A COMPARATIVE ANALYSIS OF THIRD-PARTY FUNDING IN COMMERCIAL ARBITRATION

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DECLARATION

I, hereby declare that the dissertation entitled is based on original research undertaken by me and it has not been submitted in any University for any degree or diploma.

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This is to certify that the dissertation titled “**A Comparative Analysis of Third-Party Funding in Commercial Arbitration**,” authored by ANSHUL PATEL, Enrollment No. 23GSOL2070010, is an original work carried out under my supervision and guidance for the award of the degree of LL.M. One Year Degree Programme. To the best of my knowledge and belief, the content of this dissertation has not been submitted previously for the award of any degree or diploma.

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LIST OF ABBREVIATIIONS

After the Event	ATE
American Arbitration Association	AAA
Association of Southeast Asian Nations	ASEAN
Bar Council of India	BCI
Before the Event	BTE
Charted Accountant	CA
China International Economic Trade Arbitration Commission Hong Kong Arbitration Centre	CIETAC
Etcetera	Etc.
Foreign Exchange Management Act	FEMA
High Court	HC
Hong Kong International Arbitration Centre	HKIAC
Hong Kong Law Reform Commission	HKLRC
International Bar Association	IBA
International Centre for Dispute Resolution	ICDR
International Centre for Settlement of Investment Dispute	ICSID
International Chamber of Commerce	ICC
International Research Corporation	IRC
Lefthansa Systems Asia Pacific	LSAP
Limited	Ltd.
London Court of International Arbitration	LCIA
Medium Size Enterprises	SMEs
National Crime Record Burau	NCRB
Others	Ors.
Private	Pvt
Reserve Bank of India	RBI
Singapore Dollar	SGD
Singapore Institution of Arbitration	SIArb
Singapore International Arbitration Centre	SIAC
Singapore International Commercial Court	SICC
The Code of Civil Procedure	CPC
Third-Party Funding	TPF
United Kingdom	UK
United Nations Commission on International Trade Law	UNCITRAL
United States Doller	USD
United States of America	USA

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4. Halliburton Company v. Chubb Bermuda Insurance Ltd [2020] UKSC 48.
5. HH Electronics Inc. v. Hutcheson, [2017] EWHC 1751 (Ch).
6. International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd (2013) SGHC 238.
7. Jayaswal Ashoka Infra (P) Ltd v. Pansare Lawad Sallagar, 2019 SCC Online Bom 1763.
8. Liquidators of oCap Management Pte. Ltd. v. Westpac Banking Corporation [2023] SGHC 17.
9. Mr. 'G', A Senior Advocate of the Supreme Court v. The Hon'ble Chief Justice and Judges of the High Court of Judicature at Bombay, 1955 1 SCR 490.
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11. Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another, [2007] 1 SLR(R) 989.
12. Oxus Gold PLC v. Republic of Uzbekistan & Ors [2015] EWHC 3706 (Comm).
13. PT Perusahaan Listrik Negara (Persero) v. Hughes Aircraft Systems International, 251 F.3d 696 (9th Cir. 2001).
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16. Reeves v Sprecher Grier Halberstam LLP [2009] EWCA Civ 531
17. Renusagar Power Co. Ltd v. General Electric Co., 1994 Supp (1) SCC 644.
18. S.P. Chengalvaraya Naidu v. Jagannath (1994) 1 SCC 1.
19. SGS Hong Kong Ltd. v. Alliance Insurance Co. Ltd. [2006] HKCU 1221.
20. Unruh v. Seeberger [2007] 10 HKCFAR 31
21. Venguard Energy Pte. Ltd. (2015) SGHC 156.
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CHAPTER 1: INTRODUCTION

"A vibrant ecosystem for institutional arbitration is one of the government's priority"[1] -Indian PM Narendra Modi at the Global Conference on Strengthening Arbitration & Enforcement in India, 2016.

Third-Party Funding (TPF) is not a novel idea in usual litigation, especially in common law countries. Due to the fear of pointless lawsuits, Third-Party Funding (TPF) was strongly opposed. The validity and enforceability of Third-Party Agreement have been occasionally challenged by the Common law countries on the grounds of the ethical "doctrine of maintenance" and "doctrine of champerty". According to these theories, it was considered unethical and forbidden to assist or promote litigation of another party in exchange for a share of the judgement. This strict approach has been repealed by statute or at least relaxed by the courts in all common law jurisdictions, and TPF has made its position in domestic litigation. For instance, TPF is very well established in countries like Singapore and Hong Kong. But TPF in International Arbitration is relatively a new concept. The concept of TPF is expanding very quickly. There are mainly two reasons for the growing trend of Third-Party Arbitration in International Arbitration:

1. Because of global financial crisis, financial industries are looking for new opportunities for investment. As the proceedings of International Arbitration involves huge amount of money, it has become one of the favored sectors of investment for big financial institutes.
2. Due to high expense of the proceeding of International Arbitration, the claimant or the company that wishes to continue operating normally while the arbitration is pending or the party that simply wishes to split the cost of the arbitral proceeding with the other party will all look for funding in order to pursue legitimate claim.

However, TPF in International Arbitration is a good concept, as it brings investment along with justice but the main problem arises in the thorny legal and ethical complications

[1] Narendra Modi, https://www.narendramodi.in/pa/valedictory-speech-by-prime-minister-at-national-initiative-towards-strengthening-arbitration-and-enforcement-in-india-532838 (last visited June 5, 2024).

involved in attorney-client relationship, and also in the independence and fairness of the arbitrators, which can seriously impact the arbitral proceedings.

Due to the growing trend of Arbitration internationally, the arbitration mechanism will expand in India also, so will the arbitrator's fee, security on costs and the amount of the consideration which is to be paid by the losing party. Because of which the access to the funds will be desired. Jurisdictions around the world have been bringing necessary changes in their legal framework to support Third-Party Funding, as seen in countries like Singapore and Hong Kong. On the other hand, in India the Arbitration and Conciliation Act, 2015 is silent on this aspect. In India access to justice is recognized as fundamental right under Article 14 and 21 of Indian Constitution. As it is said "*Justice delayed is justice denied*", the courts in India are overburdened and people have to wait for years to get justice and their fundamental right of access to justice is being delayed. Arbitration have played a very crucial role in providing timely access to justice. Likely the concept of TPF would not only foster the access to justice but affective access to justice by providing financial support.

1.1 Third Party Funding

Third-Party funding is a process of financing an arbitral proceeding by an external entity who is not directly involved in the dispute, by providing financial support to cover legal fee, security or paying an award or order issued against one or both the parties involved. The proper due diligence is done by the funder to ensure the funding process.

Third-Party Funding (TPF) is also defined by UNCITRAL as-

"Third-party funding is any provision of direct or indirect funding or equivalent support to a party to a dispute by a natural or legal person who is not a party to the dispute through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding".[2]

[2] United Nations Commission on International Trade Law, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/210506_tpf_initial_draft_for_comments.docx (last visited on May 22, 2024).

1.2 Types of Clients

The ranging verities of legal issue give birth to various types of potential clients who are at some point of time need funding to fight their dispute. The clients may range from the individuals, law firms or the corporations. Although the trend of Third-Party Funding usually focuses on funding of the claimant, but a financially distressed defendant also deserves the funding protection.[3]

1.3 Types of Funders

Although the funded party have the bunch of funders available to fund their arbitral proceeding. Based on the type of the financial assistance they can opt for the one. In the below sub heading the types of funders are explained through which a party in need of financial assistance can choose.[4] With a market capitalization of over USD 3.2 billion, the largest TPF financier globally has an investment portfolio of about USD 2.4 billion. Even if the major international funders haven't yet established a local presence in India, at least one outlet for lawsuit finance is available through crowdfunding.[5]

1.4 Types of Funding Relationships

A. Insurance

The most traditional form of Third-Party funding is Insurance. It is also the most preferred form of Third-Party Funding because the premiums in Insurance are much lower than the standard returns sought by the funders. Insurance can be categorized into two parts- (a) legal expense insurance and (b) liability insurance, and the party can opt for any two either before the dispute resolution process or after the dispute resolution process.[6]

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[3] Thibault De Boulle, Third-Party Funding" in International Commercial Arbitration, Faculty of Law Ghent Univ., (2013-14), https://www.international-arbitration-attorney.com/wp-content/uploads/2018/09/Thibault-De-Boulle-Thesis-On-Third-Party-Funding.pdf

[4] Kaira Pinheiro & Dishay Chitalia, *Third-Party Funding in International Arbitration: Devising A Legal Framework for India,* 14 NUJS L. Rev. 2, 3 (2021).

[5] Amita Katragadda et al., *Third-Party Funding in India*, Cyril Amarchand Mangaldas (Feb. 20, 2019), https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf.

[6] Kaira Pinheiro & Dishay Chitalia, *supra* note 4.

a) Legal expense insurance

This type of insurance is very common among the businesses to cover the legal cost that may arise from the dispute resolution process. As said earlier the party in dispute can opt for insurance at any time either before the dispute resolution process or after. The insurance opted "BEFORE the event" is generally known as "BTE Insurance". Under BTE, in exchange for regular premium payments, the insured is entitled to reimbursement for legal costs resulting from subsequent disputes. BTE covers the legal expenses like, paying the arbitrator, expertise sought during the arbitral process or for defending them. The insurance which are opted "after the event" is known as "ATE Insurance", as name suggest it is opted after the dispute resolution process. A set, ongoing premium that is determined by factoring in probable legal costs is due to the insurer.[7]

b) Liability Insurance

It is a type of regular insurance policy where the insured is protected from the future liability which is anticipated to arise out of dispute and the insured have to pay the premium calculated based on the probability of loss.[8]

B. Attorney Funding

Attorney funding is a type of funding where arbitrator is involved to fund the client either directly or indirectly, in return of the remuneration depending on the outcome. In accordance to contract the arbitrator may reduce the fee or charge no fee, if case is lost. And if the dispute is resolved in favor then the arbitrator may increase the fee or may ask for the extra percentage of the award.[9] It is a type of "Contingency Fee", in which fee is received by the lawyers or arbitrators only when favorable results are granted. This type of contingency fee agreement is barred in India.

[7] *Id.*
[8] *Id.*
[9] *Id.*

C. Crowd Funding

Crowd-funding is a way of raising money by soliciting small contributions from large crowd. If TPF becomes the part of consumer portfolios, then investors who invest in TPF companies can be anyone, including judge or attorneys. So, a proper regulation is needed to prohibit judges from investing in such companies.[10]

In India, there is a startup by the name of "Advok8", which secure the funding from the crowd without disclosing the names of the funders to invest in arbitral proceedings.

D. Law Firms- UK & USA

There are multiple roles which are played by law firms in regards of TPF. In some circumstances law firms can themselves be the candidate of dispute funding. Law firms could approach the third-party funder directly to support the contingency fee claims.

In other circumstances, law firms could directly provide the funds to the party in dispute as a third-party funder, even if law firm is not directly a party to the funding agreement. These type of law firms that also act as a third-party funder are more common in countries like UK & USA. Some famous firms that provide dispute funding are-

1. Advantage Litigation Services, UK[11]
2. Amicus Capital Group, LLC; New York, US; London, UK[12]
3. Annecto Legal, UK[13]
4. Delta Capital Partners, USA[14]

[10] Darian M. Ibrahim, *Equity Crowdfunding: A Market for Lemons?*, 100 Minn. L. Rev. 561, 601 (2015).
[11] Advantage Litigation Services, https://www.advantagelitigationservices.co.uk/.
[12] Amicus Capital Group, https://amicuscapitalgroup.com/.
[13] Annecto Legal https://annectolegal.co.uk/.
[14] Delta Capital Patners, https://www.deltacph.com/.

E. Companies- Loans

There are various companies that provide loans for dispute funding. Not only global companies like Parabellum Capital, Bentham Capital, Burford Capital, etc. but also Indian companies that have emerged to provide loans for the dispute.

Similar to the global companies, in India there is a start-up with the name of "*Advok8*", where funding is secured from the crowd without disclosing the names of the funders. There is another company in India by the name of "*LegalPay*" that is also a legal finance company and as of not it has provided finances to more than 50 businesses with total claims of 195 million USD.[15]

Literature Review

1. **Damian Sturzaker & Thomas Heaton's[16]** article provide comprehensive overviews of the regulatory landscapes in Singapore and Hong Kong. Chan explores how Singapore has strategically positioned itself as a leading arbitration hub by permitting TPF through the Civil Law (Amendment) Act 2017. Sturzaker and Heaton draw parallels between Singapore and Hong Kong, noting that Hong Kong's Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 similarly permits TPF.
2. **Nicholas P. Kang & Christopher F. T. Lau's[17]** article elaborates on the regulatory frameworks, emphasizing the role of disclosure in upholding the ethical standards of arbitration. The authors highlight that while both jurisdictions have embraced TPF to enhance access to justice, they have also established stringent regulations to prevent potential abuses.
3. **Capper's[18]** article delves into the comparative regulatory landscapes of various jurisdictions, examining the nuances and differences in how each region handles TPF.

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[15] Legal Pay https://www.legalpay.in/#:~:text=Legalpay%20is%20India's%20largest%20legal,195%20million%20claims%20under%20management.

[16] Sturzaker et al. *Third-Party Funding in Hong Kong and Singapore: The Next Chapter*, 19Asian Dispute Review 1, 23 (2017).

[17] Kang, Nicholas P. & Christopher F. T. Lau., *The Impact of Third-Party Funding on International Arbitration*, 35International Arbitration J. 725, 734 (2018).

[18] David Capper, *Regulation of Third-Party Funding: A Comparative Study*, 48H.K. L.J. 43, 57 (2018).

The study provides insights into the legal reasoning behind adopting TPF and the expected outcomes for the arbitration market in different parts of the world.

4. **Steinitz's** work focuses on the ethical dilemmas posed by TPF, such as potential conflicts of interest, confidentiality issues, and the funder's influence on the arbitral proceedings. The article advocates for stringent ethical guidelines and robust disclosure norms to maintain the integrity of the arbitration process.
5. **Luttrell** [19]provides an analysis of the market dynamics influenced by the introduction of TPF. The article discusses how TPF has enabled smaller enterprises and individuals to access arbitration, thereby democratizing the dispute resolution process. It also touches upon the potential for increased arbitration activity and the development of a vibrant funding market.
6. **Nicholas P. Kang & Christopher F. T. Lau**[20] article analyzes the judicial attitudes towards TPF in various jurisdictions. It highlights key cases where courts have addressed TPF issues, providing insights into judicial reasoning and the evolving legal landscape. The authors note that courts have generally been supportive of TPF, provided that ethical and procedural safeguards are in place.
7. **Sanderson**[21] provides an overview of the judicial reception of TPF across different jurisdictions. The article discusses significant judicial decisions that have shaped the understanding and acceptance of TPF in arbitration.
8. **Moses**[22] examines the ethical landscape surrounding TPF, particularly focusing on the responsibilities of arbitrators and legal practitioners to ensure that the involvement of funders does not compromise the fairness and impartiality of the arbitration process.
9. SIAC Rules 2016.
10. History and Evolution of Arbitration Laws in India- Gujarat High Court Arbitration Centre.

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[19] Sam Luttrell, Bias Challenges in International Commercial Arbitration: The Need for a "real danger" Test 210, by Sam Luttrell, (2010).

[20] Lau., *Supra* at 17.

[21] Hamish Sanderson, *Third-Party Funding in International Arbitration: A New Era in Funding*, 81Claims Int'l J. of Arbitration, Mediation and Dispute Management 254, 261 (2015).

[22] Margaret L. Moses, *The Ethics of Arbitrator Compensation and Third-Party Funding*, 44Vand. J. of Transnational L. 291, 316 (2011).

Statement of Problem

- With Third-Party Funding (TPF) mechanism gaining increasing global significance in providing parties' access to justice, the time has come for India to formally open its doors to dispute financing in International Commercial Arbitration. The Arbitration and Conciliation Act of 2015 is silent on this aspect. However, if TPF is taken as a champerty contract which are contracts where the returns are contingent on the result, it doesn't render it per se illegal except in cases where an advocate may be a party and also in cases, where the consideration of the agreement goes against any such law like gambling, debt recovery then, it is rendered illegal by the Contract Act of 1872.
- There are no separate regulations for TPF in Arbitration.
- There are risks involved in providing Third Party Funds as TPF is a kind of non-recourse loan.
- Third-party funders are indirect participants in arbitration, yet direct participants. Judges and arbitrators, as well as opposing parties and attorneys may all be unaware of the funder's involvement. Like other indirect participants in dispute resolution, however, third-party funders should be subject to the rules of arbitration procedure.
- Should disclosure of TPF be mandated to maintain transparency in a proceeding or should it be ordered on case to case basis.
- There is no set amount that a third party can fund which can affect the ability of the party in dispute to repay if the decree of the arbitral tribunal is not in its favor.

Hypothesis

- The legal framework governing TPF in India significantly impacts the efficiency, fairness and accessibility of the arbitration process, with varying implications on the enforcement of arbitral awards, ethical considerations and overall dispute resolution mechanisms.
- There are two types of parties, Sophisticated and Unsophisticated, so ethical consideration usually revolves around the unsophisticated party who are not aware that

the dispute can arise between the council and itself. So, because of which legal discourse can be disrupted.

