
SECURITY FOR COSTS WITHOUT A POWER TO ORDER IT: THIRD-PARTY FUNDING AND THE STRUCTURAL ASYMMETRY OF INDIAN-SEATED INTERNATIONAL COMMERCIAL ARBITRATION

Jaskiran Kaur, National Law Institute University, Bhopal

ABSTRACT

The Indian debate on third-party funding has settled into a familiar shape. Funding is lawful but unregulated; the Delhi High Court has held that a funder who never agreed to arbitrate cannot be made to pay a costs award; and the standard prescription is that India should mandate disclosure and make funders liable. This article argues that the prescription misidentifies the defect. The problem exposed by Tomorrow Sales Agency is not that the funder escaped liability, which on orthodox principles of consent it was bound to do, but that the respondent had no means of securing its costs against anyone at all, including the claimant. The Arbitration and Conciliation Act 1996 confers a comprehensive power to award costs at the end of a reference under Section 31A, and it confers a deposit mechanism under Section 38 that protects only the tribunal's own fees. It confers no express power, on the tribunal or on the court, to order a claimant to provide security for the respondent's costs. This is a drafting choice rather than an accident: where Article 17 of the UNCITRAL Model Law states an open-ended power to grant interim measures, Section 17 of the Indian Act substitutes an enumerated list in which security is available for the amount in dispute but not for costs. Funding does not create this gap; it industrialises it, because non-recourse structures make a judgment-proof claimant a rational commercial product rather than an accident of insolvency. The article compares the deliberate pairing of disclosure with security in England, Hong Kong, Singapore, the 2022 ICSID Rules and the 2025 SIAC Rules, and argues that India has imported neither half of that pair. It proposes an express security-for-costs power in Section 17 subject to Article 17A-style conditions, a disclosure duty owed by parties rather than only by arbitrators, a funding-aware factor in Section 31A(3), and an opt-in route by which a funder may submit to the tribunal's costs jurisdiction. It argues against reversing Tomorrow Sales Agency, which was correct.

Keywords: international commercial arbitration; third-party funding; security for costs; Section 17; Section 31A; Tomorrow Sales Agency; disclosure; UNCITRAL Model Law; arbitrator conflicts.

I. INTRODUCTION

A respondent who wins an international commercial arbitration seated in India and is awarded its costs may find that it has won a piece of paper. If the claimant is a special purpose vehicle with no assets, a costs award is unenforceable in fact whatever its status in law. If the claimant was funded on non-recourse terms by a third party, the funder owes nothing under the award because it never agreed to arbitrate, and the claimant owes everything but holds nothing. The respondent has spent years and a great deal of money defending a claim that it defeated, and it will recover none of it.

The standard Indian response to this problem is to look at the funder. Commentary and the beginnings of a reform literature converge on two proposals: that funded parties should be compelled to disclose their funding, and that funders should be made liable for adverse costs. The first proposal is sound and overdue. The second is a mistake, and it has been recognised as a mistake by the only Indian court to consider the question squarely.

This article argues that both proposals look in the wrong direction, because the gap they respond to is not a funding gap. It is a gap in the interim-measures regime. The Act gives a tribunal a comprehensive power to award costs when it finishes, and gives it no power to secure those costs while it is working. Funding did not create that asymmetry. Funding made it visible, systematic and commercially exploitable, which is a different thing and calls for a different remedy. Part II sets out the costs regime and the assumption buried in it. Part III shows where the security power should sit and does not. Part IV reads *Tomorrow Sales Agency* for what it actually held. Part V explains why funding is the stress test rather than the cause. Part VI turns to the disclosure corollary and the arbitrator conflicts the Act cannot presently see. Part VII examines the jurisdictions that have paired disclosure with security deliberately. Part VIII proposes four amendments, and Part IX concludes.

