

**THIRD-PARTY FUNDING ARBITRATION IN NIGERIA:  
BALANCING ACCESS TO JUSTICE WITH ETHICAL  
CONSIDERATIONS**

**Dooshima Adaguusu-Ngutswen \***

**Abstract**

*Arbitration is a dispute resolution mechanism that has evolved over the years and is still evolving even in our legal eco-system. It is the process that involves the use of a neutral party or parties in resolving or settling disputes. It is termed an alternative to litigation basically for possessing the features of speed and confidentiality. However, arbitration in recent times, though an alternative is beginning to experience high costs of implementation. In situations where the dispute is of an international nature, parties are burdened with the onerous task of catering for the welfare of the arbitrators, lawyers, witnesses and even the venue where the arbitration is to be conducted. This very often takes a significant toll financially on the parties, hence the concept of Third-Party Funding in Nigerian Arbitration. This paper sought to examine the concept of third-party funding in arbitration as a response to accessing justice in line with other ethical considerations. The methodology deployed is doctrinal with the use of primary and secondary sources being the content of Statutes and Case law. Text books and Online sources were also relied upon for secondary sources. The study found that Third Party Funding in arbitration has been introduced as a way to address the high cost of arbitration but still poses some*

---

\* ACArb, Associate, Nigerian Institute of Chartered Arbitrators, PhD Candidate, University of Abuja. Email: dibpa2012@gmail.com

*challenges. It recommended that parties who intend to adopt this way of financing the resolution of dispute, must take adequate care and caution when preparing the terms of such agreements in Nigeria.*

**Keywords:** Arbitration, Third Party Funding, Arbitration and Mediation Act, 2023

## **1.0 Introduction**

Third-party funding though not very novel on the international scene was introduced in Nigeria recently by Arbitration and Mediation Act 2023. The incidences of third-party funding have initially been felt in the area of litigation but posed a lot of issues such as champerty, which was eventually frowned against by courts. The general increase in the cost of justice, including arbitration, together with the prohibition for lawyers to anticipate their clients' costs have also contributed to the spread of third-party funding. The concept has been adjudged by proponents as being a step in the right direction in addressing the issues of high cost of arbitration. Other benefits include, access to justice, profitability barrier amongst others.<sup>1</sup> It could be an avenue for the funder to assist the claimant in sponsoring his dispute in return for some stake/reward from the business. It is mostly applied in relation to investment agreements, disputes bordering on environmental pollution and specialised industries such as the oil and gas sector and international commercial disputes.

This paper addresses the definition of keys terms, the regulatory framework for third-party funding in arbitration, issues that may arise for third-party

---

<sup>1</sup> Caroline Dos Santos, 'Third-Party Funding in International Commercial Arbitration: a wolf in sheep's clothing?' in Matthias Scherer (ed), ASA Bulletin, (© Association Suisse de l'Arbitrage Kluwer Law International 2017, Volume 35 Issue 4) pp. 918 – 936 <https://www.bakermckenzie.com/-/media/files/people/caroline-dos-santos/third-party-funding-in-ia--a-wolf-in-sheeps-clothing-asa-vol-35-issue-4.pdf> accessed 14th November, 2024

funding in arbitration such as conflict of interest, confidentiality, security for costs etc. and finally how parties to the third-party funding agreement can create a balance in Nigeria.

## 2.0 Definitions of Terms

Arbitration has been defined by the Act<sup>2</sup> as a commercial arbitration whether or not administered by a Permanent Arbitral Institution. This definition leaves much to be desired as it fails to capture the major components of an arbitral process. It links the term arbitration to only commercial transactions thereby excluding other forms of dispute that could be subjected to arbitration. It has been viewed as a method of dispute resolution involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding.<sup>3</sup> It is a private system of adjudication which provides a final and binding decision in the form of an award enforceable in court.<sup>4</sup>

The Arbitration and Mediation Act, 2023 does not expressly define the term Third-Party Funding rather it defines a Third Party Funding Agreement to mean a contract between the Third-party Funder and a disputing party, an affiliate of that party or a law firm representing third party, in order to finance part or all 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>5</sup> Arising from this definition are the points that the agreement is a contract between the parties (which includes the funder, the funded party or law firm

