
JUSTICE AS AN INVESTMENT: THIRD-PARTY FUNDING IN ARBITRATION

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ABSTRACT

This article discusses the rise of third-party funding (TPF) as a transformative mechanism in Indian dispute resolution, especially with the increasing costs of commercial arbitration, infrastructure litigation and real estate disputes. Tracing its evolution from the Privy Council's nuanced rejection of the English champerty doctrines in *Ram Coomar Coondoo* to the Supreme Court's recognition that TPF enables meritorious claims otherwise suppressed by financial barriers, in *Bar Council of India v. A.K. Balaji*. Although the ambiguities of Arbitration and Conciliation Act, 1996 along with prohibition of contingency fees by the Bar Council of India Rules persist, the emergence of TPF reflects global trend and India's burgeoning commercial disputes. The analysis balances benefits such as improved access to justice, strict case screening, cash flow management against the risks of funder control, confidentiality breaches and conflict of interest by arbitrators. In contrast to the judicial pragmatic approach adopted in India, the statutory approaches taken in Singapore and Hong Kong promote a comprehensive regulation to include mandatory disclosures, control safeguards and ethical standards to harness TPF's efficiency while preserving procedural fairness.

Introduction

Modern dispute resolution has become increasingly expensive. Cases in commercial suits, infrastructure arbitration, shareholder disputes and real estate litigation are often associated with enormous legal costs, tribunal/court fees, multiple years of challenges¹ etc. To a large number of claimants even meritorious claims are left unheard purely out of financial incapability to bear the money. It is on this background that Third Party Funding (TPF) has come out as an impressive and debatable trend in litigation and arbitration. It is transforming how disputes are financed, who can access justice and how law firms evaluate cases.

Third Party Funding², refers to an arrangement in which a person or a company who is not a party to a dispute, covers the cost of litigation or arbitration in exchange of a portion of the proceeds in the event of success of the claim. In the event of failure in the case, the funder loses its investment. Litigation therefore becomes a financial asset and the claims become investible opportunities. Although the concept appears to be new, it has a strong historical background in the doctrines of maintenance and champerty³ under the English Law, which sought to prevent outsiders from meddling in the disputes for profit. India, however, has taken a more nuanced approach.

Historical Background and Indian Legal Position

According to English common law, champerty agreements were historically void because they were considered to be against to public policy. However, the Indian law never adopted an absolute prohibition. In *Ram Coomar Coondoo v. Chunder Canto Mukerjee*⁴, the Privy Council considered that champertous agreements are not necessarily unlawful in India, unless they are extortionate or unconscionable. Therefore, the courts have recognised that in a country where many litigants lack financial resources, reasonable funding agreements may be used to access justice rather than obstruct it.

The legality of third-party funding arrangements have also been recognised by the Hon'ble

¹ Int'l Chamber of Com., *Decisions on Costs in International Arbitration* (2015), <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/>

² *Black's Law Dictionary* (11th ed. 2019).

³ 61 Halsbury's Laws of England ¶ 1105 (5th ed. 2019)

⁴ *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 1876 SCC OnLine PC 19 (India)

Supreme Court of India, in *Bar Council of India v. A.K. Balaji*⁵, observing that third party funding is not inherently against public policy and can promote access to justice. While advocates themselves are prohibited from entering into contingency fee arrangements under the Bar Council of India Rules, third party funding by non-lawyers is not illegal per se⁶. The distinction is significant, the professional ethics rules restrict advocates from speculating in litigation, but they do not bar independent funding agreements between litigants and investors. The courts have emphasised that the funding agreements must not give funders the ability to control the litigation strategy or take inconsiderable returns.

