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THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION: THE NEED FOR INDIA TO STEP IT UP?

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Abstract

There is no denial that third-party funding is a huge risk investment. Yet, the funding companies have the opportunity to double, triple or even quadruple their invested money if the claim is won. That is the reason by which a third-party who has no interest in the dispute or is not related to the matter in any way, comes forward to invest by way of financial assistance in the conflict in exchange for having certain share in it. This third-party funder can be an investment company, or a bank, or a firm, or any individual or any other entity that comes forward with a view to provide monetary support. This kind of arrangement between a funder and a claimant is what is known as third-party funding. It has gained huge momentum in the international arbitration forum and specifically in international commercial transactions and their arbitration. As this phenomenon grows, India should also step forward in this arena by making legal norms in this regard. Since the international arbitration hasn't been in India's favour in recent years and the burden of monetary compensation falls directly on the government, it is essential for India to allow for third-party funding in international arbitration by bringing legal framework to deal with the same.

Keywords: *International arbitration, Third party funding, Investments, Arbitrators*

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I. Introduction

Engaging in litigation and alternative dispute settlements have become an expensive sport these days. Gone are the days when the dominating reason was the prevailing dispute and conflict, which still remains, though the added element is the monetary efficacy to engage in such matters. Now what remains is the good cause hindered with the fog of position to fight the issue. There comes the concept of third-party funding to the rescue. Third-party funding, though is a unique concept, yet it is not a new one. It has existed for some time in different forms. International arbitration, which is constantly becoming expensive with the passing days, it has become important for any nation to ensure security in case of befalling cost and expenses.

II. THIRD- PARTY FUNDING (TPF)

1. Meaning

Third-party funding is where a party, who is not involved in the dispute or is not a party to the dispute, helps fund the matter in return for some claim in it. It is an arrangement whereby an outsider aids in funding the issue. The purpose of funding the cost is to get in return certain monetary reward if and when the dispute is won or is successful.[1] The third-party funder becomes privy to the contours of the disputes and that is where the significant discussion arises. The funder usually has agreements set in place to provide funds in relation to in general legal fees, expenses and in other cases, going beyond to pay the cost of the opponents if an order comes through court or arbitration.[2]

As the significant feature of the third-party funding is that the funder has share in the dispute in exchange for providing fund, which can be larger than what is initially invested, benefitting the funder and the claimant as well. Along with that, a funder can be any investing company, a lawyer (though not applicable in India at present[3]), a company, a firm, a financial corporation, a bank or any other third-party[4] that is interested to lend to

1 Cyril Amarchand Mangaldas, Advocates & Solicitors, *Third-party Funding in India*, https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf (last visited Feb. 20, 2019).

2 Ashurst.com, *Third-party Funding in International Arbitration,* https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/, (last visited Jun. 15, 2022).

3 Bar Council of India, Appendix G, Part IV, Ch. II.

4 Mr Arnaud Bourgeois, *Third-party Funding*, Jus Mundi (Jun. 21, 2022), https://jusmundi.com/en/document/wiki/en-third-party-funding

the claimant in regard to that dispute.

But what becomes important to look at is that no third-party funder will go on investing their time and money in the claim on only looking at the parties. The third-party funder will carefully access the situation before making any kind of decision whether they want to fund the party or not. Therefore, it is clear that the third-party funder will invest in the matter only by looking at it through individualistic claim to form a decision. The decision by the third-party funder is made through series of discussions, analysis, examination, careful scrutinizing and other important elements attached to it. This is done by going through the documents, the private information to which only the parties are privy to like the agreement itself and essential other documents.

2. Significance

In the present times, the need for third-party funding has increased multi-fold. Before dealing the current pandemic situation (as it had put a crunch on economic and financial needs of individuals, companies, businesses and even nations), the need for the third-party funding in general has grown a great deal. The third-party funding has gained momentum in different areas of law like in litigation, in arbitration, in international arbitration, in mediation, in investment law, in maritime law, etc. This shows its diversity and adaptability to different areas of law. One of the major advantages that come in favour of third-party funding is that both arbitration and litigation has become expensive these days, that is the reason the need is felt for access to justice to the ones who are not able to get it.[5] The cost of approaching the international arbitration in the present scenario has become a very farfetched phenomenon since such a huge claim at an international level becomes very much impossible at the time when there is lack of investing in the same. In that scenario, the third-party funding in international arbitration comes to the rescue by providing and investing in the dispute.

