THIRD PARTY FUNDING IN ARBITRATION: INDIAN LEGAL PERSPECTIVE

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Third Party Funding is no longer alien to arbitral jurisprudence. With it having the potential of becoming a profitable investment market, there have been various attempts to aptly define third party funding agreements. A cross jurisdictional analysis has been attempted by analysing the position of funding agreements amongst various jurisdictions and arbitral institutions. Further, an attempt has been made to ascertain the validity of third-party funding litigation in India, the validity of doctrines of maintenance and champerty. An attempt to ascertain the validity of third-party funding agreements as per the conditions of a valid contract was laid down under Section 10 of the Indian Contract Act, 1872. A qualifier of reasonability put forth by the Indian judiciary while ruling on funding agreements has also been discussed. The author being convinced about the validity of these agreements under the Indian Contract Act, has further tried to analyse the position of the funders in arbitration proceedings. Acknowledging a lack of regulations in the country regarding such funding agreements, an attempt has also been made to pick out regulating mechanisms from various jurisdictions in order to identify and fix the apertures pertaining to the regime of funding agreements in India till an act is devised by the legislature.

I. INTRODUCTION:

Third Party Funding (TPF) is no longer a new concept to arbitration. The recent decade has witnessed an increase in TPF, such that it is potentially seen as a blooming investments market of the future. The International Council for Commercial Arbitration (ICCA) has observed that the global market for dispute funding for arbitration and litigation is estimated to exceed US$10 billion and is "rapidly growing".[1] With institutions such as the Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA) and the Hong Kong International Arbitration Centre (HKIAC) welcoming TPF and starting to address challenges associated with it by conducting symposiums, deliberations and by ICCA setting up a commission on TPF in international arbitration, it is high time for India to settle the uncertainties associated with TPF in the country.

There have been frequent debates as to the requirement of TPF. However, the most important question which still remains unsettled is: *what is TPF?* There have been efforts towards answering this from scholars, international bodies like ICCA by setting up task forces, and states like Hong-

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[1] The International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 p. 17 (April, 2018).

Kong setting up commissions and enacting laws such as those in Singapore. The principle contention has been with respect to the scope of the definition of the term- whether it should be wide i.e. non-exhaustive (*latusensu*) or narrowed down to a few sources i.e. an exhaustive list (*strictosensu*).

There have been different responses and regulatory mechanisms to address TPF in different jurisdictions like UK, USA, Singapore, Australia, etc., each unique in itself, thus making it relevant to determine the global response to TPF. Now, with India's efforts to promote international trade and a bid to turn New Delhi into a likely centre for International arbitration, it becomes relevant to determine the status of TPF in India and its possible legal hurdles. The Indian legal system has primarily two prevalent modes of resolution of civil disputes, and it also recognises the concept of indigent parties through its Code of Civil Procedure, 1908 to cater to the needs of litigation as well as realising Article 39A of the Constitution of India, 1950 i.e. "*Access to legal recourse*". The Supreme Court of India recently made an observation as to the validity of third-party litigation funding and its legality in a 'non-indigent persons' scenario and also as a commercial activity, but there is no such sister provision or judicial pronouncement that caters to the funding needs of arbitration.[2] Until this point, there have been no such reportable disputes in India as to TPF in arbitration, but with an increase in arbitration as a preferred dispute settlement mechanism and realising the costs associated with it, it becomes imperative to look forward to funding agreements. Therefore, an analysis of doctrines of maintenance and champerty have been conducted. Legality of funding agreements is not just related to whether they are violative of common law doctrines but whether they are fulfilling the requirements of the law of contracts in India, which confers on them not just legality but also enforceability. Thus, a brief analysis of comparing TPF agreements with the essentials of the Indian Contract Act, 1872 with respect to 'lawful considerations', 'objects' and 'wager agreements' is required.

Having determined the validity of TPF agreements under Indian Law, the position of the funders with respect to arbitration proceedings must be determined under the Indian Arbitration and Conciliation Act, 1996. Acknowledging a lack of regulations in the country with respect to the working of TPF agreements, a cross jurisdictional analysis as to determining the best alternative practices and apt regulatory mechanisms for India that can regulate TPF as well as cater to challenges pertaining to the Indian context has been attempted.

[2] Bar Council of India v. A.K. Balaji & Ors., AIR 2018 SC 1382.

II. THIRD PARTY FUNDING DEFINED:

There has been a general consensus amongst scholars that TPF is difficult to define.[3] TPF is a form of investment which provides for funders who are alien or have no connection to the claim of the plaintiff to invest in consideration of a share in future proceeds, if the claim succeeds.

