PRESENT AND FUTURE PERSPECTIVES OF THE LAW OF THIRD LAW ON THE THIRD PARTY FUNDING OF ARBITRATION IN NIGERIA*

Abstract

Third Party Funding (TPF) of arbitration has become a topical issue in global dispute resolution and is now increasingly relevant in Nigeria. The concept, which allows external financiers to fund arbitral proceedings in return for a share of the proceeds, has long been necessitated by the financial constraints faced by parties to arbitration. The COVID-19 pandemic, however, accentuated this necessity by severely impacting business capital, disrupting cash flows, and increasing the volume of disputes arising from contract breaches, business interruptions, and force majeure claims. Consequently, TPF has emerged as a vital tool not only for claimants but also for respondents seeking to mount viable defenses in arbitration. While the benefits of TPF in enhancing access to justice, ensuring equality of arms, and balancing procedural fairness are widely acknowledged, its use also reflects evolving commercial strategies for risk allocation and cash flow management. Jurisdictions such as Singapore, Hong Kong, and England have legalized or judicially recognized TPF, thereby strengthening their attractiveness as arbitral seats. Nigeria, however, has remained bound by the outdated Arbitration and Conciliation Act, which neither expressly recognizes nor regulates TPF, leaving parties to rely on common law principles. The recent passage of the Arbitration and Mediation Bill (2022) signals a significant shift, introducing statutory recognition of TPF and laying the foundation for its structured adoption. This article examines the present state of Nigerian law on third party funding of arbitration, the practical and policy considerations driving its necessity, and the future perspectives under the new legal framework. It argues that effective regulation of TPF is critical to enhancing Nigeria's competitiveness as an arbitral venue, ensuring access to justice, and aligning the country with global best practices in international commercial arbitration.

1. Introduction

A third party or arbitral proceeding has been a tropical issues in the world of arbitration and lately in Nigeria. The need for third party funding has always existed in Nigeria and was even made much necessary by the great effect on life and business by the COVID-19 pandemic, which has foisted on the world the new 'normal'.[1]

In addition to the always existed, the pandemic has negatively impacted capital and its availability for business. Many businesses are facing their down times and can hardly afford their ordinary regular financial outgoings let alone have other funds such as for pressing or defending their arbitration claims. They are insolvent or nearing it. Even for solvent companies and persons the pandemic has in greater prudence, compelled them to look elsewhere for funds to press claims or launch a defence[2] of arbitral proceedings. Their resources are lean and they can hardly have a resort to those resources for claims or defence; and the pandemic is definitely causing a lot of breaches of contracts and other arrangement between parties. It, therefore, also has the potential of giving rise to more and more disputes over contract. Also, there will be litigation and arbitration over the allocation of responsibility, including questions such as the scope of business interruption, insurance and the limits of the force *majeure* doctrines.[3] It has also been found that Buford Capital, a TPF provider (litigation

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[1] The 'new normal' constitutes the new ways of doing things, including business in response to the pandemic.
It includes a resort to online communication (like online arbitration and court room proceedings or interaction) rather than physical meetings. The new normal promises to be conveniently resorted by parties, except to lesser degrees, even when the world has overcome the pandemic. It also includes sourcing for funds for the conduct of proceedings rather than relying on the scarce or even non –existent) resources of the parties-in third party funding, for instance.

[2] Many of the commentary on third party funding tends towards discussing he funding of the claimant alone but, of course, third party funding can be made available for the defense of an arbitral proceeding, just as a pressing a claim as well as putting up a good defense can be costly and expensive in Nigeria especially when they are compared to equivalent court proceedings where the state owes the citizenry.

[3] Joanna Bourke, Market report: Burford Capital could benefit if covid-19 legal disputes stack up evening standard of April 28 2020, http://www.standard.Co.uk/business/market-report-Buford-capital-could-benefit-if covid-19-legal-disputes-stack-up-a4426076.html(last accessed May 29th, 2021).

Financier) which had a disastrous 2019 has at April, 2020 seen its share price surge back into appreciation as it signaled a wave of coronavirus-related work …in the first four months of the year and that it has obtained court result or arbitral awards that if paid in full, would generate 'substantial income' of around £400 million.[4]

At normal times previous to the pandemic, the presence of third party funding has been a welcome relief for companies and persons. Those companies and persons had challenges pressing or defending new unbudgeted claims or defence, for instance, that arise in the course of a year.[5] Even at such times there has been a rise in 'third party funding'. In some countries like Singapore and Hong Kong, there are has been statutes legalizing third party funding as those countries aimed to increase their attractiveness as arbitral venues or seats. In other countries like England and wales, South Africa, India and the USA, there has been judicial response to third party funding as the need arose, tending to legalize the concept.

In Nigeria the Arbitration and Conciliation Acts[6] and in effect the common law principles are still the law on the matter. The law is in yesterday and the courts have hardly taken the initiative through judicial pronouncements to legalize the doctrine. However, the new arbitration and mediation bill which was passed by the National Assembly in May 2022 now promises to change the law on the issues even if not very extensively. These are the present and future perspectives of the law and the doctrine in the country.

