has been a rising costs as far as the international

arbitration is concerned. Of course, I think, the point that you've made Sherina is with this global pandemic that has affected cashflow of many organisations and many companies. And companies may be looking at basically managing their risks in a sense where having a third-party funder coming in to fund at least the whole or a part of the litigation. So that the balance access money could be used to invest in some other parts of the company in order to get the company moving and alive. Yes! We are pushing on. We are trying to introduce third party funding, but as yet in Malaysia, there's yet to be a clear direction towards third party funding.

Ms. Sherina Petit: Great. That was excellent. I know that you cover quite a lot of Asia. Could I be cheeky enough, you to tell us about Singapore and Hong Kong as well? I know those are two jurisdictions that are forging ahead, the rest of the world in fact, in terms of third-party funding. Could you perhaps run us through why this may be the case and what other countries may be able to learn from them?

Mr. Darshendev Singh: Sure. Thanks. Thank you, Sherina. I think if one were to look at Asia, one of the two countries that one could look at as a guidance would be Singapore and Hong Kong. Of course, in UK as Sherina correctly pointed out, would be ALS Code. And that's in the UK. But as far Asia is concerned, I think Hong Kong and Singapore has to a certain

extent amended their legislation, introduced regulations, introduce courts in the way how to regulate third party funding activities. I wouldn't say it's a comprehensive thing, but at least it's a good start somewhere. Like, for example, in Singapore they've actually amended their legislation to allow for third party funding in international arbitration and court proceedings, which relate to it. In fact, I think about two years ago the Singapore Law Minister, had briefly announced that it will now also be extended to domestic arbitration as well as proceedings under the SICC the Singapore International Commercial Court. As far as the key takeaways that I can see from both these jurisdictions. They are in a way quite similar in terms of their regulations and codes. For example, like in Singapore, I think, they've actually defined, how do you actually qualify to be a third-party funder. So, you first need to qualify as a third-party funder and not just as anyone could actually come into it, the definition of the third-party funder. And in Singapore, I think you have to have a paid-up share capital of asset of not less than 5 million Singapore dollars. You must be a person who carry on businesses of funding, of course to which the parties are not a party. That's one aspect of it. I think Hong Kong is about 20 million Hong Kong Dollars, if I'm not mistaken. Then the next part comes to is the deals with managing conflicts of interest. I think in Singapore the regulation is that, the funding agreement must recommend that

if there is a conflict between a third party funder and the client, how do you then deal with such situation? And I think that the recommendation that there is a lawyer who is assisting a client with being funder must be entitled and must not have any prejudice from the third-party funder. In the event, there is a conflict, the lawyer can still continue to act for the particular client and there's no interference as far as the third party is concerned. In fact, I think the regulation also goes on further to say that the third-party shall not influence the lawyer in the way of, the way it affects his professional duty. One of the interesting things in Singapore is that they've also said that lawyers or law firms, who are involved in that matter are prohibited from holding any share or ownership or interest in the third party funders company. But having said that, they can actually introduce third party funder to talk to their client. One would then ask, what sort of interest are we speaking of? Is it a direct financial interest or is it an indirect financial interest? I think the regulation here defines what is the financial interests to be direct financial interest. But we know, in reality there can be indirect financial interest as well. For example, there may be a particular set of lawyers or a law firm that works very closely with a particular third-party funder. And in a way, where most of the arbitrations are where they work, they work as a deal. That can be an indirect interest as well. If one would look at it

