

Legal Interventions of the Arbitration and Mediation ACT, 2023 of Nigeria

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Abstract

The paper brings into focus the innovations of the New Arbitration and Mediation Act, 2023 of Nigeria. The paper relied on the doctrinal method of research and found that the Arbitration and Mediation Act, 2023 of Nigeria is a great development as it took care of some of the gaps identified under the old Arbitration and Conciliation Act of 1988. It further identified some gaps under the New Arbitration and Mediation Act, 2023 of Nigeria which include outright omission of section 46 of the Act. The paper concludes that the Arbitration and Mediation Act is a welcome development in Nigeria and an alignment with international best practices.

Keywords: Arbitration, Mediation, Arbitration and Mediation Act, Legal Interventions

Introduction

On the 26th of May, 2023, the President of the Federal Republic of Nigeria enacted the Arbitration and Mediation Bill, thereby formalising it into law. This signified the conclusion of the legislative process and the initiation of a novel arbitration framework in Nigeria. The 2023 Arbitration and Mediation Act (the “Act”)¹ offers an improved and modern legal framework to parties and entities seeking to arbitrate their commercial disputes in Nigeria. The Act introduces several provisions of interest to arbitration and mediation users in Nigeria.

The new Arbitration and Mediation Act of 2023 has also come to fill some of the gaps identified under the old Law (The Arbitration and Conciliation Act, 1988 of Nigeria)². The new law replaced the 25 year old Arbitration and Conciliation Act. It is a great improvement on the legislative framework for domestic and international Arbitration in Nigeria. The new Act is based on the revised United Nations Commission on International Trade Law (UNCITRAL) Model Law adopted in 2006. This paper discusses the legal improvements and interventions provided by the 2023 Act. The New York Convention, which regulates the recognition and enforcement of foreign

¹ herein after referred to as AMA

² herein after referred to as ACA

arbitral rulings, applies to any award arising from international commercial arbitration conducted in Nigeria or any other contracting state under the Act.³

Scope of the New Act

The purpose of the new Act is to provide a uniform legal framework that will enable Structure of the New Act.

The Act is divided into three parts and it has 92 sections highlighted as follows:

Part I - Centers on Arbitration

Part II - Centers on Mediation

This part repeals the old conciliation rules.

Part III - Includes several sections, indicating that the new Act is inapplicable to procedures initiated prior to its enactment.⁴ Parties may, however, and nothing therein prohibits them from doing so, chose to apply the new Act to their pre-existing dispute.⁵

Schedules:

The new Act has three schedules as highlighted.

First schedule - capture the Arbitration Rules which govern disputes submitted to arbitration pursuant to the New Act.

Second Schedule - Captures the domestication of the Convention on the Recognition and Enforcement of Arbitral Awards(the New York Convention, and third contains the Arbitration proceeding Rules)

Explanations of Arbitration, Mediation and Related Concepts

The Arbitration and Mediation Act of 2023 addresses mainly two major alternative dispute mechanisms; namely Arbitration and Mediation. It will be important to explain the concepts.

Arbitration

³ An Act to repeal the Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria, 2004, and to enact the Arbitration and Mediation Act, 2023, establishing a cohesive legal framework for the equitable and efficient resolution of commercial disputes via arbitration and mediation, and to apply the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award rendered in Nigeria or in any contracting State resulting from international commercial arbitration.

⁴ See section 89(1) of the Act

⁵ See Laura Alakija, Nigeria's New Arbitration Act: what you need to know/June 25, 2023 <<https://arbitration.blog.kluwerarbitration.com> > accessed 9 May 2024>

Brown and Marriot define arbitration as:

private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable at law.⁶

Seide defined arbitration to be a mode by which differences are rescheduled through references of such,

To one or more persons nominated for the purpose, for determination after a hearing in a quasi-judicial manner, either instead of having recourse to an action at law; or by order of the court, after such action has been commenced.⁷

Forms of Arbitration

Customary Arbitration

As the name implies it is a form of arbitration that emanates from the customs, usage and tradition of the people of a particular geographical location. The Supreme Court in the case of *Ohiaeri v. Akabeze*⁸ defines Customary Arbitration as:

"An arbitration in a dispute based on the voluntary submission of the parties to the decision of arbitrators, who are either the chiefs or elders of their society, together with the consent to be bound by such a judgement or the option to withdraw if the outcome is adverse."

This implies that this form of Arbitration is not automatically binding on the parties involved.

In the case of *Ohiaeri v. Akabeze*,⁹ Akpata JSC stated the rationale for the caution by the courts thus-

In customary arbitration within a tightly-knit community, it is typical for some, if not all, arbitrators to possess prior knowledge of the dispute's facts, along with personal biases and diverse interests, rendering them potential judges in their own cause and likely to prejudge the issue.

