

**INTRODUCING THIRD-PARTY FUNDING IN INDIAN  
ARBITRATION: A TUSSE BETWEEN CONFLICTING  
PUBLIC POLICIES**

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**ABSTRACT**

*Third-party funding in litigation as well as arbitration is a development that has taken the world by storm. Despite such development, India continues to take a silent stance regarding the same. As opposed to this silent stance, this paper aims to shed light on the possibility of introducing third party funding in the Indian arbitration regime. By adopting a comprehensive approach, this paper begins by laying down a working definition of third-party funding. Next, this paper makes reference to the practices prevalent in various jurisdictions with respect to third party funding. While tracing such developments, the author also critiques some of the problems associated with third party funding and what approach has been adopted globally to effectively solve such problems. By employing the international developments as a foundational basis, the author then turns to Indian law by analyzing various rulings and statutory provisions that impliedly permit third party funding in the Indian arbitral regime. Finally, the author concludes by suggesting the changes that need to be introduced to effectively deal and promote third part funding.*

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## I. INTRODUCTION

Third party funding is a rapidly evolving phenomenon in litigation as well as arbitration. If properly employed, third-party funding could benefit the parties by levelling the playing field and at the same time benefit the society as a whole by promoting the goal of access to justice. Third party funding comes in all shapes and sizes. Due to a general lack of consensus amongst the scholars, “it is almost impossible to find a one-size-fits-all definition of third-party funding.”<sup>165</sup> However, there are certain characteristics of third-party funding that distinguishes it from other arrangements like insurance, contingency fee agreements etc. Though it would be outside the purview of this paper to have an elaborate discussion on the subject, it would be prudent to lay down a working definition of ‘third-party funding’ based on popular notions and concepts.

Sahani defines third party funders as, “Third – party Funders are entities that invest in litigation and arbitration for profit.”<sup>166</sup> Similarly, other commentators have opined that third-party funding is “funding of proceedings by an unconnected entity to a dispute to a party, typically the claimant, in return for financial gain, such as a share of the damages awarded or a share of the settlement sum.”<sup>167</sup> While analysing such definitions, scholars have also argued that third party funding does not

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<sup>165</sup> Maxi Scherer et al., *Third Party Funding in International Arbitration in Europe: Part I- Funders’ Perspectives*, INT’L BUS. L. J. 207, 209 (2012).

<sup>166</sup> Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 407 (2017) [*hereinafter* “Sahani”].

<sup>167</sup> K.C. Lye & Katie Chung, *Singapore- Update on Recent Changes*, 19(5) INT’L ARB. L. REV. 140 (2016).

involve sale of claim as the whole of the original claim vests with the claimant.<sup>168</sup>

From a conjoint reading of the definitions reproduced above, it can be stated that third party funding is an investment by a party who has no interest in the subject matter of dispute but makes such investment and exercises a varying degree of control over the proceedings with a view to profit from the claims of the funded party. Furthermore, it can be easily seen that in theory, the funder may finance the claim of either the claimant or the respondent.<sup>169</sup> However, since funding of claims provides a higher chance to gain higher returns, funding the claimants instead of respondents attracts greater attention of the funders. This is because; funding the claim of respondents would only defeat the claims of the claimant without providing any actual returns to the funder unless of course, the defendant puts forth counter claims before the arbitral proceedings. It is noteworthy to mention here that the words ‘investment’ and ‘profit’ are the key elements which distinguish funding from other concepts. This can be elucidated with the help of an example. In an ICSID arbitration, the claim was financed by a foundation not with a view to earn profits but because the financing foundation was generally against the sale of tobacco products which was the subject matter of the said arbitration.<sup>170</sup> In such cases, the

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<sup>168</sup> Maxi Scherer et al., *Third Party Funding in International Arbitration in Europe: Part II- The Legal Debate*, INT’L BUS. L. J. 649, 655 (2012) [hereinafter “**Scherer**”].

<sup>169</sup> William Park & Catherine A. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, No. 42-2014 Penn State Law Legal Studies Research Paper Series (2014).

<sup>170</sup> Philip Morris Products S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (2016).

financing can at best be described as donation rather than funding,<sup>171</sup> simply because there is a lack of profit-earning motive.

