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Nigeria: Trends & Developments

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Trends and Developments

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ALP NG & Co. is a commercial law firm established following a merger of Nigeria-based law practices, whose members have varied experience spanning all areas of its combined practice. It is an Africa-focused firm with a dedicated and innovative corporate practice, providing the highest quality of legal, business advisory and related services to the local business community and a network of continental and international clients. The firm is connected across the continent and internationally, linked by the extensive support capabilities and correspondent relationships with law firms in Africa, Europe, Asia and North America. It has strong regional networks and international relationships, offering pragmatic and efficient solutions to legal concerns. The firm provides services to the local business community and a network of continental and international clients. It provides effective and bespoke services to meet its clients' diverse needs in more than ten practice areas.

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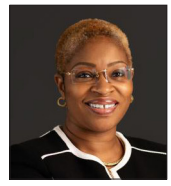

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Introduction

As a result of the well-documented benefits of arbitration as a mechanism for resolving commercial disputes, we have witnessed the trend of countries actively competing, through legislation and court decisions, to have their jurisdictions perceived as arbitration-friendly. This article discusses the trends and developments in the field of arbitration in Nigeria and analyses in detail some of the provisions of the recently passed Arbitration and Mediation Act 2023 (AMA). It also examines some recent arbitration-related decisions from Nigerian courts to see whether those decisions support or stifle the quest to establish Nigeria as a veritable regional arbitration hub and an arbitration-friendly jurisdiction.

Innovative Provisions of the Arbitration and Mediation Act 2023

On 26 May 2023, presidential assent was given to the AMA, which repealed the 35 year old Arbitration and Conciliation Act 1988 (the 1988 Act) and introduced some significant changes. Below are some of the innovative provisions in the AMA.

Unlike the 1988 Act, which did not define "Arbitration Agreement", Section 2(1) of the AMA contains a wide and liberal definition of "Arbitration Agreement" and expands scope of arbitration agreements recognised under the law. Instructively, the AMA 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 recorded in any form or is contained in electronic communication.

The AMA has eliminated arguably the most controversial aspect of the 1988 Act by discarding the provisions of Sections 4 and 5 and replacing them with a new Section 5. In the 1988 Act, Sections 4 and 5 both gave the court the power to stay proceedings in respect of a dispute that is the subject of an arbitration agreement and refer parties to arbitration. However, as most commentators agreed, the utility of having two separate provisions in 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. Thankfully, Section 5 of the AMA models 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.

More importantly, the conditions in Section 5 of the 1988 Act for the granting of a stay of proceedings, including the requirement that the applicant shall be ready and willing to do all things necessary for the proper conduct of the arbitration, which the courts elevated to onerous levels in their interpretation in, for instance, The Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd (MV Lupex) [2003] 15 NWLR (Pt 844) 469, no longer forms part of the new regime. What remains the same, though, 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 a myriad of judicial interpretations, has also been discarded.

In Section 6 of the AMA, the default number of persons that constitute an arbitral tribunal is no 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 and the parties' freedom of choice by providing that no person shall be precluded from acting as an arbitrator in Nigeria by reason of his or her nationality.

Unlike the position under the 1988 Act where the default arbitrator(s) appointing authority was the national court in cases where either the parties fail to appoint a sole arbitrator, or a party fails to nominate or appoint a party-appointed arbitrator, or even where the party-appointed arbitrators fail to agree on a presiding arbitrator, the AMA 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 had been one of the causes of delay in concluding arbitral proceedings speedily and opened the door for interference by the courts. While the ideal position is to have the arbitral institutions as the default appointing authority, the position adopted by the AMA represents a major improvement.

Another area of inconsistency that has now been addressed in the AMA is in respect of the challenge to arbitrators. Section 9(3) of the 1988 Act provided that unless the challenged arbitrator withdraws, or the other party agrees to the challenge, the arbitrator or arbitral panel shall decide on the challenge. Article 12 of the Arbitration Rules contained in the First Schedule to the 1988 Act further provided that the decision on the challenge shall be made by the court except in cases where the parties designated a different appointing authority. Under the AMA, Section 9(2) equally provides for the powers of the arbitral tribunal to decide on a challenge while Article 13(3) of the Arbitration Rules made pursuant to the AMA contains a slight but significant change to the position in the 1988 Act, in that the decision on the challenge shall be made by the appointing authority.

Overall, compared to the 1988 Act, the AMA has much more 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.

In a departure from the provisions of Section 15 of the 1988 Act, which provided, and erroneously 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 AMA provides in Section 31 that parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. It is only in cases where the parties fail to agree on the procedural rules that the Arbitration Rules set out in the First Schedule to the AMA will apply. There is no gainsaying the fact that the position under the AMA corresponds with the principle of party autonomy, which is the hallmark of arbitration.

