I. THIRD-PARTY FUNDING IN ARBITRATION: INTERNATIONAL LANDSCAPE AND THE ROAD AHEAD FOR INDIA

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ABSTRACT

With the ever-increasing burden upon parties for dispute settlement added with the economic crisis due to the ongoing COVID-19 pandemic, arbitration in India today actively requires third-party funding mechanisms at place. In this light, this paper builds upon the concept of third-party funding and its benefits for a suffering economy such as India. The paper explores the legality of third-party funding agreements in light of the legal doctrines of maintenance and champerty. From analysing the historical significance of these doctrines to the modern-day jurisprudence from leading jurisdictions, the paper makes the case that third-party funding should ideally be insulated from the umbrella of these doctrines. The paper then traces the legislative and judicial approaches to third-party funding in India and discusses the underlining legal uncertainty and future prospects. While focusing on the model adopted by Singapore and Hong Kong, the paper discusses the practical and ethical considerations associated with third-party funding such as disclosure requirements, confidentiality, and control by a third-party funder. Upon the need for regularisation of third-party funding in arbitration, the paper lays down the implications for approaching the regularisation of third-party funding in India and cementing its prospects as a global leader in dispute resolution through arbitration.

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I. INTRODUCTION

"That there is no such thing as a free lunch remains a debatable statement. But that there is no such thing as a free arbitration is not."[1]

With the rapid rise in cross-border transactions, the scope of arbitration has mounted extensively. However, exorbitant costs and prolonged proceedings have followed the erstwhile efficacy and popularity of Arbitration as an effective dispute resolution mechanism.[2] As a fundamental characteristic for arbitration in practice is to provide an open and equal access for the parties involved, all persons with meritorious claims should have access to justice through arbitral proceedings.[3] Therefore, for parties with limited financial resources, third-party funding provides a theoretical chance to bring such claims.[4]

Third-party funding can be defined as a mechanism through which all or part of the costs of a dispute resolution process is financed by a third party in return for a percentage of the damages awarded.[5] Fundamentally, a third-

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[1] Yves Derains, Foreword, ICC DOSSIERS (May 21, 2021), https://library.iccwbo.org/content/dr/DOSSIERS/Doss_0017_FWD.htm?l1=Dossiers&l2=Third+party+Funding+in+International+Arbitration.

[2] ALAN REDFERN ET. AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 10 (Oxford University Press 2009).

[3] LISA BENCH NIEUWVELD, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 13 (2nd ed., Wolters Kluwer 2017).

[4] Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd, (2006) HCA 41 144.

[5] R. Harfouche et. al., *Third-Party Funding: Incentives and Outcomes,* GLOBAL ARB. REV. 10 (2013).

party funder bears the cost associated with the arbitration proceedings with an aim to benefit from a suitable award from the dispute resolution. Third-party funding can immensely benefit the parties in reducing legal budgets, taking the arbitration costs off-balance sheet, mitigating risks associated with outcome and focusing on other business priorities.[6]

Further, third-party funding can also contribute to a decline in frivolous claims.[7] This is majorly due to the preliminary investigations undertaken by such funders for weighing the merits and risks of the claim.[8] From the perspective of third-party funders, the determination of viable claims is taken on various factors such as jurisdictional issues, counter claims, the relationship between the parties, quantum of the claim and risks associated with enforcing an award.[9]

The ongoing pandemic has insistently affected economies across the world with far-reaching consequences. India's projected growth rate has been reduced to 1.2% in 2020 while the world economy is expected to drop cumulatively output amounting to 8.5 trillion in 2020 and 2021.[10] This economic turmoil has triggered a wave of unprecedented disputes arising

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[6] Noiana Marigo et. al., *How can third-party funding help businesses during the pandemic?*, FRESHFIELDS (May 21, 2021).
https://passle-net.s3.amazonaws.com/Passle/5832ca6d3d94760e8057a1b6/MediaLibrary/Document/2020-08-31-06-03-33-256-Third-partyfundingpost.pdf.

[7] Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration*, 7 GROTIUS CENTRE FOR INT'L LEGAL STUDIES Working Paper No. 2012/1, (2012).

[8] *Id.*, at 10.

[9] STEPHEN JAGUSCH, THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 211 (3rd ed., Juris Publishing 2014).

[10] UNITED NATIONS, WORLD ECONOMIC SITUATION AND PROSPECTS REPORT, 2020 https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_FullReport.pdf.

from sovereign stringent measures against the pandemic and contractual agreement disruptions.

