SUMMARY PROCEDURE- A NEW OPPORTUNITY TO SAVE TIME AND MONEY IN ARBITRATIONS IN NIGERIA

The Need for Speed

Since the enactment of the Arbitration and Conciliation Act in 1988 arbitration has increasingly gained prominence and acceptability as a reliable mechanism for the resolution of commercial disputes in Nigeria. In addition to other key characteristics such as party autonomy, confidentiality and flexibility, the speed of arbitration as a dispute resolution process is undoubtedly a decisive factor that has contributed to the growth of arbitration in Nigeria.

However, in the last few years, there has been a growing perception that arbitration is not or no longer as speedy a process as it is often made out to be, having regard to the fact that some of the delay factors that have historically plagued litigation have crept into the arbitration process. Whilst this perception is not necessarily true (it is not true), there is never smoke without fire and perhaps the wheel of arbitration in Nigeria is due for some reinvention to reinforce its characteristic as a speedy dispute resolution mechanism. It is against this backdrop that the question of whether arbitrators have the power to make 'summary awards' in the nature of summary judgments in litigation becomes relevant.

The Summary Judgment Procedure

The summary judgment procedure is one that has existed in the procedural rules of trial courts in Nigeria for virtually as long as the courts themselves have been in existence[1]. Essentially, the summary judgment procedure is designed to enable a party, especially in liquidated demand cases, to obtain judgment without the need for a full trial where the other party cannot satisfy the court that it has a good defence to the action and as a result should be allowed to defend it. In **UBA v JARGABA**[2] **Mohammad, JSC** described the procedure as one ***"…for disposing with dispatch, cases which are virtually uncontested. It also applies to cases where there can be no reasonable doubt that a Plaintiff is entitled to judgment and where it is inexpedient to allow a Defendant to defend for mere purpose of delay. It is for the plain and straight forward, not for the devious and crafty."*** Invariably, by virtue of its nature, the summary judgment procedure in litigation is the speediest way of obtaining a

[1] See Order 13 of the High Court of Lagos State (Civil Procedure) Rules 2019, Order 12 of the Federal High Court (Civil Procedure) Rules 2009 and Order 11 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018

[2] (2007) 11 NWLR (PT. 1045) 247

meritorious determination of a dispute that ordinarily would be the subject of a plenary trial. A successful application by a party to the court for summary judgment can and will usually have the effect of trimming the lifecycle of a case in court by several years. Consequently, it is a potent procedural tool available to a Claimant in a case where the claim is unassailable.

Can an Arbitrator Make a 'Summary Award'?

Generally, the question of whether an arbitrator has the power to make a 'summary award' in the nature of a summary judgment in litigation is not one that is settled or has an unequivocal answer either way. In any particular case, the first point of reference for determining whether an arbitrator can make a summary award will be the arbitration agreement of the parties. In most cases, the arbitration agreement will contain no express provision empowering the arbitrator to make a summary award but on the rare occasion that such a provision or clause exists, the presumption would be that the arbitrator can make a summary award. For instance, in the English case of **TRAVIS COAL RESTRUCTURED HOLDINGS LLC V ESSAR GLOBAL FUND LIMITED[3], Mr Justice Blair** held that the question of whether an arbitrator can make a summary award is a substantive one that depends on the terms of the arbitration agreement and the procedure in fact adopted by the Tribunal. The court reached the conclusion that the arbitral tribunal in that case acted within the scope of its "wide powers", by virtue of the fact that the arbitration clause provided, *inter alia*, that:

> ***"The arbitrators shall have the discretion to hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part, in accordance with such procedure as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue."***

However, typically, an arbitration agreement will not contain a provision or clause specifically giving an arbitrator the power to make a summary award, which means that in many cases the question of whether this power exists will be determined by the provisions of the law of the arbitration or the applicable procedural rules.

In an arbitration under Nigerian law, specifically the Arbitration and Conciliation Act (ACA), there is sufficient reason to hold the position that, even in the absence of an express agreement to that effect, an arbitrator has the power to make a summary award where the case is one of the nature in which

[3] [2014] EWHC 2510 (Comm)

such an award may be made. In this respect, the power of an arbitral tribunal to make a summary award can be situated within its general powers under section 20(1) of the ACA in respect of the arbitral proceedings. This is because by section 20(1) of the ACA an arbitral tribunal is, subject to any contrary agreement by the parties, empowered to decide whether the proceedings shall be conducted either by holding oral hearings for the presentation of evidence or oral arguments or alternatively on the basis of documents or other materials or both.

In addition, pursuant to Article 15(1) of the Arbitration Rules in the First Schedule to the ACA (ACA Rules), the arbitrator is empowered to conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated equally and that at an appropriate stage of the proceedings each party is given a reasonable opportunity to present its case. The phraseology of both section 20(1) of the ACA and 15(1) of the ACA Rules suggest that, subject to the express agreement of the parties, the arbitrator has a wide discretion as to how the arbitration proceedings will be conducted, including as to the making of a summary award in a deserving case.

