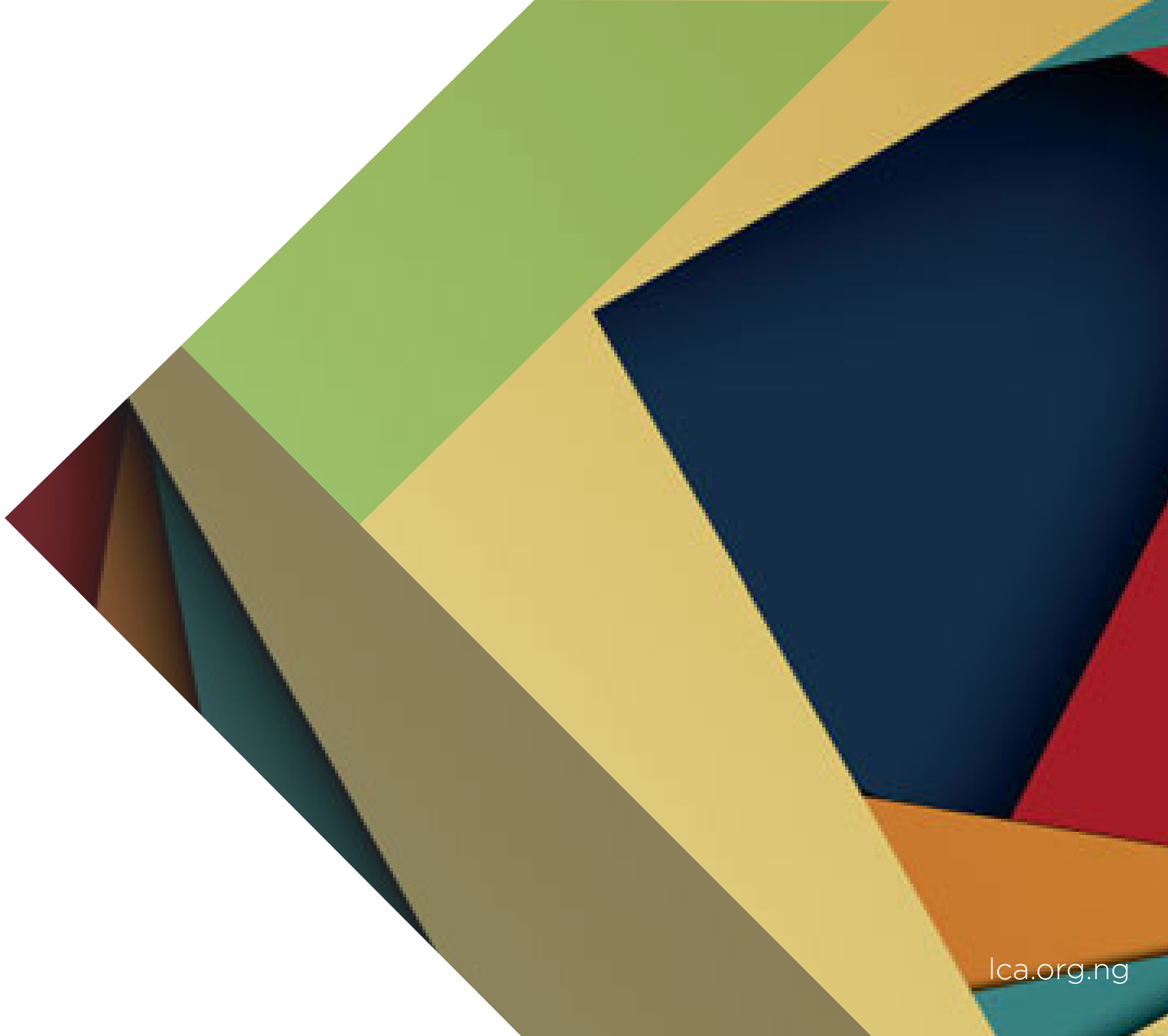
LCA

LAGOS COURT OF ARBITRATION

INTERNATIONAL CENTRE FOR ARBITRATION AND ADR



March, 2022

Newsletter

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Editor's Note

I am delighted to bring to you this first quarter Edition of the Lagos Court of Arbitration Newsletter. As this is our first edition this year, I wish you a happy and productive new year.

This Edition reflects on evolving concepts and lessons learnt during this unprecedented period. It draws from the experience and perspective of practitioners from common law and civil law jurisdictions to predict the future landscape of ADR, especially arbitration. In this Edition, important discussions on arbitration rules and practice, third party funding and industry-specific (construction) evidentiary requirements are analyzed.

Special thanks to Dr. Isabelle Fellrath, Dr. Ademola Bamgbose, Giacomo Lorenzo, Laura Alakija, Osinachi Nwandem and Ogechukwu Beluonwu-ogbo for their invaluable perspective and contribution to this Edition and the Lagos Court of Arbitration. This has indeed been a revealing Edition and the knowledge shared is extremely useful. I hope you enjoy reading it as much as I did.

Mrs. Oluwaseun Oloruntimehin *FCIArb*

EDITOR

Welcome Address
(Executive Secretary)

The Year 2022 kicked off on a hopeful note with predictions on the rising significance of the role of international arbitration and Environmental, Social and Governance policies, third party funding, investment protection within the European Union, emerging standards for the conduct of international arbitration, amongst a host of other industry thoughts and expectations in the Arbitration Space.

This first edition of the Lagos Court of Arbitration Newsletter in the year 2022, provides current information in the global arbitration industry.

It is my pleasure to welcome you to the March 2022 Edition of the Lagos Court of Arbitration Newsletter and hope you enjoy the edition.

Ms. Oluwatosin Lewis *FCIArb*

ADR Personality

Dr. Isabelle Fellrath *LL.M.*

Dr Isabelle Fellrath, Attorney at Law, LL.M. and Ph.D. (University of Nottingham), represents parties in domestic and international arbitral proceedings and before state courts, and serves as an arbitrator (accreditation Hong Kong International Arbitration Centre, Lagos Court of Arbitration, Kigali International Arbitration Centre, and General List of Arbitrators of the Court of Arbitration for Sport, Member of the Swiss Swimming Arbitral Tribunal for aquatic sports). She also has particular expertise in environmental and energy laws. She regularly publishes in her areas of expertise, which she has been teaching for many years at the Universities of Glasgow and Lausanne as well as at the Swiss Federal Institute of Technology in Lausanne.

