

THIRD-PARTY FUNDING CODIFICATION IMPERATIVE: AUGMENTING EQUITABILITY IN INDIAN DOMESTIC ARBITRATION

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ABSTRACT

Arbitration, although quicker than traditional litigation, can still financially strain parties due to its exorbitant costs. This issue is addressed by Third-Party Funding ('TPF') mechanisms, involving a third-party funder who is then entitled to a share in the award. With TPF gaining traction globally, India requires a legislation to regulate it in the domestic arbitration sphere. Hence, this essay proposes a favourable legislation for better uniformity and accountability nationwide. It begins by enlisting and analysing the problems with the current uncodified TPF regime in India, substantiated by verified research and relevant case laws. Furthermore, insights from foreign jurisprudence are applied to strengthen the argument. This is followed by providing the reader with a clear understanding of dominus litis and its distinction from the funding party, for it is essential to prioritise party autonomy and confidentiality in arbitration. After analysing the same, the authors lay out a legal framework that seeks to guarantee not only confidentiality, but also justice and efficiency, with special attention to a 'light-touch' approach harmoniously constructed with 'soft-law'. With this paper, the authors aim to synchronise and simplify the interlinked function of arbitration and TPF in all spheres of domestic arbitration in India.

1. INTRODUCTION

Consider you are a major corporate player in India facing a legal dispute with another market player. Seeking convenience and speed, you opt for arbitration over traditional litigation.¹ However, arbitration still poses

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1. Department of Legal Affairs, *Alternative Dispute Resolution in India*, para 2.

financial risks, exorbitantly emptying the pockets of the parties, thereby making Third-Party Funding (*'TPF'*) the most suitable way out. The mechanism of TPF can be loosely understood as an arrangement where an unrelated third-party provides financial support to one party in the dispute in exchange for a share in the award if successful.²

The significance of TPF was first felt in India when the first-of-its-kind deal was struck between Hindustan Construction Company (*'HCC'*) and BlackRock Inc., involving over Rs. 1,750 Crores.³ This amount was identified as a pool of arbitral awards and claims that formed a consortium to reduce the debt of HCC. The importance of TPF is further highlighted by cases like *Yukos Universal Limited v Russian Federation (2005)*,⁴ where the claim exceeded a gargantuan 98 billion USD. With arbitration claims escalating every day, the absence of TPF regulation could impact India's goal of becoming an arbitration hub.⁵

Furthermore, the Law Minister's response to Unstarred Question No. 1225 in the Rajya Sabha⁶ highlighted the need for India to adopt a suitable national legislation for third-party funding in arbitration. The Honourable Law Minister emphasised that albeit third-party funding is not illegal in India *per se*, it urgently requires codification for better accountability of parties and more secure transactions. In response to the above situation, amendments to Order XXV⁷ of the Code of Civil Procedure by Maharashtra, Karnataka, and Madhya Pradesh have facilitated the funding process by backing it with legislative grounds. However, provided the limited and

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2. International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (The ICCA Reports No. 4, 2018), para 53.
 3. Rachita Prasad, 'HCC in Pact with BlackRock to Raise Rs 1750 Crore via Monetization of Claims' (*The Economic Times* 26 March 2019) <<https://economictimes.indiatimes.com/markets/stocks/news/hcc-to-sell-litigation-claims-to-blackrock-led-investors/articleshow/68579183.cms?from=mdr>> accessed 7 September 2024.
 4. *Yukos Universal Ltd (Isle of Man) v Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227.
 5. Tariq Khan, 'Making India a Hub of Arbitration: Bridging the Gap between Myth and Reality' (*SCC Times* 17 February 2021) <<https://www.sconline.com/blog/post/2021/02/17/making-india-a-hub-of-arbitration-bridging-the-gap-between-myth-and-reality/>> accessed 7 September 2024.
 6. Ministry of Law & Justice, Government of India, Department of Legal Affairs, *Rajya Sabha Unstarred Question No. 1225*, (5 December 2024) <https://legalaffairs.gov.in/sites/default/files/AU1225_0.pdf> accessed 8 February 2025.
 7. Code of Civil Procedure 1908, or 25.

localised nature of these amendments, the requirement of a national code still persists.