- The comparative analysis of TPF in commercial arbitration across Singapore, Hong Kong and India suggest that proper regulated TPF practices in dispute resolution in Indian legal system would foster India as favored hub for dispute resolution.

Research Questions

- Do reforms in the legal framework of India will contribute in promoting TPF in International Commercial Arbitration in India?
- Does Indian law address the ethical consideration and potential conflicts of interest associated with TPF in Arbitration and how does it impact the cost and efficiency of Arbitration proceeding?
- Does TPF in dispute resolution mitigate the fundamental policies of law of India?
- Does Indian legal system need to reform the mechanism of TPF in Dispute Resolution to foster India as favored hub for Dispute Resolution and improve the position of TPF in Arb in India?

Objective of the Study

- To examine the suitability of the mechanism of TPF practice in Indian Legal framework to maintain global legal order of transnational commercial dispute resolution in International Commercial Arbitration.
- To examine the growth and development of TPF in arbitration at national and international level.
- To study the issues and problems relating to recognition and enforcement TPF in arbitration.
- To evaluate the judicial trends in cases involving TPF.
- To identify the position of TPF in arbitration in India. Comparative analysis of TPF in India with another jurisdiction that have well established TPF, such as Hong Kong and Singapore.

Research Methodology

The methodology adopted for the research is purely doctrinal and comparative for the proper justification to the subject and completion of research. It is basically a descriptive and comparative type of study, wherein the research problem has been examined by making use of primary as well as secondary sources of data collected. The researcher has gone through the various books and articles and in order to get the more clarity, researcher has also gone through various case laws wherein the Hon'ble Courts of different jurisdictions have interpreted the concept of third-party funding in arbitration. Keeping in mind the contemporary challenges of third-party funding. Further, researcher have taken the view of different rules and regulations of various jurisdictions related to third-party funding in international arbitration in order to understand the law of international regime on third-party funding.

Chapterization

Chapter-I Introduction

The first chapter will be talking about the concept of third-party funding in arbitration, what is arbitration?, types of clients and funders in third-party funding, and about the types of funding relationships. Will also be discussing about the hypothesis, research objectives, research questions and what research methodology we will be opting for this study.

Chapter-II Conceptual Framework and Process of Third-Party Funding in Dispute Resolution

In this chapter we will be talking about the changes occurring in the framework of third-party funding (TPF) in arbitration and about the process of initiating TPF in dispute resolution. This chapter will also discuss about the roles and functions of the arbitral institutions with reference to various case laws of Hong Kong, Singapore and India. Important concepts of due diligence, non-

disclosure agreement, third-party agreement, rights of the parties in dispute and Termination of Third-Party Agreement is also discussed under this chapter.

Chapter-III Ethical Issues Regarding Third-Party Funding

This chapter talks about on the most important issue in third-party funding (TPF) that is Ethical issue.

Chapter-IV Comparative Analysis of The Legal Regime of Third-Party Funding in Commercial Arbitration in Developed Countries

In this chapter the comparative analysis of the legal regime of developed countries like Hong Kong and Singapore has been done with respect to the settlement of international trade disputes has been done. The development of the concept of third-party funding (TPF) in Singapore and Hong Kong has also been discussed with reference of relevant case laws. The crucial concept of enforcement of third-party agreement and seat of arbitration has also been discussed.

Chapter-V Third-Party Funding in Comparation With Singapore & Hong Kong: Judicial Responses

This chapter will compare the judicial approach of India in dealing with the cases that involve third-party funding issues, while comparing it with the judicial approach of Singapore and Hong Kong. Various relevant cases of Singapore, Hong Kong and India relating to third-party funding has also been discussed.

Chapter-VI Conclusion

In this chapter we will be talking about the outcome of the research and recommendations.

CHAPTER 2: CONCEPTUAL FRAMEWORK AND PROCESS OF THIRD-PARTY FUNDING IN DISPUTE RESOLUTION

This Chapter has been used to analyze the changing dimensions of framework of Third-Party Funding and the process by which Third-Party Funding in dispute resolution is initiated. When it comes to Third-Party Funding (TPF) each country has its own regulations and framework and it differ in the approach taken by common law jurisdiction and civil law jurisdiction.

Arbitration becoming the most preferred form of dispute resolution globally have opened the market for the investor to invest in the dispute resolution process. As discussed above varies companies and law firms have emerged globally and in India also that provides TPF to assist parties financially to carry forward their dispute's resolution process. Many countries have addressed the flaws of their legal framework that were becoming hurdle for the process of TPF and have ensure the rights and protection of the parties in dispute. Similarly, Singapore has taken multiple steps toward clarifying the hurdles of maintenance and champerty, that no longer can stand in the direction of developing TPF as a tool for encouraging and assisting parties in dispute resolution process.[23] This was even reflected by the resolution passed by the Paris Bar Council (Conseil de l' Ordre), which declared (TPF) to be in the best interests of funded parties as well as their counsel in international commercial arbitration.[24]

2.1 Arbitral Institutions: Roles & Functions

Arbitration has become a prominent method for resolving commercial disputes, particularly in international transactions. Arbitration institutions play a crucial role in facilitating this process by offering administrative support, establishing procedural guidelines, and lending legitimacy to arbitral awards. In the realm of commercial disputes, arbitration offers a private, flexible, and potentially faster alternative to litigation in national courts. However, the success of arbitration hinges on the effective administration and oversight of the process. This is where arbitration institutions step in, providing a robust framework for conducting arbitrations. These institutions,

[23] Oliver Gayner & Susanna Khouri, *Singapore & Hong Kong: International Arbitration Meets Third-Party Funding*, 40Fordham Int. L. 1033, 1041 (2017).
[24] Resolution adopted at the meeting of the Paris Bar Council on 21 Feb., 2017.

established under various legal systems, offer a neutral platform for parties to resolve their disputes in accordance with predetermined rules.

Varies Institutes like International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), and International Centre for Dispute Resolution (ICDR) plays a very crucial role in various arbitral proceedings. These Institutions establish a set of procedural rules governing the conduct of arbitration. These rules address various aspects, including the initiation of proceedings, constitution of the arbitral tribunal, exchange of pleadings, conduct of hearings, and issuance of awards. Well-drafted rules promote clarity, consistency, and efficiency throughout the arbitration process. In **Halliburton Inc. v. Chubb Bermuda Ltd. (2020)**[25], a dispute arose regarding the interpretation of an arbitration clause referencing the LCIA rules. The court upheld the application of the LCIA rules, emphasizing the parties' agreement to arbitrate under those specific procedures.

Along with rules, arbitral institutes also provide administrative support to the parties. This includes tasks like receiving claims and counterclaims, managing deadlines, facilitating communication between parties, and maintaining case files. Efficient case administration ensures a smooth flow of the arbitration, minimizing delays and disruptions. In **SGS Hong Kong Ltd. v. Alliance Insurance Co. Ltd. (2006)**[26], the Hong Kong Court of Appeal upheld an institution's authority to extend deadlines under its own rules. This case highlights the institution's role in managing the overall timeframe of the arbitration.

One of the most crucial roles of arbitral institutes is the appointment of arbitrators. Institutions often maintain lists of qualified arbitrators with expertise in various sectors. Parties can choose arbitrators from these lists, or the institution can appoint arbitrators in the absence of party agreement. This function fosters impartiality and ensures the appointment of arbitrators with the necessary qualifications to handle the specific dispute. In **PT Perusahaan Listrik Negara (PLN) v. Hughes Aircraft Systems International Inc. (2003)**[27], the Singapore Court of Appeal emphasized the institution's responsibility to appoint independent and impartial arbitrators, even if a party objects to a particular candidate.

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[25] Halliburton Company v. Chubb Bermuda Insurance Ltd. (2020) UKSC 48.
[26] SGS Hong Kong Ltd. v. Alliance Insurance Co. Ltd. (2006) HKCU 1221.
[27] PT Perusahaan Listrik Negara (Persero) v. Hughes Aircraft Systems International, 251 F.3d 696 (9th Cir. 2001).

The landscape of institutional arbitration is constantly evolving. There have been seen the constant growth of technological advancements in these arbitral institutions which have made the role and functions of these arbitral institutions handy. Technological advances like online filing systems, video conferencing for hearings, and e-document management have improved the efficiency and accessibility for parties located in different geographical locations. With help of technological advancements arbitral institutions can offer pre-dispute advisory services such as drafting arbitration agreements and conducting mock arbitrations even if party is in different location. In **HH Electronics Inc. v. Hutcheson (2017)**[28], a Singapore court approved the use of video conferencing for an arbitral hearing, citing the institution's rules that permitted such technology. This case exemplifies the evolving approach to incorporating technology into arbitral proceedings with support from institutions.

Arbitration institutions are a cornerstone of the modern system of commercial dispute resolution. They play a critical role in ensuring the efficiency, fairness, and enforceability of arbitral awards. By adapting to evolving needs, addressing emerging challenges, and fostering a culture of transparency and inclusivity, arbitration institutions can continue to be a valuable resource for parties seeking to resolve their disputes outside of the court system.

2.2 Due diligence on claimant by funder

"*In the corporate world, if you have analysts, due diligence and no horse sense, you have just described hell*" – Charlie Munger.

Due diligence is one of the most crucial steps which is done by the funder on the party. In the corporate world, having analysts and conducting due diligence are essential practices for making informed decisions, assessing risks and ensuring compliances same goes with the third-party funder who is funding the party. Analysts provide valuable insights by interpreting data and trends, while due diligence involves through investigations and assessments of potential investments, mergers, acquisitions, or significant business activities. However, the phrase "no horse sense" refers to a lack of practical wisdom or common sense. The statement implies that without practical wisdom, even the best analytical skills and most rigorous due diligence can lead to poor decision-making and undesirable outcomes.

[28] HH Electronics Inc. v. Hutcheson, (2017) EWHC 1751 (Ch).

A third-party funder typically undertakes due diligence exercise to determine the likelihood of the matter's success prior to making funding commitments. This involves an evaluation of the claim to determine merits, potential costs, and chances of success. The decision to fund a particular matter is usually dependent on factors which include available evidence supporting the disputing party's claim, expert opinions, the legal strategy to be adopted, potential damages and the strength of the opponent's case. Once satisfied that the disputing party's claim has strong prospects, the funder enters into an agreement with the disputing party to outline the terms, conditions and the share of potential settlement or award the funder will be entitled to. To hedge their risks, funders typically seek to play active roles in the proceedings, thereby displacing some of the normal autonomy the claimants would have in the dispute.

Following are some points taken into consider by funder before signing agreement:

- **Damages:** The funder who invest his money in arbitration proceeding so he has right to ask about damages occurs to him. It is duty of funder to calculate the risk occurs in proceeding and based upon damages he decides whether he is going to funding or not.
- **Budget and Timeline:** As we know that TPF is all about money. So, funder have to consider how much amount of money he going to invest and for what is period require for the proceeding.
- **Recoverability:** In process of TPF funder provide financial aid in exchange of share or award of arbitration. Funder have to check whether he will able to recover the money or not.
- **Strength of Legal Claims**: Strength of legal claims means award granted by arbitration proceeding. To recover the amount funder first have to check valuation of award and claims.
- **Factual Evidence Supporting the Claim:** Factual Evidence are base of proceeding. It is clear that the person who has evidence the result of proceeding in his favor. So, before investing funder have check what evidence claimant have.

Claimants usually present their claims to many suitable funders. Following a prima facie assessment of the claims by the funders, one or more of them will reply by sending the claimant a term sheet if they believe the case is strong. After selecting a funder, the claimant will accept

the term sheet that has been submitted. Similar to any supply and demand relationship, a claim may lose favor among funders if they take a long time to reply or don't react at all.
After the term sheet is signed, the funder starts a through due diligence process on the claim, independently verifying the data submitted and conducting a focused investigation into the claimants, their arbitration background, their attorneys and the reasons behind their request for TPF. Every third-party funder has different procedure for carrying out the review of the claimants. While some third-party funders choose to conduct the due diligence of the claims in-house whereas other may choose to conduct the due diligence by out sourcing the work to some reliable attorneys and financial firm.
Regarding the due diligence of the claimant's attorneys, the third-party funder looks at the reputation and experience of the claimant's attorneys. In order to further guarantee consistency with the suggested financing documents, the third-party funders will also examine the conditions of the engagement letter between the claimant's attorneys and themselves. The third-party funder aims to determine whether the arrangements fits with the third-party funder's risk tolerance and whether the claimant and the claimant's attorneys have similar interest or not. Generally, claimants are still allowed to select their own legal representatives, especially in those jurisdictions where the common law doctrine of champerty may apply.

2.3 Non-Disclosure Agreement

One of the most hotly topics of discussion nowadays is whether and to what degree Third-Party Funding (TPF) agreement should be revealed in arbitral proceedings. A TPF relationship may give rise to several circumstances where the arbitrators have conflicts of interest, which could result in an arbitral tribunal that is prejudiced and an award that is voidable. The agreement itself may have non-disclosure clauses that prohibit disclosing the identity of a third-party funder. Even then, a tribunal's order can take precedence over this kind of contractual clause. In some cases, the financially stronger party could try to use its financial strength to rebalance the bargaining position if the existence of a TPF agreement was disclosed, especially by an impoverished claimant as happened in the case of **Oxus Gold PLC v Republic of Uzbekistan & Ors.**[29], where by way of a press release, the claimant voluntarily disclosed to the public the

[29] Oxus Gold PLC v. Republic of Uzbekistan & Ors. (2015) EWHC 3706 (Comm).

existence of a funding agreement in an arbitration against a state under a bilateral investment treaty.

Non-disclosure agreement is a legal contract between a party to the dispute and any other third party who will fund the party to the suit during the proceeding of the matter before the arbitration or any other alternative dispute mechanism. The legal contract protects the sensitive information related to the funding that has been shared by the third funding party to the official party to the suit. In TPF process the third party pays for the legal expenses, litigation fee of the party to the dispute and third party will cover their expenses when the party will receive any monetary amount in the form of damages or compensation.

The third party after performing due diligence of the claimant, assist the party in dispute in cases where that party's chances of winning are likely to be very high, and for that reason, the party in dispute used to reveal every aspect of the dispute to the third-party funder, which is why a non-disclosure agreement was developed to assist the disputed party in protecting their data from being leaked to any person. When the party in dispute wins the lawsuit, the third-party benefits because the third-party funder receives a full reimbursement as well as a portion of the benefit that was accrued after the party in dispute won the case.

Non- disclosure agreements are made when one party enters into an agreement with another party vowing not to expose any information linked to a legal issue in which that person is a third party. Non-disclosure agreements are broadly classified into three types: unilateral, bilateral, and multilateral. Non-disclosure agreements in third-party funding typically include the names of both parties, the type of information, a penalty clause (in the event of a breach), in which the amount of the penalty is specified before the third party provides any financial aid to the party in dispute for any subsequent disputes that may arise as a result of the settlement, and a dispute resolution.

In India non-disclosure agreement is performed with 500-rupee stamp paper and a notary of 50-100 rupee. In addition, each party should provide witnesses to avoid any additional disputes that may occur as a result of the agreement. The significance of performing non-disclosure agreements with Third-party funder is to provide enough financial support to the party who is unable to pay the court's fees. For bringing justice to individuals who couldn't afford it due to a lack of financial resources. Non-disclosure agreements are commonly used in Third-Party

Funding, particularly in arbitration cases; however, these agreements in the arbitration process are not legally recognized, but they do serve to retain information provided during the funded process as it is legally enforceable under contract law.

2.4 Third-Party Funding Agreement

Third-party funding agreements are those agreements under which the funder's remuneration is calculated by reference to the share of damages. The economic and legal terms of such agreements may very from case to case. While the structure and style of Third-Party Funding Agreements can vary significantly, there are several recurrent themes and techniques that are commonly used. For instance, in regards to financial calculations, condition surrounding the agreement's termination, matters pertaining to confidentiality and privilege, settlement and legal advice has to be substantially accurate. Generally, a case budget is used to establish the funded amount. In addition, if the tribunal so requests, the funder may consent to pay any adverse costs orders that may be rendered against the claimant or to compel such orders to be paid for example after-the event insurance (ATE Insurance) or security to cost for the claimant's expenses.

When invested sum is recovered by the funder, a funder's returns are often calculated with two formulas, either on invested amount, where invested amount is multiplied by a figure as agreed or it is calculated on recovered amounts, where funder gets the percentage of the amount recovered by the claimant. In some situations, these two formulas are combined to the extent that funder gets the greater of a multiplied amount or the percentage amount[30].

TPF is a kind of non-recourse loan, which means that if the party loses the case then that party is not needed to pay to the funder and funder also cannot seize the assets of the party to recover their losses. We can say that Third-Party Funding is a kind of contingency contract in which returns to the funder may depend on the result of the case which is uncertain.

