**THIRD PARTY FUNDING AND IT’S IMPACT ON ARBITRATION - COMPARATIVE ANALYSIS OF THE PROVISIONS OF THE UNCITRAL MODEL LAW ON ARBITRATION AND CONCILIATION VIS – SOME VIS THE PROVISIONS OF THE NIGERIA’S ARBITRATION AND MEDIATION ACT 2022, TO AREAS OF CONVERGENCE AND/OR DIVERGENCE IN THE TWO RULES**

**ARBITRATION & MEDIATION BILL 2022 ACT**

The principal legislation which governs arbitration in Nigeria is the Arbitration and Conciliation Act, 1988 (the ACA). With a view to ‘provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration, a bill to amend the ACA – the Arbitration and Mediation Bill, 2020 (the Bill) – has been introduced to the Nigerian legislative arm of government.

The Bill contains certain provisions which support the practice of third-party funding. For example, Section 52(1) of the Bill provides relevantly as follows:

‘The arbitral tribunal shall fix costs of arbitration in its award and the term “costs” includes:

(g.) the costs of obtaining Third-Party Funding.

Also, Section 61 of the Bill expressly abolishes the torts of maintenance and champerty in relation to Nigeria-seated arbitration proceedings. It provides as follows:

Section 62(1) of the Bill also provides:

(1) If a Third-Party Funding agreement is made, the party benefitting from it shall give written notice to the other party or parties, the arbitral tribunal and, where applicable, the arbitral institution, of the name and address of the Third-Party Funder.

Section 91(1) of the Bill defines ‘third-party funder’ and ‘third-party funding arrangement’:

**WHAT IS THIRD PARTY FUNDING?**

**DEFINITION**

Third party funding is a procedure whereby a third party who has no underlying interest in the outcome of a dispute or arbitration proceedings provides the financial resources for a claimant or counter-claimant to initiate or defend the claim.[[1]](#footnote-1) The funds provided by the third party funder will be used to cover the cost of the claimant’s legal fees as well as other expenses related to the arbitration including fees paid expert witnesses. In return for the funds provided, the funder will receive a percentage of the award if the claim or counterclaim turns out successful[[2]](#footnote-2).

**THE RISE OF THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION**

Third party funding is not new to international arbitration, however, there has been a recent upsurge in the number of funders, law firms working with funders, funded cases, and reported cases that were funded in international arbitration.[[3]](#footnote-3) Additionally, third party funding in international arbitration is increasingly being used not only in cases involving commercial parties but also in disputes between states and commercial parties, as well as state-to-state arbitrations. For example, the International Centre for Settlement of Investment Disputes (ICSID) has recently included rules on third party funding in its proposed updated rules on a variety of key topics, because it had noted an ‘increased resort’ to funding, with at least 20 recent ICSID cases involving third-party funding.[[4]](#footnote-4) Interestingly, Nigeria has had to rely on third party funding to institute one of its ICSID cases.[[5]](#footnote-5)

**THE IMPACT OF THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION**

Third party funding has transformed the landscape of international arbitration globally over the past decades. This is because, since the global financial crisis of 2008, most businesses and companies are experiencing a shortage of cash flow and will bask at an opportunity to access external funding to finance the cost of instituting arbitration claims.[[6]](#footnote-6)

The report of the ICCA – Queen Mary Task Force on Third Party Funding in International Arbitration quoted two Learned Professors who opined that “[The] four main forces driving the sharp increase in the demand for third party funding are: (1)] increasing access to justice (2)] companies seeking a means to pursue a meritorious claim while also maintaining enough cash flow to continue conducting business as usual ; (3)] worldwide market turmoil and uncertainty, which has inspired investors to seek investments that are not directly tied to or affected by the volatile and unpredictable financial markets; and (4)] third-party funding as corporate finance, whereby corporate entities enter into bespoke arrangements as a means of raising capital for general operating expenses or expansion to meet new business goals.