⁶ H. J. Brown and A. L. Marriot, *ADR Principal and Practice* (UL: Sweet and Maxwell, 1999)

⁷ Katherine Seide (ed) , *A dictionary of Arbitration and its terms* (Oceans Publication, 1970) 51

⁸ [1993] 2 NWLR (pt 221)pg. 1

⁹ *ibid*

The court in the cases of *Agu v. Ikewibe*¹⁰ and *Eke v. Okwaranya*¹¹ laid down five conditions that must be fulfilled before a customary arbitration will be accepted by the court:

- i. Both parties had voluntarily submitted the topic in dispute to an arbitrator or arbitrators;
- ii. An agreement exists between the parties, either explicitly or by necessary inference, that the arbitrators' judgment will be regarded as binding and final;
- iii. The arbitration was executed in alignment with the customary practices of the parties or their industry;
- iv. The arbitrator or arbitrators rendered a judgment and issued an award; and
- v. The decision or award was concurrently accepted by the parties upon its issuance.

Institutional Arbitration

Institutional arbitration occurs when the arbitration process is carried out in alignment with the established regulations of an arbitral institution. Nigeria is home to a number of arbitral organizations, such as the International Arbitration Center, Lagos Chamber of Commerce, Lagos Court of Arbitration, and Regional Centre for International Commercial Arbitration Lagos. Nigerians may also conduct arbitration in accordance with the guidelines of international organizations like the International Chamber of Commerce.¹²

Domestic Arbitration

This a form of arbitration between parties who are within the same jurisdiction; both parties being either resident or having their place of business within Nigeria.¹³ Such arbitrations are statutorily governed by the Arbitration and Conciliation Act or other domestic arbitration law. Under domestic arbitration parties and the subject of dispute are usually located in Nigeria. Domestic Arbitration is “one between persons who are doing business in the same country and the contract is to be performed in the same country where they carry on business” notwithstanding the nationality of the parties.¹⁴

International Arbitration

¹⁰ [1991] NWLR (pt 180)3085

¹¹ [2001] 4 SC (pt 11)

¹² 'Arbitration Process in Nigeria: 'A Step by Step Guide' (27th, August, 2021)

<https://oal.law/arbitration-process-in-nigeria-a-step-by-step-guide/> Accessed 8 May 2024

¹³ section 91(6) AMA

¹⁴ O. Orojo and A. Ajomo, Nigeria: (Mbeyi and Associates, 1999), 52

This stands in contrast to domestic arbitration. When entities engaged in an arbitration agreement operate across different nations, the arbitration is characterised by its international dimension. This may also apply if the arbitration agreement's cause extends beyond of a nation's boundaries.¹⁵ Zekos¹⁶ defines it as “A consensual means of dispute negotiation by a non-government decision maker, that produces a legally binding and enforceable ruling”.

Born defines International Arbitration as “a means by which a dispute can be definitely resolved, pursuant to the parties, voluntary agreement, by a disinterested, non-government decision-maker”¹⁷

For Born, International Arbitration is distinguished from domestic arbitration as it is designed to particularly assure parties from different jurisdictions that their disputes will be resolved neutrally.. that the decision maker is neutral and that the procedural rules are internationally neutral as opposed to a particular legal regime.¹⁸

Ad-hoc Arbitration

Section 63(1) of the Lagos State Arbitration Law, 2009 characterises Ad-hoc Arbitration as a proceeding that lacks administration by an institution or other entity, necessitating that the parties independently organise the selection of arbitrators, designate applicable rules, laws, procedures, and administrative support

This form of arbitration does not conform to established regulations, as implied by its designation. The parties involved in this arbitration typically establish their own procedural rules, which can be adjusted as necessary to address the specifics of their disputes.¹⁹

Document Only Arbitration

This is a type of arbitration where the arbitrators base their decisions only on the papers submitted by the parties involved in the dispute. Typical

¹⁵ section 91(5) AMA

¹⁶ G. I. Zekos, *International Commercial and Marine Arbitration* (Routledge - Cavendish, 2008), even though the definition does not totally capture the whole essence of International Arbitration

¹⁷ G. B. Born, *International Commercial Arbitration in the United States: Commentary and Materials* (Kluwer Law and Taxation Publisher, 1994) 2

¹⁸ *ibid*

¹⁹ Weal Shalaan, *International Commercial Arbitration* <https://jusice-academy.com/wp-content/uploads/2020/03/International-Commercial-Arbitration.pdf> accessed 9th May 2024

applications include commodities agreements, consumer disputes, and building contracts.²⁰

