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TEMPLARS ThoughtLab

Discussing the "New How" – Examining the "In Writing" Requirement for Arbitration Agreements Under the Arbitration and Mediation Act 2023

Introduction

There is empirical evidence that commercial arbitration as a dispute resolution mechanism has been relatively successful. Evidence of this success includes the widespread adoption and ratification of the major international arbitration conventions; enactment of national arbitral laws in many jurisdictions; an increase in the volume of disputes referred to arbitration and the number of arbitrations conducted each year; the growing number of contracts that stipulate arbitration as the dispute resolution mechanism; the establishment of arbitral institutions in many parts of the world; the conscious efforts of governments to be perceived as pro-arbitration; and very importantly too, the increasing use of arbitration to resolve new categories of disputes that were previously considered to be within the exclusive preserve of national courts and therefore outside the purview of arbitration.

One of the ways in which countries compete to be perceived as arbitration-friendly, is by enacting progressive arbitral legislations. In the case of Nigeria, the Arbitration and Mediation Act 2023 (the "**AMA**") was recently enacted to replace the outdated Arbitration and Conciliation Act 1988 (the "**ACA**") – the Federal law which initially governed arbitration in Nigeria. One defect in the ACA was the strict provision on the formal validity of arbitration agreements. This article examines the changes introduced by the AMA. In particular, it will discuss where emails, text messages, instant messages, chats on social media, voice notes, phone calls and teleconferencing now stand. Do they satisfy the "in writing" requirement? To what extent has the AMA cured the mischief posed under the ACA in this regard?

The Arbitration Agreement

An arbitration agreement is the *foundation stone* of commercial arbitration. This is because it records the consent of the parties to submit a dispute to arbitration and as a general rule, there can be no arbitration between parties who have not agreed to arbitrate their disputes. As van der Berg noted, "obviously, no arbitration is possible without its very basis, the arbitration agreement."[1] In further recognition of the significance of arbitration

[1] A. van der Berg, The New York Convention of 1958 (1981) 1.

agreements, the Convention on the Recognition of Foreign Arbitral Awards (New York Convention) 1958, mandates national courts to recognise and enforce arbitration agreements. To effectively carry out this sacred duty, when actions are brought before national courts in respect of which the parties had previously agreed to resolve by arbitration, the courts have a duty to decline jurisdiction, stay its proceedings and refer the parties to arbitration.

For the court to give up the jurisdiction ordinarily conferred by the Constitution and deny parties of their constitutional right of access to courts, the court must satisfy itself that there is a valid arbitration agreement, or in the words of the New York Convention, that the arbitration agreement is not null and void, inoperative or incapable of being performed.[2]

Formal Validity Requirements of Arbitration Agreements

An arbitration agreement is required to be recorded in any form as would allow the content of the arbitration agreement to be easily accessed for subsequent reference. This is the meaning and essence of the statutory provision that "[an] arbitration agreement shall be in writing". This is the "in writing" requirement.[3]

Electronic mails ("**emails**"), text messages, instant messages, chats on social media, voice notes, phone calls and teleconferencing are taking common place as electronic communications. They are gradually becoming more and more acceptable. In business, offer and/or acceptance of commercial transactions via these methods of electronic communication is also no longer strange.[4] It was, however, doubtful whether they satisfied the "in writing" requirements for arbitration agreements pursuant to the ACA.

Overview of the "In Writing" Requirement Under the ACA

Under the ACA, an arbitration agreement met the "in writing" requirement if contained in a signed contractual document, in exchanged communications, or in exchanged points of claim and points of defence.[5] This article will focus on exchanged communications.

The ACA provided that an arbitration agreement met the "in writing" requirement if contained:

> "… *in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement* …". [6]

As at 1988, when the ACA was enacted in Nigeria, letters, telex, and telegrams were the known means of communication. However, new means of communication have been introduced since then. For instance, business communications now include emails, text messages instant messages, chats on social media, voice notes, phone calls and teleconferencing. The question was whether these new means of communication satisfied the "in writing" requirement under the ACA in the light of the above provision.

Using the Ejusdem generis interpretation rule, general words which follow the enumeration of classes of things will apply only to the things of the same general class as those enumerated.[7] Put in context, "*other means of communication*" may not be limited *to* letters, telex, and telegrams listed in the provision. However, it will apply only to

those means of communication falling in the general class with letters, telex, and telegrams. Whether emails fell under that general class was doubtful.

One viewpoint argued that emails were not yet in use in Nigeria as of 1988 when the ACA was drafted. They could not reasonably have been contemplated by the draftsmen as "*means of communication*" at the time. Nothing in the ACA suggests an intention to include "*means of communication*" which may later come to be in use. Therefore, they did not fall under the same general class as letters, telex, and telegrams. Consequently, an arbitration agreement recorded in an exchange of emails could not satisfy the "in writing" requirement under the ACA.

From the other viewpoint, it was argued that the "in writing" quality afforded letters, telex, and telegrams should be extended to emails. Where that is the case, an exchange of emails which provided a record of an arbitration agreement ought to satisfy the "in writing" requirement.

