



The New Nigerian Law on Funding Third-Party Arbitration

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Introduction

Third-Party Funding of arbitration (“**Funding**”) is an arrangement where a third-party (“**Funder**”), with no prior interest in an investment or commercial dispute, provides financial support to one of the parties engaged in the dispute resolution, in return for a share of the eventual proceeds of the award, if any.¹

This practice typically happens where a direct party to an investment or commercial arbitration, whether a named claimant or a defendant², (i) finds it more efficient to use the Funding (even though it does not suffer from paucity of funds) or (ii) does not have the financial means to prosecute or defend an arbitration proceedings.

The usual structure is that the Funder provides the named party with the funds to prosecute or defend the arbitral proceedings, on the understanding that, out of the proceeds of recovery in the arbitration, the third party would, first, recover its outlay, and, next, share in the rest of the proceeds (if any).

Until recently, there was much to be said for the view that the practice of Funding commercial or investment disputes resolution was prohibited in Nigeria. However, with the enactment of the Arbitration and Mediation Act 2023 (“**AMA**”), Funding is now statutorily permitted. This article analyses this framework for Funding in Nigeria. It highlights its benefits, some key concerns of the practice and a review of the application of the practice in two arbitration hubs outside the Western world – Hong Kong and Singapore.

Legal Framework for Funding in Nigeria

Traditionally, Funding has been widely seen to be prohibited in Nigeria by the common law torts of champerty and maintenance (“**Torts**”). The Torts (a) prohibit a third party from funding litigation between disputants in which the third party has no legitimate interest; and (b) render an agreement to provide such funds illegal and void, on the ground of public policy.³ The philosophy underpinning this prohibition stemmed from the need to prevent abuse of justice, such as stirring up strife, speculation in lawsuits, or interference with the parties’ freedom to settle.⁴

While the Torts still govern litigation funding in Nigeria without statutory qualification, the enactment of the AMA has now legitimized Funding in the resolution of commercial or investment disputes by arbitration. The AMA has abolished the Torts in relation to Nigeria-seated arbitration, and to arbitration-related proceedings in any court within Nigeria.⁵

This is a clear departure from the repealed Arbitration and Conciliation Act 2004⁶ and constitutes significant evolution in the legal landscape for Funding, explicitly recognizing and supporting its role in arbitration. Section 61 of the AMA reads as follows:

¹ International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, ICCA Reports No. 4, 18, (April, 2018) available at https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf/ (accessed November 10, 2024)

² The Funder will also be able to share in any proceeds of arbitration where the defendant has a counterclaim. Also, “proceeds” may also not necessarily be monetary; for instance, a parent company may finance an arbitration in which its subsidiary is a defendant with the intention to defend the goodwill of the subsidiary, and the goodwill of the subsidiary will be the “proceeds” of the arbitration to be shared.

³ *Egbor et al. v. Ogbobo* (2015) LPELR-24902 (CA); See *Oloko v. Sunday Ube* (2001)13 NWLR (Part 729) 161, 181.

⁴ Charles R. Moon Jr., *Champerty And Maintenance - Validity Of Contingent Fee - Contracts By Laymen To Prosecute And Collect Claims Against The Government*, 36 Michigan Law Review, 259 (1937); available at: <https://repository.law.umich.edu/mlr/vol36/iss2/5/> accessed November 10, 2024.

⁵ S. 61 Arbitration and Mediation Act, 2023.

⁶ Section 90, *ibid.*, repealed the Arbitration and Conciliation Act 1988.

“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” (Emphasis supplied)

With this provision, Nigeria has followed the footsteps of arbitration hubs such as Hong Kong and Singapore, making Nigeria the third jurisdiction globally directly adopting express legislation to endorse Funding.⁷

a. Analysis: Funding Procedural Requirements

It is worthy of note that where there is a Funding arrangement (“**Funding Agreement**”), section 62 of the AMA imposes an obligation on the person benefiting from the arrangement (“**Funded Party**”) to give written notice of the name and address of the Funders to the (a) opposing party(es), (b) the arbitral tribunal and (c) where applicable, the arbitral institution that is administering the arbitration.⁸ These conditions encourage transparency in the arbitral process in respect of the Funding and seek to forestall a conflict of interest between the Funded Party and their legal practitioners (where applicable).⁹

