

## JOINDER OF PARTIES UNDER NIGERIA'S ARBITRATION AND MEDIATION ACT 2023

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### **Understanding Party Joinder in Arbitration Proceedings**

The concept of 'joinder of parties' in a legal context refers to the addition of one or more individuals or entities as co-plaintiffs or co-defendants in a pending legal, arbitral or administrative process. A joinder request may either be initiated by the party seeking to be joined or any of the existing parties to the action. The main purpose behind including additional parties is to ensure a thorough and final resolution of disputes by bringing all relevant and necessary parties before the court or arbitral panel.

Previously, the applicable principles governing joinder of parties in an arbitral proceeding were not expressly defined, as the Arbitration and Conciliation Act,<sup>1</sup> contained no explicit provisions on the subject. However, the enactment of the Arbitration and Mediation Act 2023 ("AMA") has introduced a new framework enabling the joinder of additional parties in arbitration proceedings subject to certain legal considerations.

In this article, we will explore the legal principles for joinder of parties in arbitration as prescribed in the AMA, delving into the implications, nuances, and potential ramifications of these principles.

### **Who can join an Arbitration Under the New Arbitration and Mediation Act 2023?**

Prior to the enactment of the AMA, only parties to an arbitration agreement can sue and be sued on any dispute arising therefrom. Put differently, a non-party to an arbitration agreement seeking to join or be joined as a party to an arbitration proceeding would be deemed a stranger and ultimately meddlesome interloper. This emphasizes arbitration's nature as a process based on mutual agreement.

However, the AMA expands this framework, thereby improving procedural effectiveness, and fostering greater inclusivity in the arbitration process. Specifically, Section 40(1) of the AMA provides as follows:

*The arbitral tribunal shall have the power to allow an additional party to be joined to the arbitration, provided that, prima facie, the additional party is bound by the arbitration agreement giving rise to the arbitration.*

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<sup>1</sup> Cap A18 Laws of the Federation of Nigeria 2004.

With the above provision, arbitral tribunals now possess the authority to exercise their discretion in adding an additional party in the arbitration, provided there is *prima facie*<sup>2</sup> evidence that the party is bound by the arbitration agreement. This implies that any of the original parties to the arbitration agreement may apply to the arbitral tribunal to join an additional party to the proceedings if the additional party sought to be joined is credibly connected to the arbitration agreement.

### **What This Means for Arbitration**

This development highlights the importance of consent in arbitration, adhering to the principle that arbitration is a voluntary process. It is worth mentioning that even before the AMA, it was possible to add individuals not initially part of the arbitration agreement, provided that the party sought to be joined consents to submit to arbitration and the existing parties do not object to the joinder.<sup>3</sup> Therefore, while the act formalizes the process of joining additional parties, it also reaffirms long-standing principles of arbitration. The provision for joinder as laid out in AMA prompts a closer examination. It specifically requires that the party to be joined must be bound by the arbitration agreement. This requirement invites questions about the extent of this provision and whether it truly introduces any novelty to the arbitration legal landscape or simply formalizes existing practices.

### **Determining When a Party is Bound by an Arbitration Agreement Under the Arbitration and Mediation Act.**

Understanding when an additional party is considered bound by an arbitration agreement under the Arbitration and Mediation Act (AMA) involves examining established legal principles and how they apply to the specifics of the Act. This is crucial because the AMA is a recent development, and its nuances are still being explored.

### **Key Considerations for Binding Parties**

By the general principles of contract, a person is bound by an agreement including an arbitration agreement, where such person is a party to, or privy of a party to the agreement.<sup>4</sup> Notably, an agreement may be created orally, in writing, or by conduct. However, the AMA specifically requires an arbitration clause/agreement to be in writing.<sup>5</sup> This requirement does

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<sup>2</sup> The term "*prima facie*" as used in section 40 of the new Act indicates the need for reasonable belief or evidence of the party's obligation to the agreement. The arbitral tribunal evaluates the available evidence to establish a credible connection between the additional party and the arbitration agreement, ensuring their compliance with its terms and obligations.

<sup>3</sup> Mekwunye v Lotus Capital Ltd & Ors. (2018) LPELR-45546(CA).

<sup>4</sup> See Hadiza & Anor v. Mohammed & Anor (2015) LPELR-40383 (CA) per Abiru JCA @ p.37 paras B-E

<sup>5</sup> See Section 2 (2) of the AMA

not negate the possibility of the original contract being oral or implied through conduct; rather, it emphasizes that the specific agreement to arbitrate disputes must be documented. The necessity of having the arbitration agreement in written form simplifies the process of proving who is bound by the arbitration agreement. This is because the parties involved and their agreement to arbitrate can be clearly identified through the written document.

