

WHITE-PAPER  
REPORT  
PRESENTATION

---

TRADE-LAB TEAM  
OF BOCCONI  
UNIVERSITY

---

**THE POTENTIAL  
REGULATION OF  
THIRD-PARTY FUNDING  
IN ARBITRATION IN KENYA**

---



# STRUCTURE OF THE PRESENTATION

- BACKGROUND ON THIRD-PARTY FUNDING
- THE KENYAN LEGAL REGIME AND THIRD-PARTY FUNDING
- REGULATION OF THIRD-PARTY FUNDING FOR ARBITRATION IN OTHER COMMON LAW JURISDICTIONS





# STRUCTURE OF THE PRESENTATION

- THE BENEFITS AND RISKS OF THIRD-PARTY FUNDING FOR ARBITRATION
- RECOMMENDATIONS



# ***CHAPTER 1***

## ***BACKGROUND ON THIRD-PARTY FUNDING***

## Legal Needs

NO RESOURCES  
OF THE PARTIES



**ACCESS TO  
JUSTICE**

**Third-Party  
Funding**

SOLUTION?

# ***WHAT IS THIRD-PARTY FUNDING***

non-recourse  
financing of legal  
proceedings.

provided by a party  
that had no previous  
ties and interest to the  
claim

for a percentage of  
the monetary  
outcome

# ***SOURCES OF FUNDING IN LITIGATION AND ARBITRATION IN THE CONTEXT OF THIRD-PARTY FUNDING***

- Contingency Fees
- Insurance
- Defendant/respondent-side funding
- Investment Third-Party Funding



# ***STRUCTURE AND TERMS IN A THIRD-PARTY FUNDING AGREEMENT***

- Control over the conduct of proceedings
- Conflicts of Interest
- Termination and withdrawal of funding
- Liability for costs
- Attorney-client privilege



# ***APPROACHES TO REGULATE THIRD-PARTY FUNDING***

- **AMERICAN LEGAL FINANCE ASSOCIATION**

# ***CHAPTER 2***

## ***THE KENYAN LEGAL REGIME AND THIRD-PARTY FUNDING***

# DOCTRINES OF MAINTENANCE AND CHAMPERTY

- *MAINTENANCE*

Giving assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognized by the law as justifying his interference.

- *CHAMPERTY*

A particular kind of maintenance, namely maintenance of an action in consideration of a promise to give to the maintainer a share of the subject matter or proceeds thereof, if the action succeeds

# DOCTRINES OF MAINTENANCE AND CHAMPERTY UNDER KENYAN LAW

- Concrete way of application unclear
- Not clear whether applicable to Arbitration or not
- Legal uncertainty raises need of Regulation



# CONSEQUENCES OF BREACH REGARDING ARBITRATION

- Consequences also unclear
- Could be argued that Award can be annulled since doctrines represent public policy, Art. V (2) (b) New York Convention
- But Doctrines directly only relate to legal relation between funder and funded party -> NOT the outcome of Arbitral Proceeding
- In any case, option of circumvention of doctrines remains

# ***CHAPTER 3***

## ***REGULATION OF THIRD-PARTY FUNDING FOR ARBITRATION IN OTHER COMMON LAW JURISDICTIONS***



Recent reforms in other common law jurisdictions have been reducing the doctrines of maintenance and champerty to allow Third-Party Funding

# ***ENGLAND AND WALES***

- No statutory law regulating Third-Party Funding
- *Association of Litigation Funders Code (2011)*



# ***SINGAPORE***

- *Civil Law Amendment Act (2017)*
- Conditional Fee Agreements

# ***HONG KONG***

- *Arbitration and Mediation Legislation Ordinance (2019)*
- *Code of Practice*

# ***COMPARISON OF SINGAPORE AND HONG KONG REFORM IMPLICATIONS***

- Light-touch approach
- Standards for the qualification of Third-Party Funders
  - Non-compliance
- Lawyers excluded from Third-Party Funding rules

# ***SOUTH AFRICA***

- No legislation to govern Third-Party Funding
- *Arbitration Foundation of Southern Africa (AFSA) Rules*



# ***NIGERIA***

- *Arbitration and Mediation Bill (2020)*
- The Bill legalizes Third-Party Funding in an indirect way

# ***COMPARISON OF THE ANALYZED COMMON LAW JURISDICTIONS***

- *England and South Africa*: no legislative reforms
- *Nigeria*: indirect recognition
- Different common law jurisdictions are trying to standardize their legislation

# ***CHAPTER 4***

## **THE BENEFITS AND RISKS OF THIRD-PARTY FUNDING FOR ARBITRATION**

# ***POTENTIAL BENEFITS OF THIRD-PARTY FUNDING***

- Benefits to the parties of arbitration disputes in Kenya
  - Facilitating access to justice, increased efficiency of the mechanism and assessment of the merits of a claim
  - A solution to the economic consequences of the Covid-19 crisis
- Benefits to Kenya
  - Promoting arbitration in Kenya
  - Increasing Kenya's competitiveness

# ***POTENTIAL RISKS OF THIRD-PARTY FUNDING***

- Promotion of unnecessary arbitration proceedings
- Ethical concerns
- Third-Party Funder control and influence
- Concerns about:
  - The structure of the Third-Party Funding agreement and the recoverability of Third-Party Funding costs
  - Liability for adverse costs awards or orders
  - Security for costs

# ***POTENTIAL RISKS OF THIRD-PARTY FUNDING***

- Potential breaches of legal professional privilege and confidentiality issues
- Concerns about the disclosure of Third-Party Funding agreement and conflicts of interest
- Risk of arbitrary termination of the Third-Party Funding agreement
- Insufficient Third-Party Funder capital adequacy
- Inadequate complaints procedure
- Money laundering



# ***RECOMMENDATIONS***

1. Kenyan laws should be amended to provide that Third-Party Funding for arbitration taking place in Kenya is permitted.
2. Clear ethical and financial standards for Third-Party Funders providing Third-Party Funding to parties to arbitrations taking place in Kenya should be developed.
3. The establishment of a working group, possibly administered by the Department of Justice and the NCIA, to first elaborate on the question on how Third-Party Funding and especially questions regarding ethical and financial standards should be regulated.



---

# THANK YOU

***TRADE-LAB TEAM OF  
BOCCONI UNIVERSITY***

Chryssi Apostolou

Pauline Bourgeonnier Cesari

Iole Maria Garufi

Edris Zewari

17 July 2022

Milan, Italy