## **II. DEVELOPMENTS IN COMPARATIVE LAW**

### **A. THE OBSOLETE MAINTENANCE & CHAMPERTY DOCTRINE**

The concepts of maintenance and champerty are the primary reasons that have constrained the development of third-party funding in common law countries. In simple words, maintenance means the unnecessary intermeddling of third parties to a dispute in which they have no interest. On the other hand, champerty which is considered as an aggravated form of maintenance refers to the share of the intermeddler from the proceeds of the litigation.<sup>172</sup> Some researchers have opined that third-party funding is indeed a form of maintenance or champerty.<sup>173</sup> In this respect, it is noticeable that whilst on one hand, it is debatable as to whether third-party funding strictly falls within the notions of maintenance and champerty or not, in the opinion of this author, the concept of third party funding is so complexly associated with the aforementioned common law principles that the former cannot be properly understood without making recourse to the latter. Therefore, the following discussion would be based on the premise that third-party funding is indeed a loose form of maintenance or champerty.

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<sup>171</sup> Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration* 6 (Grotius Centre for International Legal Studies, Working Paper No. 1, 2012).

<sup>172</sup> Jern-Fei Ng, *The Role of the Doctrines of Champerty and Maintenance in Arbitration*, 76 ARB. 2 (2010).

<sup>173</sup> Hong-Lin Yu, *Can Third Party Funding Deliver Justice in International Commercial Arbitration?*, 20(1) INT'L ARB. L. REV. 20, 22 (2017).

The concept of maintenance and champerty has been diluted to a large extent in various jurisdictions, particularly when such issue is raised in pretext of arbitration. This has been viewed as a welcome change. Australia was one of the first few countries to abolish the crimes and torts arising from maintenance and champerty. In a popular case, the Australian Court held that champerty cannot pose as a hindrance to a legitimate claim. It was also held that even during the times, when champerty was popular, the real criteria for judging such agreement was to analyze the consequences flowing from such agreements. In other words, an agreement cannot be declared as violative of public policy merely because a claim is being funded by an unrelated or third party.<sup>174</sup> Similarly, English Courts have also opined that the public policy need to evolve with the passage of time and consequently the doctrines of maintenance and champerty were diluted thereby, paving way for introduction of third-party funding.<sup>175</sup>

Hong Kong<sup>176</sup> and Singapore<sup>177</sup> are two countries that have recently made legislations trying to regulate the new and unexplored concept of third-party funding. Therefore, it would be useful to analyze the position prevalent in these two jurisdictions. The Hong Kong Courts have held that since arbitration is a private consensual adjudication, the public policy doctrine of champerty should not be extended to arbitration and its

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<sup>174</sup> *Campbells Cash & Carry Pty. Ltd. v. Pastif Pty. Ltd.*, (2006) 229 CLR 386 (Austl.).

<sup>175</sup> *Arkin v. Borchard Lines Ltd.*, (2005) E.W.C.A. Civ. 65 (U.K.).

<sup>176</sup> HONG KONG, THE ARBITRATION AND MEDIATION LEGISLATION (THIRD PARTY FUNDING) (AMENDMENT) ORDINANCE, (2017), <https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf>.

<sup>177</sup> Civil Law Act (1999) (amended 2017) (Sing.); Civil Law (Third-Party Funding) Regulations (2017) (Sing.).

application should be solely restricted to public justice administration, viz. litigation.<sup>178</sup>

In another landmark decision, the Hong Kong Courts have held that maintenance or champerty and access to justice are two notions of public policy which need to be balanced against each other while deciding whether to allow or prohibit third-party funding.<sup>179</sup> In this author's opinion, this ruling is capable of being interpreted both in favour of as well as against third party funding. Though, the Hong Kong Court interpreted this against third party funding (at least as far as arbitration is concerned), the Singapore courts have accorded more weightage to public interest than the principles of champerty. The Singapore Courts have held, "[T]he purity of justice and the interests of vulnerable litigants are as important in... [arbitration] proceedings as they are in litigation. Thus, the natural inference is that champerty is as applicable in the one as it is in the other."<sup>180</sup>

While analysing the above case laws, one commentator has opined:

*[I]t is no longer appropriate to use the doctrines of champerty and maintenance as blunt instruments with which to strike down third-party funding agreements; a more qualitative and purpose-oriented analysis of the nature of the arrangement concerned need to be*

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<sup>178</sup> Cannonway Consultants Ltd. v. Kenworth Engineering Ltd., (1995) 1 H.K.C 179, 190 (H.K.).

<sup>179</sup> Unruh v. Seeberger, (2007) 10 H.K.C.F.A.R. 31 (H.K.).