Lessons learnt from 2021 and evolving concepts of significance in arbitration

In contrast to the disruptions having impacted almost all aspects of our societies in the past two years as a result of the sanitary crisis, the arbitration communities have shown outstanding resilience on various fronts. On a purely procedural level, arbitration has proven remarkably adaptative to the exceptional circumstances crippling most domestic jurisdictions, courtesy of a proactive collaboration between arbitrators, counsels and parties under the enlightened guidance of arbitral institutions. Electronic communication, e-filing and e-awards have gained momentum, and virtual hearings shaped to fit due process standards are now common part of the arbitration arsenal. Whilst the value of non-verbal communication inherent in-person sessions at all levels must not be underestimated and fully depersonalized and remote virtual justice should be resolutely resisted, these past two years have confirmed the decisive part played by carefully framed new technologies in the efficiency of international arbitration proceedings.

On the substantive level, the primarily commercial scope of arbitration is increasingly broadening to encompass social, environmental, and human rights dimensions influencing public policies and corporate practices. This applies in particular in extractive, hospitality and constructions sectors that are key in Africa. Whilst there is room for discussion whether a private forum unrelated to a specific legal order and operating confidentially in a business setting should have any legitimacy to ensure social, environmental, and human rights compliance of public policies and corporate practices, it is undeniable that such expansion will ultimately contribute even remotely to promote fully integrated policies and practices and full accountability.

Finally, the past years have brought into the limelight the dilemma facing companies confronted with intensified litigation prospects and limited (and dwindling) dedicated liquidities, and the incidental growth of dispute resolution funding business by third parties. Whilst the development of such exogenous profitability-based funding mechanism might in itself be appreciable as it contributes to guarantee arm's length dispute resolution process, it is not without any risks and urgently requires strict regulation. The business indeed implies a random pre-selection of cases on the basis of a preliminary, partial and non-adversarial assessment of a specific dispute, excluding not only trivial and lost cases (which is appreciable), but also borderline or more nuanced cases that could have contributed to the evolution of a legal system, or even sensitive cases (environment, human rights). Furthermore, result-based funding offers limited incentives for commercial settlement agreements thus potentially unnecessarily perpetuating adjudication process on economic grounds to the detriment of preserving business relations.

All considered, such evolutions confirm the important role of international arbitration and its great adjustability to the changing context. From a perspective of African jurisdictions, these evolutions could create valuable opportunities to ensure the proactive involvement of Africans in international arbitrations as parties, advocates or as arbitrators, to secure the expansion of arbitration of disputes that involve African businesses, and to promote African countries as the venue and seat of arbitration.

Featured ADR Practitioner

Dr. Ademola Bamgbose

Dr. Bamgbose is an international arbitration lawyer in the London office of Hogan Lovells. He is also a key member of the firm's global Africa practice, and is admitted to practice in Nigeria, England and Wales. He represents clients in high-value international disputes and advises clients on issues spanning multiple sectors and jurisdictions, especially in Africa. He has previously undertaken a commercial litigation secondment at a FTSE 100 company in London. Prior to joining Hogan Lovells, he spent some time at the ICC in Paris and also worked at a leading commercial law firm in Nigeria.

Ademola has a keen interest in Africa and regularly speaks at conferences both within and outside the continent. He is widely published, with some of his contributions featuring in widely-read platforms across the globe. His PhD thesis (completed with distinction) at the University of Warwick examined the arbitration frameworks in 19 African countries.

Dr Bamgbose is chair of the Advisory Board of the Lagos Court of Arbitration – Young Arbitrators Network. He is also an honorary lecturer at University of Ibadan, Nigeria and regularly serves as guest lecturer at the University of Reading, UK. He is co-founder of Africa Arbitration; and founding director of the Africa Arbitration Academy and Africa Construction Law respectively. He is also a regional representative (Africa) of the London Court of International Arbitration - Young International Arbitration Group.

He is recognised by Legal 500 as a rising star in international arbitration. He is also recognised by other leading directories like Chambers & Partners and Yahoo Finance/Empower, as one of the future business leaders in Europe, United States and Canada.

Congratulations on your recent appointment as the Chair of the Advisory Board, LCA-YAN, what would you say are the major outcomes the Advisory Board intends to achieve during your tenure and how would they positively impact the international arbitration community including emerging and experienced arbitrators?

Thank you so much. I feel very privileged to chair a Board made up of some of the future arbitration leaders from Africa.

The LCA-YAN is arguably the most successful young persons' arbitration organization in Africa, with a line-up of very popular programmes such as its moot for young practitioners and students. An arbitration practitioner recently emailed me and mentioned that his first exposure to arbitration was through the LCA-YAN moot. That is the kind of effect that the LCA-YAN has had on the future of arbitration in Nigeria. Our major goal as an Advisory Board is simple but potentially very impactful – to build on the achievements of our predecessors by extending the reach and impact of the LCA-YAN to the rest of Africa and, eventually, the world. A key component of this is that we intend to use the LCA-YAN to integrate the young
arbitration community in Africa.

In my practice, I have had the opportunity to work and interact with colleagues from all the sub-regions in Africa. I am always surprised by both the similarities and the differences in the practice of arbitration across the continent – I think there is so much African practitioners can learn from one another. I also think that if Africa is going to make the kind of impact we all want it to make in the international arbitration community, the African arbitration community must come together. We have many leading institutions and young persons' organizations in Africa, but it seems generally that their influence is largely domestic. This limited influence has always been a source of concern for me and I have always been keen to fix it.

As a Board, we started by appointing an executive council made up of five (5) brilliant and vibrant mid to senior level lawyers from leading firms in East Africa, Southern Africa and West Africa. We have two more slots on the executive council to fill and we intend to appoint one representative from each of the remaining sub-regions. We are hoping to extend some of the excellent and inclusive initiatives already run by the LCA-YAN to other parts of the continent. We are coming up with initiatives and programmes that will encourage and facilitate the cross-pollination of ideas and experiences across the continent.

There are common problems within the continent and we intend to challenge these problems to ensure that every LCA-YAN practitioner has enough exposure and knowledge to succeed as an arbitration practitioner in the international arbitration community. This requires collaboration and we have started discussing with like-minded institutions. Just a couple of weeks ago, the LCA-YAN collaborated with the Asian International Arbitration Centre to organize a very successful webinar for young African lawyers and students. In December 2021, we organized a special session on the United Nations Convention on Contracts for International Sale of Goods (CISG) for African students looking to participate in the Vis-Moot.

My hope is that by the end of my tenure on the Board, the LCA-YAN will have evolved into a pan-African organization, that is making impact globally.

Increasingly, arbitration disputes now have elements of online proceedings and the use of virtual hearing protocols. Given the lessons learnt from 2021, how should these protocols be expounded to address thorny issues and how can technology be further leveraged, for more productive outcomes in arbitration?

