VIII. REINFORCING PARTY AUTONOMY IN THE INDIAN ARBITRAL LANDSCAPE

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ABSTRACT

This essay examines if party autonomy can be extended to the selection of arbitral counsel and their fee arrangements within the Indian arbitral framework. To do so, it analyses the relevant statutory provisions and the jurisprudence that has been developed with respect to non-advocates representing parties, and the use of international arbitral practices such as Third-Party Funding and Contingency Fee Agreements in India. It then addresses the stakeholders' reservations against the integration of these practices. In conclusion, it advocates for reinforcing party autonomy in the appointment of arbitral counsel to make India a more attractive destination for arbitration.

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PART - 1

I. INTRODUCTION

Party autonomy is the cornerstone of arbitration since it allows the parties to select and tailor the procedure of their arbitration according to their specific needs and wishes, unimpeded by possibly conflicting legal practices and traditions.[1] Accordingly, parties to an arbitration are free to choose the rules of procedure, governing law, arbitrators, seat, venue, language, and almost everything else related to the arbitration.[2] It is common knowledge that parties to international arbitration agreements choose the seat of their arbitration by assessing how deeply party autonomy is entrenched in a particular domestic arbitral framework – jurisdictions with higher standards of party autonomy are often chosen over other jurisdictions.[3] Hence, nations which intend to become more attractive for international arbitrations have to necessarily reinforce party autonomy throughout their arbitral framework;[4] and India is no different in this regard.

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[1] Gary B. Born, *Arbitration and the Freedom to Associate* (03 January 2009),38(7) GEORGIA J. OF INTERNATIONAL & COMPARATIVE L.7 (2009-10); Christopher Lau & Christin Horlach, *Party Autonomy – The Turning Point*, 4 DISPUTE RESOLUTION J.121 (2010); Jamshed Ansari, *Party Autonomy in Arbitration: A Critical Analysis*, 6(6) RESEARCHER 47, 53 (2014).

[2] *Id.*; Okuma Kazutake, Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration, 9(1) ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW 189 (2003).

[3] Sagi Peari & Saloni Khanderia, Party Autonomy in the Choice of Law: Some Insights from Australia, LIVERPOOL LAW R. 1, 2 (2021); Amelia Boss, The Jurisdiction of Commercial Law: Party Autonomy in Choosing Applicable Law and Forum Under Proposed Revisions to the Uniform Commercial Code, 32(4) THE INTERNATIONAL LAWYER: SYMPOSIUM ON JURISDICTION AND THE INTERNET 1067 (1998).

[4] *Id.*; See Léonard Stoyanov, *Switzerland to Become More Attractive for International Arbitration*, KLUWER ARBITRATION BLOG (May 18, 2018), http://arbitrationblog.kluwerarbitration.com/2017/05/18/switzerland-to-become-more-attractive-for-international-arbitration/.

In its attempt to become the hub of international arbitration, India has done a good job by buttressing party autonomy throughout its arbitral code.[5] However, it seems to have missed out on an important piece of the puzzle – extending party autonomy to the selection of arbitral counsel and the resulting fee arrangements. Indian laws, as they stand today, place certain restrictions on the parties' freedom to choose who represents them in an arbitration and how they pay their arbitral counsel, through the Advocates Act[6] and the Bar Council of India Rules[7] respectively. Such restrictions are detrimental to the development of arbitration in India.

Interestingly, the Bombay High Court, through its judgment in *Jayaswal Ashoka Infra v. Pansare Lawad Sallagar*, held that a non-advocate can represent a party in an Indian-seated arbitration.[8] It also held that the contingent fee agreement entered between such a non-advocate and his client is valid.[9] Hence, the Court has ushered in a new wave of party autonomy in the Indian arbitral framework by doing away with statutory restrictions on parties' freedom to select their counsel and choose the legal fee arrangement that they deem most fit. This essay seeks to explore if such autonomy fits

