AN ANALYSIS OF THIRD PARTY FUNDING IN INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

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Abstract

In a number of different jurisdictions, the landscape of arbitration includes the participation of third-party funding. In India, there has been a discernible rise in the amount of funding activity over the past several years; while this trend first concentrated on investor–state arbitration, it now appears to be expanding to commercial international arbitration. The concept of third-party funding is currently the most contentious subject in international commercial arbitration, and it is expanding at the fastest rate. In the context of an arbitration, the term "third party funding" refers to the practice of a non-party to the dispute, known as a "third-party funder," providing funding for all or a portion of the arbitration costs to one of the parties in exchange for a percentage of the amount recovered as previously agreed upon. In this article, the researcher explores how the third party funding in arbitration achieves SDG-16 as it helps the parties,who cannot afford arbitration cost,by financing them to access justice and ensure equitable dispute resolution process and promote Rule of Law. The researcher explores the status of Third Party Funding in different countries like USA, UK, Singapore etc. and also analyse it's applicability in India.

Key Words – *Arbitration, Third Party, Funding, Commercial, International, Policy*

Introduction

Despite the fact that one of the advantages of arbitration is that it is more cost effective than litigation, there is mounting evidence that both domestic and international arbitration are becoming increasingly expensive. Arbitration and litigation are both problematic options for many parties as a means of resolving their issue because of the various expenses associated with them.

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These charges include lawyer fees, arbitrators' fees, attendant costs, venue costs, and other regular and occasional expenses.

The fundamental idea behind third-party funding, also known as litigation financing, is that third-party funders will provide financial support for a legal proceeding or arbitration in exchange for a portion of the monetary award that will be granted to the claimant or counter-claimant, if the proceeding or arbitration is successful. The improvement of access to justice for parties who otherwise would not approach a judicial forum for their disputes is a benefit of third-party funding that is frequently stated as a benefit of this type of funding.[1]

A working definition of third-party funding in international arbitration is provided by the ICCA-QMUL Task Force on Third-Party Funding in International Arbitration, and it is as follows:

> "*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"*[2]

In both litigation and arbitration, third-party funding is a fast-expanding concept. When used appropriately, third-party funding can benefit both parties and society as a whole since it helps to level the playing field and promotes access to justice.

Global Status of Third Party Funding In International Arbitration:-

In recent years third party funding in international arbitration has been on the rise because of the increasing complexity and cost of international arbitration. In the present scenario a positive development for the parties seeking to peruse complex and expensive claim is the reason for the development of

[1]Alternative dispute resolution: Why it doesn't work and why it does. (1994, May 1). Harvard Business Review. https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does

[2]Xin Sherry Chen & Kirrin Hough, NYU LAW, May 2019

third party funding. There are so many issues and challenges like enforcement issues, lack of uniformity in arbitration law, transparency, conflict of interests etc. also effects with concept globally.[3]

The English legal theories of maintenance and champerty forbid third parties from providing financial support for a non-related party's litigation. The principles of maintenance and champerty have historically precluded third parties from supporting an unrelated party's litigation in a number of jurisdictions. In 2006 the judiciary relaxed the rules in Australia and after that it spread rapidly in the UK, USA, Singapore, Europe, Africa, Latin America and China.[4]

Prohibitions against champerty and maintenance were strictly enforced in modern times since they were deemed to be matters of public policy. It would appear that the disadvantages of third-party funding, such as the funders' control in proceedings, the compromise of anonymity, and the restricted probability of settlements, continue to lend support to the English champerty and maintenance provisions.