One of the hallmarks of arbitration is the flexibility of the process, so I am always reluctant to be overly prescriptive when it comes to issues relating to arbitration and the regulation of the practice. Personally, I think that the existing virtual hearing protocols already cover the fundamental issues and provide general guidance to parties. For more specific concerns, parties can address these at their first procedural hearing and include any agreements and/or decisions of the tribunal in their procedural order. That said, we can of course make incremental adjustments to the protocols over time if, for example, a specific issue becomes sufficiently prevalent to deserve such consideration.

To the second half of your question, peeping into the future, I see stakeholders wanting to capitalize on the benefits of technology to achieve a more efficient arbitration process. Despite the many challenges of the last two years, these challenges have at least opened all our eyes to the utility of technology in international arbitration. And if I was to peer further into my international arbitration crystal ball, I think we will see more reliance on share-file platforms, more virtual arbitration and transcription platforms and also see parties conducting procedural hearings, smaller and less controversial hearings, as well as minor witness examinations, using video conferencing platforms. In another 10 years or so, building on the momentum of 2020 – 2021, I foresee even the possibility of conducting virtual inspections for minor, relatively uncontroversial sites.

We see that double hatting has remained a topical issue within the arbitral community with opposing schools of thought on this concept, what school of thought do you align with and why?

I can see good arguments on both sides. On the one hand, there is the bias and conflicts of interest argument, which supports the school of thought calling for the ban of double hatting. The bias and conflicts of interest argument is especially relevant to investment arbitration where awards are generally available to members of the public to review.

However, speaking as a young arbitration practitioner myself, I can see how double hatting benefits less experienced colleagues. Double hatting potentially makes young arbitration practitioners better arbitrators and counsel. First, we must not forget that one of the principal advantages of arbitration is the ability to appoint a specialized panel to decide a dispute. By allowing double hatting, less-experienced practitioners are able to gather useful and

specialized experience in their day-to-day work as counsel, which would ultimately be useful for them when acting as arbitrator. For example, the preparation of submissions in a sophisticated construction-related arbitration allows practitioners to build expertise in the field. This experience and expertise gained as counsel would ultimately also be useful when clients are looking to appoint a specialized panel of arbitrators.

Double hatting is further useful from a growth perspective for the insight and perspective it offers – allowing a young practitioner to act as arbitrator on the right case allows them to see things from the other side of the table. Such a practitioner sitting as arbitrator is able to see what advocacy styles and methods were persuasive to them as a decision maker and what attitudes and errors impacted the case negatively. They can then apply these lessons in their own practice as counsel.

I have heard some people argue that making people choose their path as counsel or arbitrator early on in their career potentially provides more opportunities for young practitioners, thereby encouraging diversity. However, if we are being realistic, one of the key factors parties consider when appointing arbitrators is profile and experience. Young practitioners with limited experience will probably struggle to get regular appointments at the beginning of their career compared to the more experienced arbitrators who have gathered experience and built a profile in the community. As such, double hatting is important from a practical perspective: it provides an opportunity for young practitioners or new arbitrators to put bread on the table from their work as counsel, while still building the experience and profile required to eventually become a successful arbitrator.

Approaching this issue more holistically, party autonomy – including in relation to the appointment of counsel and arbitration panel – is one of the hallmarks of international arbitration. Further, while I concede that there may be problems with double hatting (especially in the context of investment arbitration), I do not believe that banning it is the solution we want. A total ban on double hatting could affect the practice of arbitration as we currently know it. The solution to problems arising from double hatting possibly lies in some form of regulation.

As third-party arbitration funding continues to gain relevance globally, when, and how, do you believe this concept would gain traction in Africa especially within the current framework of our arbitration laws and rules? What challenges do you envisage and how can they be resolved for a seamless adoption of this financing mechanism?

The reality is that Africa is a fantastic market for third-party funding and, in my practice, I am seeing more African parties express interest in securing funding to prosecute or defend their claim. This increased interest is because unfortunately, parties in Africa do not always have the resources to sufficiently engage their international adversary who many times, has a much larger purse.

Based on my experience engaging with third-party funders, a number of issues come to mind. For present purposes, I will focus on the following three recurrent issues:

1. Many international funders are looking to fund only high-values disputes, where there is a possibility of securing very lucrative returns. In situations where international funders are happy to fund lower-value disputes, their expected returns on their investment (i.e. the proportion of the value of the claim they expect to retain) makes the funding option not worthwhile for the party seeking funding.

2. International funders are concerned about enforcement risks in Africa. Funders usually want to know how supportive the local courts in Africa are of the enforcement process and how long it will take to enforce a validly made award. There are also concerns around whether the adverse party has enough assets to cover a potential award amount.

3. There are a number of jurisdictions in Africa where third-party funding is not allowed by virtue of the doctrines of champerty and maintenance.

Fixing these challenges requires the involvement of all stakeholders. For one, we need the private sector (and possibly the public sector), and international and non-governmental organizations with special interest in justice reforms in Africa to partner with other stakeholders to create funding options to cater for low to medium scale disputes.

We also need to consider what we can do to reassure international investors that they would be able to enforce a validly made award and recoup their investment. Again, this requires a vibrant and efficient judiciary, with minimal congestions and delays in the enforcement of validly made arbitration awards. This may also require us to review the grounds and process for challenging awards in some African countries, which currently seem to give parties more latitude to challenge an award, especially when compared with the arbitration frameworks in other jurisdictions. We could also consider introducing a costs regime that will be applied against lawyers and parties who frivolously challenge a validly made award.

Finally, we need to reconsider the relevance of the doctrines of champerty and maintenance in our laws. Interestingly, the rules against champerty and maintenance are hold overs from the English common law system, which has now recognized third-party funding as an acceptable exception to those rules. We need to modernize, and more importantly tailor our laws to the peculiarities in Africa.

What significant issues and concepts would be of relevance to the arbitration community this year and how in your opinion would resolution of arbitration disputes look like post-COVID? What practices are here to stay, and which innovative procedures do you see evolving this year?

As countries around the continent diversify their economy, stimulate growth and encourage foreign direct investment into relatively untapped sectors in Africa, I believe we are going to see more arbitrations arising in emerging sectors like fintech, agriculture, environment and climate change and even in sports and entertainment.

I also see the effects of COVID remaining with us for some time to come. As the world takes the first steps towards recovery, there will be new challenges and permanent adjustments to how businesses operate going forward.

Accordingly, I think we are going to see more disputes arise from global supply chain issues including in Africa. We are also going to see disputes arise from issues in the construction industry. Depending on when the African Continental Free Trade Area becomes fully operational, I expect to see an increase in intra-Africa trade disputes.

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We are also going to see more diversity-related discussions and campaigns. Over the years, we have witnessed some progress, with many institutions and stakeholders from across the globe devising initiatives to encourage age, socio-cultural and gender diversity. However, there is still a lot to do and I think we are going to see more efforts by stakeholders to get traction in this area.

