

EFFECTIVE USE OF INTERIM MEASURES OF PROTECTION IN ARBITRATION

BEING A PAPER DELIVERED

BY

ROSELINE OBIAGELI NWOSU (MRS)

LLB, BL, FCI Arb (UK), FICMC, ACCREDITED MEDIATOR, CENTRE FOR
EFFECTIVE DISPUTE RESOLUTION(CEDR)(UK)

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INTRODUCTION

- Interim Measures of Protection are provisional reliefs issued either by the Arbitration Tribunal or the Courts which ensure the preservation of the res thereby enhancing the effectiveness of the Arbitral process.
- Even though the Arbitral Tribunal has power to order Interim Measures of protection, this power is derived from the agreement between the parties. As such, it is limited to the parties before the Tribunal and of course, can only be exercised when the Tribunal has been set up.
- From the inception of the Arbitral process, the Court which has injunctive and coercive powers has to play several roles in ensuring the efficacy and smooth running of that process.

INTRODUCTION CONT'D

- This paper centers its discussion on the Interim Measure provisions in the **Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004 (ACA)**, **Lagos State Arbitration Law 2009 (LSAL)** and **Rules, UNCITRAL Model Law 2006** and **UNCITRAL Arbitration Rules 2010**.
- The paper will also answer such questions as what are Interim Measures, uses of Interim Measures, who can order Interim Measures and challenges in issuance/usage of Interim Measures.
- Finally, it will suggest ways of using Interim Measures more effectively to enhance the efficiency of arbitration process by ensuring that Arbitration awards are not hollow or empty awards.

WHAT ARE INTERIM MEASURES OF PROTECTION?

Interim Measures are grants of temporary reliefs aimed at protecting rights of parties pending final resolution of a dispute. They are a compliment to final awards and prevent adverse party from destroying or removing assets thereby rendering the final award meaningless.

The **ACA** which is based on **UNCITRAL Model Law 1985** and the **Arbitration Rules** contained in **the First Schedule of the Act** are narrowly worded and do not define Interim measures. See **Sec 13(a) ACA** and **Art 26(1) First Schedule** of the Act.

- **Sec 21(3) (LSAL)** which is more elaborate and based on the revised **UNCITRAL Model Law 2006** defines Interim measures in the same way as the **Model Law** in slide 6 below.

WHAT ARE INTERIM MEASURES CONT'D

- The **UNCITRAL Model Law 2006** has a more comprehensive legal regime and defines Interim Measures in **Section 1, Article 17 (2)** as:

“ As 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 the 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

WHAT ARE INTERIM MEASURES CONT'D?

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Provide evidence that may be relevant and material to the resolution of the dispute”

Similar provisions can be found in **Section 21 (3) of LSAL** which is a copy of the Model Law.

- European Court of Human Rights defines Interim measures as:

“Urgent measures which according to the Courts well established practice apply only where there is an imminent risk of irreparable loss”

USES OF INTERIM MEASURES

The Learned authors J.O.Orojo and M.A.Ojomo in their book “**Law and Practice of Arbitration and Conciliation in Nigeria**” published in 1999, gave many reasons for issuing Interim Measures viz:

- i. To prevent hardship or reduction in the value of property in urgent cases where a delay in waiting until award is made by the Tribunal to resolve the disposition of property will occasion.
- ii. To preserve the evidential value so that a party is not unduly prejudiced
- iii. To effect sale of perishable goods to prevent them from perishing

USES OF INTERIM MEASURES CONT'D

- iv. To prevent the risk that a party in whose hands, custody or control the property in dispute is may abuse the property so that a party in whose favour an award is made will not get the full benefit of that award or even get a hollow or empty award.

Another usage is to maintain the status quo pending the outcome of the Arbitration proceedings.

The **ACA** is not helpful in this regard. Under **Section 31** and **Article 26** of the Arbitration rules, the reasons are not specifically mentioned beyond the fact that they are for protection.

Please see **Sec 21(3)** of the **LSAL** which is more detailed and is the exact replica of the **UNCITRAL Model Law**.

WHO CAN ORDER INTERIM MEASURES?

- Both the Arbitral Tribunal and the Court can grant orders for Interim measures.
- By **Section 13 of ACA**, unless otherwise agreed by the parties, the Arbitration Tribunal may before or during an Arbitral proceeding:
 - (i) 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.

Article 26 of the **First Schedule** of the **ACA** which is a reproduction of **Article 26** of **UNCITRAL Arbitration Rules**, also gives powers to the Tribunal.

WHO CAN ORDER INTERIM MEASURES CONT'D

The **ACA** does not directly give power to the Courts to order Interim Measures.

However the Court's power can be implied from **Art 26(3)** of the rules which states that a request for Interim Measures addressed by any party to the Court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

See case of **Lagos State Government v Power Holding Co of Nig Plc, First Bank of Nigeria Plc, Zenith Bank Plc (2012)7CLRN 134 (HC) 146** where Court confirmed that it had such power under Article 26(3) of the Arbitration rules.