Another important feature of the AMA 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. Under the AMA, the "seat of arbitration" is the judicial seat of the arbitration for the purpose of determining the law that will govern the proceedings, which may be designated by the parties or an arbitral or other institution, while the venue is any place that the arbitral tribunal meets for consultation, hearing or inspection. This is a welcome departure from Section 16 of the 1988 Act, which merely provided for the "place" of the arbitral proceedings. This section had, not unexpectedly, brought

about some measure of controversy, sometimes with monumental consequences.

There are also the very welcome provisions in Sections 34 (1) and (4) of the AMA to the effect that although the provisions of the Limitation Act apply to arbitral proceedings as they apply to judicial proceedings, in calculating the date of commencement of proceedings for the purpose of enforcing an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded. This effectively reverses the position in cases like City Engineering Nig. Ltd v Federal Housing Authority [1997] 9 NWLR (Pt. 520) 224 and Sakamori Construction Nigeria Limited v Lagos State Water Corporation [2022] 8 NWLR (Pt. 1823) 339.

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 decision has accordingly wrought considerable hardship on award creditors and adversely affected the practice of arbitration in Nigeria. The AMA, however, borrows from the sub-national Arbitration Law of Lagos State (the commercial capital of Nigeria) and adopts the ratio in Sifax Nigeria Limited v Migfo Nigeria Limited [2018] 9 NWLR (Pt. 1623) 138 and Messrs U. Maduka Ent. (Nig.) Ltd v B.P.E [2019] 12 NWLR (Pt. 1687) 429, to bring the law in line with international expectations.

Interim Measures

Yet another innovative provision in the AMA can be found in Section 16, which provides for the appointment of an emergency arbitrator where a party requires urgent relief prior to the appointment of the tribunal, and emergency arbitration proceedings. Under the AMA, the application for the appointment of such emergency arbitrator shall be submitted to the arbitral institution designated by the parties or, failing such designation, to the national court. This remedy, designed to safeguard the rights of a party to a dispute, especially in situations where time is of the essence and parties are unable to wait for the constitution of an arbitral tribunal to prevent or remedy a damage, is a commendable inclusion in the AMA. It mirrors a similar provision in the Lagos Court of Arbitration Rules and accords with the trend in new-generation national arbitration legislations. Furthermore, Sections 19 and 20 respectively of the AMA provide 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 AMA also provides, for the first time, in Section 22, that a 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 AMA, like Article 17C (5) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, provides that preliminary orders, while binding, shall not be subject to enforcement by a court.

Consolidation of Proceedings

The AMA now provides for the consolidation of arbitration proceedings upon agreement by the parties. This will allow different parties involved in multiple arbitral proceedings arising from disputes tied to the same subject matter and the same arbitration agreement, to merge the pro-

ceedings. The law also now permits the joinder of additional parties to an arbitration, and concurrent hearings of proceedings. Parties to an arbitration or interested third parties may now apply for additional parties who were parties to the arbitration agreement to be included in an ongoing arbitration proceeding. These innovations are expected to contribute and be instrumental to the efficient settlement of class actions and disputes resulting from large (especially construction) projects.

Third-Party Funding

The most talked-about innovation in the AMA, and about which the authors are most excited, is the introduction of third-party funding as part of arbitral proceedings. The concept of third-party funding has introduced a remarkable evolution in arbitration, making it more accessible for parties that may not have the financial resources to assert their rights through arbitration. The AMA now permits parties to enter into agreements with third parties to fund the arbitration process on their behalf. This innovation removes the traditional legal barriers of champerty and maintenance, thereby allowing potentially meritorious claims to be brought that would otherwise have been financially prohibitive. The beneficiaries of third-party funding in arbitration proceedings are, however, required to notify the other party(ies) and the arbitrator(s) of this position and may be required to confirm, by deposition, whether the funder has agreed to cover any adverse cost order.

Despite its benefits, third-party funding in commercial arbitration is still in its nascent stages of evolution in global arbitral legislation. It is therefore a very welcome addition to Nigerian practice for a number of reasons, not the least of which is adding to Nigeria's competitiveness as a preferred seat for international commercial arbitration. The fact that proceedings may no longer be stalled on account of a lack of sufficient funding and the implications of this for access to justice will potentially contribute to the further growth and development of arbitration in Nigeria.

The Award Review Tribunal

The concept of the award review tribunal is another innovation that will have far-reaching effects. This important solution to a perennial problem offers a faster and more efficient means of challenging an arbitral award, effectively bypassing the characteristically time-consuming and costly court proceedings. This will not only speed up the process but also preserve the sanctity and reliability of Nigerian seat arbitral awards, thereby increasing confidence in Nigeria's arbitration framework.