#### **Instances Recognized by the AMA for a Written Arbitration Agreement<sup>6</sup>**

- **Electronic Communication<sup>7</sup>:** The AMA acknowledges the modern reality where agreements, including those to arbitrate, can be formed through digital means such as emails, online messaging, or electronic signatures. So long these communications fulfil the legal criteria for contracts and clearly show an intention to resolve disputes through arbitration, they are deemed valid. This reflects an understanding of the evolving ways in which parties can reach agreements in the digital era.
- **Exchange of Documents in Dispute:** In situations where there is an ongoing dispute, the exchange of documents (like claims and defences) between parties can inadvertently lead to an acknowledgment of an arbitration agreement. For instance, if one party claims the existence of an arbitration agreement and the other party does not contest this claim, such exchanges can be taken as evidence of both parties' agreement to arbitrate.
- **Incorporation by Reference in Separate Agreement:** It is common for contracts to reference arbitration clauses contained in separate documents. If a contract explicitly states that it includes an arbitration clause by referring to another document that contains such a clause, this is sufficient to bind the parties to arbitration. This method allows for the incorporation of detailed arbitration procedures without cluttering the primary contract.

#### **A Comparative Look at Joinder of Parties in Arbitration Across Jurisdictions**

The Arbitration and Mediation Act's approach to the joinder of additional parties reflects a modern understanding of arbitration's needs, emphasizing inclusivity and procedural efficiency. This stance is not unique to this legislation; various prominent international arbitration rules share similar perspectives, albeit with some variations.

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<sup>6</sup> Section 2 (4&5) of the AMA, 2023

<sup>7</sup> Section 91 of the AMA defines “**Electronic Communication**” as any communication that the parties make by means of data messages, that is, any information generated, sent, received, or stored by electronic, magnetic, optical, or similar means, including electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy.

**a) London Court of International Arbitration (LCIA) Rules 2020**

Under the LCIA Rules, the arbitral tribunal is empowered to join one or more third persons as parties to the arbitration, provided that both the third person and the party seeking joinder have expressly consented to such joinder in writing. This consent must be provided either after the commencement date of the arbitration proceedings or, if earlier, within the arbitration agreement itself. The tribunal can decide to add parties on its initiative or upon a party's request, provided it allows all concerned parties a reasonably opportunity to present their views on the matter.

**b) Singapore International Arbitration Centre (SIAC) Rules 2016**

The SIAC Rules offer flexibility for when a request for the addition of a party can be made — either before or after the tribunal's constitution. The request is considered valid if:

- The additional party appears, on the face of it, to be bound by the arbitration agreement and has a significant link to the dispute covered by the arbitration agreement, or
- All parties involved in the arbitration, including the proposed additional party, have provided explicit consent to the joinder of the additional party.

**c) Hong Kong International Arbitration Rules**

Similar to the SIAC, the Hong Kong Rules allow for the addition of parties both before and after the tribunal's formation, under two main conditions:

- The party to be joined is bound by an arbitration agreement that is applicable under these rules, or
- Consent for the addition of the party is obtained from all parties involved in the arbitration.

From the foregoing analyses, it is apparent that there is a shared emphasis on the need for either a direct connection to the arbitration agreement or unanimous consent from all involved parties for the additional party to be joined. This consistency highlights a universal recognition of the importance of consent and relevance to the dispute in arbitration proceedings.

**Reflections on the Arbitration and Mediation Act's Impact on Nigerian Arbitration Practice**

The Arbitration and Mediation Act has made significant strides in advancing arbitration practices in Nigeria, particularly by formalizing the inclusion of additional parties under specific conditions. This legislative update has highlighted the importance of written agreements and direct participation in arbitration, refining the procedural landscape for dispute resolution.

However, the AMA maintains traditional limitations by restricting joinder to those explicitly party to an arbitration agreement, potentially overlooking complex scenarios like subcontractor disputes in Engineering, Procurement, and Construction (EPC) contracts. This conservative approach mirrors global standards yet signals the ongoing evolution of arbitration practices, suggesting a need for further legal refinement to fully address the complexities of contemporary business relationships and ensure arbitration remains a robust, inclusive mechanism for resolving disputes in Nigeria.

### **Navigating the Future of Arbitration with Precision and Insight**

At SimmonsCooper Partners, we recognize the complexities and nuances introduced by the latest developments in arbitration law, particularly with the enactment of the Arbitration and Mediation Act 2023. Whether you are drafting contracts with foresight for potential disputes or seeking to navigate the complexities of arbitration proceedings, our team is equipped to provide comprehensive support.

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*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*