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[5] See PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd, Supreme Court Civil Appeal No. 1647 of 2021 (India); State Trading Corporation of India v. Jindal Steel and Power Limited and Ors., Supreme Court Civil Appeal No 2747 of 2020 (India); Reliance Industries v. Union of India, (2014) 7 SCC 603 (India); Pam Developments Private Limited v. State of West Bengal, (2019) 8 SCC 112 (India); Gary Born et al, *Recent Amendments to Arbitral Laws: India and Singapore*, WILMERHALE INSIGHTS & NEWS (December 15, 2020),https://www.wilmerhale.com/en/insights/client-alerts/20201215-recent-amendments-to-arbitral-laws-india-and-singapore.

[6] The Advocates Act, 1961, No. 25, Acts of Parliament (India), [hereinafter*The Advocates Act*].

[7] Bar Council of India Rules (As Amended Up To 30th September, 2009), available at http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartItoIII.pdf[hereinafter*Bar Council of India Rules*].

[8] Jayaswal Ashoka Infrastructure Pvt. Ltd. v. Pansare Lawad Sallagar, 2019 (5) MHLJ 689 (India).

within the larger Indian legal landscape by examining the applicable legal provisions and arbitral jurisprudence.

In Part 2 of this essay, the author examines the relevant statutory provisions and the jurisprudence that has developed with respect to non-advocates representing parties within the Indian arbitral framework. It is thereby submitted that there is nothing within the Indian legal framework that explicitly prevents representation by non-advocates in Indian arbitrations and that the parties should have the freedom to choose their representatives without any superfluous qualification requirements. Part 3 of this essay addresses the reservations against permitting advocate-less representation in Indian arbitration.

In Part 4 of this essay, the principle of party autonomy is extended to fee arrangements between parties and their counsel in Indian arbitrations. It is submitted that international arbitral practices such as Third-Party Funding and Contingency Fee Agreements will likely become a feature of Indian arbitrations soon. The author argues for a balanced approach during such an integration. The essay concludes with a call for reinforcing party autonomy in the appointment of arbitral counsel to make India a more attractive destination for arbitration.

[9] *Id.*

PART-2

II. ADVOCATE-LESS REPRESENTATION IN INDIAN ARBITRATION

Under the Arbitration and Conciliation Act, 1996,[10] parties can appoint individuals without any formal legal training as their arbitrators (provided there exists no conflict of interest between the parties and the arbitrator) since there are no qualification requirements to be appointed as an arbitrator.[11] Recently, the erstwhile Eighth Schedule of the Act, which introduced certain qualification and accreditation requirements for arbitrators, was omitted by the Arbitration and Conciliation (Amendment) Ordinance, 2020.[12] Hence, parties have full autonomy in choosing their arbitrators under the Act. In a similar vein, the Act does not lay down any qualification requirements for an arbitral counsel too – which theoretically means that the Act does not restrict the ability of the parties to choose their arbitral counsel, by not restricting party autonomy in this regard.

However, Indian arbitral representation has been the exclusive domain of advocates enrolled under the Advocates Act, for all intents and purposes, despite the absence of any qualification requirements.[13] Consequently, only those individuals who fulfil the stringent qualification requirements of Section 24 of the Advocates Act ("Persons who may be

[10] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament (India), (hereinafter, *The Arbitration & Conciliation Act* and/or *The Act*)
[11] See § 12, The Arbitration and Conciliation Act.
[12] The Arbitration and Conciliation (Amendment) Ordinance, 2020.
[13] See § 33, The Advocates Act.

admitted as advocates on a State roll") have been entitled to represent parties in Indian-seated arbitrations.[14]

This situation makes one ponder as to why should the parties' freedom to choose their counsel in an arbitration be restricted when no such restrictions exist on their freedom to choose their arbitrators. Why should the parties' range of choices be only limited to enrolled advocates when they may have access to better options for representing them in an arbitration? The parties should be able to choose specialists in the subject matter of their particular dispute, such as accountants, engineers, medical officials etc., who by virtue of their subject-specific training be able to provide better arbitral representation.