WHO CAN ORDER INTERIM MEASURES CONT'D

Unlike the **ACA**, the **LSAL** has specifically given powers to the Courts in **Sections 6(3)** and **21** to issue Interim Measures.

See also **Art 9 of UNCITRAL Model Law 2006, Secs 44(2) and 44(4) of English Arbitration Act 1996**. Also see **Art 29 of ICC** which provides for Interim Measures that are requested for prior to constituting the Arbitral Tribunal. It permits an Emergency Arbitrator to issue a binding Interim Measure which may be reviewed by him or by the Tribunal when constituted.

WHERE TO APPLY TO: ARBITRAL TRIBUNAL OR COURT?

- In deciding whether to apply to the Arbitral Tribunal or to the Court, the applicant should consider the advantages and constraints involved.
- A Tribunal which is seized of the matter is devoted solely to that particular reference, knows the facts and is therefore, in the best position to judge if an Interim order is necessary or appropriate in a particular case. It is therefore easier to persuade a Tribunal to order Interim Measures.
- However, the Tribunal has a lot of limitations viz: It cannot act if it is not yet in existence, has no jurisdiction over 3rd parties, has no coercive powers and cannot enforce Interim orders or grant injunctive reliefs.

WHERE TO APPLY TO: ARBITRAL TRIBUNAL OR COURT CONT'D

The Court on the other hand, has wider powers and can act effectively in cases of emergency before a tribunal is constituted and when 3rd party is involved because all persons are within Courts jurisdiction- see case of **LASG v PHCN** supra.

It also has coercive powers of enforcement and force of compliance and can act when there is a need to grant an order ex parte. It has power to grant injunction in all cases where it appears to be “**just and convenient**” Orders made by Courts are easier to enforce.

Sec 29 of LSAL states that Interim measures issued by a Tribunal may be recognized and enforced upon application to Court. Also refer to the Model Law.

CHALLENGES IN ISSUANCE/USAGE OF INTERIM MEASURES.

- There is no universally accepted definition of the concept of Interim Measures. Furthermore, in agreements to arbitrate, they are sometimes referred to by other names such as Provisional or Conservatory Measures often inter changeably.
- Most Arbitration Laws and rules including the **ACA** do not specify the types of Interim Measures that may be granted by the Tribunal. Many give Arbitrator the power to order “**any Interim Measures**” they deem necessary or appropriate, thus permitting the Tribunal to construe it as broadly as it wishes with a view to finding the most suitable Measures in the circumstances of each individual case.
- Lack of Procedural rules for applying for Interim Measures. See case of **KSO and Allied Products Ltd v Kofo Trading Co Ltd (1996) 3 NWLR 244-255** where the Supreme Court approved use of Originating Notice of Motion where a right conferred by statute exist but where no rules of practice and procedure exist.

CHALLENGES IN ISSUANCE/ USAGE OF INTERIM MEASURES CONT'D

- No rules apart from the **UNCITRAL Model Law 2006** which has not been adopted by **ACA** provide meaningful guidelines or standards for the Tribunal to decide whether or not to issue. There is no settled body of Jurisprudence and the relevant standards are still evolving.
- This poses challenges to the parties. It creates uncertainty for the applicant on the requirements for application and for the Tribunal, insecurity on the standards to apply.
- Lack of provisions on enforcement mechanisms to ensure effective enforcement in **ACA**. On one hand, the Arbitral Tribunal has no coercive power to enforce while on the other hand, the Courts that have are slow and cumbersome.

MAKING MORE EFFECTIVE USE OF INTERIM MEASURES

- The effectiveness of an Interim Measure depends at the end of the day on its enforcement. If speedily enforced, it will achieve the purpose for which it was ordered.

Certain steps need to be taken to achieve this viz:

(i) A Total Overhaul of our Arbitration Legal Infrastructure and Amendment of ACA

The **ACA** is very scanty and contains narrowly worded provisions on Interim Measures. This falls short of what is required for effectiveness.

MAKING MORE EFFECTIVE USE OF INTERIM MEASURES CONT'D

An amended **ACA** with more comprehensive, sophisticated and complete provisions on Interim Measures in line with **UNCITRAL Model Law 2006** and the **UNCITRAL Arbitration Rules 2010** is necessary.

- Some critical areas for adoption in the Model Law are:
 - (a) Definition of Interim measures- **Section 1, Article 17(2)** of **Model Law** and **Article 26(2)** of the **Arbitration rules**. Also see **LSAL 21 (3)**.
 - (b) Uniform standards and tests for granting of Interim Measures- **Section 1, Article 17(A)** of **Model Law** and **Articles 26(3-4)** of **Arbitration rules**.

MAKING MORE EFFECTIVE USE OF INTERIM MEASURES CONT'D

(c) The new **ACA** should also lay down the procedure for application for Interim Measures and adopt the principle of Emergency Arbitrator vested with the power to grant Interim relief at very short notice to a party in need before the Constitution of an Arbitral Tribunal.

