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Third Party Funding of Arbitration Post-COVID.19: A Nigerian Perspective

By

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Introduction

Originally, third party funding was designed to support entities especially small investors that did not have the means to pursue claims or companies that would like to outsource funding of the prosecution of claims. However, its use has broadened to the extent that it has become a feature of the litigation landscape in several jurisdictions. Interestingly, funders attracted by high-value claims, also look at international arbitration. Such funders are attracted by some of the attributes of arbitration including perceived finality of awards, and the enforcement regime provided by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[1] In consequence most discussions today on funding of arbitral proceedings and costs of arbitration, the concept of third party funding features prominently.

Clearly, the Covid-19 pandemic will lead to cash flow constraints for many infrastructure businesses and other commercial entities. In a country like Nigeria that depends largely on resources from petroleum, the price for crude oil is crashing. This will compound the cash flow constraints of the country. In

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[1] See *Ashurst Quickguides: Third Party Funding in International Arbitration*, 21 February, 2020 available at <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/> accessed 20 April, 2020

such circumstances, the ability to access third party funding to support existing and new claims will have its own challenges. This is so because despite the attraction of third party funding in arbitration, it raises legal, ethical, confidentiality, disclosure, conflict of interest, enforceability and evidential issues.[2] In arbitration security for costs and transparency of arbitral proceedings are major concerns. Similarly, the common law doctrines of champerty and maintenance are also implicated.

In this paper, we do not intend to examine all these legal, ethical and public policy considerations in detail as all these have been adequately treated in other texts and other jurisdictions.[3] What are the challenges facing a Nigerian lawyer advising his clients in this area? How have the courts behaved and what is the attitude of the legislature and rule-makers in this regard? At the moment, it is only Singapore in 2017 and Hong Kong in 2018 that have legislation on third party funding. The paper will show that Nigeria is repealing and re-enacting the Nigerian Arbitration and Conciliation Act, 1988 to provide for third party funding and abolish the doctrines of maintenance and champerty in arbitral proceedings. The paper proceeds to consider what factors must be taken into account in determining whether to fund a transaction. The paper concludes by examining COVID-19 Pandemic and its impact on third party funding of arbitration from a Nigerian perspective.

Third Party Funding of Arbitration

Third Party funding is an evolving concept. So far, only Singapore and Hong Kong have passed legislation on it.[4] I am glad to state that Nigeria will shortly join

[2] See generally Jean-Christophe Honlet, 'Recent Decisions on Third-Party Funding in Investment Arbitration' *ICSID Review, Oxford Journals: Law & Social Sciences* Vol.30(3), 2015 and Ashurst Quick Guides, ibid

[3] See generally Lisa Bench Nieuwveed & Victoria Shannon, *Third Party Funding in International Arbitration* (Wolters Kluwer, 2012). See also Paul Obo Idornigie, 'Third Party Funding in International Arbitration' in *The News Journal of The Chartered Institute of Arbitrators, Nigeria Branch* Vol 7 No 2, Jan – Mar 2016 4 and Paul Obo Idornigie, 'Are We Ready for Third Party Funding? in The News Journal of The Chartered Institute of Arbitrators, Nigeria Branch Vol. 8, No 4 (May-July, 2017 23

[4] See Singapore Civil Law (Amendment) Act 2017 and Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2018

the league thus making earlier comments on the Nigerian Arbitration and Conciliation Act, 1988 as re-drafted in 2017 otiose.[5]

There are several definitions of third party funding. Indeed due to the complex nature of the subject matter and with the diversity of parties, entities, funding products, players and institutions playing various roles and having different objectives, the definitional ambiguities and deficiencies have been identified by the *ICC Report of the ICC-Queen Mary Task Force on Third Party Funding in International Arbitration [ICC Report].*[6]

Section 91(1) of the Nigerian Arbitration and Mediation Bill 2019, now before the National Assembly, adopted the definition in the ICC Report and provides for 'third party funder' and 'third party funding agreement' thus:

