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# The Oath in International Arbitration: I Swear by Kindle

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## Abstract

*"I do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth."*

The giving of evidence stands as a cornerstone in legal proceedings, the integrity and reliability of the process paramount. As noted in *Atwood v Welton*:

*"A man of the most exalted virtue, though judges and jurors might place the most entire confidence in his declarations, cannot be heard in a court of justice without oath. This is a universal rule of the common law, sanctioned by the wisdom of ages, and obligatory upon every court of justice whose proceedings are according to the course of common law."* [3]

The world has become more secular since the time of *Atwood*. Depending on the circumstances, witnesses may now have the opportunity to give their evidence by way of affirmation. In certain hearings, including arbitration hearings, a warning may be issued to the witness that their evidence is taken as if it were sworn, and they must be aware that the applicable laws governing the hearing will deal with the consequences of giving untrue evidence. Be that as it may, this article focuses on circumstances where an actual oath is properly given or said to have been properly given in international arbitration.

Central to this integrity is the administration of the oath, a solemn vow binding the witness to truthfulness. The giving of the oath arguably originates from the historical concept of *judicium dei* more than a thousand years ago. This practice is not merely a procedural formality; it embodies the gravity of the legal process and the witness's commitment to honesty and truthfulness. Any deviation from the prescribed manner of administering the oath can lead to severe consequences, including the potential invalidation of the procedure and the risk of setting aside the final award rendered in reliance on the subject testimony. Moreover, there may be a bar to the enforcement of an award if there has been a failure in required procedures.

There is a general distinction between hearings where the parties have for


[3] Atwood v Welton, 7 Conn 66, 72 (1828)

whatever reason acquiesced with a departure from the required procedures and a hearing where it is wrongly believed that the correct procedures have been followed. Indeed most domestic arbitration laws, will to the extent possible and not opposed to domestic public policy, allow for exceptions in the event of party consensus.

As will be well appreciated by those involved in arbitration it is common for a losing party to engage in a post award exercise where they parse every step of what had gone before looking for cause to set aside the award. In international arbitration, the complexity of administering the oath is magnified due to the diverse legal traditions and cultural practices involved. Unlike domestic arbitration, where procedures are relatively uniform, international arbitration must navigate a mosaic of legal requirements, religious considerations, and cultural sensitivities. This requires an in-depth understanding of not only the seat of the arbitration and the prospective seat or seats of enforcement, but also the judicial practices and procedural nuances across relevant jurisdictions.

In a recent arbitration case known to the authors, a novel argument emerged: can a witness swear on a Kindle? While the proposition might initially sound bizarre, it possesses a certain logic. Suppose the holy text is downloaded on a Kindle device, and the witness places their hand on the Holy Book downloaded on the Kindle device. Would this suffice? In some jurisdictions, this might hold merit. However, as experienced practitioners know, in others, it would be a recipe for disaster. This scenario is explored with the authors sharing insights from their international practice. This article is not intended to be used as a statement of the authors' positions on the matter but merely is discussive, for the purposes of educational and development.

The requirement for witnesses to take an oath before giving evidence has deep historical roots, tracing back to ancient legal systems. Today, the practice is typically codified in law and accounted for in most modern arbitration rules. The exact wording and procedure can vary, but the underlying principle remains the same: to affirm the witness's commitment to honesty and truthfulness under threat of penal sanction. Modern legal systems have stringent requirements for administering the oath. In common law jurisdictions, the oath must be taken in the presence of a legal authority, often with a specific form of words. Civil law jurisdictions may have different formulations but maintain the same emphasis on the witness's duty to tell the truth, and engagement with a religious faith or belief

system they hold true by which they are bound.

While some regions may be more secular and adaptable to modernization than others, there remains a significant divide in territories where international arbitration is in high demand. This divide concerns the fundamental requirements for administering an oath, especially a religious one, particularly if witnesses subscribe to a religious faith or belief system. The question arises whether anything other than a bound religious text or Holy Book is acceptable. Traditionally, it was widely believed that a believer would not risk divine wrath by lying under a religious oath taken on a Holy text. To many, this rings true. However, secularism may have softened this stance, particularly in regions where secularism is more pronounced.

Numerous test cases reveal that oaths not properly administered according to required protocols have led to grounds for setting aside final awards. These awards were rendered in proceedings where witness evidence was either poorly administered or mal-administered. Therefore, ensuring the proper administration of the oath is crucial in maintaining the integrity of the evidence and the overall arbitration process.

**The Oath: Procedures and Implications**

The standard procedure for taking the oath involves the witness swearing or affirming their intention to tell the truth. This process usually requires the witness to hold a religious text or make a solemn declaration. Any deviation from this procedure can have significant implications in the event of a challenge on ratification and enforcement of a final award. The position on the administration of oaths is not uniform across jurisdictions, making it apt for international practitioners to seize every opportunity to further their own understanding of requirements to be met. This involves examining not only the relevant laws at the seat of arbitration and the prospective seat of enforcement but also insight into the judiciary's practices.

**UNCITRAL Model Law**

The UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006 (the "Model Law"), has been widely adopted by numerous countries, either wholly or partially. Alongside the New York Convention on the

Recognition and Enforcement of Foreign Arbitral Awards 1958, it remains one of the most influential instruments in international arbitration of the last 100 years. While there is no universal uniformity across Model Law jurisdictions, the United Nations Commission on International Trade Law (UNCITRAL) has achieved its primary goal of harmonization through the widespread acceptance of the Model Law as a foundational reference point. Fundamentally, under the Model Law, the parties involved are free to agree on the procedures to be followed by the Arbitral Tribunal during proceedings. In the absence of such an agreement, and subject to the provisions of the Model Law, the Arbitral Tribunal may conduct the arbitration in a manner it deems appropriate.

