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Third-Party Funding as a Panacea for an Amicable Adjudication of International Arbitration Disputes in Nigeria under the Arbitration and Mediation Act 2023

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This informative piece delves into the intriguing and crucial history of third-party funding in Nigeria and its application in the Arbitration and Mediation Act of 2023.

The article analyses the impact of this funding on cross-border transactions while addressing concerns about mandatory disclosure. The absence of remedies or sanctions for non-disclosure is also a matter of concern that warrants thoughtful examination.

The article looks closer at the role of courts, tribunals, and arbitral institutions in addressing gaps in the Act. Ultimately, it presents a well-considered set of recommendations for moving forward.

Overall, this piece provides a comprehensive and insightful look into the intricate world of third-party funding and its significance within the Nigerian legal system.

Key Words : Third-Party Funding, Arbitration and Mediation Act 2023, Cross-border transaction, Mandatory disclosure, Non-disclosure

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Ⅰ. History of Third-Party Funding in Nigeria

1. Introduction:

Historically, third parties with no legitimate interest have been prohibited from funding litigation between disputants under the common law doctrines of champerty and maintenance.

This historical position arose as a result of the Latin maxim, *interest reipublicase ut sit finis litium*, which means it is in the interest of the State that there is an end to litigation. It was believed that permitting litigation funders would result in an upsurge in litigation and unmeritorious claims.

In Nigeria, before the emergence of the Arbitration and Mediation Act 2023, Third-Party Funding (TPF) was prohibited due to the application of the common law doctrines of champerty and maintenance.

Champerty refers to an agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant's claim as consideration for receiving part of any judgment proceeds.[1)]

Maintenance refers to meddling in someone else's litigation by assisting in prosecuting or defending a lawsuit when one has no bona fide interest.[2)]

This is noted in the number of cases where relationships that involve financing a party who lacks sufficient funds in exchange for a share in the proceeds of the suit have been declared champertous and contrary to public policy.

In the case of *Oloko v Ube*, [3)]the Court of Appeal he held that a solicitor's agreement to provide funds for litigation in consideration for a share of the proceeds being the judgment sum is champertous. The deal was declared unenforceable. Thus, the solicitor could not recover his costs or out-of-pocket expenses from his client.

The decision in Oloko was affirmed in the case of *Kessington Egbor and Anor. v. Ogbebor*,[4)] where the court held that an action is champertous when a person offers

1) Black's Law Dictionary, 7th edn. (West Group Press, 1999)
2) Ibid at 965
3) [2001] 1 NWLR (pt 729) 161
4) [2015] LPELR 24902 (CA), 14, paras A-D.

to maintain and bear the cost of action for another to share the proceeds of the suit.

Although the preceding decisions on Third-Party Funding were made in litigation proceedings, there is no doubt that such an arrangement (TPF) would have been prohibited in Nigeria-seated arbitration proceedings.

2. The Rationale for Third-Party Funding

One of the main arguments against Third-Party Funding is that it may increase meritless lawsuits. However, it is worth noting that Third-Party Funding agreements are typically structured so that the funder bears some or all of the costs if the claim is unsuccessful. This fact has resulted in funders carefully assessing a claim's validity and likelihood of success before providing funding, which helps mitigate the risk of frivolous lawsuits.

Furthermore, the costs associated with arbitration can be significant, with arbitrator fees, secretary fees, expert fees, arbitral institution fees, and discovery fees all adding up. This financial burden can be overwhelming for claimants seeking to commence proceedings, historically preventing many deserving cases from accessing justice.[5)]

To address this issue, the Arbitration and Mediation Act 2023 was enacted. This legislation recognizes that jurisdictions prohibiting Third-Party Funding are unsuitable for client arbitration. Instead, the act seeks greater access to justice by permitting Third-Party Funding under certain conditions; the conditions are:

i. Ensuring the impartiality and independence of arbitrators when third-party funding is involved.

ii. Parties that receive funding may be required to provide security for costs.

iii. When dealing with third-party funders, it is essential to allocate costs properly. This process thoroughly evaluates the expenses incurred and the appropriate parties responsible for each fee. Accurate cost allocation is crucial for maintaining transparency and avoiding potential conflicts of interest. It is imperative to establish clear guidelines and procedures for cost allocation to ensure fairness and accuracy in the distribution of expenses and

5) International Council for Commercial Arbitration, "Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration." (April 2018)

iv. Maintaining confidentiality in international legal processes and dealing with third-party funding, etc.