> **"Third-Party Funder"** means any natural or legal person who is not a party to the dispute but who enters into an agreement either with 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 such 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 Agreement"** means 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

[5] See Joseph Onele 'Third Party Funding for Arbitration in Nigeria: Yea or Nay?', 7 June, 2018 available at <http://arbitrationblog.kluwerarbitration.com/2018/06/07/third-party-funding-arbitration-nigeria-yea-nay/> accessed 20 April, 2020; Robert Wheal, Elizabeth Oger-Gross, Tolu Obamuroh and Gustav Lexner, *Third Party Funding in Arbitration: Reforms in Nigeria*; White & Case, 27 November, 2018 available at <https://www.whitecase.com/publications/alert/third-party-funding-arbitration-reforms-nigeria> accessed 20 April, 2020; Opemipo Omoyeni, 'Third Party Funding in Nigeria Seated Arbitrations: Setting the Law Straight', Kluwer Arbitration Blog, 12 March, 2019 available at <http://arbitrationblog.kluwerarbitration.com/2019/03/12/third-party-funding-in-nigerian-seated-arbitrations-setting-the-law-straight/> accessed 20 April, 2020 and Justina Ibebunjo, I Dick, Pascal Ememonu and Uche Nwokedi & Co, 'The Third Party Litigation Funding Law Review – Edition 3' in *The Law Review* available at <https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-3/1212065/nigeria> accessed 20 April, 2020. It is noteworthy that all these reviews were based on the 2017 version of the Arbitration and Conciliation Bill that was never passed into law.

[6] April 2018, The ICCA Reports No 4 available at <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 20 April, 2020.

part of a selected range of cases, and such 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.

Similarly, Singapore and Hong Kong have Arbitration Rules that provide for third party funding especially disclosures of any funding agreement.[7]

Simply put, third party funding is where someone who is not involved in arbitration provides funds to a party to that arbitration in exchange for an agreed return. Typically, the funding will cover the funded party's legal fees and expenses incurred in the arbitration. The funder may also agree to pay the other side's costs if the funded party is so ordered, and provide security for the opponent's costs.[8] However, if there is no recovery, no payment will be made to the funder nor the funds already advanced be refunded. There is no standard contract for third party funding. It depends on the circumstances of the particular case. We must stress however, that the funding agreement must be properly 'packaged'.

A funder may be the client's attorney or law firm, an insurance company or an outside institution such as a corporation, bank or other financial institution. In countries like Australia, Germany, the UK, Canada, Netherlands, South Africa, New Zealand and the USA, where third party funding is well developed, there are specialized funding institutions.[9] Attorney financing is quite common in the form of *pro bono*, contingency fee[10], conditional or success fee arrangements. In the case of an institution that has no connection with the client, such institution may provide a traditional loan or non-recourse funding.

Legal, Evidential, Conflict of Interest and other Public policy Issues

These can briefly be discussed thus:

a) Is third party funding legal in the face of the doctrine of maintenance and champerty?

[7] See Order 24(l) of the SIAC Investment Rules, 2017 and Order 44 of HKIAC Rules, 2018

[8] Maya Steinitz *Whose Claim is This Anyway? Third Party Litigation Funding*, 95 Minn. L Rev. 1275-1276 (2011). See also *Ashurst Quickguides ibid*

[9] The list of funders across jurisdictions is endless including Alter Litigation (Paris, France), Advantage Litigation Services (Farnborough, UK), Amicus Capital Services (New York, USA), Bridgepoint Global Litigation Services Inc (Toronto, Canada), FORIS AG (Bonn, Germany), Hillcrest Litigation Services Limited (Perth, Australia), Invest4Justice Litigation Crowdfunding (Geneva, Switzerland). See https://international-arbitration-attorney.com/third-party-funders-international-arbitration/ accessed on 15 March, 2020.

