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CAPITAL AS A GATEWAY: THIRD-PARTY FUNDING IN COMMERCIAL DISPUTES AND ACCESS TO COMMERCIAL JUSTICE

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I. ABSTRACT

Access to justice is the utmost important key concept and a prerequisite for the effective functioning if any legal system. Although arbitration is considered to be one of the cost-effective mechanisms, but there are several instances where the parties are not able to fund their own cases or the arbitration ends up in a heavy consolidated fee or charges. In such a situation external fund financers step into their matters and finances the cost of litigation or arbitration and in return get the share from the proceeds of the case, if succeeded. This emerging mechanism is known as Third-Party funding where someone externally helps the parties to the dispute and in return gets the respective share of the proceeds of claim. One point which is quite reflected in third party funding is that funding externally seems profitable, but it has to be strictly kept in mind that the investors will get profits only if the party succeeds. They will not recover their investment if that party loses the case, reflecting the non-recourse nature of such arrangements. In many jurisdictions TPF has laid down its ways as like as that of United Kingdom, Singapore, Australia, United states but in India, the concept is still evolving. Till now we don't have any statutory provisions which can regulate the procedure of TPF, but judicial pronouncements and certain procedural provisions suggests that TPF is not prohibited in the Indian legal system. Supreme Court has observed that third parties may finance litigation; however, advocates are not permitted to act as third-party funders due to professional conduct restrictions under the Bar Council of India Rules. Despite these all approvals and applications, it is in some cases considered as an unethical practice with an ill motive of the investor which results into the potential abuse of the legal system and conflict of interests.

II. KEYWORDS

Arbitration, Third-Party Funding (TPF), Fund Financiers, Claims, Cost-Effective.

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III. INTRODUCTION

Commercial disputes have become one of the most complex issues in the modern economic framework. Businesses are now getting global, as a result of which they are entering into cross-border transactions, intellectual property combinations, infrastructure projects and many sophisticated arrangements. Now when disputes arise in such cases, resolving them through the mechanism of litigation or arbitration proves much costlier, because it often ends up in involving significant legal costs, court fees, counsel fees, expert witness fees and all the administrative and procedural expenses.

Especially for small and medium enterprises (SMEs) or the emerging startups, these costs act as a barrier between there growth and their claims. In most of the cases parties which hold good financial claims are forced to abandon the legal process on the sole ground that it lacks financial resources to sustain the whole legal procedure. This situation reflects that the very objective of the entire legal system, which is to provide justice, proves neglected in such cases.

The concept of third-party mechanism is considered to be a desirous solution to this issue. Under this typical TPF arrangements, any external funder may agree to finance the cost of litigation or arbitration mechanism of a claimant in return of a share of the overall proceeds of the case in favour of that party to the dispute on which he has invested his money. This share is predetermined, that is fixed at the time or before entering into such agreement. Most importantly, if that party fails, then the funder generally bears the risk of loss which in turn makes the mechanism of TPF as non-recourse in nature.[2]

The concept of TPF has increasingly gaining the attention in the commercial litigation and the arbitration worldwide. In certain jurisdictions, where it actually seems to be properly regulated, the funding to litigation has helped the claimants in accessing justice, manage litigation risks and improve the overall efficacy and efficiency of the dispute resolution process. In India, although this practice is at its emerging stage many judicial precedents and procedural rules laid down that litigation funding is and will be playing a significant role in improving the access to commercial justice.

[2] Maya Steinitz, Whose Claim Is This Anyway? Third-Party Litigation Funding, 95 Minn. L. Rev. 1268 (2011)

This paper seeks to examine and analyse the concept of Third Pary Funding (TPF) in context of commercial litigation. It explores and gives an idea about how is it evolving in India and its broader implications aligning with the interests of justice.

A. Research Objectives

The primary objective of this study is to analyse the legal and functional framework of third-party funding in commercial disputes, with specific reference to India. It further aims to evaluate the role of TPF in enhancing access to justice, examine the implications of emerging trends such as AI-driven funding decisions, and assess the need for a structured regulatory framework in both domestic and investor-state dispute contexts.