II. A COSTS REGIME AND ITS BURIED ASSUMPTION

Before 2015 the Indian Act said almost nothing useful about costs. The 2015 amendment, following the 246th Report of the Law Commission, inserted Section 31A, which supplies a complete code: the tribunal has discretion to determine whether costs are payable, by whom, in what amount and when, the general rule is that the unsuccessful party pays, and the tribunal

may depart from that rule for recorded reasons.¹ Section 31A(3) lists the circumstances the tribunal is to have regard to, including the conduct of the parties, whether a party has succeeded partly, and whether any reasonable offer to settle was refused.² It is a modern provision, closely modelled on English practice, and it works.

What it works on is the apportionment of a liability. It says nothing about whether that liability will ever be met. The Act addresses the collection problem exactly once, in Section 38, which permits the tribunal to fix the amount of the deposit as an advance for the costs of the arbitration, to require the parties to deposit it in equal shares, and to suspend or terminate the proceedings where the deposit is not paid.³ Section 38 is a real security mechanism, and it is directed entirely at the tribunal's own remuneration and expenses. It does not reach the respondent's legal costs, which are ordinarily the much larger figure and the figure Section 31A is concerned with.

The structure therefore carries an unstated assumption: that a party able to commence an international arbitration is a party able to satisfy an adverse costs award at the end of it. That assumption is not stated anywhere because it was never examined. It held tolerably well when claimants in cross-border commercial disputes were operating companies with balance sheets. It does not hold where the claimant is a holding vehicle, a company in liquidation pursuing its last asset, or a corporate shell assembled for the purpose of bringing the claim. The Act has a sophisticated rule about who should bear costs and no rule at all about how to make sure they can.

III. THE POWER THAT SHOULD BE IN SECTION 17 AND IS NOT

The natural home for a security-for-costs power is the interim-measures provision. Article 17 of the UNCITRAL Model Law, as revised in 2006, gives a tribunal power to grant 'any interim measure', defined functionally as a temporary measure requiring a party to maintain the status quo, prevent harm to the arbitral process, preserve assets out of which an award may be satisfied, or preserve evidence. Article 17A then imposes conditions, requiring harm not

¹Arbitration and Conciliation Act 1996, s 31A, inserted by the Arbitration and Conciliation (Amendment) Act 2015, s 17; Law Commission of India, 'Amendments to the Arbitration and Conciliation Act 1996' (Report No 246, August 2014).

²Arbitration and Conciliation Act 1996, s 31A(3).

³Arbitration and Conciliation Act 1996, s 38.

adequately reparable by damages and a reasonable possibility of success on the merits.⁴ The Model Law formula is open-ended by design. A tribunal applying Article 17 can order security for costs because nothing in the text excludes it, and the Article 17A conditions discipline the discretion rather than confining the subject matter.

India departed from this drafting. Section 17(1)(ii), as substituted in 2015, enumerates the measures a tribunal may order: the preservation, interim custody or sale of goods; securing the amount in dispute; the detention, preservation or inspection of property; an interim injunction or the appointment of a receiver; and such other interim measure of protection as may appear to the tribunal to be just and convenient. Section 9(1)(ii) confers the same list on the court.⁵ The departure is not cosmetic. An enumerated list invites the inference that what is not enumerated is not available, and the list conspicuously secures one thing and not the other.

The second limb is the one that matters. A tribunal may order a party to secure 'the amount in dispute in the arbitration'.⁶ That is security for the claim, which protects a claimant against a dissipating respondent. Its mirror image, security for costs, protects a respondent against an impecunious claimant, and it is absent. The asymmetry is precise: the drafters provided for the risk that a successful claimant would be unable to collect, and not for the risk that a successful respondent would be unable to collect.

The residual clause is the obvious answer and an unsatisfactory one. Section 17(1)(ii)(e) permits any other interim measure of protection that appears just and convenient.⁷ A tribunal could read security for costs into those words, and some tribunals plainly do. But the phrase 'measure of protection' sits more comfortably with the preservation of a thing, a status or a state of affairs than with the provision of a fund against a future money liability, and the preceding four limbs all concern property, evidence or the subject matter of the dispute, which colours the residual clause by association. A respondent asking for security is therefore asking a tribunal to resolve a question of statutory construction before it reaches the merits of the application, and is doing so knowing that an order made under a contested power will be an inviting target at the enforcement stage, since Section 17(2) makes such orders enforceable as

⁴UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, as amended 7 July 2006) UN Doc A/40/17, Annex I, arts 17 and 17A.