I believe that the campaign for a greener arbitration will also ramp up in view of our experiences in 2020 and 2021. If there is one lesson to be learnt from 2020 and 2021, it is that arbitration can certainly be greener. We do not need to travel for every minor proceeding. We do not need to print documents for every single submission and I think that we are going to see more people campaigning to save the trees and reduce the arbitration community's contribution to global warming.

On a related note, as mentioned, I think we are going to see more virtual proceedings for the smaller and less complicated hearings in the continent. We are also going to see more clients being reluctant to pay thousands of dollars for minor witnesses to attend physical proceedings. On the other hand, I think clients will generally prefer to conduct physical proceedings for their more complicated and high-value disputes.

Generally, I expect to see more efforts to make arbitration sustainable.

An Introduction to Third-Party Funding

Giacomo Lorenzo

Origins and Development of TPF

The origins of Third-Party Funding (“TPF”) are rooted in medieval England, when feudal lords supported other people's cases against their political rivals. At that time its use was considered as an abuse of justice and therefore TPF practice was – and in some countries still is – prohibited by the doctrine of “maintenance” and “champerty” . Subsequently, the rules against maintenance and champerty have been relaxed and the use of TPF was re-designed, becoming an essential tool that guarantees access to justice, levelling the played field in “David v. Goliath” cases. Recently, its use has broadened to the extent that it has become an attractive tool of corporate finance for large corporations and public entities looking for the risk and costs externalization.

What is TPF?

TPF is the mechanism by which a third-party funder (“Funder”), not involved in the dispute, bears all the legal costs for one – or more – litigants (“Funded Party”), in return for a share of the proceeds.
In practice, TPF consists in an agreement between the Funder and the Funded Party (“TPF Agreement”) wherein:

- the Funder is obliged to cover all, or part, of the costs related to the litigation or arbitration;

- the Funded Party, only in the event of a positive outcome of the proceedings, must return a share of the proceeds to the Funder.

In case of a negative outcome of the proceedings, the Funded Party will not have to pay anything to the Funder, who is the only one that bears the loss of the legal costs. Consequently, with TPF, the risk of losing legal costs of the litigation or arbitration is transferred from the Funded Party to the Funder.

Increasing Recourse to TPF in Arbitration

There are several advantages that stem from the use of TPF in arbitration and this is the reason why we are advocating for an increase in arbitration proceedings where one of the parties is financed by a Funder.

First of all, it is well known that, despite the objective pros of arbitration, many companies and individuals prefer to entrust the resolution of their disputes to the state courts. The reason is that they cannot afford the costs of arbitration, which are higher than those of the state courts' proceedings. In this regard, TPF may represent a solution, since the Funder will cover all the costs of arbitration instead of the Funded Party and the risk of loss is also transferred to the Funder.

Moreover, with TPF, the Funded Party can rely on the free and independent opinion of the Funder, who will conduct comprehensive due diligence exercises, analysing the documents, evaluating the risk of losing the case and the possibility of enforcing the award. In this way, the Funded Party can make an informed decision on whether to go to arbitration or not.

Furthermore, specialized funders have an international team of professionals with an in-depth experience in the legal field. They usually have good connections with leading law firms all over the world and this can be an additional advantage if the party is involved in an international dispute where the knowledge of foreign law and access to experienced lawyers can make the difference.

On the other hand, from a Funder's perspective, arbitration constitutes a more "secure" investment since it gives the possibility to foresee a number of aspects of the proceedings.

Indeed, the expected duration of the proceedings constitutes an essential element in the Funder's evaluation of the case. Thus, given that arbitration is characterised by shorter timeframes and predictability in the duration of proceedings, it is typically the preferred choice.

In addition, since there are limited grounds on which to appeal an arbitral award, in comparison to a court's judgment, the enforced award is usually obtained in a shorter timeframe.

Finally, another important aspect is that the dispute will be decided by one or more arbitrators, who usually have in-depth knowledge of, and extensive experience on, the subject matter in dispute. Therefore, the risk of a wrong decision for lack of experience of the decision-maker is drastically reduced.

Notwithstanding the above, it is important to mention that questions have been raised as to the impact of TPF on arbitral proceedings, these include, issues relating to the transparency and disclosure obligations.

In this regard, it is important to mention that to guarantee the transparency in international arbitration, art. 11(7) of the 2021 ICC Rules requires that parties "must" disclose the existence and identity of "any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration". In the same way, some arbitral institutions have included different rules regarding TPF in their regulations, providing disclosure obligations on the existence of a TPF Agreement and the Funder's identity.

Such obligations are essential to avoid conflicts of interest that may jeopardise the validity and enforcement of the award.

TPF in Nigeria

The Nigerian law does not expressly prohibit TPF. However, Nigeria is a common law jurisdiction and the doctrines of champerty and maintenance are still applicable, raising significant doubt about the possibility to enforce TPF Agreements.

However, it is worthy of note that the Arbitration and Conciliation Bill, 2020 ("Bill") provides useful rules on TPF. In particular, the Bill:

- allows for the recovery of TPF costs;
- abolishes the torts of maintenance and champerty in relation to Nigeria-seated arbitration proceedings;
- provides some disclosure obligations for the Funded Party;
- provides the definition of Funder and TPF Agreement.

In the light of the above, it seems that the Bill recognises the existence and validity of TPF agreements. Nevertheless, the Bill is still pending before the National Assembly and it is not yet in force or applicable: Therefore, until the Bill becomes effective, it is arguable that TPF Agreements in arbitration remain prohibited.

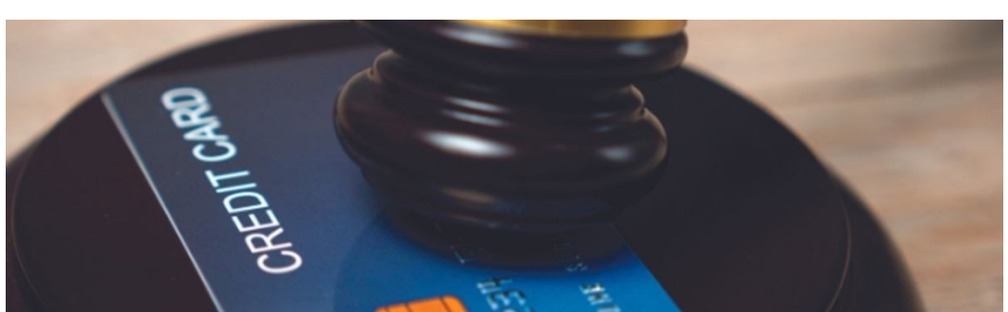
Ease of Access

Obtaining TPF it is not easy since funders tend to fund only meritorious claims with high prospects of success.
To increase the possibilities of obtaining TPF, it is important to know the elements that will be evaluated by the Funder.
In assessing the case, the Funder will usually need to assess and be satisfied with the following information:

