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Third Party Funding in Arbitration: An Overview

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ABSTRACT

World has not been the same since the dawn of last decade. With increasing number of cross-border transactions international commercial and investment arbitrations have also increased concurrently. Arbitration is more efficient and time saving procedure (compared to domestic jurisdiction), but various expenses such as legal fees, arbitrator's fees, attendant costs, venue costs, regular fees, miscellaneous expenses etc. makes arbitration a difficult process for parties. In order to help the weaker financial claimants, the concept of third-party funding came into existence. Third party funding is a concept in which a party which has no prior interest in the legal dispute provides finance to one of the parties with a hope getting a share in the damages awarded or a part of the settlement. The evolving phenomenon of third-party funding has taken the legal world by storm. However, it is important to note that India has been silent spectator with regard to this issue and continues to maintain the same stance. While many developing countries have made changes in their legislations in order to accommodate this process, India is yet to make a move. In this paper we have a discussed the concept of third-party funding in detail along with its pros and cons, practices in foreign countries and the status of third-party funding in India.

I. INTRODUCTION

Third Party Funding (TPF) also known as Litigation Financing or Legal Financing is the non-recourse funding of litigation costs of a party by a funder in exchange for a share in the monetary award of the litigation if it is successful. It may also cover the costs of any kind of dispute resolution mechanism in an arbitration or mediation. It is a manner of leveraging capital while dispute is ongoing and is often considered to level the playing field between the parties in dispute³.

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³Cyril Amarchand, Third Party funding in India, Cyril Amarchand Mangaldas Advocates and Solicitors, <http://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf>

The ICCA-QMUL Task Force on Third-Party Funding in International Arbitration⁴ 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.”

PARTIES IN A TPF AGREEMENT:

There are basically two parties in a third-party funding agreement. One is the funders who fund the money. As this practice of TPF started to increase, many large institutions prepared to finance the litigation and arbitration. Many law firms, insurance companies, investment banks, hedge funds have started to give away funds along with specialized third-party funders. The funder can be any party who is monetarily interested in the claim but has no personal connection to the dispute whatsoever.

And the next person is generally the claimants (also include counter claimants) are the recipients of TPF as they may receive a monetary award. However, there is a trend upcoming for insurance and other risk transfer arrangements for both claimants and defendants.

There are 10 standard terms for funding an agreement of TPF. They are

1. Duties of the Party: To carry out all necessary acts with reasonable care and skill; to continue diligently with the advice of the lawyers; to cooperate with the funder; to request consent of the funder where its required to incur costs, dispose of claims, discontinue the proceedings, enforce the judgment; to report all material events to the funder, etc

2. Duties of the Funder: To review the case; to cover the agreed costs; etc. In some jurisdictions, funders may also have the duty to liaise with the lawyers

3. Distribution of proceeds following successful claim: Includes the waterfall of distribution of a successful claim, the definition of proceeds, set-off rights etc. While the stake of the funder is a matter of commercial negotiation, several funds indicate the range of their stake upfront, subject to the risk assessed for each case

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

4. Representations by the Party: Fundamental conditions including the rights of assignment, presence of counterclaims, validity of documents provided, etc
5. Representations by the Funder: Funder's capital adequacy, lack of any relationship with the counter-party, independence regarding the merits, no interest in the merits of the dispute, etc
6. Assignment of Claims to Funder as security: The details of assignment of rights to claim costs and all subsidiary rights to the funder. In some agreements, funders may seek the right to on-sell
7. Termination: The events and circumstances upon which the Agreement can be terminated and its consequences
8. Settlement proposals by court or opponent: Stipulations as to the plan of action in the case of a settlement proposal, its acceptance, termination, continuance of proceedings etc
9. Confidentiality and Disclosure: Explains the confidential nature of the agreement, for example: the existence of the funding and the identity of the funder, the background of the claim; the procedural status of the claim; the planned strategies and the tactics, the expected recovery, billing arrangements, litigation risk, etc. Agreed process for disclosures where required under law or by regulator
10. Data transfer by Funder to third parties: The circumstances when transfer of data by the funder to any other third party (example, witness, expert, insurance companies, etc.) would be permissible

