International Arbitration

2017

Third Edition

Contributing Editor:
Joe Tirado

glg global legal group

www.globallegalinsights.com

CONTENTS

Nigeria

Elizabeth Idigbe & Emuobonuvie Majemite
PUNUKA Attorneys & Solicitors

Introduction

The main arbitration law of Nigeria is the Arbitration and Conciliation Act 1988 (ACA) (Cap A18 Laws of the Federation of Nigeria 2004). ACA is largely based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, with minimal differences. Nigeria is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and ACA domesticated Nigeria's treaty obligations arising under the New York Convention. Nigeria is a party to some Regional Conventions concerning the recognition and enforcement of arbitral awards. See, for instance, the Economic Community of West African States (ECOWAS) Energy Protocol. Article 26 thereof provides for the settlement of disputes between a contracting state and an investor by the International Centre for Settlement of Investment Disputes (ICSID), if the investor's country and that of the contracting party are both parties to the ICSID Convention or a sole arbitrator or *ad hoc* arbitration tribunal established under the United Nations Commission on International Trade Law (UNCITRAL) Rules, or an arbitral proceeding under the Organisation for the Harmonisation of Trade Laws in Africa (OHADA). There is also the Treaty of ECOWAS (1993 revised Treaty). Article 16 thereof establishes an Arbitration Tribunal whose powers, status, composition and procedure were to be set out in a subsequent protocol.

In 1989, the Regional Centre for International Commercial Arbitration Lagos (RCICAL) was established in Lagos, Nigeria under the auspices of the Asian African Legal Consultative Organisation (AALCO) as a non-profit, independent, international arbitral institution to provide, amongst other things, a neutral forum for dispute resolution in international commercial transactions. Its establishment is also geared towards encouraging settlement of disputes arising from international trade and commerce and investments within the region where the contract was performed. The continued operation of the RCICAL in Nigeria was ratified by a treaty executed in April 1999 between Nigeria and the AALCO. The legal framework for the existence of the RCICAL in Nigeria is embodied in the Regional Act No. 39 of 1999. The RCICAL has an autonomous international character and enjoys diplomatic privileges and immunities under international law for the unfettered conduct of its functions. See the Diplomatic Immunities and Privileges (Regional Centre for International Commercial Arbitration) Order 2001. RCICAL renders assistance in the enforcement of awards made under its Rules. See Rules 35.6 and 35.8 of RCICAL Rules.

There is no different arbitration law for international arbitration as ACA governs both domestic and international arbitration. There are myriad arbitral institutions in Nigeria including but not limited to the Lagos Court of Arbitration, the Regional Centre for International Commercial Arbitration and the Lagos Multi-Door Courthouse. Foreign

arbitral institutions also have branches in Nigeria such as the International Chamber of Commerce Nigeria and the Chartered Institute of Arbitrators, UK (Nigeria Branch). Each of these institutions have their respective rules governing arbitration and parties may elect that arbitrations be subject to the rules of the institutions rather than the rules attached to ACA. There are no special courts for international arbitration, but for a foreign arbitral award to enforced or for an application to set aside an arbitral award, an application must be made either to the Federal High Court or to the High Court of the State.

Arbitration agreement

The basic legal requirement of an arbitration agreement under this law is that an arbitration agreement must be in writing or must be contained in a written document signed by the parties. Section 1 of ACA provides that every arbitration agreement shall be in writing and contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement, or in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another. Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract. This provision presupposes that arbitration must be consensual and indicates that an arbitration agreement may either be an express clause in a contract whereby parties agree to refer future disputes to arbitration, or in a separate document (Submission Agreement), whereby parties agree to submit their existing dispute to arbitration. An arbitration agreement may also be inferred from written correspondence or pleadings exchanged between parties.

However, there are situations of non-consensual or compulsory arbitration, as depicted in statutes and consumer standard form contracts. For instance, under the Pension Reform Act, the regulator National Pension Commission, PENCOM, can refer any dispute to arbitration. Also, under the National Investment Promotion Act, any foreign investor who registers under the Act is automatically entitled to bring a treaty arbitration under the ICSID system. Arbitration provisions contained in such statutes are deemed to be binding on any person to whom they apply.

