Cavendish University Law Journal Vol. 1 August 2022

AN OVERVIEW OF THE POWER OF AN ARBITRATOR TO ORDER INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION

CULJ

ISSN 2957-8647

Volume 1

pp. 103-120

August 2022

www.cavendish.ac.ug

Email: secretaryculj@cavendish.ac.ug

Dr. Abiodun Oduwole*

Abstract

The procedural necessity of interim measures as a complement to final awards in international commercial arbitration has been acknowledged by different jurisdictions under their legal system. The availability of such provisional measures may be even more crucial due to the special risks involved in international commercial disputes. This paper examines the power of an arbitrator to grant an order of interim measures in the course of international commercial arbitration. The objective is to ascertain the existence of such powers and their limitations under the Nigerian Arbitration and Conciliation Act Cap 18 Laws of the Federation 2004. It adopts a doctrinal research approach with emphasis on the review of case law, literatures, internet sources, conventions, rules, reports, and legislations considered necessary in giving effect to the paper. The paper found that arbitrators in many cases lacked the requisite power under the Arbitration and Conciliation Act above to order interim measures especially against third parties. It concludes that arbitrators must be allowed to exercise such power if the course of international commercial arbitration will be properly served and in furtherance of these recommends that power to grant interim measures against third parties be extended to the arbitrators by law to save time, cost of the process and limit judicial interference.

Keywords: Interim measures, International Commercial Arbitration, Arbitration and Conciliation Act, New York Convention, UNCITRAL Model Law

Introduction

Interim measures are grants of temporary reliefs aimed at protecting parties' rights pending the final resolution of a dispute. Many legal systems recognize the procedural necessity of interim

* LLB, BL, LLM, Ph.D, MCIArb (UK), FIDPM. School of Law, Kampala International University, Kampala, Republic of Uganda. biodunoduwole@gmail.com

measures as a complement to final awards, and in the context of international commercial arbitration, such measures may be even more crucial due to the special risks involved in transnational commercial transactions.[1] In time past, interim relief was available only through the courts.[2] In recent time, such power has now been extended to arbitral tribunals by domestic legislation in some jurisdictions.[3] Parties to arbitration usually seek measures that would prevent the other side from destroying or disposing of evidence or from hiding or removing assets or other forms of evidence that a party needed to prove its case. It is therefore imperative to examine the existence of the power to order such measures under the Nigerian Arbitration and Conciliation Act cap 18 Laws of the Federation 2004 (ACA) and the limitations if any placed on such powers by the law.

Meaning of Interim Measure

The term interim measure has traditionally been used without a precise definition, but the United Nations Commission on International Trade Law (UNCITRAL) has provided one in its amended Model Law on International Commercial Arbitration. Article 17 (2) of UNCITRAL Model Law 2006 defines interim measures as follows:

> An interim measure is any temporary measure, whether in the form of an award or another form, but which, at any time before 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;
>
> (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.[4]

Flowing from the above, interim measures are basically those measures intended to secure the means by which a party may obtain an award and ensure that a prospective award is not

[1] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005).
[2] Margaret Moses, *The Principles and Practice of International Arbitration* (2nd edition, Cambridge University Press 2012) 105.
[3] Ibid.
[4] Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-fourth session (New York, January 23-26, 2006), at para. 18. A/CN.9/592.

rendered nugatory when eventually obtained. Often the efficacy of the arbitration process as a whole depends on interim measures that may prevent adverse parties from destroying or removing assets to render final arbitral awards meaningless.[5] Interim measures are usually designed either to minimize loss, damage, or prejudice during proceedings, or to facilitate the enforcement of final awards.[6] Parties to the international commercial arbitration process are often faced with the choice of identifying the proper place to request interim measures by a party when the need arises. Should the application be made before the arbitral tribunal or the national courts? To provide an answer to this question, it becomes imperative to examine the authorities vested with powers to issue such measures in an international commercial arbitration under the enabling statutes and laws.