[10] See Rule 50 of the Rules of Professional Conduct for Legal Practitioners, 2007 dealing with Contingent Fee Arrangement.

b) The Nigerian Evidence Act, 2011[11] provides for privileged communication and protection of communication between attorney and client. Should an attorney be compelled to make such disclosures?

c) The Rules of Professional Conduct in the Legal Profession in Nigeria provides for relationship between the attorney and the client.[12]

d) Should Disclosure of Funding Agreement be Made at all? What of the issue of security for costs? The danger of allowing third parties to fund ICSID arbitration is that, as usual, such funders are not known to the Bilateral Investment Treaty (BIT)[13] and the arbitral tribunals. Third party funders are outside the tribunal's jurisdiction. Similarly, if the claimant's sole means of bringing its claim is through third party funding, there is a risk that the claimant will not meet any costs award. However, in *Eurogas Inc and Belmont Resources Inc v Slovak Republic*[14], the Arbitral Tribunal rejected the State's request for security for costs on the ground, inter alia, that the provisional orders envisaged in Art 47 of the ICSID Convention were formulated to preserve the status quo; that it is not part of ICSID regime that a claim can only be heard on the establishment of a sufficient financial standing of the investor to meet a possible costs award; that security for costs are granted in exceptional circumstances; and that financial difficulties or impecuniosity and third-party funding do not necessarily constitute exceptional circumstances. The Tribunal ordered the Claimant to disclose the identity of the funder in order for the arbitrators to check that they did not have a conflict of interest.[15]

[11] See sections 192 and 195 of the Evidence Act, 2011

[12] In Nigeria, Rule 17(3)(b) of the Rules of Professional Conduct for Legal Practitioners (RPC) allows for a reasonable contingent fee in civil cases. This is further developed in Rule 50, RPC. The only proviso is that the engagement of the Legal Practitioner must be in respect of litigation and it is reasonably obvious that there is a bona fide cause of action; Rule 19 of RPC provides for privilege and confidence of client; Rule 51, RPC deals with payment of expenses of litigation. Accordingly, a lawyer shall not enter into an agreement to pay for or bear the expenses of his client's litigation, but the lawyer may, in good faith, advance expenses as a matter of convenience and subject to reimbursement; and Rule 53, RPC provides that a lawyer shall not share his fees except with another lawyer based upon the division of service or responsibility.

[13] See *RSM Production Corporation v Saint Lucia,* ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August, 2014) paras 26-37 where the Arbitral Tribunal ordered security for costs on the ground that 'once it appears that there is third party funding of an investor's claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made.'

[14] ICSID Case No. ARB/14/14, Procedural Order No 3 (23 June, 2015) paras 119-123

[15] See also *South American Silver v Bolivia* PCA Case No. 2013-15, Procedural Order No 10, 11 January 2016, para 66

Happily, section 62 of the Arbitration and Mediation Bill 2019 provides for disclosure and security for costs thus:

> (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.
>
> (2) Such written notice shall be made:
>
> (a) for a funding agreement made on or before the commencement of the arbitration – at the commencement of the arbitration; or
>
> (b) For a funding agreement made after the commencement of the arbitration – without delay as soon as the funding agreement is made.
>
> (3) Where a Respondent has brought an application for security for cost based on the disclosure of Third-Party Funding, the Tribunal may allow the funded party or its counsel to provide the Tribunal with an affidavit stating whether under the funding arrangement, the Funder has agreed to cover adverse costs order. The affidavit shall be a relevant consideration to the tribunal's decision on whether to grant security for costs.[16]

Similarly, in the Draft Amended ICSID Arbitration Rules, disclosure of third party funding is mandatory.[17]

Security for costs is a contentious issue in international arbitration especially investor-state arbitration. This is compounded by third party funding. As has been stated above, ICSID tribunals have set higher threshold for awarding of security for costs in the ICSID mechanism.[18]