With these questions in mind, the Indian judiciary seems to be warming up to the idea of a broader pool of arbitral counsel which extends beyond advocates enrolled under the Advocates Act. Notably, the Supreme Court in *Bar Council of India v. A.K. Balaji* held that foreign lawyers are not barred from conducting international arbitration proceedings and/or providing legal advice.[15] Taking this one step further, the Bombay High Court in *Jayaswal Ashoka Infra* held that representation before an arbitral tribunal cannot be deemed to be representation before a court and hence, arbitral representation cannot be deemed to be the exclusive domain of advocates enrolled with the Bar Council of India under the Advocates Act.[16] Understandably, these judgments have been the subject of much criticism

[14] § 24(1), The Advocates Act.
[15] Bar Council of India v. A.K. Balaji and Ors., (2018) 5 SCC 379.
[16] *Supra* note 8.

among legal circles since it disturbs enrolled advocates' hegemony over arbitral representation.[17]

In the following sub-sections, the author demonstrates why the approach adopted by the Bombay High Court is the way forward to foster India's status as a pro-arbitration jurisdiction and should be upheld by the Supreme Court in deciding the appeals against this judgment.

A. Regulatory Framework

As noted above, the Arbitration & Conciliation Act does not provide any particular class of individuals with the 'exclusive right' to represent parties in an arbitration. The Act does not even lay down any specific qualifications for arbitrators. The closest possible legal provision conferring such an exclusive right on a class of individuals can arguably be Section 33 of the Advocates Act ("Advocates alone entitled to practice").[18] It is often argued that this section, given its broad wording, bars non-advocates from practicing before arbitral tribunals, or "in any court or before any authority or person".[19]

However, *per contra*, Section 32 ("Power of Court to permit appearances in particular cases") creates an exception to Section 33 by

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[17] See Pradeep Nayak, Sulabh Rewari & Vikas Mahendra, *Arbitration procedures and practice in India: Overview*, THOMSON REUTERS PRACTICAL LAW(Feb. 1, 2021),https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=(sc.Default)&firstPage=true;James J Nedumpara et al, *Reforms in the Non-Litigious Services Sector: A Roadmap for Growth*, CENTRE FOR TRADE & INVESTMENT LAW, https://ctil.org.in/cms/docs/Papers/Publish/publish1.pdf;Bhavana Sunder et al, *Entry Restricted Casually: The Supreme Court of India's Judgment on the Entry of Foreign Lawyers in India*,ASIAN DISPUTE REVIEW (July 2018).

[18] *Supra* note 13.

[19] *Id.*

empowering the particular authorities with the discretion to permit any person to appear before them in any particular case.[20] Therefore, the courts, authorities and persons mentioned under Section 33 read with Section 32 of the Advocates Act, have an unqualified discretion to allow non-advocates to appear before them in any matter. Hence, it is reasonable to say that there are no regulations preventing a non-advocate from representing a party in an arbitration. The arbitral tribunals can use their discretionary power under Section 32 to allow for such representation without having to fulfil any set criteria. In a commensurate manner, this approach can be extended to requests for *prose* representation in arbitral proceedings too.[21]

Parties have been provided with a similar kind of autonomy under other Indian statutes as well, most notably the Consumer Protection Act, 2019.[22] Under this Act, the Consumer Dispute Redressal Forums have been established to provide speedy and cost-effective justice.[23] While appearing before these forums, the parties do not need to engage advocates to represent them and can do so themselves or through their authorized representatives, with or without any formal legal training.[24] Such representation helps parties save time and legal fees.