2. Definitions of Terms

Third party funding (TPF) is an agreement or arrangement between a funding company (normally a third party funding company, a bank, an insurance firm, etc[7]) or even an individual and a claimholder. Under the agreement, the funder agrees to finance some of all of the claimholder's legal fee and expenses in exchange for a share of the proceeds in the event to success. The funder may also agrees to pay the other side's costs if the funded party is so ordered to pay or to provide security for the opponent's costs[8]. It may also cover other costs related to the arbitration but not directly related to either party, such as the cost of bringing in expert witness. However, if there is no recovery, no payment will be made to the funder nor the funds already advanced be refunded. This is the no recourse principle under which the funder may only recover from what has been won in the

[4] *Ibid.*

[5] It may appear arguable to some commentators that third party funding may not really account for more and more arbitrations being commenced. However, evidence seems to clearly suggest that, at least with state parties , the availability o third party funds has enabled many more claimants to go to arbitration than would have been the case without such funds. Per Yilli Dautaj (Assistant Editor for investment Arbitration) (DER Legal) and Bruno Gustafsson (Roschier Attorneys, Ltd.) in their November 18, 2017? 1 comment-*Access to justice: Rebalancing the Third-party Funding Equilibrium in Investment treaty Arbitration.* "It is true that third-party funding enhances the access to justice and that it is a good thing for the equality of arms and for the overreaching principles of procedural fairness and justice." The issues of access to justice is a major item in assessing whether or not there ought to be third- party funding. Thus, one 'of the primary reasons for seeking third-party funding is the lack of " access to justice" In the context of the third-party funding, "access to justice" refers to all tools and resources that implicates a party's opportunity to defend or enforce a legal right. In order words, lack of "access to justice" can be roughly equated to a lack of resources to litigate properly. Notwithstanding, this reason alone is changing and third-party funding is more being used by claimants to allocate risks and costs while continuing its business operation with steady cash flow. However, with competition being the hallmark of the western of the western economy, a business being able to compete with simultaneously litigation for justice is ipso facto the essence of real "access to justice". 'see also the arbitration institute of the Stockholm chamber of commerce podcast of 20th December 2021, *Third party funding in arbitration – more commonly used,* where the question was answered pointedly in the positive by saying yes, that "judging by the SCC's caseload the number where the parties disclose their funders increase every year, and generally the phenomena is no longer new. There is no reason to believe that in the aftermath of the pandemic , this way of financing arbitration might become more frequently used by parties"

[6] Cap A18, LFN, 2004, enacted since 1960 as the Arbitration and Conciliation Decree of 1090 under a military regime.

[7] Third party funding are normally called by other names such as portfolio Funders, Arbitration funders, third party funders, law firm financiers, Litigation funders, Attorney Financiers etc. see Khaldoun S. Qtiashat and All K. Qtaisha, third party funding in Arbitration Question and justifications, Int J semiot Law 34(1), available at <https://doi.org/org/10.1007/s11196-019-09635-2> last accessed May 28, 2021.

[8] Maya Steinitz whose claim is this anyway? *Third party Litigation Funding*, 95 Minn. L.Rev.1275-1276(2011).

arbitration; he may not lay claims outside the proceeds of the arbitration[9]. As an exception to this rule, however, the founder may agree with the respondent to the arbitration as to how the funder may be rewarded.

Defining third party funding this way, we need to point out that there are several other definitions of concept. It can be looked at from the point of view of several players. Indeed, due to the complex nature of the subject matter and with the diversity of parties, entities, funding products, players and institutions playing various roles and having different objectives, the definitional ambiguities and deficiencies very often occur. They have been identified by the ICC reports of the ICC-Queen Mary Task force on third party funding in International Arbitration (ICC Report).[10]It needs to be noted for instance, that a respondent to a claim in arbitration can also be funded by a third party funder. Where the respondent has a counterclaim, the new or fresh claim (not the defence to the original claim) is being funded.

The differences between funding a claim and funding the defence (or where there is no counterclaim as part of the defence) is that the funder may not have any proceeds of the arbitration to share unlike the successful Claimant's case. The funder in that case may reach an agreement with the respondent as to how he would be rewarded for funding. He may also come under one of the options of funding discussed under ways of funding Arbitration/Litigation similar to 3rd Party funding *infra.*[11] *S*uppose a funder funds the respondent with an understanding that in the events that he does not have money to pay back after the proceedings but provides collateral which the funder can take in lieu of cash, is there anything against such an agreement? We do not think so. In such an arrangement, if the projected sum is exceeded and the proceedings are yet to close, parties may take additional agreement to further fund the proceedings.

In recent times, there has been an increase in the number of arbitration and indeed litigation funders; law firm that are funded in their arbitration work for claimants or working with funders, and the number of funded cases as well as reported cases that were funded in the international circuits.[12] There is no standard contract for third party funding. It depends on the circumstances of the particular cases. Third party funders typically provide or invest in a hedge fund or special purpose fund; they seek out claimholders or litigants who have meritorious and substantial claims but who may be unable or unwilling to make the financial investment required to litigate those claims.

Section 91(1) of the newly passed Nigerian Arbitration and Mediation bill 2022,[13] seems to have adopted all the issues mentioned above ion adopting the definition in the ICC Report. It provides the third party funder and third party funding agreement to mean:

> 'Third party funding agreement" means a contract between the third party funder and a disputing party, an affiliate of that party, or a law firm representing that party, in order to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and such financing is provided either through donation or grant or in return for imbursement dependent on the outcome of the dispute or in return for a premium payment.'

It is thus by all means an enforceable contract between a party to the dispute and a third party. From the definition, it can also be a donation and the question is: if it is a donation in the true sense of

[9]This underscore the need for a claim to be properly studied by Prospective funder to be sure that the claim has a strong possibility of success it has been said that "… the decision of whether to fund or not is primarily based on the merits of the case, the benefits cost analysis, and the enforceability of the award … a third party funder, privilege with the expertise of well-known arbitration scholars and practitioners …" would assess all factors first.

[10]See report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration, The ICCA Report No. 4, April 2018.

[11]See the text for footnotes 21 to 27 ff below

[12]See the ICCA Report No. 4,April 2018 footnotes 16 above

donation (gift), does anyone have to pay? It seems therefore that it is not in all cases that the third party hopes for a return either in terms of cash of premium. It also defines a funder as:

> '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 the party, or a law firm representing that party, in order to financé part or all 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'.

