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AN EVALUATION OF THIRD PARTY FUNDING IN COMMERCIAL ARBITRATION

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ABSTRACT

Arbitration as a dispute resolution mechanism aims to advance access to justice in accordance with Goal 16 of the United Nations Substantiable Development Goals (SDGs). One key issue in arbitration law and practice is the role of third-party funders in fundraising for the arbitration or even litigation process. Third Party Funding (TPF) has grown as a practice of financial responsibility for litigation or arbitration by sponsors that are not parties to a dispute, but whose interest is return for their investment. Such an arrangement may cover major litigation or arbitration costs, as well as other miscellaneous costs. The practice contradicts well established legal principles such as privity of contract and/or complements party autonomy, but the enormous advantages it offers, such as faster access to justice and investment opportunities cannot be ignored. Whilst the concept has developed in advanced countries it is yet to take shape in developing nations like Nigeria. The methodology deployed is doctrinal with primary and secondary sources being the content of Statutes, Bills and

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Case law. Online sources were also relied upon for secondary sources. The study found that TPF will assist in higher fundraising for litigation and arbitration, that it applies mainly to claimants and will increase access to justice. It is recommended that funds be made available to Defendants too and that developing countries should embrace the practice.

Keywords: Third party financing, Potential profit, Investment opportunities, Access to justice.

1. INTRODUCTION

Arbitration as a dispute resolution mechanism aims to advance access to justice in accordance with Goal 16 of the United Nations Substantiable Development Goals (SDGs). There are various principles guiding and regulating the affairs of individuals who are parties to commercial agreements and business relationships for the protection and enforcement of their interests. Prominent among them are the principles of privity of contract, sanctity of contracts and party autonomy[1]. As Jessel rightly notes in Printing and Numerical Registering Company v Sampson:

> If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting,

[1] Party Autonomy is generally described in arbitration as the principle which provides the parties in a dispute the right or freedom, not only to choose the law applicable to the substance of their dispute, but also other distinct framework. see E Ugbeta, 'Overview of the Role of Party Autonomy and its Limitations in International Commercial Arbitration' <www.researchgate.net> assessed 29 December 2022.

> and that their contract, when entered into voluntarily shall be held sacred and shall be enforced by courts of justice.[2]

The import of these principles to such agreements is that parties to a legally binding agreement can decide the modus operandi, as well as certain terms and conditions that will apply to the agreement and once such decisions are made, the contract is binding, sacrosanct and can only be enforced by the individuals who are parties to the contract. That is; it is only the parties to such agreements that can institute actions or have actions instituted against them in courts or before an Arbitral Tribunal.[3][4][5] There are recent cases which include Nospetco Oil and Gas Ltd v Prince Matiluko Olorunnimbe on this principle.[6] Exceptions to privity of contract are: Insurance, Sale of Land under Customary Law, Agency, Beneficiary to a Trust, Right Under a Charge, Covenants On Land, Assignment Under A Contract, Collateral Contracts,

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2 (1875) LR19E9 462.

3 Dizengoff W.A. Nig. Ltd v Agric Service (2018) LPELR-46361 (CA).

4 ibid. Third parties cannot even sue on it even if it is for their benefit.

5 An entirely different person cannot be bound by an arbitration agreement.

6 (2021) LPELR-55630(SC), Where it was held by the Supreme Court that privity of contract is the relation between the parties in a contract, which entitles them to sue each other, but prevents a third party from doing so. Thus, the doctrine of privity of contract is about the sanctity of contract between the parties to it, and it does not extend to others from outside. See also UBA Plc. v Jargaba (2007 11 NWLR part 1045, 247 SC, wherein the Court also held as follows: 'The doctrine will not apply to a non-party to the contract, who may have to, unwittingly, be dragged into the contract with a view to becoming a shield or scapegoat against the non- performance by one of the Parties. Barmani Holdings, is a complete stranger in the contract between the Appellants and Respondents. Barmani was never joined as a Party--- Courts of law do not make orders in vain or in vacuum. Court Orders affect directly those persons, who have had course to be subjected to the litigation before the Court either directly or by necessary extension'.

