THIRD PARTY FUNDING – A SOLUTION TO HIGH ARBITRATION COST

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# ABSTRACT

Third party litigation funding involves the funding of litigation activities by entities other than parties themselves. Mostly, this is led by affluent businessman who expenses as an investment opportunity. Basically, third party funding is contractual relationship with one of the parties such as an indemnifier or liability insurer interchange for portion of settlement advanced from the case.

The culture of arbitration is on the rise in India, so rise in the cost of arbitration is parallel, and be it any sort of fees whether given for legal procedure or to the arbitrator. So to counter this issue, Third party funding is becoming widely popular to reduce the extent of these heavy costs of arbitration.

The fees sometimes are preposterous to the result provided by the arbitrator and are sometimes exorbitant even for the party that had a meritorious claim. Since arbitration is on the verge of taking off, funding from third parties is a requirement and a necessity. This is something the nation should not be reluctant upon many different states have been proposing requisite changes in their legal procedure to provide a better pathway for third party funding.

These third party funding will improve the requisite case strategies of the funded parties since the funder will do its own handful research towards the case before entering into the process of funding since these funding authorities are only fascinated towards meritorious and suitable claims.

Although these funders are generally restricted from interfering into the matters of arbitration but even though they somehow intercede into the matters of the funded party since the claim for settlement is the verge and they sincerely wants to receive the approval for settlement.

# **INTRODUCTION**

Third party funding may not thrive in India as popularly but is still one of the most marketable phenomenon in the commercial arbitration sector. It is basically a party who is not engaged in the process of arbitration gives away funds to a party for a possible meritorious return. Opponent’s cost can also be covered if the they have been so ordered. This opens up a pathway for many institutions those are favorably inclined to finance such arbitration process, these funding institutions involve diversified funders, insurance companies, many reputed law firms, investment banks have taken their step towards financing these legal subpoena.[[1]](#footnote-1)

However, returns here are mere contingency as such the funds will only be repaid to the institution when the claim is successful. This methodology was instigated to facilitate the indigent party. Evidentiary process, Attorney’s fees, Arbitrator Fees, security payments (in some instances) are to be covered under these allocated funds[[2]](#footnote-2).

Although not everything is righteous with this phenomenon, this lead to a most common issue in this field of genre that is champerty, more description about this mentioned in this paper, basically champerty abuses the ethics as funder’s involvement in the process ambushes the secrecy of the case[[3]](#footnote-3).

## CONCEPT OF THIRD PARTY FUNDING

In comprehensive terms a third party are basically who is not a contributor to an agreement/contract, although the outcome of the contract may influence them[[4]](#footnote-4). The party though remains divulged to the terms and conditions of the contract but is a beneficiary in most of the cases[[5]](#footnote-5).

In Litigation and Arbitration, third party nowadays bears much more practicality with third party funding being extensively popular in or outside the nation[[6]](#footnote-6). These passive participators in these legal subpoenas are intended beneficiaries. Their primary intention before funding the impecunious ones is to get a claim that suits their objective otherwise this process of third party funding is known for its contingency factor.

## PROMINENCE OF FUNDER

“Fund” is an inclusive term, which is being provided by an entity (FUNDER) for the fulfilment of certain requirement.[[7]](#footnote-7) “Funders” can be a singularity or an organization that in general sense provides financial assistance to the client, mostly these funds are provided by the client’s attorney, may be a private institute, a law firm, corporate banks, insurance companies, the list goes on.

In arbitration or Litigation, as we talked above, the funders not being an active participator in the arbitral affair perhaps want a substantial profit upon the resolution of the dispute[[8]](#footnote-8).

In some cases the attorney of the client himself becomes the funder of the case, in this sort of situation the client controls and manage the case as if he had self- financed the dispute.

Sometimes adverse fees is also required to be paid the funder, the funding agreement may include provisions that may say that if the funded party loses, the funder has to pay an adverse cost. Adverse cost includes winning party’s attorney’s fees, administrative fees, evidentiary fees that had to be paid by the losing party.[[9]](#footnote-9)

## CLIENTS

Especially in terms of third party funding client can be of many sorts, be it a legal firm, an individual, a corporation, or even a sovereign, but in its basic interpretation the client will either instigate a claim or fight against the claim.[[10]](#footnote-10)

The funding institution will ask the client for the details of the case,the funder will then assess the case, thinks over the possibility of a meritorious claim,only then they might allocate the funds to their possible clients.

