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ARTICLE

Beyond Tomorrow Sales: Filling the Statutory Void of Third-Party Funding in India

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Abstract

This article examines the legal and regulatory position of third-party funding in Indian arbitration after Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. It traces judicial acceptance of litigation funding, identifies unresolved regulatory concerns, compares the approaches adopted in Singapore and Hong Kong, and proposes targeted amendments to the Arbitration and Conciliation Act, 1996.

Keywords: Third-Party Funding; Arbitration; Access to Justice; Disclosure; Adverse Costs; India

Arbitration was historically conceptualized as a swift, autonomous and cost-effective alternative to traditional civil litigation. However, the contemporary reality of international and domestic commercial arbitration tells a drastically different story. Spiralling tribunal fees, steep administrative expenditures and escalations in expert witness costs have effectively transformed modern arbitration into an elite corporate mechanism. For capital-constrained claimants, this fiscal entry barrier frequently results in a denial of justice, as meritorious claims are abandoned due to sheer economic exhaustion.

It is within this systemic friction that Third-Party Funding ["**TPF**"] emerges as a critical paradigm shift. TPF describes a commercial arrangement wherein an entity independent of the dispute provides the financial resources necessary to cover a party's legal costs in exchange for a pre-determined percentage of the monetary recovery or a success fee from the final arbitral award.[1]

While the Indian judiciary has progressively abandoned archaic common law prohibitions against champerty and maintenance, the absolute absence of a comprehensive statutory framework under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] engenders a landscape fraught with structural uncertainty. The lack of statutory rules leaves critical commercial variables, such as mandatory disclosure protocols, arbitrator conflicts of interest, and the enforcement of adverse cost awards, to sporadic judicial interpretation.

Part I of this article traces the historic and contemporary judicial recognition of TPF in India. Part II addressed the core regulatory faultlines and procedural frictions generated by the current statutory vacuum. Part II looks to international legislative blueprints to propose a structured path forward for domestic implementation. Finally, Part IV emphasizes that for India to fully realize its policy ambition of becoming a robust global hub for international commercial arbitration, relying on ad-hoc common law declarations is no longer tenable; the legislature must introduce an explicit statutory framework that legitimizes, defines, and regulates the operational frontiers of TPF.

The Indian Judicial Stance: Recognition Without Regulation

The foundational legality of litigation funding in India is not a novel judicial construct. Unlike early English common law, which criminalised financial maintenance to protect the integrity of royal courts, Indian jurisprudence never adopted an absolute prohibition against funding arrangements. In *Ram Coomar Coondoo and Anr. v Chunder Canto Mookerjee,* the Privy Council established that agreements to supply capital for litigation are valid unless they are found to be unconscionable, extortionate, or entered into for improper speculative objects.[2] This stance was subsequently affirmed by the Supreme Court of India ["**Supreme Court**"] in *Bar Council of India v AK Balaji,* where the court clarified that while advocates are strictly barred by professional ethics from accepting contingency fees, there is no legislative or ethical restriction preventing non-party investors from funding bona-fide disputes.[3]

Despite this historic tolerance, the intersection of TPF with structured arbitral procedures remained unmapped until the landmark decision of the Division Bench of High Court of Delhi ["**High Court**"] in *Tomorrow Sales Agency Pvt. Ltd. v SBS Holdings, Inc & Ors* ["**Tomorrow Sales**"]. In this dispute, an apex corporate body sought to execute an adverse costs award against a third-party funder after the underlying claimant's claims were dismissed by an arbitral tribunal.[4]

The High Court celebrated TPF as an "essential tool to ensure access to justice", observing that funding mechanisms level the economic playing field for businesses facing resource-rich adversaries. However, on the substantial question of financial liability, the High Court held that a third-party funder cannot be made personally liable for an adverse costs award unless the funder was an actual signatory to the arbitration agreement or had explicitly assumed such liability under the funding contract.[5]

The ruling in *Tomorrow Sales* exposes a fundamental structural asymmetry in the Indian ADR ecosystem. By insulating funders from cost liabilities in the absence of explicit contractual consent, the court protected investor capital but simultaneously created an unfair procedural advantage. A commercial funder can finance a high-risk speculative arbitral claim with absolute immunity from adverse cost consequences, leaving a successful respondent to bear massive, unrecoverable legal bills. This imbalance directly underscores the limitations of purely judicial remedies and highlights the need for precise statutory rules.