---

<sup>2</sup> Arbitration and Mediation Act, s. 91

<sup>3</sup> *Mutual Life & Gen. ins. Ltd v. Itheme* (2014) 1 NWLR (Pt. 1389) 671 in Basil Momodu, *Encyclopaedia of Nigerian Case Law Principle and Authorities* (Benin: Momodu B. Publishing, 2018)

<sup>4</sup> Margaret Moses, *The Principles and Practice of International Arbitration* (Cambridge University Press, 2012) 1

<sup>5</sup> s 91

representing such party) and an agreement to finance all or part of the dispute in return for something. This definition has not expressly stated what the outcome may be in a situation where the decision does not go in favour of the funded party. That could be contained in the agreement when it is being prepared.

According to the International Council for Commercial Arbitration, Third-Party funding is the involvement of an entity with no prior interest in the legal dispute, providing financial assistance to one of the parties, usually the claimant, on a nonrecourse basis in the case of an unsuccessful claim.<sup>6</sup> It can be noted that in this definition, a no win, no fee situation is contemplated, that is if the decision of the arbitration does not go in favour of the funded party, the funder is also not entitled to be paid. In its general meaning, third-party funding involves an unrelated party providing financial support to a claimholder in order to support litigation or arbitration costs. As such, it is no new phenomenon and has traditionally taken several forms, ranging from insurance policies, to attorney financing agreements or loans with financial institutions. However, a new funding alternative emerged, where a third-party finance – fully or partly – the arbitration costs in exchange for a share of the gains. Usually, this share oscillates between 15% to 50% of the result. In this configuration, should the funded party prevail, the funder obtains a portion of the proceeds of the award or the settlement. Conversely, should the outcome be unfavorable, the funder loses its initial investment and cannot recover its funding from the funded party.<sup>7</sup>

---

<sup>6</sup>Nyamasi Irene, 'Third Party Funding in International Arbitration' <https://ncia.or.ke/wp-content/uploads/2021/03/Third-Party-Funding-In-International-Arbitration.pdf> accessed 12 November, 2024

<sup>7</sup> Caroline (n1) p 919

Third-party funding in arbitration could be arranged<sup>8</sup> in different ways depending on the intention of the funder. They include:

- a. Funding with direct economic interest
- b. Funding with indirect economic interest
- c. Pro bono funding
- d. Funding with interests not tied to the outcome
- e. By type of claims funded whether consumer or commercial funding
- f. By markets whether primary or secondary market funder

Generally, the traditional view on the concept of Third-Party Funding is unified, which is where “the funder agrees to pay part or all of the costs of litigation of a claimant in exchange for a percentage in the recovery should the claim succeed.”<sup>9</sup>

### 3.0 Overview of Regulations

At the international level, Third-party funding has received recognition in different countries. Several treaties involving the European Union (EU) have expressed the attention to Third-party Funding in Arbitration. Specifically, EU-Vietnam Investment Protection Agreement (hereinafter “EVIPA”),<sup>10</sup> Comprehensive Economic and Trade Agreement between Canada and the European Union<sup>11</sup> and European Union’s proposal for Investment Protection and Resolution of Investment Disputes under the Transatlantic Trade and Investment Partnership,<sup>12</sup> all included provisions

---

<sup>8</sup> Tran Hoang Tu Linh & Bui Trung Hieu, ‘Third-Party Funding in Commercial Arbitration In ASEAN: Dealing with Conflicts of Interest’ [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0010/4356667/BUI-Trung-Hieu-and-TRAN-Hoang-Tu-Linh.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0010/4356667/BUI-Trung-Hieu-and-TRAN-Hoang-Tu-Linh.pdf) accessed 17 November, 2024 P.5-9

<sup>9</sup> Ibid p.4

<sup>10</sup> See Article 3.28(i), Article 3.37(1, 2) of EVIPA

<sup>11</sup> See Article 8.1, Article 8.26 of Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.

<sup>12</sup> See Article 1(2), Article 8 of European Union’s proposal for Investment Protection and Resolution of Investment Disputes under the Transatlantic Trade and Investment Partnership.

on Third-party Funding. This has proven that Third-party Funding is receiving more attention than ever in the EU. These regulations, however, apply to international investment arbitration rather than commercial ones. Furthermore, regulations set out by these treaties are broad and only “light touch”.<sup>13</sup> The lack of unified regulations on Third-party Funding is a problem that needs to be addressed since commercial funders now search for clients across the world.