Online Arbitration

Through online arbitration, parties can agree to submit their dispute to a nongovernmental arbiter, determined by or on their behalf. The arbiter will then issue an award that can be binding, nonbinding, or unilaterally binding, resolving the dispute in accordance with neutral procedure and due process as stipulated by the parties' agreement or the arbitration tribunal's ruling. Using internet technology, the online arbitration procedure can be completed fully or partially online.²¹

However, because of the defect in online arbitration, where some basic elements of traditional arbitration such as due process, choice of arbitrator and so on are not totally adhered to, one can then raise a question about the enforceability of this form of Arbitration. However, academics have hypothesized that it might not impair the process's ability to settle conflicts. Online arbitration may be a particularly adaptable method of resolving disputes that can be customized to meet the demands of the parties while yet being accepted as a legally binding procedure.²²

Resolution

The Cambridge Dictionary describes "resolution" as "the act of solving or ending a problem or difficulty... or finding a way to improve a difficult situation",²³ This definition is crucial as it embodies the essence of arbitration as a mode of settling disputes. Arbitration, be it international or domestic, aims not only to identify the issues between the parties but to bring such issues to an end without soiling the relationship between the parties.²⁴ It is submitted that the fair resolution of disputes is the aim of any arbitration and

²⁰ ibid

²¹ Farzaneh Badiie 'Online Arbitration Definition and Its Distinctive Features' pg. 9

<<https://ceur-ws.org/Vol-684/paper8.pdf>> accessed on 9 May 2023

²² supra 24

²³ See Cambridge (Online)

Dictionary, <<https://dictionary.cambridge.org/dictionary/english/resolution>> accessed 9 May 2024

²⁴ J Olakunle Orojo and M Ayodele Ajomo, 45, where the learned authors stated that "where the parties have business or personal relations which they wish to preserve, it is better for them to settle their business disputes by arbitration because an arbitral proceeding is a relatively friendly one. As between businessmen, they can resolve their dispute by arbitration and continue their relationship unimpaired... This is unlikely in the case of litigation in view of the confrontational and sometimes uncompromising stance of the parties".

any act by any member of the arbitral tribunal to negate this duty may serve as a ground for the challenge of the arbitrator.²⁵

Commercial Disputes

AMA defined commercial as:

encompasses issues stemming from all commercial relationships, whether contractual or otherwise, including trade transactions for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction projects, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements or concessions, joint ventures, and other forms of industrial or business collaboration, as well as the transportation.²⁶

Ferguson defines commercial disputes as "disputes arising in connection with trading contracts between business relationships",²⁷ Fouchard et al stated that any dispute had to be economical in nature before it could be said to be commercial.²⁸ Seide, in defining commercial arbitration stated that it is an arbitration used for "the settlement of disputes in the general commercial or business world"²⁹, thus insinuating that the word "commercial" refers to matters that have to do with business. However, a clearer meaning of the word "commercial" was given in the Model Law where it was stated that the word includes all transactions involving supplying or exchanging goods and services, agency and allied services, insurance, joint ventures or other types of business collaborations, carriage by any means of transportation, etc.³⁰

Fouchard et al opined that the fact that the clarification was contained in the footnote to Article 1 of the Model Law does not detract from its usefulness. This is because the Model Law allows every country to implement it as they

²⁵ Section 33 of the 1996 English Arbitration Act stipulates that the arbitral tribunal must "employ procedures appropriate to the specific case, minimising unnecessary delay or cost, to ensure a fair resolution of the issues to be adjudicated." (Emphasis supplied) Saville LJ has also stated that "everyone accepts that the tribunal must strive to reach a just decision on the dispute". LJ Saville, 'An Introduction to the 1996 Arbitration Act' [1996] 62 Journal of the Chartered Institute of Arbitrators 165, at 166.

²⁶ section 91(1) of AMA

²⁷ Robert B. Ferguson, 'The Adjudication of Commercial Disputes and the Legal System in Modern England' (1980) 7 2 British Journal of Law and Society 141.

²⁸ Emmanuel Gaillard and John Savage (eds), 'Fouchard Gaillard Goldman on International Commercial Arbitration' (1999) Kluwer Law International, The Hague/London/Boston, 35.

²⁹ Katherine Seide (ed) (n 12) 51.

