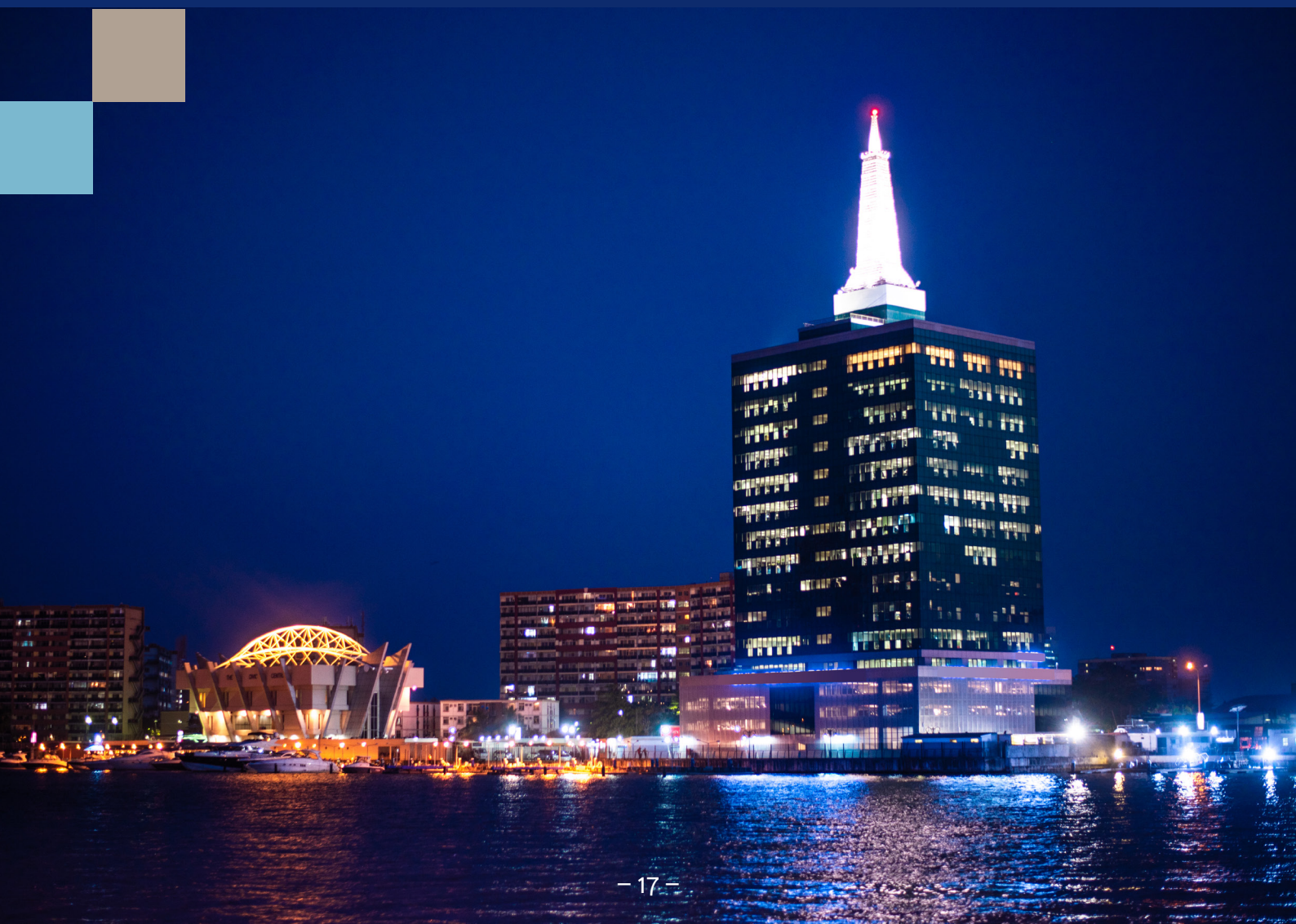
ARBITRATION AND MEDIATION ACT 2023 – NIGERIA

By Abdul Jinadu



Nigeria has a large and very active arbitral community. In a development widely welcomed by that community, in the final days of the previous administration on 26 May 2023, the Arbitration and Mediation Bill 2022 received Presidential Assent and in so doing it morphed into the Arbitration and Mediation Act 2023 ('AMA'), which repealed the Arbitration and Conciliation Act 1988 ('ACA'). The Chartered Institute of Arbitrators of Nigeria ('CIArb') has described the AMA as a significant development and capable of shaping the future of arbitration in Nigeria.[1] The AMA was the result of several years of tireless efforts by many leading members of the Nigerian arbitral community who experienced and dealt with the deficiencies in the previous legislation in their everyday practice.

