

REGULATION OF THIRD-PARTY FUNDING IN ARBITRATION WITH INTERNATIONAL AND INDIAN PERSPECTIVE

Akanksha and Sarthak Srivastava
Assistant Professor, Lloyd Law College

INTRODUCTION

Third- Party funding in International Arbitration refers to a situation where a party involved in arbitration refers to a situation where a party involved in an arbitration dispute receives in the underlying dispute. The funder provides funds to cover the arbitration costs in exchange for a share of the potential award or settlement. This practice has gained popularity in recent years as it allows parties with limited financial resources to pursue claims and share the risks and costs associated with arbitration proceedings.

The issue of third-party funding in International Arbitration requires attention from state agencies for several reasons. Firstly, there is a concern that third-party funding may compromise the neutrality and independence of the arbitration process. If a funder has a direct interest in the outcome of the case, there is a risk of influencing the decisions made by the funded party or exerting undue control over the proceedings. Secondly, there is a lack of uniform regulation and transformation regarding third-party funding, which raises ethical and legal concerns. State agencies can play a crucial role in establishing appropriate regulations to ensure the integrity and fairness of the arbitration process, protect the interests of the parties involved, and address potential conflicts of interest. By tackling this issue, state agencies can provide a framework that balances the need for access to justice with the preservation of the fundamentals principles of arbitration.

Access to Justice is a principle which forms the basis of any Justice Delivery System. All should have access to it regardless of their financial status. One of the biggest challenges that the present legal system is facing is the delay which is being caused in order to provide justice. In the light of this, the concept of Alternative Dispute Resolution has gained popularity in the last three decades.¹ Among the various kinds of ADR mechanism, Arbitration is the one which is the closest to a court setting. It is a form of ADR where two parties intend to get their dispute decided by a neutral Third party, not being a judge.

One reason for the ADR mechanism becoming popular was its cost effectiveness. However, such was not the case of Arbitration. The cost factor in Arbitration remains a much-debated topic even now after the wide acceptance of arbitration to solve the domestic as well as the international disputes. Many changes have been made and many more are required for making arbitration cost effective, one such method is Third Party Funding.

RESEARCH METHODOLOGY**Research Issue**

The concept of third-party funding was always looked down upon due to the concept of maintenance and champerty. However, many jurisdictions with time have realized that third party funding transactions are very beneficial to the parties who are involved in the process of litigation. Considering this and the fact that India has become more and more arbitration friendly in the recent past, with having its international arbitration centers, India still does not have a law governing the Third party funding transactions. The lack of legislation on the subject has left this area unsupervised. Also due to lack of legislation on the subject, there is less awareness of it and thus it is hindering the maximum number of people from taking advantage of third party funding during arbitration.

¹Vondra Albert. A, Carver Todd B Alternative Dispute Resolution: Why It Doesn't work & why it does ;t Work and Why It Does. (1994, May 1). Harvard Business Review.

Research Questions

The following are the research questions of the present study:

1. Whether Third party funding is against the principles of the justice delivery system?

Third Party Funding, where an external entity provides financial support to a party involved in legal proceedings, can raise concerns regarding the principles of natural justice delivery. Critics argue that it may undermine the fairness and impartiality of the legal system by allowing wealthier parties to gain an unfair advantage. It can potentially skew the balance of power and influence outcomes based on financial resources. However, proponents of third-party funding argue that it enhances access to justice, particularly for individuals or organization with limited resources, allowing them to pursue legitimate claims that they would otherwise be unable to afford. The extent to which third-party funding violates principles of natural justice delivery depend on the specific regulations in place and the safeguards implemented to mitigate potential risks and conflicts of interest.

India is at a crucial juncture where the question of whether it needs a specific law to govern third – party funding in arbitration proceedings has become increasingly significant. Third – Party funding, which involves an external entity financing one party’s legal expenses in exchange for a share of the potential award , has gained traction as a means to facilitate access to justice and level the playing field in arbitration. While the benefits of the third – party funding are undeniable, it raises concerns regarding ethics, conflicts of interest, and transparency. Therefore, a dedicated law in India to govern third – party funding in arbitration proceedings would provide much needed clarity, address these concerns, and establish a regulatory framework to safeguard the integrity of the process. Such a law would outline the rights, obligations and limitations of third – party funders, ensuring that the practice is conducted in a fair, transparent and ethical manner. Additionally, it would protect the interest of the parties involved, promote efficiency in dispute resolution , and foster India’s position as a global arbitration hub. By enacting a specific law to govern third – party funding in arbitration proceedings, India can strike a delicate balance between promoting access to justice and preserving the fundamental principles of fairness and integrity in the arbitration process.