³⁰ UNCITRAL Model Law on International Commercial Arbitration 1985 1, <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf > accessed 9 May 2024

deem fit.³¹ They were also of the view that, drawing from the definition as given in the Model Law of "commercial disputes", disputes involving state parties or public entities and arising from transnational business dealings be brought under the scope of international arbitration of a commercial nature.³² Brown and Marriot identified a wide range of areas wherein disputes can be classed as commercial disputes to include rent review and occupation of commercial property,³³ building and civil engineering,³⁴ consumer relations,³⁵ insurance,³⁶ securities,³⁷ maritime,³⁸ " technology,³⁹ financial services,⁴⁰ construction,⁴¹ 3 and oil and gas.⁴²

For clarity, therefore, the explanation proffered in the UNCITRAL Model Law will be adopted as the definition of commercial disputes.

Features Of Arbitration

To have a proper understanding of the nature of arbitration, there is a need to examine the salient features of Arbitration.

a. An Alternative to the Court

The most obvious medium for the settlement of disputes is the court. This is accomplished through the adversarial system, which explains why opposing parties frequently employ the expression "we shall meet in court". The State upholds and operates courts to assist parties in resolving disputes. It represents the manifestation of state authority and the obligation of the state to ensure the establishment of courts and the nomination of adequately qualified judges to

³¹ Emmanuel Gaillard and John Savage (eds) (n 32) 36. See also the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, 3-21 June, 1985; General Assembly Official Records: Session, Supplement No. 17, (A/40/17)

³² *ibid*

³³ *supra* 11

³⁴ *ibid*

³⁵ *ibid* See Ss 89-91 of the UK Arbitration Act, 1996 which repealed the Consumer Arbitration Agreements Act 1988.

³⁶ *ibid*

³⁷ *ibid* This provision can be contrasted with the Nigerian position as provided for in the Investment and Securities Act 2007 which established the Investment and Securities Tribunal in Part XVI, Sections 274-297. For the purpose of these provisions, it would appear that the tribunal stands in-between being an arbitral tribunal and a court of law. Section 290 (3) of the Act provides that "any proceeding before the tribunal shall be deemed to be a judicial proceeding and the tribunal shall be deemed to be a civil court for all purposes." Also, by virtue of Section 295, the decision of the tribunal is appealable to the Court of Appeal.

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ *ibid*

⁴² *ibid*

adjudicate disputes and render verdicts. Arbitration functions differently from the court system; once the disputing parties consent to arbitrate, they relinquish their relationship from the court's jurisdiction and transition to arbitration.

b. Privacy of Arbitration Process

Another salient feature of Arbitration is the privacy and confidentiality of the Arbitration process. Unlike litigation which is done publicly in the open courts, an arbitration process is done privately, among the parties and the selected Arbitrators. Arbitration hearings are private and the award may be made public by the arbitrators only with the consent of both parties. There is an implied duty of confidentiality imposed on the parties although the arbitration rules refer only to the privacy of the hearings, and not confidentiality of the whole proceedings.⁴³

c. Voluntary Procedure

As earlier discussed, for a dispute to be arbitrated upon, the parties involved in the dispute must have agreed to submit to arbitration. Where there is no such prior agreement, the process cannot be referred to as arbitration. Hence the Supreme Court in the case of *Commerce Assurance Ltd v. Alli*⁴⁴ held as follows:

"... it is the law that to constitute a proper arbitration which the courts can enforce there must be an agreement to submit the matter to arbitration, and any award by an arbitrator so appointed shall be binding on both parties thereto."

This decision underscores the voluntary nature of arbitration such that where there is no prior agreement in place for the submission of a dispute between the parties to arbitration, the parties can not purport to arbitrate,⁴⁵ it also follows that a party cannot unilaterally withdraw from arbitration and this is a distinctive feature of arbitration. or the validity of an arbitration agreement.

d. Control by the Party

⁴³ O. Adekoya and D. Emagun, 'Nigeria Arbitration Guide' <<https://www.aalex.com/wp-content/uploads/2017/12/Nigeria-Arbitration.pdf>> accessed 9 May 2024

⁴⁴ LPELR-883(SC)

⁴⁵ Oludayo Ayeni, 'Arbitration in Nigeria: A Close Look' pg 2

<https://www.alp.company/suites/default/files/ALP%20-%20%20arbitration%20IN%20nigeria%20%20A%20closet%20look.pdf>> accessed 9th May 2024

Another distinctive feature of arbitration is that the process of the proceeding is controlled by the parties involved in the arbitration. The AMA gives the parties a wide range of power in the determination of the processes. The parties possess the right to designate arbitrators with the requisite expertise to resolve disputes as stipulated in the Arbitration Agreement. Section 7(2) provides- The parties may stipulate the procedure for selecting an arbitrator in the arbitration agreement, in accordance with subsections (4) and (5) of this section. However, in instances where the Arbitration Agreement lacks such a clause As per Section 7(3), if both parties choose one arbitrator in a three-arbitrator arbitration, the two appointed arbitrators will select the third arbitrator. If the parties do not designate the arbitrator (or third arbitrator) within thirty days of the request, the court shall appoint one in domestic arbitration upon the application of any party to the arbitration agreement.