Limits on Arbitral Tribunal's power to grant Interim Measures

In some cases, in which interim measures of protection are required, the arbitral tribunal itself has the power to issue them. In other cases, the assistance of the national court may be sought to grant such measures because in such cases, the tribunal's power may be insufficient and therefore the only recourse would be to the national courts. There exist such circumstances which are considered below.

a. Where the arbitral tribunal lacks the power to grant such measures

The arbitral tribunal may not have the required power to act. This is usually as a result of domestic laws dating back to a time when the power to grant such measures was considered to be the prerogative of the national courts for public policy reasons. Article 753 of the Argentine Code of Civil Procedure, for example, provides that: '*Arbitrators shall not issue compulsory enforcement measures, and that such measures shall be requested to the judge who shall give the aid of his jurisdiction for the faster and more effective operation of the arbitral process*.' In such cases where the legislation has stripped the arbitral tribunal of the power to act, applications for interim measures are directed to the national court.[7]

b. Inability to act prior to the formation of the tribunal

The arbitral tribunal lacks the power to act before it is set up. This follows that the arbitral tribunal cannot issue interim measures until it is set up. Vital evidence or assets may disappear before a tribunal is set up. In this situation, national courts may be expected to act in such

[5] 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.
[6] Ibid.
[7] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn Oxford University Press) 421.

urgent matters. It is however important to note that there is an emerging trend by which some international institutional rules have sought to remedy this loophole by making provision for the appointment of emergency arbitrators to deal with such exigencies in their revised rules. For example, Article 9B of the London Court of International Arbitration Rules provides among others that any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (Emergency Arbitrator).[8] The problem with the above may be the enforcement of such orders. Where there are no specific provisions for the enforcement of the orders of the emergency arbitrator, a party may still prefer to rely on the competent national court to ensure state-backed enforcement of an interim order.

c. Lack of power to compel a third party

The powers of the arbitral tribunal are generally limited to the parties to the arbitration. Article 17 of the Model law for example makes it clear that a tribunal may order interim measures only against a party. Therefore, a third-party order, for example, directed to a financial institution would not be enforceable against such institution thereby requiring national court assistance.[9]

d. No ex parte application

The 1985 UNCITRAL Model Law does not give room for ex parte application for interim measures to be made. The UNCITRAL Model law in its 2006 revision has offered the possibility of limited *ex parte* applications to the arbitral tribunal. According to Article 17B (1), Unless agreed by the parties, a party may, without notice to any other party, request an interim measure.[10] Most countries that adopted the 1985 Model Law are yet to adopt the 2006 revised Model Law. Nigeria is one example of such countries. Therefore, where an *ex parte* relief is important, the courts are the only available option.

National Court Intervention with respect to Interim Measures

The power of the arbitral tribunal to issue interim measures is limited by circumstances earlier stated. Where an arbitral tribunal lacks the power to grant certain interim measures during an arbitral proceeding, parties are left with no other option than to seek the assistance of the national court in such a situation. It is therefore imperative that the national court should have the power to issue interim measures in support of the arbitral process. This may occur in situations of extreme emergency, in which third parties may be involved or where there is a

[8] London Court of International Arbitration Rules 2014, Art. 9B (9.4).
[9] Nigel Blackaby and others, (n 7) 421.
[10] UNCITRAL Model Law on International Arbitration 2006 Revisions.

possibility that a party will not voluntarily execute the tribunal's orders. The alternative is for a party to approach the proper national court where such an application can be made.[11] However, two issues may arise from applying to the national court for interim measures. The first is whether an application for interim measures made to a national court by a party rather than to an arbitral tribunal would qualify as a breach of the agreement to arbitrate? Secondly, where the choice between seeking interim measures from a national court or the arbitral tribunal is an open choice, should application be made to the national court or the arbitral tribunal? In essence, where should a party go for interim measures? The court or arbitral tribunal? Both issues are considered.

a. The Impact of Applying for Interim Measures before Court on Arbitration Agreement

In the past, the application for interim measures before a court was deemed to operate as a waiver of the arbitration agreement. Also, orders so obtained may be deemed dissolved in the face of a valid arbitration clause.[12] But that is no longer the case. The position now is that the right to arbitrate is not lost merely because a party obtained relief from court when needed.

