DISCLOSURE OF THIRD PARTY FUNDING IN ARBITRATION: AN INDIAN PERSPECTIVE

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ABSTRACT

This paper focuses on the interaction of Third Party Funding (TPF) and disclosure requirements in arbitration, specifically in Indian context. Impartiality and independence of arbitrators are key elements of effectiveness and due process in non-state actors resolving disputes between parties. With TPF emerging as a potent tool for pursuit of claims by Indian parties, it becomes essential to understand and explore this key element of arbitration - privity of contract between parties to Arbitral reference and the impact of TPF by an undisclosed party. The paper contends, that amongst the various stages at which such disclosure requirement can be imposed at, it is best to impose such disclosure requirement as early as possible. The paper then discusses the potential threat to confidentiality posed by TPF to the arbitration itself and the threat the disclosure requirement poses to the confidentiality of the funder. The paper posits robust Non-disclosure agreements between the funder and the funded party as a way to protect the confidentiality of the process. The paper concludes, by noting the need of amending Section 42A and Section 12 of the Arbitration and Conciliation Act, 1996, along with having a well-balanced and holistic code with regard to disclosures in TPF in India.

1. SCOPE OF THIRD-PARTY FUNDING IN INDIAN ARBITRATION:

The past few years have witnessed a steady rise in the costs of pursuing international arbitration, thereby imposing a deterrent of sorts in pursuance of even perceivably meritorious claims. Third-party funding (**"TPF"**) arrangements, as an asset class, have risen to the occasion and have made possible effective pursuance of such claims. While there exist a few varieties in TPF arrangements, a traditional TPF agreement involves a

funder paying the expenses incurred by a claimant during the arbitration process, and recovering such costs from the sum recovered by the claimant through the arbitration, if successful.[1]

While modern TPF arrangements have largely been popular in the global West and even in a few Asian countries, its recent rise in India may be owed to India's sustained efforts to promote the arbitration of disputes and India's fast economic development. Like their international counterparts, Indian companies are also looking at lever aging their balance sheets while pursuing their legitimate claims in arbitration. Publicly known for this are Indian companies, like Hindustan Construction Company Limited and Patel Engineering Limited, who have opted for certain models of TPF arrangements to fund their disputes.[2] Apart from these portfolio arrangements, there are also instances of TPF arrangements by Indian parties in arbitrations seated outside India.[3]

2. EVOLUTION OF THIRD-PARTY FUNDING IN INDIA:

TPF has historically faced resistance in common law jurisdictions. It has been considered illegal under common law in view of doctrines of maintenance and champerty.[4] However, over a period of time with shift in economic forces and public policy ethos, many countries have fairly watered down the extent of applicability of doctrines of maintenance and champerty on their legal systems and created exceptions or declared clarifications. For instance, the case of *Arkin* v. *Borchard Lines Ltd.* (Arkin) in the United Kingdom diluted the doctrines of maintenance and

1. Amita Katragadda, Bipin Aspatwar, Shruti Khanijow, Ayushi Singhal, 'Third Party Funding in India' https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf (February 2019) accessed 09 February 2023 (Amita Katragadda).
2. Swaraj Singh Dhanjal, Tanya Thomas, *HCC Raises ₹1750 Crore in Litigation Funding Deal* https://www.livemint.com/companies/news/hcc-raises-rs-1-750-crore-in-litigation-funding-deal-1553651279600.html (27 March 2019) accessed 09 February 2023; Athanasios Papadas, Kshitij Pandey, 'The Prospects of Third Party Funding in Indian Infrastructure Construction and Energy Disputes: An Overview' https://ijpiel.com/index.php/2021/11/04/the-prospects-of-third-party-funding-in-indian-infrastructure-construction-and-energy-disputes-an-soverview/ (4 November 2021) accessed 9 February 2023.
3. Norscot Rig Management Private Ltd v. Essar Oilfields Private Ltd. Commercial Arbitration Petition (L) No. 1062 of 2018 (Bombay High Court).
4. Practical Law Dispute Resolution, 'Champerty, Maintenance, and Funding' https://uk.practicallaw.thomsonreuters.com/03766749?transitionType=Default&contextData=(sc.Default)&firstPage=true accessed 9 February 2023.