1. Description of the parties involved in the dispute;
2. Identification of the legal team;

3. Indication of the quantum (quantification of damages and expert report thereon or details of how the damages are, or will be, calculated);
4. Legal budget (for example, lawyers' fees, experts' fees, enforcement costs, estimate of the adverse party's costs and whether protection against such costs is sought (ATE insurance);
5. Facts of the case;
6. Legal merits (applicable law, jurisdiction, seat of the arbitration if it is an arbitration, duration of the proceedings including enforcement, analysis of the claim(s), evaluation of the chances of success of the claim(s), existence of settlement negotiations and prospects of early settlement, likelihood of counterclaim and evaluation of the chances of success (%) of such counterclaim; and
7. Enforcement prospects (financial situation of the counterparty; indication of where the enforceable assets are located; the strategy towards enforcement).

The indication of the aforementioned information in a legal memorandum is certainly useful to illustrate to the Funder, the essential aspects of the proposed case, thus increasing the possibility of obtaining the desired funds and avoiding the immediate rejection of the funding request.



Conclusion

Africa is a fast-growing economic continent, with an increasing capacity to deliver economic opportunity and services, that attracts the attention of many foreign investors. At the same time, is well known the development of the economy is strictly linked to the good functioning of the judicial system.

With specific regard to Nigeria, we firmly believe that the approval of the Bill and the consequent recognition of TPF as legal and valid could bring several benefits to the country:

1) Nigeria could become an even more attractive venue for dispute resolution;
2) such a turnaround could also encourage foreign investment; and
3) it could significantly reduce the problem of lack of access to justice, allowing even small companies and individuals with a meritorious claim and limited financial means to bring legal proceedings to protect their rights.

In conclusion, we retain that there will likely be further liberalization of TPF in the whole African continent and this could be beneficial for investors, lawyers companies and individuals looking for the externalization of the risk or cost related to the disputes.

[i] *RONALD MINKOFF, ANDREW D. PATRICK, Taming the Champerty Beast: A Proposal for Funding Class Action Plaintiffs, July 28, 2005, available at the following link: https://fkks.com/news/taming-the-champerty-beast-a-propoal-for-funding-class-action-plaintiffs.*

[ii] *When a third party, that has no legitimate interest in the case, promotes or supports a litigation of another party.*

[iii] *Particular type of maintenance, where a third party, not involved in the dispute, provides the financial support to a claimant, asking in exchange a share of the proceeds.*

[iv] *MAX VOLSKY, Investing in Justice, An Introduction to Legal Finance, Lawsuit Advances and Litigation Funding, Legal Finance Journal, 2013, p. 27.*

[v] *The regulations against maintenance and champerty have been relaxed in a number of jurisdictions, including England and Wales and parts of Australia, Canada and the US.*

[vi] *Companies or individuals that could be at a disadvantage in pursuing a claim due to the lack of financial means.*

[vii] *Biblical story of David, who defeated the giant Goliath is used as a metaphor for the case where an individual or a small/medium-sized companies would be at a disadvantage in pursuing legal action against a multinational corporation. In particular, the disadvantage could be related to the lack of financial means to conduct the proceedings.*

[viii] *The shorter the duration of the procedure, the faster the Funder will get a return on his investment.*

[ix] *Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC"), available at the following link: https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ar-18-2016-recommendations-regarding-the-existence-of-third-party-funding-in-arbitrations-administered-by-cam-ccbc/.*

China International Economic and Trade Arbitration Commission ("CIETAC"), available at the following link: http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en. Hong Kong International Arbitration Centre ("HKIAC"), available at the following link: https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf.

International Centre for Settlement and Investment Disputes ("ICSID"), see the following link: https://icsid.worldbank.org/sites/default/files/documents/WP_4_Vol_1_En.pdf.

Milan Chamber of Arbitration ("CAM"), see the following link: https://www.camera-arbitrale.it/upload/documenti/arbitrato/ARBITRATION%20RULES%202020.pdf.

Singapore International Arbitration Centre ("SIAC"), see the following link: https://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Rules%202017.pdf.

[x] *MEHDI MELLAH, Recovery Of Third-Party Funding Costs In International Arbitration: From Myth To Reality, January 28, 2022 available at the following link: https://drs.deminor.com/en/blog/recovery-of-third-party-funding-costs-in-international-arbitration-from-myth-to-reality.*

[xi] *GODWIN OMOAKA, Third-party funding in Nigeria-seated arbitration proceedings, 24 November 2021, available at the following link: https://www.ibanet.org/third-party-funding-Nigeria-arb-proceedings.*

[xii] *Section 52(1) of the Bill provides that "The arbitral tribunal shall fix costs of arbitration in its award and the term "costs" includes…the costs of obtaining Third-Party Funding".*

[xiii] *Section 61 of the Bill provides that "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".*

[xiv] *Section 62(1) of the Bill states that "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".*

[xv] *Section 91(1) of the Bill defines Funder and TPF Agreement as follows: ""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 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, 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". G ODWIN OMOAKA (no. 11).

[xvi] *OLUWASEUN PHILIP-IDIOK, The indirect reforms and regulations of third-party funding in African arbitration, November 24, 2021, available at the following link: https://www.ibanet.org/indirect-reforms-regulations-third-party-funding-African-arbitration.*

[xvii] *Id.*

[xviii] *OYESANYA, OLUSEGUN, Should Nigeria Legalise Third-Party Funding for Arbitrations? Prospects and Issues, August 10, 2021, available at the following link: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956572.*

