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Research Article

Footprint of TPF entities in Trade Liberalization and International Commercial Dispute Resolution Mechanism with Reference to India

Ms. Seemasmiti Pattjoshi[a], Dr. Puranjoy Ghosh[b]

[a] Ph.D. Scholar, KIIT School of Law, Bhubaneswar
[b]Assistant Professor, KIIT School of Law, Bhubaneswar

[a] mail: pattjoshi.seema@gmail.com, [b]mail: puranjoyghosg@kls.ac.in

Abstract

Lately International Commercial Arbitration has witnessed a remarkable development in the contribution of Third-Party funders not only in litigation but also in in arbitral proceedings, raising queries regarding the legitimacy of TPF in international arbitral proceedings. Presently, more and more litigants are seeking to take advantage of external funding, "either because they lack the necessary funds to commence arbitration proceedings or because they want to maintain cash-flow and offset the risk of an uncertain outcome." Dispute resolution mechanism in India tends to be a cost-heavy proposition for the parties involved. And being the developing country India is now willing to open its door towards the outside funding practices in dispute resolution mechanism. The present discussion highlights the footprint of third party funding in trade

liberalization and the governing principles of International Commercial Arbitration with reference to Indian Legal Policies.

Keywords: Third Party Funding, Trade Liberalization, Dispute Resolution Mechanism, International Commercial Arbitration

1. Introduction

At this point when barriers to international trade are discussed, which is normally difficult for the nations if we analysed some issues related to, *"high pricelists", "customs red tape", "foreign exchange controls", "trade discriminations", "restrictive cartel practices"'*, and other regulations whether it is related to administrative and private. Commercial disputes regarding traders in international trade expanses are increasing gradually. And yet, many medium-sized and small companies has been affected due to any trouble when they have showed disagreements with their customers or their traders or sources of supply engaged with other countries of the world. It seems that larger companies/developed countries might not adversely affected by the cost resulting from disputes with comparison to companies in developing countries of the world, as they are in better position to afford a prosecute in courts of law/international arbitration and go through various series of appeals until the final decision passed. In the meanwhile, because of their reputation, position and wealth in the market they can often compel favourable settlement mechanism for their dispute.

Earlier, traders discovered that arbitration would be the favourable choice for them to *"adjudicate their differences quickly, cheaply, privately and fairly".* In the mean while International Arbitration has its own pros and cons likes sometimes it is complicated for the parties to understand the regulatory mechanism of different arbitral institutes. This research is intended to discuss the footprint of third party funding in trade disputes because of the globalization there is a huge demand of trading activities and it can help the participants of this

field to understand in order to conduct his business in international sphere and in case of any dispute, to settle quickly disagreements that he may have raised.

2. Trade agreements – the indian perspective:

As discussing about trade agreements in India, one of the top counties in Asia as user friendly, simplicity and trade facilities for business has viewed FTAs as a vital tool to reinforce its trade and investment, and signed variety of trade agreements with various countries or groups. In fact, India is one in every of top countries in Asia with the utmost number of FTAs either operational or under negotiation or proposed.

