A REVIEW OF THE MAJOR GAPS IN THE ARBITRATION AND CONCILIATION ACT*

ABSTRACT

The Arbitration and Conciliation Act governs both domestic and foreign arbitration in Nigeria. As the mandatory law of arbitration in the country, its provisions have a lot of implications for how arbitration is conducted in Nigeria. It is therefore in the interest of the parties and the nation at large that the provisions of the Act are reflective of the modern thinking in the realm of arbitration. Since its promulgation as a decree about 23 years ago, major trends have emerged in the realm of arbitration that has made some of the provisions of the Act obsolete. This paper, therefore, identifies the possible gaps in the Arbitration and Conciliation Act. The aim is to recommend probable actions that will close such gaps and make the Act a useful tool in dispute resolution and not a stumbling block. It adopts a doctrinal research approach with emphasis on the review of case law, literature, internet sources, conventions, rules, reports, and legislations which are considered essential in giving effect to the paper. It found that certain provisions of the Act especially as it relates to international commercial arbitration are not adequate in terms of what they provide for and therefore recommend necessary amendments to the identified provisions of the Arbitration and Conciliation Act Cap. A18 Laws of the Federation of Nigeria.

Keywords- Arbitration and Conciliation Act, Arbitrator, Interim Measures, UNCITRAL Model Law, UNCITRAL Arbitration Rules.

INTRODUCTION

The Arbitration and Conciliation Act (ACA) is the primary law governing arbitration in Nigeria. It governs both domestic and foreign arbitral proceedings and incorporates the New York Convention in its Second Schedule. The ACA is largely based on the 1985 text of the UNCITRAL Model Law and the 1976 UNCITRAL Arbitration Rules. The UNCITRAL Model Law has gone through some revisions in 2006 known as the UNCITRAL Model Law on International Commercial Arbitration 2006 Revisions. Similarly, the UNCITRAL Arbitration Rules was revised in 2010 and is known as the 2010 UNCITRAL Arbitration Rules. Both revisions came with some new innovations and improvements to the Model Law and Rules. The ACA has not been amended since its initial promulgation as a Decree in 1988. It is however imperative to point out that a bill seeking to amend the ACA is before the Nigerian National Assembly. This paper, therefore, brings to light some significant gaps in the ACA especially in relation to the provisions relating to international commercial arbitration. These lacunas are more visible in the area of appointment of arbitrators, decision on challenge to arbitrators, the

general lack of power of the arbitral tribunal to grant interim measures in basic areas of the process, and others discussed below.

Arbitration is a private system of adjudication which provides a final and binding decision in the form of an award enforceable in a court.[1] It is a mechanism for the resolution of disputes which take place in private pursuant to an agreement between two or more parties, under which, the parties agreed to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable in law.[2] The Supreme Court of Nigeria viewed arbitration as the reference of a dispute or difference between not less than two parties for determination, after judicially hearing both sides, by a person or persons other than a court of competent jurisdiction.[3] The above definitions have one thing in common: they reveal that arbitration gives the parties substantial autonomy and control over the process that will be used to resolve their disputes. It offers parties the flexibility of being able to tailor the dispute resolution process to their needs, and the opportunity to select arbitrators who are knowledgeable in the subject matter of the dispute. Arbitration can either be domestic or international. Domestic arbitration is regulated by national law whereas international arbitration is governed by a variety of laws which include national law, comparative law, international conventions, and even usages of international trade.[4]

Access to justice in Nigeria has majorly been through the court system which was received as part of the colonial legacy. This does not presuppose that there was a vacuum in the administration of justice before the arrival of the Europeans. Historical records showed clearly that long before the nineteenth century when the English law was received, each of the territories which together now form Nigeria had a system of administration of justice. In most parts of the territory now constituting the northern states, the principal law administered by the native authorities was the Islamic law while in territories constituting the southern states and some parts of the north, the law in force was the unwritten customary law.[5] Forming part of the unwritten customary law was customary arbitration. Customary arbitration formed part of the

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[1] Margaret Moses, *The Principles and Practice of International Arbitration* (2nd edition, Cambridge University Press 2012) 1.

[2] Henry Brown and Arthur Marriot, *ADR Principles and Practice* (3rd edition, Sweet & Maxwell, 2012) 1.

[3] *NNPC v Lutin Investment Ltd* [2006] 12 NWLR (PT 96) 506.

[4] Husain Al-Baharna, 'International Commercial Arbitration in A Changing World' (1994) 9 ALQ 144.

