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Market Insights on Unlocking Third-Party Funding of Arbitration in Nigeria

Introduction

Arbitration is sometimes assumed to be a cheaper and more expeditious form of dispute resolution, when compared to traditional litigation. While the latter (speed of resolution) might be true, the former (financial costs of resolution) is arguably a myth. The financial costs involved range from fees of the arbitrator(s) to counsel's fees, arbitral institution's fees, hiring the venue, transcribers, witnesses, and administrative expenses. These costs and expenses can oftentimes be prohibitive.

Such costs may prevent even financially capable persons from initiating or pursuing their claims (thus impeding access to justice) or could potentially limit their ability to build a strong and effective case even when they have a good cause of action or defence (thus compromising their case or curtailing their strategy). Considering the huge capital outlay involved in initiating and maintaining arbitration proceedings, third-party funding ("TPF") of such proceedings has evolved to provide parties with the financial backing or support that they need to prosecute such matters.

TPF is, perhaps, one of the most recent and significant developments in the evolving landscape of international arbitration.¹ In Nigeria, the enactment of the Arbitration and Mediation Act 2023 (the "**Act**") marked a pivotal moment for TPF, particularly within the context of arbitration. This article explores the potentials of the TPF market in Nigerian arbitration, drawing on global examples and local legislative changes.

¹ Although commercial TPF has long been used for insolvency proceedings and class actions in some jurisdictions, its earliest incursion into the arbitration space was in Hong Kong through the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 which permitted TPF of international arbitration matters in Hong Kong subject to certain ethical and financial safeguards. See Oliver Gayner: Third party funding: from origins to international arbitration at <https://classic.austlii.edu.au/au/journals/ANZRIArbMedr/2018/10.pdf> (last assessed on 8 October 2024).

Understanding the Market for Third-Party Funding of Arbitration

The TPF mechanism for arbitration allows parties (particularly claimants) involved in arbitration to secure funding from external sources (for instance, a litigation fund, a hedge fund, or other interested private institutions) to cover the costs and expenses of arbitration proceedings. These third parties provide the funds on a non-recourse basis and typically in exchange for an agreed return from the arbitration award or damages in the event that the funded party is successful at the proceedings or in the event of a monetary settlement.²

This funding mechanism holds various benefits including enabling access to justice for those who might otherwise be unable to afford it; helping to provide the war chest required by a claimant when going up against opponents with deeper pockets; and giving such claimants the confidence to pursue their claims without the fear of fretting away their own financial resources.

Given these advantages, the TPF model has continued to gain traction across various jurisdictions as a legitimate means of financing legal proceedings. It has so far earned recognition and use in common law jurisdictions around the world, such as the United States of America, Canada, New Zealand, the United Kingdom, Singapore, and Hong Kong; as well as civil law jurisdictions like Germany, France, and the Netherlands.

A notable example of its utility in the United States is the TPF agreement between Burford Capital Limited, and Teinver S.A., Transportes de Cercanías S.A., and Autobuses Urbanos del Sur S.A (the “**Claimants**”). There, Burford, a third-party unrelated to the claim, provided funding for the Claimants' claims against the Argentine Republic as they were then facing financial distress and required funding to cover the substantial costs associated with arbitration against a sovereign state. The TPF arrangement enabled the Claimants to pursue the claims without shouldering the entire financial burden, allowing them to concentrate on developing a robust legal strategy which proved crucial for the success of the case.³

This case is a prime example of how TPF can significantly shift the dynamics of high-stake arbitration by providing essential capital to pursue claims that might otherwise remain unaddressed due to financial limitations. Many of such examples exist across various jurisdictions.

The Nigerian Context: Legislative Backing for Third-Party Funding of Arbitration

The enactment of the Act represents a watershed moment for TPF in Nigeria as it placed a stamp of approval on TPF in Nigerian arbitration and arbitration-related court

² The manner in which the third-party funder will benefit from the funding arrangement will ultimately depend on the terms of the Third-Party Funding Agreement between the parties.

³ For context, the Claimants, all Spanish companies, filed a claim against Argentina for violating the bilateral investment treaty with Spain. They contended that regulatory changes and the eventual expropriation of their airlines without compensation, amongst other actions, breached the treaty's fair and equitable treatment standards and severely harmed their investments, leading to significant financial losses. The tribunal ruled in favour of the Claimants, confirming that Argentina had violated said treaty obligations, and awarding damages to the Claimants. See the Arbitral Award in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1 at <https://www.italaw.com/cases/1648> (last assessed on 8 October 2024).

proceedings. By explicitly stating that “[t]he tort of maintenance and champerty... do not apply in relation to Third-Party Funding of arbitration ...seated in Nigeria and ... arbitration related proceedings in any court within Nigeria,”⁴ the Act removes previous legal uncertainties surrounding TPF arrangements. This legislative endorsement not only legitimises TPF but also encourages its adoption among disputing parties.

Furthermore, Section 91 of the Act defines a TPF agreement comprehensively, outlining its scope and operational framework. By clarifying that such agreements can involve financing part, or all of, the costs associated with arbitration proceedings—whether through donations, grants, or reimbursement dependent on outcomes—the Act lays good foundation for TPF practices within Nigeria’s arbitration system.