International Commercial Mediation

In line with the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), the AMA recognises the growing popularity of commercial mediation as a formal dispute resolution mechanism and provides a comprehensive legal framework for international commercial mediation. This is a laudable acknowledgement of current business realities, as many parties are unwilling to invest the time arbitration can sometimes take and find that mediation is more effective for resolving their disputes. The inclusion of these provisions is clearly another step towards aligning Nigeria with global trends in dispute resolution and will further promote Nigeria as a business-friendly environment, adding to its competitiveness as an attractive jurisdiction for international commercial arbitration and mediation.

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. Case law in Nigeria is replete with instances where Nigerian courts have given effect to parties' agreement by refusing to adjudicate over actions in respect of which there is an arbitration agreement, instead referring parties to arbitration in accordance with their agreement. These include the cases of Nwagbara v Jadcom Ltd [2021] 16 NWLR (1802) 343 and Esso Exp. & Prod. (Nig.) Ltd. v F.I.R.S. [2021] 8 NWLR (1777) 98. In Esso Exp. & Prod. (Nig.) Ltd. v F.I.R.S., the Court of Appeal went to great lengths to distinguish between "petroleum profit tax", payable from tax oil under a production sharing contract, which is non-arbitrable by law, and "tax oil", which is determined by the parties under a production sharing contract. The court held that the basic contract dispute over the obligation of a party not to lift beyond its quota of the tax oil is not a tax dispute and, as such, is arbitrable.

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

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 both as to the decisions of facts and as to decisions of law. Thus, where parties have elected to have their dispute resolved by arbitration, and indeed took part in the proceedings, they cannot turn around and challenge the award merely because of an unfavourable outcome.

Another case in point is the case of 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 cautioning the courts not to allow themselves to be used as a tool to set aside otherwise legitimate arbitral awards or frustrate proceedings.

Regrettably, it has not been all rosy. Contrary to the wise counsel above, there has been the noticeable trend of counsel and parties raising, and of courts countenancing, frivolous grounds challenging unfavourable awards. Indeed, there is empirical evidence that parties now consider the public policy defence as an omnibus ground to challenge arbitral awards.

There is also the more problematic occurrence where Nigerian courts have on isolated occasions erroneously set aside foreign arbitral awards, ie, awards rendered by foreign-seated arbitral tribunals or awards emanating from arbitrations con-

ducted 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 [2021] LPELR-058182(CA), where the Nigerian Court of Appeal upheld the decision of the High Court 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 on the grounds that enforcing the award would be contrary to public policy. The court held that the lower court was right to exercise its powers to set aside the international arbitral award as non-compliance with the statutory requirement to register the Cooperation Framework Agreement (which gave rise to the international arbitral award) with the National Office for Technology Acquisition and Promotion is against public policy. This approach could potentially undermine ongoing efforts to reinforce Nigeria as a veritable seat (and venue) for international arbitration in the West African sub-region.

Increasing Adoption of Technology in Arbitral Proceedings in Nigeria

Although parties still favour physical sittings during arbitral proceedings, the use of various forms of electronic communication technology has become increasingly popular in Nigeria. Following the significant limitations that were imposed to address the spread of COVID-19 in 2020 and 2021, virtual hearings were adopted to prevent inordinate delays in ongoing proceedings, and their use has become fairly widespread.

Since the relaxation of travel restrictions, parties have returned to physical arbitral proceedings. However, many remain open to the use of communication technology to allow parties to attend arbitral hearings virtually where unavoidable and where agreed to by the parties. To ensure that the awards are not set aside on grounds that the proceedings were conducted at the wrong venue, the arbitral panel usually sits at the agreed venue of the proceedings and may be joined by the parties and/or witnesses via online videoconferencing platforms.

Conclusion

The severe disruptions to dispute resolution in national courts induced by the COVID-19 pandemic and subsequent worldwide lockdown meant that the need for businesses to resort to arbitration and other alternative dispute resolution options became even more acute. The introduction and now widely accepted use of virtual and other digital hearing platforms in Nigeria fitted nicely into the flexibility that arbitration offers, and the quest for the continued growth and development of the dispute resolution space in Nigeria, especially the field of arbitration, looks increasingly promising. The Nigerian government has played its part by finally signing the new Arbitration and Mediation Bill into law to replace the Arbitration and Conciliation Act 1988, while Nigerian courts have generally risen to the challenge by issuing pro-arbitration decisions. These factors have largely modernised our arbitration framework and aligned it with international best practices and the UNCITRAL Model Law. As one of the pre-eminent commercial and investment arbitration law firms in Nigeria and with affiliates across Africa, ALP NG & Co. appreciates the myriad of benefits that the new Arbitration and Mediation Act 2023 holds for Nigeria, especially in our goal of establishing Nigeria as a veritable regional arbitration hub. We expect that the protracted journey towards the reform of the Nigerian arbitral legislation which has culminated in the Arbitration and Mediation Act 2023 will be immensely beneficial to promote international best standards for arbitration in Nigeria. The future looks bright.

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