As one looks at specifically to the forum of arbitration and more particularly international arbitration, it is a completely private affair and out of the court or alternative dispute resolution (ADR) mechanism which does not bind one to the strictness of the court or litigation matters.[6] That is the reason that a lighter view can be accessed in relation to third-

5 Portfolio Media Inc., *The Rise Of 3rd-Party Litigation Funding,* Law 360.com https://jenner.com/system/assets/publications/130/original/The_Rise_Of_3rd-Party_Litigation_ Funding.pdf?1312815913 (last visited on June 9th, 2021)

6 Lisa Bench Nieuwveld, Conway & Partners, *Third-party Funding – Maintenance and Champerty – Where is it Thriving?,* Kluwer Arbitration Blog http://arbitrationblog.kluwerarbitration. com/2011/11/07/third-party-funding-maintenance-and-champerty-where-is-it-thriving/ (Last visited Nov. 7, 2011)

party funding in international arbitration. Since one understands the concept of international arbitration itself, there is definitely a dire requirement for the possibility of pursuing the claim[7] which seems a vague possibility for certain business due to monetary and financial issues. Furthermore, the major point of access to justice is to ensure that there is fairness maintained[8] in the adjudication of disputes, if the parties do not get the support to represent their matters, it leads to unfairness. Thus, access to arbitration with equal opportunity to everyone is an essential ingredient of the mechanism.

III. International Presence

1. Singapore

Singapore is considered as the international arbitration hub; thus, it comes as no surprise that third-party funding will have its market and share over there. Third-party funding in international arbitration was given wings in July 2017 where international funders saw a huge presence in Singapore.[9]

The major legal reform was in the form of amendment in the Civil Law Act of the Singapore and the Civil Law (Third-Party Funding) Regulations, 2017[10] that has aided in the third-party funding making it enforceable for certain funding agreements which are now permitted as per the law. Under the law which is Section 5A of the Civil Law Act whereby the third-party funding is now available to the parties to the dispute in regard to the prescribed dispute resolution proceedings which are international proceedings.[11]

Furthermore, the amendment is brought in the Legal Professional Act and Legal Profession (Professional Conduct) Rules, 2015 in which there is a requirement to disclose third-party funding along with the prohibition of lawyers and law firms to have interest in the funders or to receive funds or proceeds from funders.[12] These amendments are of significance and huge importance as it helps in identifying the actual working of the regulatory mechanism

7 Dr. Geoges Affaki, *A financing is a financing is a financing*, https://www.affaki.fr/wp-content/uploads/2021/11/pdf-A-Financing-is-a-financing-Dossier-Institut-ICC-Georges-Affaki.pdf

8 Rogers and Catherine A., *Gamblers, Loan Sharks & Third-Party Funders - Ethics in International Arbitration*, Penn State Law Legal Studies Research Paper Series (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962

9 KC. Vijayan, *First third-party funding in S'pore arbitration case*, The Straits Times (Jul. 1, 2017)

10 Olivia De Patoul, *The Third-party Litigation Funding Law Review: Singapore*, The Law Reviews (Jan. 10, 2021), https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/singapore

11 The International Arbitration Act, 1994, S. 5.

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

and machinery in relation to the third-party funding in the international arbitration. This cannot be denied that there is, in fact, many issues revolving around the interest of the lawyers as the funders.

2. Hong-Kong

In Hong Kong, it is necessary to start with Hong Kong Code of Practice for Third-party Funding in Arbitration which is effective from 1st February, 2019. This Code of Practice for Third-party Funding came in force from February, 2019 in Hong Kong. When a third-party is a part of the dispute which it has no interest in, a conflict might arise. Thus, in that case, these codes clearly set out that a written agreement needs to be there between the party and the funder.

Since the doctrines of champerty and maintenance are no longer applicable in cases of arbitration proceedings[13], it gives a wider scope of third-party funding in that area of international arbitration. The passing of the Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Ordinance in 2017 is of importance, where some parts will come in force by June 23rd, 2017 while others will come by February 1st, 2019.[14] The Part 10 A of the Ordinance deals specifically with third-party funding in arbitration proceedings. The rules are clearly prescribed so that no deviation and ill-will occurs from either side, for example that the funding agreement should be in writing and clearly stating the third-party funding who has no interest in the matter except to fund the dispute[15] and other essential requirements.

