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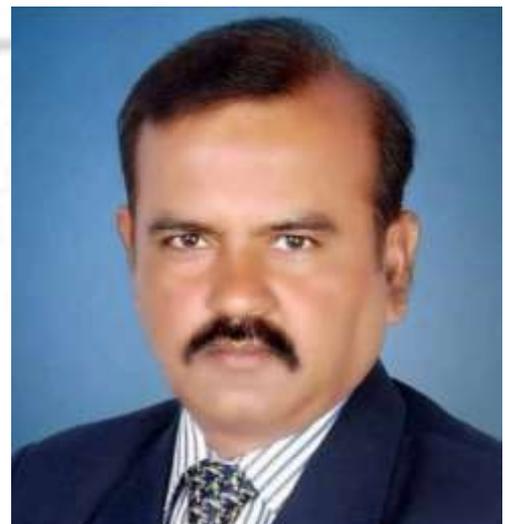
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With this thought, we hereby present to you

“ANALYSIS OF THIRD-PARTY FUNDING: A CONCEPTUAL REVIEW”

AUTHORED BY - PRIYANK DHADUK

Abstract

This paper explores the evolving landscape of third-party funding (TPF) in Indian arbitration and litigation. While TPF lacks explicit legislation, recent Supreme Court endorsements and state-level acknowledgments reveal a positive trajectory. Drawing insights from global jurisdictions, the study advocates for nuanced analysis over blanket prohibitions, emphasizing the potential role of TPF in leveling the arbitration playing field. The distinctions between litigation and arbitration, coupled with concerns about frivolous claims, are addressed, suggesting TPF as a pragmatic solution to enhance accessibility. The paper calls for comprehensive regulation, acknowledging the need for systemic improvements within India's justice delivery system.

Key Words: Third-party funding (TPF), Indian arbitration, Litigation financing, Champerty and maintenance, Supreme Court endorsements, Access to justice, International arbitration, Legal claims, Systemic improvements, Justice delivery system.

INTRODUCTION

Third-party funding, also known as litigation financing, occurs when a participant in legal proceedings, including arbitration, seeks financial assistance from an external entity instead of covering its own legal representation costs (Victoria, 2016). This external entity, commonly known as a “Third-party Funder,” offers financial support in return for a stake in the potential profits (Victoria, 2016). Third-party funders can include banks, hedge funds, insurance companies, or other entities or individuals. This type of financing involves assessing the potential value of legal claims before their adjudication, assisting parties in making informed decisions about whether to pursue litigation (Das gupta, 2021). On a broader scale, third-party funding promotes access to justice and encourages the resolution of disputes based on the merits of the claims, outside of court (Cyril Amarchand Mangaldas, 2019).

The structure of litigation-financing contracts can vary based on the specific legal case, incorporating clauses to safeguard the interests of both the funder and the funded party, along with confidentiality and non-disclosure provisions (Cyril Amarchand Mangaldas, 2019). Third-party funding can cover a range of expenses, including legal counsel fees, court or tribunal fees, costs associated with expert witnesses, pre-deposits, adverse costs orders, and other dispute-related expenditures like venue costs. This form of financing extends to various commercial disputes, such as commercial suits, international or domestic commercial arbitrations, class action suits, tortious claims like medical malpractice and personal injury claims, anti-trust proceedings, insolvency proceedings, and similar claims with the potential for substantial monetary awards (Cyril Amarchand Mangaldas, 2019).

In recent years, third-party funding has gained popularity in countries like “Australia”, “Germany”, the “United Kingdom”, “Singapore”, and “Hong Kong” (Mayank Mishra, 2021). The rapid growth of third-party funding in foreign jurisdictions can be attributed to two primary reasons: ensuring a fair playing field for both parties and preventing legitimate rights from being compromised due to financial constraints, and providing investment opportunities for funders. Advocates argue that third-party funding levels the playing field in disputes, while critics call for either banning or heavily regulating it (Kalajdzic, 2013).

