
COMPARATIVE ANALYSIS OF THIRD-PARTY FUNDING IN ARBITRATION IN INDIA AND OTHER COUNTRIES

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ABSTRACT

3rd Party Funding (TPF) in arbitration has become a notable trend in international arbitration, especially in the field of commercial and investment arbitration. It is a scheme in which a third party financing the legal expenses of one party (but not directly involved in the dispute) receives a proportion of the compensation or settlement received. Arbitration proceedings have become more expensive and costlier and an increasing number of people are seeking third-party funding to ensure access to justice, as well as for financially weaker parties to pursue legitimate claims.

This paper compares Indian law and regulations with other jurisdictions of the world on third party funding in Arbitration. Particular focus of the research is on the concept, nature and development of third party funding and the analysis of its increasing importance in domestic and international arbitration. It also examines the benefits of TPF including greater access to justice, risk management, commercial efficiency and considers, critically, the potential drawbacks of ethical issues, confidentiality, conflicts of interest and over commercialisation of disputes.

The study makes a comparative analysis of the legal position of third party funding in jurisdictions that have different levels of recognition and regulation of third party funding, including the United Kingdom, Singapore, Hong Kong, Australia and the United States. These countries have taken different positions on disclosure requirements, the liability of the funders, and ethical protections. The research also assesses the impact of these international practices on the evolution of arbitration law and funding worldwide.

In this context, the study examines the issue of lack of a comprehensive statutory framework for the regulation of third party funding in arbitration in India. Indian courts have accepted the validity of funding agreements provided they do not fall afoul of public policy; however, there remains some ambiguity about regulation, disclosure and enforceability. The research

explores the judicial judgments, recommendations of the Law Commission and recent trends in Indian arbitration jurisprudence on TPF, giving it a critical perspective.

The study also underscores the need for a balanced regulatory framework in India which would facilitate third-party funding, but would be transparent, fair and abuse-proof. It contends that a well-managed regime of TPFs can bolster the role of India as an emerging global hub of arbitration by boosting investors' confidence and access to dispute resolution.

The study concludes that third-party financing of arbitration has significant advantages, but good regulation is needed to resolve ethical and procedural issues. Comparative knowledge about international practices can help India build a robust system of law that can keep in check commerce while maintaining the principles of fairness, transparency and justice in arbitration proceedings.

Keywords: Arbitration, Dispute Resolution, International Commercial Arbitration, Investor Protection, Third-Party Funding (TPF)

1. Introduction / Statement of Research Problem

In arbitration, the terms Third-Party Funding (TPF) is used to denote a financial funding arrangement in which a third party, who does not dispute the case, agrees to fund the legal and arbitral expenses of a claimant in lieu of a share of the financial recovery in the event of a successful resolution. With its ability to redistribute the cost of arbitration, TPF has become an important tool of improving access to justice, especially in complex business conflicts where large sums of money and long-lasting litigation are the normal practice.

TPF is no longer a fringe practice but a more and more institutionalized aspect of international dispute resolution in the modern world of arbitration. It serves two purposes: to enable claims that might incurably be disposed of on financial grounds, and to help corporations manage risk by financing valuable claims at superior efficiency and fending off non-credible litigation with stringent due diligence realized by funders.¹

On a global scale, various jurisdictions have acknowledged the increased significance of TPF and have gone out of their way to regulate it. United Kingdom adheres to a self-regulatory model, in which bodies like the Association of Litigation Funders regulate factors concerning

¹ Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1270–72 (2011).

capital adequacy, transparency and ethical practices. Conversely, Singapore has been taking a legislative stance, not only by directly legalizing TPF in the context of international arbitration but also by providing disclosure requirements by statutory means and professional codes of practice.