Thus, given this understanding of TPF, the authors shall delve into the issues arising from this absence of a TPF code of conduct in domestic arbitration followed by analysing foreign jurisdictions for wider interpretations. Following this head, the paper shall entail the necessity to demarcate the funded party from the funding party for the reasons stated within the head. After having outlined the existing problems, the authors shall, with the help of cases and foreign law, give recommendations by way of potential amendments and additions the Arbitration and Conciliation Act, 1996.⁸

2. TPF IN THE UNCODIFIED REGIME

A. Identifying the Milestones in the Evolution of TPF

The trend traces its roots to ancient Greek and Roman civilizations⁹, where a primitive form of Third-Party Funding (or “litigation funding”) was practiced, wherein legal maintenance¹⁰ and the doctrine of champerty¹¹ also emerged. While scholars have had conflicting views on champerty being a doctrine opposing¹² or supporting public policy, the legal developments in the early 21st century UK have overturned the outlook toward TPF completely. Cases like *Arkin v Borchard Lines Ltd*¹³ have shown that TPF is not only a vehicle for greater access to justice but also an essential element of arbitration.¹⁴

This is bound to pique curiosity about India’s stance on the same, which can be satiated by observing *Ram Coomar Coondoo v Chunder Canto*

8. Arbitration and Conciliation Act 1996.

9. Lisa Bench Nieuwveld & Victoria Shannon Sahani, ‘Third-Party Funding in International Arbitration, Second Edition’ (*Wolters Kluwer* 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046300> accessed 8 September 2024.

10. Nicholas Thompsell, ‘Funding Litigation — the Good, the Bad and the Ugly’ (*Fieldfisher* 2016) <<https://www.fieldfisher.com/en/insights/funding-litigation-the-good-the-bad-and-the-ugly>> accessed 7 September 2024.

11. Max Radin, ‘Maintenance by Champerty’ (1935) 24 Cal L Rev 48, 49, 51.

12. J Bentham, *The Works of Jeremy Bentham* 3(1) A Defence of Usury, Letter XII, Maintenance and Champerty 1843 at 19; See also Lord Neuberger, President of the Supreme Court, Harbour Litigation Funding First Annual Lecture, 8 May 2013, 4.

13. *Arkin v Borchard Lines Ltd* 2005 ECWA Civ 655, ¶¶16, 38 (England and Wales Court of Appeal).

14. *UK Trucks Claim Ltd v Fiat Chrysler Automobiles N.V.* 2019 CAT 29 (Competition Appeal Tribunal, United Kingdom); *Road Haulage Assn Ltd v Man SE* 2019 CAT 26 (Competition Appeal Tribunal, United Kingdom).

Mookerjee (1876)¹⁵, a Privy Council case, which laid down the seeds of TPF in India. It formed the groundwork for TPF in Indian litigation, setting a practical trend that was followed in many subsequent cases.¹⁶ As the country's legal system evolved, the scope of the principle established extended to the arbitration proceedings as well, owing to country's industrial growth and economic skyrocketing, notably post FY 2022-2023.¹⁷ It was reaffirmed in the 2018 Supreme Court case of *BCI v A.K. Balaji*¹⁸, where the Hon'ble court upheld the validity of TPF in domestic arbitration, and simultaneously held that advocate-sourced funding is unconstitutional. This case marks a watershed moment for arbitration in India, since it provides the perfect foundation to formulate a separate law dedicatedly dealing with third-party funding in India.

Yet, arbitration proceedings involving third party funders are not completely immune to critical oversight by the judiciary and adjoining parties, as illustrated by the 2017 petition in High Court of Telangana.¹⁹ In the petition, an arbitral award was challenged on the sole ground that it was primarily funded by a third party. Although withdrawn later, cases like these cause the proposed codification to stagger in its materialisation. Nevertheless, validation of TPF in the Report of the Justice B.N. Srikrishna Committee is one promising avenue for creating a TPF-conducive environment in domestic arbitration.²⁰ The report was instrumental in establishing that a supporting legislation for TPF as those passed in Singapore and Hong Kong along with the one under process in Paris is essential for making India emerge as an international arbitration hub.

