Third Party Funding for Arbitration in Nigeria: Yea or Nay?

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Introduction

It is no longer news that Third-Party-Funding (TPF) has captured the attention of the arbitration community in recent times and has become increasingly popular even in international commercial and investment arbitration. No doubt, the recent expansion of TPF in international commercial and investment arbitration has spurred debates with regard to its regulation, both on a national and an international level.

Whilst noting that it is virtually impossible to address all issues with a single set of rules, and the need to avoid the risk of over-regulating as there is no 'one size fits all' approach, this article proceeds to contribute to the debate on the need for TPF regulation in Nigeria. Specifically, given the Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill 2017 (The Bill) currently pending before the House of Representatives, the second legislative chambers of the National Assembly (the legislative arm of the Federal Republic of Nigeria), this article considers the propriety or otherwise of regulating TPF for arbitration in Nigeria. This article comes to complement the previous post on this issue authored by Joshua Karton and Abayomi Okubote, given the wide interest in TPF and arbitration.

This article stems from the implicit recognition of TPF in Arbitration in Article 41(2)(g) (Definition of Costs), Article 50(1) (Costs of the Arbitration), and Article 83 (Interpretation) of the Bill. It argues that the Bill, earlier passed by the Nigerian Senate, but now awaiting the concurrence of the House of Representatives, must go beyond 'implied' recognition of TPF and include express provisions to make TPF for Arbitration in Nigeria accord with best practices.

Recent Move towards Third-Party Funding in Arbitration in Nigeria: What about the Blurred Lines in the Bill?

A careful reading of the Bill will reveal that the Bill tacitly recognizes TPF in arbitration. Apart from defining the 'costs' in arbitration to include TPF in Article 41(2)(g) of the Bill, Article 50(1) empowers the arbitral tribunal to fix 'costs of arbitration' in its award and further defines the term 'costs' to include 'the costs of obtaining Third Party Funding.' Furthermore, Article 83 defines TPF as arrangement between an individual or corporate entity (the funder) and a party involved in the arbitration, whereby the funder agrees to finance some or all of the party's legal fees in exchange for being remunerated from proceeds of the award. It is submitted that the above stated provision tacitly recognises TPF in arbitration in Nigeria to the extent that it contemplates increasing access to justice and preventing a situation where a party is unable to arbitrate a dispute on account of costs associated with arbitration.

The foregoing submission notwithstanding, it could be argued, particularly, by those belonging to the 'liberal' school of thought – canvassing that TPF should be allowed in arbitration – that a careful reading of the Bill reveals an intention by drafters to allow TPF in arbitration in Nigeria. However, this position could be countered by those belonging to the 'restrictive' school of thought. The proponents of the restrictive school of thought are likely to argue that a mere mention of TPF under the provisions on costs or the 'Interpretation' section does not suffice. It could further be argued that the drafters, if indeed desirous of permitting TPF in arbitration, should have included a substantive provision expressly stating that TPF is allowed in arbitration.

Making a Case for Third-Party Funding in Arbitration in Nigeria

With the above in mind, it is, therefore, essential that TPF in arbitration in Nigeria be given a befitting place in the body of the Bill, to avoid providing a fertile ground for undue controversy on the question as to whether the Bill actually allows TPF in arbitration. Whilst the Bill's implied recognition of TPF in arbitration is commendable, it is crucial the drafters go further to include at least a substantive provision expressly stating that TPF in arbitration is allowed. This is to ensure all existing or potential obstacles to the realisation of the TPF in Arbitration in Nigeria are swiftly dealt with and no doubt is left as to the enforceability of agreements stemming from TPF in arbitration 'seated'in Nigeria.

The Nigerian lawmakers will do well to go beyond the tacit recognition of TPF in arbitration in Nigeria and enact substantive provisions allowing TPF in arbitration in Nigeria. This will definitely clear all doubts the statutory provision supersedes the common law position precluding champerty and maintenance. This is because it is a well settled principle of Nigerian law that where a statutory provision differs from common law, the common law gives way to the statute. The Bill, no doubt, will go a long way in providing a more enabling business climate for investors, boosting investors' confidence and encouraging parties to choose Nigeria as a seat of arbitration.

Revisiting the Debate on Third-Funding in (International) Arbitration: What about it?

Arguably originating in Australia, and initially designed to support parties that did not have the means

to pursue claims, it could be conveniently argued that TPF helps with the costs of arbitral proceedings, increases access to justice and allows a claimant to allocate risks and costs while continuing its business operations with a steady cash flow.

Whilst it is incontrovertible that TPF improves access to justice, one needs no soothsayer to realise that it equally attracts some challenges. Some of the issues TPF raises include: conflicts of interest, disclosure, security for costs, and control over the claim, amongst others.

The above issues notwithstanding, it is submitted that the advantages of allowing TPF in arbitration, should sway the lawmakers in the affirmative. The choice of Singapore and Hong-Kong as preferred seats for arbitration, ranking as third and fourth most preferred arbitration seat globally, after London and Paris, is arguably not far-fetched from the Singapore and Hong-Kong permitting TPF in arbitration.

Lessons for Nigeria from Singapore and Hong-Kong

The Federal House of Representatives can readily draw relevant examples from Singapore and Hong-Kong. The Singaporean Parliament, on 10 January 2017, passed the Civil Law (Amendment) Act (Bill No. 38/2016) (the Act), which entered into force in March 2017. The Act amends Singapore law to permit TPF for international arbitration and related court proceedings under certain conditions, with further regulations prescribing specific eligibility requirements for funders. Similarly, further inspiration can be drawn from the Hong-Kong Legislative Council which recently adopted a new law permitting the TPF of arbitration, bringing Hong Kong into line with other common law jurisdictions and further strengthening the position of the Hong Kong International Arbitration Center.

Conclusion

In all, should the Bill go beyond the definition of TPF and contain substantive provisions allowing TPF in arbitration in Nigeria, it is argued that the Bill, upon being passed to law would have effectively overridden the common law position precluding champerty and maintenance.This is because it is a well settled principle of Nigerian law that where a statutory provision is in conflict or differs from common law, the common law gives way to the statute. This much has equally been alluded to by the Supreme Court of Nigeria in Patkun Industries Ltd v. Niger Shoes Ltd (1988) NWLR (Pt. 93) 138; (1988) LPELR-2906(SC), Per Nnamani JSC.

Giving the attraction of Nigeria as a preferred seat of arbitration and the potentials such offer for the Nigerian economy, the Nigerian lawmakers are advised to go beyond the tacit recognition of TPF in arbitration in Nigeria and enact substantive provisions allowing TPF in arbitration in Nigeria.