



THIRD PARTY FUNDING OF ARBITRATION IN NIGERIA UNDER THE ARBITRATION AND MEDIATION BILL 2022

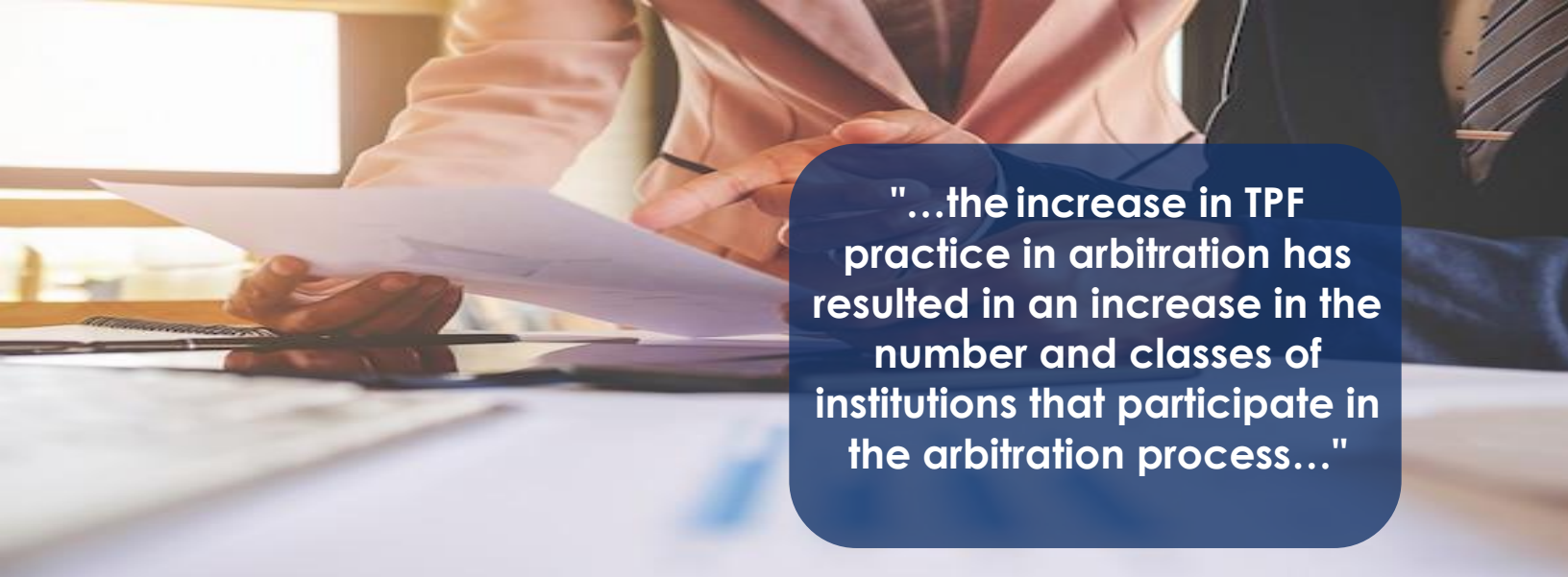




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1. Background



"...the increase in TPF practice in arbitration has resulted in an increase in the number and classes of institutions that participate in the arbitration process..."

1.1 Third Party funding (TPF) has become a common discussion in international and domestic arbitration as many claimants, faced with high costs of arbitration, enter an arrangement with third party funders who bear the cost of the arbitration. These contractual arrangements typically involve the third party funder financing the claimant's legal fees and other arbitration expenses, usually in exchange for an agreed percentage of the monetary proceeds awarded in favour of the funded party.¹ The increase in TPF practice in arbitration has resulted in an increase in the number and classes of institutions that participate in the arbitration

process; such institutions now include specialized commercial third party funders, insurance companies, investment banks, hedge funds and law firms.²

1.2 Nigeria has recently made efforts to join the increasing number of countries that have codify TPF thereby making attractive the choice of Nigeria as an arbitral seat. Notwithstanding the efforts, TPF is still novel and unexplored in Nigeria at present. This article therefore examines the introduction of TPF in Nigeria by the Arbitration and Mediation Bill 2022³ and the prospects it offers to arbitration practice in Nigeria and beyond.

¹ Arbitration Institute of the Stockholm Chambers of Commerce 'Third Party Funding In Arbitration – More Commonly Used' <https://sccinstitute.com/about-the-scc/news/2021/third-party-funding-in-arbitration-more-commonly-used/> accessed November, 2022.

²Qtishat & Qtishat, Third Party Funding in Arbitration: Question and Justifications, International Journal for the

Semiotics of Law, April 2021, <https://www.researchgate.net/publication/333990743>

³The Bill to enact the Arbitration and Mediation Act 2022 was passed by the Nigerian Senate on May 10, 2022 but is yet to receive the assent of the President of the Federal Republic of Nigeria www.nass.gov.ng/news/item/1670.

