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Arbitration in India: The Merits of Third Party Funding

[The following post is contributed by **Gourav Mohanty**, who is a lawyer in Mumbai]

Introduction

The effort at improving India's arbitration sentiment by the creation of the Mumbai International Arbitration Centre ("**MIAC**") has received applause, although many in the legal industry, for example Mr. Nishith Desai, do not think of it as a game changer. The MIAC has a lot going for it, from eminent jurists like Mr. Fali Nariman being an integral part of the drafting of the institutional rules to well-known arbitration practitioners like Ms. Pallavi Shroff as members of the Council. The rules themselves are elegant and helpful, but they fail to make any revolutionary change, which was needed to catch eyeballs and break the justified stereotype of a tardy arbitration process in India.

One revolutionary mechanism that could have been used is a provision for Third Party Funding ['**TPF**']. Despite being unflatteringly dubbed as Gambler's Nirvana due to its "heads-I-win-tails-I-do-not-lose" frame, the role of TPF in international arbitration is continuously gaining traction. The MIAC could do wonders for its reputation if it pulled up its sleeves and drafted provisions for the same. Now, TPF is neither expressly recognized nor prohibited in India. But the prohibition against lawyers charging contingency fees and India's tryst with public policy can indicate that it might not have encouraged it at least in litigation.[1] But it doesn't necessarily follow that the same yardstick would be applied to commercial arbitrations. This is especially considering how so many issues relating to rights *in rem* (e.g. fraud and corruption) that were non-arbitrable in the past have been brought under the jurisdiction of the arbitrator. Moreover, with new strides being taken in arbitration in India and in TPF provisions around the world, one wonders if a carve out might have been made for arbitration as has been done in popular arbitration centres. For example, in Hong Kong, TPF is allowed in arbitration even if not in litigation *per se*, or in Singapore which prohibits TPF in litigation but in a case last year[2] allowed TPF in the context of insolvency in appropriate circumstances.

International arbitration as a whole has become an expensive affair. The 2015 Queen Mary Arbitration Survey has noted how "cost is seen as arbitration's worst feature".[3] The problem is particularly acute in India owing to how arbitration is mostly the first step to litigation. That is where TPF steps in, aiding a public policy objective of redressal of grievance and allowing the pursuit of measures allowed under law without being crippled financially. The IBA Guidelines for Conflicts of Interest released in 2014 were the first to inaugurate guidelines on TPF in which entities contributing funds to support a party in a case in which it has a "direct economic interest" in or a "duty to indemnify a party for, the award" were classified as third party insurers and funders.[4]

Prohibition against Champerty and Maintenance

An ancient Greek concept, the prohibition against champerty and maintenance ("**C&M**") was to "weaken the hold of gangster barons" and provide for equal justice and due process of law.[5] But the Magna-Carta era law has been significantly undone in the West. The United Kingdom ("**UK**") and Australia allow litigation financing to a certain extent.[6] The United States of America ("**USA**") gives a free reign to speculative litigation financing and has gone so far to hold that even "reprehensible" purpose behind litigation funding is fine.[7] Asia, however, has been reluctant in this regard, and most jurisdictions prohibit litigation financing.

The public policy driven prohibition against C&M is understandable. Taking a cue from the jurisdiction of Hong Kong (which prohibits funding of litigation, but not of arbitration), the funding or support of a party in a litigation by a person "*who has neither an interest in the action nor any other motive recognised by the law as justifying his interference"* is maintenance[8] while champerty is the "*maintenance of an action in consideration of a promise to give to the maintainer a share of the subject matter or proceeds thereof, if the action succeeds"*.[9] The doctrine of C&M prohibits it with certain exceptional circumstances that are more or less the same across jurisdictions. But many of these very countries are using a sieve to differentiate C&M agreements from TPF, at least in arbitration, and there is considerable jurisprudence for the same. For example, there are various judgments in international arbitration jurisprudence that have ruled that the doctrine of champerty does not equate to TPF in arbitration and has to be balanced against other public policy concerns.[10] From an Indian scenario, if the MIAC does not wish to be as bold as Hong Kong, it could probably allow insolvency as an exception to the prohibition on TPF in arbitration wherein a liquidator or a trustee could be allowed to join in an arbitration funder.

The fact that there is an English Association of Litigation Funders' Code of Conduct is ample evidence of how the laws against C&M have evolved in common law. The MIAC has projected its emergence as a contender against arbitration centres in London, Hong Kong and the Singapore International Arbitration Centre ("**SIAC**"). But the MIAC in its institutional laws has not experimented with solutions for any of the current issues that international arbitration faces, which could have set it apart from and ahead of, the other institutions. Hong Kong has gone ahead and adopted an entire model of awarding indemnity costs as a rule against any appeals over an award to preserve arbitral aloofness from courts.[11] Singapore has already solved its pendency issues in the 1990s, and SIAC is considered a star in the motley crew of arbitral institutions around the world. But, with the MIAC's cautious approach and associated troubles with the new amendments in the Arbitration & Conciliation Act, 1996 ("**A&C Act**") including the Court approval for time extension in Section 29A show how Mr. Nishith Desai may be correct in his sum up.

Hence, while the world is debating on the scope of obligations to disclose TPF Agreements, we are far behind in even knowing it, let alone acknowledging it. If the MIAC wants to be taken seriously, only competitive pricing wouldn't do.[12] It needs to create a wave in the arbitration community by offering clear cut liberal guidelines that aim not only at dispute resolution but also facilitation).