2. Are there any laws governing the third party funding in any other country? How efficient are those laws?

In this the laws of Singapore, Australia, Hong Kong and other nations would be analyzed on the subject of Third-Party Funding. The efficiency of the laws would be observed and comparison of the Indian situation would be done.

Research Design

In the present study, the Doctrinal Method was used to research, where the relevant content from books as well as the Internet was utilized to get a thorough understanding of the present topic and also to answer the research questions.

OVERVIEW

Third-party funding in international arbitration is a concept where a third-party funder provides financial support to a party involved in arbitration in exchange for a portion of the proceeds if the party is successful in the arbitration. This type of funding allows parties to pursue claims that they may not have been able to pursue otherwise due to financial constraints.

Third-party funding has become an increasingly popular concept in international arbitration. It is particularly useful for parties that are unable to fund their own arbitration proceedings due to financial constraints. Third-party funding can also help to level the playing field in international arbitration by allowing smaller or less financially secure parties to pursue legitimate claims against larger or more financially secure opponents.

Third party funding is a kind of litigation financing, in which a Third party is funding the litigation in return for some benefits from the final settlement. This 3rd party can be anyone and oftentimes, investment banks, hedge funds, insurance companies and pension funds are the ones who provide funding to these litigations. It is often

believed that this type of funding creates a level playing field for both the parties making sure that they have access to justice regardless of their financial backing.

Third party funding has become a popular mechanism in the world of international arbitration. In recent years, there has been an increasing trend towards the use of third-party funding by parties involved in international arbitration proceedings. Third-party funding is a process where an external party provides financial support to one of the parties involved in a legal dispute. This type of funding can be beneficial for parties who may not have the necessary resources to pursue their claims or for those who wish to spread the financial risk associated with litigation.

The use cases of third-party funding are varied and can include anything from financing legal fees and expenses, to providing support for expert witnesses or other litigation-related costs. In this context, third-party funders can provide significant benefits to claimants by allowing them to pursue their claims without having to worry about the cost implications.

While third-party funding is not without its controversies, it has become increasingly accepted as a viable option for parties involved in international arbitration proceedings. As such, it is important for lawyers and other professionals working in this field to understand how third-party funding works and how it can be used effectively in international arbitration cases.

Yves Derains defines third-party funding as “A scheme where a party unconnected to a claim finances all or part or one of the party’s arbitration cost, in most cases the claimant. The funder is then remunerated by an agreed percentage of proceeds of the award, a success fee, or a combination of the two”.²

● **Maintenance and Champerty**

The concept of maintenance and champerty is an old concept which originated in ancient Greece. The meaning of maintenance is funding a party in a litigation without any reason or cause and champerty is a type of above defined maintenance where such funding is given with the intention to get share from the proceeds.³ This law existed in most jurisdictions for the longest time with the purpose of maintaining the purity of law. Which would prevent the third party from interfering with the matter of two private parties. This doctrine was an impediment for the concept of third party funding. With the passage of time, this doctrine of maintenance and champerty has been abolished from a lot of places in order to promote the third party funding in litigation which is beneficial for both the funder as well as the party which is funded.⁴

BENEFITS OF THIRD PARTY FUNDING

There are many benefits of third party funding:

- It provides access to justice to all regardless of their financial status: this method encourages the people not from powerful economic backgrounds to participate and solve their dispute through arbitration. This serves two pronged goals, one being, providing access to justice for all and the other being, reduction of burden from the courts.⁵

²Osmanoglu, B. (2015, May 1). Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest. *Journal of International Arbitration*, 32(Issue 3), 325–349. <https://doi.org/10.54648/joia2015013>

³Maintenance and Champerty, Oxford Reference. <https://maintenance.and.champerty>. (n.d.). Oxford Reference

⁴Zhuang WenXiong, The Subsumation of Maintenance and Champerty under Third- Party orders, *Singapore Journal of Legal Studies* (December 2014), pp. 377-396 (20 pages)