Also, parties with sufficient funds may still prefer to access third party funding to initiate their claims so as to reduce their risk in the arbitration and avoid tying up funds that could have been used to sustain or expand their core business operations in these turbulent times.[[7]](#footnote-7) Moreover, as a way of meeting up with the rising cost of arbitration while maintaining a strong balance sheet, companies are increasingly seeking avenues to transform every claim into a marketable asset for the purpose of attracting third party funding.[[8]](#footnote-8) Intriguingly, the ICCA – Queen Mary Task Force on Third Party Funding in International Arbitration report quoted one of the leading financial solutions experts who stated that “Litigation can be financed – just like any other corporate expense. Yet most corporations still pay for legal costs out of pocket, and this has created a profoundly negative financial impact: reducing operating profits, impacting publicly reported earnings, and thus valuation. Litigation finance removes this problem by shifting the cost and risk of pursuing high-value litigation off corporate balance sheets.

Third-party funding has also become a filter that sieves out frivolous arbitration claims because no funder will want to waste their resources to fund frivolous arbitrations at the risk of being ordered to pay the legal costs of the opposing party when the outcome eventually turns out negative.

Fourthly, third party funding has become a major way of attracting foreign direct investments, as nations are putting laws in place that will make their jurisdiction attractive for the global players in the multibillion-dollar third party funding industry to set up their operational bases. Indeed, the legal and arbitration community globally has moved beyond the debate about whether or not third-party funding should be permitted to the more serious regulatory issues to enhance its effectiveness.

Fifthly, and most importantly, the codification of the tribunal’s power to award costs incurred in the arbitration, including the cost of obtaining third-party funding will attract foreign direct investments, as many global players in the multibillion-dollar third-party funding industry now have the legal backing to set up bases in Nigeria, to take advantage of a new and thriving market. This was not possible previously because the common law doctrine of champerty and maintenance made it illegal for a natural or corporate entity to fund the costs of an action for another to share the proceeds of the action or suit.

**REGULATION OF THIRD PARTY FUNDING IN SOME LEADING JURISDICTIONS**

In most jurisdictions with a common law system, third party funding arrangements were traditionally illegal and void because of the common law principle of champerty and maintenance. In recent years, however, there has been a move away from this outdated position and third party funding is now permitted in a number of jurisdictions for international arbitrations and court proceedings related to international arbitration.

Some of these jurisdictions have enacted third party funding regulations to enhance its effectiveness and create a level playing field for users. Among the jurisdictions that proposed or enacted regulatory policies to enhance the effectiveness of third party funding include: the European Union, Singapore, and Hong Kong among others.

Having said this, some views I must add, is the concern about the ethical thirty party funding. This is because third party funding seems to favour millionaires and billionaires in arbitration. They appear and bought commercial arbitration whether it favour the actual parties concern or not.

Note of caution; third party funding does not promote the interest of those directly involved (victims) – For example, how does it impact those in the riverine areas with oil spillage – when a millionaire from nowhere comes in and buy off the arbitration from them at the sum of Fifty Million Naira (50,000,000.00) – goes to arbitration and is awarded five billion Naira??

Third party funding is a western concept/idea and we are swallowing it.

**European Union**

On the 13th of September 2022, the EU Parliament passed a resolution requesting the EU Commission to promulgate a new directive regulating third-party funding. The proposed new regulations have far reaching implications that may affect third party funding of EU seated claims. The regulations, if implemented, could make third-party funding in the EU more expensive or even inaccessible in some circumstances, and could go as far as to impact intra-group company loans granted for the purpose of pursuing litigation or arbitration.

Some of the features of the regulations that may appear unattractive to potential third party funders and claimants as well as counsel are:

