ALP | NG & Co.
AFRICA LAW PRACTICE NG & COMPANY
WWW.ALP.COMPANY

ARBITRATION: THIRD PARTY FUNDING

NEW FRONTIERS IN DISPUTE RESOLUTION IN NIGERIA

Olasupo Shasore, SAN FCIArb
Partner, **ALP NG & Co**

ARBITRATION: THIRD PARTY FUNDING
NEW FRONTIERS IN DISPUTE RESOLUTION IN NIGERIA[1]

INTRODUCTION

The cost of arbitration proceedings has remained one of the major deterrents for parties seeking to resolve commercial disputes. While this cost can vary significantly depending on various factors such as complexity of the dispute, the jurisdiction, and the arbitral institution, it comprises of legal fees, expert fees, cost of procuring witnesses, arbitrator fees and administrative expenses. This has been a challenge for certain parties who may be deterred by the burgeoning cost of the arbitration process. The Arbitration and Mediation Act 2023 (AMA) has introduced the practice of third-party funding ('TPF') to Nigeria's arbitration landscape, as a modern means of managing the cost of, thereby increasing the access to arbitral remedies.

This article discusses the current position of third-party funding in Nigeria, the practicality of TPF in Nigeria, the concerns that may arise with the adoption of third-party funding and how to address these concerns.

Meaning and Nature of Third-Party Funding

Third-party funding refers to a practice where a financially independent entity provides financial support to a party involved in a legal dispute in exchange for a share of the eventual settlement or award. It is a means for a party involved in a legal dispute to receive financial assistance from another party (a "funder") toward the resolution of the dispute following an agreement between the parties that the funder will receive a portion of the proceeds if the case is successful but assumes the risk of losing its investment if the case is unsuccessful.

This funding arrangement allows claimants or plaintiffs to pursue legal actions without bearing the full financial burden for such matters, as the third-party funder covers the costs associated with the proceedings, such as legal fees, expert expenses, and court costs. Internationally, third-party funding has gained popularity as a means to access remedies, particularly in complex and high-value disputes (particularly commercial disputes), where claimants may lack the necessary resources to pursue their claims. It is more favourable than other means of accessing finance for proceedings such as insurance as it completely shifts (subject to the agreement of the parties) the cost of proceedings to the funder.

A third-party funder typically undertakes due diligence exercise to determine the likelihood of the matter's success prior to making funding commitments. This involves an evaluation of the claim to determine merits, potential costs, and chances of success. The

Olasupo Shasore SAN, FCI Arb, Partner, ALP NG & Co, a member of ALP International; law & professional service firms across Africa and co-author of 'Commercial Arbitration Law and Practice in Nigeria'

decision to fund a particular matter is usually dependent on factors which include available evidence supporting the disputing party's claim, expert opinions, the legal strategy to be adopted, potential damages and the strength of the opponent's case.

Once satisfied that the disputing party's claim has strong prospects, the funder enters into an agreement with the disputing party to outline the terms, conditions and the share of potential settlement or award the funder will be entitled to. To hedge their risks, funders typically seek to play active roles in the proceedings, thereby displacing some of the normal autonomy the claimants would have in the dispute.

These features have led to a significant increase in the use of third-party funding in international arbitration over the last decade in many jurisdictions.

Third-Party Funding in Nigeria

Being a common law jurisdiction, Nigerian law inherited antiquated doctrines that do not recognise arrangements where dispute resolution is funded or maintained by third parties. This position is based on the doctrines of maintenance and champerty[2] which are now quaintly based on the public policy that interested third parties may "sully the purity of justice" as they may be tempted to take steps that may be against the interest of justice, such as inflating claims.[3]

Essentially, Nigerian courts have doggedly continued to frown on arrangements around maintenance and champerty given that it might supposedly lead to suppression of evidence, with the courts holding that champerty is unlawful. As a result, third-party funding as a relatively new concept in Nigerian thinking and generally requires statutory support to be valid and enforceable.

The Arbitration and Mediation Act (AMA) now affords parties the opportunity in section 61 by providing that:

"The torts of maintenance and champerty, including being a common barrator, do not apply in relation to Third-Party Funding of arbitration and this section applies to arbitrations seated in Nigeria and to arbitration related proceedings in any court within Nigeria."