The following additional legal requirements for a valid arbitration agreement can be distilled from the provisions of ACA:

5.1 The arbitration agreement must be in respect of a dispute capable of settlement by arbitration under the laws of Nigeria. See section 48(b)(i) and 52(b)(i) ACA.

5.2 The parties to the arbitration agreement must have legal capacity under the law applicable to them. See section 48(a)(i) and section 52(2)(a)(i) ACA.

The arbitration agreement must be valid under the law to which the parties have subjected it or under the laws of Nigeria. In other words, the agreement must be operative, capable of being performed and enforceable against the parties. See sections 48(a)(ii) and 52(a)(ii) ACA.

ACA does not stipulate any particular subject matter that may not be referred to arbitration. The question of whether or not a dispute is arbitrable is therefore left for interpretation by the courts. In ***Ogunwale v. Syrian Arab Republic*** *(2002) 9 NWLR (Part 771) 127,* the Court of Appeal held that the test for determining whether a dispute is referable to arbitration is that the dispute or difference must necessarily arise from the clause contained in the agreement. However, not all disputes are necessarily arbitrable. Only disputes

arising from commercial transactions are referable to arbitration (see section 57(1) of ACA on the definition of arbitration and commercial disputes). Disputes not falling within the category of commercial disputes (e.g. domestic disputes), would not be arbitrable under ACA, though they may be referable to customary arbitration. Such disputes as competition or anti-trust disputes with elements of criminality and nullification of patent rights are generally not arbitrable, although there are some exceptions. In ***Federal Inland Revenue Service v. Nigerian National Petroleum Corporation & 2 Ors. - Suit No. FHC/CS/774/2011,*** a case involving the Federal Inland Revenue Service (FIRS), NNPC, Shell Petroleum and other international oil companies (IOCs) operating in Nigeria, a Federal High Court in Abuja voided an arbitral award under a Joint Operating Agreement between the government and the IOCs on the ground that the subject matter of the arbitration (interpretation, application and administration of the Petroleum Profit Tax Act, the Deep Offshore Act, Education Tax Act and Company Income Tax Act) was not arbitrable, but was a function solely to be carried out by Federal Inland Revenue Service. However, the Court of Appeal in ***Statoil (Nig) Ltd v. Nigerian National Petroleum Corporation (2013) 14 NWLR (Pt. 1373) 1*** effectively overturned the decision of the Federal High Court. The Court of Appeal essentially held that jurisdiction of an arbitral tribunal is premised on the agreement of the parties and that parties are to be bound by their agreement, implying that, albeit the dispute may be related to taxation matters, if the parties agree to refer it to arbitration, then the arbitral tribunal has jurisdiction.

Also, some matters are generally more suitable for litigation than arbitration. For instance, applications for immediate enforcement of rights or preservation of *res,* e.g. the enforcement of fundamental human rights, application for *Anton Pillar, Mareva* and other injunctions, are less suitable for arbitration than litigation. In addition, since an arbitrator has no statutory power of joinder under ACA, multi-party proceedings may be less suitable for arbitration under ACA, unless the arbitration agreement makes specific provision for it. It is hoped that ACA may be revised to address multiparty provisions, as other arbitral institutions like the International Chamber of Commerce (ICC) and UNCITRAL Rules have done.

Section 40(3) of the Lagos Arbitration Law provides that a party may, by application and with the consent of the parties, be joined to arbitral proceedings, but ACA does not contain such provision. It follows that whilst Federal law does not allow joinder of non-parties, conceptually such a joinder is possible under the Lagos Arbitration Law. At present, no jurisprudence has developed on this point. In contemporary practice and with the spate of increase in multi-party (and multi-contract) arbitrations, parties who were not parties to the original arbitration agreement are made to submit to the jurisdiction of an arbitral tribunal. For instance, in ***FGN v. CTTL*** (Unreported Suit No. FHC/L/CS/421/2009), the Federal High Court refused to set aside an ICC award against the Federal Government of Nigeria, a non-signatory and its state agency which signed the arbitral agreement, on the basis that though FGN was not a party to the agreement, it had given presumed consent by its conduct and involvement with the execution and implementation of the contract.