B. Research Questions

This paper is guided by the following research questions:

1. What is the current legal status of third-party funding in India?
2. How does AI-driven funding alter the access-to-justice rationale of TPF?
3. How should India regulate third-party funding, particularly in the context of investor-state dispute settlement?

C. Research Methodology

This research adopts a doctrinal and comparative methodology. The doctrinal approach is employed to analyse statutory provisions, judicial precedents, and existing legal principles governing third-party funding in India. The comparative method is used to examine the regulatory approaches adopted in jurisdictions such as the United Kingdom, Singapore, and Australia, in order to draw contextual insights and identify best practices. The study is based on secondary sources including legal commentaries, journal articles, and institutional reports.

IV. CONCEPT AND NATURE OF THIRD-PARTY FUNDING

Third party funding refers toa structural arrangement where a person who is not a party to a dispute, provides financial support one of the litigating parties in consideration of a share

from the final recovery. [3] Some of the essential features of TPF includes, but not are not restricted to-

Firstly, the funder acts as a third party to the overall dispute and does not possess any interest in the claim of the dispute. Secondly, the funding is non-recourse in nature, i.e., the funder can only recover the amount if the corresponding party succeeds.[4] Thirdly, the funder receives a share of the settlement amount as consideration or the risk undertaken by him. Fourthly, this structural arrangement is governed by a funding agreement between the third party and one of the parties of the disputes on which such funding is applied upon. This agreement lays down the rights and obligations of both of the parties in performing such arrangement.

In commercial matters, it has become one of the most concerned decisions to make. Third party funders have to do a proper due diligence before investing in any claim, and evaluates factors such as the strength of the case, credibility of the claimant, nature of dispute, nature of damages, consequential factors etc. from an economic point of view, it can be viewed as a mechanism for risk-association. The claimant party transfers the risk associated with the litigation to the funder while funder invests money in exchange of his share for viable returns.[5] This principle of risk sharing allows the claimant to freely pursue the disputes without concerning about their financial stability.

V. HISTORICAL DEVELOPMENT: MAINTENANCE AND CHAMPERTY

The concept of third-party funding has been originated from the medieval doctrines of maintenance and champerty. Maintenance in general refers to the act of providing financial assistance or other assistance to the party in litigation in which the assisting party has no interest. Champerty is a specific form of maintenance in which the assisting party assists in return of share of proceeds.[6] Earlier, these practices were considered to be frivolous and illegal because it may lead to encourage the corrupt litigation.

[3] IBID
[4] W.B. Odgers, A Century of Law Reform 114 (1901)
[5] Maintenance by champerty, 24 Cal. L. rev. 48, 55 (1935)
[6] Criminal Law Act, 1967, C.58 § 14

During the medieval period many individuals financed the lawsuits just to manipulate the legal proceedings for personal gain. Due to this reason the English court has developed a stricter framework disallowing these practices in the legal procedure[7]. However, over the time these two doctrines have been highly criticised for being overly restrictive due to which the legitimate claims are not being pursued.

In United Kingdom through the legislative reforms, particularly the criminal law act 1967, the traditional prohibition was majorly abolished.[8] Although the doctrines were abolished formally, but the courts still have the powers to invalidate funding agreements which are contrary to the public policy.[9] In modern legal systems, litigation funding is generally acceptable with a condition that appropriate safeguards are present to prevent its abuse. This shift from prohibition to regulation lays down a broader perspective that litigation funding can serve legitimate purposes specifically in promoting access to the justice.

VI. LEGAL FRAMEWORK GOVERNING THIRD-PARTY FUNDING IN INDIA

The Indian legal system does not contain any statutory mandate or any provisions related to enforcement or regulation of the third-party funding. But instead, several judicial decisions and procedures indicates that litigation funding is not inherently unlawful from its inception.