champerty with respect to TPF, stating that TPF" *provide(s) help to those seeking access to justice which they could not otherwise afford*".[5] Further, to boost TPF, the Civil Justice Council published the Code of Conduct for Litigation Funders in 2011, administered by the Association of Litigation Funders (ALF). Moreover, in the *Master card* case,[6] the Supreme Court of the United Kingdom has acknowledged the fact that TPF has become *sine qua non* for access to justice. Similarly, the Australian landmark case of *Campbell's Cash and Carry Pty. Ltd.* v. *Fostif Ltd.*[7] held that TPF did not sacrilege due process and is not against the spirit of public policy.

More recently, in Singapore, the Civil Law Amendment Act 2017[8] paved way for TPF in arbitrations, and further amendments opened up TPF for related court proceedings as well.[9] Hong Kong has also allowed TPF through the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016.[10] It is interesting to note that both Singapore and Hong Kong permitted TPF only in relation to arbitration (or related) proceedings.

In India, it is worth noting that while there is no statute or regulation that expressly permits TPF, there is also no express prohibition on it. To that end, it is interesting to note that, unlike other common law jurisdictions where specific amendments were made to legitimise TPF, India did not have an embargo on champerty and maintenance in the Indian Contract Act, 1872.[11] Even judgments by Indian courts allude to the permissibility of TPF, although with certain riders. For example, a TPF arrangement would be considered illegal if it is demonstrably unconscionable, extortionate, or entered into for an improper object or to foment litigation that is unrighteous.[12] At the same time, 'a contract where one party agrees to

5. Arkin v. Borchard Lines Ltd. 2005 ECWA Civ 655, ¶16, 38.
6. Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent) UKSC 2019/0118.
7. Campbell's Cash and Carry Pty Ltd v. Fostif Ltd. 2006 HCA 41.
8. The Civil Law (Amendment) Act 2017 (Singapore), art. 5-B(2).
9. Deminor, 'In Review: Third Party Litigation Funding in Singapore' https://www.lexology.com/library/detail.aspx?g=cf53fd1c-8eb1-4425-9020-bfa4637e2204 (8 December 2022) accessed 9 February 2023.
10. The Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Act 2017 (Hong Kong).
11. Pechell v. Watson (1841) 8 M&W 691; Chedambara Chetty v. Renga Krishna Muthu Vira Puchaiya Naickar 1874 SCC OnLine PC 10 : (1873-74) 1 IA 241; Ram Coomar Coondoo v. Chunder Canto Mookerjee 1876 SCC OnLine PC 19 : (1876-77) 4 IA 23 (Ram Coomar Condoo).
12. *Ibid*.

fund litigation for certain benefits would be legally unobjectionable if no "lawyer" was involved and it was between third parties'.[13] That said, the judgements of Indian courts would indicate that TPF is not novel to India and it has always existed in traditional unregulated markets.[14]

Some states such as Maharashtra, Madhya Pradesh, Orissa and Uttar Pradesh have, in amendments made to Order XXV, Rules 1 and 2 of the (Indian) Code of Civil Procedure, 1908,[15] referenced rules that apply to 'financers' of a suit. The state amendments to these rules include the Court's power to order security for costs from the third-party financer to secure the costs to be incurred by the defendant, should the Court deem it fit.[16] The Supreme Court of India in 2018, in *A.K. Balaji* v. *Bar Council of India,*[17] noted that TPF is permissible, so far as the lawyer itself is not the funder.[18]

In view of existing law, as summarily discussed above, the TPF arrangements made with non-lawyers may be examined by the courts for being extortionate, unconscionable and/or against public policy. However, despite there being no embargo on TPF of arbitration in India, many issues still exist because of the lack of a comprehensive regime. These issues pertain to confidentiality, disclosure, and costs. The article will discuss these issues in further sections.

