



THIRD PARTY FUNDING FOR ARBITRATION IN INDIA

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Abstract

Third Party Funding in Arbitration is the need of the hour in India,, because of increasing fears of Insolvency and Bankruptcy Code 2016 (IBC) as well as sudden eruption of financial problems due to Covid-19, to different business segments. In this Research Paper, an attempt have been done to analyse the research questions, research hypothesis, research methods, public policy of India, Third Party Funding legislations in the some prominent international centres of arbitration and hence concluding the necessity to legislate Third Party Funding for Arbitration in India, to become a prominent entre of arbitration..

Keywords: *Arbitration, Third Party Funding (TPF), Third Party Funder, Arbitration And Conciliation Act 1996, Necessity To Legislate*



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INTRODUCTION

Third party funding (TPF) is designed to support companies that do not have the means to pursue claims, its use has broadened to the extent that it has become a feature of the litigation a well as arbitration landscape in several jurisdictions. The concept of third-party funding means that an unrelated/ non-beneficiary third party funds a litigation / arbitration proceeding in exchange for a profitable return out of the court decree or award.

SUB HEADINGS

- Research Questions
- Hypothesis
- Hypothesis Adopted
- Research Methods

- Evolution Of Concept
- Definition Of Third Party Funding
- Definition Of Third Party Funder
- Regulation Of Third Party Funding In International Arena
- Necessity To Legislate Third Party Funding In India
- Section 34 In The Arbitration And Conciliation Act, 1996
Vis-A-Vis Public Policy Of India
- Third Party Funding In Epc And Insurance Sector
- Case Laws
- Conclusion
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RESEARCH QUESTIONS

- What is Third Party Funding for arbitration?
- What are the impacts of TPF to arbitration?
- Does third party funding violate the established legal principles or public policy in India?
- Why and how may Arbitration TPF be legalized in India, as in Australia, USA, UK etc.

HYPOTHESIS

Third party funding (TPF) is designed to support companies that do not have the means to pursue Arbitration claims.

HYPOTHESIS ADOPTED

- Simple Hypothesis: In this the Independent variable is Arbitration Claim and Dependent Variable is Funds Requirements, to pursue the claim.
- Existential Hypothesis: It is need based depending upon the financial position or budget of the party, intending to pursue the arbitration proceedings.

RESEARCH METHODS

- Fundamental Research
- Doctrinal Research
- Descriptive Research
- Qualitative Research

- Case Laws

DEVELOPMENT OF CONCEPT

- Historically, third parties were prohibited from funding an unconnected party's litigation under the doctrines of maintenance and champerty under the English law.
- Maintenance essentially means the involvement of unrelated third parties to a dispute in which neither are they direct beneficiaries nor do they have any locus.
- Champerty, considered as an aggravated form of maintenance, means an agreement which divides litigation proceeds between the litigator and an unrelated third party who helps enforce the claim.
- In modern times, the rule against champerty and maintenance was based on the public policy ground of protecting the purity of justice.

DEFINITION OF THIRD PARTY FUNDING

ICCA-QMUL Task Force Report, define Third Party Funding as

The term “third-party funding” refers to 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.

DEFINITION OF THIRD PARTY FUNDER

ICCA-QMUL Task Force Report, define Third Party Funder as

The term “third-party funder” refers to any natural or legal person who is not a party to the dispute but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:

- a) in order to provide material support for or 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.

REGULATION OF THIRD PARTY FUNDING IN INTERNATIONAL ARENA

- The new 2021 ICC Rules of Arbitration, from 1 January 2021, explicitly refer to TPF and include at Article 11(7) a new requirement for parties to disclose any TPF arrangements so that any potential conflicts of interest can be identified and managed.
- In 2017, Singapore liberalised its approach to TPF, by abolishing the tort of maintenance and champerty and expressly legalising TPF in relation to international arbitration proceedings, as well as for related court and mediation proceedings
- Law Reform Commission, Hong Kong enacted the Arbitration and Mediation Ordinance 2017, which now permits TPF of arbitration.
- In Australia, TPF has been recognised at the federal level and maintenance and champerty have been abolished in some states
- England and Wales now recognises TPF , but does not subject it to a formal regulatory framework.
- In USA, the TPF remains regulated only at the state level.
- India, the Arbitration and Conciliation (Amendment) Act 2015 and its 2019 amendment neither regulate nor prohibit TPF.
- In the French legal system, TPF is largely unregulated and has only been addressed by arbitral bodies, including the International Chamber of Commerce (ICC) International Court of Arbitration etc.