The Explanatory Memorandum to the AMA describes its purpose as being to "provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation". It also makes applicable the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('NY Convention') to any award in Nigeria or in any contracting state arising out of commercial arbitration.

Constitutional context

Both federal and state governments have legislative competence over matters allocated by the Nigerian Constitution. Under Part II of the Second Schedule of the Constitution, the federal government has exclusive legislative power over matters in the exclusive list. Both the federal and state governments have legislative power over matters in the concurrent list. If a matter is not contained in either list, it is said to be on the 'residual list', meaning the state government has exclusive legislative competence over it.[2]

In 2005, the National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria concluded that: 'The Federal Government has the constitutional power and competence to legislate on arbitration and conciliation but only in respect of trade and commerce which are international or inter-state.'[3] As a result, Lagos and Delta State have passed their own Arbitration Laws (in 2009 and 2022, respectively).

Position under the old law

The ACA was promulgated under military rule and replaced the Arbitration Ordinance of 1914, which was based on the English Arbitration Act 1889. Unlike the Ordinance, the ACA applied to both domestic and international commercial arbitration. The ACA was largely based on the 1985 UNCITRAL Model Law on International Commercial Arbitration ('Model Law'): 22 provisions were identical; 16 were similar but modified; and 10 were unrelated.

The ACA contained no provisions supporting multi-party arbitration. Further, the ACA mandated that ACA Rules must apply for all arbitration conducted under it, preventing parties from selecting other institutional bodies and contravening party autonomy. In addition, the ACA lacked provision of court-ordered interim relief (such as injunctions) supporting arbitration. This was a marked absence especially as such relief is provided for under both the UNCITRAL Model Law and section 44(2) of the English Arbitration Act 1998 ('AA 1998').

The Nigerian Supreme Court in NV Scheep v MV S Araz[4] held that, to be able to grant interim orders such as injunctions, the substantive dispute must be before the court at the same time. The exception is statutory intervention providing for such interim relief, which the ACA did not do.

Reform: the AMA 2023

The AMA applies to both international and domestic arbitration proceedings in Nigeria. The main changes include: an obligation on the court to enforce arbitration agreements ('AA'); default rule of one arbitrator; default arbitrator immunity except in cases of bad faith; interim relief pending tribunal constitution; consolidation of arbitral proceedings where different parties are involved; joinder of parties bound by the AA; an Award Review Tribunal; third-party funding; changes to the limitation period; emergency arbitrations; a detailed procedure for dealing with arbitration related matters in court and on appeal; and a detailed schedule of rules applicable to domestic and international mediation.

A clear policy initiative underpins the Act: to support the development of Nigeria as a chosen venue and seat for arbitral disputes. The Act aims to address a number of issues which have developed over the years in the interpretation and application of the old law which were proving to be a significant hinderance to the use and development of arbitration in Nigeria and to address gaps in the old legalisation which were used by parties in the past to frustrate the intent and purpose of arbitral agreements.

Power to stay proceedings

Section 4(1) of the ACA provided that, upon the request of any of the parties, the court shall order a stay of proceedings and refer the parties to arbitration before the parties' submission of their first statements on the substance of the dispute. However, section 5(1) provided that if any party to an arbitration agreement commences an action in any court with respect to a matter that is the subject of the agreement, any party to the agreement may apply to the court to stay the proceedings at any time after appearing but before delivering any pleadings or taking other steps in the proceedings. The AMA resolves these contradictory provisions in section 5(1), which makes it mandatory for a court to grant an application for stay of proceedings pending arbitration, unless the arbitration agreement is found to be void, inoperative, or incapable of being performed. The referral should occur before the parties' first statement on the dispute's substance.