Consumer forums and arbitral tribunals are similar in the sense that both are quasi-judicial bodies that have been established to enable parties to secure their rights *in personam* in a cost and time-effective manner. Hence,

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[20] § 32, The Advocates Act.
[21] Constantine N. Katsoris, *Representation of Parties in Arbitration by Non-Attorneys*, 22(3) FORDHAM URBAN LAW JOURNAL (1995). Drew A. Swank, *The Pro Se Phenomenon*, 19(2) BRIGHAM YOUNG UNIVERSITY JOURNAL OF PUBLIC LAW (2005).
[22] The Consumer Protection Act, 2019, No, 35, Acts of Parliament (India), (hereinafter*The Consumer Protection Act*).
[23] *Id.*

parties are likely to have similar considerations when appearing before an arbitral tribunal given that most parties opt for arbitration for its efficiency in the first place.[25] Consequently, such representation should also be allowed in Indian arbitrations to make them faster and cheaper. This can also increase the influence that parties yield over their respective arbitral strategies. Cumulatively, these factors will go a long way in making Indian arbitrations more party-centric and the overall arbitral framework more attractive.

B. Broad-basing Arbitration

The Supreme Court in *Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Ltd.* held that arbitral panels must be broad-based to ensure that the parties can choose arbitrators with the technical know-how required to competently adjudicate the issue at hand.[26] Accordingly, it was suggested that arbitral institutions also have professionals such as engineers, accountants, government employees, architects, medical officers, etc. in addition to those with formal legal training.[27] Having a broad-based panel goes a long way in ensuring that the selected arbitral tribunal is able to identify and appreciate the finer/technical dimensions of a particular dispute.[28]

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[24] *Id.*;See Department of Consumer Affairs, FAQs on Consumer Protection Act 2019.
[25] Christopher R. Drahozal& Stephen J. Ware, *Why do Businesses Use (or Not Use) Arbitration Clauses?*,OHIO STATE JOURNAL ON DISPUTE RESOLUTION, Vol. 25(2), pp. 433 – 476, (2010); Ali K. Qtaishat, *Choice of Law in International Commercial Arbitration*, INDIAN LAW JOURNAL,https://www.indialawjournal.org/archives/volume3/issue_3/article_by_ali.html.
[26] Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665 (India).
[27] *Id.*
[28] *Id.*

Applying the same logic to arbitral counsels, it is submitted that the parties should be able to choose their counsel based on the nature of the dispute and/or the composition of the tribunal to ensure that they get the best possible representation. For instance - it might be beneficial fora party if an engineer can represent them in a construction dispute; a UK-based lawyer can represent them in a dispute relating to English tax laws; a Chartered Financial Analyst can represent them in an international transfer pricing dispute, so on and so forth. In all of these scenarios, nothing bars the parties from employing multiple arbitral counsels for a given matter and they can very well seek the services of enrolled advocates along with non-enrolled advocates depending upon the nature of the work.

PART-3

III. CHALLENGES TO ADVOCATE-LESS ARBITRAL REPRESENTATION

A. The NTT Challenge

The Supreme Court's judgment in *Madras Bar Association v. Union of India (also known as the NTT Case)* is often used by critics of the submitted position of the author, to argue that persons who have no formal training in law cannot be allowed to represent parties before tribunals.[29] The Supreme Court held that non-law practitioners cannot be permitted to address arguments on behalf of parties before a tribunal which is empowered to determine questions of law.[30] Here, the term 'tribunal' assumes great

[29] Madras Bar Association v. Union of India & Anr., (2014) 10 SCC 1 (India).
[30] *Id.*

significance in determining whether or not this decision will be applicable to representation before arbitral tribunals.

It is important to note that the *NTT judgment* was concerned with the National Tax Tribunals, which by virtue of their function are public fora.[31] In arriving at its decision, the Court utilized the instrumental definition of 'tribunal' that was adopted by the Supreme Court in the NCLT Case.[32] As per the definition adopted in the NCLT case, a tribunal is a permanent and independent body set up by the legislature to decide a *lis* between the parties in the context of a specific jurisdiction vested upon it by a statute, and which is not a part of the regular judicial system.[33]