The term "third-party funding" refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,

a) funds or other material support in order to finance part or all the cost of the proceedings, either individually or as part of a specific range of cases, and

b) 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.[4]

The International Bar Association ("IBA") defines the term as, "[T]he terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration."[5] Scholars like Yves Derains defines TPF as, "a scheme where a party unconnected to a claim finances all or part of one of the parties' arbitration costs, in most cases the claimant. The funder is then remunerated by an agreed percentage of the proceeds of the award, a success fee, or a combination of the two or through more sophisticated devices. In the case of an unfavourable award, the funder's investment is lost."[6] Lord Justice Jackson defines it as "the funding of claims by commercial bodies in return for a share of the proceeds."[7] It involves a "third person" to the proceedings providing financial "assistance or support to a party to" the proceedings.[8]

A feature of TPF that distinguishes it from other forms of financing of Proceedings is that the Third-Party Funder will be compensated only from the Funded Party's net recoveries from the Proceedings. A Funded Party will not have to pay any amount to the Third-Party Funder if the Proceedings are unsuccessful.[9] Typically, when discussing TPF, one should keep in mind the

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[3] Catherine A. Rogers, *Ethics in International Arbitration* 183 (Oxford University Press, 2014).
[4] The ICCA-Queen Mary Task Force Report on Third Party Funding.
[5] IBA Guidelines on Conflicts of Interest in International Arbitration, 2014, Explanatory Note to General Standard 6.
[6] Foreword by Yves Derains in Bernardo M. Cremades and Antonias Dimolitsa (eds.), *Third-party Funding in International Arbitration* (International Chamber of Commerce, Paris, 2013).
[7] Lord Justice Jackson, "Third Party Funding or Litigation Funding" Speech delivered at the Sixth Lecture in the Civil Litigation Costs Review Implementation Programme, The Royal Courts of Justice, Nov. 23, 2011.
[8] *Unruh* v. *Seeberger*, (2007) 10 HKCFAR 31, at ¶ 118 (*per* Ribeiro PJ).
[9] "Third Party Funding for Arbitration" HKLRC Consultation Paper (2016).

non-recourse financing by a third party of the costs of pursuing a claim in exchange for a portion of the recovered proceeds. In case of an unfavourable award, the third-party funder's investment will be lost.[10]

Only two jurisdictions, namely Singapore and Hong Kong, have attempted to define TPF by providing TPF with a statutory recognition. Singapore enacted the amended Civil Law Act and the Civil Law (TPF) Regulations 2017 (Regulations) thereby allowing TPF in Singapore. Section 5B(2)[11] attempts to define TPF as, *"*A contract under which a qualifying Third-Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty.*"*

In India, TPF is at a nascent stage. There is no statute or case law defining TPF in India. It is neither expressly barred nor allowed by law. The Supreme Court recently in *Bar Council of India v. A.K.Balaji and ors*[12] allowed third parties (non-lawyers) to fund litigation with recipients of their profits based on the outcome.

III. LEGALITY OF THIRD-PARTY FUNDING IN JURISDICTIONS ACROSS THE GLOBE:

Common law jurisdictions historically ruled against champerty and maintenance whereas in civil law jurisdictions, the existence of professional attorneys, ethics, rules and ownership of claim constraints have played a divisive role in providing limitations on TPF arrangements[13] thereby resulting in a diverse national law across globe.

An explicit law governing and regulating TPF has been only enacted by two states, Singapore and Hong-Kong, whereas most states like US, UK, Australia, Netherlands etc. have ruled TPF agreements to be valid and enforceable contracts but there are still no such rules governing them.

Civil Law Act and the Civil Law (TPF) Regulations, 2017 ("Regulations") allow for the third-party regulations in Singapore. The scope of the 2017 regulations pertains to allowance of third-party dispute funding in Singapore, but allowing it strictly only in international arbitration in line

[10] Derains (supra at note 6), Foreword, p. 5.
[11] Civil Law Act, Singapore (Chapter 43) (Original Enactment: Ordinance 8 of 1909).
[12] Bar Council of India v. A.K.Balaji and Ors., AIR 2018 SC 1382.
[13] Lisa Bench Nieuwveld and Victoria Shannon Sahani, "Third Party Funding in International Arbitration" *Kluwer Law International B.V*. 43 (2016).

with efforts to make Singapore as the most preferred destination for arbitration. Otherwise, TPF agreements are void and not enforceable in Singapore on grounds of the common law doctrine of maintenance and champerty.[14]

Efforts of a similar nature were attempted in Hong Kong in 2015 where the Law Reform Commission (LRC) released a consultation paper deliberating on the viability of TPF in arbitration and that it should be permitted under Hong Kong law. The Commission has recommended that funding must be allowed to keep Hong Kong as a preferred source of arbitration.[15] The efforts of the Commission finally culminated with the passing of the Code of Practice for Third Party Funding of Arbitration in December 2018 and to be effectively applicable from February 2019.[16]

In England, the presence of the common law doctrines of maintenance and champerty have historically led to TPF being void and unenforceable under English law. This rule has been applied to domestic but not to overseas litigation,[17] and has further been extended to apply to arbitration as well[18]; but lately, the country has been relaxing the norms of certain forms of funding, and lawyers are being specifically permitted by the legislation to enter into conditional fee agreements. Furthermore, the courts have expressly legitimized the same, which allows litigators to take a part of the award claim as their fees and expenses.[19] TPF has been a self-regulated industry through the Association of Litigation Funders in England, and there has been an absence of any specific legislation pertaining to TPF. However, despite the absence of any specific regulation, TPF has been seen in a positive light by the judiciary.[20]