On the contrary, the Indian legal stand is unclear and disjointed. Although TPF is not specifically banned by the Indian law, there is no detailed statutory regulation of its usage in arbitration. The Arbitration and Conciliation Act, 1996 is silent on the subject matter, and the partial wordings given by the judiciary are not comprehensive enough. As an example, although Indian courts have recognised that third-party funding arrangements are not necessarily illegal in nature, there are no explicit principles they have laid down about them, including how far funders can extend their control over them, and what disclosure must be provided by the arbitration, as well as the ethical limit on funders.²

2. Review of Literature

The available literature on the Third-Party Funding (TPF) in arbitration is indicative of the increased academic concern about its effect on access to justice, both procedural and substantive fairness, and the integrity of arbitral process. Among the most influential works, Gary Born defines TPF as a new form of international arbitration that generates an opportunity and helps financially constrained parties to present valid claims before the tribunal, but at the same time has raised a concern regarding the potential risks involved in the process, especially conflict of interest, loss of transparency, and distortion of party autonomy in arbitration proceedings.³

Equally, in his treatise on the law of arbitration in India, Fali S. Nariman provides insight into strides made to harmonize the Indian law on arbitration with international practice but points out the lack of lucidity in emerging disciplines such as TPF.⁴

Institutional reports and guidelines are influential in shaping a large part of the literature. As postulated by the International Bar Association in its Guidelines on Conflicts of Interest, disclosure of third-party funding arrangements is very essential in ensuring impartiality and

² Gary B. Born, *International Commercial Arbitration* 2835–36 (2d ed. 2014).

³ Gary B. Born, *International Commercial Arbitration* 2837–39 (2d ed. 2014).

⁴ Fali S. Nariman, *Harmony Amidst Disharmony: The Indian Experience in Arbitration* 89–92 (2016).

independence of arbitrators. Similarly, international arbitration the requirement of transparency has been included in the arbitration system of the International Chamber of Commerce, which is part of a larger trend to formalize the disclosure requirements in the international arbitral practice.⁵

A striking feature of the report by the ICCA Queen Mary Task Force is its detailed examination of TPF practices in various jurisdictions, with suggestions as to the best practices in TPF regulation. It also highlights the necessity of the balanced approach whereby the benefits of funding are preserved and the risks associated therewith are reduced.⁶

Juridical studies based on comparison also demonstrate the different ways that are taken by applicable jurisdictions. Specifically, Singapore has been consulted as a model jurisdiction to have effectively implemented TPF in law by introducing statutory reforms that aimed to guarantee the legitimacy, as well as accountability.⁷ In particular the practice of combining the legislation with professional rules of conduct in Singapore by the jurisdiction has proven to be very effective in ensuring the flexibility of the systems as well as maintaining ethical standards.

3. Study Objectives.

1. To grasp the idea and development of Third-Party Funding in arbitration.
2. To look into the Indian legal system governing TPF.
3. To make a comparison of the approach taken in India, with those of jurisdictions like the UK and Singapore.
4. To discuss the advantages and disadvantages of TPF.
5. To propose regulatory changes to India.

4. Research Questions

1. Legal status of Third-Party Funding in India?

⁵ Int'l bar Assn, Guidelines on Conflicts of Interest in Int'l Arbitration (2014).

⁶ ICCA–Queen Mary Task Force, Third-Party Funding in International Arbitration 17–25 (2018).

2. What do other cross-border regulate TPF in arbitration?
3. What are the strengths and weaknesses of TPF?
4. Should India introduce any formal regulatory framework on TPF?
5. What can India learn about the practice of other people?

5. Research Methodology

The current research is based on a doctrinal (black-letter) research methodology that emphasizes the systematic study and interpretation of legal principles that govern Third-Party Funding (TPF) in arbitration. Such a method is especially justified since the study focuses on analyzing legislation, case law and institutional actions, as opposed to gathering empirical or field-based evidence. Through interaction with the existing legal resources, the paper seeks to scrutinize the sufficiency, consistency and competence of available resources in regard to TPF particularly within the Indian sphere.

The work is grounded mostly on secondary sources such as statutes, court rulings, scholarly publications, institutional instructions, and international reports. The statutory analysis centers on the act of arbitration law in India which is the seat of Arbitration and Conciliation Act, 1996. The practical applicability of TPF under the Act is not directly considered, but the provisions contained in the Act that pertain to the autonomy of parties and flexibility in procedures and the cost allocation are considered to have a profound insight into the extent to which they can accommodate the funding arrangements. Moreover, the legislation changes in other jurisdictions like Singapore and regulatory practices in the United Kingdom are examined with a view to establishing the emerging global standards.

