

INTRODUCTION

An arbitral tribunal that is properly constituted has the power to issue binding orders, including interim reliefs, as required by the justice of each case. This authority is granted under most arbitration laws and rules, where the arbitral tribunal is vested with powers *"as the Court, to order a party to do or refrain from doing anything"*¹ However, there are situations where it is crucial to preserve the status of the parties or maintain the status quo before the arbitral tribunal is empanelled. . This interim action/step is typically aimed at preventing any party involved in upcoming arbitration from undertaking activities that might undermine or invalidate the final arbitral award.

Prior to the enactment of the Arbitration and Mediation Act, 2023 ("the Act" or "the AMA"), the position of the law on injunction pending arbitration was unclear and inconsistent due to the absence of clear and explicit provisions on this matter in the previously applicable Arbitration and Conciliation Act. The AMA has since introduced precise and extensive regulations concerning injunctions pending arbitration, thus providing much-needed clarity.

POWER TO GRANT INTERIM INJUNCTION PENDING ARBITRATION

The Act expressly empowers both the court and an emergency arbitrator to issue interim injunctions pending arbitration. By incorporating the concept of an emergency arbitrator, the Act reinforces the autonomy of parties to seek prompt redress including interim reliefs, independently of the national courts. This approach aligns with international arbitration standards such as those outlined in the International Chambers of Commerce (ICC) Arbitration Rules.² The powers of the courts and emergency arbitrators are outlined below:

The Court

The Act provides that either the Federal High Court or the State/FCT High Courts can issue interim measures of protection in relation to arbitration proceedings seated within or outside the Federal Republic of Nigeria.³ The courts are required to act on such applications within fifteen (15) days. Historically, the courts in pursuance of their inherent judicial powers conferred by the constitution⁴, and the provisions of the respective civil procedure rules of

¹ See Section 37(1c)(i) of the Arbitration and Mediation Act

² See Article 29 of the ICC Arbitration Rules

³ Section 19 of the Act

⁴ Section 6(6b) of the 1999 Constitution as amended

courts on the grant of injunctions, typically granted injunctions pending arbitration. This practice faced scrutiny, notably in the case of *NV Scheep v. MV S Araz*⁵, where the Supreme Court refused to grant an interim order to detain a ship in Nigeria as security for a potential award in a London arbitration. Specifically, the Supreme Court held that in the absence of any statutory guidance, seeking security for damages does not constitute a stand-alone legal claim. The Act resolves such ambiguities by explicitly empowering courts to grant interim reliefs for any arbitration proceedings, provided the courts have jurisdiction over the issue. Additionally, it expands the authority of the court to grant injunctions pending arbitration for all arbitration proceedings, irrespective of where the arbitration is seated, as long as the court has jurisdiction over the claim.⁶

Emergency Arbitrator

The Act facilitates the appointment of an emergency arbitrator to grant emergency reliefs.⁷ Before the formal constitution of the arbitral tribunal, either party may request the appointment of an emergency arbitrator from an arbitral institution agreed upon by the parties or, if no institution is designated, from the Federal High Court or the State/FCT High Courts. The application must detail the emergency relief sought, describe the circumstances and underlying dispute, justify the entitlement to the relief, and include the relevant arbitration agreement.⁸ The arbitral institution or court may accept or reject the application after careful review. If accepted, the institution or court will appoint an emergency arbitrator within two (2) business days.⁹ Following the approval of the application, the arbitral institution or court is required to promptly inform the emergency arbitrator and the other involved parties. This notification must occur no later than the end of the next business day after the application is granted, or any other time not exceeding two business days as the court or arbitral institution considers appropriate.¹⁰ According to the Act, the emergency arbitrator must issue a written decision in the form of an order within fourteen (14) days from the date the case file is received by the emergency arbitrator.¹¹

⁵ (2000) 15 NWLR (Pt 691) 622.

