Chambers
AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

International Arbitration 2024

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Contributing Editor
Gary Born
Wilmer Cutler Pickering Hale and Dorr LLP

Chambers

Global Practice Guides

International Arbitration

Contributing Editor

Gary Born

Wilmer Cutler Pickering Hale and Dorr

2024

Chambers Global Practice Guides

For more than 20 years, Chambers Global Guides have ranked lawyers and law firms across the world. Chambers now offer clients a new series of Global Practice Guides, which contain practical guidance on doing legal business in key jurisdictions. We use our knowledge of the world's best lawyers to select leading law firms in each jurisdiction to write the 'Law & Practice' sections. In addition, the 'Trends & Developments' sections analyse trends and developments in local legal markets.

GPG Director Katie Burrington
Content Management Director Claire Oxborrow
Content Manager Jonathan Mendelowitz
Senior Content Reviewer Sally McGonigal, Ethne Withers
Content Reviewers Vivienne Button, Lawrence Garrett, Sean Marshall, Marianne Page, Heather Palomino, Deborah Sinclair, Stephen Dinkeldein and Adrian Ciechacki
Content Coordination Manager Nancy Laidler
Senior Content Coordinator Carla Cagnina
Content Coordinators Hannah McDowell and Delicia Tasinda
Head of Production Jasper John
Production Coordinator Genevieve Sibayan

Published by
Chambers and Partners
165 Fleet Street
London
EC4A 2AE
Tel +44 20 7606 8844
Fax +44 20 7831 5662
Web www.chambers.com

CONTENTS

NIGERIA

Trends and Developments

Contributed by:
Olasupo Shasore, Oyinkansola Badejo-Okusanya and Michael Chukwu
ALP NG & Co

ALP NG & Co is a commercial law firm established following a merger of Nigeria-based law practices, whose members have varied experience spanning all areas of its combined practice. It is an Africa-focused firm with dedicated and innovative corporate and dispute resolution practices, providing the highest quality of legal, business advisory and related services to the local business community, as well as continental and international clients. ALP NG & Co is connected across the African continent and internationally, linked by the extensive support capabilities and correspondent relationships with law firms in Africa, Europe, Asia and North America. It has strong regional networks and international relationships, offering pragmatic and efficient solutions to legal concern and diverse needs.

Authors

Olasupo Shasore is a Senior Advocate of Nigeria, a fellow of the Chartered Institute of Arbitrators and a partner at ALP NG & Co, who has acted in international commercial and investment arbitration/litigation for more than three decades. He is the former president of the Lagos Court of Arbitration (2014–16), a member of the National Arbitration and Dispute Resolution Reform Committee, and the co-founder and former vice-president of the Maritime Arbitrators Association of Nigeria. Olasupo is a leading African counsel in ICSID and has significant experience in investment-related disputes, shipping, trade and maritime law, as well as in pre-dispute project and risk advice in energy and infrastructure.

Oyinkansola Badejo-Okusanya is a litigation, arbitration and ADR specialist at ALP NG & Co, with experience in domestic and international dispute frameworks. She represents private and state clients in commercial transactions before trial and appellate courts in Nigeria and has been described as “a dogged, results-oriented barrister”. Oyinkansola is active in the arbitration community, having served on the executive committee of the Chartered Institute of Arbitrators (UK)’s Nigeria branch. She is a fellow of the Chartered Institute of Arbitrators, an accredited Centre for Effective Dispute Resolution mediator and a member of the International Council for Commercial Arbitration, ArbitralWomen, the Commonwealth Lawyers Association, and the Nigerian and International Bar Associations.

Michael Chukwu is an associate at ALP NG & Co, who has advised local and international clients in various areas, including commercial dispute resolution. Michael is a commercially aware lawyer, utilising his multidisciplinary experience and extensive knowledge of the law to provide comprehensive legal guidance tailored to each client's specific needs. Michael's expertise involves navigating complex commercial transactions, resolving disputes effectively and delivering favourable outcomes for clients.

