

THE BURFORD

Quarterly

A REVIEW OF LEGAL FINANCE

ASSET RECOVERY ROUNDTABLE

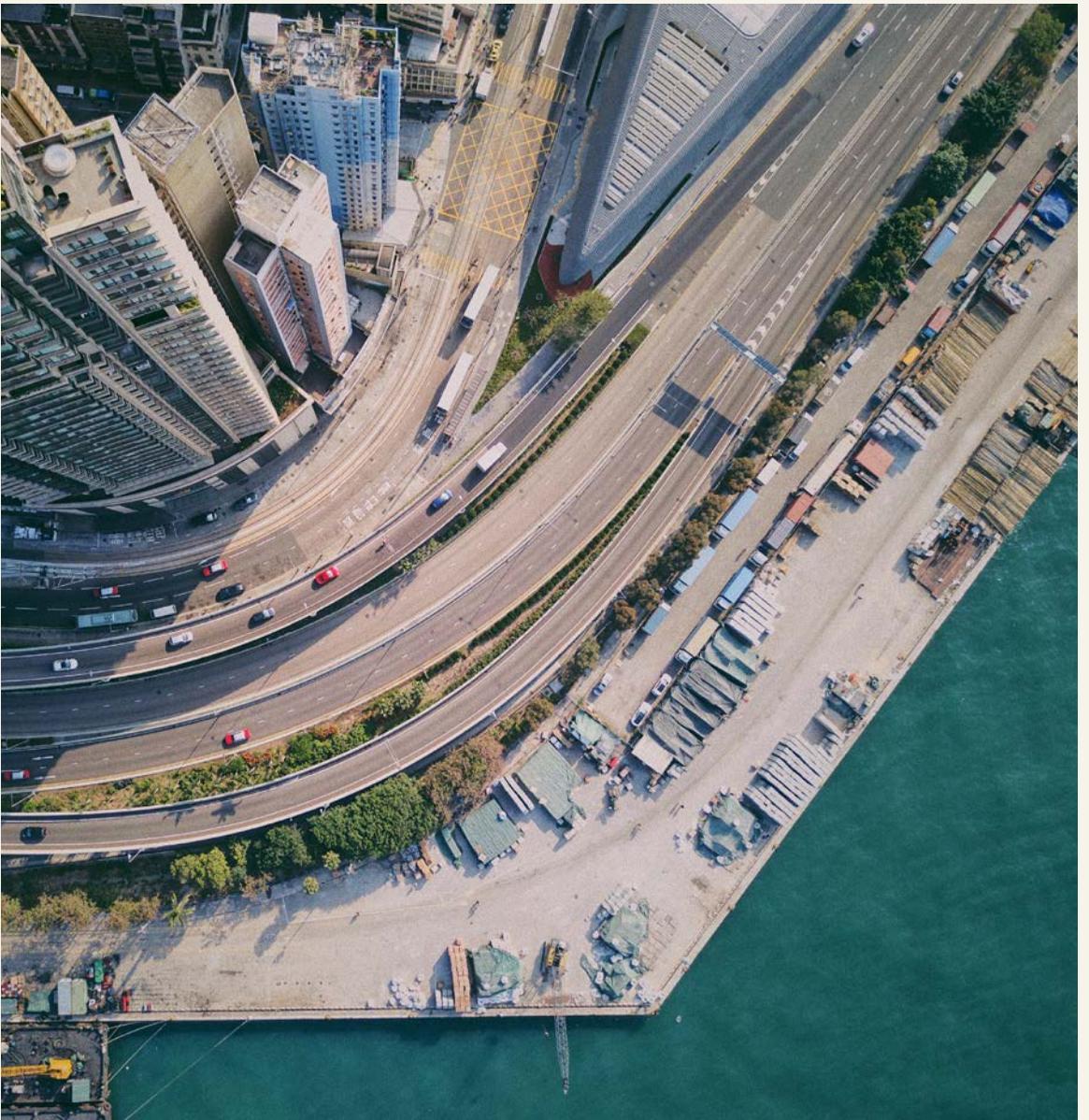
HOW LAW FIRMS USE
PORTFOLIO FINANCE

UNLOCKING IP ASSET VALUE



ROUNDTABLE

Legal finance in India: Lawyers weigh in



Given growing interest in legal finance in India, Quentin Pak asked a group of international lawyers from leading Indian law firms to address the legal framework regulating funding, recent monetization activity and predictions for the future of legal finance in the region. Their perspectives are collected below, with some edits for brevity.

