

## THIRD-PARTY FUNDING OF ARBITRATION IN NIGERIA; PROSPECTS, CHALLENGES AND LESSONS FROM SINGAPORE AND HONG KONG

By

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### Abstract

*Third-party funding which refers to the financing of a claim by a party unconnected to the dispute in return for financial gain – typically, a share of the damages if the claim succeeds, is becoming popular in many arbitral jurisdictions and centers globally, and Nigeria is not an exception. In this paper, the prospects and challenges associated with third-party funding in arbitration in Nigeria in the wake of the just-passed (Arbitration and Mediation Bill 2022) awaiting presidential assent are examined. To effectively deal with this, a literature review and comparative review methodology were adopted. The concept of third-party funding as well as its introduction in Nigeria as provided by the Bill 2022 is discussed. Furthermore, the expected challenges with third-party funding in Nigeria when the Bill comes into effect are examined. The Hong Kong and Singaporean situation is examined while looking at their provisions that make third-party funding operational in those Jurisdictions. The paper highlighted challenges regarding issues of confidentiality and disclosure as well as conflicts of interest and; Issue of non-regulation of third-party funding in Nigeria-seated arbitration proceedings as some of the expected barriers to third-party funding in Nigeria should the Bill be signed into law. These issues were however expressly dealt with in Hong Kong and Singapore as such lessons can be learned from them. The paper concludes by stating that no doubt Third-Party funding will become more prevalent if the Bill recently passed by the Nigerian Senate will be assented to by the President as soon as possible to pave way for the application of Third-party funding in Nigeria with its prospects. However, while we look forward to this happening soon, a clue could be taken from Hong Kong and Singapore to enable Nigeria to deal with future challenges or barriers in order to implement a hitch-free Third-Party Funding Regime.*

**Keywords:** Arbitration, Challenges, Hong Kong, Nigeria, Prospects, Singapore, Third-Party Funding,

### 1.0 Introduction

One of the essential elements of arbitration is the costs that are involved in prosecuting the proceedings – arbitrator fees, secretary fees, expert fees, and other miscellaneous costs such

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as the cost of the venue and so on<sup>1</sup>. Consequently, parties are sometimes hesitant in commencing arbitration proceedings because of the financial implications. The advent of Third-party funding addresses this issue and consequently, made the practice of third-party funding in arbitration more prevalent in a few jurisdictions around the world, including Singapore and Hong Kong.

Although currently not applicable in Nigeria, there are high expectations as the Arbitration and Mediation Bill 2022 has recently been passed by the Nigerian senate and awaiting presidential assent. In this article, the prospects and challenges of the third-party funding regime should the Bill be assented to are examined while looking at the provisions of Third-party funding in other nations such as Hong Kong and Singapore where third-party funding has been operational and what made it a success.

## **2.0 The Concept of Third-Party Funder and Funding**

**Section 91(1)** of the Arbitration and Mediation Bill 2022, defines ‘third-party funder’ and ‘third-party funding arrangement explicitly 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, 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 depends on the outcome of the dispute or in return for a premium payment.*

*“Third-party funding arrangement” means a contract between the Third-Party Funder and a disputing party, an affiliate of that party, or a law firm representing that party, 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 depends on the outcome of the dispute or in return for a premium payment.*

In other words, TPF is a non-recourse arrangement where typically an independent commercial fund, with no prior connection to a dispute, provides funding to a party to the proceedings, in return for a share of any potential damages awarded. Its use is well established in many jurisdictions including Australia, England & Wales, and the United States.

The TPF industry has been expanding rapidly, with a global funding now worth more than US\$15 billion<sup>2</sup>. For instance, since its establishment, Burford Capital has grown into a US\$ 5

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<sup>1</sup> Omoaka, Godwin; Nweke-Eze, Stanley and Odunsi, Olusola (2021). Third-party funding in Nigeria-seated arbitration proceedings. Online at <https://www.ibanet.org/third-party-funding-Nigeria-arb-proceedings>

<sup>2</sup> White & Case (2022).

billion company with more than US\$ 3.2 billion in investment portfolio as of 2018.<sup>3</sup> Other funders such as Juridical, Fulbrook Capital, Woodsford Litigation Funding, Omni Bridgeway, DS Legal Capital are also recurring players in the TPF industry who have had substantial growth in business.