It is also worth noting that at the international level, the historical doctrines of champerty and maintenance have been phased out for many years. Recently, there has been a rise in the number of third-party funders, funded cases, law firms working with funders, and reported cases involving funding issues in international arbitration. This trend highlights the growing acceptance of Third-Party Funding as a legitimate and effective means of accessing justice in today's legal landscape.

Ⅱ. Meaning and Scope of Third-Party Funding under the Arbitration and Mediation Act, 2023

1. Definition

Section 91(1) of the Arbitration and Mediation Act, 2023 defines a Third-Party funding Agreement as:

> "A contract between the Third-Party Funder and a disputing party, an affiliate of that party, or a law firm representing that party, to finance part or all of the cost of proceedings, either individually or as part of a selected range of cases, and the financing is provided either through a donation or a grantor in return for reimbursement dependent on the outcome of the dispute or in return for a premium payment."[6]

The section also defines a Third-Party Funder as:

> 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 to finance part or all of the cost of proceedings, either individually or as part of a selected range of cases and the financing is provided either through a donation or a grantor in return for reimbursement dependent on the outcome of the dispute or in return for a premium payment."[7]

6) Arbitration and Mediation Act (AMA) 2023, s 91(1)
7) Ibid

The above definition provided by the Arbitration and Mediation Act, 2023 aligns with the working definition facilitated by the International Council for Commercial Arbitration (ICCA) in its April 2018 report, which seeks to encompass existing funding models and the likelihood of new models.

2. Scope of Application

The definitions in the Arbitration and Mediation Act 2023 are broad to capture the full range of disputants, funders, financial assistance and reimbursement mode. This broad spectrum provides a baseline from which narrower definitions can be tailored for particular issues in each case.

The definition of funder covers any financier not a party to the case. In contrast, the definition of a disputing party may encompass proper, desirable, necessary and nominal parties to the suit and their legal representatives.

The definition of financial assistance is the broadest as it is not only limited to individually funded cases, in which a funder's support is explicitly directed at individual cases, but also to the funding of a portfolio of claims held by a business or in financing provided to a law firm and collateralized by funds anticipated to be received from cases represented by that firm.[8)]

The definition of reimbursement is also clear. Third-Party Funding is typically offered on a non-recourse basis which means that a funder may seek repayment only from the proceeds of the dispute.

The reimbursement process for the AMA 2023 involves two options for funders: a dispute resolution or a premium payout. These methods are widely recognized internationally, and there is no indication that a TPF contract would necessitate services in lieu of or in addition to monetary compensation.

8) ICCA Report (n 5) at 51

Ⅲ. The Impact of the Arbitration and Mediation Act 2023 on Cross-border Transactions

Regarding business contracts, it's essential to prioritize maintaining positive relationships between parties. However, in cross-border transactions, it's common to include a dispute resolution clause in the contract, with arbitration being the preferred method for resolving disputes.

Choosing the proper jurisdiction for arbitration is crucial, as solid legislation is needed to enforce arbitral awards. The Arbitration and Mediation Act of 2023 plays a significant role. The New York Convention of 1958 also ensures that arbitral awards are enforced in signatory states. Nigerian courts have upheld arbitral awards obtained in other jurisdictions, demonstrating the Convention's effectiveness.

The Arbitration and Mediation Act 2023 establishes a framework for the fair and efficient resolution of commercial disputes, including recognizing and enforcing foreign arbitral awards under the New York Convention. Section 57 of the Act recognizes the binding nature of arbitral awards and outlines the process for their enforcement, while Section 58 provides scenarios where recognition and enforcement may be refused.

In addition, Section 60 of the Act allows for applying the New York Convention in recognizing and enforcing arbitral awards in Nigeria, subject to specific conditions.[9] These provisions give parties the confidence to engage in cross-border commercial transactions with Nigeria as the seat of arbitration.

The Act also offers a flexible selection process for arbitrators. Parties can choose an arbitrator with the expertise and experience to handle their dispute effectively. Ultimately, this feature can contribute to a fair and satisfactory resolution of any potential conflicts that may arise in the future.