ACA cloaks the arbitral tribunal with power to rule on its own jurisdiction – the competence-competence rule. There is no specific provision in ACA that an arbitration is separable from the substantive contract. However, there is copious jurisprudence that an arbitration agreement is severable and separate from the substantive contract and therefore survives novation, unenforceability, termination or otherwise of the substantive contract, such as ***NNPC v Klifco (Nig) Ltd (2011) 10 NWLR (Pt. 1255) 209***.

Arbitration procedure

Arbitral proceedings are commenced by the issuance or communication of a Notice of Arbitration by the Claimant to the Respondent in the prescribed format in Article 3 of the Rules attached to the ACA. A 30-day notice period is stipulated.

Technically, evidential hearings can take place outside the seat of arbitration, although the law of the seat of arbitration would apply. Parties are at liberty to elect to have the hearings in a place other than the seat of arbitration. However, in practice and owing to administrative convenience in terms of access to the national courts for the enforcement of orders or interim preservatory orders, parties tend to have hearings in the same jurisdiction as the place where the hearing is held.

ACA and the Arbitration Rules contain minimal procedural provisions on rules of evidence. (See section 20 ACA and Articles 24-29 of the Rules.) In Nigeria, the substantive law of evidence in legal proceedings is the Evidence Act 2011. This Act repealed the old Evidence Act (Cap E.14 Laws of the Federation of Nigeria 2004) which provided in section 1(2)(a) that the Evidence Act is not strictly applicable to arbitral proceedings. The 2011 Evidence Act does not expressly exclude arbitral proceedings from its application, but the preamble "*...A New Evidence Act which shall apply to all judicial proceedings in or before courts in Nigeria; and for related matters"* implies that the Act does not strictly apply to arbitration. However, the general rules of evidence, like fair hearing, natural justice, equal treatment of parties and full opportunity of parties to present their case, rule against hearsay evidence, etc., are applicable to arbitral proceedings by virtue of the provisions of ACA and case law. With the agreement of parties, an arbitral tribunal may adopt any other rules of evidence which it considers appropriate. Tribunals in Nigeria sometimes adopt the International Bar Association (IBA) Rules of Taking Evidence.

By section 20(6) of ACA, which provides that "no person can be compelled under any writ of subpoena to produce any document which he could not be compelled to produce on the trial of an action", it appears that the general rules on privileged documents will apply in arbitration. Generally, privileged communications include: any document or communication made between a legal practitioner (whether external or in house counsel) and his client in the course of his engagement (see ***Abubakar v. Chuks*** *(2007) 18 NWLR (Part 1066) SC 386);* documents or agreements made without prejudice between parties in the course of negotiations; and documents which, by consent and agreement of parties, have been agreed not to be used in proceedings. Documents or communications made in furtherance of an illegal purpose or showing that a crime or fraud has been committed are not privileged. Parties may agree that a document which is ordinarily privileged, should be tendered in evidence. In such cases, privilege is deemed to have been waived. Privilege is also deemed to be waived where a party calls his counsel (external or in house) as a witness and questions are put to the Counsel on privileged matters.

Article 24(3) of the Arbitration Rules provides that the tribunal may, at any time during the arbitral proceedings, require the parties to produce documents, exhibits, or other evidence within such a period of time as the arbitral tribunal shall determine. Section 20(6) of ACA provides that any party to an arbitral proceeding may issue a writ of subpoena *ad testificandum* or subpoena *duces tecum,* i.e. for the purpose of compelling attendance of a witness to give oral testimony or to produce documents. By these provisions, an arbitral tribunal has the authority to order the disclosure of documents (including third party disclosure). This power is, however, limited by the *proviso* in section 20(6) of ACA to the extent that no person can be compelled under any writ of subpoena to produce any

document which he could not be compelled to produce on the trial of an action.

