**THIRD PARTY FUNDING IN ARBITRATION AND ITS APPLICATION IN INDIA**

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**ABSTRACT**

Arbitration has seen tremendous increase in its popularity as an alternative to the costly and time-consuming litigation process. Many companies provide clauses for arbitration when entering into a contract in order to solve any disputes which may arise. Despite its popularity, Arbitration is also a costly affair thus, various countries are accepting the concept of Third Party Funding (TPF).

Under TPF, a person or any entity who is not part of the dispute, finances either the whole or part of the costs of arbitration for a party to the dispute in return for a share in the amount which may be awarded by judgment. This is an effective method of ensuring easy access to justice by providing funds to the parties who do not have deep pockets to bear the costs of arbitration. Thus, TPF is beneficial for both the financing as well as the financed party.

Arbitration has been recognized as a good alternative to solving disputes in India too, especially when there is a huge backlog of pending cases in courts and thus with the advancement in the field of Arbitration and the introduction of TPF, India should also take steps to include this process. As of now, the Indian laws are silent on TPF which has created ambiguity regarding its validity. By the introduction of laws regarding TPF, the various aspects of it can be properly regulated to avoid any misuse of this process.

TPF should be encouraged as it empowers the parties who cannot afford this procedure but have a right to get justice. The restrictive nature of Indian laws makes it difficult for applicability of TPF as they are based on the concept that the dispute and the award shall be limited between the parties.

Through this paper, the authors attempt to initiate a meaningful discourse on TPF in India.

**Keywords:** Third Party Funding, Arbitration, Dispute, Arbitrator.

**INTRODUCTION**

In the present times, transactions take place everywhere and in great numbers. Many people enter into different agreements with each other and such agreements happen even at the international even between parties belonging to different nations. As a result, some conflict is bound to arise in carrying out such agreements.

Arbitration has become one of the most popular method of resolving such disputes. In Arbitration an Arbitrator is appointed to settle the arising dispute. This method of solving dispute is much faster than court proceedings therefore, India has also seen a rise in the cases of Arbitration as a result the Arbitration and Conciliation Act, 1996 has been enacted to regulate such proceedings.

Despite many advantages of Arbitration the problem of lack of adequate resources being available to the parties to the dispute still persists. In many disputes, both the parties are not at the same financial position and thus there is an imbalance between the two. The cost of Arbitration is also not a cheap affair as a result despite being a good remedy, many people are not able to avail of this method which is a grave injustice to the rights of the people who may have a valid claim but due to lack of resources they are not able to enforce their rights. In response to such problem, the concept of the Third Party Funding has emerged as a viable solution.

**WHAT IS TPF?**

Third Party funding is a concept in which the parties to the dispute have the right to get funding for their legal expenses by a person or a party who is not part of that dispute. Such funding is provided by the funder in return for a share in the proceeds from the award which may be provided to the funded party or for an interest charged on the amount funded by them.[[3]](#footnote-3) Thus, despite not being a party to the dispute a third party is allowed to receive the proceeds from the award of settlement

In Third Party Funding, the funder gets a share only if the award is in the favour of the funded party but if the award is made in favour of the other party, then the funder has to bear the costs[[4]](#footnote-4). When the claimant is the party who has been funded, the third party can ask for his share from the award granted and if the defendant is funded then an amount which is predetermined is provided to the third party[[5]](#footnote-5).

**HISTORY OF THIRD PARTY FUNDING**

While the Third Party Funding is of recent origin, the concept of a third party providing for the costs of a legal proceeding has been in existence for a long time. This was prevalent in the form of Maintenance and Champerty. The history of Maintenance and Champerty goes back to Ancient Greece and Rome while the common law prohibitions on these concepts had developed in England during Medieval times.[[6]](#footnote-6)

In Maintenance a person is given funds by another person for his legal expenses whereas, in champerty the funder also gets a share in the award which may be given to the funded party. In England,Champerty and Maintenance were treated as criminal offences and it was only by the Criminal Law Act, 1967 that they were finally decriminalized. These practices were regarded to be against public policy and therefore at present the restrictions on Champerty and Maintenance are the main challenge which is being faced in the application and implementation of Third Party Funding.[[7]](#footnote-7)

**TPF IN OTHER JURISDICTIONS**

Third Party Funding is now on the rise and several jurisdictions have taken different stances regarding its validity and applicability. For instance, In Ireland, in the case of *Persona Digital* Telephone Ltd. and Sigma Wireless Networks Ltd v. The Minister for Public Enterprise &Ors*[[8]](#footnote-8)* it was held by the Supreme Court that Third Party Funding is invalid in Ireland on account of the Irish doctrine of Maintenance and Champerty. Similarly, while many jurisdictions have not provided legislations which expressly prohibit the practice of Third Party Funding, there is also absence of any express provision which allows for such practice either.[[9]](#footnote-9)