Furthermore, the Funded Party is required to give written notice without delay as soon as the Funding Agreement is executed (i) whether on or before the commencement of the arbitration, (ii) at the commencement of the arbitration, or (iii) even after the commencement of the arbitration.¹⁰

The terms of a Funding Agreement determine the extent of the Funder’s obligations, which may include covering the counter-party’s costs and providing security for costs if ordered by the arbitral tribunal. The AMA provides that:

“Where a Respondent has brought an application for security for costs based on the disclosure of Third-Party Funding, the arbitral tribunal may allow the funded party or its counsel to provide the arbitral tribunal with an affidavit stating whether under the funding arrangement, the Funder has agreed to cover the adverse costs order and the affidavit shall be a relevant consideration to the decision of the arbitral tribunal on whether to grant security for costs.”¹¹ (Emphasis supplied.)

The parties to a Funding Agreement are at liberty to negotiate and agree on the terms of their funding arrangement and are not obligated to disclose the specific terms of the Funding Agreement to any other party to the arbitration. This approach, it is submitted, strikes a good balance between maintaining the confidentiality of the agreement’s details and promoting sufficient transparency to address any potential conflicts of interest.

Benefits Of Funding

Funding the arbitration of commercial or investment disputes has some inter-related benefits such as providing the Funded Party to the arbitration with access to finance, expert oversight and quality

⁷ S. Dubash “Developments in key jurisdictions show third-party funding integral in international arbitration”- <https://www.pinsentmasons.com/out-law/analysis/developments-jurisdictions-third-party-funding-integral-international-arbitration#:~:text=in%20future%20cases.,Nigeria,and%20Hong%20Kong%20in%202017/> accessed November 10, 2024.

⁸ Section 62(1), Arbitration and Mediation Act, 2023.

⁹ T. Dosunmu and U. Kpaduwa. “Third Party Funding In Nigeria: Untapped Revenue For Global Litigation Funders Within Africa’s Economic Giant” <https://www.mondaq.com/nigeria/arbitration-dispute-resolution/1466422/third-party-funding-in-nigeria-untapped-revenue-for-global-litigation-funders-within-africas-economic-giant/> accessed November 10, 2024.

¹⁰ Section 62 (2) Arbitration and Mediation Act 2023.

¹¹ Section 62(3), *ibid.*

assurance, an independent indication of the strength of the case, “levelling” of the arbitration “playing field”, and so on.

b. Access to Finance

Funding offers a lifeline to parties facing steep costs of arbitration. The financial challenges of such proceedings can discourage even the most resolute claimants. However, with Funders ready to provide the needed capital, potential claimants find their path to justice less hindered by financial constraints. This shift enhances the chances for fair redress and extends the range of claimants who can be included in the arbitration process.¹²

c. Expert Oversight and Quality Assurance

Securing backing from a Funder involves more than just financial considerations. Funders thoroughly evaluate every claim, ensuring that each case stands on at least relatively solid ground. This scrutiny benefits claimants. With a Funder’s endorsement, they gain reassurance about the merits of their claim. Moreover, the rigorous assessment introduces an additional layer of quality control, leading to better-prepared and more credible arbitration cases.¹³

d. Levelling the Arbitration Field

In addition, resources often dictate outcomes, both in arbitration and elsewhere. Those with deeper pockets have traditionally enjoyed an advantage, making it difficult for claimants with limited means to contest effectively. Funding changes this equation. With Funding, less affluent claimants can mount a compelling challenge, ensuring that financial might will not necessarily overshadow the meritorious claims. Funding evens the odds, fostering a more balanced and just arbitration environment.¹⁴

e. Indication of Case Strength

Equally, the mere act of securing Funding enhances the success potential of a claimants’ case. Given their preference for cases with a high likelihood of success, a Funder’s involvement often signals a claim’s strength. This endorsement serves dual purposes. For claimants, it offers validation and boosts morale. For opposing parties, it signifies a well-founded challenge, possibly encouraging more cooperative negotiation stances.

f. Improved Access to Justice

Pursuing a claim through arbitration is expensive. Would-be claimants, having already suffered a loss, must make the difficult commercial or investment decision whether to risk further resources to pursue their claims. Funding thus improves access to justice as it provides a financially weaker party who has a strong claim the opportunity to engage in the potentially long drawn-out and costly actions needed to succeed in that claim. Thus, Funding reduces the costs and risks involved, which is important given the uncertain outcomes of claims. Funding, therefore, is a risk-allocation tool which enables the claimant and Funders to share the costs and returns of pursuing a claim.