In these circumstances, third-party funding is certainly significant to foster dispute resolution while allocating responsibility for questions of insurance, business interruption and force-majeure doctrine.[11] Given their non-recourse nature, third-party funding agreements are being viewed as a risk-free product for the companies which provide ready access to capital for pursuing legitimate claims.[12] Further, by enforcing the recovery of assets without undermining the liquidity, these agreements can transform the arbitration "from an expense into a cash-generating asset," a much-needed change in the current pandemic.[13]

These agreements can further mitigate the risk associated with prolonged arbitral proceedings as the uncertainty over outcomes rises and is added with higher cash flow requirements.[14] However, given the relatively longer due diligence carried out by the funders, the claimants can be forced to explore other options such as ad hoc agreements. These options, although

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[11] Joanna Bourke, *Market report: Burford Capital could benefit if Covid-19 legal disputes stack up*, EVENING STANDARD (May 28, 2020), https://www.standard.co.uk/business/market-report-burford-capital-could-benefit-if-covid19-legal-disputes-stack-up-a4426076.html.

[12] Ben Sanderson, *Litigation funding: a financial solution to the pandemic*, LEXOLOGY (May 28, 2020), https://www.lexology.com/library/detail.aspx?g=e74258a1-3001-4cde-b11f-b6fd7a5bc33f.

[13] Dana MacGrath et. al., *Third-Party Funding and COVID-19*, KLUWER ARBITRATION (May 28, 2020), https://www.kluwerarbitration.com/document/KLI-KA-Scherer-2020Ch10?_ga=2.112853444.1941180986.1622299558-420699169.1621541253.

[14] Megan Betts, et. al., *The Impact of the COVID-19 Pandemic on Third Party Funding and Security for Costs in International Commercial Arbitration*, KLUWER ARBITRATION BLOG (May 28, 2020), http://arbitrationblog.kluwerarbitration.com/2020/07/30/the-impact-of-the-covid-19-pandemic-on-third-party-funding-and-security-for-costs-in-international-commercial-arbitration/.

being relatively easier and flexible, may expose the parties to security for costs order.[15]

II. THE DOCTRINES OF MAINTENANCE AND CHAMPERTY

The utmost objection and constraint to the practice of third-party funding finds its roots in the English law doctrines of maintenance and champerty.[16] While the former can be defined as intermeddling with an ongoing dispute by third parties with no interests,[17] the latter means a particular variety of maintenance where the third-party providing such maintenance draws from the proceeds of the suit or litigation.[18] As has been defined by the United States Supreme Court, "maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome."[19]

By these definitions, third-party funding agreements seem to be exactly the category of agreements to be avoided by these doctrines. However, the primary rationale for which the doctrines were formulated no longer applies as the balance of purity of justice and interests of vulnerable litigants for which the doctrines were formulated[20] itself contradicts when the

[15] *Id.*
[16] Hong-Lin Yu, *Can Third Party Funding Deliver Justice in International Commercial Arbitration?*, 20(1) INT'L ARB. L. REV. 20 (2017).
[17] R.L MEENA, TEXBOOK ON CONTRACT LAW INCLUDING SPECIFIC RELIEF (1st ed., Universal Publishing 2008).
[18] Jern-Fei Ng, *The Role of the Doctrines of Champerty and Maintenance in Arbitration*, 76 ARB. 2 (2010).
[19] Re Primus, 436 U.S. 412 (1978).
[20] Giles v. Thompson, (1993) 3 All ER 321.

access of justice is jeopardized.[21] To understand this argument in a better capacity, it is pertinent to trace the history of these doctrines.

A. Historical Context

The deliberation on the issue of third-party funding dates back to ancient Greece where parties were assisted by sycophants in vexatious litigations, a practice which was followed in Rome which saw the rise of 'calumniator' or third party which brings actions in name of another with no interests whatsoever.[22] The problems associated with such concerns saw its peak in English courtrooms, where outside attorneys and lords were feared for manipulation of decisions and were banished to enter the same.[23]

This enormous outside support in terms of finance was viewed as a tool which perverts the judicial process of law into an engine of oppression.[24] In the later era, this practice was extensively used by feudal lords who would underwrite suits against their opponents and also demand a share in the property.[25] Thus, through these numerous and ever-expanding principalities, maintenance and champers were declared as crimes against public justice.[26] This led to the birth of modern-day doctrines of maintenance and champerty which remained viable in the medieval ages and seeped into common law jurisdictions.

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[21] Gulf Azov Shipping Co. Ltd. & Others v. Idisi & Others, (2004) EWCA 292.
[22] Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 56, 48-68 (1935).
[23] *Id.*, at 56.
[24] WILLIAM BLACKSTONE, THE COMMENTARIES OF SIR WILLIAM BLACKSTONE, KNIGHT ON THE LAWS AND CONSTITUTION OF ENGLAND. (American Bar Association 2009).
[25] Radin, *supra* note22, at 60.
[26] *Id.*, at 61.