Beyond the core Model Law, additional guidance is available through documents such as the UNCITRAL Notes. Paragraph 126 of the UNCITRAL Notes on Organising Arbitral Proceedings addresses the question of whether oral testimony will be given under oath or affirmation, and if so, in what form. It notes: *"Arbitration law and practices differ as to whether oral testimony must be given under oath or similar affirmation of truthfulness. In some legal systems, the arbitral tribunal may in its discretion require witnesses to take an oath. In other legal systems, oral testimony under oath is either unknown in arbitration or may even be considered improper, as only an official such as a judge or notary is empowered to administer oaths. In such circumstances, the witness may simply be asked to affirm that they will testify truthfully. It may be necessary to clarify who will administer any oath. Where applicable, the arbitral tribunal may draw the witnesses' attention to potential criminal sanctions for giving false testimony*."[4]

**United Kingdom**

In the United Kingdom (UK), while the approach is more flexible, procedural compliance is still paramount. The Arbitration Act 1996 offers a coherent and modern framework for domestic and international arbitrations seated in the UK. The Act also sets out the principles that underlie arbitration and arbitration law in the jurisdiction. Subject to the mandatory provisions of any applicable law to the dispute, the London Court of International Arbitration (LCIA) rules are permissive and do not require an Arbitral Tribunal to administer an oath or affirmation to any witness prior to oral testimony.[5]

[4] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf

[5] Rule 20.8, LCIA Arbitration Rules 2020

The UK has a standalone Oaths Act 1978 and the Equality Act 2010. The Oaths Act permits witnesses to either swear a religious oath or make a solemn affirmation, depending on what binds their conscience. Religion or belief is a protected characteristic under the Equality Act 2010, encompassing both religious and philosophical beliefs or the absence thereof. The UK's approach is underpinned by domestic public policy on anti-discrimination, including (of relevance to this article) religious diversity and the absence of belief.

**The Republic of Ireland**

The Republic of Ireland's 2010 Arbitration Act comprises of 32 sections and a number of schedules; at schedule 1 it adopts the Model Law into Irish Law subject to specific provisions. The 2010 Arbitration Act allows for flexibility in how oaths or affirmations are administered. According to Section 14 of the Act, parties to arbitration may agree on a different approach to taking evidence, which includes how oaths or affirmations are administered. In the absence of such agreement, the Arbitral Tribunal is empowered to direct that a party or witness be examined on oath or affirmation, and may administer oaths or affirmations for the purpose of taking evidence in proceedings before the Arbitral Tribunal. The witness has the option to either swear a religious oath or make a solemn affirmation, depending on their personal beliefs. This flexibility ensures that the procedure respects the individual's conscience. While an oath can be religious, it is not required to be so; a non-religious affirmation is equally valid under Irish law.

**Kingdom of Saudi Arabia**

In 2012, through Royal Decree M/42, the Kingdom of Saudi Arabia (KSA) enacted a new arbitration law broadly modelled on the Model Law concerning the approval of the Law of Arbitration[6] and a new Law of Evidence[7]. This was supplemented by the KSA Enforcement Law[8] to address all aspects of enforcement of domestic and foreign judgments and awards in the Kingdom. Article 38 of the KSA Arbitration Law states that, notwithstanding a choice of law

[6] Saudi Arabia Royal Decree No. M/34 of 2012 Concerning the Approval of the Law of Arbitration (the "KSA Arbitration Law")
[7] Saudi Arabia Royal Decree No. M/43 of 2021 promulgating the evidence law (the "KSA Law of Evidences")
[8] Saudi Arabia Royal Decree No. M/53 of 2012 promulgating the enforcement law (the "KSA Enforcement Law")

other than that of KSA, any arbitration conducted pursuant to its terms must not (*inter alia*) contravene a judgment or order issued on the same subject by an authority of competent jurisdiction in KSA, or the provisions of Sharia and public policy. Article 25 requires procedural rules governing arbitration to comply with Sharia, including the requirement for witnesses to take an oath before giving evidence.

The new Law of Evidence recognizes the evidential value of digital evidence, equating it with traditional evidence. The law outlines mechanisms for testimony, including various forms of oaths such as the Decisive Oath[9] and Suppletory Oath[10], emphasizing the importance of oaths in refuting evidence. The Saudi Centre for Commercial Arbitration (SCCA) Arbitration Rules 2023 permit but do not expressly require the Arbitral Tribunal to administer an oath or affirmation to any witness prior to examination.[11] The Arbitration Law does not explicitly reference the use of technology for conducting hearings, leaving it to the parties to agree on the procedures.[12] The SCCA 2023 rules give the Arbitral Tribunal discretion to determine the most effective format for hearings, including remote hearings.

**United Arab Emirates**

In the United Arab Emirates (UAE), there was a period when strict adherence to oath-taking formalities was paramount. The Federal Civil Procedures Law No. 11/1992 (CPL) required arbitrators to administer an oath to witnesses, and awards could be annulled for procedural irregularities. This requirement was repealed with the issuance of the Federal No. 6 of 2018 on Arbitration (the Federal Arbitration Law or FAL), which is largely based on the UNCITRAL Model Law and does not mandate the administration of oaths. It does however provide that *"Unless otherwise agreed by the Parties, the statements of the witnesses (including experts) shall be heard according to the applicable laws in the*

[9] The evidence is to be presented by the plaintiff while the oath is to be taken by the defendant who denies the charges. The Decisive Oath is the oath taken by a defendant to refute the claim of a plaintiff. The defendant instead of taking oath may request that the plaintiff to take the oath for asserting the truth of his claim according to the provisions of the Law of Evidence. The adopted rule in this type of oath is that however requested to take oath the judgment should be for his favour if he takes the oath.