The AMA also overrides UBA Plc v Trident Consulting Ltd[5], where the Supreme Court held that there is a burden on the party applying for a stay to demonstrate unequivocally by documentary evidence that it is willing to arbitrate.

Emergency arbitrators

AMA introduces emergency arbitrators in section 16, which provides that a party that requires emergency relief may, concurrent with or following the filing of a request for a dispute to be referred to arbitration but before the constitution of the tribunal, submit an application for an emergency arbitrator to any arbitral institution designated by the parties, or failing such designation, to the court. If accepted, an emergency arbitrator is to be appointed within two business days of the application.

Appointments of emergency arbitrators can be challenged within three days of notice on the respondent of the appointment, or of the date when the party was informed of the circumstances on which the challenge is based, where that is after the date of notice.[6]

Article 27 of the First Schedule of the AMA prescribes the procedure for emergency relief proceedings. Further, applications for emergency relief shall not prevent a party seeking urgent interim measures from a court under section 19 of the AMA.[7]

Interim measures

The ACA did not provide expressly for the grant, recognition or enforcement of interim

1 CIArb, https://punchng.com/assent-to-arbitration-mediation-bill-will-boost-dispute-resolution-ciarb/, accessed on 31st August 2023

2 Constitution of the Federal Republic of Nigeria 1999, ss 6(6), (7).

3 The National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria, 'Amended Report' (2005) 13.

4 (2000) 15 NWLR (Pt 691) 622

5 (2023) 14 NWLR (Pt 1903) 95

6 Section 17 of the AMA.

7 Section 16(10) of the AMA.

measures by a court. Rather, the power to grant interim relief was vested solely in the arbitral tribunal. Section 19 of the AMA extends the scope of this power and allows a court to issue protective interim measures for, and in relation to, arbitration proceedings that are seated in Nigeria or another country in relation to court proceedings. The court must exercise its power under this provision within 15 days of any application.[8]

Interim measures are enforceable as an order of court irrespective of the country it was issued.[9] The court may order the requesting party to provide appropriate security.[10]

Preliminary orders

Section 22 of the AMA provides that, unless agreed otherwise, a party may, without notice, apply to the 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.

Section 23 provides that the tribunal shall give notice of the preliminary order and request for interim measures, as well as all communications (if any), both written and oral, between the applicant and the tribunal relating to the applications, immediately after it has determined of preliminary order.

Preliminary orders expire after 20 days from the date of issue. The tribunal may modify or adopt the preliminary order by an interim measure after the respondent has been given notice and an opportunity to present its case.[11]

Setting aside awards

The ACA enabled parties to apply to set aside awards on grounds of misconduct on the arbitrator's part or where the proceedings/ award had been improperly procured.

Guidance in the case law as to what was considered improper encouraged a multitude of allegations against arbitrators. The AMA creates exhaustive limitations on grounds to set aside. Section 55(3) provides that an award can only be set aside if the applicant provides proof that:

(a) A party to the AA was under some legal incapacity;

(b) The dispute's subject matter cannot be settled by arbitration under Nigerian law or is against Nigerian public policy;

(c) The AA is not valid under the law that applies to it/laws of Nigeria;

(d) The applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was not able to present its case;

(e) The award decides matters beyond the scope of the reference to arbitration; or

(f) The composition of the tribunal or its procedure was not according to the parties' agreement, unless the agreement was in conflict with a mandatory provision of the AMA or, in the absence of the parties' agreement, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the AMA.

Section 56 creates an Award Review Tribunal ('ART'), providing that, notwithstanding section 55, the parties may provide in their AA that an application to review an arbitral award on any of the grounds set out in section 55(3) above shall be made to an ART.

A party challenging an award on section 55(3) grounds shall within three months serve on the other party a written communication indicating its intent to do so. The number of arbitrators comprising the ART will be the same as that in the arbitral tribunal unless otherwise agreed: section 56(4)(a).