<sup>180</sup> Otech Pakistan Pvt. Ltd. v. Clough Engineering Ltd., (2007) 1 SLR 989, ¶36 (Sing.).

*undertaken in order to assess the risk that such arrangement would hold for the integrity of the arbitration in a given claim.*<sup>181</sup>

One scholar has further argued that public policy does not impose a ban on third party funding rather the latter advances public policy by providing access to justice to those who cannot afford to contest in an arbitration proceeding. Moreover, it has been opined that the inherent policy issues or limitations can be corrected through regulation.<sup>182</sup>

In context of civil law countries like Germany where the concepts of maintenance and champerty are unknown, it has been observed in respect of third-party funding:

*A key difference between the common law countries and the civil law countries is that the ancient doctrine of champerty and maintenance that occasionally still plagues the industry in the common law world does not exist in the civil law countries, which is one of the reasons why a balanced market was able to grow in Europe....*<sup>183</sup>

The invariable implication which can be drawn from the above discussion is that public policy of providing access to justice to all should outweigh the public policy doctrine of maintenance and champerty and the real criteria to test whether such agreements are violative of public policy

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<sup>181</sup> Sai Ramani Garimella, *Third Party Funding in International Arbitration: Issues and Challenges in Asian Jurisdictions*, 3 AALCO J. INT'L L. 45, 59 (2014).

<sup>182</sup> Collin R. Flake, *Third Party Funding in Domestic Arbitration: Champerty or Social Utility?*, 70(2) DISP. RESOL. J. 109, 120-23 (2015).

<sup>183</sup> George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 J. L. ECON. & POL'Y 451, 522 (2012).

or not is to see whether the object of such agreements is unconscionable or unfair to any party or not. Moreover, the above discussion has shown that scholars on both sides of the Atlantic are in agreement to the aforesaid criteria.

### **III. TROUBLED WATERS: UNDERSTANDING THE COMPLICATIONS OF THIRD PARTY FUNDING**

The involvement of strangers in arbitration claims has attracted a host of issues which may pose as a cause of concern for development of this concept in the global scenario. These issues include but are not limited to impartiality of arbitrators, security of costs, the effect of such agreements on attorney-client privilege etc.

The issue of disclosure of third-party funding agreements have been one of the core debates surrounding third-party funding. This issue also assumes importance as it is very closely connected with an arbitral tribunal's independence and impartiality. In principle, the arbitral tribunal does not have any jurisdiction to consider or give any finding with respect to the funding agreement as its jurisdiction is limited to the dispute referred to it by the parties through the arbitration agreement. Furthermore, since the funder is not a party to the arbitration agreement the arbitral tribunal or for that matter, even the opposite party may not be aware of the existence of any third-party funder. This issue has been dealt in detail in international commercial arbitration and investment arbitration. In a decision, the tribunal ordered the claimant to disclose the involvement of third-party funder due to two reasons. Firstly, to ensure the integrity of arbitral

proceedings by checking for any potential ‘conflict of interest’. Secondly, to ensure security of costs because it may so happen that at the time of payment, such funder may disappear as it is not a party to the arbitration.<sup>184</sup> Furthermore, in addition to the general principles of independence of arbitrators, scholars have opined that due to the public international law character of investment treaty arbitration, there is a need to promote transparency in general and disclosure of third-party funding agreements specifically in investment arbitrations.<sup>185</sup>

Some commentators have argued that while making such disclosure, the entire funding agreements need to be disclosed rather than few selective provisions.<sup>186</sup> In this respect, it is argued that it is too soon to comment upon the extent of disclosure of funding agreements but it would be safe to say that full agreements need not be disclosed. This is because if full disclosure is made, the strategies of the funded party as well as other confidential information may be revealed which might be misused by the other party. In addition to this it is further opined that in an ideal scenario, it would be in the interest of the parties to disclose such funding agreements at the earliest opportunity before the appointment of the arbitrator. This is because if it is later out found that there exists some kind of relationship

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<sup>184</sup> *Sehil v. Turkmenistan*, ICSID Case No. ARB/12/6 Procedural Order No. 3 (12 June 2015).

<sup>185</sup> Eric De Brabandere, ‘*Mercantile Adventurers?*’ *The Disclosure of Third-Party Funding in Investment Treaty Arbitration*, SSRN PAPERS (Oct. 8, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2846996](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2846996).