B. Modern Treatment

The recent years have seen a swift change in the international perception concerning these doctrines, with numerous jurisdictions such as Australia,[27] England,[28] the United States,[29] Canada,[30] and France[31] finding these doctrines inapplicable to the practice of third-party funding in arbitration.

1. Australia

The landmark judgment of Australian High Court in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited (Fostif)*[32] cemented the prospects of third-party funding, wherein the same was held to be not contrary to the public policy or abusive of the due process of law. It was noted that it is a "fundamental human right to have equal access to independent courts and tribunals."[33] Further, the court reasoned that without the funding by the third-party, a client would fail to stand a theoretical chance of bringing up the case and likewise the presence of third-party funding should not be discarded.

This was followed by the passing of various legislations abolishing the crimes of champerty and maintenance while making Australia the home to a sophisticated third-party funding market.[34]

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[27] David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1080, 1075-1083 (2013).
[28] David Neuberger, *From Barratry, Maintenance and Champerty to Litigation Funding*, HARBOR LITIG. FUNDING (2013).
[29] Lisa, *supra* note 3.
[30] *Id.*
[31] *Id.*
[32] Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited (Fostif), (2006) 229 CLR 386.
[33] *Id.*
[34] Maintenance, Champerty and Barratry Abolition Act, 1993, § 3,4 & 6, (Australia).

2. England and Wales

In England, the offence of maintenance was abolished through various legislations.[35] The Law Commission has justified this stance on three reasons:[36]

- That there is only a little room left for the operation of tortious claims as litigation is already being funded through legal aid, insurers, association, unions and other parties who may be justified in funding such claims.
- That both the torts required proof of damage, which is impossible to establish given the proof of non-continuation of proceedings without the funder would have to be established.
- That judicial pronouncements had already regarded these torts as archaic, empty shells and virtually useless.

The prospects for third-party funding were paved by landmark decisions Including *R (on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions (No. 2),*[37] which explained that only the funding arrangements which undermine the ends of justice should be prohibited.

The judgment in *Arkin v. Borchard Lines Ltd & Others*,[38] which noted that public policy needs to evolve with time, marked the beginning of third-party funding in England. Similarly, in the case of *Del Webb Comtys.*,

[35] Criminal Law Act, 1967, § 13 (United Kingdom).
[36] Law Commission, *Proposals for the reform of the Law Relating to Maintenance and Champerty* (1966) at 9.
[37] R (on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions (No. 2), (2002) EWCA Civ 932.

Inc. v. Partington,[39] it was held that - "an outsider's involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery."

3. Singapore

Singapore is one of the recent jurisdictions to have abolished these doctrines in order to pave way for third-party funding in arbitration.[40] The leading case law is *Re Vanguard Energy*,[41] where the High Court upheld the funding of an insolvent company for pursuing its claims by its shareholders for part of the proceeds from its litigation and found the same to not be champertous.

The Parliament of Singapore abolished the doctrines of maintenance and champerty as common law torts for international arbitration,[42] and the same was followed for domestic arbitration.[43] Further, various guidelines for practitioners and institutional rules have been followed for better facilitation and adoption of the practice in Singapore.[44]

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[38] Arkin v. Borchard Lines Ltd & Others, (2005) EWCA Civ 655.
[39] Del Webb Comtys., Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011).
[40] Ronnie King & Rob Palmer, *Third Party Funding of Arbitration in Singapore and Hong Kong: A Comparison*, ASHURST (Mar. 26, 2021), https://www.ashurst.com/en/news-and-insights/legal-updates/third-partyfunding-of-arbitration-in-singapore-and-hong-kong-a-comparison/.
[41] Re Vanguard Energy, (2015) SGHC 156.
[42] Civil Law (Third Party) Regulations, 2017.
[43] Quentin Pak, *Singapore Expands the Permissibility of Third-Party Legal Finance*, BURFORD CAP. (May 30, 2021), https://www.burfordcapital.com/blog/singapore-expands-the-permissibility-ofthird-party-legal-finance/.
[44] Matthew Secomb and Adam Wallin, *Singapore*, THE THIRD PARTY LITIGATION FUNDING LAW REVIEW, 125 (2017).

