REGULATION OF THIRD PARTY FUNDING OF ARBITRATION IN INDIA: THE ROAD NOT TAKEN

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Abstract

*Third party funding ["**TPF**"] has become a necessary evil in the face of excessively high costs involved in both international and domestic arbitrations. Historically, TPF in litigation has been deemed to be illegal in most common-law jurisdictions owing to the application of the archaic doctrines of maintenance and champerty. Arbitration hubs such as Singapore and Hong Kong have recently implemented regulatory frameworks to recognise and accept TPF in arbitration and have abolished these archaic doctrines. A regulation of this funding mechanism promotes access to justice and allows meritorious claimants to advance their claims, despite the furore over its ethical, economic, and legal considerations. Through this article, the authors have sought to explore the benefits and the associated risks that are involved in TPF, while referring to the existing regulatory regimes across jurisdictions. This is done with the objective of examining the need for a regulatory framework in India as the lack of prohibition of this funding mechanism makes India a lucrative market for TPF. The Indian market may still be exposed to significant risks due to the lack of a regulation. Legislating on this vacuum in law could assist India in becoming the arbitration hub that it envisages itself to be.*

I. Introduction

International arbitration has become one of the most sought after dispute resolution mechanisms for cross-border disputes. One cannot turn a blind eye to the fact that prominent international arbitral institutions have ensured quality case management systems, impressive panels of arbitrators, and timely disposal of cases. However, many institutions have failed to address the extortionate costs[1] involved in an international arbitration, which at times, exceeds millions of dollars.[2] This often dissuades parties with potentially legitimate claims from pursuing them, due to the lack of available funds or alternatively, encourages them to opt for TPF in order to avail justice. Given the costs involved in an international arbitration proceeding, in the instances of both, international commercial arbitration and international investment arbitration,

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1 FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 686 (Emmanuel Gaillard & John Savage eds., 1999).

2 Bernard Hanotiau, *The Parties' Costs of Arbitration, in* 4 EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION 213 (Yves Derains & Richard H. Kreindler eds., 2006).

most parties are compelled to consider various means to fund their claims, even before dwelling into the merits of their claims.[3]

The International Council on Commercial Arbitration-Queen Mary University Task Force on Third-Party Funding ["**Task Force**"], a joint task force of academicians and practitioners of arbitration laws, recognised the flourishing market for TPF and the benefits that would be reaped by all stakeholders in an international arbitration.[4] The Task Force[5] recently arrived at an exhaustive definition for 'TPF', which refers to an agreement by an entity that is not party to a dispute to provide a party (either claimant or respondent), an affiliate of that party or a law firm representing that party, funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases.[6] Such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[7] In this financing method, an entity that is not a party to a particular dispute funds another party's legal fees or pays an order, award or judgment rendered against the party, or both.[8] The market for TPF has witnessed a global impetus, leading to the establishment of several institutional funding organizations.[9] The Task Force recognised the flourishing market for TPF and the benefits that would be reaped by all the stakeholders in an international arbitration.[10] The Task Force emphasised that the benefits of this system could only be realised if there was a greater consistency in the approach along with informed decision-making in addressing the issues that entail.[11]

The increased reliance on TPF arrangements has become a global phenomenon.[12] TPF arrangements are increasingly gaining traction, which has called for greater consistency in the approach followed with respect to them.[13] As third party funders gauge the funding agreement as an investment with a financial motive,[14] which requires extensive due diligence, an analysis of the merits of the claim, the likely damages that may arise,[15] and the prospects of enforcing the award

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3 Philippe Cavalieros, *In-House Counsel Costs and other Internal Party Costs in International Commercial Arbitration*, 30(1) ARB. INT'L 145 (2014).

4 ICCA & QMUL TASK FORCE ON THIRD-PARTY FUNDING, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 3 (Apr. 2018), *available at* https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf [*hereinafter* "ICCA-QMUL REPORT"].

5 *Id.*

6 *Id.* at 50.

7 *Id.*

8 LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 1 (2d ed. 2017).

9 *Id.* at 1277.

10 ICCA-QMUL REPORT, *supra* note 4, at 3.

11 *Id.*

12 James Clanchy, *Navigating the Waters of Third Party Funding in Arbitration*, 82(3) INT'L J. ARB., MEDIATION & DISP. MGMT. 222 (2016).

13 *See generally* GIAN MARCO SOLAS, THIRD PARTY FUNDING: LAW, ECONOMICS AND POLICY (2019).

14 Joe Tirado et al., *The Costs and Funding of International Arbitration*, *in* DEFINING ISSUES IN INTERNATIONAL ARBITRATION 289 (Julio César Betancourt ed., 2016).

15 *Id.*

that is finally arrived at through the arbitration proceeding,[16] this could certainly open a Pandora's box for unfair bargains. The party availing TPF might have significantly greater resources to dispute the claims and thereby afford a lengthy arbitration or potential litigation. There is also the probability of a third party funder's abuse of financial leverage against a vulnerable party, which would lead to 'unfair bargains' and an unwarranted interference in the arbitral proceedings.