One of the elements of the methodology is the study of legal rulings. Court decisions are significant in establishing a more correct legal footing of TPF, especially where the original legal statutes are either silent or ambiguous. The case law of India is considered to perceive the way courts have perceived funding arrangements and whether they see them as valid. Simultaneously, the fact that judicial rulings are made in the foreign jurisdictions can be used to get glimpses of how similar legal systems in the developed countries resolve issues like enforceability, disclosure, and funder liability. This comparative judicial analysis assists in establishing trends, gaps and areas of legal ambiguity.

Reviewing international guidelines and institutional rules are also part of the study since these tend to have a greater impact on arbitration practices across the world. Recommendation notices of other bodies like the International Bar Association and the arbitration regulation established by organizations like the International Chamber of Commerce are examined to appreciate the expectation of the world about transparency, disclosure and conflicts of interest with regard to TPF arrangements. Although laws are not enforced, these instruments are highly influential in establishing the best practices and aligning arbitration processes across borders.

6. Discussion / Analysis

6.1 Concept and Importance of TPF

Third-Party Funding (TPF) an arrangement whereby the third party who is not involved in a dispute before agrees to fund legal and arbitration expenses on a case on a percentage basis; specifically, in international commercial litigation of high value. By redistributing the financial risk of the claimant by an external funder, TPF presents a system whereby parties can make use of claims, without having to accept the entire financial risk of litigation or arbitration.⁷

The common characteristic of TPF is that it is non-recourse i.e. the funder does not recover his or her, unless the claim succeeds. This risk pooling feature makes TPF especially appealing to claimants who might have solid legal cases, yet who are unable to fund prolonged litigation. It also aligns the interest of both the funder and the claimant as both will gain with the positive outcome.

Among the most well-known advantages of TPF, access to justice should be listed. Although its benefits are great, arbitration is usually associated with significant expenses including the cost of arbitrators, the institutional fee, expenses of expert witnesses and resources of legal representation. All these factors make arbitration quite expensive such that individuals, small enterprises and even highly cash strapped corporations would not want to have proceedings. TPF deals with this disparity by facilitating claims of such parties, effectively making sure that the access to dispute resolution is not limited to economically superior parties.⁸

TPF can be used as a critical asset in corporate risk management and financial strategy as well

⁷ Gary B. Born, *International Commercial Arbitration* 2835–36 (2d ed. 2014).

⁸ Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 *Minn. L. Rev.* 1268, 1270–72 (2011).

as to promote access to justice. The contemporary business world tends to have severe financial limitations and needs to manage assets effectively. The cost of arbitration may also be high in terms of initial spending, which may affect the liquidity of its operations. With the help of TPF, companies have an opportunity to outsource litigation expenses and transform legal claims in the name of potential litigation into financial resources.⁹ In this way, companies would be in a position to pursue meritorious claims without seizing capital that could be used in the development of core business operations. In this regard, TPF is not only a source of funds but also an instrument of strategy finance.

The other important feature of TPF is that it contributes to better efficiency of procedures and quality of claims. Most professional funders will proceed to perform due diligence prior to accepting a commitment to fund a claim, and assess its legal soundness, demonstrative capacity and recoverability. Accordingly, TPF can support a more effective arbitral procedure by making sure that it only benefits claim which are justified.

Although it has such benefits, the increasing counts of TPF have brought out various issues that require close regulation. A conflict of interests is one of the main problems and in this regard, arbitration is likely to include an undisclosed relationship between arbitrators and funders. There are also questions about the degree that the funders can bring in strategic decisions including settlement decisions or decisions on procedures, which may impact the independence of the funded party.¹⁰

Additional issues are issues to do with transparency and fairness. The lack of explicit disclosure requirements means that the opposing party and arbitral tribunal will not be aware of any funding arrangement, therefore, where the outcome might be adverse costs order may jeopardize the effectiveness of both TPF method and its potentially unsafe side

In the international scene, legal jurisdictions, including the United Kingdom and Singapore have been making proactive efforts towards regulating TPF. The UK has adopted a self-regulatory model by industry organizations, and Singapore has also adopted legislation to formalize and regulate TPF in international arbitration, which has demonstrated that good regulation can help to increase transparency, uphold ethical conduct, and increase confidence

⁹ Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 *Tul. L. Rev.* 405, 410–12 (2016).