II. ADVANTAGES AND DISADVANTAGES:

A claimant may go for a third-party funder for the following reasons:

1. Necessity: Arbitration is expensive. If a claimant does not have the means to pursue a meritorious claim, funding will be the only option available.
2. Risk Management: In order to lay off the risks involved in costly arbitration and miscellaneous costs; the claimant will be prepared to give a proportionate amount of recovery to the funders.
3. Validation: Funders are only interested in good claims. They, therefore conduct extensive due diligence and carry out their own analysis of the merits before agreeing to provide funding. This objective analysis may assist the claimant to shape its case

strategy, and may also encourage early settlement once the other party is made aware that the claim has the backing of a funder.

However, like a coin which has two sides, there are some disadvantages regarding the third-party funding:

1. **Expensive:** A successful claimant has to pay a significant portion of damages recovered to the funder.
2. **Autonomy:** Funders are generally prohibited from taking undue control or influence in an arbitration. But there may be some loss of autonomy on the part of the funded party especially while considering settlement. Generally, the funders will reserve the right of approval of the settlement.
3. **Disclosure:** Increasingly funded parties are required to disclose the fact of funding and the identity of the funder. This in turn will prompt the respondent to make application for security of costs.
4. **Costs:** Substantial costs can be incurred when packaging the case for presentation to a funder. These will have been wasted if the application for funding is unsuccessful. Even if successful, funders are not usually liable for any costs incurred before the funding arrangement is put into place, including the costs of packaging and the negotiation of the funding arrangements⁵.

III. POSITION OF THIRD-PARTY FUNDING IN OTHER COUNTRIES:

Approximately a decade ago, the Australian and English courts acknowledged the legitimacy of third party funding⁶ and ever since then, third party funding has become quite a common practice in most developed countries of the world, with many countries even making legislative changes in order to promote third party funding and regulate the action of third party funders. One of the major legislative obstacles for third party funding in the legal field happens to be the common law doctrines of champerty (When a person supports a litigation in return for a share in the proceeds) and maintenance (When a person who has no legitimate interest in the litigation gives assistance or support). Despite having been abolished in most countries these doctrines are still prevalent in a few countries

⁵ Third Party Funding in International Arbitration, 21 Feb 2020, <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>

⁶ Sameer Jain , Jayashree Parihar and Anant Gupta, *India: Third Party Funding In International Arbitration: An Indian Perspective*, MONDAQ.COM, Dec 2019, <https://www.mondaq.com/india/trials-appeals-compensation/875506/third-party-funding-in-international-arbitration-an-indian-perspective>

In the English case of *Arkin V Bochard Ltd*,⁷ the court of appeals defined commercial funders as "groups who provide help to those seeking access to justice which they could not otherwise afford". The following year the Australian High Court in the case of *Campbell's Cash and Carry Pty Ltd V Fostif Pty Ltd*,⁸ recognised the legitimacy of third party funding arrangements. The status of third party funding, in a select few countries shall be discussed in detail.

Australia

Prior 2006 funding litigations was a prohibited concept in Australia due to the common law doctrines of maintenance and champerty as these doctrines prevented the courts from being used for business ventures.⁹ The turning point however came in the 2006 landmark decision of the Australian High court in the abovementioned *Campbell's Cash and Carry Pty Ltd V Fostif Pty Ltd* in which the court held that third party funding of litigation was not an abuse of the process or against public policy. The court stated that the doctrines of champerty and maintenance could not be used to challenge proceedings because they had a third party funder. Ever since this ruling third party funding has become an integral part of Australia's legal system, however challenges to third party funding still occur from time to time especially in states where the doctrines champerty and maintenance have not yet been abolished. As of 2015 the Australian litigation funding market was estimated to be worth around 3 billion Australian Dollars. In Australia third party litigation funding was traditionally used to finance insolvency litigation, but it also being increasingly utilised for civil/commercial litigations and arbitration matters.