⁵Arbitration and Conciliation Act 1996, s 17(1)(ii)(a)–(e), as substituted by the Arbitration and Conciliation (Amendment) Act 2015, s 10; s 9(1)(ii) is in materially identical terms.

⁶Arbitration and Conciliation Act 1996, s 17(1)(ii)(b).

⁷Arbitration and Conciliation Act 1996, s 17(1)(ii)(e).

orders of the court.⁸ The practical consequence is that the application is rarely worth making. Order XXV Rule 1 of the Code of Civil Procedure, which permits a court to order a plaintiff to give security for a defendant's costs, has no counterpart in the arbitral regime.⁹

IV. WHAT TOMORROW SALES AGENCY ACTUALLY DECIDED

The leading Indian authority is the Division Bench judgment of the Delhi High Court in *Tomorrow Sales Agency Pvt Ltd v SBS Holdings Inc.*¹⁰ The facts are instructive. A group of claimants obtained non-recourse funding from Tomorrow Sales Agency, a non-banking financial company, under a bespoke funding agreement, and brought a SIAC arbitration against SBS Holdings. The tribunal rejected the claims and awarded SBS its costs. The claimants could not pay. SBS applied under Section 9 for interim measures, and a single judge directed the funder to disclose its assets and restrained it from encumbering them. The funder appealed under Section 37.

The Division Bench allowed the appeal. Its reasoning is orthodox and, with respect, plainly right. Consent is the foundation of arbitration; a person who has not agreed to arbitrate and has not been joined to the proceedings is not bound by the award; a non-signatory may be bound only where it has been compelled to arbitrate and has participated as a party; and no attempt had been made to join the funder here.¹¹ The Court rejected the characterisation of the funder as a de facto party, observing that a funder cannot be saddled with a liability it never undertook, and noted that it had no procedural power to implead a third party for the limited purpose of satisfying a costs award.¹²

The step that matters for present purposes is the next one. Having held that the award could not be enforced against the funder, the Court reasoned that interim measures under Section 9, which are available in aid of enforcement, could not be directed against the funder either.¹³ That is a correct reading of Section 9 and it is also the point at which the structural problem becomes visible. The respondent's difficulty was never really that the funder was beyond reach.

⁸Arbitration and Conciliation Act 1996, s 17(2), inserted by the Arbitration and Conciliation (Amendment) Act 2015, s 10.

⁹Code of Civil Procedure 1908, Order XXV Rule 1.

¹⁰*Tomorrow Sales Agency Pvt Ltd v SBS Holdings Inc* (Delhi High Court, 29 May 2023), an appeal under s 37 of the Arbitration and Conciliation Act 1996 from an order of a single judge dated 7 March 2023.

¹¹*Tomorrow Sales Agency Pvt Ltd v SBS Holdings Inc* (Delhi High Court, 29 May 2023) [36], [38], [46].

¹²*Tomorrow Sales Agency Pvt Ltd v SBS Holdings Inc* (Delhi High Court, 29 May 2023) [37], [65].

¹³*Tomorrow Sales Agency Pvt Ltd v SBS Holdings Inc* (Delhi High Court, 29 May 2023) [47].

It was that by the time the respondent came to look for security, the arbitration was over, the award existed, and there was nothing left to secure it against. Had a security-for-costs power been available at the outset, directed at the claimants rather than at the funder, the question of the funder's liability would not have needed to arise. The funder would have decided, as funders routinely do in other seats, whether to put up the security as a condition of pursuing the claim it had financed.

Read this way, Tomorrow Sales Agency is not a case about the limits of funder liability. It is a case about a respondent reaching for the wrong instrument because the right one did not exist.