[5] Akintunde Obilade, *The Nigerian Legal System* (1st edn, Sweet and Maxwell, 1979) 19.

customary rules in the country and predates the advent of the court system.[6] Individuals and communities in this part of the world were known to have appointed arbitrators to resolve their disputes even before written history.[7] Thus, a private means of resolving disputes between members in a community where such disputes are taken before an independent person or persons who may consist of chiefs or elders of the community or even family heads for settlement and decisions arrived at such customary tribunals were considered binding on the parties to the dispute existed.[8] Notwithstanding the centralization and modernization of the legal system, customary arbitration remains a veritable tool for resolving disputes in these communities that view such a dispute resolution mechanism as the only reasonable means of resolving their disputes.[9]

The advent of colonial rule came with it the modern arbitration system which was imported as part of the existing English Law. The first statute on arbitration in Nigeria was the Arbitration Ordinance, 1914. The Arbitration Ordinance of 1914 was based on the English Arbitration Act 1889, which had no provisions for conciliation or any other ADR, excluded the right of appeal from awards, and also did not envisage foreign awards. The Ordinance was re-enacted as the Arbitration Ordinance (Act), Laws of the Federation of Nigeria and Lagos, 1958. This became the Law of the Regions and later the States. With the growing importance of arbitration in the country, consequent on the rise in international trade, the existing statute became inadequate to cope with the arbitration problems that were frequently arising. In order to provide an up-to-date law on arbitration, the Arbitration and Conciliation Decree was promulgated in 1988. The Decree which came into effect on the 14th of March 1988, derived largely from the United Nations Commission on International Trade Law's (UNCITRAL) Model Law. It provides for both domestic and international commercial arbitration and applies to only disputes arising from commercial transactions. The Decree, which is now known as the Arbitration and Conciliation Act codified the Convention on the Recognition and Enforcement of Foreign Arbitral Award also known as the New York Convention of 1958 and UNCITRAL Arbitration Rules of 1976.[10]

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[6] Oduwole Abiodun, *Is Post Award Consent a Feature of Customary Law Arbitration or a Creation of the Nigerian Courts?* (2015) Kingston University London.

[7] Virtus Chitoo Igbokwe, 'The Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law Issues Revisited' (1997) 41 J. Afr. L. 201.

[8] Ufomba & Anor. v. Ahuchaogu & Ors. (2003) LPELR-3312(SC) 37.

[9] S. 0. Ezediaro, 'Guarantees and Incentives to Foreign Investment in Nigeria' (1971) 5(4) International Law 770.

[10] Olakunle Orojo and Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Ltd 1999) 3.

MAJOR DRAWBACKS IN THE ARBITRATION AND CONCILIATION ACT (ACA)

As pointed out earlier, the Arbitration and Conciliation Act (ACA) regulates both domestic and international commercial arbitration in Nigeria. As with other laws, its provisions are far from being perfect. This subsection, therefore, examines some of the lacunas created by legislation as it relates to domestic and international commercial arbitration.

a. Appointment of Arbitrators

Selecting arbitrators who will preside over the arbitral proceedings and issue an award is possibly one of the most vital steps to resolving dispute. The reason is not farfetched. The expertise, knowledge, and experience of the arbitrators will have a significant impact on the quality of the process and the award.[11] The procedure for the appointment of arbitrator(s) with respect to international commercial arbitration in Nigeria is contained in section 44 of the ACA. This procedure for the appointment of arbitrator is cumbersome.

Under section 44 (2) of ACA which relates to international commercial arbitration, the power of appointment of a sole arbitrator is conferred on the 'appointing authority' where the parties are unable to agree on a choice of the person to be appointed as sole arbitrator under Section 44(1) of the ACA. According to section 54(2) of the ACA, an appointing authority for this purpose means the Secretary-General of the Permanent Court of Arbitration (PCA) at The Hague in the Netherlands.

Furthermore, under section 44(5) of ACA, if three arbitrators are to be appointed, each party appoints an arbitrator and the two arbitrators so appointed will appoint a third arbitrator who will preside over the arbitral tribunal. What therefore happens if one of the parties fails or refuses to appoint its own arbitrator? Section 44(6) ACA attempt to remedy this situation but does so in a nebulous way and created a lacuna. The section provides that if within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the other party of the arbitrator he has appointed, the first party may request the appointing authority previously designated by the parties to appoint the second arbitrator. This subsection referred to an appointing authority previously designated by the parties and not the one provided under the ACA as the authority to make an appointment where one of the parties fails or refuses to appoint its own arbitrator. What therefore happens if the parties had not previously designated an appointing authority themselves or where such a previously

[11] Margaret Moses (n 1) 122.

designated appointing authority by the parties is unable to discharge its responsibility? The ACA makes no provision for this kind of situation which is likely to happen and therefore leaves a lacuna in the law. It is suggested that where a situation like this is occasioned, the proper cause of action is for the other party to make an application to the court to make such an appointment. It is therefore submitted that the provision of section 44(6) of the ACA be amended and the high court expressly empowered to make such appointment where a case like this arises.