⁵ A Step to the fore in Arbitration- Third-Party Funding. (2022, November 12). Arbitration Workshop. <https://www.thearbitrationworkshop.com/post/a-step-to-the-fore-in-arbitration-third-party-funding>

International Journal of Applied Engineering & Technology

- It provides a level playing field, financially. The game of litigation is much more beneficial for the rich and this is an inescapable reality. However through the mechanism of third party funding, a person from low income strata also comes at an equal footing with the opposite party.
- Funders are only interested in strong claims. Therefore, before deciding to provide funding, they will carry out thorough due diligence and evaluate the merits. Once the opposing party is made aware that the claim has the support of a funder, this objective analysis may help the claimant shape its case strategy and encourage early settlement.

ISSUES WITH THIRD PARTY FUNDING

- **Arbitrator's independence and impartiality**

Section 12 of the Arbitration and Conciliation Act 1996 states that the arbitrator needs to be impartial and independent. If that is not the case, either party can initiate the challenge proceeding against the arbitrator's appointment. One of the major concerns about third party funding in arbitration is that of the impartiality and independence of the arbitrator. As this mechanism is not a very transparent one, the independence of arbitrator remains a problem. For instance, if the party in arbitration with a funder appoints an arbitrator who has previously also been an arbitrator in another case regarding the same party then that is a violation of the principle of equality of parties in the process.⁶

Many jurisdictions have made an attempt to get rid of this issue. In the new amended rule of ICC on arbitration, provisions have been added regarding third party funding in arbitration and along with that it has been mentioned that the disclosure of such third party is crucial. This disclosure of the third party will make sure that the issue of impartiality of the arbitrator due to his present or past connection with the funded party can be solved.⁷

JURISDICTIONAL DIFFERENCES

It has become increasingly important to consider the variations in regulations and approaches to third party funding across different jurisdictions, as it has the direct impact on the effectiveness and fairness of the International Arbitration process. The concept of third-party funding provided by an external party to support a party's legal expenses in the arbitration process. However, the regulatory landscape for third party funding is not uniform across all jurisdictions, and there are significant differences in third party funding and disclosures and ensure that the parties involved have access to legal representation and funding, while also ensuring that there is no undue influence or improper conduct that may effect the outcome of the arbitration process. Therefore, exploring the variations in regulations and approaches to third party funding across different jurisdictions is an essential aspect of ensuring the integrity of international arbitration process.

Australia: TPF emerged as an alternative contingency fee arrangement, which was forbidden by Australian law, about 30 years ago. In keeping with the same, the High Court of Australia noted that a third party funding would not necessarily negate the claimant's rights. Notably, TPF experienced a tremendous increase in popularity during the US economic crisis of 2008, when claims were frequently dismissed due to a lack of funding for legal action.

United Kingdom: Courts in the United Kingdom have argued that the maintenance and champerty principles, which forbade anyone who wasn't a party to a lawsuit from funding the litigation process for any benefit, need to be modified and reconsidered. In *R v. Secretary of State for Transport*,⁸ the Court of Appeal determined that TPF agreements would not violate any prevailing laws as long as they were regulated. Subsequently, in the case of

⁶ *Third-Party Funding In International Arbitration - Arbitration & Dispute Resolution - Worldwide*. (2022, March 6). Third-Party Funding in International Arbitration - Arbitration & Dispute Resolution - Worldwide

⁷ *An Overview of Third-Party Funding in the 2021 ICC Arbitration Rules*. (n.d.). Lexology. <https://www.lexology.com/library/detail.aspx?g=6912f6b5-f702-400a-a710-9976e98feb98>

⁸ REGINA v. SECRETARY OF STATE FOR TRANSPORT on 28 OCTOBER 1999

International Journal of Applied Engineering & Technology

Arkin v. Borchard Lines,⁹ the court of appeal favorably looks towards Third Party Funding as a tool to access justice. Further, in the landmark judgment given in the case, *Essar Oilfields Services Limited v. Norscot Rig Management Private Ltd.*,¹⁰ The High Court ruled that third-party funding costs can be awarded under the Arbitration Act and ICC Rules if they are taken solely to further the proceedings and are reasonable in nature in the case where the arbitrator had granted third-party costs.