The Hong Kong’s case of *Raafat Imam v Life (China) Co. Ltd. et al.*¹⁵ further highlights the access to justice initiative that Funding provides. In the case, a plaintiff sued for the breach of a consultancy agreement

¹² I. Bozimo and I. Ekpo ‘Third-Party Funding in Arbitration: Pros and Cons’ (Bozimo, 24 October 2023) <https://broderickbozimo.com/third-party-funding-in-arbitration-pros-and-cons/> accessed November 10, 2024.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ [2018] HKCFI 1852.

and sought a declaration from the court that he be permitted to enter into a Funding Agreement. It was seen as a test case for the courts' approach to funding in the modern era. The court granted the relief sought. It reiterated that the access to justice aim is intended to avoid good cases being stifled by a lack of funding, and not intended to be used to assist a litigant to access their choice of solicitor/barrister or to improve the strength of a legal team that could be deployed.

2. Some Key Concerns About Funding

a. Conflict of Interest

One of the key concerns about Funding is the possibility of a conflict of interest arising from the involvement of the Funder, particularly if it has any connection with an arbitrator presiding over the proceedings. The existence of a Funding arrangement indicates that the Funded Party's ability to self-finance its involvement in the proceedings is either in doubt or otherwise seen by it as being sub-optimally efficient. This may place in question the enforceability of an adverse award against the Funder as well as the Funded Party's ability to foot the bill if the cost order is awarded against it. This latter concern raises the question whether the existence of a Funding Agreement would provide grounds for the other party/parties to apply for security for costs, and whether, and, if so, to what extent the Funder should be held liable for all or at least a portion of an adverse costs order.¹⁶

In order to address this concern, it may be important for a party to be aware of the existence and, where appropriate, the contents of a Funding arrangement. In most proceedings, however, the disclosure of Funding Agreement is not required and will only occur if the Funded Party voluntarily discloses these details, or it is required to do so by the tribunal,¹⁷ or by law (as discussed above).

b. Other Concern

While much of the Funding debate appears to have centred on the issues of disclosure, arbitrator bias, security for costs, and regulation, the potential conflicts between Funding and confidentiality in arbitration proceedings have so far received comparatively little attention. Disclosures to a Funder should be possible without entailing a violation of applicable confidentiality obligations.¹⁸ This position finds support in the exceptions to confidentiality contained in virtually all arbitral laws and rules that provide for corresponding confidentiality obligations.¹⁹ The rationale behind these exceptions is that disclosure ought to be possible to the extent necessary to prosecute or defend the arbitration, to protect the party's lawful interests, or to persons exercising monitoring and advisory functions regarding the arbitration.

For this reason, it is widely accepted that exceptions from otherwise applicable confidentiality obligations apply on disclosures to lawyers, shareholders, debenture holders, insurers, potential buyers of a company in arbitration, investors, lenders, guarantors, beneficiaries, licensors and licensees, tax advisers and others. It is suggested that Funders and the information they require for assessing and monitoring the case should fall within this non-exhaustive list and warrant an exception to confidentiality.²⁰ If Funding is

¹⁶ E. Warmington and C. Gopal 'Disclosure of third-party funding arrangements' (WW, 23 July 2021)

<https://www.webberwentzel.com/News/Pages/disclosure-of-third-party-funding-arrangements.aspx/> accessed November 10, 2024.

¹⁷ N. Casado Filho 'The Duty of Disclosure and Conflicts of Interest of TPF in Arbitration' (KAB, 23 December 2017)

<https://arbitrationblog.kluwerarbitration.com/2017/12/23/duty-disclosure-conflicts-interest-tpf-arbitration//> accessed November 10, 2024.

¹⁸ 'The Drawbacks of Third-Party Funding for Arbitration' (Aceris Law, 14 April 2024) <https://www.acerislaw.com/the-drawbacks-of-third-party-funding-for-arbitration/> accessed November 10, 2024.