There are other ways of funding arbitration/litigation similar to third party funding.[14] In fact, there are basically six different ways in which a claimholder desirous of being funded by third party may access fund. Some of them, other than a loan in the traditional sense and the classical third party funding, are almost unknown in Nigeria. Five of the ways are examined here both completeness of understanding and for further exploration by lawyer seven in court litigation while the sixth, third party funding itself is discussed later.[15] They include:

a. Loan
b. Legal expense insurance
c. Assignments
d. Equity financing
e. Attorney financing and
f. Third party funding

Firstly, we deal with several issues, situation and developments with the funding of arbitration which have normally arisen, not related to the pandemic or COVID-19 but which the pandemic has worsened especially with *ad hoc* proceedings. They were there even before the advent of the corona virus pandemic. A resort to third party funding can deal with those developments and remove the unhappy experience of arbitrators in Nigeria, for instance. Practically everyone involved in an arbitrators practice in Nigeria has been involved in arbitration in which parties were quite zealous and warm until the issue of deposit is mentioned or required.[16] Several parties back out at that point and the proceedings are thereby frustrated because the amount required is not available. Sometimes, arbitration is ongoing up to the time of making final payment of the arbitrator's fees and other ancillaries, and one or all the parties are unable to pay. Proceedings are stalled, delayed or terminated. Many more arbitrators would have gained far more experience than presently if parties were able to fund their arbitration practice, it is quite desirable that alternative funding of arbitration be resorted to as to save the many arbitration proceedings that are otherwise stillborn from such an experience.

Indeed, third party funding obtains in litigation, though to a limited degree than in arbitration. In many jurisdictions, the doctrines of champerty and maintenance stand in the way as public policy matters against a third party maintaining any interest in litigation for the purpose of getting a reward or fees from or tied to the proceeds of the litigation. It is those doctrines that have ensured that these options have not been explored for litigation. Other than the catch phrase avoidance approach of the law, there is nothing in the law against some of the options like loans, legal expenses insurance and equity financing. They can be very well explored both in court ligation and in arbitration law as it now, without any amendment. In Nigeria, for instance, even before the recent passage of the

[14]Much gratitude is owned to commentators such as Mohamed Swelfy, *Third party funding in International Arbitration*: *a critical Appraisal & pragmatic proposal a SJD Dissertation submitted to the* Fordham University school of Law, USA; Shubhanghi nangunoori, *third party arbitration funding – Comparative analysis and Indian perspective* Lexforti Legal News and journal, June 2022 *https://Lexforti.com/legal-news/third* party-arbitration-funding -comparative-analysis-and Indian-perspective /as well as Koh Swee Yen and Tiong Teck Wee, Development of Third-party litigation funding in Asia, August , 2018, *https:/www.financierworldwid.com/development of third party-litigation-funding in-asia#.* YuEhFiTMK3A

[15] See the text of Evolution and concept of third Party Funding *infra*

[16]This writer has been involved in numerous arbitrations which ended abruptly as the amounts to be paid towards arbitrator's fees and other costs of the arbitration were assessed. Typically, the parties check the fee they were required to pay against what they might pay if they resort to litigation.

arbitration and meditation bill and after the hopeful presidential assent to the bill, when the doctrine ceases to be applicable in arbitration, before the presidential assent and for long as the bill remains non-operational as an act of the national assembly, the doctrines of champerty and maintenance remain active as the law for the litigation and arbitration. It is for that and other purposes that we try to thoroughly examine them here.

Loan: For a loan, a potential claimant (claimholder) in an arbitration or court litigation may approach a bank, or other stakeholder in the company such as subsidiary or parent company, a creditor, shareholder or other beneficial owner for a facility. A bank in the traditional sense can only advance a loan with interest while some other creditors by way of loans may give a loan without interests[17] or with interest scaled down. In Nigeria, loans can be burdens especially with their ever escalating compound interests. This makes the option of borrowing from a bank to fund a claim scarcely appealing as a business option. When that is considered along with the fact in Nigeria even after getting an award, an award loser may not pay or allow an enforcement of the award. They will want to test the setting aside procedures even to the Supreme Court. They thus take a long time, within which time interest element will be running. The option of a loan begins to look even much more undesirable. However, if a claimholder has a way of sourcing an off shore loan to fund a claim in Nigeria (or with a seat in Nigeria), such factors may not be as critical.[18]

A loan is repayable whether the claimholder wins or loses the case. On the other hand, however, in arbitration it ensures that the creditor may not seek to exercise the kind of control of the case that some third party funders now seek to do these days.[19] The entire risk is borne by the claimant and he also retains the full management of the case.
The fact that a lender has to be paid whether or not the case is lost seems to be distinguishing factor between a loan and the other ways of funding a claim. Under those options, a third party bears the burden or responsibility for funding of an arbitration or indeed litigation.

Much as it may look not very enticing (on the basis of logistics when all relevant factors are considered), lawyers need to note that there is no reason why it may not be considered in court litigation. Several Claims that are not pursued now because of the absence of funds can very well be pursed with well-structured and beneficial loans.

Legal Expense Insurance is hardly known to many a lawyer or party to arbitration as a way of financing litigation or arbitration. However, as things stand, it can be good way of pursing both litigation and arbitration claims. It is taken out from an insurance company as protection either as claimant or in the defence.

