## Arbitration and Mediation

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**Abiodun V. Ogunnubi**[1]

# THIRD-PARTY FUNDING IN ARBITRATIONS IN NIGERIA: A NEW REGIME UNDER THE ARBITRATION AND MEDIATION ACT, 2023

## 1. Introduction

Access to justice is a basic principle of the rule of law,[2] which describes the ability of any person, regardless of income, to use the legal system to advocate for themselves and their interests.[3] The cost of prosecuting a matter either using the litigation or arbitration mechanisms has over the years transcended the pocket of the common man and would require a sponsor or a third party to advocate their rights and/ or interests. However, third parties are prohibited from sponsoring or providing funds to either prosecute or defend an unconnected party's action under the common law doctrine of 'maintenance and champerty'.[4]

Third-party funding has become a common discourse in international and domestic arbitration. However, prior to the enactment of the Arbitration and Mediation Act (AMA), 2023 the concept of third-party funding of arbitral proceedings in Nigeria was far-flung and an unattainable dream. Third-party funding was not applicable to arbitrations conducted in Nigeria because of the common law doctrine of the torts of

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[1] **Abiodun Ogunnubi, Associate, Dispute Resolution Department, S.P.A. Ajibade & Co., Lagos, Nigeria.**

[2] See, https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ accessed on 30th September 2024.

[3] See, https://www.texasatj.org/what-access-justice#:~:text=The%20term%20%E2%80%9Caccess%20to%20justice,for%20themselves%20and%20their%20interests, accessed on 30th September 2024.

[4] Rules 17(3) and 51 of the Rules of Profession Conduct for Legal Practitioners 2007. See also, Egbor & Anor v. Ogbebor (2015) LPELR-24902.

maintenance and champerty. However, the enactment of the AMA changed the above regime, with the abolition of the torts of maintenance and champerty in Section 61 of the AMA.

This article seeks to examine third-party funding of arbitral proceedings pre and post the AMA, the abolition of the common law doctrine of champerty and maintenance, and the challenges and prospects under the new regime in Nigeria.

## 2. What is Third-Party Funding?

The term 'Third Party Funding' (TPF) was not defined in the interpretation section of the AMA.[5] However, the Act defines both third-party funder and third-party funding agreement. Section 91(1) of the AMA defines a third-party funding agreement as:

> *a contract between the Third-Party Funder and a disputing party; an affiliate of that party, or a law firm representing that party, in order to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and the financing is provided either through a donation or grant or in return for reimbursement dependent on the outcome of the dispute or in return for a premium payment*.

Third-Party Funding can be defined as a contractual mechanism based on which a third party, who could be either a natural or legal person, but who is not a party to the dispute chooses to finance part or all of the cost of the proceedings of a disputing party, either individually or as part of a selected range of cases, in exchange for a reimbursement, often a share of the award. Third-party funders could be a hedge fund, investment bankers or corporations, insurance companies, a special purpose litigation fund or wealthy/ high networth individuals in the society who are seeking the opportunity the concept presents as an investment option.

Globally, there has been a wide resort to third-party funding of arbitration proceedings[6, 7], because arbitration can be capital-intensive. Third-party funding

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[5] Section 91(1) of the AMA.

[6] Experts from Global Arbitration Review (GAR) report that the number of firms reporting involvement in third party-funded arbitrations also rose from 54 firms in 2019 to 72 firms in 2023. https://www.mondaq.com/nigeria/arbitration-dispute-resolution/1466422/third-party-funding-in-nigeria-untapped-revenue-for-global-litigation-funders-within-africas-economic-giant, accessed on 30th September 2024.

[7] The African Arbitration Academy (AAA) in its findings from its study on cost and dispute funding across Africa released in April, 2022, revealed that 31% of defendants opt for third party funding (TPF) when faced with financial constraints in pursuing a claim. https://www.mondaq.com/nigeria/arbitration-dispute-resolution/1466422/third-party-funding-in-

affords disputants who have meritorious and substantial claims, and who wish to pursue such with the opportunity to do so by approaching financiers to seek funding. Typically, such funds would cover the party's legal fees and other expenses incurred at the arbitration proceedings, in return for an agreed percentage of the monetary proceeds awarded in favour of such a party, if successful in the arbitration.

