THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION – AN INDIAN CONTEXT

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KEY WORDS

Third party funding, International Arbitration, and India

ABSTRACT

This article discussesthe concept of third party funding in the context of international arbitration. After a general description of what third party funding is and how it works, the article examines the possible implications that the various principles of third party funding such as the conflict of interest, confidentiality, the control of arbitral proceedings may have on the impartiality and independence of the arbitral proceedings. Since the involvement of a third-party funder may create different situations of conflict of interest for the arbitrators, which in turn may affect the entire arbitral proceedings and the final award, the article suggests that the disclosure of the existence of a third-party funder in arbitration is an essential step to safeguard the fairness and transparency of the arbitral process. The article then discusses the various dispute funding models such as the insurance of disputes corporate financing and the sale of claims. Further the article briefly discusses the various jurisdictions, which recognized the idea of third party funding. The article then evaluates as to whether third party funding should be given statutory recognition in India or not? Finally, the article concludes by suggesting that third party funding should be adopted in India.

INTRODUCTION

With the increase in the cross-country trade and business, the need for effective dispute resolution mechanism is also increasing. To this end, international arbitration is a popular choice, leading to an exponential growth in the use of this mechanism.[1] Parallel to this growth, the costs associated with submitting a dispute to the international arbitration are also increasing. A considerable number of parties in international arbitration, whether engulfed in financial difficulties or otherwise are now exploring the possible alternative routes to pay these increased costs.[2] Third party funding (TPF) is one such possibility.

TPF is a financing method or arrangement whereby an entity that is not a party to a dispute and the arbitral proceedings arising therefrom, finances all or part of the expenses incurred by one of the parties to the arbitral proceedings in anticipation of making a profit.[3] If the funded party is the claimant, then the funder contracts to receive a percentage of the proceeds if the claimant wins the case. In contrast, if the

[1] Report of the ICCA-Queen Mary Task Force on Third-PartyFunding in International Arbitration https://www.arbitrationicca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf Last Accessed on 6[Th] January 2019.
[2] Supra 1
[3] Supra 1

funded party is the defendant, the funder can contract to receive a predetermined payment from the defendant and also the agreement might include an extra payment to the funder if the defendant wins the case. Conventionally, TPF is offered on a non-recourse basis, that is, the funder has no recourse against the funded party if he loses the case. In other words, unlike a loan, the funder's recourse for the repayment of the funded amount is limited only to the claims awarded by the arbitral tribunal if any.
The third party funder could be a bank, hedge fund, insurance company, an individual or a corporation.[4]

In the recent years, the demand for TPF is sharply increasing. The main forces for such increase are, first, the increasing need for accessing justice. A simple example to demonstrate this could be that there is a mid-size company (the claimant) has been wronged by a much larger corporation and is faced with the decision as to whether to spend its capital on pursuing the arbitration or allocating the capital to it business operations. Further, if it decides to self-fund the arbitration, it is likely to be outmatched in resources as against its opponent. But if the claimant opts for TPF then it allows the claimant to grow its business while pursuing the action in a manner that poses no cash flow risk. [5] Second, companies and individuals seeking a means to pursue meritorious claims along with maintaining sufficient cash flows to continue conducting their businesses. Lastly, the worldwide market turmoil and uncertainty has inspired investors to look into other investment options that are not directly linked to or affected by the financial markets. Each arbitration matter is a discrete investment and is independent of the market conditions. This independence dodges the third party funder's investment and the potential profit that can be accrued from the general uncertainty that prevails in the financial markets.[6]
In the past few years' international market has seen a tremendous increase in the TPF agreements owing to which the markets are becoming increasingly competitive. In order to sustain the increasing competition funders are seeking to differentiate themselves and offer alternative applications for their investment. For instance, in addition to financing the legal costs funders are also willing to provide working capital for the claimant's companies/businesses during the lifetime of the arbitration proceedings. In other words, a claim holder along with raising funds for arbitral proceedings can also use the claim as an asset in order to raise capital for its business.

TPF like any other mechanism has its own advantages and disadvantages and these have been discussed below.

It has several advantages, which will explain the current attention given to TPF in international arbitration.

