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INDIA'S PROSPECTS ON THIRD PARTY FUNDING IN ARBITRATION: CROSS JURISDICTIONAL APPROACH AND RECOMMENDED POLICY FRAMEWORK

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Abstract

Third-party funding, as a concept, affords a win-win situation, principally for the disputants on one hand, especially favouring the under-privileged party from the perspective of access to justice and providing an opportunity for effective representation against a well-funded party; and on the other hand, for the investors, by offering relatively safer and favourable returns for their regulated funding of the arbitration process.

The exponential rise in the litigation and arbitration claims being financed by third-party financiers has brought about perhaps the most influential trend in the civil justice system. The successful models in Singapore and Hong Kong are an inspiration for instituting regulatory measures in the Indian context. Consequently, a need is felt to institute a strong regulatory framework to safeguard the infallible image and reputation of the Indian judicial system against the potential abuse by the unscrupulous third-party financiers who fund a dispute purely with financial profit in mind. In effect, the regulatory mechanism on the subject calls for concrete rules on third-party funding from outside the country, the reinforcement of public policy objectives, and the integrity of the judicial system.

While forging conducive conditions in the Indian context, the regulatory framework must be initially customized to the Indian environment to stabilize the system. Later, with evolution of the system with time, there is a definite requirement to adapt to global benchmarks to unequivocally pave way for third-party funding mechanism as an effective method to benefit the Indian citizens and also India's global

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reputation as a prominent seat and venue for international arbitration. In this significant backdrop, this paper seeks to analyze the regulatory regime adopted by established jurisdictions, the prevailing challenges, and recommend a plausible policy framework on India's position on third-party funding in arbitration.

'*Third Party should be encouraged as it empowers parties who can't afford the procedures but have a right to justice*' – Mark Bravin

I. Introduction

Third party funding as a phenomenon is becoming mainstream in both international arbitration and litigation communities. It is a method of financing a particular dispute in which an entity is not a party to a particular dispute, however, funds another party's legal fees or pays an order, award or judgment rendered against that party. The discourse around third party funding across jurisdictions worldwide is largely focused around domestic litigation but in the context of international arbitration, it is usually classified as a subset of litigation funding. There are nuanced contours of third-party funding that advance on a different paradigm and therefore, merit a different kind of analysis.

The exponential rise in the litigation and arbitration claims being financed by third-party financiers has brought about perhaps the most influential trend in the civil justice system as highlighted by the ICCA-Queen Mary Task Force in its findings on policy issues with respect to third-party funding. A favorable response to third-party funding in the Justice Srikrishna Committee Report on Institutionalization of Arbitration in India has certainly given impetus to the prospect of a probable transition towards formally permitting third-party funding in international commercial arbitration in India. At the same time, a need is felt to institute a strong regulatory framework to safeguard the infallible image and reputation of the Indian judicial system against the potential abuse

by the unscrupulous third-party financiers who fund a dispute purely with financial profit in mind. In effect the regulatory mechanism on the subject calls for concrete rules on third-party funding from outside the country, the reinforcement of public policy objectives and the integrity of the judicial system.

In the Indian context, the regulatory mechanism on third-party funding is still very nascent. The models in Singapore, Hong Kong, and United Kingdom have a fairly evolved regulatory mechanism in place which is under constant review. The need of the hour is to embrace the best practices world over in third-party funding for a satisfactory and responsive justice system at the grassroots level, espousing to make India a preferred seat of international commercial arbitration propelled by the third-party funding regime.

This paper intends to explain the framework of third-party funding and contemplate funding arrangements in international arbitrations in light of their unique attributes by examining the key provisions across established jurisdictions.

To arrive at a logical conclusion, the approach to the study is aimed to be dealt cogently by a pragmatic assessment of crucial sub-sets and fundamentals on the subject as follows:

- Assessment of the cross jurisdictional approach to the subject from the perspective of best practices and trends evolved globally.
- Overview of the current dynamics of third-party funding in arbitration in India.
- Appreciation of issues and challenges for adopting a viable regulatory mechanism for India.
- Recommendations on enunciating a viable policy framework for third-party funding in arbitration in India.

II. Cross Jurisdictional Approach

The legality of third-party funding in international arbitration is often contested owing to a lack of judicial consensus on the propriety of such agreements. If third-party funding is regarded as illegal at the seat of arbitration, the funded party seeking interim measures from the courts of the seat may be sued by the respondent for the torts of champerty and maintenance. Also, on the prospect of challenging the award, the respondent may contend the involvement of a third-party to be a ground for setting aside the award under the public policy exception. With momentous developments in technology and markets witnessing significant investments, the inevitable benefits of third-party funding cannot be denied.[1] It is important that this mechanism is promptly regulated to ensure that stakeholders are adequately protected and the legitimacy of arbitration as a mechanism for dispute resolution is maintained.[2] Toward this end, an analysis of the best practices and trends evolved in prominent seats of arbitration globally, offers valuable inputs.

A. UNITED KINGDOM

The doctrines of maintenance and champerty originated in the ancient Greek and Roman legal systems, evolved in the common law system of England, and spread across other jurisdictions largely though the far reaching British empire.[3] Champerty can be defined as the act of providing financial assistance with the expectation of receiving money recovered if the party wins.

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[1] Varun Mansinghka, '*Third Party Funding in International Commercial Arbitration and its Impact on Independence of Arbitrators: An Indian Perspective*', in Michael Pryles and Philip Chan (eds), Asian International Arbitration Journal, Volume 13, Issue 1 (Kluwer Law International), pp. 97-112.

[2] Khushboo Hashu Shahdadpuri,'*Third Party Funding in International Arbitration: Regulating the Treacherous Trajectory*', in Michael Pryles and Philip Chan (eds), Asian International Arbitration Journal (Kluwer Law International 2016), Volume 12 Issue 2, pp. 77-106.

[3] Douglas R. Richmond, '*Other People's Money: The Ethics of Litigation Funding*', 56 Mercer L. Rev., 652-655 (2005).

Maintenance is an umbrella term encompassing champerty in which the funder seeks profit from the client's successful claim.[4] Different nations have adopted varied approaches in dealing with these doctrines. Some of the nations have deemed them to be obsolete while others have revived them in recent years to evaluate the desirability and legality of third-party funding arrangements.[5]

The courts in the United Kingdom have been preclusive in permitting third-party funding on the grounds of raising unethical and unmeritorious claims. Though third-party funding agreements are *per se* not opposed to public policy, prohibition on contingency fees is extended to arbitration proceedings.[6] The House of Lords in *Giles v. Thompson*[7] observed that it would be inappropriate to extend the doctrine of champerty to international arbitration as it would mean extending a public justice system doctrine to a private judicial system. In 1998, the doctrines of champerty and maintenance were categorically extended to arbitration. In *Bevan Ashford,*[8] the Vice Chancellor Sir Richard Scott stated that the prohibition on contingency fees does not extend to arbitration.

