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# Third-Party Funding in Arbitration: A Comparative Analysis between the UK and India

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*The rise of international arbitration in solving disputes has gained significant momentum in the past few years. The increasing reliance on arbitration has mandated the use of third-party funding to cover the costs of arbitration. Third-party funding refers to a process where a third party (not the agent of the arbitration agreement) funds the arbitration process. The novel nature of third-party funding has made it a topic of great debate. Despite its advantages, some countries have regulated it, whereas others have not. While some perceive it to be an inherent part of arbitration, others don't. While certain types of third-party arrangements are allowed, others are not. Furthermore, the scope of TPF arrangements is also ambiguous when it comes to common law jurisdictions. London, being a key player in the international arbitration market, and India, being a budding player in the same, are yet to enact a uniform framework regarding TPF arrangements. This article aims to explore the challenges both countries have faced and continue to face without a legal framework and propose possible solutions for them. The article also draws on the rules and recommendations followed by other common law countries like Hong Kong and EU member states.*

**Keywords**: *tpf agreement, arbitration, legislation, champerty, and maintenance.*

## INTRODUCTION

TPF (Third party funding) refers to an arrangement where a party, that is not an agent of the arbitration agreement funds the arbitration proceedings on behalf of one of the parties to the arbitration agreement. The primary advantage of such an arrangement is that it increases access to arbitration by removing financial barriers and leveling the playing field for economically weaker parties. Third-party funding is the modern manifestation of the decades-old practice of Maintenance and Champerty found (and previously banned) in many common law jurisdictions. Although not an unusual phenomenon seen in litigation, third-party funding is relatively new when it comes to methods of Alternative dispute resolution, such as arbitration. The concept of Third-party funding has existed in the English legal system since time immemorial. However, such funding, until recently, was prohibited by the laws of Maintenance and Champerty, both part of common law jurisdictions.

The laws were primarily enacted to prevent the abuse of power by nobles in medieval times. In feudal times, English courts made champerty illegal since litigants were 'allocating virtue-less claims to wealthy and influential individuals who were generally more effectual in the court proceedings in exchange for an interest in a favorable judgment.'[1] In modern times however, these laws have been based on the ground of going against the public policy of a nation and as such have proven to be major roadblocks in the way of common law jurisdictions, such as the UK, embracing third-party funding. Unlike The UK, the progress of third-party funding in India has never been hindered by the Doctrine of Maintenance and Champerty. India rejected the applicability of the doctrine in the pre-independence era itself.

In the Privy Council case of Ram Coomar Coondoo v Chunder Canto Mookerjee[2], Sir Smith ruled the applicability of this doctrine to be 'inappropriate to the condition of things in the Presidency towns of India'. Furthermore, the judgment went on to lay down the conditions that would entail a third-party funding arrangement to violate India's public policy[3]. There are mainly two ways of governing TPF in arbitration proceedings: Statutory regulation and Self-regulation.[4]

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[1] Fahad Bin Siddique, 'Champerty v. Third Party Funding in Arbitration' (2020) 3(3) SCLS Law Review

[2] *Ram Coomar Coondoo v Chunder Canto Mookerjee* LAWS (PVC)-1876- 11-3

[3] MNLU Mumbai Centre for Arbitration and Research, *Third- party Funding in India Survey Report* (MNLU 2021)

[4] Sherina Petit, 'Emerging approaches to the regulation of third-party funding' (*Norton Rose Fulbright,* September 2016) <https://www.nortonrosefulbright.com/en-in/knowledge/publications/bf0fd6fe/maintenance-and-champerty> accessed 03 July 2023