On the other hand, in the case of *Campbell’s Cash and Carry Pty Ltd v. Fostif Pty Ltd[[10]](#footnote-10),* the validity of the funding arrangements was upheld in Australia. Similarly in England, in the case of *Arkin v. Borchard Lines Ltd[[11]](#footnote-11),* the commercial funders group were described as those who “*provide help to those seeking access to justice which they could not otherwise afford”[[12]](#footnote-12).*

While these cases have led to the inference that Third Party Funding is valid, the more concrete steps for its validity can be found from the jurisdictions of Singapore and Hong Kong. In Singapore, the Parliament had passed the Civil Law (Amendment) Act on 10th January 2017 and it came into force March 2017[[13]](#footnote-13). Under this Amendment Champerty and Maintenance are no longer regarded as tort and it allows Third Party Funding. It further provides for the regulations which specify the eligibility of a funder and the rules which may be made regarding such eligibility and disqualification of the funder in such cases where the required qualifications are not fulfilled by a funder.

Similarly, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill[[14]](#footnote-14)was approved in Hong Kong which allows Third Party Funding in the country for arbitration proceedings which are held in the country. This law also aims to regulate the practice of Third Party Funding which was earlier not allowed because of the prohibitions regarding Maintenance and Champerty.

Thus while some countries have rejected the notion of Third Party Funding as a viable and valid option, the countries which are in favor of Arbitration have taken a favorable stance on the applicability of Third Party Funding. By passing legislations to allow for such funding’s it can be inferred that more and more countries are beginning to embrace this concept in their laws to facilitate better access to justice for their subjects.

**POSITION OF TPF IN INDIA**

In India, the principles of common law are applied in the same manner as are applied in England and other common law jurisdictions therefore, the tort of Champerty and Maintenance appears to be a roadblock in the path of implementing Third Party Funding in India. The current position of Third Party Funding is not clear because there is no express provision provided in the Arbitration and Conciliation Act, 1996 regarding Third Party Funding but it appears that Third Party Funding is not prohibited in India.[[15]](#footnote-15)

In the absence of a legislation which allows for such agreements like in Singapore and Hong Kong, the stand taken by the judiciary becomes the alternative recourse as is the case in Australia and Ireland. The Indian Judiciary had been unclear about its stand on such agreements as in an unreported judgment by Peel J in 1825 it was held that Champerty and Maintenance did not apply to India[[16]](#footnote-16)whereas, the case of Grose &Anr v. Amirtamayi Das*[[17]](#footnote-17)*it was held that the doctrines of Maintenance and Champerty were also applicable in India and therefore any such agreement would be void.

Thus there was uncertainty on the applicability of these principles in India which was finally answered by the Privy Council in the case of Ram CoomarCondoo v. Chandra CantaMukerjee*[[18]](#footnote-18)*, where the Privy Council held that Champerty and Maintenance were not applicable in India, as they are applied in England, and this concept can be applied only in those transactions which are “*inequitable, extortionate and unconsciable and not made with the bona fide objectives.”[[19]](#footnote-19)*

This view was also upheld by the Supreme Court in *G Senior Advocates of the Supreme Court[[20]](#footnote-20),* where it was observed that Champerty and Maintenance are not applied in India and by entering into a Third Party Funding agreement, a person does not act against the public policy except for those cases where an advocate is party to such an agreement. Thus, from these decisions it is clear that Maintenance and Champerty are not followed in India. Therefore, these principles should not be a bar on the application of the Third Party Funding in India.

In addition to the inapplicability of these doctrines another point in favor of Third Party Funding is that it is allowed in civil suits in certain States in India such as Maharashtra, Gujarat and Madhya Pradesh under their Code of Civil Procedure.[[21]](#footnote-21)In Maharashtra Order XXV of the CPC was amended by the Bombay High Court[[22]](#footnote-22), Under Order XXV Rule 1, if a person transfers certain part of his share or interest in the property to the suit to another person for being financed by him and such a person is not a party to the dispute before such transfer of interest, the court can order such person to be made a party to the suit if he consents. Further the court can also require the person to furnish securities for the costs which may occur, either on its own motion or on the application of the defendant. If the financer fails to furnish the security within the stipulated time period, he will lose his right to claim his share in the property.

This amendment was also adopted by Madhya Pradesh and Gujarat in their CPC, thus in these states, Third Party Funding in litigation has been allowed. From these Amendments it can be inferred that the concept of the Third Party funding is not alien to Indian laws. Under Section 89 of the Act, Arbitration has been recognized as an alternative for settlement of dispute therefore, the application of Third Party Funding should also be extended to Arbitration.