Historically, TPF has been deemed illegal under common law due to the principles of champerty and maintenance.[17] These doctrines are still enforced, rendering TPF either as a tort or a crime in certain jurisdictions such as Ireland and Malaysia, and was an enforceable common law tort even in Singapore until 2017.[18] The position of TPF in civil law systems such as France and Belgium falls under a grey-area; but the practice is usually frowned upon.[19] However, these legal barriers have now been eroded in jurisdictions such as Australia, Germany, United Kingdom ["**UK**"], the United States of America ["**USA**"],[20] and most recently in Singapore and Hong Kong as well.[21] Due to the varying approaches adopted by different jurisdictions, a complexity for the international arbitration community has been created. There has been no consensus on the approach which should be adopted towards TPF.

Irrespective of these varying approaches, the demand for TPF has already created a marketplace for third party funders such as Burford Capital (USA), Juridica Investment Ltd. (UK), and Omni Bridgeway (Netherlands),[22] amongst several others. In essence, there is a demand and supply for TPF in international arbitration and this market has its own benefits and associated risks. For this reason, it must be regulated to mitigate the associated risks that may impede the transparency and confidentiality of arbitral proceedings and to further protect the interests of the opposing party.

Today, TPF has become an indispensable component of the international arbitration process, in order to finance the claims of impecunious claimants (or respondents), and providing funding to such party to an arbitration is no longer seen as a mere consequence of the costs of an international arbitration.[23] This article, in Part II, traces the historical roots of TPF through the long-standing doctrines of maintenance and champerty, followed by the recognition of the growing need for regulating TPF in the Indian context in Part III. Subsequently, the article

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16 Frank Garcia, *Third Party Funding as Exploitation of the Investment Treaty System*, 59(8) B.C. L. REV. 7 (2018).

17 NIEUWVELD & SAHANI, *supra* note 8, at 14.

18 Nadia Darwazeh & Adrien Leleu, *Disclosure and Security For Costs or How To Address Imbalances Created By Third-Party Funding*, 33(2) J. INT'L ARB. (2016).

19 NIEUWVELD & SAHANI, *supra* note 8, at 12.

20 *Id.*

21 Alastair Henderson et al., *Update: Singapore Passes Law to Legalize 'Third-Party Funding' Of International Arbitration and Related Proceedings*, HERBERT SMITH FREEHILLS ARB. NOTES (Jan. 11, 2017), *available at* https://hsfnotes.com/arbitration/2017/01/11/update-singapore-passes-law-to-legalise-third-party-funding-of-international-arbitration-and-related-proceedings.

22 Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling An Investment Arbitration Boom*, CORP. EUR OBSERVATORY TRANAT'L INST. (Nov. 2012), *available at* https://www.tni.org/files/download/profitingfrominjustice.pdf.

23 Joe Tirado et. al., *supra* note 14, at 285.

identifies the existing concerns surrounding TPF and suggests the creation of a regulatory framework in the Indian context in Part IV. Finally, in Part V, the article draws to a close with the lessons India may derive from the prevailing regulatory regimes and the conceivable economic repercussions, before such a legislative framework is enacted.

II. Tracing the Roots of Third Party Funding

More than 70% of companies have stated that they chose to steer clear of meaningful, meritorious claims because of the impact of legal expenses.[24] In this regard, it becomes pertinent to evaluate the transition from the doctrines of maintenance and champerty under which litigation funding had been considered criminal or tortious to the abolition of such apparent wrongs in several jurisdictions to further facilitate access to justice.

A. History of the Doctrines of Maintenance and Champerty

The history of funding of claims can be contextualized and traced back to the common law doctrines of maintenance and champerty. Maintenance may be understood as an overarching doctrine which encompasses champerty as a type of maintenance.[25] Broadly, maintenance is the act of financial assistance being provided to a party to a dispute, without any expectation of receiving a share in the final amount that may be recovered in the instance that the party succeeds and without any interest in the outcome whatsoever.[26] On the contrary, champerty is the act of providing a similar financial backing, however, with the explicit expectation of receiving a share in the outcome of the dispute, if the party wins.[27]

In 1843, one of the most renowned British legal theorist and jurist, Jeremy Bentham, had opined upon the circumstances that paved the way for the doctrines of maintenance and champerty, and stated that they were initially introduced to try and curb mischief.[28] The seriousness or the negative perspective from which TPF was perceived is reflected in the statements of Jeremy Bentham, wherein he stated that such support in legal proceedings could be a mischief. He articulated: "*A mischief, (…) though a mischief not to be cured by such laws, was, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his feet, might strike terror into the eyes of a judge upon a bench.*"[29]

Traditionally, these doctrines established that funding of claims by third parties to the litigation was not only void ab initio, but also considered as tortious and criminal.[30] These acts were also

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24 BURFORD CAPITAL, BURFORD ANNUAL REPORT 2018 , at 10, *available at* https://www.burfordcapital.com/media/1526/bur-31172-annual-report-2018-web.pdf [*hereinafter* "BURFORD ANNUAL REPORT 2018"].

25 NIEUWVELD & SAHANI, *supra* note 8, at 14.

26 *Id.*

27 *Id.*

28 Lisa Bench Nieuwveld, *Third-Party Funding – Maintenance and Champerty – Where is it Thriving?*, KLUWER ARB. BLOG (Nov. 7, 2011), *available at* http://arbitrationblog.kluwerarbitration.com/2011/11/07/third-party-funding-maintenance-and-champerty-where-is-it-thriving.