Multilateral Contracts, Letters Of Credit, Bills Of Lading.[7]It is not unusual to have conflict between parties to a contractual agreement. In the event of a conflict, each party is presumed to fund and bear the cost of litigation or arbitration, but the financial implications of pursuing a legal matter can be high, and when one of the parties do not have the financial wherewithal to adequately pursue the case, there may be no access to justice or justice may be denied. Since it is in the interest of the court that justice is not just done, but must also be seen as done, most courts and rules have put some measures in place to ensure that parties have access to justice[8] and that the course of justice is not impeded by anything, not even lack of finance.[9]

2. THE CONCEPT OF THIRD PARTY FUNDING

Third Party Funding (TPF) is one of the means that have been developed over time to ensure that a legal dispute is pursued and that a party to a dispute who has a good claim is not denied justice simply because that party lacks the finance. The practice is in vogue where a party, who is not directly involved in a dispute, and without prior interest in the lawsuit, offers financial support to a party for the purpose of initiating or defending a matter in court or before Arbitration Tribunal.

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7 See generally AJM Alewo, 'The Principle and Nature of Law of Contract in Nigeria: Formation of Binding Contract' (2012) 5 Journal of Politics and Law 123.

8 Rules of the various High Courts in Nigeria have provisions to ensure that citizens have the opportunity of seeking redress on issues of violation of their legal rights and obligations. For instance, High Court Civil Procedure Rules, Laws of Osun State, Ord 1, has provisions on Form and Commencement of actions. See also Constitution of the Federal Republic of Nigeria (as amended) 1999, s 6.

9 Provisions for Probono services by Lawyers are available.

The financial assistance may also be for continuing or completing the lawsuit or arbitral proceeding. This is usually done with the expectation that the party being financed has a good case with a high probability of success. Usually, in return for financing the lawsuit, the third party financier will receive a portion of the financial proceeds of the claim.[10] Endicott, Giraldo-Carrillo and Kalicki considered TPF to be the funding of litigation or arbitration by specialized providers, whose interest is potential profit in return for providing such financing.[11] Hence, TPF involves a third party, who although not directly connected with the legal dispute, provides funds to one of the parties to the dispute for an agreed benefit. If successful, the funder will receive some compensation from the judgment credit or award.[12] However, when a claim is not successful, the financier or funder assumes the risk of receiving nothing and losing the sum invested. This is why most funders will typically carry out due diligence of the merit and quantum of the claim as well as prospects for success, before providing funding to confirm that it has a good chance of accomplishment.[13]This arrangement automatically creates a legally enforceable contract which is binding between the parties, wherein the funded party undertakes to 'satisfy' the third party funder in cash or kind. Such an arrangement may cover the arbitrator fees, legal fees, secretary's fees, expert fees

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[10] K Qtaishat and A Qtaishat, 'Third Party Funding in Arbitration: Questions and Justifications' (2013) 6 International Journal for the Semiotics of Law 341.

[11] A Endicott, N Giraldo-Carrillo and J Kalicki, 'Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 1)'<http://kluwerarbitrationblog.com/blog/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/≥accessed 15 November 2022.

[12] S Seidel, 'Insurers Today, Third Party Funders Tomorrow?' <http://fulbrookmanagement.com/2011/10/29/insurers-today-third-party-funders-tomorrow/≥ accessed 15 November 2022.

[13] G Omoaka, S Nweke-Eze and O Odunsi, 'Third-party Funding in Nigeria-seated Arbitration Proceedings' www.ibanet.org/third-party-funding-Nigeria-arb-proceeding s accessed 15 November 2022.

as well as other miscellaneous costs such as cost of venue and other expenses incurred by the funded party to fast-track the process.

This classic definition of TPF that focuses on financially distressed Claimants/Defendants requiring support to litigate, defend or arbitrate ongoing disputes has evolved overtime to encompass claimants who have the financial resources to fund their own claims as well as defendants who have weak claims against them.[14] The concept is popularly referred to as 'litigation investment' or litigation finance or 'third-party financing' and Third Party Funders have been called several names, among which are 'Litigation Funders', 'Third Party Financiers', 'Attorney Financer', 'Law Firm Financer', 'Arbitration Funders', 'Commercial funders', etc.[15]

In recent years, parties to a legal dispute are no more funded by individual third parties only, but by Professional corporate institutions. In Arkin v Borchard Lines Ltd, the Court referred to commercial funders as those who provide help to people seeking recourse to justice which they could not otherwise afford.[16] The implications of a third-party funding arrangement in litigation are similar to arbitration.