NECESSITY TO LEGISLATE THIRD PARTY FUNDING IN INDIA

- India's emergence as one of the top five economies in the world made it one of the most preferred destinations for foreign investment in recent years.
- The practicalities associated with implementing TPF mechanisms into and outside India, could also involve an examination of the Foreign Exchange Management Act, 1999 ('FEMA') and rules and regulations thereunder.
- One can therefore hope that the government proactively engages with stakeholders on evolving a robust mechanism to support the TPF infrastructure in India and eliminate the ambiguities associated with this concept in the current regulatory environment.

SECTION 34 IN THE ARBITRATION AND CONCILIATION ACT, 1996

VIS-A-VIS PUBLIC POLICY OF INDIA

Application for setting aside arbitral award

(2) An arbitral award may be set aside by the Court only if

(b) the Court finds that

(ii) the arbitral award is in conflict with the public policy of India.

Public policy of India Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

THIRD PARTY FUNDING IN ENGINEERING, PROCUREMENT AND CONSTRUCTION (EPC) AND INSURANCE SECTOR

- Insolvency and Bankruptcy Code 2016 (IBC) has necessitated the Engineering, Procurement and Construction (EPC) sector to resolve their litigation claims for two reasons: a) they are tedious and not resolved in the short term, thereby affecting short-term liquidity; b) the threat of the corporate insolvency resolution process (CIRP) in the event of an ineffective claim.
- The recovery of insurance claims has significant elements of uncertainty for both insurers and insured. Third-party funding can assume a pivotal role in such cases as the insured can receive funding collateralised by the insurance pay-out if successful.

CASE LAWS

- **The Privy Council** : In **Ram Coomar Condoo v Chunder Canto Mukherjee** as well as in **Raja Rai Bhagawat Dayal Singh v Debi Dayal Sahu**, held that English law of maintenance and champerty was inapplicable in India.
- **Supreme Court of India** : In **B. Sunitha V. State of Telengana**, observed that a personal interest in the outcome of proceedings by the advocate is unacceptable and the agreements on contingency fee are prohibited in law where an advocate is a party.

- **Supreme Court of India** : In **Bar Council Of India v AK Balaji**, reaffirmed the lawful admissibility of non-lawyer third party funding litigation and recouping the due amount after the outcome of the dispute.
- **Bombay High Court** : In **Jayaswal Ashoka Infrastructure (P) Ltd. v Pansare Lawad Sallagar** held that law graduates may engage in the business of litigation finance, provided they are not advocates registered under the Advocates Act 1961.
- **TPF Agreements** : Cash constrained Indian companies namely **Hindustan Construction Company** and **Patel Engineering Ltd.** have already secured financing solutions for their portfolio of arbitration claims with **NHAI etc..**

CONCLUSION

- India does not have any deterrents by way of statutory provisions barring third-party funding from entering into the commercial market. As long as third-party funding contracts are not opposed to public policy or in any capacity unlawful, India should manage third-party funding by following different models set by leading jurisdictions in arbitration.
- The Report of High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India stated that:
- 'The enactment of supporting legislation has contributed significantly towards the growth of these jurisdictions as arbitration hubs. For instance, Singapore has recently passed amendments to its Civil Law Act legalising third party funding for arbitration and associated proceedings. Similarly, Hong Kong recently legalised third party funding for arbitrations and mediations. The Paris Bar Council has also indicated its support for third party funding.'

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