The modern sense of third-party funding in international arbitration gained significant momentum with legislative changes such as the Legal Services Act ["**LSA**"] in 2007. The LSA opened doors to studying and improving litigation funding. The Legal Services Board[9] constituted the first tier of the new regulatory scheme addressing the issue of liability of costs orders and

[4] Ari Dobner, '*Litigation for Sale*', 144 U. Pa. L. Rev., 1543-1546 (April 1996).
[5] Richard Lloyd, '*The New, New Thing, The Am, The Law*', (Supplement), 22-26 (Jun. 1, 2010).
[6] Kshama Loya Modani and Vyapak Desai, "*Asia No Longer 'Third' To Third Party Funding – Meets The Financing World of Arbitration*", Digital Newsletter, 2017, Kuala Lumpur Regional Arbitration Centre, December 2017.
[7] Giles v. Thompson, [1994] 1 AC 142.
[8] Bevan Ashford v. Geoff Yandle, [1998] 3 WLR 172.
[9] Legal Services Act 2007, Section 3.

assigning causes of action with specific detail.[10] In *Assar Oilfield*,[11] the court recognized the discretion of the arbitral tribunal and held that costs of funding a legal proceeding may be recovered on the terms agreed with the funder in addition to the award rendered by the tribunal. The extent to which a third-party funder would be liable for the costs of the other party would depend upon the degree of financial interests and the control exerted by the funder in the legal proceeding.[12] However, in an arrangement where the funder is not expected to receive any return, the funder will generally not be held liable for the costs of the funded party in the event that the claims are unsuccessful.[13]

While considering the limits on the extent of a funder's adverse cost liability, the courts have relied on *Arkin*,[14] in which the claimant pursued his claim to judgment because of being supported by a litigation funder. The defendants upon successfully defending the claim sought an order directing the funder to pay the entire costs. Lord Phillips MR observed that commercial funders should only pay costs to the opposing parties to the extent of funding provided by them (Arkin cap).[15] However, this cap would apply only when the funder finances a part of the costs of litigation.

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[10] Sir David Clementi, Review of the Regulatory Framework for the Legal Services in England and Wales, Final Report, December 2004, (last accessed on 15 October 2019), available at: http://www.avocatsparis.org/Presence_Internationale/Droit_homme/PDF/Rapport_Clementi.pdf

[11] Assar Oilfields Services Ltd v. Norscot Rig Management Pvt. Ltd., (2016) EWHC (Comm) 2361.

[12] Mary Jordan et al, '*Why Third Party Funding is on the Rise in England and Wales*', Global Arbitration News, 27 February 2018, (last accessed on 10 September available at :https://globalarbitrationnews.com/why-third-party-funding-is-on-the-rise-in-england-wales/#_ftn2.

[13] Hamilton v. Al Fayed, [2002] EWCA Civ. 665.

[14] Arkin v Borchard Lines Ltd. and Others, [2005] EWCA Civ 655.

[15] *At What Costs*? A Lovells Multi-Jurisdictional Guide to Litigation Costs, 74, (last accessed on 07 August 2019), available at: http://www.chrysostomides.com/assets/modules/chr/publications/16/docs/LitigationCostsReport.pdf

The Court of Appeal in *Excalibur Ventures LLC,*[16] ordered the third-party funder to pay costs of the other side on an indemnity basis on the premise that '*he has funded proceedings substantially for his own financial benefit and has thereby become a real party to the litigation*' and so '*it is ordinarily just that he should be liable for costs if the claim fails*.' Lord Justice Tomlinson expressed the principle that '*justice will usually require that, if the funded proceedings fail, the funder must pay the successful party's costs*.' The Court of Appeal further ruled on two important propositions. *Firstly*, a commercial funder would be required to contribute to the defendants' costs on the same basis as the funded claimant and; *secondly*, an order for adverse costs would be made not only against the funder mentioned in the litigation funding agreement but also in favour of a third-party who contributed funds and benefitted from the success of the proceedings.[17]

The prospects of third-party funding gained prosperous momentum post the decision in *Arkin v. Borchard.*[18] The Legal Services Act, 2007 and the efforts of Lord Justice Jackson opened the way to study this question in greater depth.[19] In 2009, Lord Justice Jackson considered the question of whether common law doctrines of champerty and maintenance should continue. The results of the *Final Report* suggested that eliminating these doctrines would cause inadvertent consequences to the interested parties. Lord Jackson, however, recommended that the laws must be modified to reflect if the funder allows any form of regulation

[16] Excalibur Ventures LLC v. Texas Keystone Inc. & Ors., [2016] EWCA Civ 1144.

[17] LESLIE PERRIN, THE THIRD PARTY FUNDING LITIGATION LAW REVIEW, (2ND ED., LAW BUSINESS RESEARCH LTD., LONDON 2018).

[18] Melanie Willems, Third Party Funding: A Paper for the Society of Construction Arbitrators (London: Howrey LLP, 2009).

[19] LISA BENCH NIEUWVELD AND VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION, (2ND ED. KLUWER ARBITRATION, 2017).

that may be agreed upon, and then its agreement will not be overturned on grounds of maintenance and champerty.[20]

Third-party funding in the United Kingdom is self-regulated by the Association of Litigation Funders ["**ALF**"] which covers capital adequacy requirements for funders and rights regarding termination and control proceedings in any given investment situation.[21] The Code of Conduct for Litigation Funders ["**Code**"] provides provisions restricting the ability of the funder to withdraw from a continuing arbitration[22] subject to certain conditions. The Code mandates that reasonable steps must be taken to ensure that the funded party receives independent advice on the terms of the Litigation Funded Agreements ["**LFAs**"],[23] to ensure that no steps are taken which influence the funded party's lawyer to act in breach of their professional duties,[24] to ensure that the funder does not influence the funded party's lawyer to cede control over the proceedings of the dispute[25] and maintain adequate financial resources to meet their funding obligations.[26]

There remain unaddressed questions as to whether a voluntary code regulating third-party funders would be sufficient to regulate the market if more third-party funders enter the market. A sub-

[20] Review of Civil Litigation Costs: Final Report 124.
[21] MARY JORDAN ET AL, '*WHY THIRD PARTY FUNDING IS ON THE RISE IN ENGLAND & WALES*', GLOBAL ARBITRATION NEWS, 27 FEBRUARY, 2018, (LAST ACCESSED ON 10 SEPTEMBER 2019, AVAILABLE AT: https://globalarbitrationnews.com/why-third-party-funding-is-on-the-rise-in-england-wales/.
[22] LORD JUSTICE JACKSON, THIRD PARTY FUNDING OR LITIGATION FUNDING, SPEECH DELIVERED AT THE SIXTH LECTURE IN THE CIVIL LITIGATION COSTS REVIEW IMPLEMENTATION PROGRAMME, THE ROYAL COURTS OF JUSTICE, P. 3 (23 November 2011), available at: http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Sixth-Lecture-by-Lord-Justice-Jackson-in-the-Civil-Litigation-Costs-Review-.pdf
[23] THE CODE OF CONDUCT FOR LITIGATION FUNDERS, PARAGRAPH 9(B) (1).
[24] *Id* at Paragraph 9(b) (2).
[25] The Code of Conduct for Litigation Funders, Paragraph 9(b) (3).
[26] *Id* at Paragraph 9(b) (4).

market of UK brokers has been growing significantly who are using their expertise to match claims with funders, insurers and others.[27]

B. SINGAPORE

Third-party funding has conventionally been prohibited under the laws of Singapore on grounds of maintenance and champerty.[28] In *Otech Pakistan*[29], the Court of Appeal held that the doctrine of champerty applied to both court litigation and arbitration. The court observed that it would be unworthy to differentiate between forms of dispute resolution on the basis of the different forums in which they are conducted. In *Lim Lie Hoa,*[30] a third-party funding arrangement was upheld in the context of a pre-existing genuine commercial or personal interest in enforcing the proceedings.

