

# Arbitrating During and Post Covid-19: Nigeria and the Imperativeness of Adopting a Legal Framework on Third-Party Funding: Lessons from Selected Jurisdictions

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**Abstract:** *The advent of Covid-19 has led to the inability of parties fulfilling their commercial and contractual obligations. This inability has led to disputes and has negatively affected the financial fortune of many persons and businesses so that they may not afford or solely bear the cost of funding arbitration. To ensure that parties' intention to arbitrate their disputes is not frustrated, Third-party funding (TPF), an acceptable practice in jurisdictions such as the United Kingdom (UK), Singapore, and Hong Kong, is a possible solution. Unfortunately, TPF is unknown to Nigerian law as it offends the common law doctrines of champerty and maintenance. This article, through a doctrinal methodology, examines the legislative effort towards institutionalising TPF in Nigeria and the ethical concerns advanced against it. The article argues that these concerns are more imaginary than real. Hence, they ought not to deter the adoption of TPF in Nigeria for intra- and post-Covid-19 funding of arbitration. It discusses the practice of TPF in the UK, Hong Kong, Singapore, South Africa, Ghana, and France in which these ethical concerns have been dealt with and draws lessons for Nigeria.*

**Keywords:** *Arbitration, Champerty, Covid-19, Nigeria, Third-Party Funding*

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## I. Introduction

Traditionally, litigation has been the main means of settling disputes irrespective of their nature.<sup>1</sup> However, litigation as a means of dispute settlement is susceptible to several unpleasant proclivities that render it unsuitable for the settlement of certain disputes.<sup>2</sup> Aside from its formality and rigidity, some of the drawbacks of litigation include the seemingly combative nature of legal proceedings, lack of party autonomy, the snail-pace at which it progresses and the fact that it is overtly prone to technicalities.<sup>3</sup> These drawbacks have made litigation less than ideal for settling commercial and contractual disputes in which

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<sup>1</sup> Ajetunmobi AO, *Alternative dispute resolution & arbitration in Nigeria: Law, theory and practice*, Princeton & Associates Publishing Co Ltd, Lagos, 2017, 190.

<sup>2</sup> Onigbinde A and Adesiyani F, 'The practice of arbitration and allied alternative dispute resolution mechanisms in Nigeria', being a paper presented at the Christian Lawyers Fellowship of Nigeria, (CLASFON) (Directorate of Trial Law and Advocacy) held at Reiz Continental Hotel, Abuja on 23 May 2015, 16.

<sup>3</sup> Ibe CE, 'Commercial arbitration practice in Nigeria: The scope and extent of party autonomy and derogations therefrom in arbitral proceedings under the Nigerian Arbitration and Conciliation Act' 1(1) *Journal of Commercial and Property Law*, 2009, 1.

time is often of the essence and the continuity of relationships is equally crucial.<sup>4</sup> Arbitration, which at its miniature stage evolved as part of Alternative Dispute Resolution (ADR), has developed and gained separate prominence as a preferred means of settling commercial and contractual disputes.<sup>5</sup>

The global outbreak of the novel coronavirus (Covid-19) may make many parties to commercial and contractual relationships unable to fulfil their obligations.<sup>6</sup> This inability is likely to result in breach of contract and lead to disputes which have been reserved by their parties for settlement through arbitration. Besides Covid-19 precipitating such disputes, it has also negatively affected the financial fortune of both individuals and businesses that are bound to resort to arbitration to resolve these disputes in Nigeria. Thus, the funding of this arbitration may be a herculean task as paucity of funds may hamper, if not frustrate, the parties' choice of arbitration. Complicated international commercial arbitrations, and even some domestic arbitrations, require significant amounts of funding.<sup>7</sup>

Moreover, with the outbreak of Covid-19, several organisations have been forced to resort to different survival strategies which have led to several arbitrable disputes. These practices include downsizing their workforce, making unilateral half payment of salaries and issuing compulsory leave without or without pay.<sup>8</sup> Since the wake of Covid-19, the unemployment rate of Nigeria has risen from 13.2 percent to 16 percent. To exacerbate the situation, at the time of writing, the Naira has nosedived downward against the dollar drastically to the extent that one dollar is equal to four hundred and fourteen naira at official

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<sup>4</sup> Eyangndi DT, and Oluwadayisi A, 'An appraisal of Section 34 of the Arbitration and Conciliation Act and the role of the court in arbitral proceedings in Nigeria' 5(1) *Rivers State University Journal of Public Law*, 2018, 108-114.

<sup>5</sup> Idonigie P, 'Challenges to arbitration practice in Nigeria', accessed at <https://s3-eu-west-1.amazonaws.com/.../IDORNIGIE+-+Challenges+to+Arbitration+Pr> on 18 June 2020.

<sup>6</sup> Adekoya F, Adeyemi A, and Alade B, 'Economic impact of COVID-19 hits Nigeria's trade, supply chain' *The Guardian*, 21 March 2020, accessed at <https://guardian.ng/news/economic-impact-of-covid-19-hits-nigerias-trade-supply-chain/> on 3 November 2021.

<sup>7</sup> Okeke F, 'Nigeria: Considerations: Third party litigation and arbitration funding in Nigeria', *Mondaq*, accessed at <https://www.mondaq.com/nigeria/trials-appeals-compensation/954424/considerations-third-party-litigation-and-arbitration-funding-in-nigeria-> on 9 July 2020.

<sup>8</sup> Adekoya F, Adeyemi A, and Alade B, 'Economic impact of COVID-19 hits Nigeria's trade, supply chain' *The Guardian*, 21 March 2020, accessed at <https://guardian.ng/news/economic-impact-of-covid-19-hits-nigerias-trade-supply-chain/> on 3 November 2021.

rate while at the parallel market it is five hundred and seventy naira to one dollar.<sup>9</sup> Moreover, the influx of international commercial activities through the China-Africa relations and the Africa Free Trade arrangement between African countries is increasing the number of opportunities for international arbitral disputes to arise and lack of funds may frustrate their arbitration.

One way through which this unintended negative consequence could be avoided is for financially handicapped parties to resort to third party funding of their arbitration.<sup>10</sup> Third party funding is a service rendered by a third party who has nothing to do with the dispute that has arisen. The third party only provides financial resources to a party to an arbitration with the hope of sharing in the anticipated awarded money at the end of the proceedings.<sup>11</sup> Through TPF, parties who are financially handicapped can seek and obtain funding from third parties to discharge the cost of the arbitral proceedings in whole or in part and enable the arbitration to continue as earlier agreed. It ensures that lack of funds do not prevent a party from arbitrating.

While TPF in arbitration is practised in most jurisdictions considered as arbitration hubs,<sup>12</sup> regrettably, the arbitration law of Nigeria does not recognise it.<sup>13</sup> Apart from not being provided for under the *Arbitration and Conciliation Act*, 1988<sup>14</sup> or any arbitration law in Nigeria, TPF is regarded as unlawful. This is owing to the common law litigation doctrines of champerty and maintenance which are applicable in Nigeria.<sup>15</sup> Thus, notwithstanding the contractual nature of arbitration, it is desirable that the current law be amended to accommodate TPF in Nigeria given the succour it can bring to arbitration during and after

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<sup>9</sup> Ibikunle I, 'Dollar to Naira exchange rate for today' GatekeepersNews, 8 November 2021, accessed at <https://google.com/amp/s/gatekeepersnews.com/2021/11/08/dollar-t-naira-exchange-rate-for-today-08-november-2021/> on 8 November 2021.

<sup>10</sup> Idonigie P, 'Third party funding of arbitration post-COVID 19: A Nigerian perspective', <https://nials.edu.ng/pdf/Third%20Party%20Funding%20of%20Arbitration%20Post.pdf>.

<sup>11</sup> Ibejunjo J, Iheanyichukwu D, and Ememonu P, 'Nigeria' 3 *Third Party Litigation Funding Law Review*.

<sup>12</sup> Seidel S, 'Third party capital funding of international arbitration claims: An awakening and a future' *Financier Worldwide*, July 2012, 38, accessed at [www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500](http://www.financierworldwide.com/login.php?url=article.php%3Fid%3D9500) on 20 July 2020.

<sup>13</sup> Okeke F, 'Nigeria: Considerations: Third party litigation and arbitration funding in Nigeria', Mondaq, accessed at <https://www.mondaq.com/nigeria/trials-appeals-compensation/954424/considerations-third-party-litigation-and-arbitration-funding-in-nigeria-> on 10 July 2020.

<sup>14</sup> *Arbitration and Conciliation Act* (Cap A18 Laws of the Federation of Nigeria) (2004).

<sup>15</sup> *Oyo v Mercantile Bank (Nig) Ltd* (1989), Court of Appeal of Nigeria.