By virtue of the Act, the rules against maintenance and champerty have ceased to apply to third-party funding of arbitration. This means that persons providing financial support for arbitration cases are allowed to do so without facing legal consequences. These rules also apply to both the arbitration process itself and any related court proceedings in Nigeria. As such, parties may now enter into TPF agreements with third-party funders to bear the financial cost of the arbitral proceedings and judicial proceedings to relating to arbitration under the AMA. This is similar to the position in Hong Kong and Singapore where new laws were recently enacted (in 2019 and 2017 respectively) to exempt third-party funding of arbitration from the doctrines of champerty and maintenance.

Oloko v. Ube (2001) 13 NWLR pt. 729 CA 161
Oyo v. Mercantile Bank (Nig) Ltd. [1989] 3 NWLR pt. 108 pg. 217

Third-party funding is poised to improve party access to remedy, as it will permit claimants with meritorious arbitration claims who, otherwise would have not been able to, to prosecute their disputes to completion. It is also a tool for risk management as claimants may choose to share the risk attached to the legal dispute with the funder. The disputing party may also benefit from a partnership with the funder who may offer project management, especially in complex arbitration, to reduce time distraction.

A TPF arrangement will also benefit small businesses as major business and investors make the calculated decision of adopting London, Paris and even Lagos as the seat and venue of arbitration with the intention that the smaller business will be constrained in commencing or participating in arbitral proceedings in these locations. In such circumstances and under the operation of the AMA, the smaller business may engage a third-party to fund the arbitration to pursue viable claims regardless of the seat of arbitration and the potential costs involved.

From this development it is expected that there will be an increase in the number of arbitral proceedings involving Nigerian entities but not necessarily an increase in frivolous suits as third-party funders are, by nature, prudently selective and will not undertake to fund proceedings that appear economically unviable. Funders typically will not engage in the risky, expensive and protracted undertaking of arbitral proceedings without confirming that such proceedings are likely, with good prospect of ending favourably for the claimant.

Additionally, Non-Nigerian contracting parties within the region may be encouraged to choose the AMA as the lex arbitri for their disputes, and Nigeria as the seat of arbitration in a bid to take advantage of this innovation.

Third party funding will make enforcement of foreign awards more efficient as the funding will provide the disputing party with the required capital to enforce their rights resulting from the award, particularly in a foreign jurisdiction.

Practical Steps Relating to Third Party Funding in Nigeria

Available evidence suggests that the adoption of the funding arrangement is poised to become popular in Nigeria, particularly in relation to investment agreements, disputes bordering on environmental pollution and specialised industries such as the oil and gas sector. This is because claimants will require funding to pursue substantial, high-value, and complex arbitration claims in an uncertain economic condition.

There are currently no specific guidelines or regulations relating to third-party funding in Nigeria and the Arbitration Rules does not elaborate on the provisions of the AMA regarding to the subject. Hence, the modalities for third-party funding relationships will be in line with the provisions of the AMA and the practicalities attendant to such arrangements. Additionally, the arbitral tribunals will also draw on experience and best practices to navigate the implementation of the regime in Nigeria.

A third-party funder may be a natural or legal person who is not a party to a dispute but who has entered into an agreement either with the disputing party, the disputing party's affiliate, or a law firm representing that party, in order to finance part or all of the cost of the proceedings through a donation, grant or on the promise of reimbursement depending on the outcome of dispute or in return for a premium payment.[4]

Given the intricacies, a third-party funding arrangement will be most useful in large domestic, international commercial and investor – state disputes. In such scenarios, following preliminary discussions between the disputing party and the proposed third-party funder, the third-party funder

Section 91 of the AMA 217

typically will conduct a limited due diligence exercise on the dispute. The due diligence exercise will allow the funder consider factors such as the prospects of success of the claim; the quantum of the claim; the estimated amount required to prosecute the claim to completion; the terms of the arbitration agreement, the seat of arbitration and the capacity of the respondent to meet the arbitral award.

