Third Party Funding in Nigerian Seated Arbitrations: Setting the Law Straight

Kluwer Arbitration Blog
March 12, 2019

Opemipo Omoyeni (G. Elias & Co)

Please refer to this post as: Opemipo Omoyeni, 'Third Party Funding in Nigerian Seated Arbitrations: Setting the Law Straight', Kluwer Arbitration Blog, March 12 2019,
http://arbitrationblog.kluwerarbitration.com/2019/03/12/third-party-funding-in-nigerian-seated-arbitrations-setting-the-law-straight/

Introduction

This post addresses the topical issue of Third-Party Funding ("TPF") in relation to Nigeria-seated arbitrations, and posits in variance with recent work on the subject that there is no extant law prohibiting TPF in Nigeria-seated arbitrations. This post points out that there has been an apparent misapplication of the common law principles of champerty and maintenance as is obtainable in courtroom litigation to privately convened arbitrations. Further, there seems to be a narrow conception of TPF in terms of direct funding of a proceeding by a funder (funders). The author argues that the scope of TPF is broader than envisaged as TPF also includes attorney financing (*pro bono* and contingency or success fee type arrangements) and Nigerian law permits the latter concept.

Origins and Scope

Nigeria is a common law country. Although English case law is considered largely persuasive, certain corpus of laws were imported into the Nigerian legal system by virtue of it being a former British Colony. This is known as the Received English Law which comprises of the principles of Common Law and Equity and Statutes of

General Application (being statutes in force in England on the 1st day of January, 1900).

Historically, the English courts developed concepts like "champerty" and "maintenance" in response to what was considered to be interference by non-interested third parties with ongoing proceedings. Unfortunately, these doctrines of champerty and maintenance still form part of the Nigerian legal system on account of its association with the Common Law system and the reinforcement of these principles by local courts. Thus, in order to ascertain the scope and applicability of these doctrines in Nigeria, recourse must be readily had to the English Common Law system where these doctrines originated from. It has been posited that to understand the scope of a concept, one must readily refer to the mischief the law sought to remedy [fn]Steyn L.J in *Giles v Thompson*[1994] 1 A.C. 142; [1993] 2 W.L.R. 908.[/fn].

In the medieval British era, there was a prevalent mischief of influential persons (barons) purchasing weak claims with the expectation that they could use their power and wealth to influence the administration of justice and to eventually win those claims. This mischief was aptly pointed out by the Hong Kong High Court in *Cannonway Consultants Ltd v Kenworth Engineering Ltd* citing an extract from Jerry Bentham's work:

"A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, was, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a Baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a 100 barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands."

Nigerian Jurisprudence and TPF

Indeed, the mischief that both doctrines were devised to remedy, were prevalent in the public justice system as administered in court rooms and the application of the doctrines at common law was confined to litigation. Their applicability cannot be extended beyond that remit. The concerns for holding otherwise have been noted to include, among others, the erosion of the party autonomy doctrine and

the same have been reinforced elsewhere [fn]Giles v Thompson [1994] 1 A.C. 142; [1993] 2 W.L.R. 908[/fn].

In view of the foregoing, the contention that TPF extends to arbitration appears rather curious. The scale of the application of the doctrine of champerty and maintenance under common law cannot be readily stretched or modified to apply to circumstances and situations not otherwise contemplated at common law except modified by local legislation(s) in that regard. It is, therefore, pertinent to note that at the time of penning this article, there are no local legislations or case law positing that the doctrine extends to the field of arbitration [fn]See *Miscellaneous Offences Tribunal v. Okoroafor*(2001) 18 NWLR (Pt. 745) 295[/fn]. The attendant consequence is, indeed, that TPF in Nigeria-seated arbitrations are, in all intents and purposes, legal. The law remains that whatever is not prohibited is allowed [fn] *Oyo v. Mercantile Bank (Nig) Ltd. (1989) 3 NWLR 229*[/fn].

On another note, there are various incidences of TPF that do not entail the funding of a claim/defense by a formal funder for an agreed consideration. The financing of a claim by a lawyer or law firm on a *pro bono*or contingency basis also falls under the umbrella of TPF. These arrangements, either in arbitration or litigation, are legal and permissible under Nigerian Law. Earlier decisions of Nigerian Courts adjudging contingency fee arrangements as at best unprofessional and at worst champertuous [fn] *Oyo v. Mercantile Bank (Nig) Ltd. (1989) 3 NWLR 229*[/fn] have since been supplanted by subsidiary legislations enacted pursuant to the Legal Practitioners Act [fn]Rule 50 of the Rules of Professional Conduct for Legal Practitioners, 2007 allows Nigerian Legal Practitioners to enter into contingency arrangement with clients provided that these arrangements are reasonable. [/fn].

Conclusion

Whilst the Arbitration and Conciliation (Repeal and Re-enactment) Bill 2017 has been extensively reviewed with calls for a more explicit recognition of TPF in the Bill among others, the law as it stands does not prohibit the incidence of TPF in Nigeria-seated arbitrations. A better approach, the author suggests, will be to demand for an enactment of a comprehensive regulatory framework for TPF, as is obtainable in other jurisdictions, by calling for a holistic revision to the Bill to provide for issues bordering on disclosure of funding arrangements, conflict of interest considerations as it pertains to the arbitrators, element of control and influence of the funder in the proceedings as well as other concerns in this space.

An adoption of this approach will make Nigeria an attractive choice as a seat for contracting parties in arbitrations.