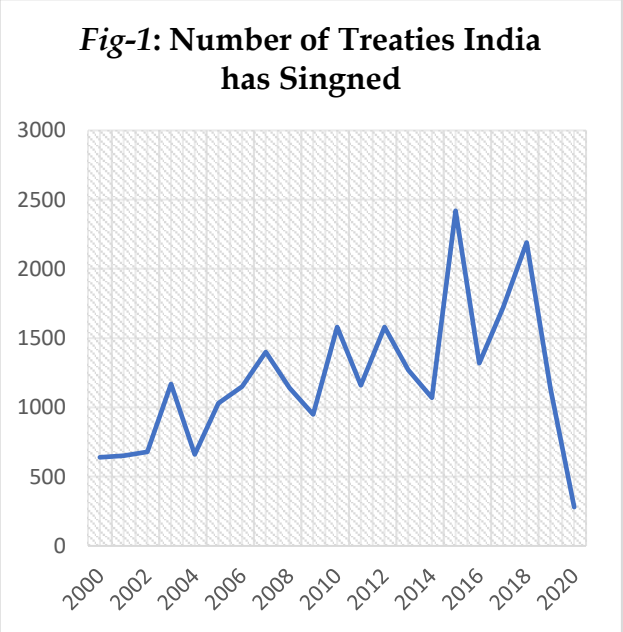


***Fig-1*: Number of Treaties India has Singned**

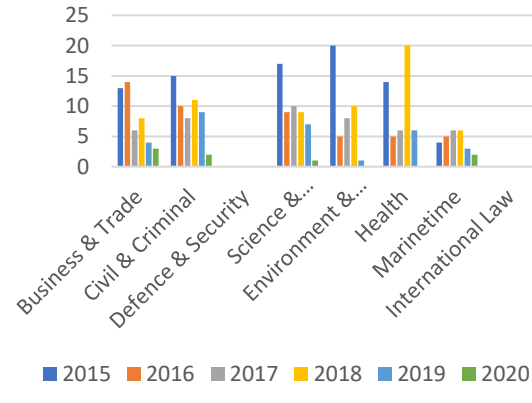


Fig-2: Treaties Signed by India during 2015-2020 in various areas

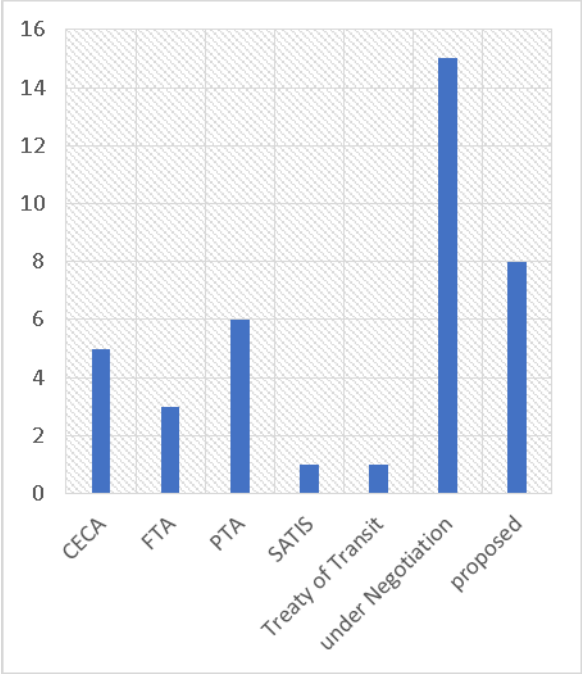
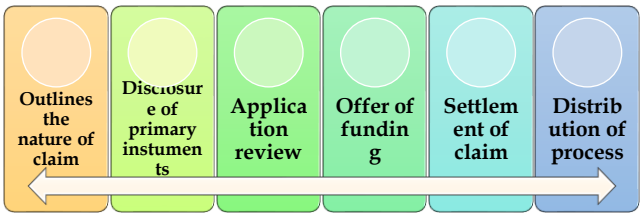


Fig-3: Treaties already India has signed

3. Footprint of tpf entities in trade liberalization and international commercial dispute resolution mechanism:

TPF has attracted debates and critics to its ethicalness the most predominant among them is the disclosure of the funding relationship. The issue of disclosure is at the heart of the hottest debates and concerns among commentators and third-party funders. It has thus been reached that threats risking the fairness and integrity of international arbitration proceedings in the presence of a third-party funder can only be eradicated or at least restrained via the enforcement of a disclosure obligation.