It generally covers lawyer's fees, witness expenses and other costs of arbitration. It comes from before the event (to cover expenditure related to pursing the claim) or after the event. Coming after the event means that it covers expenses following a loss of the award by claimant, other things associated with loss, such as the insured's own expenses, adverse damage awards, cost and professional fees for the victorious party's lawyer, etc.
Nothing stops it from being explored even as the law stands now both in litigation as well as in arbitration. However, in Nigeria in this COVID-19 pandemic, insurance companies have been greatly affected, so any party desirous of taking out this insurance needs to do serious checks on the insurance companies themselves so as not to insure with one that may go into liquidation. In other

[17] Except for the new kinds of banks that have say they have other interests rather than interest, such as the Jiaz Bank Plc
[18] The issue of interest will remain relevant and ought to be taken into consideration in weighing all the options. See Bernado cremades, Concluding remarks in third-party funding In international Arbitration 154, Bernado cremades & Antoniaa Dimolista(eds), 2013.
[19] See, for instance, LNieuwveld and V. sahani, third-party funding in internastional Arbitration, Kluwer Law international B.v.
Richard, third party funding in UsS enters mainstream,leading to calls for reform, Financier worldwide. https://www.financierworldwide. Com/third –party-litigation-funding-in us-enters-mainstream-leading-to calls-for-reform/#WIXkqKIWbIU. Accessed 20th May,2001.

places where failure amongst insurance companies may not be so pronounced like the UK, insurance companies are tightening their terms and policy.[20]

Assignment: This is a complete or outright transfer of the arbitration claim from the claimant to a third party, the assignee, who thereafter becomes the owner and claimant. Unlike the typical third party funder who only acquires an interest in the 'fruits' of a claim or the proceedings of the third party acquires total interest in the claim,[21] it can happen through an outright transfer of the right to pursue the claim or through the occurrence of merger, acquisition or asset purchase or a transfer related to bankruptcy or insolvency.[22]
As the law stands in Nigeria now, an assignment of a case can hardly be done because it can easily be stuck down as champertous. However, when champerty and maintenance have been abrogated with respect to arbitration as envisaged with the arbitration and meditation bill it will be lawful and capable of being explored. It needs to be noted however that even in UK with the development of the law that has been done, some aspects of assignment is still resisted as charpertous[23], where the claim is 'assigned to, rather than merely funded by, a third party funder.'[24]

Equity Financing: In this arrangement, the funder takes a stake in company A which is a holding Company B, the claimholder. Company B (the claimholder) is in need of funds to pursue a claim and the funder is desirous of exercising control over the company through Company A on the arbitration proceedings.
The funder's return on its equity finance investment comes by way of dividends and not expressively as payment in return for a funding of the arbitration. While a direct funding of arbitration may be champertous in certain jurisdictions, equity financing is clearly not champertous[25] and may be embarked upon in such jurisdictions.

The drawback however, as an aftermath of the coronavirus pandemic, the pandemic has forced several companies into unforeseen situations such that taking on a new shareholder or stakeholder simply for the purpose of funding an arbitration may occasion further unforeseen circumstances for a company. The general drawback is that it is not suitable for individual; it is more suitable for coorporates organization.

In **Attorney Financing,** the lawyer fee is not paid until after the award is delivered. In contingency fee arrangement, the lawyer charges a certain negotiated percentage of the recovered damages. If his side loses the award he gets nothing. This arrangement is often called a 'no-win-no-fee' arrangement. On the other hand, in a conditional fee arrangement the lawyer charges a discounted fee but such is not paid until the conclusion of the case.
At the conclusion, he gets his full fees out of the damages recovered and in some jurisdictions with a bonus. While the lawyer in a contingency fee arrangement bears the entire burden and loses all if the case is lost, in a conditional fee arrangement the lawyer shares in the bearing of the burden.

[20]See abayomi Okubote, Arbitration Finance in the Aftermath of a pandemic: Third-party funding as the magic Bullet, blog by clairesheridon January 28, 2021 http:/blogs2.law.columbia.edu/aria/arbitration-finance-in-thr-aftermath-of –a pandemic-third-party-funding-as –the magic-bullet/:Oliver Ralph,UK insurer tighten terms to explicitly exclude coronavirus, Fin. time(Mar.31,2020), https://www.ft.com/content/92518d19-ce35-4af3-90fA-64cb00f8e2f5

[21]Bernardo Cremades, third party litigation funding: investiongb in arbitration,8 Transnact'I Disput. Mgmt 11(2011)

[22] Abayomi Okubote note 4 supra; Lisa Bench Nieuwveld and voctoria sahani, third party funding in international Arbitration1,2d ed. 2017.

[23] See *Simpson v. Norfolk & Norwich University Hospital* NHS Trust 2011 EWCA (Civ) 1149(Eng).

[24]Se Abayomi okubote, Ibid supra note 4; consumer claims to recover allegedly unlawful charges were validly assigned to claimant company Herbert Smith Frehills (September 25, 2017) https://hsfnotes.com/litigation/2017/09/25/consumer - claims-to recover-allegedly-unlawful-charges-were-validly-assigned-to claimant-company/#more-11477

[25]In *Persona Diital Telephony Ltd & Ors v. Minister of Public Enterprises & Ors* (2017)1 ESC (ir) the Supreme Court of Ireland held that TPF would constitute champerty which is not allowed yet in Ireland, a financing arrangement in which the funder takes equilty in the claimholder is allowable in law.

3. Evolution and Concept of Third Party Funding

The modern day concept of third party funding (TPF) is somehow rooted in a challenge against the public policy position or torts of Champerty and maintenance. Champerty and maintenance themselves can be traced to ancient Rome and Greece, where a person engaged in champerty and maintenance was made liable for *calumnia,* a false accusation or prosecution, malicious charge, of which a commentator has said:

> 'The common law prohibitions on champerty and maintenance evolved in medieval England to stem the practice of powerful feudal lords and noblemen resorting to prosecution of frivolous claims against adversaries … and dissuade legal; action.'[26]

Under common law jurisdiction, maintenance is a sort of procurement of financial assistance to another person directly or indirectly to institute civil proceedings without any legal justification. Champerty has been defined as the extended form of maintenance where the maintainer receives a share out of the proceeds. To justify it more, it can be called as champertous maintenance, which is different from the simple maintenance where the elements of champerty is absent.

The doctrines were applicable against those having false claims, instigated and continued by corrupt men, where the poor claimants get a poor bargain.[27] Historically, champerty and maintenance have been treated as a criminal offence in England and were declared unlawful by Statute of West Minister, 1275, many centuries later they were decriminalized by s. 14(2) of the Criminal law Act 1967. Despite the decriminalization in England, they remain unenforceable till date on the grounds of public policy.

