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# International Arbitration 2022

Nigeria: Law and Practice
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# NIGERIA

## Law and Practice

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# Trends and Developments

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## Introduction

As a result of the well-documented benefits of arbitration as a mechanism for the resolution of commercial disputes, we have witnessed a recent trend where countries have increasingly come to compete through legislation and court decisions to have their jurisdictions perceived as arbitration-friendly. This article examines the trends and developments in the field of arbitration in Nigeria. It analyses in detail some of the provisions of the recently passed Arbitration and Mediation Bill 2022, which now awaits the President's assent. The paper also discusses some arbitration-related decisions that have recently emanated from Nigerian courts with a view to considering whether those decisions support or militate against the quest to establish Nigeria as a veritable regional arbitration hub, or at least as an arbitration-friendly jurisdiction.

## Innovative Provisions of the Arbitration and Mediation Bill 2022

On 10 May 2022, the arbitration community in Nigeria received the cheerful news that, after several attempts spanning at least a decade, the Senate of the National Assembly had finally passed a Bill to Enact the Arbitration and Mediation Bill 2022 (the "Bill") in concurrence with the House of Representatives, which had earlier passed the Bill. If assented to by the Nigerian President, Muhammadu Buhari, the Bill will repeal the Arbitration and Conciliation 1988 (the "1988 Act"), and the overwhelming verdict is that the Bill represents a significant upgrade from its predecessor. Below are some of the significant and innovative provisions in the Bill.

First, unlike the 1988 Act, which contains no definition of "Arbitration Agreement", the Bill in Section 2(1) contains a very liberal definition of "Arbitration Agreement". Instructively, the Bill acknowledges the advances in technology by expressly stating that the requirement that an Arbitration Agreement shall be in writing is met if the agreement is contained in an electronic communication.

Second, the Bill has eliminated the most controversial aspect of the 1988 Act by discarding the provisions of Sections 4 and 5 of the 1988 Act and replacing them with a new Section 5. In the 1988 Act, both Sections 4 and 5 provided for the powers of the national court to stay proceedings in respect of a dispute which is the subject of an arbitration agreement and refer parties to arbitration. However, as most commentators agreed, the utility of having two separate provisions of the Act to govern the same issue was less than clear, and only served to create confusion due to the duplication and the conflict in the powers granted to the court under the two sections. Section 5 of the Bill now tracks the provisions of Article II (3) of the New York Convention by simply providing 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 it finds that the said agreement is null and void, inoperative or incapable of being performed.

Very importantly too, the conditions in Section 5 of the 1988 Act for the grant of a stay of proceedings, including the requirement that the applicant is ready and willing to do all things necessary to the proper conduct of the arbitration, which the courts elevated to onerous levels in their interpretation for instance in The Owners of MV Lupex v Nigerian Overseas Charter-

ing & Shipping Ltd (MV Lupex) (2003) 15 NWLR (Pt 844) 469, no longer forms part of the new regime. What remains the same is that the order of stay of proceedings may only be granted if any of the parties so requests, and such request must be brought by the party not later than when submitting its first statement on the substance of the dispute. However, the equally controversial phrase, "before taking any other step", which was the subject of judicial interpretation in a myriad of cases, has also been discarded.

Under Section 6 of the Bill, the default number that constitutes an arbitral tribunal is longer three, as was the case under the 1988 Act, but one. A new Section 7 has been inserted which acknowledges the international nature of arbitration by providing that no person shall be precluded from acting as an arbitrator in Nigeria by reason of his or her nationality.

More fundamentally, unlike the case under the 1988 Act where the default appointing authority was the national court, in cases where either the parties failed to appoint a sole arbitrator or a party failed to nominate or appoint a party-appointed arbitrator or even where the party-appointed arbitrators failed to agree on a presiding arbitrator, the Bill has now included "an arbitral institution in Nigeria" as the joint default appointing authority with the national courts. The designation of the national courts as the sole default appointing authority under the 1988 Act is part of the causes of the delay in the conclusion of arbitral proceedings and opened the door for interference by the courts in the judicial process. While the ideal position is to have the arbitral institutions as the default appointing authority, the position adopted by the Bill represents a major improvement.

