A New Era for Arbitration in Nigeria: The Arbitration and Mediation Act 2023

By:

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July 24, 2023

Introduction

Established national laws and a reliable judicial system are two features considered crucial by investors when seeking potential investment destinations. Investors often prioritize these factors to guarantee a profitable and risk-free investment. This also holds true for arbitration, as the 2015 Queen Mary International Arbitration Survey Respondents confirmed that the established formal legal infrastructure: the neutrality and impartiality of the legal system, the national arbitration law, and its track record for enforcing agreements to arbitrate and arbitral awards; plays a vital role in the selection of an arbitral seat. For more than thirty years, the Arbitration and Conciliation Act, 1988 Chapter A.18, Laws of the Federation of Nigeria, 2004 (ACA) was Nigeria's primary legislation governing arbitration. However, new legislation was required to address the complexities and evolving needs of arbitration in the

country and align Nigeria's arbitration practices with international standards. On 26th May 2023, the Arbitration and Mediation Act 2023 (AMA) was signed into law by the President of Nigeria, signifying a significant milestone for arbitration and mediation proceedings in Nigeria.

This blog post reviews the AMA by focusing on the innovative developments and their importance to the attractiveness of arbitration in Nigeria. Some praiseworthy innovations in the AMA include new provisions on (a) mediation and enforcement of international settlement agreements; (b) recognition and enforcement of interim measures issued by arbitral tribunals, (c) award review tribunal, (d) consolidation of arbitrations and joinder of parties, and (e) third-party funding. Other provisions relate to emergency arbitration, the limitation period for enforcement of an award, and the definition of an arbitration agreement.

Providing a statutory framework for mediation and the enforcement of settlement agreements in Nigeria

The AMA completely removes conciliation from the Act. It makes provision for a statutory framework for domestic and international mediation, domestic civil mediation, and enforcement of international settlement agreements arising from mediation proceedings. Also, the Act domesticates the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation). The implication of this is that the provisions of the Singapore Convention on Mediation are now applicable in Nigeria. In particular, they are applicable to international settlement agreements made in a foreign country, provided (a) the state is a party to the Singapore Convention; and (b) the dispute arises out of a legal relationship, whether contractual or not, considered commercial under the Nigerian laws. [1]

These provisions aim to promote mediation as an alternative and effective method of resolving disputes in Nigeria. While mediation has been incorporated into the Rules of Courts in Most States in Nigeria by providing binding procedural mechanisms, it is expected the Act will bring more certainty and stability to the practice of mediation and provide a statutory basis for the enforcement of international settlement agreements arising from mediation proceedings.

Elaborate provisions on Interim Measures of Protection

In the course of the resolution of commercial disputes, whether by the court or an arbitral tribunal, it is always necessary to ensure that the property in dispute is not allowed to waste or be depleted to the detriment of either party. The need for an interim order of protection may arise because it may be too late if the tribunal has to wait until an award is made to resolve the disposition of the property. One of the contentious issues under the old Act was whether the court could grant interim measures of protection in arbitration. This arose because there was no express provision that empowers the court with such powers. In this regard, Section 34 of the old Act, which provides that a "court shall not intervene in any matter governed by this Act except where so provided in this Act has been interpreted differently. Two strikingly divergent views emerged. On the one hand is the view that section 34 circumscribed the jurisdiction of courts to grant interim measures of protection in arbitration. Accordingly, some courts have interpreted this section to exclude their powers to grant interim measures.[2] On the other hand, relying on section 6(6) of the 1999 Constitution of the Federal Republic of Nigeria, Nigerian courts have exercised? the judicial and inherent powers to grant injunctions in deserving cases.[3] The later view was given a judicial affirmation by the Supreme Court in *Owners of the MV Lupex v. Nigerian Overseas Chartering & Shipping Ltd[4]*, where the apex Court held that a party to an arbitral proceeding would be permitted to institute an action for injunctive reliefs in Court during the pendency of the arbitral proceedings if there is a "strong, compelling and justifiable reason" for such an action.

These tensions have now been put to rest with the express provision in the AMA granting the court powers to issue interim measures of protection in aid of domestic and international arbitration proceedings. The court is required to exercise this power within 15 days of receiving an application and in accordance with the Arbitration Proceedings Rules 2022 in the Third Schedule to the Act.