Singapore: Similarly, in Singapore has amended a civil law act and introduced a new regulation named Civil Law (Third - Party Funding) Regulations, 2017, to define the types of disputes that may fall under TPF, such as applications to stay international arbitrations, proceedings for or related to foreign awards under the International Arbitration Act, or court or mediation proceedings arising out of international arbitrations.

Third - Party Funding agreements are beginning to be recognised more and more in other preferred jurisdictions like Paris and London. A Resolution on Third Party Funding (2017) was also developed by the Paris Bar Council to govern such contracts in arbitration. In this regard, it is important to note that the 2021 ICC Rules of Arbitration specifically address the application of TPF in arbitration proceedings. The importance of any TPF associations in an arbitration must be explicitly stated, according to Article 11(7) of the Rules. As a result, TPF is in a way promoted in the community of Arbitration practitioners.

DUTY TO DISCLOSE THE SOURCE OF THE FUNDS

Third-party funding has become increasingly popular in international arbitration, where a party seeks external financial support to cover the costs of legal proceedings. While third-party funding can provide access to justice for claimants who may not have the financial means to pursue their claims, it also raises concerns about transparency and integrity.¹¹

One of the key issues that arise in third-party funding is the duty to disclose funds. This involves disclosing the source of funding and any other relevant information related to the funding agreement.

The funded party's duty to disclose funds is an essential aspect of third-party funding in international arbitration. It requires parties who receive external financial support from a third party funder to disclose all relevant information related to their funding agreement. This includes disclosing the identity of their funder, any terms or conditions attached to the agreement, and any potential conflicts of interest that may arise from such an arrangement.

The rationale behind this duty is clear – it ensures transparency and fairness in international arbitration proceedings. If one party receives external financial support that is not disclosed, it could create an imbalance between parties or give rise to suspicions about undue influence or bias on behalf of a funder.

Transparency and integrity are fundamental principles that underpin international arbitration proceedings. They ensure that parties have confidence in the process and outcome, which ultimately leads to greater acceptance and enforcement of arbitral awards.

In addition, maintaining transparency helps prevent conflicts of interest from arising during arbitral proceedings. For example, if a funded party does not disclose its source of funding, there could be concerns about impartiality on behalf of arbitrators or other parties involved in the case.

⁹ [2005] 1 WLR 3055.

¹⁰ [2016] EWHC 2361 (Comm)

¹¹ ICC Court of Arbitration. (1987, September 1). *Journal of International Arbitration*, 4(Issue 3), 162–164. <https://doi.org/10.54648/joia1987035>

International Journal of Applied Engineering & Technology

Furthermore, disclosure promotes fairness by allowing all parties involved in arbitral proceedings access to relevant information related to the funding agreement. This helps ensure that parties have a level playing field and can make informed decisions throughout the arbitration process.

The funded party's duty to disclose funds is crucial in ensuring transparency and integrity in international arbitration proceedings. It requires parties who receive external financial support from third-party funders to disclose all relevant information related to their funding agreement.

The funded party has a responsibility to ensure that all necessary information is disclosed, even if it may be detrimental to their case. Failure to disclose relevant information could lead to allegations of misconduct or bias and ultimately undermine the integrity of the arbitral process.

Several international arbitration case laws have recognized the importance of disclosing funds as part of maintaining transparency and integrity in proceedings.

In *RSM Production Corporation v. Saint Lucia*,¹² the tribunal held that the funded party had a duty to disclose its funding arrangement with a third-party funder. Failure to disclose such information could lead to a violation of the duty of candor and good faith.

Similarly, in *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti v. Turkmenistan*,¹³ the tribunal required the funded party to provide full disclosure of its funding arrangement with a third-party funder. The tribunal emphasized that transparency was essential in ensuring fair proceedings and upholding public confidence in international arbitration.

RIGHTS AND OBLIGATIONS OF THE FUNDER IN CASE OF AN UNFAVORABLE AWARD

While the purpose of third party funding in arbitration is two fold. One being, creating a level playing field for both the parties and two being, benefit to the funder at the time of a favorable award. However, the position of the funder at the time of an unfavourable award against the funded party needs to be carefully examined.