In international arbitrations, if the two arbitrators fail to agree on the selection of the presiding arbitrator within 30 days following the appointment of the second arbitrator, the presiding arbitrator shall be selected by the appointing body designated by the parties for this purpose.⁴⁶ Such Arbitrators are often chosen for their expertise in a particular area of law or industry, which can lead to more informed and specialized decisions. For example, in construction disputes, an arbitrator with a background in engineering may be better equipped to understand the technical aspects of the dispute.

Another control given to the parties over the arbitration process is the power to choose which procedure to adopt for the arbitration, powers of the parties to choose the venue of arbitration.

Notwithstanding the stipulations of subsections (1) and (2) of this section, the arbitral tribunal may, unless the parties have agreed otherwise, convene at any location it deems suitable for consultations among its members, for the examination of witnesses, experts, or the parties, or for the inspection of documents, goods, or other property.⁴⁷

e. Flexibility

Arbitration is an adaptable procedure that may be made to fit the unique requirements of the parties to the dispute. The arbitration's rules and processes, the arbiter's qualifications, the language to be used throughout the proceedings, and the location of the arbitration can all be agreed upon by the parties. Again, section 14(1) of the Act gives arbitrators the authority to determine their own jurisdiction. The principle of competence-competence

⁴⁶ supra 47

⁴⁷ section 32(3) of AMA

applies in Nigeria, and the court has no control over the tribunal's jurisdiction during the arbitration proceedings.

f. Finality and Enforceability

Arbitration awards are final and binding, which means that parties cannot appeal the decision or have it reviewed by a higher court. This can be beneficial for parties who wish to resolve the dispute quickly and avoid a lengthy appeals process. Also, arbitration awards can be enforced in court, just like a court judgment. This means that if a party fails to comply with the arbitration award, the other party can seek enforcement through the courts.

g. Speed

Another undisputable feature of Arbitration proceedings is that it can be faster than traditional litigation, which means that disputes can be resolved more quickly. Although, there is no stipulated time frame for the arbitral process's completion. The duration of domestic arbitration processes is often limited to nine months, however international arbitrations can extend up to eighteen (18) months. This is mostly dependent on the parties, the arbitrators, and the intricacy of the issue.⁴⁸

Mediation

Through the voluntary process of private conflict resolution, an unbiased third party helps the parties come to a mutually agreeable settlement. Both the procedure and the result are non-binding. In contrast to a court or arbitrator, the mediator actively participates in the negotiating process but does not have the authority to force a settlement; instead, he helps shape solutions that serve the interests of both parties and bring about reconciliation.

Historically, mediation was mostly utilized in labor conflicts, both in the United States and England. Government-sponsored mediation has been practiced in the latter nation since 1913, when the Department of Labor appointed commissioners of conciliation to settle labor disputes between the parties. The 1930s saw a rise in the use of mediation as a way to resolve impasses between union and management during the collective bargaining process, following the enactment of national collective bargaining legislation. Thus, mediation functions as a kind of "social intervention," whereby external agnostics help management and labor arrive at a solution that is acceptable to society. Since then, mediation has developed into one of the most widely used Alternative Dispute Resolution (ADR) methods in the world.

⁴⁸ *ibid*

A mediator controls the process, but the parties control the outcome, therefore the mediator cannot impose a decision on them. It is a facilitative approach designed to remove all impediments to effective negotiation. Therefore, where disputants are not disposed to any of the adversarial methods, they may seek the involvement of a neutral third party to assist them to a mediated settlement.⁴⁹

The mediator's responsibility is to persuade parties to prioritize their interests over their legal rights. The mediator and the parties or their representatives often meet face-to-face. The mediator begins the session by announcing the sequence of the proceedings.⁵⁰ Mediation is appropriate for any situation that may be resolved via negotiation between the parties, particularly disagreements between businesses, professionals, or individuals. It is utilized in commercial, civil, labor, family, interpersonal, communal, complicated public conflict, and environmental situations involving several parties and possible solutions that the courts cannot give, as well as a variety of other problems.⁵¹

There are three major types of mediation. The first type is rights-based. In this case, the mediator examines the rights that the conflicting parties would have in court and, using those parameters, seeks to assist the parties in resolving their conflict.⁵²

The second approach is the one that is focused on the interests or needs of the parties. The last approach is the therapeutic style which focuses more on the problem-solving skills of the parties involved.⁵³

Novel Provisions of the Arbitration and Mediation Act (AMA) of Nigeria Third-Party Funding

Third-party funding has been a big issue in Nigerian arbitration since it is banned under the Common Law torts of maintenance and champerty, which apply in Nigeria as part of the adopted English law. Disputed parties have been unable to prosecute claims before arbitral tribunals owing to finance concerns, and they believe that judgments made in respect of third-party sponsored claims may be set aside on that basis.