- Access to justice by providing the parties the financial assistance, which is otherwise unavailable, to them. In the case of *Arkin*

[4] University of California and Los Angles Law Review, Edition 63, 2016. Author Victoria Shannon Sahani

[5] Third Party Litigation Funding by Nicholas Rowles Davies page number 63-64

[6] University of California and Los Angles Law Review, Edition 63, 2016. Author Victoria Shannon Sahani

v. Borchard Lines[7]the court upheld the use of TPF and also reiterated that access to justice is a key benefit of TPF.

- TPF is a way to manage the financial risk that is usually associated with bringing or defending a claim of arbitration. This is so because the financial burden i.e. the liability of the costs or the consequences of failure to arbitration is shared with the funder.
- Funder's due diligence and assessment of the case provides an objective appraisal of the claim along with dissuading frivolous and vexatious claims, if any.
- Subject to the terms of the funding agreement, the funder can bring in additional professional expertise to assist the party in deciding the arbitrators and the legal counsel that is going represent them.[8]

Besides the advantages, several objections have been raised for the use of TPF in international arbitration and the same is being discussed below:

- The interest of the funder might not be same as that of the funded party and party might want to pursue a different strategy, which the funder might refuse to finance.
- The funder has an advantage through economic power and may take an advantage by including clauses, which might be a detriment to the party.
- Subject to the terms of the funding agreement, the funder with their professional expertise might insist on participating in day-to-day issues (includes the selection of the arbitrators as well) of the arbitral proceedings. The problem with such interference could be that as a funder his decisions could be influenced by financial considerations, rather than legal constructs.[9]
- Subject to the terms of the funding agreement, the funder might insist upon the attorney of the funded party to act in the fiduciary capacity for not only the funded party but also for himself. This could result in a conflict of duties for the attorney if he is to work for both the parties.

As there are no regulations, governing TPF in international arbitration there is widespread skepticism with respect to certain aspects that are involved in the process of third party funding. These aspects are identified as control, confidentiality/privilege, disclosure, and conflict of interest.

Control

One of the major concerns expressed by the members of the international legal community about TPF is the funded party's autonomy to make decisions. This is so because it often regarded that the funder will take control over the arbitral proceedings and the party's decision-making process. For instance, when and at what level to settle a claim. This discussion is also important because the legality of the funding agreement is dependent on who has the control, mainly in the common law jurisdiction where the doctrines of champerty and maintenance still exist.

[7]Arkin v. Borchard Lines (2005) EWCA Civ 655

[8]Third Party Funding In International Arbitration – Issues and Challenges in Asian Jurisdiction by RamaniGarimella

[9]Third Party Funding In International Arbitration – Issues and Challenges in Asian Jurisdiction by RamaniGarimella

Related to the issue of control the first question that needs to be answered is how actively does the funder seeks to interfere in the process and monitor his investment. The answer varies from funder to funder and is also largely dependent on the funding agreement but at a minimum, the funder will require a report on the progress of the case and updates on any significant developments of the case this also includes an offer to settle the matter. In some instances, the funder might take an active role this is to say that the funder might involve in planning the legal strategy and attending the client meetings etc.

However, it should be noted, that a TPF agreement is not an unconditional arrangement to provide funding until the conclusion of the case. There are provisions in the agreement with respect to funding being dependent upon the merits of the case and compliance with the terms of the funding agreement. Breach of the agreement or fundamental change in the likelihood of success may entitle the funder to terminate the agreement. And in cases of serious breach of the funding agreement, the funder might have other recourses for the amount invested. Though these kinds of terms in agreement might not amount to direct control but may act as an indirect control. Furthermore, if the funded party is completely dependent on the funder for financing the arbitration proceedings, the possibility of the withdrawal of funding may amount to powerful indirect control.

But in reality, the vast majority of the funding agreements are structured carefully to ensure that the funder does not have the control over the case or the funded party.

Confidentiality / Privilege

In order for a party to obtain funding, it is necessary for him to share certain confidential and occasionally highly sensitive information with prospective funders. It is important for the party sharing such information to ensure that the information is secure and privileged. So it is important for parties to navigate the process of information sharing with utmost care by minimizing the risk of waiving privileged information. Usually, parties enter into non-disclosure agreements before sharing any information with the other parties. However, drafting standard regulations by international arbitration institutions with respect to sharing confidential information with funders is much needed.