[16] See also Rules 24(l) and 44 of SIAC Investment Rules 2017 and HKIAC Arbitration Rules 2018 respectively.
[17] Available at <https://icsid.worldbank.org/en/amendments> accessed 21 April, 2020.
[18] See Umika Sharman, 'Third Party Funding in Investment Arbitration: Time to Change Double Standards Employed for Awarding Security for Costs?' in Kluwer Arbitration Blog, July 29, 2018 available at

Luckily, section 62(3) of the Arbitration and Mediation Bill, 2019 has addressed this.

e) Potential Conflict of Interest - Other than *EuroGas Inc and Belmont Resources Inc v Slovak Republic*[19] in *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd Sti v Turkmenistan*[20], the Arbitral Tribunal ordered the disclosure to the Respondent and the Tribunal of the identity of a third-party funder including the terms of the funding. This became necessary to avoid conflict of interest, ensure transparency and to identify the true parties to the case; for the Tribunal to decide fairly how costs should be allocated at the end of the hearing; to give proper consideration to any application for security for costs and to ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives.

   It is noteworthy that in *Muhammet Cap v Turkmenistan*, supra, reliance was placed on the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.[21]

f) Possible Encouragement of Un-meritorious Claims
g) Possible Discouragement of Settlement
h) Risks that Funder May Put its Own Interests ahead of that of Claimant.
i) Does costs of arbitration as traditionally known include third party funding?[22]

<u>Doctrines of maintenance and champerty</u>

Maintenance and Champerty[23] are the most widespread and long-standing doctrines that may serve to constrain the existence or validity of any individual third party funding agreement. Maintenance is the funding of litigation by a third party who is a stranger to the dispute. Champerty is the funding of a

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<http://arbitrationblog.kluwerarbitration.com/2018/07/29/third-party-funding-investment-arbitration-time-change-double-standards-employed-awarding-security-costs/> accessed 19 April, 2020.

[19] ICSID Case No. ARB/14/14, Procedural Order No 3 (23 June, 2015) paras 119-123

[20] ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June, 2015)

[21] Available at <https://nortonsafe.search.ask.com/web?q=IBA%20Guidelines%20on%20Conflict%20of%20Interest&o=APN12175&chn=store&prt=SSS&geo=us&locale=en_us&ver=22.11.2.7&tpr=111&guid=a46a31d9-8815-4c04-8090-28e25508c5a0&doi=2017-12-29&trackId=direct&ctype=> accessed on 19 April, 2020

[22] See *Essar Oilfields Services Limited v Noirscot Rig Management PVT Limited* No. CL-2016-000188, High Court of Justice Queen's Bench Division, Commercial Court, 15 September 2016 [2016] EWHC 2361 (Comm) or 2016 WL 04772390. See section 50 of the Nigerian Arbitration and Mediation Draft Bill 2019 that has provided that third party funding is a recoverable cost.

[23] See *Egbor & Anor v Ogbebor* (2015) LPELR 24902 (CA). See also *Uloko v Ube* (2001) WRN 116 at 129.

litigation by a stranger third party in exchange for a percentage of the win. Thus champerty is an aggravated form of maintenance.[24] The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds.

At common law, both are illegal for two basic public policy reasons: that it is desirable to curb excess litigation for the operation of an efficient judicial system; and bringing money to an individual who was not personally harmed by the defendant. In the UK, the tort and criminal law relating to these doctrines have been abolished. In some jurisdictions, the doctrines are obsolete and, therefore, give way to more up to date policies aimed at preventing 'abuse of process' and 'malicious prosecution', both of which deal with the wrongful initiation of litigation and perversion of legal process. The author sees maintenance and champerty as archaic and anachronistic.