The scenario changed with the realization of Singapore's prominence as an important and reputed seat for international commercial arbitration. With the intent to legitimize third-party funding in international arbitration, the Law Ministry of the Government of Singapore enforced the Civil Law (Amendment) Act 2017[31] ["**Act**"] along with the Civil Law (Third-Party Funding) Regulations 2017[32] ["**Regulations**"] and related

[27] Third Party Litigation Funding and Claim Transfer: Trends and Implications for the Civil Justice System: An Overview.

[28] Sapna Jhangiani and Rupert Coldwell, '*Third Party Funding for International Arbitration in Singapore and Hong Kong- A Race to the Top*', Kluwer Arbitration Blog, 30 November 2016, (last accessed on 15 July 2019), available at: http://arbitrationblog.kluwerarbitration.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/.

[29] Otech Pakistan v. Clough Engineering, [2007] 1 SLR (R) 989.

[30]Lim Lie Hoa v. Ong Jane Rebecca, [2005] 3 SLR(R) 116.

[31] Civil Law (Amendment) Act 2017, available at: https://sso.agc.gov.sg/Acts-supp/2-2017/.

[32] Civil Law (Third Party Funding) Regulations 2017, available at: https://sso.agc.gov.sg/SL-Supp/S68-2017/Published/20170224?DocDate=20170224

amendments to the Legal Professional Act (Chap. 161)[33] and the professional conduct rules[34] for lawyers in Singapore. The Act has abolished common law torts of champerty and maintenance in third-party funding and the same are not contrary to public policy where it is provided by eligible parties in the prescribed proceedings.[35] The Act defines a third-party funder as a person who carries on the business of funding all or part of the costs of dispute resolution proceedings to which the person is not a party;[36] and the Regulations provide for eligibility requirements of the funders[37] to include the '*entire process of resolving or attempting to resolve a dispute*' including '*any civil, mediation, conciliation, arbitration or insolvency proceedings.*'[38]

Rule 49 A of the Professional Conduct Rules, 2015 imposes an obligation on practitioners to disclose to the court, and the other party, the engagement of their client in third-party funding along with the identity and address of the funder.[39] Section 107 of the Legal Profession Act (Cap. 161) categorically prohibits solicitors from holding any interest in the suit which contemplates payment only upon its success.[40]

The Singapore Institute of Arbitrators ["**SIArb**"] has published guidelines to encourage best practices for funders in arbitrations seated at Singapore.[41] These guidelines have reflected on significant matters relating to conflict of interest,[42] control of

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[33] Legal Professional Act (Chap. 161), available at: https://sso.agc.gov.sg/Act/LPA1966

[34] Legal Profession (Professional Conduct) Rules, 2015, https://sso.agc.gov.sg/SL/LPA1966-S706-2015

[35] Civil Law (Amendment) Act, 2017, Section 5A(1).

[36] Civil Law (Amendment) Act, 2017, Section 5B (10).

[37] Civil Law (Third Party Funding) Regulations 2017, Regulation 4(1) (a).

[38] Civil Law (Amendment) Act, 2017, Section 5B (10).

[39] Legal Profession (Professional Conduct) Rules, 2015, Rule 49 A.

[40] Legal Professional Act (Chap. 161), Section 107.

[41] SIArb Guidelines for Third Party Funders (18 May 2017), available at: https://siarb.org.sg/images/SIArb-TPF-%20Guidelines-2017_final18-May-2017.pdf.

[42] *Id* at Paragraphs 6.1, 6.2, 2.1.3 and 3.1.5.

proceedings,[43] confidentiality and privilege.[44] The Singapore International Arbitration Centre ["**SIAC**"] has released a Practice Note on Arbitrator Conduct in matters involving external funding[45] and has addressed issues of disclosure and costs.[46] Additionally, the SIAC has also published the Investment Arbitration Rules, 2017 dealing with provisions related to third-party funding.[47]

C. HONG KONG

Hong Kong remained a British colony until 1997 and derived its laws on maintenance and champerty from the English legal tradition. The Courts in Hong Kong have ruled on in the affirmative to uphold prohibitions on maintenance and champerty buy those do not apply to third-party funding in arbitration whether international or domestic.[48] The Courts are entrusted with the discretion to order costs, including attorney fees under the traditional loser pays rule and the 'costs' are classified as taxation.[49]

In *Winnie Lo v. HKSAR,*[50] the Court of Final Appeal permitted third-party funding subject to certain exceptions. The Court in *Cannonway Consultants v. Kenworth Engineering,*[51] it was held that

[43] *Id* at Paragraphs 7.1.1, 3.1.7 and 6.2.3.
[44] *Id* at Paragraph 2.2.
[45] SIAC Practice Note PN – 01/17 on Arbitrator Conduct in Cases Involving External Funding (31 March 2017), available at: http://www.siac.org.sg/images/stories/articles/Rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf.
[46] *Id.*
[47] SIAC Investment Arbitration Rules (1st Edition, 1 January 2017), available at: http://www.siac.org.sg/images/stories/articles/Rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf,
%20Articles%2024(1),%2033.1%20and%2035.
[48] Jern-Fei Ng, '*The Role of the Doctrines of Champerty and Maintenance in Arbitration*', 76(2) Arb. 2010, 208-209, 211 (2010).
[49] Justin D'Agostino, '*New Hong Kong Arbitration Ordinance Comes into Effect*,' (Kluwer Arbitration Blog, 2011) (last accessed on 24 August 2019).
[50] Winnie Lo v. HKSAR, (2012) 15 HKCFAR.
[51] Cannonway Consultants v. Kenworth Engineering, [1995] 1 HKC 179.

doctrines of champerty and maintenance were not applicable to international arbitration as it would negatively impact Hong Kong as a preferred venue for arbitration. In *Unruh v. Seeberger*,[52] the Court of Final Appeal held that concerns of maintenance and champerty must be balanced against other public policy concerns. The Court further observed that it would undertake a case-by-case analysis of the facts of each case in light of the various public policy considerations that apply. The Court in *Chinachem Charitable Foundation Ltd.*[53] held that a party could not recover costs incurred with respect to an agreement that violates public policy including maintenance and champerty concerns.

In a watershed development, the Hong Kong Legislative Council passed the Arbitration and Mediation Legislation (Third-party Funding) Amendment Ordinance, 2017[54] pursuant to which the Hong Kong Code of Practice for Third-party Funding in Arbitration was published. This Code has similarities with the Code of Conduct for Litigation Funders in England and Wales and sets out rules, standards and permissible practices in third-party funding in Hong Kong.[55]

The Code is applicable and binding on all the parties and applies to any funding agreement.[56] Any non-compliance with the provisions of the Code does not subject any party to judicial proceedings but only operates as evidence in subsequent court or

[52] Unruh v. Seeberger, (2007) 10 HKCFAR 31.
[53] Chinachem Charitable Foundation Ltd. v. Chan Chun Chuen and Another, [2011] HKCFI 422.
[54] Hong Kong Legislative Council passed the Arbitration and Mediation Legislation (Third Party Funding) Amendment Ordinance, 2017, available at: https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf.
[55] Peter Hirst and Mun Yeow, '*Comparing Hong Kong Code of Practice for Third Party Funding Arbitration with the Code of Conduct in England and Wales*, Clyde & Co., Kluwer Arbitration Blog, 04 February 2019.
[56] Hong Kong Code of Practice for Third Party Funding in Arbitration, Paragraph 1.2.

tribunal proceedings.[57] The Code provides for explicit representation that the funder will not influence any control on the funded party or its legal representative.[58] The Code requires the funder to ensure that effective procedures are intact to manage conflicting interests[59] and warrant that the funded party discloses the existence of a funding agreement and the name of the third-party in writing both to the opposite party and the arbitration body.[60] The enactment of the Code is seen as a positive step in promoting Hong Kong's prowess as an important centre for international arbitration.