4. Hong Kong

Hong Kong is another recent Asian jurisdiction to have abolished these doctrines. In one of its leading cases of *Cannonway Consultants Limited v. Kenworth Engineering Limited*,[45] Justice Kaplan has reasoned that parties approaching arbitration are in less need to be protected by public policy. The Honk Kong Law Reform Commission delved into the public consultation for allowing third-party funding in arbitration seated in Hong Kong, which was finally legislated in 2017 without the distinction for international or domestic arbitration.[46]

5. Latin America

The case for civil-law jurisdictions is fairly different, with predictions for investments in billions in upcoming years for Latin American countries themselves.[47] This is supported with demand for third-party funding for most sectors in the legal industry in such jurisdictions[48] added with high costs in civil engineering, procurement and construction matters.[49] As has been pointed out, the non-existence of these doctrines has led to the growth of a balanced market in Europe.[50]

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[45] Cannonway Consultants Limited v. Kenworth Engineering Limited, [1997] ADRLJ 95.
[46] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) (2017) Cap. 609.
[47] Donald Hayden & Mark Migdal, *The Rise of Third-Party Funding in International Arbitration*, DAILY BUS. REV. (2017).
[48] Zachary Krug & Helena Eatlock, *Snapshot on Litigation Finance in Latin America*, KLUWER ARB. BLOG (May 24, 2020), http://arbitrationblog.kluwerarbitration.com/2018/09/24/snapshot-onlitigation-finance-in-latin-america/.
[49] *Id.*
[50] George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 J. L. ECON. &POL'Y451-522 (2012).

It can be clearly pointed out that the current trend in most jurisdictions is to encourage access to justice rather than restrict the same on archaic rules.[51] The context for international arbitration proceedings is similar and the doctrines of champerty and maintenance have clearly not deterred jurisdictions from allowing third-party funding.[52] As further opined by the International Centre for Settlement of Investment Disputes in the case of *Giovanni Alemanni v. The Argentine Republic*,[53] third-party funding is now an established practice within national jurisdictions and within international arbitration that there lie no grounds for objection in itself.

Thus, the erstwhile doctrines of maintenance and champerty have been diluted to a larger extent in numerous jurisdictions given their hindrance in the access to justice in the modern period. These findings clearly justify the advent and stronghold of third-party funding in not just arbitration-related matters but the legal industry itself. It is, therefore, pertinent for India to stand up with its international counterparts and explore the concept in practice, in length and breadth, especially in the present pandemic scenario.

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[51] Sherina Petit & Daniel Jacobs, *Maintenance and Champerty: An End to History Rules Preventing Third-party Funding?,* NORTON ROSE FULBRIGHT INTERNATIONAL ARBITRATION REPORT 9 (2016).

[52] Zachary Krug et. al., *Getting the Deal Through: International Arbitration*, WOODSFORD LITIG. FUNDING (Dec. 28, 2017),

III. INDIA'S POSITION ON THIRD PARTY FUNDING

A. Legislative Approach

The concept of third-party funding, although a well-established practice in foreign jurisdictions, does not hold absolute legal certainty in the Indian legal landscape. However, the concept is not alien to the Indian jurisprudence, as the earliest recorded instances of *pactum de quota litis* or agreements comprising third-party funding in India date back to the 1800s, before the formal codification of contract law.[54]

The power to secure costs for litigation is statutorily recognized by various states of Maharashtra, Madhya Pradesh, Uttar Pradesh, and Gujarat.[55]

Further, the court can allow the plaintiff to transfer or agree to transfer a share or interest in the property suit to a person who is not a party to the suit for financing the claim.[56] This clearly outlines a general definition of third-party funding in litigation. However, as there is no express provision for its applicability in arbitration matters, the legality of such agreements would be posed for analysis under the anvil of reasonableness, legality and equity under the contractual law[57] and public policy considerations.[58]

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https://gettingthedealthrough.com/area/94/article/29199/litigationfunding-2018-international-arbitration/.

[53] Giovanni Alemanni v. The Argentine Republic, ICSID Case No. ARB/07/8 128.

[54] Marc Galanter, *The Common Law in India*, 10(3) THE AMERICAN JOURNAL OF COMPARATIVE LAW, 292–294 (1961).

[55] The Code of Civil Procedure, 1908, Order XXV Rule 1, Allahabad, Andhra Pradesh, Madras, Madhya Pradesh and Orissa High Court Amendments (India).

[56] The Code of Civil Procedure, 1908, Order XXV Rule 3, Bombay, Dadra and Nagar Haveli, Goa, Daman and Diu, and Madhya Pradesh High Court Amendments (India).

[57] Indian Contract Act, 1872, § 23 (India).

B. Judicial Approach

The judicial stance on this dates back to the early 19th century where an unreported decision by Peel J had discarded the applicability of English prohibitions on maintenance and champerty to India.[59] This is followed by an upturn in the decision of *Grose & Anr v. Amirtamayi Dasi*[60] which upheld these doctrines of champerty and maintenance and found these agreements to void as inconsistent with the public policy.