The archaic common law ideas of maintenance and champerty rendered it illegal for any person or organization to provide financial support for a legal procedure in which they had no personal stake. This prohibition applied to both individuals and organizations. The archaic bars of maintenance and champerty have been done away with. The Criminal Law Act of 1967, which was passed in England and Wales, marked the beginning of the process that would lead to the modification of these antiquated principles. Gradually The archaic prohibitions against maintenance and champerty were removed from the Criminal Law Act of 1967, which was enacted in England and Wales. This act also made it possible for other parties to provide financial support. Both the Association of Litigation Funders and the voluntary Code of Conduct for Litigation Funders were finalized in the year 2011, making it the first year for both organizations. This piece of regulation has been recognized as a guiding tool, despite the fact that it is an informal one (owing to the fact that its adoption is voluntary). The goal of this acceptance is to more effectively facilitate funding from third parties.[5]

In the USA, TPF is a well-established industry because the legal system in USA has contingency fee arrangement , the lawyers take a percentage

[3]Xiyue Li Beejing Law Review, Volume 15, No. 1 March 2024

[4]Researching Third-Party Funding in Investor-State Dispute Settlement,

Xin (Sherry) Chen, March /April 2024

[5]Funding litigation – the good, the bad and the ugly. (0001, January 1). Fieldfisher. https://www.fieldfisher.com/en/insights/funding-litigation-the-good-the-bad-and-the-ugly

of the settlement or judgemen. This is the reason for the acceptance of TPF. The courts validate the TPF agreements if they are not contradictory to public policies or ethical standards. One of the key factor of its success in USA is the presence of legal infrastructure as well as specialized litigation financial companies.[6]

However, Australia's legal system did not get its big break in the recognition of third-party funding until its relatively recent judgement in ***Campbells Cash & Carry case***[7], wherein the High Court of Australia had established the notion that lawsuit funding in and of itself does not constitute an abuse of process or a violation of public policy, and wherein the doctrines of maintenance and champerty were held to be without relevance to the case. In Australia, the obligation in maintenance or champerty was eliminated by the Wrongs Act, which was passed in 1958.

Singapore has emerged as a key jurisdiction for TPF in international arbitration as the legal framework has been drafted carefully to balance the interest of finders, litigants and at the same time integrity of the judicial process.

However, the constraints of maintenance and champerty are still relevant for state litigation and arbitrations that take place within the territory of Singapore. [Champerty and maintenance restrictions] In 2017, Singapore approved the Civil Law Amendment Act, which eliminated the limitation of third-party funding for International Arbitrations and its connected court processes. This was accomplished by changing the name of the Act to the Civil Law Amendment Act.

The rules of Singapore International Arbitration Centre investment arbitration rules 2023 allow the tribunal to consider third party funding arrangement while awarding costs, and also emphasized the disclosure of information related to the third party funding to ensure transparency and fairness in the proceedings.[8] The Singapore Courts have taken a proactive stance in addressing potential ethical concerns associated with TPF.

Applicability of Third-Party Funding in India

In India, there has never been a statute or an express bar that expressly prohibits third-party funding arrangements. This is despite the fact that other

[6]Sushant Mahajan , Indian Business Law Journal ,2024

[7]Campbells Cash & Carry Pty Ltd vs. Fostif Pty Ltd (2006) 229 CLR 386

[8]Xiyue Li Beijing Law Review Vol 15 No1 2024

countries have laws against champerty and maintenance. In point of fact, the statutory recognition of third-party funding agreements for civil cases may be found in certain state revisions (namely Maharashtra, Gujarat, Madhya Pradesh, and Uttar Pradesh) to Order XXV Rules 1 and 3 of the Code of Civil Procedure, which was enacted in 1908.

It has been demonstrated that the presence of these agreements invites judicial scrutiny in accordance with the principles outlined in the Indian Contract Act of 1872. This is the case despite the fact that the nature of these agreements does not automatically render them null and void from the start (unless they were paid by a lawyer). As a direct result of this, such agreements have frequently been restricted on the grounds that they are "unconscionable," "unfair," or for other reasons that are analogous to these concerns on public policy. This occurs when it seems as though the agreements were not made for a valid purpose but rather for the purpose of gambling in the litigation, or of injuring or oppressing others by abetting and encouraging unrighteous claims. In other words, it appears as though the agreements were made for the wrong reasons.