In *re Trepca Mines Ltd*[25] Lord Denning MR in 1963 said of maintenance and champerty: *"Maintenance may, I think, nowadays be defined as* ***improperly*** *stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse".*

However, in England, the scope of maintenance and champerty has been progressively narrowed by judicial decisions.[26] Similarly it has been established in England that if properly structured, litigation funding does not infringe the rules against maintenance and champerty.[27] The court's approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilities access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.

In *Oyo v. Mercantile Bank (Nig) Ltd*[28] the Court of Appeal defined maintenance as: *"Improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse".*

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[24] See Bryan A Garner (ed) *Black's Law Dictionary* (10th edn, West Publishing 2014) 279 and 1097.
[25] (No 2) [1963] ch 199 at 219-22
[26] See *Sibthorpe v Southwark Borough Council* (2011) EWCA Civ 25 or (2011) 1 WLR 2111. See generally Lord Justice Jackson. 'Third Party Funding or Litigation Fund' being a Speech delivered at the Sixth Lecture in the Civil Litigation Costs Review Implementation Programme, The Royal Courts of Justice, 2011 available at http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Sixth-Lect accessed on 5 November, 2016.
[27] *Arkin v Borchard Lines* (2005) EWCA Civ 655 or (2005 1 WLR 3055
[28] (1989) 3 NWLR (Pt 108) 213

In Nigeria, do we allow third party funding in arbitration to evolve naturally or do we subject it to regulation? At the moment, it depends on the facts of each case. As rightly observed by Ogakwu, JCA in *Egbor & Anor v Ogbebor, supra* at page 14, paras A-D

> *It is no doubt settled law that a situation where a person elects to maintain and bear the costs of an action for another in order to share the proceeds of the action or suit is champertous: OLOKO vs. UBE (supra). However, the facts have to bear out the champertous relationship and cannot be founded on the perception of a person of what he thinks the relationship is. Put differently, in order for the action of the Respondent to be champertous, the facts have to show that the Respondent offered to maintain the action by bearing the costs of the litigation in order to be given a share of the proceeds.*

The good news in Nigeria is that Section 61 of the Arbitration and Mediation Bill 2019 has abolished the torts of maintenance and champerty in arbitration thus:

> The torts of Maintenance and Champerty (including being a common barrator) do not apply in relation to third-party funding of arbitration. This Section applies to arbitrations seated in Nigeria and to arbitration related proceedings in any court within Nigeria.

Factors to be Taken into Account Before Funding:

No funder will fund a transaction without carrying an initial evaluation. This is imperative. Factors to be taken into account include:

- ✓ Whether the national law/rules of the seat of arbitration provide for third party funding.
- ✓ The attitude of the courts of the place of enforcement. Are they pro-arbitration?
- ✓ As early as possible, the funder will enter into a non-disclosure agreement. This is becoming a big issue and the movement is now towards full disclosure as early as possible.
- ✓ The packaging of the transaction should include the possible of settlement. What happens if the parties settle?

Post COVID.19 Pandemic

On 30th January, 2020, the World Health Organisation (WHO) declared a public health emergency of international concern, that is, an extraordinary event which is 'serious, unusual or unexpected', carries transnational implications and may require immediate international action. On 11 March, 2020 the WHO declared it a pandemic.[29] Since then the whole world has not been the same. Before the global lock down, the aviation and hospitality industries were immediately affected. With the lock down, factories were shut down, shops closed, several supply chain industries were adversely affected and workers were ordered to stay at home to prevent the spread of the pandemic. The virus has already destablized commerce, hit company earnings worldwide and prompted significant drops in global stock markets. This will impact on either litigation or arbitration with investors opting for private forums and not public. The virus will affect the way evidence is created, gathered and transmitted. Already, there is curtailment of papers sent through mail and courier. Reliance will be more on virtual communication, artificial intelligence and other technologies.[30] It would seem that the analogue era is over as those who will be gainfully employed and act as counsel or arbitrators will be those digitally knowledgeable. Ultimately, the definition of work and office will change. So also is the appropriate dispute resolution mechanisms.

