Jumping on the TPF Bandwagon: Nigeria's New Arbitration Bill Embraces Third-Party Funding

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The past few months have witnessed several momentous developments for international arbitration in Africa. Angola, Cabo Verde, and Sudan acceded to the New York Convention; South Africa adopted a new International Arbitration Act; the OHADA Council of Ministers adopted three new texts on arbitration and mediation; and the Nigerian Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill 2017 was passed by the Nigerian Senate. The Bill is presently before the Committee of the Whole at the House of Representatives and is likely to come into force around the end of the summer. Of all these developments, we believe that the passage of the Nigerian Bill will have the greatest lasting impact because it marks the first time an African state has established a permissive statutory scheme for third-party funding (TPF) in international arbitration.

The Bill addresses some of the flaws in the current Arbitration and Conciliation Act, beginning with adoption of the 2006 amendments to the UNCITRAL Model Law. It contains helpful new provisions on matters like immunity of arbitrator, appointing authorities; recognition and enforcement by courts of tribunal-issued interim measures; and computation of time limits for commencing proceedings to enforce an award. These provisions update Nigerian law to bring it in line with current global standards, and should be welcomed without controversy. What will cement the Bill's place in history are its provisions on TPF. Assuming the Bill is passed into law with no or limited amendments, as we expect it to be, Nigeria will join Singapore and Hong Kong as the third jurisdiction to adopt a permissive statutory framework for TPF in international arbitration. A description of some of the other innovations in the Bill can be found here.

The legislative response to TPF is driven by a desire to realized its well-known benefits: improved access to justice and support for companies seeking to maintain balance sheet solvency and cash flow. With increasing capital inflows and growing commercial activity (and the attendant growth in commercial and investment disputes) Africa is poised to become a massive funding market. Nigeria should be commended for getting ahead of the curve and putting a permissive regulatory framework in place now.

The provisions of the Bill relevant to TPF are Sections 50 1(g) and 84, as well as Article 41(2)(g) of the Arbitration Rules attached as the First Schedule to the Bill. Section 50 1(g), which is mirrored in Article 41(2)(g) of the Arbitration Rules, provides:

> 1) The arbitral tribunal shall fix costs of arbitration in its award and the term "costs" includes: …
> (g) the costs of obtaining Third-Party Funding

Section 84 defines TPF as "an arrangement between a specialist funding company, an individual, a corporation, a bank, an insurance company or an institution (the funder) and a party involved in the arbitration, whereby the funder will agree to finance some or all of the party's legal fees in exchange for a share of the recovered damages."

While these provisions represent progress, we believe that the lawmakers may be missing an opportunity to advance a more comprehensive TPF regulation, as the Bill does not address some of the core concerns about TPF related to the integrity of the arbitral process and the ultimate enforcement of awards. In what follows, we identify three areas where gaps in the current draft of the Bill ought to be filled.

Costs

First, we have concerns about the proposed Section 50(1)(g) of the Bill, which empowers arbitral tribunals to consider the costs of obtaining TPF in granting the costs of the arbitration.

It is widely accepted that arbitral tribunals have broad discretion to award costs (including both legal fees and the costs of the arbitration), unless the applicable rules or the parties' agreement provide otherwise. However, it continues to be fiercely disputed whether the existence of a TPF relationship should affect the allocation of costs. We believe that tribunals should not consider the fact that a party's claim has been funded by a third party in granting costs. Here, we differ with the recently- published ICCA-Queen Mary Task Force Principles on Third-Party Funding, which accepts that the costs of funding may be recoverable, depending on the definition of recoverable costs in the applicable law and rules (see paras. C.2-3.), and depending on such factors as whether the respondent's conduct caused the impecuniosity of the claimant and whether the claimant had no other option but to seek funding from a third-party funder in order to pursue its claim (see p. 158).

If one accepts in principle that costs of funding should be recoverable, the Task Force's recommendations are sensible. However, costs of funding should not be recoverable in any case, as a matter of both fairness and good policy. First, as to fairness, the funded party's obligation to repay their funder is undertaken separately from any obligations arising under the main contract or arbitration agreement. Such liability is not a cost of the arbitration, and should not be imposed on the opposing party. Second, as to policy, permitting the recovery of funding costs as part of the costs of arbitration over-incentivizes TPF and is likely to lead to significant increases in the costs of arbitration. Funders will have an incentive to engage in expensive additional processes even if these only marginally increase the likelihood of success on the merits. In addition, including the costs of funding within the recoverable costs can significantly increase the overall costs awarded, leading to awards that may be unenforceable in practice.

On the flip side, and in the event that the Committee of the Whole currently working on the Bill retains the provision permitting tribunals to award funding costs to the prevailing party, it should ensure that information about those costs is disclosed early in the arbitral process. Ordering an unsuccessful respondent to pay the claimant's funding costs constitutes a significant shift in the risks associated with the outcome of the arbitration. Respondents should be made aware of the scope of that risk early in the proceedings, so that they can make informed decisions on their own tactics and in settlement negotiations. That brings us to the next gap in the Bill.

Disclosure

The Nigerian Bill contains no provision relating to disclosure of funding arrangements for international arbitrations seated in Nigeria. By including a provision empowering tribunals to allocate the costs of funding without an accompanying mandatory provision on disclosure, the Bill leaves a costs award open to challenges of arbitrators or applications for annulment following the belated revelation of a previously undisclosed funder. In particular, without mandatory disclosure of TPF, it will be difficult for arbitrators and arbitral institutions to run conflict checks. We therefore fear a multiplication of challenges, and the potential for even meritorious challenges to be raised late in the proceedings or after an award has been rendered, leading to delays and disappointments. Moreover, a provision on disclosure is needed because the extant provisions of the Bill on independence and impartiality of arbitrators (Sections 8 (1) and (2)) do not deal with the ethical issues that may arise from TPF, in particular conflicts created by prior or ongoing relationships between arbitrators (or their law firms) and funders. Nigeria might look to Hong Kong, whose Arbitration Ordinance, amended in 2017, obligates funded parties to disclose to the administering institution and to the other parties the existence of the funding agreement, its date of commencement, and the identity of the funder.

Champerty and Maintenance

Curiously, the Nigerian Bill contains no provision abolishing the torts of champerty and maintenance. These common law doctrines continue to be in force in Nigeria and have been applied as the framework within which the validity of TPF arrangements is assessed. As recently as 2015, the Nigerian courts have reaffirmed that the financing of a lawsuit for a share in the proceeds of the suit is champertous. See *Kessington Egbor & Anor v. Peter Ogbebor* [2015] LPELR-24902.

It therefore remains open to a recalcitrant respondent to challenge a costs award that includes the costs of TPF on the basis that the funding relationship is champertous. Practically speaking, permitting TPF requires abolishment or limitation of the common law torts of champerty and maintenance, as Hong Kong and Singapore have done. Given the continuing attachment of the Nigerian courts to maintenance and champerty, and the identified gaps in the Bill, it will be interesting to see how the courts will interpret the TPF provisions in Bill if passed into law. The devil will certainly be in the details.

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