It is argued that there are new variants of disputes, the downturn in the oil and gas industry with potential for breach of contractual agreements, hence effects of globalization of markets, developments consequent upon internet use, online dispute resolution, hence attracting practices that were hitherto unknown including the likes of Third-Party funding to evolve<sup>4</sup>.

Third-party funding is sought as a result of a lack of financial resources to pursue claims independently. Increasingly, however, third-party funding is being used as a financing or risk management tool. The non-recourse nature of third-party funding (where the funder will only receive a return for its funding if the claim is successful) is particularly attractive to businesses, allowing them to apply their funds towards their core business while shifting the risk and cost of their claims to the funder<sup>5</sup>.

### **3. Third Party Funding in Nigeria**

On 10 May 2022, Nigeria's Senate passed the Arbitration and Mediation Bill 2022 (the Bill) which, once signed by the President, will replace Nigerians' current Arbitration and Conciliation Act of 1988. The Bill contains numerous provisions that will be of interest to entities seeking to arbitrate in Nigeria, including provisions on emergency arbitrators, the recognition and enforcement of interim measures, an award review tribunal, and third-party funding (TPF), which is considered by arbitration practitioners as the most innovative provision<sup>6</sup>.

It is pertinent to mention that Nigeria first attempted to indirectly legalize TPF when it introduced an amendment bill to the current Arbitration and Conciliation Act in 2008 and, if it had become law, would have allowed a party to claim the costs of obtaining TPF as part of its costs of arbitration. However, the amendment of the later introduced bill that was consequently passed by the Senate recently, will pave way for the use of TPF as soon as the bill is assented to by the President.

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<sup>3</sup> Burford Capital, "The Burford Annual: A report on our business in 2018 and the state of legal finance"(2018),3.

<sup>4</sup> Aluko & Oyeboode Legals Publications (DEC 2019): Emergency Arbitrator and the new Rivers State Arbitration Law 2019. online at <https://www.aluko-oyebode.com/insights/emergency-arbitrator-and-the-new-rivers-state-arbitration-law-2019-law/>

<sup>5</sup> International Arbitration update, 2017, February 13

<sup>6</sup> White & Case LLP Publications, June 15, 2022. Recent Arbitration Reforms in Nigeria. Online at <https://www.jdsupra.com/legalnews/recent-arbitration-reforms-in-nigeria-2184817/>

### 3.1 Provisions of Third-Party Funding in the Arbitration and Mediation Bill 2022

One interesting aspect of the Bill is the introduction and substantive provisions allowing TPF in Nigeria-seated arbitrations and arbitration-related proceedings and the express abolition of the common law torts of maintenance and champerty. According to Section 52(1), which provides 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.’*

In the same vein, Section 61 of the Bill provides as follows:

*‘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 arbitration seated in Nigeria and to arbitration related proceedings in any court within Nigeria.’*

Before now, this issue has been a challenge and that has hindered the application of third-party funding in Nigeria. 'Maintenance' is the improper support of litigation in which the supporter has no legitimate concern without just cause or excuse. While 'Champerty' is an aggravated form of maintenance that occurs when the maintaining party pays some or all of the costs of a party in return for a share of the proceeds of the action or suit. In essence, in jurisdictions where these two torts continue to apply, most funding arrangements may be subject to challenge<sup>7</sup>.

Whilst TPF is accepted in many jurisdictions, the Bill makes Nigeria only the third jurisdiction to directly adopt such express legislation, following Singapore and Hong Kong in 2017.

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.*

*(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*

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<sup>7</sup> Ibid p4

*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.*<sup>8</sup>

It is clear from the above provisions that, the Bill imposes a disclosure obligation on the party benefiting from a TPF agreement. Basic information on the existence of the funding agreement, including the name and address of the funder, must be disclosed to the other parties, the arbitral tribunal, and, where applicable, the arbitral institution. This disclosure must be made at the commencement of the arbitration or immediately thereafter (if the funding agreement is signed after the arbitration has commenced). This is an important provision because it is argued that one of the benefits of imposing an obligation to disclose this information is that it allows the tribunal to proactively manage issues of conflict of interest that may arise in the context of a funded arbitration<sup>9</sup>.