from that perspective. Yeah, but with Singapore it seems to have finding to be direct financial interest. Of course, both in Hong Kong and Singapore there is a duty of disclosure. And you basically ought to disclose to the arbitrator and the arbitral tribunals and your opposing party at the commencement of the arbitration or as soon as practicable. If I'm not mistaken, either Singapore/ Hong Kong, I think it's Hong Kong, if I'm not mistaken and once the third-party funding arrangement seizes, for whatever reason, the duty lies on the party who was funded within 15 days, to notify the tribunal and the opposing party. I think it's in Hong Kong. And you've got to do that. Some of this regulation also goes on further to basically encourages or recommends what are the things that ought to be included in a third-party funding agreement. As far as, who calls a shot, who makes the decision, to what extent would the cost be borne, the liability, et cetera. Interestingly, as far as Hong Kong is concerned, although they've provided this requirement, there's a provision in there, which says, if anyone does not actually comply with the Code, it's not something that is subjected to court proceeding or judicial proceedings. But it can be taken into account by the arbitral tribunal when it comes to the dealing with a particular matter. So basically, in a nutshell, while there are a lot of guidelines, there's lot of measures, there's lot of recommendation to put in place, to what extent would it be enforced? To what extent would it actually be effective?

That's something that have yet to be seen and would have to be explored on a case-to-case basis. But having said that, I think as a good start, there are some guidelines issued, some guidelines that have been put in place in both the Jurisdiction Singapore and Hong Kong and for any jurisdiction, not only India, but also Malaysia would want to actually go into a kick-off into third party funding could start off looking at these two jurisdiction as a guide.

Ms. Sherina Petit: Thank you so much Darshendev. That was a fantastic whistle stop tour of three jurisdictions. Thank you very, very much. Shreyas over to you. You're a founder of a firm in India. And actually, one of the pioneers of actually founding a firm in Singapore as well. I'd be extremely interested to hear your views and your thoughts around third party funding in Singapore and Hong Kong. If there's anything you'd like to add to what Darshendev said?

Mr. Shreyas Jayasimha: Thanks, Sherina. Thanks, Vishakha Simha law, which we are privileged to establish in Maxwell Chambers Singapore. Being in part of the arbitration ecosystem in Singapore is, feels like sitting on a magic carpet because there's so much energy, part of the ecosystem which has nothing to do with you. So, it is very invigorating for sure. One point is that, is that the ecosystem as a whole is geared to beyond just regulation. Be in best practices, be it just

playing intention of all actors concerned to put in place efficient and effective dispute resolution processes. That is palpable even in the third-party funding context. So, you do have, for example, guidance notes from the SI Arb touching upon third party funding. And in Hong Kong also there has been an attempt to have a Code. But one thing that is striking is this, as Darshendev precisely put it, the need for disclosure. And so, I think in that sense the two jurisdictions are hinting at an Asian way, if I can put it that way of being comfortable with the third-party funding. But also, being and ensuring that it is not operating in an unregulated context entirely. So, I think, this will certainly inspire other jurisdictions to look more closely and the very fact that we're having panels like this, and this is not unique, this is happening every week or every fortnight in India. That tells you how the ground is shifting in this jurisdiction.

Ms. Sherina Petit: Thanks, Shreyas. And let's come back to our home jurisdiction, India. Is third party funding permitted for arbitration seated in India? What do you think? Or rather should I say not is it permitted, is happening? So, comment on that.

Mr. Shreyas Jayasimha: Yeah, thanks. I was going to rephrase it in similar line myself. Because until we have a definitive court pronouncement we can all be entitled to our views, but

wouldn't be able to say absolutely beyond doubt. But it is clearly true to say that there is no explicit either prohibition nor an express permission, sorry, to TPF per say. But the cases are all well-worn but since we do have nearly a hundred people in the audience. I'm betting that a few maybe, have not seen some of these decisions. So, pardon me. The panelists, especially Sindhu who would have heard this, every single panel that she's been on TPF. But the, cases in India go back beyond just the last century. The cases for example, of the Privy Council in 1876 of Ramkumar Kundu, acknowledging that a fair agreement to supply a funds to carry on a suit in consideration of having a share of the property, if recovered will not be opposed to public policy. A decision later in 1954 Supreme Court in Regies senior advocate drawing the distinction between Champerty and Maintenance, but also, showing the limitations, the additional limitations on legal practitioners, per se. Therefore, perhaps hinting that others are not as prohibited as legal practitioners are in funding cases. The throwaway line that we've spoken about so much in AK Balaji in 2018. Noting that the funding of third party of litigation is certainly happening in India. But the Bar Council Rules, per se, especially Rule 18, talking about fomenting of litigation, Rule 20 on contingency fees, 21 on share or interests in an actionable claim, 22 in participating be in execution. All strongly suggest that at least, lawyers themselves can't fund the claimants. So that is a few