V. FUNDING AS STRESS TEST RATHER THAN CAUSE

Third-party funding has never been unlawful in India. The Privy Council held in 1876 that agreements to finance litigation in return for a share of the proceeds are not void merely because they would offend the English rules on champerty and maintenance, which were not introduced into India, and the Supreme Court has observed that there is no restriction on non-lawyers funding litigation and being repaid out of the proceeds.¹⁴ Several states have amended Order XXV Rule 1 of the Code to require security where a plaintiff is financed by a person who is not a party, which assumes the legitimacy of the practice while regulating one of its consequences.¹⁵ Funding is therefore permitted, familiar, and increasingly used in India-seated international arbitration.

It is important to be precise about what funding changes. A funded claimant is not necessarily an impecunious one; solvent companies fund claims to move legal spending off the balance sheet and to share risk. Conversely, an unfunded claimant may be entirely judgment-proof. Funding and impecuniosity are distinct variables, and an argument that treats the presence of a funder as proof of inability to pay is unsound. The 2022 ICSID Rules make exactly this point by providing that the existence of funding is a relevant consideration on a security application but is not by itself a sufficient basis for ordering it.

What funding does change is the frequency and the deliberateness of the mismatch. Non-recourse funding is designed so that the claimant bears no downside. Where the funded entity

¹⁴Ram Coomar Coondoo v Chunder Canto Mookerjee (1876) 2 App Cas 186 (PC); Bar Council of India v AK Balaji (2018) 5 SCC 379.

¹⁵Code of Civil Procedure 1908, Order XXV Rule 1, as amended in Uttar Pradesh and Madhya Pradesh (requiring security where the plaintiff is financed by a person who is not a party to the suit).

is a vehicle holding the claim and nothing else, the structure produces a claimant that is judgment-proof by construction rather than by misfortune. That is not an abuse; it is the rational response of a funding market to a jurisdiction that imposes no adverse costs exposure on funders and offers respondents no security mechanism. India has, without deciding to, created an environment in which the cheapest way to bring a speculative claim is to bring it in an Indian-seated arbitration.

This is why the reform literature's instinct to legislate against funders is misdirected. The exposure that matters is the exposure of a funder's money to an order made before the award, not the exposure of a funder's balance sheet to an award it never consented to. A security-for-costs power achieves the former without disturbing the latter, and it does so through a party that has unquestionably consented to the tribunal's jurisdiction.

VI. THE DISCLOSURE COROLLARY: CONFLICTS THE ACT CANNOT SEE

A security power is of limited use if the respondent does not know that funding exists, and the Act's disclosure architecture is addressed to the wrong person. Section 12(1) requires a prospective arbitrator to disclose in writing any circumstances likely to give rise to justifiable doubts as to independence or impartiality, and the Fifth Schedule supplies the guiding grounds, several of which turn on the arbitrator's direct or indirect interest in the subject matter or the outcome.¹⁶ Section 12(5) and the Seventh Schedule go further, rendering a person ineligible where a listed relationship exists.¹⁷

The duty is real but it is a duty to disclose what the arbitrator knows. An arbitrator who has been appointed four times in two years by claimants financed by the same funder has an obvious relationship with a repeat economic actor, and may well have no idea that the relationship exists, because nothing in the Act requires the funded party to say so. The Fifth and Seventh Schedules are drafted around parties, counsel and affiliates; a funder is none of those, and will not appear in a conflict check that nobody has been asked to run.

Every major instrument addressing funding has responded to this problem in the same way, by placing the duty on the funded party. Article 11(7) of the 2021 ICC Rules requires a party to

¹⁶Arbitration and Conciliation Act 1996, s 12(1) and the Fifth Schedule, including the entries concerning an arbitrator's direct or indirect interest in the subject matter or the outcome of the dispute.

