



# THIRD PARTY FUNDING AND COVID 19 IN THE NIGERIAN DISPUTE RESOLUTION FINANCING ECOSYSTEM<sup>1</sup>

## 01

### **INTRODUCTION**

Gives a hint on why it is necessary to have this conversation, given the current Pandemic and Economic Constraint.

## 02

### **FUNDING**

Outlines what the Dispute Resolution Financing Ecosystem currently entails and why Change has become eminent.

## 03

### **THIRD PARTY FUNDING**

Defines, Describes and Appraises what 3<sup>rd</sup> Party Funding entails in Nigeria as well as in other jurisdictions. This Also differentiates TPF from other similar concepts,

## 04

### **FORGING FORWARD**

Summarises the Arguments canvassed herein, Concludes, Suggests and opens up the conversation.



# INTRODUCTION

Since the World Health Organization (WHO) declared the Coronavirus ("COVID-19" or "the Virus") a pandemic on 11th March, 2020, the virus has spread to all parts of the world. The WHO stated that governments, businesses, and individuals have the ability to change the disease's trajectory and also stop the spread by taking precautions and listening to Healthcare professionals.<sup>2</sup> While the world is gradually picking up, the courts have resumed and continued to dispense justice as it should. This comes with the challenges of managing the avalanche of pending and new cases, together with the increased cost of dispute resolution to be borne by disputants, given the apparent decline in the economy.<sup>3</sup>

This has again raised the question of whether it is time Nigeria allowed Third Party Funding in its Dispute Resolution Ecosystem,

bearing in mind the injustice that could be suffered by a disputant losing his/her right to approach the court on the sheer basis of lack of funds.

This article seeks to enlighten our policy makers (and the general public) of the benefits imbedded in dispute resolution financing and to also put in perspective the role the current economic turndowns, as caused by the COVID-19 Pandemic, has on dispute resolution financing generally.

# FUNDING OF DISPUTE RESOLUTION IN GENERAL

A party who decides to institute an action before a court or an arbitral tribunal should be able to fund the action. As such, dispute resolution is a capital-intensive sector. Whether instituting an action or defending same, parties are compelled to spend huge funds at different stages such as, engaging a lawyer, filing such action, payment of professional fees and other miscellaneous fees incidental to pursuing and defending an action.

Funding any dispute resolution mechanism can be expensive. Dealing with legal costs is often a source of considerable concern for any party involved in a dispute. There have been cases of people who abandoned the pursuit of the breach of their rights just because they do not have the financial capacity to seek legal assistance, for instance, people whose family properties have been grabbed by land grabbers, or persons whose assets have been compulsorily acquired by the government without adequate compensation. It is therefore important to create an avenue that allows disputers, particularly Claimants, fund their actions and protect their rights even when they are not financially buoyant enough to do this themselves

Over the years, by regular practice, the dispute resolution ecosystem has created some avenues that help indigent claimants to fund the pursuit of their legal actions nonetheless. Examples of these channels are: Contingency Fee Agreements, Pro bono Agreements, and Third Party Funding etc.

Contingency Fee is defined by the Rules of Professional Conduct, 2007 ("RPC") as "the fee paid or agreed to be paid for the lawyer's legal services under an arrangement 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".<sup>4</sup> Rule 50(1) & (2) RPC allows a Lawyer in Nigeria to go into a Contingency Fee Agreement with his Client.

Pro bono Legal Service Agreements refers to an agreement to perform or provide a legal service free of Charge. Lawyers and civil society groups usually provide this to indigent disputants.

Third Party funding, which stands at the cynosure of this piece is explained below:

# WHAT IS THIRD PARTY FUNDING



Third Party Funding (TPF) has been referred to as an agreement or arrangement between a funding company/individual and a client (the disputant) whereby the funder agrees to finance some or all of the client's legal cost in exchange for a share of the proceeds in the event of success.<sup>5</sup> In simpler terms, TPF involves someone who is not involved in a litigious claim or an arbitral proceeding providing funds to a party to a dispute in exchange for an agreed return.

## ADVANTAGES AND DISADVANTAGES

A potential claimant may approach a funder for various reasons, such as:

**Economic prudence:** Dispute resolution can be expensive. If a disputant does not have the means to pursue a meritorious claim or does not want to spend so much, funding may well be a good option.

**Risk management:** Dispute resolution never offers a 100% victory guaranty. As such, it is only shrewd for claimants to want to lay off some of the risk, and the inherent unpredictability of costs, in return for a proportion of any recoveries.

**Validation:** Funders are only interested in good claims. As such, extensive due diligence and thorough analysis of the merits of the case will be conducted before an agreement to provide funding is reached. This may assist the claimant

to shape its case strategy, and may also encourage early settlement.

The disadvantages of using third party funding:

**Loss of Autonomy:** There may be some loss of autonomy on the part of the funded party as funders may reserve the right of approval of the settlement.

**Disclosure:** Increasingly, funded parties are required (whether by order of the tribunal or the applicable institutional rules) to disclose the fact of funding and the identity of the funder (but not necessarily the funding terms). This in turn may prompt the respondent to make an application for security for costs.