29 *Id.*

30 NIEUWVELD & SAHANI, *supra* note 8, at 11-112.

rendered morally and ethically against public policy.[31] Maintenance and champerty were formally declared as unlawful in 1275 by the Statute of Westminster, through which a prohibition upon court officials from indulging in maintenance or champerty was introduced. The Statute also barred attorneys from abusing the litigation process.[32] The same was reiterated and developed further by various other Statutes.[33]

B. Dilution of the Doctrines of Maintenance and Champerty in the United Kingdom

The doctrines of maintenance and champerty were doubted or first observed as outdated in England in the 1908 case of *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.*,[34] which displays a more progressive and accepting approach towards TPF. In this case, it was held by Lord Justice Fletcher Moulton that "*the truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. Those notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete.*"[35]

The liberalisation of the doctrine of maintenance and champerty was truly effectuated by Sections 13 and 14 of the Criminal Law Act, 1967,[36] which abolished them as crimes and torts ofmaintenance and champerty. However, Section 14(2)[37] provides that in case a contract violates public policy (and is therefore unenforceable), the abolition of liability for maintenance and champerty shall not affect such determination.[38] The Criminal Law Act, 1967 has through necessary and indirect implication paved the way for TPF in England and in other post-colonial countries, such that there is similar divergence from these principles, post their independence. Furthermore, the doctrine has evolved or been diluted in different ways in other common law jurisdictions. However, a law mirroring the departure from these antiquated doctrines has not been established in India in any statutory form.

C. Dilution of the Doctrines of Maintenance and Champerty in India

The position with respect to maintenance and champerty in India is clear, and the doctrines of maintenance and champerty are inapplicable in India as determined by the Privy Council in the

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31 *See id.*; *See also* Christopher Hodges et al., *Litigation Funding: Status and Issues* 12 (Ctr. for Socio-Legal Stud., Oxford and Lincoln L. Sch., U. Lincoln 2012), *available at* https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf.

32 Statute of Westminster, The First 1275, 3 Edw. I c. 25, 28 & 33 (Eng.).

33 David Neuberger, Harbour Litigation Funding First Annual Lecture: From Barretry, Maintenance and Champerty to Litigation Funding ¶ 15 (May 8, 2013), *available at* https://www.harbourlitigationfunding.com/wp-content/uploads/2015/09/lord_neuberger_harbour_annual_lecture_8_may_2013.pdf; *See also* Percy H. Winfield, *The History of Maintenance and Champerty*, 35 L. Q. REV. 50, 56 (1919).

34 British Cash & Parcel Conveyors v. Lamson Store Service Co., [1908] 1 K.B. 1006 (Eng.).

35 *Id.* ¶¶ 1013-1014.

36 Criminal Law Act 1967, c. 58, §§ 13, 14 (Eng.).

37 *Id.* § 14(2).

38 NIEUWVELD & SAHANI, *supra* note 8, at 45.

case of *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*.[39] Here, the Privy Council held that "*the English laws of maintenance and champerty are not of force as specific laws in India*."[40] However, it was also laid down that the said doctrines would apply to an agreement which is inequitable, extortionate and unconscionable and not made with the bona fide objects of assisting a claim.[41] Therefore, they would only apply in limited situations to prevent individuals from gambling in litigation or encouraging frivolous litigation.

In the words of the arbitrator Dr. Gavan Griffith QC, a third party funder embraces a 'Gambler's Nirvana'.[42] The Transfer of Property Act, 1882, in fact, allows for the transfer of 'actionable claims',[43] while prohibiting the transfer of 'a mere right sue',[44] such that the practice of gambling over litigation may be prevented.[45] In the case of *Re: 'G' A Senior Advocate of the Supreme Court*,[46] it was observed by the Supreme Court of India that an agreement wherein a stake was held by a third party in the outcome of the litigation, would be legally unobjectionable and enforceable, if and only if, a lawyer was not involved. Consequently, there was nothing morally wrong which would shock the conscience and it would not violate public policy.[47] The conclusion was crystal clear that the rigid doctrines of maintenance and champerty do not apply in India and are only applicable against advocates. The same has also been given statutory force under Part VI of the Bar Council of India Rules wherein Rule 20 prohibits an advocate from entering into a fee arrangement on contingent on the outcome of a dispute[48] and Rule 21 prohibits an advocate from buying, trafficking, stipulating, or agreeing to receive any share or interest in an actionable claim.[49]

Most recently, in the case of *Bar Council of India* v. *A.K Balaji*,[50] the Supreme Court of India, observed that "*there appears to be no restriction on third-parties (non-lawyers) from funding the litigation and getting repaid after the outcome of the litigation.*"[51] Accordingly, the explicit restriction on financing the parties to the dispute is merely placed on the lawyers under the Bar Council Rules, such that a conflict of interest may be avoided and the professional standards of a lawyer are maintained. This limit on the interference from the lawyers prevents a situation where the final award may be set aside or deemed unenforceable under the auspices of 'public policy'.

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39 Ram Coomar Coondoo v. Chunder Canto Mookerjee, [1876] 2 AC 186, 208 (PC) [*hereinafter* "Ram Coomar Coondoo"].

40 *Id.*

41 *Id.* at 210.

42 RSM Prod. Corp. v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, ¶ 13 (Aug. 13, 2014) [*hereinafter* "RSM Prod."].

43 Transfer of Property Act, No. 44 of 1882, § 130 (India) [*hereinafter* "Property Act"].

44 *Id.* § 6(e).