[10] The oath to be taken by the plaintiff to complete his claim and the plaintiff has no right to request the defendant to take oath.

[11] Article 30(4), SCCA Arbitration Rules 2023

[12] Article 25, KSA Arbitration Law

*State"* (Article 33 (7)), raising the question as to application of mandatory laws of evidence of the state to evidence in arbitration, and the extent to which such a requirement may be contracted out of.

Articles 41, 43, and 46 of the Federal Law of Evidence (Law No. (10) of 1992), requires a witness to give an oath in accordance with their religious beliefs. The 1992 Federal Law of Evidence was replaced by the new Federal Decree-Law No. (35) of 2022 Promulgating the Law of Evidence in Civil and Commercial Transactions. Articles 76 and 96 of the new Law of Evidence, provides that an oath may be administered "*according to the practices observed in the witness's religion or belief, if he requests so*." Despite the permissive language, UAE courts have frequently invalidated arbitration awards based on witness evidence not given under the customary oath. Subject to any mandatory provisions in the procedural law applicable to the seat of arbitration, pursuant to said Article 27.6, the Arbitral Tribunal may require witnesses to swear the oath before giving oral evidence. The Arbitral Tribunal can conduct examinations in person, by telephone, or through virtual communication, provided it verifies the witness's identity.

Article 28(2)(b) of the UAE Arbitration Law expressly provides the Arbitral Tribunal with powers to "*hold arbitration hearings with the Parties and deliberate by modern means of communication and electronic technology*," unless otherwise agreed by the parties. Article 33(3) of the UAE Arbitration Law further emphasises that hearings may be held through modern means of communication "*without the physical presence of the Parties at the hearing*." The FAL was amended by Federal Law No. (15) of 2023 (the Amendment Law), allows the Arbitral Tribunal to hold hearings using modern communication technology, reflecting the shift towards virtual hearings post-pandemic.

The point is pertinent to current debate, in a future age of '100% green arbitrations', does the existing framework support the administration on an oath on a computer, a tablet or a phone subject that the relevant Holy Book or Holy Text is properly reproduced from cover to cover.

## Qatar

The Qatari Arbitration Law[13], largely adopting the UNCITRAL Model Law, distinguishes itself from other Gulf states by not requiring witnesses to testify under oath in arbitral proceedings. Article 24(2) of the Qatari Arbitration Law states, *"The Arbitral Tribunal shall hear the witnesses and experts without swearing an oath."* The Qatar International Centre for Conciliation and Arbitration (QICCA) Rules of Arbitration 2012 align with this approach.

Unlike in the UAE, Qatar has not modernised the Arbitration Law following the Covid-19 pandemic. The Qatari Civil Procedural Law does not expressly mandate physical hearings, and practices have shifted towards allowing virtual hearings. QICCA Rules have no specific rules on fully virtual hearings. Article 29.4 of the QICCA Rules however allows for the examination of witnesses (including expert) witnesses through modern means of audio and video telecommunication, supporting the position that physical presence at the hearing is not always necessary.

## Technology and Globalization

Failure to administer the oath correctly can lead to the evidence being challenged, potentially rendering the testimony invalid and subsequent findings based on that testimony invalid. Availing of the oath traditionally requires that there be a physical holy book in the hearing room. In some instances panels may have certain holy books with them in the event they are needed. But it is difficult allowing for the diversity present in many jurisdictions for a panel to cover all potential eventualities. It could be that at a preliminary meeting the panel has placed the onus on the party representatives to identify the applicable holy book that each witness will need and to be responsible for ensuring that (as applicable) the Bible, Quran, Vedas, Pali Canon, Torah and Guru Granth Sahib is available. One discrete issue that can be seen in hearings is what to do if the relevant holy book is not available. Some practitioners in their junior years may have been sent at haste to the local library or book shop to source a holy book minutes before a hearing is to be heard. In a more modern age queries can arise as to whether an electronic copy of (say) the Holy Book or Holy Text will suffice. This can introduce administrative burdens to ensure the digital version is accurate and maintains the

[13] Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law

sanctity of the swearing exercise. Worst! Due process issue. What is the correct approach when such a suggestion is made?

The International Congress for Commercial Arbitration (ICCA) recently investigated whether a right to a physical hearing exists in international arbitration. The project examined procedures in 77 jurisdictions that are party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Although a right to a physical hearing is not expressly provided in most jurisdictions, drawing from the principles of civil procedure law and constitutional guarantees, in some territories it may be inferred. Jurisdictions, such as England and Wales, Scotland and Singapore, qualify the grounds for setting aside arbitral awards with a further requirement that the violation of the parties' agreement has had a material impact on the outcome of the case or caused substantial injustice. Jurisdictions such as the UAE give arbitrators the discretion to hold remote hearings, in turn expanding on the United Nations Commission on International Trade Law (UNCITRAL) Model Law by making it clear that the appropriate place for a hearing can include a remote tribunal. Others, like Qatar do not to date draw a distinction between physical and remote hearings, Sharia compliance a subject of debate in KSA.

**Conclusion – I Swear by Kindle Scenario**

As Scottish poet Robert Burns noted 'The best-laid schemes o'mice an' men. Gang aft-a-gley' In the language of 2024 notwithstanding careful planning something may still go wrong. The hearing with no holy book is not a far-fetched scenario. With the outlier of the pandemic aside the overall position is that book sales are in a long-term decline. Many professional journals have become online only the journal of the Chartered Institute of Arbitrators taking that step in 2019. The ubiquity of zoom, e-mail, laptops, mobile phones and 'eReaders' such as Kindle mean that it is easy to forget that a physical holy book may be needed. This is indeed the case where the hearing within which an actual copy of the Bible or Quran may be needed is increasingly likely to be 'paperless.' Changes to legislation and arbitral rules can be slow moving. If there is a requirement to swear the oath on a physical book that needs to be followed and adhered to, the failure to do so runs the real risk that any subsequent award relying on such testimony will be held invalid.