Covid-19. TPF will significantly contribute to the desired growth of arbitration in Nigeria. It will also help persons and businesses arbitrate intra and post Covid-19 disputes without having to fret about funding owing to the negative effect of Covid-19 pandemic. Prior to the occurrence of Covid-19 pandemic when persons and businesses were faring well financially, recourse has been had to TPF in most arbitrations, especially international commercial arbitrations, in jurisdictions where it is allowed. If TPF was already being utilised when there was relative financial stability, the need for the same is bound to increase with the advent of Covid-19 given its debilitating financial effect on businesses worldwide.

The concerns expressed about TPF regarding its susceptibility to abuse as well as the challenge of champerty and maintenance (which are common law doctrines that guard against *meddlesome interlopers* from intervening in litigation through sponsorship with the sole aim of making gain by sharing from the proceeds of the suit) are not only less of a concern but surmountable. Now more than before, it has become imperative for TPF to be mainstreamed into arbitration in Nigeria. It is contended that it is imprudent for Nigeria not to follow the trend of robustly legalising TPF while the whole arbitration world, represented by nations such as UK, US, Singapore, and Hong Kong aggressively embrace it. Such refusal or failure is inimical to her desired and direly needed economic development as it would dissuade foreigners and businesses from choosing Nigeria as a seat of arbitration despite the attendant benefits of choosing Nigeria as A seat of arbitration. For instance, the economic fortune of jurisdictions like Hong Kong and Singapore has rapidly increased since their introduction of a liberal arbitration legal regime and TPF and, as a seat of arbitration, they are attracting more international arbitration.

This article is divided into seven parts. Part II discusses the nature of arbitration. Part III discusses the *Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill* 2017 and TPF in Nigeria. Part IV examines TPF and ethical considerations. Part V discusses the practice of TPF in some selected jurisdictions with a view to drawing lessons which Nigeria could imbibe. Parts VI and VII contain the conclusion and recommendations.

## II. The nature of arbitration examined

Commercial arbitration by nature is consensual. This means that it requires an agreement between two or more parties for it to exist. This feature

is one of the things that distinguishes it from litigation.<sup>16</sup> The agreement of the parties to submit their disputes to arbitration is the bedrock of commercial arbitration.<sup>17</sup> However, in few instances, parties could arbitrate without the opportunity of actually bargaining or agreeing to have recourse to arbitration.<sup>18</sup> This occurs where the arbitration is mandatory, such as when one of the parties to a commercial transaction has provision for mandatory arbitration in the event that it contracts and a dispute arises. For instance, this situation of mandatory arbitration provision comes to play when the law that establishes a government agency or parastatal provides for arbitration as the means of settling any dispute involving it with any other person. Thus, any person or entity that transacts with such an agency does so subject to the statutorily provided arbitration option; there is no mutual agreement to resort to arbitration as the first step in resolving any dispute that might arise from the agreement.<sup>19</sup> In such circumstances, the arbitration cannot be strictly described as consensual because the other party had ‘no choice’ but to contract subject to the provision for arbitration; it is a matter of ‘take it or leave it’.<sup>20</sup>

The consensual nature of arbitration means that the parties are at liberty, within the confines of the law, to determine how the arbitration will proceed.<sup>21</sup> They decide the seat of the arbitration, the applicable law, the language the proceedings are to be conducted in, the number and qualifications of the arbitrator(s), and the possible duration of the proceedings.<sup>22</sup> This right is what is referred to as party autonomy in arbitration.<sup>23</sup> As was held by the Supreme Court of Nigeria in *Dr. Charles Mekwunye v. Christian Imoukbuode*. An arbitration agreement is the foundation of any arbitration and without it, there cannot be

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<sup>16</sup> *K.SUUB v Fanz Construction Ltd* (1990) (Nigeria).

<sup>17</sup> Ajayi MO, ‘2009 Lagos State arbitration law: A mere revision of innovation?’ 2(1) *Journal of Private and Property Law*, 2020, 1-2.

<sup>18</sup> Omoyeni O, ‘Forced arbitrations: Rethinking perspectives in Nigeria’ 11(1) *The Gravitas Review of Business and Property Law*, 2020, 1-10.

<sup>19</sup> *Join Stock Company (Aeroflot-Russia Airlines) v Berezovsky* (2013), Court of Appeal of England and Wales.

<sup>20</sup> Omoyeni O, ‘Forced arbitrations: Rethinking perspectives in Nigeria’, 3.

<sup>21</sup> Ajetunmobi AO, *Alternative dispute resolution & arbitration in Nigeria: Law, theory and practice*, 105.

<sup>22</sup> Eyongndi DT and Oluwadayisi O, ‘An appraisal of Section 34 of the Arbitration and Conciliation Act and the role of the court in arbitral proceedings in Nigeria’, 2018, 108-114.

<sup>23</sup> Eyongndi DT and Okongwu CJ ‘The effect of party autonomy on competence-competence in arbitral proceedings under the Nigerian Arbitration and Conciliation Act’ 7(1) *Port-Harcourt Law Journal*, 2018, 25-34.

any arbitration in which an enforceable award can be rendered.<sup>24</sup> The doctrine of party autonomy which vests the parties with the power to regulate the arbitral process and proceedings epitomises the consensual nature of arbitration. Once parties have agreed to arbitrate, the agreement becomes irrevocable unless it has been made revocable from the onset or a court of competent jurisdiction orders so.<sup>25</sup> Hence, unless there is a vitiating element (for example, fraud, mistake, undue influence), the court will readily enforce an arbitration agreement between parties.<sup>26</sup>

Arbitration is also informal and flexible in nature. Due to its informality and flexibility, certain established principles of law applicable in litigation are jettisoned in arbitration as to do otherwise will unnecessarily formalise and stiffen the proceedings. For instance, in litigation, the law is that an issue of jurisdiction can be raised at any time during the proceedings and even at the Supreme Court for the first time.<sup>27</sup> However, in arbitration, this is not so as an issue of jurisdiction must be raised at the earliest opportunity. Failure to do so would be deemed a waiver of this entitlement as was held in *Nigerian National Petroleum Corporation v Klifco Nig Ltd.*<sup>28</sup>

Also, where a party permits inadmissible evidence to be admitted during arbitral proceedings and seeks to impugn it in post-arbitral court proceedings, this will not be allowed because the failure to raise issues of jurisdiction would be construed as waiver of the right to object as was held in *Comptoir Commercial & Industries SPR Ltd v Ogun State Water Corporation.*<sup>29</sup> However, in litigation, admitted inadmissible evidence will be expunged from the record of the court by an appellate court where its inadmissibility is raised either by the parties or the court *suo motu*. The formal attire worn by legal practitioners and judges as well as the formalised legal language is abandoned in arbitral proceedings for

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<sup>24</sup> (2015) (Supreme Court of Nigeria).

<sup>25</sup> Section 2, *Arbitration and Conciliation Act* (Cap A18 Laws of the Federation of Nigeria) (2004).

<sup>26</sup> *Nisan (Nig) Ltd. v. Yaganathan* (2010), Court of Appeal of Nigeria.

<sup>27</sup> *National Electoral Commission & Anor v Izuogu* (1993) (Nigeria), paras 270-293.

<sup>28</sup> (2011) Supreme Court of Nigeria.

<sup>29</sup> ‘The position of the law on issue of jurisdiction applicable in the usual way or in regular courts does not apply to arbitral proceedings. In arbitral proceedings the issue of jurisdiction to hear and determine a dispute is raised before the arbitral panel within the time stipulated in the Arbitration and Conciliation Act. A party who did not raise the issue of jurisdiction before the arbitral panel is foreclosed from raising it before for the first time in the High Court. The reason being that the foundation of jurisdiction in an arbitration is submission’.

<sup>29</sup> (2002), Supreme Court of Nigeria.

simple and plain English (language) and simple corporate dressing or any other mode of dressing welcoming to the parties.

From the foregoing, it is clear that arbitration is not only consensual in nature but it is informal and flexible. The prominence of the parties' autonomy cannot be overemphasised. This aspect of arbitration distinguishes it from litigation; their only similarity is that both are conducted in a judicial manner.

### **III. The Arbitration and Conciliation Act (Repeal and Re-enactment) Bill, 2017 and third-party funding in Nigeria**

Due to several advancements and changes in the practice and procedure of arbitration, the *Arbitration and Conciliation Act (ACA)* has become obsolete and inadequate.<sup>30</sup> As a result, a Committee was set up to review the Act. This effort led to the draft of the *Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill 2017* (herein simply referred to as 'the Bill').<sup>31</sup> Senator Andy Uba sponsored the Bill. Its long title provides that it is a Bill for an Act to repeal the *Arbitration and Conciliation Act 1988* (Cap. A18, Laws of the Federation of Nigeria 2004), and to enact the *Arbitration and Conciliation Act, 2017* in order to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; make applicable the Convention on the recognition and enforcement of foreign arbitral awards (the New York Convention) to any award made in Nigeria or in a contracting State arising out of international commercial arbitration; and for matters connected therewith.