45 DR. AVTAR SINGH, TEXTBOOK ON THE TRANSFER OF PROPERTY ACT 39 (5th ed. 2016).

46 In Re: 'G', a Senior Advocate of the Supreme Court, AIR. 1954 SC 557.

47 *Id.* ¶ 11.

48 Bar Council of India (Standards of Professional Conduct and Etiquette) Rules, 1975, Gazette of India, pt. VI § II, r. 20 (Sept. 6, 1975).

49 *Id.* r. 21.

50 Bar Council of India v. A.K. Balaji, AIR 2018 SC 1382.

51 *Id.* ¶ 35.

The Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] is silent on the role of a third party funder in an arbitration. This aspect was neither regulated by the Arbitration and Conciliation (Amendment) Act, 2015, nor does it find any mention in Arbitration and Conciliation (Amendment) Act, 2019 ["**2019 Amendment**"]. Accordingly, it is pertinent to note that TPF is not *per se* illegal in India, but is a field of law that has missed the eye of the legislators. TPF as a financing practice has still not experienced any formal evolution and has neither been explicitly prescribed nor proscribed under the letter of law.

III. The Growing Need for Regulation of Third Party Funding in India

The United Nations resolution which endorses access to justice and recognises that all institutions are accountable to just, fair, stable and equitable laws[52] has been a pivotal justification for the development of TPF, as it allows a party with insufficient financial resources to beat the hurdles of exorbitant costs, if it does indeed have a meritorious claim.[53] The market for TPF has evolved from being a small and niche market[54] to a largely prevalent one, owing to the fact that dependency on arbitration as a dispute resolution mechanism has exponentially increased over the years. This increased demand for arbitration has prompted the consequent increase in the overall costs involved;[55] therefore, external financing is often relied upon by claimants, not only to lay off the risk of losing[56] but also to prevent capital from being tied up,[57] while the arbitral proceedings are underway. This is simply because cash-flow is the life force of a business.[58]

TPF has been proliferating in most common law jurisdictions, and recently in Singapore and Hong Kong. This is true not only for the impecunious claimants, but also for the States appearing in a proceeding.[59] Recently, Hong Kong welcomed TPF as an exception to the general bar on maintenance and champerty, through the Arbitration and Mediation (Third Party Funding) (Amendment) Ordinance, 2017.[60] Since these doctrines have been held to be inapplicable in India,[61] lucrative opportunities for this market to boom have been served on a silver platter. It is to be kept in mind that TPF in arbitration (if regulated wisely) has no impact on the arbitration proceedings;[62] it merely facilitates the smooth running of the process.

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52 G.A. Res. 67/1, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, ¶ 2 (Nov. 30, 2012).

53 Tara Santosuosso & Randall Scarlett, *Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, 60(9) B.C. L. Rev. 8, 10 (2019), *available at* https://lawdigitalcommons.bc.edu/bclr/vol60/iss9/5.

54 NIEUWVELD & SAHANI, *supra* note 8, at 11.

55 *Id.*

56 Duarte G. Henriques, *Arbitrating Disputes in Third-Party Funding*, 85(2) INT'L J. ARB., MEDIATION & DISP. MGMT. 171 (2019).

57 *See* NICK ROWLES-DAVIES, THIRD-PARTY LITIGATION FUNDING 15 (2014).

58 *Id.*

59 Eric De Brabandere & Julia Lepeltak, *Third-Party Funding in International Investment Arbitration*, 27(2) ICSID REV. 379 (2012).

60 Arbitration and Mediation (Third-Party Funding) (Amendment) Ordinance, No. 6 (2017) (H.K.) [*hereinafter* "HK TPF Ordinance"]

61 Ram Coomar Coondoo, [1876] 2 AC 186, 210 (PC).

62 *See* Oxus Gold v. Republic of Uzbekistan, Final Award, Dec. 17, 2015, Arbitral Tribunal constituted under the Arbitration Rules of the UNCITRAL, ¶ 127.

The public policy ideal of access to justice can be fostered through dispute financing for claimants who are unable to pursue their meritorious claims individually,[63] and by companies that seek to carry on with their business without affecting their stock in trade.[64] Furthermore, the uncertainty and upheaval in the market resulting from the global economic slowdown in 2008 allowed for several hedge funds and banks, which are not affected by erratic changes in the financial markets to rely on dispute financing,[65] leading to the dawn of arbitration as an investment or an asset class, by creating a secondary market in the claims.[66] Recently, the institutional framework of third party funders, which has grown in response to the burgeoning of TPF as a 'corporate finance', has led to entities with abundant cash reserves to finance dispute resolution.[67] These institutions finance the claims of claimants as a means to raise capital for general operating expenses, or for the expansion of the business as a whole.[68]

The perceived economic benefits in India, which is still seen as a developing country, would especially be advantageous to small businesses and companies which do not wish to allocate funds towards legal expenses,[69] despite having arbitration clauses in their contractual agreements. This is simply because of the risks that are posed by an uncertain legal proceeding which may pose an impediment, in case of an unfavourable award. The discernible risks would, therefore, be mitigated if the opportunity to avail funds from third parties is made known to such persons or businesses who are not necessarily impecunious.