It was recently that Nigerian took steps towards regulating Third party Funding in the newly enacted Arbitration and Mediation Act. She still has a lot to pick up from the experiences of other countries like Singapore and Hong Kong who took steps to regulate Third-party Funding earlier.

In 2017, Singapore took steps to expressly and directly allow and regulate Third party Funding on several aspects. At first, these regulations only applied to international arbitration but since 28 June 2021, Third-party Funding is also allowed in domestic arbitration and court proceedings related to domestic arbitration.<sup>14</sup> The rules set out by said amendments covered several aspects of Third-party Funding, including qualifications of funder and obligations of legal practitioner.<sup>15</sup> With this movement, Singapore has shown their commitment to promote the growth of Third - party Funding. In 2017, Hong Kong officially legalized third-party funding when the Hong Kong Ordinance was passed. The scope of the Ordinance stops at arbitration and related proceedings where the place of arbitration is Hong Kong,<sup>16</sup> and thus, this does not extend to litigation.

---

<sup>13</sup> Tran Hoang (n8) P.9

<sup>14</sup> In 2021, the Civil Law (Third-Party Funding) Regulations 2021 was established, broadening the scope of permissible funding.

<sup>15</sup> Tran Hoang (n8) P.9

<sup>16</sup> See Article 98E of Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017

Another example on state regulations is the United States of America, where each state has a distinct view on the issue. Some states allow Third party Funding using statutory laws or case law; some treat Third party Funding as a loan, applying rate caps to contracts as a result; some do not regulate it, but Third-party Funding is most likely legal; and some prohibit it.<sup>17</sup>

Unlike national laws, arbitration centres around the world have been more accepting to the Third-party Funding phenomenon. More and more arbitration centres have updated their arbitration rules to include the event where a funder participates in the proceedings. For example, International Chamber of Commerce (ICC) Rules of Arbitration (hereinafter “ICC Rules”),<sup>18</sup> Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules (hereinafter “HKIAC Rules”),<sup>19</sup> and WIPO Arbitration Rules<sup>20</sup> updated their regulations to mandate disclosure by the funded party. This is a provision that is expressly stated the law regulating third-party funding in Arbitration in Nigeria.

The highlighted legal regime has gone a long way to show the development and acceptance of third-party funding in arbitration. In some jurisdictions, the courts have also adjudicated on some issues that may be raised by parties to arbitration.

#### **4.0 Ethical Considerations**

The introduction of third-party funding in Nigerian Arbitration has posed a lot of questions that are necessitating deliberations and this will be discussed under the following headings:

---

<sup>17</sup>Tran Hoang (n8) P. 10

<sup>18</sup> International Chamber of Commerce (ICC) Rules of Arbitration 2021

<sup>19</sup> See Rule 4.3(i), 5.1(g) and 44.1 of Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018

<sup>20</sup> See Rule 9(vii), and 11(b) of WIPO Arbitration Rules 2021.

1. **Confidentiality and Disclosure:** One of the major characteristics of arbitration is confidentiality. It is an inherent element of arbitration, unlike court proceedings that are by law supposed to be held in public with the processes and documents filed forming public record. They are usually attended to by the parties and their solicitors.<sup>21</sup> This bares the question of what is being disclosed to the third-party funder. Is it possible for a funder to be unaware of the details of the disputes and likely outcomes before committing his funds to a cause? Some commentators have however argued that the assumption by parties that the matter will enjoy confidentiality and privacy is a “false security”.<sup>22</sup>

In the case of *Michael Wilson & Partners Ltd v. EMMOTT*<sup>23</sup>, it was held that non-disclosure of arbitral proceedings in virtue of the obligation as to privacy and confidentiality of the proceedings thereof are implied by law. However, there are four principal circumstances where disclosure could be permissible: upon consent of parties; by order of court; where reasonably necessary for the protection of legitimate interests of an arbitrating party, and where interest of justice requires disclosure such as in the present case – where there was a danger of misleading a foreign court on position of a case.<sup>24</sup>

The concept of third-party funding in arbitration has been appraised for being a necessary option to promote the interest of justice. However, to fund an arbitration, funders have to label it as “suitable”. Funders are not charities and are aiming to gain a profit. Funding will only be granted when the case is likely to yield staggering results. Thus, the claim must respect a certain calibre and be commercially interesting as well as promising in

