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New Trend in International Commercial Arbitration Third Party Funding

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ABSTRACT

With the advent of globalisation, international trade and business achieved new heights and the world has become a single market. Many counties see the unimaginable growth and their reserves and the economic conditions have been improved. Dispute is the integral part of development when there is development there are some disputes arise which make this development more easier accessible and stable. Similar happened with the international commercial arbitration. International commercial arbitration has been the first choice among trade and business related disputes. As in any company large sum of money is involved so no company or organisation will take risk to approach the court and involved in the courts lengthy procedure. Third party funding is the latest topic and currently discussing by the jurist and the arbitrators.

Third party funding is a financing technique that entails bona fide specialist suppliers funding litigation or arbitration who are neither parties to the issue nor directly associated with it, and whose primary interest is possible profit in exchange for providing finance. The concept of Third party funding is the most rapidly expanding and debatable problematic subject in international commercial arbitration. When a non-party, meaning a third-party funder to a dispute, funds all or a portion of the arbitration expenses for one of the parties in exchange for a percentage of the sum recovered as previously agreed, this is referred to as Third party funding. It is similar to litigation financing. In India, third party funding has its own limitations because if third party funding is not regularised, Third party funding will become a matter of chance either the party will win or loose and this will become similar to lottery and lottery is banned in India by several acts and procedures. Different countries have different views about third party funding. So it has many issues and concerns involved in it.

I. INTRODUCTION

Third-party funding refers to the funding of legal procedures in exchange for a monetary incentive by a third party who has no other stake in the outcome. As a compensation, the third-

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party funder usually receives a portion of the damages awarded or the settlement money. Over the last decade, third-party funding has become more popular, with several countries adopting and/or expanding it. It has also gotten positive feedback from major arbitration centres across the world, such as London, Paris, Singapore and Hong Kong. This is especially true in case of international commercial arbitration, where the expenses can be significant and, in some cases, prohibitive.

Third party funding can be in the form of

1. Advocate fees
2. Loan
3. To get a share in claim
4. Other interest

Third party funding is now commonly regarded as a vital tool for improving access to justice for claimants who have valid claims but lack the financial resources to pursue them in court. Third party funding is widely used in Australia, England, and the United States. Australia boasts the world's largest Third-party funding industry, which is said to have started in Australia some 25 years ago. Where it has become the part of judicial and arbitration proceedings.

It all depend on the country laws and jurisdiction that can label Third party funding as a part of Guerrilla technique or as an efficient facilitator to ease the litigation financing and help the parties to get their desired results.

So, it can be said that Third party funding is present in one form or another and no one can stop to involve the third parties. Because there is various forms of third party funding.

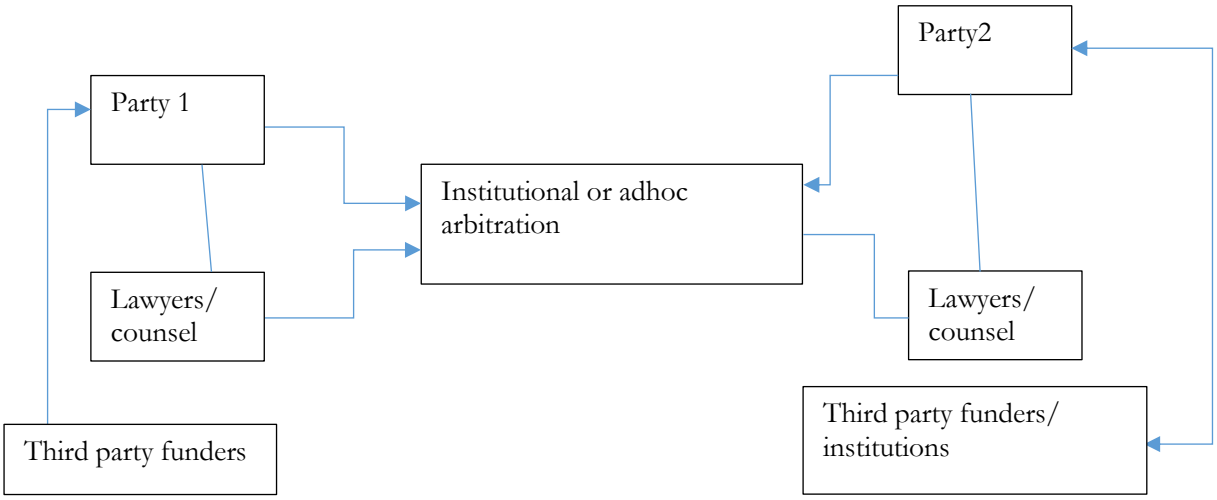
Corporations, legal firms, people, and even sovereign nations may be third-party financing clients. According to Victoria A. Shannon, there are four major factors that contribute to the global success of the third-party finance business.

