INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

www.ijlra.com

ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

THIRD PARTY FUNDING IN ARBITRATION IN INDIA

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Introduction

As a result of the rapid developments in international trade and business, the manner in which we solve disputes has changed significantly and arbitration is an increasingly popular form of resolving business disputes. In India, the customary practices have evolved as arbitration offers flexibility as compared to attending court. It enables the parties to have greater control, is neutral, keeps it confidential and is more enforceable in other countries due to international treaties such as the New York Convention of 1958. This has seen the practice of arbitration evolve in India with a view of transforming the country into a global arbitration hub.

In this regard, a new concept of resolving conflict has been introduced, namely Third-Party Funding (TPF). TPF occurs when an outside third party, who is not interested in the dispute, offers to cover a portion or all of the litigation expenses of one party. On their part, in case of a successful case they will be given a portion of the money that will be awarded. TPF also assists firms to deal with risks by enabling them to use their funds wisely and also minimize their exposure to court battles.

In India, the Third-Party Funding is neither clear nor defined. TPF is not explicitly forbidden by the law in India. Indeed, previous judicial rulings have permitted certain forms of funding arrangement provided they are not exploiting anybody or contravening the policy of the people. In the case of Ram Coomar Coondoo v. Chunder Canto Mookerjee, Privy Council acknowledged that the law in India does not consider champerty agreement as illegal unless it is unfair when it is made. It is a less stringent approach in contrast to the rigid common law prohibitions against it.

In a recent case by the Supreme Court of India, Bar Council of India v. A. K. Balaji, it was stated that there is no regulation against individuals not attorneys paying money to get a case represented and receive the benefits of that case provided that they abide by some professional and ethical standards. Nevertheless, the issue of external funding of arbitration has not been addressed by the legislation completely, causing certain significant issues.

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Major Features and Characteristics of the funding by a third party.

There are certain unique characteristics of Third-Party Funding (TPF), which enables it to be an outstanding mechanism compared with a conventional way of finance and places it in the context of dispute resolution. Such features outline its operational framework, legal implication, and an increasing usefulness in arbitration, especially in the high-value business conflicts.

Non-Recourse is one of the most basic characteristics of Third-Party Funding. In a standard TPF arrangement, the investor will only recoup their investment upon the outcome of the claim, i.e. if the case is lost the party being financed can avoid repaying the financing, which diminishes the financial risk the claimant bears, which facilitates access to justice.[1]

Funder control and involvement is an important characteristic of Third-Party Funding. Though the funders are not interested or generally have direct control over the behavior of the arbitration process, they might aim at influencing the strategic decisions especially in case there is immense financial investment in the process. The level of funder involvement will therefore be negotiated and controlled in most cases under contractual terms.[2]

Another important characteristic of Third-Party funding is confidentiality. Most arbitration processes are usually confidential and information regarding the third party funder will require disclosure of sensitive information in order to conduct due diligence and monitor the case; this may pose risks to confidentiality, where suitable measures and requirements of contracts must be taken to ensure that the information is not disclosed illegally.[3]

Third-Party Funding is also flexible and adaptable. The funding agreement could be standardized to meet the particular needs of the parties such as the degree of funding, degree of return structure, and the degree of funder participations.

These features in the Indian context work in a very unregulated system, since there is no broad legislation working on Third-Party Funding in arbitration. The appreciation of funding guidelines based on Ram Coomar Coondoo v. Chunder Canto Mookerjee and Bar Council of India v. A.K. Balaji suggests that they take a lax stance but no clear guidelines exist so that a number of questions remain unanswered.

Therefore, the main aspects and peculiarities of Third-Party Funding reveal the two-sided character of this phenomenon as a tool of improving the access to justice and the possible problem with legal and ethical issues. These features are critical in understanding the role of

[1] William W. Park, Arbitration of International Business Disputes 345 (Oxford University Press, 2012).
[2] Gary B. Born, International Commercial Arbitration 295 (Kluwer Law International, 2014).
[3] Victoria Shannon Sahani, "Reshaping Third-Party Funding" 66 UCLA Law Review 1 (2018).

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TPF in arbitration and how to come up with a relevant regulatory framework that creates sufficient safeguards against its benefits.[4]

Legal Position of Third-Party Funding in India

Judicial Approach towards Third-Party Funding in India

The judicial attitude to Third-Party Funding (TPF) in India is characterised by a conservative but open-minded approach mostly based on judicial interpretation over an intensively regulated statutory framework. In contrast to a number of jurisdictions that TPF is explicitly regulated by law or by institutional norms, the Indian legal tradition has justified the problem through case law, especially in regards to the theory of maintenance and champerty. Judiciary has been a key factor in setting out the boundaries of acceptable funding systems, balancing both issues related to public policy as well as the obligation to guarantee access to justice.