<sup>186</sup> Miriam K. Hardwood et al., *Third-Party Funding: Security for Costs and Other Key Issues*, 2 INV. TREATY ARB. REV. 103, 120 (2017).

between the arbitrator and the funder, the parties would have to start afresh by appointing a new arbitrator.<sup>187</sup>

Some authors have suggested that one of the ways to ensure disclosure is that the parties themselves incorporate a clause in the arbitration agreement mandating the disclosure of third-party funding arrangements.<sup>188</sup> In response, the author is in agreement with such solution because of its inherent advantage that the parties can pre-decide the extent of disclosure of such agreements in advance. This would save the arbitral tribunal's time and at the same time ensure that the independence of any arbitrator is not compromised in any manner.

Once the issue of disclosure has been settled, the question of security for costs comes into picture. In other words, once the tribunal becomes aware of the existence of a third-party funder, should the arbitral tribunal by means of this fact automatically order for security for costs or not? In this respect, it has been observed that this is not a simple 'yes or no' decision but has to be decided after considering various legal as well as factual aspects and that no uniform criterion exists in international commercial arbitration to decide upon this question.<sup>189</sup>

Thus, to sum up this part, it can be observed that in most jurisdictions, there exists a confusing or inadequate compliance system

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<sup>187</sup> Jennifer A Trusz, *Full Disclosure? Conflicts of Interest Arising From Third-Party Funding in International Commercial Arbitration*, 101 GEO. L. J. 1649 (2013).

<sup>188</sup> Alexander Brabant et al., *Third Party Funding in International Arbitration: Practical Consequences and Tactical Considerations*, 19(5) INT'L ARB. L. REV. 113, 115 (2016).

<sup>189</sup> Sai Anukaran, *Security for Costs in International Commercial Arbitration: Mandate, Exercise of Mandate, Standards and Third Party Funding*, 84(1) ARB. 77, 86-87 (2018).

which has added to the uncertainties and risks associated with third party funding<sup>190</sup> but nevertheless, such a system exists in most countries as well as in international arbitrations.

#### **IV. MAKING A CASE FOR APPLICABILITY OF THIRD-PARTY FUNDING IN INDIA**

##### **A. POLICY CONSIDERATIONS MANDATING INTRODUCTION OF THIRD-PARTY FUNDING**

The development of third-party funding in India has been almost negligible and it has been only recently that this concept has attracted attention from the Indian courts. Till date, the author is yet to see any precedent by Indian Courts as far as third-party funding in arbitration is concerned. At the same time, it is also pertinent to mention here that the Hon'ble Supreme Court has recently held that third-party funding in litigation is legal in India provided that the funder is a non-lawyer which is a welcome development.<sup>191</sup> The recent High Level Committee Report to review the Institutionalisation of Arbitration Mechanism in India, while making a passing reference to third party funding has also made an observation that the implementation of similar mechanism in India would give a boost to arbitration in India.<sup>192</sup> Similarly, Order XXV of the Civil Procedure Code as amended by Maharashtra, Gujarat, Karnataka and MP

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<sup>190</sup> Sahani, *supra* note 166, at 423.

<sup>191</sup> Bar Council of India v. A.K. Balaji, (2018) 5 S.C.C. 379 (India), ¶ 35.

<sup>192</sup> DEPT. OF LEGAL AFFAIRS, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA (July 30, 2017) <http://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf>.

also recognises the right of a plaintiff to transfer right in suit property to a financier.<sup>193</sup>

A bare perusal of Indian laws reveal that third-party funding is not per se prohibited in India but the public policy principles of maintenance and champerty have generally acted as a hindrance for the development of this concept in India. It is imperative to mention here that the terms ‘maintenance’ or ‘champerty’ are nowhere expressly mentioned in Indian statutes, however, they have been historically interpreted as part of the phrase ‘opposed to public policy.’<sup>194</sup>

In this respect, the Indian Supreme Court has held that the strict rules of maintenance and champerty as enshrined in English law are not applicable in India and agreements of champertous nature are not per se violative of public policy as long as advocates are not involved in the transaction.<sup>195</sup> In some of the later decisions, Indian courts have held such agreements to be violative of public policy but the test has been that the unlawful object of the agreement must be manifest on the face of the financing agreement.<sup>196</sup> While analysing various case laws, jurists have opined that “while recovery of the funded amount, and perhaps interest, was permissible, but if the funding was either for a large portion of the stake, or was success-fee-linked, it was violative of public policy and hence

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<sup>193</sup> Order XXV, The Code of Civil Procedure, 1908 (No. 5 of 1908) (India).