If the ART affirms an award, the court can only set it aside if it finds matters dealt with by the award are not arbitrable or contrary to public policy.

Consolidation of proceedings

Section 39 introduces consolidation of arbitral proceedings and concurrent hearings, subject of course to the agreement of all parties to such an order. This includes hearings with different parties.

Section 40 introduces a power of the tribunal to allow additional parties to be joined to the arbitration, provided that, prima facie, the additional party is bound by the AA. The tribunal's decision to order joinder is without prejudice to its power to later decide any question on its jurisdiction arising from such decision: section 40(2).

Third party funding

Section 61 abolished the torts of maintenance and champerty in relation to third party funding of arbitration. This applies to arbitrations seated in Nigeria and to arbitration-related proceedings in court.

Section 62 provides that, if a third party funding agreement is made, the party benefiting from the agreement shall provide written notice containing the name and address of the funder to the counterparties. The notice should be made on or before the start of the arbitration, or after the start of the arbitration as soon as the funding agreement is made.

The costs of securing third-party funding is a cost of the arbitration which the tribunal will allocate in its final award under section 50(1).

Limitation period for enforcement

The ACA did not provide for the limitation period for the enforcement of awards in Nigeria, but the limitation laws of various states made provisions for the application of those laws to arbitration in the same way they would to court actions.

The crucial issue is whether time begins to run (for the purposes of enforcing the award) from the date of the initial breach of the underlying contract or from the date of publication of the award. The Nigerian Supreme Court held in City Engineering v Federal Housing Authority (City Engineering)[12] that time begins to run from the date of breach of the underlying agreement between the parties, not from the making of the award.

This meant that, unless arbitration proceedings had been concluded and an award issued within the limitation period that applies to the cause of action, the resulting award may be caught by the limitation period and become unenforceable.

The changes introduced by the AMA were intended to ameliorate this effect. Section 34 provides as follows:

(a) Applicable limitation statutes shall apply to arbitral proceedings the same as they do to court proceedings;

(b) In computing the time prescribed by a limitation statute for the commencement of proceedings (court or arbitral) in respect of a dispute that was the subject matter of:

(1) an award that the court orders to be set aside or declares to be of no effect, or

(2) the affected part of an award that the court orders to be set aside or declares to be of no effect, the period between the commencement of the arbitration and the date of the order referred to in points (1) or (2) shall be excluded;

(c) In determining when a cause of action accrued, any provision that an award is a condition precedent to bring legal proceedings in respect of a matter to which an arbitration applies shall be disregarded; and