While countries like Hong Kong and Singapore have enacted laws to regulate TPF arrangements, countries like the UK and India have a self-regulated framework when it comes to TPF arrangements. Third-party funding in the UK is governed by the Code of Conduct for Litigation Funders, 2011, along with the formation of an independent, self-regulated body called the Association of Litigation Funders**.** In India, it is primarily governed through contractual obligations between parties. Such type of funding is mainly provided by specialized third-party funders, investment banks, hedge funds, insurance companies, and pension funds. The third-party funders cover costs such as legal counsel's fees, court/tribunal fees, cost of expert witnesses, pre-deposit, adverse costs order, and other dispute-related expenses. The investment decision of funders is based on a variety of factors, such as merits of the case, risk factor, contingency fee, jurisdictions, type of case, etc.[5]

Recent times have witnessed a massive increase in third-party funding in many common law jurisdictions including India and the UK. Both countries have embraced different pathways to reach the same destination, that is to create a flourishing environment for third-party funding in arbitration. However, both countries have faced and continue to face a plethora of challenges when it comes to navigating such a novel field. Through the medium of this article, the author seeks to analyze these challenges and propose possible solutions.

## CHALLENGES TO TPF IN ARBITRATION

The primary issue with TPF in arbitration in India and the UK is the lack of uniform legislation governing the same. Although TPF agreements are not invalid as such, the lack of legislation has raised pertinent concerns for the funders and the parties seeking funding. Some of these concerns are discussed below:

**Contingency Fee Agreements:** A contingency fee is the money received by a lawyer based on the outcome of the case (usually winning). While states like America and Canada permit such contingency fee agreements, they are prohibited in India. However, such agreements have

[5] Amita Katragadda et al., 'Third party funding in India' (*Cyril Amarchand Mangaldas*, 2019) <https://www.cyrilshroff.com/wp-content/uploads/2020/10/Third-Party-Funding-in-India.pdf> accessed 03 July 2023

been held valid in certain cases, such as in Jayaswal Ashoka (P)Ltd v Pansare Lawad Sallagar,[6] where the Plaintiff (firm) and the defendant (client) had a TPF agreement to fund the latter's arbitration process and where the defendant refused to fulfill his obligations as per the agreement once the arbitration process was successful. The defendant argued that his representing counsel in the process was a partner of the Plaintiff firm and as such the agreement amounted to a contingency fee arrangement, which was against the public policy as per Section 23 of the Indian Contract Act[7]. The Bombay High Court ruled in favour of the plaintiff, holding the TPF arrangement valid, based on the reasoning that the representing counsel in arbitration proceedings isn't equivalent to representation before the court.

The judgement, challenged before The Apex Court is yet to have its final verdict. If validated, it would successfully lay down the difference in treatment of contingency fee arrangements in case of arbitration and litigation. The element of contingency fee was also brought up in Spintex Industries v Quinn Emmanuel[8] where the arbitration agreement was argued to be held invalid as per Indian law. The case was ultimately declared by The Delhi High Court to be out of its jurisdiction, but again, raises concerns regarding the treatment of contingency fee agreements in the context of third-party funding. Unlike India, contingency fee agreements are not prohibited by the English Legal System. However, whether such agreements extend to arbitration proceedings being funded by third parties is still unclear.

In Bevan Ashford (a firm) v Geoff Yeandle (Contractors) Ltd the claimant acted for the respondent on a contingency fee basis, agreeing to be paid a certain amount only if the arbitration was successful. The case was later brought in front of a judge to determine the validity of this agreement and it was concluded that such an agreement is only lawful in case of court proceedings (as per section 58 of the Courts and Legal Services Act) and not in the case of proceedings like arbitration which take place outside the court.[9] The question then remains that while contingency fee agreements are valid in case of litigation and other court proceedings, what is the position taken in case of private proceedings like arbitration?

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6 *Jayaswal Ashoka Infrastructures Pvt. Ltd. v Pansare Lawad Sallagar* SLP( C) No 17904/2019

7 Indian Contract Act 1872, s 23

8 *Spintex Industries Ltd v Quinn Emmanuel Urquhart & Sullivan LLP*CS (OS) 568/2017

9 John B Molloy et al., 'Contingency Fee Agreements- Valid in arbitrations?' (1999) 8(6) HKIS Newsletter

**Test of public policy for arbitral award:** Section 34(2)[10] *of the* Arbitration Conciliation Act 1996 provides that an arbitral award can be challenged because it conflicts with the public policy of India. Section 48(2)(b)[11] further provides that an arbitral award can be challenged if the enforcement of the award is contrary to the public policy of India. Although not defined statutorily, the basis for what falls within the ambit of public policy has been defined through various precedents.