Why Third-Party Funding is Rising Today

There are several economic and structural factors that explain the recent growth of third-party funding. First, the costs of arbitration have increased dramatically, especially in international disputes involving infrastructure and cross border investments. Tribunal fees, expert witness, document production and legal representation can cost millions. Second, India has witnessed a growth in commercial disputes due to infrastructure projects, insolvency proceedings, shareholder conflicts and delayed real estate developments, and many small contractors and homebuyers cannot afford prolonged litigation⁷. Third, the arbitration funding has been normalised in jurisdictions like Singapore⁸, Hong Kong⁹ and England due to globalisation of arbitration. Funding arrangements have been in line with increased involvement of Indian parties in international arbitration. Fourth, the investors increasingly view litigation as an alternative asset class with potentially high returns. Sophisticated funders analyse cases such as financial portfolios, determining whether there is a probability of success, the presence of risk of enforcement and the amount of damages it might cause.

Third Party Funding in Arbitration

Third Party Funding has majorly been developed through arbitration. The international arbitration institutions also recognise the reality of funding and increasingly require disclosure to avoid conflict of interest. Disclosure ensures that arbitrators can identify any relationship

⁵ *Bar Council of India v. A.K. Balaji*, (2018) 5 SCC 379 (India).

⁶ Bar Council of India Rules, Part VI, Chapter II.

⁷ Suyash Garg, *Access to Justice Through Third-Party Funding: An Indian Perspective*, 15 NUJS L. Rev. 89 (2022)

⁸ Civil Law (Amendment) Act, 2017 (Singapore)

⁹ Arbitration and Mediation Legislation (Third Party Funding) Ordinance, 2017 (Hong Kong)

with the funder that may affect impartiality. Similar practices are being adapted by the Indian arbitral institutions. The lack of direct and explicit statutory regulation under the Arbitration and Conciliation Act, 1996¹⁰ has not prevented funding but has created uncertainty regarding the disclosure, confidentiality and security for costs.¹¹

Funding can also be effective in infrastructure arbitrations, construction disputes and shareholder claims where damages are large but claimants lack the liquidity. In real estate disputes, groups of homebuyers or families can pool claims and obtain funding to challenge developers. In case of a disputes team to conduct title checks, litigation search and arbitration preparation, the commercial consideration of funding is of great importance since the funders require strong legal merits and documentation before investing in any particular dispute.

Benefits of Third-Party Funding

The most compelling benefit of third-party funding is that it improves access to justice.¹² Remedies can be sought by claimants with strong claims without having to bear the crushing costs. TPF also allows parties to manage and control cash flow by converting uncertain litigation expenses into a shared risk. This is beneficial to law firms as they are able to assume strong cases that clients could otherwise not afford. Funding may result in improved case assessment since the funders will always do independent due diligence in terms of merits and quantum of damages. This tends to promote premature settlement since investors are comically rational actors

Economically, funding enhances efficiency in terms of dispute resolution. Weak claims are less likely to be funded because the investors don't find merit in that case and tend to invest only in strong and meritorious cases. Funding also helps small business to compete with big corporations in settling disputes. In insolvency proceedings, resolution professional may use funding to pursue avoidance transactions. In arbitration, funding allows Indian parties to protect themselves against the multinational corporations on an equal footing.

Risks and Ethical Concerns

Third part funding continues to present its advantages but also raises significant legal and

¹⁰ Arbitration & Conciliation Act, No. 26 of 1996, § 12(1), Fifth Schedule (India)

¹¹ Prashant R. Desai & Anisha N. Shelat, *Third Party Funding in International Commercial Arbitration and its implications for India*, 13 Asian Int'l Arb. J. 83 (2017)

¹² Raghav Sharma, *Third Party Funding in Arbitration in India*, Column. J. Transnat'l Dsisp., (2017)

ethical concerns. The one huge concern is the control over litigation, if a funder finances a claim it may attempt to influence strategy or settlement decisions¹³. It has been quite evident by courts that a funding agreement should not permit the funders to control the proceedings. Another concern is confidentiality, litigation often involves sensitive financial or proprietary information which must be shared with the funders during due diligence, and without proper safeguards, such information may be abused.

In arbitration, conflict of interest is particularly important. When an arbitrator has a relationship with a funder, impartiality may be compromised and therefore disclosure requirements are essential.¹⁴ Additionally, there is also concern about excessive, and courts may strike down funding agreements that are unconscionable or oppressive. Further, critics assert that such funding would in effect encourage speculative litigation or pressure parties into aggressive settlement strategies.

