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Improving Access To Justice For Corporates Under The New Arbitration Regime In Nigeria: Is Third Party Funding The Game Changer?

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Introduction:

On the 10th of May 2022, the arbitration community in Nigeria awoke to the cheering news that the Senate of the Federal Republic of Nigeria had passed the Arbitration and Mediation Bill 2022, after a 16-year struggle to have a reformed arbitration legislation tailored to meet the need of users, especially the corporates. Although the Bill still needs to be assented to by the President of the Federal Republic of Nigeria to become Law, the arbitration community is right to commemorate the feat of its passage.

Third Party Funding: The Most Innovative Provision in the Bill

The Arbitration and Mediation Bill has several innovative provisions such as the provision regarding emergency arbitration, the power of both the Arbitral Tribunal and Courts to issue interim measures, joinder and consolidation, clear guidelines for the award of interest where the parties fail to agree, the award review tribunal among others. However, the most innovative provision in my opinion is the codification of the tribunal's power to award costs incurred in the arbitration, including cost of obtaining third party funding, in favour of the prevailing party in any arbitration, and the express abolition of the torts of champerty and maintenance. This is because even though arbitration is the preferred dispute resolution mechanism for commercial disputes, the funds to institute and defend arbitration claims has always been a major challenge for many corporates, as the rising costs of instituting and defending claims places a strain on their balance sheets. In fact, a General Counsel of one of Nigeria's leading real estate companies recently noted at the 6th ICC Africa Conference 2022 which held in Lagos on the 1st -3rd June 2022, that her company's litigation costs rose to 30% of the company's annual budget.

Furthermore, several companies are still trying to recover from the financial shocks which they suffered as a result of the Covid-19 pandemic. So, third party funding is no doubt a huge game changer for corporates in Nigeria that are seeking to institute or defend arbitration claims but either have no financial means to do so or simply prefers not to use funds meant for their operations to finance arbitration.

What is Third Party Funding?

For the benefit of those who are not too familiar with the term, third party funding generally refers to a procedure whereby a third party who has no underlying interest in the outcome of a dispute or arbitration proceedings provides the financial resources for a claimant or counter-claimant to initiate or defend the claim. [1]The funds provided by the third party funder will be used to cover the cost of the claimant's legal fees as well as other expenses related to the arbitration including fees paid to expert witnesses. In return for the funds provided, the funder will receive a percentage of the award if the claim or counterclaim turns out successful.

Third party funding is not new to international arbitration, however, there has been a recent upsurge in the number of funders, law firms working with funders, funded cases and reported cases that were funded in international arbitration.[2] Additionally, third party funding in international arbitration is increasingly being used not only in cases involving commercial parties but also in disputes between states and commercial parties, as well as state-to-state arbitrations. For example, International Centre for Settlement of Investment Disputes (ICSID) has recently included rules on third party funding in its proposed updated rules on a variety of key topics, because it had noted an 'increased resort' to funding, with at least 20 recent ICSID cases involving third-party funding.[3] Interestingly, Nigeria has had to rely on third party funding to institute one of its ICSID cases.[4]

Advantages of Third Party Funding for the Nigerian Arbitration Market

Third party funding has the potential to transform the landscape of arbitration in Nigeria. This is because most businesses and companies are experiencing a shortage of cash flow and will bask at an opportunity to access external funding to finance the cost of instituting arbitration claims. Interestingly, the report of the ICCA – Queen Mary Task Force on Third Party Funding in International Arbitration quoted two Learned Professors who opined that "[The] four main forces driving the sharp increase in the demand for third party funding are: (1)] increasing access to justice (2)] companies seeking a means to pursue a meritorious claim while also maintaining enough cash flow to continue conducting business as usual ; (3)] worldwide market turmoil and uncertainty, which has inspired investors to seek investments that are not directly tied to or affected by the volatile and unpredictable financial markets; and (4)] third-party funding as corporate finance, whereby corporate entities enter into bespoke arrangements as a means of raising capital for general operating expenses or expansion to meet new business goals.

Moreover, the global economic slowdown has also inspired companies facing bankruptcy or insolvency to seek funding to pursue claims that may generate cash flow for their businesses or mitigate the risk of losing a 'bet-the-company' dispute.

