

# THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION: DEVISING A LEGAL FRAMEWORK FOR INDIA

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*Third-party funding is a practice wherein an entity funds the procedural costs of one of the parties in a dispute in exchange for a share in the monetary award, if successful. Although it is a popular practice in several jurisdictions, it has remained unexplored territory in international arbitration in India. The lack of a regulatory mechanism has resulted in widespread apprehension and reluctance to engage in such practice, rendering arbitration an inaccessible method of dispute resolution for most, due to its notoriously extortionate nature. This paper argues in favour of third-party funding in arbitration in India and seeks to reconcile the conflicting opinions regarding the duty and extent of mandated disclosure of such funding, to arrive at a middle ground which balances the interests and rights of all the parties concerned. It proposes and justifies the establishment of a transparent mechanism for mandatory disclosure of such funding while suggesting a few provisions to respect the third-party funder’s interest in remaining behind the ‘funding veil’. It analyses this mechanism in light of the new confidentiality provisions introduced in India under the Arbitration and Conciliation (Amendment) Act, 2019 and seeks to arrive at a viable regulatory framework after comparing various international practices, in order to encourage the growth of third-party funding in India in furtherance of the country’s goal to establish itself as a hub for international arbitration.*

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## I. INTRODUCTION

In the past few decades, third-party funding ('TPF') has taken the dispute resolution world by storm, not only in litigation but even in arbitration across the world. Although TPF was originally conceived as a mechanism meant to enable individuals that may not be able to afford the exorbitant costs involved in dispute resolution, it has been increasingly used by various companies in capital intensive industries who have found TPF to be a convenient alternative to financing disputes themselves. One prominent recent example of the same would be the special purpose vehicle created by Hindustan Construction Company ('HCC') to sell an identified pool of various arbitration claims and awards to a third-party investor group led by BlackRock Incorporated. This transaction made headlines since it not only amounted to a consideration of Rs. 1,750 crores but was also the first deal of its kind to have been made in the Indian infrastructure sector.<sup>1</sup> Patel Engineering and Era Engineering also serve as recent examples of litigation financing for large corporates that have created an impetus in TPF.<sup>2</sup>

These recent transactions have sparked a conversation about the benefits and opportunities that TPF offers companies that may be embroiled in a variety of disputes, or that simply wish to deleverage their debts. The sudden surge in the popularity of TPF in India has been accompanied by recent legal developments such as the Arbitration and Conciliation (Amendment) Act, 2019 ('2019 Amendment'),<sup>3</sup> as well as the overhaul of liquidation laws with the enactment of the Insolvency and Bankruptcy Code, 2016.<sup>4</sup> The nationwide lockdown in 2020 has also caused a surge in disputes particularly for engineering, procuring, and construction ('EPC') contracts. EPC companies are not only faced with various difficulties in meeting contractual obligations due to the pandemic but are most likely facing severe liquidity issues due to the slow-down in business operations. Various finance and legal experts have therefore opined that TPF is likely to gain immense traction since it serves as a convenient solution for various cash-constrained individuals and companies seeking dispute resolution.<sup>5</sup> In fact, TPF is also being increasingly used by large, solvent companies as well that simply prefer a funding alternative that facilitates sharing risk and maintaining liquidity.<sup>6</sup>

Before going into the benefits of TPF, it is crucial to understand what the term 'third-party funding' includes. While there exists widespread dispute about the nuances and technicalities of a formal definition for the concept, it can be loosely defined as an arrangement

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<sup>1</sup> THE ECONOMIC TIMES, *HCC in pact with BlackRock to raise Rs 1,750 crore via monetisation of claims*, March 26, 2019, available at <https://economictimes.indiatimes.com/markets/stocks/news/hcc-to-sell-litigation-claims-to-blackrock-led-investors/articleshow/68579183.cms> (Last visited September 20, 2021).

<sup>2</sup> THE BUSINESS STANDARD, *Infrastructure companies eye litigation funding to settle claims*, February 18, 2019, available at [https://www.business-standard.com/article/companies/infrastructure-companies-eye-litigation-funding-to-settle-claims-119021800035\\_1.html](https://www.business-standard.com/article/companies/infrastructure-companies-eye-litigation-funding-to-settle-claims-119021800035_1.html) (Last visited September 20, 2021).

<sup>3</sup> The Arbitration and Conciliation (Amendment) Act, 2019, No. 33 of 2019.

<sup>4</sup> The Insolvency and Bankruptcy Code, 2016, No. 31 of 2016.

<sup>5</sup> Amita Katragadda et al., *Cash constrained and need to litigate? Third Party Funding may be the solution*, INDIA CORPORATE LAW, June 22, 2020, available at <https://corporate.cyrilamarchandblogs.com/2020/06/need-to-litigate-third-party-funding/> (Last visited on September 20, 2021); Rajat Jariwal & Shruti Khanijow, *The Stage is Set: COVID19 Market Forces accelerating the inevitable arrival of Third Party Funding of disputes in India*, THE ECONOMIC TIMES, July 5, 2020, available at <https://cfo.economictimes.indiatimes.com/news/the-stage-is-set-covid19-market-forces-accelerating-the-inevitable-arrival-of-third-party-funding-of-disputes-in-india/76796193> (Last visited on September 20, 2021).

<sup>6</sup> Maxi C Scherer, *Third-Party Funding: Towards Mandatory Disclosure of Funding Agreement?* in BERNARDO M. CREMADES & ANTONIAS DIMOLITSA (eds), THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 96 (International Chamber of Commerce, 2013).

whereby an unrelated third-party, who has no prior interest in the dispute, provides financial support to one of the parties engaged in a dispute resolution, in return for a share of the eventual monetary proceeds that come out of the award, if any.<sup>7</sup>

The rising trend of TPF has been witnessed on a global scale, with a similar impetus developing in litigation in India. Regrettably, there is a lack of a similar practice within Indian arbitration, despite there being the same scope for returns on investments and party interests as there exist in litigation. More importantly, TPF is all the more needed in arbitration given the notoriously extortionate costs involved, which operate as a major barricade to legal recourse for impecunious individuals or companies.

In Part II of this paper, we explore the various models and types of TPF arrangements that are popularly used across the world while focusing on the varying degrees of control that can be exerted by the funders in each model. The individual interests of the three main stakeholders concerned — the third-party funder (‘funder’), the funded party, and the opposing party — shall also be analysed in-depth. In Part III, we trace the evolution of the concept of TPF while discussing the present Indian stance on the legality of such practice. In Part IV, we seek to reconcile conflicting interests of the three stakeholders involved by balancing duties of disclosure of TPF with the procedural and confidentiality concerns that may arise, with a specific analysis of the enhanced confidentiality requirements introduced by the 2019 Amendment. In Part V, we explore the potential impact that a funder may have on the sanctity of concepts such as attorney-client privilege as well as confidentiality of arbitral proceedings while attempting to lay down limitations on the extent of their inclusion in the day-to-day proceedings. In Part VI, we evaluate the potential conflicts of interest that may arise between the funder and the funded party, and whether such conflicts arising out of the funding contract would fall within the jurisdiction of the tribunal at hand, given that the funded party may not be a party to the ongoing arbitration. In Part VII, we discuss the wide-ranging concerns regarding costs and the logistics of enforcing an award against a funder, given that they are not a party to the arbitration. Part VIII presents the conclusion on the viability of TPF in India and a summary of the changes required in the legislations and institutional rules in order to create a secure legal framework for the operation of TPF.

## II. TYPES OF THIRD-PARTY FUNDING

In traditional/standard TPF, an individual or a company approaches a funder for monetary assistance, mainly for covering legal costs or liability arising out of the dispute or both.<sup>8</sup> The funded party, in return, may demand some percentage of the award contingent on a favourable decision. Generally, the percentage return ranges from twenty percent to forty percent or around three times the capital invested, whichever figure turns out to be higher.<sup>9</sup> In cases of an unfavourable decision, the liability of the funder and the funded party depend on the terms of the TPF Agreement (‘TPFA’). In international arbitration, funded clients may be claimants as well as respondents, and the experience for both types of clients is similar.<sup>10</sup>

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<sup>7</sup> INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, ICCA Reports No. 4, 18, (April, 2018) available at [https://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf) (Last visited on September 20, 2021).

<sup>8</sup> LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, *THIRD-PARTY FUNDING IN THE INTERNATIONAL ARBITRATION*, 1-5 (2<sup>nd</sup> ed., Kluwer Law International, 2017).

<sup>9</sup> JONAS VON GOELER, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE*, INTERNATIONAL ARBITRATION, Vol.35, 30-31 (Kluwer Law International, 2016).

<sup>10</sup> NIEUWVELD & SAHANI, *supra* note 8, at 1.

First, the client lists out the potential funders and applies for funding (either exclusively or simultaneously). To assess the claim, the party seeking funding will be asked to provide extensive information on the claim to the potential funders. Parallely, the funder and the client will enter into a Non-Disclosure Agreement ('NDA') to protect the confidential information shared.<sup>11</sup> Thereafter, the funder employs its expertise for due diligence which will help the funder analyse the probability of success on merits, strengths, and weaknesses of the claim, the ability to recover the award from the opposing party, possibilities of settlement, the creditworthiness of the clients as well as other metrics.<sup>12</sup> The due diligence may also include vetting by outside advisors to the funder such as legal advisors, auditors, or experts on quantum valuation.<sup>13</sup> For high-value/stake claims seeking substantial funding, the due diligence process might take months and require a significant amount of expenditure (the payer of these costs is decided as per the policy of the funder).<sup>14</sup> In case of acceptance, the funder and the funded parties decide, *inter alia*, on the terms of the agreement which include the extent of control to be exercised by the funded party,<sup>15</sup> the kinds of costs that will be covered by the funder,<sup>16</sup> the percentage of award demanded in case of a favourable outcome and other complexities such as instances allowing the funded party to redact the funding (termination)<sup>17</sup>

This section primarily focuses on the alternatives available to the standard/traditional form of TPF. There exist a plethora of types of TPF but for general understanding, the primary and most popular kinds of funding shall be highlighted along with the key differences that exist between them. In order to understand the types of TPF, one needs to be conversant with the three main stakeholders of the TPF process and their respective interests. These are discussed below.

#### A. THE THREE STAKEHOLDERS IN TPF

##### 1. THIRD-PARTY FUNDER

A funder refers to any person or entity that is contributing funds or any other material support to the prosecution or defence of the case and has a direct economic interest in the award to be rendered in arbitration/litigation.<sup>18</sup> For funders, international arbitration is an attractive area of investment because of its high value of claims, speed of conducting the proceedings, low evidentiary costs, and the industry expertise of decision-makers.<sup>19</sup> Moreover, there is greater predictability of the outcome and a high probability of the enforceability of awards which entices funders to enter the industry. Funders have an interest in concealing their identity from the opposing party and the tribunal in order to protect their interest with regards to the terms of the funding agreement and further, to prevent a delay in proceedings that may arise from a conflict of interest between the funder and the arbitrator that could potentially result in challenges being made to the appointment of the arbitrator.

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<sup>11</sup> ICCA Report, *supra* note 7, at 28.

<sup>12</sup> *Id.*, at 25.

<sup>13</sup> Aren Goldsmith & Lorenzo Melchionda, *Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (but Were Afraid to Ask)*, Vol.2012(1), INT'L BUS. L.J., 57 (2012).

<sup>14</sup> GOELER, *supra* note 9, at 16.

<sup>15</sup> *Infra* note, Part VI (B)(i), 28.

<sup>16</sup> *Infra* note, Part VI (B)(iii)(a), 28-29.

<sup>17</sup> *Infra* note, Part VI (B)(ii), 28.

<sup>18</sup> International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, Rule 6(b).

<sup>19</sup> NIEUWVELD & SAHANI, *supra* note 8, at 5-6.

## 2. FUNDED PARTY

The party that seeks funding from an external source is known as the funded party. The funded party may seek funding for several reasons, the primary one being the mitigation of loss caused due to the dispute. There are different types of parties who may need funding, some being large corporations, law firms, individuals, and in some cases, even sovereign States.<sup>20</sup> Usually, the funded party is the one initiating the claim (claimant) but in some cases, TPF is also opted for by the respondents.<sup>21</sup> One of the reasons for the abundance of claimant funding is that TPF is most often given on the basis of meritorious claims rather than counter-claims, which are not made very often. For the duration of the arbitral proceedings, the funded party generally wishes to have maximum control over the management of the proceedings and aspires to make independent decisions in matters of settlement.<sup>22</sup> The latter interest is especially crucial given that since the dispute is being funded by the third-party, it is highly possible that the financial decisions of the third-party, for example, concerning settlements, would be largely dictated by the funder.<sup>23</sup> The funded party's interests in such a scenario could potentially be undermined due to their lack of bargaining power and financial resources to proceed with the dispute.<sup>24</sup> Thus, retaining a certain degree of decisional autonomy is one of the main interests of the funded party. Further, the funder in some instances may choose to terminate the funding agreement due to the decisions taken by the funded party in the context of the proceedings (for example, accepting a settlement offer made by the opposing party). This could leave the funded party stranded, who — having already invested in the claim — would have no financial means of pursuing it. Thus, the funded party seeks to ensure that the funder does not have the right to arbitrarily terminate the funding.

## 3. OPPOSING PARTY

The party against whom the funded claim is brought is referred to as the opposing party. In cases of TPF, the opposing party may seek disclosure of the identity of the funder in order to ensure that no potential conflict-of-interest lies between the funder and any member of the arbitral tribunal, thereby ensuring no violation of the standard of impartiality and independence required of the tribunal.<sup>25</sup> Further, the opposing party also aspires to ensure that no jeopardy lies with respect to either the efficiency of the proceedings or the enforceability of the award at a later stage (due to the presence of a funder).<sup>26</sup>

### B. TYPES OF FUNDERS

There exist various kinds of funding consisting of a mixture of the features of the ones listed below. The funded party may opt for a funding agreement depending on the financial assistance it requires and the extent of control it aims to exercise. For the general understanding of the reader, the four primary (also distinctive) types of TPF are discussed in brief - (A) Insurance, (B) Attorney Financing, (C) Loans, and (D) Assignment.<sup>27</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, 2.

<sup>22</sup> ICCA Report, *supra* note 7, at 20.

<sup>23</sup> *Id.*, 28.

<sup>24</sup> *Id.*, 28.

<sup>25</sup> Pranav V. Kamnani & Aastha Kaushal, *Regulation of Third Party Funding of Arbitration in India: The Road Not Taken*, Vol.8(2) INDIAN JOURNAL OF ARBITRATION LAW, 155-156 (2019).

<sup>26</sup> *Id.*, 155-156.

<sup>27</sup> NIEUWVELD & SAHANI, *supra* note 8, at 1-5.

## 1. INSURANCE

Legal insurance is one of the oldest alternatives to TPF.<sup>28</sup> In the context of litigation/arbitration, legal insurance is structurally analogous to TPF.<sup>29</sup> A claimant may consider insurance as an alternative since the premiums are much lower than the standard return sought by the funders.<sup>30</sup> Generally, standard premiums rates range between thirty percent to fifty percent of the total claim or the sum insured, and these may be payable upfront.<sup>31</sup> Legal insurance can be broadly categorised into two parts — (1) legal expenses insurance and (2) liability insurance. Both of these kinds of insurance may be obtained either before or after the event in dispute has occurred.