# ASPECTS OF THIRD PARTY FUNDING

Regardless of all the contingency issues, T.P.F. is being popularly accepted with U.K and U.S.A. legalizing it and Hong Kong developing provisions on it. Now, it can be rightly said that modern day T.P.F. is no more similar to its originating or primitive days.[[11]](#footnote-11)

[[12]](#footnote-12)Couple of cases have been discussed in this chapter that provides a greater authority to this “industry”. Also conversed in this chapter, the similarity T.P.F possesses as a wagering contract (sec. 30 of the Indian Contract Act), mere justification to this is like a wagering contract the outcome justifies the fact that whether the party will get paid or not similarly in T.P.F the funder finances the proceedings knowing the fact that if the claim doesn’t fall in the hands of the funded party, he might not get repaid. But this reasoning cannot enforce since wagering contract are void in the eyes of law and jurisdictions have legalized T.P.F.[[13]](#footnote-13)

Sec. 124 of Indian Contract act discusses Contract of Indemnity, where a third party promises to indemnify the party at loss.[[14]](#footnote-14) Similarly These Funding institutions quintessentially indemnifies the parties which are at loss, on the basis that these clients are impecunious[[15]](#footnote-15).

Jurisdictions have corrected many loopholes in this segment, from being a “Champertous *act*” to becoming a fully-fledged “*Industry*”. Many aspects of T.P.F have been discussed down below.

## EMANATION OF THIRD PARTY FUNDING IN ARBITRATION, LITIGATION & CONTRACTUAL MATTERS

In common law third party funding is witnessing emergence in different areas like arbitration, litigation and contractual matters. The need of dispute settlement outside the court is emerging as a new way of providing remedy.[[16]](#footnote-16) The uplifting and enhancement of tradition of funding in the field of litigation has in part been due to the innovatory steps in the legal sector has had to accommodate the modern demands, needs and requirements of their clients when it comes to paying for litigation costs and managing risk.

## NECESSITY OF THIRD PARTY FUNDING

The basic keynote on which this paper is constantly hovering is the fact that is there any actual necessity for the third party to intervene with subject to financing the arbitration subpoena?

The minimal vindication to this and has already been talked in this paper is that not all parties are stable enough to finance their own claim since they have chosen to keep the matters out of the court[[17]](#footnote-17), complications may have been reduced but the cost have been inversely increased, so quintessentially to finance all such matters these passive promoters assist these claimants or respondents[[18]](#footnote-18), or act as an indemnifier, and settles a promise that if the claim that may come is not apt, the funder might have to pay the opposite party’s cost of arbitration as well.

Although this may sound abysmal but this is what this is. Easier said than done although, “Passive Participants” is just a gimmick here, these funders demand each and every fact of the case, against the ethics, isn’t it? But that is what required.

## IS THIRD PARTY FUNDING COST RECOVARABLE?

Initially this may not have been accepted since, on paper TPF seems more or less like a wagering contract (sec. 30 of the Indian Contract Act) since the returns here is just a mere contingency but many jurisdictions have come that stated that this phenomenon no longer oppose public policy as long as the funding institution is not exploiting their clients when it comes to recoveries.[[19]](#footnote-19)

This third party funding was primitively considered to be a champertous act, which is common law doctrine, where a third party finances a legal proceeding to get an award or price afterwards. Again considered against public policies but jurisdictions may have provided a relief to this from such complexities[[20]](#footnote-20).

In Ram Coomar Coondoo V. Chunder Kanto Mukherjee*,* it was held that such agreements which amounts to champerty are basically void in England but are acceptable in India till some extent considering the recovery which the funding institution demanding is apt. or not.

In Suganchand v. Balchand,funders demanded a share in the property that client had received as compensation, court held that the demand was extravagant and inappropriate, only the funded amount with some interests added on shall be repaid.[[21]](#footnote-21)

## PERMISSIBILTY OF THIRD PARTY FUNDING IN INDIA

Third party funding has become integral part of big corporate disputes in other countries such as the UK, US and more recently also Hong Kong and Singapore. In India, Third party funding is explicitly recognized in the context of civil suits in states such as Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh. This consent to third party funding can be found in Civil Procedure code 1908 (cpc) Order 5 (as amended by Maharashtra, Gujarat , Madhya Pradesh and Uttar Pradesh) renders that the courts have the power to secure costs for litigation by asking the financer to become party and depositing the costs in courts[[22]](#footnote-22).

