

Key contacts



Godwin Omoaka, SAN, FCI Arb
Partner,
Dispute Resolution
godwin.omoaka@templars-law.com



Ifeoma Solanke
Associate,
Dispute Resolution
ifeoma.solanke@templars-law.com

TEMPLARS ThoughtLab

Breaking Barriers in Arbitration Funding: Third-Party Funding as a Risk Management tool under the Arbitration and Mediation Act 2023

Introduction

Arbitration has been embraced as a cost-effective alternative for resolving substantial commercial disputes via litigation. However, increasingly, parties to arbitration agreements find themselves at a crossroads due to the escalating costs of arbitration: are compelled to seek amicable settlements or risk litigation in the courts, or even, as is becoming common in recent times, abandoning their claims at arbitration. Thankfully, the inclusion of third-party funding provisions in the recently enacted Arbitration and Mediation Act, 2023 (AMA)¹ introduces a paradigm shift by offering parties who are unable to fund their participation in arbitration proceedings a lifeline. In this piece, we will address the pressing issue of financial barriers to effective arbitration and how the AMA presents third-party funding as a risk management tool to mitigate the financial hindrances associated with arbitration.

Costs of Arbitration

Costs of arbitration are a significant determinant of a party's ability to have their claim resolved by arbitration. A party that cannot bear the costs of arbitration may be unable to prosecute the arbitration to a conclusion or at all.

The costs of arbitration are categorized as the *costs of the reference* - costs incurred by the parties in putting their respective cases in the arbitration and *costs of the award* - administration costs of the reference including the tribunal's fees.²

¹ Enacted on 26 May 2023

² Russell on Arbitration, London, Sweet and Maxwell 1997, 6-155, page 299. By section 50 of the AMA 2023, costs include a. the fee of the arbitrators; b. the travel and other expenses incurred by the arbitrators; c. the cost of expert advice and of other assistance required by the arbitral tribunal; d. the travel and other expenses of parties, witnesses and other experts consulted by the parties to the extent that the expenses are approved by the arbitral tribunal having regard to what is reasonable in the circumstances; e. the costs for legal representation and assistance of the successful party where the costs were claimed during the arbitral proceedings and only to the extent that the arbitral tribunal determines that the amount of such cost is reasonable; f. administrative costs such as cost of the arbitral institution or the appointing authority, cost of venue, sitting and correspondence; g. costs of obtaining Third-Party Funding and h. other costs as approved by the arbitral tribunal.

Parties may in their arbitration agreement stipulate who bears the costs of arbitration. However, in the absence of such an agreement, the arbitral tribunal will defer to the governing law of the arbitration.³ Under the AMA,⁴ the parties are jointly and severally liable to pay the arbitrator such reasonable fees and expenses as are appropriate, and the tribunal may request each party to deposit an equal amount as advance for costs.

Institutional arbitrations are subject to a diverse schedule of fees contrary to the uniformity seen in court systems where administrative fees are often subsidized by the government.

A combination of the administrative, arbitrator(s) and legal fees amongst others in arbitration could make it expensive at times, thus undesirable. Even though the costs are recoverable by a successful party,⁵ often, the losing party may be unwilling to pay. Consequently, arbitrations are suspended or prematurely terminated,⁶ compelling parties to either relinquish their claims or seek alternative dispute resolution mechanisms.⁷ The fear of losing it all also affects parties' bargains during these settlement discussions.

Fortuitously, the AMA, 2023 has included Third-Party Funding as part of its many innovative provisions. Parties can now engage Third-Party Funders to defray the costs of their arbitration, thereby mitigating financial risks.

Third-Party Funding as a Solution

Historical Perspective

Third-party funding is an arrangement where an independent, commercial funder, without prior connection to the dispute between the parties, provides a party with full or partial funding (ie legal fees and expenses) for the proceedings in exchange for a portion of or the full amount recovered by that party after the determination of the dispute.⁸

This marks a departure from historical legal norms of the courts resisting situations where a person elects to maintain and bear the costs of an action for another in order to share the proceeds of the action. The Nigerian Court of Appeal has, relying on Common Law, held this to be champertous.⁹ The rationale behind the courts' stern position against champerty is to ward off unending litigation because of vested third-party interests.

Notably, third-party funding has gained traction globally, especially in the realm of international arbitration¹⁰ with jurisdictions like Hong Kong and Singapore regulating it comprehensively.¹¹

Innovations under the AMA

By the AMA, it will no longer be wrong for a party to fund arbitration costs for another party in the hope of sharing from the gains of the party if the party's claim succeeds.¹² If a party enters a Third-Party Funding Agreement on, before or after the commencement of arbitration, the party is mandated to immediately notify the other party, arbitral tribunal and arbitral institution where applicable.¹³ Notifying the relevant stakeholders is necessary to avoid conflict of interest.¹⁴ This notice is also necessary for the other party to assess their potential financial exposure especially if the cost of procuring a third-party funder will be borne by the losing party.