By virtue of section 23(1) of ACA, a court is able to intervene to compel the disclosure of documents. Section 23(1) provides that the court or judge may order that a writ of subpoena *ad testificandum* or of subpoena *duces tecum*, shall issue to compel the attendance before any tribunal of a witness wherever he may be within Nigeria. Thus where, under section 20(6) of ACA or Article 24(3) of the Arbitration Rules, any person refuses to produce documents requested by a party or by the tribunal, the court can compel the disclosure or production of documents.

There is no ACA provision on confidentiality. While Article 25 (4) of the rules attached to ACA provides that hearings shall be held in camera, this only means that proceedings shall be conducted by the arbitral tribunal, the registrar, the parties alone, their counsel and representatives and any other person allowed by the parties to be present, to the exclusion of the general public. The provision does not impose an obligation not to disclose the proceedings to third parties. In practice, however, parties tend to keep proceedings confidential because the substantive contract usually contains a confidentiality clause by which the parties are bound. There are no rules mandating counsel to consider the London Court of International Arbitration (LCIA) Guidelines or IBA Guidelines, but parties may elect to abide by them. There are no provisions on the evidence of expert witnesses.

Arbitrators

Under ACA, parties have autonomy to appoint arbitrators of their choice. This autonomy is, however, limited to the extent that the arbitrators so-appointed must be independent and impartial and must make a declaration or disclosure of any circumstances that may affect their independence or impartiality. Also, the parties' choice of arbitrators must be in accordance with the arbitration agreement itself. For instance, the chosen arbitrator(s) must have the experience or professional qualification stipulated in the arbitration agreement, in order to have a properly composed tribunal and, consequently, a valid award.

Under ACA, parties are free to agree on the method of appointment of arbitrators, but where they do not stipulate the method, or the method chosen by them fails, the arbitrator(s) will be appointed by the court. Section 7 of ACA prescribes a default procedure. It provides that the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator. Where no procedure is specified, in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third, but if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement.

In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the court on the application of any party to the arbitration agreement made within 30 days of such disagreement. Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under the procedure, or the parties or two arbitrators are unable to reach agreement as required under the procedure or a third party, including an institution, fails to perform any duty imposed on it under the procedure, any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment. A decision of the court under subsections (2) and (3) of section 7 shall not be subject to appeal.

See the case of ***Ogunwale v. Syrian Arab Republic*** *(2002) 9 NWLR (Part 771) 127,* where the court held that by virtue of section 7(4) of the Arbitration and Conciliation Act, a decision of the High Court relating to the appointment of an arbitrator shall not be subject to appeal. However, it is only a decision strictly within sections 7(2)(a) and (b) and section 7(3)(a), (b) and (c) of the Act that shall not be subject to appeal. The court further held that sections 7(4) and 34 of the Arbitration and Conciliation Act cannot override the right of appeal conferred on a party by section 241(1) of the 1999 Constitution, as such right of appeal has constitutional backing.

It is a fundamental requirement under ACA that an arbitrator must be independent and impartial. The arbitrator has a duty to ensure and maintain his independence and impartiality and to disclose any circumstances which may affect his independence and impartiality. This duty endures throughout the arbitration proceedings, covering all parties until the final award. A breach of it may constitute misconduct for which an award may be set aside. Even a party-appointed arbitrator is bound by this duty to be and to remain independent and impartial. The requirement of independence and impartiality of an arbitrator is emphasised by section 9 of ACA and the section provides for the challenge of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Generally, the concept of impartiality presupposes that an arbitrator must not be biased in favour of one of the parties or as regards the issues in dispute. Independence and neutrality presupposes that the arbitrator has no such relationship or derives no such benefits from any of the parties as would oblige him to act in favour of that party. From the wordings of section 8 of ACA, the arbitrator's duty to maintain his independence and impartiality or his duty of disclosure is a mandatory provision from which the parties cannot derogate. Article 12 of the 2008 Arbitration Rules of the Regional Centre for International Commercial Arbitration Lagos contains similar provisions on the independence and impartiality of an arbitral tribunal. Article 12.2 thereof emphatically provides that no arbitrator shall act in the arbitration as an advocate of any party and no arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute.