In the health sector, a COVID-19 measure by government can be seen by an investor as a direct or indirect expropriation and therefore seek compensation. This will lead to a threshold issue as to whether the measure is potentially in breach of substantive provisions of the investment treaty, for example, fair and equitable treatment or whether the measure amount to expropriation – direct or indirect.[31] Whether such an act is wrongful or not is determined by international law and not national law.[32]

Nigeria is at the threshold of industrialization and improvement on its infrastructure. No doubt, as a country, the consequences of the lockdown will be enormous. They have implications for the economy and the health sector. In

[29] See generally Federica Paddeu and Kate Parlett, 'COVID.19 and Investment Treaty Claims', *Kluwer Arbitration Blog*, March 30, 2020 available at <http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/> accessed 19 April, 2020

[30] See generally Gary Benton, 'How will the Coronavirus Impact International Arbitration?', *Kluwer Arbitration Blog*, March 13, 2020 available at <http://arbitrationblog.kluwerarbitration.com/2020/03/13/how-will-the-coronavirus-impact-international-arbitration/> accessed 19 April, 2020

[31] Paddeu and Parlett, ibid

[32] See International Law Commission's Articles on State Responsibilities, Arts 1-3 available at <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 19 April, 2020

the face of extreme difficulties, Nigeria may be forced to nationalize or requisition or force foreign companies to cease trading or operations.

The end of the pandemic is not in sight. Will governments be insulated for measures taken or investors indemnified for substantial losses? However, it is obvious that several contractual, statutory and treaty issues will arise. We will briefly examine these issues:

a) Contractual
b) Statutory
c) Treaty

Contractual

With the declaration of the pandemic and the lock down, there are already several breaches of contract. Many new claims will be initiated involving commercial delays or cancellation due to disruptions in construction, manufacturing, production and distribution of goods and provision of services. There will also be claims relating to international transit, from shipping to rail, to air and sea, including claims involving delays or cancellation of shipment of components for a wide array of consumer and industrial products.[33] An investor can claim indemnification, compensation and damages as a result of the breach of the contractual terms. The sums claimed may be so high that the claimant may not have the resources to pursue them. A third party funder may come to the rescue if the factors discussed above are taken into account. The claimant may merely claim indemnification. It must be stated that indemnification must be expressly provided for in the contract.

Nigeria has entered into various contracts especially in the area of infrastructure – roads, rail, airports, seaports, power, mines and minerals, among others. No doubt, the lockdown will lead to breaches of various obligations. It is imperative that all these contracts are appraised to determine the best course of action.

Statutory

It is an established principle in international commercial arbitration that where a statute provides for arbitration for an investor, the investor's home state need not enter into a treaty with the host state to trigger an investor-state arbitration. In Interocean *Oil Development Company & Anor v. Federal Republic of Nigeria*,[34] where the claimant is a US company, the International Centre for

[33] Benton, ibid

[34] ICSID Case No. ARB/13/20, registered on 9 September, 2013; panel constituted on 11 December, 2013, a hearing on preliminary objections held on 26 June, 2014 and decision on the preliminary objections

the Settlement of Investment Disputes (ICSID) reference was not based on a Treaty between US and Nigeria but the provisions of section 26 of the Nigerian Investment Promotion Act.[35] The preliminary objection by the Government of Nigeria that the provision of section 26 of the NIPC Act did not amount to consent to ICSID arbitration was rejected by the Arbitral Tribunal. The Arbitral Tribunal interpreted the provision in section 26 of the NIPC Act as a standing offer which was capable of being accepted by the Claimant. The Arbitral Tribunal held that 'There is nothing novel about consent to ICSID being granted through national legislation.'