The Bill was passed by the Senate on 1 February 2018 and is presently before the House of Representatives for passage. Thereafter, the President's assents will be needed for the Bill to become a law. Once this is done, it is hoped that the Bill will revolutionise the practice of arbitration in Nigeria, especially as it relates to TPF and other matters of immense importance not captured under

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<sup>30</sup> Eyongndi DT, 'The arbitration and conciliation act, 1988 and international commercial arbitration in jet age: The imperative for urgent review' 1 *LASU Law Journal*, 2018, 89-112.

<sup>31</sup> Onele J, 'Third party funding for arbitration in Nigeria: Yea or nay?' *KluwerArbitration*, 7 June 2018, accessed at [http://arbitrationblog.kluwerarbitration.com/2018/06/07/third-party-funding-arbitration-nigeria-yea-nay/?doing\\_wp\\_cron=1594313635.0874218940734863281250](http://arbitrationblog.kluwerarbitration.com/2018/06/07/third-party-funding-arbitration-nigeria-yea-nay/?doing_wp_cron=1594313635.0874218940734863281250) on 9 July 2020.

the ACA.<sup>32</sup> The need to meet the developments in the sphere of arbitration, especially international commercial arbitration, and to position Nigeria as a possible jurisdiction to be selected as a seat for international commercial arbitration beckoned for a change in the legal framework. The inadequacies of the subsisting legislation include but are not limited to the skewed period for limitation of time in enforcing arbitral awards as the time starts running from when the dispute arose and not when the implied obligation to comply with the award was breached; lack of immunity for arbitrators; lack of provisions for third party funding; and lack of specificity over steps that if taken by a party to an arbitration agreement where the other resorts to litigation, will amount to waiver of the right to seek stay of proceedings. These identified inadequacies and many others led to the introduction of the Bill.

The Bill has tacitly ‘introduced’ TPF in Nigeria.<sup>33</sup> Idornigie,<sup>34</sup> elucidating on the meaning of TPF, states that:

Third party funding of litigation can be defined as an arrangement whereby a person who ordinarily is not concerned with the outcome of a suit bears the costs of the action for one who is concerned, to share the proceeds of the action or suit, if any. In other words, the third-party funder has no previous interest in the lawsuit but finances it as an investment, with a view to sharing the proceeds of the suit if the suit succeeds, as a return on his or her investment. Such an investment arrangement may arise for various reasons, all of which, basically, revolve around the fact that a direct party to a lawsuit, whether a named claimant or a defendant, cannot fund the prosecution or defence of the suit and a third party was required to provide the named party with the funds, on the agreement or understanding that the third party would share from the proceeds of the case, if any.<sup>35</sup>

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<sup>32</sup> Eyongndi DT, ‘The arbitration and conciliation act, 1988 and international commercial arbitration in jet age’, 96-111.

<sup>33</sup> Omoyeni O, ‘Third party funding in Nigeria seated arbitrations: Setting the law straight’ KluwerArbitration, 12 March 2019, accessed at [http://arbitrationblog.kluwerarbitration.com/2019/03/12/third-party-funding-in-nigerian-seated-arbitrations-setting-the-law-straight/?doing\\_wp\\_cron=1594314389.6418020725250244140625](http://arbitrationblog.kluwerarbitration.com/2019/03/12/third-party-funding-in-nigerian-seated-arbitrations-setting-the-law-straight/?doing_wp_cron=1594314389.6418020725250244140625) on 9 July 2020.

<sup>34</sup> Idonigie P, ‘Third party funding of arbitration post-covid.19: A Nigerian perspective’, 17.

<sup>35</sup> See also Section 91(1), *Nigerian Arbitration and Mediation Bill* (2019).

It defines ‘third-party funder’ and ‘third-party funder agreement’ thus:

“‘Third-Party Funder’ means 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’.

A clinical analysis of the Bill makes apparent its recognition of TPF in arbitration. Article 41(2) (g) of the Bill, in defining the term ‘cost of arbitration’, countenanced costs incurred as a result of securing TPF. Article 50(1) (g) empowers the arbitral tribunal to fix ‘costs of arbitration’ in its award and further defines the term ‘costs’ to include ‘the costs of obtaining third party funding’. Furthermore, the Bill defined TPF 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 agree to finance some or all of the party’s legal fees in exchange for a share of the recovered damages.<sup>36</sup>

The irresistible conclusion to be drawn from the foregoing is that the Bill has countenanced TPF as a viable practice in arbitration (whether domestic or international) in Nigeria. However, the above provisions of the Bill are incapable of avoiding altercations regarding the intention of the draftsmen. While the section shows a willingness to open Nigeria to TPF, the provisions are grossly inadequate to concretise that intention beyond argument. The mere mention of TPF under the section that deals with cost and under the interpretation section of the Bill is incapable of proving that TBF is sacrosanct. TPF is a venture that is associated with grievous ethical and economic implications that requires more than mere mentioning under sections of the Bill dealing with an entirely independent subject. In fact, it could safely be argued that under the Bill, TPF occupies the position of an *obiter* provision, despite its germane nature requiring a substantial and substantive part of the Bill dedicated to it.

If the draftsmen truly intended to introduce TPF into Nigeria’s arbitration law and practice beyond any shadow of doubt, then an independent and substantive provision of the Bill should have been dedicated to making provisions for TPF. Clearly stating that TPF is now a recognised and permissible practice in Nigeria will extinguish any possible argument that might ensue due to the current state of the law. As it stands, the Bill is totally silent on the regulation of TPF. There are no Guidelines for its practice or procedure and this

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“Third-Party Funding Agreement” means 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’.

<sup>36</sup> See Section 84, *Nigerian Arbitration and Mediation Bill* (2019).

failure can expose it to abuse. Which institution is charged with the regulation and administration of TPF in Nigeria? The Bill is silent on this important issue and many others. It is beyond contestation that the making of substantive provision on TPF in the Bill will ensure that all existing or potential obstacles to the implementation of TPF in arbitration in Nigeria are swiftly dealt with and no doubt is left as to the enforceability of agreements stemming from TPF in arbitration ‘seated’ in Nigeria (be it domestic or international).<sup>37</sup>

If this is done, it will increase Nigeria’s chances of being chosen as the seat of arbitration just as other jurisdictions where TPF is allowed and which are regarded as global arbitration hubs. The only way to achieve this is to withdraw the Bill and amend it to reflect this observation before the House of Representatives passes it and has it assented to by the President whereupon it will become a law. Once these necessary reviews are made and the Bill is passed into law, it will extinguish any possible applicability of the common law doctrines of champerty and maintenance to arbitration in Nigeria. The reason is that in Nigeria, it is trite law that where there is a conflict between a common law doctrine and a statute, the conflicting provisions of the statute supersede. This position was taken by the Supreme Court of Nigeria in *Patkun Industries Ltd v. Niger Shoes Ltd*.<sup>38</sup>

#### **IV. Third-party funding and ethical considerations**

TPF, whether in litigation or arbitration, raises some ethical concerns. The issues of champerty and maintenance, as well as conflict of interest and disclosure, are concerns associated with TPF. The question, however, is: are these concerns real or imaginary?

Nigeria is a common law jurisdiction due to its colonial affiliation to Britain. As a result of this, common law, doctrines of equity and statutes applicable in England and Wales on or before 1<sup>st</sup> January 1900 were imported into and made applicable subject to local circumstances in Nigeria. Historically, the English courts developed these principles which still form part of Nigeria’s *corpus juris* and are therefore being applied by its Courts in litigation.<sup>39</sup>

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<sup>37</sup> Onele J, ‘Third party funding for arbitration in Nigeria: Yea or nay?’, 10.

<sup>38</sup> (1988) (Supreme Court of Nigeria).

<sup>39</sup> *Oyo v Mercantile Bank (Nig) Ltd* (1989), Court of Appeal of Nigeria.

To properly understand these concepts, there is a need to foreground and understand the mischief they were intended to cure.<sup>40</sup> In medieval Britain, there was an obnoxious practice of wealthy persons (barons) purchasing weak claims with the hope of using their influence to arm-twist the judges to give judgment in their favour.<sup>41</sup> This was done with the hope of making colossal profits from such claim, albeit surreptitiously through unduly influencing the outcome of the proceedings.<sup>42</sup> This mischief was aptly pointed out by the Hong Kong High Court in *Cannonway Consultants Ltd v Kenworth Engineering Ltd* citing an extract from Jeremy Bentham's work thus:<sup>43</sup>

A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, was that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a Baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands.<sup>44</sup>

Thus, these doctrines evolved to ensure that *meddlesome interlopers* do not take over or intervene in disputes with the aim of using their economic might to intimidate the judge with the hope of getting judgement and ultimately converting it to profit. It seeks to prevent the practice of the financially capable venturing into the business of 'professional litigation' through taking over or sponsoring weak claims with the sole aim of making profit and not actually aiding the settlement of the dispute by ensuring that the right of access to court of indigent litigants is not sequestered due to lack of financial wherewithal. Black's Law Dictionary defines champerty as 'a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds'.<sup>45</sup> Maintenance, on

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<sup>40</sup> See *Giles v Thompson* (1994) Court of Appeal of England and Wales.