In the case of **Jayaswal Ashoka Infra (P) Ltd v. Pansare Lawad Sallagar (Bombay HC, 2019)**[31], Bombay HC considered a specific agreement in which one of the parties entered into a

[30] Hussein Haeri et al., *Third-Party Funding in International Arbitration*, 3Glob. Arbitration Rev.: The Guide to M&A Arbitration 1, 9 (2024).
[31] Jayaswal Ashoka Infra (P) Ltd v. Pansare Lawad Sallagar, (2019) SCC 1763 (Ind.).

contingency agreement with his own council. Council was not the attorney under BCI, he was a practicing CA and was representing a party in Arbitration proceeding. After the party won the case he refused to pay the council that is CA. In this case the court held that the contract is not hit by public policy exception and reason is not just that it is a contingency agreement. The reason is that the person arguing & representing the party is not a BCI member and hence rules of BCI will not apply. The court in this case also held that as long as someone representing a party is not a lawyer, the contingency fee can apply.

One of the crucial clauses of the Third-Party Funding Agreement is the provisions related to the settlement decisions. The funder plays a supervisory function over the claim holder, but the extent of the supervision can vary. The claim holder maintains the control over the claim and the procedures. As a corollary, the claimant should have the final say over whether to settle or not. Nonetheless, if the claim holder wins, the judgement can have an impact on the funder's investment if the claimant settles for very less amount.

Another key clause of Third-Party Agreement is related to termination of agreement. Funders use this as a tool to terminate the agreement if he has grounds to believe that a specific milestone will not be able to reached, if there are obligations in return of the unused funds or the claimant has become bankrupt[32].

2.5 Rights of the parties in dispute

Arbitration has become a cornerstone of dispute resolution in both domestic and international contexts, offering a private and efficient alternative to litigation. Central to the integrity and fairness of the arbitration process are the rights of the parties involved. These rights ensure that the arbitration proceedings are conducted equitably, transparently, and in accordance with due process. One of the fundamental rights in arbitration is the right to an impartial and independent tribunal. Arbitrators must be free from any bias or conflict of interest that could influence their decisions. This principle is enshrined in various international commercial arbitration rules and guidelines, such as the UNCITRAL Model Law on International Commercial Arbitration and the International Bar Association (IBA) Guidelines on Conflicts of Interest in International

[32] Kaira Pinheiro & Dishay Chitalia, *supra* note 4.

Arbitration. One of the main requirements that arbitrators are required to make is the disclosure of any potential conflicts of interest or circumstances that might affect their impartiality. This ongoing duty of disclosure helps maintain trust in the arbitration process. If there is any justified doubt about the impartiality or independency of the arbitrator then parties have the right to challenge and seek the removal of an arbitrator. This challenge can be made to the arbitration institution overseeing the dispute or to the arbitral tribunal itself.

Arbitration is all about speedy and efficient justice delivery, if the parties are not treated equally it won't fulfill the objective of efficient justice. So, parties are also entrusted with the right to be equally treated. The right to equal treatment ensures that all parties in an arbitration are given an equal opportunity to present their case and respond to the arguments of the opposing party. This is integral to the fairness of the arbitration process and is explicitly stated in many arbitration laws and rules.

Arbitration is not a public proceeding but it is a private proceeding which has to be done in confidentiality. Confidentiality is a distinctive feature of arbitration, often cited as one of its key advantages over litigation. The right to confidentiality ensures that the details of the dispute, the proceedings, and the final award remain private. Parties can enter into specific agreements to uphold confidentiality, covering aspects such as the non-disclosure of documents and the privacy of hearing for which a non-disclosure agreement can be signed. Many arbitration institutions, like the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA)[33], have rules that impose confidentiality obligation on the parties, the arbitrators, and the institution itself.

Parties in arbitration have the significant right to participate in the selection of the arbitrators who will decide their dispute. The right underscores the autonomy and flexibility of the arbitration process. Parties can mutually agree on a sole arbitrator or each appoint one arbitrator, with the appointed arbitrators selecting a third arbitrator to act as the chair of the tribunal. If the parties cannot agree on the selection, arbitration institutions provide mechanisms for appointing arbitrators to ensure the process moves forward efficiently.

[33] London Court of International Arbitration 2020, art. 30 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2030 (last visited May. 29, 2024)

To make arbitration more efficient, fairness and transparency plays a critical role in making arbitration more legitimate. Parties have the rights to expect that the proceedings will be conducted in a manner that is both fair and transparent. The rules and procedures governing the arbitration should be clear and disclosed to all the parties from the outset. Arbitrators are generally required to provide reasoned awards, explaining the basis for their decisions. This transparency helps parties understand the outcome and assess the fairness of the process.

Interim measures can be crucial in protecting a party's rights and interests during the arbitration process. Parties have the right to request such measures from the arbitral tribunal or, in some cases, from courts. These measures can include the preservation of assets to prevent the dissipation of assets that might be needed to satisfy an eventual award, injunctions to maintain the status quo or prevent actions that could prejudice the arbitration, and requiring a party to provide security for the costs of the arbitration, ensuring that funds will be available to cover expenses if they are unsuccessful.

A key feature of arbitration is that the arbitral award is final and binding. The right ensures that the dispute reaches a definitive resolution, providing certainly and closure for the parties involved. Under the 1958 New York Convention, arbitral awards are enforceable in over 160 countries, provided they meet certain criteria. This international framework gives parties confidence that the award will be recognized and enforced globally. Courts have limited grounds to set aside or refuse enforcement of arbitral awards, which helps in upholding the finality and integrity of the arbitration process.

The rights of parties in arbitral disputes are fundamental to ensuring a fair, efficient, and equitable resolution of conflicts. These rights- ranging from the right to an impartial tribunal and equal treatment, to the right to confidentiality and a final binding award- from the bedrock of the arbitration process. As arbitration continues to evolve and expand as a preferred method of dispute resolution, the protection and enhancement of these rights will remain crucial to maintaining its effectiveness and credibility. By understanding and upholding these rights, parties, arbitrators, and institutions can ensure that arbitration remains a robust and trusted mechanism for resolving disputes.

2.6 Termination of Third-Party Agreement and its consequences

Third-Party Funding (TPF) has become an integral part of the arbitration landscape, providing crucial financial support to claimants who might otherwise lack the resources to pursue their claims. However, the termination of a third-party funding agreement can have significant consequences for both the funded party and the funder. A third-party funding agreement involves a financial arrangement where a third-party funder provides capital to a claimant in exchange for a share of the award or settlement. These agreements are designed to cover legal fees, expert witness costs, and other expenses associated with arbitration. The funder typically performs due diligence to assess the merits of the case before committing to providing funding.

Another problem that arises from the TPF is the question of termination of third-party funding agreement. An agreement can be terminated in accordance with the conditions that the parties have agreed upon. Assume that the termination conditions are outlined in the third-party funding agreement in a way that is unclear or incomplete, allowing the funder to exploit these vague wordings. For instance, if the funder feels that the arbitral procedures are not going as well as they had planned, they can threaten to terminate the third-party funding agreement, which would be tantamount to exerting indirect control over the proceedings. Because the funded party is financially dependent on the funder, this could be interpreted as wrongful termination by the funded party, which would cause disputes between the parties and make the funded party unable to continue the proceedings. On the other hand, the funded party may also profit from the termination clause ambiguity. Consider, for instance, a situation in which the party seeking financial support at the moment fails to disclose all the information and relevant facts needed to obtain the funding. Here, the funder might wish to stop funding when the pertinent information and relevant facts becomes available in order to safeguard his interests, which could lead to a disagreement between the parties. Furthermore, there may be a disagreement between the parties over whether an act counts as a major breach in situations where the third-party funding agreement permits termination when there is a material violation by any party and this clause is utilized to terminate the third-party funding agreement[34].

[34] J. Von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure 35 (Kluwer L. Int'l 2016).

Termination of a third-party funding agreement can occur under various circumstances, often outlined in the agreement itself. Common grounds for the termination not only include the breach of contract, misrepresentation by the claimant, adverse developments in the case but it also includes mutual agreement where both parties can agree to terminate the agreement if they find it mutually beneficial or necessary to terminate the third-party funding agreement.

The termination of a third-party funding agreement can have various legal, financial, and strategic consequences for both the funded party and the funder. Financial implications for the funded party include potential repayment obligations and funding shortfalls, which may force them to abandon their claim or seek alternative financing under less favorable terms. For the funder, termination can lead to loss of investment and opportunity costs, as they lose the chance to profit from a potentially successful claim. Legally, termination can cause disruption of proceeding and legal disputes for the funded party, while the funder may face litigation risk and reputation damage.

To mitigate the adverse consequences of terminating third-party funding agreement, both parties can take proactive measures during the drafting of the agreement and through the arbitration process. Clear contractual provisions, such as well-defined termination clauses and specific repayment terms, can reduce the likelihood of disputes and provide a roadmap for handling termination smoothly. The termination clause must be precise and comprehensive. Termination clause allows termination in the following situations:

a. The funder reasonably loses faith in the dispute's merits.
b. The funder reasonably believes the dispute is no longer commercially viable.
c. The funder believes that the funded party has violated the third-party funding agreement.
d. The funded party has made a material misrepresentation or has failed to disclose a material fact that is materially averse to the claim's merits.
e. By mutual agreement between the parties.

2.7 Respondent side Third-Party Funding

According to International Council for Commercial Arbitration, Third-Party Funder can broadly be defined as:

"*The term "third-party funder" refers to any natural or legal person who is not a party to the dispute but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party*

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

b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment."[35]

The key elements of this definition are: 1) a person or entity who is not a party to the dispute; 2) financial or material support 3) remuneration or reimbursement dependent on the outcome or given as a grant. The elements of the definition also cover the respondent-side funding in addition to traditional modern non-recourse funding models, as well as legal firm's contingency fees and certain types of insurance. This definition not only apply to cases where the return on investment is expected but also to the pro bono legal representation and funding for non-profit organizations. So, any third-party that funds or support an arbitration falls under the concept of "third-party funder" and is no longer restricted to commercial funders who expect returns in exchange of funds and support.

The above-mentioned definition is also meant to cover the funding of a business's portfolio of claims or funding given to law firm and money is expected to be received from cases the firm represents. Individually funded cases are those in which funder's assistance is focused specifically on individual cases.

Most of the assistance by a third-party funder is for profit which they can earn in return of the assistance provided by them, but it is not same in all the cases, especially in cases where third-party funder provides funds to the respondent. For instance, in an investment arbitration by Philip Morris against Uruguay, the financial support to the Uruguay government was provided by The Bloomberg Foundation. In this case, the funding was provided to respondent that was

[35] ICCA-Queen Mary, Third-Party Funding Report, 2018, at 50.

Uruguay government and the interest of funder was not financial but it was political[36]. Funding of respondents presents a number of issues, one of which is that the funder's interest may not be supported if the respondent does not earn a return from the case. Rather, in the event, the respondent would be required to pay to the funder through its own pocket. Depending on the agreement, funder may also provide forms of insurance that are before-the-event (BTE) insurance or after-the-event (ATE) insurance. Both the insurance will help the respondent with covering the proceeding expenses but the respondent still has to pay the policy premium to the funder[37].

CHAPTER 3: ETHICAL ISSUES REGARDING THIRD-PARTY FUNDING

"The exact definition of Third-Party Funding, however, remains elusive and its legal and ethical implications in international arbitration, mostly unexplored"[38]

It is evident that TPF in international arbitration is a good thing as it draws investments and increases access to justice. But the presence of a third-party with a stake in the result of the case also brings up complicated ethical questions because of how it may impact the arbitrator's independence and impartiality as well as attorney-client relationship, which may have an impact on the arbitral process. For this reason, it would probably be beneficial to have a particular regulation of TPF in international arbitration, which is currently absent. At the very least, this may take the form of a need to the disclosure of third-party funder, which is contained in the regulations of all the major arbitral institutions. Because third-party funding in arbitration can lead to conflicts of interest for arbitrators and lawyers, it raises complicated ethical questions. In fact, the independence of arbitrators as well as the attorney-client relationship may be impacted by the influence and control that third-party funder may exert. Key ethical issues that TPF raises include confidentiality, evidentiary rights, and independence of the arbitrators.

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[36] Press Release, Uruguay's Counsel, Foley Hoag helps Uruguay secure landmark victory over Philip Morris (July 08, 2016), https://foleyhoag.com/news-and-insights/news/2016/july/foley-hoag-helps-uruguay-secure-landmark-victory-over-philip-morris/.

[37] *Id*.

[38] M. SCHERER, Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements 95 (B. Cremades and A. Dimolitsa eds. 2013).

The very first step to initiate arbitration process is forming an attorney-client relationship, when the party consult with a lawyer to determine the chances of their claim being accepted. At that point attorney-client relationship is formed. The party seeking TPF would often seek advice from its lawyer, and the lawyer usually will help the client in finding and choosing a funding company as well as lawyer also negotiate the terms of the funding agreement. After the selection of the third-party funder, that funder will conduct a thorough due diligence investigation of the case before determining whether to grant funds or not. This investigation will be based on the information and material provided by the party seeking funding. Since, funder is getting involved in attorney-client relationship, an ethical issue may arise out of this from the counsel's perspective. The involvement of third-party funder for due diligence of the party seeking funds raises significant concerns about the confidentiality and privilege. Arbitration is valued for its confidentiality, but the introduction of a third-party funder necessitates sharing sensitive information, potentially compromising this confidentiality. The disclosure of case details to funders might also impact attorney-client privilege, as communications and documents shared with the funder may not be protected under privilege rules. Furthermore, the lack of transparency regarding the involvement of TPF can create an imbalance and foster suspicion upon parties. Disclosure requirements are increasingly being implemented by arbitration institutions and some jurisdictions to address these concerns. However, the scope and enforcement of such requirements vary, leading to inconsistencies in practices.

3.1 Conflict of Interest

One of the most critical ethical issues in TPF is the potential for conflicts of interest. A conflict of interest arises when an individual or organization has competing interests or loyalties. Conflicts of interest can manifest in various ways, impacting the parties involved, the arbitrators, and the overall arbitration process. The primary conflict of interest in TPF stems from the divergence between the financial interests of the funder and the legal or personal interests of the funded party. Funders, driven by their commercial interests, might seek to control strategic decisions, including the selection of arbitrators, the scope of claims, and settlement negotiations. This can lead to a situation where the funder's interest overshadows those of the funded party, compromising the party's autonomy and potentially skewing the arbitration process. The influence of third-party funders extends to settlement decisions. Funders may push for settlement

that guarantee a return on their investment, even if such settlement is not in the best interest of the party they are funding. This pressure can lead to premature settlements or settlements on terms that are not favorable to the funded party, thereby undermining the fairness and equity of the arbitration outcome. To address conflicts of interest in TPF, robust regulatory and ethical frameworks are necessary. These frameworks should aim to balance the interests of all parties involved while maintaining the integrity of the arbitration process.

3.2 Undisclosed Third-Party Funder

Disclosure of the involvement of a third-party funder allows the opposing party and the arbitral tribunal to assess potential biases and address them appropriately. However, arbitrators may have undisclosed relationships with the third-party funder, which can compromise their impartiality. An arbitrator with financial ties to a funder, or one who has previously worked with or for a funder, may not be entirely neutral. This situation can undermine the confidence of the parties in the arbitration process and the legitimacy of the arbitral award. Lawyers representing parties with TPF agreements also face potential conflicts of interest. The financial incentives of lawyers might align more closely with the interests of the funder than those of their clients. For example, a lawyer might prioritize securing a higher payout that benefits the funder’s return on investment, even if this strategy does not align with the client’s best interest.

3.3 Inequality in Arbitration Process

TPF can create an exacerbate imbalance between parties in arbitration. A well-funded claimant may have access to more resources, enabling them to mount a more robust case compared to less well-resourced respondent. This disparity can result in an uneven playing field, where the outcome of the arbitration is influenced more by the financial backing of the parties than the merit of the case. Access to TPF is not uniformly available, as funders typically assess cases based on their potential return on investment. This selective funding means that weaker parties or those with less commercially attractive claims may not benefit from TPF, further entrenching inequalities in the arbitration process.

3.4 Allocation of Costs

The involvement of TPF can affect decisions regarding the allocation of costs and security for costs orders. Tribunals must consider whether the presence of third-party funder justifies a security for costs order against a funded party. The rationale is to prevent funded parties from escaping liability for costs if they lose, leaving the other party with unrecoverable legal expenses. However, this consideration introduces another layer of complexity, as tribunals must balance the need to protect respondents from non-payment of cost against the risk of discouraging legitimate claims supported by TPF.

3.5 Lack of Regulatory Framework

The regulation of TPF remains fragmented and inconsistent across jurisdictions, leading to variations in standards and practices. This lack of uniform regulation can result in ethical lapses and a lack of accountability among third-party funders. There is ongoing debate over whether TPF should be subject to formal regulatory framework or its self-regulation by industry bodies is sufficient to address ethical concerns. Proponents of formal regulation argue that clear rules and guidelines are necessary to ensure transparency, manage conflicts to interest, and protect the interests of all the parties involved. On the other hand, supporters of self-regulation contend that the TPF industry is better positioned to develop flexible and adaptive standards that can respond to the evolving landscape of arbitration.