In New Zealand, the funded party needs to expressly disclose the contract of funding.[21] In other jurisdictions like Australia, the courts have expressed that TPF agreements are not contrary to the doctrines of maintenance and champerty, and that the potential for abuse of process posed by funding arrangements can be protected by judicial forums.[22] Courts have further expanded their view point as to hold that it is not an abuse of process for a funder to exercise a degree of

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[14]The Law Society of Singapore v. Kurubalan s/o Manickam Rengaraju, [2013] SGHC 135; Otech Pakistan Pvt Ltdv. Clough Engineering Ltd., [2007] 1 SLR 989.
[15]The Law Reform Commission of Hong Kong, Consultation Paper on Third Party Funding for Arbitration(October 2016).
[16] Code of Practice for Third Party Funding of Arbitration, Arbitration Ordinance (Cap. 609).
[17]*Mansell* v. *Robinson*, [2007] EWHC 101 (QB).
[18] Bevan Ashford v. Geoff Yeandle, [1998] 3 WLR 172.
[19] Courts and Legal Services Act 1990, § 58.
[20]*Arkin* v. *Borchard Lines Ltd.*, [2005] 1 WLR 3055 (CA).
[21] Waterhouse v. Contractors Bonding Ltd, [2013] NZSC 89.
[22]*Giles* v. *Thompson*, [1994] 1 AC 142, at p.153.

control which renders the plaintiff's interests subservient.[23] In other states such as Finland, Nigeria, Sweden and Brazil, third party costs can be irrecoverable because the claimant has not incurred those costs, and the funder does not have the standing to recover their own costs.

Other major arbitral institutions around the world such as LCIA, SCC, SIAC etc. are still in the deliberations process as to position of the TPF agreements while organising symposiums and discussions around the globe.

IV. THIRD PARTY FUNDING IN INDIA:

India follows a common law system with adversarial proceedings. The legal system is bifurcated into civil and criminal domains. There are two major dispute resolution mechanisms available as to-

a. litigation in Indian courts and tribunals;

b. arbitration governed by Arbitration and Conciliation Act, 1996.

The Civil Procedure Code, 1908 ("CPC") recognizes the concept of indigent parties.[24] Further, TPF has been also expressly recognized in certain states as Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh through amendments in Order XXV Rule 1 of CPC which provides that courts have the power to secure costs for litigation by asking the financier to become a party and depositing the costs in court.

There are two doctrines of maintenance and champerty that govern the legality of funding agreements in common law, and since India is a common law country, this gains all the more relevance. Prohibitions on champerty and maintenance evolved in medieval England[25] and the rationale was to counter the growing practice of intermeddling by third parties, which was considered as endangering the inherent integrity of the judicial process, historically a private matter restricted to the judge and the two litigants.[26] In common law, maintenance means the procurement, by direct or indirect financial assistance, of another person to institute, carry on, or defend civil proceedings without lawful justification practice of powerful feudal lords and noblemen resorting to prosecution of frivolous claims against adversaries to intimidate them and

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[23] Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd, [2006] HCA 41.
[24] The Code of Civil Procedure Code, 1908, Order XXXIII.
[25] David S. Abrams and Daniel L. Chen, "A Market for Justice: A First Empirical Look at Third Party Litigation Funding"15 *University of Pennsylvania Journal of Business Law* 1075 (2013).
[26] Max Radin, "Maintenance by Champerty" 24 *California Law Review* 48 (1935).

dissuade legal action.[27] Champerty has been often viewed as a form of maintenance where the funder also keeps a share in the proceeds.

In the colonial era, English doctrines were seen to be applicable to India as English customs were imported into the Indian legal system. The uncertainty over the applicability of these doctrines remained as in an unreported decision of Peel, J. in 1825, who held that the English prohibitions on champerty and maintenance did not apply to India[28]. However, the decision was not followed, and was soon rebutted in *Grose & Anr v. Amirtamayi Dasi*[29] and *Mulla*[30] where it was concluded that champerty and maintenance would be inapplicable to the Presidency Towns, and such agreements would be void on grounds of public policy.

In 1876, the position of law reversed as the Privy Council held that these doctrines inherited a special character and the British statutes relating to them were inapplicable to India. It was recognised that an agreement to supply funds to carry on an action as consideration for a share of the proceeds arising out of such action would not per se be opposed to public policy.[31] Subsequently, the courts maintained a uniform position to hold that the doctrines of champerty and maintenance are not applicable in India. Indian courts have made observations to the extent that funding agreements can be struck down only if the object is contrary to public policy[32] and that the funding agreement is a tool to provide access to justice.[33] Recently, a division bench of Justice A.K. Goel and Justice U.U. Lalit observed in *Bar Council of India v. A.K. Balaji & ors.*[34]

> *"35. In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. There appears to be no restriction on third parties*

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[27] Jonathan Rose, 'The Law of Maintenance: The Judicial Development of the Law' *British Legal History* Conference (Oxford, July 2007), available at: www.law.harvard.edu/programs/ames_foundation/BLHC07/MaintBLHC.pdf (Visited on June 18, 2019).