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15. *Ram Coomar Coondoo v Chunder Canto Mookerjee* 1876 SCC OnLine PC 19: (1876-77) 4 IA 23.
 16. *Spentex Industries Ltd v Quinn Emanuel Urquhart* 2020 SCC OnLine Del 2484; *Essar Oilfields Services Ltd v Norscot Rig Management (P) Ltd* 2017 Bus LR 227; *Jayaswal Ashoka Infrastructure (P) Ltd v Pansare Lawad Sallagar* 2019 SCC OnLine Bom 578.
 17. 'About Indian Economy Growth Rate & Statistics' (*India Brand Equity Foundation* 2024) <<https://www.ibef.org/economy/indian-economy-overview>> accessed 7 September 2024.
 18. *BCI v. A. K. Balaji* (2018) 5 SCC 379 : AIR 2018 SC 1382.
 19. Sameer Jain et al, 'Third Party Funding in International Arbitration: An Indian Perspective' (*PSL Chambers* 1 August 2018) <<https://www.pslchambers.com/publication/third-party-funding-in-international-arbitration-an-indian-perspective/>> accessed on 8 September 2024.
 20. Justice B N Srikrishna, *Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India* (30 July 2017) 43.

B. Types of TPF Recognised in Different Jurisdictions

There are four main domains under the methods of TPF, namely insurance, attorney financing, loan agreements and claim assignments. Insurance is further subdivided into ‘Legal expenses insurance’ and ‘Liability insurance’.²¹ This essay primarily focuses on Insurance and Claim assignments²², as they are most commonly used.

Attorney financing, where the attorney finances the client’s claim, is ruled out not only due to the clear prohibition of the same held by the Apex Court in *A.K. Balaji v BCP*²³, but also because the provisions of Bar Council of India’s Standards of Professional Conduct and Etiquette²⁴ become prone to violation. Secondly, loan agreements, typically with banks, eliminate any chance of liability mitigation in the event of lost proceedings.²⁵ Hence the focus on the abovementioned two forms (of TPF).

3. FUNDING PARTY VS. DOMINUS LITIS: A BLURRED DISTINCTION

In simple terms, *Dominus Litis* is a party to the proceeding/suit, having *locus standi* in the issue not arising out of a particular concern of one party, but the subject matter of the proceeding as a whole. With this prerequisite information, one can *per se* identify the most apparent issue: liability of each of the three parties and how fairly the same is distributed.

The theory of fairness²⁶ suggests that the entitlement of the third-party to a portion of the desired arbitral award should also come with carrying the costs in adverse awards, i.e. being made liable for the costs. While it does sound equitable and just at the first glance, a deeper understanding reveals a

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21. Kaira Pinheiro & Dishay Chitalia, ‘Third-Party Funding in International Arbitration: Devising a Legal Framework for India’ (2021) 14 NUJS L Rev 2.
 22. Byron Sequeira & Yusuf Tariq, ‘Third-Party Funding: The Next Step for Arbitration in India’ (National Law School Business Law Review 1 April 2022) <<https://www.nlsblr.com/post/third-party-funding-the-next-step-for-arbitration-in-india#:~:text=TPF%20is%20an%20agreement%20through%20which%20an%20unrelated,the%20funding%20is%20only%20for%20a%20single%20claim>> accessed on 8 September 2024.
 23. *BCI v. A. K. Balaji*, (2018) 5 SCC 379 : AIR 2018 SC 1382.
 24. Bar Council of India’s Standards of Professional Conduct and Etiquette Rules 1975, pt VI, ch II, read with the Advocates’ Act 1961, §49(1)(c) and the proviso thereto.
 25. *ibid* 10.
 26. Michelle Maiese, ‘Principles of Justice and Fairness’ (Beyond Intractability July 2020) <https://www.beyondintractability.org/essay/principles_of_justice> accessed on 8 September 2024.

better option would be to keep liability insurance at the parties' discretion. The TPF Agreement ("TPFA") should explicitly state whether the insurance sought is purely legal expenses-based or is also inclusive of the liability in adverse awards. Doing so will help create a clearer distinction between the Funding Party and Dominus Litis, which would also enhance the 'party autonomy', which is one of the most important hallmarks of Indian ADR (Alternative Dispute Resolution). Essentially, funding party will be the party financing the proceeding and the Dominus Litis would be the actual person involved in it.