3. ICC Rules, 2021

The International Chamber of Commerce came up with new rules 2021 which brought significant changes in the third-party funding arrangement in the international arbitration. Through its Rule 11 of the ICC Rules, it seeks to ensure transparency by requiring that the party must disclose if there is a third-party funding in the dispute and the identity of the third-party funder as well. This will ensure transparency and will avoid any kind of conflict of interests that are bound to arise at different stages of the arbitration. The new

13 Sapna Jhangiani and Rupert Coldwell, *Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top*, Kluwer Arbitration Blog (Nov. 30, 201), http://kluwerarbitrationblog.com/2016/11/30/third-party-funding-for-internationalarbitration-in-singapore-and-hong-kong-a-race-to-the-top/

14 Jun, Jung Won., *Third-Party Funding of Arbitration: Focusing on Recent Legislations in Hong Kong and Singapore,* 30 (3) Journal of Arbitration Studies, 137-167, (2020), https://www.koreascience.or.kr/article/JAKO202027265524042.pdf

15 Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Ordinance, 2017, S. 98 J.

Rules of the ICC talks about the outcome of the arbitration whereby any non-party that has an economic interest in the dispute or the claims has to disclose the identity if they have entered into such an arrangement of funding the claims and defences.

4. IBA Guidelines – Changes Brought

The IBA Guidelines on the Conflict of Interest in International Arbitration were released in 2014 which mentions and regulates the third-party funding through its provisions. It ensures that there does not arise any conflict of interest by employing the Standard or Guideline 6 along with the Explanation to General Standard 6 of the IBA Guidelines.[16] This is a necessary amend in the already established guidelines which were operative as it brought within its new purviews. The repeat arbitrators have to be disclosed because what cannot be denied is that there is definitely regulation by the third-party funding, though not through formal sense but as a part of being interested in the dispute. The disclosure by the arbitrators needs to be made in connection to the third-party funder, if it exists, so as to remove any doubt that might arise as to the impartiality of the arbitrator along with to conduct smooth functioning of the arbitration proceedings.

Portion 2[17] and 3[18] of the guidelines discusses specifically the conflict of interest and disclosure requirements respectively. It talks about the fact that the arbitrator should decline if there is a conflict with or a doubt that whether impartiality and independence will be maintained or he can even refuse to act as an arbitrator if discovered at a later stage. It is further clarified that these doubts can be related to the third-party who has knowledge of the facts and circumstances of the matter and has the power to influence in the factors of the case and the merits of the dispute as well.[19] Thus, such a step should be taken by the arbitrator himself if such a situation presents itself.

5. ICSID Proposed Amendments

The first Working Paper came in 2018 by the ICSID that contained the proposed amendments

16 IBA Guidelines on Conflicts of Interests in International Arbitration, Part I (General Standards Regarding Impartiality, Independence and Disclosure), Explanation to General Standard 6 (a) and (b).

17 IBA Guidelines on Conflicts of Interests in International Arbitration, Part I (General Standards Regarding Impartiality, Independence and Disclosure), Guideline 2 (Conflicts of Interest) and Explanation to General Standard 2.

18 IBA Guidelines on Conflicts of Interests in International Arbitration, Part I (General Standards Regarding Impartiality, Independence and Disclosure), Guideline 3 (Disclosures) and Explanation to General Standard 3.

19 IBA Guidelines on Conflicts of Interests in International Arbitration, Part I (General Standards Regarding Impartiality, Independence and Disclosure), Guideline 2 (c).

related to the third-party funding and the requirement to disclose if there is any kind of engagement of the third-party as well the name of the third-party who is funding such an arrangement. Furthermore, the next Working Paper on the Proposed Amendments emerged in 2019 that highlighted the similar concept of disclosure but with a concise and more elaborative meaning and definition contained in it.

In 2020, the major working paper came of the proposed amendments in the form of Working Paper 4.[20] Under its Chapter II, through its Rule 14 of the Arbitration Rules of the Working Paper 4, it deems to talk about the 'notice of third-party funding'. The disclosure is to be made by a written notice with the name and address of the non-party from which the party has directly or indirectly received funds, or in the pursuit of receiving funds or if a defence is to get the expenses through a donation, grant or "in return for remuneration" which is dependent on the outcome of the proceedings which is also called as the third-party funding.[21] Thus, what is significant is that the disclosure is to be made in regard to the involvement of the third-party funding and it has become a mandatory requirement by giving notice of the same under these rules.

