

THIRD PARTY FUNDING: AN OVERVIEW AND THE WAY FORWARD IN INDIA

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General overview of third-party funding

International Arbitration has emerged as the most prominent dispute resolution mechanism across the globe. One of the major challenges associated with the practice of arbitration is the exorbitantly high costs associated with the proceedings. This might stop a party from contesting even legitimate, meritorious claims due to lack of funds for the arbitral proceedings. Third Party Funding (TPF) is an alternate means for parties to an arbitration agreement to fund their claims. The ICCA-QMUL Task Force on Third Party Funding in International Arbitration¹ provides a working definition of TPF as: "*An agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,*

a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and

b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment."

Historically, the whole idea of Third-Party Funding was deemed illegal owing to the common law doctrines of maintenance and champerty.² "Maintenance is an overarching doctrine that encompasses providing financial assistance to a third party while bearing no interest in the outcome of the case".³ "Champerty refers to providing similar assistance with the expectancy of receiving a share from the award and thus bearing an interest in the outcome of the case".⁴ These doctrines have been diluted to a large extent in the common law countries but are still enforced in jurisdictions including Ireland and Malaysia, and was an enforceable common law tort in Singapore

¹ The ICCA Reports No.4, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018.

² Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third Party Funding in International Arbitration* (2017) 2 Wolters Kluwer 1.

³ Douglas Richmond, *Other People's Money: The Ethics of Litigation Funding* (2005) 56 MERCER L. REV 651.

⁴ *Ari Dobner*, 'Litigation for Sale', (1996) Vol.144, U. PA. L. REV. 1543.

till 2017.⁵ Singapore then became the first Asian country to impose and legalize Third Party Funding in Arbitration via the Civil Law (Amendment Act) of 2017. The aforementioned act repealed maintenance and champerty and acknowledged TPF as a valid instrument for dispute resolution, with the only exception of contravention to public policy of respective jurisdiction.⁶ Singapore and Hong Kong are the foremost arbitration hubs in Asia and both these jurisdictions have permitted TPF only in case of arbitration and continues to restrict it in the arena of litigation (which is permissible only in exceptional circumstances). The Legislative Council of Hong Kong passed the Arbitration and Mediation Legislation (Amendment) Ordinance Order in 2017, legalising TPF in arbitration and mediation.⁷ The England and Wales Court of Appeal in 2005, in the case of *Arkin v. Broochard Lines Ltd.*,⁸ confirmed the validity of TPF and described commercial funders as people who “provide help to those seeking access to justice which they would not otherwise afford.” The Australian High Court, the very next year, legitimized Third Party Funding Agreements in the case of *Campbell’s Cash and Carry Pvt. Ltd. v. Fostif Pvt. Ltd.*⁹ Various countries have differing stances on the extent of Third Party Funding which should be allowed in their respective domains. For example, Ireland, which had been restricting TPF till recently is now proposing to amend its Arbitration Act to allow the Minister of Justice to make regulations to prescribe TPF, while some countries like Singapore restricts the ambit of TPF only to arbitration proceedings. There is thus no consensus on the position to be adopted regarding Third-Party Funding due to the widely varying approaches practiced by different jurisdictions and legal systems around the world. However, the doctrines of maintenance and champerty have been clearly and expressly held to be not valid in India in the case of *Ram Coomar Coondoo v Chunder Canto Mookerjee*,¹⁰ decided by the Privy Council. TPF was allowed on the grounds of promoting access to justice.¹¹ The Supreme Court of India continued to hold this position good in the case of ‘*In Re: Mr. ‘G’*, A Senior Advocate of the *Supreme Court v. Unknown*’.¹²

The legal position in India regarding the legality of Third-Party Funding was clarified in the case of *A.K Balaji v. Bar Council of India*.¹³ The Supreme Court observed that there appears to be no restriction on third parties, who are non-lawyers, from financing the litigation and getting repaid once the outcome of the litigation is settled. Thus, it was expressly observed that TPF is not illegal in India but there is a vacuum in Indian law regarding TPF as there are no regulating statutory

⁵ Nadia Darwazeh and Adrien Leleu, ‘Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding’, (2016) 33 J. INT’L ARB 235.

⁶ Prithiv Raj Sahu, ‘Third Party Funding in India’s Arbitral Proceedings’ (2021) 4 Int’l J.L Mgmt & Human 1330.

⁷ Melody Chan, ‘Third Party Litigation Funding’ 3 HKLJ 1132 .

⁸ *Arkin v Broochard Lines Ltd* [2005] EWCA Civ 655.

⁹ *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited* [2006] 229 CLR 386.

¹⁰ *Ram Coomar Coondoo v Chunder Canto Mookerjee* [1876] 2 AC 186, 208 (PC).

¹¹ *Ram Coomar Coondoo v Chunder Canto Mookerjee* [1876] 2 AC 186, 208 (PC).

¹² *In Re: Mr. ‘G’, A Senior Advocate of the Supreme Court v Unknown* 1954 (2) BLJR 477.