<sup>41</sup> Idonigie P, 'Third party funding of arbitration post-covid.19: A Nigerian perspective', 14.

<sup>42</sup> Saunders M, Cabrol E, Chenoweth J, and Cummins T, 'Third party funding in international arbitration' Ashurst, accessed at <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/> on 11 July 2020.

<sup>43</sup> (1995), High Court of Hong Kong; Bowering J, 'The works of Jeremy Bentham', William Tait, 1843, Vol 3.

<sup>44</sup> Winfield PH, 'The history of maintenance and champerty' 35 *Law Quarterly Review*, 1919, 50.

<sup>45</sup> Black's Law Dictionary, 6<sup>th</sup> ed.

the other hand, is defined as ‘an officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party with money or otherwise to prosecute or defend the litigation’.<sup>46</sup> In *Oyo v Mercantile Bank (Nig) Ltd*,<sup>47</sup> the Court of Appeal defined maintenance as: ‘improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse’.<sup>48</sup>

While champerty and maintenance are prohibited in Nigeria, it is apposite to note that contingency fee arrangements are legally permitted. The Rules of Professional Conduct in the Legal Profession (simply known as RPC) permits contingency fee arrangements. The RPC provides as follows:<sup>49</sup>

A lawyer may enter into a contract with his client for a contingent fee in respect of a civil matter undertaken or to be undertaken for a client whether contentious or non-contentious: provided that: -a. The contract is reasonable in all the circumstances of the case including the risk and uncertainty of the compensation; b. The contract is not vitiated by fraud, mistake or undue influence, or ii. Contrary to public policy; and c. if the employment involved litigation, it is reasonably obvious that there is a bona fide cause of action. A lawyer shall not enter into an arrangement to charge or collect a contingent fee for representing a defendant to a criminal case.<sup>50</sup>

From the above, it is trite that, subject to certain prerequisites, contingency fee arrangements are legally permissible in Nigeria. Before a lawyer can charge a contingency fee, he is under an obligation to inform the client the potential effect of such an arrangement.<sup>51</sup> The arrangement is only applicable in civil causes and matters and is therefore inapplicable in criminal matters on

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<sup>46</sup> Black’s Law Dictionary, 6<sup>th</sup> ed.

<sup>47</sup> *Oyo v Mercantile Bank (Nig) Ltd* (1989), Court of Appeal of Nigeria.

<sup>48</sup> In *Oloko v Ube* (2001), Court of Appeal of Nigeria. Edozie JCA held 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’.

<sup>49</sup> Rule 50 (1) and (2), *Rules of Professional Conduct* (2007).

<sup>50</sup> Rule 49 defined ‘contingency fee’ 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>51</sup> Rule 50 (4), *Rules of Professional Conduct* (2007).

grounds of public policy.<sup>52</sup> From the foregoing provisions, a contingency fee arrangement is only permissible in the following circumstances where: (i) it is a civil matter, whether contentious or not; (ii) the contract is reasonable in the circumstances of the case including risk and uncertainty of compensation; (iii) the contract is not vitiated by either fraud, mistake, or undue influence; (iv) the contract is not contrary to public policy; and (v) the employment involves litigation in which there is a reasonable and *bona fide* cause of action.<sup>53</sup>

In Nigeria, pursuant to the Rules of Professional Conduct, legal practitioners owe several duties to their client such as the duties to act in good faith, not to make secret profit, to avoid conflict of interest, and to protect the legitimate interest of their client subject to the overriding interest of justice. Where TPF exists, two independent and distinct relationships are created: (i) the relationship between the lawyer and the client (who is being funded), and (ii) the relationship between the funded client and the funder. The arbitrator or legal practitioner is duty-bound to protect the interest of the client within the bounds of the law. However, by virtue of the funding, there is a supervening interest (i.e. the funder). The legal practitioner must creatively and legitimately balance these interests, even if he becomes aware that his fees are being catered for by the funder and not the client. Confidentiality and privilege issues must be efficiently and effectively managed by the legal practitioner between the parties for whom he is acting. The legal practitioner is duty-bound to advise his client to make total disclosure to the arbitrator or tribunal at the earliest opportunity of the fact that they or it is being funded. This knowledge is necessary to foreclose issues of conflict of interest that might arise after the parties have expended time and finance on the proceedings. The legal practitioner who fails to do this risks being tried by the Legal Practitioners Disciplinary Committee (LPDC) for professional misconduct, or even gross misconduct, with grave sanctions if he is found liable.

While champerty and maintenance have been advanced as bars to TPF in Nigeria, a blanket application may not be safe as a closer examination shows that the scope of its application is not unlimited. Historically, these doctrines were developed and made applicable to litigation and have continued to be so applied. It is a common fact that litigation is different from arbitration although they share similarity in the way and manner their proceedings are conducted. In fact, arbitration is so different from litigation to the extent that certain

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<sup>52</sup> Rule 50 (2), *Rules of Professional Conduct* (2007).

<sup>53</sup> Okeke F, 'Nigeria: Considerations: Third party litigation and arbitration funding in Nigeria', 6.

established rules of law in litigation have no place in it.<sup>54</sup> All the judicial authorities supporting the position that TPF is prohibited in Nigeria relate to the funding of litigation, which is a state-controlled method of dispute settlement, unlike arbitration, which is a matter of agreement between willing parties subject to established professional ethical standards.

Thus, it can be safely argued that since there is neither a statutory nor judicial prohibition of TPF in arbitration in Nigeria, TPF is not disallowed notwithstanding the subsistence of champerty and maintenance. In fact, it is difficult, if not impossible, to get a weak arbitration claim unlike frivolous or weak litigation claim and the act of mutual agreement between the parties extinguishes such possibility. Thus, the socio-economic condition of Nigeria and the evolving business dynamics within the commercial sphere have made it imperative for Nigeria to adopt TPF and set up necessary institutional and statutory regulatory mechanisms for its seamless practice. This has become the norm as opposed to an exception in jurisdictions that can be safely described as arbitration hubs. The rather suspicious and sceptical tendencies fuelled by the fear of champerty and maintenance must be courageously broken in order to position Nigeria rightly within the comity of arbitration jurisdictions.

## **V. Third-party funding: A peep into its practice in other jurisdictions**

TPF in arbitration is a global phenomenon. Some jurisdictions have amended their laws to accommodate it in their arbitration practice and procedure. This part of the paper examines the practice of TPF in selected jurisdictions across Africa, Europe, and Asia with a view to discerning lessons which Nigeria can glean. These jurisdictions are the UK, Hong Kong, Singapore, France, South Africa, and Ghana and they were selected for the following reasons. Besides being a common law country, the UK colonised Nigeria and is regarded as a global arbitration hub. Hong Kong and Singapore are selected because they have transformed to become jurisdictions to be reckoned with in terms of arbitration and TPF by revolutionising their law. South Africa and Ghana were selected in Africa because South Africa is regarded as one of the fastest developing economies in Africa and the commercial hub of southern

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<sup>54</sup> See Section II of this article.

Africa while Ghana, like Nigeria, both of which are in West Africa, have the same legal system and are former British colonies which share political and economic ties. France is selected because it is a civil law jurisdiction and will give an insight into the practice under the civil law system and possible lessons Nigeria could draw therefrom.

### A. United Kingdom (UK)

The doctrine of champerty and maintenance are of UK origin as seen above. However, the enactment of the *Criminal Law Act* 1967 formally abolished these doctrines in England and Wales in their status as both tort and crime.<sup>55</sup> Thus, TPF in arbitration is practiced in the UK without the challenge of these doctrines.<sup>56</sup> Hence, parties in UK-seated arbitration can legally obtain TPF. This has led to a tremendous growth of the industry within the UK commercial arbitration market, as observed in *Hill v Archbold*.<sup>57</sup> After the decision of Lord Mustill in *Giles v Thompson* where threefold enquiries were set down for determining whether a funding agreement was champertous,<sup>58</sup> the law has progressed in favour of TPF as seen in subsequent decisions of the English Court. For instance, in *R (Factortame) Ltd v Transport Secretary (No 8)*,<sup>59</sup> the Court of Appeal held that where a party required expert advice and witness to maximise its right of access to justice, a funding agreement to that effect, where it was inevitable, was not champertous and the court below did not err when it awarded cost covering the benefit to be realised by the funder. In fact, access to justice was reiterated as an exception to champerty and maintenance in *Gulf Azov*

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<sup>55</sup> See Sections 13 (1) and 14 (1), *Criminal Law Act* (1967).