The reasoning that these doctrines were specifically formulated for English subjects can be seen from the decision of *Pitchakutti Chetti v. Kamala Nayakkan*[61] where Scotland CJ upheld the non-applicability of the doctrines of maintenance and champerty to Indian natives. The underlying argument suggested the formulation of such doctrines for the prevention of oppression of the King's subject by vexatious litigation from judicial officers. This was upheld in the celebrated decision of the Privy Council in *Ram Coomar Condoo v. Chandra Canto Mukerjee*.[62] This decision clarified that third-party agreements would not be per se opposed to public policy and were to be treated at par with other contracts.[63] Weighing with this argument to provide access to justice to indigent parties, this reasoning was followed in the various decisions, such as *Sri Raja Vatsavaya Venkata Subhadeayyamma Jagapati Bahadur Garu v. Sri Poosapati Venkatapati Raju Garu & Ors.,*[64]

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[58] Pannalal Gendalal & Anr v. Thansingh Appaji & Anr, AIR 1952 Nag 195.
[59] M. P. Jain, *The Law Of Contract Before Its Codification*, JOURNAL OF THE INDIAN LAW INSTITUTE 188 (1972).
[60] Grose & Anr v. Amirtamayi Dasi, (1869) 4 Beng LR 1.
[61] Pitchakutti Chetti v. Kamala Nayakkan, (1862-63) 1 Mad HCR 153.
[62] Ram Coomar Condoo v. Chandra Canto Mukerjee,1876 SCC OnLine PC 19.
[63] *Id.*
[64] Sri Raja Vatsavaya Venkata Subhadeayyamma Jagapati Bahadur Garu v Sri Poosapati Venkatapati Raju Garu & Ors, AIR 1924 PC 162.

and *Shankarappa Kotrabasappa Harpanhalli v. Khatumbi Kom Jamaluddinsab Nashipudi & Ors*.[65]

The principle in *Ram Coomar Coondoo* was further crystallized in the decision of *Lala Ram Swarup v. The Court of Wards*,[66] wherein such agreements were considered to be not *ipso facto* unenforceable and other decisions where profound emphasis was given on the access to justice argument.[67]

In the recent decision of *Bar Council of India v. A.K. Balaji*,[68] the Supreme Court acknowledged that there exists no restriction of third-party funding in India except such funding which is carried out by attorneys. The court also noted that foreign jurisdictions such as the United Kingdom and the United States of America are open to the concept of third-party funding and legal financing agreements.[69]

C. Legal Uncertainty

India's stance, as has been identified by various jurists, is unclear but not contrary to the adoption of third-party funding. The analysis in a catena of case-laws points to a practical issue with a large proportion of funding, the same could be violative of public policy and could be struck down.[70] More

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[65] Shankarappa Kotrabasappa Harpanhalli v. Khatumbi Kom Jamaluddinsab Nashipudi & Ors, AIR 1932 Bom 478.
[66] Lala Ram Swarup v. The Court of Wards, (1940) 42 Bom LR 307.
[67] Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by LRs & Ors, (1991) 3 SCC 67; Pannalal Gendalal & Anr v. Thansingh Appaji & Anr, AIR 1952 Nag 195.
[68] Bar Council of India v. A.K. Balaji, AIR 2018 SC 1382.
[69] *Id.*
[70] Payal Chawla & Aastha Bhardwaj, *Saving Arbitration from Arbitration Cost". Is Third Party Funding the Answer?*, BAR & BENCH (May 19, 2021), https://barandbench.com/savingarbitration-costs-third-party-funding/.

elaborately, this legal uncertainty can affect a party in arbitration proceeding seated in India in the following manner:[71]

- Where the claimant is the funded party, the opposite party may seek an injunction on the arbitration on the grounds of abuse of process of law.
- Where the funded party may require assistance from the Indian courts, the same may be declined to the funded party given their involvement in third-party funding as opposed to the public policy.
- Where the arbitral award is issued in favour of the funded party, the opposite party may seek to set aside the award on the grounds of the same being the product of a funded arbitration as opposed to the public policy.

These risks require the issue to be settled for the parties involved in both domestic and international arbitration seated in India. Clearly, with proper regulations in place, third-party funding can be the game-changer for the Indian arbitration landscape. As had been identified by a Report by a High-Level Committee chaired by Justice (Retd.) B. N. Srikrishna, legislative amendments for regulation will be a significant growth factor for India as an arbitration hub.[72]

[71] Kabir Singh, Sam Luttrel and Elan Krishna, *Third-party funding and arbitration law-making: the race for regulation in the Asia-Pacific*,KLUWER ARBITRATION BLOG (23 May, 2021), http://arbitrationblog .kluwerarbitration.com/2016/07/14/third-party-funding-and-arbitration-law-making-the-race-for-regulation-in-the -asia-pacific/.

D. Future Prospects

In the light of India's poor ranking in contract enforcement[73] in addition to high judicial inference and backlog,[74] the legislators' efforts for leveling the platform with substantial reforms such as the 2021 amendments,[75] the advent of commercial courts and specialized insolvency mechanisms are welcoming and suitable for India's arbitration landscape. Under this backdrop, third-party funding can substantially contribute to India's objective to attain the status of a global arbitration hub.