1. First, the proposed regulations would impact the procedure of EU-seated arbitrations where the claimant (or, presumably, a respondent bringing a counterclaim) is party to a third-party funding agreement.
2. The regulation also requires claimants and their counsel to disclose the funding agreement in full at the outset of the proceeding. This goes beyond most arbitration laws and institutional rules, which usually only require disclosure of the fact that a third party funder is funding the claim, and the identity of the third party funder. Such disclosure would be commercially unattractive for third party funders and potentially strategically disadvantageous for claimants, as it may invite applications by respondents for security for costs.
3. The regulations would also make third party funders jointly or severally liable for adverse costs in the event an unsuccessful claimant is ordered to pay the defendant’s costs. It is unclear how this would be implemented in arbitration, where tribunals do not have jurisdiction over non-parties, such as third party funders. It could result in defendants bringing claims in EU courts to enforce costs awards against third party funders following the conclusion of an unsuccessful claim in arbitration. Alternatively, the regulations could require parties funded by third party funders to post security for costs. In either case, third party funders might require ATE (after the event) insurance as a matter of course when funding EU-seated arbitrations, as a result.
4. The regulation would also regulate the terms of the third party funding agreements and prohibit third party funders from taking any formal or informal control over the pursuit of the claim.
5. Furthermore, the regulation would impose notable commercial limitations on the terms third party funders are able to offer claimants. For example: - The amount a third party funder would be entitled to recover would be limited to 40% of the claimant’s recovery. – third party funders would not be permitted to withdraw funding mid-claim, absent exceptional circumstances. They would be prohibited from terminating funding agreements unilaterally without a court’s permission. - The funding agreement would be required to grant the claimant priority of recovery over the third party funder in terms of order of payment. By contrast, currently funding arrangements typically provide for a payment “waterfall” entitling the third party funder to recover its share before the claimant is paid. - Finally, TPFs would be made subject to a fiduciary duty of care, requiring them to act in the best interests of a claimant, rather than in their own commercial interests.
6. The regulations would require third party funders wishing to fund any claim seated in the EU would be required to obtain a licence and conduct their business through a registered office located in the EU.
7. The regulations would also impose strict capital adequacy requirements on third party funders. It would require them to maintain sufficient capital to fund not only the claim itself, but “any subsequent appeal”. Such a rule could create compliance limitations on third party funders, which typically only commit to funding an arbitration claim and not subsequent challenges to the eventual arbitral award.

It has been suggested that the restrictions in the proposed may have the effect of limiting parties with EU-seated arbitration claims to TPFs willing to operate in the EU market, thereby excluding TPFs in other established and competitive markets (such as the UK, North America and Australia). It has also been opined that although the regulations on TPFs themselves would not impact arbitration users directly, they could increase costs of TPFs funding EU-seated claims. These costs could be passed to users of third-party funding or make TPFs less willing to fund EU-seated claims.[[9]](#footnote-9)

**Singapore:**

In Singapore, the first move in favour of third party funding was made in 2017 with the introduction of the Civil Law (Third-Party Funding) Regulations 2017. Since then, third party funding agreements are valid and enforceable provided they comply with two conditions: (1) the funding agreement must be concluded with a qualifying third-party funder; and (2) they must relate to one of the limited prescribed dispute resolution proceedings. Until very recently, prescribed dispute resolution proceedings were limited to:

1. international arbitration proceedings;
2. court proceedings arising from or out of, or in any way connected with, international arbitration proceedings;
3. mediation proceedings arising out of, or in any way connected with, international arbitration proceedings;
4. applications for a stay of proceedings referred to in section 6 of the International Arbitration Act (Cap. 143A) and any other application for the enforcement of an arbitration agreement; and
5. proceedings for, or in connection with, the enforcement of an award or a foreign award under the International Arbitration Act.

On the 28th of June 2021, the list was broadened to include domestic arbitration

**Hong Kong:**

In Hong Kong, the principle of champerty and maintenance are still in existence however in the Amendment to the Arbitration Ordinance and the Mediation Ordinance, the doctrines of Champerty and Maintenance no longer apply to Arbitration and Mediation.

**Nigeria:**

In Nigeria, the arbitration community in Nigeria awoke to the cheering news on the 10th of May 2022, that the Senate of the Federal Republic of Nigeria had passed the Arbitration and Mediation Bill 2022, after a 16-year struggle to have a reformed arbitration legislation tailored to meet the need of users. Among the innovative provision in the Arbitration and Mediation Bill 2022 is the codification of an arbitration tribunal’s power to award costs incurred in the arbitration, including cost of obtaining third party funding, in favour of the prevailing party in any arbitration, and the express abolition of the torts of champerty and maintenance.

So far, there is no news regarding when the Arbitration and Mediation Bill will be assented to by the President, neither is much been heard about the types of policies or regulations that should be put in place to enhance the effectiveness of third- party funding in Nigeria.