In Nigeria, TPF following the common law principles of champerty and maintenance prohibits a third party from funding a litigation (or arbitration) between disputants in which the funder has no legitimate interest; and also renders an agreement to provide such funds illegal and void, on the ground of public policy.[28] This was followed in *John Oloko v. Sunday Ube*[29] where Edozie JCA held that

> 'At common Law, champerty is a form of Maintenance that occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute. An agreement by a solicitor to provide funds for litigation in consideration of a share of the proceeds is champertous'.

This deference to the principles of champerty and maintenance has been the approach of the law in almost all jurisdictions. Some jurisdictions have, however, amended their law through legislation, in some others; the courts have taken the initiative of reaching decisions that effectively changed the law.[30]

Typically, the third party funder has no role in the substantive issues in the dispute. He is concerned with the outcome of the dispute. He would have assessed the dispute and assured himself of the credibility of the claim or defence as the case may be. Sometimes, however, some third party funders get involved in how the case is managed or conducted and indeed want to exercise control over the case. To some extents this may be excusable in view of the enormous amounts invested in the case, especially in international arbitration. It may also happen where power balance between the funder and the funded party tilts much in favor of the funder. He, seeking to maximize his investment, may seek to gain economic power over the funded party, the claimholder or may even threaten to terminate

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[26] Anish Wadia & Shivani Rawat, Third-party funding in Arbitration- India's Readiness in a Global Context, 15 T.D.M. Ogemid 2,1,2 (2018).

[27] *Giles v Thompson* 1 AC 142 (HL),153 (1986).

[28] *Mackson Ikeni v. Chief Williams Akuma Efamo & Ors* (1997) 4 NWLR (pt. 499) 318 where the court held that it is a matter predicated on public policy that there must be an end to litigation.

[29] (2001) FWLR (pt.51) 1956,1070H – 1971A; (2001) 13 NWRL (pt.729) 161,181. More recently, in *Kessington Egbor & Anor v. Peter Ogbebor* (2015) LPER-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 actions of suits, such an action is champertous.

[30] See the part of this article on comparative analysis of different jurisdictions, notes 57-100

the funding arrangement. Since third party funding is a developing phenomenon and takes place in an open market as it were, parties are advised to explore all options. This should include taking with more than one funder, letting the claimholder's lawyer into every discussion. This is to avoid arrangements that unnecessarily tie them up in such unequal power situations. Considering the high competition amongst funders in well established markets,[31] it is in every funder's interest to act very professionally and avoid practices that may push him out of the market or reduce his patronage.

TPF is indeed a developing stratagem with small and simple funder as well as big funders. The big funders now come with portfolio funding, investment funders with several models. One is where the funder provides funds for a law firm or lawyer for the cases that they firm/lawyer will handle over a period. Here, finance is invested in the law firm (or practice group in the firm) where several more or less unrelated claimholders may be clients of the firm and the funder funds their claim. it would also come as finance invested in one claimholder that they may have many claim(related or unrelated) over a period of time. Such funders are able to hedge the risk of any one case by spreading it across multiple claims.[32] Cases that are profitable may be used to offset what would have been losses in cases that may be doing as well over a period-fee overrun cases.

Sometimes, the way that third party finding is structured raise a concern whether the funder has not outrightly bought over the case. The questions can then arise whether there is still any locus in the claimholder or controversy can the PTFunder really pursue the case on behalf of the claimholder? That was the case in the ICSID case of ***Teinver SA&Anvor v The Argentine Republic.***[33] Argentina, the respondent, challenged the tribunal's jurisdiction on the basis that by the funding agreement between the funder and the claimant, the rights and interest in the claim had been transferred to a funder. The tribunal found that the funding agreement existed before the filling of the claims in the case. It held that therefore it had requisite jurisdiction.

There has also been an increase in the number and volume of the soft laws and publications on third party funding. For instance, The International Centre for the Settlement of Investment Disputes (ICSID) has rules on the third party funding as it has recorded at least 20 cases as at May 2020 involving third party funding.[34] This is in addition to the report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration,[35] and the IBA Guidelines on Conflicts of interest in International Arbitration[36]and so on.

In the same way, TPF provision now appears in recent treaties that have investment provisions, addressed in one way or the other. Such recent treaties include the Federal Republic of Nigeria and Kingdom of Morocco Bilateral Investment Treaty,[37] Netherlands Model Bilateral Investment Treaty, (BIT) 2019 art. 19, the Canada-Chile Free Trade Agreement,[38] the EU-Canada Comprehensive Economic and Trade Agreement[39] and the EU-Singapore Investment Protection Agreements.[40]

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[31] The USA, England and Wales, Singapore, Hong Kong etc.

[32] An example of such arrangement can be found in what Burford capital did in 2016 when it put $45m down in funding litigation efforts of British Telecommunication that were pending for years. https://www.25a.ca/bt-signs-45million-litigation-deal with burford - capital/. See also Abayomi Okubote , Arbitration Finance in the Aftermath of a pandemic Third- party Funding as the Magic Bullet January 28, 2021 http://blogs2.law.columbia .edu/aria/arbitration-finance-in the aftermath-of-a-pandemic-third-party-funding-as-the-magic-bullet/

[33] ICSID case No. ARB/09/1

[34] See 2020 Woodford global litigation funding survey, p, 6; International Centre for Settlement of Disputes (ICSID), Rules of procedure for the Institution of Conciliation and Arbitration Proceedings, 1965 revised in 2006

[35] The ICCA Report No. 4 of April, 2018 and IBA Guidelines on conflicts of interest in International Arbitration adopted by resolution of IBA Council on October 23, 2024, available at http://www.ibanet.org/Publication/publications_IBA_guides_and_free_materials.aspx (Last accessed May 28,2021)

[36] Ibid

[37] Available at <https://investmentpolicy.unctad.org/international-investment-agrements/treaties/otheriia/3711/morocco---nigeria-bit-2016>, last accessed 31st July,2022. Nigeria has been in the process of revising its other old stock treaties since 2006.