The phrase "*I Do Solemnly Swear by Kindle*" may well become a future practice

as AI and digital solutions continue to revolutionize the practice in international arbitration. However, in the current transitional period where old and new systems coexist, the sanctity of the swearing exercise could be irrevocably undermined by the use of digital methods.

That all said, it may not be long our dear friend Kindle will make a guest appearance at witness hearing. As Lord Denning eloquently put it:

*"If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both."*[14]

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[14] Alfred T. Denning, *The Discipline of Law* (1979), p. 296.

# Third Party Funding in the Indian Arbitration Scenario

***By: Mr. Krrishan Singhania, Ms Avni Singhania & Mr. Aayush Shah***

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## 1. Introduction

Third-party funding (**"TPF"**) is revolutionizing access to justice, particularly in commercial disputes and high-stakes areas like construction arbitration, where the financial burdens of litigation can be prohibitively high. Under a TPF arrangement, a neutral and unrelated party provides financial support to one of the disputing parties, covering costs such as legal fees, regulatory procedural fees, expert witness expenses and all other ancillary legal expenses. This funding model not only mitigates financial barriers for claimants but also becomes investment opportunities for financers who receive a portion of the favorable award.

Globally, TPF has evolved as a viable financing model, especially in jurisdictions where legal frameworks now expressly permit it, like Singapore, Australia, United Kingdom, India etc. However, while countries like Singapore have laid the groundwork for regulated TPF, in India, TPF remains relatively unregulated, relying on traditional contractual agreements to set the terms. This article explores the role of TPF in arbitration in India, examining global and Indian perspectives and addressing challenges related to regulation, ethical considerations, and practical implementation.

## 2. Historical and Legal Perspectives on TPF in Key Regions: The Indian Scenario

India's approach to third-party funding reflects a gradual shift towards acceptance of TPF, which is marked by judicial interpretation and selective legislative amendments. Historically, third-party funding was viewed with caution, given concerns about champerty and maintenance—two doctrines that aimed to prevent unethical profiteering from legal claims. Maintenance is an instance when a third-party having no actual interest, assists in litigation with money or other means to enable either party to a suit to prosecute or defend it.[1] According to the Black's Law Dictionary, the champerty is an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps ascertain the claim of the litigant or party as consideration intended for getting part of any judgment proceeds[2]. However, Indian courts have long maintained a more

[1] Meena R.L., 'Textbook On Contract Law Including Specific Relief', 1st edition, Universal Law Publishing 2008

[2] Bryan A. Garner, Black's Law Dictionary, 9th edition, West 2009.

flexible approach to TPF than many western jurisdictions, allowing funding arrangements under specific conditions only.

### 2.1. Trajectory of case laws and recognition of TPF by Indian Judiciary

TPF in India was first considered in colonial-era cases, notably in **Ram Coomar Coondoo v. Chander Canto Mookerjee.**[3] In this landmark case, the Privy Council upheld a funding agreement that allowed a financier to claim a portion of the recovered property, provided it was not "extortionate or unconscionable." This ruling set an enduring precedent, distinguishing Indian law from English law, where champertous agreements were traditionally deemed void.

Through this judgment the Indian courts thus recognized the utility of TPF, allowing it where it served an equitable purpose and did not exploit the litigant. This early acceptance paved the way for third-party funding agreements in both litigation and arbitration, especially as courts continued to uphold this precedent in subsequent cases. For instance, in the case of **Harilal Nathalal Talati v. Bhailal Pranlal Shah**[4]*,* the Bombay High Court reinforced that while TPF was legal, agreements that offered disproportionate returns to funders were invalid as "opposed to public policy."

In the case of **Bar Council of India v. A.K. Balaji**[5], the Supreme Court of India underscored that while lawyers are prohibited from financing their clients' litigation, third-party funding by non-lawyers remains permissible. This decision confirmed the judiciary's favorable stance toward TPF, marking a crucial distinction between third-party financiers and legal professionals. As a result, financiers without direct legal involvement can fund disputes, incentivizing investors to explore litigation and arbitration funding in India's burgeoning dispute resolution market.

In the landmark case of **Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc.**[6] the Delhi High Court reinforced TPF's acceptance in Indian arbitration, ruling that third-party funders, if not signatories to an arbitration agreement, cannot be held liable for adverse cost awards. Here, the court

[3] (1877) ILR 2 Cal 233.
[4] AIR 1940 Bom 143.
[5] AIR 2018 SC 1382.
[6] 2023 SCC OnLine Del 3191.

distinguished Indian law from English cases such as **Arkin v. Borchard Lines**[7] and **Excalibur Ventures LLC v. Texas Keystone Inc**[8] which impose cost liability on funders. This decision underscores the autonomy of funders in Indian arbitration and highlights the judiciary's cautious approach to imposing cost liabilities.

India's evolving stance on TPF has encouraged the establishment of several funding firms like LitiCap and Legal Pay, which evaluate cases on their potential for favorable outcomes and manage risk through strategic selection.

### 2.2. Legislative Amendments and the Road to Regulation

Even though judicial pronouncements of the apex court have recognized TPF as a precedent, it was imperative for an amendment in the legislation to accommodate TPF in India's legislation.

In some Indian states, amendments to the Civil Procedure Code, 1908 (**"CPC"**) further validate the role of TPF in civil suits. States like Uttar Pradesh and Madhya Pradesh have updated **Order XXV, Rule 1** of the CPC, making it mandatory for courts to order security for costs when a plaintiff is financed by a third party. Similarly, in Tamil Nadu and Orissa, the Code allows for such funding arrangements, provided they are not "opposed to public policy," mirroring early case law requirements for fair funding.