Furthermore, under section 44(7) of the ACA, if 30 days after the appointment of a second arbitrator the 2 arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under subsection (1) to (4) of the section. The import of this subsection is that where the 2 appointed arbitrators fail or are unable to agree on the third arbitrator, the power to appoint such a third arbitrator is conferred on the 'appointing authority' under the general provisions of section 44 (1) to (4) of ACA. The appointing authority referred to here is the appointing authority provided for under that subsection of the ACA which is defined under section 54(2) of the Act to mean the Secretary-General of the Permanent Court of Arbitration (PCA) at The Hague. The implication of the above is that the ACA recognises two appointing authorities under section 44 of the Act as follows: (a) an appointing authority previously designated by the parties and (b) an appointing authority under the ACA who is defined as the Secretary-General of the Permanent Court of Arbitration.

Under the UNCITRAL Model Law, by virtue of the general provisions of Article 11, the power of appointment of an arbitrator where the parties fail or are unable to do so or if the two arbitrators fail to appoint the third arbitrator, is conferred on the court or other authority specified in article 6 of the Model Law. Countries enacting the Model Law are allowed under article 6 to specify the court, courts or, other authority competent to perform these functions. In enacting this section of the Model Law, the ACA gave the role of appointment to an appointing authority and defined an appointing authority under section 54(2) of the Act to mean the Secretary-General of the Permanent Court of Arbitration (PCA) at The Hague.[12] The effect of this is that no role is conferred on the court with respect to the appointment of arbitrators under the ACA. This paper considers this state of affairs to be inappropriate. A role as important as that of appointing arbitrators for parties where the parties have themselves been unable to

[12] Arbitration and Conciliation Act Cap 18 LFN 2004.

do so can better be discharged by the court at the seat of arbitration. That will save time and cost. Also, such a court that has participated in the process of appointment of arbitrators would most likely demonstrate a pro-arbitration approach where a party seeks to delay the course of arbitration by objecting to the tribunal's jurisdiction, resisting arbitration, or when approached for interim reliefs. It is therefore submitted that the role of appointing a sole arbitrator where parties fail to do so under the ACA in relation to international commercial arbitration should be vested in the court in Nigeria. This will save time and money to be expended in getting the Secretary-General of PCA who sits far away at the Hague to make such appointments. Where a party has refused to appoint its own arbitrator, the court should be empowered to make such an appointment on the application of the other party. Where the two previously appointed arbitrators are unable to agree on the choice of the presiding arbitrator, the court should be conferred with the role of making such an appointment. There may be a genuine concern that the courts are slow and as such no time would have been saved when the courts are vested with such power. The answer to this is to include a time frame within which the court must make such an appointment once a party makes such an application. The ACA can be amended to provide for such appointment to be made within seven days from when a party makes such application, by a judge in the chamber and such application can be taken *ex parte*.

In the alternative, the general power of appointment relating to the above 3 scenarios under the ACA can be given to the Director-General of the Regional Centre for International Commercial Arbitration in Lagos. The Regional Centre is independent of the government of Nigeria and enjoys the status of an international non-profit organisation with diplomatic privileges and immunities. A time frame of seven days during which such an appointment must be made can be set by the ACA. There is no further justification for investing such powers under the ACA in the Secretary-General of the PCA at the Hague. Added to this is the fact that where such an appointment is made by the court, it narrows the ground for the eventual challenge of the award as it would be difficult for such party to challenge the award on the ground that he was not given proper notice of the appointment of the arbitrator which is a ground for setting aside an award under the New York Convention. Where an agency of government is involved in the international arbitration, the Director-General of the Regional Centre can serve as the neutral appointing body in place of the court especially where there is a likelihood of bias from the court.

b. Arbitral Tribunals' Lack of Power to Compel Attendance of a Witness

Under the ACA, the arbitral tribunal lacks the power to compel a witness to give evidence. The power to compel a witness or third party to give evidence for the purpose of the arbitral proceedings is conferred on the court only in Nigeria by the provisions of section 23 of ACA. The tribunals lacked authority in this regard. According to section 23(1) of ACA, the court or the judge may order that writ of subpoena ad testificandum or subpoena duces tecum shall issue to compel the attendance before an arbitral tribunal of a witness wherever he may be within Nigeria.