The Arbitration and Conciliation Act. 1996, rules arbitration in India Act of 1996 is being silent on this issue. Virtually third party funding is nonexistent in India.

Till date no paradigm on Third party funding exists and thus agreements are unconventional. Certainly, In India, the more pragmatic risk both for litigants and insurers is that most litigation is completely unforeseeable and could take years, decades or lifetimes[[23]](#footnote-23).

# PRESENT SCENARIO

Since the concept of champerty and maintenance does not actually apply in India, it gives an open path to third party funding to work extensively in India[[24]](#footnote-24). This may create a serious issue as this will lead to the commercialization of arbitration, which is generally against the legal ethics. T.P.F in India is slightly dissimilar to ones in U.K. and U.S.A, here the lawyer cannot make a contract with his client to self-finance their case, such will be rendered as a champerty agreement, and that will not be permitted. However, the apex court in 1954 haven’t actually declared the agreements regarding champerty (in which recovery is a mere contingency) void, but only provided the above mentioned exception[[25]](#footnote-25). Although there is no such statute exist that prohibits such in arbitration matters[[26]](#footnote-26).

On the other hand certain state amendments took place in order XXV of the C.P.C, 1908 which reinstates India’s legal position as a supporter of T.P.F. State of Maharashtra states-

* Where any plaintiff has for the purpose of being financed in the suit transferred or agreed to transfer any share or interest in the property in the suit to a person who is not already a party to the suit, the court may order such person to be made a plaintiff to the suit if he consents , and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the court may make an order dismissing the suit so far as his right to, or interested in the property in suit is concerned, or declaring that he shall be debarred from claiming any right to or interest in the property in suit.

# THIRD PARTY FUNDING AROUND THE WORLD & IT’S IMPACT

Third party funding agreements are dependent on the legitimacy of such agreements in those jurisdictions. In paradigm like the decision by the Irish Supreme Court, a third party agreement can be held violative of national laws. On the other hand decisions by the English, Australian and Singaporean courts have shown that irrespective of where the third party funding agreements was entered into the courts would allow execution of the award[[27]](#footnote-27).

## SINGAPORE

Compared with the huff of third party funding of litigation and arbitration in other countries, Singapore is somewhere subordinated. As there is no publicized examples of third party funding in Singapore and those litigation are few. Since, we can say that Singapore is somewhere rebuffed from third party funding, here so far is due to the torts of champerty and maintenance still apply. For the time being champertous contracts offend public policy and unenforceable.[[28]](#footnote-28)

As in England and Wales, contingency fee arrangements are prohibited in Singapore. According to section 107 of Legal Profession Act, lawyers are not allowed from entering into agreements or negotiations with a client for either an interest in the subject matter of litigation or remuneration proportionate to the amount recovered by the client in the proceedings[[29]](#footnote-29).

Still, doors are not closed for third party funding in litigation and arbitration. In Lim Lie Hoa and another v. Ong Jane Rebecca, the appeal held that since third party funder “had an interest in financing the litigation in the hope that respondent would recover funds from the estate to enable her to discharge her liabilities”, the arrangement made between the third party funder[[30]](#footnote-30) and the respondent was not champertous[[31]](#footnote-31). It is however; too early to reckon on the limit to which existing prohibitions will be modified.

## UNITED STATES

Third party funding of litigation or arbitration diverse from state to state in US. Some states are having common doctrines or statutes, such as maintenance and champerty and not allowed disinterested persons from investing in lawsuits while others have relinquished them[[32]](#footnote-32).

A sample of state jurisprudence shows the various approaches. The 1997 Massachusetts Supreme court decision in Saladini v. Righellis, court held that-

“The champerty doctrine is (no longer) needed to be protect against the evils once feared; speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position.”

On the broader stage , there are several cases in US and UK which is managed by their law firms in which claimants are receiving third party financing for arbitration expenses or engaging in other options for fee arrangements with third party financers that enables claimants to proceed with their arbitration claims[[33]](#footnote-33).