While all the amendments recommended above will strengthen the powers of both the Arbitral Tribunal and Courts in this area, for purposes of effective usage of Interim Measures, we will focus on:

(d) Adoption of Provisions for efficient enforcement mechanisms that will ensure hitch free enforcements in Court in line with **UNCITRAL Model Law 2006, Section 4, Articles 17(H) and 17(I)**.

While **Article 17(H)** provides for recognition and enforcement of Interim measures, **Article 17(1)** lists the grounds for refusing recognition and enforcement.

MAKING MORE EFFECTIVE USE OF INTERIM MEASURES CONT'D

See also **Section 41 of English Arbitration Act 1996** and **Section 29 of LSAL**.

(ii) Continuous Training and Sensitization of Judges-

With the issuance of the practice direction in support of arbitration by the former CJN Walter Nkanu Onnoghen coupled with more training and sensitization of our Judges on Arbitration Law and process, the Courts have become more co-operative and confident of their supportive role in the arbitration process.

- This awareness has resulted in the Courts being more willing to render its assistance through issuance of injunctive and protective orders in support of Arbitration.

MAKING MORE EFFECTIVE USE OF INTERIM MEASURES CONT'D

- Courts support of arbitration can be seen in the case of **Mutual Life and General Insurance Ltd v Kodi Itheme (2013) 2v CLRN 68** where the Justices of the Court of Appeal rejected Counsel's appeal to review an Arbitrator's decision on the merits.

In the case of **LASG V PHCN (2012) 7 CLRN 134**, the Claimant had reasons to believe that the assets of the Respondent were in the process of being dissipated while Arbitration was still pending and applied to Court for Interim order of protection. The Respondent argued that the Court had no jurisdiction and that only the Tribunal could grant the Interim order.

MAKING MORE EFFECTIVE USE OF INTERIM MEASURES CONT'D

- The Court disagreed with the Respondent's Counsel and held that it had power by virtue of **Article 26(3)** of the **First Schedule** of **ACA** and that since third parties, the banks were involved, the orders could only be granted by the Court. The request of the Applicants was granted and the Court made an order restraining the Respondent from dealing with monies standing to its credit in the banks until the determination of the Arbitration.
- See also case of **Statoil Nigeria Ltd v Star Deep Water Petroleum Ltd and 3 ors (Suit no FHC/CS/1452/2013)(Unreported)**. Hopefully the days of **NV Scheep v MVS Arez (2000) 15 NWLR (PT 691) 622** where the Supreme Court held that the Court can only grant an Interim order in support of Arbitration where the issues are before the Court are over while those of more favourable decisions as in **M V Lupez v NOCS Ltd (2003) 6 SC (pt11) 62 at 73** are here!

MAKING MORE EFFECTIVE USE OF INTERIM MEASURES CONT'D

(iii) Fast Track Enforcement of Interim Measures in the High Court:

Putting a time frame for such enforcements will ensure speedy enforcement by Courts using the Courts normal mechanism of enforcement and force of compliance.

(iv) Granting More Powers to Arbitral Tribunals to Issue Peremptory Orders without notice to the other party.

This is where prior disclosure might frustrate the purpose of the measure as contained in **Section 41** of the **English Arbitration Act 1996**. Also, the Arbitration agreement can give the Arbitrator power to make peremptory orders.

MAKING MORE EFFECTIVE USE OF INTERIM MEASURES CONT'D

(v) More use of Arbitrator's Discretionary Powers:

The Arbitrator can utilize his powers of granting costs against the adverse party and also he can draw adverse inferences if his orders are not complied with. According to Learned authors **Redfern and Hunter**, it would take a brave or very foolish party to choose to deliberately ignore Interim Measure ordered by a Tribunal that will judge the merits of a dispute. It was also stated that the level of voluntary compliance is very high.

CONCLUSION

- The efficacy of Arbitration as a dispute resolution method is ultimately dependent on the power of an Arbitral Tribunal or a Court to order Interim Measures to protect the parties' rights and on such orders being effectively utilized through speedy enforcement.
- In order to achieve this, there is an urgent need to amend the **ACA** especially by addition of provisions relating to enforcement, continuous training and sensitization of the Judges to make them more Arbitration friendly, Fast track enforcement in the Courts, granting of more powers to the Arbitral Tribunal to grant peremptory orders ex-parte and more use of Arbitrator's discretionary powers.

CONCLUSION CONT'D

- It goes without saying that for the Arbitration process to be optimally effective, it must use the assistance of the Courts. Luckily, this supportive role has been recognized by the Court in it's recent decisions where Courts are now more co-operative, confident and less circumspect.
- It is hoped that an amendment of the **ACA** will take care of the enforcement gaps in the act and further enhance the effective usage of Interim Measures in Arbitration.

THANK YOU !