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AWARD OF THIRD-PARTY FUNDING ("*TPF*") COSTS IN ARBITRAL PROCEEDINGS: A REVIEW OF THE ENGLISH CASE OF ESSAR OILFIELDS SERVICES LIMITED V. NORSCOT RIG MANAGEMENT PVT LIMITED (2016) EWHC 2361 (COMM)

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Introduction:

Generally, under the adversarial system of adjudication in Nigeria, a successful party may be entitled to costs subject to the prevailing Rules of Court and other underlying principles of law. The award of costs is to indemnify the rightful party either for expenses, time and/or effort dissipated in a matter before the Court or other Tribunals. The practice on award of costs is also recognised and applicable in arbitration proceedings. Under the **Arbitration and Conciliation Act ("ACA"), Laws of the Federation of Nigeria (LFN) 2014**, the costs which an Arbitral Tribunal may award include the Arbitral Tribunal fees, travel and other expenses incurred by the Arbitrators, cost of expert advice, travel and other expenses of witnesses, cost of legal representation and assistance of the successful party, provided that such costs were claimed during arbitral proceedings.

In the same vein, the **English Arbitration Act, ("EAA")** 1996 makes provision for award of costs by an arbitral Tribunal on arbitral fees and expenses of any Arbitral Institutions concerned and the legal or other costs of parties.

Apart from the above, any other fees, expenses or costs associated with or contingent upon third-party funding of arbitral proceedings are generally not cognisable and therefore, not recoverable.

Meaning of Third-Party Funding

Third-Party Funding *("TPF")* is an agreement or arrangement between a Funding Company/individual and a client (the claimant) whereby the Funder agrees to finance some or all of the clients' legal fees in exchange for a share of the proceeds of the matter. It is a financing method where a party to a dispute obtains funding for its legal costs from a third party who has no bearing with the dispute in exchange for a share of the proceeds of the matter. Under a Third-Party Funding arrangement, the legal fees and expenses of a claimant are financed on a non-recourse basis. If the claim is successful, the finance provider recovers the capital invested in addition to a success fees. If the case is unsuccessful, the funder loses its investment and receives no success fees and thus has no recourse against the funded party.

The award of third-party funding costs in arbitration proceedings was recently given a judicial endorsement in **Essar Oilfields Services Limited v. Norscot Rig Management PVT Limited,** where the Commercial Court of England and Wales interpreted the term ***"other costs"*** in **section 59** of **English Arbitration Act (EEA)**, to allow the recovery of Third-Party Funding costs in arbitral proceedings. This decision has introduced a new trend on award of costs in English-seated arbitral proceedings.

For ease of reference, section 59 of the EEA provides: -

"(1) Reference in this Part to the costs of the arbitration are to:

(a) The arbitrators' fees and expenses, and
(b) The fees and expenses of any arbitral institution concerned, and
(c) The legal or ***other costs of the parties***. *(emphasis mine)*

(2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration".

In this article, the writer examines the rationale of the English decision and its relevance to our system of arbitration.

Brief facts of Essar v. Norscot

In 2007, Norscot Rig Management PVT Limited **("Norscot")** and Essar Oilfields Services Limited **("Essar")** entered into a commercial relationship in the oil and gas industry. Due to several irreconcilable differences, Norscot brought various claims against Essar under an Arbitration Agreement which incorporated International Chamber of Commerce **("ICC")** Rules. Norscot sourced for and financed the arbitration proceedings through a Third-Party Litigation Funding Scheme **(Woodsford Litigation Funding)** which provided the funding on standard market terms on the condition that Norscot, if successful, would pay **300%** of the initial outlay or **35%** of the amount recovered.

In addition to its actual legal fees, Norscot sought to recover the sum of 1.94 million pounds from Essar being the amount of risk fees paid to its Funders. At the close of proceedings, the Sole Arbitrator, **Sir Philip Otton** found Essar in a repudiatory breach of an Operations Management Agreement ("OMA") and held that Norscot was entitled to indemnity costs and damages under the contract. In his award, the Arbitrator ordered Essar to pay the sum of 1.94 million pounds. The Arbitrator held that such litigation costs were "other costs" for the purposes of section 59(1)(c) of the Arbitration Act and therefore recoverable from Essar.

Dissatisfied with the award, Essar appealed to the Commercial Court of England and Wales and challenged the jurisdiction of the Tribunal to make the award. In its decision, the High Court of England dismissed the appeal and upheld the decision of the Arbitral Tribunal.

The Rationale for The Decision

The main issue for determination was whether **"other costs of parties"** provided under section **59(1)(c)** of **EAA** included the costs of Third- Party Funding. The Court observed that it was not the correct approach to construe "other costs" ***ejusdem generis*** with legal costs, so as to cover only such costs as are analogous to legal costs; the appropriate genus was not "legal costs" but rather, "the costs of the

arbitration" in the broad sense. The Court was also to determine whether there was any irregularity in the award.