When parties engage in contractual agreements, their primary objective is to establish a robust commercial relationship. However, in the case of cross-border transactions, it is essential to include a dispute resolution clause. Arbitration is the most preferred mode of resolving such disputes. Selecting jurisdiction as an arbitral seat involves several factors, including robust legislation that facilitates the enforcement of arbitral

9) Ibid (n 6) s 60

awards. To this end, the Nigerian government introduced the Arbitration and Mediation Act of 2023, which provides a unified framework for the fair and efficient settlement of commercial disputes. The Act also recognizes the binding nature of arbitral awards and provides a procedure for their enforcement. This legislation has instilled confidence in people who engage in cross-border commercial transactions, with Nigeria as the seat of arbitration.

Moreover, specific scenarios exist where recognition and enforcement of the arbitral award may be refused. The Act provides for applying the New York Convention on recognizing and enforcing foreign arbitral awards in Nigeria, subject to specific conditions. These provisions in the Arbitration and Mediation Act of 2023 have made Nigeria an attractive destination for cross-border commercial transactions. The Act also allows parties to select arbitrators to resolve disputes, further strengthening the country's credibility as an arbitration-friendly jurisdiction. In conclusion, the Arbitration and Mediation Act of 2023 has significantly contributed to the growth of Nigeria's economy by creating a favourable environment for cross-border commercial transactions.

Ⅳ. The Issue of Mandatory Disclosure as Provided by the Arbitration and Mediation Act, 2023

Section 62(1) and (2) of the Arbitration and Mediation Act provides as follows:

(1) Where a Third-Party Funding agreement is made, the party benefitting from it shall give written notice to the other party or parties, the arbitral tribunal and, where applicable, the arbitral institution of the name and address of the Third-party Funder.

(2) The written notice shall be made for a funding agreement made ---

a) On or before the commencement of the arbitration, at the beginning of the arbitration, or

b) After the commencement of the arbitration

Without delay, as soon as the funding agreement is made.[10)]

These provisions show that the onus to disclose is only on the part of the

benefitting party. However, the 2018 International Council for Commercial Arbitration Report states that Arbitrators and arbitral institutions have the authority to expressly request that the parties and their representatives disclose whether they are receiving support from a third-party funder and, if so, the funder's identity.[11)]

The ICCA Report justifies that the need for disclosure is to determine if there is any conflict of interest between an arbitrator and a third-party funder; if yes, the arbitrators and the arbitral institutions have to assess the need to make appropriate disclosures or take other appropriate actions that may be required under applicable laws, rules, or guidelines.[12)]

Disclosure is also necessary to address the instances of double hatting which is the practice where one individual acts in two different roles either simultaneously or within a short time period.

Double hatting in Third-Party Funding could arise where the same funder funds one case where the lawyer is acting as counsel and funds another where that same lawyer is an arbitrator.[13)] Lack of disclosure could result in pertinent questions being asked regarding the impartiality and independence of an arbitrator especially where an arbitrator is regularly appointed or seeks appointments from claimants in different arbitrations who are funded by the same funder.[14)]

A delayed revelation of a connection between a funder and an arbitrator could affect the enforceability of an award and this has triggered international debates on disclosure requirements in arbitration proceedings. Such debates have generally been concluded on the premise that disclosure should be made up-front in order to ensure the tribunal's impartiality and independence as well as to reduce the number of frivolous annulment proceedings and challenges to enforcement of arbitral awards.[15)]

This was the decision in the case of *Abengoa v Adriano Ommeto Agricola et al*,[16)]

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10) Ibid s 62(1), (2)

11) ICCA Report (n 5) at 81

12) Ibid

13) Abayomi Okubote, Arbitration Finance in the Aftermath of a Pandemic: Third-Party Funding as the Magic Bullet (Africa Arbitration Blog, 29/03/2021) https://africaarbitration.org/2021/03/29/arbitration-finance-in-the-aftermath-of-a-pandemic-third-party-funding-as-the-magic-bullet/accessed 25th August 2023

14) Ibid

15) Ibid

16) ASA Bioenergy Holding A.G. and others v. Mr. Adriano Ometto and Adriano Ometto Agrícola (2011) ICC Case No. 16176/JRF/CA

where the Brazilian Superior Court of Justice denied recognition of an arbitral award issued in the United States on the ground that the law firm of the chairman of the arbitral tribunal had received US$6 Million in fees for work in an unrelated matter in connection with another company of the Abengoa group, which the chairman failed to disclose to the parties during the arbitration. Consequently, it was held that the chairman did not have the proper independence and impartiality to act as arbitrator in a proceeding involving Abengoa and thus recognition of the arbitral award was denied.