In the United States of America, the power to issue a subpoena with respect to the attendance of a witness is conferred on the tribunal under section 7 of the Federal Arbitration Act (FAA). The section grants arbitrators the power to summon in writing any person to attend before them as a witness and in a proper case to bring with him any book, record, document, or paper that may be deemed material as evidence in the case. Such summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as a subpoena to appear and testify before a court.[13]
Under section 7 of the FAA, if any person or persons so summoned to testify refuse or neglect to obey the summons, upon petition, the United States district court for the district in which such arbitrators or a majority of them are sitting may compel the attendance of such person or persons before the arbitrator or arbitrators, or punish such person or persons for contempt.[14] Essentially, such subpoena can be issued by tribunals in respect of witnesses present in the jurisdiction, but there appear to be few instances where the power has been exercised in the context of international commercial arbitration. In *Re Security Life Insurance Co. of America*,[15] The court took the view that a territorial limit does not apply to arbitral tribunals. But in *Dynegy Midstream Services v Trammochem*[16] the court took the view that there exists a territorial limit on arbitral tribunals with respect to the power to issue subpoena

The power to compel a witness or third party to give evidence for the purpose of the arbitral proceedings is conferred on the court only in Nigeria by the provisions of section 23 of ACA. The tribunals lacked authority in this regard. It is however important that tribunals be allowed to exercise such power under the ACA. As stated earlier, section 7 of the United States of

[13] Tomas Kennedy-Grant, 'The Role of Courts in Arbitration Proceedings' A paper presented at the UNCITRAL-SIAC Conference "Celebrating Success", Singapore, on 22-23 September 2005.
[14] The Federal Arbitration Act 1925.
[15] [2000] 228 F.3d 865 (8th Cir.) 872.
[16] [2006] 451 F.3d 89 (2nd Cir.) 96.

America's Federal Arbitration Act of 1925 extended the power to compel a witness to the arbitral tribunal. This is a better practice.

One of the major benefits of investing such power in the tribunal is that it saves time and resources that would have been expended in making such an application to the court. Added to this is the ease of enforcement where the witness in question is in a foreign jurisdiction. A partial award in this regard would be easily enforced under the New York Convention as against a foreign court order. Furthermore, the more roles conferred on the court by legislation with respect to arbitration, the more the opportunity available to meddle with the system. It is therefore recommended that Section 23 of the ACA be amended to recognise the powers of the tribunal to grant measures to compel third-party witnesses to testify before it. Furthermore, the power of the court in Nigeria under section 23 is limited to where the witness is resident in Nigeria. What therefore happens where such witness is outside the shores of Nigeria? A scenario like this also accounts for the reason why tribunals should be vested with powers to compel a witness. Also, such power when conferred on the tribunal must not be restricted to Nigeria. It is possible for the tribunal when vested with such power to render a partial award in that respect which may be enforced under the New York Convention against the party where such party is outside the jurisdiction of Nigeria.

c. Decision on Challenge to the Arbitrator(s)

The provision of the ACA in relation to the decision on challenges made to arbitrators under section 45 of the ACA is riddled with confusion and inconsistencies. A party can challenge the appointment of an arbitrator and seek the arbitrator's removal at the time the tribunal is constituted or later when new facts come to light. The primary ground for challenging an arbitrator under most arbitration laws is conflict of interest. Arbitrators can also be challenged for improper conduct where for instance an arbitrator is repeatedly falling asleep at the hearings, having *ex parte* conversations with one of the parties, or simply not moving the arbitration forward promptly.[17] In institutional arbitration, the rules of the institution usually provide the basis for bringing the challenge and the procedure to do so.[18] Under the general provisions of Article 10 of the London Court of International Arbitration Rules (LCIA)[19] for instance, an arbitrator may be challenged by any party if circumstances exist that give rise to

[17] Margaret Moses (n 1) 147.
[18] Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 349.
[19] London Court of International Arbitration Rules 2014.

justifiable doubts as to his impartiality or independence. Or where he becomes unable or unfit to act. Under the LCIA Rules, an arbitrator will be considered unfit if such arbitrator does not act fairly or impartially or does not conduct the proceedings with diligence.[20] Similar grounds for challenge exist under section 45(3) of the ACA. The section provides that any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Under the ACA, where a challenge is made to the arbitrators under section 45 (3) of the Act, if the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge by virtue of section 45 (9) of the ACA is conferred an appointing authority. The ACA is silent on whether an appeal can be made against the decision of the appointing authority where a challenge made to arbitrators is not successful.

