G. ΕLIΛS

The Arbitration and Mediation Act of 2023: Notable Innovations

Introduction

On May 26, 2023, the erstwhile president of the Federal Republic of Nigeria (**"Nigeria"**) President Muhammadu Buhari GCFR assented to the Arbitration and Mediation Act, 2023 (the **"AMA"** or **"Act"**) which has now repealed the Arbitration and Conciliation Act 1988 (the **"ACA"**).[1] The Act, which incorporates to a large extent the revised UNCITRAL Model Law of 2006,[2] seeks to promote the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.[3].

The Act introduced several novel provisions which remarkably modify the existing legislative arbitration framework and has the potential to transform the landscape of arbitration in Nigeria. We have highlighted some of the notable provisions of the Act below.

1. Creation of a review mechanism for Arbitral awards

A significant innovation of the Act is its provision for the creation of an "Award Review Tribunal"[4] (the **"ART"**), an opt-in mechanism that gives the parties the option to specify in their agreement that arbitral awards may be reviewed by a second arbitral tribunal in the event that a party seeks to make application based on section 55(3) of the Act (grounds for application for setting aside an award).[5] The ART, constituted in the same way as the tribunal in the original arbitration, shall endeavor to give its decision within 60 days from the date of its constitution;[6] and during this time any enforcement proceedings must be stayed pending the decision of the ART.[7]

2. Interim measures

Unlike the ACA, the Act contains comprehensive provisions regarding an arbitral tribunal's power to grant interim measures.[8] More significantly, the Act recognizes interim measures issued by the Arbitral tribunal as binding and further provides that they are enforceable upon application to the court, irrespective of the country in which it was issued.[9] This is of course subject to the grounds for the refusal of the recognition or enforcement of such interim measure specified in section 29 of the Act.

Further, the Act expressly empowers tribunals to order security for costs in appropriate circumstances.[10] Finally, the Act extends the power to order interim measures to the court. Hence, the court shall have the power to issue interim measures of protection for the purposes of and in relation to arbitration proceedings whose seat is Nigeria or another country as it has for the purpose of and in relation to proceedings in the courts.[11] It is worthy to note that any application for urgent interim measures from a competent court is not deemed to be an infringement or waiver of the arbitration agreement.[12]

3. Stay of Court proceedings

The Act retains old section 4 (although in a modified form) and deletes section 5 under the ACA, which left the decision to stay proceedings to the court's discretion and required the applicant to demonstrate its willingness to proceed with the arbitration. The Act now mandates the courts to stay proceedings commenced in breach of the arbitration agreement unless the court finds that the

[1] Section 90 of the AMA
[2] For example, electronic communication will be capable of meeting the requirement that arbitration agreements must be in writing if the information contained therein is accessible so as to be useable for subsequent reference, recognition and enforcement of interim awards, court ordered interim measures, amidst others.
[3] Section 1(1) of the Act
[4] Section 56
[5] Section 56(1)
[6] Section 56(6)
[7] Section 56(7)(a)
[8] Section 20-29 of the Act.
[9] Section 28 of the Act
[10] Section 52 of the Act
[11] Section 19 of the Act. However, the court will not grant an interim measure which is incompatible with the powers conferred on it (section 29 (1)(b)(i) of the Act)
[12] Section 16(11) of the Act

agreement is void, inoperative or incapable of being performed.[13] This pro-arbitration approach definitely has the potential to increase the attractiveness of Nigeria as a desirable arbitral seat.