takeaways emerge, one that, the funder cannot be a lawyer or two that they ought not to be some influence on the outcome of the proceedings. They can be concerns as to how the money is deployed and certainly whether it is a funded case or any other, the sensitivities on making sure that the adjudicators are entirely immune from any financial pressures is important to retain the credibility of a dispute resolution mechanism. Also, the question of whether the funder would have the finger on the trigger as it were to pull the plug if arguments on entirely shutting out the claim entirely. Is, maybe to, for example, avoid a further outcome in adjudication which would be unwelcome. Those are all considerations which I'm sure a mature market, a regulated market will, and when I say regulated and not necessarily state regulation, it could even be self-regulation. But the absence of either state regulation or self-regulation is in my view not healthy. And, and it does ultimately impact the credibility of even the more mature players who might want to have access to justice arguments made if there are funders who are less concerned about these aspects. And finally, the fairness of the agreement of funding itself. I'm sure these are factors that will be considered in the cases that will ultimately come up before court, to answer the question more definitively that Sherina posed.

Ms. Sherina Petit: Thanks, Shreyas. That was great. I know you've touched upon this next question already, but what are

the factors that may have made third party funding less prevalent in India? Anything to add to that from what you just said?

Mr. Shreyas Jayasimha: Yeah. First is of course this, ambiguity or hesitation around giving an explicit answer to your first, especially looking for a case that says it, per se. But having said that if you look at the activity, as you said on ground, it's only increasing. So, the bets are being taken. Money is being placed, on a position, perhaps that the courts will come up in upholding the validity of certain funding regions. And that seems to be the trajectory. The other aspect is the certain regulatory aspects of concerns of, if, for example, a foreign funder is funding a claim then if there would be a fund repatriation issues that they might face, when it actually comes to counting the pennies. Again, the more examples we have of funders being able to successfully repatriate whatever was earned or the arrangement, those anxieties might come down. I think till that happens in more publicly accessible fashion the reason for some anxiety or hesitation is ambiguity.

Ms. Sherina Petit: Thanks, thanks a lot Shreyas for that. Sindhu moving on to you. You're, one of, well, you're the only funder who's on this panel. Looking at funding from the eyes of a funder, could you perhaps give us an understanding of

third-party funding that we won't find in books or journal articles, for example, how is it different to a traditional bank loan? Sindhu you need to take yourself off mute.

Mr. Sindhu Sivkumar: Sorry. When we think of funding I think we think of litigation finances, any arrangement surely where a third party to a litigation, which can be a professional litigation finance company like us, but doesn't have to be ,provides funding to a litigant to run a case and in exchange shares in the results of the case, essentially. So, if the litigant is successful, we take a portion of the winnings, if they're not successful, we get nothing. The last point that I said, which, if the litigant is unsuccessful, we get nothing is essentially what distinguishes us, litigation finance from a bank loan. Now you, a litigant can obviously take out a bank loan to finance, finance a case. But with that, you will have to pay the loan back with interest, whether or not your case is successful. Whereas a key aspect of litigation finance is, it's non-recourse. So, the risk of loss is entirely with the funder, not the litigant. And if they lose the case, they don't have to pay anything. There are, I mean, there are pros and cons to both, not to say one is superior to the other. TPF can be a bit more expensive to a traditional bank loan. There's no doubt about that, but it's a much better risk proposition. Also, banks may not, bank loans may simply not be available in a lot of litigation cases because remember banks

often want some additional collateral, separate from the litigation, which litigants may not be able to provide. Whereas in a litigation finance, the litigation itself is the only collateral, we don't seek additional collateral typically.

Ms. Sherina Petit: Thanks Sindhu for that. So, would you, as a funder, give us an overview of how you broadly see India as a market for third-party funding? And perhaps outline some of the positives and negatives of practical examples where you funded cases involving India.