The funder may seek to impose objectively unfair terms on the disputing party and may use (threats of) termination to pressurise the disputing party. The disputing party's legal counsel must advise with deliberate skill and negotiate the funding agreement to ensure the party's protection.

Both parties must agree as to the extent of the costs (such as the legal fees, expert fees, procurement of witnesses, arbitrator's fees and administrative costs) to be covered by the funding arrangement. Typically, such funding arrangements does not cover costs and damages that may be awarded against the disputing party. However, the third-party funder may agree to cover such costs and the funding agreement may stipulate the upper limit/maximum amount that the funder may cover should costs and damages be awarded against the disputing party.

Where the funding agreement does not indicate the funder's liability for costs awarded against the funded party, it is more than likely that he will be required to pay such costs[5]. In *Dymocks Franchise Systems (NSW) Ltd v. Todd*[6], the court held that,

Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs.'

Disclosure

It is in this light that the AMA provides that the disputing party benefiting from a third-party funding agreement must give written notice of the name and

[1] Arkin v. Bordchard Lines Ltd [2005] EWCA Civ 655, Excalibur Ventures LLC v Texas Keystone & Ors [2016] EWCA Civ 1144
[2] (2004), 1 WLR 2807 pp. 2815
[3] Section 62(1) of the AMA
[4] ICSID Case No. ARB/14/14
South American Silver Limited v. The Plurinational State of Bolivia PCA Case No. 2013-15 (Procedural Order No. 10)
[5] Section 62(2) of the AMA
[6] ICSID case no. arb/13/20 procedural order NO. 6 Decision on the Respondent's Nigeria: for Provisional Measures 1st February 2017.
[7] Burimi SRL and Eagle Games SH.A v. Republic of Albania, ICSID Case No. Arb/11/18 procedural order No. 2 on Provisional Measures Concerning Security for Costs

address of the funder to the other party/parties, the tribunal, and the arbitral institution (where applicable)[7]. The AMA is rightly concerned with the disclosure of the existence and not the terms of such funding agreements and it is our opinion that it is unlikely for the arbitration panel to order the disclosure of these terms.

This was the position in *Eurogas Inc. & Belmont Resources Inc. v. Slovak Republic*,[8] where the tribunal decided that the Claimants must disclose the identity of their third-party funder and that such third-party funder will have the normal obligations of confidentiality. However, the general notion is that a disclosure of the terms of the funding agreement is not necessary except where there are exceptional circumstances that the presence of a third-party funder in itself does not cure.[9]

Under the AMA, the notice must be given at the commencement of the arbitration proceedings where the funding agreement was entered on or before the commencement of the arbitration; or upon the execution of the agreement where the funding agreement was entered after the commencement of the proceedings [10]

A case that shows the interplay between disclosure obligations and the next item of securing costs is *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*.[11] The Claimants had disclosed a third-party funder and the terms of the funding arrangement. The Respondent immediately applied for security for costs as an urgent provisional measure under the ICSID rules. The Tribunal held that the fact that the Claimants are so called "penniless companies" funded by a third-party to pursue this arbitration, is not evidence of their future unwillingness and/or inability to honour a costs award rendered against them. In other words, and as stated by the tribunal in the *Burimi* case,[12] "[t]he Tribunal is unwilling to find imminent danger of harm based on the Respondent's speculation about the Claimants' future conduct." As indicated above, provisional measures are exceptional in nature, and therefore require exceptional circumstances. The Tribunal shared the views of the tribunal in the *Eurogas* case, which decided that "financial difficulties and third-party funding […] do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order for security for costs."
In the Interocean case, the tribunal held that:

'Ordering the Claimants to post security for costs in the present circumstances would impose on them an additional financial requirement, not provided for in the ICSID Administrative and Financial Regulations, for their case to proceed. The Claimants have met, so far, the financial requirements prescribed by ICSID Administrative and Financial Regulation 14(3)(d) and the Tribunal sees no convincing reason to consider that the harm allegedly faced by the Respondent greatly exceeds the damage that would be caused to the Claimants by the provisional measure. For this reason, the Tribunal considers that the provisional measures requested by the Respondent are not justified.'