# BRICS RELATIONSHIP WITH T.P.F

T.P.F. though well established in the western countries, it is still searching its path in other nations as well, most of the common law jurisdictions still prohibit agreements related champerty and maintenance and are explicitly declared void and against public policy. Here, provisions of BRICS nations are going to be discussed in context with the ones in Hong Kong and Singapore[[34]](#footnote-34).

* Unlike the western world, T.P.F is not mainstream in BRICS nations, states are still finding their provisions to put T.P.F in highlight, *Brazil* itself has no such legal sanction about T.P.F nor they explicitly refuse the provisions of T.P.F, In the case of *Re sp No. 805919* of October 2015, Brazil’s superior court acknowledged that the lawyers can claim a fixed amount from their clients and formulated that contingency fee agreements are more resourceful in lawsuits. Supreme federal court of Brazil haven’t uplifted this decision so the state can interpret many new notions for introducing T.P.F in their arbitral structure.
* More or less like Brazil, the law in Russia has remained silent over the provisions of introducing T.P.F in their country. The constitutional court of the Russian federation has declared that lawyers cannot influence the judicial proceedings or lawsuit, so no agreement between a lawyer and a client can be accepted. Technically the state is not opposed to the notion of T.P.F because in arbitration it doesn’t intervene lawyers as funders in an arbitral matter.
* ***India*** validates T.P.F in civil suits and promises a much wider array for this Industry in future, similarly like Russia, Bar council of India strictly prohibited the agreement between lawyer and a client since it opposes public policy but in arbitration, such agreement can take place since no lawyer is involved[[35]](#footnote-35).
* Champerty and maintenance is irrelevant under the legal structure of *Chinese* Judiciary, however contingency fee agreement is again a very common practice in the system, the fees here is directly paid to the law firm to which the attorney/lawyer is associated with, which basically means prohibition of direct payment between client and lawyer. The law stipulated that the contingency fees should not exceed the quantum of 30%(of the disputed matter) of the contractual amount. But unlike Hong Kong China doesn’t [[36]](#footnote-36)have any ideas or provisions over the use of T.P.F. in arbitration but it can be said T.P.F will soon embrace its virtue in Chinese arbitration[[37]](#footnote-37).
* **South African** judiciary accepted the phenomenon of T.P.F in return for some benefit at the approval of a meritorious claim, evil motives can be involved with this process and [[38]](#footnote-38)the court have seen this and thought over this. This process may lead to infuriating or frivolous litigation[[39]](#footnote-39).

QUOTED- “an attempt made to use for ulterior purposes, ‘machinery devised’ for administration of justice would constitute an abuse of the process”.

“No win-No fees” agreements are also legal, stated by the legal sanction in South Africa. This basically is the other name for contingency fees. Another provision is added in this section of contingency fees that the entitlement of fees by the attorney higher than the normal fees if the claim is successful. This has certain limitations that suggest higher fees may not exceed the general fees of the attorney by 100% and 25% of the total amount awarded if the case is surrounding in money. with so many provisions south Africa have tied its knot with T.P.F and will sooner be popularised much extensively in commercial arbitration[[40]](#footnote-40)

# CONCLUSION

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The industry for T.P.F. is still in its developing phase, considering India as a perspective however nation like U.S.A. has a well flourished infrastructure for the same. Amendments in Hong Kong have abolished the offences of champerty and maintenance and have created a pathway for many other nations including India. The current lack of provisions is a major inducement that prohibits virtually prohibits T.P.F to become mainstream in India.

Third party funding is basically a catalyst that will help putting Indian arbitration into global market, BRICS nations for instance allowed T.P.F. in one way or another, but don’t have a probable legal framework for it’s proper function, but that doesn’t necessarily mean that it is prohibited either, but these nations have a wider scope for highlighting arbitration by introducing third party funding. Maturing over time and introducing requisite changes is necessary for a dynamic legal structure that thrive parallel to the public policies instead of opposing them.

After all a Funder’s mind-set is to get back what he had invested, countries like Hong Kong, Singapore, U.K. , where the laws are much prevalent and consistent towards the process, these are the ideal jurisdictions for arbitration. No direct provisions for T.P.F in India but some state have amended their orders in CPC, which allows contingency fee structure. So, these returns which are coined as “Awards” don’t actually oppose the public policies. These awards or returns have to be checked whether they are justified or exploited.

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