Ms. Sindhu Sivkumar: I mean, I can, yeah, I can give you a sense of how funders, international funders maybe in particular perceive the market. I think, there is no doubt that international funders are interested in the market. The very fact that we're having this panel discussion and that there've been so many such discussions around funding and, Shreyas mentioned this as well, shows there's a lot of interest in this market and people are spending time investigating this market. In terms of what's, what people are doing right now and what they're most interested in. I think there are several funders who will look to fund Indian parties with respect to their disputes abroad. So foreign litigations and arbitrations that's an active thriving market. These aren't always the easiest transactions to structure for a

funder, particularly if there are, there is interaction with India's foreign exchange regulations, but there is significant interest here. Increasingly, I think funders are getting interested in domestic arbitrations in India. Driven in some part by all of the arbitration reform and the positive judgements that have been coming out of India and in the last, four or five years, I would say. And for the same reason, I think there's been increasing interest in enforcement actions of arbitral awards, both domestic and foreign awards. With pure domestic litigation in India, I think it's safe to say there's less interest there, for a number of reasons. I mean, there's, this, everyone talks about the delays associated with litigating before the Indian courts. Then there's also the perception, right or wrong that you often get unpredictable judgements from the courts. And that's something that makes funders vary. I mean, positives, negatives, not really positives and negatives, but I think there are with India related disputes, there are a couple of things I think, funders should be aware of the unique issues, if you will. For example, and you will have to keep in mind foreign exchange regulations when funding an Indian entity, which some international funders can be quite unfamiliar with. I mean with sort of any India related arbitration, you need to consider the interaction with the Indian courts, where that might arise and if that's something you can live with. I think, with like enforcement actions, which are getting

increasingly popular, the, you will also need to understand that India has a lot of different local courts and the different local courts are not all equal. You need to have a good understanding of the different local courts, the differences between them when considering such opportunities. I mean, I will say one thing and touching a bit upon what Shreyas said before, in some ways legalities is not a huge concern. I mean, the broad consensus I would say is if you look at all of the India is not unique in the sense of not having expressed permission for funding. That's something, funders are used to dealing with jurisdictions without expressed permission for funding. The judicial dicta by and large, is positive. I think it says a couple of things. One is, Champerty and Maintenance don't really apply in India in the same way that they did in Singapore or Malaysia. And the restrictions to the extent that there are any, seem to primarily apply to lawyers being involved in funding. So, lawyers having a contingent interest in funding, not with third party financing claims of which, I don't think there are many professional funders but the concept has existed and seems to exist for a long time in India. But that said, I mean there is one thing, right? Which is to the extent that there is ambiguity. As a funder, one of the things I would be thinking about is am I funding a case involving potential enforcement in India? i.e., of an Indian defendant is involved. And if so, does this ambiguity give them scope to

essentially exploit this ambiguity and obstruct enforcement in India? So, that's a more practical consideration, I think.

Ms. Sherina Petit: Thank you Sindhu. That was great. I mean, thanks Sindhu. Thanks, Shreyas and Darshendev for the incredible valuable insights. I think we've got quite a few takeaways and I can see questions are coming in from the audience. Let's now move on to the next section, which is ADR and particularly given the umbrella topic for this week as ADR. Let's not discuss the impact of third-party funding on settlement. Perhaps maybe let's walk through a hypothetical scenario. Maybe not that hypothetical because I actually experienced this. So, there's a dispute between two parties and naturally we have a lawyer, we have a client and we have a funder. Let's say that the claimant has a good case. Therefore, has secured third party funding. Respondent has a fairly weak case, fairly weak, not very weak, but fairly weak, and therefore has agreed to go through to try and settle the matter through mediation. Now let's have a think of how this plays out. Specifically looking into the aspect of the claimant's position, that it has procured third party funding and the respondent's position, that it knows that the claimant has procured this funding and effectively, already has a buy-in from an investor that the chances of success are 60% or more. So, Sindhu could you let us know your thoughts from a funder's perspective? Do funders promote settlement?