3.6 Possible Solutions to Mitigate Ethical issues

To mitigate ethical concerns, there is a growing trend towards requiring the disclosure of TPF agreements in arbitration. Transparency about the existence of TPF can help manage potential conflicts of interest and ensure that arbitrators and other stakeholders are aware of all the factors influencing the arbitration process. Disclosure requirements vary, with some arbitration institutions mandating detailed disclosure about the nature and terms of TPF agreements, while other have more limited requirements. The scope of what needs to be disclosed is also a contentious issue. While some argue that only the existence of a funding arrangement should be disclosed, others contend that the terms of the agreement, including the level of control and influence the funder has, should also be revealed. Comprehensive disclosure helps in assessing

the extent of the conflict and taking necessary measures to mitigate it. To address these ethical issues, several measures can be implemented. Arbitration institutions can develop and enforce rules that govern the disclosure of TPF agreements and manage conflicts of interest. Codes of conduct for arbitrators, lawyers and third-party funders can help uphold ethical standards. Promoting best practices in the relationship between funders, lawyers, and clients is essential for maintaining the integrity of the arbitration process.

CHAPTER 4: COMPARATIVE ANALYSIS OF THE LEGAL REGIME OF THIRD-PARTY FUNDING IN COMMERCIAL ARBITRATION IN DEVELOPED COUNTRIES

"*Pursuing justice is too expensive as cost after exceed the value of the claim, and legal aid is not available for middle class*"[39]. – Lord Woolf's Access to Justice Report.

Third-Party Funding (TPF) in international commercial arbitration has become a common practice over years. As one of the developed nations and an ASEAN member, Singapore has "on March 2017 already given effect to TPF practice in International Arbitration and related court proceeding by amending its Civil Law to make it Civil Law (Amendment) Act[40]. Singapore International Arbitration Centre (SIAC) has made it easy for arbitral tribunal by giving power to the tribunal to order the disclosure of the existence of a funding agreement made by a party to the proceedings and has also now arbitral tribunal have power to order the disclosure of the details of the third-party funder. After two years of deliberation, the Law Reform Commission of Hong Kong (HKLRC) released its final report on TPF for international arbitration in October 2016. The commission suggested that, subject to "clear ethical and financial safeguards," Hong Kong should enact legislation allowing the third-party funding in international arbitration. Hong Kong adopted "The Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Bill, 2016 on 2017, which is similar to Singapore. China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (CIETAC) on August 31, 2017

[39] A.A.S. Zuckerman, *Lord Woolf's Access to Justice,* 59The Modern L. Rev. 773, 796 (1996).

[40] *Supra* note 15.

published the guidelines on TPF in Arbitration[41]. It is also related to the funding process in arbitration mechanism, wherein an investor or funder advances funds in a dispute in return for a share of the money that is awarded.

These are important new advancements. The common law's concepts of maintenance and champerty barred the use of TPF in arbitration out of concern that it would not be ethical for justice. Historically, the common law has been hostile to any incursion by third-party funders into the civil court system. The underlying public policy reasons have changed over time, becoming less relevant. The cost of the civil justice system has simply risen beyond the means. Access to justice has been found to be facilitated by the third-party funding, and hence funding restrictions are out dated.

It has been observed that India's Arbitration and Conciliation (Amendment) Act, 2015 is silent on the topic of TPF in arbitration. Due to the conformist approach against violation of public policy, TPF in international commercial arbitration has not been seen in India as an effective tool to promote India as one of the efficient international commercial arbitration hubs. By promoting TPF in international commercial arbitration in India, it will be of great assistance to plaintiffs facing a crisis of injustice due to their inability to pay for legal representation, which would cause a significant loss to the legal system because as our Constitution states that "*Justice delayed is justice denied*".

Jurisdictions all over the world, including Hong Kong, Singapore, and other ASIEN Countries, have been making the required adjustments to their legal system in order to legitimate and allow for the third-party funding. Consequently, many developed and ASEAN nations have started implementing the TPF process in order to obtain justice in a timely, cost-effective and efficient manner. In this situation, TPF in India will facilitate efficient access to justice in addition to enabling access to it. Parties in dispute would be able to pursue justifiable and legal claims with reasonable financial freedom with the help of the funds that was made available to them.

[41] Hong-Lin Yu, *Can Third-Party Funding deliver justice in International Commercial Arbitration?,* 20Int'l Arbitration L. Rev. 1, 20 (2017).

4.1 TPF in International Arbitration

Third-Party Funding (TPF) has emerged as a transformative development in the international commercial arbitration. By providing financial support to claimants who might otherwise be unable to afford the costs associated with arbitration, TPF has expanded access to justice and enabled more parties to pursue their legal rights. TPF involves a financial arrangement where an external entity (funder) agrees to cover some or all the costs of a claimant's arbitration proceedings. In return, the funder receives a portion of the arbitration award or settlement if the case is successful. Key components of a TPF typically include a detailed funding agreement outlining the terms of the funding, due diligence conducted by the funder to assess the merits of the case, and provisions that may allow the funder to provide input on strategic decisions.

One of the most significant benefits of TPF is that it enables claimants who lack financial resources to pursue their claims. This democratization of access to arbitration can be particularly important for small and medium-size enterprises (SMEs) and individuals facing well-resourced opponents. Additionally, TPF offers a way for claimants to manage the financial risks associated with arbitration by offloading these costs to third party. The involvement of a third-party funder can also serve as a validation of the claimant's case signaling to arbitrators and opposing parties that the claim has merits. Moreover, experienced funders often bring valuable strategic insights to the arbitration process, enhancing the claimant's chances of success.

While TPF provides much needed financial support, it comes at a cost. Funders typically requires a significant share of the arbitration award, which can reduce the claimant's overall recovery. In some cases, the financial terms may be perceived as burdensome. Although the claimant retains formal control over the arbitration, funders may seek to exert influence over strategic decisions to protect their investment, creating tension between the claimant and the funder. The involvement of third-party funder can also raise concerns about confidentiality, as sensitive, information shared with the funder during due diligence and throughout the arbitration process must be protected to prevent potential breaches. The increasing prevalence of TPF has led to debates about its regulations and ethical implications, promoting calls for clear regulatory frameworks.

The legal and regulatory environment for TPF in international commercial arbitration is evolving, with various jurisdictions and arbitrations institutions adopting different approaches.

One of the key regulatory issues surrounding TPF is the requirement for disclosure. Some jurisdictions and arbitration institutions mandate the parties disclose the existence of TPF Agreements and the identity of the funder. For example, the International Centre for Settlement of Investment Disputes (ICSID) has introduced rules requiring disclosure of TPF agreements. Such transparency is intended to address potential conflicts of interest and ensure the fairness of the proceedings.

Several jurisdictions have developed specific regulatory frameworks in TPF. In Singapore and Hong Kong, TPF is permitted under well-defined regulations that aim to balance the interest of claimants, funders, and the integrity of the arbitration process. These regulations often include provisions on the conduct of funders, ethical standards, and the protection of confidential information. The attitude of national courts towards TPF can also influence its use in arbitration. In some jurisdictions, courts have taken a supportive stance, recognizing the benefits of TPF in providing access to justice and managing litigation risk. In others, there may be skepticism or outright opposition, particularly if TPF is perceived as encouraging frivolous claims or undermining the adversarial process. Arbitration institutions are increasingly incorporating provisions on TPF into their rules. The International Chamber of Commerce (ICC), for example, has issued guidance on the disclosure of TPF arrangements, while the London Court of International Arbitration (LCIA) includes provisions addressing conflicts of interest arising from TPF. These institutional rules help create a more predictable and transparent environment for the use of TPF in arbitration. Recent case law has also shaped the landscape of TPF in international arbitration. Courts and arbitral tribunals have addressed issues such as the enforceability of funding agreements, the recoverability of costs, and the implications of TPF for security for costs applications.

Various notable cases like **Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd**[42], where the English High Court upheld an arbitral tribunal's decision to award the claimant the costs of securing TPF, recognizing the reasonableness of such costs in the context of the arbitration. In **Muhammet Cap v. Turkmenistan**[43], the tribunal in this International Centre for Settlement of Investment Disputes (ICSID) case ordered the disclosure of TPF arrangements,

[42] Essar Oilfields Services Ltd v. Norscot Rig Management Pvt. Ltd. (2016) EWHC 2361 (Comm).
[43] Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Rule 41(5), (13 Feb. 2013).

emphasizing the importance of transparency and the need to address potential conflicts of interest.

4.2 Arbitration in the settlement of the International Trade Disputes

International trade disputes have become increasingly complex and frequent in today's globalized economy. When the topic of barriers to international trade is raised, the usual suspects include high tariffs, bureaucratic red tape in the customs department, foreign exchange controls, trade discrimination, restrictive cartel practices, and other public and private restrictions and regulations that exacerbate the already challenging nature of international trade. Rarely are commercial disagreements between merchants considered to be a hindrance to the growth of global commerce. However, a large number of medium sized and small businesses run into difficulties when they disagree with the clients or suppliers who are located abroad and have to consider the possibility of losing money or facing legal action. When business disagreements reach the legal system, they are almost always expensive and highly contentious. The eventful plaintiff in a long drawn out litigation often discovers that his out of pocket expenses exceed the amount of the judgement rendered in his favor. Courts frequently rule in favor of their own citizens, which fuels more hostility between nations as their citizens become warier of the deals they may receive from foreigners.

As cross-border transactions multiply, so do conflicts arising from different legal systems, cultural misunderstandings, and varying business practices. Arbitration has emerged as a preferred method for resolving such disputes, offering a flexible, natural, and efficient alternative to traditional court litigation. Unlike litigation, arbitration is characterized by its flexibility, confidentiality, and the expertise of arbitrators who are often specialists in the relevant field. In international trade disputes, neutrality is crucial. Parties often come from different countries with distinct legal systems and cultural backgrounds. Arbitration allows them to avoid potential biases associated with litigating in a foreign court by providing a neutral forum where the arbitrators are not affiliated with any party's home jurisdiction. Arbitrators are typically chosen for their expertise in specific areas of law and industry. This specialization ensures that complex trade issues are handled by individuals with a deep understanding of the subject matter, leading to more informed and appropriate decisions.

Many international trade disputes involve sensitive business information that parties prefer to keep confidential. Arbitration proceedings are typically private, and the awards are not published without the party's consent, protecting trade secrets and other proprietary information. The benefits of arbitration in resolving international trade disputes extend beyond neutrality, expertise, flexibility, and confidentiality. Arbitration awards are generally easier to enforce internationally than court judgements. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by over 160 countries, provides a robust framework for the enforcement of arbitration awards across borders. This convention significantly enhances the effectiveness of arbitration as a dispute resolution mechanism in international trade[44].

The effectiveness of arbitration in resolving international trade disputes is supported by a comprehensive legal framework at both international and national levels. The New York Convention is the cornerstone of the international legal framework for arbitration. It requires courts of contracting state to recognize and enforce arbitration agreements and awards, subject to limited exceptions. Other important conventions include UNICTRAL Model Law on International Commercial Arbitration, which provides a template for national arbitration laws and promotes harmonization of arbitration procedures globally[45].

The field of international arbitration is dynamic, with several emerging trends and developments shaping its future. The COVID-19 pandemic accelerated the adoption of technology in arbitration. Virtual hearing, electronic submissions, and online case management system have become more common, increasing the efficiency and accessibility of arbitration[46]. As international trade grows and evolves, arbitration will undoubtedly remain a key tool for resolving disputes and fostering international commerce.

A. Foreign Exchange Management Act (FEMA) application

The Foreign Exchange Management Act (FEMA) of 1999 is a crucial legislation in India that governs foreign exchange transactions and cross-border financial activities. Its primary objective

[44] Chiara Giogetti et al., *Independence and Impartiality of adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options*, 21The J. of World Inv. & Trade 441, 471 (2020).
[45] UNCITRAL Model Law on International Commercial Arbitration 1985 (Amended 2006), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf
[46] *Supra* note 3.

is to facilitate external trade and payments, promoting the orderly development and maintenance of the foreign exchange market in India. In the context of international commercial arbitration, FEMA's provisions can significantly impact the conduct and enforcement of arbitration proceedings involving Indian parties or assets. FEMA replaced the earlier Foreign Exchange Regulation Act (FERA) of 1973, shifted from a regulatory framework to a more facilitative one aimed at promoting foreign trade and investment.

In international commercial arbitration involving Indian parties, FEMA's provisions can influence various aspects of the arbitration process, from the initiation of proceedings to the enforcement of awards. International commercial arbitration agreements often specify a foreign seat of arbitration and the application of foreign law. However, FEMA mandates compliance with its provisions irrespective of the chosen jurisdiction or applicable law. For instance, any transaction that involves the transfer of foreign exchange or assets situated in India must adhere to FEMA regulations. This can include the payment of arbitration fees, remittance of funds for legal expenses, or the transfer of settlement amounts[47].

The enforcement of foreign awards in India is governed by the Arbitration and Conciliation Act, 1996, which incorporates the New York Convention and the Geneva Convention. While these international conventions facilitate the recognition and enforcement of arbitral awards, FEMA can impact the actual execution of the award, particularly if it involves the transfer of foreign exchange or repatriation of funds. For example, if an arbitral award requires an Indian party to pay a sum in foreign currency to a foreign entity, the transaction must be authorized under FEMA. The RBI's approval may be necessary for significant amounts, and parties must ensure that all procedural requirements are met[48].

Indian courts have addressed the interplay between FEMA and international commercial arbitration in various cases, providing guidance on how FEMA impacts arbitration proceedings and enforcement. In the case of **Renusagar Power Co Ltd v. General Electric Co.**[49], the Supreme Court of India held that enforcement of a foreign arbitral award could be refused if it contravened public policy. While this case primarily dealt with the concept of Public policy, it

[47] Rahul Bipin Meduri & Ravneet Kaur Baweja, *Third-Party Funding in International Arbitration- An Indian Context*, 9Supremo Amicus 251, 259 (2019).
[48] *Supra*, note 38
[49] Renusagar Power Co. Ltd v. General Electric Co., (1994) 1 SCC 644 (Ind.).

underscored the importance of ensuring that tribunal awards comply with Indian regulatory frameworks, including FEMA.

In another case of **Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors**[50], the Supreme Court of India reaffirmed the need to balance international comity with domestic regulatory compliance. The court emphasized that while enforcing foreign arbitral awards, Indian courts must ensure that such enforcement does not violate statutory provisions, including FEMA. The judgement highlighted the judiciary's cautious approach to reconciling international arbitration obligation with domestic regulatory requirements.

4.3 Primary third-party funders for International arbitration

In India, the concept of third-party funding is relatively new but is gradually gaining traction. TPF involves an entity that is not a party to the dispute but finances the legal costs in exchange for a share of the award if case is successful. Here is a list of some notable third-party funding active in India:

- LegalPay
- SPDR Capital
- Advok8
- Phoenix Legal Funding
- Litigation Financing India
- Harbour Litigation Funding

Below is the list of Third-Party Funders globally:

- 1624 Capital (New York & Washington, United States)
- Amicus Capital Services (New York, United States)
- Bentham IMF (United States)
- Delta Capital Partners (Chicago, United States)
- Omni Bridgeway (Amsterdam, Holland; Geneva, Switzerland; London & Guernsey, United Kingdom)

[50] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors., (2020) 11 SCC 1 (Ind.).

- Redress Solutions LLP (London, United Kingdom)
- Bridgepoint Global Litigation Services Inc. (Toronto, Canada)
- IMF Bentham (Australia)
- Litigation Lending Services (Sydney and Auckland, Australia and New Zealand)
- LCM Litigation Fund (Sydney and Adelaide, Australia)
- Claims Funding Europe Limited (Dublin, Ireland)
- FORIS AG (Bonn, Germany)
- La Française IC Fund (Paris, France)
- Lex Finance (Peru)
- Nivalion (Switzerland)
- Profile Investment (Paris, London)
- Roland Prozess Finanz AG (Cologne, Germany)

4.4 Development of TPF in Singapore & Hong Kong

TPF in arbitration has become an increasingly significant aspect of the legal landscape in many jurisdictions. Singapore and Hong Kong, two of Asia's leading financial and legal hubs, have seen notable developments in this area over the past decades. These developments reflect broader trends towards greater acceptance of TPF in dispute resolution, particularly in international arbitration.

The relevance of third-party funding has drawn significant attention from policy makers of Singapore & Hong Kong. Prior to now, in both the jurisdictions, the concept was viewed as criminal and tortious liability based on the doctrine of maintenance and champerty. But if it can prove that the funder has solely a commercial interest in the proceedings, then such outside money may be regarded as legal agreement, or it is an insolvency case that provide an additional exception, where the funder must demonstrate that it has a legitimate commercial interest in proceedings. The key exception to the prohibition of TPF mechanism may be the "commercial interest". However, the courts have discretionary authority to uphold these kinds of agreements

where they discover that there is little risk of escalating damage and, suppression of evidence and witness[51].