The supreme court has laid down in the case of bar council of India vs AK Balaji that there is no restriction on third party fundings and recovering their investment from the proceeds of the claims and has therefore acknowledged the permissibility of it in litigation and arbitration procedure. [10]

Courts have also emphasised that advocates are not allowed to act as the third parties in such arrangements because it may violate the rules of professional conduct which says that lawyers are prohibited from having any financial interest in the outcome of the litigation.[11] Recently, the Delhi High Court has highlighted the significant role of third-party funding in

[7] Ibid
[8] Ibid
[9] Code of Civil procedure, 1908, No. 5, Acts of Parliament, 1908(India), Order XXV, r.1
[10] Abby Cohen Smutny & Petr Polasek, some observations on the Concept of Third-party Funding in International Arbitration, 25 ICSID rev 56, 57-60 9 (2010)
[11] Victoria Shannon Sahani, Reshaping Third-Party Funding, 91 Tul. L. rev. 405, 430 (2017)

promoting access to justice. The Court observed that litigation funding enables claimants with legitimate claims to seek legal remedies that they might otherwise be unable to afford, and further clarified that a third-party funder, not being a party to the arbitration agreement, cannot ordinarily be held liable for an adverse arbitral award.[12] In fact, certain provisions of the civil procedural code also recognise the acceptability of third-party funding. Some Indian states like Maharashtra, Gujarat and Madhya Pradesh have already amended order XXV of the CPC in their respective states so that it can allow the courts to secure costs from the third-party individuals involved in the due process of litigation and arbitration.[13]

These all provisions are allowing the courts to require funders which in turn ensures that the defendants are also protected from frivolous claims.[14]

A. Arbitration and Conciliation Act, 1996 and Third-Party Funding

The Arbitration and Conciliation Act, 1996, which governs arbitration in India, does not contain any express provisions dealing with third-party funding. This legislative silence creates a regulatory gap, as neither the permissibility nor the limitations of TPF in arbitration proceedings are statutorily defined. In practice, this absence has not rendered TPF impermissible; rather, it has allowed arbitral practice and judicial interpretation to evolve flexibly.

Certain provisions of the Act may indirectly intersect with third-party funding arrangements. For instance, Section 9 and Section 17, which empower courts and arbitral tribunals respectively to grant interim measures, may be invoked in matters involving funded parties, particularly in relation to security for costs or preservation of assets. However, the absence of explicit statutory recognition creates ambiguity regarding the extent to which such provisions can be applied to or enforced against third-party funders. In contrast, jurisdictions such as Singapore and Hong Kong have introduced specific legislative frameworks recognising and regulating third-party funding in arbitration. The absence of similar provisions in India indicates the need for legislative reform. Incorporating explicit provisions within the Arbitration and Conciliation Act, 1996 would provide greater

[12] Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc. & Ors., FAO(OS)(Comm) 59/2023 (Delhi High Court, Division Bench, decided on 29 May 2023), 2023 DHC 3830-DB.
[13] Frank Pasquale, The Black Box Society: The Secret Algorithms That Control Money and Information 8 (2015)
[14] Susan D. Franck, Rationalising Costs in Investment Treaty Arbitration, 88 Wash. U.L. rev. 769, 823 (2011)

clarity, ensure procedural certainty, and align India with evolving global standards in arbitration practice.

VII. AI DRIVEN FUNDING DECISIONS- QUANTIFIED JUSTICE

Due to the integration of artificial intelligence and data analytics into the process of third-party funding, it reflects a transformative shift in the whole arbitration substance & procedure giving rise to the term of quantified justice. Traditionally, these external funders rely upon the specific legal expertise in ascertaining and evaluating the merit of a claim. However, with the increase in availability of the large datasets, analytical tools and various machine learning, models it has fundamentally altered the whole evaluation and diligence process. Today these funders are able to assess the probability of success in a case, the quantum of damages which may arose, the duration of proceedings and the tendency of an arbitrator. [15]

This development enhances bot the efficiency and complexity. AI driven funding has enhanced objectivity on the one hand but also reduces the informational asymmetry and enables all the funders so that they make more informed decisions. Funders can allocate the resources more perfectly by quantifying such legal risks which in turn increases the overall efficiency in the resolution mechanism. For claimants specifically those who are lacking the financial resources, they can access arbitration more freely since funders are now able to identify the claims that may turns to be unpursued.