[38] Canada-Chile Free Trade Agreement, 14 January 2017, Articles G-23-bis

[39] EU-Canada Comprehensive Economic and Trade Agreement ,14 January 2017, Articles8.1 and 8.26

[40] EU-Canada

UNCITRAL Is also working on its initial draft on the regulation of TPF through the UNCITRAL working group 111, which has issued six reports of the working sessions.[41] In those sessions, views were expressed concerning how TPF would impact on arbitral proceedings and how it would affect the investor-state dispute settlement system. Generally, the working group has rather preferred the regulation of TPF rather than prohibiting it. A good approach, one would say.

With respect to the number of cases now filled as a result of the resort to TPF, research has shown that in investor-state or ISDS arbitration (just as in domestic arbitration), PTF makes for more cases being filled. It enables cases that would not have been filled. Though the result is unclear and disputed as to whether TPF impacts positively on an investor deciding to stay in a country or not and as to whether his decision to invest in a particular country or not,[42] it seems clear that if parties are freed from the worries of sourcing funds for claims and would rather bring more claims because of PTF, they will positively evaluate their chances in pursuing a claim in the event of a dispute.

The way TPFunding arrangements are made sometimes to raise legal issues, ethical issues which manifest through conflicts of interests, confidentially issues and issues of evidence. Each one of these can affect the enforceability of the award rendered by the arbitrator one way or the other. One of the legal issues can arise where, for instance, the TPF raises question as to whether or not the funded party has not completely divested itself of the claim in the arbitration; such for it not to have any further locus to pursue the claim as was the case in *Teinver SA&Anvor v Argentine*.[43]

For emphasis, one thing that the claimholder, the proposed funder and indeed for arbitrator each needs to carefully consider is the conflicts of interest that a funding arrangement may implicate. This is because at the end of the day, whatever award is rendered by the arbitrator needs to be enforceable; not bogged down by conflict of interest, confidentiality etc. but the need for close examination of the intended agreement against all relevant factors to find out all previous or current contacts that would occasion any concerns for conflict is key. Such situated may arise between the funder and the arbitrator or any of them appointed by any of the parties; such as where the arbitrator is a partner in a firm that was previously funded by the third party fund provider. If there is any rule for disclosure, the funder needs to closely examine that. Both the arbitrator and the funder are often recurring personalities or factors in arbitration, especially the busy arbitrators on the international circuit.

The foregoing discussion immediately brings in the need for disclosure, a duty which the parties, especially the funded party, bear for the success of the arbitration. The party being funded bears the duty of disclosure of the funding arrangement and the TPFunder does not seem to bear any clear duty to the other party. Suppose the funded party does not disclosure that fact to him, but that fact later become known to the arbitration and becomes necessary and relevant, what happens? Will the award be set aside when the party funded did not know about it at all?
As of now, there are hardly mandatory rules on disclosure in international law. Most arbitral institutions are hardly bound by any rules even if they had any. If the funding arrangement does not allow for disclosure but the rule of the institution allows disclosure in conflicts of interest situation,

[41] A/CN.9/930/Add.1/Rev.1 – Report of working Group 111(Investor- State Dispute Settlement Reform) on the work of its thirty-fourth session-Part 11 up to A/CN.9/1004- Report of Working Group 111(Investor-State-Dispute Settlement Reform) on the work of its Thirty-eighth session . The secretariat has issued three Notes, A/CN.9/WG.III/WP. 153 - Cost and Duration; A/CN.9/WG.III/WP.157 - Third-party funding and A/CN.9/WG.III/WP. 172 – Third –party-funding-Possible Solutions. Last accessed 29th July,2022.

[42] Brooke Guven & Lise Johnson, Third-party funding and the cost of investment Treaties: Friend or foes? Retrieved from https://ww.ilsd.org/itn/en/2019//06/27third-party-funding-and-the-objectiveof-societal benefits and costs of international investment agreement : A critical review of aspects and available empirical evidence (OECD Working papers om international investment,2018/01). Paris: OECD Publishing Retrieved from https://doi.org/10.1787/e5f85c3d-en; Bonnitcha, J.(2017), Ascending the impacts of investments treaties: Overview of the evidence. Winnipeg: II5D.Retrived from https://www.isd.org/library/assessing:impacts-investment-treaties-overvuew-evidence.

[43] *Ibid* (n 39).

there is need for extra caution. As a further guide, much recourse should be had to some or all of the guidelines and rules on conflicts of interest situation. It is a recommended practice.[44]

While considering these, the parties also need to consider the prime issues of confidentiality. The funder will want access to materials and documents with which to assess the strength of the case before he funds it. All funders do that as a preliminary issue before funding a case. This is even good for the claimholder or party that needs to be funded. It is a second check on the strength of the case and legal approach. However, since the potential funder has not decided to fund the case, the party that needs to be funded should carefully decide which materials and documents he will need to make available to potential funder. The confidential nature of such material ought to be constantly considered.[45]

4. Further Necessity for Third Party Funding in Nigeria

TPFunding even has more reasons why it is desirable and indeed a necessity in Nigeria than in some other countries. First of all, we need to look at the doctrines of champerty and maintenance to establish that even if they were helpful to Nigeria at any time on grounds of public policy, they are not useful at all in the present times in arbitration. As each jurisdiction of the world is fastly moving itself and its law towards being a preferred venue for international and domestic arbitration (which is the proper thing to do and Nigeria is talking several other steps towards that direction) the country cannot afford to wait while the world moves in the direction of being friendly towards arbitration.