⁶ See Section 19 of the Act

⁷ Section 16(1) of the Act

⁸ Section 16(3) of the Act

⁹ Section 16(5) of the Act

¹⁰ Section 16(6) of the Act

¹¹ Article 17(2) of the First Schedule to the Act

CRITERIA FOR GRANTING AN INJUNCTION PENDING ARBITRATION

While the Act does not specify the criteria for courts or emergency arbitrators to grant an injunction pending arbitration, judicial decisions over time have established key guiding principles for the issuance of interim injunctions, as discussed below:¹²

- **Existence of a legal right:** The applicant must demonstrate a legal or equitable interest in need of protection by the courts. For example, if the injunction aims to prevent another party from dealing with disputed property, the applicant must prove a legitimate legal or equitable claim to that property.
- **There must be real urgency:** The situation must be genuinely urgent. There must be exceptional circumstances that necessitate immediate action to prevent irreparable harm or damage to the applicant.
- **Existence of Special Circumstances:** The applicant must demonstrate that the overall situation of the case involves certain collateral circumstances and inherent factors that, if the order is not granted, could either destroy the subject matter of the proceedings or place the court/tribunal in a situation of complete helplessness, thereby rendering any order(s) of the court/tribunal nugatory.
- **The balance of convenience should be in favour of the Applicant:** This principle dictates that justice is better served by granting the injunction than by denying it. In simpler terms, the benefits of issuing the injunction should outweigh any potential disadvantages.
- **The Applicant will suffer irreparable damage or injury:** The applicant must provide convincing evidence that the harm they would suffer if the injunction were denied is significant and cannot be adequately compensated by monetary damages.
- **Conduct of the parties:** Since injunctions are a form of equitable relief, it is crucial that the applicant has not engaged in any misconduct concerning the issue at hand.
- **Undertaking as to damages:** The applicant must undertake to compensate the opposing party for any damages incurred should it later be determined that the injunction was the adverse party was needlessly enjoined.

¹² See *Kotoye vs CBN* (1989) 1 NWLR (Part 98) 419; *Obeya Memorial Hospital vs Attorney - General of the Federation* (1987) 3 NWLR (part 60) 325; *Buhari vs Obasanjo* (2003) 17 NWLR (Part 850) 587

PRACTICAL CONSIDERATIONS FOR SEEKING AN INJUNCTIVE ORDER PENDING ARBITRATION

- **Confirming the Existence of a Dispute:** Before pursuing an injunctive order pending arbitration from a court, an applicant must confirm that a dispute, as outlined in the underlying contract between the parties, has emerged and that a notice of arbitration has been appropriately issued and served on the counterparty. This step is crucial because courts are typically cautious about being used by parties who might seek to bypass their contractual commitments to arbitrate by leveraging the judicial system.
- **Maintaining Neutrality in Substantive Matters:** Additionally, both courts and emergency arbitrators are restricted from examining the substantive matters of the dispute to avoid prejudicing the rights of the opposing party and influencing the arbitrators' decision-making once the arbitration formally begins. Therefore, applicants must be careful to ensure that the injunctive reliefs sought do not pre-determine the arbitration's outcome.
- **Timing and Duration of Injunctions:** While it might seem logical that an injunctive order should remain in effect until the arbitral tribunal is constituted, courts are intentionally prudent about issuing such orders—especially ex parte interim injunctions—without establishing a clear expiration date. This caution stems from the potential for abuse by parties aiming to delay the formation of the arbitral tribunal, thereby extending the duration of the injunction. Consequently, it is not uncommon for courts to specify a timeframe for the injunction, with the possibility of renewal or extension as the specifics of the case may require.

CONCLUSION

Injunctions serve as invaluable tools within the judicial system, designed to prevent any party from altering the status quo to their advantage before a court can intervene and determine the rights involved. Given the urgent nature often associated with applications for injunctions pending arbitration, these applications are typically made ex parte—that is, without notifying the opposing party. While this approach may appear to infringe on the adverse party's right to a fair hearing, it is legally justified as a necessary exception. Consequently, courts approach the assessment of ex parte applications for injunctions with a high degree of caution and thoroughness to ensure that justice is served. Applicants must therefore adhere to all the prerequisites for granting an injunction, as discussed in this article, to enhance the likelihood of a favorable ruling.

For additional insights or queries related to arbitration, please feel free to reach out to SimmonsCooper Partners at info@scp-law.com.