3. REQUIREMENT OF DISCLOSURE OF TPF ARRANGEMENTS IN ARBITRATION

A pertinent issue with respect to TPF arrangements has been that of disclosure of existence of such agreements in arbitration. Contrary stance has been taken on the issue in India and across the globe. While a set of scholars and practitioners argue that such disclosures are paramount for maintaining transparency in the arbitral process,[19] the other set argues that the questions relating to funding of parties is beyond the scope of

13. 'G' a Senior Advocate of the Supreme Court, In re AIR 1954 SC 557 : (1955) 1 SCR 490.
14. Ram Coomar Condoo (n 12).
15. The Code of Civil Procedure 1908, or XXV, r. 1.
16 Rajat Jariwal, Shruti Khanijow, Saniya Mirani, 'Litigation Funding: India', *Getting the Deal Through Guide* (Woodsford, 2021-2022).
17. Bar Council of India v. A.K. Balaji AIR 2018 SC 1382.
18. Bar Council of India's Standards of Professional Conduct and Etiquette Rules, 1975, pt. VI, ch. II; Advocate's Act 1961, s. 49(1)(*c*).
19. Mauricio Marengo, 'Third Party Funding and Conflicts of Interest: Mandatory Disclosure to Tame the Beast' https://www.academia.edu/42679677/

jurisdiction of arbitration tribunals and therefore, such disclosures are not a pre-requisite for maintaining transparency and fairness in the arbitral process.[20]

However, a report of ICCA Task Force on TPF has opined that there exists a unanimous consensus largely in favour of disclosures of TPF agreements in international arbitrations.[21] Broadly, the following advantages of disclosures of TPF arrangements emerge from the existing discussions on the issue:

Firstly, if not for such disclosures, the opposing party would be virtually left with no recourse to discover the existence of TPF arrangements in favour of the claimants (or otherwise). The strength of the claims is often proportionately linked to the existence of such TPF arrangements. A claim might be strong and legitimate thereby attracting third-party funders, due to higher chances of it being successful.[22] The financial strength of the claimant, owing to such TPF arrangements, thus also heavily influences the settlement processes of the disputes, if any.[23]

Secondly, such disclosures ensure that any conflict of interest between the funder and arbitrator are brought to fore.[24] In *Sehil v. Turkmenistan*, the ICSID Tribunal had ordered for the disclosure of TPF arrangement for two reasons: (a) ensuring the integrity of the arbitral proceedings, by pre-emptively checking for any potential conflict of interest between the funder and the arbitrator, and (b) ensuring security of costs, because the funder,

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Third_Party_Funding_and_Conflicts_of_Interest_Mandatory_Disclosure_to_Tame_the_Beast accessed 9 February 2023.

20. Tian-Yu DU, 'Research on Conflicts of Interest Arising from Third-Party Funding In International Investment Arbitration' (2018) 281 Advances in Social Science, Education and Humanities Research 422.
21. International Council for Commercial Arbitration & Queen Mary University of London, 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (ICCA Reports No. 4, 2018) 84 [ICCA Report].
22. Nathalie Allen Prince & David Hunt, 'Increasingly mandatory disclosure of third-party funding in arbitration' (*Financier Worldwide*, November 2018) https://www.financierworldwide.com/increasingly-mandatory-disclosure-of-third-party-funding-in-arbitration#.YA58SugzY2w accessed 9 February 2023.
23. Hadžimanović, N.,'Third-Party Funding in Arbitration: A Case for Mandatory Disclosure?', in Meškić, Z., Kunda, I., Popović, D., Omerović, E. *(eds) Balkan Yearbook of European and International Law 2019*, vol. 2019.
24. Meenal Garg, 'Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies' (2020) 6(2) NLUJ Law Review 71, 80 (Meenal Garg).

not being a party to the proceedings, might eventually choose to vanish at the time of payment.[25]

