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Emergency Arbitration in Nigeria: Legal Innovations and Practice[1]

1. Introduction

Historically, arbitration did not offer any remedy in cases where emergency reliefs were necessary. A look into the earliest arbitration laws and rules showed that emergency reliefs and conservatory measures were not conceived to be under the purview of arbitration. As a result, parties, despite having agreed to refer their disputes to arbitration had to approach the courts for injunctions and other interim reliefs in matters of extreme urgency.[2]

Even when arbitral institutions began to recognise the importance of conservatory measures, the rules still arrogated the power to grant such measures to the national courts. For instance, the 1955 ICC Arbitration Rules while recognising the importance of interim measures of protection in cases of urgency provided that parties may approach any competent judicial authority for such measures of protection, without thereby contravening the arbitration clause binding them.[3] This provision was reproduced in the 1975, 1988 and 1998 ICC Rules.[4]

However, the 1998 ICC Rules went further by taking the first step to imbue the arbitral tribunal itself with the competence to make interim or conservatory orders. Article 23 of the Rules provided as follows:

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2 This is contrary to the principle of judicial non-interference in arbitral proceedings as enshrined in the New York Convention and other international arbitration conventions and national arbitration statutes. See, Section 34 of the repealed Arbitration and Conciliation Act, Cap A18, LFN, 2004 and article 5 of the UNCITRAL Model Law. This principle has also received judicial *imprimatur* in SPDC v. Crestar Integrated Natural Resources Ltd. [2015] LPELR-40034(CA).

3 1955 ICC Arbitration Rules, Article 13 (5).

4 1975 and 1988 ICC Arbitration Rules, Article 8.

> Unless parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate...

Against the backdrop of Article 13 of the 1998 Rules, in May 2006, the International Centre for Dispute Resolution ("ICDR") introduced the concept of an emergency arbitrator into its arbitration rules which allows parties to have access to interim measures of protection on an emergency basis ("emergency reliefs") before the constitution of the arbitral tribunal,[5] laying the groundwork for the emergency arbitration regime in international commercial arbitration. In the same vein, the extant 2012 ICC Rules went ahead to make provisions for an emergency arbitrator in its Article 29 ("emergency measures").

Emulating the arbitration rules of its time, the repealed Arbitration and Conciliation Act ("the ACA")[6] provided for interim measures when it stated that unless otherwise agreed by parties, the arbitral tribunal may before or during the arbitral proceedings and at the request of a party, order any party to take such interim measures as may be considered necessary in respect of the subject matter of the dispute.[7]

The Arbitration Rules made pursuant to the ACA also made provision for interim measures.[8] Despite these provisions, the repealed Act did not contain express provisions for emergency arbitration. This is where the Arbitration and Mediation Act 2023 ("the AMA") stepped in, introducing emergency arbitrator provisions alongside other innovative provisions like appellate award review, third party funding of arbitration, amongst others which were hitherto absent in the repealed Act. The introduction of emergency arbitration brings the Nigerian arbitration regime up to trend with current international practice as parties now have access to emergency reliefs without the drudgery of national courts. This article undertakes a brief review of emergency arbitration in Nigeria.

2. Definition

Emergency arbitration is an arbitral procedure which exists to allow parties to obtain urgent interim or conservatory measures in exceptional cases which cannot await the

5 ICDR Rules, Article 37.
6 Cap A18, Laws of the Federation of Nigeria, 2004.
7 Section 13, Arbitration and Conciliation Act.
8 Article 26, Arbitration Rules, First Schedule to the repealed ACA.

constitution of the arbitral tribunal, hence the need to appoint an emergency arbitrator.[9] This allows parties access to emergency reliefs to preserve or protect their legitimate interests before the constitution of the arbitral tribunal. This procedure is also referred to as special measures proceedings, emergency relief proceedings, instant arbitration, etc.

3. Distinguishing Emergency Arbitration from Interim Reliefs

An interim relief is any temporary remedy, whether in the form of an award, restraining order or in another form, which, at any time before the final award is issued, the arbitral tribunal deems it expedient that a party be compelled to either maintain or restore the *status quo* pending the determination of the dispute.[10] Similarly, emergency reliefs by an emergency arbitrator are by their nature interim reliefs; the only difference being that emergency reliefs can only be sought and granted in cases of extreme urgency, exceptional cases, and before the constitution of the arbitral tribunal. Hence, emergency reliefs are interim reliefs awarded before the actual arbitral proceedings commence.

4. Jurisdiction of the Emergency Arbitrator

Unlike national courts, arbitral tribunals derive their competence directly from the arbitration agreement entered into by parties.[11] This is because arbitration despite being adjudicatory in nature is wholly contractual and the arbitrators' jurisdiction arises out of a valid and enforceable arbitration agreement.[12] Where parties have inserted provisions for emergency arbitration (however described, i.e., special measures reliefs, emergency reliefs, etc.) in their arbitration agreement,[13] questions as to jurisdiction will not arise. However, where parties have agreed to an arbitration agreement which does not contain any reference to emergency relief procedure, the question of jurisdiction may likely pose an issue.