D. FRANCE

The rules regulating the conduct of legal practitioners do not prohibit attorneys from accepting funds from the agents of their clients. The need for third-party funding in practice is not encouraged because of an effective mechanism of legal aid as also the low costs of legal actions[61] and prohibition of contingency fee arrangements.[62]

In 2006, the Versailles Court of Appeal[63] had to consider the validity of third-party funding in international arbitration. An Australian company had initiated proceedings against another company to enforce a funding agreement on the failure of a construction project. Upon the rejection of its claim by the arbitral tribunal, the Australian company sought to secure the financing of litigation costs from the third-party funder Foris AG

[57] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, Section 98 S (2) (a).
[58] Hong Kong Code of Practice for Third Party Funding in Arbitration, Paragraph 2.9.
[59] Hong Kong Code of Practice for Third Party Funding in Arbitration, Paragraph 2.6.
[60] Section 98 (U), Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.
[61] LISA BENCH NIEUWVELD AND VICTORIA SHANNON SAHANI, *supra* note 12.
[62] French Civil Code, Art. 1342-1.
[63] CA Versailles, 01 June 2006, No 05/01038.

which ultimately refused to honor the agreement. Though the Court of Appeal denied jurisdiction of French courts over the matter, it did acknowledge that the financing contract in dispute was *sui generis* and unknown in European Union countries other than those of Germanic cultures. The court could not determine the nature of the contract but did not render it void.[64]

Under the French National Bar Association Rules, a lawyer is entitled to receive payment only from his client or client's agent. In a third-party funding scenario, funders may provide clients with funds who may then pay the fees to the lawyers.[65] Also, in cases of privileged information provided by the funders to determine the chances of success, it would violate the lawyer's duty of professional secrecy. Therefore, in such an arrangement, it would only be the client who could provide privileged information to the third-party funder.[66] It is important to consider that compliance with such ethical rules is only restricted to French lawyers and foreign lawyers representing clients in international arbitration proceedings in France would not be subjected to such regulations.[67]

E. IRELAND

The Irish legal framework prohibits maintenance and champerty under the Statute of Conspiracy (Maintenance and Champerty). In *Persona Digital,*[68] the plaintiff sought a declaration from the High Court that third-party funding did not constitute abuse of process or contravene the rules of maintenance and champerty. The High Court held that to permit funding in litigation by a party having no legitimate interest in the proceeding would entail

[64] CA Versailles, 01 June 2006, No 05/01038.
[65] French National Bar Association Rules, Article 11.3.
[66] French National Bar Association Rules, Article 2.
[67] Antoine Adeline and Laure Perrin, *Third Party Funding of Arbitration in France*, Squire Sanders.
[68] Persona Digital Telephone Ltd. And Sigma Wireless Networks Ltd. v. The Minister of Public Enterprise & Ors., [2017] IESC 27.

bringing a policy change which was beyond the competence of the courts. The Supreme Court reiterated the view of the High Court and held that *'a person who assists another's proceedings without a bona fide independent interest acts unlawfully.'* On the question of legality of assignment of cause of action, the court in *SPV OSUS Limited* v. *HSBC Institutional Trust Services (Ireland) Limited & Ors.,*[69] observed that it was incumbent on part of the legislature to carry out wide-ranging analysis and balance important policy considerations, which would be required in order to ensure that the necessary change to the law can effectively vindicate the right of access to the courts.

F. AUSTRALIA

The common law doctrines of maintenance and champerty are not considered as torts and the proposition of third-party funding is assessed from the standpoint public policy.[70] With legal finance growing as an essential business tool, third-party funding plays a significant role in ensuring greater access to courts and bringing equality of representation against well-resourced respondents.[71] The legal regime in Australia prevents parties from entering into an arrangement based on contingency fees calculated based on the percentage of amount recovered[72] but permits conditional billing arrangements where ordinary fees is payable on the successful outcome in a matter. However, the Victorian Law Reform Commission ["**VLRC**"] in its Report on Litigation Funding and Group Proceedings suggested that prohibition based on contingency fees does not prevent lawyers from receiving a contingency fee through a common fund court order

[69] SPV OSUS Limited v. HSBC Institutional Trust Services (Ireland) Limited & Ors., 2018 [IESC] 44.
[70] Campbells Cash and Carry Pty Ltd. v. Fostif Pty. Limited, [2006] HCA 41.
[71] JASON GEISKER AND JENNY TALLIS, THIRD PARTY LITIGATION FUNDING LAW REVIEW (2ND ED., LAW BUSINESS RESEARCH LTD. 2018).
[72] *Id.*

approving a litigation service fee with respect to class actions brought before the Supreme Court of Victoria.[73]

In June 2018, a discussion paper[74] was released by the Australian Law Reform Commission which proposed that contingency fee arrangements must be permitted for solicitors in class action proceedings but with certain limitations. This proposition was suggested with the intent to ensure that solicitors, subject to a court approval would receive a percentage of the sum due at settlement to ensure that such arrangements are reasonable and comparative.[75]

G. NEW ZEALAND

The courts in New Zealand have adopted a cautious approach in permitting third-party funding in the absence of a legislation regulating the same.[76] Torts of champerty and maintenance have not been abrogated completely but their application to funded agreements has been relaxed.[77] However, funding may be disallowed if the process of the court is being abused for ulterior motives and the claim is vexatious and oppressive.[78]

The Supreme Court has categorically observed that courts are not bound to give approval to funding arrangements which are outside their supervisory role in representative proceedings under Rule 4.24 of the High Court Rules.[79] The role of courts is rather

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[73] Victorian Law Reform Commission, '*Access to Justice: Litigation Funding and Group Proceedings*' Report, p. 63, para. 3.96.
[74] Australian Law Reform Commission, '*Inquiry into Class Action Proceedings and Third Party Litigation Funders*' Discussion Paper 85, pp. 4–5, and p. 17, para. 1.17.
[75] JASON GEISKER AND JENNY TALLIS, *supra* note 71.
[76] ADINA THORN AND ROHAN HAVELOCK, THE THIRD PARTY FUNDING LITIGATION LAW REVIEW, (2ND ED., LAW BUSINESS RESEARCH LTD., LONDON 2018).
[77] PriceWaterhouseCoopers v. Walker, [2017] NZSC 151.
[78] Saunders v. Houghton, [2010] 3 NZLR 331.
[79] HIGH COURT RULES 2016, RULE 4.2.4, available At: http://www.legislation.govt.nz/regulation/public/2016/0225/latest/dlm6959801.html

restricted to adjudication of applications in which the existence and terms of a litigation funding arrangement may be relevant.[80] Litigation funders being providers of financial services are subject to the provisions of the Fair Trading Act, 1986 which regulates consumer protections against deceptive conduct and misleading representations.[81] It is also imperative for a litigant to disclose matters including the identity of the funder, the amenability of the funder to the jurisdiction of courts in New Zealand and the terms of withdrawal of funding, if those terms in some way give legal control over the proceedings to the funder.[82] The important principle of confidentiality is regulated by both common law and the Evidence Act, 2006.[83] Legal privilege extends to communication with legal advisers[84], preparatory materials for proceedings[85] and further for settlement of negotiations or mediations.[86] The assessment of costs is generally based on a notional recovery rate which is in consideration of a reasonable time for every step required in relation to an interlocutory application.[87] However, litigation funding costs do not constitute as 'disbursements' within the meaning of the costs regime and it is only in exceptional circumstances that the High Court may order the unsuccessful party to pay such costs pursuant to its inherent jurisdiction.[88] With a stark increase in the prospects of litigating funding, the Law Commission in 2018 acted upon the concern of judges and respected commentators of the need to