4. SHOULD DISCLOSURES BE MADE MANDATORY?

On an international scale, there is a growing consensus on mandatorily disclosing the TPF agreements in international arbitrations. The ICC Guidance Note and the IBA Guidelines on Conflicts of Interest, require the arbitrators to disclose their relationships with any entity possessing a direct economic interest in the dispute, or an obligation to indemnify a party for the eventual award.[26] The SIAC Investment Rules 2017, explicitly empower the arbitral tribunals to order the disclosure of existence of a TPF arrangement.[27] Furthermore, the ICCA Task Force, which has attempted to provide certain guiding principles with respect to TPF in International arbitrations, has incorporated Principles' A.1.' to 'A.4.', mandating disclosure of TPF arrangements and the identity of the funders to the arbitrators and the arbitral institution, at the instance of the parties themselves.[28]

It is also essential to note that Asian countries, like Singapore and Hong Kong, have enacted domestic legislations requiring disclosure of TPF arrangements in arbitrations (as mentioned above). While the Singapore law places the onus on domestic lawyers of the parties to make such disclosures, the Hong Kong law requires the parties itself to disclose such TPF arrangement.[29] This, interestingly limits the effectiveness of disclosures in Singapore, where only local practitioners representing parties and not foreign lawyers would be covered by the mandatory disclosure requirement. Since foreign lawyers are not bound by the rules of practice as applicable to Singaporean lawyers, only best practices would presumably guide them on the issue of disclosures.[30]

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25. ICSID Case No. ARB/12/6 Procedural Order No. 3 of 12 June 2015.
26. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration 2021, cl. II(D); IBA Guidelines on Conflicts of Interest in International Arbitration 2014, General Standard 6(*b*).
27. SIAC Investment Arbitration Rules 2017, r. 24(1).
28. ICCA Report 81.
29. S. 98-U, Singapore Civil Law Act (Cap. 43), ss. 5-A, 5-B; Hong Kong Arbitration Ordinance (Ord. 6 of 2017).
30. Christine Sim, 'Third Party Funding in Asia: whose duty to disclose' (*Kluwer Arbitration Blog*, 22 May 2018) http://arbitrationblog.kluwerarbitration.com/2018/05/22/third-party-funding-asia-whose-duty-disclose/?doing_wp_cron=1596980805.2989599704742431640625 accessed 9 February 2023.

In contradistinction, certain scholars have opposed a general mandatory duty of disclosure of TPF agreements. They are of the opinion that it is neither the task of the arbitral tribunal nor within the scope of their powers, to regulate the relationship between claimants and third parties, who are not within the scope of the issues raised before the tribunal.[31] However, it seems that such approach is based on a narrow understanding of the powers and duties of an arbitral tribunal, which has the primary duty to ensure that the award is rendered in an impartial and effective manner. In pursuance of such duties, the arbitral tribunal is empowered to take actions which might incidentally affect third parties, who have, on their own accord, acquired an economic interest in the eventual award of the tribunal. More so because such economic interest is tied so inherently to the outcome of the arbitration that conflict of the funder with an arbitrator or a representative of either party may prove fatal to the enforcement of the award, rendering the whole process of arbitration fruitless.

The Indian arbitration law would expectedly require such disclosures by its operation, especially since the arbitrators have a statutory duty to disclose. However, Indian law of disclosure of conflict in arbitration is driven by the arbitrator itself disclosing any conflict within its knowledge. Section 12(1) of the Arbitration and Conciliation Act 1996 ("Act"), read with Schedule V to the Act, requires the arbitrator to disclose in writing the existence of any direct or indirect relationship with any of the parties having an interest in the dispute.[32] The provision is quite widely worded in order to ensure the impartiality of the arbitral tribunal, and it would make sense for it to also include a third-party funder within its scope.[33] That said Indian law is silent on duty of the arbitrator to reasonably enquire if any TPF arrangements exist, so as to obviate the risk of non-fulfilment of duty under the Act. Hence, it would be a natural pre-requisite for parties to disclose the existence of any such TPF arrangement, in order to allow the arbitrators to make such disclosures in accordance with Section 12(1), the failure of which declaration is a ground for challenge of appointment of such arbitrator. Furthermore, the non-disclosure of such relationships by the arbitrator, ought to amount to *de facto* inability to perform the functions of arbitrator, within the meaning of Section 14(1)(a).