A. Does TPF Compromise Party Autonomy?

Here, a valid concern arises: given that the involvement of a third person often exacerbates matters, how can TPF still ensure party autonomy? To address this concern, it should first be known declaratively that the funder's sole duty is to financially support the claimant throughout the arbitration. The funder has no responsibility whatsoever in appointing the arbitrators, choosing the forum of the proceedings, etc. apart from supporting the claiming party.²⁷ This also satisfies the criteria of challenging the appointment of arbitrators, as it remains an autonomous decision of the parties, entirely within their control. The third-party neither intervenes with this decision nor goes beyond its singular monetary goals, thus minimising the possibility of its involvement causing an undesirable shift in party autonomy.

Additionally, referring to the preceding head, the authors advocate in favour of the "light-touch" approach²⁸ in India, where TPF is still in a nascent stage; the reason being that both the parties could benefit from autonomy without compromising confidentiality²⁹. The NDAs signed before the commencement of the proceedings shall entitle the arbitrator, and the opposing party, to the knowledge of the identity of the funder used by the claimant, as per the HKIAC Rules.³⁰ This will, firstly, ensure that there is no conflict of interest between the funder and the arbitrators/opposing party³¹; secondly, increase the credibility of the award, adding to the quality

27. Public Consultation on the Draft Civil Law (Amendment) Bill 2016 (n 57).

28. Michelle Maiese, 'Principles of Justice and Fairness' (n 26).

29. Association of Litigation Funders ('ALF'), *The Code of Conduct for Litigation Funders* (November 2011) <<https://associationoflitigationfunders.com/code-of-conduct/>> accessed on 8 September 2024.

30. Institutional Arbitration HKIAC Administered Arbitration Rule (2018), art 44.

31. *ibid.*

of the proceedings.³² And thirdly, most importantly, significantly reduce the chances of challenging the award on the grounds of non-disclosure of funder, leading to even quicker and more convenient arbitration.³³

B. Understanding the liability of Dominus Litis in TPF

Black Law Dictionary defines *Dominus Litis* as:

*“The master of the suit; i.e., the person who was really and directly interested in the suit as a party, as distinguished from his attorney or advocate. But the term is also applied to one who, though not originally a party, has made himself such, by intervention or otherwise, and has assumed entire control and responsibility for one side, and is treated by the court as liable for costs.”*³⁴

This aptly highlights the need to mark a distinction between the Funding Party and *Dominus Litis*. *Eskosol S.P.A. in Liquidazione v Italian Republic* (2017)³⁵ encapsulated the very essence for not making the funding party liable in case of adverse award, wherein its status as a party to the proceeding was observed as the main matrix based on which its liability (if any) could be calculated. It was observed that *“imposing the additional financial burden of a security for costs order would be unfair and would effectively reward Italy (responding party) for the misconduct that was alleged to have driven Eskosol (claimant) into the financial distress that necessitated the need for TPF.”*³⁶

The third-party funders have no purpose to serve in the proceedings apart from paying for the proceeding costs and receive a pre-decided portion of the arbitral award in case the proceedings succeed. Fundamentally, the principal motive of TPF in arbitration is, for the funder, to earn profit, which in no way makes the funder a party to the dispute.

C. Implications of Equating the Funder and the Funded

Wherein both of the above are equated, the party being funded itself would require a special legal team of its own, with capable lawyers that would

32. Oliver Gayner & Susanna Khouri, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding* (n 56).

33. *ibid.*

34. ‘Dominus litis’ (Black’s Law Dictionary) <<https://thelawdictionary.org/dominus-litis/>> accessed 8 September 2024.