The provision of section 45 of the ACA on the proper authority to decide where the appointment of an arbitrator is challenged by a party is rather cumbersome and a recipe for confusion. Decision on challenge to the arbitrator is left in the hands of an appointing authority and there exists about two categories of such appointing authorities while the Secretary-General of the Permanent Court of Arbitration is the last resort. It is however recommended that the procedure be made less cumbersome and effective through an amendment to the ACA that makes the arbitral tribunal the proper authority to decide on the challenge made to an arbitrator as opposed to the present position of the law that confers such authority on the Secretary-General of the Permanent Court of Arbitration in the Hague having the final say. The unsuccessful party should be allowed under the ACA to appeal within 14 days to the court designated to take such appeal and, in this case, the High Court is recommended. The decision by the court shall be final and no room for further appeals. This will prevent dilatory tactics where that is the intention of the party making such a challenge. It would also make it difficult for such a party to challenge the recognition and enforcement of an award on the ground that the composition of the arbitral authority was not in accordance with the agreement of the parties. A time frame can be set by the ACA during which the court must hear and dispense of such challenge to arbitrators. This paper recommends 30 days.

d. Enforcement of Arbitration Agreement

Sections 4 and 5 of the ACA govern the same subject under the ACA. They both relate to enforcement of arbitration agreement under the Act thereby creating confusion that stems from

[20] Ibid.

having multiple conflicting sections governing the same subject under the ACA. Although sections 4 and 5 of the ACA deals with the same subject matter, which is enforcement of arbitration agreement, the interpretation and application of both sections it is submitted defers.

Section 4 of the ACA provides as follows:

1. A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.
2. Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.[21]

Section 5 of the ACA provide as follows:

(1) If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

(2) A court to which an application is made under subsection (1) of this section may, if it is satisfied- (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

(b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

From the above, it is clear that while section 4 of the ACA makes it mandatory for the court to order a stay of proceedings and refer the matter to arbitration if any such request is made by a party no later than when submitting his first statement on the substance of the dispute thereby contemplating no review by the court, section 5 of the ACA seems to give the court some level of discretion as to whether to order a stay of proceedings or not in an action to enforce arbitration agreement and thereby contemplating some extent of review which may be prima facie review or complete review depending on the circumstances of the case. Also, section 5 does not mandate the court in any event to make orders referring the dispute to arbitration.

It is therefore clear that section 4 of ACA best serves the interest of a party to international commercial arbitration who desires to enforce an arbitration agreement when compared to section 5 of ACA which gives so much discretion to the court. Parties to international commercial arbitration would reasonably expect a minimal intervention from courts of the seat

[21] Arbitration and Conciliation Act Chapter A18 LFN 2004.

of arbitration.[22] In any case, there is no justification for having section 5 of the ACA when section 4 actively addresses the issue of enforcement of arbitration agreement. The effect of this is that an application for a stay of proceeding under the ACA could differ simply because of the provision pursuant to which the application is made. It is submitted that section 5 of the ACA, should be excluded in the proposed amendment Bill to the ACA pending before the National Assembly. Section 4 of the ACA, demonstrates a better pro-arbitration approach in our law. This is one of the factors parties to international arbitration consider when choosing a seat of arbitration.

In the alternative, the provisions of section 4 of the ACA which empowers the court to enforce arbitration agreement may be moved to part III of the ACA and clearly marked as a section applicable to international commercial arbitration while enforcement under section 5 of ACA should be applicable to domestic arbitration. In the alternative, the provision of section 5 of ACA which gives too much discretion to the national court should be completely expunged from the ACA through an amendment while section 4 of the ACA should govern the enforcement of arbitration agreement under domestic and international commercial arbitration. This would clear the confusion that stems from having multiple conflicting sections governing the same subject under the ACA. This paper, therefore, recommends an amendment that may reflect any of the proposed options.

e. **Measures on Protection and Preservation of Res and Evidence**

The Arbitration and Conciliation Act confers on the arbitral tribunal in the first instance the power to grant an interim order of protection which it may consider necessary with respect to the subject matter of the dispute. In the course of the resolution of commercial disputes by the arbitral tribunal, it is always necessary to ensure that the property in dispute is not allowed to waste or be depleted to the detriment of either party. The need for an interim measure of protection may arise as it may be too late if the tribunal has to wait until an award is made to resolve the disposition of the property. The value of the award as a consequence of this delay may be seriously diminished coupled with the hardship such delay could have caused.[23] The

[22] Frederic Bachand, 'Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?' (2006) 22 Arb. Int'l 463.
[23] Orojo O and Ajomo A, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Ltd 1999) 179.