31. Jonas von Goeler, 'Third-Party Funding in International Arbitration and its Impact on Procedure', Kluwer Law International, 2016. See also Rebecca Leinen, 'Striking the right balance: disclosure of third-party funding', Oxford University Commonwealth Law Journal (2020), 20:1, 115-138.
32. Arbitration and Conciliation Act 1996, s. 12(1).
33. Amita Katragadda, (n 1).

5. STAGE OF ARBITRATION WHEN DISCLOSURE COULD BE MADE

The subsequent issue that arises with respect to disclosures of TPF arrangements is concerning the stage at which such disclosure may be made. Considering the currently prevailing jurisprudence, there exist three primary options with respect to stage at which such disclosures are to be made:

Firstly, a disclosure of existence of TPF arrangements can be required at the outset, before the appointment of the arbitrators itself, to ensure the impartiality of the tribunal from the very beginning. If a party does not disclose such TPF arrangements at the outset, and subsequently any conflict of interest comes to light, then the very validity of the award of the tribunal can be challenged under Section 34 of the Act.[34] Furthermore, the ICCA report on TPF, which incorporates a comprehensive discussion on several nuances of TPF arrangements, states certain principles which reflect a similar idea.[35]

Secondly, the disclosure of TPF arrangements can be ordered by the tribunal at any point during the proceedings. The SIAC Rules appear to fall within this category, as they empower to the tribunal to order such disclosures, but leave it open for the tribunal to decide when such disclosure is ought to be made.[36] However, such a provision does not take into consideration the time and resources already invested in the arbitral process before the tribunal orders such disclosure and a conflict of interest is brought to light.

Thirdly, the TPF agreements should be viewed as any other documentary evidence, which can be produced at the document production stage of the arbitral proceedings, and are subject to corresponding rules of relevancy and materiality. Certain arbitration cases in the past, like *South American Silver v. Bolivia*[37] and *RSM Production Corporation v. Saint Lucia,*[38] have adhered to such standards for disclosure of TPF arrangements. However, the fallacy with such a line of reasoning is that it does not take into consideration that a TPF agreement is not at par with other documentary

34. Arbitration and Conciliation Act 1996, s. 34.
35. Meenal Garg (n 24).
36. SIAC Rules, 24(l).
37. PCA Case No. 2011-2017, Procedural Order No. 13 of 21 February 2013, ¶8.
38. ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings of 8 April 2015, ¶67.

evidence, because the latter do not, generally, have a potential to give rise to a conflict of interest with the arbitrator itself.

6. DISCLOSURE AND ITS POTENTIAL THREAT TO CONFIDENTIALITY OF THE FUNDER

While the article has hitherto discussed the advantages of disclosure of any TPF arrangements in an arbitration proceeding, it should be noted that such disclosures may potentially threaten confidentiality of the funder. It is well-recognized that confidentiality is a grundnorm in arbitration. In that light, it is important to note that disclosures, of the kind discussed in this article, may threaten the confidentiality of the TPF arrangements, hence prejudicing the funder's right to confidentiality. While, the parties are interested in ensuring the confidentiality of the arbitration proceeding, the funder has an equal interest in ensuring the confidentiality of the terms of the Third Party Funding agreements.

This is owing to the fact that a TPF disclosure, in order to be effective, shall involve revealing the substantial details (professional, and/or financial) of the funder and its approach to the funding arrangements; thereby threatening its confidentiality.

Besides the threat to confidentiality posed by disclosure of TPF Agreements, it is noteworthy that TPF may in itself constitute a threat to confidentiality of arbitration proceedings. This is because the process of TPF naturally requires that a claimant, who wishes to find a funder for his claim, submit his claim to a potential funder, so that such a potential funder is able to conduct a cost-benefit analysis on the basis of factors such as likelihood of award being granted, the likely quantum of such award and other subtle factors. This obviously requires disclosure of information at a substantial level, therefore threatening the confidentiality of the entire case record. Further should the funder take the case, they will require regular updates on the progress of the proceedings; this would further put confidential information of the opposing party at peril of being exposed. This is typically protected by the party seeking funding through non-disclosure agreements ("NDAs") with the funder, that also forms a fundamental tenet of the TPF agreements.