In spite of what was stated above, the Honourable Supreme Court of India has also made it abundantly clear on several occasions that the stringent English notions of champerty and maintenance do not apply in India. This is something that has been done multiple times. This is communicated in a manner that is crystal clear and without equivocation. It has also been made abundantly plain that there is nothing inherently immoral about such a transaction; there is nothing that should shock the conscience, and there is nothing that goes against public policy or public morals; the only exception to this is when a legal practitioner is involved. On the other hand, each agreement needs to be analysed on its own to make certain that it does not in fact contain the goal of going against public policy or public morals.[9]

In one case, the Rajasthan High Court looked at the fairness of such agreements and decided that they cannot be upheld if they were made with the goal of gambling in court and making big money. One case they looked at was this one. In this case, the High Court did not agree with the transfer of half of the property to the funder in exchange for the funder paying some of the legal fees. It was decided that giving the donor such a hugely disproportionate return was against the law, so the agreement was thrown out.

[9]Judicial decisions. (2010, August 12). Taylor & Francis. https://www.tandfonline.com/doi/abs/10.1080/03050718.1996.9986455?journalCode=rclb20

Based on what the Indian courts have said, it may not be completely wrong to say that the amount of the share to which the funder is entitled is one of the most important factors in deciding whether a financing agreement is legal or not. Indian courts may also look at other parts of the agreement, such as the role, rights, and responsibilities of the litigant and the funder in a funded proceeding, the disclosure of confidential information to the funder, the funders' say in evaluating settlement proposals by courts or opponents, the termination of the agreement and the conditions that must be met, the funders' liability for accrued obligations, etc. Among these clauses are: Putting private information in front of the funder Giving the funder confidential information Fund Even if one party is paying for the lawsuit, this way of thinking says that the plaintiff shouldn't have to pay for the interests of other people.

It's important to know that whenever a case is brought before a court or tribunal, the existence of such agreements must always be made clear. This is done to make sure that no bad orders are given during the execution or enforcement stage. For instance, when a funder is involved in the arbitration process, it matters how independent the arbitrators are from the funders. If this independence isn't set up, it can be a strong reason to challenge an arbitral decision, but only if it's done before the arbitration process starts.

In India, there are no restrictions that prevent third-party investment from entering the commercial market, hence there is no regulatory barrier to entry. As long as the arrangements for third-party funding do not contradict public policy or are illegal in any other way, India should manage third-party money by following the many systems that leading arbitration countries have created. The following are some of the findings that were presented in the report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanisms in India:

> ***"The enactment of supporting legislation has contributed significantly towards the growth of these jurisdictions as arbitration hubs. For instance, Singapore has recently passed amendments to its Civil Law Act legalising third party funding for arbitration and associated proceedings. Similarly, Hong Kong recently legalised third party funding for arbitrations and mediations. The Paris Bar Council has also indicated its support for third party funding."***

India's acceptance of international arbitration could be bolstered by the adoption of appropriate Indian-specific adjustments to comparative metrics.

Judicial Approach towards Third Party Funding In India:-

As there was no law in India related to Third Party Funding , the judiciary regulated it .It was in the case of ***Ram Coomar Condoo v. Chunder Canto Mukherjee***[10] the Privy Council lowered the bar for champertous agreements to be invalidated by the public policy concept in common law and found that such agreements could be invalidated by Indian public policy if they were inalienably discriminatory, unsuitable, and not created with the intention of fraudulently supporting a claim. In other words, the Privy Council found that certain agreements could be invalidated by Indian public policy.

However, the same view was trailed out by the Privy Council in the case of ***Raja Rai Bhagawat Dayal Singh v. Debi Dayal Sahu***[11]**,** where it was very much clear the law of maintenance which evolved from the English law and the doctrine of champerty was not applicable in Indian laws.

Moving on when the Supreme Court was established in India a case was referred in ***B Sunitha v. State of Telangana***[12] in which the ruling of Mr. 'G, A Senior Advocate,' was cited by the Supreme Court of India where the court held that the legal agreements based on contingency fees are banned in areas where an advocate is a party.

In ***Spentex Industries Ltd v Quinn Emanuel Urquhart & Sullivan***[13] due to the fact that their governing agreement was not dependent on Indian law, the Delhi High Court did not investigate the question of whether or not the law relative to the contingency fee charged by Quinn Emmanuel was legal under the law of India.