STATUTES IN COMMON LAW JURISDICTION

Historically, the evolution of Third-party Funding (TPF) has encountered obstacles from common law doctrines like champerty and maintenance, originating in the fifteenth century with roots in Greek and Roman civilizations (Pinheiro, 2021). Maintenance involves providing financial aid to a third party without an interest in the case's outcome, while champerty entails assistance with an expectation of a share in the award. In England, perspectives on champerty and maintenance transformed, and since 1967, they are no longer considered criminal or tortious (Pinheiro, 2021).

Recent legislative actions in Hong Kong and Singapore, including “*The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, 2017*, and *Civil Law (Third-Party Funding) Regulations, 2017*”, respectively, reflect a growing need for analysis. “*Hong Kong Courts restrict champerty's application to litigation, asserting that in arbitration, it shouldn't impede private consensual adjudication*” “(Cannonway Consultants Ltd. v.

Kenworth Engineering Ltd)". *"Balancing champerty or maintenance with access to justice is emphasized, and in Singapore, public interest prevails in both arbitration and litigation (Otech Pakistan Pvt. Ltd. v. Clough Engineering Ltd)"*.

Critics argue that champerty and maintenance should not bluntly invalidate third-party funding; instead, a qualitative analysis of the arrangement's nature is suggested (Garg, 2020). In civil law countries like Germany, unfamiliar with maintenance and champerty, the absence of these doctrines promotes balanced growth in the third-party funding market in Europe. The consistent implication is that the public policy of ensuring access to justice should outweigh maintenance and champerty. The key criterion for assessing these agreements is whether their object is unconscionable or unfair to any party, a perspective shared by scholars on both sides of the Atlantic (Garg, 2020).

WHERE INDIA STANDS

India currently lacks a specific law governing Third-Party Funding (TPF), but it doesn't explicitly prohibit it. Notably, the "Privy Council" in the case of " (Ram Coomar Coondoo v. Chunder Canto Mookerjee)" stated *"That English common law and statutes related to maintenance and champerty have no force in India"*, though agreements deemed extortionate or unconscionable could be opposed to public policy. The Supreme Court of India in " ("G" Senior Advocate v. Unknown)", and " (Bar Council of India v. A.K. Balaji)" acknowledged TPF agreements, with certain restrictions. The Court suggested that non-lawyer third parties could fund litigation but strongly discouraged advocates from doing so (Dalal, 2022).

Despite these observations, there hasn't been explicit reference to the Privy Council's judgment. The Supreme Court recognizes *"TPF agreements if the third party is not an advocate participating in the litigation"*. However, each agreement must adhere to the principles outlined in the Contract Act, 1872, ensuring it doesn't violate public policy and morals. Some Indian states, including Gujarat, Madhya Pradesh, and Uttar Pradesh, have statutorily recognized TPF through amendments to the Code of Civil Procedure, 1908. Maharashtra's Bombay High Court, in 1983, empowered courts to secure costs for litigation by involving financiers as parties (Dalal, 2022).

While strides have been made in corporate India with companies like Hindustan Construction

Company entering agreements with investors, TPF has yet to gain widespread recognition and popularity. Suggestions to regularize and legislate TPF in India have been made, with a 2017 report on institutional arbitration recognizing existing TPF frameworks from arbitration-friendly jurisdictions. However, introducing legislation alone might not be sufficient, as systemic issues in the justice delivery system, notably delay and unpredictability, remain significant challenges. Despite efforts such as the Commercial Courts Act, 2015, and amendments to the Arbitration and Conciliation Act, 1996, addressing docket explosion and delays in deciding disputes is crucial for the effective growth of TPF in India. Currently, the large number of pending cases at the district and taluka levels, coupled with the lack of clarity on the duration of litigation, presents a significant impediment to the development of TPF in India (Dalal, 2022).

SCOPE OF APPLICABILITY

The expansion of third-party funding (TPF) in India has been limited, receiving recent attention from Indian courts. While there is no precedent for TPF in Indian arbitration, the recent endorsement of third-party funding in litigation by the Supreme Court, especially when facilitated by non-lawyers, is a positive development. *“The High-Level Committee Report on Institutionalisation of Arbitration in India briefly acknowledges TPF, hinting that its implementation could improve arbitration practices”*. Although Indian laws do not explicitly forbid TPF, obstacles arise from the “historical interpretation of maintenance and champerty as contrary to public policy”. The Indian Supreme Court clarified that the stringent English rules on maintenance and champerty are not applicable in India. Despite some subsequent rulings deeming such agreements against public policy, the author advocates for a balanced approach, aligning with the international arbitration regime and underscoring the importance of weighing public policy considerations (Victoria, 2016).

