

INTERIM MEASURES OF PROTECTION UNDER THE ARBITRATION AND MEDIATION ACT 2023: AN OVERVIEW

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Abstract

It is a general practice embedded in our Laws, Rules and Practices, that there is need to preserve the Res or the property in dispute, even under Civil Litigation; although a lot of jurists in our clime are often not disposed to granting interim applications, especially such that has to do with the protection of the property or the Res. The Arbitration and Conciliation Act, CAP A18 LFN 2004 (Which is now defunct), did not provide a clear framework for the enforcement of interim measures and Preliminary Orders. However, the Arbitration and Mediation Act 2023, provides a clear framework for the grant and enforcement of interim measures and preliminary orders, to be made without the notice to the other party. This paper shall examine the powers inherent in the Arbitral Tribunal with respect to interim measures and protection, under the Arbitration and mediation Act 2023. It is noteworthy to state that there is often the need for interim measure of protection and Preliminary Orders in commercial Arbitration.

Introduction

Arbitration is an Alternative Dispute Resolution (ADR) mechanism for the resolution of disputes privately, using one or more (three) intermediaries voluntarily agreed upon by the disputing parties and whose decision, called an Award, is binding and enforceable in law.

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The meaning and nature of Arbitration was laid out in *Nigerian National Petroleum Company v Lutin Investment Ltd and Anor*¹, thus:

An arbitration is the reference of a dispute or difference between not less than two parties, for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction. The Arbitrator(s) has the jurisdiction to decide only what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority and consequently the whole proceedings will be null and void and of no effect. This will include any award he may subsequently make.

On the issue of application for interim measures of protection, although section 13 of the Arbitration and Conciliation Act² (Now Defunct) provides or rather empowers the Arbitral Tribunal to make Interim Orders of protection to preserve the property, such as an Order to deposit the Res with a third party or to sell perishable goods, however it did not provide any coercive powers on third parties, which implies that the party must resort to the courts to obtain an Order against a third party, that is in possession of the Res, hence the Tribunal cannot make an enforceable Order of protection against a Third Party. The good news with the introduction of the Arbitration and Mediation Act 2023, is the fact that a party need not go seek a Court Order against a third party in respect of the protection of a Res.

Application for Interim Measures of Protection

Interim measures of protection are taken, pending the final determination of the issues in dispute. Such measures include Orders to protect the Res or subject of a dispute.

An application may be made even before the Tribunal Hearing Commences, especially where there is delay in commencing proceedings³.

¹ (2006) 2 NWLR (Pt 965) p. 134

² CAP A!*, LFN 2004

³ J Orojo and M. Ajomo: Law and Practice of Arbitration in Nigeria, Lagos (Mbeyi & Assoc Ltd) 1999, p. 180

It is paramount that the Res in a commercial dispute is protected for the following reasons to prevent dissipation by a party in custody of the Res, thereby rendering the Award nugatory, if it is in favour of the other party:

- (a) To prevent hardship on a party
- (b) To prevent devaluation of the eventual Award.
- (c) To preserve the evidential value of the Res.
- (d) To sell perishable goods in order to avoid deterioration and loss.

It is pertinent to state at this juncture that interim measures were not exhaustively provided for in the now defunct Arbitration and Conciliation Act, however the Arbitration and Mediation 2023, provides for Applications for Preliminary Orders in Section 22 of the Act. Section 22 of the Arbitration and Mediation Act 2023 provides thus:

- 22(1) Unless Otherwise agreed by the parties, a party, make a request to the Arbitral tribunal for an interim measure together with an application for a Preliminary order directing a party not to frustrate the purpose of the interim measure requested.*
- (2) The Arbitral tribunal may grant a preliminary order, provided it considers that prior disclosure of the request for interim measure to the party against whom it is directed may frustrate the purpose of the measure.*
- (3) The conditions defined under section 21(1) of this Act apply to any Preliminary Order, provided that the harm likely to result from the order being granted or not.*

May I also state that there are certain conditions set out in Section 21 of the Arbitration and Mediation Act 2023, for the grant of interim measures. It provides thus:

- 21(1) The party requesting an interim measure under Section 20(2) (a), (b) and (c) shall satisfy the arbitral tribunal that:*

- (a) *Harm not adequately reparable by an Award of damages is likely to result where the measure is not ordered and the harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed where the measure is granted; and*
 - (b) *There is reasonable possibility that the requesting party may succeed on the merits of the claim, provided that any determination on this possibility does not affect the discretion of the arbitral tribunal to make any subsequent determination.*
- (2) *With regard to a request for an interim measure under Section 20(2)(d) the requirements under 1(a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.*

The Arbitration and Mediation Act 2023 imbues the Arbitral tribunal with the powers to grant interim measures, such as directing parties to maintain or restore status quo, pending the determination of the dispute, to preserve the subject-matter of the arbitration or evidence that may be relevant and material to the resolution of the dispute, provide means of preserving assets that subsequent award may be paid from, including the grant of preliminary orders etc, unless otherwise agreed by the parties. The Act provides a clear framework for the enforcement of the interim measures, ordered by the tribunal and permits an application for interim measures and preliminary orders to be made without notice to the other party (Exparte Applications). Also, the tribunal can modify, suspend or terminate an interim measure or preliminary order, that it has granted upon application by the other party or in exceptional circumstances, See Section 24 of the Act.