¹⁰ Catherine A. Rogers, *Ethics in International Arbitration* 215–18 (2014).

in arbitration systems.

In sum, TPF is an important development in the way arbitration is financed that has great benefits regarding the access to justice, risk management, and efficiency of the procedure. Meanwhile, its growing application poses complicated legal and ethical issues that need to be regulated carefully. It is imperative to have a balancing measure between and inclusive of approaches that embrace the best practices inherent worldwide but still responsive to jurisdiction issues to make sure that the TPF is beneficial and not detrimental to the integrity of the arbitration process.

6.2 Legal Position in India.

There is no legal status on Third-Party Funding (TPF) that is established in India yet. By contrast, India has not as yet adopted a specific statutory framework that specifically regulates third party funding in the context of arbitration trials unlike some of the most popular arbitration jurisdictions. The main statute on arbitration, the Arbitration and Conciliation Act, 1996, does not address the question of the funding arrangements, nor does it acknowledge or outlaw TPF, creating ambiguity on whether or not such arrangement is lawful, binding and procedural in arbitration.¹¹

Although there have been no explicit statutory provisions, Indian courts have in most cases been permissive on the aspect of third party funding in many cases especially when it comes to litigation. Traditionally, the English common law champerty and maintenance doctrine, limited access by third parties to a dispute. These doctrines have not been employed that strictly by Indian courts, however, and they have accepted funding agreements as long as they are not extortionate, unconscionable or contrary to public policy.

One notable judicial statement towards this effect is Lavender in **Bar Council of India v. A.K. Balaji the Supreme Court** noted that third-party funding is not illegitimate per se in India but only advocates were not allowed by legal obligation to fund litigation, there were no restrictions on third-party funding (non-lawyers). This ruling is commonly referred to as a de facto judicial acceptance of the legality of TPF arrangements but does not go as far as establishing a full

¹¹ The Arbitration and Conciliation Act, No. 26 of 1996 (India).

regulatory structure.¹²

Additional arguments in favor of the admissibility of TPF include the case law of **Ram Coomar Coondoo v. Chunder Canto Mookerjee**, where the Privy council concluded that litigation financing deals are not necessarily illegal, as long as they are not unfair or contrary to the law.¹³

On a legislative level, some states such as Maharashtra, Gujarat and Madhya Pradesh specifically in the amendments to the Code of Civil Procedure, 1908 explicitly admit to third-party funding in civil litigation, whether by permitting direct imposition of costs on funders by the court, or by directly providing the state courts with authority to impose adverse cost orders on moneyed parties in specific situations. Yet, the provisions are only applicable under civil litigation and not on arbitration proceedings, thus creating a huge vacuum in the regulation of the arbitral arena.¹⁴

6.3 United Kingdom

The United Kingdom has become one of the richest and most powerful jurisdictions in the context of Third-Party Funding (TPF), remaining of liberal and market-driven nature. The UK uses primarily self-regulation to govern TPF, unlike those whose primary regulation is statutory, and which therefore govern via greater flexibility whilst ensuring accountability. This practice demonstrates the more general policy of the country towards pro-arbitration and its desire to make London a global leader in arbitration.¹⁵

Common law traditions of champerty and maintenance in England from old days limited the role of third parties in litigation. These doctrines however have over time been greatly loosened with particular reference to commercial situations as it is seen within the UK courts that modern litigation financing is not without purpose and allow claimants to undertake meritorious claims without facing financial burdens.

Another key aspect of the UK system is the requirement of capital adequacy of funders. The ALF Code requires that funders should have adequate financial resources to fulfill their

¹² Bar Council of India v. A.K. Balaji, (2018) 5 SCC 379 (India).

¹³ Ram Coomar Coondoo, (1876) 2 I.A. at 210–11.

¹⁴ Code of Civil Procedure, 1908, Order XXV, as amended by Maharashtra, Gujarat, and Madhya Pradesh State Amendments (India).