<sup>56</sup> However, Section 14 (2) reserved these doctrines on the ground of public policy when it provided that ‘the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal’.

<sup>57</sup> (1968), Queen’s Bench of the United Kingdom, paras. 494 and 495.

<sup>58</sup> In *Giles v Thompson* (1993), House of Lords of the United Kingdom, it was held thus:

‘At the first the agreement is analysed to see whether the company... agrees to involve itself in the litigation in a way which yields a financial benefit from a successful outcome. If so, the agreement is champertous and prima facie unlawful. At the second stage it is considered whether the third party has an interest in the transaction which legitimates what would otherwise be unlawful. Finally, it is asked whether aside from special rules concerning champerty, the relationship has features which make it contrary to public policy, and hence unenforceable’.

<sup>59</sup> (2002), Court of Appeal of England and Wales.

*Shipping Co Ltd v Chief Humphrey Irikefe Idisi*.<sup>60</sup> The Court held that ‘public policy now recognises that it is desirable, to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation’.<sup>61</sup>

The English Court of Appeal in 2005 held that TPF obtained to enable a party to access the court to ventilate his claim without which access to court would have been denied was not champertous. This was the decision in *Arkin v Borchard Lines Ltd*.<sup>62</sup> However, the above cases were decided within the realm of litigation. In arbitration, TPF has been held to be valid as recently as 2016. In *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd (Essar Oilfields)* the Commercial Court held that an arbitrator, in awarding costs incurred by a successful party to arbitral proceedings, can award costs covering a third-party funder engaged by the successful party to ensure that the proceedings took place.<sup>63</sup> The Court refused to set aside a sole arbitrator’s partial award wherein cost was awarded to a funder pursuant to the 1996 *British Arbitration Act*.

While TPF is legitimate and legal in the UK, such an agreement would be regarded as champertous where it fails to meet certain standards. If the purpose of the TPF is mainly to make a profit rather than to preserve a genuine interest, such as ensuring that a parties’ right of access to justice is preserved, the agreement will be rendered champertous, contrary to public policy and, therefore, unenforceable. TPF has continued to grow in the UK and has remained a privately regulated industry under the auspices of ‘Association of Litigation Funders’. This regulation came after the Civil Justice Council (CJC) of the UK’s Ministry of Justice Agency in 2007 compiled a report on litigation funding showing that courts favoured it as it promotes access to justice.<sup>64</sup>

In 2011 the CJC made a Code of Conduct for Litigation Funders.<sup>65</sup> The Code which was revised in 2014 regulates the TPF industry in the UK whether

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<sup>60</sup> (2004), Court of Appeal of England and Wales.

<sup>61</sup> *Gulf Azov Shipping Co Ltd v Chief Humphrey Irikefe Idisi* (2004), Court of Appeal of England and Wales, para 54.

<sup>62</sup> (2005), Court of Appeal of England and Wales.

<sup>63</sup> (2016), High Court of England and Wales.

<sup>64</sup> The Judiciary, ‘Improved access to justice – Funding options and proportionate costs’, accessed at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/CJC+Improved+access+to+Justice+-+Funding+options+and+proportionate+costs.pdf>

<sup>65</sup> Iwuoha S, ‘Third party funding in Nigerian seated arbitrations: Time to join the progressives’, 11(1) *The Gravitas Review of Business and Property Law*, 2020, 17.

in litigation or arbitration.<sup>66</sup> The Code has been criticised for its lack of details in regulating TPF and it mainly refers to litigation, despite the fact that most members of the ATF fund arbitration too.<sup>67</sup> Rules 10 and 11 of the Code give the ALF wide and potentially self-serving powers to determine whether a funder is liable to a third party which is worsened by the non-binding nature of the Code.<sup>68</sup> Given the nature of funding and the role played by the ALF as well as the need for transparency and accountability, it would be appropriate for the UK authority to establish a distinct entity to regulate TPF in both litigation and arbitration and expand the scope and province of the subsisting Code. This will ensure that the potential of abuse by the ALF which is self-regulating will be extinguished. This will further build confidence in the process. As it stands, any funder who is part of the ALF undertakes to abide by the Code and shall not seek to influence the outcome of any proceedings and must pay all debts when they become due and payable. They must also ensure that they have enough capital to cover all the arrangements on their books for a minimum period of 36 months.<sup>69</sup>

## B. Hong Kong

Like every other common law jurisdiction, Hong Kong has the bars of champerty and maintenance operational thereby rendering TPF tortious or criminal in nature. The recognition and operationalisation of these doctrines had hitherto made Hong Kong lag in the development of arbitration. In 1995, the High Court of Hong Kong in *Cannonway Consultants Ltd v Kenworth Engineering Ltd* was faced with the question of whether champerty and maintenance are applicable to litigation.<sup>70</sup> It held that, although things are changing, the bars are still applicable. In 2007, the Court of Final Appeal was faced with a similar issue

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<sup>66</sup> Osmanoglu B, 'Third-party funding in international commercial arbitration and arbitrator conflict of interest', 32 *Journal of International Arbitration*, 2015, 337.

<sup>67</sup> Kalicki J, 'Third-party funding in arbitration: Innovations and limits in self-regulation (part 2 of 2)' KluwerArbitration, 14 March 2012, accessed at <http://arbitrationblog.kluwerarbitration.com/2012/03/14/third-party-funding-in-arbitration-innovations-and-limits-in-self-regulation-part-2-of-2/> on 15 July 2020.

<sup>68</sup> Lawrence L, 'Regulating third party funding in arbitrations held within South Africa', a Mini Thesis submitted in partial fulfilment of the requirement for the degree of Legum Magister (LLM), Faculty of Law, University of the Western Cape, South Africa, 2018, 268.

<sup>69</sup> Iwuoha S, 'Third-party funding in Nigerian seated arbitrations: Time to join the progressives', 17. (1995), High Court of Hong Kong.

in *Unruh v Seeberger*.<sup>71</sup> It acknowledged that there is a shrinking in the application of the doctrines of champerty and maintenance although the two still form part of Hong Kong's law. However, it declared that an arbitration agreement to be performed in a jurisdiction other than Hong Kong where the doctrines are inapplicable would not be declared champertous and unenforceable in Hong Kong.

However, owing to business exigencies and the compelling force of growth, Hong Kong has recently amended its law to countenance TPF in arbitration.<sup>72</sup> To this end, the court have held that TPF would be allowed where it seeks to preserve the right of access to court or in insolvency proceedings as was in *Akai Holdings Ltd (in compulsory liquidation) & Ors v Ho Wing On Christopher & Ors*.<sup>73</sup> The same decision was reached in *Re Po Yuen (To's) Machine Factory Ltd*,<sup>74</sup> where it was held that the existence of a real commercial purpose would permit the approval of TPF in litigation.

In 2013, the Law Reform Commission of Hong Kong (LRCHK) commenced consultation with the industry stakeholders on the possibility of introducing TPF for arbitration and mediation. In October 2016, the Commission made a report wherein it recommended that champerty and maintenance should not be applicable to arbitration and mediation. This recommendation paves the way for the introduction of TPF into these settlement mechanisms and review of the extant law.<sup>75</sup> Pursuant to this, the *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance* (Order No 6) was enacted by the Legislature on 14 June 2017. The legislation came into force on 23 June 2017, formally opening Hong Kong to TPF in arbitration and mediation. The aim of the legislation is captured thus: 'An Ordinance to amend the Arbitration Ordinance and the Mediation Ordinance to ensure that third party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty; and to provide for related measures and safeguards'.<sup>76</sup> The law defines TPF as follows:

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<sup>71</sup> (2007), Court of Final Appeal of Hong Kong.

<sup>72</sup> Chan M, 'Hong Kong', 1 *Third Party Litigation Funding Review*, 2017, 78.

<sup>73</sup> (2009), High Court of Hong Kong.

<sup>74</sup> (2012), High Court of Hong Kong

<sup>75</sup> See Law Reform Commission of Hong Kong, *Third party funding for arbitration*, 2016.

<sup>76</sup> See *Arbitration and Mediation Legislation (Third Party Funding) (Amendment)* (Ord No 6 of 2017).

Third party funding of arbitration is the provision of funding for an arbitration- (a) under a funding agreement; (b) to a funded party; (c) by a third party funder; and (d) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.<sup>77</sup>

The Ordinance is applicable to both international and domestic arbitration particularly where Hong Kong is the seat of arbitration.