However, after relying on such algorithmic decisions, it eventually raises critical normative concerns. The datasets which are used to train such sort of systems are now often derived from the historical arbitration outcomes which may outrightly reflect the present system biases. Furthermore, AI tools are nor inadvertently perpetuating the existing inequalities by favouring the claims which are prima facie success patterns, while subsequently denying the novel or complex claims that lack precedent. This system creates a risk of 'selection bias' where only the commercial attractive disputes receive the funding therefore marginalising less conventional, but potential claims.[16]

[15] U.N. Comm'n on International Trade Law (UNCITRAL) Report of Working Group III (Investor-State Dispute Settlement reform), 62-70
[16] International Centre for Settlement of disputes (ICSID), ICSID Arbitration Rules, r.14 (2022)

Furthermore, the ambiguity of such algorithmic models which are often referred to as the 'black box problem, showcases different challenges to transparency and accountability.[17] Sometimes claimants are also denied the funding based on these algorithmic assessments without providing any meaningful explanation which creates barriers in procedural fairness. This is very much problematic in arbitration which is certainly criticised for its limited transparency compared to the traditional systems.

Another aspect of concern lies in the commercialisation of justice. When these funding decisions are prima facie based upon the prediction of profitability metrics, arbitrations risks are reduced to an investment vehicle rather than being a mechanism for dispute resolution.[18] This shift can alter the fundamental core of arbitration by prioritizing the financial returns over the justiciable outcomes.

Therefore, although AI driven funding enhances certain significant efficiencies, it also mandates a careful regulatory process. Policymakers and decision holders must ascertain the mechanism to ensure transparency in such algorithmic decisions thereby maintaining arbitration as a form of justice. This balance ensures that rise in quantified justice does not let go the very core principles of arbitration to uphold.

VIII. THIRD-PARTY FUNDING IN INVESTOR-STATE ARBITRATION (ISDS): SOVEREIGNTY VS CAPITAL

The increasing demand of third-party funding in dispute settlement has initiated a critical and intense debate at the intersection of international investment law, sovereignty of state and the global capital flows. ISDS consists of disputes between the private investors and the sovereign states which implicates the public policy and regulatory autonomy, which is totally different from the mechanism of commercial arbitration.[19] Introduction of third-party funding in the ISDS system has reformed such disputes significantly.

Third party funding allows the investors, including those who have limited financial capacity, to process the claims against the states without carrying the full cost of arbitration. Although it promotes access to justice in various domains, yet it also raises significant

[17] Gus Van Harten, Investment Treaty Arbitration and Public Law 5 (2007).
[18] Supra note 15
[19] Supra note 16

concerns regarding the expansion of hypothetical or opportunistic claims. Funders which are expecting high substantial returns may encourage the continuation and initiation of such claims that may not have been dealt into otherwise.[20] This whole process led to the understanding about the financial aspect of the investment arbitration where the disputes are highly driven by the profit considerations rather that genuine interests in such grievances.

The consequences are particularly severe more for the developing states. Defending the whole nature of ISDS claims is quite expensive and is resource-intensive process which may involve millions of dollars in the legal fees and ascertaining the liability. When these claims are supported by high profiled investors or funders. States may have a chance to face the increased pressure of settle even in the case where the actions and the case are genuine.[21] This prospect may have a discouraging effect on the public policy which may raise tensions within the states from initiating any measures in areas prone to environmental pollution, public health etc.

