THE ALP REVIEW

Third-Party Funding in Nigeria-Seated Arbitration Proceedings

Introduction

The huge funds involved in conducting arbitration proceedings has, on several occasions, served as discouragement to many potential claimants who have, as a result, relaxed on pursuing their rights. This has led many jurisdictions seeking to establish themselves as leading international arbitration venues to enact provisions relating to third-party funding. Prominent amongst these jurisdictions are Hong Kong and Singapore. Although with a different approach, Nigeria is on her way to joining the league of jurisdictions legalising third-party funding with the New National Arbitration and Mediation Bill. This article discusses the current position in Nigeria on third-party funding and the possible future.

What is Third-Party Funding?

Third-party funding is an arrangement where a commercial fund finances the costs of proceedings in return for a share of any damages awarded. Usually, a party who is not involved in an arbitration, such as a hedge fund or special purpose litigation fund, provides funds to a party to that arbitration in exchange for an agreed return. Typically, the fund will cover the funded party's legal fees and expenses incurred in the arbitration.

Third-party funding has various advantages to the potential claimant. Arbitration can be very expensive and unaffordable in which case third-party funding may well be the only option for a potential claimant with meritorious and substantial claims. In addition, risk management can be another advantage of a third-party funding. Claimants may have the funds to arbitrate but may wish to share some of the risks associated with costly arbitration and in return be prepared to give up a proportion of any recoveries to do so. Similarly, a third-party funding may help the parties arrive at an early settlement of dispute. Funders will usually conduct extensive due diligence to ascertain good claims. This objective analysis by the Funder may thus assist the case management strategy of the claimant thereby facilitating early settlement once the other party is made aware that the claim has the backing of a funder.

However, third-party funding is not without its shortcomings. More often than not, significant part of the amount recovered would usually go to the Funder. In addition, the funded party may lose some autonomy, a key feature of Arbitration (particularly when considering settlement) as funders may reserve the right of approval of the settlement.

[1] Olasupo Shasore, SAN, Orji A. Uka, and Kehinde Adegoke

Furthermore, the duty of disclosure on the part of the funded parties and substantial costs likely to be incurred when packaging the case for presentation to a funder may also serve as disadvantages.
Third-party funding has recently been largely embraced by a number of jurisdictions looking to increase their attractiveness as international arbitration venues. The New Arbitration and Mediation Bill in Nigeria will no doubt position the country as one of the leading arbitration centres in Africa.

Extant position of the Nigerian laws

Historically, the doctrines of "*maintenance*" and "*champerty*" [2] prevented the funding of litigation by third parties in common law jurisdictions. These doctrines prevent the third parties who have no legitimate interest from funding litigation. The intended result is to prevent frivolous or vexatious litigation. Some jurisdictions, in a bid to improve access to justice, have adopted a more pragmatic approach to third-party funding. In some jurisdictions, such as Ireland, third-party funding has been blocked by the Supreme Court on grounds of champerty. However, others like Hong Kong and Singapore have taken a different approach by legislating to permit and regulate third-party funding.[3]

Third-party funding is currently not prevalent in Nigeria and where it occurs not as a matter of law and then, arguably, only in International Commercial Arbitration . There are currently no laws permitting or prohibiting it. Being a common law country, the common law doctrine of maintenance and champerty, which are part of the received English law, remain applicable. Third-party funding is frowned at by the courts based on the common law principles of champerty and maintenance which:
(a) prohibit a third party from funding litigation between disputants (in which the funder has no legitimate interest); and
(b) render an agreement to provide such funds illegal and void, on the ground of public policy.

The Latin maxim, "*interest reipublicase ut sit finis litium*" meaning "it is in the interest of the State that there be an end to litigation" underpins public policy and permitting litigation funders could result in significant spikes in litigation, and potentially more of the otherwise unmeritorious claims. Presumptively most litigation funders could view the suits as an investment, thereby incentivizing a more than passing interest in the outcomes of claims they funded, and all attendant implications flowing therefrom. Being common law principles, until contrary statutory provisions are enacted, the principles of champerty and maintenance are applicable in Nigeria.
In the case of *Michael Abdallah v. S.J.S. Barlatt* [5], the court held thus:

> *"'Champerty', defined by Lord Atkin in Wild v. Simpson reported in (1919) 2 K.B. at page 562,* ***'is illegal and an indictable offence'*** *– It is a form of maintenance. Champerty is but a species of maintenance, which is the genus. An action for maintenance did lie at the common law and if maintenance in genre was against the common law, a fortiori was champerty, for that of all maintenance is the worst: 2 Co. Inst. Page 208. The definition by Coke is 'to maintain to have part of the land, or anything out of the land, or part of the debt or other thing in plea or suit, and this is called cambi partia, champertie.' Co. Litt 368*
> ***(b). It is maintenance aggravated by an agreement to have a part of the thing in dispute-Maintenance is the unlawful intermeddling with litigation in which one has no concern-"***

[2] Maintenance means where a third party with no legitimate commercial interest financially supports litigation. Champerty means maintenance where the maintainer receives a share of the proceeds.
[3] See Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 and the Hong Kong Code of Practice for Third Party Funding of Arbitration, 2018; Singapore Civil Law (Amendment) Act 2017 and Singapore Civil Law Third-Party) Regulations 2017.
[4] See Interocean Oil Development Company & Anor. v. Federal Republic of Nigeria, ICSID Case No. ARB/13/20 where the respondent admitted to third party funding in an International Investment Arbitration Proceeding at ICSID.
[5] JELR 85235 (WACA)