England

The passing of the Criminal Law Act 1967 eliminated the archaic rules of maintenance and champerty which were considered to be the legal barriers to third party funding and paved way for the establishment of the Third party funding industry in London's Arbitration market.¹⁰ Third party funding for a long time was considered to be unethical and contrary to public opinion in the United Kingdom. It is a relatively new concept which is mostly used by multi-national companies as a means of taking the costs of large scale arbitration or litigation

⁷ *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655.

⁸ *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited* (2006) 229 CLR 386; [2006] HCA 41.

⁹ Jason Geisker, Dirk Luff, *The Third Party Litigation Funding Law Review - Edition 3(Australia)*, The Law Reviews, Dec 2019 <https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-3/1211998/australia>.

¹⁰ Sharina Petit, Ewelina Kajkowska, *Development of Third Party Funding In Arbitratio*, Norton Rose Fulbright, Sept 2019, <https://www.nortonrosefulbright.com/en-in/knowledge/publications/c015054d/developments-in-third-party-funding-in-arbitration>.

off the balance sheet.¹¹

There is no legislation in the UK which formally regulates third party funding. Third party funding in England is self regulated by the Association of Litigation Funders(ALF), which is a private company owned and directed by the member firms.¹²

A landmark case with regard to Third Party Funding in the UK was the case of *Excalibur Ventures LLC V Texas Keystone Inc and Ors.*¹³ In this case the English court of Appeal by following the "following the fortunes of the funded" approach by ordering the funder to pay the other parties cost on an indemnity basis. The court held it appropriate to make the funder pay as "he has funded the proceedings for his own financial benefit and has thereby become a 'real party' to the litigation so it is just that he should be liable for the costs if the claim fails." The court held that the claim was "opportunistic" and did not want the third party funder to evade the liability. This case is a very good example of the risk which the third party funders face. However this is different in an arbitration as an arbitrary tribunal do not have the jurisdiction to issue an adverse cost order against the funder.

Hong Kong

While the doctrines of champerty and maintenance have been abolished by most nations of the world, Hong Kong to date has held on to these doctrines as a result of which it is lagging behind in the development in third party funding. In 2017 the Government of Hong Kong took a major step towards third party funding by opening up third party funding for arbitrations and mediations.¹⁴ Hence any form of third party funding in court proceedings in Hong Kong may attract liability under maintenance or even criminal liability. The Arbitration and Mediation Legislation (Amendment)¹⁵ Ordinance Order No.6 of 2017 was passed by the Legislative council on June 14 2017 which legalised third party funding arbitration and mediation in Hong Kong. On 1st February 2019 the Hong Kong Government published the Code of Practice of Third Party Funding of Arbitration.¹⁶ The Code of Practice of Third Party Funding of Arbitration shares similarities with the Code of Conduct for litigation Funders in

¹¹ Mary Jordan, Andrew Matheson, Emma Brown, *Why Third Party Funding is on the rise in England & Wales*, Global Arbitration News, 27 Feb 2018, <https://globalarbitrationnews.com/why-third-party-funding-is-on-the-rise-in-england-wales/>.

¹² Ben Wells, *Regulation of Third Party Litigation Funding in England and Wales*, Pinsent Masons, 19 Jul 2018, <https://www.pinsentmasons.com/out-law/analysis/third-party-litigation-funding-england-wales>.

¹³ *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2016] EWCA Civ 1144.

¹⁴ Melody Chan, *Third Party Litigation Funding Law Review-Edition 3(Hong Kong)*, The Law Reviews, Dec 2019, <https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-3/1212006/hong-kong>.

