

ARBITRATION AND CONCILIATION ACT (REPEAL AND RE-ENACTMENT) BILL 2017

Background

On 1 February 2018, the Senate considered and passed the Arbitration and Conciliation Act (Repeal and Re-enactment) Bill, 2017 (the **Bill**). It is expected that the Federal House of Representatives will also pass the Bill, which will come into force following presidential assent.

The Bill, if passed into law, will repeal the Arbitration and Conciliation Act Cap. A18, Laws of the Federation of Nigeria, 2004 (the **ACA**). The Bill is laudable in the sense that it contains innovative provisions which will enhance the perception of Nigeria as an attractive destination for arbitration. However, the Bill has some shortcomings.

Some Innovative Provisions of the Bill

Some of the innovative provisions of the Bill are as follows:

- Section 5 of the Bill conflates the provisions of Sections 4 and 5 of the ACA. Specifically, Section 5 of the Bill mandates the Court to stay proceedings on any matter which is subject to an arbitration agreement unless the Court finds that the agreement is null and void, inoperative, or incapable of performance.
- Section 5 of the Bill also empowers the Court, while making an order for stay of proceedings in deference to the parties' agreement to arbitrate, to make such interim or supplementary orders as may be necessary for preserving the rights of the parties to the arbitration agreement.
- In addition, Section 5 of the Bill omits the provision of Section 5(2)(b) of the ACA, which places an obligation on an applicant seeking an order for stay of proceedings pending arbitration to establish readiness and willingness to do all things necessary to arbitrate the dispute in order to obtain the order.
- The Bill, in Section 13, imbues **immunity on arbitrators, appointing authority and arbitral institution**, by protecting them from liability for anything done or omitted to be done in the discharge of their functions.
- Section 16 of the Bill allows for the appointment of an **Emergency Arbitrator** to attend to applications for urgent reliefs by parties to arbitration agreements.
- Section 19 of the Bill empowers Courts to grant interim measures in aid of arbitral proceedings in Nigeria or abroad. This provision if passed will result in a statutory override of the decision of the Supreme Court in **NV. Scheep v. MV. "S. Araz"** [2000] 15 NWLR (Pt. 691) 622.
- Section 28 of the Bill provides for the **recognition and enforcement by courts of interim measures issued by an arbitral tribunal** irrespective of the country in which it was issued subject to the conditions in Section 29 of the Bill.

- Section 34 of the Bill provides that, in computing the time for commencing proceedings to enforce an arbitral award, **the period between the commencement of the arbitration and the date of the award should be excluded.** This provision resolves the controversy surrounding computation of time for purposes of determining whether application for the registration and enforcement of an arbitral award is statute barred.
- Section 50(1)(g) of the Bill tacitly recognizes **Third-Party Funding**, which allows an individual or corporate entity without connection to the dispute to finance the costs of the arbitration on behalf of one of the parties, and is remunerated from proceeds of the award. This provision seeks to prevent a situation where a claimant is unable to arbitrate a dispute on account of impecuniosity.
- In a nutshell, Section 72 of the Bill provides that unless parties agree, certain information and pieces of evidence given in the course of conciliation proceedings shall enjoy privileged status in arbitral, judicial or other similar proceedings.

Some Short-comings of the Bill

Some of the short-comings of the Bill are as follows:

- Section 5(2) of the Bill allows arbitral proceedings to be commenced or continued, and an award given in respect thereof despite the pendency of the matter in Court. Unfortunately, this provision will put an arbitral tribunal and the Court on a collusion course as it portends the risk of the Court and the arbitral tribunal reaching inconsistent decisions. Such a situation has been decried by the Supreme Court in **Peters v. Ashamu** [1995] 4 NWLR (Pt. 388) 206.
- This provision also begs the question whether a Nigerian court will recognize

and enforce an award obtained during the pendency of court proceedings bordering on the same dispute that gave rise to the award.

- The provisions of Section 21 of the Bill on the condition for the grant of interim measures are unnecessary given that arbitral tribunals should be better guided by the procedural law of the arbitration in determining applications for interim measures.
- In addition, the conditions specified in Section 21 of the Bill are not exhaustive having regard to the different species of interim measures specified in Section 20(2) (a) – (d) of the Bill. For example, Section 20(2) (c) of the Bill empowers the arbitral tribunal to “*preserve assets out of which a subsequent award may be satisfied*” which is in the nature of a freezing or Mareva order. However, the conditions in Section 21(1) (a) and (b) of the Bill do not encompass an essential condition for the grant of a freezing or Mareva order – the risk of dissipation of the assets in question.
- Section 46(2) of the Bill empowers an arbitral tribunal “*to award simple or compound interest from such dates ... as it considers just.*” This provision will arrogate the decision to award interest, rate and type of interest to the personal idiosyncrasies of arbitrators notwithstanding the provision of Section 15(3) of the Bill, which provides that the arbitral tribunal shall not determine matters “*ex aequo et bono*” unless the parties otherwise agree.
- In addition, Section 46(2) of the Bill on interest is unnecessary given the provision of Section 37(2)(c)(i) of the Bill which states that the “*tribunal has the same powers as the Court to order a party to do or refrain from doing anything.*”

Conclusion

Notwithstanding its shortcomings, the Bill, if passed into law, will boost arbitration as a veritable vehicle for the settlement of commercial disputes in Nigeria, and in consequence thereof increase the inflow of foreign investment into Nigeria given that foreign investors prefer arbitration to litigation in emerging markets.

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