Ms. Sindhu Sivkumar: I mean, I think having a funder by their side can be very helpful for litigants during the settlement process. If you think about it, a funder is primarily interested in achieving a financially optimal outcome. And that's usually what the litigant is interested in doing, not always, but in arguably those sorts of litigants should not be seeking funding in the first place. So, so broadly speaking the as far, I mean, as far as the funder and the litigant are concerned their interests are aligned in evaluating settlement offers. And in the evaluation processes, where in our experience litigants often value and often reliant on us and often value our contribution. Because there are a number of things you want to consider either when deciding how, whether to make an offer, how much to make it at and an equally in evaluating an offer made from the other side. Now what are the costs saved by a settlement? So, by avoiding trial essentially. What's the level of the offer versus what you might achieve at trial? Where, what are the merits of the case? What sort of results do you expect at trial? Funders are very used to modelling these sorts of scenarios and assessing settlement offers. So having them involved can be helpful for the litigant who aren't, who might not have quite so much experience with them. Apart from that, I think just the assessment process itself, again, funders can be, funders go through a lot of settlements and they can be helpful in the

negotiation process as well, just bringing their experience to the table, that again, for an inexperienced litigant that can be hugely helpful. Ultimately, I think, it depends on all the parties involved, the jurisdictions involved as to how involved or not the funders will be in the process, because not all jurisdictions will allow for it. But I think in our, I mean, in our experience when it's done right, it's, it can only be a positive and it's good for the litigant.

Ms. Sherina Petit: That's great to hear, Sindhu. Now Shreyas, your thoughts from the perspective of a client and counsel to the claimant. And also, if you can then put another hat on and then look at it from the respondent. Darshendev, I'm warning you. I'm going to ask you the same thing as well next. So Shreyas go on.

Mr. Shreyas Jayasimha: Thank you Sherina. Before this, I just want to quickly pick up on a point that Sindhu made on the last matter, that was delighted as a lawyer practicing outside Delhi and Bombay, what does call, Muffasil courts. The rest of the civil courts in India are called Muffasil courts. And, the practices vary tremendously. And especially in relation to TPF, even there are certain amendments in certain States in the Civil Procedure Code itself, which might include implement of financiers into the litigation. I'm sure in due course that might be explored a little more. But back to your, role play

now. The scenario that you have traced puts me as the counsel for the claimant in an excellent position. You have given me Sherina a strong case. Thank you very much. You have also given me access to funding. So not only the, you and I think we have a good case but there's a funder in the room who agrees with that view. So that can lead to some irrational thinking unless we're careful. It's not easy to exercise humility. The first thing is to know that, in your scenario, you said, if I remember, you have a 60% chance of success. Now, it does still mean that there's a 40% chance of failure. And quite often that is lost sight of. And so, the first thing I would advise which I always do, is to ask my clients to become emotionally aware. And so, I say, please look at the Dalai Lama's Atlas of emotions. It'll tell you to put a name on your inner weather system, whether the strong winds are blowing stronger or gentle. Calm down. That's when your best place to make rational decisions. Next assess whether this 40% is a real risk. Thankfully there's a funder in the room. There is no recourse funding available to me, even to deal with this risk of 40%. And so, I am therefore empowered, feel more empowered. Perhaps to suggest that we can conduct confident negotiations in the settlement process. But knowing that there is some downside protection if the settlement negotiation fails. Finally, in any settlement the point of having future business is important and also of a reputation as an inveterate litigant or as a person who finds value in any

business situation. I would counsel the claimant to say that if the reputation gets built over time, that even in a difficult situation, this is a claimant who will reach out to find value even in a dispute. Then that reputation itself, is builds long-term reputation and real economic value to the entrepreneurs.

Ms. Sherina Petit: Thanks, Shreyas. Darshendev, do you have anything to add? What do you think? Do you think third party funding promotes, promotes or discourages settlement?