35. *Eskosol S.P.A. in Liquidazione v Italian Republic*, ICSID Case No. ARB/15/50.

36. *ibid.*

represent it. Subsequently, it would lead to more mandatorily drafted legal agreements, and add even more legal complexity to the process. An added encumbrance would be that it could increase the risk of issues and conflicts arising during the proceedings.³⁷ This could divert the claimant's attention from the main arbitration, leading to unnecessary legal complications irrelevant to the arbitral subject matter. Consequently, the process would become even more costly, defeating the purpose of third-party funding for smooth arbitration.³⁸ Moreover, the funding party could face unnecessary legal charges initially directed at the claimant, further complicating its position.

In furtherance of the same, *Tomorrow Sales Agency (P) Ltd v SBS Holdings, Inc* (2023),³⁹ is referred to by the authors, in which the Delhi High Court ruled that including the funding party as a party to the conflict is not legally valid since it merely funded one party in the arbitral proceedings, and is thus not a signatory to the arbitral agreement as a whole.⁴⁰ Hence, it creates a clear demarcation between the claimant and the funding party, leaving no room for overlaps. This distinction adds on to the fairness and justiciability of the preceding, making it stand even more stalwart on the scales of the principles of natural justice.⁴¹

Since it has been already established that the funding party does not have any interest in the subject matter of the proceedings except the possible successful outcome, making it a party to the arbitration is meaningless, and worse, a step that would complicate this already complex arena of legal dispute resolution.

D. Distribution of Liability

After establishing the difference between the funding party and the funded, the next step is to consider liabilities. If the proceedings favour the funded party, the funding party would share in the award. But what about unfavourable outcomes?⁴² The Delhi High Court, in *Tomorrow*

37. ICCA Report, *ibid* 2.

38. *ibid* 29.

39. *Tomorrow Sales Agency (P) Ltd v SBS Holdings, Inc* C.A. No.-007664-007664 / 2023.

40. *ibid*.

41. B A Hepple & B A H, 'Natural Justice' (1969) 27(1) *The Cambridge Law Journal* 13-16 <<https://www.jstor.org/stable/4505268?seq=1>> accessed 27 April 2024.

42. Prateek Dhir & Mohit Kandpal, 'Third-Party Funding of Arbitrations in India – Risks & Liabilities' (*Mondaq* January 2024) <<https://www.mondaq.com/india/>

*Sales Agency (P) Ltd v SBS Holdings, Inc*⁴³, has emphasised that imposing liability on third-party funders without their agreement is neither desirable nor permissible as it would be counterproductive. However, it does not settle the principle of basic law, i.e., it does not make the funder aware of the liability associated with the funding agreement. Parallely, based on multiple scholarly debates, the authors believe that the parties should determine liability distribution amongst themselves.⁴⁴ The same can be mentioned in the TPF, whether they want liability insurance or only legal expense insurance. This would uphold party autonomy and ensure the free will of both the funded and the funding party, since the opinions on both sides of the fence are duly appreciated.

4. RECOMMENDATIONS AND WAY AHEAD

The lack of codification of TPF in domestic arbitration in India has led to several shortcomings, as discussed earlier. Codification is the obvious solution, and specific provisions require more attention, particularly the definition and scope of third-party funders involved in proceedings.

A. Amendments to the Arbitration and Conciliation Act, 1996

i Section 2:

Drawing inspiration from the Task Force Report (2018) of the International Council for Commercial Arbitration,⁴⁵ which provides comprehensive overviews of TPF, the authors aim for legal clarity in defining Third-Party Funders. These reports govern international arbitration and offer reliable, multifaceted and concrete insights applicable to the Indian legal system. The definition of the Third-Party Funder is as follows:

“A.3. For the purposes of disclosure, the term “third-party funder” refers to any natural or legal person who is not a party to the

arbitration--dispute-resolution/1408892/third-party-funding-of-arbitrations-in-india--risks--liabilities-> accessed on 27 April 2024.