Also, in subsection (3) above, on the issue of security for cost applications. The bill provides that where a respondent brings security for costs application based on the disclosure of TPF, the tribunal may allow the funded party or its counsel to provide the tribunal with an affidavit confirming whether the funder has agreed to cover adverse costs orders. The affidavit is intended to form part of the information that the tribunal will consider in its decision on the security for cost application. For the respondent, such confirmation may be of some assistance given that the security for costs application is likely to have been made because of concerns that the funded party would be unable to pay the respondent's costs if ordered to do so.

However, the reality is that much will hinge on the terms of cover set out in the funding agreement<sup>10</sup>. While arbitrators and other users are optimistic about the Bill and see it as a positive initiative that is introduced in the Bill, however, it remains to be seen how the funding market will react to the Bill and whether third-party funders may be more willing to fund Nigeria-seated arbitrations.<sup>11</sup>

### **3.2 Some Expected Barriers to Third-Party Funding in Nigeria**

- (i) Existence of the common Law of doctrines of Champerty and maintenance within the Nigerian Legal system: The common-law doctrines of champerty and maintenance are still applicable in the Nigerian legal system as part of the received English law<sup>12</sup>. In other words, the doctrines of the common law are applicable in Nigeria, unless and until they are abolished (or to such extent that they are modified) by Nigerian legislation and/or case law. So far, no Nigerian law has abolished or

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<sup>8</sup> Omoaka, Godwin; Nweke-Eze, Stanley and Odunsi, Olusola (2021). Third-party funding in Nigeria-seated arbitration proceedings. Online at <https://www.ibanet.org/third-party-funding-Nigeria-arb-proceedings>

<sup>9</sup> Ibid p5

<sup>10</sup> <https://www.jdsupra.com/legalnews/recent-arbitration-reforms-in-nigeria-2184817/>

<sup>11</sup> White & case, 2022

<sup>12</sup> Ajibade & Co Publications

modified these doctrines such will continue to pose a problem for third-party funding<sup>13</sup>. Interestingly, these doctrines have been affirmed by Nigerian Courts in plethora of cases, inclusive of the case *Egbor & Anor v. Ogbebor*<sup>14</sup> and *Oloko v. Ube*<sup>15</sup>.

In *Oloko v. Ube*, the Court of Appeal Per Edozie JCA held that 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 the property is in dispute.<sup>16</sup> In *Egbor v. Ogbebor*, the Court of Appeal Per Ugochukwu Anthony Ogagwu, JCA held that,

*“It is no doubt settled law that a situation where a person elects to maintain and bear the costs of an action for another to share the proceeds of the action or suit is champertous”.*

The Court went further to express the view that in the determination of whether a relationship is champertous or contrary to public policy, the facts must show that the party being accused of champerty offered to maintain the action by bearing the costs of the litigation to be given a share of the proceeds<sup>17</sup>.

From the Court’s decision in this case, it appears that for a contingency fee arrangement to be champertous, there has to be some element of maintenance. This implies that third-party funding of litigation might not be champertous, if the third party merely ‘bears the cost of action for another, without any intention of benefiting from the suit by way of sharing the proceeds of the action.<sup>18</sup> However, the odds of this occurring in an arbitration context are very slim, as third-party funding is premised on sharing the proceeds of the action.

While the above cases deal with third-party funding in litigation, the principles established may be extrapolated to arbitration cases in Nigeria. As the Nigerian courts still abide sternly by the common law doctrines of champerty and maintenance, third-party funding in arbitration might be considered contrary to public policy in Nigeria. In light of this, the enforceability of arbitral awards granted to a party who utilized third-party funding is quite unlikely before the Nigerian courts.

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<sup>13</sup> Ibid

<sup>14</sup> *Egbor & Anor v Ogbebor* [2015] LPELR 24902 (CA), 14, paras A–D.

<sup>15</sup> *Oloko v. Ube* [2001] 1 NWLR (pt 729) 161.