**Costs:** The cost involved in pitching this idea to a potential funder are sometimes outrageous, all of which do not guarantee that the funder would agree.

## THIRD PARTY FUNDING IN NIGERIA

There is no legislative provision or judicial precedent that expressly prohibits third party funding in Nigeria. While in some cases, Champerty and contingency fee arrangements may have been considered by Nigerian courts, there appears to be a vacuum of express judicial pronouncements as to Third Party Funding in the Nigerian Dispute Resolution Ecosystem. Thus, it can only be inferred that, should a Third Party Funder fund a litigation or an arbitration, there would likely be series of litigation against same on ground of being Champertous and against public policy.

Champerty has been defined by the Black's Law Dictionary, 10th Edition as "*An agreement between an officious intermeddler in a law suit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds; specif., an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who support or helps enforce the claim.*"

Under Common Law, the principles of "Maintenance and Champerty" prevent the funding of litigation (by extension, Arbitration) by third parties. Nigeria, being a Common Law jurisdiction is not immune to this. The logic behind this reasoning has been that third parties should not be profiting from litigation in which they have no legitimate interest, as this may open the courts to frivolous or vexatious action.<sup>6</sup>

In **Oloko v. Ube**,<sup>7</sup> where the Respondent's Solicitor, upon obtaining judgment in favour of the Respondent at the trial court, wrote a letter to the Respondent demanding the payment of "...The sum of N189,600 being the agreed 20% of the Judgment Sum of Ng48,000...", the Court of Appeal per Edozie JCA held that this letter is champertous. The Learned Justice (as an Obiter Dictum)<sup>8</sup> went on to posit thus: "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".

More recently, in **Kessington Egbor v. Ogbebor**,<sup>9</sup> the Court of Appeal per Per Ogakwu, J.C.A. held that where a person elects to maintain and bear the costs of action for another, in order to share.

Here, the Appellants had claimed that the 15% of a Judgment Sum claimed by the Respondent was champertous. The Respondent was a chartered accountant, who was called to give expert opinion on the Appellant's behalf in an action for the recovery of a debt owed the Appellant by Union Bank of Nigeria Plc (UBN), the Court held that this was not champertous.

In Nigeria's **Arbitration and Conciliation Act, CAP A18 LFN 2004 (ACA), Section 49** defines "costs of arbitration" only as:

*"(a) the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself; (b) the travel and other expenses incurred by the arbitrators; (c) the cost of expert advice and of other assistance required by the arbitral tribunal; (d) the travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal; (e) the cost for legal representation and assistance of the successful party if such cost were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such cost is reasonable."*

Which is similar to the provisions of Section 59(1)(c) Arbitration Act 1996 of the United Kingdom as provided below:

*(1)References in this Part to the costs of the arbitration are to— (a)the arbitrators' fees and expenses, (b)the fees and expenses of any arbitral institution concerned, and (c)the legal or other costs of the parties<sup>10</sup> . (2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration*

However, the courts in the UK<sup>11</sup> have interpreted "other costs" in the above provision to include the cost of a Third Party Funder, but the Nigerian courts have not been able to expand Section 49 of the ACA 2004 to mean same because Section 49 of the ACA 2004 is restrictive in its definition and its Interpretation of what costs is. Thus, has not created any room for arbitrators' discretion or private interpretation.

## **ON-GOING AMENDMENTS**

Nigeria is in the process of amending its current national legislation on Arbitration, the Nigerian Arbitration and Conciliation Act of 2004, via an amendment bill (the "Bill").<sup>12</sup> The Bill has passed through the final stages of the Nigerian legislative process. It effectively legalises TPF in arbitration (but not litigation)

in an indirect manner. It does so by including the costs of obtaining TPF as part of costs of arbitration. In other words, the Bill does not expressly state that TPF will be legal, but the consequence of including it as part of costs of arbitration logically connotes that the Bill gives room for TPF.<sup>13</sup>

It is expected that market practice will gradually change (informally) as funders engage with claimants in the market, the dynamics of demand and supply would ultimately channel a new cause. Most likely, once a market practice has been established or a court of competent jurisdiction rules on it, specific legislation will likely be passed to enshrine it.<sup>14</sup>

Thus, while it appears that some sort of liberalization is coming to TPF in Arbitration, same cannot be said for Litigation which explains the worry the Post-COVID 19 era would usher in for litigants.



# HOW COVID-19 WILL SHAPE THIRD PARTY FUNDING?

The far-reaching reverberations of COVID-19, the most disruptive pandemic in more than a century, have sent shock waves throughout the legal industry. Courts across the country were temporarily closed, while so many suspended trials. While Nigeria is playing catch up in terms of moving Proceedings online, we have seen that dispensing justice during these times have become more expensive. Law firms have implemented headcount reductions, salary cuts, or both. Law firms and their clientele have been forced to accept this disruption and accommodate a "new normal." This process is particularly strenuous in Nigeria, given how crude our judicial frameworks are.