<sup>194</sup> § 23, The Indian Contract Act, 1872, (No. 9 of 1872) (India).

<sup>195</sup> Re: Mr ‘G’ A Senior Advocate v. Unknown, (1955) 1 S.C.R. 490 (India), ¶11; M.P. Jain, *The Law of Contract Before its Codification*, 14 J. INDIAN L. INST. (SPECIAL ISSUE) 178, 187-98 (1972).

<sup>196</sup> Rattan Chand Hira Chand v. Askar Nawab Jang, (1991) 1 S.C.R. 327 (India).

prohibited.”<sup>197</sup> In response, this author argues that as seen in the international arbitration regime, the need of the hour is to balance public policy considerations against each other and bridge the gap between legitimate claims and lack of resources to support the same. It is further argued that such doctrines should be diluted considering the fact that the country from which these public policy doctrines originated has scrapped the strict application of such doctrines.

Another argument which can be put forth for introducing third party funding in arbitration is that litigation and arbitration differ in material aspects. Firstly, arbitration is based upon the concept of party autonomy where all catalysts of the proceeding are directly or indirectly decided by the parties. Thus, keeping in line with the same, parties should be free to take the services of a third-party funder wherever necessary. In support of this, it is opined that a party is a best judge of its interest and the court should ordinarily uphold such consent if it is satisfied that the benefits arising from such funding outweigh the risks associated with such funding. Moreover, it is suggested that the standards of maintenance and champerty should be relaxed in arbitration as the state has little or no stake in private disputes.

Another noteworthy point in this respect is that in litigation, there are statutory provisions for providing free legal aid to the party who cannot afford the same.<sup>198</sup> Thus, it is not absolutely incorrect to say that India is

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<sup>197</sup> Payal Chawla & Aastha Bhardwaj, “*Saving Arbitration from Arbitration Cost*”. *Is Third Party Funding the Answer?*, BAR & BENCH (Dec. 19, 2017), <https://barandbench.com/saving-arbitration-costs-third-party-funding/>.

<sup>198</sup> Order XXXIII, The Code of Civil Procedure, 1908 (No. 5 of 1908) (India).

perhaps justified, to some extent, in not expanding the scope of third party funding in litigation. However, it is noteworthy to mention here that in contrast to the same, there is no such provision in the Arbitration Act. In such circumstances, a party is either required to put forth its claim (or defend it) on his own or surrender it due to financial restraints. In this respect, it has been observed that unlike litigation, where the litigant has a constitutional right to access to justice; a party de facto loses this right if it is unable to support the costs of arbitration.<sup>199</sup> Furthermore, in certain cases, the less privileged party may be able to hire the services of a lawyer but the opposite party might be in a position to hire better lawyers, thereby enabling it to put forth its claim in a much better way. Such a situation may arise, for instance, in case of real estate contracts where the buyer is comparatively in an inferior position as compared to the builder. In such circumstances, third-party funding can play a pivotal role while financing such less privileged parties whose claim is likely to succeed thereby, levelling the playing field. This argument has found much support globally and arguing on similar lines, one scholar has opined that “... [I]third-party funding may well introduce a mechanism similar to legal aid applicable in court systems.”<sup>200</sup>

Apart from the above arguments it is pertinent to mention that it is an internationally acknowledged fact that sometimes arbitration may involve huge costs. Furthermore, the Supreme Court of India has justified

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<sup>199</sup> Francisco Blavi, *Towards a Uniform Regulation of Third Party Funding in International Arbitration*, 18(6) INT'L ARB. L. REV. 143, 144 (2015).

<sup>200</sup> Khalil Mechantaf, *Third-Party Funding in International Arbitration: Active Funders as parties in Arbitration Proceedings*, 82(4) ARB. 371 (2016).

this high cost if it results in a proportionate time saving.<sup>201</sup> In this author's considerate opinion, this ruling implies that the Indian courts have impliedly agreed to the fact that arbitration costs cannot be reduced and something needs to be done so that these high costs do not pose as a hindrance in development of arbitration in India. In this humble author's views, perhaps third-party funding is the only way to combat this 'expensive arbitration' problem and popularize arbitration amongst the masses.

