THIRD-PARTY FUNDING IN ARBITRATION: IS INDIA LAGGING BEHIND THE WORLD?

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Introduction

The increasing significance of international commercial transactions has brought arbitration to the forefront of alternate dispute resolution methods. With the emergence of this means of dispute settlement, the concept of "third-party funding in arbitration" has also generated interest among several countries. In the past few years, there has been an upsurge of cases with third-party funders around the globe. This begs an important question – why is India silent on this issue?

Before delving deeper into the issue, it would be apposite to put forth a basic outline of what constitutes third-party funding. While there has been no formal consensus on a composite definition, it can be largely defined as "*an agreement whereby a natural or legal entity provides financing resources to a party, in such terms that will allow or entail the extension to the funder of the arbitration clause, and having a retribution such as the repayment or a benefit (financial or otherwise) from or linked to an award rendered in the arbitration.*"[1] In essence, third-party funders are "*entities that invest in litigation and arbitration for profit*".[2] While technically being regular investors, they assume a position of far greater significance. In fact, even when compared to a bank, a third-party funder has a scope and approach that exceeds a banker.[3] In light of this, it is the author's opinion that the need of the hour is to effectively regulate third-party funding in Indian arbitration as well in order to prevent other countries from overtaking it.

Third-party funding across the world

i. United Kingdom

Nearly one and a half decades ago, the United Kingdom's ["**UK**"] Court of Appeal examined the bare concept of third-party funding concerning the litigation. The Court opined that third-party funding is a means for people who cannot afford the costs of contending issues to receive

[1] Duarte G Henriques, 'Third-party funding – In search of a definition' (2018) 28 ARIA 405.
[2] Victoria Shannon Sahani, 'Reshaping Third-Party Funding' (2017) 91 TUL L REV 405.
[3] Radek Goral, 'The Law of Interest Versus the Interest of Law, or on Lending to Law Firms' (2016) 29 Georgetown Journal of Legal Ethics 253.

justice.[4] This was a clear departure from the archaic 'Doctrine of Maintenance and Champerty', which was previously a criminal and tortious offence in the UK and other countries as well. Maintenance is defined as the "*intermeddling with a suit that does not belong to one, by assisting either party with money or otherwise to prosecute or defend*". Further, Champerty is "*a bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds.*"[5] Section 13 of The Criminal Law Act, 1967 officially abolished the criminalisation of Maintenance and Champerty in the United Kingdom. The doctrines, however, continued to apply to both litigation and arbitration[6] to reject third-party funding in cases which went against public policy. In *Essar v Norscot,*[7] the seat of arbitration was England. The Court enabled Norscot to avail of third-party funding on a non-recourse basis, granting the party recovery of both the costs of the arbitration as well as the third-party funding.

ii. Singapore

Singapore is a country that has recently attempted to regulate the implementation of third-party funding in arbitration. It was held in the case of *Lim Lie Hoa v Ong Jane Rebecca & Ors* that third-party funding would be permitted if the third-party had a genuine commercial interest in the dispute.[8] The Civil Law (Amendment) Act (Bill No. 38/2016), enacted in January 2017, brought about the radical change of abolishing Maintenance and Champerty in Singapore as well – paving the way for third-party funding in Arbitration. The act was enacted after the Ministry of Law, in its Public Consultation in 2016, took the view that allowing third-party rights would significantly boost international arbitration and business in Singapore. Further, in *Re Vanguard Energy Pvt. Ltd.*,[9] the Court recognised the validity of third-party funding in insolvency proceedings. These legislations and judicial pronouncements have paved the way for third-party funding to be introduced vigorously in the future. The key component is the "commercial interest" that permits third-party funding in an arbitration which has assumed vital importance.

iii. Hong Kong

Third-party funding is not completely barred under Hong Kong law. In *Unruh v. Seeberger,*[10] the Court laid down specific conditions in which such funding is permitted. Firstly, the funding is permitted when the third-party has a legitimate interest in the proceedings. Secondly, the