The potential for abuse in TPF is high. In 2016, the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (CIETAC HKAC) released a public consultation on the Guidelines for Third Party Funding for Arbitration.<sup>78</sup> The Commission seeks to ensure that funders adhere to international best practices when engaging in TPF. The CIETAC HKAC Guidelines deal with concerns ranging from confidentiality and conflict of interest to disclosure, security of cost, and control.<sup>79</sup> Thus, today, Hong Kong has by this statutory innovation set itself amongst the comity of pro-arbitration jurisdictions and stands the benefit of being chosen as a seat of most international arbitration. Parties who might have issues with funding their arbitration due to the financial devastating effect of Covid-19 can easily access funds from funder bodies and prosecute their arbitration seamlessly during and post Covid-19. Hong Kong, like the UK, has certainly demonstrated foresight and is a step ahead of the effect of the devastating Covid-19 as far as funding of arbitration is concerned.

### C. Singapore

Prior to 2016, the doors of Singapore were shut to TPF and the doctrines of champerty and maintenance held sway. However, on 10 January 2017, like Hong Kong, Singapore joined the enviable league of pro-arbitration jurisdictions. On this date, the Singaporean Parliament passed into law the *Civil Law (Amendment) Bill, 2016* and the *Civil Law (Third Party Funding) Regulation*

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<sup>77</sup> Section 98G under Division 2, *Arbitration and Mediation Legislation (Third Party Funding) (Amendment)* (Ord No 6 of 2017).

<sup>78</sup> Xinglong Y, 'Third party funding under investor-state arbitration: Respondent State's risks and recent developments in ASEAN and Hong Kong' 6 *Ramkhamhaeng Law Journal*, 2017, 200.

<sup>79</sup> China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center CIETAC – Hong Kong Arbitration Centre Guidelines for Third Party Funding Arbitration, accessed at [http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen\\_US%5Cindex&userLocale=en\\_US](http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen_US%5Cindex&userLocale=en_US) on 21 July 2020.

2016.<sup>80</sup> Section 5A of the law abolished the applicability of the doctrines of champerty and maintenance as torts under Singaporean law. However, this abolition is inapplicable to the part of the law that declares a contract as illegal or contrary to public policy.<sup>81</sup> Section 5B legalises funding agreements and lays down the procedure for funding. The same section also vests the Minister of Law with the powers to make or adopt regulations to give effect to Sections 5A and 5B. Pursuant to this section, the Minister of Law exercised this power on 1 March 2017 when the *Civil Law (Third-Party Funding) Regulations 2017* came into operation.<sup>82</sup>

The Regulation provides that the legalisation of TPF in Singapore is limited to international commercial arbitration.<sup>83</sup> It also applies to all other procedures connected to international arbitration such as court proceedings and mediation.<sup>84</sup> The Regulation further makes copious provisions for requirements an aspiring funder needs to meet to be licensed to practice. Generally, under the regulation, a funder is prohibited from funding a dispute that it is a party to.<sup>85</sup> Surprisingly, the Regulation, like its Hong Kong counterpart, fails to make provision on the germane issue of security for cost and control.

Singapore is reputed as a leading arbitration jurisdiction.<sup>86</sup> Due to this, the caseload of the Singapore International Arbitration Centre (SIAC) has tremendously increased in the recent past. Secomb and Wallin attesting to the increased workload opined that:

... in 2016, SIAC received over 340 new cases involving parties from 56 jurisdictions – a 27 per cent rise in caseload compared with the year before. The total aggregate sum in dispute for new cases filed in 2016 was S\$17.13 billion.<sup>87</sup>

With the passage of the new law, there has been a geometric increase in cases flowing into Singapore. In 2018 for instance, ‘SIAC received over 400 new

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<sup>80</sup> Iwuoha S, ‘Third party funding in Nigerian seated arbitrations: Time to join the progressives’, 15.

<sup>81</sup> Section 5A (2), *Singapore Civil Law (Amendment) Act* (2017).

<sup>82</sup> *Civil Law (Third-Party Funding) Regulations* (2017).

<sup>83</sup> Section 3 (a), *Civil Law (Third-Party Funding) Regulations* (2017).

<sup>84</sup> Sections 3(b) and (c) respectively, *Civil Law (Third-Party Funding) Regulations* (2017).

<sup>85</sup> Section 4(1) (a), *Civil Law (Third-Party Funding) Regulations* (2017).

<sup>86</sup> Queen Mary University of London and White & Case, ‘2015 international arbitration survey: Improvements and innovations in international arbitration, 11-12, accessed at <http://www.arbitration.qmul.ac.uk/> on 14 July 2020.

<sup>87</sup> Secomb M and Wallin A, ‘Hong Kong’ 1 *Third Party Litigation Funding Review*, 2017, 125.

cases involving parties from 65 jurisdictions, and the total aggregate sum in dispute for new cases filed in 2018 was USD 9.64 Billion'.<sup>88</sup> There has also been an unprecedented influx of funders. To qualify, a third party funder must carry on the principal business of funding the costs of dispute resolution proceedings in Singapore or elsewhere and have a paid-up share capital of not less than USD 5 Million or not less than USD 5 million in managed assets.<sup>89</sup> Failure to fulfil this requirement and others makes a funding agreement null and void and therefore unenforceable.<sup>90</sup>

The effect of these provisions is that most commercial third party funders will now be able to fund international arbitration and related proceedings under Singaporean law. However, the requirement to 'carry on the principal business' of funding and the apparent need to fund in return for a share or other interest in the proceeds or potential proceeds of the proceedings seem to exclude respondent-side funding and non-commercial funders such as *pro bono* funders, most individual persons, and businesses not principally engaged in funding.<sup>91</sup> The law has placed a duty on legal practitioners and law firms to disclose the existence of a TPF.<sup>92</sup> Thus, lack of funds cannot impede arbitrating in Singapore as it stands. One may safely conclude that the inclement financial weather ushered in by Covid-19 is unlikely to frustrate the continuous arbitration of disputes of which Singapore is the seat of arbitration. This is because incapacitated parties can have recourse to TPF to fund the costs of the proceedings or any part thereof.

## D. South Africa

South Africa is reputed as one of the main commercial hubs of Africa and an arbitration destination in the continent. Before 2004, TPF was unknown to the South African arbitration *corpus juris*. However, the country has since joined pro-TPF jurisdictions like Australia (where TPF originated), the United Kingdom, the United States, Singapore and Hong Kong.<sup>93</sup> It is apposite to note

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<sup>88</sup> Iwuoha S, 'Third party funding in Nigerian seated arbitrations: Time to join the progressives', 15.

<sup>89</sup> Iwuoha S, 'Third party funding in Nigerian seated arbitrations: Time to join the progressives', 15.

<sup>90</sup> Section 5B (4), *Civil Law Act* (2017).

<sup>91</sup> Secomb M, and Wallin A, 'Hong Kong', 127.

<sup>92</sup> Iwuoha S, 'Third party funding in Nigerian seated arbitrations: Time to join the progressives', 16.

<sup>93</sup> Scott R, Kenton M, Meyerov A, Gordon R, and Gabryk N, 'South Africa: The advent of litigation funding – and what does it involve?', Mondaq, accessed at <https://www.mondaq.com/southafrica/>

that South Africa (SA) does not prohibit TPF *per se*. South African courts first tackled the topic as far back as 1894 when in *Hugo & Moller NO v Transvaal Loan, Finance and Mortgage Co*,<sup>94</sup> it was ruled that an agreement to share proceeds of lawsuits or *pactum de quota litis* are not necessarily illegal and could be upheld or otherwise at the discretion of the courts based on the structure of the agreement and the peculiarity of the situation.

In a 2004 judgment, the South African Court of Appeal accepted that agreements in terms of which an outsider provides finance to allow a party to litigate in return for a share of the proceeds of the action are legal, enforceable and are consistent with the constitutional values underlying freedom of contract. This decision was reached in the case of *Price Waterhouse Coopers Inc & Others v National Potato Co-Operative Limited*.<sup>95</sup> The facts of the case are as follows. NPC suspected their General Manager of misconduct and commissioned a law firm to investigate. In their preliminary findings, NPC found that there was misconduct and that NPC's auditors, Price Waterhouse, should have identified it. This led to an investigation into a potential claim against Price Waterhouse who had since undergone a merger forming PWC. Before its completion of the investigation, NPC came under financial distress and required alternative means of funding to proceed with the investigation to its logical conclusion.<sup>96</sup>

NPC obtained funding from Farmers Indemnity Fund Pty; a shelf company whose shares was held by NPC's attorney. The shares were later distributed amongst members of NPC and an investment company. They concluded a Funding Agreement that entitled the Funder to 45% of a successful outcome or settlement. It was further agreed that the Funder would contribute R1.5 million to cover the costs associated with instituting a claim against PWC and left open the possibility of additional funding. Thereafter, NPC instituted a claim of damages against PWC for breach of contract. In 2002, the trial commenced but the issues were soon diverted to deal with PWC's claim that the Funding Agreement was champertous and therefore contrary to public policy. The court below ruled against PWC leading to the appeal.<sup>97</sup>

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arbitration-dispute-resolution/705682/the-advent-of-litigation-funding-and-what-does-it-involve on 20 June 2020.