Rule 2 (share or interest in an actionable claim), Rule 18 (fomenting litigation), Rule 20 (contingency fees), and Rule 22 of the Bar Council of India Rules make it abundantly clear that Indian advocates are unable to fund the litigation of their clients. This conclusion can be drawn from the rules of the Bar Council of India (participating in bids in execution, etc.). Reaffirmation of non-lawyer third-party funding admissibility and recovery of the necessary sum after a dispute's resolution was recently made by the Supreme Court of India in ***Bar Council of India v AK Balaji***[14]. Lawyers

[10]Ram Coomar Condoo v. Chunder Canto Mukherjee, [L.R.] 2 App. Cas. 186 : (1876-77) 4 IA 23

[11]Raja Rai Bhagawat Dayal Singh v. Debi Dayal Sahu, (1908) 12 Cal WN 393

[12]B Sunitha v. State of Telangana, (2018) (1) 190 SCC 638

[13]Spentex Industries Ltd v Quinn Emanuel Urquhart & Sullivan, AIR Online 2020 Del 704

[14]Bar Council of India v AK Balaji, 2018 (5) SCC 379

who graduated from law schools can now enter into damages-based agreements, as long as they are not registered advocates under the Advocates Act 1961, according to the Bombay High Court's decision in ***Jayaswal Ashoka Infrastructure (P) Ltd. v Pansare Lawad Sallagar***[15]

Because of recent changes in the law, India has recently seen an increase in the number of fundraising events that involve the participation of third parties. Under the Specific Relief Act of 1963, specific performance of a contract is no longer a discretionary remedy that a judge may offer if there is no other viable pecuniary remedy. Instead, specific performance of a contract is now an obligatory remedy that must be provided. If it would put the continuation or completion of a construction project in jeopardy, the court cannot rule in favour of the plaintiff in a lawsuit seeking an injunction. The revisions that were made to the Arbitration and Conciliation Act of 1996, on the other hand, do not directly address third-party funding; yet, they have resulted in faster arbitrations as well as stricter and shorter time restrictions for the passing of decisions. If necessary reforms are achieved, such as a robust framework for dispute resolution, an overhaul of the arbitration regime, the enforcement of contracts, and the establishment of commercial courts, then the introduction of third-party funding in India can be carried out without incident.

If an arbitration is funded by a foreign third-party funder or if the funder is headquartered in India – whereby foreign cash is transmitted from India – then the requirements of the Foreign Exchange Management Act 1999 (FEMA) would come into play. This is the case because FEMA was passed in 1999. In this particular scenario, funding from a third party does not fit well into either the category of a current or a capital transaction. It is not obvious how these payments will interact with the regulatory system, which is especially puzzling considering that FEMA is responsible for both of these transactions.

Foreign Exchange Regulation Act (FERA) 1973, which is FEMA's archetypal rule, is neither restrictive nor unlawful if there is any procedural non-compliance, as the Delhi High Court observed in ***NTT DokomoInc.v Tata Sons Ltd.***[16] and ***Cruz City 1 Mauritius Holdingsv Unitech Limited***[17]

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[15]Jayaswal Ashoka Infrastructure (P) Ltd. v Pansare Lawad Sallagar, 2019 SCC OnLine Bom 578

[16]NTT DokomoInc.v Tata Sons Ltd., (2017) SCC OnLine Del 8078

[17]Cruz City 1 Mauritius Holdingsv Unitech Limited, 2017 LawSuit (Del) 1611

that the Arbitral awards issued by tribunals with their seats in a foreign country must be respected in today's commercial world. Regardless of whether there is a lay regulation that hinders the implementation, it should not be referred to as being against Indian public policy. The Indian Court enforced awards in each of these cases.

Recently in the leading case of **Tomorrow Sales Agency Private Limited vs. SBS Holdings, INC and Others**[18], the Hon'ble High Court of Delhi ruled that the funder not being either the party to arbitration agreement the arbitration, or the eventual award refused to hold a third party funders liability for furnishing security in an enforcement of a foreign award. The Court further observed that any uncertainty in holding a funder liable for an adverse award would dissuade third party funders from funding proceedings.