4. Third-Party Funding

Unlike the ACA, the Act sets out Third-Party funding ("TPF") provisions which apply to arbitrations in Nigeria and arbitration-related proceedings in Nigerian courts.[14] The Act provides that an arbitral tribunal shall fix the costs of arbitration in the final award and such costs include the cost of obtaining Third-Party funding.[15] It goes further to expressly abolish the obstacles of common law torts of maintenance and champerty in relation to TPF arbitration.[16]

Furthermore, to guard against potential conflict of interest that may arise, the Act mandates that the identity and address of any third-party funder be disclosed before and/or during the arbitration. The Act also provides that where a respondent brings a security for costs application based on the disclosure of TPF, the tribunal may allow the funded party or its counsel to provide the tribunal with an affidavit confirming whether the funder has agreed to cover adverse costs orders. The affidavit is intended to form part of the information that the tribunal will consider in its decision on the security for cost application.[17]

This is a very commendable innovation by the AMA as it would make it possible for many corporates to institute and defend arbitration claims despite the rising costs of arbitration.[18] In all, this will increase corporates' access to justice, while also maintaining enough cashflow for business operations.

5. Emergency Arbitrators

The Act allows for the appointment of an emergency arbitrator where a party requires urgent relief prior to the arbitral tribunal's constitution. Hence, a party that needs an urgent relief pursuant to a dispute may submit an application for the appointment of an emergency arbitrator to an arbitral institution designated by the parties or failing such designation, to the court.[19] The emergency arbitrator shall be appointed within two business days after the date the application is received.[20] A practical question that would have reasonably arisen from this would be whether the Nigerian Courts are well placed to select and appoint an emergency arbitrator within the specified deadline. However, the Act contemplates that attendant delays of the courts and makes up for such situation by providing that the 'court' in relation to appointment of emergency arbitrators means the *"Chief Judge of any of the Courts referred to in this provision, sitting as a Judge in chambers".*

Finally, the decision of the emergency arbitrator shall be binding on the parties and can be enforced upon application to the court.[21]

6. Limitation period

The limitation period for the enforcement of awards now expressly excludes the period between the commencement of the arbitration and the date of the award in computing the time for the commencement of enforcement proceedings.[22] This has laid to rest the controversy that arose from the court decision in the case of *City Engineering Nigeria Limited v Federal Housing Authority,*[23]and

[13] Section 5 of the Act
[14] Section 91 of the Act 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, in order to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases.
[15] Section 50(1)(g) of the Act
[16] Section 61 of the Act
[17] Section 62(3) of the Act
[18] In both the 2015 and 2018 international Arbitration Surveys (the "survey") conducted by the School of International Arbitration at Queen Mary, University of London's ("QMUL") in partnership with White & Case, "costs" was seen as the worst characteristics of arbitration.
[19] Section 16 of the Act
[20] Section 16(5) of the Act
[21] Article 27(6) of the Act.
[22] Section 34 (4) of the Act
[23] (SC 204/1992) [1997] 1

further reflects the judicial precedent in *Messrs U. Maduka Ent. (Nig.) Ltd v B.P.E*[24] (albeit decided in light of Section 35(5) of the Lagos state Arbitration Law).

7. Consolidation, concurrent hearings, and joinders

The Act recognizes the agreement of parties to consolidate arbitral proceedings or hold concurrent hearings.[25] Hence, without the parties authority, the arbitral tribunal may not be able to hold concurrent hearings or consolidate the proceedings.[26] Further, the Act gives the arbitral tribunal the power to allow the joinder of additional parties to the arbitration, provided that, *prima facie*, the additional party is bound by the underlying arbitration agreement.[27]

This is a laudable provision as efficiency in arbitration demands that multi-contract disputes should be consolidated before a single arbitral tribunal. More so, it reduces time and costs of resolving the dispute and prevents inconsistent/duplicative decisions on related claims and factual issues.[28]

8. Grounds for setting aside an arbitral award

The Act has introduced significant changes to the grounds for setting aside an arbitral award. The Act does not include "misconduct of the arbitrator" as a ground for challenging arbitral awards. This is a positive development that will deal with tactics like alleging arbitrator misconduct, which are often accompanied by injunctions to restrain arbitral proceedings. Also, it is now necessary for a party to demonstrate that the ground for setting aside the award *"has caused or will cause substantial injustice to the applicant"*.[29] The Act takes a much more stringent stance setting aside arbitral awards, restricting the courts' authority to get involved and potentially annul arbitral awards, improving the finality and preservation of awards.