On the other hand, arbitration tribunals are private fora that are set up by arbitration agreements between parties and not through any statutory/legislative instrument.[34] They are not confined to any specific jurisdiction and can deal with any issue arising between the parties related to an arbitration agreement, provided that the subject matter of such disputes is capable of settlement through arbitration under the law.[35] Hence, arbitral tribunals cannot be deemed to be 'tribunals' under the instrumental definition adopted in the *NTT case*. Accordingly, the Supreme Court's ruling in the *NTT case*, barring non-lawyers from representing parties before tribunals

[31] See The National Tax Tribunal Act, 2005, No. 49, Acts of Parliament (India).
[32] Union of India v. Madras Bar Association, (2010) 11 SCC 261.
[33] *Id*; Alok Prasanna Kumar and Rukmini Das, *State of the Nation's Tribunals: Introduction and Part 1: Telecom Disputes Settlement and Appellate Tribunal*, VIDHI CENTRE FOR LEGAL POLICY(2014),http://www.vidhilegalpolicy.in/140618_State%20of%20the%20Nation's%20 Tribunals%20- %20TDSAT.pdf.
[34] Vidya Drollia& Ors. V. Durga Trading Corporation, (2019) 20 SCC 406 (India). A. Ayyasamy v. A. Paramasivam& Ors., (2016) 10 SCC 386 (India).
[35] *Id*; State Trading Corporation of India v. Jindal Steel and Power Limited & Ors., Civil Appeal No. 2747 of 2020 (India).

empowered to determine questions of law, will not be applicable on representation before arbitral tribunals.

B. Advocates are Better Representatives

It is often argued that enrolled advocates make for better arbitral representatives considering their extensive knowledge of the Arbitration & Conciliation Act, as well as the other Indian procedural and substantive laws.[36] While it is true that legal training can be helpful to present one's case, enrolled advocates certainly cannot lay an exclusive claim over the skills of effective representation.[37] Knowledge and tact, and not legal qualifications, are the true prerequisites for being an effective arbitral counsel.[38] Accordingly, various professionals, including accountants, engineers, medical officers, and even law graduates, possess these attributes and can use it to represent their clients effectively. It can also be said that these professionals may be better suited than advocates to represent parties in certain subject-matter intensive disputes. It should be left to the parties to freely choose the representative most suited for their arbitrations.

Nevertheless, some form of inequality between the competencies of parties' representatives is inevitable, irrespective of the existence of an enrollment requirement. However, this is not an aberration but is a feature of all litigations and arbitrations, where representatives of vastly differing competencies often go head-to-head. Therefore, it is submitted that the

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[36] Jason E. Meason & Alison G. Smith, *Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12(1) NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS (1991); See Kellie Pantekoek, *Do I need a Lawyer for Arbitration?*,FINDLAW (May 4, 2020),https://www.findlaw.com/adr/arbitration/do-i-need-a-lawyer-for-arbitration-.html.

[37] *Id.*

minute possibility of inequality of arms should not override or limit party autonomy in selecting counsel, especially in the context of arbitration. All parties want the best possible representation and will hence, benefit from the unrestricted autonomy in choosing their counsel.

It is highly likely that representation by advocates may diminish the flexibility of the arbitral process and reduce it to a litigation-like rigmarole, given their inclination towards traditional legal practices and procedures.[39] Such a scenario may severely undermine the concerned party's interests.

C. Issues of Enforceability

In principle, a party's decision to go ahead with an advocate-less representation should not be grounds for annulment or non-recognition of an award. Nonetheless, in highly complex cases, a party's lack of representation by enrolled advocates may raise issues of enforceability under Section 34(2)(a)(i) of the Arbitration & Conciliation Act ("party was under some incapacity").[40] Moreover, the issue of tribunals sympathizing with the parties represented by non-advocates may also raise questions of bias. However, such issues can be effectively dealt with if the arbitral tribunal uses its discretion under Section 32 of the Advocates Act judiciously to identify if the circumstances of the dispute necessitate representation by an enrolled advocate and advise the parties accordingly.[41]

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[38] *Id.*

[39] Colin Ong, *Case Strategy and Preparation for Effective Advocacy*, GLOBAL ARBITRATION REVIEW (Oct. 01 2019),https://globalarbitrationreview.com/guide/the-guide-advocacy/fourth-edition/article/case-strategy-and-preparation-effective-advocacy.