⁴⁹ D Peters, *Arbitration and Conciliation Act Companion* (Dee-Sage Nig. Ltd, Lagos, Nigeria 2006) p.98

⁵⁰ M.T. Ladan, *Alternative Dispute Resolution in Nigeria: Benefits, Processes and Enforcement* (ILEARN, Ibadan, Nigeria 1998)

⁵¹ H. J. Brown and A. L. Marriot, *ADR: Principles and Practice* (London, Sweet & Maxwell 1993)

⁵² Ladan M.T op.cit. p.256

⁵³ *ibid*

The new act eliminated the tort of champerty from arbitration proceedings and arbitration-related court actions in Nigeria.⁵⁴ The benefitting party is, nevertheless, compelled to reveal the funder's address as soon as the financing arrangement is signed.⁵⁵ This intervention on third-party funding will encourage people and businesses with limited financial means to pursue or defend a legal claim by delegating some of the costs to a third-party funder.⁵⁶

Interim Measures

Interim measures in arbitration are interim instructions or directions made by the arbitral tribunal prior to the final award being issued. Parties to an arbitration case may ask for an interim measure before the arbitral tribunal under the ACA, but there are no provisions for the acceptance and execution of interim measures or orders made by a tribunal in court. The AMA enables a party to seek recognition and execution of an interim measure in the same manner. It prevents the Court from conducting a comprehensive evaluation of the measure and allows for its rejection on limited grounds, similar to those employed to contest the recognition and enforcement of an arbitral ruling.⁵⁷

Statutory Emergency Arbitrator

The new act introduces the concept of emergency arbitration.⁵⁸ This mechanism allows a party to an arbitration agreement to apply for interim reliefs urgently till the time an arbitral tribunal will be formally constituted in accordance with the arbitral agreement. Prior to the formation of the arbitral panel, parties may request the appointment of an emergency arbitrator from the court or authorized arbitral institution.⁵⁹ If such an application is successful, the court or arbitral institution will appoint the arbitrator within two working days after receiving the application, and the arbitrator will be notified within one working day.⁶⁰ This provision brings great relief to parties as it provides a way of eliminating the difficulty of a party approaching a Nigerian court for interim reliefs.

⁵⁴ section 61 of AMA

⁵⁵ section 62 AMA

⁵⁶ section 62 AMA., see generally, Nigerian Arbitration and Mediation Act, 2023 - key innovation <<https://www.templars.law.com>> accessed 9 May, 2024

⁵⁷ See Laura Alakija, 'Nigeria's New Arbitration Act: what you need to know' / June 25, 2023 <<https://arbitrationblog.kluwerarbitration.com>> accessed 9th May 2024

⁵⁸ section 16 of AMA

⁵⁹ *ibid*

⁶⁰ *ibid*

The Default number of Arbitrators

Under the Act, the default number of arbitrators has changed from three to one.⁶¹ This is highly significant and good news for domestic arbitrators because the cost of paying three arbitrators has been high and that has stood as an obstacle to parties. The new Act aligns with recognised worldwide standards and practices as established in the UNCITRAL Model Law. However, where parties are unable to compel a single arbitrator, the non-defaulting party may seek intervention from the court or any arbitral institution in Nigeria for the appointment of an arbitrator.⁶²

Award Review Tribunal

The New Act makes it possible for parties to benefit from an award review under an Award Review Tribunal (ART).⁶³ It enables the tribunal to consider it applicable to set aside an arbitral award relying on the same grounds as the Court. The ART has the option of setting aside or upholding an award within 6 days of being constituted. The Court may reinstate an award that has been annulled by the ART if it determines that the decision is irrevocable.

The Court may annul an award upheld by the ART based on non-arbitrability and public policy considerations. A disadvantage of this provision is that it could lead to an outright increase in the cost and time for the final settlement and enforcement of a dispute.

Joinder of Parties

Under the ACA, there was no provision for additional party to arbitral proceedings. However, the AMA allows parties to seek to the arbitral tribunal to add another party to the arbitration proceedings.⁶⁴ This clause allows the arbitral tribunal to allow all required parties to the arbitration agreement to participate in an arbitration for the reasonable and fair resolution of the problems in the arbitration.