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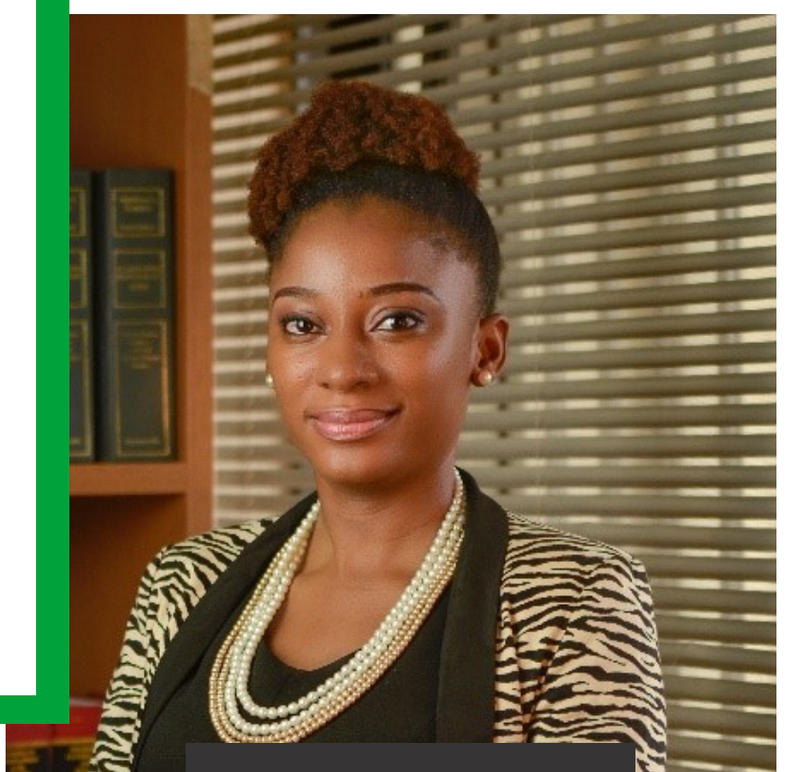
Giacomo Lorenzo is a Legal Counsel at Deminor, a litigation funder. He assesses litigation funding opportunities in international arbitration and commercial litigation and manages Italian cases in the three core business areas of Deminor: litigation funding, antitrust actions and investment recovery. He is currently completing the LL.M. program at University of Lausanne with a specialization in International Business Disputes. Before starting the LL.M., he worked in the litigation and arbitration practice group of the international law firm, Gianni & Origoni, in Milan.

Member Focus

Laura Alakija FCIArb is the Managing Partner of Primera Africa Legal - a top tier commercial law firm in Lagos, Nigeria. She leads PAL's Commercial Dispute (Arbitration and ADR) practice. Her expertise spans the disparate yet connected fields of disputes and transaction advisory services. In addition to being an experienced Arbitrator and accredited Mediator, Laura boasts of over 15 years post call experience with specialties in hospitality; project finance; transport; power & infrastructure; energy and natural resources; real estate and information and communications technology. She has served as a Counsel and Arbitrator in several disputes and led the team representing clients in a number of big-ticket transactions in Nigeria.

Laura is a Fellow of the Chartered Institute of Arbitrators, United Kingdom, Accredited Mediator of the Lagos Multi-Door Courthouse and a certified Online Dispute Resolution expert. She is an active member of the international arbitration community currently serving as Member of the ICC Africa Commission, Member of Advisory Board of the Lagos Court of Arbitration Young Arbitrators' Network among other memberships and positions.

She was part of the team that drafted the widely celebrated Africa Arbitration Academy Protocol on Virtual Hearings in Africa – which won the Innovation in Arbitration at the Africa Arbitration Awards 2020. She was awarded the 40 under 40 Nigerian Rising Star Award by the Nigerian Legal Awards in 2019 and Africa's 50 Most Promising Young Arbitration Practitioners, 2020 - awarded by the Association of Young Arbitrators (AYA).



Laura Alakija *FCIArb*

Evaluation of Expert Evidence in Construction Arbitration

Osinachi Nwandem

Introduction

In a typical construction arbitration, there are several mediums of presenting evidence. Evidence could be elicited through the presentation of contemporaneous documents, the testimony of fact witnesses, or testimony of expert witnesses. However, one medium of evidence that has been predominant and mostly deployed in construction arbitration is the evidence of an expert witness commonly referred to as expert evidence. Notwithstanding its regular deployment in arbitration, certain conditions determine its acceptability by the arbitral tribunal ("the tribunal"). This paper discusses the various ingredients considered by an arbitral tribunal in deciding whether to accept expert evidence.

What is expert evidence?

Expert evidence is evidence provided by a witness who, by his or her education, training, skill and experience, is believed to have the expertise and specialised knowledge in a particular field. In Mustapha v. Bulkachuwa[xviii] , an expert witness was defined as one who, through education or experience, has developed skill or knowledge will assist the fact-finder (court or arbitral tribunal).

Experts in construction disputes

In construction disputes, the use of expert evidence is usually indispensable, as it assists the arbitral tribunal in a variety of complex technical issues and other factual issues that require technical assistance. Typically, expert evidence in construction arbitration is provided by professionals ranging from quantity surveyors, claim consultants, cost engineers and other relevant professionals. These experts are mostly called upon to provide assistance and advice on issues relating to delays, quantum, geotechnical work, defects, planning and programming, and other technical engineering issues.

Requirements for acceptance of expert evidence

The requirements for the acceptance of expert opinion can be distilled from the duties, roles and obligations of an expert, as laid down by the English courts in the **Ikarian Reefer** and **Anglo Group Plc v Winther Brown & Co.** cases. Interestingly, several courts and arbitrators in domestic and international arbitrations have relied on these cases when assessing expert opinions. Four points summarize these requirements.

1) A properly qualified expert must give the expert evidence.
2) The expert evidence must be impartial and unbiased.
3) The expert evidence must be relevant to the matter under reference.
4) The expert evidence must be able to assist the arbitral tribunal in arriving at a just and fair conclusion of the matter under reference.

A properly qualified expert must give the expert evidence

Every expert evidence must be given by one with a **solid reputation** in the field wherein the opinion is sought. The witness should have experience in acting as an expert witness and must possess the requisite skill and knowledge in the field s/he proclaims to be an expert.

In A.N.P.P. v. Usman[xviii], it was held that the correct test of the relevance of an expert opinion is whether the witness is specially skilled in the particular field in question. Consequently, the tribunal will reject the evidence of a witness who lacks the requisite skill, knowledge and experience in the field he is seeking to give an opinion. The American case of J. A. Jones Construction Co., elucidates this point.

In **J. A. Jones Construction Co. v The United States**, the Corps of Engineers Board of Contract Appeals (ENG BCA) rejected the contractor's attempted use of the measured mile approach where it found the expert's method to be weak. The contractor's expert, Paul L. DeMent, gave evidence and sought to calculate the loss of productivity based on his variation of the measured mile approach. In evaluating the evidence of the contractor's expert, the Board analyzed Mr. DeMent's education and professional standing. The Board observed that Mr. DeMent had only obtained a bachelor's degree in building

construction. Mr. DeMent had received no formal training in measuring labour productivity. The Board equally observed that he was not a member of any relevant professional associations and had not published any writings. Mr. DeMent had also not obtained any engineering or contractor's license and he only learnt how to perform productivity measurements from on-the-job expe-rience.