While there has been questions regarding the validity of Third Party Funding agreements, it also faces certain problems regarding procedure when the agreement for funding has to be made with a person from outside India.[[23]](#footnote-23) The provisions of Foreign Exchange Management Act, 1999 are attracted in cases where a transaction takes place in foreign exchange or the party is non-resident.

Under Section 5 and 6 of the Act, these transactions are categorized as either current or capital transactions respectively but since Third Party Funding has not been classified in either category therefore there is ambiguity regarding its nature. This ambiguity has arisen because Third party funding can be treated as both a current as well as a capital transaction both of which are treated differently. The net profit from investments is part of the current account transactions and Third Party Funding is viewed as an investment and this share received by the funder is treated as net income from the investment. So, from this perspective it is a current account transaction.

The second perspective regarding the nature of Third Party Funding is that it is a capital account transaction. The borrowings which are made in foreign exchange or which involves a party who is non-resident, are covered under the ambit of capital account transactions and from this perspective a Third Party funding agreement is also similar to such borrowings and so it can also be regarded as a capital account transaction.

Thus, unless an Amendment is not made in the Foreign Exchange Management Act, 1999 for expressly providing the nature of such transactions, the Third Party Funding in International Arbitration will face this ambiguity and while there are certain ways to go around it such as the creation of Special Purpose Vehicles[[24]](#footnote-24), a definitive and effective measure has to be put in place to facilitate Third Party Funding for International Arbitration.

**APPLICABILITY OF TPF IN INDIA**

As mentioned earlier, the International agreements regarding Third Party Funding cannot be made due to the ambiguity in the nature of such agreements under the Foreign exchange Management Act, 1999 therefore, for now the applicability of such agreements should be allowed for Arbitrations of domestic nature.

In India, there is an absence of any express provision regarding Third Party Funding and therefore, the provisions of the Indian Contract Act, 1872 have to be looked into for checking the applicability of such agreements.

In the Indian Contract Act, Section 10 provides the conditions which are necessary for an agreement to be legally enforceable and some conditions can also be extended to the agreements made between parties for funding of a dispute in return for a share in the proceeds from the dispute.

One of the essential conditions under section 10 is that the object and the consideration should not be unlawful and such unlawful objects and consideration includes those acts which are against public policy[[25]](#footnote-25). As has been held by the Courts in Ram Coomar’s case[[26]](#footnote-26) as well as in the case of *G Senior Advocates of the Supreme Court[[27]](#footnote-27)*, the principles of Maintenance and Champerty are not against public policy therefore, the applicability of Third Party Funding in India should not be barred only on the ground that such agreements are against public policy because they are in the nature of Maintenance and Champerty. Thus, if a funding agreement is made which fulfills the conditions of section 10 and there is no illegality in it then, such agreement should be allowed to be held valid and enforceable.

One more important challenge on the validity of Third Party Funding in India arises by the provision of Section 30 of the Contract Act which provides for wagering agreements. Under Section 30 of the Act, wagering agreements are void and cannot be enforced in a court. In the case of Gherulal Parakh v. Mahadeodas Maiya & Ors*[[28]](#footnote-28),* the definition of wagering agreements which has been provided by Anson was reiterated as “*a promise to give money or money’s worth upon the determination or ascertainment of an uncertain event.”[[29]](#footnote-29)*

Since wagering agreements are void, the same argument can be made against the applicability of Third Party Funding because in such agreements too, a promise is made for giving money to another person in relation to an uncertain event i.e., the settlement of the dispute which may be awarded in either party’s favour. Thus, in this sense, the funding agreement resembles a wagering agreement. But the application of section 30 is subject to some exception for instance, in case of horse racing the provisions of Section 30 do not render the agreements made to subscribe towards the prize or amount of money which exceeds Rs.500 to be given to the winner of a horse race as void.[[30]](#footnote-30)

Similarly in the case of Moore v. Elphick[[31]](#footnote-31) it was observed that “*If skill plays a substantial part in the result and prizes are awarded according to the merits of the solution, the competition is not a lottery.”[[32]](#footnote-32)*So, where skill plays an important role it does not amounts to a wagering agreement. In wagering agreements there is an element of chance. Explaining this in context of card games it has been observed by the Supreme Court in the case of State of Andhra Pradesh v. Satyanarayan & ors*[[33]](#footnote-33),* that “*In fact in all games in which cards are shuffled and dealt out, there is an element of chance because the distribution of the cards is not according to the set pattern but is dependent upon how the cards find their place in the shuffled pack”[[34]](#footnote-34)*

In the agreements for Third Party Funding there is no element of chance because a dispute is resolved on the merits of a case and not on chance therefore, to hold the view that such agreements are the same as a wagering agreement is wrong. Additionally, in any legal dispute the skills of a legal representative is also very precious and it is the reason why top lawyers and legal practitioners charge high fees, therefore Third Party Funding cannot be held void by section 30 of the Contract Act.