¹⁵ · Rachael Mulheron, Third Party Funding and Costs Awards in Arbitration, 33 Civ. Just. Q. 33, 36–38 (2014).

obligations, such as funding undertaking, and possible untenable cost expenses. It is necessary to ensure that funded parties are not exposed to the risks of funder insolvency and to achieve the credibility of the funding structure. It, too, fosters a feeling of safety within the TPF market since it puts in place expectations that only solvent organizations engage in financing practices.

In the UK framework, protecting funded parties is also of priority. The Code of Conduct also upholds measures to make sure that funders are not excessively involved in controlling the proceedings.⁷ Funders may have a fair interest in the resolving results of the dispute, but the final decision maker must be the funded side and their attorneys. This principle maintains party autonomy, a characteristic aspect of arbitration.

7. Case Laws / Case Analysis

A judicial treatment of the Third-Party Funding (TPF) in India is of tolerance with a sense of conditionality and regulatory silence. The Supreme Court, in **Bar Council of India v. A.K. Balaji**, has made it clear that there is no absolute bar on third-party funding in India and non-lawyers are allowed to fund litigation as per the ethical standards set on the profession. This decision is all the more critical because it implicitly grants judicial recognition of TPF in India, thus legalizing the practice in principle. Meanwhile, the Court did not provide any guidelines on how disclosure, control, or funder liability should be. Consequently, the decision makes available to TPF but at the same time raises the presence of a lack of a written legal framework in such a way that the practical and procedural factors still await action.¹⁶

India: Indigenous to the case of **Ram Coomar Coondoo v. Chunder Canto Mookerjee**, a decision of the Privy Council, which still prevails in Indian law, is the fact that an agreement to fund litigation is not necessarily illegal unless it is extortionate, unconscionable, or contrary to the public policy. The Court did not take a strict interpretation of the rules underwriting the doctrines of champerty and maintenance but resorted to a context-related strategy interpreting funding deals on the grounds of justice and equality. This principle continues to be fundamental to Indian jurisprudence wherein TPF arrangements could be made within reasonable limits. The factors that the case does not deal with in relation to modern issues of arbitration include specific funding of arbitration, disclosure requirements, and institutional regulation, which

¹⁶ Bar Council of India v. A.K. Balaji, (2018) 5 SCC 379 (India).

restricts its use in modern arbitration practice.¹⁷

On the contrary, the United Kingdom has evolved a more advanced and activist judicial system that directly gets involved with the intricacies of TPF. The Court of Appeal dealt with the problem of funder liability to adverse costs in **Arkin v. Borchard Lines Ltd.** and applied the principle of the so-called Arkin cap according to which the liability of the funds depends on the amount it has provided in terms of financing the litigation. The relevance of this decision is that it balances between some incentive to invest in meritorious cases and the avoidance of undue financial exposure by the defendants. The clarity of the limit of liability ensured by the court that the funders were given a certainty in their operations hence facilitating the expansion of the TPF market without compromising on the handling of justice.¹⁸

The UK courts have also added to the validity of TPF by ruling in favor of an arbitral award in the same case of **Essar Oilfields Services Ltd. v. Norscot Rig Management Pvt. Ltd.** whereby the judge concurred that the cost of third-party financing was justifiable and recoverable as part of the arbitration costs. The case is especially interesting since it recognizes the commercial reality of arbitration, where funding expenses can be the key towards the quest of justice. It also shows the readiness of the judicial system to treat TPF as an element of a larger system of dispute resolution of arbitrating costs.¹⁹

With the combination of these cases, there is a evident difference in judicial involvement between the UK and India. Indian courts have mostly restricted themselves in accepting the permissibility of TPF but not in considering the complexities involved in its functioning. By contrast, UK courts have actively developed the legal frameworks of TPF, including responding to concerns over cost liability, funding costs recoverability, and balancing access to justice and the fairness of procedures. The difference indicates the difference in developed levels of the respective arbitration regimes.²⁰

8. Findings

The researcher found out that Third-Party Funding (TPF) is gaining more and more acceptance as a legitimate financing method in arbitration all over the world. TPF is currently considered

¹⁷ Ram Coommar Coondoo v. Chunder Canto Mookerjee, (1876) 2 I.A. 186 (P.C.).