(d) In computing the time for the commencement of proceedings to enforce

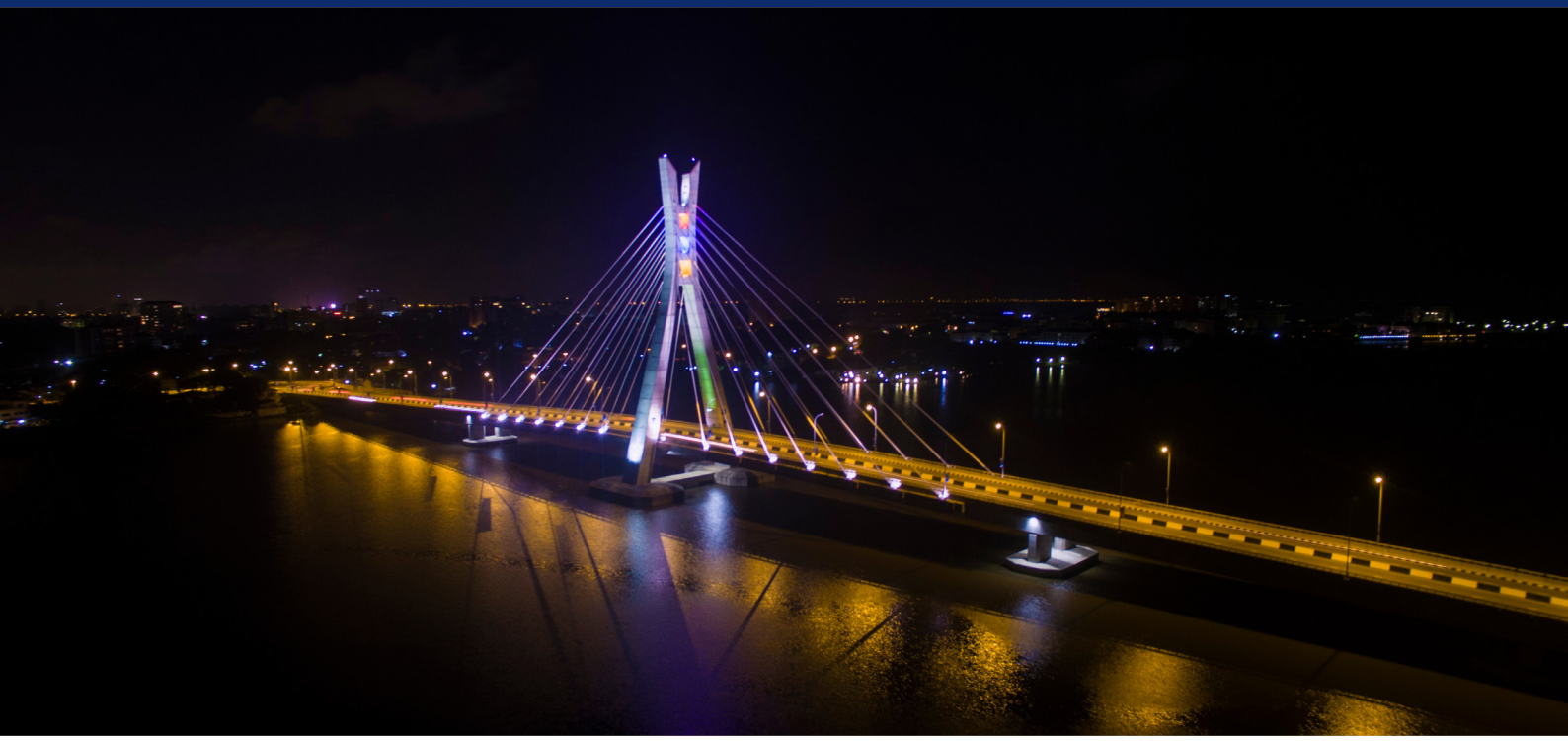
8 Procedure set out in Third Schedule of the AMA.

9 Section 28(1) of the AMA.

10 Section 28(3) of the AMA.

11 Section 23(4) of the AMA.

12 (1997) 9 NWLR (Pt 520) at 224



an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.

Electronic arbitration agreements

The ACA provided that all AAs must be in writing and contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other recorded means of communication. The AMA includes electronic communication as fulfilling the writing requirement: section 2(4) AMA.

"Electronic communication" is defined in section 91(1) as *"any communication the parties make by means of data messages, i.e., any information generated, sent, received or stored by electronic, magnetic, optical or similar means, including electronic data interchange, electronic mail, telegram, telex or telecopy"*.

Court Proceedings

Section 64(1) of the AMA provides that courts cannot intervene in any matter governed by the AMA except where provided by the AMA. Section 64(2) provides that applications in respect of matters governed by the AMA shall be conducted in accordance with the Rules set out in the Third Schedule to the AMA.

The Third Schedule contains the "Arbitration Proceeding Rules 202" which set out a detailed procedure for the case management of "arbitration claims" as defined in paragraph 1 of the Third Schedule. These rules are mandatory to claims which fall within the definition of arbitration claims. Such claims include applications for a stay of proceedings, determining challenges to arbitrators, interim measures and recognition and enforcement of an award.

The Third Schedule also deals with appeals in respect of arbitration matters and it expressly provides that such appeals shall have their first hearing no later than 6 months after the filling of the record of appeal.

Representation

The Arbitration Rules which are contained in the First Schedule deal with the issue of the representation of the parties which has often proved to be fertile grounds for challenges where one or more of the parties is a Nigerian entity. Article 5 of the First Schedule provides expressly that each party maybe represented or assisted by persons chosen by it. There is no restriction on the nationality or the qualification of such persons.