As evidenced by the 2019 Amendment, the goal of the Parliament is to make India a hub of arbitration by adopting a pro-institutional arbitration framework.[70] This goal would certainly be advanced by adopting a regulatory framework addressing challenging issues like TPF that have been regulated across other institutional arbitration hubs. On that account, the time is ripe for a law governing and regulating the market for TPF, which is bound to mushroom. Legitimising TPF would give India a competitive advantage at a global level while competing with Singapore and Hong Kong as an arbitration hub in South East Asia. It would also mitigate the risks of forum shopping, keeping in mind the fact that TPF is neither prohibited nor regulated in India as non-regulation of TPF can potentially be abused by unscrupulous third party funders.

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63 Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56(2) MERCER L. REV. 649, 659 (2005).

64 NIEUWVELD & SAHANI, *supra* note 8, at 11.

65 *Id.*

66 Charlie Lightfoot et al., *England and Wales*, GLOBAL ARB. REV. (Oct. 19, 2018), *available at* https://globalarbitrationreview.com/insight/the-european-arbitration-review-2019/1175823/england-wales.

67 NORTON ROSE FULBRIGHT, INTERNATIONAL ARBITRATION REPORT 3-4 (Sept. 2016), *available at* https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-7.pdf?la=en&revision=2b95e882-b426-4aa1-952e-6270bebf896b.

68 *Id.*

69 Jef De Mot et al., *Third-Party Funding and its Alternatives: An Economic Appraisal*, LEIDEN L. SCH. 3 (2016), *available at* https://ssrn.com/abstract=2747277.

70 Arbitration and Conciliation (Amendment) Act, No. 33 of 2019, Statement of Objects and Reasons [*hereinafter* "2019 Amendment"].

IV. Reconciling Existing Gaps in Third Party Funding

The benefits of TPF in the arbitral process have been widely discussed in several academic works,[71] and the access to justice that the funding mechanisms provide to the indigent parties is undeniably laudable.[72] However, when not regulated, TPF also creates certain imbalances between claimants and respondents, particularly, information asymmetry, as there exists no obligation to disclose any funding received by a third party. Furthermore, the predicament of "*arbitral hit-and-run*"[73] whereby the costs of arbitration become irretrievable because of the frivolous and inflated claims being engendered,[74] is an essential factor to ponder over, before advocating for its regulation. The obstacles in the way of a sound regulatory scheme for TPF and the viable solutions to these specifically highlighted problems are discussed below.

A. Risks Involved

i. Potential for Abuse

The proponents of TPF opine that it limits the scope of frivolous cases.[75] This would be true if we assume that institutional funding structures across jurisdictions would only invest in claims that would maximize the funders' prospects of a favourable outcome. Notwithstanding this, a recent United Nations Conference on Trade and Development Report revealed that TPF companies have an economic incentive through the creation of "*portfolio*" of claims to invest even in weak cases that have at least some chance of a high monetary award.[76] This, however, gives way for speculation and is a plausible taint on the reputation of a respondent State, i.e., in case of an investor-State dispute. TPF has been compared to drilling for oil,[77] which is a gamble considering that one discovery, after drilling several dry holes, can make all the difference.[78] This uncertainty in the recovery of costs from the claims that have been invested in further increases the overall 'costs' of an arbitral process. Furthermore, and more importantly, if a respondent procures an adverse costs award against an impecunious claimant who has placed reliance on TPF,[79] the respondent cannot ensure the enforcement of the award as the financier is not a direct party to the dispute between the respondent and the claimant.[80] This raises the issue of

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71 Courtney Barksdale, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707 (2007); *See generally* NIEUWVELD & SAHANI, *supra* note 8; *See also* Rachel Denae Thrasher, *The Regulation of Third-Party Funding: Gathering Data for Future Analysis and Reform* 11 (L. & J. Ams., Working Paper No. 9, 2018) [*hereinafter* "Thrasher"].

72 Nadia Darwazeh & Adrien Leleu, *supra* note 18, at 127.

73 RSM Prod., ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, ¶ 33 (Aug. 13, 2014).

74 Nadia Darwazeh & Adrien Leleu, *supra* note 18, at 129.

75 *See* Susana Khouri et al., *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*, 4 TRANSNAT'L. DISP. MGMT. 5 (2011).

76 *See Recent Developments in Investor-State Dispute Settlement (ISDS)*, U.N. CONF. ON TRADE & DEV. 25 (May 2013), *available at* https://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

77 George Kahale, III, *Is Investor-State Arbitration Broken?*, 7 TRANSNAT'L. DISP. MGT. 33 (2012).

78 *Id.*

79 William Kirtley & Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant is Relying upon Third-Party Funding?*, 30 J. INT'L ARB. 17, 19 (2013).

80 Nadia Darwazeh & Adrien Leleu, *supra* note 18, at 131.

privity of contract between the funder and the claimant being funded. Such a situation is often referred to as 'arbitral hit-and-run'.[81]

The authors of this paper urge that the statutory provisions relating to 'security for costs', as provided under certain state amendments to Order XXV of the Code of Civil Procedure, 1908,[82] and also dealt under English law, particularly in the Civil Procedure Rules[83] and the Arbitration Act, 1996,[84] and in institutional rules such as the London Court of International Arbitration Rules,[85] be similarly adopted under the Indian Arbitration and Conciliation Act, 1996. Such an incorporation would allow the courts to uniformly demand for security from the third party funders, despite the privity.[86] Further, the English Arbitration Act lays down that if a peremptory order for security for costs order is not complied with, the claim is likely to be dismissed.[87] The incorporation of such a provision would allow for the preservation of the rights of both parties, i.e., the claimant's right to access to justice and the respondent's right to financial protection for their costs,[88] thereby reducing the risk for the potential 'arbitral hit-and-run' cases.

ii. The 'Public Policy' Dilemma

Like India, Australia had similarly inherited the doctrines on maintenance and champerty. However, today, litigation funding in Australia is a flourishing industry,[89] unlike the untapped market in India. In the cases of *Campbells Cash and Carry Pty. Ltd.* v. *Fostiff Pty. Ltd.*[90] and *Mobil Oil Australia Pty Ltd.* v. *Victoria*,[91] the question on the involvement of third party funders deeming a

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81 William Kirtley & Koralie Wietrzykowski, *supra* note 79, at 26.