ACA does not provide for arbitrator immunity, but the Lagos Arbitration Law 2009 provides for arbitrator immunity. Section 18 of the Lagos Law provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of the arbitrator's functions as arbitrator, unless the act or omission is determined to have been in bad faith. This provision applies to an employee or agent of an arbitrator as it applies to the arbitrator, but it does not affect any liability incurred by an arbitrator by reason of resignation. Article 45 of the Regional Centre Rules provides for absolute immunity on the Regional Centre staff, director, arbitrators and experts for any act or omission in connection with any arbitration conducted under the Rules.

Arbitral secretaries are now being frequently used in arbitrations to limit direct interface between the arbitral tribunal and the parties with their counsel and for greater administrative convenience. Many arbitral institutions now encourage presiding or sole arbitrators to select arbitral secretaries from qualified arbitration practitioners in their database. There are no rules governing arbitral secretaries but they would be bound by the same standards governing the arbitrators. All arbitrators are bound by the rules of professional conduct promulgated to regulate standards of service and professionalism in the respective arbitral institutions to which they belong. For instance, the Chartered Institute of Arbitrators, UK has its Code of Professional and Ethical Conduct for Members. In a similar manner, the Lagos Multi-Door Courthouse has its Code of Ethics for Arbitrators.

Interim relief

Under ACA, an arbitral tribunal has the power to 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 to require any party to provide appropriate security in connection with any measure taken. (See section 13 of ACA.) There is no restriction on the type of interim reliefs which the tribunal can grant; however, it is suggested here that in awarding interim reliefs, the tribunal should be careful to act within the scope of its jurisdiction, as determined from the arbitration agreement and the law applicable to the contract.

Although section 13 of ACA confers on the tribunal the power to grant interim reliefs without recourse to court, it is doubtful if the tribunal can enforce compliance with its interim orders since the tribunal has no coercive powers. The Lagos Arbitration Law 2009 puts it more clearly by providing in section 29(1) that an interim measure issued by an arbitral tribunal shall be binding, unless otherwise provided by the arbitral tribunal, recognised and enforced upon application to the High Court by a party, irrespective of the jurisdiction or territory in which it was issued, subject to the provisions of subsections (2) and (3) of this section. Article 29 of the Regional Centre Rules also gives the tribunal power to grant interim measures; it provides that such interim measures may be made in the form of an interim award.

ACA does not expressly give the courts the power to grant interim relief in respect of arbitral proceedings. However, the courts are entitled by the Rules of Court and under their inherent jurisdiction to grant interim orders in any matter where there is a situation of urgency and this power of court can be inferred from Article 26(3) of the Arbitration Rules. Thus, once a party can show that there is a situation of urgency which will cause irreparable harm if not remedied by an interim order of the court, the court is entitled to grant the order. (See ***Afribank v. Haco*** *supra.)* See also ***Maevis v. FAAN*** (Unreported Suit No. FHC/L/CS/1155/2010).

In the recent case, ***Nigerian Agip Exploration Ltd v. Nigerian National Petroleum Corporation and Oando Oil*** (***NAEL v. NNPC***, unreported CA/A/628/2011), (February 25 2014), the court emphasised that urgency is a condition for the granting of an interim injunction, stating that such injunctions are "granted in cases of extreme urgency so as to preserve the *'res'* pending the determination of the motion on notice".

The Lagos Arbitration Law expressly confers on the court the power to make interim orders in respect of arbitral proceedings. (See sections 6(3) and 21 thereof.)