Disclosure and Conflict of Interest

When a party enters into a TPF agreement as result of such agreement there might arise the issue of conflict of interest (whether actual, potential or perceived). The three possible conflict of interest situations that are identified are between the funder and the funded party. Second between the funder and the funded party's attorney and third is between the funder and the arbitrator.

While the majority of funded cases proceed smoothly with an aligned interest between the funder and the funded party there can be a possibility for conflict of interest at some stage. For instance, the funded party wants to settle for an amount but the funder might perceive as insufficient in comparison with the investment made and the vice versa. Similarly, issues where their budget overrun or merits of the case are deteriorated as a result of the discovery of new evidence by the opponent can create situations where the interest of the funded party might diverge from that of the funder.

In reality the relationship between the funder and the funded party's attorney often go deeper, that is to say, that party might have entered into a funding arrangement as a result of the attorney introduction and also funder might be the client of such attorney. And if the attorney represents both funder and the funded party then the attorney might be in conflict of duty to both the parties. Typically, the funding arrangement is structured in a manner where there is a clear demarcation between the duties owed to the party and those owed to the funder (if the attorney represents). However, to mitigate such conflict attorneys recommend maintaining independent legal counsel for both the parties.

Third party funders can raise another potential conflict of interest that is distinct from those that were discussed above. This is the possible conflict of interest between the arbitrator and the funder, and if there actually the existence of conflict then such a conflict will result in a nullification of the award passed. This conflict is illustrated through an example there is a party (P1) funded by the funder (F) and X is the arbitrator in an arbitral dispute (A1), F along with funding P1 is also a funding another party in another unrelated arbitral dispute (A2) where X's son is the one who is being funded by F. The fact X's son is being funded by F would raise concerns about the independence and impartiality of X towards the other party in A1. This whole set of events would render X to be ineligible to be an arbitrator in A1. The solution to the problem illustrated in the example can be avoided if F in A1 makes a disclosure with respect to the funding arrangement. The absence of an obligation to disclose the presence and identity of the funder's participation in the arbitration seems to be problematic in international arbitration.

<u>Other Alternative Funding Models</u>

TPF has been emerged as a source of funding for international arbitration only in the recent years. Before the arrival of TPF there were other various alternative means through which international arbitration was funded. This section of the article briefly discusses some of the funding models that exist.

A. Insurance

Insurance has been one of the oldest ways of financing disputes. The insurance packages usually cover all costs that are involved as a part of the dispute, this includes the cost incurred to bring a claim or to defend the claim, the attorney's fee, and to pay any award, or order which is passed against the insured. There are mainly two kinds of insurances models and they are referred to as "before the event" (BTE) and "after the event" (ATE) insurance. [10]

BTE insurance model is usually taken to cover the possible future legal dispute/s. Under this model, the insurer receives the premium in advance. And the insurance provides finance for bringing in claims or defending the claim and all the other associated costs involved. The insurer has

[10] James Clanchy "Navigating the Waters of Third Party Funding in International Arbitration" Page 82

no interest in the proceeds of the arbitration expect to minimize the expenditure incurred by the insured party and for this reason, the insurer controls the conduct of the arbitration as closely as possible

ATE insurance is also known as the litigation/arbitration insurance, is subscribed after the legal dispute has arisen. The insurance premium under this package is structured in a unique manner that is the contingency premium model. The insured under this model pays the insurance premium only if the claim is successful, in which case the premium is usually paid out of the settlement agreement or the compensation award obtained. It is similar to the TPF model but the return paid is much lower. The ATE insurance model is very similar to the TPF and the only distinction is that the former does not provide the day to day financing, but instead pay the insured on indemnity basis if the case is unsuccessful and also the insurance premium is typically much lower than the return sought by a funder under the TPF model.[11]

B. Corporate Financing

Under this model there are mainly two ways through which the funding is obtained. One is through corporate finance and this can be best illustrated by the following example, a parent company can grant a loan to its subsidiary to enable the subsidiary to pursue the claim. The other instances could be that the shareholders, creditors or other stakeholders of the company itself might provide financial assistance needed for pursuing the claim in return for some benefit (which can be either a financial benefit or to gain control in the management).[12]

The second way is an equity based funding. This means that the funder might provide finance required for pursuing the claim by the company in return for an equity ownership in the company. Private placement of equity is the most effective and common way of raising funds in equity based funding.