Q.

Lawyers are under obvious pressures to innovate and better manage costs. What do you perceive to be the main business challenges faced by lawyers in India, and how can legal finance help?

Cyril Shroff:

The aftermath of COVID-19 will see big changes in the practice of the law—in India and globally. Lawyers will have to innovate on the front foot, change fundamental practices and meet business needs in order to survive.

Specifically, the issue around managing costs has been top of mind for clients for some time, but it will now become immediate. Until recently, clients did not question the conventional billing models on which

the legal industry has been operating for decades.

Indian lawyers have increasingly found themselves competing in the global marketplace, with lawyers from other jurisdictions who have embraced more innovative models of legal finance (particularly in international arbitration matters). Our clients have become more proactive and sophisticated, pushing their lawyers to consider what innovative financing models can be

adopted within the existing legal regime in India.

One of the biggest challenges remains innovating on fee structures to compete in the global legal market, despite domestic statutory limitations on offering clients the most flexible financial terms of service. Unlike other jurisdictions, lawyers in India are prohibited from charging contingency or success fees—this can create a situation where a client is forced to forego or easily settle a case, simply because it is unable to front the legal costs.

This situation is a perfect entry for litigation finance and Indian clients are ready—perhaps even keen—to embrace it. Legal finance can be an invaluable tool in a client’s arsenal to ensure that it is able to receive quality legal representation to pursue cost-intensive but meritorious cases, and in situations where the client may prefer to deploy its funds for other uses. For lawyers, it enables them to take on cases that may be complex and document-intensive, and utilize their best resources to service clients without having to invest in them in terms of fees—whether as a fee discount or on a contingency basis (which is restricted under Indian professional regulations).

The first set of what I would call “India-centric” cases have been funded off-shore, where there is no uncertainty on the permissibility of funding, and also some certainty on a swifter recovery of the decretal amount. I see the trend continuing in the near future. The Indian market is ready for this disruption, and changes triggered by COVID-19 may only accelerate it.

Another recent development in India which will be a hotbed for legal

innovation is the notification of class action lawsuits under the Companies Act of 2013. The class action regime in India is very nascent, and it may be that, like Australia, the Indian infrastructure around legal finance develops alongside the class action regime—an area that we are watching closely.

Pallavi Shroff:

Judicial delay is unfortunately common in India, as it takes several years for a dispute to be conclusively resolved. Clients are therefore averse to incurring legal expenses, as there is a delayed return on any investments. Additionally, actual costs are rarely awarded by Indian courts. In these circumstances, clients are concerned as to how they can reduce their risk and expenses relating to disputes.

To cut costs, clients often end up compromising on legal representation. Some clients with limited resources may even consider not pursuing a claim at all because of the expenses involved.

In such circumstances, legal finance is a helpful solution. This is particularly relevant at the moment. The downturn in the economy (owing to the effects of COVID-19) means that many parties will fail to pursue claims because of the related expenses.

Sanjeev Kapoor:

Legal advisors across jurisdictions are under pressure to provide the best legal advice at the most competitive prices. The era of globalization and the establishment of good legal institutions that produce commendable talent has resulted in the increasing popularity of law as a career in India. Legal practitioners have the benefit of access to greater knowledge and exposure across jurisdictions and are constantly

under pressure to innovate and better manage costs.

Arguably, therefore, one of the major business challenges faced by lawyers in India is pricing their services competitively. Increasingly, clients are moving away from hourly mandates to fixed fee estimates that they can provide for in their balance sheets. This is particularly tricky for dispute resolution mandates where courts or tribunals are unpredictable in terms of the time and cost involved in rendering a decision.