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[4] *Arkin v Bochard Lines & Ors* [2005] 3 All ER 613 (CA).
[5] Henry Campbell Black, *Black's Law Dictionary* (2nd edn, West Publishing Co. 1968).
[6] *Bevan Ashford v Geoff Yeandle Ltd* [1998] 3 WLR 172 (Ch).
[7] *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] WLR(D) 576 (HC).
[8] *Lim Lie Hoa v Ong Jane Rebecca & Ors* [2005] 3 SLR 116 (SC).
[9] *Re Vanguard Energy Pvt Ltd* [2015] 4 SLR 597 (SC).
[10] *Unruh v Seeberger* [2007] 2 HKLRD 414 (CFA).

funding is permitted in the interest of justice, where the third-party can persuade the Court that he is enabling access to justice for someone who may not be able to receive so. Finally, a miscellaneous category, which includes the scope of insolvency proceedings, permits the funding. In *Cannonway Consultants Ltd v Kenworth Engineering Ltd,*[11] the Court opined that access to justice and Maintenance and Champerty are two doctrines that must be considered conjointly while determining the benefit of third-party funding. Further, it was held that the prohibition of Maintenance and Champerty must not extend to private arbitration proceedings as they differ considerably from litigation proceedings in judicial forums. Importantly, the Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Bill 2016 was important legislation enacted in this regard. The very purpose of the Bill, as stated in Part 10A, is "…..*to— (a) ensure that third-party funding of arbitration is not prohibited by particular common law doctrines; and (b) provide for measures and safeguards in relation to third-party funding of arbitration."*

iv. Australia

In *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd,*[12] the Highest Court of Australia demystified the confusion regarding third-party funding. It stated that in those states of Australia where Maintenance and Champerty were abolished, third-party funding could be freely considered legitimate. There would be no grounds to challenge the funding by the other party. It also held that it would not be an abuse of process if the third-party exercises a certain amount of influence or control over the interest of the funded party. While this judgment focused on litigation funding, in the author's opinion, there is no reason the same cannot be extended to arbitration proceedings. As held in *Bevan,*[13] what applies to litigation in this regard should apply to arbitration as well.

The above description of the various laws of countries clearly emphasises the pro third-party funding approach that most courts are beginning to take. Countries like Switzerland have also openly promoted third-party funding – the Swiss Apex Court directly struck down an effort to prevent it by the Cantonal Law of Zurich, terming it a violation of the 'freedom of commerce'. The importance of such third-party agreements has been recognised by most jurisdictions, with the courts attempting to pave the way to patronise it. There seems to be no further basis for using the archaic Doctrine of Maintenance and Champerty to strike down the concept of third-

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[11] *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 1 HKC 179 (HC).
[12] *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] 229 ALR 58 (HC).
[13] Bevan (n 6).

party funding, especially in arbitration.[14] In light of the entire world moving towards this relatively unexplored field, it is interesting to examine its application to India's arbitral and judicial landscape.

A brief history of third-party funding in India

In India presently, there is absolutely no statutory mechanism for regulation of third-party funding in arbitration or third-party funding itself. An oft-overlooked issue in this country, third-party funding has only recently been receiving some spotlight. The High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India analysed the numerous policies on third-party funding adopted by various jurisdictions. They observed – "*Similar measures, if adopted with suitable modifications for the Indian context, could give a boost to arbitration in India."*[15] They further mentioned that regulation of such funding would contribute significantly towards establishing the country enacting them as a vibrant hub of arbitration. This can be strongly connected to the goal of the Indian government to establish India as an important centre for arbitration, akin to the status that Singapore holds today.

