

THIRD-PARTY FUNDING IN AFRICAN ARBITRATION: OPPORTUNITIES AND CHALLENGES

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Unlike on other continents, African arbitration claims are set for significant expansion. For the most optimistic, the growth is here already. This foreseeable trend is the result of a convergence of factors, including the establishment of the African Continental Free Trade Area (AFCFTA) with its many protocols generating cross-border claims, increased Foreign Direct Investment (FDI) leading to the rise in investment claims, and Africa's growing global influence in international commerce and services, driving the growth of commercial arbitration claims.

In addition to these factors expected to contribute to the future growth of arbitration claims in Africa, challenges related to the perceived weaknesses in implementing the rule of law in many African jurisdictions by the court system may further amplify this trajectory.

There is also a growing confidence among the users of the African arbitration centers to take into consideration when listing the factors.ⁱ

Businesses, investors, and other stakeholders will need funding to cover arbitration costs in this evolving landscape. Third-party financing (TPF) of arbitration could become a valuable contractual mechanism for this purpose, thus creating a market for funders and funded parties in Africa.

The implementation of TPF and the projected exponential increase of its use in Africa by the parties in cross-border and international arbitration (investment or commercial) (I) require the establishment of a well-defined regulatory framework that could lead to the birth of an emerging Market for TPF in arbitration (II). The expansion will bring forth both opportunities and challenges (III). However, to harvest the rewards of such an increase, some recommendations are necessary for overcoming the challenges its implementation faces (V).

I. Implementation of the Third-Party Financing

The TPFⁱⁱ is a contractual arrangement or mechanism between a party to arbitration (the client) and a third-party investor (funder) with no connection to the dispute, agreeing to cover the arbitration costs wholly or partially. The consideration in this TPF agreement for the funder is to capture a percentage of the final amount awarded to the funded party and/or a multiple of the amount invested by the third-party funder.

Unlike in the traditional funding of litigation or arbitration process where a party pays from its pocket or takes a loan to finance the proceeding, in the TPF arrangement, the costs, partly or wholly, are paid by the funder, which could be corporate or individual. This arrangement does not create creditor-debtor relations that generate a loan to be paid. The funder loses its investment in case the funded party does not prevail in any way.

Historically, the TPF was created for domestic litigation in Australia in the 1990s. It is increasingly becoming common in both commercial and investment arbitrations worldwide.

II. TPF Legal Framework in Africa

The legal framework dealing with Third-Party Financing (TPF) in Africa can be categorized as threefold approaches. First, there is an absence of dealing, as observed in countries falling under the umbrella of the Organization for the Harmonization of Business Law in Africa (OHADA). Second, TPF is addressed through case law precedents (in South Africa). Third, there is a regulatory framework governing TPF (in Nigeria).

OHADA Zone

In the year 1993, fourteen (14) African countries gathered in Port Louis (Mauritius) to sign the OHADA Treaty that aimed at harmonizing business law in Africaⁱⁱⁱ. To date, this organization has brought together seventeen (17) African countries. The entity known as the OHADA organization is an intergovernmental organization for legal integration^{iv}. Intense in its goals, the organization has adopted many Uniform Acts to deal with business relations in the OHADA Zone in diverse legal sectors. Among these Uniform Acts, there are two Acts that deal with Arbitration. The Arbitration Uniform Act (AUA)^v was adopted on March 11, 1999, and amended on September 10, 2017, and CCJA Rules of Arbitration^{vi} was adopted on March 11, 1999, and amended on November 23, 2017.

None of them either provides for or prohibits TPF in arbitration proceedings^{vii}. As of today, no statute or Act issued by the Ohada organization regulates the use of TPF in arbitration^{viii}.

Even though the AUA, the CCJA Rules of Arbitration, and the OHADA Treaty stay silent on the TPF, this contractual mechanism became part of the solution some international arbitration practitioners recommended to impoverished clients or financially sound clients for strategic reasons.

It is fair to ask on which grounds OHADA countries' practitioners and arbitration users utilize the TPF in arbitration. The rational answer is that of a contract based. The TPF has been defined as a contractual arrangement between a funder and a funded party^{ix}. When each party has a consideration in the said agreement, and the offer meets the demand, there is a valid contract. Therefore, the agreement becomes the law of the parties.