1. First, funders assist people with insufficient financial capacity in pursuing claims that they otherwise would not be able to pursue
2. many small businesses or bankrupt businesses seek third-party finance to pursue genuine claims that they otherwise would not be able to pursue.
3. many major corporations that are regularly sued as a result of their business operations would prefer a means to balance out the litigation line item on their balance sheets, and

funders may provide them with a set payment scheme for controlling litigation expenses as defendants.

4. Many investors have sought assets that are not reliant on financial markets, stock prices, or business valuations as a result of the recent market volatility.

Fig : The Position of third party funding in arbitration process.



II. WHY THIRD-PARTY FUNDING IS GETTING POPULARISED?

There are several reasons which enable the third-party funders to come in to arbitration. Firstly, many countries have strict stance on third party funding in international commercial arbitration because it is against the public policy of the countries. But later the countries which has largest institutional arbitration setups have to accept this realm of arbitration and allowed and regularised the third party funding. Like Singapore and Hong Kong regularised the third-party funding by passing the bill.

There are several causes which help the Third-party funding in becoming popular

1. The main, and probably most important, reason for the growth is that third party funding is seen as a way to achieve the public policy goal of expanding access to justice. As a result of the financing, parties can have a genuine possibility of enforcing their rights by going to arbitration, without the fear of being forced into financial ruin by pursuing the claim. A basic element of any useful system is open and equal access to arbitration for all parties who choose to use it.

2. Financial stability should be maintained. By utilising Third party funding, businesses may retain sufficient cash flow and avoid liquidity or budgetary issues, allowing them to continue doing business as usual or even engage in new ventures while pursuing a valid claim without risking bankruptcy.

3. From the litigant's view, third party funding is the favourable offer and everybody wants that there is less economic burden of litigation. When third party funders invest their money, they know the merits and demerits of the suit so they also play role in decision making and can provide expertise opinion on the matter.

4. Third party funding is works as a boon to the sick companies who are in the litigation and don't have enough funds to maintain itself.

5. By giving financing, donors acquire economic influence in their relationship with the funded claimant and in the result of the dispute. Another worry is that, because of the amount at risk, an unscrupulous funder may use its economic clout to insist on unjust conditions in a funding agreement, or even to renegotiate terms to the prejudice of the vulnerable client at a mature stage of the procedure. Because the money is required to continue the procedure, funded claimants may consent to these inequitable terms because they would have to withdraw their claim otherwise.

III. ISSUES RELATED TO THIRD PARTY FUNDING

There are still some procedures and ethical standards in place that might prohibit the TPF business from expanding in some countries since the doctrines in question can impact the legality and enforceability of Third-party funding agreements. Given the rivalry among nations and arbitral institutions for arbitral procedures, it is critical to determine if Third party funding agreements will be recognised and enforced in later court actions. If this is not the case, parties may be hesitant to proceed to the relevant jurisdiction. The theories of maintenance and champerty have had a significant impact on the widespread development of TPF and have proven to be barriers to future Third party funding expansion in common law nations. The public policy justification for maintenance and champerty has come full circle. Initially, its ban was justified as a way to aid in the formation of an inclusive, pluralist society controlled by the rule of law. Initially, the different theories were designed to avoid certain litigation tactics. This raises the issue if these theories are applicable in the arbitration private sphere. It is possible that, owing to inapplicability of the public policy protection of the national system of civil justice which is the foundation for prohibitions non the court setting in the private world of arbitration, there are no further limitations or bans on arbitral conflicts. The main problem is

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that if all its expenditures are met by the funders, does a "supported" party experience any financing costs? In fact, if the sponsored party succeeds, it frequently gives the donor a share of its revenues. It may also pay a "success fee" above and beyond the proportion of revenue, thereby lowering the effective recovery quantum of the financed party. This means that the costs of Third-party funding are borne by the sponsored party – if successful. In order to determine the amount, the funded claimant may collect for his costs at the cost of reducing the recovery of the funded Party, certain courts reject TPF's consideration. Are TPF fees 'cost' in accordance with the legislation applicable? Can a successful financed party have the right to a TPF charge? The concept of 'costs' includes 'other costs' in some arbitral tribunals and national legislation. The United Kingdom High Court placed cost of TPF under 'other costs,' giving it a functional structure in Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd. Moreover, regulations on majority voting explicitly provide, for arbitration purposes, that these 'costen' include 'fair' expenses. For the purposes of arbitration, the legal cost paid by the funder to the party would be charged. Hong Kong international arbitration centre and allowed the the third-party funding by passing the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 and Singapore international arbitration centre also amended its provisions. But there are some of issues included in third party funding some of which are discussed below.