[28] M. P. Jain, 'The Law of Contract Before its Codification' Journal of the Indian law Institute, Special Issue: Laws of Evidence and Contract 188 (1972), available at: http://14.139.60.114:8080/jspui/bitstream/123456789/16203/1/006_The%20Law%20of%20Contract%20before%20its%20Codification%20%28178-204%29.pdf (Visited on June 18, 2019).

[29] Grose & Anr v. Amirtamayi Dasi, (1869) 4 Beng LR 1.

[30] Mulla Jaffarji Tyeb Ali Saib v. Yacali Kadar Bi & Ors, (1871-1874) 7 Mad HCR 128.

[31] *Ram Coomar Condoo* v. *Chandra Canto Mukerjee*, (1876-77) 4 IA 23,1876 SCC OnLine PC 19.

[32] Sri Raja Vatsavaya Venkata Subhadeayyamma Jagapati Bahadur Garu v. Sri Poosapati Venkatapati Raju Garu & Ors., AIR 1924 PC 162, (1924) LW 298, 1924 SCC OnLine PC 22; Mukesh Mahadeo Mahadik v.Shaila Jayant Rane & Ors., 2015 SCC OnLine Bom 2852; Shankarappa Kotrabasappa Harpanhalli v. Khatumbi Kom Jamaluddinsab Nashipudi & Ors., AIR 1932 Bom 478; Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by LRs & Ors., (1991) 3 SCC 67.

[33] *Kishen Lal Bhoomik* v.*Pearee Soondree & Ors.*, 1852 Sudder Dewanny Adawlut (SDA) 394-397.

[34] Bar Council of India v. A.K. Balaji & Ors., AIR 2018 SC 1382.

(non-lawyers) funding the litigation and getting repaid after the outcome of the litigation. In U.S.A., lawyers are permitted to fund the entire litigation and take their fee as a percentage of the proceeds if they win the case. Third Party Litigation Funding/Legal Financing agreements are not prohibited. In U.K., Section 58B of the Courts and Legal Services Act, 1990 permits litigation funding agreements between legal service providers and litigants or clients, and also permits third party Litigation Funding or Legal Financing agreements, whereby the third party can get a share of the damages or "winnings".

36. In India, partnerships with non-lawyers for conducting legal practice is not permitted. In U.K., Section 66 of the Courts and Legal Services Act, 1990 expressly permits solicitors and barristers to enter into partnerships with non-solicitors and non-barristers."

While the CPC expressly recognizes the concept of litigation financier, the judiciary has held that the doctrines of maintenance and champerty as not violative of public policy of the country. Section 19 of the Arbitration and Conciliation Act, 1996 expressly carves out arbitration from the CPC as it states, "*the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908*". Further, there is a lack of sister provision in the Arbitration and Conciliation Act, 1996 catering to TPF.

V. LEGALITY OF THE AGREEMENTS IN ACCORDANCE WITH THE INDIAN CONTRACT ACT, 1872:

Section 10 of the Indian Contract Act, 1872 enunciates a valid contract as "*all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are hereby not declared as void."* Therefore, the act lists down five conditions for a lawful contract i.e. a free consent, competency of the parties, lawful consideration, lawful object and hereby not declared as void.

Lawful Consideration:

As Pollock states, "Consideration is the price for which the promise of the other is brought, and the promise thus given for value is enforceable."[35] Lush, J. in *Curie v. Misa*[36] states, "A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other." Section 2(d) defines consideration as "*when, at the desire of the promisor,*

[35] Sir Frederick Pollock, *Pollock on Contracts* 133 (Stevens & Sons, London, 13th edn., 1950).
[36] *Curie* v.*Misa*, (1875) 10 Ex 153, 162.

the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

If there have been successful claims, there is a fulfilment of the condition of payment of consideration by both the parties, but what if the claims are unsuccessful? For example, consider that the funder has already performed his part of consideration and the claim is unsuccessful. According to the concept of the TPF, the funded party owes no liability as to the refund of the consideration. In that case, will it be a valid contract?

A TPF contract consists of a transfer of money or a promise to pay money in future to cover legal and all the other antecedent costs of the claim along with a liability to pay damages in case of the failure of the claim in lieu of a share in proceeds of the claim if it is successful. It provides the party an interest in the arbitration proceedings along with conditional profits and benefits in cases of a claim being successful, and forbearance of liability in cases of failure. A coverage needs to be provided for the insured's own legal fees and costs and/or the insured's potential liability for the opponent's legal fees and costs if the claim is unsuccessful.[37] Litigation/arbitration insurance is taken out after a legal dispute has arisen and covers the risk that the insured party will be unsuccessful in the litigation/arbitration.[38] They are also funded by equity based investments, corporate finance, loans or a hybrid of them. Therefore, a TPF agreement is not hit by a requirement of a valid consideration requirement as there is the presence of a valid quid-pro-quo between the parties as to the payment or a promise to pay in the future in lieu of benefits in the final claim amounts.