ACA, therefore, makes provisions for the making of interim orders for the protection of property in dispute during the arbitration. Section 13 of the ACA provides that:

> Unless otherwise agreed by the parties, the arbitral tribunal may before or during an arbitral proceeding-
>
> (a) at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute; and
>
> (b) require any party to provide appropriate security in connection with any measure taken under paragraph (a) of this section.[24]

The above section of the ACA is from Article 17 of the UNCITRAL Model Law. This section gives arbitral tribunals powers to grant interim orders directing either party to preserve any property in dispute in the arbitral proceedings pending the completion of the proceedings. Article 26(1) of the Arbitration Rules contained in the First Schedule to the Arbitration and Conciliation Act which was adopted from Article 26 of the 1976 UNCITRAL Arbitration Rules list such interim measures to include measures for conservation of the goods forming the subject matter in dispute, such as ordering deposit with a third party or the sale of perishable goods. The tribunal may for the purpose of granting interim measure order any of the parties to provide appropriate security in connection with such measure. The application for protection may be made even before the commencement of the arbitral proceedings where there is a threat to the property or such property is in peril.[25]

The provision of section 13 of the Act is applicable where the property to be protected is in the hands or control of a party to the arbitration. What happens where the interim measure of protection is to be taken against property in the hands of a third party? The arbitral tribunal has no power to make such an order against a third party. This is a lacuna in the ACA. The arbitral tribunal it is submitted should be vested with powers to grant such measures against a third party through an amendment to section 13 of the ACA. Doing this will save time and cost parties expend in making such applications to courts since one of the prime benefits of international commercial arbitration as a dispute resolution mechanism is savings in time and cost to parties. The need to reduce the over-reliance of the arbitral tribunal on the local court is also a justification for vesting such powers in the arbitral tribunal. However, in the interim, such application can be made to the court for the grant of such measures.

[24] Arbitration and Conciliation Act.
[25] Ibid.

In *Lagos State Government v Power Holding Company of Nigeria Plc & Ors,*[26]

The claims were in connection with a dispute as to the obligation of the applicant and 1st respondent pursuant to a power purchase agreement and a contribution agreement entered into between the applicant and the 1st respondent. The appellant sought to set aside ex parte interim orders earlier made in favour of the respondent pending arbitration. The court found no merit in the application to set aside the ex parte orders and agreed that the orders were made in the proper exercise of the court's discretion. The court agreed that section 13 of the ACA confers powers on the arbitral tribunal to order interim measures of protection but found that in the particular case, non-parties to the arbitral proceedings were involved and, in such circumstances, the arbitral tribunal was not the proper forum for the relief sought. The court was satisfied that the High Court has the power to grant interim measures even while parties arbitrate.[27]

Added to the need for such measure may be the need to preserve the property for its evidential value so that a party is not unduly deprived. In this respect, arbitration laws may grant powers to courts to support arbitration by means of granting interim injunctions to preserve evidence. A good example is the provision of section 44(3) of the English Arbitration Act 1996 which grant to the courts in cases of urgency, the same powers in arbitration to order the preservation of evidence, or the inspection, photographing, or preservation of property, as in court proceedings.[28] In *Cetelem SA v Roust Holdings,*[29] the English Court of Appeal granted a freezing order preventing a respondent from disposing or otherwise dealing with shares in order to protect a disputed right to purchase under a share purchase agreement. The court held that the property could include contractual rights and that there was no bar to the issuing of a mandatory injunction. According to the court, the need to protect rights that would be the subject of arbitration was key question.[30]

f. **Power of Arbitral Tribunal to compel a Third Party**

Arbitral tribunals under the ACA lack the power to compel third parties who are not a party to the agreement or dispute to give evidence or produce documents that may be material or useful to the arbitral proceedings. The absence of such powers seriously impedes the ability of the

[26] [2012] 7 CLRN 134.
[27] Ibid.
[28] The English Arbitration Act 1996.
[29] [2005] EWCA Civ 618.
[30] Ibid.

arbitral tribunal to discharge its duties in international commercial arbitration. The lack of power to compel third parties seriously impedes the ability of the arbitral tribunal to discharge its duties in international commercial arbitration. This is because the powers of the arbitral tribunal for instance on interim measures are generally limited to the parties to the arbitration. Therefore, a third-party order, for instance, directed to a financial institution would not be enforceable against such institution thereby requiring the court's assistance. An amendment to the ACA in this area is therefore recommended to confer on the arbitral tribunal in addition to the courts, powers to compel third parties and for its orders to bind such third parties and be enforced against them. This will save the time and cost expended in making such an application to the local court. A partial award rendered by the arbitral tribunal in this situation can be enforced against a third party even outside the territory of Nigeria under the New York Convention. This becomes even more imperative since the power of the court to compel third parties under the ACA with regards to interim measures is limited to where such party is within the jurisdiction of the court thereby limiting the scope of coverage of such order.