1. Disclosing about the third party funding is widely discussed by the countries and the institutional setups of arbitration's.The united stated Supreme Court rules described about the disclosure. In international arbitration the important question is whether and, if so, to what degree, the financing connection should be made public, and potentially the details of the financing agreements. It is particularly desirable to establish the presence of a financing scheme for three reasons. To eliminate any conflicts of interests and to assure impartiality and independence of the arbitration officer, transparency. Potential conflict of interest because of the third party funding . As regards conflicts of interest, it is necessary to distinguish between the first disputes of interest in the connection between the funded party and the funder and the second conflicts of interest for the designated arbitrator (s). Although a normal financing arrangement between client and funders is concluded, the fact that the client's counsel is present cannot qualify as a simple bilateral connection. The so-called three-edged connection can create various possible interest disputes, as outlined in this section. The issues, whether at a time when the financing deal is concluded or at the stage of the arbitration as such, are typically due to a conflict of interest between the client's interest (i.e. the client's best interest). Various possibilities for enforcing arbitral rulings, when the requester receives funding from a third

party. The execution of funding agreements with third parties and arbitration awards in which a third party supported the claimant may be subject to different conditions depending on the enforcement of the award or third party funding agreement.

2. Choice of the arbitration seat is the next issue included in it. If the judgement needs to be executed at the arbitration site, the execution of such award would rely on the arbitration site and on its validity as far as the financing agreement of a third party is concerned.In the decision on Jurisdiction and Admissibility of 17 November 2014, Giovanni Alemanni v. The Argentina Republic11 judged: "The practise of TPF is currently so well established, both within numerous national jurisdictions and under arbitration for international investment, that it does not itself provide grounds for objections." In "Realizing a financed award in an anti-funding climate," Ben Knowles and Paul Baker brought out many significant concerns linked to the recognition and enforcement of funded arbitral decisions.

3. There is no privacy of documents and data when the third party involved in the arbitration proceedings the privacy compromised. It can influence the arbitration proceedings. There are various other ethical issues involved in third party funding. Some countries tried to regularise the third party funding. The IBA guidelines also mentioned that it is duty to mentioned the parties who has direct economic interest in the arbitration proceedings.

4. The joinder of parties in arbitration certainly influenced the arbitrator or the arbitration proceedings. The transparency of the arbitration which is the essential component of international commercial arbitration compromised. Sometimes litigation financing companies also work as the expert in the concerned disputed field. It certainly help the parties to make the arbitration proceedings more efficient.

IV. VIEW OF INDIAN COURTS

India is a growing country in terms of business and trade and after observing the shortcomings of arbitration and conciliation act 1940 has been quashed and arbitration and conciliation act 1996 was come in force to make easy transaction and to settle the disputes with the international companies. It certainly helps the country to gain foreign reserve and India was able to come out from the emergency foreign reserve problem. But the arbitration is still growing in India. The one of the tenets of arbitration is consent of the parties. It was developed and gain its popularity because it escapes from the regular court proceedings. There should be minimum role of courts in arbitration. As in business if there is any weak party involved the court has to come in picture to do the justice. So, to safeguard the interest of the weaker party the role of courts evolved. Indian courts passed many famous judgements from Bhatia’s case to ONGC’s

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case and passed many judgements that become the precedent for the arbitration proceedings. One of the most contentious issue in arbitration is, setting aside the arbitration award on the violation of public policy. There are various judgements that showed that one cannot hide behind the veil of public policy. In India the most arbitration is of ad hoc types. There is very long debate on which type of arbitration is best and the merits and demerits of institutional and ad hoc arbitration is widely discussed. The one of the main reasons that there is maximum role of courts is that ad hoc arbitration is more prevalent. Lack of institutional setup of arbitration leads to more involvement of courts. And it somewhere discourages the very purpose of arbitration which is settling the dispute out of the court. In India recently CJI proposed to setup international arbitration centre in Hyderabad it shows the commitment of the Indian courts to improve the arbitration culture in India. B N. Srikrishna argued that Parliament should create the legislation on third-party finance. Justice Srikrishna said that "it will be problematic if the courts just interpret the present legal situation. Third-party funding has grown at an extremely high pace as a possible source of dispute finance, which is easily accessible. Investment portfolio is $2.4 billion, and market capitalisation amounts to around $3.2 billion, the biggest third-party fund. Although the notion of third-party funding is not new to the Indian legal market, as there are still many cases purchased and sold on an unexecuted market in India. In respect of third-party funding in arbitration, There is very less literature in India. No legislation specifically prohibits or authorises funding from outside parties. Moreover, the arbitration and conciliation act of 1996 does not contain a specific provision regarding the legality or illegality of the financing of third parties. In civil lawsuits against states such as Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh, the use of third-party money is nonetheless expressly recognised. Through the modification of Rule 1 of Order XXV (1908) these states have made it possible for courts, by making them a party to the proceedings, to secure litigation costs of a litigator.