In contrast, when the Board examined the Government's defence, it noted that the government's expert, Dr. H. Randolf Thomas, held a bachelor's degree in architectural engineering and a Master's in civil engineering. The Board also observed that for fifteen years, Dr. Thomas had taught a graduate course on labour productivity. Also, the government expert belonged to many profes-sional organizations, had published many articles on labour productivity, and received many honours relating to his work in labour productivity and produc-tivity quantification. The Board noted that Mr. DeMent's measured mile approach was one of a kind and equally noted that the opposing expert, who was much more experienced, had never heard of this method.

The expert evidence must be impartial and unbiased

The requirement of independence and impartiality is not only the arbitrator's obligation, an expert witness and his/her evidence must be seen to be **impartial and unbiased**. The expert's duty of independence and impartiality implies that the expert will need to identify in his/her testimony any **opinions held that do not support the case put up by the party who appointed him/her.** It has been recommended that the more objective and independent the expert appears, the more credible he or she is and **the more weight that the tribunal will give to the expert's evidence**. It was held in the Canadian case of **Widdrington (Estate of) v. Wightman** that expert witness evidence will not be admitted and acted upon where it shows that the expert has an interest in the outcome of the proceedings either because of a relationship with the party that retained his or service or otherwise.

The expert evidence must be relevant to the matter under reference

For an expert's evidence to be accepted, the evidence must have relied on facts which exist and which are in the evidence before the tribunal. Consequently, where an expert opinion is based on facts not in evidence, **such opinion has no value** for the tribunal. In **Widdrington (Estate of) v. Wightman**, it was held that "as long as there is some admissible evidence on which the expert's testimony is based, it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish".

The expert evidence must be able to assist the arbitral tribunal in arriving at a just and fair conclusion of the matter under reference

We have established that an expert opinion is meant to assist the tribunal in its fact-finding process. The expert can achieve this by providing in as much detail as possible to convince the tribunal that the expert's opinions are well-founded. In addition, the expert must be able to simplify complex technical terms to the understanding of a layman.

The expert evidence must be based on sufficient facts and data of a credible source of tests and tried principles and methods. In Ogiale v. Shell Pet. Dev. Co. (Nig,) Ltd. , the court held as follows:

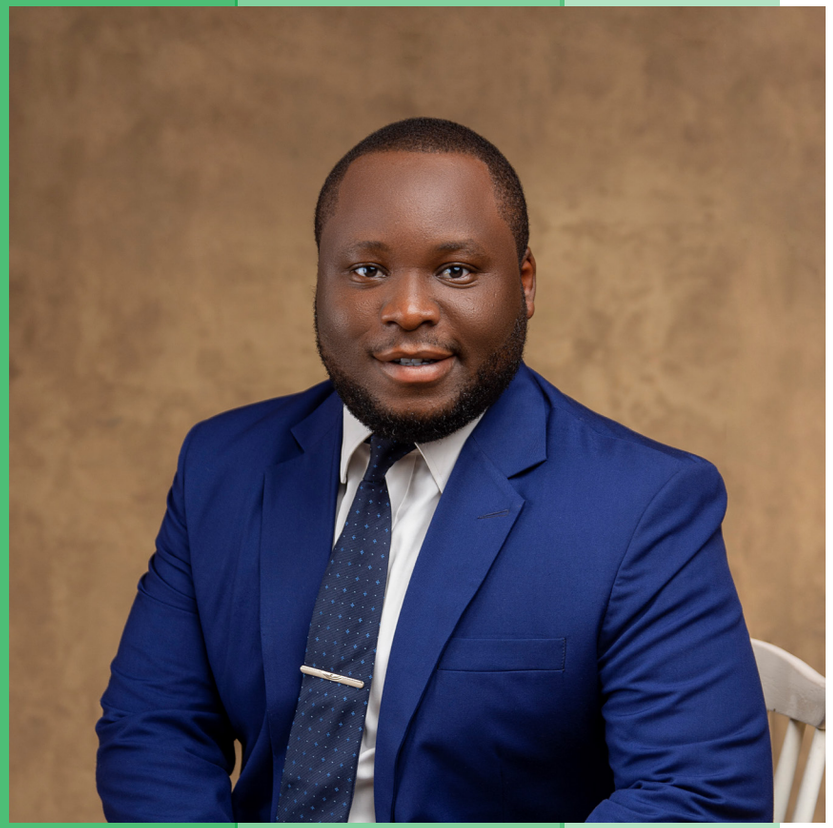
> "the duty of the expert is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusions so as to enable the judge to form its own independent judgment by the application of these criteria to the facts proved in evidence. It is therefore not enough for an expert to give 'a mere opinion and conclusion of' leaving out the criteria upon which such opinion and conclusion are based. His opinion and conclusions must be supported by scientific analysis otherwise his evidence will be valueless."

The J. A. Jones Construction case gives an example where an expert's evidence was rejected because his opinion and conclusions were not supported by tried and tested methods or principles.

The Board observed that Mr. DeMent, the contractor's expert, did not base his report upon facts and that the report did not contain any accurate analysis. The Board equally noted that Mr. DeMent had made several erroneous assumptions in carrying out his work assignment. In the Board's final analysis, the specific formula used by Mr. DeMent had not been tested or peer-reviewed. The Board, therefore, rejected Mr. DeMent's analysis and concluded that the expert opinion was highly questionable, unreliable, and produced patently illogical results.

Conclusion

Expert evidence is a key to success in any construction dispute. However, where the expert evidence does not satisfy the requirements discussed above, the evidence will not be given the weight it might otherwise deserve. Like the J. A. Jones Construction case, a further consequence is that the tribunal may reject the expert's evidence and may accept the opposing expert's evidence (if any) or appoint another expert. Therefore, both parties and experts must ensure that the expert reports and testimonies which form the expert's evidence comply with the discussed requirements. The court's guidance in the Ikarian Reefer and the Anglo Group Plc cases remain invaluable.



Osinachi Nwandem is a Senior Associate in ÆLEX, Nigeria and is a certified construction industry expert with extensive experience in construction law and arbitration.

Osinachi has broad know-how in acting for and advising on legal issues concerning construction projects and contracts. He has assisted clients in the drafting, reviewing and negotiation of construction contracts, and has represented clients in several construction arbitrations.

Osinachi's clients are key players in the construction industry ranging from property developers, engineers, architects, contractors, subcontractors, owners and builders. Osinachi is a regular contributor to several construction law platforms and publications. Osinachi's publications on legal issues affecting construction projects and contracts offer unique guidance to players in the construction industry.

Osinachi is currently a doctoral researcher at the Nnamdi Azikiwe University, Nigeria. Particularly, his PhD research focuses on construction arbitration.

