

COMMENTARIES ON THE KEY PROVISIONS IN THE ARBITRATION AND MEDIATION ACT, 2023



writing, by recognising electronic communication. It also acknowledges the existence of arbitration agreements even where contracts have been concluded orally or by other means. The Act makes provisions for emergency arbitrators who can grant urgent relief pending the final determination of a dispute.

Unlike the ACA, the Act does not include "misconduct of the arbitrator" as a ground for setting aside an arbitral award. It introduces a more onerous test for an award to be set aside. It is no longer sufficient for a party simply to show that one of the grounds for setting aside an award is present; it must also show that the ground "has caused or will cause substantial injustice to the applicant". It is our view that this test may give rise to a new set of controversy as the Act does not provide any criteria the courts will use in determining "substantial injustice". It is not certain whether the court will rely on case laws arising from the resolution of disputes determined via litigation.

The Act extends the power to grant interim measures of protection to the court, putting parties in an arbitral proceeding in a position to apply to the courts for interim reliefs. This does not detract from the powers of a tribunal to grant interim measures of protection. However, a court may not recognize or enforce an interim measure of protection granted by a tribunal where the court finds that the interim measure is incompatible with the powers conferred on the court.

The Act also provides for consolidated and concurrent hearings. Without the parties' consent, an arbitral tribunal may not consolidate proceedings or hold concurrent hearings. The Act allows additional parties to be joined in an arbitration proceeding provided that the additional party is bound by the arbitration agreement giving rise to the arbitration. These mechanisms may be helpful in resolving disputes involving multiple parties and contracts.

Introduction

The Arbitration and Mediation Act 2023("the Act") was assented to by the former President of the Federal Republic of Nigeria, President Muhammadu Buhari on 26 May 2023 after several years of review and criticism of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria 2004 ("ACA").

Overview

The Act which repealed the ACA is primarily focused on providing a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation. The Act also makes the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) applicable to any award made in Nigeria or in any contracting state arising out of international commercial arbitration.

The Act is divided into three parts. Part I pertains to arbitration, Part II deals with the role of mediation in domestic and international dispute settlement and Part III covers miscellaneous provisions and saving clauses. Key provisions introduced by the Act are highlighted in the following paragraphs.

PART I - Arbitration

The Act broadens the scope of forms that can fulfill the condition for an arbitration agreement to be in

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Third-party funding is another key inclusion in the Act which would inevitably bode well for the development of arbitration in Nigeria as parties who would have been discouraged from pursuing arbitration proceedings due to its attendant costs can now seek alternative funding arrangements. The provision on the period for limitation of action for the enforcement of an award is also notable, as it aligns with the recent decisions of Nigerian courts to the effect that the relevant period for the purposes of limitation of action will exclude the period between the commencement of an arbitration and the time of the delivery of the final award.

Another innovative provision of the Act is the introduction of the Award Review Tribunal (“ART”). The Tribunal to be convened shall within sixty days either uphold or set aside an arbitral award. This provision is only applicable if parties in their arbitration agreement expressly provide that awards can be reviewed by an ART. If an ART sets aside an award, fully or partially, the courts can still review the decision. Enforcement proceedings must be stayed during this process of the ART review. The mode and time for appointment of the ART is similar to the provisions applicable for appointment of the tribunal in the arbitration agreement.

PART II - Mediation

The Act establishes a legal framework for mediation in Nigeria. The provisions on mediation do not apply to certain types of disputes including disputes emerging from arrangements or contracts that are void under Nigerian laws. These provisions also do not extend to situations where a judge or arbitrator seeks to assist in reaching a settlement during the legal or arbitration process, or to cases that have been documented or are enforceable as an arbitral award. Nevertheless, parties can choose to employ this method. Virtual mediation sessions are also allowed by the Act. Further, statements made during mediation cannot be used as evidence in other proceedings.

Settlement agreements made pursuant to mediation are binding and enforceable in court. International

mediation settlements under the Singapore Convention on Mediation are also enforceable provided certain conditions are met. Thus, parties are assured of the necessary legal backing to engage in mediation without the fear of the agreement being subsequently challenged.

Overall, the new provisions on mediation are positive steps towards improving Nigeria's dispute resolution processes and ensuring that parties have access to a range of effective and efficient means of resolving their disputes.

PART III – Miscellaneous Provisions

The Act contains a saving clause which provides that the repeal of the ACA does not affect any ongoing proceedings related to rights, privileges, obligations, or liabilities acquired under the ACA. The provisions of the Act only apply to arbitrations commenced after the effective date of the Act.

While the Act provides similar definitions for terms as obtainable under the ACA, it defines new terms not contained in the ACA and further clarifies certain definitions such as "Court" which now includes a chief judge sitting as a judge in chambers. The Act defines what constitutes international and interstate arbitrations and mediation. The Act also provides guidelines for determining a party's place of business or habitual residence in the context of an international or interstate arbitration or mediation. Finally, the Act emphasizes the need to promote uniformity in applying the provisions of the Act and allows courts to refer to UNCITRAL Model Laws. Similarly, any matters not explicitly covered in the Act are now to be resolved in accordance with general principles of the Act.

You can also view our full comparative analysis of the provisions of the Act vis-à-vis the repealed Act on our website.

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