6. Certain International Decisions and Pronouncements

Decisions and pronouncements by different bodies are important to analyse the position taken by them in relation to such a third-party funding arrangement in the international arena as well as in the arbitration arena. Firstly, in the important pronouncement of made in the dispute of *Oxus Gold PLC V. Republic of Uzbekistan*[22], decided on 17th December, 2015 where there was involvement of UNCITRAL Rules of Arbitration applicable between UK and Uzbekistan BIT. In the present case, the complainant was assisted by a third-party funder in the arbitration proceedings. The court relied on the fact that the voluntary disclosures by the parties regarding the funding agreements between the third parties[23] and themselves should become a norm so that complexities does not arise at a later stage when dealing internationally like in present case through BITs. Thus, even at the stage of proceeding in regard to the bilateral investment treaties, the favour still goes in the part of disclosing that there exists third-party funding the arrangement.

20 International Centre for Settlement of Investment Disputes (ICSID) World Bank Group, *Proposals for Amendment of the ICSID Rules*, Volume 1 International Centre for Settlement of Investments Disputes (Feb. 2020), https://icsid.worldbank.org/sites/default/files/documents/WP_4_Vol_1_En.pdf

21 International Centre for Settlement of Investment Disputes (ICSID), World Bank Group, *Proposals for Amendment of the ICSID Rules*, Volume 1 International Centre for Settlement of Investments Disputes (Feb. 2020).

22 Oxus Gold PLC v. Uzbekistan, IIC 779 (2015).

23 *Ibid*.

In another significant case of South *American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia*[24], the issue involved was related to international investment. There was British investor whose identity was to be disclosed compulsorily by the parties as said by the Tribunal.[25] Furthermore, the award which was rendered involved sunk cost to the funder or the investor. Thus, the Arbitral Tribunal can also order for the disclosure of the involvement of the third-party funder at any stage in the proceedings.

In another case of *RSM Production Corp. v. Saint Lucia*[26], the ICSID looked at the fact of the security of the cost and the third-party funding whereby it said that the third-party funding alone was not the basis for its decision. Rather, the tribunal was also convinced to order security because of the fact that the claimant's proven history of non-payments in prior ICSD cases and it's simultaneously admitted lack of any other financial resources also proved as an essential factor for allocation of the cost. So, in this particular case as well, the identity of the third-party funding was disclosed.

IV. Steps Taken for Third-Party Funding in India

India has made developments over the years paving way for many crucial decisions and policy reforms and changes which has helped in shaping the country's legal system and defining it as a progressive and developing system. More than that the positive development in the field of arbitration is commendable of India whereby India is stepping in the arena of becoming the international arbitration hub in regard to commercial and trans-national disputes. As a result, it is necessary that India takes necessary and crucial steps in recognizing the need of the third-party funding and its growing demand in the international arbitration sector with providing for a regulatory framework as well as mechanism for the claimants as well as the funders to approach this new sector and market at an international level.

1. Legal Position

Before moving ahead, it is necessary to examine the position of India with respect to the third-party funding and its application, principles and approach that is adopted in the present times along with different judicial opinions or pronouncements on the matter. Firstly, the Code of Civil Procedure, 1908 (CPC) though does not regulate or provide for

24 South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia, UNCITRAL PCA Case No. 2013-15, Procedural Order No. 10, https://perma.cc/G97S-HV6L

25 *Ibid.*

26 RSM Production Corp. v. Saint Lucia, ICSID Case No ARB/12/10, https://perma.cc/K8QB-LWDB.

third-party funding but there have been state amendments in the states of Maharashtra, Madhya Pradesh, Karnataka, and Gujarat whereby they have expressly made amendments in regard to the funder or a financier giving the litigation cost to the plaintiff and where the funder can act as a party to the proceedings through Order XXV. In addition, a report of High-Level Committee to review the Institutionalisation of Arbitration Mechanism in India[27] has come up which had recommendations for changes and inclusions in arbitration as well in this regard.