82 CODE CIV. PROC. 1908, No. 5 of 1908, o. XXV, r. 3 (as amended in Gujarat, Maharashtra and Madhya Pradesh) (India). It reads as follows:
"3. Power to implead and demand security from third person financing litigation:
(1) Where any plaintiff has for the purpose of being financed in the suit transferred or agreed to transfer any share or interest in the property in the suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in the property in suit is concerned, or declaring that he shall be debarred from claiming any right to or interest in the property in suit.
(2) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to or interest in the property in suit.
(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of rule (2) shall apply mutatis mutandis to such application".

83 Civil Procedure Rules, r. 25.12, Apr. 26, 1999 (Eng.).

84 The Arbitration and Conciliation Act § 38(3), No. 26 of 1996 (India).

85 London Court of International Arbitration Rules, r. 25(2), Oct. 1, 2014.

86 Progas Energy v. Islamic Republic of Pakistan, [2018] EWHC 209 (Comm.), ¶¶ 35-43 (Eng.).

87 Arbitration Act 1996, c. 23, § 41(6) (Eng.).

88 Arkin v. Borchard Lines Ltd., [2005] EWCA (Civ.) 655, ¶ 41 (Eng.); *See also* William Kirtley & Koralie Wietrzykowski, *supra* note 79, at 21.

89 *Litigation Funding – Australian Market Research Report*, IBISWORLD, *available at* https://www.ibisworld.com.au/industry-trends/specialised-market-research-reports/advisory-financial-services/litigation-funding.html.

90 Campbells Cash & Carry Pty Ltd. v. Fostif Pty Ltd. (2006) 229 CLR 386, ¶¶ 146-149 (Austl.) [*hereinafter* "Campbells"].

91 Mobil Oil Australia Pty. Ltd. v. Victoria (2002) 211 CLR 1 (Austl.).

proceeding to be antithetical to public policy was answered in the negative. The Australian High Court, in both these cases, noted that possible questions of illegality and public policy may arise in relation to the fairness of the agreement.[92] It is also pertinent to note that no objective standard was laid down to determine the fairness of the agreement in either of these cases. In order to test such a funding agreement on the grounds of public policy and abuse of process, the courts would have to address three main issues. *First*, whether the agreement adversely affects the litigation process. *Second*, whether bargaining powers have been exercised fairly.[93] *Lastly*, whether the funder has exercised excessive control.[94] Accordingly, there exists no definitive test for the same and these are questions to be determined on a case-to-case basis.

It was also observed that setting an overarching rule would "*take too broad an axe to the problems that may be seen to lie behind the fears.*"[95] This helps understand the apprehension of the legislature in legitimising TPF in India given the long drawn conundrum around 'public policy' in the Indian arbitration scenario. Yet, this is not an excuse to delay the regulation of TPF.[96] While bearing in mind that these doctrines are meant to protect vulnerable parties, it is imperative that TPF is reconciled with the doctrine of public policy to ensure that the fairness of the funding agreements is maintained.

iii. Latent Conflicts of Interest

A third party funder may possibly have a pre-existing relationship with a member of the arbitral tribunal. In the event that there exists no obligation to disclose the name of the third party funder, this possibility would impact the transparency of the arbitral process and would also be antithetical to the principles of independence and impartiality of an arbitrator.

The Task Force has recommended that a party or its representative disclose the existence of a TPF arrangement along with the identity of the funder to the arbitral institution, either as soon as possible or after such an agreement is entered,[97] and this must not be subject to any legal privilege.[98] This would further mitigate the risk of non-enforcement[99] of the arbitral award. Furthermore, the International Chamber of Commerce Guidance Note on the Conduct of Arbitration lays down that arbitrators should disclose any relationships among arbitrators and with any entity that has a direct economic interest in the dispute along with any obligation to indemnify a party for the final award obtained.[100]

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92 Campbells, (2006) 229 CLR. 386, ¶ 92 (Austl.).
93 *Id.* ¶ 90.
94 *Id.* ¶¶ 88-89, 93.
95 *Id.* ¶ 91.
96 *See generally* Arthad Kurlekar & Gauri Pillai, *To be or not to be: the oscillating support of Indian courts to arbitration awards challenged under the public policy exception*, 32(1) ARB. INT'L 179-198 (2016).
97 ICCA-QMUL REPORT, *supra* note 4, at 81.
98 *Id.* at 117.
99 Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 440-45 (2016).
100 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, INTERNATIONAL CHAMBER OF COMMERCE 6 ¶ 28 (Jan. 01, 2019), *available at* https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/.