In India, the Delhi high court has clarified that a third party cannot be bound by an unfavorable award unless and until he was a part of the arbitration agreement or the arbitration proceedings.¹⁴

In other jurisdictions as well, the third-party funders are not bound by the arbitral award. no extra laws have been made which would extend the effect of an arbitral award to a third party. Even Hongkong as well as Singapore which are pro arbitration nations, also do not have such a law. Various countries who have a pro TPF policy should include the funder to suffer the effect of an unfavorable award but if that is done, then it would place the funder at the same level as that of the party and it would be against the in personam nature of arbitration.¹⁵

DISCLOSURE OF THE FUNDS AND THE FUNDING CIRCUMSTANCES - INSTITUTIONAL RULES

Institutional rules have recently been updated to reflect the evolution of disclosure requirements related to Third Party Funding. Although there isn't a unanimous agreement to the subject, the trend generally favors requiring parties to arbitration to disclose third party funding. The position with regard to different arbitral institution is outlined below:

- **International Chambers of Commerce (“ICC”)**

¹² (ICSID Case No. ARB/12/10)

¹³ (ICSID Case No. ARB/12/6)

¹⁴ 2023 LiveLaw (Del) 482

¹⁵ Pinheiro Kaira & Chitalia Dishay, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION: DEVISING A LEGAL FRAMEWORK FOR INDIA, NUJS Law Review, pg. 13, (2021).

International Journal of Applied Engineering & Technology

The International Chambers of Commerce (“ICC”) is, according to the 2021 International Arbitration Survey¹⁶, one of the most preferred arbitral institutions globally. The idea that parties should disclose the existence of third-party funding has long been supported. The ICC gave tribunals discretion on the matter in its report “*Decisions on Costs in International Arbitration*”, which meant that a tribunal could order the disclosure of funding information if it believed that third – party funding exists. In addition, with regard to the impartiality and independence of the arbitrator.

The ICC’s 2016 ‘Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration’ stated that the arbitrator’s should consider “relationships with an entity having a direct economic interest in the dispute or an obligation to indemnify a party for an award” when making disclosures, which would include a third-party funder.

The ICC released new arbitration rules in 2021 that, in accordance with Article 11(7), required parties to disclose the existence of third-party funding as well as the identity of the funder. As per Article 11(7),

“In order to assist prospective arbitrators in complying with their duties under Articles 11(2) and 11(3) [duty to confirm their independence], each party must promptly inform the secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non- party which has entered into an agreement for the funding of claims or defenses and under which it has an economic interest in the outcome of arbitration.”

Although it is now required, the disclosure of third-party funders only covers "the existence and identity" of any such funders and does not call for the disclosure of more specific information (such as the funding agreement itself). The 2021 ICC Guidance Note clarifies that the following circumstances would not normally fall within the scope of disclosure under Article 11(7):

- i. Inter-company funding within a group of companies.
- ii. Fee arrangements between a party and its counsel, or
- iii. An indirect interest, such as that of a bank having granted a loan to the party in the ordinary course of its ongoing activities rather than specifically for the funding of the arbitration”.

● **Singapore International Arbitration Center (“SIAC”)**

One of the first countries in Asia to allow third-party funding in international arbitration and related legal proceedings was Singapore. The tribunal has the discretion to order disclosure of information under the 2017 Singapore International Arbitration Centre (“SIAC”) Investment Arbitration Rules.

- iv. The existence of the third-party funding arrangement
- v. The identity of the third- party funder; as
- vi. Details of the third-party funder’s interest in the outcome of the proceedings (where appropriate); and /or
- vii. Whether the third-party funder has agreed to be liable for adverse costs.

This suggests that the tribunal can account for third-party funding arrangements when allocating the costs of the arbitration and when issuing any necessary cost orders against parties (although it is likely that tribunals would require good grounds (e.g., an application for security for costs) before directing such additional details to be disclosed).

¹⁶ 2021 International Arbitration Survey: Adapting Arbitration to a Changing World - School of International Arbitration. (n.d.). 2021 International Arbitration Survey: Adapting Arbitration to a Changing World - School of International Arbitration.

- **Hong Kong International Arbitration Centre (“HKIAC”)**

Updated rules were published by the Hong Kong International Arbitration Centre in 2018, and Article 44 specifically addresses third-party funding. It stipulates that the funded party must inform all other parties and the tribunal in writing of the existence of a funding agreement and the identity of the funder. According to Article 34.4, the arbitral tribunal may consider any third-party funding arrangement when figuring out all or some of the arbitration costs.¹⁷

- **Vienna International Arbitration Centre (“VIAC”)**

Similar to the 2021 ICC Rules, the 2021 VIAC Rules of Arbitration and Mediation (“2021 VIAC Rules”) take a stance. According to Article 13(1), a party must disclose:

“The existence of any third-party funding and the identity of the third-party funder in its statement of claim or its answer to the statement of claim, claim or immediately upon concluding a third-party funding arrangement.”