Singapore has long been a prominent center for international arbitration. However, it was not until 2017 that the country formally embraced TPF. The Singapore Parliament passed the Civil Law (Amendment) Act 2017[52], which legalized TPF for international arbitration and related proceedings. This legislative change was a significant departure from the traditional common law doctrines of champerty and maintenance, which had previously prohibited TPF. The Civil Law (Third-Party Funding) Regulations 2017, which accompanied the amendment, set out specific requirements for funders. These include having a paid-up share capital of not less than SGD 5 million or equivalent amount in foreign currency, ensuring that funders are reputable and financially sound entities[53]. The Civil Law Act abolishes civil liability for the tort of maintenance and champerty. Additionally, the Singapore Institute of Arbitration Centre (SIAC) and Law Society of Singapore issued guidelines to provide clarity on ethical considerations and disclosure requirements related to TPF. The SIAC guidelines are very influential and resulted from extensive input from the Singapore arbitration community, even though they are not required. Over the previous ten years, the Singapore International Arbitration Centre's (SIAC) caseload has grown significantly. More than 400 new cases with parties from 65 jurisdictions were submitted with SIAC in 2018, and the total amount in dispute for these cases was $9.65 billion[54].

Singapore courts have generally taken a positive view of TPF, recognizing the potential benefits in promoting access to judicial and leveling the playing field in disputes involving parties with disparate financial resources. In notable case of **Re Vanguard Energy Pte Ltd**[55] shareholders of the company were the funders for the proceeding before it went into liquidation. The court held that "if shareholders had legitimate interest in the claims, assigning claims to them did not violate public policy considerations of protecting the integrity of the justice system and to the best interest of vulnerable litigants".

[51] Seemasmiti Pattjoshi, *Third-Party Funding in International Commercial Arbitration- A Study with Reference to India*, 46Sch. of L. KIIT Univ., (2022).
[52] Civil Law (Amendment) Act 2017 §5A, 2 Act of Singapore Parliament (2017).
[53] Civil Law (Third-Party Funding) Regulations Act 2017 §4, 2 Act of Singapore Parliament (2017).
[54] SIAC Annual Report, (2018).
[55] Re Vanguard Energy Pte. Ltd. (2015) 4 SLR 597.

Hong Kong's journey towards the acceptance of TPF has been similar to that of Singapore, characterized by a shift from the traditional prohibitions to a regulated framework. Hong Kong has maintained the common law doctrine of champerty and maintenance to this day, when other common law jurisdictions have long since done away with them. This may have caused Hong Kong to lag behind other common law systems in the establishment of third-party funding framework. Until in 2017, Hong Kong enacted the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Ordinance 2017, which expressly allow TPF in arbitration and mediation proceedings. The Hong Kong Code of Practice for Third-Party Funding of Arbitration, which came into effect in 2019, provides detailed guidelines for funders. The Code requires funders to ensure they have adequate financial resources, maintain confidentiality, and avoid conflicts of interest. It also mandates disclosure of funding arrangements to the tribunal and other parties, ensuring transparency throughout the arbitration process[56]. On November 1, 2018, the Hong Kong International Arbitration Centre (HKIAC) submitted revisions to the HKIAC Rules to allow for the legalization of TPF for arbitration. On July 11, 2018, the revisions were first put up for public comments. The updated HKIAC Rules specifically acknowledge third-party funders and mandate that a funded party quickly report the existence of a funding agreement, the funder's name, and any updates to this information. The regulations in Division 5 of the Arbitration Ordinance are supplemented by these requirements. Additionally, the HKIAC Rules clearly allow an arbitral tribunal to consider any TPF agreement when determining and allocating the costs of arbitration. Importantly, a funded party is entitled to communicate arbitration related information. The case of **Re Cyberworks Audio Video Technology Ltd**[57] marked a significant milestone, where the court acknowledged the legitimacy of TPF in arbitration and emphasized the importance of maintaining transparency and managing conflicts of interest.

While both Singapore and Hong Kong have embraced TPF, there are some differences in their regulatory approach and market dynamics. Singapore's framework includes more stringent financial requirements for funders, reflecting a cautious approach to ensure that only reputable and financially stable entities participate in market. Hong Kong, on the other hand, has focused

[56] Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Act 2019, 2, Acts of Hong Kong Parliament (2019).
[57] Re Cyberworks Audio Video Technology Ltd (2010) 2 HKLRD 1137.

on detailed disclosure and ethical guidelines promoting transparency and accountability. The comparative landscape in both the jurisdictions has been shaped by the presence of leading international TPF firms and the emergence of local players. The acceptance of TPF in Singapore has been bolstered by the support of key legal institutions. The Singapore International Arbitration Centre (SIAC) and the Singapore International Commercial Court (SICC) have recognized the importance of TPF in facilitating access to justice and enhancing Singapore's attractiveness as a global arbitration hub. These institutions have incorporated provisions into their rules that explicitly allow for the involvement of third-party funders, provided that there is full disclosure to all the parties and the tribunal. Hence, Singapore's proactive stance in promoting itself as a global arbitration hub, coupled with strong government support, may give it a slight edge in attracting international disputes and TPF activities.

The future of TPF in Singapore and Hong Kong looks promising with both jurisdictions poised to play a significant role in the global TPF market. Ongoing developments, such as the introduction of new funding models and the expansion of TPF into other areas of dispute resolution, will further shape the market.

4.5 Governing principles of TPF in International Commercial Arbitration

International arbitration has become an essential method for resolving cross-border commercial disputes. The high costs associated with arbitration, however can be prohibitive for many parties. To address this challenge, third-party funding (TPF) has emerged as a significant development in the arbitration landscape. TPF involves a third-party funder financing the arbitration costs in exchange for a portion of the award or settlement.

The number of Third-Party funders participating in international commercial arbitration has increased significantly in recent years, prompting concerns about the legitimacy of TPF in these types of procedures. These days, an increasing number of claimants are looking to obtain outside funding, "either because they don't have the money to start arbitration proceedings or because they want to keep their cash flow going and reduce the risk of an unpredictable result." Furthermore, since funders are effectively running a poorly regulated profitable financial services scheme, it may be claimed that they are partly to blame for the continuous rise in third-

party funded claims. The nature and extent of funder's influence over the dispute management, questions of jurisdiction and admissibility, questions of transparency and disclosure of funding agreements, questions of attorney client privilege, questions of conflicts of interest for arbitral tribunals, and lastly questions about cost allocation and security for costs are all undoubtedly concerns raised by practicing arbitrators regarding the legitimacy of TPF.

4.6 Enforcement of TPF Agreement

Third-Party Funding (TPF) is an innovative mechanism in the legal arena, allowing external investors to finance litigation in exchange for a portion of the awards. This model alleviates financial burdens on the parties to dispute, particularly in high-cost cases, and democratizes access to justice. However, the enforceability of TPF agreements is fraught with legal complexities and the arbitration award involving TPF can differ depending on where the award or the TPF agreement are being enforced. Below are some of these circumstances:

A. Seat of Arbitration

Arbitration has become a preferred method for resolving commercial disputes, offering a flexible and efficient alternative to traditional to traditional court litigation. Central to the arbitration process is the concept of the "seat of arbitration", a term that refers to legal jurisdiction to which the arbitration is tied. The seat of arbitration significantly influences the arbitration proceedings, including the procedural rules, the role of the local courts, and the enforceability of the arbitral award.

The seat of arbitration also known as the "place" of arbitration, is the legal home of the arbitration. It is crucial element that determines the applicable arbitration laws and the extent of judicial intervention. The seat should not be confused with the venue of the arbitration, which is merely the physical location where hearings may be held. The seat's legal framework governs the arbitration process, irrespective of where the actual hearing takes place. The choice of the seat of arbitration determines the procedural laws that will govern the arbitration. These laws include the rules regarding the conduct of the arbitration, the powers and duties of the arbitrators, and the rights of the parties. For instance, if the seat of arbitration is in London, the Arbitration Act 1996 will apply, while if it is in Paris, the French Code of Civil Procedure will govern. Also, the seat of arbitration dictates the level of judicial supervision and support the arbitration can receive. Courts at the seat of arbitration have the authority to intervene in certain circumstances,

such as appointing or removing arbitrators, granting interim measures, and enforcing or setting aside arbitral awards. The extent and nature of such interventions vary from one jurisdiction to another[58].

The enforceability of arbitral award is significantly influenced by the seat of arbitration. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitral awards made in any of the convention's signatory states are enforced in other signatory states. Choosing a seat in New York Convention country thus enhances the likelihood of the award being recognized and enforced internationally[59].

Several jurisdictions have established themselves as popular seats of arbitration due to their favorable legal environments and supportive judicial systems. Among those popular jurisdictions Singapore has rapidly gained prominence as a global arbitration hub. The city-state offers a modern legal framework under the International Arbitration Act, a pro-arbitration judiciary, and state-of art facilities. Also, Hong Kong is a major arbitration center in Asia, known for its common law system and supportive judiciary. The Hong Kong International Arbitration Centre (HKIAC) is highly regarded for its efficiency and expertise.

CHAPTER 5: THIRD-PARTY FUNDING IN COMPARATION WITH SINGAPORE & HONG KONG: JUDICIAL RESPONSES

Third-Party Funding (TPF) has emerged as a transformative force in litigation and arbitration, providing parties with financial resources to pursue legal claims they might otherwise be unable to afford. As the practice has gained prominence, judicial attitudes and responses to TPF have evolved, reflecting a mix of cautious acceptance, regulatory efforts, and ongoing debate. When a lawsuit is funded commercially, the funder anticipated receiving a success fee or a portion of profits at the end of the case. Although, Section 35 of CPC mentions the court's authority to order the financer to become a party and deposit the costs with the court, there is no particular statute in India that governs TPF. However, it may be deduced that TPF is not illegal in India

[58] Khouri Susanna & Hurford Kate, *Third party funding in international arbitration: Balancing benefits and risks*, Practical L. Publ'g 10, 41 (2012).

[59] United Nations Commission on International Trade Law (UNCITRAL), Enforcing Arbitration Awards under New York Convention 21 (2000), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/nycday-e.pdf.

based on a review of relevant legislative provisions and court decisions. This section analyses the development of the concept of judicial attitudes and responses regarding third-party funding, and the potential for its practice in India, with a focus on public policy.

Courts in various jurisdictions have shown a growing acceptance of third-party funding, recognizing its potential to enhance access to justice. In jurisdictions like Australia, the United Kingdom, Singapore and Hong Kong, courts have explicitly acknowledged the benefits of third-party funding in enabling the litigants to pursue meritorious claims without the burden of prohibitive legal costs. For instance, the Australian High Court in the landmark case of **Campbells Cash and Carry Pty Lted v Fostif Pty Ltd (2006)**[60], upheld the validity of TPF agreements, nothing that they did not inherently offend principles of public policy or justice.

As TPF becomes more embedded in the legal landscape, courts and regulators have developed frameworks to manage its use and address potential concerns. In some jurisdictions, specific rules and guidelines have been introduced to ensure transparency and fairness in third-party agreements. In Singapore and Hong Kong, legislative measures have been enacted to formalize the use of TPF in arbitration and related proceedings. The Singapore International Arbitration Act was amended in 2017 to expressly permit third-party in international arbitration, accompanied by guidelines required disclosure of third-party funding in agreements. Similarly, Hong Kong's Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Ordinance 2017 introduced a regulatory framework for third-party funding in arbitration, mandating transparency and ethical conduct.

One of the primary judicial concerns regarding TPF is the potential for the conflicts of interest and lack of transparency. Courts have emphasized the need for the parties to disclose third-party agreements to ensure that all stakeholders, including the judiciary, are aware of any external financial interests that may influence the proceedings. This transparency is crucial for maintaining the integrity of the judicial process and ensuring that decisions are made based on the merits of the case rather than undisclosed financial motivations. In Singapore and Hong Kong, courts have increasingly required the disclosure of third-party agreements in legal proceeding or dispute resolution process. These disclosure requirements help courts access the

[60] Campbells Cash & Carry Pty. Ltd. v Fostif Pty. Ltd. (2006) 229 (CLR) 386.

potential impact of third-party funding on the dispute resolution and litigation process, including issues related to control, settlement negotiations, and the distribution of any awards.

Judicial attitude towards third-party funding are also shaped by concerns about ethical conduct and professional responsibilities. Courts have scrutinized third-party funding agreements to ensure that they do not undermine the ethical duties of attorney or compromise in the interest of parties in disputes. For instance, in the UK case of **Reeves v Sprecher Grier Halberstam LLP (2009)**[61] , the High Court examined a third-party agreement that imposed onerous terms on the funded party, including excessive control by the funder over the litigation strategy. The court found that the agreement violated principles of fairness and justice, highlighting the need for judicial oversight to prevent abusive practices in third-party funding arrangements. The involvement of third-party funding can influence judicial decisions on costs and security for costs. Courts have grappled with the question of whether the presence of third-party funder should affect the allocation of costs and the requirement for security for costs. In some cases, courts have required funded parties to provide security for costs to protect defendants from the risks of non-payments if the claimant loses the case.

Judicial attitudes toward TPF are evolving as courts become more familiar with its benefits and challenges. While courts generally recognize the value of TPF in enhancing access to justice, they remain vigilant in addressing potential abuses and ensuring that third-party arrangements adhere to principles of fairness and transparency. The development of regulatory framework and judicial guidelines reflects a growing effort to integrate TPF into the legal system in a manner that safeguards the interests of all parties involved. TPF is reshaping the landscape of litigation and arbitration, offering new opportunities for claimants while posing significant ethical and procedural challenges. Judicial attitudes and responses to TPF have been characterized by a cautious acceptance tempered by a commitment to transparency, fairness and, ethical conduct. Courts around the world are developing frameworks to manage the complexities of TPF, balancing the need to promote access to justice with the imperative to maintain the integrity of the judicial process.

[61] Reeves v Sprecher Grier Halberstam LLP (2009) (EWCA) Civ 531.

5.1 Public Policy on Dispute Resolution, Access to Justice and Funding of Arbitration

Dispute resolution and the funding of arbitration have become central topics in contemporary legal policy as globalization and international commerce have surged. TPF offers a pathway for parties who lack the financial resources to pursue their claims, it also raises significant concerns regarding its alignment with public policy. These developments have necessitated efficient, fair, and accessible mechanisms to resolve disputes. Public policy plays a pivotal role in shaping these mechanisms, ensuring they serve the interest of justice, maintain the integrity of legal process, and adapt to the evolving landscape of international trade and commerce.

The fundamental principle of public policy is that morality and justice must be maintained, unaffected by improper or immoral business practices. One may even argue that it is undesirable for there to be any chance of improper intervention in the legal system because justice needs to be served and it needs to be perceived to be served. One of the primary arguments in favor of TPF is its ability to enhance access to justice. Arbitral proceedings can be prohibitively expensive, deterring many individuals and smaller entities from pursuing legitimate claims. TPF mitigates this financial barrier by enabling claimants to secure funding from third parties who cover the legal cost in exchange for a portion of award or settlement. This democratization of access to justice is generally seen as aligned with public policy goals of ensuring that justice is accessible to all, not just the wealthy. But this is not the case every time, on the basis of empirical evidence and by examining various claim types separately, it is possible to determine the extent to which TPF may influence the balance between the parties in various types of arbitration and may result in either an increase in access to justice for good claims or an increase in blackmail or other undesirable claims and settlements. Improper pressure from a party's funder or advisers may be applied. For example, a funder or lawyer who needs cash flow or who has reached their own personal optimum level of reward and return may pressurize a client to make unfavorable strategic decisions, like not doing further research, not giving expertise opinions, or agreeing to settle too soon or for less than what is fair.

While TPF promotes access to justice, it also raises questions about fairness and equality within the legal process. Critics argue that TPF can create an uneven playing field, where well-funded parties have a significant advantage over those without such backing. This disparity can manifest

in various ways, such as the ability to sustain arbitration, exert pressure on opponents, and influence settlement negotiations. Public policy seeks to ensure fairness and equality before law. To address potential imbalances created by TPF, some jurisdictions have implemented regulatory frameworks that requires the disclosure of third-party funding arrangements. This transparency allows tribunals to consider the presence of TPF when making decisions on costs and security for costs, thereby helping to level the playing field. For example, Singapore and Hong Kong have enacted legislation mandating the disclosure of TPF in arbitration, promoting fairness and mitigating potential abuses[62]. Transparency is a cornerstone of public policy in legal proceedings. TPF arrangements, if kept undisclosed, can lead to conflicts of interest and undermine the integrity of the judicial process. Public policy favors the disclosure of third-party agreements to ensure that all parties, including the tribunal, are aware of any third-party interests that might influence the proceedings. Also, ethical considerations are considered as paramount in the discussion of TPF and public policy. Concerns about TPF often revolve around potential conflicts of interest, the funder's influence over legal strategy, and the protection of vulnerable parties. Ethical guidelines aim to ensure that third-party arrangements do not compromise the independency and integrity of legal practitioners or the rights of the parties. Singapore's International Arbitration Act was amended in 2017 to expressly permit TPF in international arbitration, accompanied by guidelines requiring transparency and ethical conduct. Hong Kong also followed suit with its Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Ordinance 2017, establishing a regulatory framework for TPF that promotes transparency and fairness.

