

NEWSLETTER 8

Navigating Challenges to Third-Party Funding in Indian Arbitration

Third-Party Funding (“TPF”) in arbitration occurs when one of the involved parties secures financial assistance from an external entity, commonly known as a third-party funder. This external entity, often a commercial entity or individual investor, agrees to provide funding for the legal expenses associated with arbitration in exchange for a percentage of any potential award. While TPF is a common practice in litigation, its emergence in arbitration is a relatively recent phenomenon.

TPF represents a contemporary evolution of the long-standing legal practices of Maintenance and Champerty which were traditionally prohibited in various common law jurisdictions, including the United Kingdom. Interestingly, India does not impose such restrictions on Maintenance and Champerty. The Privy Council, in the significant case of *Ram Coomar Condoo v. Chunder Canto Mukherjee*¹, explicitly affirmed that “*The English laws of maintenance and champerty are not of force as specific laws in India.*” Consequently, the concept of third-party funding has been acknowledged in India since the pre-independence era. Unlike jurisdictions like Hong Kong and Singapore, which have enacted legislation to regulate TPF arrangements, India has opted for a system of self-regulation concerning TPF agreements. However, to establish itself as a robust market for TPF, in the domain of domestic arbitration, India must undergo a critical reassessment of specific provisions within the Arbitration and Conciliation Act of 1996 (“the Act”).

Major concerns for Arbitration TPF in India

The introduction of TPF arrangement introduces a notable challenge related to confidentiality. *Section 42-A* of the Act explicitly emphasizes the fundamental nature of confidentiality in arbitration proceedings. However, involving a funder raises concerns about the viability of this provision. Disclosing sensitive information to the funder poses a potential threat to the confidentiality of arbitration proceedings, necessitating careful consideration to balance transparency associated with funders and the imperative to maintain confidentiality integral to arbitration processes.

¹ (1876) L.R. 4 I.A. 23.

Moreover, *Section 12* of the Act mandates arbitrators to maintain independence and impartiality, requiring disclosure of any relationships that could compromise these principles. The involvement of TPF introduces complexities to arbitrator impartiality. Questions may arise due to potential influence from the funder, stemming from relationships between the arbitrator or arbitral institution and the funder. The Fifth Schedule, introduced in the 2015 Amendment, outlines grounds for doubts on an arbitrator's neutrality but lacks specific provisions addressing TPF-related conflicts in domestic arbitrations. To effectively manage such conflicts, additional measures must complement the Fifth Schedule.

Another key technical challenge in TPF concerns the level of control funders may exert in arbitration. This raises concerns about potential interference in decision-making and the party autonomy. TPF often involves financial support in exchange for a share in arbitration proceeds, enhancing access to justice but prompting questions about the funder's influence on the arbitration process.

Conclusion

Despite the challenges faced by TPF in Indian arbitration, it proves highly beneficial for smaller businesses or individuals facing prohibitive arbitration costs. TPF levels the playing field, enabling parties with limited resources to pursue claims without financial intimidation. In *Jayaswal Ashoka Infrastructures Pvt. Ltd. v. Pansare Lawad Sallagar*,² the Bombay High Court affirmed the validity of a TPF contract, treating it as a contingency fee arrangement. The court asserted that it didn't violate public policy under *Section 23* of the Indian Contract Act, emphasizing the distinction between arbitration as a private dispute resolution and court representation where public policy is crucial. Despite an ongoing Supreme Court appeal, this reflects a pro-TPF stance by the judiciary, encouraging arbitration practices.

Best,

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² SLP (C) No. 17904/2019.

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