¹⁷Arbitration and Conciliation Act 1996, s 12(5) and the Seventh Schedule.

disclose the existence of any non-party with an economic interest in the outcome.¹⁸ Rule 14 of the 2022 ICSID Rules requires written notice of the name and address of any non-party funding the pursuit or defence of the proceeding, and permits the tribunal to order disclosure of further information about the funding agreement.¹⁹ Rule 38 of the 2025 SIAC Rules requires disclosure of the existence of a funding agreement and the identity and contact details of the funder in the Notice or Response or as soon as practicable thereafter, permits the tribunal to order disclosure of the funder's interest in the outcome and of whether it has undertaken adverse costs liability, and restricts a party from entering into funding after the tribunal is constituted where doing so would create a conflict.²⁰

India has none of this, and the omission is doubly costly. It leaves a category of arbitrator conflict structurally invisible, and it denies the respondent the one fact on which a security application would be built.

VII. JURISDICTIONS THAT PAIRED THE TWO DELIBERATELY

The instructive feature of the comparative material is not that other jurisdictions regulate funding. It is that they regulate it in pairs, treating disclosure and security as two halves of a single mechanism.

England supplies the clearest model, and it did so long before funding became an issue. Section 38(3) of the Arbitration Act 1996 gives the tribunal express power to order a claimant to provide security for the costs of the arbitration, qualified by a proviso that the power is not to be exercised on the ground only that the claimant is resident or incorporated outside the United Kingdom.²¹ The proviso matters: it shows the drafters distinguishing between the legitimate concern, which is enforceability, and the illegitimate one, which is foreignness. English tribunals have accordingly had a settled security jurisdiction for three decades, and the funding question in England has concerned recoverability rather than security, the Commercial Court having held in *Essar v Norscot* that the costs of obtaining funding may be recoverable as other costs of the arbitration.²²

¹⁸ICC Rules of Arbitration (2021) art 11(7).

¹⁹ICSID Arbitration Rules (2022) r 14.

²⁰SIAC Arbitration Rules (7th edn, in force 1 January 2025) r 38.

²¹Arbitration Act 1996 (England and Wales), s 38(3), together with the proviso excluding the exercise of the power on the ground only that the claimant is resident or incorporated outside the United Kingdom.

²²*Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), [2016] 2 CLC

Hong Kong legislated both halves at once. Section 56(1)(a) of the Arbitration Ordinance confers the security-for-costs power on the tribunal, and the Part 10A regime inserted in 2017, which made funding of arbitration lawful, simultaneously imposed a disclosure obligation requiring a funded party to give written notice of the funding agreement and the funder's identity.²³ Singapore did the same. Section 12(1)(a) of the International Arbitration Act confers the security power; Section 5B of the Civil Law Act, inserted in 2017, disappplied champerty and maintenance for qualifying funders; and the 2025 SIAC Rules completed the structure with mandatory disclosure in Rule 38 and express security provisions in Rules 48 and 49.²⁴

The investment arbitration rules show the two halves interlocking most explicitly. Rule 14 of the 2022 ICSID Rules compels disclosure; Rule 53 then requires a tribunal deciding a security application to consider the funding so disclosed, while cautioning that funding alone does not justify an order.²⁵ Disclosure is not an end in itself in that scheme. It is the input to the security decision.

A cautionary note belongs here. The United Kingdom Supreme Court's decision in *PACCAR*, which held a class of litigation funding agreements unenforceable because they fell within the statutory definition of damages-based agreements, produced immediate market disruption and a legislative response, and it illustrates how a regulatory intervention aimed at funders can destabilise the funding market without improving a respondent's position.²⁶ A security-for-costs power carries no comparable risk, because it operates on the claimant and leaves the funding contract untouched.

VIII. FOUR AMENDMENTS

The reforms that follow are narrow and mutually reinforcing. None requires a funding statute, a licensing regime or a regulator, and none disturbs the holding in *Tomorrow Sales Agency*.

First, an express security-for-costs power. A new Section 17(1)(ii)(f) should empower the

243.

²³Arbitration Ordinance (Cap 609) (Hong Kong), s 56(1)(a); Part 10A, inserted by the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017; s 98U.