The Core Regulatory Faultlines

Conflict of Interest and Mandatory Disclosure

The absolute cornerstone of any legitimate arbitration mechanism is the independence and impartiality of the arbitral award. Under Section 12 of the Arbitration Act, read together with the Fifth and Seventh Schedules, prospective arbitrators are under a strict continuous obligation to disclose any direct or indirect business or financial relationships that could compromise their neutrality.[6]

However, in the absence of a mandatory disclosure rule for TPF, a profound systematic vulnerability arises. Large-scale institutional funders frequently maintain ongoing financial relationships, repeat appointments, or equity stakes across multiple international arbitrators. If a funder has a pre-existing commercial alignment with an arbitrator presiding over an unrelated dispute, the integrity of the panel in compromised.

Without an explicit statutory mandate forcing a funder party to immediately disclose the existence and identity of their financier at the commencement of proceedings, arbitrators cannot effectively evaluate potential conflicts of interest. This regulatory vacuum increases the risk that final arbitral awards will be challenged or set aside under Section 34 of the Arbitration Act on the ground of bias, severely undermining the finality of the process.[7]

Confidentiality versus Due Diligence

A separate procedural friction exists between statutory mandate of confidentiality and commercial realities of risk assessment. Section 42A of the Arbitration Act imposes an absolute obligation on parties, institutions and arbitrators to maintain the confidentiality of all arbitral proceedings, pleadings, and evidence.[8]

Conversely, before a professional funder commits substantial financial capital to a dispute, they must perform through legal due diligence. This requires the claimant to share proprietary documents, internal legal opinions, trade secrets, and core evidentiary matrices with a non-party financial entity.

Under the current text of the Arbitration Act, sharing this material with an external investor could technically constitute a material breach of Section 42A, potentially exposing the claimant to structural sanctions or procedural challenges. The statutory framework offers no clear guidance on whether sharing data with a prospective funder constitutes a waiver of privilege, nor does it provide standard protective exceptions for non-disclosure agreements executed during the due diligence phase.

Unconscionable Bargains and Public Policy

While *Ram Coomar Coondoo* established that litigation funding is permissible, it explicitly carved out a prohibition against agreements that are unconscionable or opposed to public policy under Section 23 of the Indian Contract Act, 1872. Because Inda lacks a regulatory body or an official code of conduct for third-party funder, there are no statutory limits on the percentage of an award an investor can claim.[9]

If an institutional funder takes advantage of a claimant's financial desperation to extract an extortionate return, such as eighty percent of the final recovery, the arrangement ceases to be an instrument of justice and becomes predatory speculation. Without statutory boundaries defining the permissible scope of funding fees, tribunals are forces to evaluate these complex financial arrangements on a case-by-case basis under the broad, ambiguous doctrine of "public policy", creating commercial unpredictability for both investors and litigants.

The Global Blueprint: Comparative Frameworks

The Singaporean Model

When structuring a domestic statutory amendment, India can derive critical insights from leading common law jurisdictions that have successfully integrated TPF. Singapore represents a premier model of cautious, highly effective legislative intervention. Through the Civil law (Amendment) Act 2017, Singapore formally abolished the torts of maintenance and champerty specifically for international commercial arbitration and related court proceedings.[10]

Crucially, rather than leaving the market unregulated, Singapore introduced the Civil law (Third-Party Funding) Regulations 2017. This framework limits eligibility to fund disputes exclusively to professional entities that meet strict capital adequacy requirement.[11] Furthermore, the Singapore International Arbitration Centre ["**SIAC**"] amended its institutional rules to empower tribunals to order the disclosure of the existence and identity of funders, as well as take funding arrangements into account when allocating costs.[12]

The Hong Kong Paradigm

In a similar vein, Hong Kong amended its Arbitration Ordinance in 2017 to incorporate Part 10A, which explicitly legalises TPF in arbitration and mediation.[13] Hong Kong's legislative model relies on a statutory "Code of Practice for Third-Party Funding of Arbitration."[14]

This code mandates that funders must maintain a minimum of twenty-five million Hong Kong dollars in clear capital, implement robust internal conflict-of-interest checks, and incorporate clear provisions regarding a party's right to retain control over the strategy of the dispute. If a funder fails to adhere to this statutory code, the amendment enables courts and tribunals to consider this non-compliance when determining cost allocations or imposing sanctions.

Proposing a Structural Blueprint for India

To address these regulatory gaps and build a predictable environment for commercial dispute resolution, the Indian Parliament must introduce targeted amendments directly into the Arbitration Act. Rather than waiting for a comprehensive code of civil litigation, a localized amendment to the law of arbitration provides a swift, high impact solution.[15]

Statutory Definitions

First, Section 2(1) of the Arbitration Act must be amended to formally define the key actors within this financial ecosystem.[16] The statute should incorporate clear definitions for both "Third-Party Funding Agreement" and "Third-Party Funder:

"Third-Party Funding Agreement" means any contract or agreement whereby a natural or judicial person, who is not a direct party to an arbitration proceeding, agrees to fund or manage the costs of all or part of the proceedings for a party, in consideration of a financial return contingent on the outcome of the dispute.