Although the final award in this ICSID Arbitration has not been published, there are allegations of possibility of third party funding that were not disclosed especially how the Nigerian Legal Team and the Claimant were being funded. The Lead Counsel to the Nigerian Legal Team admitted that he was doing the case *pro bono* for Nigeria. Can this be taken to mean that his law firm is a third party funder? This is debatable if not questionable. On the part of the Claimant, it would seem, from available evidence, that it was funded but made no disclosure. There was also allegation of possible conflict of interest.[36] Eight (8) Procedural Orders were issued between 2014 and 2018, the last issued on 14th May, 2018 ordering post-hearing briefs by 13 June, 2018. Yet, no final award has been published.[37] This is troubling. We must add that this is the only known Nigerian case where third party funding was raised.

It should be borne in mind, therefore that a statutory claim can arise from the provisions of the Nigerian Investment Promotion Act. The claim may be similar to those under treaty discussed hereunder.

Treaty

Nigeria has entered into twenty nine (29) Bilateral Investment Treaties (BITs) out of which fifteen (15) are in force.[38] Those in force are with:

(Decision on Jurisdiction) rendered on 29 October, 2014. See also *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No ARB/84/3 (April 1988) 60; *Inceysa Vallisoletana SL v Republic of El Salvador* (Award), ICSID Case No. ARB/03/26 (2 Aug 2006) 212-213, *Zhinvali Development Ltd v Republic of Georgia* (Award), ICSID Case No. ARB/00/1 (24 Jan 2004), 339 and Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (Oxford University Press, 2013) 35.

[35] Cap N117, Laws of the Federation of Nigeria, 2004. Section 26 provides for ICSID arbitration where the dispute is with a foreign investor.

[36] See Global Arbitration Review of 23/24 September, 2018 available at <https://globalarbitrationreview.com/article/1174630/nigeria-fails-to-disqualify-whole-icsid-tribunal> accessed on 21 April, 2020

[37] See ItaLaw available at <https://www.italaw.com/cases/3379> accessed 21 April, 2020.

[38] Available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/153/nigeria> accessed 19 April, 2020.

a) United Kingdom
b) France
c) Netherlands
d) Republic of Korea
e) Switzerland
f) Romania
g) South Africa
h) Italy
i) Spain
j) Finland
k) Germany
l) China
m) Serbia
n) Sweden
o) Taiwan

All these treaties provide that in case of a dispute arising out of the treaty, such a dispute will be resolved under the provisions of the International Convention for the Settlement of Investment Disputes Between States and Nationals of Other States.[39] Under the BIT, breaches can occur in the following areas: breach of fair and equitable treatment, breach of full security and protection, breach of most-favoured nation treatment, and expropriation – direct or indirect.

Major foreign investors in Nigeria are from these countries where we have treaties in force. Generally apart from the protection offered foreign investors by the treaties, the investors enter into underlying contracts. When there is a breach, the investor has a choice between proceeding under the contract nationally or the treaty. Generally, the treaty offers more protection than the contract and therefore, the investors invoke the provisions of the treaty and initiate treaty arbitration.

The defences open to government include those of frustration, force majeure, exceptions in treaty provisions and customary international law remedies.

[39] Under this Convention, Nigeria has been involved in ICSID arbitrations: See ICSID Case No. ARB/78/1. The case was filed on 20 March, 1978, the panel was constituted on 25 April, 1979, Settlement Agreement was reached on 14 December, 1979 and an award issued embodying the Settlement Agreement on 22 July, 1980. See ICSID Cases at www.worldbank.org/icsid accessed on 4 November, 2019 and Case No. ARB/07/18. The Panel was initially constituted on 21 January, 2009 and re-constituted on 20 April, 2010. The Tribunal had a hearing on the merits in Paris, on May 17, 2010, the Claimant filed a Post-hearing brief and on May 19, 2010, the Respondent filed a post-hearing brief. Unfortunately, on 1 August, 2011, the Tribunal issued an order taking note of the Notice of Discontinuance of the proceedings pursuant to ICSID Arbitration Rules 43(1). See ICSID Cases at www.worldbank.org/icsid accessed on 4 November, 2019

Claims under BITs are usually substantial that the assistance of a third party funder will be imperative. Other than the restriction on a legal practitioner for funding arbitration, institutional funders can fund. Investor-state arbitration has a major attraction for third party funders. We urge Nigerian entities to develop this funding option.