Arbitration Proceedings Rules 2020

The Arbitration Proceedings Rules, which are contained in the third schedule of the New Act, are another AMA innovation.⁶⁵ The regulations eliminate the obligation for a compilation of records from lower courts. In

⁶¹ section 6(2) of AMA

⁶² section 7(3) of AMA

⁶³ section 56 of AMA

⁶⁴ section 40 of AMA

⁶⁵ section 64(2) of AMA

arbitration appeals,⁶⁶ the appellant is expected to prepare and file records in accordance with the rules.⁶⁷ In case of appeal from a first instance court, the court is required to list the appeal for hearing not later than six months after filing of a party-produced record of appeal.

According to Rule 13, unless a party explicitly asks an oral hearing, the Court may determine the whole appeal or specific issues raised on the papers presented. This intervention is vital because of the unnecessary delay usually experienced by arbitration appeals in appellate Courts in Nigeria. There is the likelihood of a challenge to this rule in relation to arbitration-related proceedings at State High Courts because it is ultra-vires⁶⁸ for the National Assembly to purport to legislate procedure at the State High Courts.⁶⁹

Stay of Court Proceedings

AMA revised sections 4 & 5 of ACA which gives power to stay proceeding in court in the form of arbitration enforcement. According to the AMA, a Nigerian Court hearing a dispute subject to an arbitration agreement must, if any of the parties requests it, refer the parties to arbitration no later than when they submit their first statement on the substance of the dispute, unless the arbitration agreement is found to be void, inoperative, or incapable of being performed.⁷⁰

Consolidation

As opposed to the ACA, the AMA allows for dispute consolidation.⁷¹ AMA allows contesting parties to agree that the arbitral procedures be merged with other arbitral actions, including those involving different parties. This provision will save time and money by reducing the possibility of duplicate processes and inconsistent rewards.⁷²

Streamlined Grounds for Setting Aside an Arbitral Award

The grounds for setting aside an arbitral award under the AMA have been streamlined by excluding the error on the face of the award ground. If the Act has partially or entirely affirmed an award, the award may only be annulled by a Court on the restricted grounds of arbitrability and/or public

⁶⁶ Rule 10, Third Schedule of AMA

⁶⁷ Rule 11, Third Schedule of AMA

⁶⁸ beyond the scope or in excess of legal power or authority, <<https://www.merriam-webster.com/dictionary/ultra%20vires>> accessed 9 May 2024

⁶⁹ Fasakin Foods Nig. Ltd. v. Shosanya S.C. 312 [2001] [2006] NGSC 118

⁷⁰ section 5 of AMA

⁷¹ section 39 of AMA

⁷² ibid

policy.⁷³ This enhances the conclusiveness of arbitral rulings and may foster more confidence in the process.

Electronic Communication

The AMA is in line with modern reality and development in Arbitration and Mediation. The Act allows the conduct of Electronic Arbitration and Mediation within Nigeria.⁷⁴ The Act acknowledges that a signed Arbitration Agreement encompasses Electronic Communications. Electronic Communication⁷⁵ refers to any interaction conducted using data communications, encompassing information created, transmitted, received, or stored via electronic, magnetic, optical, or other methods, including electronic data exchange, email, telegrams, telex, or telecopy.

Default Appointing Authority

According to Article 6 of the Arbitration Rules, as outlined in the Schedule to the Act, the default Director of the Regional Centre for International Commercial Arbitration in Lagos (RCICAL) shall serve as the appointing authority in the absence of a mutual agreement between the parties. The designation of an appointing authority is required when one party has previously offered an appointing authority, but the other party has not agreed to this within 30 days.⁷⁶

Enforcement of Arbitral Agreements

The AMA requires the court to suspend proceedings and direct parties to Arbitration for cases initiated in violation of the Arbitration Agreement, unless the court determines that the agreement is “void, inoperative, or incapable of being performed.”⁷⁷ This is a significant enhancement over the ACA, which rendered the decision to suspend proceedings contingent upon the court's discretion and mandated that the applicant justify its readiness to forward with arbitration.

Application of Statute of Limitation to Arbitration and Proceedings

According to AMA, the period between the initiation of an arbitration and the final arbitral ruling is not taken into account when deciding whether the cause of action subject to the arbitration has become barred. The AMA

⁷³ section 55(2) and 56(9) of AMA

⁷⁴ section 2(4) of AMA

⁷⁵ section 91 Of AMA

⁷⁶ see generally Jackson, Etta & Edu, *A review of Arbitration and Mediation Act, 2023* <https://jee.africa/wp-content/uploads/2023/07/A-REVIEW-OF-THE-ARBITRATION-AND-MEDIATION-ACT-2023.pdf> accessed 10 May 2024

⁷⁷ section 5(11) of AMA

suspends the running of the limitation period for the claim that is the subject of a mediation until the mediation procedures have concluded without a settlement agreement. This increases the appeal of arbitration and mediation. Members can now resolve their disagreements without worry that the statute's restriction time would harm their cause of petition.