### a. Legal Expenses Insurance

It is a common practice for a business to take out insurance policies to cover the legal costs associated with future claims disputed by the insured.<sup>32</sup> This is termed as ‘before the event’ (BTE) insurance. Under BTE insurance, the insured pays recurring premiums and in return is entitled to legal expenses arising out of future disputes. In this context, generally, legal expenses cover costs for bringing the claim or defending them, paying lawyers, arbitrators, and expertise sought for/during the proceedings.<sup>33</sup> Insurances bought ‘after the event’ (ATE) as the name suggests, are instances when insurance is taken out after the said legal dispute has arisen. The insurer is entitled to a fixed recurring premium calculated in accordance with the potential legal expenses. ATE insurance seeks to protect the insured from potential losses arising from the dispute, such as having to pay its own costs (incurred in pursuing the case) or even adverse costs.<sup>34</sup>

### b. Liability Insurance

The liability insurance or outcome policy is structured like regular insurance policies, whereby the insured is protected from the liability arising out of the dispute and in return pays a premium to the insurer which is calculated based on the probability of loss.<sup>35</sup> There are two types of liability insurance — traditional liability insurance, and modern ATE-BTE type. The primary difference between these two is the extent of control exercised by the funded party.<sup>36</sup> Under traditional liability insurance, the insurer is under the duty to defend the insured during the proceedings (as a result, liability insurance largely covers the legal expenses) as well as the duty to indemnify the insurer in case of an unfavourable decision.<sup>37</sup> Traditional liability insurance is not TPF *per se*, since the insurer appears as a co-client of the insured during the proceedings or substitutes (right of subrogation) the funded party while pursuing the

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<sup>28</sup> James Clanchy, *Navigating the Waters of Third Party Funding in Arbitration*, Vol.82(3), INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT, 224-230 (2016); ICCA, *supra* note 7, 33-34.

<sup>29</sup> *Id.*, 35.

<sup>30</sup> *Id.*

<sup>31</sup> GOELER, *supra* note 9, at 52-55.

<sup>32</sup> Goldsmith & Melchionda, *supra* note 13, at 60.

<sup>33</sup> ICCA Report, *supra* note 7, at 2.

<sup>34</sup> *Id.* (An adverse cost may require the losing party to pay some or all of the costs of the winning ty; these may include attorney fees, evidentiary costs and administrative fees. The use of adverse costs awards and expenses covered therein depend on the applicable laws and the rules of arbitration adopted by the parties).

<sup>35</sup> Goldsmith & Melchionda, *supra* note 13, at 9.

<sup>36</sup> NIEUWVELD & SAHANI, *supra* note 8, at 9.

<sup>37</sup> GOELER, *supra* note 9, at 54.

claim.<sup>38</sup> Through the right of subrogation, the insurer steps into the shoes of the funded party and pursues the claims in its own name. Outcome policies or traditional liability insurance is mainly used to protect the respondents' own risk liability from pending litigation/arbitration. In these policies the insurer assumes a significant risk; therefore, an intensive exchange of information is required between the funder and the funded party followed by an extensive (and costly) case assessment to protect its own financial interests.<sup>39</sup>

From the aspect of control, the main disadvantage of traditional liability insurance is that the insurer requires the insured to relinquish much or all of the control over the management of the case and any possible settlement negotiations or agreements.<sup>40</sup> In most cases, the extent of control exercised by the insurance company is directly proportional to its financial contribution.<sup>41</sup> Under modern ATE-BTE liability insurance, the funder exerts no control over the management of the arbitration proceedings and has no say in settlement agreements.<sup>42</sup>

## 2. ATTORNEY FINANCING

Under success-based legal fees, the lawyer invests his own resources and services in the case with remuneration depending on the outcome.<sup>43</sup> Depending on the contract, the lawyer may be entitled to a reduced fee or no fee at all if the case is lost. On the other hand, if the claim is successful, the lawyer may be entitled to an increased fee or an extra percentage interest. Based on the possible combinations of the outcome, they are termed contingency or conditional fee arrangements. In attorney financing, the relationship between the attorney and the client is linear, and the client retains the full control or management of the case akin to the client himself financing the dispute.<sup>44</sup> Success-based fees could be a contingency-based or a conditional fee arrangement.

Under contingency fee arrangements, the attorney does not receive any remuneration in the case of an unsuccessful claim. Typically, the fee is calculated as one-third of the damages obtained from the settlement and forty percent to fifty percent of damages obtained through legal proceedings.<sup>45</sup> Contingency fee arrangements act as an incentive for the client to pursue the claim since they do not have to bear the financial pressure. Sometimes, in order to mitigate the pressure that results from contingency fee arrangements, law firms themselves obtain loans from an external funder.<sup>46</sup>

A conditional fee arrangement is very similar to the contingency arrangement, excluding the fact that in the former the attorney charges a discounted fee in case of an unfavourable decision.<sup>47</sup> If the client wins, then the attorney is paid an additional fee over and above the traditional (stipulated) fee. The primary distinction between conditional fee and contingency fee is that the risk of loss is split between both the parties in the former, while the

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<sup>38</sup> *Id.*; Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, Vol.8, J.L. ECON. & POL'Y, 676-77 (2012).

<sup>39</sup> GOELER, *supra* note 9, at 1.

<sup>40</sup> Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, Vol.95, MINN. L. REV., 1295-1296 (2011).

<sup>41</sup> NIEUWVELD & SAHANI, *supra* note 8, at 2-5.

<sup>42</sup> NIEUWVELD & SAHANI, *supra* note 8, at 9.

<sup>43</sup> GOELER, *supra* note 9, at 50-53.

<sup>44</sup> NIEUWVELD & SAHANI, *supra* note 8, at 4-6.

<sup>45</sup> GOELER, *supra* note 9, at 51-53.

<sup>46</sup> Jonathan Molot, *The Feasibility of Litigation Markets*, Vol.89, INDIANA L.J., 185 (2014).

<sup>47</sup> GOELER, *supra* note 9, at 50-52.



entire risk is borne by the attorney in the latter.<sup>48</sup> Conditional fee arrangements ensure that the attorney receives some remuneration for his efforts.

Under attorney financing/success-based fees, although the attorney assumes most of the risk, the client retains control over the management of the case.<sup>49</sup> This is in sharp contrast to traditional liability insurance wherein the company is often granted full control over the claim. The primary reason for the difference in control is due to the professional ethics and the code of conduct that obligate the attorneys to zealously pursue the case even in situations where they feel that the case is not winnable.<sup>50</sup> Contrariwise, the insurance company has no such obligation and thus, the right to withdraw the claim regardless of the interests of the insured.<sup>51</sup>

### 3. LOAN AGREEMENTS

Parties facing legal disputes may opt for loans from banks or other financial institutions to have access to money for defending or bringing claims. A client may also receive a loan from an attorney or a law firm. Further, the attorney or the law firm may also seek a loan to bridge the gap between the current expenses of the firm and the influx of cash expected from standard or success-based fees. The primary advantage of opting for a loan is that the client retains management and control over the dispute.<sup>52</sup> The disadvantage, however, is that the funded party loses the chance of mitigating his losses since the sum paid out under the loan agreement must be returned regardless of the outcome of the proceedings.<sup>53</sup>

### 4. ASSIGNMENT OF CLAIMS

Assignment of claims is relevant to the present discussion as historically, it was regarded as a category of maintenance. In some jurisdictions, the extent of control exercised by the funder is taken into consideration for deciding the validity of the funding agreement.<sup>54</sup> Thus, in most jurisdictions, classic TPF comprises of transfer of proceeds of a successful claim rather than the right to pursue, in order to ensure compliance with ethical rules and laws of that jurisdiction.<sup>55</sup> In other jurisdictions, assignment of claims may occur either through the outright sale of the right to pursue the claim or in situations wherein a fundamental corporate change has taken place due to merger or acquisition, sale of assets, or liquidation during bankruptcy.<sup>56</sup> An outright sale of claims is made in exchange for immediate monetary compensation.<sup>57</sup> In this process, the purchase price of the claim agreed on is lower than the expected value of the claim.<sup>58</sup>

Assignment of claims is akin to debt collection agreements in which the original creditor sells to a third-party debt agency for a lesser value. In this regard, a contemporary incident related to the Indian regime is the previously mentioned HCC-Blackrock arrangement

<sup>48</sup> NIEUWVELD & SAHANI, *supra* note 8, at 3-5.

<sup>49</sup> NIEUWVELD & SAHANI, *supra* note 8, at 4-6.

<sup>50</sup> Douglas Richmond, *Other People's Money: The Ethics of Litigation Funding*, Vol.56, MERCER L. REV., 651-652, 659-664 (2005).

<sup>51</sup> Steinitz, *supra* note 40.

<sup>52</sup> NIEUWVELD & SAHANI, *supra* note 8, at 4-6.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Steinitz, *supra* note 40, at 1296-1299.

<sup>57</sup> *Id.*

<sup>58</sup> GOELER, *supra* note 9, at 54-57.

wherein, HCC assigned its claims to the global investment firm Blackrock in exchange for immediate monetisation. This was done in order to deleverage the company's debt and to address the issues of asset-debt mismatch that HCC was facing.<sup>59</sup> This assignment of claims agreement would prove to be crucial in reducing HCC's debt and creating the liquidity to undergo a financial turnaround, as quoted by their Group CEO, Arjun Dhawan.<sup>60</sup> Another example of assignment of claims is TPF for class actions wherein the claimants assign their claims to a non-profit association that pursues the claim for the class or group of individuals seeking a settlement or legal action.<sup>61</sup>

The different types of funding discussed in this section have evolved over several decades and their validity is based on the laws of their respective jurisdictions. As mentioned throughout the section, the extent of control exercised by the funder is an important aspect in the process of TPF as it represents the interests of the stakeholders. The funded party would prefer to enter into an arrangement that grants him maximum autonomy. Through the analysis of the types of TPF, it can be deduced that a funder would prefer to enter into modern insurance policies rather than traditional ones. Further, in cases of loan agreements, even though the funded party has the desired decisional autonomy it might not prefer to opt for it due to the relatively onerous financial burden. With regards to attorney financing, the financial burden is minimal and the control is also with the funded party but the funded party's gain is significantly reduced as a substantial part of the award is taken up by the attorney or the law. The next section of the paper discusses the evolution of the concept TPF.

### III. EVOLUTION OF THIRD-PARTY FUNDING AND THE PRESENT INDIAN STANCE ON ITS LEGALITY

Historically, TPF was prejudiced against due to the existence of the fifteenth-century common law doctrines of maintenance and champerty.<sup>62</sup> These doctrines originate from the ancient Greek and Roman civilisations.<sup>63</sup> Although jurisdictions define maintenance differently, a broad-based understanding dictates that maintenance is an overarching doctrine that encompasses providing financial assistance to a third-party/stranger while bearing no interest in the outcome of the case.<sup>64</sup> Steyn LJ terms maintenance as the support of litigation by a stranger without just cause.<sup>65</sup> Similarly, champerty refers to providing similar assistance with the expectancy of receiving a share from the award and thus, bearing interest in the outcome of the case.<sup>66</sup> These doctrines stemmed from a fear of impediment to 'purity of justice' caused by a third-party/stranger who, when allowed to meddle in a foreign matter, could possibly stir up litigation.<sup>67</sup> Further, in some instances, third-party support could also give rise

<sup>59</sup> FINANCIAL EXPRESS, *HCC lenders to hive off Rs 2,100-crore of company's debt into third-party SPV*, January 11, 2020, available at <https://www.financialexpress.com/industry/hcc-lenders-to-hive-off-rs-2100-crore-of-companys-debt-into-third-party-spv/1819645/> (Last visited on September 20, 2021).

<sup>60</sup> ECONOMIC TIMES, *HCC in pact with BlackRock to raise Rs 1,750 crore via monetisation of claims*, March 26, 2019, available at <https://economictimes.indiatimes.com/markets/stocks/news/hcc-to-sell-litigation-claims-to-blackrock-led-investors/articleshow/68579183.cms?from=mdr> (Last visited on September 20, 2021).

<sup>61</sup> NIEUWVELD & SAHANI, *supra* note 8, at 3-5, 136-137.

<sup>62</sup> Max Radin, *Maintenance by Champerty*, Vol.24, CAL. L. REV., 48, 49, 51 (1935).

<sup>63</sup> *Id.*, 52-54 (1935); NIEUWVELD & SAHANI, *supra* note 8, at 14.

<sup>64</sup> Richmond, *supra* note 50, at 649-650.

<sup>65</sup> *Giles v. Thompson*, [1994] 1 A.C. 142 (England and Wales Court of Appeal).

<sup>66</sup> Ari Dobner, *Litigation for Sale*, Vol.144, U. PA. L. REV. 1543-1546 (April 1996); Radin, *supra* note 62, at 51.

<sup>67</sup> *Otech Pakistan Pvt Ltd v. Clough Engineering Ltd*, [2006] SGCA 46 (Singapore Court of Appeal); *British Cash and Parcel Conveyors Ltd v. Lamson Store Service Co Ltd*, [1908] 1 K.B. 1006 at 1014 (Court of King's Bench, England) (per Fletcher Moulton L.J.).

to frivolous claims. Hence, to safeguard the administration of justice, maintenance and champerty were made tortious and criminal offences by the United Kingdom (UK).<sup>68</sup>

Several scholars opined that aforesaid doctrines rather than promoting public policy were acting against it.<sup>69</sup> Eventually, the sovereigns concurred and consequently, these doctrines became outdated and their application was diluted to promote greater access to justice. The United Kingdom legislature through the Criminal Law Amendment Act, 1967, abolished the classification of the doctrines as crimes or torts.<sup>70</sup> However, §14(2) of the amended Act reserves the applicability of these doctrines in case of contracts in violation of public policy. Although the doctrines continue to survive with respect to contractual claims, their strength has diminished over the last two decades. The turning point came in 2005 when the Court of Appeals decision in *Arkin v. Borchard Lines Ltd.* confirmed the validity of TPF by describing commercial funders as people who “provide help to those seeking access to justice which they could not otherwise afford”.<sup>71</sup> Moreover, in support of TPF, the Civil Justice Council (Agency of the United Kingdom's Ministry of Justice) published the Code of Conduct for Litigation Funders in 2011 which was administered by the Association of Litigation Funders (ALF).<sup>72</sup> Additionally, in 2019, the Competition Appeal Tribunal in its hearings described TPF as an essential feature of modern litigation that facilitates access to justice.<sup>73</sup>

Similarly, other countries such as Australia, Singapore, Hong Kong, and the United States have also diluted the applicability of the doctrines to pave the way for TPF.<sup>74</sup> Australia recognised the legitimacy of TPF in 2006 through the landmark case *Campbell's Cash and Carry Pty Ltd v. Fostif Ltd.*, wherein the Court held that litigation funding was neither an abuse of process nor was it contrary to public policy.<sup>75</sup> Likewise, Singapore (which is one of the world's leading international arbitration jurisdictions) enacted the Civil Law Amendment Act in 2017, permitting TPF for international arbitration and related proceedings.<sup>76</sup> Correspondingly, Hong Kong approved TPF for arbitration in the same year by adopting the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016.<sup>77</sup> Interestingly enough, both Singapore and Hong Kong permitted TPF only in the context of arbitration (which was previously prohibited) and not litigation (which is only permissible under exceptional circumstances). Contrary to the rising global trend of legalising and encouraging TPF in arbitration, Ireland still abides by the superannuated/antediluvian doctrines. The Irish Courts have taken an alternative stand regarding the validity of TPF in the

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<sup>68</sup> The Criminal Law Act, 1967, §13(1), §14(1) (United Kingdom) (now abolished).

<sup>69</sup> J. Bentham, *The Works of Jeremy Bentham*, Vol.3, (1), A Defence of Usury, Letter XII, MAINTENANCE AND CHAMPERTY, at 19 (1843); See also Lord Neuberger, President of The Supreme Court, Harbour Litigation Funding First Annual Lecture, 8th May 2013, 4.

<sup>70</sup> The Criminal Law (Amendment) Act, 1967, §13-14 (United Kingdom).