There is also a question about the funder's rights or power over the proceeding, the funded party, and his counsels. A sacrosanct principle to consider in civil law regarding attorney-client relations is the absolute respect of Attorney-client privilege (this is also true in common law). In the Civil law system, which is the system that governs all the OHADA's countries, the attorney holds the privilege, and the client cannot release him of such responsibility^x. This is part of a bundle of rules and principles that are part of "*secret professionnel*" of attorney in French civil law. The breach of "*secret professionnel*" by the custodian exposes him to prison time and fines.^{xi}

Considering all this, the funder has, in principle, no say in the arbitration proceeding, and the funded party holds the right to decide and is the only one who gives instruction to the lawyers on the case. However, considering the nature of the contract that creates the TPF, the parties may agree that the funder will have a say on some aspects, such as the choice of arbitrators, the expert, and even the lawyers^{xii} on the case. This will be acceptable as long as such conceded rights to the funder that do not impact the funded party's best interests. These incursions by the funder on some aspects of the case make sense because such funding is non-recourse, i.e., only if the claim succeeds and proceeds are recovered can the funder take its pre-agreed share.

South Africa and Case Laws

Based on its English legal system background, South Africa followed the common law doctrine of champerty and maintenance. On such a basis, the use of third-party funding in arbitration was not tolerated. However, the Supreme Court of Appeal in *Price Waterhouse Coopers Inc and Others v. National Potato Co-operative Ltd*, 2004, reversed course and evolved on the use of TPF in the arbitration^{xiii}. The Supreme Court of Appeal held that an agreement between parties in terms of which a third person to a lawsuit extends funds to a party to a litigation, on condition that if the claim succeeds and proceeds are recovered, the funder takes its pre-agreed share, is to be part of the proceeds of the suit, is not contrary to public policy in so far as the claim is *bona fide*^{xiv}.

South African courts' decisions went further in other cases to define the conditions that could justify the use of TPF, in *De Bruyn v. Steinhoff International Holdings N.V. and Others*^{xv}. In its opinion, the High Court of

South Africa provided a list of conditions to be followed to conclude such a contractual agreement. The checklist provided in the *De Bruyn* decision imposes that:

- the arrangement should be necessary to provide access to justice;
 - the arrangement should be fair and reasonable to protect the interests of the defendants;
 - the arrangement must not over-compensate the funders for assuming the risks of the litigation;
 - the arrangement must not interfere with the duty of the lawyers to act in the best interests of their clients;
- and
- the funded party must be the one who gives instructions and exercises control over the litigation, and the decisions must be in the funded party's best interests.

In another instance, the very court recognized the right of the funder to terminate the TPF agreement on the condition that the dispute has no potential for success.

On the base of those courts' decisions that are favorable to TPF arrangements, some South African Arbitration institutions integrated the TPF into their arbitration Rules. This is the case of The Arbitration Foundation of Southern Africa (AFSA). AFSA has recently published a revised set of international arbitration rules, which came into effect on 1 June 2021. Article 27 of AFSA Rules provides for TPF contractual arrangement^{xvi}.

Nigeria

Under the Arbitration and Conciliation Act of 2004 in the Federal Republic of Nigeria, the TPF was neither provided for nor prohibited in arbitration proceedings. However, even though the Nigerian courts have forbidden the use of third-party funding of domestic litigation under the common law torts of maintenance and champerty^{xvii}, the Rules of Professional Conduct of the Legal Practitioners Act 2007 has circumvented^{xviii} the prohibition by allowing legal practitioners to use contingency fees arrangement.

On 26 May 2023, the Arbitration and Mediation Act (the "**Act**") was signed into law, and consequently, TPF is now allowed in Nigeria-seated arbitrations and arbitration-related proceedings in Nigerian courts^{xix}. Nigeria is the first and only country in Africa with regulation on TPF in arbitration.

The Act provides that the funded party must disclose the name and address of the Funder to the other parties, the tribunal, and, where applicable, to the arbitral institution. The requirement of disclosure on behalf of the funded party allows proactive management of conflict-of-interest issues that may arise in the context.

The Act also provides for the right of a respondent to bring security for costs application^{xx} based on the disclosure of TPF. In such a case, the seating tribunal may allow the funded party or its counsel to produce to the tribunal an affidavit stating whether the Funder has agreed to cover an adverse costs order, if any.

To enable African users and practitioners of cross-border and international arbitration to fully harness the potential benefits of third-party financing (TPF), there is an imperative need for regulatory clarity or established case precedents. The advantages of the TPF contractual mechanism are beneficial, particularly in a continent where financial resources for businesses are often scarce.