ALP NG & Co

15 Military Street
Onikan
Lagos
Nigeria

Tel: +234 201 700 2570
Email: alp@alp.company
Web: www.alp.company

ALP | NG & CO.
AFRICA LAW PRACTICE NG & COMPANY
WWW.ALP.COMPANY

Introduction

As a result of the well-documented benefits of arbitration as a mechanism for resolving commercial disputes, there has been a trend towards countries actively competing – through legislation and court decisions – to have their jurisdictions perceived as arbitration-friendly. This article discusses the trends and developments in the field of arbitration in Nigeria and analyses in detail some of the provisions of the recently passed Arbitration and Mediation Act 2023 (AMA), in addition to some concerns that may arise in the application of the law. It also examines some recent arbitration-related decisions from Nigerian courts to see whether those decisions support or stifle the quest to establish Nigeria as a veritable regional arbitration hub and an arbitration-friendly jurisdiction.

Innovative Provisions of the Arbitration and Mediation Act 2023

A year after the AMA repealed the 35-year-old Arbitration and Conciliation Act 1988 (the "1988 Act"), the innovations and provisions of the new law are being tested in many ways. The AMA has introduced some significant changes, which shall be discussed.

Definition of arbitration agreement

Unlike the 1988 Act, which did not define "arbitration agreement", Section 2(1) of the AMA contains a wide and liberal definition of "arbitration agreement" and expands the scope of arbitration agreements recognised under the law. Instructively, the AMA acknowledges the advances in technology by expressly stating that the requirement for an arbitration agreement to be in writing is met if the agreement is recorded in any form or is contained in electronic communication. As such, application of the judgment in UBA Plc v Triedent Consulting Ltd (2023) 9 CLRN 69; 14 NWLR (Pt 1903) 130, which was decided based on the 1988 Act, means that electronic communication (including emails) would constitute a binding arbitration agreement even when the arbitration "agreement" is in a separate communication or document from the agreement on the subject matter.

Stay of proceedings and referral to arbitration

The AMA has removed the confusing provisions of Sections 4 and 5 from the 1988 Act, both of which allowed the court to stay proceedings and refer disputes to arbitration, leading to duplication and conflict. The new Section 5 of the AMA aligns with Article II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), stating that a court must refer parties to arbitration if the matter is subject to an arbitration agreement, unless the agreement is found to be null, void, inoperative, or incapable of being performed.

The conditions in Section 5 of the 1988 Act for granting a stay of proceedings – which the courts elevated to onerous levels in their interpretation in, for instance, the Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Ltd (MV Lupex) (2003) 15 NWLR (Pt 844) 469 – no longer form part of the new regime. What remains the same, though, is that the order of stay of proceedings may only be granted if any of the parties so requests and such request must be brought by the party no later than when submitting its first statement on the substance of the dispute.

Designation of default appointing authority

Under the 1988 Act, the default arbitrator(s)-appointing authority was the national court in cases where either the parties fail to appoint a sole arbitrator, or a party fails to nominate or appoint a party-appointed arbitrator, or even where the party-appointed arbitrators fail to

agree on a presiding arbitrator. In such circumstances, the decision of the court in appointing an arbitrator under Section 7(2) and (3) of the 1988 Act was not appealable, as was held by the court of appeal in AG Ogun State & 3 Ors v Bond Investment & Holdings Ltd (2024) 1 NWLR (Pt 1918) 155.

Unlike the 1988 Act, the AMA has now included "an arbitral institution in Nigeria" as the alternate default appointing authority along with the national courts for domestic arbitrations under Section 7(3). For international arbitration, where the parties have neither agreed on a procedure for the appointment of an arbitrator nor on the appointing authority, Section 59 of the AMA provides that the director of the Regional Centre for International Commercial Arbitration, Lagos (RCICAL) will be deemed to be the appointing authority.

The designation of the national courts as the sole default appointing authority under the 1988 Act had been one of the causes of delay in concluding arbitral proceedings speedily and opened the door for interference by the courts. As such, the provisions of the AMA as highlighted here are a major improvement.

However, to encourage expediency, efficiency, and adequate consideration of the facts, the ideal position is to have the arbitral institutions as the default appointing authority. The Arbitration Rules in Article 6 attempt to provide for this by stating that unless parties have already agreed on the choice of an appointing authority, a party may propose the name(s) of one or more institutions or persons (including the director of the RCICAL) to serve as the appointing authority. Where the parties fail to agree on the appointing authority within 30 days following the proposal, any party may request the director of the RCICAL to designate the appointing authority.