[40] § 34(2)(a)(i),The Arbitration & Conciliation Act.

[41] See Amiya Kanti Das & Anr. v. Shefalika Ash, Calcutta High Court, GA No. 966 of 2019 (India).

Further, the tribunals can actively ensure that the parties are making informed choices while selecting their counsel and should consciously try to step out of the shoes of either of the parties during the arbitral proceedings to minimize the inequality of arms between parties. Subsequent to this, whatever inequality exists will be the product of deliberate choices made by the parties and will hence, not be bad in law.

PART-4

IV. THIRD-PARTY FUNDING AND CONTINGENCY COUNSEL FEE ARRANGEMENTS IN ARBITRATION

Historically, third parties were prohibited from funding an unconnected party's litigation under the doctrines of champerty and maintenance.[42] These doctrines have evolved from their medieval origins and are now based on public policy ground of protecting the purity of justice.[43] However, in the current era of encouraging access to justice, these concerns are widely considered to be out of date. As a result, rules against champerty and maintenance have been relaxed in most leading jurisdictions including England, Canada, Singapore, Australia and the USA.[44] These relaxations have led to the steady growth of third-party funding and contingency fee

[42] *The Practice, A Brief History of Litigation Finance*, 5(6) LITIGATION FINANCE – HARVARD LAW SCHOOL (2019).
[43] Lord Neuberger, *From Barretry, Maintenance and Champerty to Litigation Funding*, GRAY'S INN SPEECH(May 08, 2013), https://www.supremecourt.uk/docs/speech-130508.pdf; In re Trepca Mines Ltd, (No 2) [1963] 1 Ch 199.
[44] See Dean Lewis, *Jurisdiction guide to third party funding in international arbitration*, PINSENT MASONS OUT-LAW GUIDE(May 07, 2021), https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration;*Supra*note 43.

arrangements in international arbitrations.[45] The growing use of such litigation financing arrangements suggests that they are the new normal for arbitrations.[46]

In this regard, India finds itself in a peculiar position. Vestiges of colonial rules and practices continue to bind Indian advocates to the confines of champerty and maintenance. However, no such restriction can be said to exist for non-advocates. Given that non-advocate representation is increasingly becoming a reality in Indian arbitrations, this differential treatment for advocates and non-advocates must be rectified. Accordingly, the following sub-sections seek to identify the best way forward in regulating arbitral representation under the Arbitration and Conciliation Act.

A. Third-Party Funding – The new normal?

The principles behind Third-Party Funding ("TPF") are not alien to the Indian legal "market."[47] Many case files, especially assets that are subjects of litigation, are bought and sold in the unorganized sector.[48] To this effect, Order XXV Rule 1 of the Civil Procedure Code, as amended by the states of Maharashtra, Karnataka, Gujarat, and Madhya Pradesh, recognizes the right of the plaintiffs to transfer a suit property to obtain litigation financing. Hence, TPF is not *per se* prohibited in India, with the only restrictions on it being the principles of champerty and maintenance

[45] *Id.*
[46] See Swargodeep Sarkar, *Third Party Funding in International Arbitration: New Challenges and Global Trends*, 3(1) INTERNATIONAL JOURNAL OF LEGAL SCIENCES AND INNOVATION (2020).
[47] AmitaKatragadda et al, *Third Party Funding in India*, CYRIL AMARCHAND MANGALDAS (2020) https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf .
[48] *Id.*

contained in the BCI rules.[49] This position was clarified and reiterated by the Supreme Court in *Bar Council of India v. AK Balaji* by holding that that "*(t)here appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation*."[50] As a result, arbitral representatives have been dichotomized into those who can enter into TPF agreements (non-advocates) and those who cannot (advocates).