In the jurisdictions where the practice of TPF is well-established practice, signing of an NDA between the potential funder and the claim-holder before any exchange of information is considered to be standard practice. This restricts the funder from releasing the information or any part of it

to any other entity and creates a contractual liability that binds the funder and may be invoked in case of breach. Other solutions include limiting the amount of information shared with the funder, redacting sensitive information, especially the information shared by the opposing party. If required, the opposing party would be granted an opportunity to identify and make its representation with regard to the sensitive information that is required to be redacted, the tribunal would deliberate and pass an order for such a redaction.[39] The ICCA- Queen Mary Report[40] mentions these practices, while highlighting that it may vary depending on the jurisdiction. One of the most important recommendations in the report is that "*…in all jurisdictions, a Party seeking funding and its counsel should ensure that a robust NDA is entered into before any substantive discussions with a Funder to protect against the disclosure of confidential communications*".[41]

A recent amendment to the Act also reflects progress in terms of greater confidentiality.[42] An insertion made to Section 42 of the Act, reads as under:

> *"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"*

While this provision was seen as ambiguous and was criticized for leaving the extent and manner of disclosure unclear, it is nevertheless a right step towards ensuring greater confidentiality. To promote greater confidentiality in TPF, certain precautionary measures must be built into a TPF regulatory framework. Association of Litigation Funders published a voluntary Code of Conduct in England and Wales, which has also been applied to funded arbitration cases.[43] Introducing a similar code in India would benefit arbitration and litigation funders equally. An approach involving voluntary codes of conduct, limited disclosure obligations as well as the inclusion of "funders" within the arbitrator conflict provisions may help in

39. Kaira Pinheiro & Dishay Chitalia, 'Third-Party Funding In International Arbitration: Devising A Legal Framework For India' (2021) 14 NUJS L. Rev. 2 http://nujslawreview.org/wp-content/uploads/2021/10/14.2-Pinheiro-Chitalia.pdf accessed on 4 December 2022.
40. *Id.* at 16.
41. *Ibid.*
42. Inserted by (Indian) Act 33 of 2019, s. 9.
43. *Id.* at 5.

promoting a sustainable growth of TPF in India. Another approach would be for the arbitrators to consciously seek such information from the parties prior to making their disclosures. Since India is now moving from *ad hoc* to institutional arbitration regime, it may also be worthwhile for Indian arbitral institutions to consider including a mechanism for such disclosures while maintaining both – confidentiality of the TPF structure and sanctity of the arbitral process.

7. CONCLUSION

Globally, the law and policy with respect to TPF arrangements itself is far from settled, much less with respect to disclosures of such arrangements in arbitrations. The varying views are yet to be reconciled into a comprehensive standard, which can eventually be prescribed as a base guideline for all countries. However, moving forward, it seems that mandatory disclosures at the outset of the arbitral proceedings would be an appropriate way to approach the issue of disclosures, a standard which must be facilitated to bring into effect a robust TPF regime in India.

A balanced approach needs to be adopted in India as far as TPF and disclosures are concerned. It is pertinent to maintain a balance between the confidentiality of the arbitration proceedings and the parties' right to access justice. It is also important that a balance is maintained between the funder's right to confidentiality and the impartiality and independence of the arbitrators. Therefore, it will be prudent to change institutional norms for both domestic and international arbitrations in India to include appropriate disclosure obligations. Further, through a modification to Section 42A of the Arbitration Act, it is also crucial to include third-party funders in the list of parties with whom the information may be communicated. Moreover, to preserve the arbitrators' independence and impartiality, the provisions of Section 12 and the Fifth Schedule of the Act may be revised. Due to the funded party's lack of negotiating power, the relationship between the funder and the funded party must also be regulated to protect the interests of the funded party. This can be achieved by implementing a code of conduct for TPF in India. In India, where TPF is still in its infancy, a soft-law approach in the form of a model code of conduct would give the necessary boost and direction for the development and implementation of TPF.