

THIRD PARTY FUNDING IN NIGERIA:

**UNTAPPED REVENUE FOR GLOBAL
LITIGATION FUNDERS WITHIN AFRICA'S
ECONOMIC GIANT.**

INTRODUCTION

Global statistics on Third Party Funding

In April, 2022, the African Arbitration Academy (AAA) released findings from its study on cost and dispute funding across Africa. The survey revealed that 31% of defendants opt for third party funding (TPF) when faced with financial constraints in pursuing a claim. This practice involves an external entity, not directly involved in the legal matter, financing some or all of a party's expenses associated with pursuing a legal claim and its enforcement. In exchange, upon successful resolution, the funder recoups its investment along with an additional margin. Among the array of funding options available in different jurisdictions, third-party funding emerged as one of the most favoured choices.

Notably, a surge in dispute funding is being experienced across virtually every economic region of the world. Experts at the Global Arbitration Review (GAR) report that there were approximately 196 funded arbitrations on average each year from 2019 to 2023, with 208 funded arbitrations in 2023 alone. In addition, the number of firms reporting involvement in third party-funded arbitrations also rose, from 54 firms in 2019 to 72 firms in 2023.

Shift to Africa?

As the global litigation industry continues to experience windfalls in funding due to varying factors ranging from widespread class actions; inflow of capital from diverse sources such as institutional investors and HNIs; to AI-enabled risk assessments of disputes, new markets in Africa, particularly Nigeria, readily provide spending alternatives for global funders to diversify litigation finance options. Nigeria's vibrant and diverse economy offers a wide range of investment prospects across various sectors namely energy, mining, real estate, telecommunications, and finance. This diversity provides third party funders with sufficient options for investment portfolios, allowing them to spread their risk and potentially achieve higher returns.

As a result of the mass availability of capital, increased competition in dispute funding surfaces globally. African countries such as Nigeria and South Africa represent the new demography of jurisdictions ripe for litigation and arbitration funding. Nigeria leads the pack of litigation funding-friendly destinations largely due to its new laws expressly welcoming arbitration and litigation² funding and its role in attracting the fiercest disputes on the continent³.



2. The scope of litigation referred to here is arbitration related litigation.

3. Federal Republic of Nigeria v. Process & Industrial Developed Limited [2023]EWHC 2638 (Comm) where the High Court of the UK in a landmark decision, eventually set aside the award.

GLOBAL OVERVIEW OF TPF

Globally, TPF has gained remarkable progress, in both developed and developing countries. In the United Kingdom, both the judiciary and legislature have expressed support for third-party funding as a means to enhance access to justice. While specific legislation governing third-party funding has not been enacted, the Association of Litigation Funders (ALF) has been tasked by the Ministry of Justice with self-regulating litigation funding activities in England and Wales.

In a landmark decision on 26 July 2023, the UK Supreme Court⁴ ruled that litigation funding agreements entitling funders to a portion of claim proceeds are considered legal (as damages-based agreements) under UK law. Consequently, failure to comply with the formal requirements for damages-based agreements renders such funding agreements unenforceable. This decision effectively now requires funders to adjust their funding models and revise their litigation funding agreements to align with applicable regulations, especially in ongoing cases.

In Ireland, TPF of international commercial arbitration and any subsequent court proceedings or mediation resulting from such arbitration is now permissible for the first time in many years.⁵

In India, in the landmark case of **Tomorrow Sales Agency Private Limited SBS Holdings Inc & Ors**,⁶ it was decided by the Delhi High Court that only parties to an arbitration process can have a judgment enforced against them. Therefore, in the absence of a TPF agreement compelling the funder to cover expenses in the event of an adverse award, funders not being parties to the arbitration process or awards are not liable to pay adverse awards⁷. This is a welcome development for India and good news for both funders and funded parties, it also demonstrates India's commitment over the years to promote arbitration as a means of resolving disputes.