With widespread work stoppages fueling another economic downturn today, we anticipate a similar surge of undercapitalized claimants. Many commercial claimants with pending or ongoing litigation have already begun exploring funding options. Others have

just started to file cases that directly stem from the pandemic. What, then, lies ahead for the Dispute Resolution finance industry? Is it time Nigeria adopts a system that allows third-party funders bail out disputants, with particular reference to litigation now? Should economic inadequacies deprive a person the right to seek solace in our courts?

In the United States of America (US), more small business plaintiffs and law firms have inquired about litigation funding as they seek to bridge the financial gaps caused by COVID-19. In March 2020, when the pandemic's effects were first felt in the US, LexShares, a third party funder, saw its inbound funding inquiries increase 100% over three weeks. Other funders, including Burford Capital and Omni Bridgeway, have observed similar growth.<sup>15</sup>



# FORGING FORWARD

It is important to note that one of the factors driving the demand for TPF is the maxim *ubi jus ubi remedium*,<sup>16</sup> which is a cardinal principle and hallmark on which our jurisprudence rests and by extension at the very core of the legal profession.

In a country like ours with endemic poverty and where many parties cannot afford the disproportional cost of access to justice, bearing in mind that Nigeria's unemployment rate increased to 23.10 percent in the third quarter of 2018 from 22.70 percent in the second quarter of 2018 up from 18.1 percent in 2017.<sup>17</sup> The Nigeria Employers' Consultative Association (NECA) had warned in late 2019 that the rate of unemployment in Nigeria may rise to 33.5% in 2020 from a rate pegged at 23.1% in the Q4 of 2019. Puzzlingly, this was even without cognizance of the current pandemic. What would be the current percentage be? It remains unknown, but one.

can assume.

Thus, should we continue wholesale application of champerty and maintenance? I think not. While abuse is possible, we may need to pay attention to the possible injustice that may occur. In an economy that was already fragile even before the pandemic, your guess is as good as mine; things have definitely gone worse. We have more Nigerians losing their jobs and their means of livelihood.

COVID-19 has changed the lives of millions of businesses and individuals. We suddenly find ourselves searching for new sources of capital and economic stability. The coming deluge of legal claims promises to make equitable access to justice a chief concern for disputants. In the right situations, TPF can allow lawyers and clients to gain financial clarity and flexibility amid these great uncertainties.

## REFERENCES AND ENDNOTES

1. **Basit Kolapo Saka** is an Associate in a Tier One firm in Lagos, Nigeria. His areas of expertise are Dispute Resolution, Corporate Law and International Trade Law.
2. <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 9th September, 2020 at 9:52 AM
3. Nigeria recorded a lower Gross Domestic Product (GDP) or economic growth of 1.87 percent, year-on-year, in the first quarter of the year (Q1'2020) reflecting the impact of the COVID-19 pandemic on the economic activities across the country. This represents a decline of 23 basis points when compared with the 2.55 percent recorded in the fourth quarter of last year (Q4'2019). It also represents 68 basis points when compared with the 2.10 percent recorded in the first quarter of last year (Q1'2019): <https://www.vanguardngr.com/2020/05/nigerias-economic-growth-slows-to-1-87-in-q12020/> accessed on the 12th of June, 2020.
4. Rule 50 (5) of the RPC 2007.
5. <https://www.mondaq.com/nigeria/trials-appeals-compensation/954424/considerations-third-party-litigation-and-arbitration-funding-in-nigeria-> accessed on the 25th June, 2020 at 12:00AM.
6. [en.m.wikipedia.org/wiki/Champerty\\_and\\_maintenance](en.m.wikipedia.org/wiki/Champerty_and_maintenance) accessed on 9th September, 2020 at 8:30 AM.
7. [2001] 13 NWLR (Pt.729), 161 at 181.
8. Meaning it was said in passing, was not part of the reasoning of the court when arrive at a decision on an issue.
9. 2015) LPELR-24902
10. *Essar Oilfields Services Limited v. Norscot Rig Management PVT Limited*- Where include The Court held that as a matter of language, context and logic, it seemed that "other costs" could include the costs of obtaining litigation funding.
11. Section 59(1)(c) Arbitration Act 1996.
12. In the proposed Bill, TPF is defined as "an arrangement between a specialist funding company, an individual, a corporation, a bank, an insurance company or an institution (the funder) and a party involved in the arbitration, whereby the funder will agree to finance some or all of the party's legal fees in exchange for a share of the recovered damages".
13. <https://businessday.ng/opinion/article/nigeria-update-on-the-bill-to-amend-the-arbitration-and-conciliation-act/> accessed on the 25th June, 2020 at 2:00AM.
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15. <https://www.law.com/therecorder/2020/04/24/how-covid-19-will-shape-litigation-funding-the-short-term-effects/> accessed on 27th June, 2020 at 9:00
16. Which means "where there is a right there is a remedy"
17. <https://tradingeconomics.com/nigeria/unemployment-rate> accessed on the 12th July, 2020 at 3:30 PM