Mr. Darshendev Singh: I think the answer is, it depends. There are certain plus points in third party funding, especially in the scenario that you've mentioned, which may promote settlement. One of it is what Shreyas has mentioned which is when a third-party funder is on board the impression that you get upfront is that at least the other party who is being funded have a reasonably good case, or at least 60% or more. So, if you, as the respondent have a, I wouldn't say a terrible case but at least a fairly weak case. That could be one of the considerations that you could consider in trying to resolve matters amicably as opposed to pushing on. Because this will also be a situation where the claimant, will not run out of funds. You won't have a situation, where if you were to drag the arbitration and with the cost of experts, et cetera,

coming in, it may eventually frustrate the claimant, but that would not be the case here. Because he has a third-party funder involved. So that, that actually promotes settlement. In fact, it puts the claimant in slightly in a higher bargaining position. But having said that one, if we are faced with a scenario where the settlement offer that is on the table may be in the best interest of the claimant and had it not been for a third-party funder, it would have been the best thing that the claimant ought to have done. But because of the existence of a third-party funder and the arrangement between the claimant and third-party funder how then does a settlement goes through? Particularly in a situation where the third-party funder feels, No, I don't think the settlement amount is good enough from my perspective. Whereas the claimant, who wants to continue and have a long-term relationship with the respondent, feels, well. I think it's good enough for me. So, it then falls on back to the question of what was the arrangement in the TPF agreement? But this definitely can play a part in terms of whether a settlement would go through or fall.

Ms. Sherina Petit: Thanks, Drashandev. I mean, as I said, at the beginning, I actually faced this issue. I was acting for counsel for the respondent, and we didn't have a very good case. We didn't know the other side was been funded until the

funder showed up at the mediation table. For me as a counsel, it reiterated to my client what I've been saying to them, because they were more bullish about the case than I was. Actually, when they saw the funder on the other side they said, Oh god! Maybe Sherina is saying something that's sensible that we don't have that greater case, because the other side is a Claimant and they've got a buy in. It was really interesting what played out at the mediation because actually the, we didn't settle at mediation and there was a real blur in that room, who was the client? Because every time I thought we were getting there, the funder would be whispering something into the ear of the counsel and in the ear of the client. And the settlement would keep getting scuppered. So, it didn't settle at settlement. My clients walked out of the room because there was no sense. But we settled ultimately over the phone because both of us counsel I had a very sensible counsel on the other side. We both agreed that it was more sensible for the case to settle. Because just as one of you said, even though there is a 60% chance of success, there's a 40% chance of no success. And we ultimately settled not at mediation but after. So that was a really alive situation, that I experienced. In fact, thank you very much. We've actually got a number of questions that have been coming in. Shreyas, can I ask you, there's a question from Kishore. Would third party funding possibly aid and abet money-laundering and spur a wave of frivolous litigation and

arbitration? Fantastic question. Shreyas, do you want to take that one on?

Mr. Shreyas Jayasimha: I mean, these are exactly the kind of, the fear of the unknown type concerns that we should address, frontally. There is no point in dismissing these concerns as being overblown. The very fact that it has been expressed means it is a view which is held by somebody and it must be rationally dealt with. So, when it comes to concerns around foreign exchange, as I have pointed out myself and Sindhu has confirmed, making sure they are fully compliant with FEMA Regulations and the role of the RBI as regulator. These are concerns that are well-known and the allegations of being complicit in improper activity, as defines under FEMA Section 13 of, three times the amounts involved in such contravention and concerned is sufficient. I would say economic incentive to take foreign exchange regulation seriously. So that's, that. The second factor actually, it might temper and not increase frivolity in litigation because it to have an access to funding as Sherina put it, the funder must be convinced of a higher probability of success than of failure and what the exact percentages may vary from case to case, but it is not every case that would get funded. Therefore, there would be a filter that of cases where the parties are not able to proceed because of a lack of funds. And so, the law of the market might just show that some funds fall by the wayside and some

claims fall by the wayside because they're not able to be funded by the claimants themselves or to secure funding. Therefore, the frocks on frivolity that has been referred to, might even be tempered. Of course, there are situations that you've been equally think of where, funders would nudge parties, if they have taken aggressive positions. And, it's a subjective view as to litigation is frivolous or not, especially you will consider it, so if you're losing sight. But I think in a well-regulated market, many of these concerns should be addressed. But I think the concerns will remain if the market remains unclear, unregulated and ambiguous.