2. Meaning and Scope of Third-Party Funding of Arbitration under the Arbitration and Mediation Bill 2022

2.1 The Arbitration and Mediation Bill 2022 (the “Bill”) defines TPF agreement to mean 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.⁴

2.2 The Third Party's role in the arbitration is limited to providing fund for the arbitration as the Third-Party Funder does not participate in the substantive issue of the dispute in the arbitration.

The Third-Party Funder refers to 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.⁵

2.3 The import of this meaning of TPF, shows that TPF may include lawyers' contingency fee arrangements.⁶ In a lawyers' contingency fee arrangement, the law firm represents the funded party and advances the claim by investing resources in the claim with no guarantee of recovery. The returns of the law firm are based upon the outcome of the case, the fees are recoverable if the client's claim succeeds.

2.4 Generally, the justification for this practice is to cater for the financial necessity of a party seeking funds to sponsor its claims in an arbitral proceeding. TPF is necessary as it enables access to justice where the costs involved would otherwise have hindered a claimant from commencing the arbitral proceedings for a meritorious claim.

⁴ Section 91(1) of the Arbitration and Mediation Bill 2022.

⁵ *Ibid.*

⁶ Maria Choi, *Third-Party Funders in International Arbitration: A Case for Protecting Communication Made in Order to Finance Arbitration*, 29 *Geo. J. Legal Ethics* 883 (2016).

3. Framework for Third-Party Funding in Nigeria

3.1 Historically, common Law jurisdictions like Nigeria, have encountered issues in legalizing TPF and enforcing awards granted in favour of a funded party in an arbitration proceeding. This is because of the common law doctrines of *champerty* and *maintenance*⁷ that potentially criminalize the involvement of a third-party funder in litigation.⁸

Conciliation Act 1988 (the "ACA").¹⁰

3.3 With the evolution of modern arbitration practice, and unlike the ACA, the Bill makes a comprehensive provision for TPF and expressly excludes the application of the common law principles of maintenance and champerty in relation to TPF of arbitration

"... Third Party's role in the arbitration is limited to providing fund for the arbitration as the Third-Party Funder does not participate ..."

3.2 In applying these principles, the Courts will refuse to enforce an agreement whereby a third-party funds disputes between disputants (in which the funder has no legitimate interest).⁹ This may likely explain why there is no mention of third-party funding under the extant Arbitration and

proceedings seated in Nigeria and consequently, in enforcing such contracts by any Court within Nigeria.¹¹

3.6 The Bill provides statutory definition¹² for 'third-party funder' to mean any natural or legal person who is not a party to the dispute but who enters

⁷ Champerty—a subspecies of maintenance—is “an illegal proceeding in which a person (often a lawyer) not naturally concerned in a lawsuit engages to help the plaintiff or defendant to prosecute it, on condition that, if it is successful, that person will receive a share of the property in dispute.” Maintenance is the “action of wrongfully aiding and abetting litigation; the act of sustaining a suit or litigant by a party who has no interest in

the proceedings or who acts from an improper motive”

⁸ *Kessington Egbor v Ogbebor* (2015) LPELR–24902.
⁹ *Oloko v. Ube* [2001] 13 NWLR (Pt.729), 161

¹⁰ The Arbitration and Conciliation Act. Cap A18, Laws of the Federation of Nigeria 2004.

¹¹ Section 61 of the Arbitration and Mediation Bill 2022

¹² Section 9(1) of the Arbitration and Mediation Bill 2022

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.

- 3.7 The Bill also defines “Third-party funding arrangement”¹³ to mean 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.
- 3.8 In addition to providing statutory definitions as stated above, the Bill, with a view to providing ‘a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration’, also contains

certain provisions which support the practice of TPF. Principally the Bill expressly abolishes the application of the common law doctrines of maintenance and champerty in relation to arbitration proceedings seated in Nigeria and to arbitration related proceedings in any court within Nigeria.¹⁴ The Bill particularly 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.’

- 3.9 Similarly, the Bill defines the term “costs of arbitration” to include the costs of obtaining Third-Party Funding and empowers the Tribunal to consider costs incurred by a funded party in obtaining TPF when fixing the costs of arbitration.¹⁵
- 3.10 Based on the foregoing provisions of the Bill, the already passed Bill when assented to by the President of Nigeria, will provide the legal framework for the practice and enforcement of TPF agreements in Nigeria.

¹³ Section 9(1) of the Arbitration and Mediation Bill 2022

¹⁴ Section 61 of the Arbitration and Mediation Bill 2022

¹⁵ . Section 52(1) of the Arbitration and Mediation Bill 2022.

4. Requirement for Disclosure of Third-Party Funder/Third-Party Funding Agreement under the Bill

4.1 In recent time, debates pertaining to TPF in international arbitration have been whether a funded party is required to disclose the existence and/or terms of a TPF agreement.