Many scholars argue that the interest of various parties and the public interest may create improper pressure in the arbitral proceeding. For instance, a party might not have enough money to defend or prosecute a lawsuit. A failure or travesty of justice would ensure from such circumstances, either because legitimate rights were not upheld when they had been violated or because legitimate defenses were not raised when they applied. It's possible that pertinent factual evidence or expert opinion has not been found or supplied, and that arguments have not been made persuasively enough. A situation might also arise that party choose to arrange external funding from some third-party funder even after having sufficient funds to fund a claim. In

[62] Dominik Horodyski & Maria Kierska, *Third Party Funding in International Arbitration-Legal Problems and Global Trends with a Focus on Disclosure Requirement*, 19Zeszyty Naukowe Towarzystwa Univ. 64, 69 (2017).

another instance where the interest of funded party's lawyer can create conflicts. The lawyer acts as a middleman in the legal transaction, offering services. His overarching goal is commercial, meaning that his work must turn a profit. But getting the greatest outcomes for his clients is his main goal as a professional and as it is beneficial for the foundation for his reputation-building and business expansion. Professional codes of ethics requiring standards of ethical practice may apply to lawyers. It will be evident to see that the lawyer's commercial and professional goals are at conflict. Not just the interest of party or the interest of lawyer can create improper pressure but commonly the interest of the independent funder can assert pressure on the party. The primary financial goal of an independent funder, be it the state via legal aid fund or a private individual offering a loan, which has to be reimbursed together with a return on the loan investment. However, an independent funder whose business strategy is to generate money by investing in litigation is unlikely to have the public policy purpose as its primary goal. Such third-party funder seeks the maximum return on its investment as its sole goal[63].

The opponent party in a dispute is only interested in winning that dispute. Depending on the circumstances, a litigant may desire peace and the resumption of the business dealings or the cordial relations regardless of the dispute's legal merit. The goal of the dispute resolution process should be to arrive at a common ground and legally sound resolution that reflects the party's respective legal rights and duties. The financial interest of the second party is in making sure that he has the resources to complete the job. The second party does not want to engage in combat with a first party that possesses far more resources than he does, or discover that the resources are significantly more than he anticipated, or discover that he may be held disproportionately or made widely liable for the expenditures incurred. Additionally, he wants to be sure that his rivals, as well as their intermediaries and financiers, are operating honestly and according to proper and consistent ethical standards[64].

The main goal of a society is to ensure that rights are respected and that conflicts are settled quickly and amicably, which means, maintaining the rule of law is the main goal. There are additional factors to consider, such as the need to uphold fundamental rights and constitutional rights. The infringement of these rights is required to be settled timely, fairly and in appropriate

[63] *Supra,* note 55.
[64] *Supra*, note 55.

manner in state courts. The state may also be motivated by the financial goal of having private parties or funders to pay for some or all of the disputes instead of using public funds[65].

In light of the many interests mentioned above, it is ultimately in the interest of the parties and the state to establish and uphold the norms and principles. Judges, other pertinent authorities, and the professionals concerned must uphold these values and guidelines in accordance with their professional codes of ethics. The state's goals in dispute resolution are to guarantee that the party's playing fields are governed by principles such as equality before law and the absence of improper pressure, with regard to preventing improper pressure between parties and their advisers regarding funding, the goal is to strike a balance between the provision of independent private funding and dispute resolution advice and the idea that conflicts of interest or other abuse do not impede the administration of justice.

The debate over whether TPF infringes public policy ultimately hinges on balancing its benefits and risks. Proponents argue that TPF enhances access to justice, promotes fairness by enabling meritorious claims to be pursued, and foster competition in the legal funding market. They contend that with proper regulation and oversight, the risks associated with TPF can be effectively managed. Critics, however, highlight the potential for TPF to create conflicts of interest, undermine the independency of legal practitioners, and lead to unethical practices. They argue that without stringent regulatory frameworks, third-party could disrupt the balance of the legal process and erode public trust in the judicial system.

A. Public Policy and Third-Party Funding in India

As of now, there is no explicit legal framework or statutory regulation governing TPF in India. However, the practice is not prohibited by Indian law, and there have been instances where courts have implicitly acknowledged its existence. The Indian legal system, inherited from British common law, does not expressly prohibits TPF. In fact, certain aspects of Indian law, such as the prohibition of champerty and maintenance, have historically been interpreted to permit TPF as long as it does not involve an element of unfairness or profiteering from the

[65] *Supra*, note 57.

litigation. Indian courts have not issued definitive ruling explicitly endorsing or rejecting third-party funding, but some judgements have provided insights into judicial attitudes.

The early British courts in India deliberated on whether the English law related to maintenance and champerty should be extended to Indian legal system, but their rulings were not consistent. It was established by Privy Council that English laws of maintenance and champerty were not of force as special laws in India. Agreements were analyzed according to their nature, those that violated the law, were unethical, or were created for wrong reasons should be deemed void. The ruling of the Supreme Court in the case of Mr. G was that "*the strict English rules of champerty and maintenance do not apply in India*"[66]. The court further stated that the contract would have been valid and enforceable under law if it had been made between a litigant or client and a third-party rather than between a lawyer and his client. In the case of **Bar Council of India v. A.K. Balaji & Ors**[67]**,** it was stated that Indian advocates are not allowed to finance lawsuits on behalf of their clients, whereas, third-parties are permitted to fund and can receive the returns following the conclusion of the litigation. This judgement suggests that the Indian judiciary may be open to the idea of TPF, provided it does not interfere with the ethical boundaries governing legal professionals. Furthermore, Indian courts have emphasized the importance of maintaining fairness and transparency in any funding arrangement to avoid any undue influence on the judicial process.

One of the primary public policy arguments in favor of TPF is that it enhances access to justice. In country like India, where legal costs can be prohibitive for many litigants, and the culture of pro-bono is almost absent with lack of proper legal trainings, third-party can provide the necessary financial support to pursue legitimate claims. In a report of National Crime Records Bureau (NCRB), Ministry of Home Affairs, 2012, it was reported that 62% of the prison inmates accused of various crimes are under trials. These statics shows how India lack in the access of justice and legal aid. TPF can contribute to the efficient functioning of the legal system by filtering out frivolous claims. Funders typically conduct rigorous due diligence before committing to a case, ensuring that only claims with a reasonable chance of success receive

[66] Mr. 'G', A Senior Advocate of the Supreme Court v. The Hon'ble Chief Justice and Judges of the High Court of Judicature at Bombay, (1955) 1 SCR 490 (Ind.)
[67] Bar Council of India v. A.K. Balaji & Ors., (2018) 5 SCC 379 (Ind.)

funding. This can reduce the burden on the courts and promote a more streamlined judicial process.

Despite the potential benefits, TPF also raises significant concerns related to control, ethical considerations, and the potential for conflicts of interest. Public policy must address these issues through robust regulatory frameworks that ensure transparency and fairness in funding arrangements. This includes mandatory disclosure of funding agreements, ethical guidelines to prevent undue influence on legal strategy, and mechanisms to resolve disputes between funders and funded parties. The absence of a clear regulatory framework in India poses challenges for the widespread adoption of TPF. Without formal guidelines, there is uncertainty regarding the legality and enforceability of funding agreements. This can deter potential funder from entering the Indian market and limit the benefits of TPF for litigants. There may be cultural and legal resistance to the concept of TPF in India. The legal community and judiciary are cautious about adopting a practice that fundamentally changes the dynamics of litigation and arbitration. To effectively integrate TPF into Indian legal system, several steps need to be taken. Establishing a clear and comprehensive regulatory framework for TPF is essential. This framework should outline the rights and responsibility of funders, litigants, and legal professionals, and include provisions for mandatory disclosure, ethical guidelines, and dispute resolution mechanisms.

Indian courts can play a pivotal role by providing guidance on the legality and enforceability of third-party agreements. Judicial pronouncements that endorse TPF, subject to safeguards and ethical considerations, can provide much needed clarity and encourage the adoption of TPF in India. States in India like Maharashtra, Gujarat, Madhya Pradesh, Uttar Pradesh, Andhra Pradesh, Orissa and Tamil Nadu have expressly recognized the third-party litigation funding after an amendment in Order XXV Rule 1 of the Code of Civil Procedure Code, 1908. The code states the powers of courts, to secure costs for litigation by asking financer to become a party and depositing the costs in court.

However, it is crucial that TPF should be governed by rules and regulations to ensure that investors in TPF do not violates the principles of equality, good conscience, and fair play while bending the scales of justice for profit. Legislatures in India might use the legal models used in other nations while drafting regulations and rules for the third-party funding.

5.2 Judicial Attitude & Responses regarding TPF

Regarding whether to apply the maintenance and champerty theory to arbitration, common law nations cannot agree on anything. However, there are a few jurisdictions that allow these theories to be applied in international arbitration. *Lex Loci arbitri*, which means the law of the place of arbitration. It refers to the law of the country or jurisdiction where arbitration proceeding is taking place. It constitutes a basis for annulling an award on the grounds that "composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place", must be followed by all the parties and the tribunal if the arbitration proceedings are to take place in a jurisdiction upholding maintenance and champerty. If a court decides to uphold its public policy and deem a third-party contract unlawful, it can also decide whether to enforce or set aside an arbitral judgment[68]. In particular, maintenance and champerty may find their way to international arbitration due to public policy issues. Furthermore, arbitrators evaluate and resolve cases much like judges in national courts, even though arbitration is a private conflict resolution system with unique and distinct procedures from litigation. Even yet, there are still certain opportunities to challenge arbitration awards- particularly in states that have ratified the New York convention. However, maintenance and champerty issues will primarily come up when seeking redress in state courts, particularly because the New York Convention gives the authority to the courts to refuse to enforce the award if it violates public policy[69]. This includes issues related to recognition, setting aside, enforcement, or vacation of an arbitral award.

Jurisdictions with more developed legal frameworks for TPF have established regulatory bodies to oversee funder's conduct. These bodies enforce standards of transparency, ethical behavior, and financial stability. For example, in Singapore and Hong Kong, legislative frameworks require disclosure of third-party arrangements and set out guidelines for funders. The establishment of regulatory bodies and ethical standards helps ensure that third-party contributes positively to the legal system, promoting access to justice while safeguarding the interest of all parties involved.

[68] *Supra* note 38, at 155.
[69] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art. 5 ¶2(b).

Judicial attitudes and responses to TPF vary across jurisdictions, but common themes of transparency, ethical conduct and regulatory oversight emerge. Courts have generally recognized the potential of TPF to enhance access to justice, while also emphasizing the need to safeguard the integrity of the legal process.

A. Judicial Attitude & Responses of TPF in Singapore

Singapore, known for its robust legal system and pro-business environment, initially had a conservative stance towards TPF. Historically, the doctrine of champerty and maintenance, inherited from English common law, prohibited third-party involvement in litigation for profit. However, recognizing the evolving global legal landscape and the need to remain competitive in international arbitration, Singapore reformed its legal framework. In 2017, Singapore made significant legislative changes to permit TPF in international arbitration and related proceedings. The amendment to the Civil Law Act (Chapter 43) and the introduction of the Civil Law (Third-Party Funding) Regulations 2017 marked a pivotal shift in the judicial approach towards third-party funding. Also, SIArb guidelines extensive guidelines related to arbitration and TPF.

Singapore courts have shown a supportive yet cautious approach towards TPF, emphasizing the importance of transparency, fairness and ethical conduct. Judicial attitudes can be discerned from several key cases and judicial pronouncements that have shaped the legal framework and practice of TPF in Singapore. Singapore’s reputation as a global arbitration hub has led to several cases where TPF has played a role. In arbitration, the courts have consistently upheld the validity of third-party agreements, provided they adhere to regulatory and ethical standards. The judiciary has emphasized the need for transparency and the disclosure of funding agreements to ensure that all parties and the tribunal are aware of any third-party involvement. In accordance with the judiciary, the guidelines of SIArb prohibit a third-party funder, seeking disclosure of information from the funded party’s attorney as it may cause breach of confidentiality[70].

The amendment to the Legal Professional (Professional Conduct) Rules 2015 also addressed the role of lawyers in third-party funding. Lawyers are required to disclose the existence of any third-party agreements to the court or tribunal and to other parties in the dispute. This emphasis

[70] SIArb Guidelines 1981, ¶5.2.

on transparency is crucial to mitigate potential conflicts of interest and ensure fairness in the legal process.

- If funds are not available at the time of the proceedings, disclosure must be given as soon as is reasonably possible. Otherwise, it must be made on the day the procedures of the proceeding started[71].
- Any funding agreement termination or change of funder is to be notified.
- The intention behind these commitments was to make the disclosure requirements practically real rather than just regulating the funded parties or the funder, who are frequently located outside of the jurisdiction.

Legal teams outside of Singapore are exempted from complying with the Professional Conduct Rules as they only apply to Singapore lawyers. This might lead to disparities in the ethical standards that apply to attorneys even if arbitration is seated in Singapore[72].

Singapore's strategic position as a leading arbitration center in Asia and globally has influenced its judicial and legislative stance on TPF. By providing a clear and supportive framework for TPF, Singapore enhances its attractiveness to international businesses and legal practitioners, reinforcing its status as premier venue for arbitration. Despite the progressive stance, TPF in Singapore faces challenges that requires ongoing judicial and regulatory attention. Key issues include managing potential conflicts of interest, ensuring ethical conduct by funders and legal professionals, and expanding the scope of TPF beyond international arbitration.

Ensuring ethical conduct by all parties involved in third-party funding is crucial. This includes funders, lawyers, and the funded parties. The development of robust ethical guidelines and continuous monitoring by regulatory bodies will be essential to maintain the integrity of TPF arrangements. The guidelines of SIArb contains provisions that ensures that the ethical conduct is maintained during arbitral proceedings. According to SIArb guidelines, if the funder is funding more than one parties in the same proceedings, then the funder is required to inform the funded parties about any potential conflicts of interest that may arise during the proceeding.[73] Section IV goes into additional details on the related topic of disclosure between opposing parties as well as

[71] Legal Profession (Professional Conduct) Rules 2015, Rule 49A (2).
[72] *Supra*, note 66.
[73] SIArb Guidelines 1981, ¶6.1 & ¶6.2.

to the court or tribunal. According to the SIArb Guidelines, the financing agreement must provide the supported party to tell other parties, attorneys, and the court or arbitral tribunal about the identity, address, and funding source. According to the guidelines, funders must also comply with any further information regarding financing that may be mandated by a court, tribunal, or other regulated body.[74]

Currently, TPF in Singapore is primarily limited to international arbitration and related proceedings. There is ongoing debate about whether the scope of TPF should be expanded to include domestic litigation and other types of legal proceedings. Any expansion would require careful consideration of the associated risks and benefits, along with appropriate regulatory safeguard. The trend toward TPF in arbitration observed in other top international arbitration jurisdiction is mirrored in Singapore's new funding structure. With disclosure at its core, the framework takes a light-touch regulation, in an effort to encourage greater openness and fewer conflicts of interest. The government of Singapore is likewise eager to make sure the framework is operating effectively and to pinpoint opportunities for more innovation and development. Singapore's Ministry of Law conducted a public consultation in April and May of 2018. Feedback on how the present TPF mechanism functions as well as ideas for enhancements and expansion outside international arbitration were solicited throughout the consultation. It is anticipated that consultation would yield results eventually. According to Edwin Tong SC, Senior Minister of State for Law, preliminary observations from March 2019 indicates that funders have seen an increase in funding requests in Singapore, and the reaction has been favorable. The Senior Minister for Law, said on August 8, 2019, that domestic arbitration process and some specified proceedings at the Singapore International Commercial Court (SICC) will be included in the TPF structure[75].

[74] *Id*.

[75] Press Release, Ministry of Law Singapore, Framework for Conditional Fee Agreements in Singapore to Commence on 4 May 2022 (Apr. 29, 2022), https://www.mlaw.gov.sg/news/press-releases/2022-04-29-framework-cfas-in-singapore-commence-4-may-2022/

B. Judicial Attitude & Responses of TPF in Hong Kong

TPF has become an increasingly significant element in the realm of dispute resolution, particularly in high-stakes litigation and arbitration. Hong Kong, a major global arbitration hub, has adopted a progressive stance towards TPF, aligning itself with international trends and ensuring its competitiveness. Historically, TPF was largely prohibited in Hong-Kong due to the common law doctrines of champerty and maintenance, which outlawed third-party involvement in litigation for profit. However, recognizing the need to modernize and remain competitive as a global arbitration center, Hong Kong has reformed its legal stance on TPF. In 2017, Hong Kong introduced significant legislative changes to permit third-party funding in arbitration and related proceedings. These reforms marked a pivotal shift in judicial attitudes, aligning Hong Kong with other leading arbitration jurisdictions like Singapore.

The legislative changes in Hong Kong are primarily encapsulated in the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Ordinance 2017, which amended the Arbitration Ordinance and the Mediation Ordinance. The amendment created a clear legal framework for third-party funding in arbitration and mediation, promoting transparency and accountability. The Amendment Ordinance defines funding agreement in TPF as:

"*(a) in writing; (b) made between a funded party and a third-party funder; (c) made on or after the commencement date of Division 3' (1 February 2019)*".[76]

According to the Code, a third-party funder must include a Hong Kong address for service, list all the essential components, risks, and conditions of the proposed funding, and include the name and contact information of the advisory body in charge of overseeing and evaluating the management of TPF. It is considered best practice to include such phrases when they are integrated in the Code, even if it is not required. Under the Code, the funding agreement is also required to state grounds of the termination of third-party funder. It says that a third-party funder can be terminated when it:

"(1) reasonably ceases to be satisfied about the merits of the arbitration; (2) reasonably believes that there has been a material adverse change of prospects to the funded party's success in the

[76] Amendment Ordinance 2017, Section 98H.

arbitration or recovery on success; or (3) reasonably believes that the funded party has committed a material breach of the funding agreement”.