2. Views of the Court through various Pronouncements

A very important judgement came from the Supreme Court of India in 2015 in the case of *Bar Council of India v. AK Balaji*.[28] In this case the court held that the concept of third-party funding in India is permissible in legal terms and there appears no apparent restriction in regard to the conduction of such practice in the litigation where the amount is dependent on the outcome of the litigation. But the court clarified that the third-party funder needs to be a non-lawyer. Thus, this is an important information and judgement in regard to the third-party funding and its growing importance in India.

Going back in the case of *Ram Coondoo v. Chunder Cando Mookerjee*[29], it was said that the principle of champerty in India is not prohibited completely and can be used in restricted sense and circumstances. Furthermore, in a very important case of In *Re Mr. G, A Senior Advocate*[30], the court held that where there is no involvement of lawyers in such transactions, then it does not go against the public policy.

Thus, these judgements are significant in highlighting that the third-party funding was never exclusively, absolutely or completely barred in India and its position and aid can be taken for the same. The development of the same in domestic litigation in India is less only because there is in place a legal aid mechanism, a concept which is enshrined in the Constitution itself, and also the pro bono cases and matters taken up by different lawyers, companies, firms, etc. But it cannot be ignored that in international arbitration no such mechanism exists and thus, it can definitely be employed and worked in that arena. Furthermore, the cost arbitration is at a very high increase which the apex court has itself

27 Department of Legal Affairs, Report of The High-Level Committee to Review the Institutionalisation of Arbitration Mechanism In India (Jul. 30, 2017), http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

28 Bar Council of India v. AK Balaji, (2015) 5 SCC 379.

29 Ram Coondoo v. Chunder Cando Mookerjee, 1876 SCC Online PC 19.

30 In Re Mr. G, A Senior Advocate, (1958) 1 SCR 490.

observed in a case[31] and to make sure that such a mechanism prevails, the engagement of a third-party funder ensuring the cost in international arbitration is of paramount significance.

In another very important case A Division Bench of the Kerala High Court in *Damodar Kilikar and ors. v. Oosman Abdul Gani*[32], the issue was related to the champerty agreements in the country. The court highlighted that the agreements are not illegal only if no advocates are involved. This judgement is significant and clearly shows the preference towards the third-party funding in India as well as what it shows is that even the concepts of maintenance and champerty are not prohibited in India but only in regard to the portion that the advocates and law firms cannot be involved.

So, what is analysed in this regard is that the third-party funding does creates the issues in regard to the public policy of a particular state as well. Moreover, in India the lawyers or advocates cannot ask for fees which are contingent on the outcome of the dispute since that goes against the basic principle of the duty of an advocate which is clearly mentioned is towards the court, the client and the society. But more than that, it is prohibited in the stricter sense that there cannot be any kind of financial aim on the dispute to the advocate is himself interested in.

V. Conclusion

The discussion is a bit more segregated and particular in its approach by looking at different elements, international instruments, amendments, changes, implications, explicit and implicit matter, decisions, holdings, etc. taken in regard to specifically third-party funding in the international arbitration to understand how much has it been developed, changed, is accepted, and succeeded in the international arbitration arena. The third-party funding is international arbitration is clearly developing at a faster pace.

In regard to India, what is clearly established is that there is bar on the advocates or attorneys funding the claim of the dispute because the basic intrinsic purpose of the third-party funding is that there is an investment which is risky in nature and depends on the result of the dispute. But the advocate cannot charge as such. So, the concept of third-party funding is as has been said allowed in India with many states having made specific amendments in regard to it in the statutes.

It is true that the concept of third-party funding will grow in India since the cost of

31 Union of India v. M/s. Singh Builders Syndicate (2009) 4 SCC 523.

32 Damodar Kilikar and ors v. Oosman Abdul Gani, Appeal Suits No 171 of 1956, 176.

international arbitration is very much increasing and to fund the essential claims, it is necessary to take help from third-party funding in the international arbitration. To formulate a legal enactment, amendment or provision to tackle with third-party funding in international arbitration in India is crucial with the first step being its acceptance in direct and legal terms; secondly, defining third-party funding; thirdly, putting the disclosure requirement for arbitrators and parties; fourthly, allowing for arbitration agreements or clauses with third-party funding clauses; and lastly, ensuring independence and impartiality of arbitrators. Thus, in the end, it can be concluded that third-party funding will lead to better access to justice in India with specific regard to international arbitration and thereby, rules and regulations should be adequately brought to deal with the changing legal scenario.