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Nigeria Reform of Arbitration Law

A Closer Look at the Major Legislative Changes

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Introduction

On 26 May 2023, the president of the Federal Republic of Nigeria signed into law the 2023 Arbitration and Mediation Act 2023 (New Arbitration Act), which repeals the Arbitration and Conciliation Act 1988 (Laws of the Federation of Nigeria 2004 Cap A18) (1988 Act).

The New Arbitration Act, as highlighted in its explanatory memorandum, has the purpose of "provid[ing] a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation". It is further stated that the New Arbitration Act "make[s] applicable the New York Convention [on the recognition and enforcement of arbitral awards] to any award made in Nigeria or in any contracting State."

The New Arbitration Act's objective to enhance and strengthen Nigeria's arbitration system and cement Nigeria's status as a leading arbitration hub is primarily achieved by (i) regulating national courts' power to issue, recognise and enforce interim measures, (ii) establishing a tribunal for the review of arbitral awards, (iii) providing mandatory stay of parallel court proceedings, and (iv) regulating the issue of third-party funding in arbitration.

Interim Measures (Sections 19-29)

Interim measures involve awards or orders issued by arbitral tribunals to protect a requesting party from damages during the course of an arbitral proceeding. Most often, the power to grant interim measures is considered inherent within arbitral tribunals and, depending on the jurisdictions, it may be exclusively or jointly exercised with national courts.

Nigeria's recent reform provides for a shared power to issue interim measures between arbitral tribunals and national courts (Sections 19 and 20).

Under the 1988 Act, only an arbitral tribunal may grant interim relief in respect of a pending arbitration. This led to a situation as illustrated in the case of *NV Scheep v MV S Araz* (2000) where the Nigerian Supreme Court refused to grant an injunction on the basis that it considered that, for the court to be able to do so, the substantive dispute concerned needed to be before the court for determination. The power to grant interim measures by the courts as provided in the New Arbitration Act is therefore a clear improvement on the 1988 Act.

Furthermore, the New Arbitration Act sets forth specific grounds for refusal to recognise or enforce interim measures by national courts. In this respect, and as examples, interim measures may be refused where a decision by an arbitral tribunal ordering the provision of security, as a condition for the grant of the interim measure, has not been complied with or where, as provided in Section 29 (1) (b), the courts find that the interim measure is incompatible with the powers conferred upon the court. Nevertheless, the court may decide to adapt the interim measure to its powers and procedure by reformulating the interim measure without modifying its substance.

Despite a *prima facie* broad discretionary power bestowed to the courts, the latter will be acting as a procedural supportive mechanism to arbitral tribunals. The New Arbitration Act, therefore, represents a step forward to a full empowerment of arbitral tribunals seated in Nigeria to issue interim measures.

Establishment of the Award Review Tribunal (Section 56)

One of the distinguishing novelties of the New Arbitration Act is the establishment of an arbitral awards review mechanism to ensure the finality of arbitral awards by creating the Award Review Tribunal (Review Tribunal).

The creation of the Review Tribunal allows disputing parties to submit a request for review of arbitral awards before the Review Tribunal – constituted in the same manner as the original tribunal – provided that referral to the Review Tribunal is expressly included in the arbitration agreement (Section 56). It follows that where parties agree to opt in to this mechanism, the Review Tribunal will have exclusive jurisdiction to consider challenges to arbitral awards. The New Arbitration Act does not specify, however, whether this mechanism may also be applied in *ad hoc* arbitrations.

The Review Tribunal's decision may be reviewed by courts if the award is fully or partially set aside upon the application of one party. In such cases, the court may reinstate the award if it is satisfied that the decision of the Review Tribunal is "unsupportable" having regard to the grounds for setting aside arbitral awards (Section 56(8)). Conversely, if the award is confirmed by the Review Tribunal, the court can annul the award only on the grounds of arbitrability and/or public policy.

Mandatory Staying of Parallel Court Proceedings (Section 5)

The New Arbitration Act has brought clarity in relation to the staying of parallel court proceedings, if the matter before the court is covered by a valid arbitration agreement. Under the New Arbitration Act, the courts are mandated to stay proceedings except where the arbitration agreement is adjudged to be void, inoperative or incapable of being performed. Previously, the 1988 Act, in fact, provided that a decision to stay proceedings was at the discretion of the courts and based on the willingness of the applicant to proceed with the arbitration. Instead, the New Arbitration Act conclusively clarifies the issue as its Section 5(1) provides that "a Court before which an action is brought in a matter, which is the subject of an arbitration agreement, shall refer the parties to arbitration" unless the arbitration agreement is "void, inoperative or incapable of being performed."

Therefore, parties may be confident that, in the presence of a valid arbitration agreement, Nigerian courts will now – without exception – stay the proceedings in favour of arbitration.

Third-party Funding (Sections 61 and 62)

A significant innovation brought by the New Arbitration Act is the regulation, for the first time in Nigeria, of the controversial phenomenon of third-party funding in arbitration. Despite the issue not being addressed in the 1988 Act, the prevailing view was that third-party funding was illegal, being in contrast with the common law doctrine of champerty and maintenance, which prohibits third parties from financing the disputing parties.

The New Arbitration Act dispels all doubts in this respect, and, at Section 61, provides that the torts of maintenance and champerty do not apply in relation to third-party funding of arbitrations seated in Nigeria. In addition, pursuant to Section 62(1), and in line with international third-party funding legislations, the party benefitting from the financing shall disclose it to the adverse party.

Therefore, not only does the New Arbitration Act legitimise third-party funding in Nigeria, but in light of the duty to disclose, it also reassures the parties that the impartiality and fairness of the proceedings will not be impaired by the failure of a party to disclose a concealed third-party funder.

Other Changes

In addition to the key changes pictured above, the New Arbitration Act introduced further relevant changes to Nigeria's arbitration legislation:

- **Seat of arbitration** – When the seat of arbitration is not specified by the parties, the seat will be Nigeria, unless the tribunal decides otherwise (Section 32(2)).
- **Default number of arbitrators** – When the parties do not specify the number of arbitrators, there will be a sole arbitrator (Section 6(2)).
- **Form of arbitration agreement** – Electronic communications with accessible information will also constitute agreements in writing (Section 2).
- **Challenge to arbitrators** – Arbitral tribunals will have the authority to rule on the challenge of the arbitrators, but the unsuccessful party may apply to Nigerian courts for review (Sections 8 and 9).
- **Mediation** – The Singapore Convention on Mediation and the UNCITRAL Model Law on Mediation are implemented (Part II).

Conclusion

The New Arbitration Act represents a comprehensive reform of Nigeria's arbitration legislation and meaningfully addresses and resolves many of the crucial issues at debate in contemporary arbitration. In light of the structured, modern and unified arbitration legislation, African and international players will be incentivised to choose Nigeria as the seat of their arbitration proceedings, placing Nigeria as one of the most preferred destinations for arbitration and investments in the continent.

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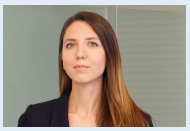

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