Many arbitration rules are now clear in confirming that an application for interim relief from the court is not incompatible with the arbitration agreement. For example, Article 26(3) of the Arbitration Rules in the First Schedule to the Nigerian Arbitration and Conciliation Act provides that a request for interim measures addressed by any party to a court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.[13] A similar provision is found in Article 26(3) of the 1976 UNCITRAL Arbitration Rules and Article 9 of the UNCITRAL Model Law on International Arbitration.[14] Nonetheless, in *Channel Tunnel Group Ltd v Balfour Construction Ltd*,[15] the court was reluctant to make a decision that risks prejudicing the outcome of arbitration when an application was made to it for interim measures. The House of Lords stated:

> There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether

[11] Paul Michell, 'Interim Measures in Canadian Commercial Arbitration' (*2006) 32 Advoc. Q.* 413.
[12] Eric Schwartz and Jurgen Mark, 'Provisional Measures in International Arbitration - Part II: Perspectives from The ICC and Germany' *(2009) 6 World Arb. & Mediation Rep.* 52.
[13] Arbitration and Conciliation Act Chapter A18 LFN 2004.
[14] Article 28(3) ICC Rules; Article 24(3) ICDR Rules; Article 26(3) SIAC Rules.
[15] [1993] AC 334.

> the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hand of the arbitrators a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail. If the court now itself orders an interlocutory mandatory injunction, there will be little left for the arbitrators to decide.[16]

The effect of the above decision is that notwithstanding the provisions of the Rules, some courts are still reluctant to exercise their power except it is clear that the exercise of the power will not take away from the arbitrators a power of decision which the parties have entrusted to them alone. This reasoning of the court is to the effect that where an interim order can still be obtained from the tribunal, such an application should go to the tribunal and not the court. Resort should only be made to the national court where it is clear that the court in that circumstance is the only option available to the party making such application.

b. The proper forum to apply for interim measure

The answer to the question of whether to seek interim relief from the court or tribunal depends largely on the relevant law and the nature of the relief sought. The relevant law may make it clear for instance that application for interim relief should be made first to the arbitral tribunal, and only then to the court of the seat of arbitration. This position is taken by the Swiss Law under section 183 of the Switzerland Federal Code on Private International Law, which empowers the arbitral tribunal to take provisional or conservatory measures. It then states further that if the party against whom the order is made does not voluntarily comply, the arbitral tribunal may request the assistance of the state judge, and the judge shall apply his own law.[17] The English law spells out the position in three provisos to the court's powers exercisable in aid of arbitral proceedings.[18] The three provisos are set out in section 44(3)-(5) of the English Arbitration Act 1996 which provides that:

> (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

[16] Ibid.
[17] Switzerland Federal Statute on Private International Law.
[18] Nigel Blackaby and others (n 7) 425.

> (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings, made with the permission of the arbitral tribunal or with the agreement in writing of the other parties.
>
> (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any tribunal or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.[19]

Where the position is not spelt out as clearly as this, the answer to the question of whether to seek interim relief from the court or the arbitral tribunal will depend on the circumstance of each case. Where a tribunal has not been constituted for example, and the matter is one of urgency, the only possibility is to apply to the relevant national court for interim measures. At the same time, the party seeking such an order should take steps to advance the arbitration, to show that there is every intention of respecting the agreement to arbitrate. Where the arbitral tribunal is in existence or appointing an emergency arbitrator is possible and likely to be effective, it is appropriate to apply first to that tribunal or emergency arbitrator for interim measures.[20]