Competency and Free Consent:

Section 11 of the act enunciates as to who are competent to contract as, "*Every person is competent to contract who is of the age of majority according to law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."* This general condition applies to a fact specific scenario and will not be applicable to third-party contracts as a concept. Similar is the concept of free consent to the contract which is fact-specific and thus does not affect the third-party contracts as a concept.

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[37]Bristows, "Guide to Litigation Costs Funding and Insurance" *Zorin available at:* http://www.zorinlegal.com/fileadmin/user_upload/docs/Litigation_funding_insurance_guide.pdf (Visited on June 18, 2019).

[38] The International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 at p. 34 (April, 2018).

Lawful Object:

Section 23 of the act stipulates that the consideration or object of an agreement is lawful unless the court regards it as immoral or opposed to public policy. Public policy, being considered as a vague term, a contract which has the object of interference with the administration of justice has been considered as opposed to public policy. The doctrines of maintenance and champerty have been viewed as a public policy objective by various common law jurisdictions including India. Agreements by which a stranger advances money for maintenance of litigation with a view to obtaining an unconscionable gain are called champertous agreements.[39]

The courts in India have observed that there is no specific prohibition on champertous agreements as discussed earlier, but there have been few instances of certain qualifiers put by the courts on funding agreements. In *Harilal Nathalal Talati v. Bhailal Pranlal Shah*,[40] the agreement was held to be extortionate and unconscionable and opposed to public policy for a reason that an agreement which provides the funder with $3/4^{th}$ of the share is not reasonable or fair. Similar agreements with share agreed as to $3/6^{th}$ [41], $1/4^{th}$ [42] and $1/8^{th}$ [43] have been upheld as valid agreements. Whereas in one of the cases, an agreement of $1/6^{th}$ of the property was also held as invalid because of the value of that share[44] whereas an agreement to pay 40 percent of the proceeds was also held to be champertous.[45]

Thus, a qualifier of "reasonability" and "genuine commercial interest" in the quantum of proceeds that has been put so as to check the practices of unfair contractual terms and exploitation of the party in a weak position. Now, what is reasonable has been left to the wisdom of the courts and is purely subjective in nature. Courts may undertake considerations such as the share percentage, net value of the share, and position of the parties while bargaining the shares into consideration when determining the nature of the contracts as champertous or not. Though the courts have expressly held the non-applicability of these doctrines in the Indian legal system, they have also not been hesitant to apply these doctrines in fact-specific circumstances.

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[39] Khaja Moinuddin Khan v. S.P. Ranga Rao, AIR 2000 AP 344 at p.346.
[40] Harilal Nathalal Talati v. Bhailal Pranlal Shah, AIR 1940 Bom 143; Nuthaki Venkataswami v. Katta Nagi Reddy, AIR 1962 AP 457; Babu Ram v.Ram Charan Lal, AIR 1934 All 1023.
[41] Vatsavaya Venkata Subhadeayyamma Jagapati Bahadur Guru v. Poosapati Venkatapati Raju Guru, AIR 1924 PC 162.
[42] Valluri Ramanamma v. Marina Viranna, (1931) 33 MLW 757.
[43] Rajah Mokham Singh v. Rajah Rup Singh, (1892-93) 20 IA 127.
[44] Ratanchand Hirachand v. Askar Nawaz Jung, AIR 1976 AP 112.
[45] Khaja Moinuddin Khan v. S.P. Ranga Rao, AIR 2000 AP 344.

There have been various funding sources such as individual direct funding, insurance, loans, corporate financing, equity-based and inter-corporate funding, attorneys as funders etc.[46] Applying the golden English constitutional principle of "*Everything which is not forbidden is allowed*", every form of funding is allowed in the Indian legal scenario except attorneys as funders.

As provided in Bar Council of India Code of Conduct and expressly stated by a division bench of Justices AK Goel and UU Lalit in *Bar Council of India v. A.K. Balaji & ors.*[47],

> *"35. In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients."*

Therefore, a funding agreement between advocates and clients has been expressly barred in India. Further, a system of contingent fee, i.e. fee to the advocate depending upon the outcome of the case has been held as against the public policy. It is a professional misconduct for an advocate to stipulate for or agree with his client to accept as his fee or remuneration a share of the property sued or other matter in litigation upon the successful issue thereof.[48] In *Re: 'G', A Senior Advocate of The Supreme Court*, [49] where a senior advocate was suspended by the bar council for misconduct under Section 11(1) of Bar Councils Act for entering into an agreement of contingent fee with the client, his suspension was upheld by the Supreme Court and the agreement was held to be illegal and void.

Hereby not declared as void [Wager Contracts]

Another contentious point could be that whether the funding agreement, being subject to a contingent future situation, may be termed as an agreement by wager and be void ab-initio. Section 30 of the Indian Contract Act stipulates as, *"Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made."* Now, there can be one potential argument against TPF, which is that since the funding agreements are based on the success of a future uncertain event or feed on uncertainty, they are wager contracts and thereby void ab initio.