Where parties have not expressly provided for emergency relief procedure the validity of any emergency/special measures would depend on the type of arbitration stipulated in the arbitration agreement—institutional or ad-hoc.[14]

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9 Commission on Arbitration and ADR, *Emergency Arbitrator Proceedings* (April 2019), ICC Dispute Resolution Library, p. 4, para. 8. See also, Cameron Sim, *Emergency Arbitrator* (Oxford University Press, 2021) p. 233, para. 7. 39.

10 Section 20, Arbitration and Mediation Act 2023.

11 See, M. V. Lupex v Nigeria Overseas Chartering & Shipping Ltd [2003] 10 SCM 71 at 79; [2003] 15 NWLR (Pt. 844) 569.

12 R. M. Merkin, *Arbitration Law*, (Lloyds University of London Press Ltd 1991) Chapter 4, Issue 2.

13 It should be noted that an arbitration agreement may be in the form of an arbitration clause forming part of a contract or a separate agreement.

14 Section 91(1), Arbitration and Mediation Act 2023.

4.1 Emergency Arbitration in Institutional vs. Ad-hoc Arbitration

Institutional arbitration arises where the parties agree to refer their disputes to a particular arbitral body which has its own settled procedures and rules. In institutional arbitration, parties would adopt the "tailor-made" procedures[15] under the arbitration rules of their chosen arbitral institution. Thus, where parties have agreed to refer their dispute to institutional arbitration, they would by extension be entitled to emergency arbitration under the relevant rules. And since the option of an emergency arbitrator is contained in the relevant rules, parties become entitled to emergency arbitration as the jurisdiction of the emergency arbitrator originates out of the relevant institutional rules.

Ad-hoc arbitration, on the other hand, has been defined as "a proceeding that is not administered by an institution or other body and which requires the parties themselves to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures, and administrative support.[16] The arbitration is subject only to the parties' agreement and the applicable law. In this type of arbitration, parties may have, at the point of concluding the arbitration agreement, chosen to include the option of emergency reliefs in their arbitration clause or agreement. But where this is omitted, either party might contest the jurisdiction of the emergency arbitrator on the basis that the procedure is only available if the parties have agreed to it in writing.[17] This is premised on the ground that the competence of the arbitrator (emergency or otherwise) is derived strictly from the arbitration agreement and that the appointment of an arbitrator defines jurisdiction.[18]

This challenge will surely be of no moment where the applicable national or state arbitration law contains provisions for emergency arbitration. Parties to an (ad-hoc) arbitration agreement in Nigeria would not be disentitled to emergency arbitration where the AMA and the Arbitration Rules thereto contain emergency arbitrator provisions[19] This is particularly so in light of section 1(5) of the AMA which provides that the provisions of Part I of the AMA would be applicable to domestic, inter-state and international commercial arbitration Nigeria. It should be noted that emergency

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15 Tinuade Oyekunle and Bayo Ojo, *Hanbook of Arbitration and ADR Practice in Nigeria* (Lexis Nexis, 2018) 38.

16 Section 63(1), Lagos State Arbitration Law 2009.

17 Ibid, note 14.

18 See generally, Michael J. Mustill, and Stewart Crauford Boyd, *Commercial Arbitration* (2nd edn, Butterworths 2001).

19 Emergency Arbitration provisions are contained in section 16 of the Arbitration and Mediation Act 2023.

arbitrator provisions are contained in Part I of the Act, particularly in section 16 which provides for the appointment of an emergency arbitrator and states thus:

> A party that requires emergency relief may, concurrent with or following the filing of a request for a dispute to be referred to arbitration but before the constitution of the arbitral tribunal, submit an application for the appointment of an emergency arbitrator to any arbitral institution designated by the parties, or failing such designation to the Court, as defined in section 91.

Therefore, going by the provisions of section 1(5) of AMA, parties who have agreed to arbitrate their disputes, whether by institutional or ad-hoc arbitration would still be entitled to emergency arbitrator proceedings by virtue of the Act. It should also be added that while ad-hoc arbitrations are conducted without the facilitation of arbitral institutions and institutional rules, parties who have chosen certain arbitration laws or rules will be entitled to the emergency arbitration provisions under such rules. For instance, where parties have adopted to arbitrate under the ICDR Arbitration Rules, they will be entitled to the emergency arbitrator provisions thereunder.

5. Conclusion

Given its speed, flexibility and efficiency, arbitration will continue to be the preferred method of dispute resolution, especially in international commercial disputes. It therefore follows that if arbitration is fast, emergency arbitration offers more in speed and where well conducted, emergency arbitration oftentimes forecloses the need for a full-blown arbitration (in respect of the subject matter) and by extension, litigation. Also, parties to arbitration agreements which do not expressly contain the option of emergency measures will still be entitled to such measures given the applicability of the AMA or the applicable state arbitration law to their arbitration agreements.

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