While this dichotomy may be good in law, it is *prima facie* inequitable and prejudicial to the interests of the members of the Indian Bar. On one hand, advocates should not be discriminated against by being the only group being denied the right to enter into TPF agreements for arbitrations. On the other hand, non-advocates cannot be bound by the rules of an exclusive professional preserve or "club" which they are not members of, as was observed by the Supreme Court in the matter of *G, A Senior Advocate of the Supreme Court.*[51] It is submitted that this dichotomy is one of the primary reasons why TPF has not been able to pick up steam in the Indian arbitral landscape.

As has been observed elsewhere and demonstrated by Hong Kong's success with its TPF Code, the advantages of TPF in arbitration can far outweigh its disadvantages, provided appropriate regulations are put into place.[52] Even the High-Level Committee to review the Institutionalisation of

[49] Rule 18, 20, 21, 22,Bar Council of India Rules.
[50] *Supra* note 15.
[51] In Re. Mr 'G' a Senior Advocate of the Supreme Court, (1955) 1 SCR 450 (India).
[52] Meenal Garg, Introducing third-party funding in Indian Arbitration: A tussle between conflicting policies, 6(2) NLUJ LAW REVIEW 71 (2020);See Carolina Carlstedt, And then there were three … Third Party funding in Hong Kong, THOMSON REUTERS PRACTICAL

Arbitration Mechanism in India has favoured the introduction of TPF in Indian arbitration in its report.[53]

In a bid to bridge this gulf, the Supreme Court has held that is up to the Bar Council of India and the Central Government to draft a code of conduct for non-advocates representing parties in arbitrations.[54] Accordingly, these authorities now have the power to amend their rules to allow for TPF in arbitrations. They can choose to either allow all categories of representatives to partake in TPF agreements for arbitrations, continue restricting only advocates from engaging in such agreements [which is highly inequitable], or prevent everyone from doing so [which hampers party autonomy].

Although weighing the individual merits and demerits of TPF agreements in arbitration is beyond the scope of this essay, the international consensus is that allowing TPF in arbitrations bolsters party autonomy without raising most of the ethical concerns associated with such agreements.[55] Hence, it is submitted that the concerned authorities should allow for TPF arrangements in arbitrations by introducing a robust code for the same at the earliest. It is also clarified that till the time such a code is enacted, non-advocates are free to enter into TPF agreements for arbitrations.

B. Contingent Fee Agreements – A shift from *status quo*?

LAW ARBITRATION BLOG (01 February 2019),http://arbitrationblog.practicallaw.com/and-then-there-were-three-third-party-funding-in-hong-kong/.

[53] Department of Legal Affairs, *Report Of The High Level Committee To Review The Institutionalisation Of Arbitration Mechanism In India*, GOVT. OF INDIA, https://legalaffairs.gov.in/sectiondivision/report-high-level-committee-review-institutionalisation-arbitration-mechanism-india.

[54] *Supra* note 15.

[55] *Supra* note 50. Seemasmiti Pattjoshi &Puranjoy Ghosh, *Third Party Funding Mechanism and Judicial Attitudes and Responses in International Commercial Arbitration*, 29(1) INTERNATIONAL JOURNAL OF ADVANCED SCIENCE AND TECHNOLOGY5645 (2020).

The legal position on contingent fee agreements is crystal clear with regards to advocates appearing before courts. Simply put, contingency fee contracts between advocates and clients are not allowed in India since they are against the ethics of the profession.[56] As officers of the courts, advocates should not have any vested interest in the subject matter of their cases so as to prevent them from engaging in unethical practices.[57] Hence, all such agreements are deemed void under Section 23 of the Indian Contract Act ("What considerations and objects are lawful, and what not")[58] and Rule 20 of the BCI Rules ("Contingency fees").[59]

