

TEMPLARS Legislative Watch: Nigerian Arbitration and Mediation Bill 2022

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On 10 May 2022, the Nigerian Senate passed the Arbitration and Mediation Bill, 2022 (the “**Bill**”) which seeks to repeal the Arbitration and Conciliation Act 1988 (the “**ACA**”). The Bill seeks to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation by setting out substantive and procedural provisions. It contains several novel provisions that are not in the ACA.¹

The Bill presents a positive restructuring of arbitral and mediation proceedings in Nigeria. This note briefly highlights some of the novel provisions sought to be introduced by the Bill which significantly modifies the existing legislative framework on arbitration while introducing for the first time, a new framework for mediation. Though some provisions of the Bill leaves more to be desired, (such as the provision of immunity for arbitrators² and lack of any penalty provision for non-expeditious delivery of an Emergency Decision), overall, the passage of the Bill is a quantum leap for the projection of Nigeria as one of the major arbitration hubs in Africa. Some of the novel provisions in the Bill are discussed below.

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¹ This note does not provide an exhaustive review of the Bill. Besides the provisions discussed in this note, it also contains other novel provisions, including: (a) the codification of foreign arbitral awards (second schedule to the Bill); (b) setting out guidelines for the award of interest by an arbitral tribunal where parties do not agree on interest (section 46(2)(a) of the Bill); (c) provision for lien on final awards pending full payment of arbitrators’ fees and institutions’ expenses by the parties (section 54 of the Bill); (d) provision for a review of the final arbitral award (section 56(1) of the Bill); (e) setting out grounds for setting aside an arbitral award (section 55 (2) of the Bill—this includes legal capacity, invalid arbitration agreement, lack of due process, exceeding the scope of the submission, procedural irregularity, arbitrability and public policy, and (f) clarification of the distinction between juridical place of arbitration and physical place of arbitration (section 32(1)(2)(3) of the Bill).

² Section 13 of the Bill.

1. Third-Party funding

Third-Party funding crystallises when a person or an entity that is not a party to an arbitration agreement or proceedings (i.e., the Third-Party funder³) agrees to provide financial assistance to a party to arbitration proceedings in exchange for a return – usually a fraction of the damages awarded to the funded party. Subject to the terms of a Third-Party funding agreement, a Third-Party funder may agree to pay the counter-party's costs and provide security for the opponent's costs if the funded party is so ordered by an Arbitral Tribunal.

Unlike the ACA, the Bill expressly recognises Third-Party funding and provides that the torts of Maintenance and Champerty do not apply in relation to Third-Party funding of arbitrations seated in Nigeria and related to proceedings in any court within Nigeria.⁴ The Bill also specifically provides that an arbitral tribunal shall fix the costs of arbitration in the final award and such costs include *the cost of Third-Party funding*.⁵ These provisions could encourage parties to a dispute to expend resources and engage the services of a Third-Party funder given that there is scope for such expenses to be repaid by a counter party as may be directed by the final award.

2. Electronic communication as a form of an arbitration agreement

The Bill provides that if an electronic communication is accessible so as to be useable for subsequent reference, then it satisfies the requirement that an arbitration agreement must be in writing.⁶ While “electronic communication” is defined as any communication that the parties make by means of data messages, “data messages” is defined as information generated, sent, received or stored by electronic, magnetic, optical or similar means.⁷

Although the extant ACA contains a similar provision,⁸ it is unclear whether electronic communication falls within “other means of communication” as contemplated by the ACA. Indeed, the Bill expressly recognises e-mail correspondence and other like mediums of electronic communication referring to an agreement by both parties to submit disputes to arbitration. This clears any ambiguity as to what qualifies as a legally binding arbitration agreement under Nigerian law.

3. Emergency arbitration

The Bill provides that 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, either along with or following the filing of a notice of arbitration, but prior to the constitution of the arbitral tribunal.⁹ Thus, in an instance where a party needs an urgent interim relief before the constitution of an arbitral tribunal, an emergency arbitration would aid that party to obtain a valid and legally binding decision which will serve as a conservatory and urgent relief pending the final decision of the arbitral tribunal.

³ Section 91 of the Bill 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.

⁴ Section 61 of the Bill.

⁵ Section 50(1) g of the Bill.

⁶ Section 1(4) of the Bill.

⁷ Section 1(7) of the Bill.

⁸ As section 1 of the ACA provides that an arbitration agreement may be in writing contained in any other means of communication which provide a record of the arbitration agreement.

⁹ Sections 16 and 27(2) of the Bill, Articles 16 and 17 of the First Schedule to the Bill.