¹⁵ Section 98H

¹⁶ Government Notice No. 9048, Arbitration Ordinance (Chapter 609): (Notice under Section 98P) (the Code).

England and Wales.¹⁷ This code contains rules, standards and recommended practices for third party arbitration funding in Hong Kong. This Code applies to all Hong Kong seated Arbitrations and arbitrations conducted outside Hong Kong in which the cost and expenses of the services related to arbitration are provided in Hong Kong.¹⁸

Hong Kong continues to have a ban on third party funding in litigation as they government has chosen to preserve the doctrines of champerty and maintenance. Apart from 3 exceptions that have been provided, third party funding in litigation would still potentially attract tortious or criminal liability.

Singapore

Singapore, the city state is one of the leading international arbitration jurisdiction's in the global level,¹⁹ and is considered a hub in the Asian continent for arbitration. However, Singapore had approved the process of third-party funding only since 2017 and had allowed it only for international arbitration and related proceedings. Despite the late entry into country third party funding has been a very important feature in the country's arbitration landscape. The Singapore International Arbitration Centre's (SIAC) caseload has increased more than 5 times in the last 10 years, and since 2017 ICC International Court of Arbitration and The Permanent Court Arbitration have established offices in the country to meet the growing demand for arbitration.²⁰

Singapore also happens to be a potential market for third party funders, with many funders having already established permanent offices. The first third party funding agreement was reported on July 2017, and ever since then there has been a growing presence of funders in Singapore.²¹

Singapore law permits third party funding only for international arbitration and related proceedings only if the funder meets certain qualifying criteria.²² Outside arbitration the concept of third party funding is prohibited on public policy grounds, however this condition could change as there are signs for it.

¹⁷ Peter Hirst, Mun Yeow *Comparing Hong Kong Code of Practice for Third-Party Funding Arbitration with the Code of Conduct in England & Wales*, Kluwer Arbitration Blog, 4 Feb 2019,

¹⁸ Section 98H Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017

¹⁹ The Queen Mary University of London and White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration', 9-10, <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf>.

²⁰ ICC press release, 'ICC Court case management team begins operations in Singapore' (23 April 2017), <https://iccwbo.org/media-wall/news-speeches/icc-court-case-management-team-begins-operations-singapore>

²¹ KC.Vijayan, 'First third-party funding for S'pore arbitration case', The Straits Times, 1 July 2017.

²² Law Reviews, Dec 2019, <https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-3/1212071/singapore>

The amended Civil Law Act and Civil Law(Third Party Funding) Regulations 2017 provide a framework which allow funding in cases. The Civil law Amendment Act 2017 abolished the age old tort of maintenance and champerty.²³ However the funding agreements would become unenforceable if they are against public policy or illegal.²⁴ Moreover according to the Civil Law Act a third party funder is a person who is 'in the business of funding all or a part of the cost of dispute resolution proceedings of which they are not a party'.²⁵ To qualify as a funder under the Civil law Act the funder must carry on the business of funding the cost of dispute resolution proceedings which they are not a part of, in Singapore or elsewhere;²⁶ and must have a paid up share capital of not less than 5 million Singapore Dollars or not less than 5 million Singapore Dollars in managed assets.²⁷

The Amendment also made changes to the Legal Profession Act and Professional Conduct Rules which are applicable to practitioners and law firms in the country. The amendments require the parties to disclose the existence of third party funding²⁸ and forbid lawyers and law firms from holding any sort of financial interest in the funders firms or receive fees, commissions or shares of proceeds from the funders.²⁹

IV. INDIAN SCENARIO

The concept of third-party funding is not a new one in India. Many cases have been brought and sold in the legal market by investors and funders which often results in the transfer of asset for the litigation. But formal agreements are however yet to come in India.

In 2015, the case of Bar Council of India v. AK Balaji³⁰, the supreme court clarified on the topic of TPF that there appears to be no restriction on the third parties (non -lawyers) funding the litigation and getting repaid after the outcome of the result. Till date there is no restriction by any legislation on it. Moreover some of the states of India like Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh have already given assent to Third-party funding by amending the Civil Procedure Code, 1908.