---

<sup>21</sup> Fabian Ajogwu, *Commercial Arbitration in Nigera: Law & Practice* (Thomas Reuters Legal Ltd:2011)

<sup>22</sup> Caroline Dos Santaos (n1)

<sup>23</sup> (2008) C.P. Rep., (Pt. 4) 469 @ 459-6 C.A

<sup>24</sup> ‘Iai Oshitokunbo Oshisanya, *An Almanac of Contemporary and Comparative Judicial Restatements* (Almanac Foundation, Lagos 2013)

terms of projected outcome.<sup>25</sup> The only way the funder can get all this information is when the funded party fully discloses, thereby risking confidentiality. Although the funder has an agreement with the funded party, this funder is not a party to the arbitration agreement and some of the terms therein are not be binding on him.

2. **Conflict of Interests:** As things stand in Nigeria, the Arbitration and Mediation Act<sup>26</sup> provides that the party being funded must give a written notice of the presence of a third-party funding agreement. This goes a long way to notify the parties and arbitrators of certain vital information that may constitute a conflict of interest.

In some jurisdictions, a funded party is under no obligation to disclose being funded, as no rule expressly requires so. <sup>27</sup> That said, the presence of a funder could lead an arbitrator to be in a conflict of interest which might put the efficiency of arbitration at risk. Numerous scenarios could be exposed, including but not limited to, the following examples; Arbitrators might also, somehow, be financially related to the funder, an arbitrator that would be a shareholder in a publicly traded third-party funding corporation could risk being in a conflict of interest. In the same vein, an arbitrator that would be a major shareholder or a director of a funding corporation would probably also be in a conflict of interest.<sup>28</sup>

A conflict of interest occurs when an entity or individual becomes unreliable because of a clash between personal (or self-serving) interests and professional duties or responsibilities”. Conflicts of interest are the issues closely associated with third-party funding since a new entity is

---

<sup>25</sup> Caroline Dos Santaos (n1) p. 922

<sup>26</sup> s 62

<sup>27</sup> Caroline Dos Santos (n1) p.2-3

<sup>28</sup> Ibid

introduced to the procedure.<sup>29</sup> It has been maintained that where the issue of conflicting interest is discovered, it goes to the root of the arbitration. Thus, if an arbitrator fails to ensure their own impartiality and independence, the arbitral award might be unenforceable. Similarly, an arbitrator conflict of interest arising without being acknowledged may still lead to the challenge or removal of an arbitrator or annulment of an award due to lack of independence.<sup>30</sup>

On the other hand, there could be conflict of interest that is occasioned by the parties, depending on how the agreements between parties are structured. Such scenarios include:<sup>31</sup>

- a) In many cases, the claimant retains the lawyer but the funder pays the lawyer's fees; and
- b) Funding agreements may provide that the funder can give input on decisions, even where the lawyer is retained by the claimant.
- c) So, for example, where the claimant wishes to settle but the funder does not, the lawyer may feel pressure to accede to the funder so as to gain repeat business.

Unlike arbitrator conflicts of interest, however, party conflicts do not necessarily lead to the challenge of the arbitral award.

3. **Champerty and Maintenance:** In feudal England, the notorious phenomenon of champerty became widespread, i.e. the contract that, in case of a positive result of the financed cause, attributed to the financier the property of a portion of the disputed land and to the financed body a right substantially similar to the emphyteusis on the same portion.<sup>32</sup> This phenomenon became more extensive as the feudal lords,

---

<sup>29</sup>Segal, Troy, *Conflict of Interest Explained: Types and Examples*, INVESTOPEDIA <https://www.investopedia.com/terms/c/conflict-of-interest.asp>.