g. **Limitation on the Power of the Tribunal to Grant Interim Measures**

As it stands, the power of the arbitral tribunal to grant interim reliefs is seriously limited under the ACA, and in most cases, the recourse is to the court. The power to grant interim reliefs under the ACA does not extend, for instance, to the power of the tribunal to enjoin a party from commencing or continuing a parallel court proceeding in breach of the arbitration agreement. The Revised Model law of 2006 under Article 17(2)b has conferred on the arbitral tribunal that particular power which is important in the protection of the course of international commercial arbitration.

Article 17(2) (b) of the Revised Model Law 2006 provides that:

> An interim measure is any temporary measure, whether in form of an award or in any other form, but which at any time prior to the issuance of the award by which dispute is finally decided, the arbitral tribunal orders a party to:
>
> (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the tribunal process itself.

This paper therefore recommends the adoption of Art. 17(2)b of the Revised Model Law 2006 granting tribunals powers to grant anti-suit injunction through an amendment to section 13 of the ACA and Article 26 of the Arbitration Rules contained in the first schedule to the ACA. This will save parties the time and resources expended when they approach courts for the grant

of such measures. This pro-arbitration provision will serve as a tool for strengthening and protecting international commercial arbitration in Nigeria.

h. **Enforcement of Interim Measures**

In general terms, where an arbitral tribunal grants an interim measure, and court enforcement is needed, the court at the seat of arbitration will provide enforcement.[31] The challenge is if the interim measure needs to be enforced in a different jurisdiction. It is quite likely that the jurisdiction where enforcement is sought will not be the seat of arbitration, because parties generally choose as the seat a place that is not the home country of either party.[32] For instance, if the purpose of an interim measure is to attach a bank account, or to prohibit the sale of a property, the bank account, and the property are likely not to be in the same country as the arbitration, and therefore will need to be enforced in the country where they are located. The Model Law provides a helpful step toward improving the possibility that interim measures will be enforced by foreign courts by including this matter in its amended Article 17 of the 2006 revisions.

The Model Law under Article 17(H) provides that:

> An interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Article 17(I).[33]

Being made subject to Article 17(I) means that the measure must be enforced unless there are reasonable grounds for its non-enforcement as set forth in Article 36 of the Model Law. Those grounds for non-enforcement are essentially the same grounds that are set forth in the New York Convention. The Model Law, therefore, lays the foundation for the enforcement of interim measures granted by an arbitral tribunal. Any interim measure granted would be enforceable in a Model Law country that had adopted Article 17H of the 2006 revisions, without the need to consider the applicability of the New York Convention.

The Model Law has therefore created a framework for Model Law countries to be able to enforce interim measures granted by the arbitral tribunal in other countries, independently of

[31] Anna Tucker, 'Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty' (2011) 1 Int'l Comm Arb Brief 15.
[32] Jason Fry, 'Interim Measures of Protection: Recent Developments and the Way Ahead' (2003) 6 Int'l Arb. L. Rev. 153.
[33] UNCITRAL Model Law on International Commercial Arbitration 2006 Revisions.

the New York Convention.[34] This is because the New York Convention was not intended by its drafters to deal with interim measures, but rather with the enforcement of final awards. There are cases however where an interim measure has been enforced under the Convention when the relief granted by the tribunal was termed a partial award.[35] Also where the measure was determined by a court to be a final and enforceable award, such award was enforced under the Convention.[36] The Model Law however avoids the need to establish whether the interim measure is an order or a final award. If the measure fits the Model Law definition of an interim measure, then it is binding and a court in a country that has adopted this provision of the Model Law should enforce it. If general provisions of Article 17 are adopted in the countries where the Model Law is in effect, it should significantly facilitate the enforcement of the interim measures issued by an arbitral tribunal. It is therefore submitted that Nigeria should take steps to adopt the general provisions of Article 17 of the Revised Model Law which has brought so many innovations to the issue of interim measures and provided ease of enforcing such measures in a foreign jurisdiction without necessarily relying on the New York Convention for its enforcement.