A party's request for interim relief would in most cases have effect on the *res,* i.e. the subject matter of the dispute, and the parties' or tribunal's dealings with it, rather than on the tribunal's jurisdiction. However, if the nature of interim relief sought affects the arbitral proceeding itself, such as where the relief is sought to restrain the commencement or continuance of arbitration on the grounds that the dispute is not arbitrable or that the arbitration agreement is not valid, etc., then the tribunal's jurisdiction may be affected by the request for relief. Be that as it may, if an arbitral tribunal has already been constituted, such objections or grounds ought to be brought before the tribunal itself.

Arbitral tribunals are empowered to grant interim measures by virtue of Section 13 of the ACA while, by virtue of Section 34 of ACA, the national courts are restrained from intervention save as specifically provided under ACA. There is no express provision for the enforcement of interim measures granted by an arbitral tribunal but it is foreseeable that in the event a party attempts to flout such an interim measure, recourse could be had to the national court to prevent such contemptuous attitude.

The Arbitration Law of Lagos State 2009 is of great assistance, however, by virtue of its Sections 21 to 30. Specifically, an interim measure granted by an arbitral tribunal is given binding enforceability upon application to the High Court (Section 29).

Interestingly, there are two conditions for the grant of an interim measure, *viz*. (i) that monetary damages will not be adequate remedy should the interim measure not be granted, and (ii) that there is a serious issue to be determined in the substantive claim which would not fetter the discretion of the arbitral tribunal to make subsequent determination.

The arbitral tribunal is additionally empowered to extend, modify, suspend or terminate any interim measure. There is also provision for the tribunal directing for security for the interim measure to be supplied by the applicant party. The applicant party in whose favour an interim measure is granted is also mandated to inform the tribunal of any material change in circumstances on which basis the interim measure was granted *ab initio*. Where a tribunal finds that an interim measure ought not to have been granted, it is empowered to award costs against the beneficiary party.

ACA does not provide for anti-suit injunctions in aid of arbitration and this procedure has not been tested in Nigeria to our knowledge. The courts are, however, empowered under ACA (Sections 4 and 5) to order a stay of court proceedings commenced in breach of an arbitration clause.

ACA also does not provide for anti-arbitration injunctions, but a court can grant them under its inherent jurisdiction. In the unreported case, Court of Appeal ***Case No: CA/L/331M/2015 – Shell Petroleum Development Company of Nigeria and Ors v Crestar Integrated Natural Resources Limited***, the Court granted an anti-arbitration injunction against the Claimant in the arbitral proceedings.

The national courts have the power to order security for costs under the various Rules of Court. ACA confers similar powers on an arbitral tribunal, but does not confer an express power on the courts to order security for costs in relation to arbitration proceedings. Section 13(b) of ACA provides that the arbitral tribunal may require any party to provide appropriate security in connection with any interim measure made or taken. Sections 26(1) and 29(3) of the Lagos Law contain similar provisions.

Arbitration award

Section 26 of ACA sets out the legal requirements of an arbitral award. It provides that an arbitral award must be written, signed by the arbitrator (or a majority of them in the case of three arbitrators), state the date and place it was made, contain the reasons on which it is based and be published to the parties. Also, an arbitral award must not contain decisions or deal with disputes or matters not submitted to arbitration, must be in accordance with the arbitration agreement and governing law, must be enforceable and must not be contrary to public policy. (See sections 48 and 52 of ACA.) ACA does not state that an must award be signed on every page by the arbitrator(s), but in practice, some arbitrators sign every page of the award for authenticity.