Secondly, Nigerian parties that have sufficient funds may still prefer to access third party funding to initiate their claims so as to reduce their risk in the arbitration and avoid tying up funds that could have been used to sustain or expand their core business operations in these turbulent times.[5] Moreover, as a way of meeting up with the rising cost of arbitration while maintaining a strong balance sheet, companies are increasingly seeking avenues to transform every claim to a marketable asset for the purpose of attracting third party funding.[6]

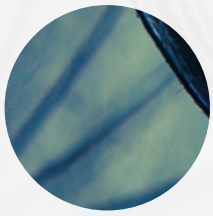
1. Report of the ICCA – Queen Mary Task Force on Third Party Funding in International Arbitration, The ICCA Reports No. 4, April 2018. P. 4. Available online https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4
2. Ibid
3. 2020 Woodford global litigation funding survey, P. 6.
4. See Lionell Faull & Oladeinde Olawoyin, Nigeria silent over secret asset recovery deal that could see 'stolen' oil treasure paid to US firm, Finance Uncovered (Sept. 11, 2020), at https://www.financeuncovered.org/investigations/nigeria-silent-over-secret-asset-recovery-dealthat-could-see-stolen-oil-treasure-paid-to-us-firm/
5. See ROWLES-DAVIES, Third Party Litigation Funding, pp. 63-64 (highlighting a "real life practical example of a mid-sized company deciding whether to embark on a piece of litigation … [against] a much larger competitor
6. Ibid n 1 P. 5

Intriguingly, the ICCA – Queen Mary Task Force on Third Party Funding in International Arbitration report quoted one of the leading financial solutions experts who stated that "Litigation can be financed – just like any other corporate expense. Yet most corporations still pay for legal costs out of pocket, and this has created a profoundly negative financial impact: reducing operating profits, impacting publicly reported earnings, and thus valuation. Litigation finance removes this problem by shifting the cost and risk of pursuing high-value litigation off corporate balance sheets.

Thirdly, third-party funding could act as the filter necessary to sieve out frivolous claims because no funder will want to waste their resources to fund frivolous arbitrations at the additional risk of being ordered to pay the legal costs of the opposing party when the outcome eventually turns out negative. Indeed, the legal and arbitration community globally have moved beyond the debate about whether or not third-party funding should be permitted to the more serious regulatory issues to enhance its effectiveness. In fact, the enactment of laws that either allow or provide a clear regulatory framework for third party funding is now considered as a yardstick for determining the most arbitral friendly jurisdictions with Hong Kong and Singapore as notable examples.[7]

Fourthly, and most importantly, the codification of the tribunal's power to award costs incurred in the arbitration, including cost of obtaining third-party funding will attract foreign direct investments, as many global players in the multibillion dollar third-party funding industry now have the legal backing to set up bases in Nigeria, to take advantage of a new and thriving market. This was not possible previously because the common law doctrine of Champerty and Maintenance made it illegal for a natural or corporate entity to fund the costs of an action for another party in order to share the proceeds of the action or suit.[8]

As noted above, the passage of the Arbitration and Mediation Bill which empowers an arbitral tribunal to award the costs of obtaining third-party funding in favour of the prevailing party, as part of the arbitration costs has been welcomed by stakeholders. Moreover, other leading arbitration institutions such as the International Chamber of Commerce (ICC) Court of Arbitration and the Singapore International Arbitration Centre, among others have amended their rules to include guidance on the use of third party funding.[9]



7. Ibid n 1 P. 5
8. In Egbor & Anor v. Ogbebor, [2015] LPELR 24902 (CA), 14, paras A–D, the Nigerian Court of Appeal also noted as follows: *"It is no doubt settled law that a situation where a person elects to maintain and bear the costs of an action for another in order to share the proceeds of the action or suit is champertous..."*
9. Indeed, the Singapore International Arbitration Centre (SIAC) has already addressed third-party funding in the first edition of its Investment Arbitration Rules.

Safeguards for the use of Third-Party Funding in Nigeria

There are a number of the challenges which Nigerian parties and practitioners may have to guard against in their quest to utilise third party funding to institute their claims, especially when dealing with parties from other jurisdictions. These challenges may either be associated with legal hurdles in the jurisdiction where the arbitration is seated (if it is not seated in Nigeria) or where the award will be enforced (if the other party is not a Nigerian entity and has no assets in Nigeria). They may also arise as a result of some procedural bottlenecks that if not taken care of, may give rise to objections or proceedings to set aside the award when obtained.