In Harilal Nathlal Talati v Bhailal Pranlal Shah[12], the plaintiff entered into a TPF agreement with the defendant, agreeing to fund the defendant's partition suit in return for half the share of the partitioned property, regardless of how it is settled. The suit was ultimately settled through arbitration. However, the TPF arrangement between the funder and the client was held to be extortionate and unconscionable and thus in violation of India's Public Policy. The case further provided guidelines like the presence of undue influence and the allocation of funds and the arbitral award between the funder and the client to be considered relevant while evaluating the validity of the TPF agreements. Furthermore,

The Supreme Court, in Rattan Chand Hira Chand v Askar Nawab Jung,[13] explained what would be against the Public Policy in context with TPF agreements, stating that the contracts injuring public welfare, determined by the time and the societal conditions surrounding the enforcement of the contract and the facts of the case, would consider to be in violation with the nation's public policy.

In the English Legal system, any TPF agreement that amounts to champerty is considered to violate the public policy of the UK. Historically, champerty has only been applied to court proceedings. Although courts are much more relaxed now when it comes to the application of this doctrine, whether the courts in England & Wales will follow the footsteps of Hong Kong in not extending champerty to arbitration(Canonway Consultants Ltd v Kenworth Engineering Ltd)[14] is still conflicting. The issue has also been addressed by Lord Neuberger,

[10] Arbitration Conciliation Act 1996, s 34(2)
[11] Arbitration Conciliation Act 1996, s 48(2)(b)
[12] *Harilal Nathlal Talati v Bhailal PranlalShah* (1940) 42 BOMLR 165
[13] *Rattan Chand Hira Chand v Askar Nawaz Jung (dead) by l.rs. & Ors* (1991) SCC (3) 67
[14] *Canonway Consultants Ltd v Kenworth Engineering* [1994] HCCT 5/1994

who stated Access to the courts is a right and the State should not stand in the way of individuals availing themselves of that right.'[15]

**Disclosure and Confidentiality:** The two dichotomic obligations raise pertinent concerns for the involved parties and can affect the enforcement of an arbitral award or appointment of an arbitrator or both at a later stage**.** As expounded under Section 42(a) of the Arbitration Conciliation Act 1996[16] the parties to the arbitration agreement and the arbitrator must maintain confidentiality of all the arbitral proceedings. The norm can give rise to a conflict of interest between the arbitrator and the third party funding the arbitration proceedings, especially if there is a repeat appointment of an arbitrator by a party to the arbitration agreement and the third party has previously funded an arbitration proceeding with the same arbitrator[17]. The arbitral award under such circumstances can be challenged on the grounds provided under section 34 Arbitration Conciliation Act 1996.

International Bar Association and SIAC have mandated the general disclosure of the interest of Third Parties funding the arbitration process and empowered the tribunals to take further action, whereas ICSID Rules have made specific disclosure requirements. Although Section 12 of the Arbitration and Conciliation Act 1996[18] obligates the arbitrator to disclose any fact that may impair his/her impartiality, the extent of such disclosure vis a vis the confidentiality requirement is not specified. The extent of disclosure of the TPF agreement is left to the parties' discretion, causing ambiguity and ultimately jeopardizing the enforcement of the award, in which case the ultimate burden falls on the courts, undermining the role of arbitration in the first place.