Several cases have been made for and against third party funding in Investor-State Dispute Settlement (ISDS). These include a) third party funding may increase the number of ISDS, b) third party funding may impact investors' decisions to remain engaged in or exit the host state; c) third party funding may shift the development of investment law in a more funder- (and claimant-) friendly direction; d) third party funding can impact decisions to settle, or not settle, claims; and e) third party funding can impact governments' willingness and ability to regulate investment in order to advance sustainable development aims. In consequence, a case is being made to ban third party funding in ISDS.[40] As has been stated, third party funding is an evolving concept, a work-in-progress and therefore it is not finished product yet. The debate continues.[41]

It is not the case that a government has no right to regulate to provide for environment, human rights, labour and public policy issues. When this is done, it may amount to expropriation. The law is that where there is expropriation, there must be adequate and prompt compensation. The quantum of compensation is usually controversial. Luckily, the modern BITs provide for rights to regulate in order to advance sustainable development goals.[42]

Post-COVID.19, the potential for disputes arising from contract, statute and treaty is very high. Nigeria should get ready. However, we must warn that third party funding is inappropriate in all cases. It is appropriate in the following cases:

- ✓ Claims where damages will be the outcome.
- ✓ The potential claim should also be beyond a particular monetary threshold otherwise it is inadvisable
- ✓ Funders will require good prospect of success

[40] Brooke Guven and Lise Johnson, 'Third Party Funding and the Objectives of Investment Treaties: Friends or Foes? In Investment Treat News, June 27, 2019 available at <file:///C:/Users/Prof%20P%20Idornigie%20SAN/Downloads/iisd-itn-june-2019-english.pdf> accessed 19 April, 2020.

[41] See the United Nations Commission on International Trade Law (UNCITRAL) Working Group III Papers available at <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 19 April, 2020.

[42] See the Nigeria-Morocco BIT (2016) available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheriia/3711/morocco---nigeria-bit-2016->. Compare the Nigeria-Netherlands BIT (1992) available at the same website.

- ✓ Funders will be interested in knowing if the respondent will be able to meet the claim, costs and interest
- ✓ The seat of the arbitration is very important. The seat determines whether the national laws provide for third party funding.[43]

Where there are claims against Nigeria, efforts should be made to ensure that legal practitioners with subject matter and process expertise are engaged. It is not enough being a senior member of the bar. These are specialized areas and legal practitioners with the requisite expertise should be engaged to prosecute such claims.

Concluding Remarks

Third party funding has its advantages and disadvantages. Striking a balance is therefore imperative. Post-COVID.19, the possibility of claims against the Government of Nigeria or by the government looms large. Third party funding has not developed in Nigeria like in other jurisdictions like the UK, US, Singapore, Hong Kong, among others. Nigerian institutions – insurance, banks and private institutions should think about this urgently.

In Nigeria, if the funding is to be done by a lawyer, the privileges provided in the Evidence Act and the Rules of Professional Conduct are likely to be invoked. However, where the funder is an institution, these provisions will not apply.

Any attorney whose clients is considering working with a third party funder must be cautious and conduct thorough research on the current law in any applicable jurisdiction, especially since the law is so rapidly evolving in jurisdictions where third-party funding in litigation is growing.

As arbitrators, it is for us to determine the costs where the reference is *ad hoc*. It is also for the arbitral tribunal to apportion costs. In the apportionment, the arbitral tribunal is obliged to take into account the circumstances of the case. Generally, costs follow the event. In awarding costs, are we going to take into account third party funding? If the new Bill is passed into law, the answer will be in the affirmative.

[43] See also Ashurst Quick Guides, ibid