

**Africa Arbitration Academy**

2019 Cohort

London

**Third-Party Funding in International Arbitration**

by

Omonigho Oyoma BROWN

and

Arnaud OULEPO

## **Introduction**

Arbitration has emerged as one of the preferred methods of resolving disputes arising either between companies, or investors and states. However, few traditional benefits of arbitration such as efficacy in time and cost are slowly being eroded, as disputes submitted to arbitration have become more complex, last for longer durations and result in parties incurring bloated costs and expenses. Consequently, a party may find itself in a situation where it is near impossible to bear all costs related to arbitral proceeding(s)<sup>1</sup>. This amongst other challenges has made third-party funding a growing and attractive phenomenon in International Arbitration.

## **Origin and Meaning of Third-Party Funding**

Third-party funding is an arrangement where someone who is not involved in arbitration provides funds to a party to that arbitration in exchange for an agreed return from the damages awarded. It initially emerged in the field of bankruptcy in the early 1900s in Australia<sup>2</sup> and has been widely developed in the US and England respectively.

## **Debate on Issues arising from Third-Party Funding**

Proponents of third-party funding stress its importance as a human right for impecunious parties to have “access to justice”<sup>3</sup>, while critics view third-party funding as gambling in the field of justice in that funders pick the cases, they believe are more likely to succeed. Critics also argue that some claimants adopt third-party funding in order to maintain enough cash flow for conducting their business as usual, and not because they are impecunious.<sup>4</sup>

There also exists a debate on whether the use of third-party funding in international arbitration will result in an increase of frivolous claims. In response to this, funders maintain that their internal scrutiny processes for reviewing several aspects of potential cases like jurisdiction, respondents’ assets, quantum, enforcement and the complexity of a case, ensure frivolous cases are weeded out.

Other concerns are potential conflict of interest that may lead to other procedural and ethical issues<sup>5</sup> stemming from the fact that arbitrators are often selected by the parties and as such, if an arbitrator, or his/her colleagues or firm, has a relationship with a funder involved in the case, then there might be conflict of interest. There are currently no uniform requirements for disclosure of third-party funding. It is against this backdrop that there is an increased call for regulation of third-party funding in international arbitration.

## **Filling the legal vacuum: different legislation across different jurisdictions**

Rather than let it out of their control, some jurisdictions have taken steps towards filling the legal vacuum in relation to third-party funding. For example, Hong Kong<sup>6</sup> and Singapore<sup>7</sup>, ranked among the preferred arbitral seats, have positioned themselves as key players in the field with recently-enacted laws and codes. United Arab Emirates is also paving the way towards a third-party friendly environment as the Dubai International Financial Centre (DIFC) issued “Practice Direction 2” that recognizes and regulates third-party funding<sup>8</sup>. The Abu Dhabi Global Market (ADGM) in the footsteps of DIFC, also issued regulations in favor of the practice.<sup>9</sup> Furthermore, ICSID<sup>10</sup> has included provisions to address third-party funding in its rules that are currently under review of being amended.

## Africa and Third-party funding: Uncharted territory

Recent trend demonstrates that third-party funding keeps growing as an investment tool in international arbitration. According to a 2018 survey<sup>11</sup>, 97% of respondents were aware of third-party funding, implying that parties are familiar with the mechanism and may use or recommend same.

In Africa, third-party funding is floating in a grey area as it is neither fully recognized nor prohibited. However, jurisdictions like South Africa<sup>12</sup> and Nigeria<sup>13</sup> show a trend in favor of the recognition of third-party funding.

In view of continental integration and increase in commercial and investment agreements within Africa, disputes in which third-party funding could play a major role are bound to arise. Consequently, African countries should position themselves as viable seats of arbitration by recognizing and regulating third-party funding. This will in turn attract investment and provide economic benefits for the continent.

Originality – 20

Depth – 15

Presentation – 15

**Total – 50%**

---

<sup>1</sup> For Example, RSM Production Corporation (“RSM”) was only able to begin ICSID arbitration against St. Luca in 2012 because it received funding from a Third-Party.

<sup>2</sup> Lake Wilhans, ‘The History and Evolution of Litigation Finance’, ABOVE THE LAW, <<https://abovethelaw.com/2017/01/the-history-and-evolution-of-litigation-finance/?rf=1>>, last accessed 8 June 2019.

<sup>3</sup> See Article 8 of the Universal Declaration of Human Right 1948.

<sup>4</sup> Dominic Roughton and Nathalie Allen Price, ‘Third-Party Funding and Investor-State Arbitration’ (2009) 1 ICLG to: Investor-State Arbitration 1, 2.

<sup>5</sup> On these issues, the International Council for Commercial Arbitration (ICCA), along with Queen Mary College at the University of London (QMUL), set up a Task Force to assess these concerns and published its report in April 2018.

<sup>6</sup> See the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Ordinance Order No. 6 entered into on 23 June 2017; Code of Practice for Third-Party Funders which came into force on 1 February 2019.

<sup>7</sup> See the Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017.

<sup>8</sup> Vanin Capital In Conversations Series No. V: *On The Rise: Third Party Funding In The Middle-East*, <<https://www.vannin.com/downloads/in-conversation/Vannin-In-Conversation-Series-No5.pdf>> accessed 12 June 2019.

<sup>9</sup> Ibid.

<sup>10</sup> International Centre For Settlement of Investment Disputes.

<sup>11</sup> 2018 International Arbitration Survey: The Evolution of International Arbitration conducted by Queen Mary University of London and White & Case.

<sup>12</sup> In *Price Waterhouse Coopers Inc. & Others v National Potato Co-Operative Limited*, the South African Court of Appeal stated that “... it must also be recognised that the civil justice system is strong enough to withstand the perceived abuses which could arise as civil litigation is made possible by financial support given by persons who provide such support in return for a share of the proceeds. Accordingly, it must be held that an agreement in terms of which a

---

stranger to a law suit advances funds to a litigant on condition that his remuneration, in case the litigant wins the action, is to be part of the proceeds of the suit, is not contrary to public policy.”

<sup>13</sup>Nigeria is in the process of passing the Arbitration and Conciliation (Repeal and Re-enactment) Bill 2017 that recognizes third-party funding into law.