There have been arguments that the inconsistency between the provisions of Section 7 of the AMA and Article 6 of the Arbitration Rules must be resolved in favour of the Arbitration Rules, such that parties must agree on the institution (or on the person that may act as the appointing authority or must request the director of the RCICAL to act as the appointing authority) and cannot resort to the court for such appointments. However, the provisions of the AMA as the substantive law are superior to the Arbitration Rules, which is the subsidiary legislation. Therefore, appointment under Section 7 of the AMA is the appropriate step in appointing arbitrators in these circumstances.

Relatedly, the combined reading of Section 7 and the interpretation of "court" under Section 91 of the AMA clearly provide that the appointment of arbitrator(s) may be made by the chief judge of the High Court of a state, the High Court of the Federal Capital Territory Abuja or the Federal High Court, sitting as a judge in Chambers. As such, requests for such appointments by the court need not be made through an application in the form of a motion or other modes for commencement of action. A formal application in writing to the chief judge in these cases should be sufficient to initiate the appointment procedure by the court.

Decisions on challenges to arbitrators

Another area of inconsistency that has now been addressed in the AMA is in respect of the challenge to arbitrators. Section 9(3) of the 1988 Act provided that, unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitrator or arbitral panel will decide on the challenge. Article 12 of the Arbitration

Rules contained in the First Schedule to the 1988 Act further provided that the decision on the challenge will be made by the court, except in cases where the parties designated a different appointing authority.

Under the AMA, Section 9(2) equally provides for the powers of the arbitral tribunal to decide on a challenge, whereas Article 13(4) of the Arbitration Rules made pursuant to the AMA contains a slight but significant change to the position in the 1988 Act – in that the decision on the challenge must be made by the appointing authority.

Freedom of parties to decide procedural rules

In a departure from the provisions of Section 15 of the 1988 Act, which provided – and erroneously, too – that arbitral proceedings must be conducted in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to the Act, the AMA provides in Section 31 that parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. It is only in cases where the parties fail to agree on the procedural rules that the Arbitration Rules set out in the First Schedule to the AMA will apply. There is no gainsaying the fact that the position under the AMA corresponds with the principle of party autonomy, which is the hallmark of arbitration.

Distinction between seat and venue of arbitration

Another important feature of the AMA is that it explicitly provides in Section 32 for the seat of an arbitration and distinguishes between the "seat" and the "venue" where the arbitration proceedings are to take place. Under the AMA, the "seat of arbitration" is the judicial seat of the arbitration for the purpose of determining the law that will govern the proceedings and it may be designated by the parties or an arbitral or other institution, whereas the "venue" is any place that the arbitral tribunal meets for consultation, hearing or inspection.

This is a welcome departure from Section 16 of the 1988 Act, which merely provided for the "place" of the arbitral proceedings. This section had, not unexpectedly, brought about some measure of controversy – sometimes with monumental consequences.

Limitation period for enforcement of arbitral awards

There are also the very welcome provisions in Sections 34(1) and (4) of the AMA to the effect that – although the provisions of the Limitation Act apply to arbitral proceedings as they apply to judicial proceedings – in calculating the date of commencement of proceedings for the purpose of enforcing an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded. This effectively reverses the position in cases such as City Engineering Nig Ltd v Federal Housing Authority (1997) 9 NWLR (Pt 520) 224 and Sakamori Construction Nigeria Limited v Lagos State Water Corporation (2022) 8 NWLR (Pt 1823) 339.

In the City Engineering case, the Supreme Court held that – for the purpose of determining the limitation period for the enforcement of an arbitral award – time begins to run from the date that the original cause of action arose and not from the date of the arbitral award. The implication of this judgment has been that award creditors were bound to apply to enforce their award no later than the stipulated limitation period (ie, usually six years). Indeed, there have been cases where the limitation period expired even before the award was rendered. The decision has accordingly wrought considerable hardship on

award creditors and adversely affected the practice of arbitration in Nigeria. The AMA, however, borrows from the sub-national Arbitration Law of Lagos State (the commercial capital of Nigeria) and adopts the ratio in Sifax Nigeria Limited v Migfo Nigeria Limited (2018) 9 NWLR (Pt 1623) 138 and Messrs U Maduka Ent (Nig) Ltd v BPE (2019) 12 8 CLRN 103; (2019) 12 NWLR (Pt 1687) 429 in order to bring the law in line with international expectations.