The issue of openness may further complicate the whole discussion. Many arbitral rules or policies do not mandate the disclosure of third-party funding arrangements which in turn leads to uncertainty, conflict of interests and lack of procedural transparency.[22] Taking this issue in account, the international governing bodies like UNCITRAL, and ICSID have initiated the discussions on taking a reform on the disclosure measures.[23] Mandating the disclosure of funding arrangements is highly viewed as being essential to preserve the viability and genuineness of ISDS.[24]

At a ground level the ore question is whether the third-party funding is undermining the state sovereignty. By allowing the private investors to fund capital in order to influence the disputes specifically governing the public interests, TPF may shift the balance of powers away from the states. Some scholars have argued for a stricter compliance and regulation

[20] Supra note 18
[21] Supra note 4
[22] Supra note 13
[23] W. Kent Davis, The International View of Attorney Fees in Civil Suits: Why is United States the "Odd man Out" in how It pays Its lawyers? 16 Ariz. J. International & Competition Law 361 (1999)
[24] Supra note 17

over such conduct including the limitations on funding in the ISDS or enhanced cost valuations and shifting mechanisms to discourage the wrongful and unsustainable claims. [25]

Finally, although third party funding has enhanced the access to justice in ISDS, but it has also introduced the risks that have to be carefully regulated. The main challenge lies in creating a regulatory framework which can harbour the benefits of funding while safeguarding state sovereignty and justiciable resolution of disputes.

IX. ETHICAL BOUNDARIES OF CONTROL: WHEN FUNDERS BECOME "SHADOW PARTIES"

one of the prominent controversial aspects of third-party funding in arbitration is the level of control exercised by the funders in the overall conduct of proceedings. While these funders are apparently passive funders, in reality, their involvement is highly extended to a strategized decision making which raise concerns about their role as 'shadow parties'.[26]

The contractual relation between the funders and the claimants usually grants funders an exclusive significant right which includes the ability to influence the selection of the legal counsel, approval of litigation-based strategies and participation in strategic decisions. This involvement although commercial rational, creates a significant challenge while going with the core foundational principles of arbitration, more particularly the party autonomy and the independence of legal representation.

From a different purview, the influence of funders establishes various conflicts of interests between the claimants and their respective counsel. Lawyers who are totally bound by their professional duties to act in the best interest of their respective clients have to face certain pressure from such funders whose primary objective is to maximise their earnings through the profit.[27] This tension is raised more onto the step of negotiation where funders may prefer to extend the proceedings so that they may get a higher rate of awards while on the other hand claimants always try to seek an early resolution.

[25] Lucy Reed & Jonathan Sutcliffe, The "Americanization" of International Arbitration? 16 Mealey's International Arbitration Rep. 37 (2001)
[26] Bar Council of India vs A.K. Balaji, (2018) 5 SCC 379 (India)
[27] Code of Civil Procedure, 1908, Acts of Parliament, 1908 (India), Order XXV

The question whether the funders must be recognised as the original parties in interest complicates the issue further. If funders are going to exercise substantial control over the proceedings, it may be argued prima facie, that they should be bound be certain obligations and must be scrutinised as formal parties including all the disclosure requirements and potential liability for adverse cost.[28] However, such step would alter the core and fundamental nature of arbitration proceedings and could even discourage the investment in funding.

The most critical point in arbitration, i.e., Confidentiality, is also at stake. The involvement of these funders mandates and necessitates the sharing of the confidential information of the parties and their respective cases which may often lead to potential harm and risk of breaches.[29] While the confidentiality agreements are given a safe place, but the expansions of such information transmissions make raise legitimate concerns about the data security of the claimants/parties.

Even some of the regulatory Reponses to these challenges remain undiscussed and disintegrated, Various institutions and jurisdictions have introduced guidelines for the disclosure and conflicts of interests, but a comprehensive set of regulation is still lagging behind. There is a growing concern that these regulations and standard shall be taken into account so that the scope of funder involvement could be transparently viewed and regulated.

In short, the core issues are not concerned with the influence of funders but rather to the extent of their involvement in the integrity of arbitration. Creating transparent and clearer boundaries is deeply essential to prevent the erosion of party autonomy which will ensure that arbitration will remain fair and impartial mechanism for the dispute resolution.