Consequently, although unlike the High Court Rules in litigation, the ACA and ACA Rules have no express provisions empowering arbitrators to make summary awards, in suitable cases arbitrators can make summary awards pursuant to their general powers under the ACA and ACA Rules. The interpretation of the arbitrator's general powers under the ACA and ACA Rules in this way is not at all out of this world, having regard to the fact that a similar interpretation has been given to Article 22 of the International Chamber of Commerce Rules of Arbitration (ICC Rules) in the ICC Note to Parties and Arbitral Tribunals On the Conduct of the Arbitration Under The ICC Rules of Arbitration 2019 (ICC Note). Article 22 of the ICC Rules provides, *inter alia*, that:

> ***(1)The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.***
>
> ***(2)In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.***

The ICC Note provides guidance on Article 22 of the ICC Rules by stating that applications for the expeditious determination of "manifestly unmeritorious claims" may be addressed within the broad scope of that Article and further specifically states at Paragraph 75 that:

> ***"Any party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction."***

For arbitrations under the Lagos State Arbitration Law (LSAL), which provides for the Lagos Court of Arbitration Rules (LCA Rules) as its default arbitration rules and has provisions similar to section 20(1) of the ACA[4], the ICC Note's interpretation of the ICC Rules is particularly relevant because of the material and obvious similarities between Article 22 of the ICC Rules and Article 20(1) of the LCA Rules. Article 20(1) of the LCA Rules provides, *inter alia,* that:

> "***The Arbitral Tribunal, in exercising its discretion, shall conduct the proceedings in a manner that avoids unnecessary delay and expense and provides a fair and efficient process for resolving the parties' dispute.***"

It is apparent from the foregoing that, in appropriate cases, avoidable delays can be mitigated, if not eliminated from the arbitration process through the conscious exercise by arbitrators of their wide discretionary powers to make summary awards in the nature of summary judgments in litigation in the conduct of arbitration proceedings under both the ACA and LSAL. In the absence of an express agreement by the parties to the effect that the arbitrator can make a summary award, by adopting a liberal interpretation of the ACA Rules, the benefits of the summary judgment procedure in the litigation process can be applied to the arbitration process, and for good reason. Although there does not appear to be a reported Nigerian case on this specific issue, the decision in the English case of **TRAVIS COAL RESTRUCTURED HOLDINGS LLC V ESSAR GLOBAL FUND LIMITED** and the liberal interpretation given to Article 22 of the ICC Rules provide the basis for an irresistible argument for the introduction of such an innovation in arbitrations conducted under the ACA and LCA Rules.

Notwithstanding the foregoing, there is no doubt that the absence of express provisions in the relevant arbitration agreement, applicable law or procedural rules empowering arbitrators to make summary awards leaves room for significant debate and inevitable doubt as to whether arbitrators can make such

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[4] See section 39(1) of the LSAL

awards. These reservations are fueled by the fact that certain provisions in both the LCA[5] and ACA[6] Rules appear to mandatorily require arbitrators to hold a hearing if any of the parties so requests. As a result, there is the significant likelihood that arbitrators may be continue to be reluctant to make summary awards under the ACA and LCA Rules for the fear that such awards may ultimately be unenforceable in the courts. At the international level, in the face of the need to restore the characteristic speediness of arbitrations, such considerations perhaps influenced the amendment of international arbitration rules such as those of the Singapore International Arbitration Centre[7] and Arbitration Institute of the Stockholm Chamber of Commerce[8] to include express provisions for summary procedures.

Looking Forward

Certainly, these converse issues reflect the practical reality of the arbitration process in Nigeria and are undeniable reasons to believe that there are possible inherent enforcement risks in an arbitrator making an award on the basis of a summary application. However, for contracting parties for whom speed in the arbitral process is an overriding consideration, it may be useful to consider the express inclusion of summary procedure as an option at the time of preparing the arbitration agreement. Generally speaking, for arbitration in Nigeria to seize back its glory as a faster and consequently cheaper commercial dispute resolution process than litigation, there is no doubt that two important things need to occur.

Firstly, there is the need to amend the LCA and ACA Rules to include summary procedures, which should be done without much delay. Secondly and in any case, arbitrators should be more readily disposed to exercising their wide discretionary case management powers to consider summary applications and make summary awards in deserving cases. No doubt, it is not in every case that a summary award is appropriate or may be made. However, the availability of such a procedure in commercial arbitration will certainly enhance the ability of arbitrators to expedite the completion of arbitrations where it is clear that a full hearing will achieve no better purpose than delay the expeditious resolution of the dispute.

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[5] See Article 20(2)
[6] See Article 15(2)
[7] See Article 29
[8] See Article 39
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