<sup>16</sup> Omoaka *et al* 2021

<sup>17</sup> Ajibade & Co Publications 2021

<sup>18</sup> Ibid p6



- (ii) Challenges regarding confidentiality and disclosure as well as conflicts of interest: According to Omoaka *et al.*,<sup>19</sup> third-party funding arrangements may give rise to concerns relating to confidentiality and disclosure (particularly about the exchange of information between the claimant and the funder) as well as conflicts of interest (for example, reconciling the interests of the funder with the interest of the claimant during the arbitration proceedings).
- (iii) Issue of non-regulation of third-party funding in Nigeria-seated arbitration proceedings: While the Bill will pave the way for third-party funding in Nigerian jurisdictions, the issue of unregulated proceedings can be a barrier. It would have been necessary to have more detailed provisions in the Bill that will regulate the entire spectrum of third-party funding arrangements in Nigerian arbitration proceedings, particularly regarding questions of confidentiality and conflict of interest<sup>20</sup>.

#### **4. Third-Party Funding in Singapore**

Third-party arbitration funding in Singapore and Hong Kong is evolving rapidly. In the past year, both jurisdictions have made regulatory changes permitting third-party funding in the arbitration context. While it is early days, the combination of light statutory regulation and a rich pool of disputes means the future looks bright for third-party funding in these arbitration hubs<sup>21</sup>. In a significant shift in position, both Singapore and Hong Kong introduced legislation in January 2017 to permit third-party funding in arbitration, bringing them in line with other leading arbitral centers such as London, Paris, and Geneva.<sup>22</sup>

In Singapore, the amended Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017 (Regulations) come into effect in January 2017 and they provided a new framework to allow funding in certain cases. Singapore has abolished the torts of maintenance and champerty altogether,<sup>23</sup> legislating that third-party funding agreements for "prescribed dispute resolution proceedings" are no longer contrary to public policy or otherwise illegal.<sup>24</sup> Prescribed dispute resolution proceedings include international arbitrations and related court and mediation proceedings.<sup>25</sup> Domestic arbitrations are not included, although the Government has indicated that the third-party funding framework may be extended to other categories of dispute

<sup>19</sup> Omoaka, Godwin; Nweke-Eze, Stanley and Odunsi, Olusola (2021). Third-party funding in Nigeria-seated arbitration proceedings. Online at <https://www.ibanet.org/third-party-funding-Nigeria-arb-proceedings>

<sup>20</sup> *ibid*

<sup>21</sup> Melody Chan, Matthew Secomb and Adam Wallin (2018), A changing landscape: third-party arbitration funding in Singapore and Hong Kong, White & Case Law Publications. Online at <https://www.whitecase.com/publications/article/changing-landscape-third-party-arbitration-funding-singapore-and-hong-kong>.

<sup>22</sup> International Arbitration, 2017. It is reported in it that In Singapore, the amendments have been introduced under the Civil Law (Amendment) Bill 2016 and the Civil Law (Third-Party Funding) Regulations 2016, and in Hong Kong, by way of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016.

<sup>23</sup> New section 5A of the Civil Law Act.

<sup>24</sup> New section 5B of the Civil Law Act.

<sup>25</sup> Section 3 of the Civil Law (Third-Party Funding) Regulations 2016.

resolution proceedings after a period of assessment.<sup>26</sup> Unlike in Hong Kong, the legislation does not include express provisions dealing with foreign-seated arbitrations.

**Regulation of Funders:** To benefit from the legislation in Singapore, a funder must be a "qualifying third party funder".<sup>27</sup> This means that the funder must: carry on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which it is not a party (that is, the funder must be a professional funder); have access to funds immediately within its control, including within a parent corporation or the third-party funder's subsidiary, sufficient to fund the dispute resolution proceedings in Singapore; and invest those funds, under a third-party funding contract, to enable a funded party to meet the costs (including pre-action costs) of prescribed dispute resolution proceedings.<sup>28</sup>

Crucially, a third-party funder that fails to comply with these requirements will not be able to enforce its rights under a third-party funding agreement,<sup>29</sup> although a third-party funder can apply for relief where it can show its non-compliance, was accidental or inadvertent, or because it would otherwise be just and equitable to grant relief.<sup>30</sup>

**Position on Disclosure of third-party funding arrangements:** Not provided immediately in the existing law, however, there are proposals to amend the Professional Conduct Rules to require lawyers to disclose the existence of a third-party funding agreement and the identity of the third-party funder to the court or tribunal and every other party to proceedings "as soon as is practicable."<sup>31</sup>

**Position on Liability for adverse costs and security for costs:** The Singapore International Arbitration Centre (SIAC) Practice Note provides that 'The Tribunal may take into account the existence of any external funder in apportioning the costs of the arbitration,'<sup>32</sup> and 'The Tribunal may take into account the involvement of an external funder in ordering... that all or a part of the legal or other costs of a Disputant Party be paid by another Disputant Party.'<sup>33</sup> These provisions confirm that the tribunal may take into account funding arrangements when apportioning costs of the arbitration and awarding costs to a funded party. In other words, different tribunals will approach the issue of the expenses in funded cases differently.