The Act also introduces new provisions relating to the grant of a "Preliminary Order" on an *ex parte* basis. By Section 22 of the Act, a party applying for an interim measure of protection may, without notice to his adversary, seek a Preliminary Order to preserve the purpose of the interim measure that is being

sought. Where granted, the Preliminary Order will subsist for only 20 days as the Act envisages that during this period, the arbitral tribunal would consider the application for interim measures on an *inter partes* basis.

Relatedly, the Act reinforces the arbitral tribunal's power to grant interim measures of protection and provides enforcement mechanisms for such measures. The grant of the application for enforcement is subject to the grounds set out in Section 29 of the Act; however, the Court is not permitted to review the substance of the interim measure when making its determination. Upon the recognition by the court, the order of interim measures is enforceable irrespective of the country where it is issued.[6]

Provisions relating to Award Review Tribunal

Another innovation introduced by the AMA is the establishment of the 'Award Review Tribunal.'[7] Under the old Act, recourse against a final award may only be sought in court, thereby causing unnecessary delay to the enforcement process and undermining the objective of arbitration as an efficient and cost-effective dispute resolution method. The AMA offers parties the option to include a provision in their arbitration agreement that allows for the review of their arbitral award by an Award Review Tribunal.[8] Unless parties agree otherwise, the Award Review Tribunal will consist of the same number of arbitrators as the initial arbitral tribunal,[9] and shall reach a decision as to whether to set aside the award, either in part or entirely, or uphold it, within sixty days of being constituted.[10]

Notably, reference to the Arbitral Review Tribunal does not wholly preclude the involvement of the court in annulment/enforcement proceedings; hence, a party has the option to seek a review of the decision of the Award Review Tribunal before the court. Where the Tribunal sets aside the arbitral award (partly or wholly), the court may reinstate the award if it considers the decision of the Tribunal to be 'unsupportable' having regard to the grounds for the annulment. On the other hand, if the Tribunal upholds the arbitral award, the court can only set aside the award on limited grounds, namely – (a) arbitrability; and (b) public policy[11]. This new provision offers dissatisfied parties an additional opportunity for redress before resorting to the Court. However, the potential shortcoming of this provision is that consistent practice

of challenging the Award Review Tribunal's decision in court may lead to increased costs for the parties and, consequently, impede the efficient enforcement of arbitral awards.

Consolidation of arbitrations and joinder of parties

One of the issues thrown up by the old Act was whether the arbitral tribunal has powers to consolidate arbitration proceedings between multiple parties in related contracts. There was no helpful guidance in the old Act or judicial precedent, so the regime for consolidation was generally in a state of flux. Multiple parties in related construction contracts or parties in long-term commercial relationships may find themselves in multiple disputes over time.

The AMA now has provisions on consolidation and concurrent hearings[12]. This avoids the risks of conflicting decisions in cases involving related contracts and enhances the efficiency of arbitration in Nigeria. Based on the provisions in the new Act, parties involved in arbitration may agree to consolidate their arbitral proceedings with other ongoing proceedings, even if they involve different parties. They can also agree to have concurrent hearings, where multiple proceedings are conducted simultaneously. However, the arbitral tribunal does not have the authority to order consolidation or concurrent hearings unless the parties specifically agree to it.[13] It remains to be seen how this provision would be interpreted by tribunals and the courts - whether a joint application by parties or an application by one party with the consent of all other parties would be required? Notably, the Act also confers on the tribunal the authority to permit the joinder of an additional party in arbitral proceedings if it appears that the additional party is bound by the arbitration agreement that initiated the arbitral process.[14]

Permissive statutory framework for Third-Party Funding

Third-party funding (TPF) is an arrangement between a party and a funder wherein it is agreed that the funder will cover the party's legal costs and expenses in exchange for allocating to the funder a percentage of any proceeds derived from the arbitral proceedings. This funding arrangement is a relatively new phenomenon in international arbitration, and the arbitration community and states alike are grappling with its implications. TPF does raise concerns relating to conflicts of interest, confidentiality, and security for costs. Also,

some state respondents, particularly in investment arbitration cases, have argued that TPF is designed to favour investors, given that funders have the incentives to fund claimants and not the respondents. Despite these contentions, there is nothing in principle that prevents the funding of respondents in an arbitration. More so, TPF demonstrably increases access to justice, reduces systemic inequalities in the legal system, and helps parties to maintain cash flow and balance sheet solvency. For these reasons, the Nigerian parliament should be particularly commended for being one of the two African countries to adopt a permissive statutory framework for TPF in international arbitration. The other African country is the **Republic of Sierra Leone**.