An argument which is often forwarded by critics of Third-Party Funding is that by enabling such a facility; the parties would be encouraged to bring forth frivolous and vexatious claims. In this respect, it has been argued that there are provisions in the Arbitration Act,<sup>202</sup> which enables the Courts to impose penalty in case the Court finds that such a proceeding was vexatious or frivolous. It has been further opined that any funder would examine the case so as to ascertain whether he will benefit from such investment or not and would not invest in any case which according to him is vexatious, frivolous or otherwise not likely to succeed.<sup>203</sup>

Thus, it can be easily seen that in light of the many advantages that third-party funding has to offer and the absence of any concrete argument to prohibit the same, it would be in the interest of the state if third-party funding is introduced in Indian arbitration regime. Furthermore, it is

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<sup>201</sup> Sanjeev Kumar Jain v Raghbir Saran Charitable Trust, (2012) 1 SCC 455 (India), ¶ 17.

<sup>202</sup> § 31(3), The Arbitration and Conciliation Act, 1996, (No. 26 of 1996) (India).

<sup>203</sup> Kumudini Chattopadhyay, *Third-Party Funding in Arbitration - Questioning its Scope in India*, CIARB (Aug. 15, 2017), <http://www.ciarb.org/docs/default-source/ciarbdocuments/ournetwork/ymg/ymg-features/third-party-funding-in-arbitration---questioning-its-scope-in-india.pdf?sfvrsn=4>.

suggested that by permitting third party funding by non-lawyers' entities in litigation, the Apex Court has already paved the way for introducing third party funding by non-lawyers in the Indian arbitration regime.

**B. REGULATING THIRD-PARTY FUNDING: DEFINING THE ROLES OF LEGISLATURE AND THE JUDICIARY**

Now, that it has been settled that there is nothing in Indian law to prevent or prohibit the usage of third-party funding in Indian arbitration, it is only a matter of time that third-party funding will find its way in Indian arbitration. However, at the same time, it is imperative that India prepares itself before such inevitable event takes place. In other words, by reason of its infancy and lack of concrete legislation at the international level, the speculative disadvantages of third-party funding may very well become a reality which may ultimately defeat the object for which third party funding was employed in the first place. Therefore, this part of the paper would address the concerns regarding regulation of third-party funding industry in India focusing on some controversial issues surrounding third-party funding. As far as legislation or judicial intervention is concerned, third-party funding may prove to be particularly tricky in this respect and it would be wise to demarcate the roles of the state organs so as to effectively regulate third-party funding in theory and in practice.

The first issue pertaining to third-party funding which requires regulation is the degree of control that can be exercised by the funder. The power of the funder to exercise control over how a claim shall be put forth in arbitration arises from the fact that at any point of time, he may withdraw

his financial assistance. To put this in another set of words, through control over future funding of the lis, the funder ensures that no decision with respect to the funded claim is taken against the wishes or knowledge of the funder. Some scholars while according a superior role to party autonomy have opined that the parties should be free to determine the extent of such “control.”<sup>204</sup> In this respect it is opined that keeping in mind the consensual nature of the funding agreement, the aforementioned submission may seem logical but the same cannot be implemented in India primarily due to two reasons. Firstly, despite recent rulings, India is still at a very nascent stage as far as third-party funding is concerned when compared with other jurisdictions. In such a scenario, experienced funders or repeat players may ‘fool’ the claimants into subsuming a higher degree of control from the funded party. Secondly, assuming the fact that the aim of legalizing arbitration funding is to popularize arbitration among the masses, i.e., to say that the parties would prefer to go for arbitration instead of litigation for even simplest of cases; the funders may have higher bargaining power to force a claimant into surrendering a higher degree of control to such funder. Furthermore, the likelihood of such a scenario is very high considering the funded party’s adamant need to secure finances to support its claim. Thus, it would be prudent if the state issues certain rules or guidelines regulating the funding industry in the country. To substantiate this, attention may be drawn to the fact that though some countries have left the funding industry to self-regulation, however, with the expansion of

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<sup>204</sup> Oliver Gayner & Susanna Khouri, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding*, 40 FORDHAM INT’L L. J. 1033, 1044 (2017) [*hereinafter* “**Gayner & Khouri**”].

this industry; even such countries are working towards introducing statutory regulations with the aim of clarifying the parties' obligations. Therefore, it would be advisable that India learns from such international experiences and issues certain guidelines to regulate the funding industry in India.<sup>205</sup> In addition to this and by giving due consideration to party autonomy, it is also opined that such regulations may be reduced as the industry matures.