¹³ *A.K Balaji v Bar Council of India* AIR 2018 SC 1382.

provisions. The Arbitration and Conciliation Act of 1996 [**“The 1996 Act”**] is silent on the role of TPF in Arbitration.¹⁴ Neither did the Amendment Act of 2015 nor the Amendment Act of 2019 insert provisions regarding TPF in Indian context. Nevertheless, these amendments evidenced the objective of Parliament to make India a hub for International Arbitration and adopt pro-arbitration measures to further this objective in the long run. Nevertheless, TPF finds some statutory recognition¹⁵ under Order XXV, Rule 1 of the Code of Civil Procedure, 1908, facilitated by amendments by states including Maharashtra, Uttar Pradesh, Gujarat, and Madhya Pradesh.

Third Party Funding was initially relied upon by impecunious claimants to finance their dispute resolution. It holds more relevance in arbitration than litigation because of the extortionate costs involved in the process which may act as a hurdle to seek legal remedy for financially unstable parties or companies. But recent years have witnessed an unbelievably high surge in the demand for Arbitration as the dispute resolution mechanism. With the surge came an increasing reliance upon TPF to finance the arbitral proceedings. It is no longer limited to being a method adopted by penurious parties, instead companies and institutions are now ready to invest as Third party funders. External financing is relied upon by claimants to let go of the risk of losing the amount incurred in dispute resolution as well as to prevent their capital from being tied up during the course of arbitral proceedings.

While TPF has the downside of party autonomy being adversely affected, consequently resulting in its erosion, it ensures unfettered access to justice for claimants with financial barriers. India is deemed as a lucrative jurisdiction for Third Party Funders since it is not illegitimate but at the same time remains unregulated. Lack of regulatory provisions pave way for abuse of the process and illegal means of proceeding with Third Party Funding. Third Party Funders tend to act according to their whims and fancies and take undue advantage of the funded party due to the unregulated domain of Third Party Funding in India. A legal framework should be devised to regulate TPF in Indian context. Legitimising and regulating TPF in India would boost India’s competitive edge while competing with other much developing contemporary arbitration hubs like Singapore and Hong Kong.

Proposed legal framework for India

There are voids in the field of Third Party Funding which needs to be addressed carefully and filled by a regulated and structured legal framework. These issues are relevant in the contemporary scenario and important for India’s development as an arbitration hub. The main issues that will be

¹⁴ The Arbitration and Conciliation Act, 1996.

¹⁵ The Code of Civil Procedure (Amendment [State]) Act, 1908, Order XXV, Rule 1.

highlighted include absence of a standard definition, need for a code of conduct for the Third Party Funders, making a disclosure agreement mandatory, provisions regarding security for costs, clarity regarding enforceability of arbitral award against Third Party Funders and safeguards against abuse of the scheme of Third-Party Funding.

First of all, a lucid definition of Third Party Funding should be standardized in India apart from the contemporary definitions given by other arbitral institutions and other jurisdictions. A clear definition rules out any possible ambiguity which may arise regarding what comes under the ambit of Third Party Funding. Then, it should be given statutory recognition under a Central legislation and provisions regarding the same should be encompassed in the 1996 Act.

A Code of Conduct should be devised for the Third Party Funders. Third Party Funding can no longer be seen as a mechanism restricted to assist claimants in precarious financial conditions. For these Third Party Financiers, International Arbitration is a lucrative domain for investing because of its upscale worth of claims, expeditious conduct of proceedings as well as high returns. This conduct code shall ensure party autonomy and that bargaining power of the parties are not completely undermined by virtue of Third Party Funders. The Funder shall be restricted from disclosing details regarding the parties to the dispute, their claims, costs involved or any such information during the arbitration proceedings as confidentiality is to be strictly maintained.¹⁶ Section 42 of the 1996 Act may be amended to bring these financiers within the umbrella of persons who may have access to information. The Code of Conduct shall prescribe the roles and responsibilities of the Third Party Funder for smooth conduct of the proceedings.

A disclosure agreement should be made mandatory for the arbitral proceedings. A mandatory disclosure shall ensure impartiality and independence of the arbitral tribunal. The existence of a TPF Agreement and the identity of the Third Party Funder shall be disclosed by the Funded Party to the other party as well as to the Arbitral Tribunal. This shall enable the other party to conduct due diligence and ensure that the Third Party Funder has no prior biased relationship with the Arbitrators. The probability of any 'potential conflict of interest' shall be checked and reported before commencement of proceedings. The absence of the mandate for a likewise disclosure agreement shall undermine one of the most sought-after elements of arbitration, the neutrality of the arbitrator and fairness of proceedings. The appointment of arbitrator itself can be challenged on the ground of justifiable doubts as to the arbitrator's impartiality and independence. If the identity of the funder is revealed only at a later stage, during the arbitral proceedings and the appointment is challenged, it leads to delayed proceedings and incurring of extra costs. This defeats the whole purpose of arbitration over litigation, that is, prompt and expeditious disposal of

¹⁶ Arbitration and Conciliation Act, 1996, s 42A.

disputes. A clause, which mandates disclosure of third party funding, may be incorporated in the arbitration agreement. This measure bolsters party autonomy by leaving it to the parties to decide upon the extent of disclosure and saves the arbitral tribunal's time but at the same time ensures impartiality of the arbitrators.¹⁷

Apart from disclosure regarding the identity of the Third Party Funder, it should also be clarified as to whether the Third Party Funding Agreement ("TPFA") contains any agreement for the payment of adverse costs.¹⁸

An express regulatory provision should be encompassed to ensure that the funder does not arbitrarily terminate the financing of arbitral proceedings.¹⁹ The absence of such a provision places the funder at a higher pedestal over the funded party, giving the funder an unfair advantage. An express regulatory provision would thus bolster the position of the funded party.

