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PRE-ARBITRATION EMERGENCY MEASURES UNDER THE ARBITRATION AND MEDIATION BILL 2022.

INTRODUCTION

The passage of the Arbitration and Mediation Bill 2022 ("the Bill") introduces innovative fallback provisions in the legal framework for alternative dispute resolution in Nigeria. Under the Bill, provisions have been made for appointment of emergency arbitrators and applications for grant of interim measures pending arbitration.

Section 16 of the Bill provides that a party who requires an "urgent relief" may apply for it, prior to the constitution of an arbitral tribunal. According to this section, the application for urgent relief may be made concurrently with a request for arbitration to the arbitral institution. In this application, the applicant urges the arbitral institution designated by the parties for the appointment of an emergency arbitrator and failing such designation, the application for the appointment of an emergency arbitrator is made to the Court.

Worthy of note are the provisions of section 16 (9) of the bill and Article 27 of the first schedule to the Bill. The combined effect of these provisions is detailed information on the powers of the emergency arbitrator to, upon his appointment, give directions as to the course of the emergency relief proceedings, deliver decisions ("emergency orders"), form and content of the decision, fixing of cost for the emergency proceedings. More importantly, it also provides that once an arbitral tribunal has been constituted, the powers of the emergency arbitrator ceases with the only exception in respect thereto being enforcement of its decision, although the practicability of this proviso remains to be seen because the provisions regarding the powers of an emergency arbitrator do not give him coercive authority to do so.[1] Furthermore, the nature of decision reached by the emergency arbitrator in an emergency relief proceedings may be modified, suspended or terminated by the emergency arbitrator or arbitral tribunal upon a reasoned request by a party.[2] There are also other instances where the emergency order if granted may cease to subsist.[3] While there is a procedure to be undertaken by the parties to comply with the emergency order made under these rules, in the event of non-compliance such emergency order may be recognized and enforced as an interim measure and in the same manner as an award against the defaulting party.[4] Examples of interim measures or emergency orders which may be enforced include but are not limited to Injunctions, Security for costs, Applications for the preservation or detention of property and maintenance of status quo, to mention a few.[5]

Unless the parties agree otherwise, the application must contain the following, to wit; a

1. See Article 27 (12) & (15) of the first schedule to the Bill. Which still gives the emergency arbitrator to take steps to ensure that an emergency decision is valid notwithstanding the constitution of an arbitral tribunal.
2. See Article 27 (8) of the first schedule to the Bill.
3. See Article 27 (9) of the first schedule to the Bill.
4. See Article 27 (6) of the first schedule to the Bill and Section 28 of the Bill.
5. For more discussions on interim measures in arbitration please visit https://expert-evidence.com/kinds-of-interim-measures-in-arbitration/

statement of the Emergency Relief sought; the name in full, description, address and other contact details of the other parties; a description of the circumstances giving rise to the application and the underlying dispute referred to arbitration; reasons why the applicant needs the relief on an urgent basis that cannot await the constitution of an arbitral tribunal; why the applicant is entitled to such relief; and any relevant agreement(s) and, in particular, the arbitration agreement(s).

Where the arbitral institution or the Court resolves to accept the application, it shall, unless the parties agree otherwise, appoint an emergency arbitrator within two (2) business days after the date the application is received. Once appointed, the Emergency Arbitrator is to be notified not later than two (2) business days and subsequently all correspondences from the parties shall be submitted directly to the Emergency Arbitrator with a service copy to the other party. The emergency arbitrator is expected to remain independent and impartial and is required to deliver to the parties a statement confirming acceptance, availability, impartiality, and independence.[6]

Section 17 on its part stipulates that unless the parties otherwise agree, there is avenue to challenge the appointment of an emergency arbitrator upon receipt of notification in respect thereof. This challenge must be made within three (3) days and must be supported with grounds for challenge as stipulated in Section 8. Parties and the Emergency arbitrator are to join issues on the challenge via written submissions not later than three (3) business days. Where the challenge is successful or the emergency arbitrator is deceased the arbitral institution or the court shall appoint a "substitute emergency arbitrator" within two (2) business days and unless this substitute arbitrator decides otherwise he/she shall take over the conduct of the Emergency relief proceedings from where the predecessor stopped.

Section 18 makes provisions for the seat of the emergency relief proceedings and it stipulates that where the parties have agreed on the seat of arbitration, the emergency relief proceedings shall be seated there. Where the parties have not agreed on the seat of arbitration and without prejudice to the powers of the duly constituted arbitral tribunal to determine the seat of the arbitration, the arbitral institution or the Court shall decide the seat of the Emergency relief proceedings.

Section 19 provides that application for emergency measures can also be made directly to the Court without the involvement of an arbitrator or an arbitral institution and it will not constitute a waiver of the agreement to arbitrate.[7] Furthermore, this power is expected to be

6. See Section 16 (7) & (8) of the Arbitration and Mediation Bill 2022.
7. See Section 16 (9) of the Arbitration and Mediation Bill 2022.

exercised by the Court within fifteen (15) days and in accordance with the provisions of the third schedule of the Bill.[8] The application for emergency procedure and reliefs must be commenced by way of Originating Motion (Arbitration Claim) which shall be accompanied by a concise statement of the remedy claimed and any question which the Claimant seeks the decision of the Court in respect thereof and other particulars as stated in the Act.[9]

OBSERVATIONS AND RECOMMENDATIONS.

The provisions for appointment of an emergency arbitrator and obtaining emergency reliefs are indeed laudable. The Courts are now statutorily required to support and preserve the arbitral process, which will in turn create a synergy between the arbitral institutions and the Courts in this regard.