These amendments, while specific to civil suits, provide a foundation for TPF regulation across different kinds of disputes and States of India and indicate a need for a comprehensive national framework that applies to arbitration as well. With regulatory guidance, India can facilitate TPF within arbitration, potentially clarifying issues around cost allocation, funder involvement, ethical boundaries, and confidentiality issues critical to protecting the rights of the litigants and maintaining integrity of arbitration.

## 3. International Perspective on TPF Regulation

Internationally, TPF regulation varies widely, with jurisdictions such as Singapore leading in formulating structured regulatory frameworks. In Singapore the *Civil*

[7] [2005] 1 WLR 3055.
[8] [2016] EWCA Civ 1144.

*Law (Amendment) Act 2017* legalized TPF for arbitration, limiting funding to "Qualifying Third-Party Funders" that meet specific financial and ethical criteria. This approach provides a balanced model, ensuring funders' reliability while protecting claimant rights. Singapore's regulations mandate disclosure of funding arrangements, promoting transparency in arbitration while addressing ethical considerations.

Singapore's approach to third-party funding marks a significant step towards in the global acceptance of TPF. With the enactment of the Civil Law (Amendment) Act 2017, Singapore amended its Civil Law Act, 1909 to allow TPF specifically for arbitration proceedings, effective as of March 1, 2017. This was a pioneering move in Asia, reflecting Singapore's commitment to becoming a leading hub for international arbitration hub.

The Act outlines strict norms guidelines for funders, defining "qualifying third-party funders[9]" stating that their operations are not against public policy.[10] They must meet specific requirements related to their experience, financial capacity, and professional conduct. Only such qualifying entities can offer funding, a safeguard that ensures funders are adequately resourced and have a strong understanding of the arbitration process. These qualifications provide balance by reducing the risks of exploitation or undue influence that might arise from an unrestricted funding market.

Moreover, the amendment in the Civil Law Act restricts TPF exclusively to arbitration, leaving litigation funding outside its scope. This decision reflects a cautious but progressive stance, enabling TPF in scenarios where it aligns with Singapore's pro-arbitration policy while limiting potential for abuse in other judicial settings. This framework has bolstered Singapore's as a preferred choice of attractiveness as a venue for international arbitration in Asia, providing disputing parties with confidence in the legitimacy and transparency of TPF.

Whereas in the **United Kingdom** there is a self-regulatory approach, with the *Association of Litigation Funders* (ALF) overseeing funder conduct. The ALF's Code of Conduct requires funders to maintain financial stability, non-interference in litigation strategy, and transparency with claimants.

[9] Section 5B(10), Civil Laws Act, 1909
[10] Section 5B(2), Civil Laws Act, 1909

## 4. Challenges and Ethical Considerations in Third-Party Funding

While TPF offers significant advantages, it also raises critical ethical and operational challenges that if left unaddressed, could affect its credibility and fairness. These challenges are especially seen where cases are typically complex and involve multiple stakeholders, each with potentially conflicting interests.

### 4.1. Conflicts of Interest and Control over Proceedings

One of the primary concerns surrounding TPF is the potential conflict of interest that arises when a third-party funder becomes involved in the arbitration process. In construction disputes, the funder's financial stake may incentivize them to influence the litigation strategy or push for specific outcomes that maximize their return. For instance, a funder might prefer an aggressive approach or avoid early settlement negotiations, even if a settlement might be in the best interest of the funded party.

While funders are generally contractually bound not to interfere directly with legal strategies, these provisions are challenging to enforce, and funders often exercise indirect control, such as through approvals for case expenses or strategic decisions. This control can compromise the funded party's autonomy, creating ethical concerns about impartiality in arbitration.

Many funders bring industry knowledge, which can prove advantageous in strategic planning and pre-arbitration negotiations, making them more than just financial backers. This involvement enables claimants to refine their case strategies, boosting the potential for favorable outcomes. However, this level of involvement also raises concerns around funder influence in litigation strategy. Ensuring that funders do not unduly influence decision-making processes is crucial for preserving the claimant's autonomy and the arbitration's integrity.

### 4.2. Confidentiality and Privilege Concerns

Another issue that is highly pertinent in TPF arrangements is the risk of breaching confidentiality or waiving legal privileges. In arbitration, confidentiality is a cornerstone, especially in construction disputes where proprietary data, engineering plans, and financial details are typically involved. Sharing information with a third-party funder can inadvertently risk these confidential details, and in

some cases, courts may even determine that attorney-client privilege is waived once sensitive information is shared with an external funder.

The complexity of construction arbitration heightens the risk, as funders often require extensive access to case details to evaluate the investment's viability. For TPF to remain sustainable, legal frameworks will need to define clear boundaries regarding the handling of confidential information between funders, legal teams, and claimants to preserve privilege and protect sensitive data.

To address this, globally TPF agreements are often structured to limit funder access to only necessary documents, and communication between funders and claimants, and the claimant is protected by litigation privilege. However, as the use of TPF expands, formal regulations around confidentiality and privilege in arbitration are needed to ensure consistency in how funders and claimants handle privileged and confidential information.

### 4.3. Unregulated Fee Structures and Fairness

Fee structures in TPF are generally contingent, meaning that the funder is compensated based on the arbitration's outcome. However, if these structures are not regulated, funders may impose disproportionately high fees or claim substantial portions of the award, leaving the funded party with less than expected. This is particularly critical in arbitrations where costs tend to escalate, and the financial stakes are already high.