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[46] The International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 p. 35 (April, 2018).
[47] Bar Council of India v. A.K. Balaji & ors., AIR 2018 SC 1382.
[48] Kathu Jairam Gujar v. Vishvanath Ganesh Javadekar, AIR 1925 Bom 470.
[49] Re: 'G', A Senior Advocate of The Supreme Court, AIR 1954 SC 557.

Definition of wager as given in *Carlill v. Carbolic Smoke Ball Co.*[50] as *"a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of such event, one shall win from the other, and that other shall pay or hand over to him, a sum or money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake which he will so win or lose, there being no other real consideration for the making of such contract by either of the parties."* Thus, mutual chances of gain or loss has been an essential to a contract being a wager.[51]

Applying the principles of wager into a TPF agreement:

1. It is based on a future uncertain event i.e. subject to an outcome of an arbitration claim.

2. The two parties to the contract do not hold an opposite view about the future uncertain event as both the parties to the agreement are in favour of a single outcome, i.e. a positive outcome of the claim which could serve their individual respective purposes, which is a funder getting return on his investment and the funded party being provided with his claimed right.

3. Both the parties would be either at the winning or the losing end and therefore an essential requirement that either side should either win or lose respectively is not fulfilled.

Further, an agreement is a wager agreement only if neither party has any interest in the happening of the event other than the sum that he will lose according to the contract. Whereas, in funding agreements, one of the parties has a pre-existing interest in the arbitration proceedings as a claimant or the respondent apart from the costs under the funding agreement.

However, TPF agreements can find a place under the Indian Contracts Act, 1872 under the ambit of contingent contracts. Section 31 of the act defines contingent contract as, "*a 'contingent contract' is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen."* Since, the nature of TPF is that the payment of the proceeds to the funder is based on the event of success of the claims, it can be termed as contingent contract and hold validity under Indian law.

[50] Carlill v. Carbolic Smoke Ball Co., (1893) 1 QB 256.
[51] *Sasson* v. *Tokersey*, ILR (1913) 28 Bom 616.

VI. POSITION OF THE THIRD-PARTY FUNDER IN ARBITRATION PROCEEDINGS:

Having already established that the funding agreements are not in contravention of the Indian laws, another challenge exists as to the position of the funders with respect to the arbitration proceedings. In the Arbitration and Conciliation Act, 1996 there lies no express provision which vests the power to the tribunal or the courts to bind any third party or signatory to arbitration. Further, the act does not contain any provision wherein a third party can challenge the award. But the legislature made the amendment to Section 2(1)(h) of the Act which earlier defined a '*party'* to mean '*a party to an arbitration agreement';* but with the amendment, the term '*party'* in various sections of an arbitration agreement and in reference of the court to arbitration, finality of award, etc. has been made wider, and the words '*any person claiming through or under him*' have been added, showing the legislative intent to include, to a certain extent, third parties to the initiation, proceedings and award of the arbitration. As held in *Chloro Controls,*[52] *"It does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party."*

There is no dispute about the proposition of law that a third party cannot appear before the arbitral tribunal and seek any interim measures under section 17 of the Arbitration & Conciliation Act, 1996 or seek any modification or variation of the interim measures if granted by the arbitral tribunal against such third party even though he may be aggrieved by such interim measures granted by the arbitral tribunal.[53] A person having vital interest in the subject matter of arbitration agreement cannot be asked to watch proceedings from the fence and leave the arena for the parties to the arbitration agreement to cut swords, when the victim of the outcome of the dispute is non else but the person pushed to the fence.[54]

Thus, the possibility of a third party being involved directly in an arbitration proceeding is not farfetched in view of the recent developments of the arbitral jurisprudence in India. But with a possibility of funders being involved in the proceedings, a condition of mandatory disclosure of the funding agreements before the arbitrators must be introduced so as to facilitate the entire process.

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[52] Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors., (2013) 1 SCC 641 at para 65.
[53] Prabhat Steel Traders Pvt. Ltd. and Ors. v. Excel Metal Processors Pvt. Ltd. and Ors., 2019 SCC OnLine Bom 2347 at para 41.
[54] Mohammad Ishaq Bhat v. Tariq Ahmad Sofi & Anr., (2010) 3 Arb.LR 107.

VII. REQUIREMENT OF THIRD-PARTY FUNDING IN INDIA:

A bid is being made to turn New Delhi into a centre for International Arbitration by the announcement of the New Delhi International Arbitration Centre Bill, 2018 and its passing in Lok Sabha and comparing it to the likes of Singapore, London, Stockholm and Hongkong– but settlement of disputes is still a lengthy process. The Supreme Court recently in *Bar Council of India v. A.K. Balaji & ors.*[55] allowed TPF in litigation in India. This leads us to a possibility of TPF in arbitration in India.