¹⁸ Arkin v. Borchard Lines Ltd. [2005] EWCA (Civ) 655 (UK).

¹⁹ Essar Oilfields Servs. Ltd. v. Norscot Rig Mgmt. Pvt. Ltd., [2016] EWHC 2361 (Comm) (UK).

²⁰ ICCA–Queen Mary Task Force, Third-Party Funding in International Arbitration 144–50 (2018).

as an effective mechanism improving access to justice and efficiency in dispute resolution in various arbitration jurisdictions. It has developed out of a controversial notion into a professional element of contemporary arbitration, and is increasingly engaged in by professional funders and recognized by arbitral institutions and arbitral courts.

Simultaneously, the analysis indicates that India does not have an elaborate statutory and regulatory framework to cover TPF. Although court rulings have confirmed its permissibility, no clear legislative interpretation can be found concerning the necessary elements such as the duty to disclose or hold the funders accountable or set ethics. This lack of transparency brings ambiguity to all the stakeholders involved in an arbitration process such as parties, arbitrators and even funding bodies.

9. Recommendations / Suggestions

In order to overcome the legal ambiguity at the topical level of the Third-Party Funding (TPF) and to adapt to international best practices, India needs a balanced and carefully designed regulatory regime. The recommendations below should facilitate the merits of TPF and at the same time offer fairness, transparency, and integrity of the process in arbitration.

To start with, a dire necessity to establish statutory legalization of TPF in India. Currently, lack of clear legal provisions has led to some kind of ambiguity as to whether the arrangement of funding is valid or enforceable. The inclusion of certain clauses in the Arbitration and Conciliation Act, 1996 or in other laws would give TPF clarity and legitimacy. This would also boost investor confidence and make them more willing to take part in arbitration proceedings.

Second, the concept of disclosure of funds in arbitration in India should be compelled. There should be disclosure requirements that there ought to be a funding agreement and the identity of the funder at the early stages of proceedings. It would assist arbitral tribunals in establishing conflicts of interest, as well as, maintaining impartiality. Another predominantly accepted international practice is that funding arrangements should be transparent, which is also crucial to ensuring the credibility of the arbitration.

Third, regulation guidelines on the conduct of funders should be put in place. The guidelines are required to deal with major areas like capital sufficiency, financial stability and responsibility of funders. Establishment of minimum standards on funding arrangements would

help to safeguard funded parties against possible risks faced by insolvency or withdrawal of funders during proceeding by only involving credible and financially able entities in the funding arrangements.

Fourth, India needs to take into account the ethical standards and avoid conflicts of interest in the TPF arrangements. There should be an introduction of clear rules to govern the relationship between funders, parties, and legal representatives. Any relationship with funders must be revealed by the arbitrators, and measures put in place to avert undue interference of funders in proceedings. This would help protect the fundamental aspects of arbitration of neutrality, independence, and free will of parties.

Fifth, there is a need to encourage the growth of institutional arbitration frameworks in India. By introducing disclosure, cost allocation, and funder participation rules into the procedures to which they are governed, arbitration institutions can make a significant contribution to the regulation of TPF. Institutional arbitration would not only offer more certainty of the process but also would bring the practices of arbitration in India more in line with international practice.

10. Conclusion

Third-Party funding (TPF) has become a groundbreaking change in the arbitration profession and essentially redesigned the ways of how disputes are financed and sought. TPF has made arbitration more accessible, efficient and commercially viable by alleviating the financial stress on claimants and giving parties with limited means access to dispute resolution mechanism. It has also grown to be a strategic financial instrument in that business are able to cover legal risks without necessarily draining operational capital.

Experiences in jurisdictions like the United Kingdom and Singapore have shown that a combination of regulatory clarity, transparency and institutional support can be effective in integrating TPF with a legal system. Their strategies emphasize that the governance of TPF is one that promotes both procedural fairness as well as bolsters a sense of trust in arbitration as an effective solution to disputes.

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