Contrary to its Indian counterpart, The Arbitration Act 1996 does not obligate any sort of disclosures[19]. LCIA Rules 2020[20] under which a large number of arbitration proceedings take

[15] David Edmond Neuberger, *From barretry, maintenance and champerty to litigation funding : Harbour Litigation Funding first annual lecture* (2013)
[16] Arbitration Conciliation Act 1996, s 42(a)
[17] MNLU Mumbai Centre for Arbitration and Research (n 3)
[18] Subhrotosh Banerjee, 'Worldwide: Third-Party Funding In International Arbitration' (*Mondaq*, 06 march 2022) <https://www.mondaq.com/india/arbitration--dispute-resolution/1162218/third-party-funding-in-international-arbitration>a ccessed 05 July 2023
[19] Arbitration and Conciliation Act 1996
[20] LCIA Rules 2020

place in England, do not contain any obligation to disclose information to prevent conflict of interests. Additionally, the English Court in Arroyo and Ors v BP Exploration Co (Columbia) Ltd[21]held that the TPF agreements are subjected to legal advice privilege and as such there is no obligation on the parties to disclose how the claim is being funded in case of a privately funded claim. The position was reiterated by the Court in Edwardian Group Ltd and another v Singh and others.[22]

**Security for Costs:** Security for cost is a provisional measure where a party to arbitral proceedings (Typically respondent) seeks the tribunal to order the other party to make a security payment in case the former wins the claim and the latter refuses to fulfill his/her obligations due to lack of funds or other reasons. This provides the respondent protection against the cost of arbitration. Presently, the legal position on whether Security for costs should be an inherent part of the arbitral proceedings or not is unclear. As stated earlier, such an order is left up to the discretion of the tribunal.

The ICCA-QM Task Force's 2018 report on TPF[23] states that the existence of this feature should be determined by the solvency of the claimant. The same position was taken in *Eskosol S.P.A. v Italy and Garcia Armas v Venezuela,* in which the tribunals considered evidence based on the solvency of the claimants. However, a different position was taken by the English Court in the Progas Energy Ltd. v Islamic Republic of Pakistan Case where the feature was assessed based on the funding arrangement. These contrasting views increase the ambiguity in assessing the security for costs and increase the complexity around the security of costs in case they are being funded by a third party.[24]

In the Indian context, the provisions for security for costs have been introduced through the 15th amendment in the Arbitration Conciliation Act 1996.[25] However, the act does not explicitly

[21] *Arroyo v Equion Energia Ltd* [2016] EWHC 3348 (TCC)
[22] *Edwardian Group Ltd and another v Singh and others* [2017] EWHC 2805
[23] International Council of Commercial Arbitration, *Report of the ICCA- Queen Marry Task Force on third-party funding in international arbitration* (ICCA 04, 2018)
[24] Sami Houerbi and Sima Ghaffari, 'TPF beyond COVID-19: What can we expect in the post-pandemic scenario?' (*University of Nottingham Commercial Law Centre blog,* September 2020) <https://www.nottingham.ac.uk/research/groups/commercial-law-centre/blog/tpf-beyond-covid-19.aspx> accessed 07 July 2023
[25] Arbitration and Conciliation Act 1996

mention the position to be taken in case of TPF arrangements. Moreover, like its counterpart in the UK, the deciding factors are left up to the discretion of courts and tribunals, thus making the provisions non-obligatory in nature.

**PROBABLE SOLUTIONS**

In contemplating possible solutions, it's imperative to take the recommendations made by the Voss Report into account. The Voss Report proposes the introduction of a TPF regulatory regime focused on transparency, fairness, and proportionality. [26]The recommendations made by the Voss report can serve as a conspicuous basis for both countries to determine the correct pathway ahead regarding TPF arrangements. keeping these recommendations in mind, the following steps can be taken by both India and the UK:

**Establishing a consultation committee:** Since TPF agreements in arbitration are still in their developing stages in both countries, the establishment of a specific committee providing recommendations and analyzing the progress on the same is advisable. The need to conduct strong background research into the laws of maintenance and champerty is also imperative. Such a deep analysis would aid the speedy enactment of laws on the same**.**

**Establishing a uniform legal framework:** With the growth of the TPF industry, it has become imperative to define its scope in clearer terms. Whether such an arrangement only extends to litigation or does it extend to methods of ADR? In case it does, does it only cover arbitration or does it also extend to mediation and conciliation? The legislation should also clear ambiguities regarding the allocation of costs between the party being funded and the third party funding it, the security for costs, and other legal and regulatory procedures.