Though arbitral institutions in the country such as Delhi High Court Arbitration Centre, Mumbai Centre for International Arbitration ("MCIA"), Nani Palkhivala Arbitration Centre and Indian Institute of Arbitration and Mediation ("IIAM") have taken an initiative to make arbitration more accessible and cost-friendly, arbitration is still perceived as an elite dispute settlement process. The filing costs and expenses still override litigation, which has subdued its growth in the country. The basic costs or administration fees for filing an arbitration is still as high as Rs. 30,000 in Delhi High Court Arbitration Centre and IIAM to Rs. 40,000 in MCIA, excluding arbitrator's fees and other expenses (such as costs of stay, travel etc.) compared to court fees for filing a fresh civil suit range from Rs. 50 - 15000 [56] with no additional expenses borne unlike arbitration. Rise of the international arbitration has led to attendant costs and thus users are demanding ways to finance their matters.[57]

The International Council for Commercial Arbitration ("ICCA") has noted that some reports suggest that the global market for dispute funding for arbitration and litigation is estimated to exceed US$10 billion and is "rapidly growing"[58]. Thus, to keep up with competitive scenarios around the globe and the potential for a profitable economic market, an effort to make arbitration a cost-friendly process in India and bring recognition to India as an arbitration friendly jurisdiction, TPF agreements pertaining to arbitration should be given an expressive recognition under Indian law, and statutory rules should be formulated determining thresholds as to the qualifiers of "reasonability" and "genuine commercial interest" in the quantum of proceeds with respect to TPF.

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[55] Bar Council of India v. A.K. Balaji & Ors., AIR 2018 SC 1382.

[56] Court Fee Required to be Affixed in Fresh Cases Filed Before the Establishment of District and Sessions Judge, *available at:* https://districts.ecourts.gov.in/sites/default/files/Court%20Fee%20for%20Filing%20Fresh%20Case_2_0.pdf (Visited on June 18, 2019).

[57] J. Von Goeler, "Third Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library" 35 *Kluwer Law International Volume* 1-2 (2016).

[58] The International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4 p. 17 (April, 2018).

VIII. PROPOSED REGULATORY FRAMEWORK:

TPF jurisprudence is still at a developing stage throughout the globe. There has been some development in the jurisprudence due to non-applicability of the doctrines of maintenance and champerty in Civil law countries, and Germany is an excellent example of a booming TPF market.[59]

There have been distinct examples of TPF regulatory mechanisms across the globe. In Netherlands, there is no bar on accessing TPF; however, no legislation has been enacted to govern this practice. In the absence of special legal provisions governing these transactions, funding agreements are governed by principles of Dutch contract law and lawyers are expected to follow ordinary professional rules while advising on matters of TPF.[60]

In England and Wales, TPF is subject to voluntary regulation through the Association of Litigation Funders of England and Wales ("ALF") and has been a classic model of voluntary regulation as a mechanism being widely recognised by government to provide a viable regulatory framework as an alternative to statutory regulation.[61]

In Australia, there is a minimum regulatory mechanism as to third-party funders that should ensure that conflict of interest has been managed by them adequately.[62] In Germany, a funder does not provide legal advice to the client.[63] Apart from such restriction relating to attorneys, TPF in Germany has been an unregulated industry. Singapore prohibits third-party dispute funding domestically but has strategically allowed it in International Arbitration via Civil Law Act and the Civil Law (TPF) Regulations 2017 (Regulations) which allows for the third-party regulations in Singapore. In Hongkong, the Law Reform Commission (LRC) released in 2015 a consultation paper on TPF where it suggested a set of non-binding regulations to be put forth as a testing mechanism for 3-5 years and subsequently a regulatory law covering the inadequacies of the regulations. The commission recommended:[64]

A. *We recommend that the Arbitration Ordinance should be amended to provide that TPF for arbitration taking place in Hong Kong is permitted under Hong Kong law.*

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[59] Cento Veljanovski, "Third Party Litigation Funding in Europe" 8 *Journal of Law, Economics & Policy* 405 (2012).
[60] Maarten Drop, Jeroen Stal and Niek Peters, 'Netherlands' in Steven Friel and Jonathan Barnes (eds.), Woodsford Litigation Funding, *Litigation Funding 2018 - Getting the Deal Through* 48 (Law Business Research Ltd., London, 2017).
[61] Association of Litigation Funders, *available at:*http://associationoflitigationfunders.com/about-us/ (Visited on June 18, 2019).
[62] Regulation 7.6.01AB of the Corporations Regulations, 2001 (Cth).
[63] Section 49b (2) of the Federal Lawyer's Act (Bundesrechtsanwaltsordnung, BGBI. l,565,1959).
[64] The Government of the Hong Kong Special Administrative Region of the People's Republic of China, *available at:* https://www.hkreform.gov.hk/en/docs/tpf_se.pdf (Visited on June 18, 2019).

B. We recommend that clear ethical and financial standards for Third-Party Funders providing TPF to parties to arbitrations taking place in Hong Kong should be developed.

Having analysed regulatory mechanisms pertaining to TPF of various jurisdictions, there are two essential models governing the TPF globally – self-regulated/unregulated and regulation through statutes.