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<sup>26</sup> New Section 5B (2) of the Civil Law Act.

<sup>27</sup> *ibid*

<sup>28</sup> New Section 5B (10) of the Civil Law Act and section 4 of the Civil Law (Third-Party Funding) Regulations 2016

<sup>29</sup> New Section 5B (3)-(4) of the Civil Law Act.

<sup>30</sup> New Section 5B (5)-(6) of the Civil Law Act.

<sup>31</sup> Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016

<sup>32</sup> SIAC Practice Note, Paragraph 10. See also the SIAC Investment Arbitration Rules, Paragraph 33.1.

<sup>33</sup> SIAC Practice Note, Paragraph 11. See also the SIAC Investment Arbitration Rules, Paragraph 35.



**Recover of adverse costs:** The SIAC Practice Note addresses this as follows: ‘The involvement of an External Funder alone shall not be taken as an indication of the financial status of a Disputant Party. The Tribunal may take into account factors other than the involvement of an External Funder for security for legal or other costs.’<sup>34</sup> Tribunals may also see an increase in applications for disclosure of the terms (if any) on which a funder has agreed to undertake adverse costs liability.<sup>35</sup> Such applications may be used to assess prospects of recovering costs from a funded party, or as a precursor to a security application.

### **5. Third Party funding in Hong Kong**

The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6 of 2017 (the Amendment Ordinance) was passed by the Legislative Council on 14 June 2017. The legislation came into force, on 23 June 2017, legalizing third-party funding in arbitrations and mediations in Hong Kong.<sup>36</sup> The Hong Kong legislation provides that the doctrines of maintenance and champerty no longer apply to the third-party funding of "arbitration.

**Third-Party Funding and its definition within the Ordinance Order:** The Amendment Ordinance defines third-party funding of arbitration to mean a ‘provision of arbitration funding for an arbitration (1) under a funding agreement; (2) to a funded party; (3) by a third party funder; and (4) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement’<sup>37</sup>, It further defined a third party funder as someone ‘(a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person, and (b) who does not have an interest recognized by law in the arbitration other than under the funding agreement’.<sup>38</sup>

**Self-regulation of Third-Party funding Arbitral proceedings:** Under the Hong Kong situation, the Law Reform Commission envisions that a Code of Practice (the Code) will be issued by a body under the Arbitration Ordinance to promote best practices in the initial three-year period<sup>39</sup>. This is a common approach in Hong Kong to ensure accountability among the relevant industries. This also reflects the trend in other common law jurisdictions that a ‘light touch’<sup>40</sup> or self-regulating approach towards third party funding in arbitration is often preferred. As stated by the Law Review<sup>41</sup> A draft Code circulated to the Legislative Council<sup>42</sup> provides some insight as to what may be contained in the Code. The draft Code is said to apply to some

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<sup>34</sup>SIAC Practice Note, Paragraph 9.

<sup>35</sup> Tribunal’s powers under SIAC Practice Note, Paragraph 5 and SIAC Investment Arbitration Rules, Rule 24(1).

<sup>36</sup> Lesile Perin (2017). The Law Reviews. Law Business Research Ltd

<sup>37</sup> S98F & S98G of the Arbitration Ordinance Cap 609.

<sup>38</sup> S 98F & 98J(1)(a) & (b) of the Arbitration Ordinance Cap 609.

<sup>39</sup> S98P of Arbitration Ordinance

<sup>40</sup> Law Reform Commission of Hong Kong Report

<sup>41</sup> <sup>41</sup> Leslie Perin (2017). The Law Reviews. Law Business Research Ltd

<sup>42</sup> Annex C of the Legco Brief.

pre-contractual negotiations and the making and performing of any funding agreement between a third-party funder and a funded party.