C. Sale of Claims

Under this model, there is an outright sale of the claim by the claimholder to the funder. This is because the claimholder may view lengthy arbitration proceedings as an expensive and time-consuming affair and would transfer the rights to another party in exchange for some consideration payable immediately. Usually, the consideration is cents on dollars. Even the funders are happy with the sale of claims because they will have an unfettered power and control over the arbitration proceedings unlike funding some third party.

In common law jurisdictions and jurisdiction where champerty exits, the outright sale of claims is not permitted and there is a prohibition on funders from taking the control over the claims of another party. Thus, the definition of the TPF in these jurisdictions is restricted to as an arrangement for an investment in the claim holder's arbitration in return for a financial interest, as opposed to the outright sale.[13]

[11] Bristow's, Guide to Litigation Costs Funding and Insurance, (last accessed on 30th May 2018)

[12] Crystallex International Corporation v Bolivarian Republic of Venezuela, Case No. ARB (AF)/11/12

[13] Persona Digital Telephony Limited and Others v The minister for Public Enterprise (2017) IESC 27

However, in some civil law jurisdiction, the outright sales of claims are permitted and the funders are allowed to pursue the claims of the third parties.

D. Attorneys as Funders

Attorneys may also act as funders in certain cases. In this model the attorney bears some or all the cost of the arbitration and along with sharing the risk. The structure under this model is usually that the attorneys don't charge any legal fees in exchange for a share in the award or the settlement obtained.

E. Portfolio Funding

Portfolio funding is yet another alternative approach of financing claims and many funders are actively promoting this approach because of its diversified risk. So how is a portfolio arrangement structured? A portfolio arrangement can be structured in many ways, but there are two popular models in which these arrangements are structured: 1) finance structured within a law firm, where claims holders are various clients of the firm; 2) finance structured around multiple legal disputes of a corporate claim holder over a relatively short period of time.

As it can be seen that in both the models' finance is being structured over multiple claims, this structure provides the funder some form of cross-collateralization (meaning that the funder's return is dependent upon the overall net performance of claims of the portfolio as opposed to an individual claim). These models of finance structure enable the law firm or corporate entities to secure TPF more quickly. In addition, there is also an economic benefit to this approach that is, the funder's risk is spread across a number of claims, thus leading to a reduced risk percentage on each claim.

From a corporate claim holder perspective, portfolio financing provides another added advantage. This is the possible inclusion of some types of claims within the portfolio that would not otherwise be capable of being funded on an individual basis (for instance non-monetary claims). The inclusion is possible because of the cross-collateralization that portfolio financing provides.

Position of TPF in various Jurisdictions

Historically, common law jurisdictions have a bar on the TPF agreements on account of the common law principles of maintenance, champerty, and public policy. Maintenance has been defined as a process of funding of legal proceedings by an unconnected third party and champerty is described as an aggravated form of maintenance, wherein the third party funds the legal proceedings in exchange for a share in the proceeds arising out the legal proceedings. In the past few years, many jurisdictions around the world have relaxed the usage of the doctrines of champerty and maintenance and have promoted the idea of TPF. For instances, the England and Wales introduced a code of conduct for TPF including international arbitration in 2011. Then, the Paris Bar council in February 2017 adopted a resolution confirming that there is nothing precluding the parties from entering into TPF agreements. Yet again Singapore, which is considered as the arbitration pro country in the Asian continent, promulgated the Civil Law Amendment Act in March

2017, to legalizing and regularizing TPF. Even Hong Kong has made amendments to abolish the torts of champerty and maintenance and recognized TPF as not being contrary to public policy. The sole reason for such change in attitude in across various countries is because of the TPF has been proven to be an effective and efficient way to combat the increasing legal cost in international arbitration, and it is one best way possible to meet these increasing cost and provide access to justice by funding people who cannot afford the costs. The two Asian countries have also taken a step ahead and made it mandatory on the parties concerned to disclosure of the existence of TPF.