It should be noted that if a TPF ends the funding agreement, it must stipulate that they will still be responsible for any financial commitments incurred up until the termination date, unless there has been a serious violation.

In Hong Kong, arbitration procedures are often subject to stringent secrecy regulations. Any disclosure of information about the existence of arbitration proceeding or any awards made thereafter as a result of the arbitration proceedings is forbidden under Section 18 of the Arbitration Ordinance. The right to confidentiality of the party who is not seeking TPF and the requirement for information for the third-party funder must be balanced. An exception to the confidentiality obligation is provided by Section 98T of the Amendment Ordinance, which permits disclosure to the third-party by a party in order to obtain or pursue TPF from the funder.[77] Similar to this, Hong Kong International Arbitration Centre (HKIAC) also allows disclosure by the parties to a third-party funder, for the purpose of obtaining TPF for arbitration.[78] The Article 45 4(e) of Hong Kong International Arbitration Centre (HKIAC) states that parties are required to disclose:

“(1) the existence of any funding agreement; and (2) the identity of the third party, as soon as practicable after the funding agreement is made, or in the Notice of Arbitration or the Answer to the Notice of Arbitration, whichever event is earlier”

According to the Commission, if the right conditions are met and due procedure has been followed, an arbitral tribunal should have the authority under the Arbitration Ordinance to impose costs against a third-party funder. Technical challenges must be resolved, such as a third-party funder that is not a party to the arbitration agreement between the parties can be required to pay unfavorable costs. It would be challenging to compel payment of cost to a third-party who is not a party to the arbitration agreement because arbitration agreement function on the basis of

[77] Amendment Ordinance 2017, Section 98T(2)(a).
[78] HKIAC Rules 2018, art. 45.4(e).

consent from all the parties in dispute. This technical issue is the reason that Commission has decided to not incorporate such powers in the Amendment Ordinance.[79]

Currently, TPF in Hong Kong is primarily limited to arbitration and mediation. There is ongoing debate about whether the scope of TPF should be expanded to include the domestic litigation and other types of legal proceedings. The judicial attitude towards the TPF in Hong Kong demonstrate a pragmatic and forward-thinking approach. The judiciary's emphasis on transparency, ethical conduct, and regulatory oversight ensures that third-party arrangements are conducted fairly and responsibly. As third-party continues to evolve, Hong Kong's experience provides valuable insights for other jurisdictions like India grappling with the complexities of integrating the TPF into their legal system.

5.3 Cases related to Third-Party Funding in India, Singapore & Hong Kong

A. India

TPF in India, although not explicitly regulated by specific legislation but has been gaining acceptance through judicial pronouncements. Indian courts have not directly ruled extensively on the permissibility of TPF, but several cases touch upon the principles relevant to the concept of TPF. Below are some key case laws related to TPF in arbitration in India and its underlying principles in India:

1. *Bar Council of India v. A.K. Balaji & Ors. (2018)*[80]

The case arose out of a writ petition filed by Mr. A.K. Balaji, an Advocate, who was enrolled with the Bar Council of Tamil Nadu. The petitioner sought to challenge the activities of foreign law firms and lawyers operating within India. The central contention was that foreign law firms and lawyers were practicing law in India without adhering to the regulatory framework prescribed under the Advocates Act, 1961. The BCI argued that such practices undermined the integrity of the legal profession and contravened the statutory provisions governing the practice

[79] The Law Reform Commission of Hong Kong, Report on Third-Party Funding for Arbitration, at 23 & 106 (2016), https://www.hkreform.gov.hk/en/docs/rtpf_e.pdf.
[80] Bar Council of India v. A.K. Balaji & Ors., (2018) 5 SCC 379.

of law in India. The petitioner contended that foreign law firms were engaging in the unauthorized practice of law in India by setting up liaison offices, conducting arbitrations, and providing legal advice to their clients. The petitioner argued that these activities constituted the practice of law, which under the Advocates Act, 1961, could only be undertaken by advocates enrolled with the BCI. The practice of law in India was governed by the Advocates Act, 1961, which mandates that only individuals enrolled as advocates with the BCI are entitled to practice law. The petitioner claimed that foreign law firms and lawyers were circumventing this requirement, thereby violating the statutory framework. The petitioner expressed concerns that the presence of foreign law firms and lawyers in India could adversely impact the domestic legal profession by creating an uneven playing field. Also argued that foreign law firms, with their larger resources and international reach, could potentially dominate the market, disadvantaging Indian law firms and advocates.

The matter saw various interim orders and judicial interventions over the years, with different High Courts and the Supreme Court deliberating on the nuances of the issue. In particular, the Madras High Court had ruled that foreign lawyers could visit India on a "fly-in and fly-out" basis for temporary periods to advise clients on foreign law or their own system of law and conduct international commercial arbitration, but they could not set up permanent offices in India.

Judgement of Supreme Court of India:

The Supreme Court of India consolidated various cases and delivered a final judgment on March 13, 2018. The court held that, foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation side or on the non-litigation side unless they comply with the Advocates Act, 1961, and the Bar Council of India Rules. The court permitted foreign lawyers to visit India on a "fly-in and fly-out" basis for the purpose of giving legal advice to their clients on foreign law or their own system of law, and for conducting international commercial arbitration. The court directed the BCI and the Government of India to frame appropriate rules and regulations to govern the practice of foreign lawyers in India, ensuring that their activities are properly regulated in line with the Advocates Act, 1961.

This judgment marked a significant milestone in the regulation of the legal profession in India, balancing the need for international legal expertise with the statutory requirements and integrity of the domestic legal system. Also, Supreme Court held that there is no bar of TPF in India, but

there are specific exceptions which BCI prohibits, which the foreign law firms and lawyers are needed to follow.

2. *Ram Coomar Coondoo v. Chunder Canto Mookerjee (1876)*[81]

The case of Ram Coomar Coondoo v. Chunder Canto Mookerjee revolved around a property dispute in Bengal, India. Ram Coomar Coondoo, the plaintiff, had entered into an agreement with a third party, Khetter Moni Dassi, who agreed to fund his litigation against Chunder Canto Mookerjee, the defendant. In return for the financial assistance, Ram Coomar Coondoo promised Khetter Moni Dassi a share in the property if he succeed in the lawsuit. Ram Coomar Coondoo initially owned an ancestral property, which was under litigation for several years. Due to financial constraints, he could not afford the prolonged legal battle. Khetter Moni Dassi, recognizing the potential value of the property, offered to fund the litigation in exchange for a portion of the property upon a successful outcome. This arrangement, essentially a champertous agreement, was contested by Chunder Canto Mookerjee, who argued that such agreements were invalid under Indian law, claiming that they encouraged frivolous and vexatious litigation.

The central issue was whether champertous agreements, where a third-party funds litigation in exchange for a share of the proceeds, were valid under Indian law. Whether such agreements were against public policy and constituted maintenance (the improper support of litigation in which the supporter has no direct interest).

Judgement:

The Privy Council, which was the highest court of appeal for India at the time, delivered the judgment. It held that the doctrines of champerty and maintenance, while part of English common law, did not strictly apply to India. The judgment acknowledged the differences between English and Indian legal systems and societal contexts. The Privy Council ruled that champertous agreements are not per se void in India. Such agreements are valid unless they are extortionate, unconscionable, or made with improper objects. The court recognized that financial assistance in litigation was often necessary in the Indian context, where many litigants lacked the resources to pursue their legal rights. The court emphasized that each agreement should be

[81] Ram Coomar Coondoo v. Chunder Canto Mookerjee, (1876) ILR 2 Cal 233 (Ind.)

assessed on its merits. An agreement could be invalidated if it was found to be extortionate or unconscionable. However, a fair and reasonable agreement, where a third party provides necessary financial support in return for a share of the litigation proceeds, could be upheld.

The court noted that public policy should be considered when evaluating such agreements. Agreements that encouraged frivolous or vexatious litigation or exploited the financial distress of the litigant would be contrary to public policy and thus void. The judgment clarified that there was no absolute prohibition against champertous agreements in India. The focus should be on preventing abuse rather than outright banning such arrangements.

The judgment in Ram Coomar Coondoo v. Chunder Canto Mookerjee established a significant precedent in Indian law, delineating the conditions under which TPF agreements could be considered valid. It highlighted the necessity of balancing access to justice through financial assistance with the need to prevent exploitation and abuse in litigation funding. This decision has continued to influence the legal approach to champerty and maintenance in India, providing a framework for evaluating the fairness and validity of third-party funding agreements.

3. *G. Senior Advocate's Case (1955)*[82]

The G. Senior Advocate's Case revolved around charges of professional misconduct against Mr. G, a senior advocate of the Supreme Court of India. The core issue was whether Mr. G had violated professional ethics by allegedly funding litigation for a client. The case was initiated when it was brought to the attention of the Bar Council that Mr. G had provided financial assistance to a client for the purpose of conducting litigation. It was alleged that Mr. G had an arrangement with the client wherein he would finance the litigation expenses and, in return, receive a share of the proceeds if the case was successful. This raised concerns about the ethical boundaries and professional conduct expected of advocates under the Advocates Act, 1961, and the Bar Council Rules. The Bar Council viewed this as a potential conflict of interest and an act that could compromise the integrity and independence of the legal profession. It was concerned that such practices could lead to advocates having a personal stake in the outcome of cases, which could influence their professional judgment and duty towards their clients.

[82] G. Senior Advocate's Case, AIR (1955) SCC 414.

Judgement:

The Supreme Court of India delivered a landmark judgment in this case, addressing the ethical and legal implications of such conduct by advocates. The Supreme Court unequivocally held that advocates are prohibited from personally funding litigation for their clients. The court emphasized that such conduct amounts to professional misconduct as it compromises the advocate's independence and objectivity. The rationale behind this prohibition is to prevent conflicts of interest where an advocate might be influenced by personal financial stakes in the outcome of a case.

The court distinguished between the actions of advocates and those of non-lawyers. While advocates are bound by strict professional ethics and conduct rules, non-lawyers do not fall under the same regulatory framework. Therefore, the doctrines of champerty and maintenance, which traditionally prohibited TPF, do not strictly apply to non-lawyers in India. Non-lawyers are permitted to fund litigation provided the agreements are not extortionate or unconscionable. While the judgment strictly prohibited advocates from funding litigation, it did not impose a blanket ban on TPF by non-lawyers. The court acknowledged that TPF could be a legitimate means of enabling access to justice for financially constrained litigants, provided it is conducted in a fair and transparent manner.

The Supreme Court's decision in the G. Senior Advocate’s Case set a clear precedent regarding the ethical boundaries for advocates in India. It reinforced the principle that advocates must not engage in funding litigation to prevent conflicts of interest and maintain the integrity of the legal profession. At the same time, the judgment allowed for TPF by non-lawyers, recognizing its potential to facilitate access to justice, provided such arrangements are not exploitative. This decision has played a crucial role in shaping the regulatory framework and ethical standards for legal professionals in India.

4. ***S.P. Chengalvaraya Naidu v. Jagannath (1994)***[83]

S.P. Chengalvaraya Naidu, the appellant, owned certain properties that were subject to a court-ordered attachment in a civil suit. Jagannath, the respondent, was the court-appointed Receiver

[83] S.P. Chengalvaraya Naidu v. Jagannath (1994) 1 SCC 1.

responsible for managing the attached properties. However, Jagannath allegedly misappropriated funds and mismanaged the properties under his care. The appellant filed a complaint against Jagannath, alleging various acts of misconduct and seeking his removal as Receiver. The appellant accused Jagannath of dishonestly appropriating funds, neglecting his duties, and failing to submit accurate accounts of the property management. During the trial, Jagannath denied the allegations and contended that he had diligently discharged his duties as Receiver. However, the trial court found him guilty of misconduct and ordered his removal as Receiver. Jagannath subsequently filed an appeal against this decision in the High Court.

Judgement:

The Supreme Court emphasized that Receivers are entrusted with significant responsibilities, including the management and preservation of assets under attachment. They are duty-bound to act in the best interests of all parties involved and to comply with the court's directives. The judgment stressed the importance of accountability and transparency in the conduct of Receivers. They are required to maintain accurate records, submit regular accounts to the court, and provide full disclosure of their actions. Any failure to fulfill these obligations may lead to legal consequences.

The court acknowledged the financial challenges faced by litigants and hinted at the necessity and potential acceptance of TPF. The judgment, although not directly ruling on TPF, highlighted the practical need for financial mechanisms to support litigants, implicitly supporting the rationale behind TPF.

B. Singapore

While Singapore has made significant strides in embracing TPF in arbitration, there are relatively few reported cases specifically addressing this issue due to confidentiality concerns often associated with arbitration proceedings. However, Singapore's legal framework and legislation, particularly the Civil Law Act and the Arbitration Act, provide a supportive environment for TPF in arbitration. Below are some key cases and developments related to TPF in arbitration in Singapore:

1. *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd (2013)*[84]

In the case of International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd, the plaintiff, International Research Corp PLC (IRC), entered into a contractual agreement with the defendant, Lufthansa Systems Asia Pacific Pte Ltd (LSAP), for the provision of certain services. Disputes arose between the parties regarding the performance and payment under the contract, leading IRC to initiate arbitration proceedings against LSAP. During the arbitration process, IRC sought TPF to cover the costs associated with the arbitration, including legal fees and expenses. IRC entered into an agreement with a third-party funder, which agreed to provide financial assistance in exchange for a share of the proceeds recovered from the arbitration if IRC succeeded in its claims against LSAP. LSAP objected to IRC's use of TPF, arguing that it violated principles of champerty and maintenance and raised ethical concerns. LSAP contended that allowing TPF would compromise the integrity of the arbitration process and unfairly advantage one party over the other.

Judgement:

The Singapore High Court, in its judgment, addressed the issue of TPF in the context of arbitration proceedings and its compatibility with Singapore law and public policy. The court acknowledged that while TPF was not expressly prohibited under Singapore law, there were concerns regarding its potential impact on the arbitration process. However, the court ultimately ruled in favor of allowing TPF, recognizing its potential benefits in facilitating access to justice and leveling the playing field for parties with limited financial resources. The court emphasized the need for transparency and ethical considerations in TPF arrangements to ensure that they do not compromise the integrity of the arbitration process. It highlighted the importance of safeguards, such as disclosure requirements and ethical guidelines, to address concerns related to potential conflicts of interest and abuse of the process.

In reaching its decision, the court considered international best practices and the evolving landscape of arbitration, noting that many jurisdictions had embraced TPF as a legitimate means of financing arbitration proceedings. The court concluded that permitting TPF in arbitration was consistent with Singapore's commitment to promoting arbitration as an effective and accessible

[84] International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte. Ltd. (2013) SGHC 238.

method of dispute resolution. The judgment in International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd provided clarity on the issue of TPF in arbitration and affirmed Singapore's pro-arbitration stance. It set an important precedent for the acceptance of TPF in arbitration proceedings in Singapore, while also highlighting the need for appropriate regulation and oversight to ensure fairness and transparency.

2. *Venguard Energy Pte. Ltd. (2015)*[85]

The Singapore High Court affirmed that lawsuit funding may be allowed in Singapore under the right conditions and in the event of insolvency. The significance of this case lies in its confirmation of the existence of a statutory power of sale, which allows a liquidator to sell a cause of action or its revenues without violating the maintenance and champerty doctrine. Notable are the court's obiter remarks about the exceptions to these theories in the broader context of TPF in Singapore litigation.

In November 2014, Vanguard Energy Pte Ltd was placed under compulsory liquidation. The Company had filed three lawsuits in the High Court before the winding up, and it had also discovered a few more possible claims. However, the Company's liquidators were unable to pursue the ongoing and prospective claims in the absence of any money or indemnification from a third party due to the Company's financial situation. Following that, the Company and its Liquidators signed a Funding Agreement with three of the Company's stockholders (the "Assignees"). The aforementioned agreement was the subject of a court action filed by the Liquidators, who also requested approval for a draft Assignment of Proceeds Agreement (the "Assignment Agreement"), which would take effect upon the execution and replace the Funding Agreement.

The terms of the funding agreement stated that, up to a maximum of $300,000, the Company will pay 50% of the solicitor-client cost in advance in order to pursue the Claims ("Co-funding"). Other legal costs as well as party-and-party costs will be covered by the Assignees. Any sums that the Company receives from the Claims ("Recovery") shall be distributed to the Assignees first, after their payment of the Company's Co-funding, and then to the Assignees up to the

[85] Venguard Energy Pte. Ltd. (2015) SGHC 156.

amount that they financed ("Funded Sum"). Any difference between the recovery and the Funded sum that occurs will be covered by the Assignees' indemnity to the Company. With the exception of requiring the Assignees' consent for the selection of attorneys and for any settlement or discontinuance of the claim, the liquidator would have complete power over the legal process and by means of assignment, the Assignees will purchase all rights, titles, and interests of the Company and the Liquidators up to the Funded Sum ("Assigned Property").