Trouble with TPF

Many difficulties can emerge in the realization of such a revolutionary change. One will have concerns regarding capital adequacy of a funder, the requirement of formal Arbitration Funding Arrangement ("**AFA")**, issues of conflict of interest, and more importantly the bandwidth of the control exercised by the funder over the proceedings which, on a brief perusal of common law, has witnessed shifting interpretations.. For example, if a third party exercises slightly more zealous influence on the arbitration process than would be otherwise ordinarily accepted in the arm's length context, the court will hold it as C&M, rendering the funding agreement void, as has been seen in jurisdictions like the UK.[13] On the other hand, if it does not carry out a cost benefit analysis of funding the litigation by using its own lawyers, then a potential third party funder can never identify a good case to place its bet on. Thus, the third party funders have a thin margin of error, which has to be carefully assessed with sound legal advice.

What could be done by MICA is to allow TPF to walk on a tight rope by narrowing its scope. We can have stringent requirements for qualifying as a 'third party', exclude any success fee arrangements which can irk India (prohibition against contingency fees), requirements of institutional funding rather than individual funding and the mandatory requirement of being paid a 'share' in the arbitration fruits: be it costs or award, depending on the outcome of the proceedings.

Technical difficulties arise as well. Though the law on non-signatory to arbitration is developing (awaiting clarification on amended Section 8 of A&C Act)[14], its application to TPF would have to be thought through in the context of costs inasmuch as whether the arbitrator can direct the third party to pay a portion of costs considering that it is a non-signatory to an arbitration agreement. One way would be to have the arbitrator see whether the AFA between the party and its TPF is strong enough to require mandatory compliance from the third party or not, when it comes to costs. The other route would be to have arbitrators apply alter ego or implied consent theories to snare the TP in by extending the arbitration agreement. ICSID has tried to find some clarity in the AFA area but with limited success.[15]

Conclusion

The EU-Vietnam Free Trade Agreement released in January 2016[16] as well as the investment chapter of the draft Transatlantic Trade and Investment Partnership sent by it to the USA in 2015[17] require disclosure of TPF presence in cases. The revised version of Comprehensive Economic and Trade Agreement between Canada and the European Union released in February 2016 contains TPF provisions. The EU is currently negotiating FTAs with India and it seems the right opportunity for the country to open its doors to TPF to enhance the effectiveness of arbitration as an alternative dispute resolution despite its price and cost. Recently in May 2016, the HKAC released draft Guidelines for TPF for public consultation in pursuance of their recent initiatives to clean the air on TPF which included a Law Reform Commission consultation paper in 2015. The MIAC can do the same and the reception it receives. The MIAC can tread the same path and develop clear ethical and financial standards to govern TPF framing an effective framework that addresses the issues laid out above. After all, Mumbai deserves a top notch arbitration centre.

- Gourav Mohanty

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[1] *Ganga Ram v. Devi Das*, 61 P.R. (1907); rule 20 Part Vi, chapter II, section II (Rules Governing Advocates) Bar Council of India Rules.

[2] *Re Vanguard Energy* Pte Ltd [*2015*] SGHC 156, at http://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/re-vanguard-energy-pte-ltd.pdf. See also http://www.bloombergquint.com/business/2016/08/27/will-this-made-in-india-arbitration-centre-become-the-next-global-arbitration-hub.

[3] The 2015 *Survey* 'Improvements and Innovations in International *Arbitration*', Queen Mary, University of London, at http://www.arbitration.qmul.ac.uk/docs/164761.pdf.

[4] General Standard 6(b), *IBA Guidelines* on *Conflicts of Interest* in International Arbitration 2014, at http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918.

[5] Lord Neuberger, From Barretry, Maintenance and Champerty to Litigation Funding, Speech at Gray's Inn, May 8, 2013, at http://www.supremecourt.gov.uk/docs/speech-130508.pdf.

[6] *Belated 'Clean Up' for Litigation Funders in Australia*, U.S. Chamber of Commerce, (Sept. 17, 2014), at http://www.instituteforlegalreform.com/resource/belated-clean-up-for-litigation-funders-in-australia/.

[7] Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc. v. Love Funding Corp., 591 F.3d 116 (2d Cir. 2010).

[8] *Massai Aviation Services v Attorney General* [2007] UKPC 12, quoted in *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16, at para. 10.

[9] *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16.

[10] *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 2 HKLR 475, *Siegfried Adalbert Unruh v Hans-Joerg Seeberger and Another* [2007] HKEC 268.

[11] Gourav Mohanty & Shruti Raina, 'Use of Indemnity Costs to Combat Dilatory Tactics in Arbitration: Advocating the Hong Kong Approach' 3(1) IJAL 101 (2014), at Indian Journal of Arbitration Law, at http://www.ijal.in/sites/default/files/IJAL%20Volume%203_Issue%201_Gourav%20Mohanty%20%26%20Shruti%20Raina.pdf.

[12] To file a case at the MCIA, a party has to pay INR 40,000 which is non-refundable. To do the same at SIAC, a non-Singaporean party needs to spend over INR 100000. At the LCIA, one would have to spend over INR 1,50,000 for the same http://www.bloombergquint.com/business/2016/08/27/will-this-made-in-india-arbitration-centre-become-the-next-global-arbitration-hub.

[13] *Hughes v. Kingston Upon Hull City Council* [1998]EWCA Civ 1731. However, some jurisdictions

like Australia allow third party funders more control than the UK currently permits. See *Campbell Cash & Carry Pvt Ltd. v. Fostif* [2006] HCA 41.

[14] See *Chloro Controls* India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, *Sukanya Holdings* (P) Ltd v Jayesh H Pandya AIR 2003 SC 2252.

[15] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan I*CSID Case No. ARB/12/6.

[16] http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf.

[17]http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.