NOVEL PROVISIONS OF THE ARBITRATION AND MEDIATION ACT, 2023

Abstract

Arbitration under the Act means Arbitration as regulated by the Arbitration and Mediation Act 2023. The Arbitration and Mediation Act 2023 effectively repealed the Arbitration and Conciliation Act of 1988. In Nigeria the first statute to be enacted on arbitration law was the Arbitration Ordinance 1914 modeled based on the English Arbitration Act 1889. It was later re-enacted as the Arbitration Ordinance 1958. This Ordinance was in force until in 1988 when Nigeria adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, thereby enacting the Arbitration and Conciliation Decree 1988. This Decree was largely significant as it provided for rules governing international and domestic arbitration and made provisions for conciliation, which was not present in the Arbitration Ordinance of 1958. On the transition from a military regime to a democratic setting, the Arbitration and Conciliation Decree became an Act codified under the Laws of the Federation of Nigeria 2004. This 2004 Act has been repealed with the coming into effect of the Arbitration and Mediation Act 2023. In this article, we are going to look at the major innovations introduced by the Arbitration and Mediation Act, 2023.

Introduction

The Arbitration and Mediation Act 2023[1] came with it a number of new innovations that have shaped the scope and limits of the practice of Arbitration in Nigeria. Section 2 of the new Act provides that arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate complete agreement. The arbitration agreement shall be in writing where its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by any other means. The requirement for arbitration agreement to be in writing is met, where it is -- (a) by an electronic communication, as defined in section 91, and the information contained in it is accessible so as to be useable for subsequent reference; and (b) it is contained in an exchange of points of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. Reference in a contract or a separate arbitration agreement to a document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is in a manner that makes it part of the contract or the arbitration agreement. Major emphasis is placed on a written agreement evidencing the consensus *ad idem* of the parties to submit their dispute to arbitration. Where there is no initial written agreement, the decision of the arbitrator has no binding effect on the parties, as either of disputing parties is at liberty to accept or reject the award at the time it was made. In *Awosibe v Sotunbo*[2] it was held that owing to the fact that the dissatisfied party filed a writ of summons, it showed a positive demonstration that he never believed there was a binding arbitration and his abandonment of the gentlemen's agreement reached between them.

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[1] Hereinafter refer to as an Act.

[2](1992) 5 NWLR (Pt. 243) 514.

In arbitration under the Act, once the disputing parties through a written agreement submitted their dispute to arbitration, that agreement is binding on those parties and any decision made by arbitrators appointed by parties shall be final and binding. The award will create an estoppel and operate as '*res judicata'* with regard to matters with which the award dealt with, hence preventing either party from abandoning the award or pursuing such matters dealt with in the award in litigation. In this article, we are going to look at the major innovations introduced by the Arbitration and Mediation Act, 2023.

The Novel Innovations introduced by the Arbitration and Mediation Act, 2023

The Arbitration and Mediation Act, 2023 introduced some innovations in the practice of Arbitration in Nigeria. Some of the innovations will be discussed hereunder:

The Issue of Stay of Court Proceedings

The Act now mandates the courts to stay proceedings commenced in breach of the arbitration agreement, on the request of any of the parties, not later than when submitting their first statement on the substance that the dispute refers the parties to the arbitration. Unless the court determines that the arbitration agreement is *void*, inoperative, or incapable of being performed, the court must make an order for a stay of proceedings.[3]

The Issue of creation of a Review Mechanism for Arbitral Awards

The creation of an "Award Review Tribunal" (the "ART") is a significant innovation of the Act.[4] It mandates parties to specify in their agreement that arbitral awards may be reviewed by a second arbitral tribunal if a party seeks to make an application under Section 56 of the Act (grounds for application for setting aside an award).[5] The ART, which is constituted in the same manner as the original arbitration tribunal, shall endeavour to render its decision in the form of an award within 60 days of its being constituted.[6] However, the award rendered by the ART remains subject to be challenged in the Court by any party to the Arbitration.

Grounds for Setting Aside an Arbitral Award

The new Act exempts "misconduct of an arbitrator" as a ground for challenging arbitral awards, which is significant in dealing with the gullible act of parties seeking injunctions to restrain arbitral proceedings. It further establishes that one of the necessities or grounds for an affected party or parties to set aside an award is that it "has caused or will cause substantial injustice to the applicant.[7] This phenomenal impact improves the finality and preservation of awards, thereby restricting courts' involvement in setting aside arbitral awards.

Emergency Arbitrators

The Act permits the appointment of Emergency Arbitrators for providing emergency relief following the filing of a request for a dispute to be referred to arbitration prior to the constitution of the arbitral tribunal.[8] The emergency arbitrator shall be appointed within two business days after the date the application is received.[9] These emergency arbitration meetings can be conducted through various means of communication, such as video conferencing and *via* the use of telephones. More so, the decisions made by emergency arbitrators are binding and enforceable, and ensures swift resolution of urgent disputes.

Electronic Communication as a form of Arbitration Agreement

[3] Section 5 Arbitration and Mediation Act 2023.
[4] *Ibid*; Section 56.
[5] *Ibid*; Section 56 (1).
[6] *Ibid*; Section 56 (6).
[7] *Ibid*; Section 55.
[8] *Ibid*; Section 16.
[9] *Ibid*; Section 16 (5).