Under the 1976 UNCITRAL Arbitration Rules which was adopted under the First Schedule to the ACA, little legal consensus existed as to the proper scope and implementation of interim measures in international arbitration. The UNCITRAL Arbitration Rules were therefore revised in 2010 to be in harmony with the 2006 Revised Model Law and its standards. In particular, the 2010 UNCITRAL Arbitration Rules unify and clarify the function of interim measures in international commercial arbitration and are intended for universal application.[37] The 2010 UNCITRAL Arbitration Rules are presumed to apply to all arbitration agreements which reference the Rules. The Rules represent the foremost set of ad hoc arbitration rules, which are rules for conducting arbitration without the oversight of an arbitral institution or other permanent administering body.[38] Notwithstanding that the Rules are typically used in non-institutional arbitrations, they also provide the basis for the international rules of some arbitral institutions, many of which offer to administer arbitrations conducted according to the Rules, or have adopted the Rules in whole or substantial part as their own institutional rules.[39]

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[34] Dana Bucy, 'How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law' (2010) 25 Am. U. Int'l L. Rev. 579.
[35] *Four Seasons v Consorcio Barr S.A* [2004] F.3d 377 (11th Cir.) 1164.
[36] *Yasuda Fire & Marine Ins. v Continental Cas* [1994] F.3d 37(7th Cir.) 345.
[37] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn Oxford University Press 2015) 421.
[38] Gary Born, International Litigation & Arbitration' (2014) 30 U. Pa. J. Int'l L. 45.
[39] Paul Michell, 'Interim Measures in Canadian Commercial Arbitration' (2006) 32 Advoc. Q. 413.

Many bilateral investment treaties also cite the UNCITRAL Rules as an option for disputes to be referred to arbitration. The 1976 UNCITRAL Rules was adopted under the First Schedule to the ACA and therefore forms part of the Nigerian arbitration legal instrument just like most states of the world made similar adoptions. The UNCITRAL Arbitration Rules are fundamentally different from the Model Law in that they are designed to enable greater flexibility and compatibility to parties from diverse states than are available under national laws. The Arbitration Rules are directed at parties, whereas the Model Law is directed at legislatures. The 2010 UNCITRAL Arbitration Rules' new Article 26 on Interim Measures is significantly more detailed than its predecessor from 1976 and covers more types of interim measures not envisaged by the 1976 Rules. It is therefore submitted that an amendment be made to Article 26 of the First Schedule to the ACA to reflect the extended coverage offered by the 2010 UNCITRAL Arbitration Rules. The national arbitration law is one of the primary factors that continue to determine preferences for a given seat in international commercial arbitration and for Nigeria to become accessible to be picked as a seat, the ACA must reflect current trends in international commercial arbitration and be up to date with similar amendments already made to UNCITRAL Model Law and Rules from which is it was majorly adopted.

i. Provision for Emergency Arbitrator

There exist no provisions for Emergency Arbitrator before the constitution of the arbitral tribunal under the ACA. Major arbitral institutions have made provisions for such an appointment under their various Rules to enable such an arbitrator to address preliminary issues that may arise before the setting up of the arbitral tribunal. A Provision for the appointment of an emergency arbitrator prior to the constitution of the arbitral tribunal by the ACA is desirable and therefore recommended. The emergency arbitrator can be appointed by the court when a party makes an application to the effect. An emergency arbitrator so appointed will be vested with the power to grant any urgent or emergency reliefs as may be sought before the tribunal is constituted. The power conferred on the emergency arbitrator should extend to grant of such measures against a third party where the documents or evidence sought to be protected is in the possession of a third party. This will eliminate or substantially limit the recourse to court to only extreme cases. A provision for emergency arbitrator under the ACA when introduced through an amendment by the should state clearly that any award made by the emergency

arbitrator shall be final and binding on the parties to the dispute or third parties as the case may be and have the force of a court judgment. It shall also be enforceable. The major benefit of having an arbitrator grant such interim reliefs is the wider scope of coverage of the arbitrator's award outside the jurisdiction where it is granted.

CONCLUSION

The Arbitration and Conciliation Act has played a major role in the conduct of arbitral proceedings in Nigeria. It has incorporated the New York Convention and the UNCITRAL Rules in its schedules thereby making it a viable law useful in international commercial arbitration. As indicated in this paper, it is not a perfect document and certain noticeable gaps have been raised. Given the ongoing amendments to the ACA pending before the National Assembly, it is believed that the gaps pointed out in this paper will serve as a useful foundation in the amendments to the ACA. Furthermore, suggestions made in the area of appointing authority, power to compel the attendance of a witness, decision on challenge to arbitrators, the dichotomy between sections 4 and 5 of the ACA which is critical in the enforcement of arbitration agreement, and enforcement of interim measures considering the importance of such measures in an international commercial proceeding will go a long way in simplifying the process and making it sustainable. It is hoped that these recommendations will contribute to making the ACA a more functional law than it is presently thereby making arbitral proceedings conducted under it a more viable process.