[80] Waterhouse v. Contractors Bonding Ltd., [2013] NZSC 89.
[81] Fair Trading Act, 1986 and Consumer Guarantees Act, 1993 (imposes certain statutory guarantees in relation to goods and services with a more limited set of remedies available).
[82] Waterhouse v. Contractors Bonding Ltd, *supra* note 66 at 67-69, 72.
[83] The Evidence Act, 2006, Section 68–70.
[84] The Evidence Act, 2006, Section 54.
[85] The Evidence Act, 2006, Section 56.
[86] The Evidence Act, 2006, Section 57.
[87] The Arbitration Act, 1996, Schedule 2, Rule 14.2(c) and (d).
[88] ADINA THORN AND ROHAN HAVELOCK, *supra* note 76.

formulate a regulatory regime to remove uncertainties and inefficiencies in the court system.[89]

The Law Commission decided to assess the potential benefits of class actions and litigation funding *vis-a-vis* any costs and disadvantages that it may entail.[90] The draft terms for reference include the extent to which the courts should have a role in managing class actions and third-party funding arrangements, whether any regulatory requirements should be imposed on third-party funders and issues concerning costs and settlement in class actions and other third-party funded proceedings.[91]

III. OVERVIEW OF THE CURRENT DYNAMICS OF THIRD-PARTY FUNDING IN ARBITRATION IN INDIA

The judiciary in India has adopted a pro-arbitration approach[92] in acknowledgement of the inefficiency created by severe judicial backlog. This has indeed created pathway for an effective means for settlement of disputes from a credible forum.[93] In India, resolution of disputes through arbitration is a costly proposition involving multifarious costs of the various stakeholders involved in the process.[94] The prospect of third-party funding entails multiple advantages. It provides for a viable opportunity of having a dispute financed without undertaking the immediate risk of expending financial resources.[95] It would ensure that a

[89] *Id.*
[90] Law Commission Act 1985 Sections 4 and 5(3).
[91] Law Commission Act 1985 Sections 4 and 5(3) at 14.
[92] NTT Docomo Inc. v. Tata Sons Limited, O.M.P. (EFA) (COMM.) 7/2016 & IAs 14897/2016, 2585/2017.
[93] PP Rao, '*Access to Justice and delay in disposal of cases*', 30 Indian Bar Review 208 (2003).
[94] Thibault De Boulle, 'Third *Party Funding in International Commercial Arbitration*', Faculty of Law, Ghent University, 27 (2014).
[95] Susanna Khouri, Kate Hurford and Clive Bowman, '*Third Party Funding in International Commercial and Treaty Arbitration-A Panacea or a Plague*?' , A discussion of the risks and benefits of third party funding', Article for TDM Special Issue.

financially weaker party would not have to settle for a less than reasonable offer irrespective of the merits of the claim.[96] Third-party funding would certainly rationalize the bargaining power[97] of the parties thereby giving a major boost to the promotion of arbitration as a preferred mechanism of dispute resolution.

Third-party Funding in arbitration would certainly augment the public policy objective of greater 'access to justice'[98] providing a cogent alternative to heavy costs[99] incurred on cases languishing in courts without resolution. In *Anita Kushwaha*,[100] the Supreme Court held that access to justice is a fundamental right guaranteed to every citizen under Articles 14 and 21 of the Constitution.[101] The Court observed that '*access to justice will be no more than an illusion if the adjudicatory mechanism provided is so expensive as to deter a disputant from taking resort to the same*.'[102] The State under Article 39A is obliged to promote a laudable objective of providing legal aid to needy litigants and to make access to justice affordable for the less fortunate sections of the society.[103] Indian companies account for a seemingly high number of cases at some of the well-established centres across the world.[104] This has further resonated the thoughts of the industry experts of establishing a comprehensible

[96] C Bogart, '*Third party funding in international arbitration*', The Arbitration Review of the Americas (2017), available at: https://globalarbitrationreview.com/edition/1000396/the-arbitration-review-of-the-americas-2017.
[97] Rodak, '*It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*', University of Pennsylvania Law Review, 503, 522 (2006).
[98] Boulle, *supra* note 94.
[99] '*Access to Justice Survey*', 2015-16, DAKSH, May 2016, (last accessed on 25 August 2019), available at: http://dakshindia.org/access-to-justice-survey/.
[100] Anita Kushwaha v. Pushap Sadan, (2016) 8 SCC 509.
[101] *Id* at Para 31.
[102] *Id* at Para 38.
[103] *Id.*
[104] '*After Mumbai, India's second business Arbitration Centre in Gurgaon*', Times of India, 20 January 2017, (last accessed on 16 September 2019), available at: https://timesofindia.indiatimes.com/city/gurgaon/after-mumbai-indias-second-business-arbitration-centre-in-gurgaon/articleshow/56675579.cms

framework to permit third-party funding in arbitration and exploit the massive potential that the Indian market possesses.[105] The establishment of the Mumbai Centre for International Arbitration,[106] the passing of the New Delhi International Arbitration Centre Act, 2019[107] and also the Arbitration and Conciliation Act, 2019[108] are indicators of steps being taken in the right direction towards realizing the dream of making India a desired jurisdiction for institutional arbitration.

India inherited the laws of maintenance and champerty as a colony of the United Kingdom. The prospects of third-party funding in India are neither specifically recognized nor expressly prohibited. The loser pays rule is followed in India. The claimant may be ordered to provide security for costs, and the cost awards may be adjusted in reference to the conduct of the parties litigating the case.[109] It is important to take into account that third-party funding agreements in India would have to be tested on considerations of equity and reasonableness. The terms of the contract must not be reprehensible to public policy grounds mentioned under Section 23 of the Indian Contract Act, 1872.[110]

The question regarding the applicability of champerty in India was first decided by the Privy Council in *Ram Coomar Coondoo,*[111]

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[105] Varun Marwah, '*Third Party Funding Series (Part II): In conversation with Selvyn Siedel, Fullbrook Capital Management Bar*' (last accessed on 30 August 2019), (Bar and Bench, 28 November 2016), available at: https://www.barandbench.com/interviews/third-party-funding-series-part-ii-conversation-selvyn-seidel-fulbrook-capital-management.

[106] '*After Mumbai, India's second business Arbitration Centre in Gurgaon*', *supra* note 104.