However, in *Jayaswal Ashoka Infrastructures*, the Bombay High Court held that a contingent fee agreement entered into by a non-advocate to represent his client before an arbitrator would not render such an agreement void.[60] The Court also held that representation before an arbitrator could not be considered as representation before the 'Court' under the Arbitration & Conciliation Act and the Civil Procedure Code.[61] Furthermore, the Delhi High Court in *Spentex Industries Ltd. v. Quinn Emanuel Urquhart & Sullivan LLP* held that foreign lawyers/law firms can charge a contingency fee for representing a party in an India-seated arbitration since they are not governed by the Advocates Act.[62] Two positions emerge out of these decisions; a) non-advocates can enter into contingent fee agreements since they are not regulated by the Advocates Act or the BCI rules, and b)

[56] See Shubhangi Maheshwari, Allowing Lawyers charge Contingency Fees: Impact on The Indian Services Market, 2 GNLU JOURNAL OF LAW & ECONOMICS 79 (2019).
[57] *Id.*
[58] § 23, Indian Contract Act, 1872.
[59] Rule 20, Bar Council of India Rules.
[60] *Supra* note 8.
[61] *Id.*

advocates can also enter into contingent fee agreements for arbitrations since arbitral tribunals are not 'Courts.'[63]

It is to be seen if the Supreme Court upholds the second position in deciding the appeals against the Bombay HC judgment. One thing becomes increasingly clear though that there is no bar on non-advocates from entering into contingent fee agreements, considering the Supreme Court's holdings in *AK Balaji* and *G, A Senior Lawyer*.

Furthermore, it is submitted that allowing advocates to enter into contingent fee agreements for arbitrations is the way forward to maximize the welfare of all stakeholders involved. Since various categories of disputes have been deemed non-arbitrable and have been reserved exclusively for public fora, the likelihood of abuse of contingency fee arrangements is minimal in the Indian context.

Justice Raveendran had once noted that, "it is necessary to find an urgent solution…. to save arbitration from the arbitration cost." It is the author's sincere belief that TPF and Contingency Fee Arrangements are those solutions.

V. CONCLUSION

Since 2015, India has been working towards becoming the 'hub' of international arbitration, by streamlining its arbitral code to make it more consistent with the prevailing approaches in international arbitration. Achieving this feat requires that the framework embraces, accepts, and

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[62] Spentex Industries Ltd. v. Quinn Emanuel Urquhart & Sullivan LLP, CS (OS) 568/2017 (India).
[63] *Id*.;supra note 8.

entrenches party autonomy throughout the entirety of the arbitral process.[64] A fundamental element of this autonomy is the ability to choose one's representatives and all efforts must be made to ensure that this choice is not impeded by superfluous qualification requirements. Hence, the Indian arbitration community should embrace the judgment in *Jayaswal Ashoka Infra v. Pansare Lawad Sallagar* and ensure that party autonomy is given priority over advocates' existing monopoly over arbitral representation.

In *A. Ayyasamy v. Parmasivam & Ors.*, Justice D.Y. Chandrachud opined that the Arbitration and Conciliation Act should be implemented in a manner that is consistent with the prevailing approaches in international arbitration.[65]As a result, international arbitral fee arrangements such as TPF and Contingency Fee agreements are slowly making inroads into the arbitral framework of the country. In light of these developments, the impetus on party autonomy must be balanced with the interests of the Bar to ensure a smoother and equitable transition. Tasked with this balancing act, the BCI and the Central Government are currently faced with two options; either to embrace the changing scenarios in international arbitration and reap long-term dividends or to stick with the status quo to protect the short-term interests of particular members of the Bar. The author believes that it is high time that India embraces appropriately balanced versions of these popular tools to achieve its objective of becoming a leading arbitration hub.

India, through its legislature and judiciary, has continually taken a pro-arbitration and pro-party autonomy stance for a better part of the decade.

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[64] Mia L. Livingstone, Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?, 25(5) JOURNAL OF INTERNATIONAL ARBITRATION 529 (2008).
[65] A. Ayyasamy v. Parmasivam & Ors., (2016) 10 SCC 386 (India).

Hence, the author remains hopeful that Indian institutions will usher in the required changes to reinforce party autonomy within the arbitral framework by making suitable amendments to the concerned statutes and opening doors for new market entrants in arbitral representation.