Types of Interim Measures

This paragraph considers some of the interim measures available to parties in international commercial arbitration and the involvement of the court in the grant of such measures.

a. Measures Compelling Attendance of a Witness

During an international commercial arbitration proceeding, the need may arise to compel the attendance of a person or entity that is not a party to the proceedings but whose testimony may help advance the course of proving the case of the parties before the tribunal. The arbitral tribunal often does not generally possess the power to compel the attendance of such relevant witnesses. It may therefore be crucial to resort to the courts, especially if the witness whose presence is required has no attachment to any of the parties to the arbitration and cannot, therefore, be persuaded to attend voluntarily.[21] The court, therefore, is often called upon to come to the rescue of the tribunal in a circumstance like this.

The ACA and UNCITRAL Model Law confer on national courts the role of assisting the tribunal in this regard. Section 23(1) of ACA provides that the court or the judge may order

[19] English Arbitration Act 1996.
[20] Nigel Blackaby and others (n 7) 426.
[21] Ibid 427.

that a 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. The need for the assistance of the court is also recognised by Article 27 of the UNCITRAL Model Law which provides that: The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of the State assistance in taking evidence. The court may execute the request within its competence and according to its rule of taking evidence.

In England, the English Arbitration Act sets out the position in a detailed manner. Section 43(1) of the Act provides that a party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness to give oral testimony or to produce documents or other material evidence.[22] 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 in the United States. 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 in the case.

Under section 7 of the Federal Arbitration Act, if any person or persons so summoned to testify shall refuse or neglect to obey the summons, upon petition to the United States district court for the district in which such arbitrators, or a majority of them, are sitting, the court may compel the attendance of such person or persons before the said arbitrators, or punish such person for contempt in the same manner provided by the law for securing the attendance of witnesses or their punishment for neglect or refusal to attend the courts of the United States.[23] 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,* [24] the court took the view that a territorial limit does not apply to arbitral tribunals. But in *Dynegy Midstream Services v Trammochem*[25] the court took the view that there exists a territorial limit on arbitral tribunals with respect to the power to issue subpoena.

In an unreported ICC case, a tribunal refused to exercise its power to issue a subpoena to produce documents against a foreign national present in New York only for the arbitration

[22] The English Arbitration Act 1996.
[23] The Federal Arbitration Act 1925.
[24] [2000] 228 F.3d 865 (8th Cir.) 872.
[25] [2006] 451 F.3d 89 (2nd Cir.) 96.

hearing. The tribunal considered that the parties would not have contemplated the exercise of such powers when selecting New York as a seat for a dispute that otherwise has no connection with the United States.[26] In Canada, a Model Law jurisdiction, the courts have relied on sections 9 and 27 of the Model Law to compel a third party to give evidence that could subsequently be tabled at arbitration. In *Delphi Petroleum Inc v Derin Shipping and Trading Ltd*,[27] the Federal Court of Canada, Trial Division, held that it had jurisdiction to entertain a request to compel a third party to give evidence which could subsequently be tabled at an arbitration. The court held that Article 9 of the Model Arbitration Law gave it that jurisdiction but also took guidance from Article 27 of the Model Arbitration Law.

The power to compel a witness or third party to give evidence for the purpose of the arbitral proceedings is conferred on the court in Nigeria by the provisions of section 23 of ACA. The ACA did not extend the power to compel a witness or third party to give evidence to the arbitral tribunal. As stated earlier, section 7 of the U.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 arbitral tribunal is that it saves time and cost that would have been expended in making such applications to the national court. The benefits of international arbitration are lost where parties are continuously subjected to delay occasioned from seeking from courts, measures which could have been sought from the tribunal where it is invested with such powers.

It is imperative to note that Article 23(1) of the ACA is silent on the proper court to make such an application. It only states that the court or judge may make such an application. Where foreign parties are involved, they will be confronted with the challenge of identifying the proper court before which to bring such an application. 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 international commercial arbitration, the more the opportunity available to meddle with the system. It is therefore submitted that Section 23 of the ACA be amended to also recognise the powers of the tribunal to grant such measures to compel a witness 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

[26] Nigel Blackaby (n 7) 428.
[27] [1993] 73 FTR 241, 24.