However, third-party funders to protect their interests would usually conduct extensive due diligence to ascertain that the claims are good. An advantage of third-party funding is that once the other party is made aware that the claim is being funded by a third-party funder, it may facilitate an early settlement of the dispute. Also, the involvement of a third-party funder may have an impact on the jurisdiction of the arbitral tribunal, the possibility to obtain security for costs, the determination of recoverable costs, encourages transparency of the arbitral process and could mitigate the risk of the agreement creating a conflict of interest between the funded party and its lawyer.[8] Nonetheless, a demerit of third-party funding is that a third-party funder may reserve the right of approval of the settlement which could lead to a loss of autonomy by a funded party. Also, a substantial part of the award would usually go the third-party funder. Lastly, the possibility of a conflict of interest between a third-party funder and an arbitrator cannot be ruled out.[9]

## 3. The Doctrine of Maintenance and Champerty under the Old Regime

Prior to the enactment of the AMA, third-party funding was neither recognized nor applicable to arbitrations seated in Nigeria. This position was due to the common law doctrine of maintenance and champerty which: (i) prohibited a third party from funding litigation between disputants (in which the funder has no legitimate interest); and (ii) rendered an agreement to provide such funds illegal and void, on the ground of public policy. The rationale for this is attributable to the latin maxim, *"interest reipublicase ut sit finis litium"* which means *"it is in the interest of the State that there be an end to litigation"*. Thus, third-party funding could result in significant spikes in litigation, and propagate unmeritorious claims. The doctrine of maintenance and champerty being a common law doctrine, was applicable in Nigeria and affirmed by

nigeria-untapped-revenue-for-global-litigation-funders-within-africas-economic-giant, accessed on 30th September 2024.

[8] See, https://jusmundi.com/en/document/publication/en-third-party-funding accessed on 30th September 30, 2024.

[9] See, https://www.webberwentzel.com/News/Pages/disclosure-of-third-party-funding-arrangements.aspx accessed on 30th September 30, 2024.

Nigerian Courts,[10] thus, making third-party funding of Arbitration inapplicable in Nigeria until 2023.

The Court of Appeal in the case of **Oloko v. Ube** defined champerty in the following terms:

> *"at common law, champerty is a form of maintenance and occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute. An agreement by a solicitor to provide funds for litigation in consideration of a share of the proceeds is champertous."*

The doctrine of maintenance and champerty was extended to arbitration, and third-party funding was regarded as contrary to public policy in Nigeria.[11] This was especially so because of Article V (2)(b) of the New York Convention,[12] which was replicated in Section 52 (2)(b) of the Arbitration and Conciliation Act (ACA),[13] prior to its abolition in 2023.[14] Section 52 (2)(b) of the ACA sets out public policy as one of the grounds for setting aside an arbitral award or for refusing the recognition and enforcement of an arbitral award.

## 4. <u>Other Jurisdictions</u>

The Doctrine of Maintenance and Champerty is a common law doctrine imported from the United Kingdom into Nigerian law through the Statutes of General Application. However, the torts of maintenance and champerty was abolished in England and Wales in the late 1960s. The common law prohibitions on maintenance and champerty are only applicable if such arrangements would be contrary to public policy and would become unenforceable on that basis. An example of this is where there is disproportionate profit or excessive control of the proceedings by a third-party funder.[15]

In South Africa, the common law doctrine of maintenance and champerty was applicable until the court in the case of *Hugo & Moller N.O v. Transvaal Loan,*

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[10] Per Edozie JCA in Oloko v. Ube (2001) 13 NWLR (Pt. 729) CA 161 at 181. See also, Egbor & Anor v. Ogbebor (2015) LPELR-24902.

[11] See, https://spaajibade.com/third-party-funding-vis-a-vis-public-policy-considerations-in-arbitral-awards-enforcement-in-nigeria/ Accessed on 30th September 2024.

[12] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York, 10th June 1958).

[13] Cap 18 Laws of the Federation of Nigeria, 2004.

[14] Sections 61 and 62 of the AMA.

[15] See, https://www.mondaq.com/nigeria/trials-amp-appeals-amp-compensation/954424/considerations-third-party-litigation-and-arbitration-funding-in-nigeria Accessed on 30th September 2024.