Interim measures

Yet another innovative provision in the AMA can be found in Section 16, which provides for the appointment of an emergency arbitrator where a party requires urgent relief prior to the appointment of the tribunal and also provides for emergency arbitration proceedings. Under the AMA, the application for the appointment of this emergency arbitrator must be submitted to the arbitral institution designated by the parties or (failing such designation) to the national court. This remedy – designed to safeguard the rights of a party to a dispute, especially in situations where time is of the essence and parties are unable to wait for the constitution of an arbitral tribunal to prevent or remedy a damage – is a commendable inclusion in the AMA.

This provision in the AMA mirrors a similar provision in the Lagos Court of Arbitration Rules and accords with the trend in new-generation national arbitration legislations. Furthermore, Sections 19 and 20 of the AMA respectively provide for the powers of national courts and arbitral tribunals to grant interim measures of protection that, under Section 28, are binding and capable of recognition and enforcement.

An emergency arbitrator appointed under the AMA must issue its decision within 14 days from the date the arbitrator receives the file on the dispute/claims. Any order/decision made by the emergency arbitrator will not bind the arbitral tribunal and, where the arbitral tribunal has been constituted, the emergency arbitrator will have no further power to act.

The AMA also provides for the first time, in Section 22, that a request for interim measures may be made together with an application for a preliminary order without notice to the other party. However, Section 23(5) of the AMA – like Article 17C (5) of the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") – provides that preliminary orders, while binding, shall not be subject to enforcement by a court.

Third-party funding

The most talked-about – and about which the authors are most excited – innovation in the AMA is the introduction of third-party funding as part of arbitral proceedings. The concept of third-party funding has introduced a remarkable evolution in arbitration, making it more accessible for parties that may not have the financial resources to assert their rights through arbitration. The AMA now permits parties to enter into agreements with third parties to fund the arbitration process on their behalf. This innovation removes the traditional legal barriers of champerty and maintenance, thereby allowing potentially meritorious claims to be brought that would otherwise have been financially prohibitive. The beneficiaries of third-party funding in arbitration proceedings are, however, required to notify the other party(ies) and the arbitrator(s) of this position and may be required to confirm by deposition whether the funder has agreed to cover any adverse cost order.

Despite its benefits, third-party funding in commercial arbitration is still in its nascent stages

of evolution in global arbitral legislation. It is therefore a very welcome addition to Nigerian practice for a number of reasons – not the least of which is adding to Nigeria's competitiveness as a preferred seat for international commercial arbitration. The fact that proceedings may no longer be stalled on account of a lack of sufficient funding and the implications of this for access to justice will potentially contribute to the further growth and development of arbitration in Nigeria.

Award review tribunal

The concept of the award review tribunal is another innovation that will have far-reaching effects. This important solution to a perennial problem offers a faster and more efficient means of challenging an arbitral award, effectively bypassing the characteristically time-consuming and costly court proceedings. Although this innovation has not been adopted, it will not only speed up the process but also preserve the sanctity and reliability of Nigerian-seated arbitral awards, thereby increasing confidence in Nigeria's arbitration framework.

Arbitration-Related Decisions of Nigerian Courts

Nigerian courts have generally, especially in more recent times, adopted a pro-arbitration approach in the determination of arbitration-related cases. Case law in Nigeria is replete with instances where Nigerian courts have given effect to parties' agreements by refusing to adjudicate over actions in respect of which there is an arbitration agreement, instead referring parties to arbitration in accordance with their agreement. These include the cases of Nwagbara v Jadcom Ltd (2021) 16 NWLR (1802) 343 and Esso Exp & Prod (Nig) Ltd v FIRS (2021) 8 NWLR (1777) 98.

Scope of arbitration clauses

However, in UBA Plc v Triedent Consulting Ltd, the Supreme Court made a decision that restricts the scope of arbitration agreements in Nigeria. The court held that common law and statute are the two sources of arbitration law in Nigeria that coexist to complement each other. Essentially, statutes provide the detailed guidance addressing specific issues, whereas the common-law principles supplement statutory provisions by addressing areas not covered by the statue. As such, a court may apply both laws in a matter to the extent that they are relevant in the circumstances.