Order XXV Rule 1 of the code (as amended by Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh) provides that the courts have the power to secure costs for litigation by asking the financier to become a party and depositing the costs in court.

²³ Civil Law Act Section 5A(1).

²⁴ Civil Law Act, Section 5A(2).

²⁵ Civil Law Act, Section 5B(10)

²⁶ Regulations, Regulation 4(1)(a).

²⁷ Regulations, Regulation 4(1)(b).

²⁸ Legal Profession (Professional Conduct) Rules 2015, Rule 49A.

²⁹ Legal Profession (Professional Conduct) Rules 2015, Rule 49B.

³⁰AIR 2018 SC 1382.(India)

Order XXV of the Civil Procedure Code was amended for Maharashtra by Bombay High Court Notification P 0102/77, dated September 5 1983.

It reads as follows:

"3. (1) Where any plaintiff has for the purpose of being financed in the suit transferred or agreed to transfer any share or interest in the property in the suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in the property in suit is concerned, or declaring that he shall be debarred from claiming any right to or interest in the property in suit...."

This same amendment has been adopted by Gujarat and Madhya Pradesh. Allahabad has added only Rule 2 of Order XXV, which states that costs may be secured from the third-party funding of litigation. Therefore, the concept of third-party funding is not alien to the Indian Jurisprudence. But it should be noted that there is no law expressly allowing or barring third party funding in arbitrations seated in India.

The Arbitration and Conciliation Act, 1996 makes no mention of third-party funding. The presence of a third-party funding clauses in specific state amended Civil Procedure Code cannot adduce the legality of a similar clause in arbitrations. Therefore, any possible third-party funding agreement would depend on it being a valid contract under the Indian Contract Act, 1872.³¹

The Supreme Court of India upheld a decision in a case that a champerty contract in which the returns are contingent on the success of the case is not per se illegal, except in cases where an advocate is a party.³²

V. CONCLUSION: WHAT CAN BE DONE?

In the last few years India has witnessed a major surge in Arbitration among the Asian countries. India's new Arbitration and Conciliation (Amendment) Act 2015, a host of

³¹ Sameer Jain, Jayashree Parihar, Anand Gupta Third Party Funding In International Arbitration: An Indian Perspective, PSL advocates and solicitors, 20 Dec 2019 <https://www.mondaq.com/india/trials-appeals-compensation/875506/third-party-funding-in-international-arbitration-an-indian-perspective>

³²Rule 20, Bar Council of India's Standards of Professional Conduct and Etiquette, Chapter II, Part VI, Bar Council of India Rules 1975 (read with Section 49(1)(c) of the Advocate's Act 1961, read with the proviso thereto).

arbitration friendly judgements and institutions such as the Mumbai Centre for International Arbitration has helped reach new heights in the world of arbitration.³³ In India there are provisions which already exist to introduce the concept of third party funding. The absence of any precedent which expressly prohibit third party funding supports this finding.³⁴ Therefore proper steps need to be taken in order to promote the concept of third party funding in India with proper regulations and amendments to the present legislations so that its pros outweigh the cons. Rather than prohibiting third party funding, it should be regulated since it has its own benefits for the society.³⁵ Hence it is pertinent that India takes proper legislative steps in order to regulate the arbitration market as this not only helps improve India's position in the global arbitration market but also helps in transforming the country into South-Asian hub for commerce.

³³ Kshama Loya Modani, Lapak Desai, *Asia No Longer Third to Third Party Funding-Meets the Financing World of Arbitration*, KLRC Digital Newsletter 2017, Dec 2017.

³⁴ Meenal Garg, *Introducing third-party funding in Indian Arbitration: A tussle between conflicting policies*, NLUJ Law Review 6(2) 71 (2020).

³⁵ Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011).