The Court, in agreeing with the Arbitrator on the award of costs, considered the following factors: -

a. Conduct of the Respondent (Essar): The Court agreed with the Arbitrator on the conduct of Essar as being despicable and held as follows:

> **"As a consequence (of the conduct), Norscot had no alternative but was forced to enter into the litigation funding…Essar was undoubtedly aware that Norscot' s costs could not be financed from its own resources…(and) probably hoped that this financial imbalance would force the claimant to abandon its claims… (and was) a blatant attempt to drive Norscot 'from the judgment seat'".**

According to the Arbitrator, Essar had deliberately sought to cripple Norscot financially by withholding payments under the agreement. He concluded that Norscot had no option but to enter into a third-party litigation funding on the terms it did and that it would have been "blindingly obvious" to Essar that Norscot "would find it difficult, if not impossible to pursue its claims by relying on its own resources".

The Arbitrator and the English Court were swayed by the reprehensible conduct of the Respondent which, the Court rightly held, constrained the claimant to enter into a third-party funding arrangement.

b. Provisions of ICC Rules on costs: The Court considered ICC Rules on award of costs. The ICC Rules make provision for payment of **"reasonable legal and other costs incurred"** by the other. In doing so, an Arbitrator is enjoined to take into account such circumstances as it considers relevant.

c. Provision of English Arbitration Act on costs: The Court considered section 59 (1)(c) of the **EAA** on award of cost in relation to the Arbitrator's fees and expenses, fees and expenses of any Arbitral Institution concerned and ***the legal or other costs of the parties***.

d. Issue of irregularity: The Court considered the provisions of section 68(2)(b) of **EAA** on whether there was any irregularity by the Arbitrator in making his award. The Court held that there was no serious irregularity within the meaning of section 68 even if the Arbitrator was wrong in his construction of "other costs". It noted that for there to be a serious irregularity, the Arbitrator would have exceeded its powers or purported to exercise a power which it did not have.

e. Good exercise of discretion: The Court stated that the Arbitrator exercised his discretion judicially and judiciously. It stated as follows:

> **"The arbitrator's exercise of his discretion here to award Norscot the costs of its third-party funding, while, of course itself not under challenge, is nonetheless a telling example of the good sense of reading "other costs" in this way. This was a case, perhaps unusual, where the arbitrator ruled in detailed and robust terms that Essar drove Norscot into this expensive litigation because of its own reprehensive conduct going far beyond technical breaches of contract, in order to vindicate its rights. Further, as the tribunal found, Norscot had no option, but to obtain this funding from this third-party funder. As a matter of justice, it would seem very odd and certainly unfortunate if the arbitrator was not entitled under section 59(1)(c) to include the costs of obtaining third-party funding as part of "other costs" where they were so directly and immediately caused by the losing party…I unhesitatingly conclude that the arbitrator's interpretation of "other costs" was correct, in that it extended in principle to the costs of obtaining third party legal funding. Whether then to award it is a matter of discretion."**

Is Third-Party Funding recognised under the Arbitration and Conciliation Act (ACA)?

Presently, there is no provision on Third-Party Funding of arbitration under the ACA or any other Rule. The ACA, specifically provides under section 49 that the Arbitral Tribunal shall fix costs of arbitration in its award and the term **"costs"** includes only the following:

a. The fees of the Arbitral Tribunal to be stated separately as to each Arbitrator and to be fixed by the Tribunal itself;
b. The travel and other expenses incurred by the Arbitrators;
c. The cost of expert advice and of other assistance required by the Arbitral Tribunal;
d. The travel and other expenses of witnesses to the extent that such expenses are approved by the Arbitral Tribunal;
e. The costs for legal representation and assistance of the successful party if such costs were claimed during the Arbitral proceedings, and only to the extent that the Arbitral Tribunal determines that the amount of such costs is reasonable.

In **Kessington Egbor v. Ogbebor (2015) LPELR-24902,** the Court held that where a person elects to maintain and bear the costs of action for another in order to share the proceeds of the action of the suit, such an action is champertous. For an action

to be champertous, the facts must show that the Respondent offered to maintain the action by bearing the costs of the litigation in exchange for a share of the proceeds.

Contingency Fee Arrangement under the Rules of Professional Conduct (RPC) 2007

The Rules of Professional Conduct 2007, which regulates the conduct of legal practitioners, only provides for contingency fee and not third-party funding. The term contingency fee is defined by the RPC as follows: -

> **"The fee paid or agreed to be paid for the lawyer's legal services under an arrangement whereby compensation, contingent in whole or in part upon the successful accomplishment or deposition of the subject matter of the agreement, is to be of an amount which is either fixed or is to be determined under a formula".**

It is instructive to note that under Rule 50(4) **RPC**, a lawyer shall not enter into a contingent fee arrangement without first informing the client of the effect of such arrangement. For clarity, section 50(1) of the RPC is reproduced below:

> " A lawyer may enter into a contract with his client for a contingent fee in respect of a **civil matter** undertaken for a client whether contentious or non-contentious: provided that: -
> a. The contract is ***reasonable in all the circumstances of the case*** including the risk and uncertainty of the compensation;
> b. The contract is not
> ***i. Vitiated by fraud, mistake or undue influence or***
> ii. ***Contrary to public policy***; and
> c. If the employment involved litigation, it is reasonably obvious that there is a bonafide ***cause of action***."
> **(Emphasis mine)**

A contingency fee arrangement is only permissible only in the following circumstances, to wit:

i. Where it is a civil matter, whether contentious or non-contentious;
ii. Where the contract is reasonable in the circumstances of the case;
iii. Where the contract is not vitiated by either fraud, mistake or undue influence;
iv. Where the contract is not contrary to public policy; and

With respect to litigation, where there is a reasonable and bonafide cause of action. Apart from the above circumstances, the RPC frowns at any attempt by

a lawyer to instigate controversy or litigation or to enter into any form of agreement towards collecting or charging clearly excessive fees.

Any Paradigm shift towards Third-Party Funding?

The decision of the English Court under review undoubtedly opened a new vista on award of costs in arbitral proceedings. Third party funding promotes access to justice and spreads the risk of complex litigation. The availability of funders and funds ensures that valid claims are litigated. Contrary to arguments that suggest that third party funding may open a floodgate of claims, funding arrangements could indeed reduce unmeritorious claims, as the funder's return on investment is dependent on the outcome or success of each case. Funders are therefore obliged to conduct due diligence, weighing the merits of respective claims and the likelihood of recovery before taking a decision.

Over the years, different jurisdictions have enacted laws, formulated policies and/or made judicial pronouncements in favour of third-party funding. For the purpose of this write up, the following (which are by no means exhaustive) are considered: -

a. In Singapore, third-party funding was previously outlawed for being contrary to the laws on maintenance and champerty. However, in January 2017, the Parliament in Singapore passed the **Civil Law (Amendment) Bill 2016** and abolished the common law tort of maintenance and champerty. The Amendment provides that a contract for third-party funding of international arbitration proceedings (alongside with its related court and/or mediation proceedings) will not be rendered unenforceable for being contrary to public policy or illegal.

b. In **Bayens v. Kinross Gold Corporation (2013) ONSC 4974,** the Ontario Superior Court of Justice in Toronto, Canada, approved the use of third-party funding but maintained that in any proceeding to be funded by a third-party, the funding agreement must be disclosed to and approved by the Courts. Such approval should only be given where, first, the funder cannot interfere with the conduct of the proceedings on the lawyer/client relationship and secondly, the funding is necessary to provide access to justice.

c. In England, the Code of Conduct for Association of Litigation Funders (**"ALF"**) was published in November 2011. The ALF is charged with administering self-regulation of the industry in line with the Code. Amongst other things, the Code requires Funders to maintain adequate financial resources at all times in order to meet their obligations to fund the disputes they have agreed to

fund and to cover aggregate funding liabilities under their funding agreements for a minimum period of 36 months. Under the Code and in line with the practice in England and Wales, the role of Funders, litigants and solicitors are distinct.

d. In **Price Waterhouse Coopers Inc and others v. National Potato Co-operative Limited** (2004) ZASCA 64, the South African Court held that an agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not contrary to public policy or void. The Court also stated that the need for the rules of maintenance and champerty had diminished or perhaps disappeared. The Court's focus is now to look at the transaction holistically and determine the public policy issues.

e. In **Campbells Cash and Carry Pty Limited v. Fostif Limited** (2006) 229 CLR 386, (the Fostif case), an Australian High Court held that a litigation funding arrangement was not an abuse of process or contrary to public policy (and, indeed, noted the access-to-justice benefits that can flow from litigation funding).

It is hoped that **"costs"** that may be awarded by an Arbitrator under the **ACA 2014** should be reviewed and broadened through legislative process and judicial activism to encompass other ancillary and incidental costs such as third-party funding costs.

Conclusion

Third-party funding has become a dominant feature in the world's most popular seats of international arbitration - London, Paris, Geneva and Hong Kong. Arbitration, no doubt, is expensive and if a claimant does not have the means to pursue a meritorious claim, funding may be the only option. Third party funding also creates a level playing ground when a party is either under-resourced or out-resourced by its opponent. It has also become an efficient tool of choice for corporations who are most willing to pay for legal fees by moving them off their own balance sheets. Commercial activities and businesses all over the world thrive to a large extent on this emerging industry of third party funding.

Following the gradual shift towards third-party funding as illustrated by some jurisdictions above, champerty, being a relic of English common law has lost its significance in modern arbitration. To this end, the Arbitration and Conciliation Act should be amended to incorporate and allow for recovery of third-party funding costs in arbitration proceedings in Nigeria. This feat, will amongst other things, give Nigeria a place of pride in the international arbitration community.

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