It was on this basis that the court held that the terms of arbitration agreements must be clear and certain in satisfaction of the elements of contract. The court adopted a restrictive approach in interpreting the arbitration clause (which provided that parties must use their best endeavours to settle "disputes arising from the agreement" entered into by the parties), circumscribing the matters to which the arbitration clause applies. The court held that the operation of such arbitration agreements must be narrowly defined in order to exclude disputes outside of the substance of the original agreement, as the court cannot make inference as to the intention of the parties.

The court's stance differs from the international interpretation tendencies, which – in the interest of the parties – typically favour interpreting arbitration clauses as covering not only future contractual disputes but also disputes arising from the non-contractual obligations of the parties if they relate to the execution of the contract. In applying this position, the House of Lords of the United Kingdom stated in Premium Nafta Products Limited and others v Fili Shipping Company Limited and others (UKHL 2007) 40 that it should

be assumed that parties – when using phrases like "disputes arising from this agreement" in arbitration clauses – intend for any dispute arising from relationship into which they entered to be decided by the same dispute resolution mechanism.

In the UBA Plc v Triedent Consulting Ltd case, the court held that the arbitration clause excluded the issue of defamation raised by the respondent as a result of the appellant's letter, which was published to a third party, indicating that the company was overpaid and in the bank's debt. It was held that defamation and costs for litigation are secondary liabilities and not part of the contractual obligations in the contract and, as such, not covered by the arbitration clause under the agreement. It appears that the court may have aligned with international tendencies to hold that the arbitration clause had a wider scope if the arbitration clause had included the phrase "or relating to…". However, the court's decision is a clear limitation of the scope of arbitration agreements in Nigeria.

Inapplicability of pre-action notices

The courts have also made other pronouncements that have expanded the frontiers of arbitration in Nigeria in cases such as NNPC v Fun Tai Eng Co Ltd (2023) 15 NWLR (Pt 1906) 196, where the Supreme Court held that the right to receive pre-action notice that was granted to the Nigerian National Petroleum Corporation (NNPC) under the NNPC Act does not apply to arbitration. In upholding an award that was made against the appellant and enforcing the fundamental principles of arbitration, the court held that by deliberately, consciously and freely choosing by consensus to submit to arbitration, the corporation's statutory right to pre-action notice was not applicable in such instances.

Setting aside of foreign arbitral awards

But there is also the more problematic occurrence whereby Nigerian courts have, on isolated occasions, erroneously set aside foreign arbitral awards – ie, awards rendered by foreign-seated arbitral tribunals or awards emanating from arbitrations conducted under laws other than Nigerian law. The latest example of this is the case of Limak Yatirim Enerji Uretim Isletme Hizmetleri ve Insaat AS & Ors v Sahelian Energy & Integrated Services Ltd (2021) LPELR-058182(CA), where the Nigerian Court of Appeal upheld the decision of the High Court of the Federal Capital Territory Abuja, which set aside a final arbitral award published on 28 June 2018 by a tribunal of the ICC International Court of Arbitration seated in Geneva, Switzerland on the grounds that enforcing the award would be contrary to public policy. The court held that the lower court was right to exercise its powers to set aside the international arbitral award, as non-compliance with the statutory requirement to register the Co-operation Framework Agreement (which gave rise to the international arbitral award) with the National Office for Technology Acquisition and Promotion is against public policy.

Increasing Adoption of Technology in Arbitral Proceedings in Nigeria

Although parties still favour physical sittings during arbitral proceedings, the use of various forms of electronic communication technology has become increasingly popular in Nigeria. Many remain open to the use of communication technology to allow parties to attend arbitral hearings virtually where unavoidable and where agreed to by the parties. To ensure that the awards are not set aside on grounds that the proceedings were conducted at the wrong venue, the arbitral panel usually sits at the agreed venue of the proceedings and may be joined by the parties and/or witnesses via online videoconferencing platforms.

Conclusion

The need for businesses to resort to arbitration and other ADR options has become even more acute. The introduction and now widely accepted use of virtual and other digital hearing platforms in Nigeria fitted nicely into the flexibility that arbitration offers, and the quest for the continued growth and development of the dispute resolution space in Nigeria – especially the field of arbitration – looks increasingly promising. The Arbitration and Mediation Act 2023 and the issuance of pro-arbitration decisions by Nigerian courts have largely modernised the country's arbitration framework and aligned it with international best practices and the UNCITRAL Model Law.