Mediation

The AMA has established substantive and procedural guidelines for international and domestic commercial mediation, along with the agreements arising from mediation processes, in Part II of the AMA. It aligns with the 2018 UNCITRAL Model Law on International Commercial Mediation, laying out a mediation procedure where by at either party's request, a jointly appointed mediator may review the conflict, hear from the parties, and then submit settlement ideas.

The new regime provides that settlement agreements arising from mediation are binding on the parties and can be enforced by a court as a contract, consent award, or consent judgment: section 82(2). Further, communications made during mediation proceedings are inadmissible in any court or arbitral proceedings: section 77(1).

Section 87 provides that the Singapore Convention on Mediation applies where a party seeks to enforce an international settlement agreement made in a jurisdiction other than Nigeria provided that (i) that State is a signatory to the Convention, and (ii) the dispute arises out of what would be considered a 'commercial' legal relationship in Nigeria.

Section 71 provides that when the mediation proceedings commence, the running of the limitation period regarding the claim is suspended. Time resumes upon unsuccessful mediations from the time that mediation ended.

Miscellaneous provisions

Repeal of the ACA does not affect ongoing proceedings under that Act. The AMA is not retrospective in effect.

Section 13 of the AMA introduces immunity for the arbitrator, appointing authority or arbitral institution. As mentioned in para 21 above, under the ACA, a multitude of claims were brought against arbitrators due to ambiguity in the definition of concepts such as 'improper'. Section 13 was introduced to encourage confident arbitrators and to discourage defensive practice due to fear of litigation, unless the act or omission was done in bad faith.

Commentary

The electronic agreement provisions and the new mediation regime have been largely welcomed by the arbitration community in Nigeria. It is noteworthy that while Nigeria adopted the Singapore Convention on Mediation in August 2019, it was not integrated into the AMA. Section 87, however, may be said to elucidate its scope to disputes in Nigeria. Mondaq describes the mediation regime as a positive step 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. In particular, parties can be assured of enforceability of the mediation outcomes without subsequent challenge.

In many ways, the AMA is evolutionary, rather than revolutionary, building as it does on the Model Law. However, the ART process is an innovation that aims to ameliorate the old position that parties may seek recourse in court against a final award, delaying the enforcement process and undermining arbitration as an efficient alternative. However, the ART does not expressly preclude the involvement of the court in the annulment or enforcement proceedings, and so a party may still seek review of the ART's decision if it is considered to be 'unsupportable', having regards to the grounds for annulment (i.e., arbitrability or public policy).

This has caused a stir in the Nigerian arbitration community, who are worried about the potentially counterintuitive impact of the ART process: where the ART sets aside the arbitral award partly or wholly, the court may reinstate the award, leading to arguably greater costs and delay than before.[13] However, the counterargument would be that the ART process provides parties the chance to include in their contract a private form of review before resorting to the court process, where there is significant backlog and delay, as well as public scrutiny. In the vast majority of cases, the ART will be the final step in the process. The aims of the ART to increase the efficiency of arbitration in Nigeria are irrelevant to determining the award's arbitrability or conformity to public policy.

One of the most impactful innovations introduced by the AMA is likely to be the new regime for dealing with arbitration matters set out in the Third Schedule. The hope and intent is that, by providing a comprehensive regime governing arbitration matters in the court, the extensive delays which have been a persistent feature of the way courts in Nigeria deal with arbitral matters will be significantly reduced and it will reduce the scope for parties to use court applications as a means of delaying or frustrating references to arbitration. Ultimately, the impact of these changes will depend on the attitude of the judges to the application of these new rules.

Comparative perspective: England and Wales

On 7 November 2023, the King's Speech confirmed that Parliament will consider the Law Commission's reform proposals to the Arbitration Act 1996 ('AA96'). This would modernise London's arbitration framework, which has a strong international reputation. There are at least 5,000 domestic and international arbitrations in England and Wales each year, worth at least £2.5bn to the economy.[14] The Chartered Institute of Arbitrators has over 17,000 members in 149 countries and is headquartered in London (the branch in Nigeria being one of the largest outside London). The Law Commission ('LC') noted in its Final Report that international arbitration has grown by about 26% between 2016 and 2020. An arbitration survey by Queen Mary University of London ('QMUL') in 2021 revealed that London and Singapore are the world's most preferred seats. For these reasons, it is worth looking at this jurisdiction's reform efforts in the field of arbitration when considering arbitration reform in any other jurisdiction.