**SHOULD INDIA ALLOW THIRD PARTY FUNDING?**

Based on the current trend in International stage regarding arbitration and the acceptability of Third Party Funding by several jurisdictions, the researchers believe that India should also allow Third Party Funding in Arbitration. In Arkin v. Borchard Lines Ltd*[[35]](#footnote-35),* it was observed that Third Party Funding provides access to justice which is one of its key benefits.

Similarly in India, in the case of Anita Kushwaha v. Pushap Sudan*[[36]](#footnote-36),* the Supreme Court has held that the right to access to justice is part of the Fundamental Rights under Article 14 and 21 of the Indian Constitution.

Third Party Funding facilitates the right of the people to have access to justice by providing them with the resources necessary for availing good legal services which they otherwise could not have availed of even if their claims were genuine and their rights had been violated.[[37]](#footnote-37)

Also, there was a high level commission which had been formed to look into the mechanism of arbitration in India and in that report while observing the other measures which have been taken by other jurisdictions such as Hong Kong and Singapore, it was indicated that it is time for India to allow Third Party Funding in International Arbitration which are seated in India by applying these measures as per the Indian conditions.[[38]](#footnote-38) So, allowing such agreements in India is a step forward in the path of providing better access to justice to the people.

**HOW INDIA SHOULD APPLY THIRD PARTY FUNDING?**

As the concept of Third Party Funding is still new and is getting recognition by various jurisdictions only recently, there are not many countries which can be taken as an inspiration for adopting this practice in India. Thus, India is at a position where it could create a system which can be followed by other jurisdictions for their laws regarding Third Party Funding.

There is a need for proper regulation of such agreements which is balanced in such a manner that there is neither over regulation or under regulation as both scenarios will result in unsatisfactory and ineffective outcomes.

While implementing Third Party Funding, the role of the Law Commission of India which is an advisory body, cannot be overlooked. The Law Commission is known for its detailed and well researched reports and therefore by taking its help India can devise the most suitable approach for implementing Third Party Funding as per the Indian situation.

There are two approaches to regulate Third Party Funding; the hard law approach and the soft law approach[[39]](#footnote-39). In the hard law approach, a legislation can be passed and its provisions will be binding on the funder and the funded party, whereas, in the soft law approach, instead of passing a legislation, some non-binding regulations are provided which guide the parties to such an agreement and these regulations act as a code of conduct for these parties.

For India, the soft law approach appears to be a more viable approach as the concept of Third Party Funding is at a development stage and certain developments may arise which cannot be foreseen presently, therefore it is better to have a non-binding regulation which can incorporate these new developments quickly and when this concept is firmly established a legislation may be passed if a need for the same arises in the future.[[40]](#footnote-40)

In providing regulations for Third Party Funding, several aspects have to be borne in mind including the definition of Third Party funding, the rights of the funder and the funded party, the duties of the funder such as the duty to disclose honest information, the scope of control which can be exercised by the funder in a dispute, the grounds for termination of such agreements etc.

Thus, keeping all these factors in mind a new regulation should be created which is of non-binding nature in its initial stage and it can be made binding after testing the effectiveness of these regulations.

**CONCLUSION**

Third Party Funding is witnessing a rise in its popularity among various jurisdictions including many common law jurisdictions which have set aside the old principles of Maintenance and Champerty and have recognized its validity. Countries like Hong Kong and Singapore have passed laws for providing statutory effect to such agreements. While India also follows the principles of common law, from the cases which have been discussed it can be stated that the maintenance and champerty do not apply in India and therefore these should not be any bar on allowing Third Party Funding.

Third Party funding is an effective solution to the rising costs of disputes and therefore, India should also apply this concept as there is a huge backlog of cases in India. It also facilitates access to justice by allowing the financially weaker parties to get funded by a person for the costs of disputes and they have to pay to such funders from the share only if the dispute is decided in their favour, thus it prevents the funders from demanding back the funded amount where a case is ruled against the funded party.

While its recent origin does create some obstacles but at the same time it has also provided India with the opportunity to have freedom in coming up with regulations for these agreements which are unique to Indian conditions and India should capitalize on this opportunity to come up with a regulatory framework which is very robust and suitable for furthering its pro-arbitration approach.

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