<sup>71</sup> *Arkin v. Borchard Lines Ltd.*, [2005] ECWA Civ 655, ¶16, 38 (England and Wales Court of Appeal).

<sup>72</sup> ASSOCIATION OF LITIGATION FUNDERS (‘ALF’), *The Code of Conduct for Litigation Funders*, (November, 2011) available at <https://associationoflitigationfunders.com/code-of-conduct/> (Last visited on September 4, 2021).

<sup>73</sup> *UK Trucks Claim Limited v. Fiat Chrysler Automobiles*, [2019] CAT 29 (Competition Appeal Tribunal, United Kingdom); *Road Haulage Association Limited v. Man SE*, [2019] CAT 26 (Competition Appeal Tribunal, United Kingdom).

<sup>74</sup> NIEUWVELD & SAHANI, *supra* note 8, at 129; Steptoe & Johnson LLP, *Litigation Funding Update - Abolishing Common Law Champerty*, July 7, 2020, available at <https://www.lexology.com/library/detail.aspx?g=bbd1a649-717c-49e3-a323-c476f2e6626e> (Last visited on September 20, 2021).

<sup>75</sup> *Campbell's Cash and Carry Pty Ltd v. Fostif Ltd.*, [2006] HCA 41 (High Court of Australia).

<sup>76</sup> The Civil Law (Amendment) Act, 2017 (Singapore).

<sup>77</sup> The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Act, 2017 (Hong Kong).

case of *Persona Digital Telephony Limited v. The Minister for Public Enterprise*, 2017.<sup>78</sup> The Irish Supreme Court refused to accept the progressive view and affirmed that TPF in return for a share of proceeds would automatically be termed unlawful.

In the Indian context, there exists no jurisprudence regarding TPF in arbitration. The Arbitration and Conciliation Act, 1996 ('Arbitration Act' or 'the Act') also does not recognise TPF. Thus, the legitimacy of TPF in arbitration would have to be drawn from its jurisprudence with respect to litigation. The Privy Council in the landmark case of *Ram Coomar Coondoo v. Chunder Canto Mookerjee* held that the rigid English doctrines of maintenance and champerty do not apply to the Indian jurisdiction and thus allowed TPF on the ground of promoting access to justice.<sup>79</sup> However, the Council noted that:

“But agreements of this kind ought to be carefully watched, and when found to be extortionate, and unconscionable, so as to be inequitable against the party; or to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, — effect ought not be given to them.”<sup>80</sup>

This position was reiterated by the Privy Council in various subsequent cases,<sup>81</sup> and was also been affirmed post-independence by the Indian Supreme Court.<sup>82</sup> The concept of TPF was subsequently given statutory recognition in case of civil suits under Order XXV Rule 1 of the Civil Code of Procedure, 1908, through state amendments by Gujarat, Madhya Pradesh, Uttar Pradesh, and Maharashtra.<sup>83</sup> The provisions of the state of Maharashtra also specifically provide the Courts with the power to secure costs for litigation by asking the financier to become a party to the suit and deposit the cost in the Court.<sup>84</sup> Further, the Supreme Court, through the case of *A.K. Balaji v. Bar Council of India*, subsequently reaffirmed the validity of TPF but stated that attorney financing would be impermissible due to the potential violations of the provisions of Bar Council of India's Standards of Professional Conduct and Etiquette.<sup>85</sup> Therefore, it can be concluded that Indian laws do not prohibit TPF.

Nonetheless, at the central level, there exists an absence of statutory provisions or legal framework for the promotion of TPF. Hence, concerns of confidentiality, disclosure, costs, and enforcement of awards remain largely unaddressed. Further, Indian law lacks guidance on how to deal with conflicts of interest prevailing between the funder and the funded party. This hampers the growth of the TPF market as funders are apprehensive to engage in the same. Moreover, due to the absence of legal provisions, the legitimacy of TPF is constantly questioned. In 2017, an arbitral award passed by Justice Phillip Otton in London was

<sup>78</sup> *Persona Digital Telephony Limited v. The Minister for Public Enterprise*, [2017] IESC 27 (Supreme Court of Ireland).

<sup>79</sup> *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, (1876-77) 4 IA 23.

<sup>80</sup> *Id.*, ¶38.

<sup>81</sup> *Kunwar Ram Lal v. Nil Kanth*, (1893) 20 I.A. 112; *Lala Ram Swarup v. Court of Wards*, (1940) 42 BOMLR 307.

<sup>82</sup> *In Re: Mr. 'G', A Senior Advocate Of the Supreme Court. v. Unknown*, 1954 (2) BLJR 477, ¶11.

<sup>83</sup> The Civil Procedure Code (Amendment [State]) Act, 1908, Order XXV Rule 1.

<sup>84</sup> The Bombay High Court in 1983 substituted Order XXV of the CPC which pre-supposes that third-party funding is permissible for Indian litigation. See, Bombay High Court Notification P 0102/77, dated September 5, 1983.

<sup>85</sup> *A.K. Balaji v. Bar Council of India*, AIR 2018 SC 1382 (Bar Council of India's Standards of Professional Conduct and Etiquette Rules, 1975, Part VI, Chapter II, read with the Advocate's Act 1961, §49(1)(c) and the proviso thereto).

challenged in the Hyderabad High Court, and one of the grounds of the challenge was the presence of a third-party funder. However, the petition was subsequently withdrawn.<sup>86</sup> Thus, these factors impede the growth of TPF in India.

The need for TPF is greater than ever.<sup>87</sup> The disruption in the global economy caused by the COVID-19 pandemic is profound, to say the least. Moreover, litigation and arbitration procedures require a substantial amount of money and their recovery is contingent on a favourable outcome. Further, the arbitration and the possible subsequent appeals require the investment of capital for a considerable amount of time.<sup>88</sup> Amidst this uncertainty, TPF can help Indian companies to sustain their claims or to assign them for immediate liquidation. As was previously mentioned, a similar resort of assigning claims to third-party funders has recently been taken by Indian companies Patel Engineering and HCC for overcoming their cash constraint.<sup>89</sup> Hence, the evolution of TPF in India could be boosted by the pandemic, but unprecedented problems might arise due to the lack of rules and regulations governing TPF. The subsequent chapters of this paper discuss the concerns arising during the process of TPF (in the context of arbitration) and a possible framework that could be adopted by India.

#### IV. RECONCILING DUTIES OF DISCLOSURE WITH PROCEDURAL AND CONFIDENTIALITY CONCERNS - HOW FAR TO PIERCE THE 'FUNDING VEIL'?

At the very outset, it is crucial to distinguish between the concepts of disclosure and that of confidentiality. The principle of disclosure operates within the arbitral proceedings between the parties to the dispute, while the principle of confidentiality applies outside of the proceedings themselves, with respect to third-parties. Divulging of information to a third-party funder that is not a party to the arbitration, therefore, goes against the principle of confidentiality since it is equivalent to "opening the door of the arbitration room to a third-party".<sup>90</sup> The funder is thus uniquely placed in such a situation.<sup>91</sup> Although it is not a party to the arbitral proceeding, it nevertheless possesses sensitive information about the dispute at hand.

While TPF in litigation has a relatively simple procedural mechanism, TPF in arbitration comes with several additional hurdles due to the unique nature of arbitration. Most of these issues largely stem from the party's right to appoint their arbitrators, as well as their

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<sup>86</sup> Sameer Jain et al., *Third Party Funding in International Arbitration: An Indian Perspective*, PSL CHAMBERS, August 1, 2018, available at <https://www.pslchambers.com/third-party-funding-in-international-arbitration-an-indian-perspective/> (Last visited on September 21, 2021) (EXEP/2/2017 Hyderabad High Court (Unreported)).

<sup>87</sup> Amita Katragadda et al., *Cash constrained and need to litigate? Third Party Funding may be the solution*, CYRIL AMARCHAND BLOGS, June 22, 2020, available at <https://corporate.cyrilamarchandblogs.com/2020/06/need-to-litigate-third-party-funding/> (Last visited on September 21, 2021).

<sup>88</sup> *Id.*

<sup>89</sup> THE MINT (Swaraj Singh Dhanjal & Tanya Thomas), *HCC raises ₹1,750 crore in litigation funding deal*, March, 27 2019, available at <https://www.livemint.com/companies/news/hcc-raises-rs-1-750-crore-in-litigation-funding-deal-1553651279600.html> (Last visited on November 21, 2020); THE BUSINESS STANDARD (Amritha Pillay), *Infrastructure companies eye litigation funding to settle claims*, February 19, 2019, available at [https://www.business-standard.com/article/companies/infrastructure-companies-eye-litigation-funding-to-settle-claims-119021800035\\_1.html](https://www.business-standard.com/article/companies/infrastructure-companies-eye-litigation-funding-to-settle-claims-119021800035_1.html) (Last visited on 21 September, 2021).

<sup>90</sup> *Hassneh Insurance Co. of Isreal v. Steuart J. Mew*, [1993] 2 Lloyd's Rep. 243 (Queen's Bench, England).

<sup>91</sup> Caroline Dos Santos, *Third-Party Funding in International Commercial Arbitration: A Wolf in Sheep's Clothing?*, Vol.35(4), ASA BULLETIN, 923 (2017).

right to challenge and replace an arbitrator should concerns arise with respect to their independence and impartiality.

In order to ensure equal treatment of parties, the arbitrators appointed are expected to maintain independence and impartiality throughout the arbitral proceedings. Under Indian law, one of the primary grounds for challenging the appointment of an arbitrator is the existence of either a past or present relationship with one of the parties, which gives rise to justifiable doubts as to the arbitrator's independence or impartiality.<sup>92</sup> Before the appointment of an arbitrator, the arbitrator is required to sign a statement confirming their impartiality and independence, and to disclose any circumstances that could potentially give rise to justifiable doubts concerning the same.<sup>93</sup> These circumstances could range from having worked with one of the parties in the past to having a financial interest in the outcome of the dispute being arbitrated.<sup>94</sup> Such unilateral disclosure is meant to be made explicitly and unequivocally to both of the parties to the arbitration, thereby ensuring the greatest degree of transparency and impartiality.<sup>95</sup> Upon such disclosure, it is up to the parties to decide whether the circumstances of the relationship disclosed by the arbitrator amount to a risk to the ability of the arbitrator to be independent. If one of the parties feels that such risk exists, they may file a challenge to the arbitrator's appointment and seek a replacement or change to the composition of the arbitral tribunal.<sup>96</sup> This power to challenge is one of the key tenets of arbitration since the existence of any partiality would not only jeopardise the principle of equality but can even render the eventual arbitral award unenforceable. The Seventh Schedule of the Act even provides categories of arbitrators' relationships with the parties or interests in the dispute at hand which would render a person ineligible to be appointed as an arbitrator in those specific cases.<sup>97</sup>

To ensure impartiality in an ordinary arbitration (without a TPF arrangement), it was only the relationship between the arbitrator and the parties themselves that had to be scrutinised. The entry of a third-party funder into the fray considerably complicates matters since even though the funder may not be enjoined as a party to the arbitration, the same degree of unfair treatment or impartiality could just as well exist if the funder has had a previous (or existing) relationship with the arbitrator(s). It, therefore, becomes crucial that the same check for prior relationship or potential bias should apply for the arbitrator with respect to the third-party funder as well, to ensure fairness in proceedings. If it is found subsequently that the principle of procedural fairness has been violated, the award rendered by the tribunal becomes unenforceable, which would be contrary to the interests of both the funded party as well as the funder. Whether the party should disclose their TPF arrangement to the tribunal and the opposing party has been a widely contested issue to this date.<sup>98</sup> The increased degree of party autonomy in arbitration (as opposed to litigation) could very easily become a weapon of abuse that parties may use by appointing an arbitrator that may either have a vested interest in or otherwise be partial to a third-party funder.

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<sup>92</sup> The Arbitration and Conciliation Act, 1996, §12(1)(a).

<sup>93</sup> The Arbitration and Conciliation Act, 1996, §12(1), Explanation 2.

<sup>94</sup> See the Arbitration and Conciliation Act, 1996, Fifth Schedule.

<sup>95</sup> See the Arbitration and Conciliation Act, 1996, Sixth Schedule.

<sup>96</sup> The Arbitration and Conciliation Act, 1996, §12(4).

<sup>97</sup> The Arbitration and Conciliation Act, 1996, §12(5), Schedule VII.

<sup>98</sup> Dominik Horodyski & Maria Kierska, *Third Party Funding in International Arbitration – Legal Problems and Global Trends with a Focus on Disclosure Requirement*, available at <https://core.ac.uk/download/pdf/132335993.pdf> (Last visited on September 21, 2021); see also Nathalie Allen Prince & David Hunt, *Increasingly mandatory disclosure of third-party funding in arbitration*, FINANCIER WORLDWIDE, November 2018, available at <https://www.financierworldwide.com/increasingly-mandatory-disclosure-of-third-party-funding-in-arbitration#.YFEfIZ0zY2w> (Last visited on September 21, 2021).

This duty to ensure that the arbitrator has not had any prior relationship with either of the parties or the funder is precisely what makes the disclosure of the identity of the third-party funder to the tribunal so crucial. At the same time, however, it is important to note that such disclosure of identity is often contrary to the wishes and interests of the funder since it potentially risks delaying the arbitral proceedings. Funders often fear that the disclosure of their identity to the opposing party may result in an unnecessary delay in the proceedings since sufficient time must be given to the opposing party to conduct due diligence on its own part to assure itself of the absence of any potential concerns of conflict of interest with any of the arbitrators. The approach towards procedural disclosures must therefore strike a delicate balance between transparency to mitigate risks of undisclosed TPF on one hand, and concerns of confidentiality, fairness, and equal treatment on the other.<sup>99</sup> Consequently, it is crucial to understand what the implications such failure to disclose may have on integral principles of international commercial arbitration.

#### A. CONFLICTS OF INTEREST AS GROUNDS FOR CHALLENGE OF AN ARBITRATOR

The right to challenge the appointment of an arbitrator is one of the core principles for ensuring procedural fairness in arbitration. This right has been universally acknowledged and included under not only domestic statutes,<sup>100</sup> but even under various institutional arbitration rules,<sup>101</sup> as well as the UNCITRAL Model Law itself.<sup>102</sup> The 2014 revisions made to the IBA Guidelines on Conflicts of Interest in International Arbitration (‘IBA Guidelines’) have cleared up much of the TPF controversy by creating a colour-coded list of various circumstances and scenarios that could amount to justifiable grounds of impartiality and lack of independence.<sup>103</sup> While the IBA Guidelines are not binding, they are considered soft law embodying the best practices that are well accepted across the field of international arbitration. General Standard 6 of the IBA Guidelines which defines ‘Relationships’ includes circumstances or situations where one of the parties has a “direct economic interest” in the award to be rendered in the arbitration.<sup>104</sup> The Orange List provides a non-exhaustive list of scenarios in which the arbitrator is duty-bound to disclose, since (depending upon the facts of the case), such a situation may amount to doubts as to the independence or impartiality of the arbitrator. An instance where an arbitrator has been appointed several times by the same funder is said to fall under the ‘Orange List’ provision of an arbitrator having “previous services for one of the parties or other involvement in the case”.<sup>105</sup> This demonstrates that funders are effectively considered equivalent to parties in a dispute while determining conflicts of interest at the stage of arbitrator appointment.

Since the IBA Guidelines have included third-party funders within the scope of relationships that the arbitrator must disclose to the parties to an arbitration, the existence of any relationship between the funder and the arbitrator could result in a challenge to the

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<sup>99</sup> GOELER, *supra* note 9, at 125.

<sup>100</sup> The Arbitration and Conciliation Act, 1996, §12(1)(a).