Fig-4: The process of applying for funding



There is no standard yet specifying how TPF relationship should be revealed to the arbitral tribunal and what part of this relationship shall be disclosed, hence the study of the scope of potential disclosure obligation; *"(A) seems to be very important at this point in order to avoid abuses by both arbitral tribunals and third-party funders. However, in the scenario of impossibility of imposing a disclosure obligation, can a third-party funder be joined to the arbitration proceeding (B) in order to eliminate once and for all legal and ethical concerns emanating from its presence therein".*

The voluntary disclosure of the existence of a TPF agreement in Oxus arbitration claim raised the question on whether the LFA should be publicly disclosed, in this case the claimant(funded party) issued a press release indicating that it had *"entered into a litigation funding agreement". "The press release identifies the funder and a related entity, and provides some information about the LFA as well as the agreement about potential settlement offers. However the degree of funders' input into decisions about settlement, if any, was not entirely clear".*

However, it is hard to know what should be disclosed; should the arbitral tribunal be only informed about the mere existence of a TPF or should the disclosure embrace all the terms of the LFA or just some of them and if so, which terms have to be revealed?

The only available data to answer this question is that as we previously mentioned, third-party funders are extremely reluctant to disclose their existence or at least the LFA to the arbitral tribunals that is why they take

precaution measures given that *"most funding agreements contain confidentiality provisions".* According to Laurent Lévy and Regis Bonnan the mere existence of a third-party funder should not be considered as a "sufficient reason" for the tribunal to order disclosure.

The next logical question will be to determine to whom should the LFA be disclosed, should it be a public disclosure, or should it be addressed only to the arbitral tribunal or to all parties in the arbitration proceeding. For this issues, disclosure to the arbitral tribunal is arguably adequate given that *"the tribunal will be the ultimate decision maker"* with regards to the needs compelling disclosure (security for costs and conflict of interests).

At the *"ICC Institute of World's Business Law's 32nd annual meeting"* participant funders enunciated their disfavor of extensive disclosure of the LFA terms and provisions and stated that they have confidentiality measures in place for various reasons among them the concern that such disclosure might actually influence the arbitral tribunal. The same approach was taken by funders participating in the International Business Law Journal Roundtable discussions on TPF . Moreover, funders consider that no mandatory disclosure rules shall be made and that the state of rules should better stay as they are, totally unregulated.

In any event, if disclosure is highly required in a specific case, *"only limited disclosure of TPF is tolerable".* However, some funders expressed their willingness to disclose the existence of a LFA especially when discussing a settlement offer. The reason behind this latitude is that the existence of a TPF in this specific circumstance will be beneficial to the funder since it will alert the opposing party that the claimant is financially able to pursue the claim.

Notwithstanding, some funders are in favor of mandatory disclosure and support the belief that arbitral tribunal must ask the involved parties to the dispute to reveal the LFA and the TPF entity in question. However, even for opponents of disclosure, they do not see the need of fully disclosing their LFA stating that the mere discloser of the existence of any type of funding relationship, which is sufficient not to challenge the proceeding and arguing that the terms of the LFA has no connection with the arbitral decision.

The LFA is a separate contract of the arbitration agreement; these two contracts contain a sole repeat player which is the funded party. However, even though third-party funders' common policy is to stay outside the arbitration proceeding, there are legal grounds on which a third-party funder may be joined to the arbitration.

The arbitration agreement would be considered to be extended under the theories of "alter ego" or implied consent. French courts have for too long provided the possibility to extend the arbitration agreement to non-signatory parties in specific situations. In 1991, in the case of *Companie Tunisienne de navigation v. Société Comptoir* commercial Andre the French Court of Appeal extended the arbitration agreement to a non-signatory third-party on the basis of implied consent concluded from the acceptance of the arbitration agreement which is by itself presumed from the knowledge of the arbitration agreement. In this case it was held that *"the arbitration clause set out in an international contract has a validity and effectiveness of its own, such that the clause must be extended to the parties directly involved in the performance of the contract and in any disputes arising out of the contract, provided that it is established that their contractual situation and their activities raise the presumption that they have accepted the arbitration clause, which existence and scope they were aware of, irrespective of the fact that they were not signatories to the contract."*