In Hong Kong and Singapore, as of 2017, TPF was permitted in arbitration and some court proceedings. In Singapore TPF is applicable in international arbitration. In Hong Kong, TPF applies in relation to arbitration, both domestic and international.

4. R (PACCAR) v Competition Appeal Tribunal.

5. Disputing parties were not allowed to obtain third party funding to help them fund the cost of pursuing their case to resolution. However, the Courts and Civil law (Miscellaneous Provision) Act 2023 was signed into law on 5th July 2023, which amended the Arbitration Act 2010 and in effect permitted TPF.

6. (MANU/DE/3643/2023)

7. This ruling not only acknowledged third party funding as legitimate in India, but it also uplifted it as "essential to ensure access to justice". The High Court also went further to distinguish the position under English Law where third party funders covered the cost of failed arbitration claims.

THIRD PARTY FUNDING IN NIGERIA

Previously, TPF was strictly prohibited in Nigeria due to the common law restrictions of maintenance⁸ and champerty.⁹

In Nigeria today, TPF is now gaining traction and providing massive investment potential for global litigation and arbitration funders especially after the passing of the Arbitration and Mediation Act of 2023. The effect of the Act is that the common law torts of maintenance and champerty have been abolished for TPF in relation to arbitration and litigation¹⁰

The wording of **Section 61 of the Arbitration and Mediation Act of 2023** is as follows;

“The torts of maintenance and champerty, including being a common barrator, do not apply in relation to third party funding of arbitration and this section applies to arbitrations seated in Nigeria¹¹ and to arbitration related proceedings¹² in any court¹³ within Nigeria”

Nigeria has followed in the footsteps of more developed jurisdictions like Hong Kong and Singapore, making Nigeria the third jurisdiction globally to directly adopt express legislation in relation to TPF. This is a step in the right direction for Africa’s disputes giant, arguably.

Under Section **62**¹⁴ there is a provision for disclosure of third party funders to the tribunal and opposing party. This requirement is vital as it encourages transparency of the arbitral process and further mitigates the risk of the agreement creating a conflict of interest between the funded party and their lawyer.¹⁵

8. ‘Officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise’ - definition by William Blackstone.

9. maintaining a suit for profit.

10. In a limited sense.

11. Alastair Henderson describes the concept of the seat of Arbitration as “a legal construct, not a geographical location. The arbitral seat is the nation where an international arbitration has its legal domicile or juridical home”. If the seat of arbitration is Nigeria, the law governing the arbitration would be the Arbitration and Conciliation Act.

12. . Examples of Arbitration related proceedings includes; application to set aside arbitral award, proceedings to appoint arbitrators, application for stay of proceedings pending arbitration, proceedings to enforce arbitration clauses, proceedings for revocation of arbitration agreement, proceedings to challenge an arbitrator, appointment and removal or substitution of emergency arbitrators etc.

13. Includes; State High Court, Federal High court, National Industrial Court, Court of Appeal, Supreme Court.

14. Arbitration and Mediation Act, 2023

15. Under subsection 3[4], the respondent is allowed to bring an application for security cost based on the disclosure of the third party funding, the arbitral tribunal may allow the funded party or its counsel to provide the arbitral tribunal with an affidavit stating whether under the funding arrangement, the funder has agreed to cover adverse cost order and the affidavit shall be a relevant consideration to the decision of the arbitral tribunal on whether to grant security for cost. The purpose of the provision is to address the risk of potential non-compliance with cost award. In most cases the tribunal may consider the following in reaching its decision to grant security of cost; (a) the tribunal must be convinced that a significant risk of the respondent’s inability to recover costs exist (b) that such an order will not hinder the funded party’s right to prosecute the case.

IMPLICATIONS OF TPF-FRIENDLY LAWS FOR NIGERIA?

TPF in Nigeria signifies an opportunity to revolutionize the commercial disputes ecosystem with a win-win outcome for stakeholders. Businesses with cash flow issues and rising contingent liabilities on their books are a huge market for litigation funders. For litigation funders, due to Nigeria's economic potential underscored by its role in playing host to mega assets of global brands across active sectors¹⁶, big-ticket disputes are in no short supply.