9. Electronic communication as a form of arbitration agreement

The Act expressly provides that electronic communication would satisfy the requirement for an arbitration agreement to be in writing, provided the information contained therein is accessible so as to be useable for subsequent reference.[30] The Act goes further to define "electronic communication" as *"any communication that the parties make by means of data messages, that is, any information generated, sent, received or stored by electronic…means".*[31] Hence, unlike the ACA, the Act expressly recognizes email correspondence and other similar medium of communication that refers to the parties' agreement to submit their disputes to arbitration.

10. Introduction of provisions on Mediation

Another notable change in the Act is the introduction of detailed provisions on Mediation in replacement of Conciliation as was in the ACA. In essence, Part II of the Act aligns with the 2018 UNCITRAL Model Law on International Commercial Mediation. Specifically, it lays out a mediation procedure whereby at either party's request, a jointly appointed mediator may review the conflict, hear from the parties, and then submit settlement ideas. A legally binding settlement agreement is then drawn up if both parties agree.[32] The parties are still free to decide on a different process. Further, Section 87 of the Act clearly establishes the scope of application of the Singapore Convention on Mediation to international settlement agreements made in States other than Nigeria with the conditions that the State is a party to the Singapore Convention (reciprocity reservation) and the dispute arises out of what would be considered a "commercial" legal relationship under Nigerian law.

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[24] (2019) 12 NWLR (Pt. 1687) 429.
[25] Section 39(1) of the Act
[26] Section 39(2) of the Act
[27] Section 40 of the Act
[28] Eunice Chan Swee En (Drew & Napier), "Consolidation of Arbitral Proceedings and its Ramifications on a Party's Right to Challenge the Jurisdiction of the Tribunal and the Arbitral Award", March 21, 2018. https://arbitrationblog.kluwerarbitration.com/2018/03/21/consolidation-arbitral-proceedings-ramifications-partys-right-challenge-jurisdiction-tribunal-arbitral-award/
[29] Section 55 (5) of the Act
[30] Section 2(1) and (4)(a) of the Act.
[31] Section 91 of the Act
[32] Section 82 of the Act

Other arbitration-related changes introduced by the Act include;

11. Number of arbitrators: The Act now provides that where the number of arbitrators is unspecified, the default is a sole arbitrator, rather than three as it was under the ACA.

12. Arbitrator's Authority: The Act also provides that the authority of an arbitrator shall not be revoked by the death, bankruptcy, insolvency or other change in circumstances of the party who appointed the arbitrator.[33] This further buttresses the independence of an arbitrator from the appointing party.

Conclusion

No doubt, the provisions introduced by the Act has the potential to increase Nigeria's attractiveness as a major arbitration hub in Africa and even globally. Most of these innovative provisions cater for the intricacies of international arbitration in modern times and is set to transform the landscape of arbitration in Nigeria. Similarly, the Nigerian legislature's efforts to actively promote the use of mediation in Nigeria through the Act are a welcome development. One can only be hopeful that the Act achieves its objective to promote the fair and efficient resolution of disputes in Nigeria.

[33] Section 4(2) of the Act.

Authors

Chimezie Onuzulike
Senior Associate
chimezie.onuzulike@gelias.com

Ayomide Abiodun
Associate
ayomide.abiodun@gelias.com

Owen Umeh
Associate
owen.umeh@gelias.com

LOCATIONS

LAGOS OFFICE
6 Broad Street
Lagos, Nigeria

T: +234 (1) 460 7890
E: gelias@gelias.com

ABUJA OFFICE
2nd Floor, Abia House,
Plot 979, First Avenue,
Central Business District
F.C.T, Abuja.

T: +234 (1) 888 8881

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