First, third-party funding can assist in the reduction of the monetary burden on parties due to the cost-heavy resolution in India.[76] This may further benefit the parties, already affected by the pandemic, to bring up or defend meritorious claims which otherwise would fail for being unaffordable.[77] This also serves the purpose of building confidence in the public at large for supporting such valid and meritorious claims while deferring the vexatious claims.

Second, the advent of third-party funding in Indian seated arbitration would assist in the realization of its objective for increased access to private justice as well as contribute to public policy.[78] Access to justice has been

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[72] DEPT. OF LEGAL AFFAIRS, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA (2017).
[73] WORLD BANK, DOING BUSINESS (2018).
[74] Manav Kapur, *Judicial Interference and Arbitral Autonomy: An Overview of Indian Arbitration Law* (2009) 2 CONTEMPORARY ASIA ARBITRATION JOURNAL 325.
[75] The Arbitration And Conciliation (Amendment) Act, 2021.
[76] LAW COMMISSION OF INDIA, REPORT NO. 246 ON AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996, 2014.
[77] Meenal Garg, *Introducing third-party funding in Indian Arbitration: A tussle between conflicting policies*, 6(2) NLUJ LAW REVIEW 71 (2020).
[78] *Id.*

recognized as a fundamental right enshrined in Articles 14 and 21 of the Indian Constitution.[79] The above stated factors of heavy enforcements costs and judicial backlogs have already posed a hindrance for achieving these thresholds. These reasons solidify the requirement to introduce third-party funding in India.

IV. PRACTICAL AND ETHICAL ISSUES

Although the utility of third-party funding in arbitration is undeniable, there are various considerations regarding its mechanism and acceptance globally. These issues are pertinent for the practical development of third-party funding and are analyzed from the perspective of recent regulations and advisory governing third-party funding in Singapore and Hong Kong.

A. Disclosure Requirements

The need for disclosure of third-party funding agreements has been identified as an essential practice for assessing the conflicts of interest and promotion of a full and fair discussion of cost-related matters.[80] In both Singapore and Hong Kong, the disclosure of funding agreements has been given significance.

In Singapore, the relevant requirements can be traced to the amendments in conduct rules applicable to the legal practitioners for disclosing the existence of a third-party funding agreement and the identity

[79] Anita Khushwaha v. Pushap Sudan, (2016) 8 SCC 509.

[80] Lisa A. Rickard, *TPLF Transparency: A Proposed Amendment to the Federal Rules of Civil Procedure*, U.S. INSTITUTE FOR LEGAL REFORM (May 26, 2021), https://www.instituteforlegalreform.com/ resource/tplf-transparency-a-proposedamendment-to-the-federal-rules-of-civilprocedure

of the funder to the parties and the tribunal.[81] Further, such disclosures are to be made at the commencement of the proceedings or as soon as practicable, when such agreements are entered into after the proceedings have begun.[82]

As per Singapore's Ministry of Law, these amendments envisage the best practices and global standards also reflected from the guidelines of the International Bar Association.[83]

On a similar note, Hong Kong's Law Reform Commission has established a similar practice, however, the obligation lies with the funded party itself.[84] Hong Kong has mandated the disclosure requirements before the proceedings commence or within 15 days after the agreement is made in case the proceedings have already commenced.[85] Further, a written notice has to be furnished at the end of such an agreement.[86] The detailed requirements of the disclosure of third-party agreements can be found in the Arbitration Rules of HKIAC.[87]

Further, reference can be drawn from the case of *EuroGas Inc. and Bellmont Resources Inc. v. The Slovak Republic*,[88] where the claimants were asked to reveal the identity of the funder. The urgency for regulatory norms regarding disclosure can be drawn from the case of *Ecuador v. Chevron*,[89]

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[81] Rule 49A, Legal Profession (Professional Conduct) Rules, 2015.
[82] Rule 49A(1), Legal Profession (Professional Conduct) Rules, 2015.
[83] Public Consultation on the Draft Civil Law (Amendment) Bill 2016.
[84] THE LAW REFORM COMMISSION OF HONG KONG, REPORT—THIRD PARTY FUNDING FOR ARBITRATION (2017).
[85] The Arbitration Ordinance, 2014, § 98U (Hong Kong).
[86] The Arbitration Ordinance, 2014, § 98V (Hong Kong).
[87] HKIAC Administered Arbitration Rules, 2018, Rule 44 (Hong Kong).
[88] EuroGas Inc. and Bellmont Resources Inc. v. The Slovak Republic, ICSID Case Nr. ARB/14/14.
[89] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23.

which revealed the various issues concerning conflict of interest which could affect the impartiality of the award.