Clear-cut provisions regarding security for costs should be sewn into the legal system. Institutions across the world, including the Singapore International Arbitration Centre²⁰ and the London Court of International Arbitration,²¹ empowers the tribunal to award security for costs. India also acknowledges the significance of a provision to authorize arbitral tribunals to order security for costs.²² Security for costs is an interlocutory measure that a party may seek to safeguard themselves in a situation where the arbitration ruling is in their favour and they have been awarded costs, but the unsuccessful party does not have funds to pay for the same. Thus, security for costs becomes relevant in TPF, since the existence of a Third Party Funding Agreement ["TPFA"] may give rise to reasonable doubts that the funded party lacks sufficient funds. At the same time, the mere presence of a TPFA is not an indication that the funded party is penurious. To avoid unnecessary ordering of security for costs, an appropriate test should be devised and standardised in Indian landscape. The 2015 Guidelines by the Chartered Institute of Arbitrators ["CI Arb"] prescribes a standard test²³ to govern if security for costs should be ordered and this test is successfully practiced in common law jurisdictions. Indian courts have also adopted a similar approach of the Chartered Institute of Arbitrators. In the case of *Revlon Inc. v Kemco Chemicals*,²⁴ it was observed that whether the funded party owns any assets or immovable property within the Indian jurisdiction is

¹⁷ Meenal Garg, 'Introducing third-party funding in Indian Arbitration: A tussle between conflicting policies' (2020) 6 NLUJ Law Review 71.

¹⁸ Kaira Pinheiro & Dishay Chitalia, 'Third-Party Funding in International Arbitration: Devising a Legal Framework for India' (2021) 14 NUJS L Rev 1.

¹⁹ Pranav V. Kamnani & Aastha Kaushal, 'Regulation of Third Party Funding of Arbitration in India: The Road Not Taken' (2020) 8 Indian J Arb L 151.

²⁰ Arbitration Rules of the Singapore International Arbitrations Centre (SIAC), 2016, Art. 27(j).

²¹ London Court of International Arbitration (LCIA) Rules 2020, Art. 25.1(i).

²² The Arbitration and Conciliation Act, 1996, s 17(ii)(b).

²³ Chartered Institute of Arbitrators, Applications for Security for Costs, International Arbitration Practice Guideline (2015).

²⁴ *Revlon Inc. v Kemco Chemicals* 1987 SCC OnLine Cal 39.

a prime consideration. The Bombay High Court ruled in the case of *Alpha Oil International v. m. t. Chem Lily*, that if the plaintiff is within India, it is under the discretion of the court to pass an interim order for security while on the other hand, security for costs must be ordered for in all cases, where the plaintiff is not a resident of India.

Another unsettled legal issue is the enforceability of arbitral award against the Third Party Funder. The ruling of the arbitral tribunal does not bind the funder as there is no privity to the agreement. Making the funders a party to the agreement would undermine the privacy of the arbitral proceedings and pose a threat to the much sought after confidentiality element of arbitration. However, even if the order of arbitral award cannot directly bind the funder, it becomes eventually binding upon the Third Party Funder owing to the duty arising out of the Third Party Funding Agreement.

Conclusion

TPF attains even more significance in the light of the post pandemic world, with special emphasis in the Indian context.²⁵ It gives parties and companies with meritorious claims who have dire financial constrictions, an opportunity to pursue their claims through arbitration. TPF can benefit both the parties at an individual level by creating a level playing field,²⁶ and the society as a whole by promoting unfettered access to justice for all.

Third Party Funding is still in its nascent stage and a rigorous watertight regulation might impede its growth and adversely impact India's growth as a prospective arbitration hub. Hence, a 'light-touch' approach is the ideal solution, incorporating voluntary code of conduct, limited disclosure obligations to ensure the regulated and sustainable growth of Third Party Funding in India.²⁷

²⁵ Kandavel K. & Nithin Srinivas J., 'Third Party Funding in Arbitration: An Overview' (2020) 3 Int'l J.L Mgmt & Human 1138.

²⁶ Meenal Garg, 'Introducing third-party funding in Indian Arbitration: A tussle between conflicting policies' (2020) 6 NLUJ Law Review 71.

²⁷ Kaira Pinheiro & Dishay Chitalia, 'Third-Party Funding in International Arbitration: Devising a Legal Framework for India' (2021) 14 NUJS L Rev 1.