<sup>101</sup> See London Court of International Arbitration (‘LCIA’) Arbitration Rules (2020), Art. 10.1(iii); Rules of Arbitration of the International Chamber of Commerce (2017), Art. 14(1); Singapore International Arbitration Centre Rules (‘SIAC’) (2016), Art. 14; Hong Kong International Arbitration Centre (‘HKIAC’) Administered Arbitration Rules (2018), Art. 11; Mumbai Centre for International Arbitration Rules (2017), Art. 6.

<sup>102</sup> Model Law on International Commercial Arbitration 1985 (United Commission on International Trade Law [UNCITRAL], UN Doc A/40/17, Annex I, Art. 12-13.

<sup>103</sup> International Bar Association Council, IBA Guidelines on Conflicts of Interest in International Arbitration, October 23, 2014.

<sup>104</sup> *Id.*, General Standard 6(b).

<sup>105</sup> *Id.*, Art. 3.1.3; IBA Guidelines, Part II: Practical application of the General Standards, 3.

appointment of the arbitrator. This inclusion is well-reasoned since an arbitrator's relationship with one of the funders in a dispute can have the same detrimental impact on the impartiality and fairness of the arbitration. A challenge to the independence of an arbitrator, if successful, would result in the concerned arbitrator having to step down from the arbitration, and thereafter being replaced by another arbitrator. However, even if such a challenge is unsuccessful, it inevitably results in delayed arbitral proceedings, as well as an increase in costs.<sup>106</sup> Furthermore, this could also risk the possibility of the award itself being set aside after the proceedings have taken place. All these potential circumstances result in unwanted delays for both parties and greatly impede the efficiency and expediency of the arbitration. In the interest of expediency of proceedings, funders are often reluctant to make disclosures for these reasons.

## B. NON-DISCLOSURE AS A VIOLATION OF EQUAL TREATMENT OF PARTIES AND A GROUND FOR NON-ENFORCEMENT OF AWARD

### 1. REQUIREMENT OF DISCLOSURE

The principle of procedural fairness and equal treatment of parties is one of the paramount principles of international arbitration, which has been provided for under the Indian Arbitration Act, which is largely an adoption of the UNCITRAL Model Law. §18 of the Indian Arbitration Act specifically is a verbatim adoption of Article 18 of the UNCITRAL Model Law which reads as “[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”,<sup>107</sup> and reflects international due process rights.<sup>108</sup> Interestingly, Article 18 also lays down a limitation to the otherwise unhindered principle of party autonomy to protect parties from the injudicious conduct of the tribunal.<sup>109</sup> Given that the failure to disclose the relationship between a funder and an arbitrator who may lack impartiality and independence creates scope for one of the parties to be subject to unfair treatment by the tribunal itself. While non-disclosure of such a relationship may not always result in a violation of fair and equal treatment under Article 18, it nevertheless does run a risk of appointment of an arbitrator that lacks impartiality and independence, which may lead the tribunal to treat one of the parties more favourably than the other. Thus, the power of the parties to appoint any arbitrator that they so choose is a right that may only be upheld so long as such an appointment does not threaten the other party's right to equal treatment and a fair trial. Similar interpretations of “equal treatment” have been made under §18 of the Indian Arbitration Act as well, with questions of violation of §18 being raised when an arbitrator is accused of having an apparent bias, and treating the parties unequally, as was done in *Satpal Malhotra v. Puneet Malhotra*.<sup>110</sup>

An untimely discovery of the existence of a TPF arrangement could therefore open up a Pandora's box of potential challenges being made, not just to the arbitrators and the ongoing proceedings, but even to the validity of the award if such discovery occurs after the tribunal renders the award. As per the Indian Arbitration Act, where a challenge is being made to the impartiality or independence of an arbitrator after the award has been made, the party

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<sup>106</sup> NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 259.

<sup>107</sup> Model Law on International Commercial Arbitration 1985 (United Commission on International Trade Law [UNCITRAL], UN Doc A/40/17, Annex I, Art. 18; The Arbitration and Conciliation Act, 1996, §18.

<sup>108</sup> HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International, Art. 18, 552 (1989).

<sup>109</sup> LOUKAS MISTELIS & STAVROS BREKOULAKIS, ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 623 (Kluwer Law International, 2009).

<sup>110</sup> *Satpal P. Malhotra v. Puneet Malhotra*, 2013 SCC OnLine Bom 689.



challenging the arbitrator has the power to apply for setting aside the award under §34.<sup>111</sup> Similarly, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('NY Convention'), which has over 160 nation signatories and is considered to be one of the most successful treaties in private international law, has similar grounds for the enforcement of arbitral awards.<sup>112</sup> As per Article V(1)(b) of the NY Convention, an award can be refused recognition and enforcement if a party was not given a proper opportunity to present its case, impliedly due to a lack of equal treatment of parties.<sup>113</sup> This gravely threatens the status of the award in itself, which could render the entire arbitral proceedings futile, should such disclosure of relationship not be made at the earlier possible stage of the proceedings. Moreover, it would result in a considerable delay for both the parties involved since it would require new proceedings to be conducted, which is contrary to the interest of expediency.

Given that the Indian legal stance on TPF has been historically influenced heavily by common law, it becomes crucial to analyse how the English approach to TPF has changed, and what it is today. The TPF approach in England and Wales characterises disclosure of funding arrangements to be a "voluntary process", that may only be moderated by an order by the tribunal to disclose the same.<sup>114</sup> This means that unless the tribunal orders for such explicit disclosure, no such obligation rests upon the funded party to provide any notice of such arrangements. As it stands today, since most jurisdictions and institutional rules lack any framework for disclosure, such funding arrangements often go by entirely undisclosed and undetected. This is however not an ideal scenario since the non-disclosure of the identity of the third-party funder threatens the very legitimacy of the arbitral proceedings since it undermines the opposing party's ability to be aware of a potential arbitrator-funder conflict. An unfair burden seems to be placed upon the opposing party in such a scenario where they are left in the dark, not only about the risk to the procedural fairness of the proceedings but even to the subsequent enforceability of the award itself.

Jonas von Goeler explains how the lack of any disclosure mandate often results in the opposing party having to file a document production request themselves, which may only be approved if the opposing party successfully demonstrates a reasonable belief that the party has concluded a TPFA, and specifies the relevance of the disclosure of the relevant terms of the funding agreement.<sup>115</sup> This procedure, however, places an unfair burden on the opposing party to carry out due diligence based on a mere suspicion that the other party may have entered into a TPFA. This process of detecting a "suspicion" would only be possible when a discernibly impecunious party engages in large-scale arbitration proceedings with a sophisticated legal team.<sup>116</sup> This suspicion would then only arise in cases of parties that are publicly known to be facing liquidity issues or bankruptcy problems, and would not be easily detectable for solvent parties that have simply chosen TPF as a convenient alternative. This predicament often arises

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<sup>111</sup> The Arbitration and Conciliation Act, 1996, §13(5).

<sup>112</sup> New York Arbitration Convention, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards in Brief, available at <http://www.newyorkconvention.org/in+brief> (Last visited on 21 September, 2021).

<sup>113</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1959, 330 U.N.T.S. 38, Art. V(1)(b).

<sup>114</sup> Sherina Petit & Ewelina Kajkowska, *Developments in Third Party Funding in Arbitration: A comparative Analysis*, NORTON ROSE FULBRIGHT, September 2019, available at <https://www.nortonrosefulbright.com/en-in/knowledge/publications/c015054d/developments-in-third-party-funding-in-arbitration> (Last visited on 21 September, 2021).

<sup>115</sup> GOELER, *supra* note 9, at 137.

<sup>116</sup> Marc Goldstein, *Should The Real parties in Interest Have to Stand Up?- Thoughts About a Disclosure Regime for Third-Party Funding in International Arbitration*, TRANSNATIONAL DISPUTE MANAGEMENT, available at <https://www.transnational-dispute-management.com/article.asp?key=1745> (Last visited on 21 September, 2021).

as a result of a lack of any statutory or institutional mandate for disclosure to be made by the funded party.

Having explored the drawbacks of a legal regime that does not place any obligation on the parties to disclose the existence of a TPF arrangement, it becomes clear that a mandated disclosure regime would be preferable for ensuring procedural fairness. The following sub-part explores the jurisdictions which mandate disclosure of TPF arrangements, and analyses the specific legal provisions which govern such disclosure.

## 2. EXTENT OF DISCLOSURE

Unfortunately, considerable lacunae continue to exist in the law of most jurisdictions with respect to the mandated disclosure of the existence of a TPF arrangement. Another concern of confidentiality arises concerning the extent of information regarding the TPF arrangement that must be disclosed to the tribunal in itself. A debate often arises as to whether mere mention of the existence of a TPF arrangement would suffice, or whether the specifics of the funding agreement need to also be disclosed to the tribunal and the opposing party. Most institutional arbitration rules such as the LCIA Rules, the ICC Rules, the SIAC Rules as well as the Swiss Rules make no mention of the procedure to be followed in the case of TPF arrangements. The HKIAC Rules however do have a specific provision that mandates the disclosure of the existence of a TPF arrangement.<sup>117</sup> As per Article 44 of the HKIAC Rules, disclosure of a funding agreement made on, before, or even after the commencement of the arbitration, must be made.<sup>118</sup> A failure to do so may be considered as an act of bad faith on part of the funded party.<sup>119</sup> The tribunal may accordingly choose to exercise its powers to impose sanctions upon the funded party at the time of deciding the allocation of costs and attorney fees.<sup>120</sup>

The Hong Kong Law Reform Commission Report also laid down the specific details that such disclosures are meant to contain. The Report explicitly placed the obligation of disclosure upon the funded party and mandated that such disclosure needs to contain the identity of the funder as well as a clarification as to whether the TPFA contains any agreement for the payment of adverse costs.<sup>121</sup> This degree of disclosure reflects a sensible position that balances all the conflicting interests of the stakeholders concerned. For the opposing party, the primary considerations for ensuring the absence of any arbitrator conflicts or any potential risk to procedural fairness are resolved once the identity of the third-party funder is disclosed. Upon such disclosure, the arbitrators themselves are better equipped to ascertain whether there exists any prior relationship or other grounds for a conflict of interest. Disclosing the identity of the funder to the opposing party also increases the level of transparency in the arbitration, since it allows the opposing party to satisfy itself that no risks are posed to the fairness of proceedings by conducting due diligence and a background check of the past engagements and relationships of the arbitrators and the funder. This also helps ensure that, even in a scenario where a conflict of interest does exist and the arbitrator omits to bring it to the notice of the parties (either intentionally, or accidentally), the opposing party will have also received a fair chance to have conducted due diligence and detect such conflict. Thus, it becomes imperative for the

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<sup>117</sup> Institutional Arbitration HKIAC Administered Arbitration Rule (2018), Art. 44.

<sup>118</sup> Institutional Arbitration HKIAC Administered Arbitration Rule (2018), Art. 44.2.

<sup>119</sup> Dr. Dean Lewis & Jason Hambury, *Jurisdiction guide to third party funding in international arbitration*, PINSENT MASONS, May 7, 2021, available at <https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration> (Last visited on September 20, 2021).

<sup>120</sup> Margart Moses, *Arbitrator Power to Sanction Bad Faith Conduct: Can it Be Limited by the Arbitration Agreement?*, Vol.84, AUSTRALIAN LAW JOURNAL, 82 (2010).

<sup>121</sup> The Law Reform Commission of Hong Kong, *Third Party Funding for Arbitration*, 18 (October 2016).

disclosure of the identity of the funder to be made not only to the tribunal itself but also to the opposing party in the arbitration. This would greatly help to prevent or reduce untimely challenges being made to the appointment of an arbitrator, once the arbitration has begun. A challenge made at a later stage of the proceedings would result in significant delays and could even jeopardise the legitimacy of the award rendered.

Similar to Hong Kong, Singapore, Australia, and various other jurisdictions have also adopted an approach known as the “light touch” approach to encourage TPF in arbitration.<sup>122</sup> As was described by the Singapore Ministry of Law, such an approach to TPF consists of statutory provisions and institutional rules that provide “precedence to party autonomy with disclosure as the central tenet”.<sup>123</sup> As per the recommendations of the Singapore Ministry of Law’s consultation paper, such disclosure need only extend to the identity of the funder, and such disclosure must be made “as soon as is practicable”.<sup>124</sup> No other information concerning sensitive details of the funding agreement such as the financing budget, terms of funding, or the budget will fall within the scope of the disclosure that the funded party is obliged to make. This ensures that the parties are at full discretion to enter into any kind of funding agreement that best suits their needs so long as they disclose the existence of such an arrangement to the Tribunal and the opposing party.

An amendment ought to be made in the Indian Arbitration Act along lines similar to that of the HKIAC Rules, in order to encourage the parties to enter into TPF arrangements. Especially since the TPF industry is still at a rather nascent stage, adopting a “light touch” approach would be in the best interests of encouraging funders to invest in arbitration claims. Although under-regulation may lead to concerns regarding scope for misconduct, various arguments point to the self-regulatory nature of TPF, wherein investors restrict their investments only to meritorious claims that are likely to be successful and typically do not engage in bad faith tactics of appointing arbitrators “in conflict” since it jeopardises the proceedings and the enforceability of the award.<sup>125</sup> Thus, at the present stage, it would be best for a “light touch” approach to be implemented in India by placing a statutory obligation upon the funded party to disclose the existence of a funding agreement as well as the identity of the funder. A disclosure regime could be enforced in India by amending §12(a) of the Arbitration Act, by including the phrase “third-party funders” or “parties with a direct economic interest in the dispute” as persons with whom the arbitrator’s relationship must be scrutinised for justifiable doubts as to impartiality and independence. As a result, a relationship with the funder would amount to a potential ground for challenging the appointment of the arbitrator.

Including funders within the same category of relationships that could amount to potential conflict and a subsequent challenge to the arbitrator would create a sense of obligation upon the funded party to ensure disclosure at the earliest possible time. This amended provision would ensure that any TPF arrangements shall be disclosed by the funded party since they would not want to jeopardise the proceedings with this looming possibility of a challenge being made to an arbitrator. It would therefore be in the funder as well as the funded party’s own interests to disclose any existing arrangements in order to ensure that they do not create any scope for untimely challenges during the course of the proceedings. The existing set of rules concerning the right to challenge the appointment of an arbitrator would continue to

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<sup>122</sup> Oliver Gayner & Susanna Khouri, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding*, Vol.40(3), Article 13, *FORDHAM INTERNATIONAL LAW JOURNAL*, 1037 (2017).

<sup>123</sup> Public Consultation on the Draft Civil Law (Amendment) Bill 2016 (‘Amendment Bill’); Civil Law (Third Party Funding) Regulation 2016, 12 (Singapore).

<sup>124</sup> *Id.*, 11.

<sup>125</sup> Gayner & Khouri, *supra* note 122, at 1042.

apply, except the scope of their applicability would also be extended to the funder as well. Further recommendations with respect to the extent of details regarding the funding agreement that ought to be disclosed shall be discussed in the subsequent sections.<sup>126</sup>

### C. DISCLOSURE AS A POTENTIAL THREAT TO CONFIDENTIALITY

While the previous two sub-parts have discussed aspects of arbitration pointing in favour of disclosure of the TPF arrangement being made to the tribunal, this sub-part focuses on the potential disadvantages that may come out of such a disclosure being made. The principle of confidentiality is one of the cornerstones on which arbitration is strictly based. One of the primary arguments posited by those that oppose the practice of TPF in arbitration is the threat that it causes to the confidentiality of not only the parties concerned but also the funder itself. While the parties to the arbitration are primarily concerned about the confidentiality of information and documents that may be shared during the dispute, the funder has an equal interest in ensuring that the specific terms of the TPFA remain confidential.