³ See *Polaris Bank v. Magic Support Limited* (2020 LPELR-53106(CA))

Additionally, an application for security for costs¹⁵ when third-party funding has been disclosed will not be granted as of right. The tribunal may allow the party being funded to state by an affidavit whether or not the Third-Party Funding Agreement cover adverse costs order.

While these provisions do not cover the full extents of third-party funding,¹⁶ it is a step in the right direction and it is expected that with practice, the scope of third-party funding will be positively expanded.

Third-Party Funding Agreement – Nature, Scope and Enforcement

A Third-Party Funding Agreement formalises the rights, duties and liabilities of parties to the Agreement. The nature of the Agreement could be likened to an insurance contract where an insurer (third-party funder) steps in to bear the claims of an insured (party) for a fee (premium).

The agreement can also be likened to a financing or investment agreement where a financier (third-party funder) advances funds to a party to cover the expenses a party would incur in a project in return for repayment. What is common in both scenarios is that should the case fail, the funder loses its investment and is not entitled to payment.¹⁷ Expectedly, a third-party funder will not fund all arbitrations requested of it. The third-party funder is expected to conduct its due diligence and take on cases that will be profitable to it.¹⁸

⁴ Sections 51 and 53 of the AMA 2023.

⁵ Section 50 of the AMA 2023.

⁶ Section 51(3) of the AMA 2023. Several other Arbitration Rules for instance, the International Chamber of Commerce Rules (Articles 37 and 38), Articles 41.4 and 41.5 of the 2018 HKIAC Procedure for the Administration of International Arbitration of the Hong Kong International Arbitration Centre.; Article 37, 39(4) and (5) of the International Arbitration Rules of the International Centre for Dispute Resolution are ad idem on the point that where the parties are not able to pay their portion of the arbitration cost or the portion of the other party when they are not able to, the arbitral tribunal can suspend or terminate the arbitration proceedings.

⁷ In some cases, even when proceedings are terminated due to inability of parties to pay for costs, Arbitrators request payment for work already done.

⁸ Section 91(1) of the AMA 2023. See *Templars on Third-Party Funding in Nigeria-seated Arbitration Proceedings* available at [Third-party funding in Nigeria-seated arbitration proceedings | International Bar Association \(ibanet.org\)](#) and last accessed on 8 October 2023.

⁹ See *Oloko vs. UBE* [2001] 13 NWLR (Pt. 729) 161 and *EGBOR & ANOR v. OGBEBOR* [2015] LPELR-24902(CA)

¹⁰ Interestingly, a foreign third-party funder is funding an ICC claim against Nigeria reportedly worth US\$400 million arising from the purported settlement of a prior arbitration over a hydropower project. See Jack Ballantyne on *Burford Backs Revived Nigerian Hydro Claim* available on [Burford backs revived Nigerian hydro claim - Global Arbitration Review](#) and last accessed on 8 October 2023.

¹¹ "In June 2017, the Hong Kong legislature passed the **Arbitration and Mediation (Third Party Funding) (Amendment) Bill** into law. This new legislation expressly permits TPF agreements and authorizes a body to issue a code of practice for third-party funders. Like Hong Kong, Singapore passed a **Civil Law (Amendment) Bill** in January 2017 to permit TPF agreements for arbitration ...The Singaporean government also introduced the **Civil Law (Third Party Funding) Regulations** to set out eligibility requirements for TPFers." See White & Case LLP on **Third party funding in arbitration: indirect reforms in Nigeria** available at [Third party funding in arbitration: indirect reforms in Nigeria | Arbitration Blog \(practicallaw.com\)](#). Last accessed on 7 October 2023.

¹² Section 61 of the AMA 2023

¹³ Section 62 of the AMA 2023

¹⁴ By the provisions of General Standard 7 and Article 1(1.2) of Part 2 of the IBA Guidelines on Conflict of Interest in International Arbitration 2014, an arbitrator will be immediately required to decline an appointment or recuse himself if the arbitrator has any relations with an identity that has a direct economic interest (a third-party funder) in the award to be rendered. An arbitrator's relationship with a third-party funder is in the Non-waivable Red List.

¹⁵ See Section 52 of the AMA 2023. Security for costs is the amount a Claimant is expected to provide for some or all of the Respondent's and where appropriate, the tribunal's projected costs as a condition for pursuing the arbitration. This is to avoid situations where the Respondent's defence succeeds and the Claimant is unable to bear the costs awarded in favour of the Respondent. Michael O'Reilly, *Costs in Arbitration Proceedings – Second Edition*, LLP London Hong Kong 1997, Page 77.

¹⁶ There should be more provisions for the regulation of third-party funding to address all the grey areas. See *Templars on Third-Party Funding in Nigeria-seated Arbitration Proceedings* available at [Third-party funding in Nigeria-seated arbitration proceedings | International Bar Association \(ibanet.org\)](#) last accessed on 8 October 2023.