The doubt surrounding the validity of an arbitration agreement recorded in an exchange of emails lasted as long as the ACA subsisted. Satisfying the "in writing" requirement via text messages, instant messages, chats on social media, voice notes, phone calls and teleconferencing was even more problematic.

Discussing the "New How" – Emails, Text Messages, Instant Messages, Chats on Social Media, Voice Notes, Phone Calls and Teleconferencing – in Satisfying the "In Writing" Requirement

One of the many innovations of the AMA is that it has improved the available options for satisfying the "in writing" requirement on laudable fronts. However, this article will focus on emails, text messages, instant messages, chats on social media, voice notes, phone calls and teleconferencing in discussing the "New How".

By virtue of the AMA, the requirement for arbitration agreement to be in writing is met, where it is by an electronic communication accessible for subsequent reference.[8] The AMA defines electronic communication as:

> "… *any communication that the parties make by means of data messages, that is, any information generated, sent, received or stored by electronic, magnetic, optical or similar means,* ***including*** *electronic data interchange (EDI), electronic mail, telegram, telex or telecopy*."[9]

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2 Article II (3) of the New York Convention of 1958.

3 The general principle that every arbitration agreement must be in writing dates back to the Arbitration and Conciliation Act, 1988. The Nigerian Court of Appeal in ***Williams Esq. & Anor v. Adold/Stamm International Nigeria Limited & Anor. (2013) LPELR-20356*** reechoed those provisions of the old Act at pages 43 to 44, paragraphs E to D. The new Arbitration and Mediation Act, 2023 retains this requirement.

4 In July 2023, the Court of King's Bench in Saskatchewan, Canada declared a thumbs-up emoji as a valid legally binding electronic signature, constituting acceptance of an offer.

5 The Arbitration and Conciliation Act, 1988 – ***Section 1***.

6 *ibid* – ***Section 1(1)(b)***.

7 This was the decision of the Supreme Court in ***Kabiri Krim v Emefor (2009) 14 NWLR pt. 116 602 at page 622, paragraph F-G***.

8 The Arbitration and Mediation Act, 2023 – ***Section 2(4)(a).***

9 *ibid* – ***Section 91(1).***

The use of the word "*including*" in defining electronic communication above clearly shows that the definition is not exhaustive.[10] It avoids providing a complete list of electronic communication. The AMA has also considerably dispelled those doubts caused by the ACA from the arguments which resulted from the ACA's adoption of an exhaustive list.

Emails

The non-exhaustive list in the AMA categorically states that electronic communication includes emails. This categorical mention immediately clears the doubt surrounding whether an arbitration agreement in an email meets the "in writing" requirement. With the enactment of the AMA, the answer is now a resounding "YES"! An exchange of emails that provides a record of an arbitration agreement will undoubtedly satisfy the "in writing" requirement.

Text Messages, Instant Messages, Chats and Voice Notes

The use of text messages, instant messages, and chats on social media is also fast increasing even in business transactions. These contain "*information generated, sent, received or stored by electronic, magnetic, optical or similar means.*" [11] Hence, they qualify as electronic communications by virtue of the definition provided by the AMA. Therefore, an exchange of text messages, instant messages or chats that provides a record of an arbitration agreement ought to satisfy the "in writing" requirement under the AMA.

Voice notes are also becoming part and parcel of communications via instant messages and chats on social media. They are equally non-alien to the business world. Voice notes contain "*[audio] information generated, sent, received or stored by electronic magnetic, optical or similar means.*" Hence, by virtue of the AMA, they also qualify as electronic communications. Consequently, an exchange of voice notes that provides a record of an arbitration agreement ought to also satisfy the "in writing" requirement under the AMA.

Phone Calls and Teleconferencing

Business phone calls and teleconferencing offer fast interaction between business organisations and their stakeholders. Like voice notes, "*[audio] information generated, sent, received or stored by electronic magnetic, optical or similar means.*" Therefore, they qualify as electronic communication under the AMA. When recorded, they can be easily "*accessible so as to be useable for subsequent reference*".[12] An exchange of phone calls and teleconference which have been recorded and found to provide a record of an arbitration agreement ought, therefore, to also satisfy the "in writing" requirement under the AMA.

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10 This was the interpretation given by the Supreme Court in ***Okesuji v. Lawal (1991) 1 NWLR (Pt. 170) 661 at page 676, paragraph F***.
11 The Arbitration and Mediation Act, 2023 – ***Section 91(1).***
12 *ibid* – ***Section 2(4)(a).***

Conclusion

The AMA has improved the available options for satisfying the "in writing" requirement in a manner in tune with recent trends in electronic communication. Emails are now undoubtably valid for satisfying the "in writing" requirement. What is more, text messages, instant messages, chats, voice notes, recorded business phone calls and teleconferences also fall in line with the definition of electronic communications. Therefore, they can also satisfy the "in writing" requirement under the AMA.

Indeed, the AMA has erased any doubts whether emails and other such electronic communication satisfy the "in writing" requirement. Arguments around text messages, instant messages, chats on social media, voice notes, phone calls and teleconferencing may still arise, nonetheless. But such arguments are not likely to go very far given the non-exhaustive definition of electronic communication in the AMA.