The 2021 VIAC Rules also state that the tribunal may order the disclosure of specific information pertaining to the funding arrangement, the funder's interest in the outcome of the proceedings, and/or whether the funder has agreed to bear some or all of any adverse costs liability, if it deems it necessary. This final requirement is probably intended to ascertain whether the defendant can anticipate receiving payment for its costs should the claim be dismissed, and if not, to allow the defendant to seek security for costs so that the claim does not proceed until the claimant has proven their capacity to comply with an adverse costs order.

- **The Dubai International Arbitration Centre (“DIAC”)**

Article 22 of the 2022 DIAC Arbitration Rules (“2022 DIAC Rules”), which went into effect on March 21, 2022, explicitly states that parties who enter third-party funding arrangements must promptly disclose this fact to all other parties and DIAC, and must disclose whether or not the funder has committed to bear any adverse costs liability. The 2007 DIAC Rules were silent on this matter.

- **The International Centre for Settlement of Investment Disputes (“ICSID”)**

The ICSID 2022 Arbitration Rules (which went into effect on July 1, 2022) (the “2022 ICSID Arbitration Rules”) built on the precedents set by the ICC and VIAC and for the first time addressed the subject of disclosure requirements relating to third-party funding. To prevent conflicts of interest that may result from such financing arrangements, Rule 14 of the 2022 ICSID Arbitration Rules states that disputing parties are required to disclose third-party funding on an ongoing basis (including the name and address of the funder). During the registration of their request for arbitration, or as soon as they reach a third-party funding agreement after registering, the parties must disclose this information. At any point in the proceedings, the tribunal has broad authority to order additional disclosure regarding third-party funders, which may include the funding agreement.

- **Other Institutions**

In contrast to the aforementioned, the 2020 Rules of the London Court of International Arbitration (“LCIA”), which govern a significant number of arbitrations with seats in England and elsewhere, are silent on the subject of disclosure of third-party funding.

Other institutions appear to follow a halfway approach. The 2021 rules of Kuala Lumpur’s Asian International Arbitration Centre do not require parties to disclose the existence of third-party funders, but instead give the tribunal the power to make “necessary enquiries on the existence of third-party funding arrangements, including the third-party funder’s economic interest in the outcome of the arbitral proceedings” as well as the power to

¹⁷ 2018 HKIAC Administered Arbitration Rules | HKIAC. (2023, June 15). 2018 HKIAC Administered Arbitration Rules | HKIAC.

International Journal of Applied Engineering & Technology

direct “the Parties to disclose the existence of such arrangements, as well as any change in circumstances throughout the course of the arbitral proceedings” (as per Article 13.5(e)).¹⁸

The International Bar Association has published Guidelines on Conflicts of Interest in International Arbitration, which have stated since 2014 that given their direct economic interest in the final award, a third-party funder should, for the purposes of conflict checking, be considered as equivalent to a party in the dispute. However, it should be noted that this organisation is not an institution. These recommendations are not legally binding, but they do reflect good international practice.

CONFIDENTIALITY AND FEASIBILITY

A significant quantity of information about the dispute must be disclosed to the potential funder right away. When a claimant presents their case to a potential funder, the funder conducts an in-depth risk analysis, considering not only the likelihood of success and the amount of the potential award but also the finer points like the specific terms of the agreement and any contentions between the parties.

Naturally, this raises the possibility of a breach of the confidentiality of information pertaining to the dispute. The funder will occasionally demand updates on the status of the proceedings as well, which might potentially put sensitive information of the opposing party in serious danger¹⁹.