This becomes necessary as TPF may have certain effects on specific procedural issues thus making such disclosure necessary and desirable. Such issues bother on:¹⁶

- a. impartiality and independence of arbitrators in the context of third-party funding
- b. security for costs against funded parties
- c. awarding costs in the presence of third party funders, and
- d. confidentiality in international proceedings and third party funding etc.

4.2 Further to the foregoing, some guidelines have been made to assist parties and arbitrator(s) in international arbitration in determining conflict of interest. For instance, the Guideline issued by International Bar Association (IBA) in 2014¹⁷ attempts to cover the conflict of interest situation, in the following terms:

The parties are required to disclose any relationship with the arbitrator. Disclosure of

such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment. The parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.

4.3 In the same vein, the International Centre for Settlement of Investment Disputes (ICSID) Convention Arbitration Rules¹⁸ provides a 'safeguard' requiring arbitrator(s) to

¹⁶ Swargodeep Sarkar, "Third Party Funding in Arbitration: New Challenges and Global Trends", International Journal of Legal Science and Innovation, Vol.2 (2020) [Third-Party-Funding-in-International-Arbitration-New-Challenges-and-Global-Trends.pdf](#)

¹⁷ General Standard 7a: Duty of Parties and the Arbitrator, The 2014 IBA Guidelines on Conflicts of

Interest in International Arbitration, 23 October 2014 [IBA Guidelines on Conflict of Interest NOV 2014 TEXT PAGES.indd \(ibanet.org\)](#).

¹⁸ International Centre for Settlement of Investment Disputes (ICSID), Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, 1965 (revised in 2006 and 2022) Rule

declare past and/or present relationship (if any) with the parties, which includes any knowledge of funder being associated with the said arbitrator(s). Flowing from this, the arbitrator can only make such disclosure of present or past relationship with funder(s) where the arbitrator has knowledge of the presence and identity of the funder. These guidelines are only best practices to provide guidance with no binding legal effect on the funded party to disclose.

- 4.4 However, the Nigerian Bill has made provisions, which mandate a funded party to disclose the third-party funder. Section 62(1) of the Bill requires the funded party to give a written notice to the other party and the arbitral tribunal disclosing information about the Third-Party Funder. It provides as follows:

‘(1) If a Third-Party Funding agreement is made, the party benefitting from It shall give written notice to the other party or parties, the arbitral tribunal and, where applicable, the arbitral institution, of the name and address of the Third-Party Funder.’

- 4.5 The Bill requires that notice be given for a funding agreement made on or before the commencement of the

arbitration or for a funding agreement made after the commencement of the arbitration as soon as the funding agreement is made. Aside the mandatory disclosure of a Funder, a funded party may be required to disclose some terms of a TPF Agreement executed with the funder. It will be required in a situation where a Respondent has brought an application for security for cost based on the presence of Third-Party Funding. The Tribunal has the discretion to require the funded party or its counsel to provide the Tribunal with an affidavit stating whether the terms of the TPF arrangement obligates the Funder to cover security for cost or any other adverse cost that may be ordered by the tribunal. The tribunal shall then consider the affidavit in its decision on whether to grant security for costs or not.

- 4.6 Perhaps, one needs to point out the fact that there is no provision in the Bill on the steps that a party can employ to challenge the appointment of any arbitrator based on his/her affiliation with a third-party funder. Equally, the question of whether an arbitration proceeding, or an arbitral award can be nullified solely on grounds of non-disclosure of a TPF agreement by the benefiting party remains unattended to by the Bill.

6(2). [International Centre for Settlement of Investment Disputes \(worldbank.org\)](http://www.worldbank.org)

5. Conclusion

- 5.1 We have noted that the funding of arbitration by commercial funders who seek to make profit from their funding of dispute resolution, though a novel practice in Nigeria, would be encouraged under the provisions of the Arbitration and Mediation Bill 2022 which provides the legal framework for the practice of TPF and the enforcement of TPF agreements. It is expected that after the grant of Presidential assent to the Bill, these provisions will operate to offer support to financially incapacitated claimants who may otherwise have no access to justice and create a level playing against well-funded parties.
- 5.2 It is also hoped that cases arising from arbitral proceeding after the assent of the President on the Arbitration and Mediation Bill 2022, will allow the Courts of law to clarify the issues of whether non-disclosure of a TPF Agreement by a benefiting party would be sufficient ground for the nullification of an arbitral award or the entire arbitration proceeding.

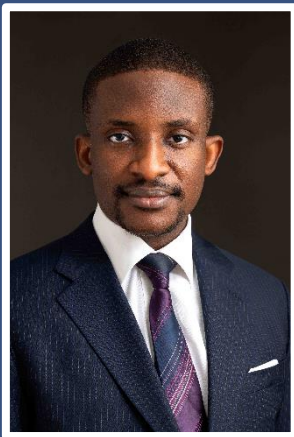


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