Vyapak Desai:

The practice of law in India faces a number of challenges where litigation finance could provide a solution.

Sophisticated clients understand the legal market and recognize

expertise, but for clients that lack this sophistication it is difficult to charge fees commensurate to case complexity. It is almost always expected that law firms give a discount on their invoices and fee rates. Litigation funders usually have a good understanding of the legal market and, given that they also have a legal background, are often better suited to recognize the value of legal work. Involving them reduces bill negotiations and eliminates the discount mindset.

Recovery of fees from clients continues to be a major challenge, and usually requires law firms to be extremely efficient in cash flow management. Legal finance helps ease this cash flow risk, as invoices are paid by the funders in a very timely and prescribed manner.

Q.

The doctrines of champerty and maintenance historically have been seen as the primary legal hurdles to financing litigation in India. Do you foresee the formalization of guidelines for the use of legal finance? If so, how would it impact the legal finance market in India?

Pallavi Shroff:

Under Indian law, there is no restriction, by way of champerty or otherwise, on third-party funding of arbitrations or litigation—no such rules apply under Indian law. This has been confirmed by various judgments of the Privy Council (which served as the highest court of appeal in India prior to India's independence in 1947) and the Supreme Court of India (the highest court of appeal in India post-independence).

In one of the earliest decisions on third-party funding in India, *Ram*

Coomar Coondoo v. Chunder Canto Mookerjee, the Privy Council noted that although the doctrines of champerty and maintenance were applicable in England, they were not applicable in India. However, it was clarified that a transaction that is inequitable, extortionate and unconscionable and not made with the bona fide objects of assisting a claim would be invalid.

This position has been upheld in subsequent decisions and further confirmed by the Code of Civil Procedure, 1908 (CPC). The Bombay

High Court in 1983 made an amendment to Order XXV, Rule 3, of the CPC which pre-supposes that third-party funding is permissible for Indian litigation and permits the courts to issue an order requiring the funder to give “security for the payment of all costs incurred and likely to be incurred by any defendant”. While this amendment only applies to proceedings before Bombay High Court, the fact that the amendment was made leaves little doubt about the validity of third-party funding in India.

Vyapak Desai:

Unlike England, the doctrines of champerty and maintenance never strictly applied in India and there are several court judgments which have permitted the financing of litigations in India—the recent Balaji case shows just what is possible in India. However, a formalization of the guidelines would go a long way in creating greater awareness amongst litigants and lawyers. It would also eliminate the legal uncertainties which would arise if the legal finance market grew without such a framework.

Cyril Shroff:

In the A K Balaji judgment, the Supreme Court observed that there was no restriction on third parties funding litigation and getting paid after the outcome. Indeed, it noted that there was no bar to a lawyer funding a litigation—as long as the lawyer was not representing a client in such litigation. This is one among many signs that litigation funding is an acceptable practice.

The Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India noted the

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Indian clients are ready—perhaps even keen—to embrace legal finance.

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legislations passed in various jurisdictions, including Singapore and Hong Kong, with regard to third-party funding, and also that this contributed significantly towards the growth of these jurisdictions as arbitration hubs. The Committee then recommended enacting legislation in this regard, as something that could give a boost to arbitration in India.

The last few years have seen a slew of amendments and new legislations by the government with a view to promote its “Make in India” campaign and its avowed intent to make India a worthwhile regional hub for arbitration. While there may be some distance to go before India enacts a comprehensive supporting framework for funding, one hopes that the Indian government is receptive to the idea. Guidelines would be required to address the kinds of cases allowed for funding (for instance, Singapore allows funding of only international arbitrations—a good place to start), ethical issues surrounding conflict of interest, disclosure of funding and regulating control of legal proceedings by a funder.

Amendments to our legal professional regulations would also be welcome, for instance permitting lawyers to work on a conditional fee arrangement, thus also being able to provide further value to their clients. This could also open the door for portfolio funding provided by funders to law firms for a basket of cases, where both the law firm and the funder are invested, along with the client, in a successful outcome.