X. SUGGESTIONS AND RECOMMENDATIONS

In light of the issues identified in this paper, the following recommendations are proposed to ensure a balanced and effective framework governing third-party funding in India:

[28] Supra Note 14
[29] Supra Note 16

1. **Legislative Recognition of TPF**: There is a need to formally recognise third-party funding within the statutory framework, particularly by introducing enabling provisions in the Arbitration and Conciliation Act, 1996, to provide clarity and legal certainty.
2. **Mandatory Disclosure Requirements**: All arbitration-related funding arrangements should be subject to mandatory disclosure to arbitral tribunals and opposing parties in order to prevent conflicts of interest and enhance procedural transparency.
3. **Regulation of Funder Control**: Clear statutory or institutional guidelines should be introduced to limit the extent of control exercised by funders over litigation strategy, counsel selection, and settlement decisions, thereby preserving party autonomy and professional independence.
4. **Transparency in AI-Assisted Funding**: The use of artificial intelligence in funding decisions should be subject to transparency standards, including disclosure of decision-making criteria and safeguards against algorithmic bias, to ensure fairness and accountability.
5. **Cost and Security Mechanisms**: Courts and arbitral tribunals should be empowered to order security for costs against third-party funders where appropriate, in order to safeguard defendants from frivolous or speculative claims.

XI. CONCLUSION

Third party funding has emerged to be one of the most significant developments in the purview of commercial disputes in the 21st century. The practise which began has been historically linked under the medieval doctrines of champerty and maintenance which has now evolved through various legislative reforms and judicial responses into a well-recognised and highly demanding mechanism for the expansion of access to justice.

The trajectory of TPF from prohibition to toleration, and from toleration toward cautious regulation reflects a broader jurisprudential shift: that the pursuit of justice must be materially accessible, not merely formally guaranteed.

Across the jurisdictions examined in this paper, a common thread runs through the regulatory conversation: TPF, when properly governed, serves a legitimate and valuable

purpose. It allows claimants with meritorious claims but constrained financial resources whether small enterprises, emerging startups, or sovereign states facing well-resourced counterparties to participate meaningfully in dispute resolution processes that would otherwise be foreclosed to them. In the Indian context specifically, while the absence of a dedicated statutory framework leaves the field governed largely by judicial precedent and procedural provisions, the direction of the law is unmistakably toward recognition rather than restriction. The Supreme Court's observations in *Bar Council of India v. A.K. Balaji*, the Delhi High Court's progressive reasoning on access to justice, and the state-level amendments to Order XXV of the Code of Civil Procedure collectively signal that TPF occupies a legitimate space in India's legal architecture one that awaits comprehensive legislative articulation.

Yet the promise of TPF is not without its perils, and intellectual honesty demands that these be confronted directly. The emergence of AI-driven funding decisions, while enhancing efficiency and reducing informational asymmetry, carries with it the risk of systemic bias, the marginalisation of novel claims, and the reduction of arbitration to a vehicle of quantified commercial return. The phenomenon of funders exercising shadow-party control over proceedings influencing counsel selection, litigation strategy, and settlement decisions strikes at the autonomy of parties and the independence of legal representation. And in the domain of investor-state dispute settlement, TPF's intersection with state sovereignty raises questions of profound public importance: whether the infrastructure of international investment arbitration is being quietly reshaped by the priorities of private capital rather than the imperatives of justice.

The central challenge for legislators, arbitral institutions, and courts is therefore not whether to permit TPF, but how to regulate it in a manner that preserves its access-to-justice dividend while neutralising its capacity for abuse. Mandatory disclosure of funding arrangements, clear boundaries on funder control, algorithmic transparency in AI-assisted funding evaluation, and robust conflict-of-interest protocols are not optional refinements they are the minimum conditions for a system that can credibly claim to deliver commercial justice rather than merely commercial advantage.

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India, standing at the threshold of becoming a significant arbitration hub, has both the opportunity and the obligation to shape a regulatory framework that learns from the experiences of more mature jurisdictions while remaining responsive to its own unique economic and social context. Third-party funding, appropriately governed, can be a powerful instrument of access to justice. Left ungoverned, it risks becoming yet another structural advantage for those who already possess it.

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