III. Opportunities and Challenges

The creation of the African Continental Free Trade Area (AFCFTA) and its many protocols, mainly its recent protocol on investment^{xxi}, the Foreign Direct Investment (FDI) surge^{xxii}, and Africa's expanding role in global commerce and services are poised to fuel substantial growth in cross-border claims and international arbitration cases. As a result, claimants will increasingly explore the opportunities presented by Third-Party Financing (TPF) agreements.

Concurrently, users of African arbitration are growing. A study conducted by SOAS^{xxiii} University of London reveals, among other findings, that 88% of respondents would recommend African arbitral centers to arbitration users. Furthermore, the top five recommended arbitral seats in Africa were Cairo, Johannesburg, Kigali, Lagos, and Cape Town.

On the international stage, African countries, state-owned entities (SOEs), and businesses are actively engaged in high-stakes arbitration proceedings before institutions such as the ICC, ICSID, UNCITRAL, PCA, and CRCICA. This underscores Africa's increasing prominence in the global arbitration landscape. See ([The Federal Republic of Nigeria v. Process & Industrial Developments Limited \[2020\] EWHC 2379 \(Comm\)](#)), [Winshear v. Tanzania](#) Winshear Gold Corp. v. United Republic of Tanzania (ICSID Case No. ARB/20/25,..).

There are potential markets in Africa for funding cross-border and international arbitration through TPF. These potentials need to be converted into opportunities. The African TPF market is facing, for the moment, many challenges. The first one is the weakness of TPF regulation. Standardized TPF regulations and guidelines in Africa have a long way to go. Only the Republic of Nigeria, through its Arbitration Act of May 2023, and the Republic of South Africa, through case laws, have provided guidance for such contractual arrangements.

Notably, civil law countries in Africa, united under the OHADA organization with seventeen (17) countries, have yet to take a definitive stand and enact legislation or provide case laws regarding this matter.

The second challenge is the difficulties of enforcement of Arbitration Awards in Africa. It is fair to say that in litigation, in general, after winning a case, in most cases, begins another battle, that is, the enforcement of the Awards. Even though this is not exclusive to the African continent, enforcing an arbitration Award on the continent is sometimes an “epic battle.” Third, no known fund on the continent provides TPF in arbitration or litigation.

IV. Recommendations

To expand the adoption of the TPF mechanism in Africa, arbitration practitioners should play a pivotal role in conveying its advantages to policymakers. It is essential to persuade policymakers of the positive impact of such tools on enhancing access to justice, especially for financially disadvantaged claimants. In this regard, policymakers serve a dual function: they formulate legislation to support TPF and establish effective regulations for award enforcement.

Arbitration lawyers must also familiarize themselves with TPF and encourage their clients to consider it for arbitration proceedings. Furthermore, there is a pressing need to establish African funds dedicated to TPF, involving stakeholders who deeply understand the continent's financial and legal landscape.

V. Conclusion

African arbitration claims are experiencing growth, and this trend is expected to continue. Parallel to this growth, there arises a necessity for claimants to secure funding for arbitration proceedings, whether they are situated within Africa or beyond its borders. Both financially challenged and economically stable claimants in Africa could benefit from the Third-Party Funding (TPF) arrangement to cover arbitration expenses. This mechanism holds the potential to propel the field of arbitration in Africa forward. However, to fully harness the benefits of this mechanism within the African arbitration community, it is imperative to establish transparent and standardized TPF regulations. While a few countries have made progress in this regard, let 's others will soon follow suit.

African arbitration claims are on the rise, and this trend is expected to persist. Parallel to this growth, there arises an increasing need for African claimants to secure funding for arbitration proceedings, whether the arbitration is cross-border or international. Both financially constrained and economically stable claimants in Africa could find value in utilizing the Third-Party Funding (TPF) arrangement to cover the costs

associated with arbitration. This mechanism has the potential to propel the field of arbitration in Africa forward. However, to fully harness the advantages of this mechanism within the African arbitration community, it is crucial to establish transparent and standardized TPF regulations. While a few countries have made strides in this regard, it is hoped that others will soon follow suit.