In Ram Coomar Coondoo and other councils v Chunder Canto Mookerjee, the Privy Council decided that English maintenance and champerty acts were not valid as particular legislation in India.' It held that "these were rules with a distinctive character which were, in early days, aimed against misuse and which had gone into at least comparative waste in England." While the Privy Council observed that the maintenance and champerty doctrine had no applicability to the Indian setting since it was unique, the champerty agreement might in some instances be used if the policy was challenged.

It is clearly apparent that, as far as this sort of agreement is unfair to the party, it ought to be observed attentively and, if deemed exorbitant and unconscious, not made with the bona fide

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purpose of support for the claim. This judgement found that the embargo was not total, and limited it to "imperfect items for the purpose of gambling in lawsuits or for damaging or oppressing others by promoting and inciting wrongful acts to run counter to public policy."

The issue of the third-party financing has clearly been defined by the Supreme Court of India in the Bar Council of India v A.K. Balaji et al (2015). Through A.K Goyal and UU Lalit JJ, the Apex Court declared that no third party (non-lawyers) restrictions emerge to finance the dispute and be paid off after the lawsuit conclusion. The Bench supported the opinions of legal practitioners in the United States and the UK in respect to the financing of third parties.

The possible conflicts of interest of the arbitrators are among the first and most noticeable issues concerning the presence of third-party sponsors in international arbitration. The more important are the concerns as to who, how and by whom the arbitrators, parties and institutions should be evaluated, and if a possible conflict of interest involving funds from third parties is possible. Through current laws the main international arbitral agencies have a responsibility to provide the ICC Secretariat, the ICDR Administrator or the LCIA Registrar with data concerning the conflict of interest.

In EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic. The disagreement emerged in that instance when the facts communicated to the arbitral tribunal revealed that the claimants were not able to support arbitration proceedings. And from many sources, they received funds from third parties through the sale of rights to prospective arbitral verdicts. The Tribunal had requested the applicants not to divulge any of the specifics of the financial arrangements but to disclose the identity of their third-party funder for the purpose of verification of arbitrators' conflicts of interest

V. CONCLUSION

If one sees the merits of third-party funding it somewhere helps the parties to get the fair chance of hearing. Third party funding is a fast-developing sector and will certainly play a significant part in future international trade arbitration by becoming a standard means of funding international arbitration disputes. While the market is still relatively limited in terms of the number of suppliers and accessible assets, appropriate funds for arbitrations are available and are now invested in cases considered strong and with excellent chances of recovery. Because investment arbitration needs to be traIn conclusion, whether the advantages of the TPF are beyond the scope of the problems arising from the introduction of a foreigner into the arbitral proceedings remains an open question for debate but it appears to be a question which will stimulate debate for some time already with the help of several advanced entities. In any event,

if we are to go on to TPF, the legal and regulatory measures of the new funding instruments, be they formal or soft, might help to avoid abuses or misuse, TPF will undoubtedly play an ever-greater part in investment arbitration. TPF has undergone many problems in its recent years of development. Currently, there is an absence of arbitral practise in relation to third-party funding due to the restrictive nature of applicable laws (including the definition of "party" and "cost"), and the exceptionally exercised jurisdictional powers of the courts over third-parties (except for the traditional agency principles and assignment). Interestingly, although the bulk of the rules relevant indicate that the award is binding between parties, the English Arbitration Act of 1996 also covers the sphere of 'party.' This may be construed as involving donors.

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[5] Order XXV of the Civil Procedure Code was amended for Maharashtra by Bombay High Court Notification P 0102/77, dated September 5, 1983.

[6] Foreign Exchange Management Act of 1999

[7] Dilip K Sheth, Treatise on FEMA: Law and Practice

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