How Can Law Firms and Advocates Benefit

Third party funding creates strategic opportunities for law firms and advocates. Firms can work and collaborate with funders to finance meritorious claims. This is particularly useful in high value arbitration or real estate group litigation. Firms may design hybrid fee arrangements in which the funders cover disbursements and clients pay reduced fees. Funding also enhances case screening as funders require detailed due diligence.

For advocates, understanding funding can improve client counselling. Lawyers can advise the clients on whether funding is appropriate, can negotiate funding terms and ensure ethical compliance. While contingency fees are prohibited for advocates but is permissible as long as independence and confidentiality are preserved. Law firms that understand funding mechanisms will be better placed in cross border arbitration and complex commercial disputes.

Need for Regulation in India

India, currently lacks a comprehensive statutory law on third party funding. High courts of Delhi, Bombay, Gujarat, Madhya Pradesh and Uttar Pradesh have addressed third party funding

¹³ Nakul Dewan, *Third Party Funding in India: The Legal and Practical Landscape*, 7 *Transnat'l Disp. Mgmt. (TDM)* 1 (2020)

¹⁴ Neha Vyas, *Regulating Third Party Funding in Indian Arbitration*, 28 *Arb. Int'l* 451 (2019).

through rulings and amended rules¹⁵ recognising funding disclosure, but there is no national law regulating funders, disclosure obligations or caps on returns¹⁶. A regulatory framework would strike a balance between access to justice and safeguards against abuse. A mandatory disclosure of funding, protection of confidentiality and restrictions of control by funders as well as ethical standards of lawyers may bring clarity and responsible development of financing sector.

Conclusion and Analysis

The current situation regarding Third party Funding in India is in a state of cautious judicial acceptance combined with regulatory silence. It has been made clear by the courts that funding agreements are not per se illegal as long as it is not extortionate, unconscionable, or contrary to the public policy. This position reflects a pragmatic understanding of socio-economic realities in India where in many cases financial barriers determine whether rights can be meaningfully enforced. The Indian law tries to maintain the professional independence by accepting fund arrangement but limiting the contingency fee arrangements with advocates, without closing access to external funds.

However, this approach also reveals structural gaps. In contrast to other jurisdictions such as Singapore and Hong Kong which have passed specific laws to coordinate funding in arbitration, India draws mainly upon judicial interpretation and haphazard amendments to High Court rules. The lack of harmonisation of the standards of disclosure brings about confusion during the arbitration process especially concerning cases of arbitration conflicts, security of costs and disclosure of confidentiality. In commercial cases of high value, there could be some valid apprehensions of the lack of neutrality and procedural fairness due to undisclosed funding connections.

From a systemic perspective, Third Party Funding can transform the behaviour of disputes in India. Funders introduce commercial due diligence into the litigation process, evaluating claims on the basis of merits, enforcement prospects and counter party solvency. This may have an effect of filtering out the weak claims while strengthening viable ones. Concurrently, however, there is always the threat of excessive commercialisation with litigation strategy being made

¹⁵ Code of Civil Procedure, No. 5 of 1908, Or. XXV, r. 1 (as amended by High Courts) (India)

¹⁶ Debashreeta Purohit, *Third Party Litigation Funding in India: A Legal Vacuum or a Regulatory Opportunity*, 5(1) Int'l J. L. & Legal Res. 1 (2025)

subject to investment logic. It is not the issue of whether funding is allowed or not, the main regulatory issue is how to create efficiency and fairness.

In case India wishes to establish itself as a viable arbitration hub then it must be regulated. A structured and uniform framework incorporating mandatory disclosure of funding arrangements, safeguard against funder's control over proceedings, defined cost liability rules and ethical guidance for advocates would align Indian practice with global standards while respecting domestic legal traditions. Third party funding when properly organised, it can be a tool of access to justice and commercial efficiency. If it is left unregulated, it can produce unwarranted procedural and ethical disputes. The future trajectory of third-party funding in India will thus depend on the extent to which policy reform keeps pace with market innovation.