<sup>30</sup> Tran Hoang (n8) P. 16

<sup>31</sup> Tran Hoang (n8) P.18

<sup>32</sup> <https://delex.legal/the-ancient-origins-of-third-party-litigation-funding/> accessed 14<sup>th</sup> November, 2024

progressively deprived of military power and taxation, resorted to champerty in order to increase their possession. Maintenance is the support (typically financial) of litigation by a non-party who does not have a 'legitimate interest' in that litigation. Champerty is an aggravated form of maintenance, in which litigation is funded in exchange for a share of the proceeds of that litigation. Third party funding may be considered champertous in nature. Maintenance and champerty has been considered a crime or a tort in common law jurisdictions.<sup>33</sup>

As a common law jurisdiction, Nigeria inherited these doctrines, but the Courts have continuously frowned at arrangements around maintenance and champerty given that it might supposedly lead to suppression of evidence, with the courts holding that champerty is unlawful.<sup>34</sup> However, section 61 of the Arbitration and Mediation Act has abolished Champerty and Maintenance by stating that both concepts do not apply in relation to third party funding in Nigeria. This means that persons providing financial support for arbitration cases are allowed to do so without facing legal consequences. The position is still a subject of debate in other jurisdictions especially countries that apply both common and civil law, as well as those which have common law history.

4. **Security for costs:** Security for costs is a special form of interim relief. Thus, where a claimant considers launching arbitral proceedings, this is— or should be— one of the factors to be taken into account that the respondent may well ask if there is any way in which it can be assured that if it wins and is awarded costs, there will at least be a fund out of which the costs award will be paid.<sup>35</sup> A more difficult issue arises where a claimant has obtained third-party funding— that is, where its legal costs are paid in

---

<sup>33</sup> Tran Hoang (n8) p.12

<sup>34</sup> <https://www.alp.company/sites/default/files/ARBITRATION%20-THIRD%20PARTY%20FUNDING%20%20..pdf> accessed 14<sup>th</sup> November, 2024

<sup>35</sup> Redfern & Hunter, *Law on International Commercial Arbitration* (Oxford: 2015) p. 324

whole or part by a professional funder, who will usually be repaid only in the event of success. Respondent states have argued that the mere existence of third-party funding should require the posting of security, since, in the event of a failed claim, there will be no ability to recuperate costs from the funder, which is not a party to the arbitration.<sup>36</sup> In *Guaracachi and Rurelec v Bolivia*, the tribunal was circumspect about this argument, noting:

... As a factual matter, the Respondent has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third-party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not.

In *RSM Production Corporation v Saint Lucia*,<sup>37</sup> the claimant's history of consistently failing to pay advances or costs orders in other ICSID cases caused the tribunal to reach a decision in favour of granting security.

## **5.0 Creating the Balance**

1. The place of full disclosure cannot be overemphasized. Parties must seek at all times to carry on the business of arbitration with diligence and transparency. Although the private nature of arbitration contradicts disclosure obligation, it is only safer for parties to act in good faith at all times. It is in this light that the AMA provides that the disputing party benefiting from a third-party funding agreement must give written notice of the name and address of the funder to the other party/parties, the tribunal, and the arbitral institution (where applicable).<sup>38</sup>
2. With regards security for cost, it has been suggested that the presence of the third-party funding agreement implies the inability of the funded party to cater for cost when it arises. This cannot be entirely true and a reason for a tribunal to grant such upon request.

---

<sup>36</sup> Ibid p.325

<sup>37</sup> ICSID Case No Arb/12/10

<sup>38</sup>Section 62

As stated earlier on this paper, there are various reasons why a funder may wish to fund a party's dispute and why a party may wish for his dispute to be funded. The tribunal must be guided by the appropriate rules in arriving at its decisions as regards security for cost.

3. In other to avoid over saturation and miscreants in the market of third-party funding, licensing requirements for third-party funders should be introduced to ensure that they operate ethically. This would cater for issues surrounding reasonable funding terms, risk-sharing mechanisms and funding caps. This would go a long way in directing persons interested in being funding to the right source.

## **6.0 Conclusion and Recommendations**

The subject of third-party funding in Nigerian Arbitration is one that is gaining momentum by the day. For a country like Nigeria, there are a lot of factors that come to play in the commercial scenes. Business men will continue to seek out ways to make profit, while disputants will strive to see that justice is truly done and money should not a hindrance. While there are suspicions that third-party funding will gradually sneak in the elements of bribery and corruption into the arbitration process, all hands must be on deck to prevent such occurrences. This will enable the positive growth of the concept rather than stifle it at an early stage. There could be a further development of special rules that will cater for the concept of third-party funding in arbitration and serve as a guide to funders, the funded party, arbitrators and disputing parties. By addressing these concerns and implementing effective regulations, third-part funding in arbitration can increase access to justice while minimizing negative impacts.