India currently lacks statutory guidance on what constitutes a fair fee structure for TPF, and this gap could lead to exploitative practices. Drawing from cases like **Harilal Nathalal Talati v. Bhailal Pranlal Shah**[11], the Indian judiciary may consider fee agreements unconscionable if they are excessively disproportionate. However, without specific regulations, parties must rely on court discretion, which may vary and add to uncertainty in dispute financing. This points out to a need of regulatory framework through acts or rules by administrative authorities that supervise the fee structure and deter it from being disproportionate.

[11] AIR 1940 Bom 143.

### 4.4. Ethical Challenges in Contingency Models and Lawyer Involvement

While TPF allows access to justice, it also raises ethical issues, especially in jurisdictions where contingency fees are prohibited for lawyers. In India, for instance, lawyers cannot take cases on a contingency basis, meaning they cannot directly benefit from a favorable outcome. However, TPF may indirectly impact legal representation if funders push lawyers toward specific strategies or align their interests with the funder rather than the client.

To address this, some jurisdictions, like the United Kingdom, have adopted self-regulatory guidelines mandating minimal interference by funders in case strategy. While Indian law does not yet recognize this model, adopting similar guidelines could help manage the ethical dimensions of TPF, aligning funders' interests with the client's goals and maintaining the independence of legal counsel.

### 4.5 Cross-Border Third Party Funding

When a third party funder is investing in another country, respective foreign exchange laws will also be applicable in addition to the already binding ones. In case of India, the Foreign Exchange Management Act, 1999 (FEMA) comes into play when there are investments or funding from other jurisdictions in India. The FEMA does not explicitly put a bar on TPF in India, neither does it classify it, nor there are, at present, any RBI guidelines in support or prohibition of the same. The FEMA classifies transactions as Capital Transactions [12] and Current Transactions.[13] With a bifurcation in the type of transactions, each transaction is treated differently under the Act. The treatment of TPF under FEMA would be based on the type of transaction it is treated as. If the TPF is a Current Account Transaction, it will be allowed unless the FEMA prohibits or controls it.[14] To the contrary, if TPF is being classified as a Capital Account Transaction, if specifically permitted, the FEMA generally prohibits it.[15] There exists a legal vacuum due to the absence of any RBI regulation being specific to TPF or the FEMA laying down the recourse to regulate it.

[12] Section 2(i), Foreign Exchange Management Act, 1999.
[13] Section 2(j) Foreign Exchange Management Act, 1999.
[14] Section 5, Foreign Exchange Management Act, 1999.
[15] Section 6, Foreign Exchange Management Act, 1999.

## 5. Recommendations for a Balanced TPF Framework in India

To harness the full potential of TPF while addressing the ethical and operational challenges it presents, India should consider implementing a balanced regulatory framework. This framework could enhance transparency, protect parties' interests, and promote ethical practices in construction arbitration. Here are a few recommendations that can guide the development of such a framework:

### 5.1. Establishment of Regulatory Guidelines

India should establish comprehensive regulatory guidelines for TPF that outline the qualifications of third-party funders, permissible funding arrangements, and transparency requirements. Drawing inspiration from the Singapore Civil Law (Amendment) Act 2017, which mandates the registration of qualifying funders and imposes obligations on them, India can create a framework that ensures funders operate within defined legal boundaries. Such regulations could include:

a. **Registration Requirements:** where only registered funders should be allowed to finance litigation or arbitration, ensuring they meet established financial and ethical criteria;
b. **Disclosure Obligations:** where Funders should be required to disclose their financial interests and fee structures clearly to the funded parties and their legal counsel, enabling informed decision-making. It may also be beneficial to disclose such information to the Arbitrator.

### 5.2. Ethical Guidelines for Funders and Lawyers

The introduction of ethical guidelines that govern the relationship between funders, legal representatives, and clients is crucial. These guidelines should address issues such as:

a. **Non-Interference in Legal Strategy**: Clearly outline that funders should not interfere with or control the litigation strategy of funded parties;
b. **Protection of Confidentiality**: Ensure that all parties understand the implications of sharing information with funders, promoting practices that safeguard confidentiality and privilege.

### 5.3. Enhanced Transparency and Fairness in Fee Structures

To prevent exploitative practices, India must implement regulations that ensure fairness in TPF agreements, particularly concerning fee structures. This could involve:

a. **Caps on Fees**: Establishing maximum limits on the percentage of awards that funders can claim, which could protect funded parties from excessive financial burdens.
b. **Standardized Fee Models**: Developing standardized fee models that funders can adopt, providing clarity and predictability to the parties involved.

### 5.4. Training and Education for Legal Practitioners

As TPF becomes more prevalent, legal practitioners must be equipped to navigate its complexities. Ongoing training programs should be instituted to educate lawyers on:

a. **Best Practices for Engaging with Funders**: Providing guidance on how to engage with funders while maintaining professional independence and upholding client interests.
b. **Understanding TPF Structures**: Educating lawyers about different TPF structures, potential implications, and ethical considerations to better advise their clients.

### 5.5. Judicial Guidance and Timely Resolution of Disputes

The judiciary plays a crucial role in shaping the TPF landscape. Courts should focus on:

a. **Proactive Case Management**: Adopting proactive case management techniques to handle arbitration challenges and TPF-related disputes swiftly, ensuring that the interests of all parties are balanced and protected.
b. **Clarifying Legal Precedents**: Providing clear legal precedents on TPF to guide future agreements and mitigate ambiguities, thus fostering a more predictable legal environment for funding arrangements.

As India is at a stage where it is considering regulatory models for TPF, Singapore's legislation could serve as an example, particularly for ensuring that funders do not interfere excessively in case of strategies for resolving disputes. This would maintain the claimant's control over their own case while allowing funders to invest in dispute resolution with defined expectations and responsibilities. However, the regulations shall be formulated, not only to restrict the funder's involvement but also ensure that their interests are well protected.