2.1 History of Third Party Funding

Third Party Funding has its origin in Common Law jurisdictions, particularly in England, USA and Australia. Other countries like Singapore and Hong Kong have also

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[14] M Scherer and A Goldsmith, 'Third Party Funding in International Arbitration in Europe' <https://www.transnational-dispute-management.com/news/20120312.pdf> accessed 15 November 2022.

[15] M Sweify, 'Third Party Funding in the United States: A Systematic Judicial Analysis' (2021) 32 ARIA 1.

[16] [2005] EWCA Civ 655; see also Campbells Cash and Carry Pty Limited v Fostif Pty Limited [2006] HCA 41.

adopted the TPF system by enacting legislations and measures that are aimed at ensuring that the integrity of the justice system is preserved and remains un- thwarted.

Prior to the adoption of TPF, 'Maintenance and Champerty' were long prevalent in the Common Law jurisdictions. While 'Maintenance' is the action of assisting litigation by an unconnected third party or the act of financially assisting to prosecute a suit by a party who has no interest in the proceedings with an ill-motive, 'Champerty' is a specie of maintenance where the third party pays the cost of the litigation in return for a percentage of the result. The third party may be the briefed legal practitioner.[17] According to Lord Justice Steyn, 'in modernidiom maintenance is the support of litigation by a stranger without just cause. Champerty is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger for a share of the proceeds.[18]

The question may be posed as to whether the third uninterested funding party can legitimately pursue claims on behalf of the funded party. In Teinver S A et al v Argentina[19], the Arbitration Tribunal of International Centre for Settlement of Investment Disputes faced similar questions. In the case, the respondent raised an objection that a funding agreement between the claimants and an investment company concerning the financing of the litigation expense could impact the tribunal's jurisdiction, as the claimant had transferred his

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17 B Garner, Modern Legal Usage (2nd edn, OUP 2001); See also B Garner (ed), Black's Law Dictionary (9th edn, West 2009).

18 Giles v Thompson [1994] 1 AC 142 it was held that car hire companies who pursued actions in the names of motorists to recover vehicle replacement costs after an accident were not guilty of champerty.

19 Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic, ICSID Case No ARB/09/1.

interests to a third party. The tribunal rejected the respondent's argument that its jurisdiction remained intact. Since it is still an evolving area of law, different climes have different measures in place in order to regulate the operations of TPF within their jurisdictions. As submitted by Okonkwo in issues of whether TPF is against common law and public policy motive is the key consideration in deciding whether the assistance is maintenance or champerty[20]

Generally, funders, especially professional and commercial funders usually consider the jurisdiction where the award will probably be enforced to ensure that the jurisdiction is likely to accept such enforcement.[21]

In England, TPF is deemed to be a means to an end, a way of accessing justice.[22] As such, it is permitted and approved. Although within this jurisdiction, funders are not encouraged to control the lawsuit. In R (Factortame) v UK,[23] the judiciary encouraged third parties who respected the integrity of the court. Therefore, while TPF is encouraged, funders are not encouraged to exercise undue influence on the case they fund. TPF agreements are acceptable when the aim is genuine, the financing agreement and does not restrict access to justice. If there is a reason to believe that a third party funding agreement undermines the foundations of justice, or if from the agreement, the funder has the propensity to control the proceedings more than the original party to the dispute, the court may declare such TPF agreements null and void.

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20 Okonkwo.
21 N35.
22 Arkin v Borchard Lines Ltd and Others [2005] EWCA Civ 655.
23 [2002] EWCA Civ 932.

In Australia, the jurisdiction encourages TPF. It is neither an abuse of the court's process nor is it contrary to public policy. In Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd, the Fostif case[24], the Court held that financial gains made out of assistance in litigation or arbitration could only be opposed to public policy if there was legislation against maintaining actions. Professional funders can invest into litigation and arbitration. However, the court restricts a third party's control of proceedings. The Court explained that the fact that a professional funder may exercise control over proceedings by buying the rights to litigation and arbitration does not render the funding arrangements opposed to public policy.

TPF seems on the first outlook to be in general parlance with Party Autonomy. Issue of funding is more aligned with autonomy since it is a choice within the framework of the decisions. The seemingly complementary role of TPF becomes questionable with the reminder that economic control rests with the Funder and may be out to control the proceedings or the outcome.[25]

2.2 Third Party Funding Practices in Nigeria

In Nigeria, the principles of received English law remain applicable in Nigeria except for those abolished or modified by legislation or case laws.[26] The import of this is that the common law doctrine of champerty and maintenance that dissuades third parties with no recognisable direct legal interest in a

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[24] [2006] HCA 41.