The Code of Civil Procedure ["**CPC**"] through Order XXV statutorily recognises third-party litigation funding and financing in civil suits in India.[16] The judgment of the Supreme Court in *Re: Mr.' G', A Senior Advocate Of ... v Unknown,*[17] directly clarified the air of mystery around this issue. The Court held that there is *"there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals"* when it comes to third-party funding. The only caveat imposed by the Supreme Court was that the third-party funders must necessarily not be lawyers and that it mustn't be opposed to public policy. If such funding is permitted in litigation, there is no reason it should not be regulated in arbitration as well. Further, it has been established that this violation of public policy must be a clear violation, only then can it be used to prevent such transactions.[18] In two judgments of the Supreme Court, the Court struck down third-party financing transactions when they were conditioned on the receipt of a substantial portion of the final stake, declaring this as a violation of public policy.[19] These judgments can be considered as definitive examples of the type of consideration that is regarded as a contravention to public

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[14] Sai Ramani Garimella, 'Third-party Funding in International Arbitration: Issues and Challenges in Asian Jurisdictions' (2014) 3 AALCO Journal of International Law 45.
[15] Dept. Of Legal Affairs, *Report Of The High-Level Committee To Review The Institutionalisation Of Arbitration Mechanism In India*, < http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf > accessed 9 November 2020.
[16] The Code of Civil Procedure 1908.
[17] *Re: Mr. 'G' A Senior Advocate Of ... v Unknown* [1955] 1 SCR 490 (SC)
[18] *Rattan Chand Hira Chand v Askar Nawab Jang* [1991] 1 SCR 327 (SC)
[19] *Raja VV Subhadrayamma v Poosapati Venkatapati* [1924] SCC OnLine PC 22 (PC); *Khaja Moinuddin v SP Ranga Rao* [1999] SCC OnLine AP 583 (SC).

policy. It is impossible to lay down an exhaustive list of such possible violations, which must be examined on a case-to-case basis.

The way forward for India – An analysis

It is the author's opinion that third-party funding must be applied to Indian arbitration, albeit with some restrictions to prevent a violation of public policy. India has always maintained a rigorous pro-arbitration stance.[20] Regulating third-party funding in arbitration may provide an avenue for the common man to take recourse to arbitration, thus increasing its popularity and reliance. The immense backlog that the Indian judiciary faces has brought arbitration rapidly to the forefront. Third-party funding will capitalise on this momentum. Funding of dispute resolution serves as an effective redistributive tool between the haves and the have-nots, rather than being a guardian of the status quo in favour of the elite and wealthy.[21] This assumes vital significance in a country where the disparity is a pressing issue, and arbitration proceedings are known to have enormous costs. The Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] has completely ignored the point of third-party funding – neither accepting nor barring it. It is the author's opinion that as arbitration is, in essence, a form of litigation[22], hence what is permitted for litigation under the CPC should apply to arbitration as well.

Firstly, it must be noted that the definition of a 'party', as per Section 2 (h) of the Arbitration Act, is a "*party to an arbitration agreement*". This may pose a hurdle. Thus, the application of third-party funding cannot simply be permitted by a judicial decision. It will need the legislature, executive and judiciary to work in tandem to achieve a common goal.

Secondly, India may take inspiration from the Law Commission Report of Hong Kong.[23] The Report suggests a phased approach to third-party funding – it proposes an initial stage of approximately five years to test and implement preliminary regulations that are non-binding in nature. Once these regulations are implemented, a complete review can be done in the next phase. Further, there needs to be a clear ethical standard established for such arbitration proceedings. This could occur by drafting a separate Code of Conduct for Arbitration proceedings that are third-party funded, as was done by the United Kingdom with respect to

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[20] Prakash Pillai and Umer Chaudhary, 'Law Commissions Report Reinforces the Pro-Arbitration Trends in India' (Kluwer Arbitration, 9 October 2014) <http://arbitrationblog.kluwerarbitration.com/2014/10/09/law-commissions-report-reinforces-the-pro-arbitration-trends-in-india/> accessed 9 November, 2020.
[21] M Steinitz, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95 Minnesota Law Review 1268.
[22] Bevan (n 7).
[23] The Law Reform Commission of Hong Kong, *Third-party Funding for Arbitration – Report*, (Law Reform Com 2016), <http://www.hkreform.gov.hk/en/docs/rthird-party funding_e.pdf > accessed 9 November 2020.

litigation.[24] It could also be effectively achieved by an amendment to the Arbitration Act, inserting a section that governs such disputes.