## Conclusion

As TPF continues to gain traction within the Indian legal landscape, it is imperative that the country develops a balanced and robust framework to govern its application in arbitration. By addressing ethical concerns, promoting transparency, and establishing regulatory guidelines, India can create an environment where TPF serves as a catalyst for greater access to justice and fair resolution of disputes. A thoughtful approach to TPF not only aligns with international best practices but also bolsters India's position as a viable forum for global dispute resolution.

In conclusion, the evolving nature of TPF presents both opportunities and challenges. By adopting a proactive and thoughtful regulatory stance, India can ensure that TPF contributes positively to the legal landscape, fostering an atmosphere of fairness, equity, and accessibility of justice.

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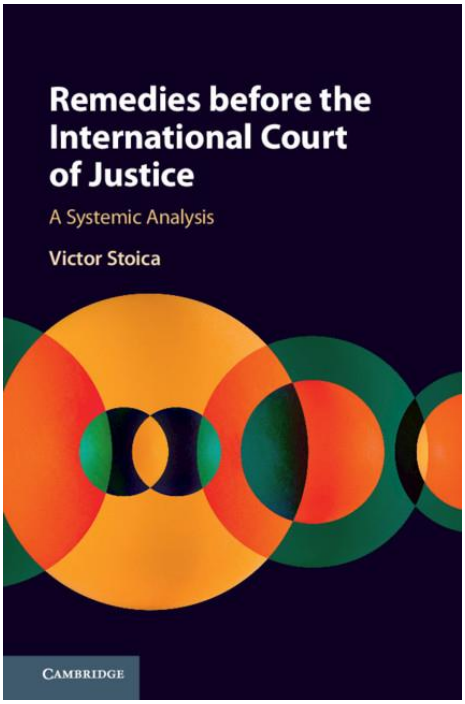


# Book Review – Remedies before the International Court of Justice: A Systemic Analysis

**Victor Stoica**

Cambridge University Press (2021)

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**Reviewed by Dr. Shahrizal M Zin, FCIArb, FAIADR, FMIArb**

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The remedies before the ICJ is a topic that continues to be of great interest to all international law practitioners. It is a specific topic on remedies that is important to highlight but appears to be under-ventilated by many publications on international law subjects. While many international law texts are typically laden with theoretical aspects, Victor Stoica takes a holistic approach by addressing the practical perspective of the law. In his book, Victor Stoica delves into this critical subject matter to provide a practical bird's eye view of the landscape of international law remedies. This approach shows the breadth of work and thinking that has gone into the book and is what makes it stand out. The beauty of this book is that if you have a thorny problem or a pressing issue to research on international law remedies, there will likely be something from this book that will guide you in the right direction. The book is centered around nine (9) chapters that take the reader through the provenance of the ICJ's remedies from theoretical and practical perspectives. Due to its specific theme on the availability of remedies at the International Court, this book is particularly relevant to advanced learners of international law (at the postgraduate level) or international law practitioners, stimulating them intellectually and keeping them engaged. This book provides a comprehensive analysis from the introduction to the conclusion,

which traverses the available remedies at the International Court, which makes for a helpful read in a single book. It is an ideal companion to the law of the ICJ, which is often covered as one of the topics in public international law books. My approach to this review is to highlight the main issues that every chapter addresses to stimulate the readers' interest in accessing the book's full content.

Victor Stoica begins by providing an overview of the Court's jurisdiction in **Chapter 1**. The key takeaway from this chapter is how the Court determines its competence to decide upon the applicable remedies in the absence of the state's consent on the power of the Court to decide upon the application of a particular remedy. This issue was first raised before the Permanent Court of International Justice (PCIJ) in the *S.S. Wimbledon Case* and *Chorzow Factory Case*, in which the PCIJ concluded that it had the inherent competence (jurisdiction) to grant remedies despite the state's preliminary objection. To this day, the challenge on the Court's or Tribunal's jurisdiction persists, albeit on various issues, at the ICJ, and the arbitration proceedings in situations where the parties' agreement is silent on the subject matter require exercising such jurisdiction.

Victor Stoica identifies the source of remedy in his **Chapter 2** on 'provisional measures.' The issue of provisional measures is well placed due to the increasing tendency of parties to request the indication of provisional measures, a trend first observed in the *LaGrand Case*. This case, which involved a dispute between Germany and the United States over the Vienna Convention on Consular Relations, is a significant example of the Court's use of provisional measures. The contentious point that the author analyses is whether the orders for provisional measures issued by the Court can include the remedies of international law and, if so, what remedies are permissible within the ambit of the provisional measures. Looking at the power of the International Court to grant provisional measures, the author highlights the issues concerning the binding effect of orders for provisional measures. As a result, the state that is breaching an international obligation must perform the orders for provisional measures that may include remedies for international law. It bears noting that the remedies of international law seek to preserve the parties' rights in dispute pending the Court's judgment on the case's merit.

**Chapter 3** deals with the versatile remedy that stems from the power of the International Court to issue 'declaratory judgments,' which is the most requested remedy for a wide range of disputes. Declaratory judgments are a unique form of remedy that the Court can issue. The primary function of declaratory judgments is that they confirm the pre-existing rights of states with

no coercive decree. In simpler terms, a declaratory judgment is a Court's statement of the rights or duties of the parties without ordering any action to be taken or awarding any damages. Despite lacking a coercive character, in the sense that it does not always imply a specific act on behalf of the disputing states, it remains an efficient remedy. This is evident by Article 59 of the Statute of the ICJ that the declaratory judgment is binding upon the parties in the dispute, even if it does not have an executory character. This explains why the Court is inclined to render declaratory judgments rather than coercive remedies such as compensation, specific performance, and restitution in kind. In the remaining parts of the chapter, the author explains in detail the types of declaratory judgments, starting from 'declarations of rights, declarations of applicable law and responsibility' with specific reference to decided cases in this respect.

