

## International arbitration: Levelling the playing field

Published: August 22, 2016 6:18 AM



It has always been debated, whether it is an easy access to justice or if it leads to an increase in frivolous suits. (Source: IE)

---

Third party funding is at the cusp of changing the landscape of international dispute resolution. Third party funding is when a neutral party finances an on-going proceedings for potential profit in return. It has always been debated, whether it is an easy access to justice or if it leads to an increase in frivolous suits. Despite several benefits, the lack of regulations invite legal and ethical issues. In today's global economy, there has been substantial rise in third party funding in cross-border arbitration disputes. Though currently third party funding remains a slippery slope, it has the potential to level the playing field.

Judicial precedents clearly state that third party funding of a dispute is not per se illegal despite limited statutory recognition. It is undeniably an investment scheme untethered from regulation. Third party funding has evolved over the years in developed jurisdictions, though most of them have still not legislated on the validity of such arrangements. Lack of financial means should not be the determining factor deterring parties from safeguarding their interests and ultimately reaching

justice. Additionally, it also helps examine the merits of the case as third parties would fund only after conducting extensive due diligence, to minimise frivolous litigation. However, the issue which needs to be addressed is the desirability of such a practice in international arbitration and safeguards to be incorporated.

The two main legal hurdles to litigation funding are the doctrine of champerty and prohibition on attorney fee sharing with non-lawyers. Views taken by most jurisdictions clearly reflect that these two concepts are treated as “dead letter” in today’s complex scenario. Third party funding has attracted significant attention on grounds of disclosure, transparency, confidentiality, conflicts and apprehensions over control that a litigation funder may exert over proceedings. Courts across jurisdictions have attempted to deal with these issues by laying down rules requiring disclosure and limiting the ability of funders to interfere in the proceedings or at the time of settlement. Yet, third party funding still remains a grey area in international arbitration with no norms on disclosure. Resolving this unregulated territory through international standards and arbitral institutions will have permanent benefits.

## **Disclosure**

The need for disclosure assumes importance as international arbitration is utilised by small and medium-sized companies. With expenses mounting in international arbitrations, funding has become imperative for a level playing field. No law or arbitral institutional rule requires the parties to mandatorily disclose funding arrangements. However, in certain cases, voluntary funding disclosure has helped in ensuring transparency in arbitral proceedings. Disclosure would also encourage the opposite party to settle.

## **Conflict of interest**

Conflict of interest arises due to the existence of ‘three cornered relationship’ between client, funder and client’s lawyers. The approach adopted by the funder whether restricted to only providing financial assistance or adopting a hands-on approach could lead to issues of conflict of interest. Another issue that cannot be ignored is in relation to attorney-client privilege. Privilege is extended only between the client and lawyer, but if loyalty lies with the entity paying the legal bills there could be conflicts.

Concerns have also been raised on the aspect of conflict in relation to independence and impartiality of arbitrators. The International Bar Association has come up with Guidelines on

Conflict of Interest in international arbitration (IBA Guidelines) to prevent such conflict issues and require arbitrators to make disclosures. Disclosure helps identify if an arbitrator is biased or lacks independence. However, this does not entirely solve the issue of conflict unless the existence of funding is disclosed.

## **Costs**

Costs in international arbitration have always been daunting since it involves payment for arbitral proceedings and legal costs. The trend has always been that security for costs should be granted with great reluctance. Third party funding has implication on costs. Most funders often incorporate provisions to provide for security however that should not be a determining factor in imposing security for costs or else it would never level the playing field.

Third party funding is a white knight acknowledging the existing caveats and need for internationally accepted standards to regulate this sphere. Good governance is critical in third party funding considering that currently there is no uniform regulation. Now is the time to change the international arbitration scenario and level the playing field for all parties involved.

***Payel Chatterjee**, the author is senior member of the international litigation & dispute resolution practice, Nishith Desai Associates. Views are personal.*