Ms. Sherina Petit: Thanks, Shreyas that was great. Shardul Kulkarni has asked really important questions as well. In fact, two questions. Sindhu would be great if you could address those. How does third party fund, or how does third party funders analyse the merits of the case and is funding decided based on the winning probability of the case?

Ms. Sindhu Sivkumar: Sure. I mean, there are lots of things a funder looks at when they're assessing a case, but if you kind of break it down it's fundamentally about merits. It's about legal merits and it's also about economic merits. i.e., Is it a good investment. So, on legal merits, we're going to look at is the case likely to succeed at trial if it goes through to

trial on the law as well as an evidence. I mean funders have no interest in funding that cases because we get nothing absolutely if the case loses. Secondly, the economic analysis. And I, and I often tell people this, but it's no different to any other investment you make. You're going to look it up, how much, the funder is going to look at how much they're being asked to fund? How long is it going to take? What's the likely value of the case? What's the realistic value, right? Not the claim value stated in the claim form. Where does this leave everybody? Does this leave the funder with a good return? And does this also leave the claimant with a fresh air of the proceeds? Because we would want both. When you, when you do the diligence exercise, which is what funders do when they sort of assessing a case. You look at, there are lots of other little things you look at to kind of do this, a fundamental analysis. You're going to look at the legal and factual arguments of each side. You're going to look at the evidence supporting it. You're going to look at theory, the legal theory underlying your damages claim as well as the expert evidence and how strong or weak those things are. You're going to look at the jurisdiction because that impacts both the likelihood of success, as well as the length of the case. You're going to look at the budget. Is it a good, is it a realistic budget? Is it comprehensive? You're going to look at the defendant. You're going to look at the defendant their financial history. Can they pay up? If you are successful at

the end and also what's their litigation history? Are they going to be pragmatic and settle or are they going to drag it out? And likewise, you're going to look at the claimant. I mean, you're going to look at the claimant, are they commercial and pragmatic? Are they motivated to dedicate the resources needed to run the case? And lastly, of course, you're going to look at the counsel and expert team. Actually, going back a little bit as well to, settlement and what Darshendev said, if a lot of those things, the worst-case scenarios in terms of the litigant and the funder not agreeing on settlement should ideally be taken care of it in diligence itself. Because if the litigant that seeking funding doesn't seem to be pragmatic and commercial, funders will typically hesitate to fund such claimants. Because that, and that sort of preempts and that sort of prevents some of these settlement-based situations from occurring in the first place. Right? That's really it, I mean, I think there's lots of other things you look at. Who's the expert team? You look at, you look at lots of other things, but broadly, I think it will always come back to, is this, is this going to be a successful investment? And is it going to be a good investment?

Ms. Sherina Petit: And when you say successful Sindhu, you're looking up at 60 - 40 splits?

Ms. Sindhu Sivkumar: Not at all. I mean, I think, I mean, we're all ex litigators, most funders are ex-litigators. And we understand, the it's very difficult to quantify, or even if someone does quantify it, I think he'll take it with a pinch of salt. But we, we will look at, you know, the overall merits of it. It more likely to succeed or not, and not just, you know 51 - 49, but is it a good case. So if have to quantify it, I'd say, ideally you want something that's 70% or more.

Ms. Sherina Petit: Right. And what's the minimum claim amount, third party funders provide? I know it's across a very large value, isn't it? I mean some will go for 10, 10 million will be the base. Some will go for 100. What do you think in your experience?

Ms. Sindhu Sivkumar: Entirely depends on the funder. I mean, just like other investment funds, different funders have different models. Some want to do lower value cases and limit their exposures, but do perhaps do more, a greater volume of work. Others take a very different approach and say we don't want to do quite so much in the, by way of investments, by way of volume of investments, but we only fund cases above a certain threshold. One of, I mean, a very sort of very bare minimum, I say is, there's got to be enough in the pot for the claimant to have a fair share of the proceeds for us to have a good return. And in doing that assessment, you need to look

at, if you need to look at the jurisdiction involved, are there going to be adverse costs, costs and exposures as well, et cetera. That so you would, I mean, putting all that together different, the truth is different funders have arrived at dramatically different answers in terms of what their minimum threshold are.