Though many TPF friendly jurisdictions have laws on it which ensures signing of a NDA by the funder, so that any sensitive information of the party does not get disclosed before any other person. In India, by the amendment of 2019 in the Arbitration and Conciliation Act, 1996 Section 42 has been added which talks about maintenance of confidentiality during the proceedings of arbitration. However this section is applicable on the parties only and as the funder is a non party it has the risk of excluding the funder from its ambit. Thus changes to this section have been suggested in the light of the better mechanism for third party funding in the country.²⁰

FAIRNESS CONSIDERATION

However, third-party funding can raise ethical concerns and may impact the independence and impartiality of the arbitrator. This is because the funder may have a financial interest in the outcome of the arbitration, which may influence the funded party's decisions during the arbitration. This can lead to concerns about the impartiality of the arbitrator and the fairness of the arbitration process.

To address these concerns, many jurisdictions have implemented regulations to govern third-party funding in international arbitration. These regulations often address issues such as the duty to disclose the source of the funds, the funders rights and obligations, and the arbitral tribunal's power to direct disclosures.

One of the key issues in third-party funding in international arbitration is the duty to disclose the source of the funds. In some jurisdictions, such as the United States, there is no requirement for the funded party to disclose the source of their funds. However, in other jurisdictions, such as Australia and Singapore, the funded party is required to disclose the source of their funds to the arbitral tribunal and the other party.

Another area of concern is the rights and obligations of the funder, especially in case of an unfavorable award. In some jurisdictions, such as Hong Kong, the funder is not liable for adverse costs if the funded party is unsuccessful in the arbitration. However, in other jurisdictions, such as the United Kingdom, the funder may be liable for adverse costs if the funded party is unsuccessful.

¹⁸ *ICSID Convention Institution Rules | ICSID*. (n.d.). ICSID Convention Institution Rules | ICSID. <https://icsid.worldbank.org/rules-regulations/convention/icsid-institution-rules>

¹⁹ Kadarisman, A. (2019, October 31). Disclosure Of Third-Party Funding Arrangements and The Existence of Third-Party Funders in International Investment Arbitration. *Indonesian Journal of International Law*, 17(1).

²⁰ Id.

International Journal of Applied Engineering & Technology

The arbitral tribunal also has the power to direct the disclosure of the source of the funds and other information related to the funding arrangement. This power is often exercised to ensure that the funder does not have undue influence on the arbitration and to ensure that the funded party is not using the funding arrangement to engage in frivolous or vexatious claims.

There are also concerns about the enforceability of the funding agreement in some jurisdictions. In some cases, the funding agreement may be unenforceable if it is found to be champerty or against public policy. This can create uncertainty for funders and parties seeking funding.

INDIAN POSITION ON THIRD PARTY FUNDING

In the Indian context there is no specific law with regard to third party funding in arbitration. No special and separate provision has been made in the law governing arbitration in India, i.e. Arbitration and Conciliation Act 1996. Therefore, the Indian position of third-party funding has to be understood with regard to the opinion of the courts concerning it. In innumerable cases the Indian courts have talked about this concept, few of the important cases have been explained below :

*Ram Coomar Coondoo v. Chunder Canto Mookerjee*²¹: In this case the applicability of the internationally valid principle of *Maintenance and Champerty* was discussed as to its application in India. It was held that these doctrines, as they apply in the other nations do not apply to India, therefore indirectly providing a green signal to the concept of third party funding.

The above stand of the privy council has been reiterated by the Indian Supreme Court in *Re: Mr. 'G', A Senior Advocate Of the Supreme Court. v. Unknown, 1954*²²

In the recent case of *A.K. Balaji v. Bar Council of India*²³ the Supreme Court has yet again talked about the third party funding in India and has made a sharp remark by barring any kind of funding from the lawyer of the party as it is in violation of the laws governing the lawyer's conduct in the country.²⁴

In another recent case of *Tomorrow Sales Agency Pvt. Ltd. v SBS Holdings Inc. and Ors*²⁵ by Delhi High Court the following points have been made with regard to the third party funding:

1. A third party in arbitration may be bound by the Arbitral award only if it has been compelled to arbitrate during the arbitral proceedings.
2. The third party should also be a party to the arbitral proceedings, who is neither a signatory to the arbitration agreement nor a party to the arbitral award, merely because it funded a party to the arbitration.

Statutory Provision

For the first time in India, a statutory provision allowing third party funding was made in The Civil Procedure Code, 1908 under Order XXV Rule 1 through state amendment in the state of Maharashtra, Madhya Pradesh, Uttar Pradesh and Gujarat. However there is no central legislation which authorizes the concept of third party funding as of now.