<sup>94</sup> (1894), High Court of South Africa.

<sup>95</sup> (2004), Court of Appeal of South Africa.

<sup>96</sup> Lawrence L, 'Regulating third party funding in arbitrations held within South Africa', 230.

<sup>97</sup> Lawrence L, 'Regulating third party funding in arbitrations held within South Africa', 230.

At the outset, the court acknowledged that agreements contrary to public policy are void and unenforceable. In determining whether the Funding Agreement concluded between NPC and the Funder was indeed contrary to public policy, the court returned to the common law doctrines of maintenance and champerty. The common law doctrines were inherited from the English legal system and any agreements found in violation of them were considered contrary to public policy. The court found that in South Africa, these agreements were looked upon with disfavour unless it could be determined that the financial assistance was offered in good faith and the return was reasonable. This exception was allowed out of fear that a Claimant would be denied the opportunity to institute a *bona fide* claim due to financial constraints.<sup>98</sup>

The Court acknowledged the constraint imposed by the doctrine of champerty and maintenance but was urged to create a balance between them and the constitutional right of access to Court under the South African Constitution. The Court, countenancing the position in the UK, felt that the doctrines have become archaic and subservient to the right of access to court for disputants who might not have the means to do so. The Court considered that the doctrine was developed to protect the civil justice system. However, the South African civil justice system had developed to the extent that it did not require the application of the doctrines for it to be protected, particularly in the presence of extant laws regulating the concerns sought to be protected by the doctrines. It therefore held that such an agreement to fund a litigation with the expectation of sharing from an award thereof upon its success is not against South African public policy but aids access to court which is prime. The court held as follows:

... It must also be recognised that the civil justice system is strong enough to withstand the perceived abuses which could arise as civil litigation is made possible by financial support given by persons who provide such support in return for a share of the proceeds. Accordingly, it must be held that an agreement in terms of which a stranger to a lawsuit advances funds to a litigant on condition that his remuneration, in case the litigant wins the action, is to be part of the proceeds of the suit, is not contrary to public policy.

The position above represents what is obtainable in South Africa with respect to TPF in litigation, which is by nature formal, although the same position, by extension, can be argued to be applicable to arbitration. Litigation

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<sup>98</sup> Lawrence L, 'Regulating third party funding in arbitrations held within South Africa', 362.

is state-controlled and has several formalities and strict rules. It is litigation that the doctrines of champerty and maintenance were developed to regulate. Thus, if the South African Courts have relaxed their application in litigation, it would be safe to assume that the same outcome will be expected in arbitration which is party-driven and informal.

Section 34 of the South African Constitution, which guarantees the right of access to courts, was a major consideration that tilted the court to approving TPF in litigation and this would have the same effect in arbitration. No doubt, this decision benefits businesses as it avails them the opportunity to allow parties who have limited financial resources to pursue and prosecute disputes, as well as to manage cash flow by freeing up available funds and resources to pursue other business objectives and interests. TPF is also a way of managing costs and risks inherent in major disputes such as the duration of a dispute or adverse costs awards. TPF is seen and is used as a risk management tool to bring on board a partner who has experience in litigation and arbitration and, importantly, someone who has expertise in tracing and recovery of assets and in the recognition and enforcement of both local and international judgments and awards.

Based on the decision in *Price Waterhouse Coopers Inc & Others v National Potato Co-Operative Limited*, there are controversies as to whether it encompasses arbitration, given that it deals with litigation.<sup>99</sup> The South African Parliament has enacted the *International Arbitration Act* which came into force on 20 December 2017.<sup>100</sup> The Act is applicable to international commercial arbitration and is tailored after the *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law)* which was first adopted in 1985. One would have expected that the Act would have specific provisions on TPF, but it is silent on the matter, despite its several innovations.

Moreover, the *Contingency Fee Act* of South Africa permits a legal practitioner who anticipates reasonable prospects of a client's success in Court proceedings to enter into a contingency fee agreement with the client.<sup>101</sup> The Act makes provisions for two kinds of contingency fee arrangements: (i) the 'no win, no fee agreement', and (ii) one which pertains to a situation where the legal

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<sup>99</sup> (2004), *Court of Appeal of South Africa*.

<sup>100</sup> *International Arbitration Act* (Act No. 15 of 2017).

<sup>101</sup> Section 2(1), *The Contingency Fee Act* (Act No. 66 of 1997).

practitioner shall be entitled to a fee higher than the regular if the client is successful.<sup>102</sup> The latter fee is not unregulated or without limitation.

In cases of claims in monetary sums, the fee shall not exceed 25% of the total amount awarded in the event of success of the case or any amount obtained by the client from the proceedings minus cost imposed thereof. Nor can the fee be more than 100% of the normal fee of the legal practitioner.<sup>103</sup> This decision was followed in *Price Waterhouse Coopers Inc and Ors v IMF (Australia) Ltd and Anor*.<sup>104</sup> In 1997, with the enactment of the *Contingency Fees Act*, ‘no win, no fee’ agreements became legally enforceable. Accordingly, there are companies such as Litigation Funding SA and South African Litigation Funding Company Limited engaged in litigation funding as their primary business. Nevertheless, there is a need for certainty and clarity (as seen in the Singapore and Hong Kong examples) on the state of the law on this important issue in South Africa.

## E. Ghana

Ghana is a common law jurisdiction like Nigeria and, being members of the Economic Community of West African States (ECOWAS), the two countries have very close political and economic affinity. In 2010, Ghana repealed its arbitration law and enacted the *Alternative Dispute Resolution Act, 2010*.<sup>105</sup> This Act introduced several innovations in the practice and procedure of arbitration in Ghana.<sup>106</sup> The Act is divided into five parts dealing with subjects ranging from arbitration, mediation, and customary arbitration to alternative dispute resolution centres, finance, and administration.<sup>107</sup> Despite the Act being made at a time when TPF is topical and despite the several innovations the Act ushered in, it remains silent on the issue of TPF of arbitration in Ghana. Sections 22, 51 and 55, which deal with arbitration fees, make no mention of TPF. The

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<sup>102</sup> Section 2(1) (a) and (b), *The Contingency Fee Act* (Act No. 66 of 1997).

<sup>103</sup> Section 2 (2), *The Contingency Fee Act* (Act No. 66 of 1997).

<sup>104</sup> (2013), High Court of South Africa.

<sup>105</sup> Amarteifio M and Lartey IA, ‘Arbitration procedures and practice in Ghana: Overview’, PracticalLaw, accessed at [https://uk.practicallaw.thomsonreuters.com/6-610-7025?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/6-610-7025?transitionType=Default&contextData=(sc.Default)) on 16 July 2020; *Alternative Dispute Resolution Act* (2010).

<sup>106</sup> Onyema E, ‘The new Ghana ADR Act 2010: A critical overview’ 28(1) *Arbitration International*, 2012, 101-124.

<sup>107</sup> Kwadwo S, ‘Arbitration in Ghana – The Alternative Dispute Resolution Act 2010’, MayerBrown, October 2011, accessed at <https://www.mayerbrown.com/en/perspectives-events/publications/2011/10/arbitration-in-ghana-the-alternative-dispute-resol> on 16 July 2020.

irresistible conclusion is that Ghana, like Nigeria, is still bound by the common law shackles of champerty and maintenance.

Thus, it is argued that the Court in Ghana, in the absence of any Act or any other statute recognising TPF in arbitration, would not countenance such an agreement. Given the various socio-economic innovations in Ghana, with its ever-increasing volume of trans-border contractual and commercial transactions, coupled with the debilitating financial effects of Covid-19, it is imperative to review the Act with a view to mainstreaming TPF in Ghana.

## **F. France**

France is a civil law jurisdiction and has an established reputation for the practice of arbitration. The popularity of international commercial arbitration in Paris has been established for decades. Created after the World War I and located in France, the International Chamber of Commerce (ICC) established the International Chamber of Commerce Court of Arbitration (ICCCA) and has adjudicated over thousands of arbitral proceedings.<sup>108</sup> One can safely conclude that the very large arbitration community base in Paris is a testament to its continuing attractiveness. Thus, in 2016 alone, a total of 966 new cases administered by the ICC International Court of Arbitration were filed involving 3,099 parties from 137 countries, although all were not seated in Paris.

Theoretically, TPF is not prohibited in France as the French law does not disallow its practice. However, it is scarcely resorted to and remains fairly unregulated. This state of affairs is attributable to two main factors:<sup>109</sup> (i) the relatively low cost of litigation in France as compared to common law jurisdictions, and (ii) the fact that punitive damages, which are usually granted in deserving cases in common law jurisdictions, do not exist under French law. The French courts generally grant modest fees to the winning party compared to the actual cost that might be incurred in litigation. This will mean that the actual sum to be recovered may be disadvantageously low and will automatically dissuade

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<sup>108</sup> Vannin C, 'France: Third-party funding – The French perspective' Mondaq, 25 October 2017, accessed at <https://www.mondaq.com/france/arbitration-dispute-resolution/640364/third-party-funding-the-french-perspective> on 3 November 2021.