The first challenge that a party or practitioner may have to protect against is whether or not third-party funding is acceptable in the jurisdiction where the arbitration is seated (if it is not seated in Nigeria). This is because some jurisdictions still have legal restrictions that forbid third party funding. The most notable of such legal restriction is the common law doctrine of champerty and maintenance. For instance, the Irish Supreme Court in the case of Persona Digital Telephony Ltd v The Minister for Public Enterprise[10] held that the common law prohibitions on maintenance and champerty remain in force in Ireland, thereby restricting the availability of third-party funding.

Another potential huddle that practitioners and parties must seek to avoid is to ensure that a third-party funding arrangement is not structured in a way that violates any existing law in the jurisdiction where the arbitration is seated (if it not seated in Nigeria). For example, some jurisdictions have legal restrictions on contingency or success fees arrangement and often, the third-party funder may insist that the lawyers and sometimes even the expert witnesses for the claimant share in the risk by structuring the third-party funding agreement on the condition that the lawyers and experts defer the payment of their professional fees pending the outcome of the arbitration proceedings. This kind of arrangement may become problematic and may eventually render the award unenforceable in some jurisdictions like the United Arab Emirates where contingency fee arrangements are prohibited.[11]

The next issue that practitioners and parties should be careful about is ensuring the protection of confidential information and making sure existing privilege is not lost. Third party funding arrangement often requires the party seeking funding to share confidential, sensitive and in many instances, privileged information with the third-party funder. If care is not taken, certain information or privileges may be disclosed that may jeopardize not only the arbitration proceedings but may also open the floodgates to all kinds of challenges to the award when issued. In other to avoid these challenges, it is suggested that the party seeking funding should take some preliminary steps such as entering into a non- disclosure agreement and limiting the information shared at the early stages of the negotiation with the funder.

The next major issue that practitioners and parties may have to address is the potential conflict of interest that may arise as a result of the funder's participation in the arbitration. Conflict of interest whether actual, potential or perceived may arise on three major fronts: firstly, between the funder and one or more members of the arbitral panel; secondly, between the funder and the claimant, and thirdly, there could be a conflict between the funder and the law firm handling the arbitration proceedings. In the first instance, a conflict could arise if the funder has a relationship with one or more members of the tribunal so that such member(s) becomes interested in the outcome of the proceedings. In the second instance, there could be a conflict between the funder and claimant if the respondent makes an offer for settlement that is acceptable to the claimant but does not meet the expected return on investment that the funder had anticipated. In the third instance, a conflict could arise if the funder tries to interfere with the way and manner the law firm is conducting the arbitration proceedings, or the legal expenses begins to exceed the budgetary limits set for the arbitration.

All potential conflicts discussed above can be effectively managed by a well drafted third-party funding agreement where the role of each party is clearly defined and where disclosure is promptly made if the funder has a relationship with any member of the tribunal.

10. [2017] IESC 27,
11. Article 31 of the UAE Federal Law No. 23 of 1991 on the regulation of lawyers provides thus: *"It shall not be permitted for a lawyer to buy all or part of the rights which are in dispute, nor to agree to take a part thereof in respect of his fees"*

Recommendations for promoting the use of Third Party Funding in Nigeria

Given the increasing popularity of third-party funding in international arbitration and the impact it may have in helping parties access justice in the Nigerian legal landscape, stakeholders in the Nigerian arbitration community have to become more proactive not only in setting standards and initiating policies that regulate third-party funding; but also take deliberate steps to promote third-party funding. Some of the areas that need to be addressed are as follows:

1. Arbitral Institutions: Arbitral institutions in Nigeria need to start incorporating provisions that support and regulate third party funding in their rules. Arbitral institutions are drivers of international arbitration and most international arbitration cases are administered by these institutions. The arbitral institutions are therefore in a pole position to promote third party funding especially in the resolution of commercial disputes. Interestingly, as was observed earlier, a number of leading institutions such as the ICC, SIAC, HKIAC and ICSID have incorporated provisions to promote and regulate third party funding. Arbitral institutions in Nigeria are therefore encouraged to follow international best practices.

2. Arbitrators: Arbitrators play a crucial role in promoting third party funding because of the wide discretionary powers that most domestic legislations have given them to award cost. Oftentimes, arbitrators develop cold feet when it comes to awarding cost of obtaining third party funding as part of the arbitration cost.