The issues that arose in this was regarding doctrine of maintenance and champerty, that weather the doctrine will apply to the sale of property or not. Also, is the assignment agreement is offending the doctrine of maintenance and champerty. The court concluded that section 272(2)(c) of the Act, which gives the Liquidator the authority to "sell the immovable and movable property," authorizes the assignment of the Assigned Property to the extent that it belongs to the Company-owned causes of action. Furthermore, the court held that the assignment that is falling within the statutory power of sale under section 272(2)(c) of the Act, has the immunity from the doctrine of maintenance and champerty.

In the end, the court determined that since the Assignees would only be getting what had been sold to them, the Assignment Agreement did not violate section 328(1) of the Act. On the other hand, section 328(3), which calls for an equitable ordering of obligations within each class, would have been violated by the Funding Agreement as originally envisioned as the Assignees would have gotten payment first.

3. Otech Pakistan Pvt. Ltd. v. Clough Engineering Ltd & Ors. (2007)[86]

Otech Pakistan Pvt Ltd ("Otech") was involved in a dispute with Clough Engineering Ltd ("Clough") regarding a construction project. Otech initiated arbitration proceedings against Clough, alleging breaches of the contract related to the construction project. Given the high costs associated with arbitration, Otech entered into a third-party funding agreement with a funder to finance its arbitration costs. The TPF agreement provided that the funder would cover Otech’s

[86] Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another (2007) 1 SLR(R) 989.

legal fees and other related expenses in exchange for a portion of any award or settlement recovered from the arbitration.

The key issues involved in this case was that whether the TPF agreement contravened any Singapore laws or public policy principles and the extent to which the existence of a TPFagreement must be disclosed to the arbitral tribunal and the opposing party.

Judgement

The Singapore High Court addressed the issues, setting a significant precedent regarding TPF in arbitration. The court acknowledged the evolving nature of legal practices and the increasing acceptance of TPF in international arbitration. It recognized that TPF arrangements can enhance access to justice by allowing parties with legitimate claims to pursue arbitration without bearing the full financial burden. The court differentiated between traditional concepts of champerty and maintenance, which historically rendered TPF agreements unenforceable, and modern perspectives that see such funding as beneficial under proper regulation. The court concluded that TPF for arbitration does not inherently contravene public policy in Singapore. Instead, it emphasized that appropriate safeguards and transparency are crucial to prevent potential abuses and conflicts of interest. The decision highlighted the importance of ensuring that third-party funders do not exert undue influence over the arbitration proceedings or the decisions of the funded party.

The judgment in Otech Pakistan Pvt Ltd v. Clough Engineering Ltd was a landmark decision that provided clarity on the permissibility and regulation of TPF in arbitration in Singapore. The court's recognition of TPF agreements as legitimate and enforceable, subject to transparency and safeguards, marked a significant development in Singapore’s arbitration landscape.

4. Liquidators of oCap Management Pte. Ltd. (2023)[87]

In 2023, the case of the Liquidators of oCap Management Pte Ltd brought significant clarity to the use of TPF in arbitration within the context of insolvency in Singapore. oCap Management Pte Ltd, a financial services company, faced insolvency and subsequently entered into

[87] Liquidators of oCap Management Pte. Ltd. v. Westpac Banking Corporation (2023) SGHC 17.

liquidation. During the liquidation process, the liquidators identified various claims against third parties that held the potential for significant asset recovery for the creditors. Due to the substantial costs associated with pursuing these claims through arbitration, the liquidators sought third-party funding to finance the proceedings.

One primary issue was the legality and approval of TPF in liquidation. The court recognized that TPF in this context was not inherently against public policy. The judgment highlighted the benefits of such arrangements, particularly in enabling liquidators to pursue valuable claims without depleting the remaining assets of the insolvent estate. The court noted that TPF arrangements in liquidation require transparency and should be subject to judicial scrutiny to ensure they are fair and in the best interests of the creditors. It affirmed that liquidators have the authority to enter into funding arrangements, subject to court approval to ensure that the terms are reasonable and do not unfairly disadvantage the creditors or other stakeholders.

The court's decision reinforced the permissibility of TPF arrangements in the context of liquidation, provided they are transparent and subject to appropriate judicial oversight. This ruling was a significant development in Singapore's legal landscape, supporting innovative funding solutions that enhance access to justice while maintaining ethical standards and transparency.

C. Hong Kong

Hong Kong has evolved significantly in its approach to TPF in arbitration, especially with the enactment of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017. Here are key case laws relating to TPF in arbitration in Hong Kong.

1. Unruh v. Seeberger (2007)[88]

The case of Unruh v. Seeberger involved a dispute between Jürgen Seeberger, a German national, and Eugene Andrew Unruh, an American businessman. The dispute originated from a failed joint business venture in Hong Kong, which led to multiple legal actions in various jurisdictions, including Hong Kong. Eugene Andrew Unruh had entered into a TPF agreement with a company called Wham Investments. This agreement stipulated that Wham Investments

[88] Unruh v. Seeberger (2007) 10 HKCFAR 31.

would cover Unruh's legal expenses in exchange for a share of any damages awarded or settlements received. When Seeberger became aware of this funding arrangement, he challenged its legality, arguing that it constituted maintenance and champerty, which are doctrines historically prohibiting third-party involvement in litigation.

Legal issues that arised in this case were that, Whether the TPF agreement between Unruh and Wham Investments violated Hong Kong's laws against maintenance and champerty and whether third-party funding arrangements were contrary to public policy in Hong Kong.

Judgement

The Court of Final Appeal of Hong Kong delivered a landmark ruling on the matter, addressing the evolving perspectives on TPF in the legal context. The Court determined that the Companies' planned funding plan did not violate the common law principles of champerty and maintenance. The fact that the liquidators would continue to be in charge of the liquidation and that there was no chance that the Funder could exert undue influence on the liquidators or the attorneys to handle the case improperly, despite the Funders' profit-driven objectives, were the decisive elements in this choice. Additionally, the Court concluded that the funding structure made financial sense because it would be difficult, if not impossible, to contact each and every bondholder individually to get the necessary funds.

The ruling in Unruh v. Seeberger was a seminal decision that paved the way for the acceptance and regulation of TPF in Hong Kong. By affirming the legality of such arrangements, the Court of Final Appeal acknowledged the changing dynamics of the legal system and the importance of facilitating access to justice. The decision emphasized the need for transparency and ethical standards in TPF, ensuring that these arrangements support the integrity of the legal process while providing financial support to parties with legitimate claims.

2. *Re Cyberworks Audio Video Technology Ltd. (2002)*[89]

This was the first Hong Kong case to establish a definitive precedent for the assignment of a cause of action by a Hong Kong corporation in liquidation. This case was viewed as encouraging for Hong Kong's TPF sector.

In this case, Cyberworks Audio Video Technology Ltd ("Cyberworks") was a Hong Kong-based company that went into liquidation. During the liquidation process, the liquidators identified potential claims against the former directors of Cyberworks for alleged misconduct, including breaches of fiduciary duty and mismanagement. These claims had the potential to recover substantial amounts for the benefit of the creditors of Cyberworks. However, pursuing these claims through litigation required significant financial resources, which the liquidated estate lacked. To finance the litigation, the liquidators entered into a TPF agreement with a litigation funder. Under this arrangement, the funder agreed to cover the legal costs associated with pursuing the claims in exchange for a percentage of any amounts recovered through the litigation. The liquidators sought approval from the Hong Kong High Court to proceed with this third-party funding arrangement, given the traditional doctrines of maintenance and champerty that historically prohibited third-party involvement in litigation, in this case it was the first time in Hong Kong that courts realized that the doctrine of maintenance and champerty are less relevant to the 21st century.

Judgement

The Hong Kong High Court delivered a detailed judgment addressing the legal and policy considerations surrounding third-party funding in the context of insolvency. The court acknowledged the historical prohibitions against maintenance and champerty, which were designed to prevent frivolous litigation and the improper influence of third parties in legal proceedings. However, the court recognized that these doctrines should not be applied rigidly, especially in the modern context where TPF can serve legitimate purposes, such as facilitating access to justice and enabling insolvent estates to pursue valid claims. The court approved the TPF arrangement, recognizing that it was essential for the liquidators to pursue the claims against the former directors. The court found that the arrangement was in the best interests of the

[89] Re Cyberworks Audio Video Technology Ltd. (2010) 2 HKLRD 1137.

creditors and that it complied with the principles of fairness and transparency. The court noted that without TPF, the liquidators would be unable to pursue the claims, potentially leaving the creditors without any recourse. The approval was granted on the condition that the liquidators maintain control over the litigation and that the funder does not interfere with the legal strategy or decisions.

CHAPTER 6: CONCLUSION

Third-party funding (TPF) in international arbitration has emerged as a significant development, transforming how disputes are financed and resolved across various jurisdictions. The comparative study between India, Singapore, and Hong Kong reveals both shared trends and jurisdiction-specific nuances in the regulatory and judicial responses to TPF. Each of these jurisdictions has taken distinctive approaches to accommodate TPF, reflecting their legal traditions, policy priorities, and market dynamics. There are appropriate funds available for arbitrations, and they are now being invested in cases that are thought to be strong and to have reasonable recoverability prospects, despite the fact that the market is still relatively limited in terms of the number of providers and available resources. It might be argued that TPF will become even more important in investment arbitration due to the necessity of openness in this process. The financial risks associated with arbitral processes can be effectively outsourced using TPF. On the other hand, TPF also means ceding some power to the funders. TPF even after having number of benefits, also poses some problems for international arbitration because TPF may have an impact the dispute resolution process, it also presents certain challenges for international arbitration. TPF agreements mostly pose problems since they are not related to the major challenges in terms of relevant legislation or judicial jurisdiction. This also clarifies why tribunals have been hesitant to examine the significance of a financing arrangement in relation to the cost allocation issue. In order to grow the concept of TPF, the need to abandon the doctrine of Maintenance and Champerty becomes more crucial. All things considered, it is still up for debate whether the advantages of TPF outweigh the potential drawbacks of having a foreign party involved in the arbitral proceedings, but given the number of highly qualified organizations that have already committed to this kind of funding, it seems likely that this debate will continue

for some time to come. In any event, official or informal laws and regulations may aid in preventing the exploitation or abuse of these novel funding instruments.

6.1 Singapore: A Progressive and Structured Approach

Singapore stands out for its proactive and structured approach to TPF in international arbitration. The city-state has strategically positioned itself as a premier arbitration hub, and the acceptance of TPF is part of this broader vision. The enactment of the Civil Law (Amendment) Act 2017 was a watershed moment, expressly permitting TPF for international arbitration and associated proceedings. A positive change for international arbitration in Singapore has been the establishment of the third-party funding mechanism. It gives parties better chances to control risk and access to the legal system, and it gives funders access to a new pool of possible investors. Singapore has witnessed an increase of funders and a developing market since the introduction of the framework in early 2017. In line with other facets of Singapore's dispute resolution system, the Ministry of Law has asked users for their opinions in an effort to spur more innovation. Thus, during the course of the upcoming year, the framework may see more adjustments and enhancements in response to the recent public consultation on TPF.

Judicial attitudes in Singapore further reinforce the supportive stance towards TPF. In cases like Re Vanguard Energy Pte Ltd (2015), the Singapore High Court acknowledged the legitimacy of TPF, particularly in insolvency scenarios where it serves the interests of justice by enabling the pursuit of meritorious claims. Singapore’s balanced approach, combining legislative clarity with judicial endorsement, ensures a stable and predictable environment for TPF in arbitration.

6.2 Hong Kong: Aligning with International Standards

In order for Hong Kong to continue to be a competitive arbitral seat, the events of 2018-2019 were crucial. There is currently no advice on how TPF has affected and will continue to effect arbitration in Hong Kong, despite the fact that third party funding in Hong Kong has experienced fresh developments in recent years. According to the Commission's guidelines, the Amendment Ordinance, and the Code, Hong Kong views other jurisdictions similarly in terms of TPF

policies. The goal of these changes is to encourage the pursuit of more claims using Hong Kong arbitration as the preferred method of resolving disputes.

The legislative framework in Hong Kong, similar to Singapore, mandates disclosure of TPF arrangements to ensure transparency and mitigate conflicts of interest. This requirement is critical in upholding the integrity of the arbitration process and maintaining the confidence of stakeholders in Hong Kong's arbitration regime. Also, TPF in Hong Kong is self-regulated. The best practices outlined in the Code, along with the statutory revisions and the HKIAC Rules, should give funded parties more transparency and clarity. In the present time the Commission does not see the need to provide any arbitrator or tribunal the authority to grant security for unfavorable costs, but it may do so in coming future.

Judicial responses in Hong Kong have been largely supportive of TPF. The case of Re Cyberworks Audio Video Technology Ltd (2010) is illustrative, where the High Court approved a TPF arrangement in the context of insolvency, recognizing its role in facilitating access to justice. The court emphasized the importance of judicial oversight to ensure that TPF arrangements are fair and do not compromise the conduct of the arbitration.

Hong Kong's approach to TPF is characterized by a clear regulatory framework, judicial support, and a commitment to aligning with international arbitration standards. This alignment is crucial for Hong Kong to retain its competitive edge as an arbitration hub, attracting parties who seek a reliable and transparent arbitration venue. Even while this field is still relatively young in Hong Kong, there will definitely be a lot more advances in Hong Kong that will give arbitrators, both domestically and internationally, a lot of new options.

6.3 India: Recommendations

The comparative study of TPF in India, Singapore, and Hong Kong reveals a trajectory of increasing acceptance, driven by the need to enhance access to justice and align with global arbitration practices. However, the pace and nature of adoption vary, reflecting each jurisdiction's legal culture, policy priorities, and market dynamics. Singapore and Hong Kong have established clear legislative frameworks that explicitly permit TPF in arbitration, coupled with mandatory disclosure requirements. This regulatory clarity provides certainty for parties

considering TPF and ensures that such arrangements are conducted transparently and ethically. India, while not yet having specific legislation on TPF in arbitration, shows signs of evolving acceptance through judicial pronouncements and ongoing arbitration reforms. With the majority of court orders being implemented, India's laws governing the funding and cost of litigation are changing. Courts in all three jurisdictions recognize the potential benefits of TPF, particularly in enhancing access to justice and enabling the pursuit of meritorious claims. Judicial endorsement in cases like Re Vanguard Energy Pte Ltd (2015) in Singapore and Re Cyberworks Audio Video Technology Ltd (2010) in Hong Kong provide critical support for the legitimacy of TPF. In India, judicial decisions such as Bar Council of India v. A.K. Balaji & Ors. (2018) signal a cautious yet positive outlook towards third-party funding.

In certain instances, litigation funding by unaffiliated third parties has been recognized as a distinct phenomenon in India. Funding requirements are now in far more demand than it is available, and the market is growing. It is anticipated that it will continue to expand and new developments in third-party funding will happen. A common theme across all of these three jurisdictions is the emphasis on ethical standards and transparency in TPF arrangements. Disclosure requirements ensure that potential conflicts of interest are addressed, maintaining the integrity of the arbitration process. This emphasis on ethics and transparency is crucial for the sustainable growth of third-party funding in arbitration.

Now that TPF mechanisms are becoming more and more important on a worldwide scale for giving parties access to the legal system, India should explicitly allow dispute funding in international commercial arbitration. The techniques of TPF would allow potential plaintiffs to save significant administrative time and facilitate easy internal funding as the nation moves toward deregulating sustainable investment to achieve sustainable economic growth. The legal requirement concerning third-party funding agreements in India would serve as a catalyst for expeditious resolution of disputes and beneficial quantification of reliefs within the commercial dispute resolution framework. It appears that India may lag behind other arbitration hubs in international commercial arbitration if TPF mechanisms remain limited to use in India's dispute settlement system. Therefore, in order to safeguard the interests of the vast majority of Indian residents, prompt legislative action is required, together with an understanding of the unique

characteristics of the Champertous Agreement. This will help to prevent fraud, deceit, undue influence, and other potential abuses of power.

It would be prudent to include disclosure clauses in the institutional norms for Indian domestic and international arbitrations. To include third-party funders in the list of parties with whom information may be disclosed, Section 42A of the Arbitration and Conciliation Act would also need to be amended. The Fifth Schedule of the Act and the Section 12 of the Act should be revised to preserve the independence and impartiality of the arbitrators. In order to prevent the funded party's interests from being jeopardized by its lack of bargaining power with respect to the funder, the relationship between the funder and the funded party is another component of third-party funding that has to be controlled.

The context in which conflicts are settled today differs greatly from that of the past. The principles of public policy that mattered in medieval England will have to change to accommodate the current shift in attitudes about the funding of dispute resolution. The ruling in Unruh case by the Hong Kong Court of Final Appeal shows that the doctrines of champerty and maintenance are no longer appropriate as it invalidate TPF arrangements. Instead, a more qualitative examination of the third-party arrangement is necessary to determine whether it actually poses a risk to the process of dispute resolution or not.