²¹ 1876 SCC OnLine PC 19

²² 1954 (2) BLJR 477, ¶11

²³(2018)3 MLJ470

²⁴ AIR 2018 SC 1382

²⁵ FAO(OS)(COMM) 59/2023 and CM Nos. 14793/2023 & 14794/2023 (Delhi High Court)

Fresh Prospects in India

In 2017, the Report of the High-level committee to review the institutionalization of arbitration mechanisms in India was submitted.²⁶ The judicial committee recommended the following things:

1. The introduction of third-party funding for the promotion of India as an arbitration hub, on par with that of Hong Kong and Paris.
2. The Committee notably pointed out the ambition to push India as a renowned seat in International Arbitration, and the need to incorporate and elaborate on principles such as TPF within the legislation. India's position towards TPF, therefore, has been with regards to its recognition and gradual adaptation into a legislative structure.

Recently, a legal technology start-up called LegalPay has announced plans for launching India's first third-party litigation funding platform. It aims to achieve an internal return of 20-25%.²⁷

CONCLUSION

In conclusion, the research questions need to be addressed.

- The concept of third-party funding is not against the Indian justice system. As the tenets of the Indian justice system believe in providing access to justice to all the citizens without any discrimination. The concept of TPF transaction put the financially disadvantaged party at the same level as the other party so that it can also take advantage of Arbitration and get its disputes solved outside the court in an expeditious manner.
- India needs a robust law for the regulation of Third-Party Funding transactions. India with time has become a very arbitration friendly country. It has amended its law that governs arbitration multiple times in the recent past in order to provide ease with which arbitration be conducted. India is also aiming at making its arbitration law at par with the international standards. The other arbitration friendly jurisdictions have started to make laws for Third party funding and therefore, India to be at par with the other countries, needs a law of its own on the subject.

SUGGESTIONS

The TPF transactions for the very basis of the justice delivery system and therefore can not be considered just champertous in nature. As seen from above, no legislation exists to regulate this type of transaction and therefore the following are the suggestions that the researcher would like to make:

1. Making legislation to govern and regulate third party funding transactions, where the parties are asked to clearly disclose any third party funding among other things which make this transaction more transparent.
2. A precise definition of the term "Third party funding" is necessary which would clearly explain which kind of transaction falls into its ambit and which are excluded from its scope.
3. Another suggestion for the legal framework in India to govern the TPF transactions is to put a cap on the funding by a third party in arbitration

Over the past decade, Third Party Funding has gained significant traction in the field of International Arbitration. This can be attributed to various factors, including the rising costs of complex disputes, the desire for risk mitigation, and the increased awareness and acceptance of TPF among practitioners and arbitral institutions. TPF has proven particularly attractive for cash-strapped claimants who will make the necessary resources to pursue costly international arbitration proceedings.

²⁶ Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India.

²⁷ Third-Party Funding: The Next Step for Arbitration in India. (2022, April 1). NLS BLR.

International Journal of Applied Engineering & Technology

Many jurisdictions and arbitral institutions have taken steps to address the ethical and legal concerns associated with TPF. For instance, guidelines and regulations have been developed to ensure transparency, disclosure, and fairness in the funding process. Furthermore, some jurisdictions have enacted legislation explicitly recognizing and regulating in TPF, providing parties with additional certainty and protection.

While TPF has its advantages, it also presents challenges and potential drawbacks. Critics argue that TPF may lead to increased costs, conflicts of interest, and excessive control by funders over the proceedings. There are ongoing debates regarding the level of disclosure required and the impact of TPF on the independence and impartiality of arbitrators.

The current state of TPF in international arbitration is marked by its growing acceptance and the development of guidelines and regulations. TPF has become an important tool for parties seeking financial support to pursue complex international disputes. However, challenges remain, and ongoing discussions are necessary to strike the right balance between promoting access to justice and safeguarding the integrity of the arbitration process.

In conclusion, third-party funding has emerged as a significant aspect of International Arbitration, bringing both advantages and challenges to the dispute resolution process.

The rights and obligations of funders were another crucial aspect explored in this article.

We examined how these concerns are addressed and mitigated through contractual provisions and risk assessment. The enforcement of the funding agreement, the protection of confidential information, and the practical implications of Third-Party Funding requires careful attention and a robust legal framework.

Finally, fairness considerations were at the forefront of our analysis.