[25] R Smith, '"Tempering the Gambler's Nirvanna"': A Review into the Issues and Regulation of Third Party Funding in Investment Treaty Arbitration' <http://www. diva-portal.org/smash/record.jsf?pid=diva2%3A1212686&dswid=7684> accessed 24 Janua ry 2023.

[26] AO Obilade, The Nigerian Legal System (Sweet and Maxwell 1979).

dispute from interfering in legal proceedings remains applicable in Nigeria as part of the received English law. Hence, the practice of third-party funding is not prevalent in Nigeria.

The position of the Court of Appeal in Egbor & Anor v Ogbebor[27] is that it is champertous where a person elects to maintain and bear the costs of an action for another in order to share the proceeds of the action or suit. Likewise, in Oloko v Ube[28], the court had earlier held that any agreement by a Solicitor to provide funds for litigation in consideration of a share of the proceeds is champertous in nature. The Solicitor cannot recover from his client his own costs or even his out-of-pocket expenses.

Apart from the dominant prevalence of this common law doctrine of Maintenance and Champerty in Nigeria, there exist no legislation that expressly permits third-party funding; and likewise there is no legislation that expressly prohibits the practice of TPF in the Nigerian courts or in arbitration.[29] For this therefore, there is a chance that such an arrangement may be held to be champertous and therefore unenforceable. Exceptions to Maintenance and Champerty will appear to be credit hire agreements[30] when the maintainer has a legitimate interest in the outcome of the suit[31], where filial ties justify interest in the suit[32] or in contingency fee arrangements.[33]

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27 [2015] LPELR 24902 (CA), 14.

28 [2001] 1 NWLR part 729, 161.

29 K Qtaishat and A Qtaishat, 'Third Party Funding in Arbitration: Questions and Justifications' (2013) 6 International Journal for the Semiotics of Law 341.

30 N 34.

31 T Okonkwo, 'An Overview of Champerty, Maintenance and Third Party Funding of Litigation' (2016) 17 The Calabar Law Journal

32 Ibid.

33 See for instance Rule 50 Rules of Professional Conduct for Legal Practitioners in Nigeria.

2.3 Features of Third Party Funding

The main feature of third party funding is that the party assigns a share of the credit to the funder, and not the right to pursue the claim which remains with the original creditor. In the words of Cremades, the litigant merely sells the possible 'fruits' of the lawsuit, not the lawsuit itself.[34] Emphasizing this further, the New York City Bar Association in her Formal Opinion stated that:

> Non-recourse litigation financing is on the rise, and provides to some claimants a valuable means for paying the costs of pursuing a legal claim, or even sustaining basic living expenses until a settlement or judgment is obtained.[35]

Other distinctive features of TPF from similar concepts like contingency fee arrangements, hedge funds or insurance companies are:

(1) TPF thrives on the investment of a third party.
(2) Third party funders typically supply funding to sophisticated commercial corporate entities, which do not need the same types of protection as a consumer.
(3) They are dedicated to funding claims and, where applicable, to providing additional services to manage the claim.
(4) Based on the agreement between the funder and the fundee, return is usually either a percentage of the recovery or a multiple of the capital invested (or whichever is higher).

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[34] B Cremades, 'Third Party Litigation Funding: Investing in Arbitration' (2011) 8 TDM 11.

[35] New York City Bar Association, 'Formal Opinion 2011-2: Third Party Litigation Financing' <www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal -opinion-2011-02≥accessed 15 November 2022.

(5) The Funder was not privy to the agreement which led to the dispute. And so is not a party to the proceedings in arbitration. He is usually on the side of the plaintiff but the defendant or respondent may be funded too.
(6) According to Thony Hardin, the demand and number of cases funded are increasing and the phenomenon is no longer new in international arbitration.
(7) Funders focus on disputes which in their view have strong merits and definitely not ones with long ropes in terms of timing. Arbitration is therefore admissive of TPF.
(8) TPF is not attractive to cases whose proceedings are dependent heavily on oral evidence.
(9) PTF may be frightening to the opposing sides in that a Funder has investigated the likely merits and the Fundee probably has a very worthy case.
(10) Funders may be active or passive

2.4 Advantages of Third Party Funding

The following have been identified as the justification for third party funding in international arbitration