¹⁷ See *Aceris Law LLC on Third-Party Funders for International Arbitration* available at [Third Party Funders for International Arbitration • Arbitration \(international-arbitration-attorney.com\)](#) and last accessed on 10 October 2023.

¹⁸ A third-party funder is expected to consider the value and complexity of the claim, the amount needed for funding, the likelihood of success of the case, whether the adverse party has assets over which the award will be enforced and the ease of enforcement of the award. See *Aceris Law LLC on Third-Party Funders for International Arbitration* available at [Third Party Funders for International Arbitration • Arbitration \(international-arbitration-attorney.com\)](#) and last accessed on 10 October 2023.

It is a typical agreement with terms peculiar to the funding.¹⁹ The Agreement can be between the funder and a disputing party, an affiliate of that party, or a law firm representing that party.²⁰ The parties may agree that the funder finances a part or all of the cost of the proceedings of the case alone or as part of a selected range of cases.²¹ The funding may be provided as a donation or grant in which case the funding will be free of charge.²² The funding may also be in return for reimbursement depending on the outcome of the dispute – if the funded party succeeds, the third-party funder will be entitled to repayment.²³ Lastly, the parties may agree for the party to be funded to pay a premium²⁴ which will be recoverable by the funded party as costs of third-party funding, if the party succeeds.²⁵

On the enforceability of Third-Party Agreements, the inapplicability of the torts of maintenance and champerty makes Third-Party Agreements enforceable against the party to the agreement like a contract would.²⁶

Benefits, Risks and Potentials

Third-party funding offers various benefits, including financial risk mitigation, enhanced access to justice for parties who might otherwise be unable to pursue arbitration due to financial constraints, and a level playing field²⁷ for parties involved in arbitration, making it an attractive option for both claimants and respondents. For the funder, it presents a business opportunity.

Notwithstanding the foregoing, third-party funding also presents risks such as the potential increase in costs of the arbitration²⁸ and unmeritorious claims; risk of conflict of interest and breach of confidentiality.

In the Nigerian context, already existing finance or insurance companies can expand the scope of their businesses to funding arbitration. More still, foreign third-party funders²⁹ can incorporate their businesses in Nigeria in line with the relevant laws³⁰ to invest in arbitration in the country. The success or otherwise of third-party funding business in Nigeria may, among others, be dependent on the ease of enforceability of awards in Nigeria. Nigerian Courts lean in favour of enforcement of arbitral awards.³¹

¹⁹ The Third-Party Funding Agreement will include the amount to be funded, the consideration for the funding, whether the funding includes security for costs; the repayment terms and termination of the funding amongst other terms.

²⁰ Section 91(1) of the AMA 2023

²¹ Section 91(1) of the AMA 2023

²² Section 91(1) of the AMA 2023

²³ Section 91(1) of the AMA 2023

²⁴ Section 91(1) of the AMA 2023

²⁵ Section 50(1)(g) of the AMA 2023 – See the landmark English case of *Essar v. Norscot* [2016] where an English High Court upheld an ICC tribunal award against the Respondent for the Claimant's cost for third-party funding.

²⁶ See *Baliol (Nig) Ltd v. NAVCON (Nig) Ltd* (2010) LPELR-717(SC)

²⁷ Parties who are apprehensive about the justice of the case not being met because they cannot fund the arbitration will be more confident in pursuing their claims.

²⁸ Third-party funding costs is one more cost to be incurred in arbitration, albeit a necessary cost to ensure access to justice.

²⁹ See *Aceris Law LLC on Third-Party Funders for International Arbitration* available at [Third Party Funders for International Arbitration • Arbitration \(international-arbitration-attorney.com\)](https://www.international-arbitration-attorney.com) and last accessed on 10 October 2023.

³⁰ Section 78 of the Companies and Allied Matters Act, 2020.

³¹ In *Metroline Nigeria Limited & Others v. Dikko* [2021] 2 NWLR (Pt. 1761) 422 the Supreme Court per Rhodes-Vivour JSC (as he then was) strongly commented on the trend of parties seeking to 'appeal' awards and reiterated the finality and bindingness of arbitral awards.

The AMA also has innovative provisions on the review and enforcement of awards³² which should put the minds of prospective third-party funders at ease.

Conclusion

The AMA is barely six months old and there is a lot to be unravelled with the application of the new law. The inclusion of third-party funding provisions in the AMA represents a significant step towards addressing the escalating costs associated with arbitration. By embracing this form of funding, parties can effectively manage financial risks, and contribute to promoting arbitration as a preferred dispute resolution mechanism.

³² Section 56 of the AMA 2023 provides for the review of an award by an Award Review Tribunal. This review streamlines the grounds upon which parties who decide to further apply to set aside the award on grounds that the dispute is not arbitrable or that the award is contrary to public policy amongst others. Section 55(3)(b) of the AMA 2023.