However, some practical shortcomings have been observed with respect to some of the provisions on the procedure for appointment of an emergency arbitrator, obtaining interim preservatory orders, and the exercise of these powers by the Court or the emergency arbitrator. These processes are expected to be completed within a very short time frame and the consequences for non-compliance are in limbo or not provided for in the Bill. Also, the Arbitration Proceeding Rules has extended some of the time frames for taking certain steps, for instance, on the one hand, the Court is expected to exercise its powers to determine an emergency relief application no later than fifteen (15) days as stated in Section 19. However, the rules[10] provide amongst other long timelines that a Defendant is required to respond to an application[11] and enter appearance in respect thereof within Twenty-one (21) days, although this is subject to the powers of the court to order otherwise as contained in the Rules. The emergency arbitrator also has similar powers as the court to control the emergency proceedings as may be appropriate while bearing in mind the urgency of the proceedings before him.[12] Unlike the courts, the emergency arbitrator is expected to reach a decision in respect of any issue before him within 14days and this period may only be extended with the consent of the parties.[13]

Furthermore, most often than not parties against whom emergency reliefs are sought are usually in a position of strength in taking steps that might not only be inimical to the interest of the party applying for the emergency relief but also the decision of the arbitral tribunal. Therefore, the requirement of notice to such party would appear counterproductive in cases of this nature and there are no consequences for non-compliance in the Bill. Although enforcement of the orders made in the aftermath of an emergency relief

8. The third schedule to the Bill contains the "Arbitration Proceedings Rules of 2022" these rules will govern applications made to the High Court for emergency reliefs. See Rule 2 (3) for the procedure for applications brought pursuant to sections 16, 17 & 18 of the Bill.
9. See Rule 2 (3) (a) – (f) Arbitration Proceedings Rules of 2022.
10. See Rule 8 (3) – (6) Arbitration Proceedings Rules of 2022.
11. Note that an application in this regard is in respect of an application for urgent relief and it is designated as an "Arbitration Claim" in court.
12. See Article 27 (1) of first schedule of the Bill.
13. See Article 27 (2) of first schedule of the Bill.

proceeding may be undertaken by the beneficiary of the emergency order or interim measure, this in our view will prolong the actual resolution of the main dispute before the tribunal. Note that under the SIAC Rules it is possible to obtain an emergency order or interim relief in an emergency relief proceeding in exceptional or special circumstances. It is only after it has been granted that an affected party will be notified of it and will be immediately given an opportunity to present an argument with a view to setting aside the emergency order.[14]

Curiously, the proposition for the enforcement of an emergency or interim relief pending arbitration may be a long shot when such interim measure is intended to be effective in another jurisdiction. Notably, the regime for the enforcement of arbitral awards internationally and across other jurisdictions is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) to which Nigeria[15] is a signatory. The convention is only applicable to the enforcement of final foreign arbitral awards amongst state parties. Therefore, an interim measure which does not have the characteristic of a final award may not be enforceable outside of the jurisdiction in which it was granted. The leeway here we believe, is that the relevant article of the convention[16] should either be reviewed in this regard or state parties may take steps to enact in their national laws or arbitration laws and rules, provisions for the enforcement of interim measures obtained from other jurisdictions and in line with the provisions of the convention. We are not unaware that where an adverse party fails to comply with interim reliefs, the arbitral tribunal (when constituted) could draw adverse (negative) inferences against the party.

Penultimately, the implementation of these provisions particularly by the Courts do not seem viable because of the short time frames, given how long the administrative process of filing an action to its assignment for hearing before a Judge of the High Court may take. Admittedly, the Bill tries to mirror international best practices in arbitration, thus applications bordering on emergency reliefs pending arbitration should be given priority by the authorities to enable Nigeria to claim a pride of place as a pro-arbitration friendly nation. This can attract investments and generate foreign exchange for the country. Most International investors are interested in knowing how arbitration friendly a nation is before making their choice of seat of arbitration. It is therefore recommended that there may be a need for collaboration of the relevant stakeholders and the judiciary to ensure that preservatory applications which are connected to arbitrations should be prioritized and speedily determined by the Courts.

Finally, it appears that the Bill is silent on the definite period for which an order of this nature will

14. See Art. 26(3) of the SIAC Rules 2012.
15. See Section 60 of the Bill.
16. Article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) which is contained in the Second Scheduled of the Bill.

last generally, however, it is recommended that the duration of an emergency order should be determined on a case-by-case basis. There is also the issue of the constitutional right of appeal of parties who may be dissatisfied by the grant of an emergency relief against them by a court. Appeal is not contemplated in an emergency arbitral proceeding but a dissatisfied party is at liberty to apply for review, set aside or variation of the interim measures after the constitution of the arbitral tribunal. Notwithstanding, where the emergency relief is granted by the court, application to set aside can lie and possible appeal which is governed by the provisions of the Bill.[17]

CONCLUSION

As stated in various parts of this paper, the passage of the Arbitration and Mediation Bill 2022 is no doubt a welcome development. However, upon close examination of the novel emergency procedure and reliefs provisions, it is apparent that the peculiarity of the administration of justice system in Nigeria was not taken into consideration. The climate of dispute resolution in Nigeria whether by alternative dispute resolution or the involvement of the judiciary remains adversarial in nature. Thus, there is a constant situation whereby litigants are always looking for ways to have a substantive or procedural (or both) advantage over each other during the dispute resolution process.

Therefore, it is without a doubt that the Bill if subsequently assented to will be subjected to various reviews to accommodate the current realities of the administration of justice systems and processes in Nigeria.

17. See Rules 10 – 13 of the Arbitration Rules in the third schedule of the Bill.

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