

IMPLICATIONS OF THE ARBITRATION AND MEDIATION BILL ON SETTING ASIDE AN ARBITRAL AWARD



The Arbitration and Mediation Bill, 2022 (HB. 91) (the “Bill”) went through third reading and passage by the Senate on 10th May 2022¹ and is currently awaiting presidential assent. The Bill which seeks to repeal the Arbitration and Conciliation Act, 1988 (the “ACA”), proposes fundamental changes to the conduct of arbitration and enforcement of an arbitral award. Some of the highlights of the Bill include the introduction of an emergency arbitrator, third-party funding, joinder of parties, consolidation of arbitrations, the Award Review Tribunal, the limitation of the grounds on which an arbitral award may be challenged or set aside as provided under the ACA, etc.

¹ Policy and Legal Advocacy Centre (PLAC), ‘Bills Track’ (HB 91: Arbitration and Mediation Bill, 2022) <<https://placbillstrack.org/view.php?getid=9325>> accessed: 1st November 2022,

² Sections 29, 30, and 48 of the Arbitration and Conciliation Act, Chapter A18, Laws of the Federation of Nigeria 2004.

³ Section 48 (a) of the ACA provides a list of grounds which the party making the application must furnish the court in order to set aside an arbitral award. They include but are not limited to the following: incapacity of one of the parties, an invalid arbitration agreement, www.sskohn.com

This article highlights the new regime sought to be introduced by the Bill on challenging and setting aside an arbitral award.

AN ANALYSIS OF THE GROUNDS FOR SETTING ASIDE AN ARBITRAL AWARD

Under the ACA, the grounds upon which an arbitral award may be set aside include the following²:

- a. where the award contains decisions on matters which are beyond the scope of the submission to arbitration; or
- b. where the arbitral proceedings or award has been improperly procured as for example, where the arbitrator has been deceived or material evidence has been fraudulently concealed; or
- c. where the arbitrator or umpire has misconducted himself
- d. where there is an error of law on the face of the award; or
- e. the grounds contained in the provisions of section 48³

The ground often relied upon to challenge an arbitral award is the misconduct of an arbitrator. The Supreme Court in **Mekwunye v. Imoukhuede⁴ and Arbico (Nig.) Ltd. V. N.M.T. Ltd.**,⁵ held that by virtue of section 30 of the ACA, where an arbitrator has misconducted himself or where the arbitral proceedings or award was improperly procured, the court has powers to interfere and set aside the award.

improper notice of the appointment of an arbitrator, the matter being beyond the scope of submission to arbitration, etc. Subsection (b) further stipulates that if the courts find that the subject matter of the dispute is not legally capable of settlement in Nigeria or the arbitral award is against public policy, it may also be set aside.

⁴ Mekwunye v. Imoukhuede [2019] 13 NWLR (Pt. 1690) 439 (Pp. 481-482, paras. H-C;501, paras. A-C)

⁵ Arbico (Nig.) Ltd. V. N.M.T. Ltd. [2002] 15 NWLR (Pt. 789) 10 (P. 24, paras. D-E)

It is noteworthy that the ACA does not define what amounts to misconduct by an arbitrator. Consequently, this ground has become susceptible to an elastic construction and has been prone to abuse by litigants and lawyers alike.

In the case of **Taylor Woodrow (Nig.) Limited v. S.E GMBH**,⁶ the Supreme Court held that although it is challenging to provide a full description of what may constitute misconduct on the side of an arbitrator or umpire, an act of misconduct by an arbitrator entails but is not limited to any of the following:

- a. where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement.
- b. when, even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of public policy ought not to be enforced.
- c. technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference. This, however, does not mean that every irregularity of procedure amounts to misconduct;
- d. where the arbitrator or umpire has failed to decide all the matters which were referred to him.
- e. where the arbitrator or umpire has breached the rules of natural justice.

The expansive nature of misconduct in the context of the ACA was further emphasized by the Court of Appeal in **Arbico (Nig.) Ltd. v. N.M.T. Ltd. (2002) 15 NWLR (Part 789)** 1 at page 24 where the Court held that:

. . . what constitutes misconduct as used in both enactments has not been defined. One thing however, that is certain is that misconduct in the context of a long line of

authorities does not mean willful misconduct but conduct in the sense of mistaken conduct. There being no moral turpitude there can be no doubt that it is of wide import. And so, an exhaustive definition of what amounts to misconduct becomes impossible. Suffice it to say that it is a question of fact and degree in all cases.

It is clear from the above decisions that the acts or omissions which may constitute misconduct are inexhaustive. The elastic meaning ascribed to misconduct in the ACA provides support for applications to set aside arbitral awards for sundry reasons. It also confers a wide discretion on the courts to infuse their own meanings to the term to set aside an award.

Consequently, an arbitral award may be set aside for unsubstantial reasons upon an application for setting aside on the basis of misconduct of the arbitrator. The flexibility that is afforded by this ground for setting aside an arbitral award could be plausibly blamed for the alarming rate at which losing parties in arbitral proceedings apply to set aside arbitral awards to frustrate the winning party from reaping the fruits of the award. This negates the consideration of time effectiveness which leads parties to explore arbitration with the result of dampening public confidence in arbitration. There was, therefore, an urgent need to address the incessant applications to set aside arbitral awards and the Bill, amongst other reforms, may fulfill this purpose by limiting the grounds for setting aside an award.

GROUND FOR SETTING ASIDE AN ARBITRAL AWARD UNDER THE BILL

Section 53(3) of the Bill prescribes the grounds for setting aside an arbitral award. The section provides that the court may set aside an arbitral award if–

⁶ Taylor Woodrow (Nig.) Limited v. S.E GMBH [1993] 4 NWLR (Pt. 286) 127 (See also K.S.U.D.B. v. Fanz Const. Ltd. [1990] 4 NWLR (Pt. 142) 1 (P-37, paras. F-H))

- i. a party to the arbitration agreement was under some legal incapacity; or
- ii. the arbitration agreement is not valid under the law to which the parties have subjected it, or failing such indication, under the laws of Nigeria; or
- iii. that the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present its case; or
- iv. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or
- v. the award contains decisions on matters which are beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- vi. the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate; or
- vii. where there is no agreement between the parties under subparagraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act; or

(b) the Court finds –

- i. that the subject matter of the dispute is otherwise not capable of settlement by arbitration under the laws of Nigeria; or
- ii. that the award is against public policy of Nigeria.

The above grounds for setting aside an arbitral award under the Bill are similar to the grounds under the ACA. However, a significant difference is the exclusion of misconduct as a ground for setting aside an arbitral award under the Bill. With this omission, the Bill clearly seeks to eliminate this omnibus ground for setting aside arbitral awards which has become an unruly horse and clog to arbitration in Nigeria.

CONCLUSION

The Bill is a step in the right direction and will certainly address the perennial problem of incessant challenges to arbitral awards. This will instill more confidence in arbitration as a means of dispute resolution and eliminate bottlenecks that plague the enforcement of arbitral awards. We hope that the Bill would receive presidential assent and become operational without much delay.

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