Provisions on Mediation

In contrast to the ACA, which provides directed rules on conciliation, the AMA includes mediation provisions in sections 67-87. The AMA contains detailed regulations for the conduct of mediation, including secrecy and the inadmissibility of remarks made during such procedures. In terms of mediation, the AMA allows for the execution of a settlement agreement as a contract, consent judgment, or consent award. It also provides limited reasons for refusing to enforce a settlement agreement.

In respect to the international settlement agreement, the AMA integrates and demands the execution of Singapore's mediation rules. The settlement agreement must be with a nation that is a signatory to the convention and pertain to a business relationship. Section 76 of the AMA stipulates that all mediation processes be confidential. Disclosure is crucial in instances such as the prevention and detection of crime. AMA prohibits the use of remarks made during mediation as evidence in later arbitral or judicial proceedings.⁷⁸ The AMA further states that the mediator must participate in the formulation and drafting of the settlement agreement, and that settlement agreements reached via mediation are binding on the parties and enforceable in court as contracts, consent judgments, or consent awards.⁷⁹

The Mediator is also prohibited from functioning as an arbitrator in a case that was the subject of mediation procedures unless the parties agree.⁸⁰ The Act introduced the immunity clause⁸¹ which shields and exempts the mediators from any liability arising from actions taken or not taken in the execution of their duties. AMA is committed to upholding the International Mediation Settlement Agreement.⁸² It stipulates that the Singapore Convention shall apply when enforcing any international settlement agreement made outside the Federal Republic of Nigeria, provided:

- a. that the State is a signatory to the Singapore Convention; and
- b. that disputes arising from a legal relationship, whether contractual or otherwise, are deemed commercial under Nigerian law.

⁷⁸ section 71 of AMA

⁷⁹ section 82 (1) & (2) of AMA

⁸⁰ section 79 of AMA

⁸¹ section 81 of AMA

⁸² section 87 of AMA

The AMA mediation provisions are applicable wherever the parties have provided written approval, encompassing international commercial mediation, domestic commercial mediation, domestic civil mediation, and both domestic and international settlement agreements resulting from mediation.

Conclusion and Recommendations

The implementation of AMA 2023 signifies a significant advancement in Arbitration and Mediation in Nigeria. The innovations are interesting and well-received by arbitrators, mediators, academics and all users. The discussed innovation enhances the available new legal framework for arbitration and mediation in Nigeria. There are however identified gaps/loopholes under the AMA.

1. Lack of penalty provisions for non-expedient delivery of a decision by :

(1) an emergency Arbitrator;

(2) the mechanisms of ART;

(3) Requiring the agreement of all parties as a condition for consolidation.

It is suggested that the AMA should attend to these gaps in its subsequent amendment.

2 Even though the ART is a welcome development under the Act. Practitioners and users are of the view that it will result in further delay and additional costs. ART involves subjecting an award to further review. Even though it is the parties that will voluntarily agree to it in the agreement, the delays in enforcement of awards coupled with this additional delay sort of by ART may not be too beneficial to arbitration, which is expected to be divorced of unnecessary technicalities and also achieved speedily.⁸³

3. Concerns have been raised over the inadequate advice on the arbitration of tax issues. It is also noted that the Act has not distinguished between tax disputes and tax-related disputes as demonstrated by the Court in the case of *Esso v. FIRS*,⁸⁴ the case is instructive in this regard.

4. It is particularly concerning that Nigeria joined the United Nations Convention on International Settlement Agreements Resulting from Mediation in August 2019. the Convention does not in any way form part of AMA as it was not integrated in any way into the Act.

5. The AMA has explicitly excluded section 46 pertaining to the "Award of Interest." Even though this appears in the arrangement section/content section. It is totally missing in the body of law. The omitted provisions will need to be

⁸³ <https://www.patrelipartners.com/overview-of-the-arbitration-and-mediation-act-2023/>
accessed 10 May, 2024

⁸⁴ [2017] LPELR - 516 18 (CA)

inserted so as to grasp the full intention of the law in that section .This is expected to be corrected in the gazetted copy.

AMA is a welcome development in Arbitration and Mediation in Nigeria and an alignment with international best practices.