This is a novel provision that is not contained in the ACA. Indeed, it could improve the speedy resolution of disputes where a subject matter is of such nature that expedient decision making would be required to protect the interest of a party, pending the final determination of the dispute.

4. Interim reliefs

Under the ACA, parties may make an application to the arbitral tribunal for an interim measure of protection¹⁰ (“**Interim Relief**”). However, the Bill extends this power to grant Interim Reliefs to the court as it provides that a 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. It further states that the court must exercise the power to grant Interim Reliefs within fifteen (15) days of any application.¹¹ This would grant parties to an arbitral proceeding access to the courts where they seek Interim Reliefs and would also mitigate against the time lags that may occur during litigation, as a court’s decision making in this regard is time-bound.

While it appears that any court may grant Interim Reliefs¹², the Bill provides that the recognition or enforcement of an interim measure may be refused if the court finds that the interim measure is incompatible with the powers conferred upon the court¹³. Thus, the power of any court to grant Interim Reliefs to an applicant is subject to the limits of the inherent powers granted by a statutory enactment to the court.

5. Default number of arbitrators

The Bill provides that if there is no agreement as to the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator.¹⁴ This is not provided for in the ACA and has the potential of improving the cost and time expedient in arbitral proceedings. Additionally, with respect to international arbitration, where no procedure is agreed for the appointment of an arbitrator, and no appointing authority is designated or agreed to be designated by the parties, the Director of the Regional Centre for International Commercial Arbitration, Lagos shall be deemed to be the appointing authority designated by the parties.¹⁵

6. Consolidation and joinder of parties

Contractual relationships between distinct but related parties create complementary rights and obligations such that a dispute arising out of one contract may initiate separate but correlated actions for enforcement of rights and obligations which may involve other contracting parties. Assuming binding arbitration clauses exist in all the relevant contracts, there is a significant risk of inconsistent findings and duplicative proceedings if the disputes are adjudicated separately. In such a scenario, the need to consolidate arbitral proceedings and join the parties in one proceeding becomes necessary.

¹⁰ Section 13 of the ACA and Article 26 to the First Schedule of the ACA.

¹¹ Section 19 of the Bill.

¹² As section 91 of the Bill defines court as the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court, unless the parties otherwise agree.

¹³ Section 29 of the Bill.

¹⁴ Section 6(2) of the Bill.

¹⁵ Section 59 of the Bill.

Although this is not provided for in the ACA, the Bill provides that parties may agree that the arbitral proceedings should be consolidated with other arbitral proceedings, including arbitral proceedings involving a different party or parties with the agreement of that party or parties.¹⁶ The arbitral tribunal is also empowered to allow an additional party to be joined to the arbitration, provided that the additional party is bound by the arbitration agreement giving rise to the arbitration.¹⁷

These provisions could enhance procedural efficiency by ensuring that all necessary parties to a dispute are present in the same proceeding. As such, it seeks to alleviate the time, costs, and other inefficiencies of multiple and/or parallel proceedings among which may be increase the risk of inconsistent awards, thereby improving the efficiency of arbitral proceedings.

7. Recognising mediation, conciliation, and other alternative dispute resolution mechanisms

The Bill recognises and defines “mediation” as the process whereby parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship, whether referred to by the expression mediation, conciliation or an expression of similar import.¹⁸ This means that where parties agree to subject their dispute to mediation, conciliation or similar modes of alternative dispute resolution, the provisions of the Bill pertaining to mediation¹⁹ will apply, thus providing an integrated procedural channel for enforcing other alternative dispute resolution clauses in an agreement.

8. Application of statute of limitation to arbitration and mediation proceedings

While the Nigerian courts have held that the time between the commencement of an arbitration and the final arbitral award is not reckoned in considering statute of limitation,²⁰ the Bill reflects this judicial precedent with respect to both arbitration and mediation proceedings.²¹ It emphatically provides that when a mediation proceeding commences, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended, and where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement. Indeed, these provisions offer an additional statutory protection from limitation period with respect to arbitration and mediation proceedings conducted pursuant to the Bill.

Conclusion

The Bill, which now awaits the assent of the President before it becomes law, significantly remodels the administration of arbitral proceedings under Nigerian law and provides for a more efficient and innovative means of administering and enforcing arbitration and mediation agreements and proceedings which could improve the choice of Nigeria as a seat of arbitration.

¹⁶ Section 39 of the Bill.

¹⁷ Section 40 of the Bill.

¹⁸ Section 90 of the Bill.

¹⁹ Section 91 of the Bill.

²⁰ *Messrs U. Maduka Ent. (Nig.) Ltd v B.P.E* (2019) 12 NWLR (Pt. 1687) 429.

²¹ Section 34(1)(b), 37(1)(2) of the Bill.