Section 49 of ACA provides that the arbitral tribunal shall award costs in its award. Costs include the fees of the arbitral tribunal, travel and other expenses incurred by the arbitrators, the cost of expert advice and of other assistance required by the arbitral tribunal, travel and other expenses of witnesses to the extent approved by the tribunal, reasonable costs of legal representation and assistance of the successful party that were claimed during the arbitral proceedings. The general practice is that costs follow the event and the unsuccessful party pays the costs, subject, however, to the circumstances of each case, for instance, the extent

to which the other party has been guilty of delay in the course of the arbitral proceedings. Article 40 of the Arbitration Rules gives the arbitral tribunal the power to apportion costs between the parties based on the circumstances of the case. ACA does not list all the circumstances that may affect apportionment of costs. However, the effect of sealed offers or settlement offers is one relevant factor which arbitrators generally consider. The High Court of Lagos State Civil Procedure Rules 2012 has expressly introduced the effect of settlement offers in the award of costs in judicial proceedings by the provision of Order 49(2) that where an offer of settlement made in the course of Case Management or ADR is rejected by a party and the said party eventually succeeds at trial but is awarded orders not in excess of the offer for settlement made earlier, the winning party shall pay the cost of the losing party from the time of the offer of settlement up to judgment. It is hoped that the proposed amendments to ACA would include this express provision.

ACA does not give an arbitrator express powers to award interest. However, an arbitrator has inherent powers to award interest on amounts successfully claimed based on the overriding principle of award of interest, which presupposes that interest should be awarded to the claimant not as compensation for the damage done, but for being kept out of money which ought to have been paid to him. (See ***N.B.N. Ltd. v. Savol W.A. Ltd.*** *(1994) 3 NWLR (Part 333) Page 435 at 463;* and ***R.E.A. v. Aswani Textile Industries*** *(1991) 2 NWLR (Part 176) 639 at 671*.)

Challenge of the arbitration award

In Nigeria, an arbitral award is final and binding. An award can only be challenged on limited grounds as stipulated in ACA. A party may apply to court to set aside the award or to refuse recognition and enforcement of the award on special grounds under sections 29, 30, 48 and 52 of ACA. Such grounds include:

- Incapacity of a party to the arbitration agreement.
- The arbitration agreement is not valid under the law which the parties have indicated should be applied or under Nigerian law.
- A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case.
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.
- The award contains decisions on matters which are beyond the scope of the submission to arbitration.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place.
- The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.
- The subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or the recognition or enforcement of the award is against public policy of Nigeria.

Beyond these, an award cannot ordinarily be challenged in substance. See: ***Baker Marina (Nig.) Ltd. v. Danos & Curole Contractors Inc.*** *(2001) 7NWLR (Part) 712 p. 340;* ***Ebokan v. Ekwenibe & Sons Trading Co.*** *(2001) 2NWLR (Part) 696 p. 32 at 36;* and ***Ras Pal Gazi Const.Co. v. F.C.D.A.*** *(2001) 10NWLR pt.722 p. 559 at 564.*

In the case of ***Mutual Life and General Insurance Ltd v. Kodi Iheme*** (*2013) 2, CLRN, 68*, the court held that "there must be an error of law on the face of the award to set aside an arbitral award". This demonstrates that the Nigerian Courts will not be eager to set aside awards where the parties have agreed to resolve their dispute by arbitration and abide by the decision of the arbitral tribunal.

Also, in the case ***NAEL v. NNPC*** (*supra*), the Court of Appeal justified the restrictions for setting aside an award by stating that "the underlining principle of arbitration is to ensure that parties who have voluntarily elected independent umpires whom they trust to settle their matters should be bound by the decision of the arbitrator without resort to the courts". ACA provides for certain exceptions for the court to intervene in the "interest of justice and fair play".

An arbitral tribunal is properly empowered to clarify, correct, amend or make an additional award pursuant to the provisions of Section 28 of ACA. This power may be exercised *suo motu* or upon a request by a party. It is germane to note that this power is limited to thirty (30) days and is therefore not a power open to be wielded in perpetuity.

Enforcement of the arbitration award

A foreign arbitral award is enforced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 which has been domesticated by ACA. In practice, the courts in Nigeria will recognise and enforce an arbitral award in the absence of any valid and convincing ground for setting aside or for refusal of recognition and enforcement. A party applying for the recognition and enforcement of an arbitral award shall furnish the court with:

(i) the duly authenticated original award or a duly certified copy thereof;

(ii) the original arbitration agreement or a duly certified copy thereof; and

(iii) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.