Section 62(3) of the AMA
(ICSID Case No. ARB/12/10)
Guaracachi v. Bolivia, UNCITRAL, PCA Case No. 2011-17, (Procedural Order No. 14 dated 11 March 2013) < https://www.italaw.com/sites/default/files/case-documents/italaw1331.pdf>; South American Silver Limited v. The Plurinational State of Bolivia (Supra)

Security for Costs

As seen above, after receiving notice of a third-party funding arrangement, the respondent in the arbitral proceedings may bring an application for security for cost and the tribunal may require the funded party or its counsel to inform the tribunal with an affidavit whether the funding arrangement covers adverse costs. It is expected that this shall constitute one of the considerations of the tribunal in reaching a decision relating to grant of security for costs.[13]

In such circumstance, the tribunal may grant the security for cost upon considering the following factors: (i) the gravity of the claim; and (ii); the claimant's financial capability. Since the claimant has indicated its poor financial position by procuring a third-party funder to secure financing for the proceedings, it is likely that a tribunal may be minded to award the security for cost as a condition to the continuation of the arbitral proceedings in the interest of the respondent.

This was the position of the arbitral tribunal in RSM *Production Corporation v. Saint Lucia*[14] where it was decided that the third-party funding obtained by the claimant supports the concerns that the claimant may not be able to comply with a costs award rendered against it since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honouring such an award.

However, it is clearly best practice and good precedent that the presence of a third-party funder should not in itself occasion an award of security for cost. The existence of third-party funding does not imply an inability of the claimant to pay an eventual cost awarded against it as such a relationship may have been necessitated for reasons other than unavailability of funds[15] such as risk management or a known agreement for the TPF party not to be liable for costs

Conflict of Interest

Third-party funding arrangements might present concerns regarding conflict of interest on several fronts which could lead to many issues.
Firstly, there is the concern that the claimant's counsel may become unduly inclined to favour the funder's interests over the interests of the claimant. As such, counsel must abide to the strictest rules of professional conduct, disclosing any information that will enable the claimant to make an informed decision on the question of funding and the attendant risks.

Secondly, a conflict of interest may arise in such situations where one of the arbitrators has acted or acts as counsel to the third-party funder in other matters. Such relationships create concerns regarding the impartiality of the arbitrator and could negatively impact the claimant's case should the award made by a panel consisting of such persons be challenged.

The Supreme Court of the United Kingdom (UK) had in the past refused to allow for the appointment of the same arbitrator in multiple arbitrations with overlapping issues, although with different parties[16] but the court recognised that of itself, the appointment of that common arbitrator did not justify an inference of apparent bias. The position is that it is prudent for an arbitrator to disclose facts that could infer a conflict of interests of the involved parties, including a funder. However, the UK Supreme Court has held in *Halliburton Company v. Chubb Bermuda Insurance*[17] *Ltd* that the legal obligation of disclosure imposes an objective test and does not look to the perception of the parties as to whether they might have justifiable doubts as to the arbitrator's impartiality.

As such, the claimant and the funder must undertake adequate conflict checks as part of the due diligence process. Additionally, the arbitrator

Guidant LLC v. Swiss Re International SE [2016] EWHC 1201
[2020] UKSC 48
Procedural order No. 3 (Confidentiality Order) in ICSID case No. ARB/07/5 of 27th January 2000, 72-73

must make full disclosures at appointment or upon notification of the third-party funding arrangement.

Thirdly, where the respondent is affected by the illustrations of conflict of interest mentioned above and seeks to argue against it, it may cause undue delay to the arbitral proceedings. This delay detracts from one of the advantages of arbitration over litigation – which is expediency in handling disputes.

Confidentiality

Confidentiality is one of the hallmarks of arbitral proceedings and third-party funding arrangements creates concerns regarding possible disclosure of such confidential information of the parties to the dispute by the claimant to the third-party funder. This is particularly important considering that the funder requires the disclosure of several documents including the agreement(s) from which the dispute arose and the facts which gave rise to the dispute.