This position is further maintained by the French Court of Appeal in numerous occasions by holding that *"an arbitration clause introduced in a foreign contract has a distinct feature of validity and enforcement, which requires it to be applied to the parties directly involved in the obligation of the contract and in the disagreement which may result from breach of contract, later it has been recognized that they were knowledge of the existence of the arbitration clause, even though they were not signatories to the contract which contained it".*

The Court of Cassation affirmed this position, in *Societe Alcatel Business Systems (ABS), Societe Alcatel Micro Electronics (AME) et Societe AGF v. Amkor Technology* by stating that *"the enforcement of arbitration clauses(domestic or international) extends to the parties directly involved in the the contract, and any disputes that may arise from its obligation, in connection therewith".*

These decisions should be analyzed on two different levels; *"first, when the parties actively intervene in the negotiation and performance of the relevant contract to the dispute. Second, where the party is directly involved in the disputes that arise with connection to the underlying contract".* Considering the former situation, applying such analogy on TPF will not however be consistent given that third party funders generally intervene at a subsequent phase to the negotiation of the contract between the parties because no disputes generally arise at the negotiation phase. Consequently, third-party funders are not parties to the initial contract that is why they won't have any role to play in its performance. This hypothesis given by the French court was heavily criticized by many commentators lately on the ground that *"The fact that a party is directly concerned in reciprocal promises and known of any arbitration clause, or had corresponding interests, which should generally be insufficient, without more, to subject that party to an arbitration agreement."* The author reasoning is rooted by the necessities of maintaining "commercial predictability" and the consensual aspect of arbitration.

The second situation is where the party is directly involved in the disputes that arise with connection to the underlying contract. This statement indicates that a party may be deemed to be joined if it is implicated in the

arbitration itself, however this hypothesis is equally inconsistent and has been criticized by Phillippe Pinsolle who considers that even in applying the flexible criteria used by the French court, it will stay doubtful whether, a third-party that only intervenes at the commencement of the dispute in order to financially assist one of the parties no matter how substantial the degree of control that it exercises over the case, can be considered as a party to the arbitration agreement. Moreover, this third-party did not take part neither in the negotiation of the underlying contract to the dispute nor in its performance. Accordingly, the author concludes that the criteria used by the French Supreme Court are not sufficient, absent to any further particular circumstances, to join the third-party funder to the arbitration proceeding.

In the light of the challenges presented by the rise of TPF, arbitral institutions should thoroughly consider adopting a disclosure responsibility of the funding agreement for the purpose of reducing the risks associated with the presence of a third-party funder especially with respect to conflict of interests. Predominantly, third party funders are reluctant to disclose their funding relationship because they worry that arbitral tribunals will take such information into consideration when ordering security for costs.

In order to satisfy the tribunal's need to assess conflict of interests and the funders' concern of arbitral tribunals abuse, Truz proposes an appealing approach compensating both sides by imposing some minimum changes in the current arbitration rules while preserving the confidentiality provisions agreed upon by the parties to the LFA and heavily relying on the good faith of the TPF operation.

As a result of the specificities of each type of arbitration, a distinction has to be drawn while imposing disclosure obligation between arbitrations conducted under the auspices of arbitral institutions (A) and Ad-Hoc arbitrations (B).

A. The role of arbitral institutions:

According to Truz the arbitral institution shall first conduct a *"conflict check"* in order to determine potential conflict of interests. After imposing a disclosure obligation upon the parties the arbitral institution under which auspices the arbitration is conducted has to automatically perform a conflicts check.

Accordingly, after receiving information from the parties and arbitrators, the arbitral tribunal will thus have all necessary information to conduct its conflicts check. In this respect institutional rules have to be mandated in a way to keep all disclosures about TPF confidential. In the event the institution decides that an arbitrator shall be disqualified this decision can be notified to the opposing party in two different ways, *"first; by stating that disqualification is due to a conflict of interests emanating from the existence of a TPF relationship. Second, disqualifying the arbitrator without motivating their decision"*. However, in both cases it will inevitably be understood by the opposing party that conflict is due to a TPF relationship.