[107] The New Delhi International Arbitration Centre Act, 2018 (Act No.17 of 2019), available at: http://legalaffairs.gov.in/sites/default/files/The%20New%20Delhi%20International%20Arbitration%20Centre%20Act%2C%202019.pdf.

[108] Arbitration and Conciliation Act, 2019 (Act No. 33 of 2019), available at: http://egazette.nic.in/WriteReadData/2019/210414.pdf.

[109] Phoenix Legal India, in Hogan Lovells LLP (ed.), '*At What Cost?'* 103.

[110] Pannalal Gendalal & Anr. v Thansingh Appaji & Anr AIR 1952 Nag 195.

[111] Ram Coomar Coondoo v. Chunder Canto Mookerjee, 1876 SCC OnLine PC 19.

holding that common law statutes of maintenance and champerty were enacted specifically for England to prevent vexatious suits and perverse practices of purchasing rights in litigation. The Privy Council held that champertous agreements were void as they were contrary to public policy. It categorically held that these statues were of a special character and were not applicable to India *in toto* but would apply to transactions which were *'inequitable, extortionate and unconscionable and not made with the bona fide objects of assisting a claim'*

The Privy Council in *Kunwar Ram Lal* v. *Nil Kanth,*[112] held that *'agreements to share the subject of litigation, if recovered in consideration of supplying funds to carry it on, are not in themselves opposed to public policy'*. In *Lala Ram Swarup* v. *Court of Ward,*[113] the Privy Council observed that a financier must be allowed the opportunity of exceptional advantage given the uncertainties of litigation.

The Courts have also considered the position of advocates engaging in third-party litigation funding in India. In *Moung Htoon Oung,*[114] the Calcutta High Court reprimanded an advocate for having entered into an agreement to receive professional fees in the form of a fixed share in the subject matter of the suit, as being contrary to public policy. Similarly, in *K.L Gauba,*[115] the Bombay High Court held that '*an agreement which makes the lawyer's fees conditional upon the success of the suit which gives the lawyer an interest in the subject- matter of the suit itself would necessarily tend to undermine the status of a lawyer as a lawyer. It would not be difficult to imagine at all how in such a case a conflict between self-interest and duty would immediately arise.'*

In *'G', A Senior Advocate*[116], a five-judge bench of the Hon'ble Supreme Court held that the rigid English rules of champerty and

[112] Kunwar Ram Lal v. Nil Kanth, *1893 SCC OnLine PC 7.*
[113] Lala Ram Swarup v. Court of Ward, AIR 1940 PC 19.
[114] In the Matter of Moung Htoon Oung, *21 WR 297 (Cal).*
[115] K.L Gauba, In re, 1954 Cri LJ 1954.
[116] 'G', A Senior Advocate, (1955) 1 SCR 490.

maintenance do not apply in India and third-party arrangements are legally enforceable in India. The Court further observed that there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals in such a transaction per se.

There is statutory evidence to suggest that there is approval for litigation funding in India. Order XXV of the Code of Civil Procedure, 1908 ["**CPC**"] empowers the Indian courts to order security for costs. Rule 3 of Order XXV of CPC has been amended by various states like Maharashtra, Gujarat and Madhya Pradesh and inserted as '*Power to implead and demand security from third-person financing litigation*.'

The Supreme Court in *Bar Council of India* v. *AK Balaji and Ors,*[117] categorically held that third-party funding arrangements in arbitration are not prohibited, however, lawyers in India are specifically precluded from entering into contingency arrangements with their clients. The Bar Council of India Rules, 1975, under Part IV, Chapter II, Standards of Professional Conduct and Etiquette encompass provisions which do not allow lawyers to indulge in any form of litigation funding.[118] The Supreme Court in *B Sunitha*[119] dismissed a case involving cheque

[117] Bar Council of India v. AK Balaji and Ors., 2018 5 SCC 379.

[118] Bar Council of India Rules, 1975, Part IV, Chapter II, Standards of Professional Conduct and Etiquette:

> *Rule 9 : An advocate should not act or plead in any matter in which he is himself pecuniarily interested*
>
> *Rule 18 : An advocate should not, at any time, be a party to fomenting of litigation*
>
> *Rule 19 : An advocate shall not act on the instructions of any person other than his client or his authorized agent*
>
> *Rule 20 : An advocate shall not stipulate for a fee contingent on the results of the litigation or agree to share the proceeds thereof*
>
> *Rule 21 : An advocate shall not buy or traffic in or stipulate for or agree to receive any share in any actionable claim*
>
> *Rule 32 : An advocate shall not lend money to his client for the purpose of any action or any share of interest in any actionable claim*

[119] B. Sunitha v. The State of Telangana and Anr., (2018) 1 SCC 638.

bounce as the advocate sought to enforce a damages-based agreement for the recovery of 16% of the decretal amount in a motor accident claims case.

In *Jayaswal Ashoka Infrastructures Pvt. Ltd.,*[120] a partner of a law firm not registered as an advocate under the Advocates Act, 1961 entered into a damage based agreement with the client for consultancy in an arbitration proceeding. The client was successful in the claim but denied to pay fees to the counsel which was expressed in terms of percentage of the proceeds. The lower court ruled in favour of the law firm partner for the recovery of fees. On appeal before the Bombay High Court, the client argued that damage-based agreements were void under the Contract Act and also the Bar Council Rules. The partner of the law firm contended that he was not registered as an advocate, hence was not barred from entering into a damage based agreement under the Bar Council Rules. He argued that champertous agreements were not void as they were not in conflict with Section 23 of the Contract Act, 1872. The Court while relying on the obiter dicta of *'G', A Senior Advocate,*[121] held that there was nothing wrong in a champertous transaction not involving a legal practitioner. The court further observed that the agreement could not be rendered void only on the grounds that the respondent was a partner of a law firm.

IV. Appreciation of Issues and Challenges for Adopting a Viable Regulatory Mechanism for India

The interplay between third-party funding and arbitration is often met with various challenges where different rules of procedures,

[120] Jayaswal Ashoka Infrastructures Pvt. Ltd. v. Pansare Lawad Sallagar, F.A. No. 106 of 2015 decided on 07 March 2019.
[121] 'G', A Senior Advocate, (1955) 1 SCR 490.

discovery and other practices are involved.[122] The proposition of third-party funding is often viewed from the spectrum of a possible conflict between a market oriented approach of the investors *vis-à-vis* interference in a legal suit[123] which may significantly compromise the position of the parties involved in an arbitration proceeding. Some of the challenges have been enumerated below:

A. EROSION OF PARTY AUTONOMY.

It is argued that the prospect of party autonomy is compromised by the influence that is exerted by a third-party not just at the outset but throughout the arbitration proceedings.[124] The funder is in a commanding position to make selective choices with the objective of enhancing profitability, thereby compelling the choice of the funded party in selecting their legal counsels, nominating arbitrators and adopting decisive strategies for the arbitration proceedings.[125] A similar effect is prevalent in investor-state arbitrations, wherein any control influenced by the investor in adopting a dispute strategy may well be opposed to a State's public policy.[126] This concern can certainly be used to the advantage of the funded party with appropriate regulation. With their specialist skills and experience,[127] funders can enable the