Furthermore, the arbitral tribunal could require an applicant for an interim measure to provide security in relation to the measures sought and could also find an applicant for an interim measure or preliminary order liable for costs and damages caused to the other party, see sections 25 and 27 of the Act. The tribunal's decision on interim measures is binding upon the parties.

The Power of the Tribunal to Order Interim Measures of Protection

Unless otherwise agreed by the parties, Section 20 of the Arbitral and Mediation Act empowers the Arbitral Tribunal to grant interim measures or Orders of Protection to preserve the Res. Section 20 of the Act, provides thus:

- 20(1) Unless otherwise agreed by the parties, the arbitral tribunal may at the request of a party, grant interim measures.*
- (2) An interim measure is a temporary measure, whether in the form of an award or in another form, which, at any time before the award which decides the dispute is issued, the arbitral tribunal orders a party to:*
 - (a) Maintain or restore the status quo pending determination of the dispute.*
 - (b) take action that may prevent or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*
 - (c) Provide means of preserving assets out of which a subsequent award may be satisfied; or*
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute or preserve the subject matter of the arbitration itself.*

The Arbitral Tribunal may also order the Applicant to provide security, in case the Order was wrongly made and the Respondent suffers any loss, as a result of the Order.

The Power of the Court to Order Interim Measures of Protection

It is indisputable that the award of interim reliefs could be regarded as part of the inherent powers of the court, however such powers are usually derived from status. While the Arbitration and Conciliation Act (now defunct) empowers the courts to issue orders necessary to preserve the subject matter of the dispute, such as the grant of Orders for stay of proceedings, *subpoena duces tecum* or *ad testificandum*, etc. Section 19 of the Arbitration and Mediation Act, expands the powers of the courts to issue

interim measures in relation to arbitration proceedings conducted in Nigeria or in another country.

Find below the provisions of Section 19 of the Arbitration and Mediation Act 2023

“Without prejudice to Section 16 of this Act, a Court has the power to issue interim measures of protection for the purpose of, and in relation to arbitration proceedings whose seat is in another country as it has for the purpose of, and in relation to proceedings in the Courts and shall exercise that power within 15 days of any application, in accordance with the rules set out in the Third Schedule to this Act”.

The Arbitral tribunal or the court may make the following Orders as the case may be.

(a) Order of interlocutory Injunction to protect property

According to Mustill and Boyd⁴

“In the context of an arbitration, an interlocutory injunction will usually fulfill one or other of two functions. First, to protect the property in issue from abuse by one of the parties: for example, to prohibit the removal of property The object being to ensure that any order which the arbitrator may ultimately make as to the disposition of the property will not be rendered academic by the previous removal of the property. Second, to bring about a kind of interim specific performance of the contract”.

A Mareva injunction is the type of injunction referred to by Mustill and Boyd. It is a conservatory Order extrapolated from the case of *Mareva Compania Naviera S.A v International Bulk Carriers S.A*⁵. The injunction prevents a party from removing an asset from

⁴ Mustill and Boyd: Commercial Arbitration, 2nd Edition 1989, P 330, cited in Orojo, op cit

⁵ (1975) 2 Lloyd’s Reports, 509

the jurisdiction of an Arbitral Tribunal or a Court. It serves as a security for payment of the award, if it is in favour of the Claimant⁶.

(b) Appointment of a Receiver

The parties may provide for the appointment of a receiver in their agreement. In the absence of this, a party may apply to the court for an Order appointing receivers for the property in dispute⁷.

(c) Detention, Custody and Preservation

The court has the power to Order the detention, custody and preservation of the Res to prevent damage, deterioration or misappropriation by the party in custody of it⁸. The arbitral tribunal may issue such an Order since it is issued against a party to the proceedings. The distinction between this and a Mareva injunction is that a Mareva injunction can be issued against a third party, while an Order under Order 31 of the Abuja High Court Civil Procedure Rules is principally against a party to the action. Furthermore under Order 31, of the Abuja High Court Civil Procedure Rules, the court may order the sale of the property or delivery to the plaintiff or defendant as the case may be, if he deposits security.

However, a property attached under a Mareva injunction may not be sold.

(d) Order for Security for Costs

The Arbitral tribunal may request that the parties deposit an equal amount as an advance for the costs specified under Article 38-40 of the Rules⁹.

The Arbitral Tribunal may suspend or terminate proceedings if this deposit is not made.

Conclusion

The basic aim of arbitration is the resolution of disputes. The main goal is to bring the parties to the rudiments of natural justice, as close as possible. The

⁶ Order 15, High Court (Civil Procedure) Rules, FCT Abuja.

⁷ Order 19, High Court (Civil Procedure) Rules, FCT Abuja.

⁸ Order 31, High Court (Civil Procedure) Rules, FCT Abuja

⁹ Article 41 of the Rules.

strategy is to avoid delays and attendant costs associated with litigation and technicalities, hence Arbitration is made convenient to the parties.

Interim measures and protection under the Arbitration and Mediation Act 2023 is not forumless, disorderly or unwholesome. The Act and its provisions on Interim measures and protection are the best things to happen in the realm of Arbitration in Nigeria. The need to protect the Res or the property especially where they are perishable goods cannot be overemphasized.

Finally, may I applaud in very unmistakable terms, the enactment of the Arbitration and mediation Act 2023 and to state that whether there will be need for amendments in future, will depend on new global innovations and practices.