We propose that India, while determining the type of model it wants to pursue, can take the example of Netherlands to make the entire process self-regulated in the transition process before the Legislature and Bar Council can be called upon to provide a set of ethical standards which need to be adhered to by the advocates in cases of presence of funding agreements like mandatory disclosure of the funding agreements such as Law Society of Singapore's Guidance Note 10.1.1 on TPF read with Rule 49A of the Legal Profession (Professional Conduct) Rules 2015. Another way can be the creation of a voluntary regulatory entity like ALF. It can act as a master directory of all the third-party funders in the country and can also be useful to run a confidentiality check.

India being at nascent stages of TPF, with no reportable cases existing in its jurisprudence regarding the subject, the country is at the most prime stage to adapt to regulatory mechanisms and kickstart funding operations a step ahead. The Hong Kong model, i.e. a set of non-binding regulations, should be released by the government to provide a sense of regulation in the market and subsequently a binding act can be enacted. However, there are a few challenges as to funding agreements in Indian such as the conflict of interests, control of the arbitration by third party funder's, disclosure requirements and regulating the unscrupulous funders.

NITI Aayog deliberated as to insufficiency of a pool of professional arbitrators who are able, conflict free and above all, non-partisan.[65] Conflict of interests can be curbed through setting up guidelines as to mandatory disclosure of funding agreements, by streamlining the process of appointment of arbitrators under Section 11 of the Arbitration and Conciliation Act, and reducing the challenges to the validity of the arbitral award. Further, there can be a dedicated bar set up like "Insolvency Professionals" and "Insolvency Professional Agencies" who are enrolled with the Board to calculate conflicts in a speedy manner.

Further reference can be taken from IBA which laid down the Guidelines on Conflicts of Interest in 2014 where general standard 7A which required that a party to receive a TPF should

[65] Bibek Debroy and Suparna Jain, *Strengthening Arbitration and its Enforcement in India – Resolve in India* (NITI Aayog), *available at*: www.niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf (Visited on June 18, 2019).

disclose it to the tribunal at the very first opportunity. General Standard 7(a) lays down that a party shall inform the arbitrator, the tribunal and all other parties (as well as any administering or appointing authority) of any relevant direct or indirect relationship between the arbitrator and "the party (or another company of the same group of companies or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in the award to be rendered in the arbitration" (i.e. a third-party funder or insurer).[66]

ICC in 2016 issued a guidance note for the disclosure of conflicts by arbitrators which "aims at ensuring that arbitrators are forthcoming and transparent in their disclosure of potential conflicts".[67] It states that, *"in addressing possible objections to confirmation or challenges, the Court will consider… Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case."*[68] Various investment tribunals also have supported the view of disclosing the TPF agreements to the tribunals at the earliest opportunity and recognized this ground as to challenge the constitution of the arbitration panel.[69]

The 2015 amendment to the Act has been a positive step for third parties to arbitration proceedings in India. A further amendment as to the scope of involvement of the funders in arbitration proceedings can be set out as in Germany where funders cannot provide with legal advice. The focus of the Indian Judiciary, despite ruling out maintenance and champerty doctrines, has been to put a qualifier of "reasonability" in the percentage or part of proceeds to be with the funder to keep a check on the practices of unfair contractual terms and exploitation of the party in a weak position. This leads to uncertainty of the funding agreements. There should be a fixation of the total percentage of the proceeds apart from initial investment that a funder can appropriate, which should be set out so as to end the realm of uncertainty.

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[66] General Standard 7(a), IBA Guidelines on Conflicts of Interest in International Arbitration, 2014.

[67] ICC Court adopts Guidance Note on conflict disclosures by arbitrators, *available at:* https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/(Visited on June 18, 2019).

[68] Regulation 28, Chapter III, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 2019.

[69] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 13 of February 21, 2013; Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3 of June 12, 2015; South American Silver v. Bolivia, PCA Case No. 2013-15, Procedural Order No. 10 of January 11, 2016.

IX. CONCLUSION:

TPF has recently started taking big steps across the globe, though still at the nascent stage as countries struggle to their its own models to regulate it and define the ambit of the funding agreements within their policy objectives. India stands at an advantageous position since countries like Singapore and Hong Kong, with similar legal systems to ours, have been enacting TPF regulation and have thus been providing us with already existing models to analyse, compare and come up with regulations. Historically, India has always rejected doctrines of champerty and maintenance and there is no statute or case law defining TPF in India. It is neither expressly barred nor allowed by law. With this, we hold an opportunity, to set the ball rolling by allowing funding agreements with no inhibitions as per our legal system since funding agreements also comply with the conditions of a valid contract in India with a certain subjective qualifier as to reasonability in share to be apportioned. With an estimated 31 million cases pending in various courts and India being ranked 131 out of 189 countries on how easy it is for private companies to follow regulations and observation been made as to much as 1,420 days and 39.6% of the claim value for dispute resolution, arbitration has been considered as the key going forward. In a new era of dispute mechanisms where new concepts need to replace old ones, TPF should be preferred over maintenance and champerty. As India makes its bid to become an arbitration hub, the time is ripe for the country to adopt TPF.