These concerns are well-founded given that TPF simply cannot function without the communication of a certain amount of information that would have been otherwise protected by the cloak of confidentiality that protects all discussions and information that arises during the arbitral proceedings. At the very outset, a substantial amount of information regarding the dispute must necessarily be divulged to the prospective funder. When a claimholder submits its case to a potential funder, the funder conducts a thorough risk assessment by going through not only the prospects of success and the quantum of the potential award but even the finer details such as the specific terms of the agreement, as well as the matters of contention that arose between the parties thereafter.<sup>127</sup> This naturally puts the confidentiality of matters concerning the dispute at risk of a potential violation. Should the funder agree to take the case and fund the arbitration, the funder will from time to time require updates on the progress of the proceedings as well,<sup>128</sup> which could potentially put sensitive information of the opposing party at grave risk.

This often-highlighted issue has however been resolved in most jurisdictions by simply ensuring the use of NDAs. In fact, for jurisdictions that have well-established TPF practice, it is considered standard practice for the funder and the (potentially) funded party to sign an NDA, before the sharing of any information regarding the claim.<sup>129</sup> An NDA restricts the funder from dispensing information regarding the dispute to any other entity, thus upholding the principle of confidentiality. Moreover, it establishes contractual liability of the funder which can be invoked in case of breach. Other additional precautionary measures that are commonly followed to ensure confidentiality include limiting the amount of information shared with the funder, redacting sensitive information of the opposing party that is disclosed during the proceedings, *etc.* The opposing party would be allowed to identify and make representations with respect to the sensitive information that it would prefer to have redacted, and the tribunal would deliberate and order for such redaction accordingly, if deemed to be in the interest of confidentiality. While such practices have been mentioned in the ICCA-Queen Mary Report, it was also noted that these practices vary widely depending upon the jurisdiction, highlighting the need to establish a universal set of best practices that ought to be followed when availing of TPF.<sup>130</sup> One of the most important recommendations put forth by the Report

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<sup>126</sup> *Infra* note, Part VI(C).

<sup>127</sup> GOELER, *supra* note 9, at 298.

<sup>128</sup> *Id.*

<sup>129</sup> ICCA Report, *supra* note 7, at 29.

<sup>130</sup> *Id.*

was that “in all jurisdictions, a Party seeking funding and its counsel should ensure that a robust NDA is entered into before any substantive discussions with a Funder to protect against the disclosure of confidential communications”.<sup>131</sup>

The recent 2019 Amendment to the Indian Arbitration Act has also shown progressive steps in the direction towards a greater degree of confidentiality in arbitration. An insertion was made to §42 to the Act, which reads as follows:

“42A. Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.”<sup>132</sup>

A reading of the provision indicates a possibility that the aforementioned circumstances are the only ones in which disclosure can be made, which can potentially result in the exclusion of a funder. In order to prevent this, an amendment to §42A would need to be made in order to fit funders within the scope of the legislation. While this new amendment was criticised for its ambiguity with regard to the extent and manner of disclosure that would be required for the proper implementation of an award,<sup>133</sup> this is nevertheless a step in the right direction towards confidentiality. To promote the spirit with which the 2019 Amendment was made, certain precautionary measures must be built into the TPF regulatory framework to ensure that the confidential information of the parties is in no way compromised. In England and Wales, a voluntary Code of Conduct was published by the ALF, which has also been applied to funding in arbitration.<sup>134</sup> As per the ALF Code of Conduct, a funder is expected to “observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party”.<sup>135</sup>

The introduction of a similar code of conduct in India embodying best practices of TPF would be greatly beneficial not only for arbitration funders but also for litigation funders. While the statutory confidentiality provisions do require further enhancement either through an amendment or by judicial interpretation, for the present purposes, a code of conduct that mentions such obligations on part of funders is the need of the hour to encourage investment in dispute claims in India. As was previously argued, approaching the newly developing practice of TPF with aggressive and strict regulation at this formative stage may hinder the growth of the TPF market. The “light touch” approach involving voluntary codes of conduct, limited disclosure obligations, as well as the inclusion of ‘funders’ within the arbitrator conflict provisions therefore seems like an ideal solution to encourage the sustainable and controlled growth of TPF in India.

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<sup>131</sup> *Id.*, Best Practices Regarding Disclosure and Conflicts of Interest, 188.

<sup>132</sup> The Arbitration and Conciliation (Amendment) Act, 2019, No.33 of 2019.

<sup>133</sup> Subiksh Vasudev, *The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward?*, Kluwer Arbitration Blog, August 25, 2019, available at <http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/?print=pdf> (Last visited on September 20, 2021).

<sup>134</sup> ALF, *supra* note 72; See also ALF, *About Us*, available at <http://associationoflitigationfunders.com/about-us/> (Last visited on September 20, 2021).

<sup>135</sup> ALF, *supra* note 72, Art. 7.

## V. ATTORNEY-CLIENT PRIVILEGE AND THE EXTENT OF INCLUSION OF THE FUNDER IN THE ARBITRATION

Knowledge about the specifics of the dispute is typically acquired by the funder at two distinct stages — firstly, at the pre-arbitral stage when the funder evaluates whether or not to invest in the claim brought forth by the claim-holder, and secondly, during the arbitral proceedings, when the funder receives updates concerning the progress of the dispute. Crucial and sensitive data of the opposing party may be divulged to the funder at both these stages, for the funder to conduct a comprehensive risk assessment and to make a well-informed decision as to whether or not to invest in a party's claim.

If the information provided to a funder were to be severely restricted, there would be significantly less incentive for it to invest in a claim. Thus, it is also in the best interest of the claim-holder to be forthcoming with the specifics of the dispute, so as to increase the chances of receiving the requisite financing from a funder. At the same time, principles such as attorney-client privilege as well as arbitral confidentiality restrict the disclosure of sensitive data to the confines of private communications and the arbitral proceedings respectively. How then, does the funder fit into such a framework without damaging or compromising these universal and integral principles? This chapter seeks to explore the position of the funder in the aforementioned framework, while also exploring the various legal measures that ought to be taken to protect sensitive dispute-related information.

The principle of “privileged information” has developed differently in common and civil law jurisdictions. While most common law jurisdictions have widely accepted the concept of “attorney-client privilege”, the approach followed by civil law jurisdictions is based on the concept of ‘professional secrecy’. The former treats such “privilege” as a substantive right, while the latter tends to treat it as more of a procedural rule.<sup>136</sup> To understand how funders can fit into these frameworks without jeopardising the status of information being shared, it is crucial to undertake a jurisdiction-specific analysis.

### A. ATTORNEY-CLIENT PRIVILEGE IN COMMON LAW JURISDICTIONS

“Attorney-client privilege” is a common law rule according to which disclosure of confidential communications between a client and its legal counsel to any other person may be refused.<sup>137</sup> This principle prevents the opposing party from presenting any information relating to these oral or written communications as evidence in the proceedings. The application of this principle is not always mandatory, and the client may waive this privilege for specific information to share such information with another party- say, for instance, the funder. However, once such privilege is waived, the information becomes discoverable by the opposing side.<sup>138</sup> Thus, waivers in such a situation would not be ideal since information disclosed to a funder would automatically lose its “privilege” protection, making it fair game for the opposing party to use to its advantage as well.

Disclosures to funders while retaining the “privileged” nature of such information can, however, be made since there exist several exceptions to the rule of attorney-client privilege. One such relevant exception is the “common interest” doctrine, whereby

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<sup>136</sup> Sahil Kanuga & Payel Chatterjee, *The Concept of Privilege- What Does it Mean for You? A Snapshot of the Practical Aspect of Legal Privilege*, Nishith Desai Associates, September 24, 2019, available at <https://nishithdesai.com/information/news-storage/news-details/article/the-concept-of-privilege-what-does-it-mean-for-you-a-snapshot-of-the-practical-aspect-of-legal-pr.html> (Last visited on September 20, 2021).

<sup>137</sup> NIEUWVELD & SAHANI, *supra* note 8, at 154.

<sup>138</sup> *Id.*

disclosures may be made to third-parties with a shared interest in the dispute, without waiving the attorney-client privilege from applying to others.<sup>139</sup> Thus, a client would be able to pass on information to a funder without such an act constituting a waiver of privilege. The “common interest” doctrine has been widely accepted in various common law jurisdictions such as England and Wales, Singapore, and Australia and has been popularly applied to contracts involving an insurer and an insured.<sup>140</sup> Thus, by analogy, this doctrine may be applied to funders since they share a common financial interest in the dispute, similar to the vested interest of an insurer.<sup>141</sup>

It is also crucial to note here, that the common interest privilege may only apply to the funder after the funding agreement had been entered into since the funder does not have any vested interest in the outcome of the dispute prior to the stage of investment. A similar finding took place in the Australian case *Asahi Holdings v. Pacific Equity Partners*, where confidential documents shared with the insurer at the pre-investment stage were deemed to lack such “privileged” status since the insurer did not possess any common interest in the dispute at that stage.<sup>142</sup> Thus, information shared at the due diligence stage cannot be protected from disclosure under the common interest privilege, and a separate protection mechanism in the form of NDAs or confidentiality agreements would be required.

There does however seem to be a disagreement concerning the extent and scope of the interpretation of what constitutes a valid “common interest” across jurisdictions. While many jurisdictions deem a common financial interest to be a sufficient qualification for the disclosure of sensitive information, other jurisdictions adopt a stricter interpretation wherein the shared interest must necessarily be of a “legal” nature.<sup>143</sup> This would mean that mere commercial interest in a dispute would not amount to sufficient grounds for eliciting a valid disclosure without a waiver of privilege. Thus, parties considering engaging a funder for pursuing their claim would have to be mindful of the law operating in their jurisdiction, to ensure that such sensitive information is sufficiently protected.

### *B. PROFESSIONAL SECRECY IN CIVIL LAW JURISDICTIONS*

Instead of viewing the concept of privilege as a substantive right that may be waived at the client’s sole discretion, civil law jurisdictions adopt a rather protectionist procedural approach. All forms of communication passing between the client and counsel are considered to be protected by the “professional secrecy” doctrine, irrespective of whether the information is contentious or non-contentious.<sup>144</sup> This “secrecy” also applies to all documents shared, irrespective of the stage at which such information is shared. Furthermore, while the client is in complete control of waiving privilege and disclosing information in common law jurisdictions, the rights and duties are balanced more equitably in civil law jurisdictions since

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<sup>139</sup> *Winterthur Swiss Insurance Company & Anor v. AG (Manchester) Ltd & Ors*, [2006] EWHC (England and Wales High Court); *Asahi Holdings (Australia) Pty Ltd v. Pacific Equity Partners Pty Limited (No. 2)* [2014] FCA 481 (Federal Court of Australia).

<sup>140</sup> ICCA Report, *supra* note 7, at 133.

<sup>141</sup> *Id.*

<sup>142</sup> *Asahi Holdings (Australia) Pty Ltd v. Pacific Equity Partners Pty Limited (No2)* [2014] FCA 481 (Federal Court of Australia).

<sup>143</sup> ICCA Report, *supra* note 7, at 133. *See also* *Miller v. Caterpillar*, 10 C 3770 [2014] (United States District Court for the Northern District of Illinois Eastern Division), where the stricter interpretation was adopted in the context of sharing documents with a third-party funder. The Court held that the interest shared between the parties must be a substantive legal interest in the underlying subject matter of the dispute rather than a commercial one. The Court explained that “the “common interest” doctrine is designed to encourage “parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly”.

<sup>144</sup> *Id.*, 136.

the secrecy doctrine constitutes a part of the professional and ethical codes of conduct for attorneys.<sup>145</sup> With this concept being engraved within the statutory provisions of these jurisdictions, these confidential communications are accorded a greater sanctity and protection.

Concerning the position of funders in such a framework, there exists a wide range of stances across civil jurisdictions. In jurisdictions such as Russia and Brazil, the client may impliedly consent to disclose confidential communications (with the opposing party) and sensitive data to a funder, while maintaining the “secrecy” status of the information.<sup>146</sup> Based on the nature of the information in question, specific disclosures that are prohibited as per the lawyer's duty embodied in professional rules may not be made, even if the client were to unequivocally consent to the disclosure being made.<sup>147</sup> Other jurisdictions such as Portugal and Sweden adopt a harsher approach. Information in the hands of a funder is not regarded as ‘secret’, which means that any such information becomes discoverable upon being handed over to the funder, effectively operating as a “waiver” to secrecy.<sup>148</sup> The practical shortcomings of the statutory law are however generally compensated for through the use of robust confidentiality agreements in such jurisdictions.

### C. ATTORNEY-CLIENT PRIVILEGE IN INDIA AND THE WAY FORWARD

Although India is a common-law jurisdiction, it seems to adopt a rather ‘civil law’ approach on the matter of attorney-client privilege. The principle of “common interest privilege” is non-existent in India, with the only provisions of privilege being provided in the Indian Evidence Act, 1872.<sup>149</sup> As per these evidentiary rules, any documents shared between the client and their legal counsel made “in the course and for the purpose of [the legal professional's] employment” shall be protected from disclosure, unless the client were to “expressly consent” to such disclosure being made.<sup>150</sup> Only “barristers, pleaders, attorneys or vakils” enjoy the protection of this provision, while the duty of confidentiality has been extended to the clerks and servants of the aforementioned category as well as translators.<sup>151</sup> The Supreme Court has even held privilege not to be accorded to an individual who is privy to sensitive information if the individual is operating as a mere employee, and not as an advocate in such a scenario.<sup>152</sup> Thus, India seems to have adopted a privilege model that is heavily centred around legal representation, with the primary focus being accorded to the purpose with which the person has been provided the information.

As per the existing law, there exist no statutory provisions for ‘privilege’ or ‘secrecy’ to accommodate communications between a client and their funder within the existing legal framework. While the Evidence Act pertains to the admissibility of disclosures made in litigation, the Arbitration Act fails to account for funders, and their unique position in the dispute, which could potentially lead to undermining document confidentiality, if not accommodated within the ambit of the Act. As previously mentioned, an amendment to §42A would have to be made in order to fit funders within the scope of the legislation.<sup>153</sup> This would operate as a stepping stone to protecting the principle of confidentiality in arbitral proceedings

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*, 138.

<sup>148</sup> *Id.*, 136.

<sup>149</sup> The Indian Evidence Act, 1872, §§126-129.

<sup>150</sup> The Indian Evidence Act, 1872, §126

<sup>151</sup> The Indian Evidence Act, 1872, §127

<sup>152</sup> *Satish Kumar Sharma v. Bar Council of Himachal Pradesh* (AIR 2001 SC 509).

<sup>153</sup> *Supra* note, Part IV (C).



since it would impose a statutory obligation upon funders to maintain strict confidentiality despite being neither a party to the arbitration nor legal counsel.

An amendment to §42A would also need to be complemented by confidentiality agreements or NDAs being signed between the client and the funder. Signing such an agreement is already a well-established practice in most jurisdictions with well-developed funder arrangements, since it provides aggrieved parties with a breach of contract remedy should an unauthorised disclosure take place.<sup>154</sup> While ensuring that the funder signs an NDA relating to all the dispute-related information that it acquires knowledge of, it is also crucial that the amount of information privy to the funder is restricted to the bare minimum. NDAs ensure that a funder is barred from passing on any dispute-related information to a third-party, but cannot prevent the funder from using the information in its possession in its individual capacity. The funder could therefore use the sensitive data of the opposing party against them in another case involving them, should such a scenario arise.<sup>155</sup> Although NDAs are indeed necessary to ensure that such sensitive information is not shared beyond the funder, they are not sufficient protection in themselves, since the mere act of conveying information to the funder in itself is a concern. Thus, it also becomes crucial to restrict the amount of information that the funder has access to, at the outset.