Another area of inconsistency that has been addressed in the Bill is in respect of the challenge to arbitrators. Section 9(3) of the 1988 Act provides that unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge, while Article 12 of the Arbitration Rules contained in the First Schedule to the 1988 Act provides that the decision on the challenge shall be made by the court except in cases where the parties designated a different appointing authority. Section 9(2) of the Bill equally provides for the powers of the arbitral tribunal to decide on a challenge, while Article 13(3) of the Arbitration Rules in the Bill provides that the decision on the challenge shall be made by the appointing authority. Overall, and compared to the 1988 Act, the Bill makes very elaborate provisions on the powers of an arbitrator; the mode of appointment; the appointment of a substitute arbitrator; the withdrawal, death and cessation of office of an arbitrator; the immunity of an arbitrator, an appointing authority, and the arbitration institution; etc.

Yet another innovative provision in the Bill can be found in Section 16, which provides for the appointment of an emergency arbitrator where a party requires an urgent relief, prior to the constitution of the emergency arbitrator. The application for the appointment of such emergency arbitrators shall be submitted to the arbitral institution designated by the parties or, failing such designation, to the national court. This commendable provision accords with the trend found in new-generation national arbitration legislations and the Lagos Court of Arbitration Rules. Furthermore, the Bill in Section 19 and Section 20 respectively provides for the powers of national courts and arbitral tribunals to grant interim measures of protection which under Section 28 are binding and capable of recognition and enforcement. The Bill also provides for the first time, in Section 22, that the request for interim measures may be made together with an application for a Preliminary Order without notice to the other party. However, Section 23(5)

of the Bill mirrors Article 17c (5) of the UNCITRAL Model Law, by providing that Preliminary Orders, while binding, shall not be subject to enforcement by a court.

In another departure from the provisions of Section 15 of the 1988 Act, which provided, and onerously too, that arbitral proceedings shall be conducted in accordance with the procedure contained in the Arbitration Rules set out in the first schedule to the Act, the Bill provides in Section 31 that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. It is only in the case where the parties fail to agree on the procedural rules, that the Arbitration Rules set out in the first schedule to the Bill apply. There is no gainsaying the fact that the position under the Bill corresponds with the principle of party autonomy, which is the hallmark of international arbitration.

Another fundamental feature of the Bill is that it explicitly provides in Section 32 for the Seat of an arbitration and distinguishes between the "Seat" and the "Venue" where the arbitration proceedings are to take place. This is a welcome departure from Section 16 of the 1988 Act, which merely provided for the "Place" of the arbitral proceedings, which section has resulted in great controversy between parties, sometimes with monumental consequences.

There are also the welcome provisions in Section 34 (1) & (4) of the Bill that although the provisions of the Limitation Act apply to arbitral proceedings as they apply to judicial proceedings, in calculating the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded. If this Bill is assented to by the President, this provision, which borrows from the sub-national Arbitration Law of Lagos State (in Nigeria), will finally bury any argument that the Nigerian Supreme Court decision in the case of City Engineering Nig. Ltd v Federal Housing Authority (1997) 9 NWLR (Pt. 520) 224 still constitutes binding precedent.

In the City Engineering case, the Supreme Court held that for the purpose of determining the limitation period for the enforcement of an arbitral award, time begins to run from the date that the original cause of action arose and not from the date of the arbitral award. The implication of this judgment has been that award creditors were bound to apply to enforce their award not later than the stipulated limitation period, usually six years. Indeed, there have been cases where the limitation period expired even before the award was actually rendered. The Supreme Court judgment has accordingly brought hardship to award creditors and adversely affected the practice of arbitration in Nigeria. The coming into effect of the Bill will therefore represent a transformation in the practice of arbitration in Nigeria.

The most talked-about innovation in the Bill, and about which the present authors are most excited, is the introduction of third-party funding as part of the provisions of the Bill. Despite its benefits, third-party funding in commercial arbitration is still at early stages of evolution in global arbitral legislation. It is therefore a very welcome addition which could potentially contribute to the growth and development of arbitration in Nigeria.