2.4.1 Access to Justice

Increase in yearnings for justice is one of the advantages of TPF. It is a popularly held opinion that the practice successfully grants access to the financially week litigants, who hitherto had no means of surviving the financial onslaught to contest the case with the financially strong both in the courts and in arbitration. The grace of access is to persons who may

have solid claims or defense, but do not have the resources to go to court or arbitration.[36]

2.4.2 Maintenance of Financial Stability

Bankruptcy is a probable risk for a company that is a party to a legal dispute. By using TPF, a company that is a party to a conflict can maintain enough cash flow and avoid budgetary problems so they can continue their usual business or even invest in new areas with multifarious investments without bearing the risks.[37]

2.4.3 Attractive Investment from a Funder's Perspective

Some funders who are primarily investors consider TPF as a way of investing in dissimilar businesses thereby eliminating risks to a certain level. The returns from TPF can be based on a percentage of the award; or pro-rated by the investment. In general, a third party funder aims to multiply his investment.[38] Some Funders may be passive during the proceedings with no interest in fueling or affecting the proceedings in any way. This is good for party autonomy in that there will be no pressure on the freewill of the parties. Similarly, TPF enables netter cash flows for fundees as they may expend funds on other areas. Furthermore, if opposing party becomes aware of the backing of a Funder, this may encourage earlier settlement of the dispute.

TPF is therefore a leveler of sorts for parties. No rich person may bulldoze his way for ample opportunities. The fundee can also raise his head high and match the choices of the opposing

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[36] Walter Hugh Merricks v MasterCard and Others [2017] CAT 1266/7/7/160; M Rodak refers to this as the 'bargaining-power-equalizing' function of TPF.

[37] TD Boulle, 'Third-Party Funding in International Commercial Arbitration' (Masters Thesis, Ghent University 2013).

[38] ibid.

party. Another advantage is that the proceeds of the arbitration proceedings can therefore be used as collateral.

2.5 Disadvantages of Third Party Funding

First, some Funders could be active in that they monitor the proceedings, affect the decision of the fundees and this may not be good party autonomy. Issues of concern with respect to TPF may be in relation to whether or not the Funder may be subject of influence since the funder would not wish to lose his funds.

Secondly, confidentiality between the Funder and the Fundee is another issue of concern. Full disclosure is key in the relationship between the Funder and the Fundee like a Contract uberrimae fidei .According to the Wuham University of Technology. Whilst third party funding is growing the practice is growing with problems and issues of confidentiality, investors' rights and conflicts of interest[39]. In addition to full disclosure between funders and Fundees, it is important that arbitrators disclose any interest or participation in TPF activities. In Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria[40] The respondent submitted in an objection that one of the arbitrators and Claimant's legal expert were members of a Task Force on TPF set up by the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London (QMUL) with the mission to make recommendation for the procedure, ethics, and other policy issues relating to TPF in international arbitration.

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[39] DU Tian-Yu, 'Research on Conflicts of Interest arising from Third-Party Funding in International Investment Arbitration' (2018) 281 Advances in Social Science, Education and Humanities Research 422.

[40] ICSID Case No. ARB/13/20

Other areas of disadvantage are in the modes of trafficking in litigation, and frivolous litigation.[41]

2.6 Third Party Funding and Similar Programs Distinguished

2.6.1 Third-party funding and lawyer risk agency.

In Lawyer Risk Agency, attorney's fees are delayed till end of the matter but parts of ancillary bills are paid in advance. At the end of the matter the attorney will not be paid if the suit is lost or not executed. Lawyer risk is about encouraging him to handle related cases whereas third party funding is financing the case or the arbitration [42] The lawyer risk agent simply does not charge a lawyer's agency fee, but does not bear the remaining fees charged by the arbitration institution.

2.6.2 Third-party funding and legal insurance.

Under this heading if the party loses in arbitration, the insurance will cover a percentage loss of costs through the settlement of claims such that the economic losses are shared. The policyholder pays the insurance company in advance but the fundee pays no fee in advance. Another difference is that the insurance company does not get more money after winning the case, and the sponsor can share the winning income after winning the case. A third-party funder bears greater risks and enjoys greater return on his investment.

(3) Third-party funding and private lending

The difference between the third party funding and private lending is that after the private loan expires, it is necessary to

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[41] Okonkwo relying on Tenai, S. and Saint-Martin. N. (2011). "Third Party Funding of Class Actions" Osgoode Hall

[42] ibid.

repay the principal and interest. So private lending does not mitigate the risk of the loser, but increases the burden on the borrower. Third-party funding is more helpful to the sponsor and thus more favoured by the parties in international investment.