The court further held as follows:

> *"The offence of maintenance apart from the interest of the public generally, is directed primarily not at the client maintained, but at the other party to the litigation. He has the right to be free from litigation conducted with the assistance of persons working for their own interests, and not in order to give lawful professional aid to the opening litigant.* ***A champertous agreement between solicitor and client is void,*** *therefore, not merely because of an abuse of the confidential relationship between solicitor and client but because the agreement involves a continuing wrong, namely the maintenance of the litigation against the opposing party."*

In *Oloko v. Ube* [6], the Court of Appeal held an agreement by a solicitor to provide funds for litigation in consideration of a share of the proceeds champertous.

Similarly, in *Egbe & Anor. v. Ogbebor* [7] the court of appeal held that 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, such action is champertous.

It is therefore clear from the above that third-party funding in Nigeria-seated arbitration proceedings, as at the time of writing this article, cannot be legally enforced, as same would most likely be held to be champertous.

Possible changes to be introduced by the Arbitration and Mediation Bill

The extant legislation governing arbitration in Nigeria is the Arbitration and Conciliation Act [8] (the "ACA"). In a bid to provide a unified framework for the settlement of commercial disputes, the Nigerian Senate recently passed the Arbitration and Mediation Bill 2022 (the 'Bill") to repeal the extant ACA. The Bill is an improvement on the ACA with regards to third-party funding. The Bill legalises third-party funding in arbitration. This it does by including the cost of obtaining third-party funding as part of cost for arbitration. It must be noted that, unlike the situation in Hong Kong and Singapore, the Bill does not expressly permit third-party funding, however, it can be implied from its wordings that it intends that third-party funding is legal. This, however, may be a future subject for the courts to determine.

Below are some of the prominent provisions in the Bill dealing with third-party funding:

Definition of Third-party funder and Third-party funding arrangement [9]

"Third-party funder" means any natural or legal person who is not a party to the dispute but who enters into an agreement either with a disputing party, an affiliate of that party, or a law firm representing that party, in order to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and such financing is provided either through a donation or grant or in return for reimbursement dependent on the outcome of the dispute or in return for a premium payment.

"Third-party funding arrangement" means a contract between the Third-Party Funder and a disputing party, an affiliate of that party, or a law firm representing that party, in order to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and such financing is provided either through a donation or grant or in return for reimbursement dependent on the outcome of the dispute or in return for a premium payment.

[6] (2001) 13 NWLR (Pt. 729), 161 at 181
[7] (2015) LPELR 24902 (CA), 14, paras -D
[8] 1988, CAP 18, Laws of the Federation of Nigeria 2004
[9] Section 91(1) of the Bill

Practice of Third-party funding [10]

The arbitral tribunal shall fix costs of arbitration in its award and the term "costs" includes the costs of obtaining Third-Party Funding.

Abolishment of maintenance and champerty in relation to Nigeria-seated arbitration proceedings

The torts of Maintenance and Champerty (including being a common barrator) do not apply in relation to third-party funding of arbitration. This Section applies to arbitrations seated in Nigeria and to arbitration-related proceedings in any court within Nigeria.

Requirement as to notice

(1) If a Third-Party Funding agreement is made, the party benefitting from it shall give written notice to the other party or parties, the arbitral tribunal and, where applicable, the arbitral institution, of the name and address of the Third-Party Funder.
(2) Such written notice shall be made:
(a) for a funding agreement made on or before the commencement of the arbitration – at the commencement of the arbitration; or
(b) for a funding agreement made after the commencement of the arbitration – without delay as soon as the funding agreement is made.
(3) Where a Respondent has brought an application for security for cost based on the disclosure of Third-Party Funding, the Tribunal may allow the funded party or its counsel to provide the Tribunal with an affidavit stating whether under the funding arrangement, the Funder has agreed to cover adverse costs order. The affidavit shall be a relevant consideration to the tribunal's decision on whether to grant security for costs.

Likely consequences of the Bill

The Bill which has been passed and awaits assent will provide some legality for third-party funding in Nigeria-seated arbitration proceedings. It may however be insufficient to cater for the attendant issues of third-party funding such as confidentiality and conflict of interest. Unlike the situation in jurisdictions like Hong Kong and Singapore where these issues and more have been effectively catered for in the relevant laws, Nigeria may still be faced with disputes surrounding these issues and may, in the long run, require the intervention of the courts in determining such disputes thus defeating the whole purpose of the third-party funding due to the slow and frustrating nature of the Nigerian courts.

Conclusion

The reforms introduced into the Bill are a welcome development regarding third-party funding in Nigeria-seated arbitration proceedings. It brings Nigeria at speed with other developed jurisdictions of the world and it should see a much-needed increase in the ability of parties to bring disputes to Arbitration. However, this may just be one out of many required steps to be taken in effectively regulating third-party funding in Nigeria. There is need for a specific, more detailed legislation that will effectively cater for all the intricacies involved in third-party funding in order to strengthen Nigeria's attractiveness as a leading international arbitration venue.

[10] Section 52(1)(g) of the Bill

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[8] 1988, CAP 18, Laws of the Federation of Nigeria 2004
[9] Section 52(1)(g) of the Bill