Author's Bio

Dr. Theo BITHO is an international arbitrator and a bilingual attorney with a robust background in legal service projects spanning Civil, American, and African (OHADA) law jurisdictions. He earned his LLM from the University of Texas at Austin School of Law (US) and holds a Ph.D. in Law from the University Paris I Pantheon Sorbonne (France), where his doctoral thesis focused on "*The Protection of Trade Secrets in International Commercial Arbitration.*" In addition, he holds a Certificate in International Dispute Resolution from the University of Leiden, Netherlands, a Certificate in Negotiation from Yale University, US, and a Certificate in the Law of the Sea from Kiel University (Germany). His expertise predominantly lies in International Arbitration, in both the commercial and investment sectors. He has honed his skills through diverse experiences in Washington DC (US), Togo (Africa), and Paris (France). Over the years, he has been instrumental in assisting, advising, and representing numerous clients across various facets of arbitration procedures. His portfolio encompasses international arbitration cases with seats in both Europe and Africa, resulting in a wealth of invaluable insights and knowledge.

ⁱ See, e.g., the "2020 Arbitration in Africa Survey Report: Top African Arbitral Centers and Seats" by SOAS University of London, finding amongst other things that (1) 88% of respondents would recommend African arbitral centres to users of arbitration and (2) the top five recommended arbitral seats in Africa were Cairo, Johannesburg, Kigali, Lagos, and Cape Town (available at <https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf>).

ⁱⁱ See Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No 4 (April 2018) ('The ICCA Reports No 4'), 18; A/CN.9/WG.III/WP.157, para 5; Collin R Flake, 'Third Party Funding in Domestic Arbitration: Champerty or Social Utility?' (2015) 70(2) Dispute Resolution Journal 109, 109; Ondřej Svoboda and Jan Kunstýř, 'Third Party to Pick Up the Bill? Cost Issues relating to Third Party Funding in Investment Arbitration' (2016) 7 Czech Yearbook of Public and Private International Law 427, 428; Nadia Darwazeh and Adrien Leleu, 'Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding' (2016) 33(2) Journal of International Arbitration 125, 127.

ⁱⁱⁱ Ohada Treaty (available at: <https://www.ohada.org/traité-portant-revision-du-traité-relatif-a-lharmonisation-du-droit-des-affaires-en-afrique/>).

^{iv} Acte uniforme relatif au Droit de l'arbitrage – (available at : <https://www.ohada.org/en/history-of-ohada/>).

^v Ibid.

^{vi} Amended Rules of Commun Court of Justice and Arbitration (CCJA) (Un Règlement d'arbitrage révisé de la Cour Commune de Justice et d'Arbitrage (CCJA)), (available at <https://www.ohada.org/en/ccja-arbitration-rules/>).

^{vii} Whether within Africa or involving African parties in international or cross-border arbitration.

^{viii} It seems to be true as well for all domestic laws for these countries.

^{ix} A French court of appeal qualified this contract as a "sui generis" contract, CA Versailles 1-6-2006 n° 05/01038.

^x Dr. Theodore BITHO. « The Protection of Trade Secrets in International Commercial Arbitration » (La protection des secrets commerciaux dans l'arbitrage commercial international) », Edition Universitaires Européennes, 2021, n° 565, P.299.

^{xi} See, e.g., article 226-13 of the French Penal Code: « *The revelation of information of a secret nature by a person who is its custodian, whether by status, profession or by virtue of a function or temporary assignment, is punishable by one year of imprisonment and a fine of 15,000 euros.*»

^{xii} In case, after auditing the case, the funder concluded that there is a need to beef up the legal team.

^{xiii} (2004) ZASCA 64; (2004) 3 All SA 20 (SCA).

^{xiv} *Price Waterhouse Coopers Inc, para 46 and 51.*

^{xv} (2020) ZAGPJHC 145 (para 82).

^{xvi} Article 27, Arbitration Foundation of South Africa (AFSA) arbitration Rules.

^{xvii} See, e.g., "An end to historic rules preventing third-party funding?" (Available at: <https://www.nortonrosefulbright.com/en-au/knowledge/publications/bf0fd6fe/maintenance-and-champerty>).

^{xviii} *Kessington Egbor v. Ogbobo* (2015) LPELR-24902.

^{xix} Section 61 of the Arbitration and Mediation Act, 2023.

^{xx} Ibid.

^{xxi} The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area, (available at https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/#_ftn1).

^{xxii} <https://unctad.org/news/investment-flows-africa-dropped-45-billion2022#:~:text=FDI%20in%20the%20Common%20Market,%25%2C%20to%20%243.8%20billion>).

^{xxiii} SOAS Arbitration in Africa 2022 Survey Report.pdf (available at : <https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf>).