Osinachi is a member of the Institute of Construction Industry Arbitrators (ICIArb), the International Bar Association, Young International Council for Commercial Arbitration (Young ICCAA), Africa Construction Law (ACL) Initiative and the Nigerian Bar Association (NBA) Section on Business Law. Osinachi is currently the West African Region Editor of the Africa Construction Law (ACL) Blog.

Global News

Boris Johnson Promises to Boost Green Investment in Africa

The United Kingdom (UK) Prime minister Boris Johnson opened the latest UK-Africa Investment Conference, a one-day virtual event with UK and African ministers, business leaders and heads of international organisations. This meeting discussed sustainable investment and Boris Johnson made comments about boosting UK-Africa investment to help alleviate climate change.

Readmore: **https://www.thenational-news.com/world/uk-news/2022/01/20/boris-johnson-uk-africa-investment-can-help-alleviate-climate-change/**

Kenya Starts Oil Exploration Activities in Lamu

Kenya has launched oil and gas development in the Lamu Basin, disregarding an International Court of Justice order in a maritime dispute with Somalia.

Despite a boundary dispute with Somalia, Kenya has been searching for oil and gas resources in the Lamu Basin since April last year. The basin runs from the Kenya-Somali border to the Tanzanian border, and Kenya is relying on its size.

Petroleum commissioner James Ng'ang'a stated that ENI Kenya Business Venture, previously Agip, began drilling at the Mlima-1 well, also known as Block L11B, in December 2021 after seismic investigations suggested that the region had oil and gas potential. The deposit findings of the commercial viability of the block are expected to be released within March 2022, according to the business.

Read more at: **https://www.businessdailyafrica.com/bd/economy/kenya-re-news-lamu-oil-search-amid-somali-row-3678260**

Senegal Faces New ICSID Claims

Mauritian investors have filed an ICSID action against Senegal over a €1 billion power plant project, months after Senegal lost its challenge to a €243 million UNCITRAL verdict in favor of a dual national.

Read more at: **https://globalarbitrationreview.com/senegal-faces-new-icsid-claim#:~:text=Mauritian%20investors%20have%20brought%20an,favour%20of%20a%20dual%20national**

The International Bar Association Arbitration Committee has announced the appointment of new officers.

The International Bar Association's arbitration committee announced its new line up of officers for the coming year, with Samaa Haridi of Hogan Lovells in New York stepping up to senior co-chair and Brazilian Valería Galíndez becoming junior co-chair.

Read more at: **https://www.ibanet.org/officer/officerList/3010**

Egypt and Algeria seek to boost political, economic cooperation

Egypt's Minister of International Cooperation, Rania al-Mashat, met with Algeria's ambassador in Cairo, Hameed Shbeira, ahead of the two nations' Joint Higher Committee meeting.

Mashat emphasized Egypt's desire to deepen bilateral cooperation in a variety of spheres, capitalizing on both nations' significant economic potential. She emphasized the determination of both political leaders to remove any impediment to economic unification.

Read more at: **https://english.aawsat.com/home/article/3425596/egypt-algeria-seek-boost-political-economic-cooperation**

Upcoming Events

S/N	EVENT	DATE/TIME/VENUE	WEBSITE
1.	AIIL and AfAA's Advanced Introduction Workshop on International Investment Law and Dispute Resolution	3 March 2022 10:00 AM - 2:30 PM	Register via: https://afaa.ngo/page-18451
2.	International Women's Day 2022: Break The Bias	8 March 2022 10:00 AM - 11:30 AM	Register via: https://www.eventbrite.co.uk/e/international-womens-day-2022-break-the-bias-registration-245771427957
3.	The Singapore Institute of Arbitrators (SIArb) Presents Res Judicata in International Arbitration	9 March 2022 4:30 AM - 6:15 AM	Register via: https://siarb.org.sg/events/upcoming-events/icalrepeat.detail/2022/03/09/367/-/webinar-you-can-t-re-open-that-question-res-judicata-in-international-arbitration-9-march-2022?utm_source=NYIAC&utm_campaign=1a10349cc5-EMAIL_CAMPAIGN_7_10_2020_10_0_COPY_01&utm_medium=email&utm_term=0_e0df4891d0-1a10349cc5-64782164&mc_cid=1a10349cc5&mc_eid=c8a095eede
4.	Law and Investor-State Mediator Training	11–14 Mar 2022 09.00–17.30 daily The Former French Mission Building, Central, Hong Kong	Register via: events@aail.org
5.	The United Nations Commission on International Trade Law (UNCITRAL) Presents Working Group II: Dispute Settlement	March 28-April 1 (Monday-Friday) New York, NY	Register via: https://uncitral.un.org/en/working_groups/2/arbitration?utm_source=NYIAC&utm_campaign=ac11d9020c-EMAIL_CAMPAIGN_7_10_2020_10_0_COPY_01&utm_medium=email&utm_term=0_e0df4891d0-ac11d9020c-64782164&mc_cid=ac11d9020c&mc_eid=c8a095eede

6.	Onyema Arbitration in collaboration with LACIAC, CIMAC, KIAC and CRICA's 4 Session Training for Practitioners in International Arbitration	20th -22nd April 2022 (LACIAC, Lagos) 6th – 8th of June 2022 (CIMAC, Douala) 20th -22nd July 2022 (KIAC, Kigali) 10th – 12th October 2022 (CRCICA, Cairo)	Register via: https://onyema-arbitration.co.uk/training-for-practitioners-in-international-arbitration-2022-registration-of-interest/
7.	The International Chamber of Commerce (ICC) Presents 6th Africa Conference on International Arbitration	June 1, 2022 12:00 am - June 3, 2022 5:00 pm	Register via: https://2go.iccwbo.org/icc-africa-conference-on-international-arbitration.html?utm_source=NYIAC&utm_campaign=ac11d9020c-EMAIL_CAMPAIGN_7_10_2020_10_0_COPY_01&utm_medium=email&utm_term=0_e0df4891d0-ac11d9020c-64782164&mc_cid=ac11d9020c&mc_eid=c8a095eede
8.	25th Congress of the International Council of Commercial Arbitration (ICCA)	September 18, 2022 12:00 am - September 21, 2022 5:00 pm Edinburgh, Scotland	Register via: https://www.arbitration-icca.org/icca-edinburgh-congress-rescheduled-Sept22?utm_source=NYIAC&utm_campaign=5de3a4aafd-EMAIL_CAMPAIGN_7_10_2020_10_0_COPY_01&utm_medium=email&utm_term=0_e0df4891d0-5de3a4aafd-64782164&mc_cid=5de3a4aafd&mc_eid=c8a095eede
9.	3rd AfAA Annual International Arbitration Conference & Awards Ceremony	3 Nov 2022 - 5 Nov 2022 Accra	Register via: https://afaa.ngo/event-4355959

Contact Details

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