In *Beccara v Argentina*,[18] the tribunal decided that while transparency in investment arbitration is important, it will not be considered more important if the disclosure will exacerbate the dispute or compromise the integrity of the arbitral proceedings. In such circumstances, there is need for the claimant to ensure that disclosures to the funder is undertaken in accordance with and to the extent permitted by its confidentiality obligations to the other parties to the dispute. Typically, there is need for the funder to enter into a non-disclosure agreement with the claimant, but this may not cure all the potential issues that could arise from the transfer of information between the claimant and the funder. Apart from the disclosure of the confidential information of the other parties, there exists a risk that information shared by the claimant to its counsel may lose its privilege upon disclosure to the funder

Party Autonomy

The engagement of a third-party funder will inevitably lead to partial loss of autonomy of the claimant. This is in view of the fact that the funder's objectives and the objectives of the claimant may not always align on cogent areas especially where the respondent offers settlement. In such cases, the claimant may be bound by terms in the funding agreement which gives the interests of the funder priority.

For example, in *Glaz LLC and 2 Ors. v. Sysco Corporation*,[19] the arbitral tribunal held that the respondent was bound by the terms of the funding agreement between the parties to seek for the Claimants' consent before entering a settlement agreement between itself and the defendants in an antitrust litigation initiated by the respondent and funded by the Claimants. In recognising the funder's veto[20] right to the amount to be accepted by the defendant as settlement for the litigation, the tribunal found that (i) the funder would suffer irreparable harm should the settlement agreement be signed and (ii) the funder is entitled to the temporary restraining order against the respondent, barring the company from entering to the settlement agreement.

To manage such situations, the claimant's counsel must adhere to rules of highest professional conduct to adequately represent the claimant during the negotiation of the funding agreement and during settlement negotiations.

(LCIA Case No. 225609) (Order) (10 March 2023)

The work of The National Committee on the Repeal and Re-enactment of the arbitration governing law in Nigeria of which the author was a member and the lead reform proponent on Third party Funding inclusion in the Bill submitted to the National Assembly as a private member bill.

See the Hong Kong the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6 of 2017 (the 'Amendment Ordinance'). According to the statistics released by the HKIAC, parties in 6 of the 277 arbitrations submitted to HKIAC in 2021 made disclosure of third-party funding. In 2020, parties in 3 of the 318 arbitrations submitted to HKIAC made disclosures of third-party funding. (The Anatomy of 3rd party funding – An insider's view of the funding process – Hong Kong Lawyer May 2022).

The International Arbitration survey (QMUL & White & Case) 2018 reported: '…97% of respondents are aware of third-party funding in international arbitration. The majority of respondents have a generally 'positive' perception of third-party funding, particularly those who have actually used third party funding.' , <https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF>

The Future Prospects

The introduction of third-party funding in Nigerian practice is a welcome development.[20] It is positioned to improve investment and international commercial arbitration in Nigeria and is poised to set out Nigeria as a choice location for arbitration in the region. It is expected that the adoption and the utilisation of the practice will lead to its development as many of its benefits are currently untapped. TPF regulations in Singapore significantly energized arbitration and a funder market emerged[21] in no time such that though the 2017 regulations focused on international arbitration, the framework was expanded in June 2021 to include domestic arbitration.[22]

The absence of similar regulations on the passing of the AMA 2023 will not in any way reduce the Act's effect as an introductory framework. In any event SS. 52, 61, 62 and 91 of the AMA together cover several regulatory issues from their clear definitions of TPFs and TPF agreements, security for costs, the barring of the application of the doctrines of Maintenance and Champerty and its disclosure provisions.

Despite the commentary on the lack of regulations as a shortcoming of the AMA because of the lack of specific regulations compared to TPF regulations in Singapore and Hong Kong. It is expected that as the practice develops the market will mature and further developments to the framework will follow as with other jurisdictions.

The AMA already imposes specific obligations on the disputing party receiving funding. It is expected that future additions to the framework that will emerge in due course which will deal with new issues regarding conflict of interest, overbearing power of the third-party funder, among others.

Author

Olasupo Shasore, SAN FCIArb
Partner, **ALP NG & Co**

Commercial Litigation & Dispute Resolution Energy; Natural Resources & Infrastructure
T: +234 1 700 257 2
E: oshasore@alp.company