#### D. EXTENT OF INCLUSION OF THE FUNDER

Since arbitration agreements only bind the parties to the agreement, the principle of confidentiality that comes along with such arbitral proceedings technically extends only to the parties to the arbitration agreement.<sup>156</sup> Third-parties, therefore are not bound by any such obligations stemming either from the agreement or from the tribunal itself (since the tribunal's orders only bind the enjoined parties).<sup>157</sup> Since the confidentiality obligation can, at best, stem from nothing apart from a contractual agreement, many have found it advisable to exclude the physical presence of the funder from the arbitral proceedings. The ICCA-Queen Mary Task Force round-table discussions on third-party funding also opined that the presence and participation of the funder in the proceedings would negatively affect the conduct of the arbitration and was therefore undesirable.<sup>158</sup>

Common-law jurisdictions with a well-established practice of TPF such as Singapore, Hong Kong, and Australia, have largely adopted a 'light touch' approach whereby the funders are expected to distance themselves from the day-to-day proceedings.<sup>159</sup> By keeping the funders at an arm's distance from the dispute, these countries have aimed to give "precedence to party autonomy and flexibility" while simultaneously treating disclosure as the central tenet to TPF arrangements.<sup>160</sup> Given that most professional funders would have multiple ongoing claims being pursued simultaneously, daily engagement with each of their funded

<sup>154</sup> Alexis Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, Vol.16(4), AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, 1024 (2001).

<sup>155</sup> GOELER, *supra* note 9, at 83; Santos, *supra* note 91, at 922.

<sup>156</sup> Brown, *supra* note 154, at 1006.

<sup>157</sup> Zhivko Stalev, *Interim Measures of Protection in the Context of Arbitration*, in INTERNATIONAL ARBITRATION IN A CHANGING WORLD, 103, 108 (1993).

<sup>158</sup> ICCA Report, *supra* note 7, Annex C at 251.

<sup>159</sup> Matthew Saunders & Emmanuelle Cabrol, *Third Party Funding in International Arbitration*, ASHURST, available at <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/#:~:text=Third%20party%20funding%20is%20where,exchange%20for%20an%20agreed%20return.&text=The%20funder%20may%20also%20agree,funded%20party%20is%20so%20ordered> (Last visited on September 20, 2021).

<sup>160</sup> Public Consultation on the Draft Civil Law (Amendment) Bill 2016 (Singapore); Civil Law (Third Party Funding) Regulations 2016 (Singapore).

parties is not even a viable or practical option. Most funders generally require only quarterly updates or information at key stages of the arbitration.<sup>161</sup> The Indian TPF framework should similarly ensure that the funder is distanced from the oral proceedings themselves to protect the principle of confidentiality that is considered to be a cornerstone of arbitration.

An additional precautionary measure that ought to be taken in furtherance of confidentiality is the redaction or concealment of any documents containing sensitive information belonging to the opposing party that may be discussed and shared as part of the proceedings. This obligation could be placed upon the parties to the arbitration itself by an order of the tribunal. Thus, the funded party would then have an obligation imposed upon them prohibiting them from sharing any documents or information, without the prior consent of the opposing party or the permission of the tribunal. A sample stipulation, such as the following could be created and signed by the parties, and thereafter presented to the tribunal:

“The parties acknowledge that the Arbitration Proceeding is a private forum and that allegations, statements and admissions made [...] are solely for the purpose of the Arbitration Proceeding and not intended for any other forum. The parties, therefore, mutually agree that all pleadings, memorials, briefs, memoranda, exhibits, affidavits, reports, transcripts, and other documents or information [...] produced in the Arbitration Proceedings ('Arbitration Records') shall be deemed confidential, and shall not be given, shown, or disclosed to or discussed with any third-person or party except upon compulsory legal process or as contemplated by this Agreement.”<sup>162</sup>

The opposing party can thereafter make a representation to the tribunal regarding the specific information and documents that it wishes to redact or debar from sharing with the funder. This would help protect the opposing party's information and interests, by routing such order through the tribunal to ensure that it has a binding effect upon the funded party. This helps ensure the amount of information escaping beyond the confines of the arbitral proceedings is kept to a minimum. The contractual obligations stemming from the NDAs and/or confidentiality agreements signed shall thereafter operate to ensure whatever information 'escapes the arbitration' does not go beyond the possession of the funder.

## VI. CONFLICTS OF INTEREST BETWEEN THE FUNDER AND THE FUNDED PARTY - WITHIN THE JURISDICTION OF THE TRIBUNAL?

This chapter explores the potential conflicts between the funder and the funded party in the context of the TPFA. Under Part A of this chapter, the paper highlights some of the potential conflicts that may arise between the funder and the funded party. Generally, these conflicts pertain to disputes regarding enforcement due to unfair terms, amount of control exercised by the funder, termination of the TPFA as well as the payment of additional financial costs. The paper argues that these conflicts are beyond the jurisdiction of the tribunal since the funder is not a part of the original (disputed) agreement between the two parties to the arbitration. Furthermore, since the Indian regime lacks legal regulations to address these conflicts, the paper under Part B, recommends adopting a model code of conduct regulatory framework through the soft law approach. Additionally, Part C of the paper discusses the arbitral tribunal's power of discovery with respect to the TPFA.

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<sup>161</sup> Saunders & Cabrol, *supra* note 159.

<sup>162</sup> Charles S. Baldwin, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, Vol.31, TEX. INT'L L.J., 451, 459 (1996).

### A. POTENTIAL CONFLICTS BETWEEN THE FUNDER AND THE FUNDED PARTY

Funders and other investors primarily invest in international arbitration as the return on the investment is high, the proceedings are speedy, there is potential for greatly reduced evidentiary costs, greater predictability of the outcome than other investment avenues, expertise of the decision-makers, and the higher enforceability of awards in most of the jurisdictions.<sup>163</sup> Nevertheless, factors such as quality of counsel/attorneys, rigid jurisdictional regulations, and the arbitrators chosen might affect the funder's decision.<sup>164</sup>

Various conflicts between the funder and the funded party may stem from the TPFA itself. These conflicts may comprise (1) control over the proceedings by the third-party funder and, (2) disputes pertaining to termination and additional costs. §35 of the Arbitration Act states that the award is binding on the parties and persons claiming under them respectively.<sup>165</sup> Therefore, the aforementioned conflicts are beyond the jurisdiction of the tribunal since the funder is not a party to the arbitration agreement between the funded party and the opposing party. Moreover, the Statement of Objects and Reasons in the Arbitration Act sets forth its main objectives, which states that the Act attempts to establish a fair, efficient, and capable arbitral procedure and ensure that the tribunal remains within the limits of its jurisdiction.<sup>166</sup> Therefore, the tribunal would not have jurisdiction over the disputes between the funder and the funded parties other than in situations where the parties voluntarily submit to the jurisdiction of the tribunal.

#### 1. DISPUTE OVER THE CONTROL EXERCISED BY THE FUNDER

The extent of control exercised by the funder over the proceedings and the claimant's decision-making process is often a concern for the clients.<sup>167</sup> Conversely, the funder attempts to exercise control over the proceeding to protect and promote his investment. Thus, several conflicts might arise in cases where the TPFA does not delimit the extent of control to be exercised by the funder. Control over the proceedings could be exercised in day-to-day proceedings as well as other strategic decisions (such as the kind of claims sought, the legal arguments, *etc.*).

One such conflict might arise when there is a difference of opinion between the parties for accepting a settlement offer. The funder might suggest that the funded party settle (in order to protect the investment), but the funded party may prefer to wait for the decision of the tribunal. The case of *Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc.*, represents an extreme situation where the client refused to accept a reasonable offer because its contract with the third-party funder was drafted in such a way that a court loss with no monetary damages

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<sup>163</sup> *Id.*, at 48

<sup>164</sup> Stephenson Harwood LLP, *Third party funding in international arbitration*, September 7, 2020, LEXOLOGY, available at <https://www.lexology.com/library/detail.aspx?g=345c349b-1bbb-4510-834e-618b4e1cd74b> (Last visited on September 20, 2021).

<sup>165</sup> The Arbitration and Conciliation Act, 1996, §35; White Case LLP, *Arbitration awards in India*, March 7, 2019, LEXOLOGY, available at <https://www.lexology.com/library/detail.aspx?g=8c489b6a-7fc5-44ef-80f3-a56616272874> (Last visited on September 20, 2021).

<sup>166</sup> The Arbitration and Conciliation Act, 1996, Statement of Objects & Reasons.

<sup>167</sup> ICCA Report, *supra* note 7, at 28.

was better than accepting the settlement.<sup>168</sup> In that instance, the opposing party and the funder began to settle among themselves.<sup>169</sup>

Another important aspect is the funder's control over the client's choice of arbitrator (provided that an arbitrator has not been appointed).<sup>170</sup> Similar control can be expected in the selection of legal counsel by the client. Some funders might even ask the funded party to reconsider the chosen legal counsel.<sup>171</sup> Furthermore, the funder can even exert control by influencing the legal counsel of the funded party, which may lead to the legal counsel prioritising the funder's interests due to the possibility of prospective business.<sup>172</sup>

The degree and nature of control exercised by the funder vary across nations due to different legal standpoints. Since this section does not aim to draw a comparative analysis of contract laws that apply to funding agreements, it suffices to briefly illustrate the control practices under the Australian, U.S., and English law. In England, the Courts have opined that the client should control the case, rather than the funder.<sup>173</sup> On the contrary, the Australian and several U.S. Courts have allowed the funder to exercise a considerable amount of control over the proceedings.<sup>174</sup>

In the Indian context, there exists no jurisprudence dealing with the aspect of control by the funder. Although Indian contract law is akin to England, it cannot be concluded that India would not allow the funders to have some control over the case since full control of the dispute through assignment of claims has not been objected to by the Indian courts and tribunals (as observed previously in the case of H.C.C. and Patel Engineering).<sup>175</sup>

## 2. DISPUTES OVER TERMINATION OF THE TPFA AND ADDITIONAL FINANCIAL COSTS

A TPFA is not an unconditional agreement to fund the case to the conclusion under any circumstances.<sup>176</sup> The termination of an agreement is subject to the terms agreed upon by the parties. Suppose the TPFA lays down the termination clauses in an ambiguous manner (or non-exhaustive manner), such that the funder may take advantage of such ambiguous terms. For instance, if arbitral proceedings do not seem to be progressing as favourably as the funder had hoped, they may threaten to terminate the TPFA which essentially amounts to exercising indirect control over the proceedings. This, in turn, might be construed as wrongful termination by the funded party, which would lead to conflicts between the parties and the funded party may be unable to sustain the proceedings if it is financially reliant on the funder. Conversely, the funded party too can take advantage of the vagueness in termination

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<sup>168</sup> Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc., 162 F.Supp.2d (W.D.N.C. 2001) (United States District Court for the Western District of North Carolina.).

<sup>169</sup> Carolyn B. Lamm & Eckhard R. Hellbeck, *Third-Party Funding in Investor-State Arbitration Introduction and Overview* in BERNARDO M. CREMADES & ANTONIAS DIMOLITSA (eds), *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* 108-109 (International Chamber of Commerce, 2013).

<sup>170</sup> GOELER, *supra* note 9, at 26-27.

<sup>171</sup> *Id.*, at 27-28.

<sup>172</sup> Derric Yeoh, *Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?*, Vol.33(1), *Journal of International Arbitration*, J. Int'l Arb., 120 (2016).

<sup>173</sup> Mark Roe, *Third party funding: an introduction*, September 8, 2020, PINSENT MASONS, available at <https://www.pinsentmasons.com/out-law/guides/third-party-funding-introduction> (Last visited on September 20, 2021).

<sup>174</sup> *Cash and Carry Pty. Ltd. v. Fostif Pty.*, (2006) 229 ALR 58, 88-89 (High Court of Australia); Yeoh, *supra* note 172; *Abu-Ghazaleh v. Chaul*, 36 So.3d 691, 693 (Fla. Dist. Ct. App. 2009) (United States District Court of Appeal of Florida); See also, Lamm and Hellbeck, *supra* note 169.

<sup>175</sup> See THE BUSINESS STANDARD, *supra* note 2.

<sup>176</sup> ICCA Report, *supra* note 7, at 28.

clauses. Take, for example, an instance where the funded party at the time of seeking funding does not disclose all the relevant facts and materials to secure the funding. Here, when the relevant facts come to light, the funder may want to terminate the funding to protect his interests, thus giving rise to a potential conflict between the parties. Furthermore, in cases where TPFA allows termination when there is a material breach by any party and this provision is used to terminate the TPFA, a conflict might arise between the parties disputing whether or not such act qualifies as a material breach.

Commonly, the TPFA demarcates the costs that the funder and the funded party have to bear during the proceedings. Sometimes, however, unforeseen additional costs might be incurred during the course of the arbitration proceedings, which would need to be remunerated. This may consequently result in a conflict between the parties contesting the bearer of these additional costs. Similarly, an unanticipated situation may also arise where the arbitral award is substantially less than originally expected. In this case, a debate concerning payment structure could arise between the parties regarding whether the funder's costs would be reimbursed before the distribution of the award, or whether the award itself would be directly divided between the parties. While most competent funders will account for such possibilities, these are nevertheless crucial circumstances that the parties ought to bear in mind while entering into such funding agreements.

On the same token, a plethora of unprecedented conflicts may arise between the parties which may hamper the process of TPF. Thus, the absence of any guidance further disincentivises the funder and funded party from opting for TPF. Besides, jurisdictions with well-developed TPF practices, such as the United Kingdom, Hong Kong, and Singapore have adopted a regulatory framework to minimise conflicts. For these reasons, under Part B, we recommend adopting a model code of conduct through a soft law approach to address these issues.

#### *B. ADOPTING A REGULATORY FRAMEWORK FOR INDIA*

The 2019 Amendment to the Arbitration Act aims at making India a hub for domestic and international arbitration.<sup>177</sup> The report of the High-Level Committee, 2017, chaired by Justice B.N. Srikrishna recognised the existing TPF frameworks provided by arbitration-friendly jurisdictions such as Hong Kong, Singapore, and Paris.<sup>178</sup> Yet, the 2019 Amendment fails to acknowledge TPF in arbitration for India. It has been suggested that guidelines for regulating TPF would be beneficial for not only the parties concerned but also the economy since it would open an opportunity for investment in India.<sup>179</sup> One of the most important issues to be dealt with in introducing regulations for TPF is whether India should adopt a soft law or hard law approach. Although India has been long striving to become an arbitration hub, actual positive steps and actions have commenced only recently. India is still at a very incipient stage. Therefore, in our opinion, a soft law approach would be more feasible. A hard law approach would lead to a rigid mechanism, whereas a soft law approach would provide flexibility to adjust to the Indian regime and address unprecedented issues. We suggest that a model code of conduct be adopted by the Indian Arbitration Council and published on their website for the reference of parties. Subsequently, over the span of a few years, the

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<sup>177</sup> The Arbitration and Conciliation (Amendment) Act, 2019.

<sup>178</sup> JUSTICE B.N. SRIKRISHNA, *Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India*, 43 (July, 30, 2017).

<sup>179</sup> Kamnani & Kaushal, *supra* note 25, at 160-162. (2019).

legislature can adopt a regulatory framework along with the necessary changes to the model code. This section hence propounds a model code of conduct through the soft law approach.

The recommendations provided under this section are aimed at minimising the potential disputes which may arise between the funder and the funded party. These recommendations are made after considering the existing problems in the TPF process, regulations provided by foreign jurisdictions such as England (the ALF Code of Conduct), and Hong Kong regulations, while analysing the best practices existing in TPF industry around the globe.<sup>180</sup> It should be noted that these recommendations only pertain to the scope and the subject matter of this section.