"Third-Party Funder" means any professional entity or person entering into a Third-Party Funding Agreement with a party to an arbitration.

Mandatory Continuous Disclosure

Second, the legislature should insert a new Section 12A, creating an absolute obligation for mandatory disclosure. This provision should dictate that any party availing themselves of TPF must submit a written notice to the opposite party, the arbitral institution and the tribunal. This notice must state the existence of the funding agreement and the exact identity of the funder.

This disclosure must be made either at the commencement of the arbitral proceedings or within fifteen days of executing a funding agreement during the course the course of the dispute. Crucially, the statute should clarify that while the identity and existence of the funder must be disclosed to prevent conflicts of interest, the internal financial terms of agreement remain protected by commercial privilege unless ordered otherwise by the tribunal for exceptional reasons.

Statutory Exceptions to Confidentiality

Third, to resolve the friction with Section 42A, a specific proviso must be appended to confidentiality clause.[17] This exception should explicitly state that the transmission of data, pleadings, or evidence by a party to a prospective or actual third-party funder for the sole purpose of risk evaluation or due-diligence does not constitute a breach of statutory confidentiality, provided that such disclosure is executed under a legally binding non-disclosure agreement.

Balancing Adverse Cost Liability

Finally, to correct the structural imbalance created by *Tomorrow Sales,* Section 31A of the Arbitration Act, which governs the allocation of costs, must be updated.[18] The amendment should grant tribunals the explicit statutory discretion to join a disclosed third-party funder to the cost's allocation proceedings.

The tribunal should be empowered to hold the funder liable for adverse costs award up to a maximum limit proportionate to funder's contractual financial stake in the dispute. Furthermore, the amendment should explicitly authorize tribunals to entertain applications for security for costs under Section 17 against a funded claimant, allowing tribunals to compel the funder to provide security if it is demonstrated that the underlying claimant is impecunious.[19]

Conclusion

The evolution of TPF from a prohibited common law doctrine to a recognized commercial reality represents a vital step forward for access to justice in India. As confirmed by the High Court in *Tomorrow Sales,* TPF serves as an important financial mechanism that ensures meritorious claims are not supressed by economic asymmetry. However, judicial acceptance in the absence of statutory regulation creates a highly unpredictable legal landscape.

Leaving the management of TPF to sporadic judicial interpretations creates substantial risks regarding hidden arbitrator conflicts, breaches of statutory confidentiality, and unfair exposure to unrecoverable costs for successful respondents. By looking to the legislative models of Singapore and Hong Kong, the Indian legislature can introduce clear amendments to the Arbitration Act that protect investor capital while maintaining the procedural integrity of the dispute. Implementing statutory definitions, mandatory disclosure protocols, and balanced cost-allocation mechanisms will provide the legal certainty needed to protect the interests of all participants. This legislative clarity is essential if India is to secure its place as a trusted leading destination for international commercial arbitration.

Footnotes

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3. *Bar Council of India v AK Balaji* (2018) SCC OnLine SC 214. ↩
4. *Tomorrow Sales Agency Pvt. Ltd. V SBS Holdings Inc. and Ors* (2023) SCC OnLine Del 3191. ↩
5. *Tomorrow Sales* (n 4) [32]. ↩
6. The Arbitration and Conciliation Act 1996, s 12. ↩
7. The Arbitration and Conciliation Act 1996, s 34. ↩
8. The Arbitration and Conciliation Act 1996, s 42A. ↩
9. The Indian Contract Act 1872, s 23. ↩
10. Civil Law (Amendment) Act 2017 (Singapore) s 5. ↩
11. Civil Law (Third-Party Funding) Regulations 2017 (Singapore). ↩
12. Singapore International Arbitration Centre, *SIAC Rules 2025* (7^{th} Edition, SIAC 2025) r 38. ↩
13. Arbitration Ordinance 2017 (Hong Kong) pt 10A. ↩
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15. Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996 (LCI Report No. 246, 2014) ['2014 LCI Report'] ↩
16. The Arbitration and Conciliation Act 1996, s 2(1). ↩
17. The Arbitration and Conciliation Act 1996, s 42A. ↩
18. The Arbitration and Conciliation Act 1996, s 31A. ↩
19. The Arbitration and Conciliation Act 1996, s 17. ↩