Sanjeev Kapoor:

The Supreme Court in *Balaji* observed that Indian law does not prohibit third-party non-lawyers from funding litigation and getting repaid after the outcome of litigation. However, the same can't be construed as a conclusive ruling on the issue, as this is a passing observation made in a list before the Supreme Court that did not concern

the question of litigation financing. The absence of formal laws, rules or guidelines create uncertainty here.

With increased financial stress on companies in India, especially in the infrastructure, construction and energy sectors, there have been some recent instances where arbitration awards have been monetized. Given the increasingly risk-averse and cost-conscious approach of Indian companies, I expect this to be a more commonly used tool, especially with the threat of insolvency looming large upon companies with stressed financial assets post the commencement of the Insolvency and Bankruptcy Code 2016. In such a scenario, monetizing awards can prove to be a boon and potentially prevent a company from entering an insolvency process by increasing liquidity.

Q.

Last year saw two notable examples of legal finance being used as a corporate finance tool in India: The monetization of arbitration awards in the Hindustan Construction Company and Patel Engineering transactions. What do these arrangements suggest about the future of legal finance in the region?

Vyapak Desai:

Statistically speaking, India saw more money involved in the monetization of claims than Singapore and Hong Kong. These deals show that, in a market starved of liquidity, companies are exploring new means of raising capital—and legal finance appears to be a tool on the cusp of surging in popularity. These deals have raised awareness amongst dealmakers of alternate means of financing.

Cyril Shroff:

Judgments and claims have been traded on secondary unorganized markets in India for decades. Our firm worked on the HCC transaction, enabling it to obtain funding against arbitration awards received in its favor, as well as claims pending in various fora, aggregating to over \$200 million. This was a great example of the legal industry tailoring solutions to fit the need of a large construction industry player. These transactions are test



cases and promote experiments in the area of legal finance.

We can look forward to further innovations on the legal finance front, in terms of the number of companies which monetize their portfolio of claims or awards, the appetite of buyers and the sophistication with which valuation of such claims is approached. Both the HCC and the Patel Engineering transactions were not vanilla legal finance structures—the various custom-made structures used for such transactions in light of the present regulatory vacuum is also exciting for the legal finance space, and indicative of its gradual sophistication.

The expected return of investment of some of these transactions is more than 200 percent, way higher than the existing rate of returns from the best investment instruments in the market. Successful realization of this potential return will further entice investors

into exploring legal finance. The Indian litigation market is characterized by very high risks, where the expected outcome and rate of return from a legal dispute may be difficult to predict. While this may mean that the legal finance market tilts towards arbitrations in the near future, one cannot discount the audacious investors who may look at very high risks as a sign, and perhaps a necessary corollary to, very high returns.

Sanjeev Kapoor:

With increased financial stress especially in the infrastructure, construction and energy sectors, the Hindustan Construction Company and Patel Engineering transactions pose a very promising step towards encouraging monetization of awards in India to minimize risk and ensure greater liquidity to companies.

This becomes particularly relevant since the government and public sector companies form the bulk of

disputing parties in India and largely refuse to honor arbitral awards until appealed to the highest forum, the Supreme Court of India, which is time consuming and costly. Even a party who has successfully obtained an award against such entities may face a significant enforcement resistance. I expect award monetization to be more commonly used in the future to ensure greater liquidity, especially in view of the precedent set by the above instances.

In an encouraging development, the Indian government has proposed a policy initiative for public sector entities in the event of a challenge to the award to deposit up to 75 percent of the arbitration award against the security of a bank guarantee to be issued by the award holder. This is to ensure private parties are not driven into insolvency by being deprived the award amount during the course of the challenge.

However, even this does not mean that the award holder will receive the award amount, which is likely to remain in deposit with the court. The award holder may still be subject to liquidity constraints and award monetization may provide a critical solution.

Pallavi Shroff:

Although the growth of legal financing is still at a nascent stage in India, its advantages are likely to make its progress quick. The Indian infrastructure sector has been stressed for some time now. The HCC and Patel Engineering transactions are good examples of funding arrangements as corporate finance tools. They helped avoid potential bankruptcy for the companies. Given the involvement of large investment houses in both transactions, there is good reason to be optimistic about the future of legal finance in the region.