²⁴International Arbitration Act 1994 (Singapore), s 12(1)(a); Civil Law Act 1909 (Singapore), s 5B, inserted by the Civil Law (Amendment) Act 2017; Civil Law (Third-Party Funding) Regulations 2017; SIAC Arbitration Rules (7th edn, in force 1 January 2025) rr 38, 48 and 49.

²⁵ICSID Arbitration Rules (2022) rr 14 and 53(4), the latter requiring a tribunal to consider the existence of third-party funding on an application for security for costs while providing that funding alone is not a sufficient basis for ordering it.

²⁶*R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594.

tribunal to order a claimant, or a party advancing a counterclaim, to provide security for the costs of the arbitration. It should carry two qualifications drawn from the comparative material: an express exclusion of the ground that the claimant is resident or incorporated outside India, following the English proviso and necessary in a statute that defines international commercial arbitration by reference to the foreign nationality of a party;²⁷ and a direction, following Article 17A of the Model Law, that the tribunal consider the reasonable possibility of success and the risk of stifling a meritorious claim. The power should sit with the tribunal rather than the court, and Section 9 should not be amended in parallel, since the pre-constitution stage is not where the question properly arises.

Second, a disclosure duty on parties. The Act should require a party that has entered into an agreement with a non-party under which that non-party has an economic interest in the outcome to disclose the existence of the agreement and the identity of the funder, at the commencement of proceedings or as soon as the agreement is concluded. The duty should be owed to the tribunal and the other parties, and should not extend to the commercial terms, which are irrelevant to conflict checking and valuable to an opponent. The tribunal should retain power to order further disclosure where a security application is on foot, following the ICSID and SIAC model. This should be placed alongside Section 12 rather than inside it, because it is a duty of the party, not of the arbitrator.

Third, a funding-aware costs factor. Section 31A(3), which lists the circumstances relevant to a costs determination, should include the existence of a funding arrangement and whether the funder has undertaken adverse costs liability.²⁸ This is a modest change that allows a tribunal to reflect in its costs order a respondent's wasted effort in resisting a claim funded by an entity that structured itself to be judgment-proof, without extending liability to the funder.

Fourth, an opt-in submission route. The Act should provide that a funder may, by written notice to the tribunal and the parties, submit to the tribunal's jurisdiction for the limited purpose of costs, and that a funder which does so may be made subject to a costs order as if it were a party. This converts an imposed liability into a chosen one. It will be used, because in practice a funder faced with a security order against its claimant will often prefer to accept costs exposure directly rather than tie up capital in a security fund for the duration of the reference. It also

²⁷Arbitration and Conciliation Act 1996, s 2(1)(f).

²⁸Arbitration and Conciliation Act 1996, s 31A(3)(a)–(c).

preserves the principle the Delhi High Court was defending, since liability would follow consent rather than displace it.

What should not be done is the reform most often proposed, namely a provision deeming funders liable for adverse costs. It would reverse *Tomorrow Sales Agency* on grounds the Court was right to reject, it would price funding out of the Indian market for exactly the claimants access to justice arguments are concerned with, and it would be unnecessary if the first and fourth proposals were adopted.

IX. CONCLUSION

India's funding debate has been conducted as though the central question were what to do about funders. The more useful question is what to do about a statute that confers a power to award costs and withholds the power to secure them. That withholding was a drafting choice, made when Section 17 was recast in 2015 as an enumerated list rather than the open-ended grant of the Model Law, and it produces an asymmetry that is indefensible on any view: a claimant may obtain security for the sum it claims, and a respondent may obtain nothing at all for the costs it will incur in defeating that claim.

Funding did not cause this. Funding found it, and a market that finds a structural subsidy will use it. The remedy is correspondingly narrow. Give tribunals an express security power with conditions that prevent its abuse against genuine but impecunious claimants; require funded parties to say that they are funded, so that conflicts can be checked and security applications can be made on facts rather than suspicion; let costs orders reflect the funding reality; and leave a route by which funders can take on costs exposure voluntarily. *Tomorrow Sales Agency* should be left standing. It was a correct decision about consent, and the fact that it produced an unattractive outcome is a criticism of the Act, not of the Court.