Interestingly, disclosing the terms of the agreement has been discarded in the case of *South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia*,[90] which required only disclosure of the identity of the party for transparency. The confidentiality of the financing agreement draws its importance from the commercially sensitive information which may serve as a tactical advantage for the opposing party.[91]

B. Confidentiality

Another practical concern is the confidentiality of the arbitral proceedings, which is a significant aspect, and was also recognised by the 2019 amendments to the arbitration law in India.[92] While executing the funding agreement, it would be unavoidable for the receiving party to disclose certain information concerning the proceedings to the funder for due-diligence and evaluation of the claim.[93]

A response to this issue can be located in Honk Kong's legislation which carves out the exception for the confidentiality obligation and allows disclosure to a third party for seeking funding.[94] However, the regulation makes a caveat that no such information can be communicated unless the

[90] South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia, UNCITRAL PCA Case 2013-15.
[91] Oliver Gayneret. al., *Singapore And Hong Kong: International Arbitration Meets Third Party Funding*,40(3) FORDHAM INTERNATIONAL LAW JOURNAL1033 (2017).
[92] The Arbitration and Conciliation Act, 1996, § 42A (India).
[93] Mick Smith, *The Mechanics of Third-Party Funding Agreements: A Funder's Perspective* in THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION (Kluwer Law International, 2012).
[94] The Arbitration Ordinance, 2014, § 98T (Hong Kong).

same is specifically for professional advisory on financing-related matters,[95] and reaffirms the duty to observe confidentiality of the proceedings.[96]

In Singapore, the Law Society recommends the party to include certain terms in the financing agreement for protecting confidentiality and privilege before the funding of the claim.[97] A similar context can be found in the SIArb guidelines[98] restricting the third party to seek disclosure of information from the funded party's legal practitioner.

C. Control by Third-Party Funders

Another concern is the control that may be exerted by the funder over the arbitral proceedings. This is one of the issues where the regulators from both jurisdictions have remained silent. While the active involvement can be argued as a 'value addition' to the proceedings, the concern can be mitigated at the drafting stage of such an agreement.[99]

In Hong Kong, it is recommended that the third-party agreement stipulates the third-party funder to not seek influence on the funded party or its legal representative.[100] Similarly, Singapore's Law society requires the agreement to set out the level of involvement of the third-party.[101]

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[95] The Arbitration Ordinance, 2014, § 98T(2)(c) (Hong Kong).
[96] THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, PRESS RELEASE: CODE OF PRACTICE FOR THIRD PARTY FUNDING OF ARBITRATION ISSUED (2018).
[97] THE LAW SOCIETY OF SINGAPORE, GUIDANCE NOTE 10.1.1 29 (2017).
[98] SIARB, GUIDELINES FOR THIRD PARTY FUNDERS 5.2 (2017).
[99] REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION, 28 (2018).
[100] THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, *supra* note 97.
[101] THE LAW SOCIETY OF SINGAPORE, *supra* note 98.

D. Security for Costs

This is another issue that is left open in various jurisdictions. The issue draws its importance in the form that whether the existence of a third-party agreement allows the respondent party to obtain an order for security of costs.[102] Tribunals, in this regard, have applied a high threshold in granting these orders[103] and considered third-party funding, not a conclusive ground for furnishing such orders.[104] Majorly, these orders have found relevance in special circumstances where the party had a history of non-compliance.[105] A potential solution in this regard can be the incorporation of an after the event policy in the financing agreement for covering the costs of the claimant in case the claim is unsuccessful.[106]

V. THE WAY FORWARD

For gracing the usefulness of third-party funding, there is a need for legislating the reform with clarity on the scope and definition of the third-party funding. With the nascent of third-party funding, a light-touch approach can arguably be the correct approach, to begin with in India. As has been accepted in both Hong Kong[107] and Singapore,[108] such an approach gives the necessary breathing space for the regulators, tribunals, as well as

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[102] Megan Betts et. al., *The Impact of the COVID-19 Pandemic on Third Party Funding and Security for Costs in International Commercial Arbitration*, KLUWER ARBITRATION BLOG (May 36, 2021), http://arbitrationblog.kluwerarbitration.com/2020/07/30/the-impact-of-the-covid-19-pandemic-on-third-party-funding-and-security-for-costs-in-international-commercial-arbitration/.

[103] Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador (ICSID Case No ARB/09/17.

[104] South American Silver Limited v. Plurinational State of Bolivia, PCA Case No 2013-15.

[105] RSM Production Corporation v Saint Lucia, ICSID Case No ARB/12/10.

[106] Eskosol S.P.A. in Liquidazione v Italian Republic, ICSID Case No ARB/15/50.

[107] THE LAW REFORM COMMISSION OF HONG KONG, *supra* note85.