Nigeria. A scenario like this also accounts for the reason why tribunals should be vested with powers to compel a witness. Where such power is conferred on the tribunal, its application should not be subject to territorial limits. It is therefore submitted that the arbitral tribunal when vested with such power can render a partial award to compel a witness outside jurisdiction which can be enforced under the New York Convention against the party where such party is outside the jurisdiction of Nigeria.

b. 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.[28] The ACA, therefore, makes provisions for the making of interim orders for the protection of property in dispute during an 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.

The above section of the ACA is a replica of 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

[28] Orojo O and Ajomo A, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Ltd 1999) 179.

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 an 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.[29]

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 national 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 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.

In *Lagos State Government v Power Holding Company of Nigeria Plc & Ors*,[30] 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 an *ex parte* interim order 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 a circumstance, 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.[31]

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

[29] Ibid.
[30] [2012] 7 CLRN 134.
[31] Ibid.

to national 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 which grants 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.[32] In *Cetelem SA v Roust Holdings,*[33] 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.[34]

c. Measures on Production of Documents

It is often said that the best evidence is documentary evidence. However, the document production process is also one of the most time-consuming and costly stages of international arbitration. In the course of international commercial arbitration proceedings, the need may arise for one party to the proceedings to require the other to produce certain documents in the possession and custody of the other party. The requests for document production are common in international commercial arbitration. In an International Arbitration survey conducted by Queen Mary University of London, 62% of respondents said that more than half of their arbitrations involved requests for document disclosure, while only 22% said that less than one-quarter of their arbitrations involved such requests.[35]

As international commercial arbitration spans the civil and common law jurisdictions, there is a differing traditional approach to document production in these jurisdictions. Despite certain differences in the views of common and civil lawyers, there is broad consensus within the arbitration community as to what the standard for document production should be. The majority of respondents to the Queen Mary University of London survey, 70% to be precise believed that the standard contained in Article 3 of the International Bar Association Rules on Taking Evidence 2010 should apply.[36] Article 3 of the International Bar Association Rules on Taking

[32] The English Arbitration Act 1996.
[33] [2005] EWCA Civ 618.
[34] Ibid.
[35] Paul Friedland, and Stavros Brekoulakis, 'International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (2012) Queen Mary University of London School of International Arbitration.
[36] Ibid 20.

Evidence[37] governs the production of documents under the IBA Rules. Article 3(1) provides that:

> Within the time ordered by the arbitral tribunal, each party shall submit to the arbitral tribunal and to the other parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another party.[38]

The intents and purposes of the IBA Rules on the Taking of Evidence in international commercial arbitration are set out in its preamble which states that the Rules are intended to provide an efficient, economical, and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc, or other rules that apply to the conduct of the arbitration. Parties and arbitral tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and advantage of, international arbitration, and parties and arbitral tribunals are free to adapt them to the particular circumstances of each arbitration. The arbitral tribunal's power to order disclosure of documents is generally limited to the parties to the arbitration. What therefore happens where such document is in the hands of a third party. For parties who adopt the IBA Rules on Taking Evidence, Article 3(9) of the Rules governs this circumstance but in a vague manner. Article 3(9) provides that:

> If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself.[39]

The IBA Rules does not empower the tribunal to order a third party who is in possession of a relevant document to produce such. Rather, the party is allowed to take whatever steps that are

[37] International Bar Association Rules on the Taking Evidence in International Arbitration. Adopted by a resolution of the IBA Council 29 May 2010 International Bar Association. available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC> accessed on January 3 2021.

[38] Ibid.

[39] IBA Rules on Taking Evidence (n 37).

legally available. It is therefore submitted that such application could be made to the national court with jurisdiction over such a party for the grant of such order.

