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TEMPLARS ThoughtLab

# Nigerian Arbitration and Mediation Act, 2023 – Key Innovations

## Introduction

Sequel to [TEMPLARS Legislative Watch: Nigerian Arbitration and Mediation Bill 2022 issued on 1 June 2022](#), the former President of the Federal Republic of Nigeria, Muhammadu Buhari GCFR, assented to the Arbitration and Mediation Bill 2022 on 26 May 2023 which then became the Arbitration and Mediation Act 2023 (the “**AMA**”).

The AMA repealed the Arbitration and Conciliation Act 1988 (the “**ACA**”) and became the unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation.

## Analysis of Key Innovations in the AMA

The AMA contains several novel provisions,<sup>1</sup> some of which are discussed below:

### *i. Third-Party Funding*

The AMA introduces third-party funding arrangements by providing that the torts of maintenance and champerty will no longer apply in relation to arbitrations seated in Nigeria and arbitration-related proceedings in any Nigerian court.<sup>2</sup> For context, in a third-party funding arrangement, a person or an entity who is not a party to an arbitration agreement or proceedings (i.e., the third-party funder) 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.<sup>3</sup>

Indeed, these new provisions on third-party funding can, among others, encourage individuals and companies who lack the financial resources to pursue or defend a legal

<sup>1</sup> This note does not provide an exhaustive review of the AMA. Indeed, the AMA contains other novel provisions, including: (a) recognition of e-mail correspondence and other like media of electronic communication referring to an agreement by both parties to submit disputes to arbitration as a form of arbitration agreement (sections 2(4)(a) and 91); (b) reducing the default number of arbitrators from three (3) to a sole (1) arbitrator (section 6(2)); (c) provision for lien on final awards pending full payment of arbitrators’ fees and institutions’ expenses by the parties (section 54); (d) introducing preliminary orders which may be applied for and granted without notice to the other party pending hearing for an interim measure (section 22(1)); (e) changing the default appointing authority from the Permanent Court of Arbitration at the Hague to the Regional Centre for Commercial Arbitration; and (f) introducing the Arbitration Proceedings Rules 2020 which essentially provides for the mode of starting “arbitration claims” and other ancillary matters in the courts.

<sup>2</sup> Section 61 of the AMA.

<sup>3</sup> Section 91 of the AMA defines a “third party funder” and “third party funding arrangement.”

claim to do so, while managing the financial risks of arbitration, by transferring some or all the costs to a third-party funder, subject to the disclosure requirements set out in the AMA.<sup>4</sup>

## **ii. Interim Measures**

Interim measures in arbitration are temporary measures ordered by an arbitral tribunal pending the issuance of the final award. Under the ACA, parties to an arbitration proceeding could bring an application for an interim measure to the arbitral tribunal,<sup>5</sup> but it had no provisions for the recognition and enforcement of the interim measures or orders granted by a tribunal in court. Under the AMA, however, an interim order of protection issued by an arbitral tribunal is binding and can be recognised and enforced by either party to an arbitration proceeding in Nigerian courts.<sup>6</sup> Such interim order must, however, be compatible with the powers conferred on Nigerian courts and the court may order the requesting party to provide appropriate security if the tribunal has not already made a determination in that regard or where it is necessary to protect the rights of third parties.<sup>7</sup>

## **iii. Emergency Arbitration**

The AMA also introduced the innovative concept of emergency arbitration. This mechanism allows a party to an arbitration agreement to apply for an urgent interim relief pending when an arbitral tribunal has been formally constituted in line with the arbitration agreement. An Emergency Arbitrator can make orders for interim measures or conservatory relief only for a fixed period. Under the AMA, a party who needs an urgent relief to protect their interest, pending the final determination of the dispute, can now apply for the appointment of an Emergency Arbitrator.<sup>8</sup> This provision can eliminate the difficulty of a party approaching Nigerian courts for such interim reliefs.

## **iv. Joinder of Parties**

The ACA did not contain provisions in relation to the joinder of an additional party to arbitration proceedings. Under the AMA, however, a party can now apply to the arbitral tribunal to join an additional party to the arbitration proceedings, provided that the additional party is bound by the arbitration agreement giving rise to the arbitration proceedings.<sup>9</sup> This provision enhances procedural efficiency by ensuring that the arbitral tribunal has the power to allow all necessary parties to the arbitration agreement to be joined in an arbitration for the just determination of the issues in the arbitration.