*Finance and Mortgage Co.*,[16] ruled that agreements to share proceeds of lawsuits – or *pactum de quota litis* – are not necessarily illegal, and could be upheld or otherwise at the discretion of the courts, based on the structure of the agreement and the peculiarity of the situation.[17] The Supreme Court of Appeal of South Africa in the latter case of *Price Waterhouse Coopers Inc and Others v. National Potato Co-operative Ltd.*,[18] held that an agreement in terms of which a stranger to a lawsuit advances funds to a litigant on condition that their remuneration, in case the litigant wins the action, is to be part of the proceeds of the suit, is not contrary to public policy in so far as the claim is bona fides.

Other jurisdictions predominantly known for third-party funding are Hong Kong and Singapore, where it is permitted in arbitration and some court proceedings. In Singapore, TPF is applicable in international arbitration and related court proceedings under certain conditions, also provisions were made for further regulations which prescribes specific eligibility requirements for funders.[19] In Hong Kong, TPF applies in relation to both domestic and international arbitration, thereby making both jurisdictions convenient hubs for arbitration.

## 5. Third Party Funding under the Arbitration and Mediation Act

Section 61 of the AMA abolished the torts of maintenance and champerty in relation to third-party funding of arbitrations in Nigeria and arbitration related proceedings in courts in Nigeria. However, it could be argued that the mere abolition of the doctrine of maintenance and champerty as well as the requirement to disclose third-party funding does not expressly permit third-party funding in Nigeria, although, it could be presumed from its wordings that said abolition intends that third-party funding be applicable in Nigeria.[20]

The AMA in Section 62 requires a recipient of third-party funding to give written notice of the existence of the funding arrangement to the other parties, the arbitral tribunal, and the arbitral institution where applicable.[21] The written notice for a funding agreement could be issued either on or before the commencement, at the

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[16] [1894] 1 OR 339 at 340.

[17] See, https://www.mondaq.com/nigeria/trials-amp-appeals-amp-compensation/954424/considerations-third-party-litigation-and-arbitration-funding-in-nigeria Accessed on 30th September 2024.

[18] (2004) ZASCA 64; (2004) 3 All SA 20 (SCA).

[19] See, Civil Law (Amendment) Act (Bill No. 38/2016) which was passed into law on 10 January 2017.

[20] Also, Section 50(1)(g) of the AMA empowers the arbitral tribunal to fix the costs of arbitration and to include the costs of obtaining Third Party Funding in the costs of the Arbitration. See also, https://arbitrationblog.kluwerarbitration.com/2018/06/07/third-party-funding-arbitration-nigeria-yea-nay/ accessed on 30th September 2024.

[21] Section 62(1) of the AMA.

commencement or immediately after the commencement of the arbitration,[22] and is required to include the name and address of the third-party funder. Lastly, where a respondent has brought an application for security for cost based on the disclosure of third-party funding, the arbitral tribunal may allow the funded party or its counsel to provide the arbitral tribunal with an affidavit stating whether under the funding arrangement, the funder has agreed to cover adverse costs orders and the affidavit shall be a relevant consideration to the decision of the arbitral tribunal on whether to grant security for costs.[23]

At this juncture it is worthy to note that while the AMA introduces third-party funding by the abolition of maintenance and champerty and the requirement for disclosure of third-party funding, however, there is still a need for a specific and detailed structure for third-party funding in Nigeria to address such issues as confidentiality, conflict of interests, etc.

## 6. Conclusion

The abolition of maintenance and champerty by the AMA combined with the provisions of Section 62 is no doubt a welcome development, as more people would be encouraged to explore arbitration since alternative funding arrangements could be made for attendant arbitration costs. Also, with Nigeria's economic potential, sections 61 and 62 of the AMA is the first step in the direction of making Nigeria a leading international arbitration venue and an emergent arbitration seat of preference in Africa.


For further information on this article and area of law,
please contact **Abiodun V. Ogunnubi** at:
S. P. A. Ajibade & Co., Lagos by
Telephone (+234 1 472 9890), Fax (+234 1 4605092)
Mobile (+234.809.790.4777, +234.818.449.2339)
Email: aogunnubi@spaajibade.com
www.spaajibade.com


[22] Section 62(2) of the AMA.
[23] Section 62(3) of the AMA.