At the outset, the authors recommend that the TPFA should be in writing and that the terms of the agreement should be laid down in a clear and unambiguous manner. Furthermore, the funded party is advised to seek independent legal assistance while negotiating the terms of the TPFA to avoid inclusion of unfair terms.<sup>181</sup> Additional recommendations are listed below.

#### 1. CONTROL BY THE FUNDER

The TPFA should specify the scope of the involvement of the funder on a day to day management and the control regarding key issues such as settlements. Likewise, the vetoing power of the funder (if any) and the right to choose legal counsel or arbitrators should be mentioned in the TPFA itself. Thus, the TPFA should reflect the intention of the parties with respect to the scope of involvement in the proceedings.

#### 2. TERMINATION CLAUSES

The termination clauses shall be clear and exhaustive in nature. They should clearly lay down the instances which permit termination by either of the parties. Standard termination clauses allow termination of the contract when (a) the funder reasonably ceases to be satisfied about the merits of the dispute;<sup>182</sup> (b) the funder reasonably believes that the dispute is no longer commercially viable;<sup>183</sup> (c) the funder reasonably believes that there has been a material breach of the TPFA by the funded party;<sup>184</sup> (d) when the client has made a material misrepresentation or omitted to disclose a material fact that is materially adverse to the merits of the claim; (e) and lastly, by mutual agreement between both the parties.

It would also be advisable for a contract to provide for a specified mechanism and time-period within which funds are to be returned, in cases where the contract has been validly terminated. This would also include specifications such as the ratio or amount of money that the funded party is required to repay/return to the funder upon termination.

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<sup>180</sup> ALF, *supra* note 72; The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Hong Kong).

<sup>181</sup> Code of Conduct for Third Party funding in Arbitration, 2018. (Hong Kong).

<sup>182</sup> *Id.*; ALF, *supra* note 72

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

### 3. AWARD SETTLEMENT CLAUSES

#### a. Division of proceeds from the award

The TPFA should encompass the exact ratio in which the award is to be distributed between the funder and the funded party.<sup>185</sup> In addition to this, the TPFA should also preferably contain a waterfall agreement to deal with situations where the award is substantially lower than expected. A waterfall or priority agreement sets out how the claim proceeds are to be divided among the stakeholders.<sup>186</sup> For instance, a waterfall agreement can allow the funder to recover the costs they had incurred before distribution of the arbitral award and avoid conflicts in cases where the award is substantially lower than expected. Additionally, the funding agreement should also provide for an alternate payment structure (if agreed upon by the parties) to address situations of early settlements.

#### b. Limitation of funders liability and payment of disputed amount

The TPFA should clearly lay down the costs which are to be paid by the funder. Additionally, TPFA may provide for limitation of the funder's liability, for *e.g.*, in cases where the tribunal has awarded punitive or exemplary damages.<sup>187</sup> On the same token, TPFA should also clarify if the funder or the funded party will pay the cost related to the enforcement of the award or related judgements arising from the said dispute.

### 4. DISPUTE SETTLEMENT MECHANISM

The TPFA should provide a transparent, fair and independent dispute settlement process to ensure that any dispute arising between the parties is resolved efficiently and expeditiously.<sup>188</sup>

The funder heavily scrutinises the process of acquiring TPF to protect his investment. Conversely, the funded party attempts to maximise its gains while negotiating the terms of the TPFA. Thus, at various instances, TPFA results in a conflict of interest between the parties and in the absence of any guidance in India, several problems could arise which can hinder its growth. In our opinion, the abovementioned model code of conduct could significantly reduce the potential disputes between the funder and the funded party. The present model code of conduct has been suggested after carefully analysing the ALF Code, the Hong Kong Code and the best practices in the industry. It can act as a guiding tool for the Indian TPF industry. Additionally, it will provide clarity to the process which may draw significant investment to the arbitration sector and lead India to its goal of becoming an arbitration hub.

#### C. *TRIBUNALS POWER TO DISCOVER THE TPFA*

In the context of the TPFA, as discussed previously, the conflict between the third-party funder and the funded party does not fall within the jurisdiction of the tribunal. Nevertheless, some aspects of the TPFA such as the third-party funder's liability to pay adverse and security for costs are essential to the arbitration process and thus, within the jurisdiction of the tribunal. As discussed under Part IV of this paper, the TPFA should be disclosed to the

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<sup>185</sup> ICCA Report, *supra* note 7, at 191.

<sup>186</sup> *Id.*, at 28.

<sup>187</sup> ICCA Report, *supra* note 7, at 191.

<sup>188</sup> ICCA Report, *supra* note 7, at 193; Arbitration Ordinance, Code of Conduct for Third Party funding in Arbitration, 2018

tribunal. However, when the existence of a TPFA comes to light, the tribunal can order the production of the TPFA and other funding documents pertaining to arbitration costs through its power of discovery. Unquestionably, this power would be subject to the laws of the jurisdiction of the seat of the arbitration.

The scope of ‘discovery’ or document production significantly varies across jurisdictions, most notably when comparing common law and civil law courts. §1782 of the United States Civil Code (‘USC’) directs parties in foreign proceedings (outside of the U.S.) to seek an American Court's assistance for the discovery of relevant documents.<sup>189</sup> Nevertheless, several Federal Courts have diverged from this position. The Second Circuit and Fifth Circuit Courts of Appeal have rejected the use of §1782 to obtain discovery for foreign-seated private commercial arbitrations, while both the Fourth Circuit and Sixth Circuit Courts of Appeal have permitted these applications.<sup>190</sup> Thus, the U.S. legal stance remains unanswered even today. Singapore, on the other hand, has taken a progressive position and has granted the power to call for discovery to the tribunal itself, stating that Court assistance may be requested for enforcement of the said directive.<sup>191</sup>

India's position is similar to Singapore. In India, there is no express/specific provision conferring the power to direct discovery to the arbitrator. However, the power is derived from §19 of the Act, which permits the arbitrator to have absolute power and flexibility to control the proceedings.<sup>192</sup> Additionally, §27 of the Act provides for the tribunal to seek the Court's assistance in taking evidence. Such assistance can be sought by the arbitral tribunal on its own accord or a party to the dispute (subject to the approval of the tribunal).<sup>193</sup> Further, in the case of *Silor Associates v. Bharat Heavy Electricals Ltd*, the Court held that the tribunal had operated on a mistaken assumption that it did not have the power to order discovery and thus, said that the application under §27 of the Arbitration Act was premature.<sup>194</sup> The courts have also stated that the arbitrator is not bound by the Indian Evidence Act, 1872 and Code of Civil Procedure, 1908 (‘CPC’).<sup>195</sup> Additionally, in the case of *Delta Distilleries Limited v. United Spirits Limited*, the Hon'ble Supreme Court clarified that the term 'any person' under §27(2)(C) of the Arbitration Act, is not just limited to the witnesses but also covers the parties.<sup>196</sup>

India has adopted a progressive stance with regard to discovery which would act in a manner conducive to the promotion of arbitration as a form of convenient dispute resolution. This stance will be helpful in the enforcement of the awards for costs in the cases where one of the parties has turned to TPF. Moreover, when integrated with the suggestion mentioned under Part VI.B regarding mandated disclosure of the TPF arrangement, the conflict

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<sup>189</sup> The United States Civil Code, 1926, §1782 (U.S.).

<sup>190</sup> Morrison Foester, *International Arbitration Update: Crystalizing Circuit Split, Second Circuit Refuses To Allow U.S. Discovery In Aid Of Foreign-Seated Private Commercial Arbitration*, July 14, 2020, available at <https://www.jdsupra.com/legalnews/international-arbitration-update-78221/> (Last visited on September 20, 2021).

<sup>191</sup> Michael Hwang & Andrew Chin, *Discovery in Court and Document Production in International Commercial Arbitration—Singapore*, in INTERNATIONAL CHAMBER OF COMMERCE- BULLETIN, DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION, SPECIAL SUPPLEMENTS (2006).

<sup>192</sup> The Arbitration and Conciliation Act, 1996, §19.

<sup>193</sup> *Id.*, §27.

<sup>194</sup> *Silor Associates v. Bharat Heavy Electricals Ltd*, 213 (2014) DLT 312.

<sup>195</sup> *Thyssen Krupp Werkstoffe GMBH v. Steel Authority of India*, 2011 SCC OnLine Del 1747; The Indian Evidence Act, 1872; The Code of Civil Procedure, 1908.

<sup>196</sup> *Delta Distilleries Limited v. United Sprits Limited*, AIR 2014 SCC 13.



between the funder and funded party would stand significantly reduced. The concerns of enforceability of costs will be explained in the next part of this paper.

## VII. COSTS, SECURITY FOR COSTS AND ENFORCEABILITY OF THE AWARD

The financing arrangements entered into between parties are of relevance not merely during the arbitral proceedings but also at the time of awarding costs and enforcing the award rendered by the tribunal. Upon the conclusion of the arbitral proceedings, the tribunal must determine the allocation of costs between the parties — a decision that is naturally impacted by the existence of any funding arrangements that the parties may have entered into. Furthermore, given that the funder is not a party to the arbitration itself, there often arises a situation wherein the tribunal asks the funded party to deposit security for costs through an interim order (before the final award) to ensure that a successful opposing party can enforce the tribunal's award and receives the awarded damages, compensation and/or costs.

This chapter seeks to address the powers of the tribunal concerning ordering for payment of costs, provision of security of costs, as well as the manner in which such an award may be enforced as against the funder, a non-party to the arbitration. While drawing from international practice and jurisprudence relating to the powers of the tribunal, this part shall also seek to evaluate the statutory provisions in place to address similar issues of costs in the context of litigation funding in India. It seeks to prescribe a viable framework keeping in mind the interests of the opposing party as well as the funder. Furthermore, it shall draw from established practices in common law jurisdictions, while striving to abide by the general principles that Indian courts have applied to litigation funding contracts while considering applications for security for costs.

### A. AWARDING OF COSTS

Apart from rendering an award at the end of the arbitral proceedings, tribunals are also vested with the power to award and allocate costs between the parties. The tribunal may determine whether the costs involved in the arbitration can be reallocated between the parties, so as to determine which and how much of these costs are recoverable as against the unsuccessful party. The costs associated with arbitral proceedings across the world have often been prohibitively expensive. The costs of arbitration are of two general categories. The first category is the procedural costs such as the arbitrators' fees and the administration charges of the arbitral institution, while the second category consists of 'party costs' which involve the fees and expenses of legal counsel, witnesses, party-appointed experts, translators, *etc.*<sup>197</sup> The legal fees involved generally amount to a large sum, such that a few studies have found that they account for more than eighty percent of the total costs of the arbitration.<sup>198</sup> The arbitral costs are sometimes so expensive that the final award itself scarcely covers the costs incurred by the parties. Thus, in such circumstances, it becomes crucial to enable the successful party to recover the costs it has incurred.

The Indian Arbitration Act, as it stood before the 2015 Amendment, empowered arbitral tribunals to fix the costs of the arbitration, "unless otherwise agreed upon by the

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<sup>197</sup> Micha Bühler, *The Guide to Damages in International Arbitration*, GLOBAL ARBITRATION REVIEW, November 29, 2018, available at [https://www.lexology.com/library/detail.aspx?g=0537f158-18da-4fbc-b232-e737f6232ad5#:~:text=The%20costs%20of%20the%20arbitration,arbitral%20tribunal%3B%20and%20\(2\)](https://www.lexology.com/library/detail.aspx?g=0537f158-18da-4fbc-b232-e737f6232ad5#:~:text=The%20costs%20of%20the%20arbitration,arbitral%20tribunal%3B%20and%20(2)) (Last visited on September 20, 2021).

<sup>198</sup> *Id.*

parties”.<sup>199</sup> This effectively meant that the tribunal was bound by the parties’ prior agreement concerning the allocation of costs, which may not always result in a fair outcome if frivolous or vexatious claims are initiated by one of the parties, compelling the other party to pay substantial costs to rebut these claims. The 246<sup>th</sup> Law Commission Report had recommended statutory recognition of the “loser pays” principle while allocating costs,<sup>200</sup> pursuant to which the phrase was deleted from §31(8). Tribunals were given the power to fix arbitration costs under the newly introduced §31A which clarified that “the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party”.<sup>201</sup> This is in accordance with the principle followed in arbitrations in most international jurisdictions as well.<sup>202</sup>

The issue that now arises is whether the funded party, if successful, ought to be awarded recovery of costs, considering that it did not pay for the arbitral costs itself (since the funder financed the same). Although such a matter has not yet been addressed in India, the landmark decision of the English High Court in *Essar Oilfield Services Ltd v. Norscot Rig Management* laid down a progressive and widely acclaimed legal stance.<sup>203</sup> The Court held that for all intents and purposes, the concept of “other costs” in the English Arbitration Act, 1996 included TPF costs, thus making those costs also recoverable from the unsuccessful opposing party. This means that the costs that the funder incurs are also recoverable from the opposing party, should the funded party’s claim be successful. Similar rulings have also been made in the U.S., where recovery of TPF fees has been allowed in circumstances where the funded party is obligated to reimburse the funder for the costs advanced.<sup>204</sup> This is following the belief that a successful funded party ought not to be denied their deserved costs and fees simply due to the existence of a TPF arrangement.<sup>205</sup> These rulings have made TPF in arbitration an attractive option for the funded party as well as the funders since it increases the total sum awarded to them upon the successful outcome of arbitral proceedings, thereby increasing the overall popularity and practicality of TPF.<sup>206</sup>

It must, however, be noted that the issue concerning whether TPF costs are included within the general term ‘costs’ under the Arbitration Act has not yet come before the Indian courts. As per §31A(1) of the Act, the tribunal has complete “discretion” while deciding the scope of the term ‘costs’ as well as the question as to whether an order for costs is required in a particular case.<sup>207</sup> In a scenario where such a question does arise, as will be likely to occur in the future, the courts ought to follow the common law precedent that has already been laid down and to interpret the term “costs” similar to the English interpretation of “costs” to ensure

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<sup>199</sup> The Arbitration and Conciliation Act, 1996, §31(8).

<sup>200</sup> Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996*, Report No.246, 53 (August, 2014), available at <https://lawcommissionofindia.nic.in/reports/report246.pdf> (Last visited on September 20, 2021).

<sup>201</sup> The Arbitration and Conciliation Act, 1996, §31A(2)(a). This section *inserted vide* the Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. October 23, 2015).

<sup>202</sup> ICCA Report, *supra* note 7, at 147; *see also* the English Arbitration Act, 1996, §63.

<sup>203</sup> *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd*, [2016] EWHC 2361 (Comm) (England and Wales High Court).

<sup>204</sup> *Morrison v. C.I.R.*, 565 F.3d 658, 666 (9th Cir. 2008) (United States Court of Appeals, Ninth Circuit).

<sup>205</sup> *American Council of the Blind of Colorado, Inc. v. Romer*, 962 F.2d 1501, 1503-04 (10th Cir. 1992) vacated on other grounds, 506 U.S. 1075 (1993) (United States Court of Appeals, Tenth Circuit).

<sup>206</sup> Chirag Karia & Nicholas Bacon, *Third party funding costs awarded (Essar Oilfields Services v. Norscot Rig Management Pvt)*, LEXIS NEXIS, October 10, 2016, available at <https://www.lexisnexis.co.uk/blog/dispute-resolution/third-party-funding-costs-awarded-essar-oilfields-services-v-norscot-rig-management-pvt> (Last visited on September 20, 2021).

<sup>207</sup> The Arbitration and Conciliation Act, 1996, §31A(1).

that funders are incentivised to fund such arbitrations, thereby encouraging the growth and accessibility of TPF in arbitration in India.