Position of TPF Under the Indian Law

While jurisdictions around the world moved away from these archaic doctrines, however, India despite some early progressive decisions on this subject continues to show legislative inertia.[14]

In the case of *RamCoomar Condoo v Chandra Canto Mukerjee*[15]the Privy Council held that the common law doctrines of champerty and maintenance are applicable to England and not applicable to India except in those transactions, which are "inequitable, extortionate and unconscionable and not made with the bona fide objective". The Constitutional bench of the Supreme Court of India in the case of *G. Senior Advocate of the Supreme Court*[16] has reiterated that the doctrines of champerty and maintenance are not applicable to India and that there is nothing morally wrong or nothing against the public policy and public morals that are being affected through entering into the TPF agreements expect when the lawyers are not involved in these agreements or they are not having a contingency fee structure. The position since then remained the same and thus, an agreement by a third party to finance the cost of litigation is neither illegal nor void on grounds of champerty and maintenance.

Along with the validity of TPF agreements, there are also certain procedural challenges faced by the parties and the funders while routing funds into or out India.

Any transaction involving the foreign exchange or non-residents parties then such transactions are governed by the rules and regulation of the Foreign Exchange and Management Act, (FEMA) 1999. Section 5 and 6 of the FEMA classifies all the transactions into two categories; current and capital account transactions. Since FEMA does explicitly classify TPF as either current or capital account transactions, it is uncertain as to how TPF would interact with the regulations, especially since both these transactions are treated differently under the FEMA regulations. [17] The reason for uncertainty in classification is because current account transactions include net profit from the investments and TPF is often regarded to be an investment. Thereby any

[14] L Nieuwveld and V Shannon, *Third-Party Funding in International Arbitration* (Kluwer Law International 2012) 12; M Steinitz, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95 Minnesota Law Review 1268, 1283.

[15] Ram Coomar Condoo v Chandra Canto Mukerjee (1876) SCC Online PC 19

[16] G. Senior Advocate of the Supreme Court AIR (1954) SC 557

[17] TPF In International Arbitration – India's Readiness in a Global Context; By Anish Wadia and Shivani Rawat.

profit accrued from such an investment would be under the current account transactions. On the other hand, capital account transactions include all the borrowing made either in foreign exchange or to/from a non-resident and hence, here TPF can assume the form of a loan.[18]

A high level committee was constituted by the Government of India to review the institutionalization of arbitration in India. The committee along with other observations also indicated that it is time for India to consider formally permitting TPF in international arbitration, which is seated in India.[19]

Should India allow TPF?

As mentioned above one of the strongest propositions for advocating TPF is to increase access to justice. The Supreme Court of India in the case *Anita Kushwala v Pushap Sudan*[20] held that access to justice is recognized as a fundamental right under Article 14 and 21 of the Indian Constitution and is guaranteed to every citizen of the country. “Access to justice would remain a mere illusion if the adjudicatory mechanisms available were so expensive as to deter a disputant from having resort to the same”. Furthermore, the court stated that the driving principle behind the need for access to justice would remain same for all forms of dispute resolution.

It is a well-established fact as to how long a case can languish if taken before the court, but commercial arbitration has provided a relief to the litigants with its speedier disposal of disputes. Moreover, the judicial backlog and systemic administrative neglect,[21] coupled with the heavy costs incurred while instituting a case in the court have led to render the court not be an effective way of resolving disputes. The judiciary’s pro arbitration approach in the recent times has led to advancement to the idea of access to justice that is to mean access to justice is not only limited to prosecute or defend a claim but having recourse to an affordable, quick and satisfactory settlement of disputes.[22] Therefore it is important to note that TPF in India would enable not only access to justice but also effective access to justice

Another impact of TPF is that as it provides parties access to speedier methods of dispute resolution it would in one manner help to reduce the backlog of cases in the Indian judicial system by diverting the litigants to a more attractive forum of dispute resolution. The extensive due diligence conducted by the funder prior to entering into a TPF agreement is a way to ensure that only meritorious claims are bought for adjudication.[23]

It is not often the case that both the parties to the arbitration have equal financial standing and this disparity has a huge impact on the

[18] TPF In International Arbitration – India’s Readiness in a Global Context; By Anish Wadia and Shivani Rawat.

