

LEAD DEBATE

President of the Senate, the amendment to the Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria (LFN) 2004 is necessary in order to bring the Act in line with modern standards. Arbitration has fast become the modern mode of dispute resolution and it is necessary to update our statute in order not to be left behind by the advancing international trends.

Mr. President, one of such trends is to empower Arbitral Panels to have authority to protect the subject matter of the dispute before them. Currently under our laws, interim measures of protection issued by the arbitration panel in the form of an interim award under section 13 of the Arbitration and Conciliation Act must be enforced by the court in the same manner as a final award, in effect, if a Panel makes an **interim/preliminary order** in a case, such an order needs to be ratified by courts before enforcement. Interim orders are generally intended to assist the arbitral process toward the achievement of the final award (i.e. Judgment) - interim orders preserve the subject matter of the arbitration, as is the case in judicial proceedings in the courts. This Senate is aware of the backlog of cases in our courts and the fact that our judiciary is overburdened with litigation. For instance, to get a date in court to enforce an interim order can take months, by which time the reason for making the order may long have disappeared. Mr President, the question we must ask ourselves is why we subject interim orders- and I stress the word *interim*- to ratification by courts when the *final* award will

surely go through the scrutiny and enforcement process of the courts. Arbitration is supposed to be faster and cheaper than litigation, but having to go back and forth to the courts forestalls the intendment behind the entire process.

The distinctive thing about arbitration is that parties have voluntarily signed up to it- there is no coercion to take part in the process. By electing to resolve disputes through arbitration when entering into an agreement, the parties have voluntarily empowered the Arbitral Panel to make decisions on the dispute. We should give the Arbitral Panel the legal backing to execute their mandate. It should be noted, Mr President, that the proposed amendment also addresses grounds for refusal of an arbitral award on the reason of composition. If the composition of the arbitral tribunal is, therefore, not in accordance with the the law or agreement of the parties, a party against whom the award was made, may apply for same to be set aside. This is the way things are done in more advanced nations and we must follow suit so not to be left behind. The amendment to the Act also seeks, amongst others, to ensure that an aggrieved party has recourse to challenge the award, irrespective of the country in which it was made. It recognises that an award given with respect to an agreement that has been rendered invalid as a result of illegality or other vitiating factors, may be rejected by the party against whom it was made.

The unique thing about arbitration is that directly or indirectly, parties decide who the umpire is. Therefore, there is a consensus that there is

expertise in that field. If the expert believes an interim order will help along the way towards resolving the case then it should be binding without being subjected to the court bureaucracy, especially because the final decision will be enforced by the courts anyway.

We must also take note that arbitration is paid for by the parties and this saves the government a lot of money as for each arbitration it is one less case that the taxpayer needs to fund. We as lawmakers must support this cost saving by not dragging cases back to courts at every opportunity, particularly when parties have opted out.

I must stress there is an important difference between interim orders and final awards. Interim orders are made to aid the progress of arbitration, by preserving the subject matter until the final awards are made. Final awards, however, are the judgments of the panel. This amendment seeks to make interim awards enforceable by the panels without having to go to the courts (for the reasons stated above- i.e. time, money, modernity etc). It goes without saying that final awards need to be enforced by courts and as Nigeria is a signatory to the New York Convention we need not amend the provisions with relation to enforcement of final awards.

This 8th Senate is a vibrant one that must leave the legacy of bringing Nigeria into the 21st Century and this amendment is one of the ways which we can achieve that vision. It is disheartening when local and international countries conducting business in Nigeria have arbitration clauses in their contracts but

choose the seat of arbitration to be some foreign land outside of Nigeria. If you ask them why they opt for this they will tell you that it is because our laws slow down arbitration because at every stage we have to run back to the courts, that if they wanted to spend a significant amount of time in court they would not have opted for arbitration. Enforcement of foreign arbitral award is very important in international arbitration practice. If arbitral award made pursuant to arbitral proceedings cannot be enforced, then the arbitral process is hopeless and of no relevance. Our system cannot continue to be one that treats the issue as if arbitration award is governed by different legal regime and is therefore absolutely autonomous or is floating on an independent legal regime unconnected with the legal regime governing cause of action in civil matters, when in fact, it aids the process of civil litigation in Nigeria. We must strive to make Nigeria a hub for international dispute resolution and the foundation towards achieving this is by having the right laws in place. It is important that this Bill is passed in order to prevent the court's intervention in the commencement or continuation of arbitration, thereby defeating the purpose for which arbitration stands. President of the Senate, this is one of such laws and I urge my Distinguished colleagues to support this amendment and bring Nigeria into the new age.

A Bill

Sponsored by Senator Monsurat J. Sunmonu (Oyo Central)

for

An Act to amend the Arbitration and Conciliation Act CAP A19, Laws of the Federation of Nigeria, 2004

ENACTED by the National Assembly of the Federal Republic of Nigeria:

1. The provisions of the Arbitration and Conciliation Act 1990 (in this Act referred to as "the Principal Act") are altered as set out in this Bill.
2. Section 32 of the Principal Act is hereby replaced with a following section 32:-

Section 32. Grounds for refusing recognition or enforcement

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
 - (a) at the request of the party against whom it is invoked, if that party furnishes to the proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the

award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

3. Section 13 of the Principal Act is substituted with the following section "13"-

13A Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Section 13B Conditions for granting interim measures

- (1) The party requesting an interim measure under section 13(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
 - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
- (2) With regard to a request for an interim measure under section 13A(2)(d), the requirements in paragraphs (1)(a) and (b) of this section shall apply only to the extent the arbitral tribunal considers appropriate.

Section 13C Applications for preliminary orders and conditions for granting preliminary orders

- (1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order

directing a party not to frustrate the purpose of the interim measure requested.

- (2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
- (3) The conditions defined under section 13A apply to any preliminary order, provided that the harm to be assessed under section 13A(1)(a), is the harm likely to result from the order being granted or not.

Section 13D Specific regime for preliminary orders

- (1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.
- (2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.
- (3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.
- (4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.
- (5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 13E Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Section 13F Provision of security

- (1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
- (2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Section 13G Disclosure

- (1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.
- (2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this section shall apply.

Section 13H Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 13I Recognition and enforcement

- (1) An interim measure issued by an arbitral tribunal shall be recognized 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 section 13 I.

- (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
- (3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Section 13J Grounds for refusing recognition or enforcement

- (1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

1. (i) Such refusal is warranted on the grounds set forth in article 32(1)(a)(i), (ii), (iii) or (iv); or
2. (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
3. (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

1. (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the

- purposes of enforcing that interim measure and without modifying its substance; or
2. (ii) Any of the grounds set forth in section 32(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.
- (2) Any determination made by the court on any ground in paragraph (1) of this section shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 13K Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.