3. CHALLENGES OF THIRD PARTY FUNDING

One key challenge with third party funding is the problem of conflict of interest. The risk of conflict of interest about third-party funding is also called the challenge of arbitrator independence and impartiality. Mr. Yang Liangyi once said:

> 'Today's London is the center of international maritime arbitration, but if our arbitrators move together in the Sahara Desert, then the Sahara Desert tomorrow will become the center of international maritime arbitration'.[43]

This is to show how impactful arbitrators can be in a converged atmosphere. There may be conflict because the funder may try to control the sponsored party to negotiate the procedural strategies like appoint a lawyer recommended or approved by them, and in the choice and selection of arbitrators. Through funding agreement, the sponsor may request the sponsored party to select arbitrators who may make favorable decisions for them.

Full disclosure is key in a mission which involves third party funding. Even a good personal relationship between an arbitrator and a lender may raise questions about the impartiality of the arbitrator funding agencies. If the other

[43] 'Atlantis Press' <https/www.atlantis-press.com> accessed 30 January 2023.

party discovers the existence of the third-party funding during or after the arbitration it will lead to doubts about the independence or otherwise of the arbitrator. [44]

A number of issues had been raised against third party funding. Some of them are issues relating to confidentiality and disclosure (exchange of information between the claimant and the funder) as well as conflicts of interest (for instance, reconciling the interests of the funder with the interest of the claimant during the arbitration proceedings). To address these areas of concern, different jurisdictions that have adopted the mechanism of TPF have come up with different measures, suitable for their jurisdictions and legal systems, to curtail the excesses that may arise from sharp practices of fraudulent third parties.

The principles of TPF remain mostly the same, regardless of the type of dispute resolution wherein it is utilized. In litigation and arbitration, which are both dispute resolution mechanisms, in terms of external funding, there is not much difference between litigation and arbitration.[45]

In 'A Self-regulatory Code for Third Party Funding'[46] Legal professionals and third party funders were invited to consider:

1. Continuing with the status quo; or
2. Introducing self-regulation; or
3. Introducing formal regulation.

The perceived difficulty with continuing with the status quo was that it would potentially leave consumers and third party

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[44] ST Oil v Romania ICSID Case No ARB/07/13 .
[45] S Dunn, 'Class of its Own' (2010) 4 CDR 14.
[46] Council 2010.

funders vulnerable. Consumers might face attempted interference or influence from funders in the conduct of litigation, and not be adequately protected on adverse legal costs orders if third party funders had insufficient capital to pay a lost claim. For their part, third party funders would potentially be vulnerable to claimants seeking to use champerty as an excuse not to pay the agreed share of a successful claim, or defendants avoiding paying legal costs for the same reason. At common law, champerty means the funding of a court action by a stranger to the claim in the court action other than promoting the court action in order to benefit from making a monetary benefit from the award.

In Australia, the common law principle of champerty was abandoned and third party funding has been available for over a decade. Australia has gone further than any other jurisdiction in permitting the full assignment of claims to third party funders, in effect permitting the purchase of an action.[47]

Within England and Wales, the apparent absence of poor practice; the acceptance by the judiciary, legal professionals and the market of third party funding, and the lack of any obvious regulator, has meant a reluctance to intervene. The fact is that 'the spirit of our age, for good or ill, has been to encourage voluntary regulation and limit state regulation except to egregious cases'. Self-regulation looks likely to remain the only way the sector in England and Wales will be prepared to fund expensive and uncertain litigation and arbitration[48].

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[47] Jeffery and Katauskas Pty Ltd v Rickard Constructions Pty Ltd [2009] HCA 43.

[48] C Hodges, J Peysner and A Nurse, 'Litigation Funding: Status and Issues' <https://www.law.ox.ac.uk/sites/default/files/migrated/litigation_funding_here_1_0.pdf> accessed 31 January 2023.

4. THE FUTURE OF THIRD PARTY FUNDING

The continuous expansion of the digital economy is a reality in COVID-19 times, because of its presence in every aspect of daily living. To this end, it has contributed to economic growth, created numerous new economic opportunities, added to the swifter realisation of the UN SDGs, and spurred innovation and productivity for businesses. On the other hand, it has created an avenue for 'fiscal injustice' by providing opportunities for many businesses to expand across many tax jurisdictions and realise huge profits to avoid contributing to the tax purse of market jurisdictions where they derive value. This section provides policy considerations that may be useful to policymakers in arriving at effective policies that would be more responsive to the changing aspects of the digital economy and achieve balanced and inclusive policy outcomes.