Coming to the concept of disclosure, it has been already seen that the general notion in the international community is to disclose such third-party funding to some extent either to ensure compliance with principle of full disclosure or to ensure security of costs. As far as the position in India is concerned, in cases where there might be a possible conflict of interest between the financier and the arbitrator(s), the disclosure of third party funding agreements assumes importance.<sup>206</sup> In this respect, the Arbitration Act clearly casts a duty upon the arbitrator to disclose (in writing) any fact that may put a question mark on his independence or impartiality.<sup>207</sup> Moreover, it might be necessary to disclose such funding agreements to ensure the independence of the arbitrators. Non-disclosure may lead to setting aside of the award which might have been in favour of the funded party thus leaving the whole arbitration exercise futile.<sup>208</sup>

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<sup>205</sup> Mary Jordan, Andrew Matheson & Emma Brown, *Why Third Party Funding is on the Rise in England & Wales*, GLOBAL ARBITRATION NEWS (Feb. 27, 2018), <https://globalarbitrationnews.com/why-third-party-funding-is-on-the-rise-in-england-wales/>.

<sup>206</sup> Scherer et al., *supra* note 168, at 652.

<sup>207</sup> *See*, §12, The Arbitration and Conciliation Act, 1996, (No. 26 of 1996) (India).

<sup>208</sup> *Id.* at §34(2)(a)(v).

A careful perusal of the provisions of the Arbitration Act and the above discussion until now reveals that assuming the fact that third-party funding becomes legal in India; it is probable that for the interim being, the courts will have a more prominent role while shaping third-party funding viz. reinterpreting existing provisions. While doing so the courts may bank upon the experiences of other jurisdictions. However, as the industry matures, “...it appears that the legislatures – rather than the courts – are seeking to lead the way in shaping the future of the third-party funding industry.”<sup>209</sup> This is because ultimately, the responsibility would fall upon the legislature to amend the existing provisions to empower the courts as well as arbitral tribunals to effectively adjudicate upon the issue of third-party funding. For instance, §2(h) of the Arbitration and Conciliation Act, 1996 defines party as “party to an arbitration agreement.” This may pose as a hindrance in development of third-party funding in Indian arbitration as technically, a funder is not a party to an arbitration agreement. Such outdated definitions and statutory fallacies in the existing arbitration regime would obviously pose as a hindrance for introduction of third-party funding in India. Having said that, this author is in agreement with commentators who opine that the funding industry is self-regulating and therefore, the intervention by the legislature should be minimal and in case any risks associated with the funding industry do materialize, the same can be addressed by the courts or the arbitral tribunals themselves.<sup>210</sup>

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<sup>209</sup> Victoria Shannon, *Recent Developments in Third-Party Funding*, 30 J. INT’L ARB. 443, 452 (2013).

<sup>210</sup> Gayner & Khouri, *supra* note 204, at 1042.

Finally, it is suggested that India can follow the example of Singapore by creating a presumption in favour of third-party funding agreements in arbitration. After considering the ‘totality of factors’, if such presumption is rebutted then the agreement may be termed as violative of public policy. According to this author’s considerate opinion, this will be the correct way of balancing the two conflicting public policies.

### **V. CONCLUSION**

Steinitz has argued (in context of litigation funding); that instead of prohibiting litigation funding, it should be regulated because it has its own set of benefits for the society.<sup>211</sup> In this respect, it is opined that applying this principle *mutatis mutandis* to domestic and international arbitration, the need of the hour is to regulate third party funding instead of imposing a blanket prohibition on the same. Moreover, the analysis in this paper has revealed that certain provisions already exist in Indian law to introduce third party funding. The absence of any precedent expressly prohibiting third party funding supports the above finding. As one scholar has argued, the provisions need to be reinterpreted rather than revised or amended.<sup>212</sup> At the same time, it is necessary that amendments are made to existing legislations to ensure that the cons of third-party funding do not outweigh its pros.

Finally, it is this author’s considerate view that third-party funding is here to stay and it is high time that the same is introduced in India

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<sup>211</sup> Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011).

<sup>212</sup> Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388 (2016).

especially in the field of arbitration. It is admitted here that it cannot be possibly assumed that such a system would be a perfect one. However, it is obvious that the patent and latent difficulties pertaining to same would come to light once such a system is implemented. This would be in line with the international developments and could be viewed as a robust step in fulfilling the dream of making India as an international arbitration hub.