Q.

In 2019 Burford celebrated its 10th anniversary. Looking ahead to the next decade, what are your predictions for how legal finance will impact the business of law in India?

Pallavi Shroff:

India's legal sector has seen tremendous growth in the last two years, with revenues increasing by more than 62 percent. However, clients remain cost conscious. Legal finance will be, therefore, viewed very positively by clients and will have a bright future in India.

Vyapak Desai:

India is unlikely to tread the same path as other jurisdictions, where

growth of legal finance has also resulted in increased consideration of contingency fee arrangements. However, the practice of law will be significantly impacted as lawyers would be expected to provide legal finance as an option to their clients.

Sanjeev Kapoor:

The lack of clear law and guidelines concerning third-party funding has hampered any rapid growth of this sector.

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The involvement of legal financiers will also herald the growth of litigation due diligence and potentially result in greater involvement of legal advisors in litigation management functions to optimize time, cost and resultant outcomes.

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Optimistically, India will see adoption and formalization of a legal financing regime as a result of the success of legal financing in neighboring regimes as well as its aspiration to be an International Commercial Arbitration hub. Once adopted, legal finance will greatly benefit the business of law by ensuring greater flexibility to legal advisors to tailor optimal solutions for clients without cost being the primary concern. The involvement of legal financiers will also herald the growth of litigation due diligence as a key tool to avail third-party funding, and potentially result in greater involvement of legal advisors in litigation management functions to optimize time, cost and resultant outcomes.

Cyril Shroff:

I see India having a thriving litigation finance market supported by a robust regulatory framework reflecting global best practices. I also anticipate that the coming decade will witness the advent of class action litigations, especially in the context of environmental, climate and natural resource-related fact scenarios, which, along with international arbitration, will be fit cases for obtaining legal finance. There will also be some fundamental shifts on how dispute resolution forums function in a post-COVID-19 situation which would provide fertile ground for legal finance to take firm root in India.

More innovative legal finance opportunities will emerge—start-ups are already beginning to innovate with tools such as online crowdfunding of disputes. We also see a more front-loaded approach being adopted in dispute resolution where a full stock of the merits of a case is taken at an early pre-funding stage. We can expect a greater role for experts and professionals from across sectors to play, leading to an overall increase in the quality of dispute resolution.

Law firms and lawyers will be forced to take on board legal financiers while negotiating mandates with clients to better service their clients and compete. Specifically, in times of economic uncertainty, access to legal finance may differentiate one law firm from another.

PARTICIPANTS



Cyril Shroff

Managing Partner of Cyril Amarchand Mangaldas, with over 37 years of experience in corporate and securities law, disputes, banking, infrastructure, private client, financial regulatory and other areas. He has been recognized as a “legendary figure in the Indian legal community” and the “M&A King of India”.



Pallavi Shroff

Managing Partner of Shardul Amarchand Mangaldas, where she heads dispute resolution and mentors its competition law practice. She has extensive experience representing public and private corporations and other entities before various national courts, tribunals and legal institutions. Ms. Shroff is an Alternate Member at the ICC Court of Arbitration.



Vyapak Desai

Heads the international dispute resolution and investigation practices at Nishith Desai Associates, where he is a senior attorney. He specializes in cross-border complex disputes and formerly led the firm’s corporate and securities practice. Vyapak is also a trained mediator and an experienced arbitrator in international commercial arbitrations.



Sanjeev Kapoor

Partner in dispute resolution at Khaitan & Co. He regularly advises clients in complex cross-border litigations and multi-jurisdictional disputes, and has deep experience in constitutional law, environment, mining, energy and infrastructure, foreign exchange laws, general trade and commercial laws.

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Director with responsibility for leading Burford’s office in Singapore and for expanding Burford’s resources to support clients in Asia. Prior to joining Burford, Quentin was most recently the head of the Asia commodities business at Commonwealth Bank of Australia. Before going into banking, Quentin practiced law with Allen & Overy in London and Singapore.