The Act expressly embraces the need for an arbitration agreement to be in writing *via* electronic communication provided that it satisfies the requirement for the information contained therein to be accessible and useable for subsequent reference.[10]

In addition, Section 91 of the Act[11] 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."[12]

Hence, unlike the Arbitration and Conciliation Act 2004, the 2023 Act embraces electronic communication, allowing for the conduct of electronic Arbitration and Mediation within Nigeria.

The issue of Third-Party Funding

The Act provides for Third-Party Funding ("TPF") that apply to arbitrations in Nigeria and arbitration-related proceedings in Nigerian courts. Section 91 of the Act 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, and the financing is provided either through a donation or grant or in return for reimbursement dependent on the outcome of the dispute or in return for a premium payment.[13] Hence, the arbitral tribunal shall fix the costs of arbitration in the final award and such costs include the cost of obtaining Third-Party Funding.[14]

The Act also provides that where a respondent brings a security for costs application based on the disclosure of TPF, the tribunal may allow the funded party or its Counsel to provide the tribunal with an affidavit confirming whether the funder has agreed to cover adverse costs orders. The affidavit is intended to form part of the information that the tribunal will consider in its decision on the security for cost application.[15]

Issue of Consolidation, Joinder and Concurrent Hearings in Arbitral Proceedings

Another groundbreaking change in Nigerian arbitration is a provision in the new Act that recognizes the agreement of parties to consolidate arbitral proceedings or hold concurrent hearings.[16] That is to say, without the parties' agreement to the making of such an order, the arbitral tribunal will not be able to hold concurrent hearings or consolidate the proceedings.[17]

In furtherance, the Act gives the arbitral tribunal the power to allow the joinder of additional parties to the arbitration, provided that, *prima facie*, the additional party is bound by the underlying arbitration agreement.[18] These new provisions will successfully benefit parties by providing efficiency, cost savings, consistency, judicial economy, settlement opportunities, and increased finality.

Introduction of Provisions on Mediation in the Act

Detailed provisions for international dispute resolution mediations, including how mediations are conducted, the status of matters disclosed in mediations, and the enforcement of agreements reached following a relevant mediation. Unlike the repealed Arbitration and Conciliation Act

[10] *Ibid*; Section 2 (1).
[11] *Ibid*.
[12] Section 91 of the Arbitration and Mediation Act, 2023.
[13] *Ibid*.
[14] Section 50(1)(g) Arbitration and Mediation Act 2023.
[15] Section 62(3) Arbitration and Mediation Act 2023.
[16] Section 39(1) Arbitration and Mediation Act 2023.
[17] Section 39(2) Arbitration and Mediation Act 2023.
[18] Section 40 Arbitration and Mediation Act 2023.

2004, which has no specific provision for mediation as a frequently utilized alternative dispute resolution mechanism in Nigeria, the Arbitration and Mediation Act recognizes and codifies Mediation as dispute resolution mechanism for the first time in the history of Nigeria.[19]
Before the enactment of the new Act, 2023, there were no existing legal provisions on mediation, thus this Act as a Federal statute now codifies explicit guidelines to govern the practice of Mediation in Nigeria, which is an important step for expanding the practice of Mediation.

Issue of Arbitrator's Immunity

The new Act introduces and recognizes the immunity of an arbitrator, appointing authority, and or an arbitral institution. Under the Act, an arbitrator, an appointing authority, or an arbitral institution is granted immunity in the performance of their duties; unless it can be proved that they acted in bad faith.[20] However, it is important to note that this immunity does not exempt arbitrators from any liabilities arising from their withdrawal.[21] This provision ensures that arbitrators, similar to litigators, are now safeguarded by law while carrying out their responsibilities, alleviating concerns about potential liability.

Limitation of Time

The limitation period for the enforcement of awards now expressly excludes the period between the commencement of the arbitration and the date of the award in computing the time for the commencement of enforcement proceedings.

Time Limitation

There is a time frame of 30 days for a party to receive the acceptance of the invitation to mediate. Failure to respond may be treated as a rejection to mediate.

Number of Arbitrators

The Act now provides that where the number of arbitrators is unspecified, the default is a sole arbitrator, rather than three as it was under the ACA.[22] The Act provides that, there shall be one mediator unless the parties agree otherwise.[23]

Conclusion

The act of referring a dispute to a third party who is chosen by the disputing parties themselves and agreeing to be bound by the decision rendered by that third party is known as arbitration. However, owing to certain shortcomings and the evolution of the world, there was the need for a modern arbitration to evolve through amendment of our laws. This is aimed at creating certainty and making people perceive arbitration as a viable tool in resolving disputes even in the most complex scenarios. In this article, we have looked into the new innovations introduced by the Arbitration and Mediation Act, 2023. Such new innovations considered are: issue of Stay of Court Proceedings; issue of creation of a Review Mechanism for Arbitral Awards; Grounds for Setting Aside an Arbitral Award; Emergency Arbitrators Electronic Communication as a form of Arbitration Agreement; issue of Third-Party Funding; Issue of Consolidation, Joinder and Concurrent Hearings in Arbitral Proceedings; Introduction of Provisions on Mediation in the new Act; Issue of Arbitrator's Immunity; Limitation of Time and Number of Arbitrators.

[19] Part II, Section 67-87 Arbitration and Mediation Act 2023.
[20] Section 13 (1) Arbitration and Mediation Act 2023.
[21] Section 13 (3) Arbitration and Mediation Act 2023.
[22] Section 6 (2) Arbitration and Mediation Act 2023.
[23] Section 72 (1) Arbitration and Mediation Act 2023.