43. *ibid.*

44. Victoria Shannon Sahani, ‘Judging Third-Party Funding’ (2016) 63(2) *UCLA Law Review* 388-448 <https://heinonline.org/HOL/Page?handle=hein.journals/uclalr63&div=11&g_sent=1&casa_token=SZNTDoW49uEAAAAA:DABYTMxp7vBP2hD0s6xNHVspoi5AcgD8-z5C73QdOls_YiPnyl6sS2reR6Sg4zYoBP7OAAASZIfv&collection=journals> accessed 8 January 2025.

45. International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, ICCA Reports Nos. 4, 18 (April 2018).

dispute and is not a party's legal counsel, but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:

- a) *in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and*
- b) *such support or financing is provided through a donation, or grant, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute.*⁴⁶

The authors propose this definition to be included as an amendment in Section 2 of the Act.⁴⁷ This would codify a concrete understanding of the said 'Third-Party' in domestic arbitration, which is essential for ensuring functionality of the legislation.

ii Section 42A:

The insertion of Section 42A to the Indian Arbitration Act in 2019⁴⁸ has already made a substantive move towards adding an additional layer of confidentiality in ADR proceedings. The section reads:

*"42A. Confidentiality of information - Notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentially of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award."*⁴⁹

However, this can create clashes with third-party funders and potentially exclude them from the proceedings. With there already being criticisms about ambiguity regarding the extent and manner of disclosure,⁵⁰ there arises a need to amend the same and add a provision wherein, when opting for third-party funding, section 42A won't be applicable to such a funder.

46. *ibid.*

47. Arbitration and Conciliation Act 1996, s 2.

48. Arbitration and Conciliation Act 1996, s 42A.

49. *ibid.*

50. Subhiksh Vasudev, 'The 2019 Amendment to the Indian Arbitration Act: A Classic Case of One Step Forward Two Steps Backward?' (*Kluwer Arbitration Blog* 25 August 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/?print=pdf>> accessed 3 May 2024.

A proviso can be added for the same. The inspiration for the same can be taken from the voluntary Code of Conduct published by the Association of Litigation Funders in England and Wales, wherein, the funder can “observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party.”⁵¹ Instead of adding a proviso, alternatively a provision for NDAs can also be added.

iii Section 31(8):

Through this section, the tribunals get the discretion to determine the bearer of costs, which includes “any other expenses incurred in connection with the arbitral proceedings and the arbitral award”⁵². This section has the potential to include Third-Party Funding under its ambit. So, it can very well be amended to erase questions regarding the funder’s liabilities in the absence of an NDA.

B. Releasing of Guidelines as “soft-law”

Speaking of application of such laws, it becomes imperative to study the procedure in which the suggested changes may be introduced, bringing us to the following sub-heads;

1. The ‘soft-law’ approach

Procedural soft-law assists in stepwise application of proposed law, commencing with guidelines, followed by regulations, para-regulatory texts⁵³, and when the time is right and social-impact-assessment⁵⁴ is appropriately done, the new law/amendment is enacted.

51. Association of Litigation Funders (‘ALF’), *The Code of Conduct for Litigation Funders* (November 2011) <<https://associationoflitigationfunders.com/code-of-conduct/>> accessed on April 2024.

52. Maharashtra National Law University Mumbai, *Third-Party Funding in India: Survey Report 2021* <https://www.google.co.in/books/edition/Third_Party_Funding_in_India_Survey_Repo/8omWEAAQBAJ?hl=en&gbpv=1&dq=distribution+of+liabilities+in+third+party+funding+in+india&pg=PR5&printsec=frontcover> accessed on 5 May 2024.

53. Favalli, Daniele, *An Overview of Existing Para-Regulatory Texts (“PRTs”): Analysis, Facts and Figures*, ASA Special Series No. 37, pp 1-16; Daniel p 4

54. Emma Wilson, *What is Social Impact Assessment?* (Indigenous Peoples and Resource Extraction in the Arctic: Evaluating Ethical Guidelines 1 January 2017) <https://www.researchgate.net/publication/315550573_What_is_Social_Impact_Assessment> accessed on 8 September 2024.