### *B. SECURITY FOR COSTS*

Security for costs is an interim measure that may be sought by a party to protect themselves in a potential scenario where it is successful in the arbitration and is awarded costs by the tribunal, but the other party does not have sufficient money to pay the same. To avoid such a scenario (and upon application to that effect), a tribunal may require one of the parties to set aside a sum of money to provide security for the applicant's costs before the conclusion of the proceedings themselves. Applications to the tribunal to order security for costs against a party are typically made when the financial situation of such party is a matter of concern, such that it may not be able to afford the costs ordered by the tribunal, thereby jeopardising the enforceability of the future award.

The need for a provision for the ordering of security for costs by the tribunal has been widely acknowledged across the world, including in India,<sup>208</sup> with most institutional rules providing the tribunal with the power to award security for costs.<sup>209</sup> Security for costs is especially relevant in the case of TPF since the existence of a TPF arrangement is often considered reasonable grounds to suspect that the party may not have the financial capabilities of paying an award of costs on its own.<sup>210</sup> As discussed previously, however, the existence of a TPF arrangement itself does not necessarily mean that the funded party is impecunious or bankrupt. Some parties, especially commercial parties, may well choose to avail of TPF simply because of its convenience. In such a circumstance, an order for security for costs would not be required. To avoid unnecessary ordering for security for costs, many jurisdictions have laid down a general test for courts and tribunals to apply while determining whether an order for security for costs is required.

The mandated disclosure of TPF, as was recommended in Chapter IV, becomes necessary in such a circumstance to enable the tribunal to determine whether an order for security for costs is appropriate and to provide the opposing party with due notice. This provides the opposing party with an opportunity to apply for security if there exist any urgent circumstances surrounding the ongoing dispute at hand which requires enforcement of the rendered award without any subsequent delay. It would otherwise be unjustified to burden the opposing party with the risk and uncertainty regarding the funded party's compliance with the costs award.<sup>211</sup> Thus, disclosure of a TPF arrangement becomes crucial to protect the opposing party's interests, as well as the enforceability of the award that shall be rendered in the future.

The disclosure of the existence of a TPF arrangement, however, does not automatically amount to sufficient grounds to order for security. As per general practice,

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<sup>208</sup> The Arbitration and Conciliation Act, 1996, §17(ii)(b).

<sup>209</sup> United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, Art. 26; London Court of International Arbitration (LCIA) Rules 2020, Art. 25.1(i); Arbitration Rules of the Singapore International Arbitrations Centre (SIAC), 2016, Art. 27(j); 2017 Arbitration Rules, International Chamber of Commerce, Art. 28(1).

<sup>210</sup> Patricia Živković, *Security for Costs in International Arbitration: What's Missing from the Discussion?*, Kluwer Arbitration Blog, November 9, 2016, available at <http://arbitrationblog.kluwerarbitration.com/2016/11/09/security-for-costs-in-international-arbitration-whats-missing-from-the-discussion/> (Last visited on September 20, 2021).

<sup>211</sup> RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10), ¶83.

security for costs is only granted in proceedings in exceptional circumstances,<sup>212</sup> where the tribunal believes it is necessary to prevent a funder from benefiting from the success of a potential award while at the same time bearing no risk of paying adverse costs.<sup>213</sup> It, therefore, becomes crucial to avoid an unlikely (but possible) situation where the funded party and the funder fail to pay the ordered costs to the successful opposing party, resulting in what has popularly been termed as an “arbitral hit-and-run”.<sup>214</sup> The power and circumstances in which courts and tribunals can exercise their power to order for security for costs are largely determined according to the *lex arbitri* of the arbitration agreement, and the applicable national legislation.

The English Arbitration Act, 1996 allows for a party to apply for security for costs if there exist reasonable grounds to believe that the party against whom it has been ordered might not be able to pay an adverse costs award.<sup>215</sup> A well-accepted test for determining the requirement for an order for security for costs that has been popularly followed in common law jurisdictions has been prescribed in the 2015 Guidelines by the Chartered Institute of Arbitrators (‘CIArb’).<sup>216</sup> Some of the factors to be considered by the tribunal while making such a determination are the prospects of success of the claims and defence, the claimant’s ability to satisfy an adverse costs award, the availability of the claimant’s assets for enforcement of an adverse costs award and a consideration of fairness of such order.<sup>217</sup> While these general guidelines have been largely adopted and followed in various jurisdictions, it is also crucial to note that the tribunal’s determination based on the “prospects of success of the claim” ought to be nothing more than a prima facie evaluation of the strength of the case. The tribunal must be careful not to prejudge the merits or outcome of the case at such a preliminary stage since the parties have not yet fully presented their cases.<sup>218</sup>

In a scenario where the funded party is unsuccessful and is ordered to pay for the adverse costs of the successful opposing party, it becomes crucial to ascertain whether the funder is liable for paying for the same, as per the funding agreement.<sup>219</sup> It is for this purpose that the tribunal’s power of discovery, as was discussed in the previous chapter, becomes crucial for the tribunal to determine the distribution of liability between the funder and the funded party. Specific terms of the funding agreement may therefore be disclosed to the tribunal since it concerns the enforceability of the future award. If the tribunal ascertains that a particular funder has not contractually consented to pay for adverse costs, and the funded party is impecunious or bankrupt, the opposing party would be likely to successfully obtain an order for security for costs.

The Indian stance on ordering security for costs in the context of third-party litigation financing has been provided within the CPC through state amendments which pre-

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<sup>212</sup> Antony Smith & Anna Braden, *Arbitration News: Security for Costs in Arbitration- Is it likely to be ordered?*, LEXOLOGY, July 20, 2019, available at <https://www.lexology.com/library/detail.aspx?g=1c469efa-38ce-411a-81c1-aaaca83d215d> (Last visited on September 20, 2021).

<sup>213</sup> Kelsie Massini, *Risk Versus Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security of Costs*, Vol.7, Y.B. ARB. & MEDIATION, 336 (2015).

<sup>214</sup> *Id.*, 337.

<sup>215</sup> The English Arbitration Act, 1996, §38.

<sup>216</sup> Chartered Institute of Arbitrators, *Applications for Security for Costs, International Arbitration Practice Guideline* (2015).

<sup>217</sup> *Id.*, Art. 1- General Principles, 3.

<sup>218</sup> Alvin Tan & Gillian Seetoh, *Security for Costs in International Arbitration*, INTERNATIONAL ARBITRATION ASIA, October 9, 2017, available at [http://www.internationalarbitrationasia.com/security\\_for\\_costs\\_in\\_IA#\\_ftn43](http://www.internationalarbitrationasia.com/security_for_costs_in_IA#_ftn43) (Last visited on September 20, 2021).

<sup>219</sup> *Id.*

suppose the permissibility of TPF in Indian litigation.<sup>220</sup> Order XXV, Rule 1 of the CPC (as amended by Maharashtra, Gujarat, Madhya Pradesh, and Uttar Pradesh) provides that the Courts have the power to secure costs for litigation by asking the financier to become a party and depositing the costs in Court.<sup>221</sup>

Drawing from the same legislative intent to avoid exposing the opposing party to any risks of uncertainty concerning the enforceability of cost awards, it is reasonable to infer that arbitral tribunals would also be able to use their discretionary power to order for security for costs in cases where a TPF arrangement exists. While there remains a lack of legislative direction in the Arbitration Act with respect to security for cost orders in the specific context of TPF arrangements, this ought not to operate as an impediment to the tribunal's powers to issue orders for the same.

The Indian courts have adopted a similar test to the one prescribed by the CI Arb Guidelines while evaluating the requirement for security for costs order. One of the primary considerations while considering such applications is the availability of any assets or immovable property of the funded party within the territory of India.<sup>222</sup> Furthermore, if a plaintiff is within India, then the court may decide whether an interim order for security is required; while if the plaintiff is a resident outside India, then security for cost must be provided in all cases.<sup>223</sup> Arbitrators ought to incorporate similar principles and considerations while determining applications for security for costs when filed in arbitral proceedings against a funded party. Furthermore, they ought to follow the general international as well as domestic principle of reserving granting of such applications only in exceptional and rare circumstances, since if the existence of TPF arrangements were to amount to automatic order for security, funders would be strongly disincentivised from disclosing their presence in an arbitral dispute. Thus, arbitrators ought to grant such applications sparingly, keeping in mind that increased ordering of security for costs may lead to even less voluntary disclosure of TPF arrangements.

### C. ENFORCEMENT OF AWARD AGAINST THE FUNDER

As has been highlighted previously, one of the greatest concerns that arise with respect to TPF arrangements is the fact that the funder is not a party to the arbitration, and therefore, the tribunal's award does not bind the funder. The tribunal's award is only binding upon the parties to the arbitration agreement, or those that may have been subsequently enjoined to the proceedings, but it in no way has any authority over a non-party to the arbitration.<sup>224</sup> While in the context of litigation, judges would have the power to be able to issue orders against any known funders, the same power does not vest in arbitrators in a similar circumstance, due to the inherently consensual nature of arbitration.<sup>225</sup> A tribunal, therefore,

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<sup>220</sup> Sameer Jain et al., *supra* note 86.

<sup>221</sup> The Code of Civil Procedure, 1908, Order XXV (Order XXV of the CPC, substituted for Maharashtra, by Bombay High Court Notification P 0102/77, September 5, 1983 which provides that "[...] the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.")

<sup>222</sup> *Revlon Inc. v. Kemco Chemicals*, 1987 SCC OnLine Cal 39.

<sup>223</sup> *Alpha Oil International v. m.t. Chem Lily*, 2014 SCC OnLine Bom 4838.

<sup>224</sup> Dmytro Galagan & Patricia Živković, *If They Finance Your Claim, Will They Pay Me If I Win: Implications of Third Party Funding on Adverse Costs Awards in International Arbitration*, Special Edition, EUROPEAN SCIENTIFIC JOURNAL, 174 (2015).

<sup>225</sup> Alison Ross, *The Dynamics of Third-Party Funding*, Global Arbitration Review, GLOBAL ARBITRATION REVIEW, available at <https://globalarbitrationreview.com/the-dynamics-of-third-party-funding-in-full> (Last visited on September 20, 2021).

cannot extend its effect to parties that never agreed to arbitrate in the first place.<sup>226</sup> Extending the applicability and binding nature of the arbitral award to a non-party would also compromise upon the general *in personam* nature of arbitral claims and awards.<sup>227</sup> Thus, tribunals are left effectively powerless over an entity that plays such a crucial role in the progress and functioning of the proceedings.

Various recommendations and ideas have been suggested to make such an award legally binding and enforceable as against the funder. While some scholars have suggested that funders be required to “voluntarily submit” themselves to the jurisdiction of the tribunal thereby becoming a party to the proceedings and being bound by the tribunal’s orders,<sup>228</sup> such a solution is not ideal. It would place the funder on an equal footing with the original parties to the dispute, making them privy to all the arbitral proceedings. Such an approach would greatly compromise arbitral confidentiality. Furthermore, another concern is that the established standard of joining parties to an arbitration is significantly higher than a mere financial interest in the outcome of the dispute.<sup>229</sup> As Pinsolle once explained “[e]ven in France, where we are very generous and flexible about the involvement of third-parties in arbitrations, the party must have some involvement in the contract itself – not the dispute that arises, but the performance of the contract – to become a party to the case”.<sup>230</sup> Since it is highly unlikely that the parties would have foreseen the requirement for a funder of a dispute at the time of entering into the contract, the funder cannot be said to be having any involvement in the performance of the underlying contract itself. Thus, attempting to join the funder in the proceedings is not an ideal solution.

Based on a global analysis of jurisdictions with well-established TPF frameworks, no special statutory or institutional provisions have been put in place to extend the applicability of the arbitral award to the funder. Not even jurisdictions such as Singapore or Hong Kong have introduced any such provisions despite the barrage of recent amendments that their governments have made to adopt a more pro-TPF stance in arbitration. This could perhaps be due to the lack of a need for the same, on a practical level. While it is indeed true that the order of the tribunal is not directly binding upon the funder, it nevertheless indirectly becomes binding upon the funder due to the contractual obligations stemming from the TPF. Thus, even in a scenario where the funder is defaulting on the payment of the award costs, relief can nevertheless be sought through the TPF on grounds of breach of contract. The likelihood of the default on payment on the funder’s part is hardly likely to change simply due to its legal obligation to comply with such order changing from being one of a contractual obligation to that of a statutory obligation. Especially since the inclusion of the funder as a party to the arbitration undermines the most important aspects and features of arbitration, it remains preferable that the funder is not joined to the proceedings.

To summarise, for orders for costs as well as security for costs in India, there already exists considerable legislation in place for funders in the context of litigation financing. The same principles that have been laid down through statutory interpretation as well as case law may be applied parallelly to arbitral tribunals’ orders concerning the same. The tribunal ought to consider the same general international guidelines and factors that are typically factored into the decision-making process by other common law jurisdictions. The procedural

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<sup>226</sup> GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, 1406 (Kluwer Law International, 2014).

<sup>227</sup> STAVROS BREKOUKAKIS, *THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION*, ¶9.06 (Oxford University Press, 2010).

<sup>228</sup> Galagan & Živković, *supra* note 224, at 176.

<sup>229</sup> William Park, *Non-Signatories and International Contracts: An Arbitrator’s Dilemma*, Vol.2, *DISPUTE RES. INT’L*, 84 (2008).

<sup>230</sup> Ross, *supra* note 225.

safeguards that have been built into the existing guidelines would serve well if adopted within the arbitration framework in India.

### VIII. CONCLUSION

The COVID-19 pandemic has created grave market volatility and uncertainty in a vast number of commercial transactions and contracts, which have led to various disputes, in litigation as well as arbitration. Many parties are hard-pressed to afford the costs involved in financing such disputes, which has resulted in the creation of an ideal market for the growth and development of TPF. Third-party funding is the need of the hour since it allows parties to seek legal relief, even in dire economic circumstances such as those of the present year. Creating a conducive environment for TPF in arbitration in India would, therefore, be a highly prudent move. Given that the practice of TPF in litigation has already been stated to be in compliance with Indian public policy, and has been incorporated within statutory provisions of the CPC in a few states, there exists no reason for India to refrain from actively practicing third-party funding in arbitration as well.

Based on an analysis of the jurisdictions with well-developed TPF frameworks, it is clear that a disclosure regime is the most conducive for the growth of TPF while ensuring maintenance of the independence and impartiality of the arbitrators, as well as the opposing party's right to equal treatment and procedural fairness. For this reason, it would be advisable to incorporate provisions for disclosure in the institutional rules for both international as well as domestic arbitrations in India. An amendment to §42A of the Arbitration Act would also be required in order to bring third-party funders within the scope of parties with whom information may be shared. In order to maintain the independence and impartiality of the arbitrators, the conflict provisions under §12 and the Fifth Schedule of the Act, ought to be amended. The relationship between the funder and the funded party is also an aspect of TPF that must be regulated, to ensure the funded party's interests are not compromised due to its lack of bargaining power in relation to the funder. This can be brought about by introducing a code of conduct for TPF in India. Furthermore, given the confidential nature of arbitral proceedings, regulations must be put in place in order to ensure that the funder maintains an arm's distance from the day-to-day proceedings. Since TPF is still at a nascent stage in India, a soft-law approach would be the most ideal method, since a model code of conduct would help guide the growth and practice of TPF without restricting it through strict regulations.

While the involvement of a third-party in a dispute resolution forum built on the cornerstone of confidentiality does raise various concerns and potential problems, the benefits of TPF far outweigh the costs. Active efforts must therefore be made in India in order to promote such practice. TPF in arbitration may only be incipient at present, but what is certain is that such practice is here to stay, and it would be in the country's best interests to make the requisite amendments and take precautionary measures to safeguard parties that choose to opt for such a financing arrangement. Creating a regulatory framework that is conducive to the growth of third-party funding is a crucial step for establishing India as a global arbitration hub.