In **Chapter 4**, Victor Stoica identifies the controversies regarding specific performance and its availability as a remedy of international law before the Court, starting with the power of the Court to order it and its interaction with other remedies. Although the terminology is not necessarily used before the Court, specific performance is an important remedy that contributes to the re-establishment of the status quo ante, being the first effect of the breach. The vague approach of the Court concerning this remedy is understandable, given the sensitivity due to its coercive nature. Nevertheless, the author highlights that the Court has the power to order it, as illustrated in a number of cases, notably the *Gabčíkovo–Nagymaros Case*. This case, which involved a dispute between Hungary and Slovakia over a dam project on the Danube River, is a significant example of the Court's use of specific performance as a remedy. The Court ordered Slovakia to continue with the project, which it had unilaterally suspended, as a form of specific performance.

**Chapter 5** is dedicated to the prospective remedy concerning ‘cessation, assurances, and guarantees of non-repetition.' Cessation, assurances, and guarantees of non-repetition represent the remedies of international law through which the Court decides that states must discontinue a breach of an international obligation and must promise that the same breach will not occur in the future. However, questions have been raised about the availability of cessation as a veritable remedy of international law, considered a form of injunctive relief, which is not a remedy before the Court. Moreover, the Court has rarely granted cessation as a remedy, even though it has been requested by the parties in the disputes, save for the exceptional circumstance in the *Nicaragua Case*, where the Court did not shy away from determining that the obligation to cease exists and must be complied with by the USA. Despite this vagueness, the author

demonstrates that they are veritable and autonomous remedies that apply the same force as restitution, compensation, or satisfaction.

**Chapter 6** explores the 'restitution in kind,' which the Court has not adequately clarified or interpreted. In contrast to the forward-looking remedies of cessation, restitution in kind has been described as the backward-looking remedy, which implies that the injuries should be restored in their material form. In this chapter, the author clarifies certain interpretational uncertainties related to restitution in kind which is distinguishable from *restitutio in integrum*. The author succinctly summarises the various reasons the Court rarely grants restitution in kind. Firstly, this remedy is less requested by applicant states, which limits the Court through the parties' submission when rendering its decision. Secondly, the particularities of the disputes submitted before the Court render restitution in kind either impossible or inappropriate to perform. Therefore, restitution in kind is available in a narrower scope of disputes, such as the ones involving illegal expropriation on the seizing of property.

**Chapter 7** outlines the most frequent form of reparation on 'compensation.' Ironically, despite being the most sought-after remedy, the Court has granted compensation only in a handful of cases, demonstrating its reserved attitude towards this remedy. The author dissects the scope of compensation a state may claim based on four (4) areas. Firstly, 'material damages' as illustrated in the *S.S. Wimbledon Case*; secondly, 'moral damages' in the *Diallo Case*; thirdly, 'direct and indirect injury' in the *Corfu Channel Case*; and finally, 'environmental damages' in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area between Costa Rica and Nicaragua*.

**Chapter 8** sets out the final remedy in the form of 'satisfaction.' It bears emphasis that satisfaction is the appropriate remedy for injuries that are directly caused to states and cannot be quantified because they are not material. In this chapter, the author argues that satisfaction is a more abstract remedy that can be adapted according to each case's specificities, provided that compensation or restitution cannot be applied. In other words, satisfaction could be considered an exceptional remedy applicable only if restitution and compensation are unavailable. For example, 'the declaration of wrongfulness' as satisfaction is the remedy the Court has awarded in the *Application of the Genocide Convention Case*, either on a stand-alone basis or in conjunction with other remedies.

Finally, in **Chapter 9**, the author provides his final analysis in relation to cases before the International Courts and Tribunals in which the interpretation

and clarification of international law remedies are made. The author observes that the fragmentation of international law and the proliferation of International Courts and Tribunals have influenced the application of certain concepts, including international law remedies. In this final chapter, the focus of analysis is directed toward the mechanism of assessment of moral damages in the *Diallo Case* and pecuniary satisfaction in the *S.S. 'I'm Alone' Case*, the *Rainbow Warrior Case*, and the *Lusitania Cases*. The chapter concludes with the proposition that International Courts or Tribunals should observe each other's practices to bring coherence to the interpretation and application of legal concepts that resolve international disputes.

Having carefully reviewed the above chapters, the impressive part of the author's work is that he manages to enlighten the blurry lines of the remedies, which are often uncertain when it comes to the availability issues of such remedies in international law. Thus, the Court must cautiously exercise its power to verify the availability of such remedies on a case-by-case basis. Ultimately, it answers the fundamental question of whether the Court applies the remedies of international law and maps the difference in approach between the Court's practical purpose of resolving disputes and the theoretical perspective preferred by the International Law Commission (ILC). Victor Stoica's book is a welcome work of scholarship extending the breadth of international law literature. It is an excellent book and a very welcome first port of call for all things to do with international law remedies. What makes this book a fantastic read is the systematic analysis of the remedies through the jurisprudence of cases that encountered issues in granting such remedies. The wealth of insights in this book offers significant value for the parties who seek the appropriate remedies at the International Court for dispute resolution. Undoubtedly, this book makes its way to the shelves of many avid researchers and busy practitioners.

## Author's Profile

Shahrizal M Zin, PhD, FCIArb, FAIADR, FMIArb, is a legal academic and alternative dispute resolution (ADR) practitioner. As a Public Service Department scholarship recipient, he read law at the University of Malaya. He graduated with LLM from the University of Malaya and held a PhD from Monash University, Australia. He has been awarded a diploma in International Commercial Arbitration (DipICArb) from the Chartered Institute of Arbitrators (CIArb) UK and was admitted as a fellow in 2016. He is also a fellow

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