### Discussion on Some Recent Arbitration-Related Decisions of Nigerian Courts

Nigerian courts have generally, especially in more recent times, adopted a pro-arbitration approach in the determination of arbitration-related cases. The case law in Nigeria is replete with instances where Nigerian courts have given effect to parties' agreement by refusing to countenance actions in respect of which there is an

arbitration agreement and referring parties to arbitration in accordance with their agreement.

Indeed, a former Chief Justice of Nigeria, Walter Nkanu Onnoghen, issued a "direction" at the 2017 annual arbitration conference of the Nigerian Institute of Chartered Arbitrators, calling on judges to resist the temptation of assuming jurisdiction over commercial disputes arising from contracts with arbitration clauses and, instead, to stay such proceedings in favour of arbitration as required by law, thereby restating beyond doubt the clear Nigerian judicial policy in favour of a stay of proceedings pending arbitration.

Further, there has been a recent trend of decisions from Nigerian courts, especially the Supreme Court, which have greatly expanded the frontiers of the field of arbitration, and which have contributed significantly to the growth and development of arbitration in Nigeria. Such cases include Mekwunye v Imoukhuede (2019) LPELR-48996(SC), where the Supreme Court restated the general principle that parties must take their arbitrators for better or worse as regards both decisions of fact and decisions of law, thus where parties elected to have their dispute resolved by arbitration, and indeed took part in the proceedings, they cannot turn around to challenge the award by reason of an unfavourable outcome.

There is also the recent decision in Metroline (Nig.) Ltd. v Dikko (2021) 2 NWLR (Pt. 1761) 422, where the Supreme Court deprecated the practice of filing "all manner of appeals against awards"; urged parties to fully understand, respect and appreciate the nature of arbitration agreements they freely entered into; and impressed on counsel the need to explain the nature of arbitration agreements and not to encourage their clients to disregard them when they get unfavourable awards. Above all, the court issued a policy discouraging the courts from allowing themselves to be used as a tool to set aside otherwise good awards or to frustrate legitimate arbitration awards.

Regrettably, it has not been all rosy. Contrary to the wise counsel above, counsel and parties still raise frivolous grounds on which to challenge unfavourable awards. It now appears that parties consider the public policy defence as an omnibus ground to challenge arbitral awards. It is left to the courts to resist such practice given the dicta above.

There is also the more problematic occurrence of Nigerian courts erroneously setting aside foreign arbitral awards, ie, awards issued by foreign-seated arbitral tribunals or awards which emanated from arbitrations conducted under laws other than Nigerian law. The latest example of this is the case of Limak Yatirim Enerji Uretim Isletme Hizmetleri ve Insaat A. S. & Ors v Sahelian Energy & Integrated Services Ltd, where the Nigerian Court of Appeal upheld the decision of the Federal Capital Territory Abuja, which set aside a Final Arbitral Award published on 28 June 2018 by a Tribunal of the International Chamber of Commerce (ICC) International Court of Arbitration seated in Geneva, Switzerland. This is a trend that portends one of the greatest threats to the New York Convention and could undermine the ongoing efforts to establish Nigeria as a veritable seat (and venue) for international arbitration in the West African sub-region.

## Conclusion

The quest for the continued growth and development of the dispute resolution space in Nigeria, especially the field of arbitration, looks increasingly promising. As a result of the severe disruptions occasioned to the dispute resolution system before national courts by the COVID-19 pandemic and the lockdown it induced all over the world, the need for businesses to resort to arbitration and other alternative dispute reso-

lution options felt all the more acute. This was coupled with the introduction and widespread acceptance of virtual and other digital hearing platforms which fitted nicely into the flexibility that arbitration offers. Nigerian courts have generally risen to the challenge by issuing pro-arbitration decisions, while the Nigerian legislature has played its part by finally passing the Arbitration and Mediation Bill to replace the outmoded Arbitration and Conciliation Act 1988. The ball is now firmly in the court of the executive branch of government to sign the Bill into law. We appreciate the myriad of benefits that the Bill potentially holds for Nigeria, especially in the area of the quest to establish Nigeria as a veritable regional arbitration hub, and we are cautiously optimistic that the journey towards the reform of the Nigerian arbitral legislation is coming to an end as we await the signing of the Bill into law.

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