<u>BEING A PAPER DISCUSSION AT THE NIGERIAN BAR ASSOCIATION ANNUAL GENERAL CONFERENCE 27TH – 31ST AUGUST 2023 ON THE ARBITRATION AND MEDIATION ACT 2023 AND OTHER CURRENT DEVELOPMENT IN ADR. THIS PRESENTATION DISCUSSES THE PROVISIVIONS DEALING WITH NUMBER OF ARBITRATORS AND THE AWARD REVIEW TRIBUNAL.</u>

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5.2 NUMBER OF ARBITRATORS

Generally speaking in any arbitral proceedings, the parties have the option to appoint either one or more arbitrators to constitute the arbitral tribunal to determine their dispute.

Accordingly section 6 of the repealed Nigeria Arbitration and Conciliation Act, 1988 that was the law governing arbitration in Nigeria for over 3 decades provides:

> ***"The parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be three".***

However the default position has been greatly improved under the new Arbitration and Mediation Act 2023 to the effect that where there is no agreement between the parties as to the number of arbitrators, the arbitral tribunal shall consist of one arbitrator.

Section 6 of the Arbitration and Mediation Act 2023 Provides:

> ***6(1) "Parties to an arbitration agreement may agree on the number of Arbitrators to constitute an arbitral Tribunal"***

6(2) "where there is no agreement as to the number of Arbitrators the Arbitral Tribunal shall consist of a Sole Arbitrator".

This is a clear deviation from ACA which provides for 3 arbitrators in default situations. Generally fees for three arbitrators will be higher than that of a sole arbitrator. Section 6(2) of the AMA takes into consideration the costs for the parties as the cost of arbitrators' fees for three arbitrators will be higher than that of a sole arbitrator.

This provision clearly indicates the need for the parties to decide as to the number of arbitrators in the arbitration agreement. Although it is not clearly stated as such. However, what is advisable is that, the parties must agree on the number of arbitrators before the dispute is referred to arbitration. It is only when they fail to exercise the right of determining the number that the provisions of section 6 of the Act will apply. Under the AMA, if the parties fail to agree on the number of arbitrators, the minimum is one.

Another issue raised by this new provision is at what point the statutory provision could be triggered? The Act is silent on this, however, the lacuna is filled by Articles 7- 10 of the Arbitration Rules. (First Schedule to the Act)

I reproduced the relevant provisions hereunder;

Article 7

1. ***Where the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the written communication containing a request for the dispute to be referred to arbitration the parties have not agreed that there shall be only one arbitrator, one arbitrator shall be appointed.***
2. ***Notwithstanding paragraph one, where no other parties responded to a party's proposal to appoint a sole arbitrator***

within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint the second arbitrator in accordance with Article 9 or 10, the appointing authority, may at the request of a party, appoint a sole arbitrator under the procedure provided for in Article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.

Article 8

1. Where parties have agreed that sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list- procedure should not be used or unless the appointing authority determine in its discretion that the use of the list-procedure is not appropriate for the case –

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) after the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties; and

(d) Where for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 9

1. Where three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. Where within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. Where within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be

appointed by the appointing authority in the same way as a sole arbitrator would be appointed under Article 8.

Article 10

1. ***For the purposes of Article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.***

2. ***Where parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.***

3. ***In the event of any failure to constituter the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.***

The import of these rules is that if within thirty days after the receipt by respondent of the written communication of the notice of arbitration and there is no agreement on the number, then one arbitrator shall be appointed.

Arbitral proceedings and the resultant award can easily be challenged and set aside if the municipal law or the ***lex arbitri*** or *the* ***lex fori*** is not complied with. It is advisable that Counsel advise the parties to agree on the number of arbitrators before a dispute is referred to arbitration.

THE AWARD REVIEW TRIBUNAL

The AMA 2023 has introduced a novel provision in section 56 creating the Award Review Tribunal (by the parties arbitration agreement) this will be through arbitration agreement which permits for a first level review of an arbitral award issued by an arbitral tribunal in the first instance arbitration conducted in Nigeria by the ART on any of the grounds provided for the setting aside of an award (S.55 (3) AMA).

The Award Review Tribunal is to be constituted in the same number as the tribunal of first instance that determined the dispute. Unless the parties agree otherwise the Award Review Tribunal shall issue its award within 60 days of its composition. A dissatisfied party can resort to the **ART** before approaching the Courts where necessary. Where the **ART** has partially or wholly upheld an award, the award can only be set aside by the court on the limited grounds of arbitrability and/or public policy.