[122] Selvyn Seidel, '*Third Party Funding in international Arbitration Claims-To invest or not to invest? A daunting question.*' ICC Publication Dossier X: Third Party Funding in International Arbitration in ICC, October 2013.
[123] Langtry v. Dumoulin, (1885) 7 QR 644 (Div Ct), p. 661.
[124] Jonas Von Goeler, '*Third Party Funding in International Arbitration and its Impact on Procedure*', International Arbitration Law Library, Chapter 2: The Various Forms of Third-Party Funding in International Arbitration, Volume 35 (Kluwer Law International, 2016), p. 41.
[125] *Id* at 47.
[126] Munir Maniruzzaman, '*Third Party Funding in International Arbitration-A Menace or Panacea*?' Kluwer Arbitration Blog, 29 December 2012 (last accessed on 10 August 2019).
[127] Alison Ross, '*The Dynamics of Third Party Funding*', Global Arbitration Review, 07 March 2012.

funded party to take important and tactical decisions after conducting extensive due diligence exercises.[128]

B. CONFLICTING INTERESTS.

It is often a scenario where both the legal counsel and arbitrator are selected and nominated from the same pool of experts practicing in different subject matters. Therefore, an arbitrator in one proceeding may well be representing the same party as legal counsel in another proceeding.[129] The risk is augmented when both proceedings involve the same funder[130] and if this situation goes unnoticed by the tribunal, it may become a ground for challenging an arbitral award.[131] Even in cases where there is no direct conflict, prevalence of such a situation may raise claims of appearance of bias, which in the legal framework of most jurisdictions is a ground for disqualification of an arbitrator. These concerns can be circumvented with mandatory disclosure by the funders.

C. FRIVOLOUS ARBITRATIONS AND CLAIMS.

Though third-party funding increases overall financing, it augments the possibility of frivolous claims, since the probability of any loss of investment is spread throughout the funding leaving little scope for the funder to investigate individual claims.[132] This

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[128] Susanna Khouri, Kate Hurford and Clive Bowman, *supra* note 95.

[129] Charles Kaplan, '*Third Party Funding in International Arbitration Issues for Counsel*', in Bernardo M Cremades Roman and Antonias Dimolitsa (eds), Third Party Funding in International Arbitration (ICC Dossier), Dossiers of the ICC Institute of World Business Law, Volume 10 (Kluwer Law International).

[130] Jennifer A Trusz, '*Full Disclosure? Conflict of Interest Arising from Third-Party Funding in International Commercial Arbitration*', GEORGETOWN LAW JOURNAL, 1649, p. 1665.

[131] Dr. Markus Altekirch and Brigitta John, '*Should a party be obliged to disclose details about receiving third party funding in international arbitration*?' Global Arbitration News (February 2016) (last accessed on 18 July 2019) .

[132] Bruno Deffains and Claudine Desrieux, '*Litigation Financing: A Comparative Analysis*', at 11, (last accessed on 20 August 2019), available at: https://pdfs.semanticscholar.org/c997/06839b13a87975eb0baf809cb6aae72e720b.pdf.

concern may be overstated to some extent as funders would not like to invest in meritless claims which have a high probability of yielding a negative net value.[133]

D. ACCESS TO JUSTICE VERSUS PROFITABILITY BARRIER.

A strong argument that merits third-party funding in arbitration is the proposition of providing access to justice to those having meritorious claims but are averse to the portals of justice due to their financial condition.[134] Third-party funding also enables parties who are financially capable to engage in arbitration but are opposed to risk in terms of benefits being outweighed by the cost of bringing a claim.[135] This method of funding shifts the burden on the funder who may apportion a part of the award but the funded party will stand to benefit of having realized something rather than not bringing the claim in the first place.[136] One of the significant limitations of this proposition is the bias of the funder towards investing in the claims of the claimants, as there is higher probability of gaining significant monetary outcome of the transaction. But it may also be argued that the respondents have valuable assets to defend from which the funders may derive significant returns.[137]

V. Recommended Policy Framework: Indian Perspective

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[133] Anthony Lin, '*The Smart Money: Australia's Litigation Funding Giant Looks Abroad*', The American Lawyer, I July 2011.

[134] REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, LORD JUSTICE JACKSON, Chapter 11, paragraph 2.12 (December 2009).

[135] David S Abrams and Daniel L Chen, '*A Market for Justice: A First Empirical Look at Third Party Litigation Funding*', 15 Penn J Bus L (2013) 1075, at 1-77.

[136] REVIEW OF CIVIL LITIGATION COSTS, *supra* note 136.

[137] Julie Triedman, '*Arms Race: Law Firms and the Litigation Funding Boom*', American Lawyer (30 December 2015), (last accessed on 18 August 2019), available at: https://www.law.com/americanlawyer/almID/1202745121381/Arms-Race-Law-Firms-and-the-Litigation-Funding-Boom/.

A. EXPLICIT PROVISION IN THE ARBITRATION AND CONCILIATION ACT, 1996.

The proposition of third-party funding though held valid by courts in India, can be challenged on grounds of being opposed to public policy. Owing to the tendency of courts to expand the scope of public policy exception, a specific provision[138] must be provided in the Act to reinforce the confidence of the stakeholders involved in the arbitration.[139]

B. CENTRALIZED DATABASE FOR FUNDERS.

Experts have argued for the creation of a centralized data bank facilitating both the funders and the parties in making a comparative choice based on competitive pricing.[140] This data bank would include information based on various parameters including details related to sector-wise experience of the funders, total business expenses, amount of money advances, percentage of profits that have been yielded by funded arbitrations etc.[141]

C. CONSULTATION PROCESS BY THE LAW COMMISSION OF INDIA.

It is believed that the contours of third-party funding are restricted to deliberations by the academia. Therefore, it is incumbent on the Law Commission of India to initiate a transparent consultation process to assess the requirements, need, best global practices, legal implications and objections to ascertain India's firm position on third-party funding in arbitration. This would contribute in developing a holistic and comprehensive

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[138] Varun Mansinghka, *supra* note 1.
[139] Renusagar Power Co. Ltd. v. General Electric Co., (1994) Supp 1 SCC 644; Shri Mahal v. Progetto Grano Spa, (2014) 2 SCC 433.
[140] Martin Estevao, '*The Litigation Financing Industry: Regulation to Protect and Inform Consumers*', (2013) University of Colorado Law Review 84, p. 467.
[141] Anish Wadia and Shivani Rawat, '*Third-Party Funding in Arbitration-India's Readiness in a Global Context*', TDM 2 (2018).

regulatory regime encompassing representations made by the various stakeholders to be involved in the process.[142]

D. ABOLITION OF CIVIL AND CRIMINAL LIABILITY FOR CHAMPERTY.

To effectuate the desire of making India a reputed seat of arbitration, it is imperative that efforts are made to make significant amendments to Indian laws to permit third-party funding in international and domestic seated arbitrations in India and abolish any civil and criminal liability for maintenance or champerty.[143]

E. DISCLOSURE REQUIREMENTS.

Mandatory disclosure of third-party funding agreements is important to ensure the independence and impartiality of the arbitral tribunal along with concerns relating to confidentiality, ethical standards, conflicting interests of counsels, and allocation of costs. Principle 6 of the *IBA Guidelines* mandates '*disclosure by third-party funders and insurers in relation to the dispute may have a direct economic interest in the award.*[144] The *ICC Guidance Note*[145] requires arbitrators to disclose their *'relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award'* Such conditions for disclosure apply only on account of the arbitrator being aware of the presence of the third-party funder in the first place. Section 12 of the Arbitration and Conciliation Act, 1996 provides for mandatory disclosure on behalf of the arbitrators,[146] however, it does not incorporate

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[142] *Id.*

[143] Varun Mansinghka, *supra* note 1.