Indian courts have always been aware of this principle and they have decided to give validity to those funding arrangements which do not conflict with the administration of justice. Courts, in a number of decisions, have stressed the fact that the presence of a third party in financing a litigation does not even make the agreement unlawful provided that it does not constitute an abuse of the process or even encourages wanton litigation.

In addition, although the courts have mostly taken a lax approach when it comes to TPF in lawsuits, there is equally very little jurisprudence on the precise application to arbitration. Since arbitration is a private dispute resolution system with a very special qualitative feature, the concern about confidentiality, independence of arbitrators and procedural fairness turn out to be more important. The fact that these aspects lack judicial guidance illustrates the necessity to follow a more systematic and logical approach.[5]

To sum up, judicial approach to Third-Party Funding in India shows the progressive change in viewing it with skepticism to conditional acceptance. Courts have both recognized that TPF assists in achieving access to justice and at the same time the necessity to avert abuse and safeguard the interests of public policy. Nevertheless, this has caused a certain level of uncertainty since the interpretation of the law through a judicial system has been applied by not having an elaborate statutory framework. This highlights why there is a need to legislature or institutionalize issues to create a clear guideline on how Third-Party Funding in arbitration

[4] Redfern and Hunter, Law and Practice of International Commercial Arbitration 520 (Oxford University Press, 6th edn., 2015).
[5] Redfern and Hunter, Law and Practice of International Commercial Arbitration 85 (Oxford University Press, 6th edn., 2015).

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should be used in order to ensure that in addition to ensuring its effective use this does not compromise the integrity of the arbitral process.

Applicability of Third-party Funding by Indian Law.

The common law does not specifically state what rules apply to Third-Party Funding (TPF) in Indian law. Instead, it is based on a mix of laws made by government, court rulings, and different aspects of contract and public law. Even though there isn't a specific law about TPF in India, the legal system does not prevent these types of arrangements, so they can operate with certain limits. Whether TPF is allowed in India should be understood by examining legal principles, laws written by the legislature, and court interpretations.

First, it's important to note that Indian law does not specifically address Third-Party Funding in arbitration or legal cases on a national level. However, the absence of a ban means that such arrangements can be seen as acceptable as long as they follow general legal principles. The importance of TPF is grounded in the idea of freedom of contract, recognized in the Indian Contract Act of 1872, which allows parties to create agreements as long as they are fair and not making unfair demands or breaking any laws.

In the 1996 Arbitration and Conciliation Act, there are no particular regulations regarding Third-Party Funding of arbitration. Nevertheless, the key concepts of this law, which include letting parties make their own decisions, not becoming overly intruded by judges, and having flexible processes, puts a good environment in which Third-Party Funding can be utilized. Arbitration contracts are similar to ordinary contracts, and the parties can normally establish their fund arrangements, such as the Third-Party Funding, provided that they do not violate any laws.

Moreover, the use of third-party funding brings up issues regarding confidentiality and legal protections because when a funder steps in, it usually means that sensitive information has to be shared. If there are no clear legal rules in place, this can lead to problems. that such divulging might undermine secrecy of arbitral proceedings.[6]

Therefore, on the one hand, Third-Party Funding has not been prohibited according to the Indian law, but on the other hand, its use is controlled by a patchwork and dynamic set of laws. The overall analysis of judicial precedents, contract principles, and a few statutory provisions is that TPF is approached with caution, yet is reflective of major gaps and uncertainties as well.

[6] Russell on Arbitration, Russell on Arbitration 60 (Sweet & Maxwell, London, 24th edn., 2015).

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In sum, Indian law defines the applicability of Third-Party Funding by being permissible with no detailed regulation. Although TPF can be used in accordance with the current principles of law, a lack of a comprehensive regulatory framework brings difficulties to the provision of transparency, fairness, and accountability. This shows the necessity of legislative or institutional reform to establish a clear definition of scope and practice of TPF in arbitration to streamline Indian practice in line with international business practices and to increase the legitimacy of the arbitration system.

Existing embodiments of gaps in Indian legal framework.

The Indian legal system despite increased applicability of Third-Party Funding (TPF) in litigation and arbitration, still displays some serious gaps and ambiguity in the way such arrangements can be governed. Although there is indication of a lax attitude towards TPF by judicial pronouncements, and inclusion of minimal statutory provisions, the lack of a comprehensive and uniform regulatory regime creates confusion and questions the proper operation of the funding mechanisms of the Indian dispute resolution system.[7]

Funder control and influence also has been too poorly regulated. No clear requirements define how much funders can be involved and affect the outcome of the arbitral proceedings, which begs the question of the independence of the party being funded and the quality of the litigation process, as too much control over funders can distort litigation strategy or settlement decision. Regulatory protection with respect to this does not exist, which has the potential to abuse and compromise trust in the arbitral system.[8]

In addition, the lack of particular regulations on TPF in arbitration poses a threat to the vision of making India a world arbitration center. Since most international arbitration is now to be funded through mechanisms, absence of any definite regulatory structure can make foreign investors and parties reluctant to select India as a seat of arbitration.[9]

Indian courts have been crucial in figuring out what is legal and what isn't when it comes to funding from outside sources in India. The following court cases explain the legal status of third-party funding, maintenance and champerty, lawyer funding, and the responsibility of third-party funders in India.