¹⁹ See, for instance, Article 30(1) of the LCIA Rules

²⁰ A. Singh and R. Devaiah Ittira, 'Addressing the Tug-of-War Between Confidentiality and Third-Party Funding in English Arbitration' (KCL, 31 July 2024) <https://blogs.kcl.ac.uk/kslr/2024/07/31/addressing-the-tug-of-war-between-confidentiality-and-third-party-funding-in-english-arbitration//> accessed November 10, 2024.

not objectionable in principle on the basis of confidentiality, Funders should be entitled to information when ascertaining whether to provide capital for arbitration.²¹

3. Funding Practice in Two Arbitration Hubs

a. Singapore

In 2017, Singaporean law endorsed Funding with the amendment of its Civil Law Act (CLA). Until then, litigation funding was considered unlawful due to the Torts. In 2017, the Torts were abolished, and Funding was allowed only for international arbitration and related proceedings.

With the enactment of the Civil Law (Third-Party Funding) Regulations 2017 (as amended in 2021), Funding Agreements are valid and enforceable provided they comply with two conditions: **(i)** the Funding Agreement must be concluded with a qualifying Funder; and **(ii)** they must relate to one of the limited classes of prescribed dispute resolution proceedings.²² A qualifying Funder is one who carries on the principal business in Singapore or elsewhere; is not a party to the dispute resolution process, and has a paid-up share capital of not less than S\$5 million or the equivalent amount in foreign currency, or not less than S\$5 million or the equivalent amount in foreign currency in managed assets.²³

b. Hong Kong

As obtainable in Nigeria, in Hong Kong, the Torts' prohibition of Funding applied not only to court litigation but also to arbitration, as confirmed by the Court of Final Appeal in *Unruh v Seeberger*.²⁴ However, in 2017, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order²⁵ (the **"Arbitration Ordinance"**) was passed, legalizing Funding of arbitration, mediation and related proceedings in Hong Kong. Following this amendment, the law now recognizes the Funding of arbitration and related proceedings where the place of arbitration is Hong Kong, with the exception that Funding must be provided by a third party and not by a lawyer acting for a party to the arbitration.²⁶

The Arbitration Ordinance defines Funding as the "provision of arbitration funding for an arbitration (i) under a Funding Agreement; (ii) to a Funded Party; (iii) by a Funder; and (i) in return for the Funder receiving a financial benefit only if the arbitration is successful within the meaning of the Funding Agreement".²⁷ It further defines Funder as a person "(a) who is a party to a Funding Agreement for the provision of arbitration funding for an arbitration to a Funded Party by the person; and (b) who does not have an interest recognized by law in the arbitration other than under the Funding Agreement."²⁸ For a Funding Agreement to be valid and enforceable, it must be made (a) in writing and (b) between a Funded Party.²⁹

²¹ *Ibid.*

²² C. Boon Leong *et al.*, 'Third-party funding permitted for more categories of legal proceedings in Singapore' (A&G, 15 July 2021) <https://www.allenandledhill.com/sg/publication/articles/18946/third-party-funding-permitted-for-more-categories-of-legal-proceedings-in-singapore/> accessed November 10, 2024.

²³ I. Lee Wing Yun, 'A general introduction to Third Party Litigation Funding in Singapore' (Lexology, 2 January 2024) <https://www.lexology.com/library/detail.aspx?g=648ca2b8-19b4-43eb-9106-ee7e98f8fa3a/> accessed November 10, 2024.

²⁴ [2007] 10 HKCFAR 31.

²⁵ No. 6 of 2017 (Amendment Ordinance).

²⁶ FANUEL RUDI, 'Third-Party Funding in Hong Kong Arbitration' (VMC, 7 October 2024)

<https://viamediationcentre.org/readnews/MTU2Mw==/Third-Party-Funding-in-Hong-Kong-Arbitration/> accessed November 10, 2024.

²⁷ Section 98G, Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order, 2017

²⁸ Section 98J, *ibid.*

²⁹ Section 98H, *ibid.*

Conclusion

The AMA offers a structured legal framework for the Funding of arbitration, positioning the country as a potential leader in the regulation of Funding. This legislative clarity is crucial for promoting access to justice by alleviating financial constraints on would-be parties to an arbitration. While Funding presents clear benefits, such as improved access to justice and broader participation in commercial arbitration, it also brings challenges, particularly with respect to conflicts of interest and other concerns. These issues, if not properly managed, could undermine the integrity of dispute resolution processes. Therefore, while Nigeria's framework is progressive, its effective implementation and ongoing legal oversight will be essential to address these risks and maintain a fair and transparent system. By so doing, Nigeria can fully harness the potential of Funding while safeguarding the rights and interests of all parties involved.

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