[144] International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration, Explanation to General Standard 6 (October 2014).

[145] International Court of Arbitration of the International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (13 July 2016).

[146] The Arbitration and Conciliation Act, 1996, Section 12 (Also refer to Explanation 1 and Fifth Schedule).

obligations enumerated under the Red List and Orange List of the IBA Guidelines. Therefore, it is imperative that necessary provisions are included under the Act to strictly enforce disclosure requirements by arbitrators in the event of a third-party funding.[147]

F. UNIFORM DEFINITION OF THIRD-PARTY FUNDING IN THE ACT.

There are two alternatives that can be adopted in this regard. Either a specific definition as provided under the United States Transatlantic Trade and Investment Partnership negotiations[148] or one in concurrence with Principle 6 of the IBA Guidelines may be incorporated under the Act or every arbitral institution must be given discretion to have their own definition.[149] In case of ad-hoc arbitrations, the arbitral tribunal may extend their services for the appointment of an arbitrator upon a requisite fee.[150] Rule 7.8 of the Mumbai Centre for International Arbitration ["**MCIA**"] Rules prescribe that parties can designate MCIA as the appointing authority without subjecting the arbitration to the provisions of such Rules.

G. BALANCED APPROACH FOR SECURITY AND ADVERSE COST AWARDS.

Experts have argued that third-party funding should not be a parameter in assessing security for costs as it determines the claimants' incapacity to satisfy an adverse cost award. It furthers the risk of the financially stronger party exerting influence on the

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[147] Varun Mansinghka, *supra* note 1.

[148] The European Union's Proposal for Investment Protection and Investment Dispute Resolution for the Transatlantic Trade and Investment Partnership, Section 3, Article 1.

[149] Laurent Levy and Regis Bonnan, '*Third Party Funding Disclosure, Joinder and Impact on Arbitral Proceedings in Third Funding in International Arbitration*', in Dossiers of the ICC Institute of World Business Law, 78, M Cremades Roman and Antonias Dimolitsa (eds) (2013).

[150] Varun Mansinghka, *supra* note 1.

financially weaker party.[151] If third-party funding was to be considered as a factor in determining security for costs of application, then this approach would come up every time a party would utilize third-party funding. This proposition has been reiterated in a number of judicial decisions highlighting the fact that sanctions arising out of the default in complying with the decision of security for costs 'does not depend on the question of the parties' source of funding[152] and application of such costs can only be ordered in cases of exceptional circumstances.[153] Alternatively, while formulating a legal framework, the Indian legislature must also look beyond the view propagated by the English courts of limiting the extent of funding provided and enforce complete liability on the funder for the defendants' costs. Section 31A amended by the 2015 Act read with Sections 9 and 17 permits the arbitral tribunal to order a party to furnish security for costs. With the involvement of a third-party funder, the states of Maharashtra, Gujarat and Madhya Pradesh have made amendments to Order XXV of the Code of Civil Procedure, 1908 to ascertain if such funder could be ordered to furnish security on behalf of the party which he is funding and the extent to which such funding can be made.[154]

H. CONFIDENTIALITY AND ETHICAL STANDARDS.

This requirement entails regulation to cater the interests and relationship between the attorney and client and also the funder and the funded party.[155] From an ethical standpoint, the involvement of a third-party may dilute the lawyer's duty of

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[151] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (KLUWER LAW INTERNATIONAL 2009).
[152] RSM Production Corporation v. St. Lucia, ICSID Case No ARB/12/10.
[153] South American Silver Limited v. Bolivia, UNCITRAL, PCA Case No 2013-15, Procedural Order No. 10, January 11, 2016.
[154] ARBITRATION IN INDIA: CURATED VIEWS, ECONOMIC LAWS PRACTICE, MAY 2019.
[155] Khushboo Hashu Shahdadpuri, *supra* note 2.

exercising independent professional judgment.[156] The extent to which a funder must be allowed to have access to necessary materials for its due diligence must be strictly regulated significantly so in an adversarial form of arbitration. Therefore, ethical standards must be established to ensure that third-parties do not prevent lawyers from performing their duties with utmost sense of confidentiality and loyalty[157] towards their clients in compliance with the rules enacted in the jurisdiction of their practice.

I. RESTRICTION ON WITHDRAWAL OF FINANCIAL SUPPORT BY THE FUNDER IN A CONTINUING ARBITRATION.

It is necessary to ensure an effective regulation to prevent the funder from abruptly withdrawing financial support in an ongoing arbitration. This however, should be a balanced approach to ensure that such a regulation does not reduce the incentives of a funder to invest in future arbitration claims. To incorporate provisions under Indian laws, reliance must be placed on the Association of Litigation Funders and Wales ["**ALF**"] Code of Conduct which restricts funders to unilaterally terminate the agreement barring certain exceptions.[158] To reduce probability of disputes related to such termination, explicit standards must be laid down in the agreement which would regulate the circumstances of termination by funders.[159] Such a solution would be a viable proposition, if the funders are effectively bound by them.

VI. Conclusion

[156] American Bar Association, Commission on Ethics 20/20, International Report to the House of Delegates, p. 4.
[157] Valentia Frignati, '*Ethical Implications of third-party funding in International Arbitration, Arbitration International*', 2016, 1-18, p.7.
[158] LORD JUSTICE JACKSON, THIRD PARTY FUNDING OR LITIGATION ON FUNDING, *supra* note 22. at 3.
[159] Harcus Sinclaim v. Buttonwood Legal Capital Ltd., [2013] EWHC 1193.

Third-party funding in India holds greater promises in achieving public policy objectives by increasing access to justice, facilitating effective representation as also speedy and better management of cases.

At the London Court for International Arbitration and SIAC, Indian companies account for as much as 30% of all cases referred for resolution. Besides the limitation of a favorable arbitration culture, the lack of concrete regulatory framework on third-party funding has precluded financiers in India despite a very large potential of opportunities.

The institutional arbitration centres in Singapore and Hong Kong are amongst the fastest growing globally. The experiences of these two countries offer inspirational model for India to emulate. While forging conducive conditions in the Indian context, the regulatory framework must be initially customized to the Indian environment to stabilize the system on matters of procedures & ethical standards, benchmark for disclosure of funding agreement, confidentiality, control over proceedings, caps on returns, mandatory legal advice for the litigant prior to entering funding agreement, termination of funding etc. Later, with evolution of the system with the experiences gained over passage of time, it should adapt to global benchmarks to unequivocally pave way for third-party funding mechanism as an effective method to benefit the Indian citizens and also India's global reputation as a prominent seat and venue for international arbitration.

India must also encapsulate provisions relating to third-party funding in investment disputes. With substantial increase in high value claims, the relevance of third-party funding is even more profound for investors who otherwise have to sustain the burden of the economic might of the State. While venturing into establishing a regulating regime, impetus must be placed on

addressing questions related to disclosure of funder's identity and independence of arbitrators.

Given the immense commercial viability of third-party funding, it is most appropriate at this juncture for India to establish a cohesive regulatory regime necessary for the development of an efficient justice delivery system. This when done will not only ensure benefits to its citizens but also accord India a position of great significance in the arbitration community.