[7] Gary B. Born, International Commercial Arbitration 210 (Kluwer Law International, 2nd edn., 2014).
[8] O.P. Malhotra and Indu Malhotra, The Law and Practice of Arbitration and Conciliation 120 (LexisNexis, New Delhi, 4th edn., 2012).
[9] Nick Rowles-Davies, Third Party Litigation Funding 95 (Oxford University Press, Oxford, 2014).

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1. Ram Coomar Coondoo v. Chunder Canto Mookerjee (1876).

It is one of the initial and most important cases regarding third-party funding in India. The Privy Council was also inquiring on the validity of champerties agreements and they concluded that such agreements are not necessarily illegal in India. The court ruled that champerty contracts are not unacceptable except when they entail unfair practice or contrary to the morals of the people. The court also noted that such agreements may be required in India to help those who were incapable of covering the cost of legal services. The case established a precedent towards acknowledging the legality of third-party funding in India.

2. Laxmi Narayan v. Official Receiver (1930).

The court in this case decided that the champerty agreement is not considered invalid in India, unless unreasonable or against the interests of the people. The court admitted that third-party funding agreement can be considered valid in case it is signed with a good purpose and is not exploitative. This case also reaffirmed the legality of third-party funding agreements in India.

3. Re: G, A senior Advocate of the Supreme Court (1954).

In this instance the Supreme Court examined the issue of lawyer financing and ethics. The court decided that lawyers are not supposed to enter into agreements where they pay lawyers to handle a legal case in order to share a part of the victory as it is a conflict of interest and it is unprofessional. The case is important in the context of the restriction on lawyers who are third party funders.

4. Bar Council of India v. A. K. Balaji (2018)

In this case, the Supreme Court of India explicated the regulations regarding third party funding in India. According to the court, third party funding is permissible in India. Nevertheless, lawyers are not able to finance law suits on behalf of their clients since it may result in trouble and be unethical. The court ruled that non-lawyers can fund without any problems.

5. Sales Agency Pvt Ltd v. SBS Holdings Inc (2023) tomorrow Sales.

In this new case, the Delhi High Court considered the question of whether a third party funder may be held liable to an arbitration decision. The court argued that a third party funder does not have any role in the arbitration contract, but is simply a source of money. As such, the funder does not bear responsibility of the outcome of arbitration, unless he or she has assumed control of the arbitration process. This case clarified the way in which third party funders are

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liable in India.

6. Nuthaki Venkataswami v. Katta Nagi Reddy (1962).

In this instance, the court ruled that the champerty agreements are permissible in India provided that they are not unreasonable and unfair. The court recognised that the contracts of third party funding may be legitimate provided they are fair and reasonable. The case affirmed the legal position on champerty agreements in India.

7. Radhey Shyam v. Chhabi Nath (2015)

In this case, the Supreme Court discussed the powers held by courts in seeking security of costs according to the Civil Procedure Code. This case is significant to third party funding since courts may seek security on third party funders costs.

Comparative Analysis and Regulatory Framework

Third-Party Funding in the United Kingdom

Trying to reconcile the business interests of financers and the necessity to maintain the autonomy of parties and the integrity of the dispute resolution process, this approach attempts to balance these two perspectives.

Another important aspect of the UK framework is the approach to cost liability and the "Arkin principle". According to the law using this principle, judicial precedent of liability a third-party funder can have the costs of a third party payable damages, but only within the scope of the funding involved. This capped liability is a measure of middle ground, in that the funders would not be entirely held liable; however, neither put them in an unquantified exposure.

UK has also been on the frontline in appreciating the use of Third-Party Funding in international arbitration. London, a leading world arbitration centre, has experienced widespread application of TPF in commercial disputes of high values. Lack of strict statutory limitations has enabled the funding industry to thrive giving parties more freedom to take control of costs arising out of arbitration. Concurrently, UK-based arbitral institutions and practitioners have placed greater prominence on the need to disclose and manage conflicts to resolve issues that emerge as a result of funders involvement.

Comparatively, UK model can serve as an important lesson to other jurisdictions like India. Its focus on self control, judicial control and work principles is an even footing of a system which prevents access to justice whilst upholding integrity on dispute resolution processes. This fact that TPF is an acceptable and useful practice along with the mechanisms concerning the risks

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mitigation shows how a jurisdiction can easily incorporate funding into its legal frameworks [Nick Rowles-Davies, Third Party Litigation Funding 130 (Oxford University Press, 2014).