In Nigeria, financially-secure companies with deep pockets to fund arbitration or arbitration-related litigation still find TPF attractive as funds which would ordinarily have been applied to disputes can now be channeled as working capital requirements, easing the agitation of shareholders over the endless costs on disputes. Simply put, in a dispute, a corporate party's reliance on the financial war-chest of funders obviates the need for direct funding from proceeds of the business. When this occurs, the beneficiary company is exempt from the financial pressures and cash flow problems typically associated with legal disputes, paving the way for business continuity without disruptions.

Interestingly, the International Council for Commercial Arbitration (ICCA)¹⁷ reports that "Litigation can be financed – just like any other corporate expense. Yet most corporations still pay for legal costs out-of-pocket, and that has a profoundly negative financial impact: reducing operating profits, impacting publicly reported earnings, and thus valuation. Litigation finance removes this problem by shifting the cost and risk of pursuing high-value litigation off corporate balance sheets." With this statement from the ICCA, global litigation and arbitration funders are likely to be in search of new and emerging markets to exploit opportunities.

Third party funding in Nigeria is not restricted to local funders. Major players in the global multibillion dollar TPF sector are permitted to establish operations in Nigeria, capitalizing on the emerging and prosperous market thereby bringing in revenue to the country.

Furthermore, TPF will also help in screening out unwarranted and frivolous legal actions, as funders would be disinclined to support cases with low likelihood of success, given the added risk of potentially covering the opposing party's legal costs in the event of an unfavourable outcome.

16. Oil and gas, mining, real estate, telecommunication

17. Queen Mary Task Force on Third Party Funding in International Arbitration

The government can generate revenue from third-party funding through taxation on the funds provided by the third-party funders thereby providing the government with additional revenue to fund public services and infrastructure amongst others. Without more, the new regime of TPF in Nigeria further reinforces Nigeria's position as one of the leading hubs for commercial arbitration in Africa.

BENEFITS AND RISKS OF THIRD PARTY FUNDING FOR FUNDERS.

In terms of ROI (return on investment), TPF has the potential of becoming an attractive market for investors as the returns are neither contingent nor hedged against the price of other investments such as stocks, bonds, and commodities. Legal proceedings are not dependent on macroeconomic factors. Due to the uncertainty of the global market, investors are now inclined to seek investments unaffected by the highly volatile financial market, thus making TFP a safer form of investment for these investors.

With the myriad of benefits associated with TPF it is not without its risks. Perhaps, the core risk associated with TPF particularly in the Nigerian or African market is the lack of adequate investor information. More often than not, global litigation or arbitration funders lack qualitative data to make informed investment decisions on disputes on the continent due to shallow case analysis prior to investing, lack of data sets on disputes, and the uncertainty of decisions of courts or arbitral tribunals. From our experience, this risk curve can be flattened through prior and periodic case analysis and due diligence from local law firms with expertise in dispute resolution. Depending on the complexity of the dispute and the funder's risk appetite, second or multiple opinions could be procured from more than one law firm or local expert in the country where the dispute is seated.

Our market experience reveals that third party funders who invest in locally-procured due diligence on disputes, or case analysis record more profits compared to third party funders who resort to other methods of risk analysis.

CONCLUSION

The Nigerian TPF space is a potential multi-billion dollar industry riding on the basis of its recent legalization. With this, Nigeria establishes itself as a preferred location for investors both locally and internationally and an emergent arbitration seat of preference. As a rather growing industry, TPF still faces certain risks. However, with the help of appropriate due diligence and risk analysis from law firms with expertise in dispute resolution, these risks can be mitigated.