The principles of champerty and maintenance may indeed have had their strengths and has been beneficial in court of Nigeria,[46] but in arbitration they have rather been clogs in the wheel of progress. Those common law restrictions have led to a bigger challenge in the growth of TPFunding in arbitration in Nigeria. While the concept of TPF has of late gained popularity both in the litigation and arbitration community, with the main focus on justice for the litigants and the funding industry has rapidly been growing in several jurisdictions, Nigeria has not been positively affected. The doctrines make the whole idea of TPF illegal. It is only hoped that the passage of the arbitration and meditation bills, 2019 pending at the national assembly will overdue the doctrines in line with the well settled principle of law that where a statutory provision is in conflicts with the common law, the common law gives way to the statute.[47]

The effects of coronavirus pandemic on capital for business and its ancillary difficulties have been noted in this article.[48] In Nigeria, this effect even seem to be worse. In the face of the global down turn occasioned by the pandemic, the effects of and on a dwindling economy in the face of very serious and terrible national insecurity are even more adverse. The purchasing power of the Nigeria currency, the naira, is by the day terribly depreciating and worsening. The need for individuals and companies for funds with which to press claims or defend them is even more serious and dire. There is poverty in the land and in the absence of third party funds the pressing or defence of some arbitration claims may well look like pipe dreams. Companies may need funds more seriously now and in the near future to be able to defend claims launched against them and their interest in arbitration. What is suspected to have happened in the *Interocean Oil Development Co & Anor v Federal Republic of Nigeria* [49]will even have more need to happen again.

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[44]See as examples, the provision of the IBA Guidelines on conflicts of interest in international Arbitration note 35 above of the international Centre for Settlement of Disputes (ICSID), Rules of procedure for the institution of conciliation and Arbitration proceedings note above 34.

[45]See generally on these matters (Conflicts of interest and confidentiality) Khaldoun S. Qltlashat and Ali K. Qtaishat, third party funding in arbitration: Question and justification note 11 above.

[46]See text under Evolution and Concept of third party funding especially footnotes 28 *ff*.

[47] Patkun industries Ltd v. Niger shoes Ltd (1988) NWLR (Pt.93) 138; (1988) LPELR-2906(SC): *ibidapo v. Lufthsnsa Airlines* (1997) LPELR SC238/1994. More on the pending bill and hopeful development in Nigerian law again.

[48] See the text for notes 4 to 8 *supra*

[49] ICSID Arb/13/20. The suspicion was that a party was funded in the matter but not disclosed. It is even the more for conjecture how a particular law firm that appeared for one of the parties did the case *pro bono*.

Poverty is even likely to continue in the land due to avoidable causes of deliberate incompetence in the management of national resources that predates the present government at the federal and state levels. Incompetence and preferences for petty clannish and tribal sentiments have become firmly established in the country. Nigeria is even rumored to be funding its liabilities to the states through the resort to the euphemist ways and mean approach-printing money not backed up by the normal resources. The issues of inflation in the face of that will likely be worse than has been experienced.

It has been stated that legislative intervention in Nigeria normally comes long after a necessary intervention has been necessary for over four decades now. In the light of that, hopes for a progressive advance of the law would have been placed on the Nigerian judiciary, to arise and live up to expectation and legalize TPF. Happily, the Nigeria judiciary has normally lived up to expectation in very many other areas of law. In arbitration, the judiciary has been arbitration friendly in being pro-arbitration and enforced arbitration awards and took all other steps to make Nigeria a hub for arbitration. It would appear however, the opportunity to turn, propose and enacts as it were a rule that would do away with the principles of maintenance and chamerty in arbitration has hardly arisen in the court.

A legislative intervention has arrived somewhat later but later than never, in the Arbitration and Mediation Bill, 2022 just passed into law in May, 2022 by the National Assembly. It has been taken several months for the presidency to look at the bills and assent to it to become an act of the national assembly. It can only be hoped that after the delay the act will eventually be assented to.

Until the Bill is assented to, the law as it was in Nigeria remains unfortunately valid and subsisting. The Rules of Professional Conduct for Legal Practitioners, 2007 (RPC) exists as a statutory instrument (a subsidiary legislation) that in some way allows TPF. Until the bill becomes law as envisaged by the doctrines of champerty, any maintenance seem to be done away with before then. However, the doctrines is still part of Nigerian Law.
As has been stated earlier, TPF remains frowned at in Nigeria law based on those principles of champerty and maintenance. Though the RPC does not clearly make provision for champerty and maintenance, it provides at the rule 50(5) for what is regarded as contingent fee which is denied:

> 'the fee paid or agreed to be paid for the lawyer's legal services under an agreement 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'.

Rule 50(1) and (2) of the rules provide,
'(1) A Lawyer may enter into a contract with his client for a contingent fee in respect of a civil matter undertaken or to be 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 bona fide cause of action.

(2) A Lawyer shall not enter into an agreement to charge or collect a contingent fee for representing a defendant to a criminal case.'
Sub-rule (4) forbids a lawyer from entering into a contingency fee arrangement without first advising the clients on the effect of the arrangement and affording the client an opportunity to retain him under an arrangement whereby he would be compensated on the basis of a reasonable value for his services.
Sub-rule (5) explains that a contingency fee:

> '…means fee paid or agreed to be paid for the lawyer's services under an agreement

whereby compensation, contingent in whole or in part upon the successful accomplishment or deposition of the subject matter of the agreement, is to be amount which is either fixed or is to be determined under a formula'.

From the foregoing, a contingency fee arrangement is only permissible where,

i. It is a civil matter, whether contentious or non-contentious;
ii. The contract is reasonable in the circumstances of the case including risk and uncertainty or compensation;
iii. The contract is not vitiated by either fraud, mistake or undue influence;
iv. The contract is not contrary to public policy; and
v. The employment involves litigation; there is a reasonable and *bona fide* cause of action.