Third-Party Funding in Singapore

Singapore has emerged as an arbitration hub in Asia and a groundbreaking jurisdiction in respect of the Third-Party Funding (TPF). It takes a comprehensive approach towards TPF that indicates a healthy gap between the provision of access to justice and the correctness of the dispute resolution processes. Through the use of legislation, institutionalization and moral control Singapore has established a well-structured and proactive system and this has been a significant source of development of its arbitration ecosystem.

Previously Singapore also was subject to maintenance and champerty, which restricted intervention by a third party in the litigation process, the doctrines of most common law jurisdictions. Such notions were founded on the apprehension of law system abuse and monetising of wars. However, with the world getting smaller, in the way of business; and arbitration becoming steadily costly; Singapore knew that it was high time to re-evaluate its legal framework to permit the notion of Third-Party Funding as a justifiable approach to funding.

Among such changes, the introduction of the Civil Law (Amendment) Act of 2017, formally abolishing the tort of maintenance and champerty in Singapore, and allowing Third-Party Funding of some types of disputes, is one such change. The policy change with this legislative reform was a major step forward towards establishing Singapore as an environmentally competitive and arbitration-friendly location. The Act particularly permits TPF in international arbitration disputes and in other procedures related to the area of arbitration like court proceedings in connection with arbitration e.g. award enforcement and setting aside.

The Civil Law (Third-Party Funding) Regulations, 2017, justify the suggested introduction of TPF in Singapore to improve a better comprehension of the variety and operation of funding regimes. According to these rules, TPF is entitled to various proceedings, and such conditions of funders are fixed, including the condition of a financial capacity and business activity. The rules will eliminate unrealistic and unsound enough funders; this is achieved by setting minimum qualification of those who are eligible to be in the funding market.

Recommendations and Conclusion

Proposed Model for TPF Regulation in India

An all-encompassing regulatory framework on Third-Party Funding (TPF) in India should start

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off with a distinct statutory acknowledgment. This can either be achieved by appropriate amendments to the Arbitration and Conciliation Act, 1996 or otherwise by another piece of legislation that is specially drafted to address TPF. This must be a framework that would help to establish what is meant by Third-Party Funding, it would help to identify that funding agreements are enforceable and the rights and duties of the funders and fund receivers. Establishing a common legal framework under which TPF will be operating in arbitration by ensuring the state of law will eradicate uncertainty and create a legal basis on which legal proceedings can proceed.

The fact that the obligatory disclosure regime is implemented is a significant aspect of the suggested model. Both sides should be compelled to disclose the fact that there is a funding arrangement in place, and the name of a funder where litigation by arbitral means is being undertaken. The model also proposes that there should be some form of a control or monitoring mechanism established to control the activities of the third party funders. This could be in the form of a regulatory institution or through a self-governing system aided by a code of conduct. A system like this would have the responsibility of registering funders, ensuring observance of financial and ethical practices, and grievance management. Accountability through regulatory control would ensure accountability and feelings of safety by stakeholders in funding ecosystem.

Conclusion

Third-Party Funding (TPF) is a pivotal point in the history of arbitration as it is viewed as the increase in the overlap of the spheres of finances and the settlement of conflicts. This study has revealed that TPF could transform the face of arbitration by making it more accessible to justice, risk management, and efficiency in settling disputes. By removing the arbitration cost to their parties, particularly into the hands of the weak financially crippled, TPF will facilitate their ability to proceed with claimable claims, as well as participate in the arbitration process fully.

At the same time, the paper also provides to indicate the fact that implementing the concept of the Third-Party Funding in arbitration is not achieved only easily. Problems of fairness, confidentiality, impartiality, control by the funder, and disclosure present complicated issues, which could rate arbitral proceedings as integrity issues in case of unregulation. The participation of external financial parties brings new dynamics to the situation, which must be carefully managed to maintain the main principles of arbitration.

By making comparative analysis of jurisdictions like the United Kingdom, Singapore, and

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Hong Kong, it is possible to prove that regulating TPF is not only achievable but effective as well. The mechanisms used to achieve this balance between the benefits of funding and risk containment of the attendant risks have proven effective in these jurisdictions, and the main measures have been to provide mandatory disclosure, control funder behavior and institutional regulation. The necessity to be clear and ethical also increase the need to maintain the integrity of the arbitration process with international codes.

The major argument of the provided work is that there is no chance to co-exist the Third-Party Funding, the values of fairness, confidentiality, and impartiality in arbitration in case of the lack of the regulation. Despite TPF being deemed as a desirable and required mechanism in the present dispute resolving realm, uncontrolled use of the specified approach poses more risks, which are likely to restrict the legitimacy of arbitral processes.