Ms. Sherina Petit: Thanks Sindhu. Yeah. That's exactly my experience as well. We are nearly getting to time. Well, one, probably one last question. Shreyas this is a question from Rama Appatu. How is attorney client privilege dealt with, within the third-party funding landscape in India?

Mr. Shreyas Jayasimha: Just leaving out India for a minute. Certainly, the attorney client privilege is a very important concern and confidentiality in sharing documents with anyone else be it a funder or anyone else is vital to ensure that we maintain a confidentiality and privilege. Now, in some of the regulated markets, you do have guidelines on this and you do have suggestions that the funders agree to respect the nature of the privilege and confidentiality that is governed by those arrangements. But look at it this way. In adding India to the mix, you might share details of the claim with certain advisors. I'm sure your lawyers would advise you to keep lawyers copied on such communications. It could be a Chartered accountant or it could be a claims expert. It could be

somebody else who is a subject matter expert that you need to show some documents to, which are otherwise governed by attorney-client privilege. So, there are even an unregulated market, there are many ways in which, in such situation of non-disclosure agreements, but beyond that also ensuring that lawyers are kept copied, that contains a header in each email to say that it's attorney client privilege communication. I don't see how communication with the funder would be a much different in the sense that the funder would be in a way advising or evaluating the case at the first instance, before they choose to fund. So, I'll stop there.

Ms. Sherina Petit: Thank you Shreyas. I mean, we are spot on time to close. There are loads of more questions. What I would request is please do feel free to email the panelists, with your questions so that they can be answered if not on this because we don't have time on this forum. As expected and as Neeti had told me this would be a really popular session and clearly it is. Bilshan over to you to end this session.

Mr. Bilshan Nursimulu: Thank you very much, Sherina. Thank you very much to all the panelists. It was a very interesting session and I don't think I'll do justice by summarizing the detailed in the content of what you've said in just a 30 seconds time, I might have left. But I'm very grateful to Darshendev. It was very interesting to hear the, perhaps the

more conservative approach to litigation funding in Malaysia. But also, thanks very much for sharing the regulations of the practical regulatory aspects I would say that apply in Singapore and Hong Kong. And Shreyas same to you. Shreyas it was very interesting to hear from you about the practicalities, perhaps sensitivities as you put it, that apply in India, even in the absence of express regulation and express authorization permission or any decision or judgment of the court on litigation funding. And on that aspect Sindhu thanks. Thanks for first of all, explaining a bit more about the risk allocation that applies in litigation funding. But also it's reassuring to hear that funders are not put off by the fact that there is no express permission in certain jurisdictions regarding third party funding. Sherina, thanks very much for putting together the content and the structure of this session, including the practical scenario towards the end. I don't think I have the time to talk about it. Last but not the least, probably other key takeaways for those who have been with us since the beginning of the session where short fun facts from some of the panelists when I introduced them. I am very sorry Sindhu, I forgot to ask you about your fun facts, at the beginning. That is not out of an intention to blank you. But we are very keen to hear about that just before we finished off this session.

Ms. Sindhu Sivkumar: I thought I had dodged the bullet actually, Bilshan, you shouldn't be sorry at all. No, I don't know if I have a fun fact about myself off the top of my head. I'm sure there are many, to be honest. But I can tell you this and when I'm not financing litigation, I suppose I'm usually found outside in the water, so maybe we should swap jurisdictions as well. I love swimming outdoors, pool, lake, ocean. I'm not picky, but that's where I'd like to be when I'm not at work.

Mr. Bilshan Nursimulu: Great. Thanks very much for sharing that. So that ends, that concludes the, this session. The next one is at 3:00 PM on enforcement of arbitral awards in India, which I'm sure is going to be another interesting session. So, see you then.