## **v. Stay of Court Proceedings**

The AMA revised sections 4 and 5 of the ACA which provide for the power of courts to stay proceedings in favour of an arbitration agreement. The AMA simply provides that a Nigerian court before which a dispute—which is subject to an arbitration agreement—is brought shall, if any of the parties requests not later than when submitting their first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the arbitration agreement is void, inoperative or incapable of being performed.<sup>10</sup> This can discourage parties from instituting matters in Nigerian courts in breach of the arbitration agreements.

## **vi. Consolidation**

Unlike the ACA, the AMA provides for the consolidation of disputes.<sup>11</sup> Consolidation is a procedural mechanism allowing for two or more claims to be united into a single proceeding concerning all related parties and disputes. Under the AMA, parties to a dispute may agree that the arbitral proceedings shall be consolidated with other arbitral proceedings, including proceedings involving different parties. This provision

<sup>4</sup> Section 62 of the AMA.

<sup>5</sup> Section 13 of the ACA and Article 26 to the First Schedule of the ACA

<sup>6</sup> Section 28 of the AMA. The AMA also expressly enables the Nigerian courts to issue interim measures (section 19).

can, without a doubt, save time and costs and reduce the risk of parallel proceedings and inconsistent awards.

## **vii. Arbitral Award Review Tribunal**

The AMA also introduces the creation (by parties' arbitration agreement) of an Award Review Tribunal (the "ART")<sup>12</sup> through an arbitration agreement,<sup>13</sup> which allows for a first level review of an arbitral award made in an arbitration proceeding seated in Nigeria by the ART on any of the grounds provided for setting aside an award.<sup>14</sup> Once constituted—in the same number as the tribunal that first determined the dispute, unless the parties agree otherwise—the ART will endeavour to give its award within 60 days of its constitution. Thus, a dissatisfied party can resort to the ART before the Nigerian courts, if necessary. And if the ART has partially or wholly upheld an award, the award can only be set aside by a court on the limited grounds of arbitrability and/or public policy. A major demerit of this provision is that it could increase cost and time for the final settlement and enforcement of a dispute.

## **viii. Streamlined Grounds for Setting Aside an Arbitral Award**

The AMA has streamlined the grounds for setting aside an arbitral award by excluding the "error on the face of the award" ground. Furthermore, if an ART has partially or wholly upheld an award, the award can only be set aside by a court on the limited grounds of arbitrability and/or public policy.<sup>15</sup> This further strengthens the finality of arbitral awards and can encourage more confidence in the arbitration process.

## **ix. Recognising Mediation**

The AMA has also introduced a substantive and procedural framework for domestic and international commercial mediation and settlement agreements resulting from mediation.<sup>16</sup> This can improve the general recognition for mediation proceedings in Nigeria in view of the organised framework the AMA now provides.

## **x. Application of Statute of Limitation to Arbitration and Mediation Proceedings**

The AMA makes it clear that the time between the commencement of an arbitration and the final arbitral award is not reckoned in determining whether the cause of action which is the subject of the arbitration has become statute barred.<sup>17</sup> The AMA also provides that the running of the limitation period regarding the claim that is the subject matter of a mediation is suspended until the mediation proceedings have terminated without a settlement agreement.<sup>18</sup> This makes arbitration and mediation more appealing, and parties can take sufficient time to settle their dispute by arbitration and mediation, without any danger of their cause of action being affected by the limitation period in a statute.

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<sup>7</sup> Sections 28 and 29 of the AMA.

<sup>8</sup> Section 16 of the AMA.

<sup>9</sup> Section 40 of the AMA.

<sup>10</sup> Section 5 of the AMA.

<sup>11</sup> Section 39 of the AMA.

<sup>12</sup> Section 56 of the AMA.

<sup>13</sup> By section 56(1) of AMA, the parties would have to have agreed (in their arbitration agreement) to make an application to review the award to the ART.

<sup>14</sup> These grounds are set out in Section 55(3) of the AMA.

<sup>15</sup> Sections 55(2) and 56(9) of the AMA.

<sup>16</sup> Part II of the AMA.

<sup>17</sup> Section 34 of the AMA.

<sup>18</sup> Section 71 of the AMA.

## Conclusion

Although some provisions of the AMA still leave more to be desired (such as the lack of any penalty provision for non-expedient delivery of a decision by an Emergency Arbitrator, the mechanisms of the ART, and requiring the agreement of all parties as a condition for consolidation), overall, the passage of the AMA is a quantum leap for the projection of Nigeria as one of the major arbitration and mediation hubs in Africa and beyond.

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