Under Article 9(5) of the IBA Rules, if a party fails without satisfactory explanation to produce any document requested in a request to produce to which it has not objected in due time or fails to produce any document ordered to be produced by the arbitral tribunal, the arbitral tribunal may infer that such document would be adverse to the interest of that party. In practice, the tribunals rarely explicitly draw adverse inferences from a party's failure to produce documents. Arbitrators are very hesitant to draw adverse inferences explicitly since they are afraid that this may be a ground for challenging the award. This asks the question of whether the sanction of drawing adverse inferences for a party's failure to produce documents stipulated in Article 9(5) of the IBA Rules has much teeth at all.[40] It is however submitted that arbitrators should make use of this power more often, as long as they give appropriate warnings to the parties in advance of doing so.

The ACA makes no specific provisions with respect to the powers of the arbitral tribunal to order for the production of documents in the hands of a third party. The result is that a document in the hands of a third party remains outside the scope of the arbitral tribunal. It, therefore, submitted that recourse in such a situation should be made to the court for an order of discovery and production of documents.

This paper however takes the view that the power to compel a third party to produce any document in its possession relevant to the arbitral process should also be conferred on the arbitral tribunal by the ACA. This will reduce the time and cost expended in making such applications to the court. It is not necessary to take away the power out rightly from the court, but the tribunals should be vested with powers to compel third parties to produce such documents. Where such party fails or neglects to produce such document, proceedings for contempt may be taken out against such party at the court.

Enforcement of Interim Measures

In general terms, where an arbitral tribunal grants an interim measure, and court enforcement is needed, the national court at the seat of arbitration will provide enforcement. 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

[40] Paul Friedland and Stavros Brekoulakis (n 35) 20.

generally choose as the seat a place that is not the home country of either party.[41] For example, 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).[42] 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 is therefore creating a framework for Model Law countries to be able to enforce interim measures granted by an arbitral tribunal in other countries, independently of the New York Convention. 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.[43] Also where the measure was determined by a court to be final and enforceable award, such award was enforced under the Convention.[44]

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 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

[41] Jason Fry, 'Interim Measures of Protection: Recent Developments and the Way Ahead' (2003) 6 Int'l Arb. L. Rev. 153.
[42] UNCITRAL Model Law on International Commercial Arbitration 2006 Revisions.
[43] *Four Seasons v Consorcio Barr S.A* [2004] F.3d 377 (11th Cir.) 1164.
[44] *Yasuda Fire & Marine Ins. v Continental Cas* [1994] F.3d 37(7th Cir.) 345.

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.

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.[45] 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. 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 Nigerian ACA to reflect the extended coverage offered by the 2010 UNCITRAL Arbitration Rules.

[45]Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn. Kluwer Law International 2001) 45.

Conclusion

In many cases, the efficiency of the arbitration process as a whole depends on interim measures that may prevent adverse parties from destroying or removing assets so as to render final arbitral awards meaningless. Interim measures are therefore usually designed either to minimize loss, damage, or prejudice during proceedings, or to facilitate the enforcement of final awards. It is therefore important that arbitrators saddled with the responsibility of resolving disputes are empowered to order such important measures which can serve to preserve the outcome of the process itself. The 2006 revisions of the Model Law and the 2010 UNCITRAL Arbitration Rules have all provided guidance as to the extent of power that can be given to arbitrators in relation to interim measures and, in the process, has widened the scope. This can incorporated be into the Arbitration and Conciliation Act through an amendment which in practical terms is long overdue. The importance of allowing arbitrators to exercise such power cannot be overstated as it will save time, cost of the process and limit judicial interference. It is in the interest of parties that arbitrators appointed by them are able to adjudicate on the disputes with little or no reliance on the courts during the course of the process. This, in practical term, is possible if arbitrators are able to exercise power to protect and preserve the subject matter of dispute or grant such measures that will serve the course of the arbitration and ensure that the essence of the award will not have been defeated.