The Commercial Viability of Third-Party Funding in Nigeria

The commercial viability of TPF in Nigeria is underscored by several factors which combine to create a fertile ground for such arrangement to flourish. The factors include:

- **Rising Costs of Arbitration versus Need for Access to Justice:** as indicated previously, arbitration can become prohibitively expensive, especially in high-stake international disputes and “bet-the-company” cases. This financial burden can deter many Nigerian companies and individuals from pursuing or defending claims. TPF alleviates these costs by allowing disputing parties to secure funding from third-party funders, enabling them to pursue their claims without the pressure of upfront or ongoing personal expenses. Ultimately, TPF levels the playing field and encourages meritorious claims that might otherwise remain unaddressed, thus increasing the chances for access to justice.
- **Increasing Complexity of Disputes:** investors are encountering increasingly complex investment and commercial disputes. In this context, TPF support in Nigerian arbitration will also come with legal expertise and support that empower investors to pursue their claims more effectively. This expertise not only helps the investors to seek redress in these disputes but also boosts their confidence in investing in Nigeria. Knowing that they have reliable options for recourse enhances their willingness to invest and use Nigeria as a seat for arbitration.
- **Attracting International Investment and technical support:** A TPF market in Nigeria will attract international funders, bringing both capital and expertise that can significantly enhance the quality of arbitration in the country. The funders often undertake extensive due diligence and detailed case analysis to establish or identify viable claims that are worthy of their investment. Such rigorous analysis or diligence can generally improve the quality of the strategy to be adopted in the case which the funders shortlist for financial backing.
- **Diversifying Arbitration Funding Sources:** The introduction of TPF into Nigeria’s arbitration space also offers a diversification of funding sources and innovative financing options for arbitral proceedings, beyond personal savings and the claimant’s balance sheet.

⁴ Section 61 of the Act.

Challenges and Considerations

While the potentials for TPF in Nigerian arbitration is promising, a number of challenges must be addressed to fully realise its benefits. The challenges worthy of consideration include:

- **Market Competition:** as the TPF market in Nigeria begins to develop, competition among funders will likely increase in deserving cases. While competition can drive innovation and improve service offerings, it may also lead to aggressive marketing tactics or predatory practices if not properly regulated. Ensuring that funders operate within a fair and transparent framework will be crucial to maintaining the integrity of the TPF market.
- **Ethical Considerations:** the introduction of TPF raises ethical questions that must be carefully navigated. Issues such as conflicts of interest, the influence of funders on legal strategy, and the potential for exploitation of vulnerable parties are critical considerations.
- **Proper Regulatory Framework and Stakeholder-awareness:** although the Act has provided a solid foundation for TPF, further regulatory clarity and awareness may be needed to ensure that all stakeholders understand their rights and obligations under TPF arrangements. Clear guidelines regarding the requirements for an enforceable TPF agreement, disclosure requirements⁵, ethical considerations, and the role of funders in arbitration proceedings will help build trust among disputing parties and their legal representatives alongside other stakeholders.

Market Prospects for Third-Party Funding in Nigeria

The TPF industry is huge. In recent years, TPF has grown exponentially and is now a multi-billion-dollar industry worldwide. In the United States alone, there is an estimated \$15.2 billion in TPF investments albeit for litigation.⁶ In Nigeria, the potential market for TPF of arbitration in Nigeria is also significant, particularly following the enactment of the Act. As the TPF market matures in Nigeria, we expect to see major investments into that industry. Several trends that could further influence the commercial viability of TPF, include:

- **Regulatory Developments & Awareness-building:** continuing dialogue among stakeholders—especially between international funders and their local counterparts and government parastatals—will be essential in shaping a regulatory framework that supports the growth of TPF while safeguarding ethical standards. Continuous engagement will ensure that regulations evolve alongside market dynamics and that stakeholders concerned are properly carried along.
- **Expansion into Other Areas:** While TPF in Nigeria is presently primarily associated with arbitration, its principles could extend to other areas of law, such as litigation or mediation. This expansion could provide additional avenues for parties seeking financial support in various legal contexts and even further enhance the commercial viability for the TPF market in the country.
- **Global Partnerships and Technological Integration:** we project that opportunities for partnerships between local funders and international third-party funding firms

⁵ Beyond the requirements in Section 62 of the Act to disclose the fact that any TPF agreements exists with the name and address of the funder and possibly some specific terms and conditions in the agreement, there are other relevant disclosures which will prove necessary to ensure regulatory compliance for healthy market competition.

⁶ See U.S Chamber of Commerce Institute of Legal Reform: *What You Need to Know About Third Party Litigation Funding* at <https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/> (last assessed on 8 October 2024).

could spring up over time as TPF grows in the Nigerian space. There may also be advancements in legal technology to streamline the process of securing TPF by providing platforms for funders and disputing parties to connect more efficiently.

Conclusion

The successful integration of TPF into Nigeria's arbitration landscape has the potential not only to transform how disputes are pursued or defended, but also in promoting a healthier economic climate by attracting both local and international players eager to engage or participate in the market.

However, realising this potential requires addressing several challenges, including regulatory clarity, awareness-building among stakeholders, ethical considerations, and ensuring healthy market competition. As businesses continue to navigate complex disputes in an increasingly interconnected world, TPF offers a viable solution for managing financial risks associated with disputes. With proper implementation and oversight, Nigeria's TPF market has the potential to foster an environment conducive to responsible funding practices, contributing positively to Nigeria's broader economic development goals.