It does appear from the forgoing that the RPC made very clear provision which support TPF in Nigeria as it relates to the operations of legal practitioner. However, rules 51(a) and (b) tend to support in principle the concept of third party funding. It states that a lawyer shall not enter an agreement to pay for, or bear the expenses of his client's litigation, but he may in good faith advance expense (a) as a matter of convenience and (b) subject to reimbursement. The said rule as well as the person in provision in rule 50 clearly and expressly does not prohibit TPF in light of its definition and description of what amounts to contingent fee (for civil matters) which is not in any way different from the spirit and letters of what is meant by third party funding.

Section 61 of Arbitration and Meditation Act, 2022 clearly provides for the abolition of the doctrines or rules of maintenance and champerty, including being a common barrator. This is in relation to TPFunding of arbitration with respect to arbitration seated in Nigeria and to Arbitration related proceedings in any court within Nigeria.

Section 62 provide for disclosures and security for cost to the effect that if there is a TPF, the name and address of the funder shall be communicated to the other party or parties, to the tribunal and, where applicable, the arbitral institution by the party benefiting from funding. It further provides at subsection (2) that such a written notice or communication shall be made, for a funding agreement made on or before the commencement of the arbitration at the commencement of the arbitration or for a funding agreement made after the commencement of arbitration, without delay as soon as the funding agreement is made. This takes care of the problem of unnecessary challenges of awards based on where or when the existence of a funder has been disclosed, and when the burden is placed on the Claimholder or party benefiting from the funding fall. It goes without saying that it can constitute a ground for setting aside of any award resulting from arbitration. Subsection (3) states that where a Respondent has brought an application for security for cost based on the disclosure of a TPF, the tribunal may allow the funded party or its counsel to provide the tribunal with an affidavit stating whether under the funding arrangement, the funder has agreed to cover adverse costs order. It makes the affidavit a relevant consideration in the tribunal's decision whether to grant security for costs.

In the draft amended ICSID Arbitration, ules disclosure of third-party funding is a must; hence the issue of security for costs remains a boiling issue in the international arbitration. This is mostly Investor-State arbitration coupled with the fear orchestrated by the present Third-party funding that is already gaining momentum in international arbitration. This has made the ICSID tribunal to take the issues of awarding cost for security seriously as never before.[50]

[50]Paul Obo Idoornigie, *Third Party Funding of Arbitration Post Covid-19 Nigerian Perspective, Nigerian Institute of Advanced Legal Studies. See also* https://icisid,worldbank.org/en/amendments. Accessed last on the 14th day of May,2001.

It is advised that adequate measure should be put in place by ensuring that the pending bills on third-party funding concerning arbitration in Nigeria is passed into law, this will boost the morale of investors and consolidate the use of arbitration as a veritable instrument of resolving commercial disputes in Nigeria. It will also be commendable to expound the frontier of legal system by making TPFunding an integral part of our laws especially as it relates to civil matters as it is obtainable in other jurisdictions especially as Nigeria has entered into different Bilateral Investments Treaties (BITs).[51]

The passage of the Bill is a welcome development for Nigerian Arbitrators and all people interested in Nigerian arbitration market. However, what will be made out of the act, when it eventually become an act, will depend on the arbitration practitioners and the lawyers. It is common knowledge that it is very necessary for arbitration to be promoted in the country, it is also necessary for arbitration legislation to be tested in very laudable way. It is, however, regrettable that some Nigerian practitioners and lawyers are wont to put every legislation to unnecessary tests by subjecting even the best of awards to setting aside procedures. With what happens now with the setting aside of awards, only favorable awards are allowed to stay, and others challenged even up to Supreme Court, by time some of the awards have lost their meaning and appeal.

As the Bills is, there are several things and principles about TPF that are covered by it. More issues and principles on disclosure rationale, disclosure scope, disclosure limitations, TPF and assignment, unconscionability, funders control, parallel funded proceedings, funded award enforcements etc,[52] allocations of costs and security for costs, recovery of costs of funding, funders liability for costs etc[53] will remain to be grappled with by the courts.

5. Conclusion

Third Party Funding (TPF) of arbitration has evolved from being a controversial mechanism viewed with suspicion, into a modern instrument of access to justice and commercial efficiency. In Nigeria, the historical position under the Arbitration and Conciliation Act, coupled with judicial reticence, left the practice in a vacuum of uncertainty, forcing parties to rely on common law principles. However, the COVID-19 pandemic underscored the necessity of TPF as businesses, individuals, and even solvent entities increasingly required alternative sources of financing to prosecute or defend arbitral claims.

The enactment of the Arbitration and Mediation Act 2022 marks a turning point by offering statutory recognition of TPF in Nigeria. While this recognition is still at its formative stage, it signals Nigeria's readiness to align with global best practices, as seen in jurisdictions like Singapore, Hong Kong, and England. Nevertheless, statutory recognition alone will not suffice. For TPF to thrive as a credible and reliable tool, Nigeria must develop a robust regulatory framework that addresses disclosure requirements, conflicts of interest, confidentiality, and ethical considerations.

Looking ahead, the future of TPF in Nigeria depends on how well the new law is interpreted, implemented, and complemented by judicial activism and arbitral practice. If properly regulated, TPF will not only enhance Nigeria's attractiveness as a preferred arbitral seat in Africa but also guarantee fairness, equality of arms, and improved access to justice for parties. It is therefore imperative that policymakers, practitioners, and arbitral institutions continue to refine the legal and institutional environment in order to maximize the benefits of third party funding, mitigate its risks, and secure Nigeria's place within the evolving architecture of international commercial arbitration.

[51] Such as with countries like France, South Africa, UK, China, Taiwan, Italy, Spain, Germany, Sweden etc.

[52] For these and more, see snech Chaoudhary in footnote 70 ibid.

[53] Matthew Saunders, Emmanuelle Cabrol, Jeremy Chenoweth and Cameron Cuffe, *Third Party Funding* in International Arbitration, https://www.ashurst.com/en/news-and-insights/legal-update/quickguide---third-party-funding-in-international-arbitration/