The long drawn discourse on whether the funding agreement should be disclosed or not, has often led to International Centre for Settlement of Investment Disputes ["**ICSID**"] tribunals ordering the disclosure based off the "*inherent powers*" of the tribunal to do so.[101] While the Singapore International Arbitration Centre ["**SIAC**"] lays down that the tribunal has the discretionary power to order disclosure of the funding agreement or the funder,[102] the Canada-European Union Trade Agreement ["**CETA**"] states that the TPF agreement must mandatorily be disclosed.[103] More recently, the amendment to Article 43 of the Milan Chamber of Arbitration Rules now expressly requires the disclosure of both the funding agreement as well as that of the funder's identity.[104]

The lack of regulation of disclosure requirements raises a serious dilemma over the confidentiality and transparency of arbitral proceedings,[105] however, the authors of this article verily believe that this dilemma may be resolved by requiring the disclosure of the existence of a funding agreement and the name of the funder. In this regard, it is interesting to note that Singapore imposes an obligation upon all practitioners to disclose to the court or arbitral tribunal and all other parties, the existence of TPF,[106] and the identity and address of any third party funder involved.[107]

Hong Kong, on the other hand, mandates disclosure of the TPF and the identity of such third party to the other parties in the arbitration and the arbitral tribunal at the time of commencement of the arbitration, if the funding was obtained on or before the commencement of proceedings or within 15 days of entering into the funding agreement, if such an agreement was entered into after the commencement of the arbitration proceedings.[108]

The authors of this paper propose that in the Indian scenario, the approach on disclosure adopted by Hong Kong be incorporated in the Arbitration Act and the rules pertaining to the professional conduct of the third party funders (as it imposes such an obligation directly on the party, unlike Singapore where the obligation is imposed on legal professionals through rules of professional conduct). Consequently, the Singapore approach on the conduct of the funders also does not cast an obligation on foreign practitioners and is also silent on the time frame within which such funding must be disclosed.

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101 *See* Eurogas Inc. & Belmont Res. Inc. v. Slovak Repub., ICSID Case No. ARB/14/14, Hearing on Provisional Measures (Mar. 17, 2015); *See also* Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Repub. of Turkm, ICSID Case No. ARB/12/6, Procedural Order No. 3 (Jun. 12, 2015), *cited in* Christopher Boog & Philip Wimalasena, *The SIAC IA Rules: A New Player in the Investment Arbitration Market*, 6(1) INDIAN J. ARB. L. 73, 80 (2017).

102 Singapore International Arbitration Centre Investment Arbitration Rules, r. 24, Jan. 1, 2017 [*hereinafter* "SIAC Rules"].

103 Comprehensive Economic and Trade Agreement, Can.-EU, art. 8.26, Jan. 14, 2017, O. J. L11/23.

104 Arbitration Rules of the Milan Chamber of Arbitration, r. 43, Mar. 1, 2019.

105 Thrasher, *supra* note 71, at 11.

106 Legal Profession (Professional Conduct) Rules, r. 49A (1)(a), Nov. 18, 2015 (Sing.).

107 *Id.* r. 49(1)(b).

108 Arbitration Ordinance, (2011) Cap. 609, § 98-u (H.K.).

Therefore, the Hong Kong approach would be most suitable in terms of ensuring that there is no scope of the abuse of disclosure requirements. With respect to the disclosure of the funding agreement, an obligation to disclose the agreement in its entirety would not only conflict with a confidentiality clause of such an agreement (if any) but also risk exposing the funded parties' litigation strategy (such as quantification of claims, choice of counsel etc.). However, this would not be necessary, if an order for security for costs has been passed. In this regard, the authors of this paper maintain that disclosure of the funding agreement must be subject to the discretion of the tribunal.

iv. Conduct of the Funders

The incentive for funders to invest in claims despite the incalculable returns is discernible through the case of *Teinver* v. *Argentina*,[109] wherein the funding institution Burford Capital realized a 736% return on their invested capital.[110] This case manifests the perverse intent with which funders often offer their services, which are no longer limited to providing assistance in case of the precarious financial situation which the party is subjected to.[111] A regulation of the conduct of the third party funders, similar to the UK Code of Conduct for Litigation Funders ["**UK Code**"],[112] under which funders are self-regulated, would be necessitated if TPF were to be explicitly allowed. The UK Code tackles the capital adequacy of the funders, termination, and the control that funders have over the parties being funded, through the various responsibilities and the duties that the UK Code imposes.[113] Additionally, the IBA Guidelines on Conflicts of Interest, as revised in 2014, place an added onus on the funders to reveal whether there exists any conflict with the arbitrators presiding over the matter, despite the existing obligation of the arbitrators to investigate for conflicts.[114] The Code of Practice for Third-Party Funding of Arbitration in Hong Kong[115] adopts a self-regulating outlook for the third party funders to statutorily comply with[116] such that accountability is promoted.[117] Unlike the UK Code of Conduct, the Code of Practice of Hong Kong is mandatory and binding on all parties (including potential funders) and applies to all funding agreements.[118] Having a code of practice for the funders would prevent the abuse of the law, and maintain a check on the degree of control that the funders have over the process, to the effect that speculative funders do not take undue advantage of the market system under the guise of providing access to justice.

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109 Teinver S.A., Transportes de Cercanías S.A. & Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision (Dec. 21, 2011).

110 BURFORD ANNUAL REPORT 2018, *supra* ntoe 24, at 4.

111 Tara Santosuosso & Randall Scarlett, *supra* note 53, at 5.

112 *Code of Conduct for Litigation Funders*, ASSOC. OF LITIG. FUNDERS (Jan. 2018), *available at* http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf.