Another argument for introducing TPF in arbitration is the material differences between litigation and arbitration. Arbitration is based on party autonomy, allowing parties to involve third-party funders when necessary. *“The author suggests relaxing the standards of maintenance and champerty in arbitration, as the state has minimal or no stake in private disputes”* (Garg, 2020). Unlike litigation, which has statutory provisions for providing free legal aid to the financially incapable party, the Arbitration Act lacks such provisions. This creates a situation where a party must present or defend its claim independently or forfeit it due

to financial constraints. Third-party funding, according to the author, can play a crucial role in financing less privileged parties in arbitration, levelling the playing field (Garg, 2020). Acknowledging the substantial costs involved in arbitration, the author suggests that the Supreme Court's justification of high costs implies an acceptance that arbitration costs cannot be reduced easily. In the author's view, third-party funding might be the solution to address the challenge of expensive arbitration and promote its accessibility. Critics often argue that enabling TPF may encourage frivolous claims. However, existing provisions in the Arbitration Act allow courts to impose penalties for vexatious or frivolous proceedings. The author contends that funders, motivated by potential benefits, would carefully evaluate cases, ensuring they are not frivolous or unlikely to succeed (Garg, 2020).

Despite India lacking specific legislation governing TPF, the courts have displayed a cautious acceptance, emphasizing adherence to principles outlined in the Contract Act, 1872, to prevent violations of public policy and morals. Some Indian states have taken steps to recognize TPF through statutory amendments, showcasing a growing awareness of its potential benefits. The discussion surrounding the scope of applicability emphasizes the need for a nuanced and purpose-oriented analysis of TPF agreements, moving away from using champerty and maintenance as blanket prohibitions. The distinctions between litigation and arbitration, particularly the autonomy in party decisions in the latter, argue for a relaxation of standards, enabling TPF to play a vital role in levelling the playing field for less privileged parties. While proponents highlight the potential for TPF to address the financial constraints in arbitration, critics' concerns about frivolous claims are mitigated by existing legal provisions for penalties in the case of vexatious proceedings. The Supreme Court's acknowledgment of high arbitration costs suggests that TPF might be a pragmatic solution to combat the challenges associated with expensive arbitration, making it more accessible to a broader segment of society. In the broader context, the call for regularizing and legislating TPF in India aligns with global trends and recognizes the need for a comprehensive framework. However, it is acknowledged that addressing systemic issues within the justice delivery system, such as delays and unpredictability, remains crucial for the effective growth of TPF in India.

CONCLUSION

In conclusion, the landscape of third-party funding (TPF) in India is gradually evolving, marked by recent attention from the legal community and the acknowledgment of its legitimacy in litigation by the Supreme Court. While TPF in arbitration is yet to witness explicit precedents, the positive development in the litigation sphere, particularly the endorsement of non-lawyer funders, sets a precedent that may extend to arbitration. The historical hurdles posed by the common law doctrines of champerty and maintenance have been addressed in various jurisdictions, including the United Kingdom, Australia, Singapore, and Hong Kong. The recognition that these doctrines should not unduly restrict access to justice and the balanced growth of TPF markets in these jurisdictions provide valuable insights for India.

The author proposes introducing TPF in the Indian arbitration regime, emphasizing its advantages and the absence of concrete arguments against it. The Supreme Court's approval of TPF in litigation by non-lawyers is seen as a precedent that could pave the way for a similar approach in arbitration (Garg, 2020). The evolving stance of Indian courts, the recognition of TPF in select states, and the broader global trends in jurisdictions with similar legal frameworks collectively advocate for a thoughtful and inclusive approach towards incorporating TPF into the Indian arbitration regime. The positive trajectory indicates a potential paradigm shift that could enhance access to justice and contribute to the efficient resolution of disputes in the country.

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