It is true that *"sua-sponte review by the institution might be money and time consuming, however viewing it differently, costs and time are dramatically higher when challenges to an arbitrator are brought at the enforcement or recognition stages. In the other hand, it shall be taken into consideration that funders might be more indulgent to disclose their funding relationship if there are sufficient guarantees in place to ensure that the arbitral tribunal will not consider the funding relationship in ordering security for costs".* This proposal is not however without difficulty since arbitral tribunals enjoy discretion in deciding on security for costs consequently, it remains probable that they order security for costs because of the presence of a TPF but state another reason in their decision.

B. Ad-Hoc Arbitration:

The focus is now on disclosure obligation in Ad-hoc arbitration conducted under the UNCITRAL Rules. The absence of supervising institutions in this type of arbitration will implicate a modification of the aforementioned proposals in order to reach the same degree of arbitrators' independence.

Article 11 of the UNICITRAL Rules provides that the arbitrator *"that he/she shall disclose any circumstances likely to create a justifiable doubts regarding impartiality or independence"*, in principle under the provisions of the same article disclosure should be made before the constitution of the arbitral tribunal either to the appointing party or the appointing authority. Thus, the question here is to determine who has the authority to conduct a conflict check in the absence of a supervising institution.

Under Ad-Hoc arbitration the party that have funded will disclose their relationship about their funding agreement to the appointing authority instead of the arbitral institutions. Much like institutional arbitration the authority has to upon receipt of necessary information, request arbitrators to disclose any relationship with the revealed funder. Then, a conflicts check has to be conducted by the appointing authority and information has to be kept confidential.

That the legal policies of India do not bar litigation funding agreement by a funder except an advocate as per the Bar Council of India. But it may somehow can be challenged on the ground of Public Policy (Sec. 23 of Indian Contract Act) Consideration. The question whether or not a contract is against public policy or not is to

be selected general principles solely. However, another aspect related to litigation funding should be considered that justice cannot be dined it can be delayed.

4. Conclusion

The growth of TPF in International Commercial Arbitration is growing very fast, even some jurisdictions have already recognized litigation funding both in domestic as well as international arbitration(like Singapore, Hong Kong, England and Wales). Now it is the time for India to open the gate for litigation funding to avail the benefits of Third Party Funding, as per the judicial decisions relating to third party arbitration, described about how the existing laws already make adequate scope to legalize TPF in India, and the investor's right. Overall, India's time to adopt a soft law relating to funding agreement like England and Wales for an effective and time saving dispute resolution mechanism hub.

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Authors Profile

This is Seemasmiti Pattjoshi, working as an Assistant Professor in Shri Vaishnav Institute of Law, Indore M.P. India. I have 5 years 6 months of rich experiences in the field of academics and 5 years of experience as an Advocate. Previously, I have worked as an Advocate in District Court and High Court of. I am pursuing my Ph.D.(Submitted my Thesis) from KIIT School of Law, Bhubaneswar in the specialization on Corporate Law and International Commercial Arbitration. I have done my graduation from M S Ramaiah College of Law, Bangalore, Karnataka and Postgraduate in Law from National Law University Odisha, Cuttack.

Dr. Puranjoy Ghosh

Assistant Professor

Completed his LL.B. & LL.M. from the University of Burdwan, W.B. Dr. Puranjoy Ghosh started his career of Advocacy in Civil Laws for 7 years and since 2002 he is teaching profession in various Law Institutes. He has completed his Doctoral Degree in Law from the University of Burdwan in 2013. He joined in School of Law, KIIT in 2012. His area of interests are Corporate Law, Private Laws, Procedural Laws and Jurisprudence