<sup>109</sup> Isabelle M, 'Paris launches Arbitration Week' GAR, 27 February 2017, accessed at <http://vannin.com/press/pdfs/27-2-17-Paris-Launches-Arbitration-Week.pdf> on 3 November 2021.

funders from engaging in funding since the potential money to be realised may be insignificant.<sup>110</sup>

While third party funding has not been implemented with as much enthusiasm as expected in litigation, with the adoption of the practice by jurisdictions which can be safely and correctly described as hubs of arbitration such as the United Kingdom, Singapore, Hong Kong, South Africa and even Australia, arbitration practitioners in France have recently reflected on the need for implementing TPF, especially by setting up a regulatory framework.

Thus, during the Paris Arbitration Week (PAW), on 21 February 2017, the Paris Bar Council adopted a Resolution on the practice of third-party funding in international arbitration. The resolution was presented to the public for the first time in April during the Paris Arbitration Week.<sup>111</sup> The Committee on TPF set up during the PAW submitted its report alongside the resolution. Thus, as far as a legal framework is concerned, the report and the resolution are the main instruments regulating TPF in France. The Working Committee observed that mainstreaming TPF into the French system is multi-beneficial as well as a positive advancement in the field of international commercial arbitration. Its introduction will assure greater access to justice to those who are incapable of bearing the financial obligation of their arbitral proceedings. It also benefits non-impecunious parties such as small or medium enterprises that may be faced with the need to initiate arbitration without compromising their ability to manage their cash flow regarding the legal profession in France in general. Also, the arbitral system stands to gain from the involvement of a wide network of skilled professionals interested in making international arbitration as sound and efficient as possible.

The resolution deals with ethical issues such as confidentiality and privilege between the legal practitioner, the client, and the funder, breach of which attracts both civil and criminal liability under French law. One way the legal practitioner and arbitrator can ensure that this ethical requirement is met is to avoid communicating with the funder without the knowledge of the client.

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<sup>110</sup> Roger J, Dowlings C, and FitzGerald AG, 'Emerging approaches to the regulation of third party funding' Norton Rose Fulbright, accessed at <https://www.nortonrosefulbright.com/en/knowledge/publications/4f5fb25c/emerging-approaches-to-the-regulation-of-third-party-funding> on 3 November 2021.

<sup>111</sup> Vannin C, 'France: Third-party funding – The French perspective', 25 October 2017, accessed at <https://www.mondaq.com/france/arbitration-dispute-resolution/640364/third-party-funding-the-french-perspective> on 3 November 2021.

The legal practitioner has a duty to encourage the client to disclose the subscription to funding to the tribunal at the earliest opportunity. This is to preempt issues of conflict of interest that may arise between the arbitrator or member of the tribunal and the funder which, if known from the outset, would have been resolved. In this regard, one may note the Credit Approved Receivables Purchase Agreement (CARPA), a unique feature of the Paris Bar. The Bar uses the CARPA to handle funds exchanged between lawyers and clients and other parties involved. The CARPA will be deployed to ensure transparency of the process of TPF and thus allay fears attached to such arrangements. The CARPA system is an ideal safety-net which Nigeria could adopt to safeguard the financial transparency of the process of TPF.

The twine doctrines of champerty and maintenance have remained a clog in the wheels of TPF in Nigeria despite the fact that other jurisdictions nowhere these doctrine applied, have reconsidered their position by reviewing and amending their law to permit TPF of arbitration. From the historical development of these doctrines, their application is not absolute, sacrosanct or untrammelled but restricted to litigation and may be considered justifiable. TPF is a goldmine that if carefully implemented, is capable of positively jump-starting and bringing Nigeria within the realm of pro-arbitration jurisdiction with its concomitant benefits. The restriction of TPF to litigation should not be erroneously extended to arbitration or other amicable dispute resolution mechanisms as this extension is argued to be reprehensible and legally unsustainable. Notwithstanding the foregoing, to avoid unnecessary controversies and possible ridiculing of arbitration, it is desirable and expedient for the law to expressly sanction TPF of arbitration in Nigeria as it is in jurisdictions like UK, US, Hong Kong, and Singapore.

The need to ensure disclosure in TPF is very germane. Otherwise, the integrity of the arbitral proceedings is jeopardised and the proceedings are brought into disrepute. Funders must abide by high ethical standards in the provision of funds and must be required to disclose any conflict of interest. The need for ensuring that funders abide by high ethical standards is to preserve the integrity of the process. The essence of funding is not necessarily to make profits, although profits will invariably be made, but rather to ensure that the parties' expressed desire to arbitrate is not frustrated by lack of funds. Where the funder fails to appreciate this fact, arbitral proceedings may be instrumentalised for the sake of making profits.

The funder must ensure that the party being funded discloses this fact to the arbitrator or tribunal at the earliest opportunity. The importance of such disclosure cannot be overemphasised, especially when the arbitrator (not in the sense of being a counsel) has a relationship with the funder, or the funder has a relationship with an adverse party, or a counsel or firm involved in the proceedings. Arbitral bodies and arbitration regulators must put in place safety nets to safeguard TPF and the general arbitration public. Thus, the *Arbitration Bill* should take into cognizance this critical issue and make adequate guidelines for their control and disclosure in TPF. The surest means of securing the integrity of TPF in arbitration in Nigeria is to ensure that an independent body is charged with the onerous duty of regulating its practice. Aside from this, clear guidelines and punitive sanctions coupled with periodic evaluation of funders' activities should be carried out. A reasonable minimum capital should be specified to ensure that funders do not go below the murky waters of financial instability. Any funder or stakeholder in the TPF sector that contravenes the regulatory framework should be made to face the law and not shielded for whatsoever reason as this would serve as a deterrent to others.

## VI. Recommendations

Based on the findings above, it is recommended that:

(i) To avoid unnecessary controversies and exposing arbitration to the same shackles that have tied down litigation in Nigeria, the Arbitration Bill pending before the House of Representatives, should be withdrawn and copious provisions on TPF should be made beyond merely mentioning TPF and rendering it as an appendage to the meaning of cost. At present, the mere 'mentioning' of TPF as opposed to dedicated substantive provisions in the Bill, raises an issue of whether it is recognised or a mere obiter provision in the Bill.

(ii) Furthermore, the examples of Hong Kong (where right to access to court or insolvency of a party are justifications for resort to TPF), UK (where access to justice and absence of funding on the sole desire to make profit are justifications for TPF) and Singapore (where champerty and maintenance have been statutorily abolished as a tort and the Minister of Law is vested with the power to make regulations on TPF practice) should be followed in redrafting the Bill.

(iii) It has become increasingly urgent for the Bill to pass into law after the aforementioned reviews have been captured to enable parties to resort to TPF without any fear of uncertainty on the state of the law.

(iv) Arbitration institutions in Nigeria should widely publicise the amended version of the Bill when it is passed into law. This is to enable prospective and unaware beneficiaries to take advantage of it to cushion themselves against the effects of Covid-19 on their capability to fund arbitration.

(v) To safeguard the integrity of arbitration and the practice of TPF in Nigeria, the Bill should make explicit and robust regulations on possible ethical issues surrounding TPF such as control and disclosure (conflict of interest) so that TPF is not used as an engine of fraud or undue self-enrichment by funders. In fact, the Bill should create an independent body to regulate TPF in Nigeria and not let it be regulated by the practitioners to avoid possible abuse.

(vi) Arbitration institutions in Nigeria like the International Chambers of Commerce Court of Arbitration and the Lagos Court of Arbitration should develop procedural and regulatory guidelines on TPF to insulate the practice from abuse.

(vii) To safeguard the transparency of the funding process as well as disclosure, the Bill should adopt the French CARPA system given its proven ability to ensure that the funding is transparent.

## **VII. Conclusion**

The global outbreak of the Covid-19 pandemic has led to several disputes because it has rendered many parties to commercial and contractual transactions incapable of fulfilling their obligations. Many of these disputes are subject to arbitration. Resorting to TPF is a possible solution; however, the present arbitration legal framework in Nigeria makes no provision for TPF. The concerns of champerty and maintenance have been raised as possible ethical roadblocks on the path of TPF despite its numerous benefits. It has been shown that these concerns are more imaginary than real. It is also needless to expand the scope of champerty and maintenance beyond litigation as this is the context in which it evolved from and to which it is exclusively applied. Disputes meant to be arbitrated ought not to suffer funding setbacks during and post Covid-19 if TPF, an assured leeway, is available.