Thirdly, India needs to establish a definitive balance between the regulations to be imposed on third-party funding and the benefits that are expected to be extracted from it. The first step that India needs to take is to make a decision on the extent of the funding permitted in arbitration, primarily whether such funding would be allowed *stricto sensu* (restricted scope) or *lato sensu* (broad scope)[25]. The former relates to funding by completely unrelated parties in exchange for monetary return, while the latter is much more far-reaching and includes donations, loans, financing etc. It is suggested that India implements a *stricto sensu* approach due to it being the prevalent method in international commercial arbitration. Slowly, as time passes, an active effort can be made towards expanding the scope of funding in a *lato sensu* approach as well.[26] The *stricto sensu* approach can be seen in Singapore, while Hong Kong has applied the *lacto sensu* approach.

Fourthly, a way must be found to regulate third-party funding in and out of the country, i.e. cross-border transactions. This holds significance in those arbitrations which involve either foreign parties or when the funding is out-sourced from an international funder. Such transfers would come within the jurisdiction of the Foreign Exchange Management Act, 1999 ["**FEMA**"]. FEMA does not categorise third-party funding as either capital or current account, rendering it difficult to fit such transactions within the regulatory framework.[27] This causes a direct clash between the FEMA and the Arbitration Act regarding the admissibility of arbitration proceedings.

Fifthly, it must also be recognised that should India not permit third-party funding in arbitrations, it would be severely lagging behind international arbitral forums. This could cause grave complications for the enforcement of foreign awards. The ICSID Tribunal in *Giovanni Alemanni v. The Argentine Republic*[28] took the view regarding third-party funding that – "*the practice is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds in itself for objection.*" This shows that in international forums, the

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[24] Association of Litigation Funders, 'Code of Conduct for Litigation Funders' (2018) <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf> accessed 9 November 2020.

[25] Thibault De Boulle, 'Third-party Funding in International Commercial Arbitration' (LLM, Faculty of Law Ghent University 2014).

[26] Anish Wadia and Shivani Rawat, 'Third-party Funding In Arbitration – India's Readiness in a Global Context' (2018) 15(2) Transnational Dispute Management Journal 1.

[27] ibid.

[28] *Giovanni Alemanni v The Argentine Republic* [2014] ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility.

objections against third-party funding are barely maintainable. When such foreign awards need recognition and enforcement in India under Sections 47 to 49 of the Arbitration Act, it will cause an inherent conundrum. The Supreme Court, in *Government of India v Vedanta Ltd. & Ors*[29], has reinforced the pro-enforcement bias of Indian Courts, relying on India's obligations under the New York Convention. It limited the scope to deny enforcement of the foreign award, establishing that courts should not review the merits of the case while doing so. Therefore, these contrasting stands may cause a quandary for the courts, ultimately jeopardising Indian interests in international commercial arbitration.

Lastly, the Courts in India clearly have a 'minimum intervention' policy in arbitration.[30] Therefore, in the author's opinion, third-party funding in arbitration should be left freely to the parties involved. The consensual private nature of arbitration implies that the funding method of these proceedings should also be private. The private right to out-source funding must not be taken away but should be regulated. If a citizen were able to access justice by third-party funding, a bar on the same would be a denial of justice, constituting a violation of their fundamental rights.

Conclusion

The International trend shows that third-party funding will become a norm soon. A regulatory framework is essential for India. Guidelines need to be imposed to deal with problems of confidentiality that arise with third-party and unnecessary claims being filed. The culmination of such regulation could greatly benefit the arbitral landscape in India, bringing it at par with the rest of the world.

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[29] *Government of India v Vedanta Ltd. And Ors* [2020] SCC Online SC 749 (SC).
[30] *Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs. Northern Coal Field Ltd* [2020] 2 SCC 455 (SC).