I reproduced hereunder the provisions of the AMA dealing with the Award Review Tribunal;

Section 56(1)

> "Notwithstanding section 55 (1) of this Act, (application to set aside before the court) the parties may provide in their Arbitration agreement that an application to review an arbitral award on any of the grounds set out in section 55 (3) of this Act shall be made to an Award Review Tribunal.

56(2) "Where the parties have agreed that an Award shall be reviewed by an **Award Review Tribunal,** a party who is aggrieved by an arbitral award and who seeks to challenge the award on any of the grounds set out in Section 55(3) of this Act shall, within the same time frame specified in section 55(4) of this Act, send to the other party a written

communication which indicates its intent to challenge the Award (in this Act referred to as "Notice of Challenge").

S. 56(3) – The Notice of challenge shall include the documents referred to in section 57(2) of this Act.

S. 56 (4) – Unless the parties otherwise agree, the Award Review Tribunal shall;-

a) Consist of same number of Arbitrators in the Arbitral Tribunal that first determined the dispute ("in this Act referred to as "The First Instance Tribunal") and

b) Be constituted when in the case of a sole arbitrator, the arbitrator accepts the appointment or, where there is more than one arbitrator, when every arbitrators accept their respective appointment.

S 56 (5) the provisions of this Act applies ***mutatis - mutandis*** to the Award Review Tribunal:-

a) Section 7 – Appointment of Arbitrators
b) Section - 8 (Grounds of Challenge)
c) Section – 9 (Challenge Procedure)
d) Section – 10 (Failure or impossibility to act)
e) Section – 11 (Appointment of substitute arbitrator)
f) Section – 12 (Withdrawal, death, and cessation of office of an arbitrator)
g) Section – 13 (Immunity of an Arbitrator, appointing authority and arbitral institution)
h) Section – 14 (Competence of an arbitral Tribunal to rule on its jurisdiction)
i) Section – 30 (Equal treatment of parties
j) Section – 41 (default of a party)
k) Section – 44 (decision making by arbitral tribunal)
l) Section – 47 (Form and content of award)

m) Section – 50 (cost of the arbitration) and 49 of the first Schedule (Fees and expenses of arbitrators)
n) Section – 53 (Joint and several liability of the parties for arbitrators fees and expenses;) and
o) Section – 54 (his on the Award)

S 56 (6) Parties may agree on the procedure to be followed by the Award Review Tribunal, otherwise the Award Review Tribunal shall conduct its proceedings in a manner as it considers appropriate and shall endeavor to render its decision in the form of an award within **60 days** from the date on which it is constituted.

Section 56 (7) An application for enforcement of an award under section 57 of this Act may be made to the court notwithstanding that a party has given a Notice of Challenge to the other party under subsection 2, unless,

a) Proceedings upon the application for enforcement is stayed until after the decision of the Award Review Tribunal has been rendered, and
b) Notwithstanding sub paragraph (a) the Court makes such order as to the interim preservation of the subject of the dispute or as to giving security for the award as may be just in the circumstances of the case.

Section 56 (8) where the Award Review Tribunal has set aside the award in whole or in part, a party may apply to the court to review the decision of the Award Review Tribunal and where the Court decides that the decision of the Award Review Tribunal is unsupportable having regards to the grounds on which the Award Review Tribunal set aside the award, the Court shall reinstate the award, or the part of it that was set aside by the Award Review Tribunal.

Section 56 (9) Where the Award Review Tribunal has affirmed the award in whole or in part, an application to the Court to set aside the award of First Instance Tribunal or the award of the Award Review Tribunal, the application

may only be made on the ground set out in Section 55 (3) (b) (i) or Section 55 (3)(b) (ii) of this Act.

Practitioners have raised great concerns about this novel provision on the possibility of increase in arbitration costs and longer time for the final settlement and enforcement of the arbitral award.

The enactment of AMA 2023 promises to reform the arbitration law in Nigeria. The grounds for the challenge before the Award Review Tribunal are similar to the grounds for setting aside of arbitral awards under the ***UNCITRAL Model Law (2006).*** They are also in line with the globally accepted grounds for refusing enforcement under the ***New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*** The intent and purpose of the Act to my mind is to further strengthen the practice of arbitration in Nigeria. The Global Arbitral institutions view the new Act as a major step in developing arbitration practice in Nigeria. It remains to be seen how the courts in Nigeria will interpret this novel provisions.

Many provisions introduced in the Act reflect the **UNCITRAL Model Law** (**"the Model Law"**) in arbitration and applies to both domestic and international arbitration.