The Act contains express provisions abolishing champerty and maintenance in relation to funded arbitration proceedings in Nigeria. The implication is that funding agreements are now fully enforceable in Nigeria. Further, the Act imposes a mandatory disclosure obligation on the funded party – requiring a written notice of the funding arrangement to be provided to the other parties, the arbitral tribunal, and, where applicable, the arbitral institution. In addition, the Act provides that where a respondent seeks security for costs based on the disclosure of TPF, the tribunal may allow an affidavit from the funded party confirming whether the funder covers adverse costs orders, and the tribunal will consider facts disclosed in the affidavit in reaching its decision.

Other notable provisions in the AMA

Emergency Arbitration: the Act permits a party in need of urgent relief to submit an application for the appointment of an emergency arbitrator to the designated arbitral institution or the court before the arbitral tribunal is constituted. The application must include relevant details such as the emergency relief sought, party information, the underlying dispute, reasons for urgency, and the arbitration agreement. Once accepted, an emergency arbitrator is appointed within two business days. This provision operates alongside the option of seeking urgent interim measures from a Court[15]. The introduction of the emergency arbitrator provision, in the main, enhances the Act’s responsiveness in addressing the need for urgent provisional measures in an arbitration process and brings Nigeria arbitration law in line with international best practices.

The Limitation period for enforcement of awards: the issue of when time begins to run for the purpose of commencement of enforcement proceedings has been fiercely debated within the Nigerian Arbitration Community. The debate arises from the conception of the enforcement proceedings as a civil action instituted for the assertion of a right – which would be caught by the statutes of limitation. The AMA resolves the controversy regarding the lack of clarity which resulted from the Nigerian court's decision in *City Engineering Nigeria Limited v. Federal Housing Authority*.[16] The Act expressly excludes the period between the commencement of arbitration and date of award from the computation of limitation period for the enforcement of an arbitral award.

Conclusion

The Arbitration and Mediation Act 2023 heralds the dawn of a new age for mediation and marks a significant development in international commercial arbitration in Nigeria. The need for an arbitration law with clear, modern, and efficient provisions drove this much-needed change. Having achieved this primary objective, the Act increases Nigeria's attractiveness as a dispute resolution hub and enhances its reputation as one of the preferred seats for international arbitration in Africa. The Act will no doubt have the most crucial impact because of its innovative provisions, including (for the second time in Africa) establishing a permissive statutory framework for third-party funding in international arbitration. With increasing capital inflows and growing commercial activity (and the attendant growth in commercial and investment disputes), Africa is poised to become a massive legal funding market. Nigeria should be commended for getting ahead of the curve and putting a permissive regulatory framework in place now.

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References

[1] Section 87 of the Act

[2] See Statoil (Nig.) Ltd & Anor v. NNPC & 3 Ors 14 NWLR (Pt. 1373) 1, where the Court of Appeal held that the intention of the legislature in drafting the provision of Section 34 is to protect the mechanism of arbitration and to prevent the courts from having direct control over arbitral proceedings outside the circumstances specified in the Act. Thus, the Court held that the issuance of an exparte Order of interim injunction was not permitted under the ACA.

[3] See the cases where the courts have granted interim measures in arbitration: Atlantic Energy Drilling Concepts Nigeria Limited & Anor v. Nigerian Petroleum Development Company Ltd & Anor in Suit No: FHC/ABJ/CS/477/2016, before the Federal High Court, Coram Dimgba J., delivered on 14 September 2016; and Limak Yatrin Enerji Uretim Isletme Hizmetleri ve Insaat (Limak) v. Sahelian Energy & Integrated Services Limited Unreported ruling in suit number: FHC, in CV/481/2018, ruling delivered on 13.02.19, where Hon. Justice Aladetoyinbo (retired) granted a Mareva Order of Injunction in aid of enforcement of an arbitral award.

[4] (2003) 15 NWLR (Pt 844) 469.

[5] Section 28

[6] Section 29 of the Act.

[7]Section 56

[8] Section 56 of the Act

[9] Section 56(4)(a)(b)

[10] Section 56(6)

[11] Section 56(9)

[12] Section 39

[13] Section 39(2)

[14] Section

[15] 40 Section 16 (10 &11)

[16] See City Eng (Nig) Ltd. v. Federal Housing Authority (1977) 9 NWLR (Pt 520) 224.

[17] Section 34(4)

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