113 Rachael Mulheron, *England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments*, 73(3) CAMBRIDGE L. J. 570-97 (2014).

114 IBA Guidelines on Conflicts of Interests in International Arbitration, Gen. Std. 7(d) (Oct. 23, 2014).

115 HK TPF Ordinance, No. 6, (2017) (H.K.).

116 Melody Chan, *Hong Kong*, *in* THE THIRD-PARTY LITIGATION FUNDING LAW REVIW 81 (Leslie Perin ed., 2018).

117 *Id.*

118 Code of Practice for Third-Party Funding of Arbitration, (2018) G.N. 9048, ¶ 1.2 (H.K.).

B. A Proposed Regulatory Framework for Third Party Funding in India

The report of a High-Level Committee, chaired by Justice B.N. Srikrishna,[119] recognised the existing regulatory regimes for TPF across arbitration-friendly jurisdictions such as Singapore, Hong Kong and Paris.[120] Furthermore, the systematic shift from the prohibition of TPF towards its regulation was also acknowledged as a prominent reason for the development of these jurisdictions as arbitration-hubs.[121] It may be speculated that guidelines regulating TPF shall be beneficial to the litigating parties, the third party funders and to the economy as a whole as it would open a window of opportunities for investments in India.

The 2019 Amendment Act aims at making India a hub for domestic and international arbitration.[122] Yet, it fails to address the contentious issue regarding the regulation of TPF. The formidable intentions of the Parliament require several hurdles to be overcome before the desired result of India establishing itself as a global arbitration hub can be achieved. The authors of this paper suggest that a holistic regulatory framework that governs TPF of arbitration, as adopted by the governments of Singapore and Hong Kong recently, be incorporated into the Arbitration Act to meet this objective of becoming an arbitration hub in the foreseeable future. Embracing such a regime would certainly bolster the attractiveness of India as a dispute resolution centre.[123] In this regard, it is the position of the authors of this article that a framework regulating TPF in India must entail the following features:

(i) A provision for ordering 'security for costs' and the consequences of non-compliance of such an order;
(ii) Mandatory disclosure of access to TPF and identity of the third party funder, though the disclosure of the details of the funding agreement may not be necessitated;
(iii) Discretionary power must be vested with arbitral tribunals to order disclosure of the funding agreements to ensure that there is no abuse of process and to ensure that funders do not exercise excessive control over the funded party; and,
(iv) Adopting a code of practice that a third party funder is mandated to adhere to.

The authors of this article concede that a proposal for adopting a code of conduct for third party funders may be vague at this juncture. The authors of this article have left a proposal in that regard open ended, as the formulation of a code of conduct could be done while emulating certain provisions from the code of conduct as adopted by the UK and Hong Kong, subject to the policy of the State and the parameters that the State would prefer to adopt for permitting and certifying this funding mechanism. Such a code of conduct would also change from time to time to ensure third party funders do not use oppressive means that would be contrary to public policy. Despite this, provisions for mandatory disclosure of the identity of the funder, a

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119 DEP'T OF LEGAL AFF., REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALIZATION OF ARBITRATION MECHANISM IN INDIA 43 (2017).

120 *Id.*

121 *Id.*

122 *Changes in law needed to make India hub of arbitration: Ravi Shankar Prasad*, FIN. EXPRESS, Jul. 18, 2019, *available at* https://www.financialexpress.com/india-news/changes-in-law-needed-to-make-india-hub-of-arbitration-ravi-shankar-prasad/1648775; *See also* 2019 Amendment, *supra* note 70.

123 Peng Hou, *Financing arbitration in mainland China: Hong Kong's Legislation as a model*, 34(4) ARB. INT'L 593, 597 (2018).

provision for security of costs and a provision vesting discretionary power with arbitral tribunals to order disclosure of funding agreements is certainly the need of the hour.

V. Conclusion

The exorbitant costs involved in an international arbitration necessitate the procurement of financing through various vehicles, such that parties with seemingly authentic claims are not prejudiced and that they are provided with a reasonable opportunity to represent their case. The conflicting values at stake including the promotion of due process and justice to investors with no financial backing, on one hand and the possible promotion of gambling and speculation of cases on the other, contrary to public interest, are to be evaluated carefully before a definitive regulatory legislation is enacted.

The authors, while highlighting the global growth of the TPF market, have intended to suggest means to fill the gaps through an airtight legislative regulation in India. It is to be kept in mind that the potential for the market of TPF to have a far-reaching impact in India calls for the adoption of the recommendations of the Task Force, along with certain tailored modifications, which extensively discuss the procedural, ethical and policy related issues pertaining to TPF in international arbitration.

Although the primary purpose of the 2019 Amendment Act was to bolster India's vision to become a hub for domestic and arbitration[124] it fails to address the regulation of TPF while aggressively institutionalising arbitration.[125] Consequently, with the institutionalisation of arbitration in India, the regulation of TPF is now in the hands of prudent arbitral institutions as the government has missed the bus. Adopting such regulations would undoubtedly help in the pursuit of valid claims, both at a domestic and an international level and by not regulating TPF, the government has taken the road less travelled by and that has made all the difference.

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124 2019 Amendment, No. 33 of 2019, Statement of Objects and Reasons.

125 *Id.* § 10.