[108] Public Consultation, *supra* note 84.

parties. The fundamental aspect of this approach can be identified as giving "precedence to party autonomy and flexibility, with disclosure as the central tenet."[109] The following implications can be further useful for such an approach:

A. Elimination of doctrines of champerty and maintenance

In consonance with the analysis in the present paper, it can be effectively reasoned that concern of deluging non-meritorious claims and obstruction of justice associated with these doctrines do not hold water in modern times.[110] Instead, third-party funding promotes meritorious claims while shifting the costs in a secondary legal market.[111] As an immediate conclusion, elimination of these doctrines will only promote access to justice and equal participation. A decision in this area can be taken either by legislative means (Hong Kong and Singapore) or through judicial means (Australia and United States).

B. Reforming the relationship between third-party funders, clients and attorney

The complexity of the relationship between the client and the third-party funder has been a critical issue in the discussion of third-party funding.[112] Given the fact that the part of the claim of the client is now shared with the third-party funder, the disclosure requirements and

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[109] *Id*.
[110] Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 291 (2002).
[111] *Third Party Litigation Funding and Claim Transfer*, RAND CORP. (May 23, 2021), http://www.rand.org/events/2009/06/02.html.
[112] VICKI WAYE, TRADING IN LEGAL CLAIMS: LAW, POLICY &FUTURE DIRECTIONS IN AUSTRALIA, UK& US (2008).

confidentiality become some of the major practical issues underlining third-party funding. The fragmentation of the relationship between the funder-client-attorney, may further lead to conflicts of interest between the parties and lead to breakage of the attorney-client privilege given the client communications with the third-party funder who would be inclined to such communications for monitoring the investment.

Similar to the insurance industry, the expansion of the common interest doctrine of putting both the client and funder in the position of co-clients can solve this issue.[113] Also, the funder should be treated as fiduciaries of the client and the common law duties of zeal and loyalty should be extended to the funders.[114] As in other jurisdictions,[115] India can benefit from transparency requirements pertaining to attorney-funder relationship, as well as confidentiality requirements concerning attorney client communication.[116] Further, the scrutiny and review by courts similar to that in cases of class action suits can be significant in this context.[117]

C. The Financing Agreement Design and Consumer Protection

As in the cases of insurance contracts, important measures can be adopted in the third-party financing agreements to avoid moral hazards and

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[113] Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 511 (2003).
[114] Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909 (2009).
[115] *Jurisdiction guide to third party funding in international arbitration*, PINSENT MASONS (May 23, 2021),https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration
[116] Model Rules of Professional Conduct, 2010, Rule 1.6 (United States).
[117] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 33 (2000); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 55 (1982).

prevention of collusion for promoting the effectiveness of the practice.[118] Important caveats concerning confidentiality, control of proceedings and conflicts of interest can save the authenticity of the arbitral award while being economic for both the funder and client. Specific reporting and disclosure requirements in this regard can further protect the parties to the agreement from potential breaches and misinformation.

VI. CONCLUSION

"*If football were played without rules but with massive stakes and rewards, how would we condemn those playing the man instead of playing the ball?*"[119]

Reflecting on legislations in Singapore and Hong Kong as a watershed in the evolution of third-party funding, it is well-established that it is now an internationally recognized practice[120] and development that is here to stay.[121] With its regularization and legal certainty, India can travel the same road and benefit from enormous growth of arbitration practice and commercial development in the area, while fulfilling India's dream as an international hub in arbitration. With a light-touch approach, India can gradually address the issues and difficulties and promote ethical practices in the industry, thus, balancing its drawbacks against the greater benefits.

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[118] A. Smith, *Institutions and Entrepreneurs in American Corporate Finance*, 85 CALIF. L. REV. 1 (1997).
[119] S. Menon, *Some Cautionary Notes for an Age of Opportunity*, CHARTERED INSTITUTE OF ARBITRATORS INTERNATIONAL ARBITRATION CONFERENCE (2013).
[120] Bernardo M. Cremades et. al., DOSSIER X: THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (International Chamber of Commerce 2013).
[121] John Fellas, *Third-Party Funding: The Award of Costs and Security for Costs*, FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY (Kluwer Law International 2019).

Albeit various developments such as setting up of the International Arbitration Centre at New Delhi,[122] India's approach to arbitration has been fairly criticized, added with its struggle in winning the confidence of domestic and international clients, given the poor contract enforcement and huge judicial backlog. The ongoing pandemic has further devastated the economy with reduced cash flow and higher risks for parties. Evidently, third-party funding makes a greater case for bringing the international best practices to the table while easing the heavily-mounted pressure on the market. It would, thus, not be an overstatement that the practice of third-party funding sits at the door will soon be the game-changer for dispute resolution practice in India.

[122] New Delhi International Arbitration Centre Act, 2019 (India).