**Setting an award cap:** The VossReport recommends setting a cap of 40% over the settlement or award that the funders would be entitled to in the case of EU member states. In the absence of such a cap, it recommends that the member states should declare the arrangement invalid[27].

[26] Robert Wheal and Oliver Dean, 'The End of the Regulatory Vacuum in Europe and a New Era for International Arbitration In Ireland? Developments in Third-Party Funding Regulation' (*White & Case*, 27 October 2022) <https://www.whitecase.com/insight-alert/end-regulatory-vacuum-europe-and-new-era-international-arbitration-ireland> accessed 08 July 2023

[27] *Ibid*

Both India and the UK can implement an improvised version of this recommendation to solve ambiguity around the allocation of the arbitral award.

**Proposing joint liability for adverse costs:** Adverse costs in an arbitration procedure might have to be borne by the losing party. This is especially prominent in the UK under the 'loser pays' principle. These costs include the opponent's solicitors' fees, as well as other expenses or disbursements associated with the legal action, such as court fees, barrister and expert fees, and copying/printing costs. The potential liability of the losing party can, therefore, be substantial and difficult to predict. After the event insurance is a mechanism through which parties to the arbitration agreement can seek such adverse costs from a third party funding the proceedings. The Voss report suggests that in case of such costs, there should be no limit on the funder's liability[28]. However, putting the pressure of unlimited liability exclusively on the funder can make it seem unattractive to the investors. Especially in countries like the UK and India where the ATE market is in its fetal stage. Instead, both the party and the funder should be proposed to have limited liability in bearing the adverse costs, to the extent of their respective financial positions.

## CONCLUSION

Common law jurisdictions like India and the UK have always emphasized the concept of equality before the law and as such have recognized the importance of ADR mechanisms to make justice more accessible to various sections of society. ADR, with its primary purpose being making justice more accessible and reducing the litigation burden, continues to face hurdles such as funding, which defeats the entire purpose of having such a feature in the first place.

Consequently, this has led to the creation of new opportunities to fund such proceedings, third-party funding being the most prominent one. Although third-party funding has opened new doors for leveling the economic field between the parties and provided the funders with new investment opportunities, it has also given rise to new problems. TPF, previously restricted by the Doctrine of Maintenance and Champerty in the UK, has now started to

[28] Wheal and Dean (n 26)

emerge as a popular means of funding arbitration proceedings. With London serving as a hub for arbitration proceedings, it has become imperative for the country to shift from a mode of self-regulation to enacting uniform legislation regarding TPF agreements.

A very similar need has arisen in India, with the growing demand for arbitration as the chosen method for dispute resolution. Due to the lack of proper legislation, both countries continue to face ambiguities regarding contingency fee arrangements, public policy, disclosure and confidentiality, security for costs, etc.

There is a need to enact a comprehensive legal framework addressing the above-mentioned issues, which helps to eliminate the ambiguity regarding these provisions. Third-party funding in both India and the UK is expected to have exponential growth. With people and businesses increasingly opting for ways to settle matters in private proceedings, the field of arbitration is constantly on the rise. More law firms are now ready to fund the arbitration proceedings on behalf of their clients. More specialized institutions and investors are now looking to support parties in arbitration proceedings, which identify with a particular cause.

With such a tremendous shift in the landscape of arbitration funding, it is quite fair to say that the upcoming years can witness the process of litigation, which is quite cumbersome, being replaced by ADR mechanisms like arbitration, heavily. The implementation of a uniform legal framework will not only accelerate this process but also pave the way for India to invite more international players (firms or investors) to fund arbitration proceedings and for the UK to surpass global competitors like Singapore.