Initial reaction from industry to the need for reform was that the AA96 works well and that major reform is neither needed nor wanted. The LC shared this view in the main but asked consultees how the AA96 might be reformed to remain cutting edge. In doing so, it focussed on the following: confidentiality; independence of arbitrators; immunity; summary disposal; interim measures; emergency arbitrators; jurisdictional challenges; appeals on legal issues; discrimination; and disclosure.

The Nigerian AMA covered arbitrator immunity, emergency arbitration, and interim measures. Therefore, it is worth considering the English reform proposals in these areas.

a. Immunity: The AMA is in line with the LC's reform proposal that arbitrators should not incur liability for costs in relation to an application for their removal under section 24 AA96 unless the arbitrator has acted in bad faith. There is a principle of arbitrator immunity already in operation in English law.

b. Interim measures: Section 44 provides that the court has power to make orders in support of arbitral proceedings in certain matters. S.44(2) lists those matters, which include granting of interim injunctions and preservation of evidence. It is proposed that section 44 should enable court orders to be made against third parties.

c. Emergency arbitration: The proposal for emergency arbitration to be provided for in the AA96 was rejected. However, the LC recommended provisions empowering the court to enforce a peremptory order issued by an emergency arbitrator, who will have the same power as a normal arbitrator to give parties permission to apply to court for an order under section 44(4) of the AA96.

The biggest innovation in the Nigerian AMA is arguably its most criticised: the ART. No such procedure was proposed by the LC in England. An equally novel innovation had been propounded instead: the power to order summary judgment.

The AA96 contains no provision for summary disposal but section 33(1)(b) provides that the tribunal shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, to provide a fair means for the resolution of matters falling to be determined. Section 34(1) provides that the tribunal is to decide all procedural and evidential matters subject to the parties' agreement on any matter. Thus, it had been argued that summary disposal was permissible.

The LC has proposed that the AA96 should expressly provide for summary disposal, subject to the parties' agreement. The procedure is to be a matter for the tribunal, having consulted the parties. The tribunal may make an award on a summary basis in respect of an issue only if it considers the party has no real prospect of succeeding on the issue.[15]

Arguably, this would have been a better solution than the ART, enabling arbitrators to deal with ex ante questions of arbitrability and public policy. Should these issues arise ex post, then they should be dealt with in court. This placates the concern of the ART as a potentially wasteful intermediary step.

Summary judgment does not appear in the UNCITRAL Model Law, but appears in certain model arbitral rules, such as:

a. ICSID Arbitration Rules 2022, r.41: 'objection for manifest lack of legal merit';

b. HKIAC Administered Arbitration Rules 2018, art.43: 'early determination'; and

c. ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration 2021, para 110: 'expeditious determination'.

Arguably, a summary procedure limits the opportunity for a party to put its case. The party must have a reasonable opportunity to do so: section 33(1)(a). This matters as a party may be able to resist under Article V.1(b) of the New York Convention. However, if explicit provision were to be included in the AA96, it would also remove the 'due process paranoia' of arbitrators who have shied away from adopting summary disposal in some cases for fear that their award will be challenged under section 68 of the AA 96 for serious irregularity, i.e., failing to comply with their section 33 duty.

13 https://www.afronomicslaw.org/category/analysis/new-era-arbitration-nigeria-arbitration-and-mediation-act-2023 <accessed 21/06/2024>; https://www.stewartslaw.com/news/nigerias-new-arbitration-act-changing-arbitration-practice-in-the-country/ <accessed 21/06/2024>.

14 Law Commission, Review of the Arbitration Act 1996: Final Report and Bill (HC 1787, Law Com No 413), 1.

15 LC Final Report: paras 6.24, 6.34, 6.51.