[19] Sri Krishna Committee, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (2017) Paragraph No 43-44.

[20] Anita Kushwala v Pushap Sudan (2016) 8 SCC 509

[21] Supreme Court of India, The Indian Judiciary Annual Report 2015-2016; Law Commission of India Report no 245 of 2014

[22] TPF In International Arbitration – India’s Readiness in a Global Context; By Anish Wadia and Shivani Rawat.

[23] TPF In International Arbitration – India’s Readiness in a Global Context; By Anish Wadia and Shivani Rawat.

prospects of settling a claim. For instance, a party might have a meritorious claim but is financially weak as against the opposing party who has sufficient clout to prolong the proceedings. As the arbitral proceedings require a continuous infusion of funds, the financially weaker party might be forced to settle for a less than the reasonable amount, regardless of the merit of the claim. In such kind of scenarios, a third party funding would protect the financially weaker party from entering into the unfair settlement. Thus, TPF can equalize the bargaining power between the parties and provide for a fair and equitable settlement if any. It is important that even parties who enter into international arbitration agreement take advantage of being sufficiently funded.[24]
Since the financial disparities between the parties can be erased by entering into a TPF agreement, with the advent of TPF in India, the commonly held perception that international arbitration is only for large business entities is weakened because now all the parties with a meritorious claim can have the sufficient financial strength by way of entering into a TPF agreement. Thus, TPF provides for a level playing field to the parties between large institutions and the average everyday litigants and can also act as a retributive tool in the hands of the weaker sections of the society.

Regulatory Framework for India

It is pertinent to note how India should be tackling with the idea of TPF. The law commission of India should be directed in facilitating a public consultation process on third party funding and to examine the idea from an Indian perspective and provide for the necessary elements for the development of TPF in India. The aspects that the law commission should focus are the examining the scope and growth of TPF in India; how to locally adapt the global best practices; the impact of TPF on the right to access to justice; regulatory approvals for cross border funding including the amendments to the FEMA Act; and the amendments that needs to be brought about in the Indian Arbitration and Conciliation Act 1996 and in the Indian Income Tax Act 1961. A public consultation on these issues would acquaint the general public on the concept of third party funding and also educates the disputants on its advantages.[25]

Another important issue that needs to be dealt with at the time of framing the regulations for TPF is whether hard or law soft approach should be followed. A hard law approach means that the regulation made is binding on the parties concerned. On the other hand, soft law approach means that the regulations made are non-binding on the parties concernd. Given the novelty and continual development nature of TPF, it is better India adopts a non-binding regime that is to provide regulations as guiding code of conduct to the parties. Thereafter, once TPF has been established as an industry these regulations can be made into a binding code of conduct (if necessary).[26]

[24] TPF In International Arbitration – India's Readiness in a Global Context; By Anish Wadia and Shivani Rawat.

[25] TPF In International Arbitration – India's Readiness in a Global Context; By AnishWadia and ShivaniRawat.

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Conclusion

Around the world, various jurisdictions have welcomed the idea of third-party funding and some common law jurisdictions have re-analyzed the applicability of the archaic doctrines of champerty and maintenance to give effect to the idea of TPF. Even though India is a common law country, through various judicial precedents it has been established that the doctrines of champerty and maintenance are not applicable to India hence, making a step closer for India to recognize the idea of TPF in international arbitration. It has also been established that adoption of the idea TPF would lead to an increase in the access to justice and also leads to a reduction in the number of cases the court has to deal with. TPF can also tackle the problem of rising costs for submitting the matter before an arbitral tribunal and is considered as the most favorable mechanism by the global legal community. Countries like the Hong Kong and Singapore have given statutory recognition of TPF in international arbitration so as to meet the needs of the international arbitration participants and to attract these participants to their countries for conducting the arbitration. With that in mind, it is important that India should take concrete steps towards developing a robust regulatory mechanism to ensure a smooth introduction of TPF in India.

The current lack of international regulations is largely owing to the fact that TPF is yet to expand its frontiers. This also places India in a unique position to navigate these waters with sufficient freedom in developing its own regulatory framework.

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