The third-party will be subject to duties to maintain capital adequacy requirements to (1) pay all debts when they become due and payable; and (2) cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months among others.<sup>43</sup>

**Contingency fees rule:** Unlike other jurisdictions, Hong Kong law does not permit Hong Kong solicitors or barristers to charge conditional or contingency fees.<sup>44</sup> It argued that charging conditional and contingency fees would be against the public interest. However, a solicitor, barrister, or registered foreign lawyer seeking to be a third-party funder in arbitration where he or she is serving, will serve, or has previously served as counsel to a party, maybe committing the crime and tort of champerty or maintenance. It leaves open the possibility of Hong Kong law firms that do not represent any party in an arbitration being third-party funders.

The Amendment Ordinance does make clear that third-party funding is not available to lawyers acting for parties in the arbitration<sup>45</sup> but it does not prohibit providers of legal services or persons practicing law from being third-party funders. It is worth noting, however, that this section falls under Division 3 in the Amendment Ordinance<sup>46</sup>.

**Position on Disclosure:** Arbitrations in Hong Kong generally abide by strict confidentiality rules. Section 18 of the Arbitration Ordinance prohibits any disclosure of information relating to the existence of any arbitration proceedings and any subsequent awards made under the arbitration proceedings. However, with the development of a third-party funding regime for arbitration, there is a need to balance the right to the confidentiality of the party not seeking third-party funding and the need for information for the third-party funder. Section 98T of the Amendment Ordinance carves out an exception to the confidentiality obligation and imposes disclosure obligations on the party seeking third-party funding<sup>47</sup> both on the third-party funder as well as the other parties to the arbitration.<sup>48</sup>

Furthermore, Section 98T provides that despite the restriction under Section 18, a funded party can communicate information relating to the arbitral proceedings to a third-party funder and the subsequent awards made to have or seek funding. However, no further information may be communicated unless the information is necessary to ‘protect a legal right or interest and

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<sup>43</sup> Clause 2.6, Annex C, Legco Brief.

<sup>44</sup> Third Party Funding for Arbitration by the Law Reform Commission of Hong Kong Report at para. 3.36, s64(1) of the Legal Practitioners Ordinance, rule 4.17 of Guide to Professional Conduct Vol.1 by the Law Society of Hong Kong and para. 124 of the Bar Association Code of Conduct.

<sup>45</sup> S98F & S98O of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017

<sup>46</sup> S1(3)(a) of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

<sup>47</sup> S98U, S98V and S98W of Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

<sup>48</sup> It is worth noting that in the draft Code, there is a section on confidentiality and privilege that reaffirms the need for the third party funding to observe confidentiality of the arbitration (Clause 2.9, Annex C, Legco Brief).

enforce or challenge an arbitration award’,<sup>49</sup> communications that the funded party had to make ‘in accordance with any government body, regulatory body, court or tribunal’<sup>43</sup> and possibly information that is protected by the attorney-client privilege.<sup>50</sup>

**Position on Award of costs (adverse and security for adverse costs).** The Amendment Ordinance did not incorporate the power of the arbitral tribunal to award cost, however, made provision to review this after the initial three years of implementation of the Amendment Ordinance. Hong Kong’s third-party funding regime placed a greater emphasis on the funding agreement, where it is expected that the issue of the responsibility for adverse costs, as well as security for costs, is covered.

## **6. Concluding Remarks**

Third-party funding has become popular in the international arbitration space. All indications suggest the practice is here to stay. In Nigeria, there is currently no legislation or judicial pronouncement that expressly prohibits third-party funding. Nonetheless, as it stands at this writing, the common law doctrine of champerty and maintenance continues to apply in Nigeria, and this raises significant doubt about the enforceability of third-party funding agreements.

No doubt the Third-party funding will, however, become more prevalent if the Bill recently passed by the Nigerian Senate will be assented to by the President as soon as possible paving the way for the application of Third-party funding in Nigeria. However, while we look forward to this happening soon, a clue could be taken from Hong Kong and Singapore applications as highlighted in this article, that could enable us to deal with future challenges including the removing of the expected barriers from the implementation of Third-Party Funding in Nigeria.

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<sup>49</sup> S98T(2)(a) of Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

<sup>50</sup> S98T(2)(c) of Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.