2. *The ‘hard-law’ approach*

This approach mainly focuses on the direct codification, application, and enforcement of the law in question. It imposes laws from the perspective of judges and legislators and aims at providing a set framework directly.⁵⁵

Jurisdictions such as Hong Kong, Australia, Singapore and other have been seen following the soft-law procedure, complementing it with the “light-touch” approach.⁵⁶ This approach can be loosely defined as “precedence to party autonomy with disclosure as the central tenet”⁵⁷, meaning that the NDAs would bar the signatory parties from divulging information to any other person, while simultaneously utilising it to raise the credibility of the arbitral proceedings.

If India were to introduce third-party funding mechanisms, the very first decision to make would be choosing between the two abovementioned approaches. The authors firmly believe that soft-law approach would be the way forward. That is because the whole concept of TPF is still in its nascent stage, wherein flexibility is the key, which soft-law approach provides.⁵⁸ Hard-law approach, on the other hand would be too rigid and wouldn’t provide the scope needed to adapt to the Indian arbitration scenario and deal with any unprecedented issues.

C. **Mandating Non-Disclosure Agreements**

When we talk about NDAs, there are two NDAs in question, one before the TPFA is signed, where the parties involved would be just the potential funder and funded party, and the second one would be where the parties involved would additionally have the opposing party(ies) and the arbitrators. Our suggested mandate for NDAs would be employing a “light-touch” approach, wherein the funders would distance themselves from the day-to-day proceedings.⁵⁹ This will give “precedence to party autonomy and

55. King & Wood Malleons, *IA Fundamentals / 3. Hard Law and Soft Law in IA* (Lexology 3 July 2020) <<https://www.lexology.com/library/detail.aspx?g=5436b6de-0d8a-4a78-bdb9-baf031f79ce8>> accessed on 6 September 2024.

56. Oliver Gayner & Susanna Khouri, ‘Singapore and Hong Kong: International Arbitration Meets Third Party Funding’ (2017) 40(3) *Fordham International Law Journal* 1037, art 13.

57. Public Consultation on the Draft Civil Law (Amendment) Bill 2016 (‘Amendment Bill’); Civil Law (Third Party Funding) Regulation 2016, 12 (Singapore).

58. *ibid* 20.

59. Matthew Saunders & Emmanuelle Cabrol, ‘Third Party Funding in International Arbitration’ *Ashurst*, <<https://www.ashurst.com/en/news-and-insights/legal-updates/>

flexibility” and simultaneously treat disclosure as the central tenet to TPF arrangements.⁶⁰

5. CONCLUSION

The evolution of Third-Party Funding has witnessed significant milestones, from ancient roots to modern acceptance as a vital element of arbitration. Recent legal developments in the UK and India have highlighted the importance of TPF in enhancing access to justice and supporting arbitration. Different jurisdictions have adopted various approaches to TPF, with some, like Hong Kong and Australia, favouring a soft-law approach emphasising party autonomy and disclosure.

The authors suggest that a useful distinction be made between the funding party and *Dominus Litis* to ensure party autonomy and confidentiality. A ‘light-touch’ approach would ensure this, and NDAs would *inter alia*, enhance transparency and award credibility while reducing challenges based on non-disclosure. Furthermore, as suggested, there is also a need to make certain amendments to the arbitration act, namely in sections 2, 31(8), and 42A to make the Indian laws more TPF-friendly. Plus, as a precursor, releasing guidelines as “soft-law” and mandating NDAs before and during TPF arrangements can provide the flexibility required to adapt to the evolving nature of arbitration, while simultaneously ensuring that ethical standards are not compromised. With these recommendations, the authors conclude on a hopeful note, envisioning legislation for TPF that aligns seamlessly in the ever-changing arena of alternative dispute resolution in the Indian legal landscape.

quickguide---third-party-funding-in-internationalarbitration/#:~:text=Third%20party%20funding%20is%20where,exchange%20for%20an%20agre> accessed on 5 May 2024.

60. Public Consultation on the Draft Civil Law (Amendment) Bill 2016 (Singapore); Civil Law (Third-Party Funding) Regulations 2016 (Singapore).