   In Bahgat v. Egypt,[12] a third party funded UNCITRAL administered case, despite finding that the respondent's actions were grossly abusive, the tribunal, chaired by German academic Rüdiger Wolfrum, declined to consider the question of whether funding costs equals legal costs, but instead, used its discretion under the UNCITRAL rules to decide that the cost of obtaining third-party funding should be borne in the case by the claimant. The role that arbitrators play in shaping the future of third-party funding cannot be overemphasized. Arbitrators need to be more courageous in awarding the cost of obtaining third party funding as part of the legal cost in arbitration proceedings. Gladly, arbitrators and even judges in some jurisdictions such as England have demonstrated enormous courage by including the cost of obtaining third party funding as part of the arbitration costs.

   In Essar Oilfield Services Ltd v. Norscot Rig Management Pvt Ltd,[13] the arbitrator ordered Essar to pay costs on an indemnity basis, including a substantial amount which the claimant had paid to a third-party funder. The arbitrator held that the concept of "other costs" in the English Arbitration Act was not merely limited to legal costs but extended to any other reasonable costs incurred by parties, including funding costs. The arbitrator further held that the respondent in the arbitration had exhibited egregious conduct in deliberately putting the claimant in a position where it could not fund the arbitration out of its own resources and it was, therefore, reasonable for the claimant to obtain funding from a third party on usual market terms for funding costs, namely 300 percent of the amount advanced or 35 percent of the amount recovered.

12. Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (PCA Case No. 2012-07)(PCA Case No. 2012-07)
13. [2016] EWHC 2361 (Comm) Paras. 56, 68 and 69.

Essar Oilfield sought to set aside the award. The English High Court confirmed the award, holding that it was within the arbitrator's discretion to construe the phrase "other costs" in s.59(1)(c) of the Arbitration Act 1996 and "costs of the arbitration" in s.63(3) as including costs of funding. The court stated that the correct approach was to take a functional approach to the term "other costs" and "costs of the arbitration" and consider what other costs were incurred in bringing or defending the claim. The court noted that as a matter of language, context, and logic "other costs" could include third party funding costs. It has been suggested that arbitrators should also be courageous to award adverse cost on third party funders in favour of respondents so as to create a balance.[14] Proponents of this argument have said that this will not only help to create certainty in the arbitral proceedings but will also act as a disincentive for funders who may want to fund arbitrations that are not clearly meritorious.[15]

3. Countries: Nations are important drivers of the concept of third party funding. They can do so by incorporating third party funding into their domestic legislation. As noted earlier, Singapore and Hong Kong have led the way in this regard and Nigeria has now followed suit. It is hoped that other nations will follow this trend especially given the global financial crisis nations have suffered and the fact that even nations are now requiring funding to institute both investor-state and state – to - state arbitrations.

4. Other stakeholders: Other stakeholders such as the UNCITRAL Working Group, IBA and arbitral institutions such as CIArb, ABA, etc. have to do more in providing policy direction for the promotion of third-party funding. Stakeholders in the arbitration community need to consider making a guideline on third party funding. Despite concerns regarding what some refer to as an excess or proliferation of "para – regulatory or of soft law instruments in international arbitration,[16] majority of stakeholders and especially users of international arbitration have continued to express an overall positive perception to guidelines and soft law instruments.[17]

   Given the very crucial role that third-party funding plays in international arbitration and the frequency in which issues arise regarding the recovery of the cost of obtaining third party funding; there is a need for stakeholders to initiate guidelines that will enable arbitrators to make decisions on this important subject.

Conclusion

In conclusion, it is hoped that the Arbitration and Mediation Bill will be promptly assented to by the President and that parties, as well as law firms, will take advantage of third- party funding to initiate and defend arbitration claims. It is also hoped that other stakeholders will continue to initiate policies that will deepen its effectiveness as we all seek ways to enhance access to justice for corporates.

14. Ibid n 2 P. 162
15. Ibid
16. D. FAVALLI, ed., The Sense and Non-sense of Guidelines, Rules, and other Para-regulatory Texts in International Arbitration, ASA Special Series No. 37 (Juris 2015)
17. Ibid n 2 P. 3. See also the (2015) Queen Mary, University of London and White & Case, International Arbitration Survey: Improvements and Innovations in International Arbitration, (finding an overall positive perception of guidelines and soft law instruments, with only 31% responding either that they were too numerous or not useful)