I am however of the opinion that this is the best time for the President to sign the Arbitration and Mediation Bill into law and for stakeholders in the arbitration community in Nigeria, to start proposing policies that will promote the use of third party funding in Nigeria. This is because third party funding has become a major pillar of international arbitration globally and the leading jurisdictions are all scrambling to put regulations in place that will make their seat attractive for the use of third party funding in international arbitration.

**Brief Analysis of the UNCITRAL Model Law on International Commercial Arbitration vis-a-vis the Arbitration and Mediation Bill**

The UNCITRAL Model Law on International Commercial Arbitration, 1958 with Amendments as adopted in 2006 (UNCITRAL Model Law) continues to form the basis for a uniform law on international commercial arbitration. The Arbitration and Mediation Bill 2022 (The 2022 Bill) conforms with the UNCITRAL Model Law to a large extent by incorporating the revised provisions of the UNCITRAL Model Law. The 2022 Bill, impressively, expands the scope of regulation of International Arbitration as it introduces novel provisions not contemplated by the UNCITRAL Model Law.

The 2022 Bill, in compliance with the revised provision of the UNCITRAL Model Law, provides that electronic communication of an arbitration agreement which can be referenced subsequently can now satisfy the requirement that an arbitration agreement must be in writing .

The 2022 Bill and the UNCITRAL Model Law both recognize the powers of the Court to grant interim measures of protection for the purpose of or in relation to arbitration proceedings . Also, unless parties agree, no person is to be precluded from acting as an arbitrator by virtue of his nationality

The 2022 Bill now codifies the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards .

Other novel provisions of the 2022 Bill not contemplated by the UNCITRAL Model Law include:

• the provision for emergency arbitration as an interim measure of protection pending the constitution of an arbitral tribunal. ;

• immunity of arbitrators ;

• application of statute of limitation to arbitration proceedings to not include the period between commencement of the arbitration proceedings until the delivery of the final award ;

• consolidation of arbitration proceedings and joinder of additional parties

• award review tribunal where parties agree that a challenge of the award would be submitted to a review tribunal ;

• third party funding

Few provisions of the 2022 Bill seem to contradict or expand the provisions of the UNCITRAL Model Law. For instance,

• The UNCITRAL Model Law provides that where parties do not agree, the default number of arbitrators is 3 while the 2022 Bill provides for 1 arbitrator .

• The 2022 Bill expressly uses the expression “Seat of arbitration” as being the determination of the law that would govern the arbitration proceeding and this may be interpreted as a distinction from a “place” of arbitration for the purpose of meeting to hear witnesses, experts, or the parties.

Notwithstanding any real or perceived divergence between the UNCITRAL Model Law on International Commercial Arbitration, 1958 (with amendments as adopted in 2006) and the Arbitration and Mediation Bill 2022, Section 91 (10) of the 2022 Bill provides to the effect that in the interpretation of the 2022 Bill, recourse is to be had to its international origin, the need to promote uniformity in its application and the travaux preparatoires of the UNCITRAL Model Law.

Finally, it is noteworthy that the 2022 Bill recognizes and makes provisions for Mediation as encompassing other alternative means of dispute resolution where a third party assists in reaching amicable resolution of the disputes. The 2022 Bill provisions on Mediation adopts the UNCITRAL Model Law on International Commercial Mediation and also seeks to ratify the Convention on International Settlement agreements Resulting from Mediation, 7th august 2019. (Also known as the Singapore Convention on Mediation).

**Conclusion:**

In conclusion, with the benefits that come from third party funding, especially in the area of improving access to justice, and the ability to attract huge foreign direct investment to Nigeria, I recommend that NICArb should as a matter of urgency, in this august conference, set up a working group to research and propose a regulatory policy for the promotion of third-party funding in Nigeria. So that Nigerian becomes modern in international Arbitration.

1. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)
3. *Ibid* [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. [↑](#footnote-ref-5)
6. [↑](#footnote-ref-6)
7. [↑](#footnote-ref-7)
8. [↑](#footnote-ref-8)
9. Third-Party Funding: EU Parliament’s Proposals for Regulation and their Implications for Arbitration <https://www.lalive.law/third-party-funding-eu-parliaments-proposals-for-regulation-and-their-implications-for-arbitration/>. [↑](#footnote-ref-9)