Unfortunately, the Arbitration and Mediation Act 2023 did not expand the onus of ensuring disclosure and was silent on the likelihood of conflicts of interest between arbitrators and third-party funders.

Ⅴ. The Silence of the Act on Remedies or Sanctions in Cases of Non-disclosure

The Arbitration and Mediation Act was noted in the previous chapter to mandate the disclosure of a third-party funding agreement as soon as such an agreement is made.

However, the Act is silent on the sanctions and remedies available in cases of non-compliance. In the previous chapter, it was noted that the disclosure requirement is necessary to prevent instances of conflict of interest, which is an issue that can adversely affect the integrity of proceedings.

Hence, legislators should have made use of the opportunity to codify deterrent provisions in the Act. Now, wily disputants and arbitrators may exercise the option of taking advantage of this oversight which is not ideal since the Nigerian jurisdiction is new to allowing Third-Party Funding.

The global trend in the regulation of third-party funding increasingly requires disclosing the existence and identity of the entity providing financing.[17] Opposition to disclosure arises out of strategic consequences such as alleged frivolous challenges to arbitrators and unfounded requests for security for costs.[18]

17) ICCA Report (n 5) at 83
18) Ibid at 86

Irrespective of this aspect of global opposition to disclosure, the general consensus is that disclosure is necessary to avoid instances of conflict of interests as noted in the previous chapter.

Thus, the Arbitration and Mediation Act 2023 has created a lacuna by its silence on an important issue being the remedies and sanctions available for non-disclosure.

Ⅵ. The Role and Impact of the Courts/Tribunals/Arbitral Institutions in Determining the Gaps in the Act.

The enactment of the Arbitration and Mediation Act 2023, into law as well as the recognition of third-party funding has made Nigeria an attractive seat for resolving arbitration disputes.

It is the duty of a lawyer to draft an arbitration agreement in such a way that it maximizes his/her client's advantage and this extends to choosing the seat of arbitration in the event of conflict between parties.

Since the application of third-party funding is new to Nigeria, there is a need to curtail instances may where Nigeria is picked as the seat of arbitration for the sole purpose of exploiting the loopholes present in the AMA 2023, especially concerning the disclosure requirements and the penalties for non-disclosure. In this regard, the courts, tribunals and arbitration institutions have a crucial role to play.

Legal proceedings will be the most effective and easily accessible recourse to tackle such gaps effectively, and it becomes the duty of the courts, tribunals, and arbitration institutions to ensure that all the concerns the Act was designed to address are adequately addressed. Their decisions will provide the needed judicial and institutional precedent that will create and ensure certainty in this area of law.

This way, the proper implementation of the Act can be guaranteed, and its intended benefits can be instituted.

Another option will be for the various arbitration institutions in Nigeria to have a treatise that addresses the Third-Party Funding and provides solutions on how to

bridge the gaps were created by the law. This treatise can serve as a guide to disputants, courts and tribunals as the arbitration institutions are likely to proffer useful insights to the issues of disclosure, particularly the scale of proportion of remedies and sanctions.

Ⅶ. Recommendations and Conclusion

This article applauds the abolition of the doctrine of the torts of maintenance and champerty as contained in section 61 of the Arbitration and Mediation Act, 2023, as well as the recognition of Third-Party Funding in arbitration.

To make Third-Party Funding a viable practice in the Nigerian jurisdiction, the following recommendations are made:

1. Law firms and lawyers should be sensitized on the appropriate procedures and measures to obtain funding. This is because lawyers enjoy a fiduciary relationship with their clients as they will be the ones trusted to draft funding agreements. Furthermore, their advice on this issue will be held in high esteem by their clients; hence, law firms and lawyers need to be appropriately educated on the intricacies of third-party funding.
2. Arbitration institutions should provide useful materials such as treatises, papers or policy documents on third-party funding and the Arbitration and Mediation Act, 2023 in order to educate and give insight to disputants, Courts and tribunals.

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