The Hon'ble Court also analyzed the applicability of **Gemini Bay Transcription PVT. Ltd. vs. Integrated Sales Services Ltd.**[19]**,** decided by Hon'ble Supreme Court and observed that it has no application where an award is sought to be enforced against a person who is not a party to the arbitral proceedings and has not been imposed with any liability in terms of the award.

The Hon'ble court held that third party funding is essential to ensure access to justice. In absence of third party funding, a person having a valid claim would be unable to pursue the same for recovery of amounts that may be legitimately due. In many cases, in absence of third-party funding, a person having a valid claim would be unable to pursue the same for recovery of amounts that may be legitimately due.

In many cases, the claimants become impecunious on account of the very cause for which they seek redressal. The cost for pursuing claims in arbitration are significant; the same not only include fees paid to arbitrators and institution, but also professional fees for legal counsels and experts and other attendant expenses. A person without the necessary means would have no recourse, in the absence of third party funders.

Third party funders play a vital role in ensuring access to justice. It is essential for the third-party funders to be fully aware of their exposure. They cannot be mulcted with liability, which they have neither undertaken

[18]Tomorrow Sales Agency Private Limited vs. SBS Holdings, INC and Others, 2023 SCC OnLine Del 3191

[19]Gemini Bay Transcription PVT. Ltd. vs. Integrated Sales Services Ltd. (15) AIR 2021 SC 3836

nor are aware of. Any uncertainty in this regard, would dissuade third party funders to fund litigation.

It is also necessary to ensure that there is transparency and that the party funding is not exploitative. The fact that a party is funded by a third party is a relevant fact in considering whether an order for securing the other party needs to be made.

However, permitting enforcement of an arbitral award against a non-party which has not accepted any such risk, is neither desirable nor permissible. Whilst, there is no cavil that certain rules are required to be formulated for transparency and disclosure in respect of funding arrangements in arbitration proceedings, it would be counterproductive to introduce an element of uncertainty by mulcting third party funders with a liability which they have not agreed to bear.

This judgement has answered in the affirmative, the age-old question of whether third party funding in arbitration is allowed or not. The Honble Court accepted the important role of TPF in arbitration to ensure access to justice.

Way Forward

The concept of third-party funding in international commercial arbitration is new and is currently evolving in other developed countries as well. India on the way to alternative dispute resolution is making a lot of progress but a lot is to be achieved.

The India may establish a robust mechanism for TPF by incorporation of the following :

(1) International Funders may be allowed to enter the Indian market by creating a conducive regulatory environment that may significantly benefitted the industry like Australia and Singapore.

(2) By creating regulatory bodies to oversee TPF and ensure industry integrity (Like in Australia).

(3) By enacting a comprehensive legislation which clearly define and regulate TPF Agreements. It should address the enforceability of TPF Contracts, Protect the rights and obligations of funders and litigants, mandatory disclosure and also protect a system in case of abuse of process of law Like Singapore's Civil Law (Amendment) Act of 2017.

(4) By developing best practices and industry led initiatives to standardised TPF Practices like the American Bar Association "Best Practices for third party litigation funding".

(5) Indian Courts may also establish jurisprudence for upholding the validity of TPF Agreements and also safeguard the integrity of judicial process like the english court's approach to TPF (Arkin Case) .

Conclusion

The rise of third-party funding in International Arbitration is a complex phenomenon which is full of challenges and opportunities so it requires careful consideration and thorough analysis. There have been so many issues and challenges such as Conflict of interest, Confidentiality, Disclosure of TPF, Transparency, frivolous claims etc.which may also be considered while making the appropriate regulation to the Indian legal system so that it can be properly regulated and the interest of all stakeholders can be protected.

It will benefit the Indian Legal System to access to justice in cases which involve complex commercial disputes. It provide litigants with the financial support so that they can persue meritorious claim which they might otherwise be unable to afford. The claimant can manage the financial risk associated with the litigation by shifting the burden of legal cost to the funder. It also increases efficiency of case management and which resulted into economic growth of the country.

India can develop a balanced legal framework by incorporating the framework of USA, UK, Australia and Singapore and also learn from the established practices in other jurisdictions to foster the responsible use of TPF and also safeguarding the integrity of justice system in India.