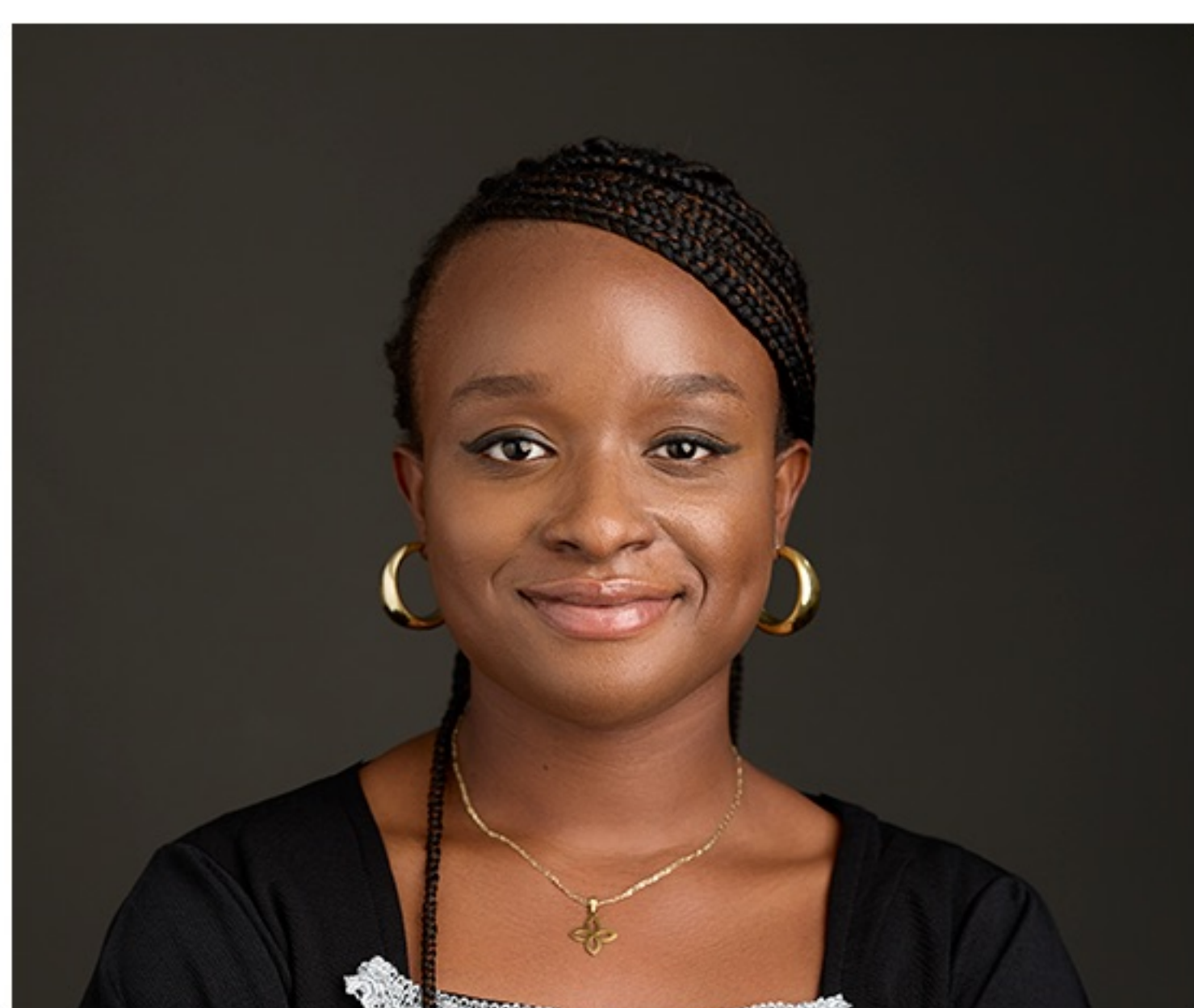
CONTRIBUTORS



Temiloluwa Dosumu

Managing Associate / Disputes Lead

temiloluwa.dosumu@famsvillesolicitors.com



Miracle Uzochukwu Kpaduwa

Associate

uzochukwu.kpaduwa@famsvillesolicitors.com