Third Party Funding, although a relatively new concept in some parts of the world (especially in civil justice jurisdictions), has been firmly established in advanced countries of the United States of America, United Kingdom and Australia. The industry's modus operandi is not uniform across board and is still a work in progress in various jurisdictions. Claimants and Respondents are likely to key into the practice because of its advantages.

In Nigeria, there are calls for the enactment of a regulatory framework for TPF practices as is obtainable in other jurisdictions. The newly enacted Arbitration and Mediation Act 2023 contains key provisions which support the practice of third-party funding in Nigeria. While Section 61 expressly abolishes the torts of maintenance and champerty in relation to

Nigeria-seated arbitration proceedings, Section 62(1) regulates the procedures for creating a third-party funding agreement, and Section 91(1) defines 'third-party funder' and 'third-party funding arrangement'.[49]

To strengthen the practice of TPF in Nigeria, funding of arbitral proceedings should be encouraged in Nigeria by in accordance with the new Act to increase access to justice and sustenance of proceedings. Secondly, it is imperative that a third party funding disclosure system is established. The purpose of the disclosure system is that the parties or arbitrators consciously disclose matters that may affect their independence and impartiality, thereby protecting the rights of the other party or parties. The disclosure system is the most important means to protect the independence and impartiality of arbitrators in cases without third-party funding intervention.

Third, the international documents stipulated in the third-party funded disclosure system by the International Bar Association's 2014 IBA also known as the IBA Guidelines are pertinent. Article 6 (2) of the IBA Guidelines states that in determining whether there is a conflict of interest, a third party that has a direct economic interest in the arbitral award shall be considered to be equal to the party's status, and the rules applicable to the parties shall also apply to the third party Investors. The first paragraph of Article 7 stipulates that when there is a third party that has direct economic interests with the outcome of the award, or if the third party bears the liability for compensation to the other party, if the arbitrator has a direct or indirect relationship with the third party, the parties

[49] G Omoaka, S Nweke-Eze and O Odunsi, 'Third-party Funding in Nigeria-seated Arbitration Proceedings' <www.ibanet.org/third-party-funding-Nigeria-arb-procee dings ≥ accessed 15 November 2022.

shall notify the arbitrator, the arbitral tribunal, the opposing party and the arbitral institution at the earliest possible time.[50] It is noted that funders are more interested in Claimants. It is recommended that Respondents be funded too especially where there are counterclaims.

Finally, other countries that have not embraced third party funding should do so and emulate countries like Singapore and Hong Kong which are advancing in establishing and regulating TPF practices in their jurisdictions by enacting legislations that govern the practice of third-party funding such as the Singapore Civil Law (Amendment) Act 2017, and the Hong Kong Code of Practice for Third Party Funding of Arbitration, 2018.

5. CONCLUSION

Third party funding is gaining ground, even though some scholars still believe it to be at its infancy stage.[51] Some of the many factors that have contributed to the increase in TPF at international level especially in the United States, Hong Kong and Singapore are the increase in costs associated with handling major disputes particularly commercial arbitration and the increasing role of arbitration as a mechanism to resolving disputes that arise in international commercial and investment arena.[52]

However Nigeria's current regime prohibits the involvement of third party funders and financiers in the dispute resolution

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50 Tian-Yu (n 23) 424.

51 ibid.

52 EV Sitkareva, YA Artemyeva and S Mendosa-Molina, 'Third-Party Funding: Practical, Ethical and Procedural Issues' (6th International Conference on Education and Social Sciences, Dubai, February 2019).

process based on the common law doctrines of champerty and maintenance. Notwithstanding, the time is ripe for TPF in Nigeria's seated arbitration and court process particularly as the Arbitration and Mediation Bill 2022 awaits Presidential assent. Access to justice will be encouraged and its sustenance will be further assured. It will also be more beneficial to arbitrators in that they will gain more experience than hitherto.[53]

[53] A Chukwuemerie, 'Present and Future Perspectives of the Law on Third Party Funding of Arbitration in Nigeria'(Okibe Law House) <okibelawhouse.com> accessed 12 March 2023.