If the application is brought in the High Court of Lagos State, the application is by motion on notice, stating the grounds with supporting affidavit and the above-mentioned documents. See Order 39 Rule 4 of the Lagos High Court Civil Procedure Rules 2012. Under Order 52 Rule 16 of the Federal High Court Civil Procedure Rules 2009, an application for enforcement of an award may be made *ex parte,* but the court hearing the application may order it to be made on notice. The application shall be supported with an affidavit which shall:

(a) exhibit the arbitration agreement and the original award or certified copies;

(b) state the name, usual or last known place of abode or business of the applicant and the person against whom it is sought to enforce the award; and

(c) state, as the case may require, either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

Generally, the courts would enforce a foreign arbitral award unless there is a compellable reason not to, such as evidence that the arbitral award has been set aside by the national court in the seat of the arbitration.

Investment arbitration

Nigeria ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States in August 1965. The Convention came into force in Nigeria in October 1966.

Nigeria is a party to a significant number of Bilateral Investment Treaties (BITs). For instance, there is the BIT between the Republic of Turkey and the Federal Republic of Nigeria Concerning the Reciprocal Promotion and Protection of Investments. Article VI thereof provides for submission of disputes to the ICSID, or to an *ad hoc* court of arbitration under the UNCITRAL Arbitration Rules or to the Court of Arbitration of the Paris International Chamber of Commerce. Others include the U.S-Nigeria Trade and Investment Framework Agreement (TIFA), Nigeria-Egypt, Nigeria-France, Nigeria-UK, Nigeria-Germany BITs for the Promotion and Protection of Investments, and many others. *Nigeria is not a party to the Energy Charter Treaty, although Nigeria became an observer to the Charter in 2003.*

Domestically, the Nigerian Investments Promotion Commission Act allows settlement of disputes under the auspices of the ICSID. Section 26 provides that any dispute between a foreign investor and the Nigerian government shall be settled within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the investor's country are parties and, where there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the ICSID Rules shall apply.

In Nigeria, section 308 of the 1999 Constitution of the Federal Republic of Nigeria provides immunity from court proceedings for the sovereign who is the executive arm of government. Thus actions that are similar to this must be strictly construed in favour of the sovereign. The defence of state immunity does not, however, prevent Nigeria as a state or sovereign from agreeing to submit to the authority of an arbitral tribunal. As regards jurisdictional immunity, where Nigeria, as a sovereign state, has agreed to arbitrate, such agreement would be treated as a waiver of immunity. Generally, by virtue of the New York Convention which is domesticated in Nigeria as Schedule 2 to ACA, Nigerian courts have jurisdiction to recognise an arbitral award made under an agreement to arbitrate where the seat of arbitration is Nigeria. Similarly, by virtue of the New York Convention, where Nigeria has signed a valid agreement to arbitrate, an award against it may be recognised and enforced by courts in a foreign jurisdiction in which she has assets. Thus, a valid and binding agreement to arbitrate to which Nigeria is a party will also operate as a waiver of immunity from execution.

There have, however, not been any recent investment arbitrations initiated against Nigeria.

Elizabeth Idigbe
Tel: +234 1270 4791 ext 103 / Email: e.idigbe@punuka.com

Elizabeth Idigbe is a legal practitioner and a Fellow of the Chartered Institute of Arbitrators, UK, Member of the Advertising Practitioners Council of Nigeria, and Managing Partner of PUNUKA Attorneys & Solicitors. She has a Diploma in International Arbitration, Chartered Institute of Arbitrators, UK (2016); Diploma in International Commercial Arbitration, Chartered Institute of Arbitrators, UK (2015); and a Diploma in Advertising, Advertising Practitioners Council of Nigeria (2004). She also has a Certificate in Advertising, Advertising Practitioners Council of Nigeria (2002).

She has a Master of Law (LL.M), University of Lagos, Akoka-Yaba, Lagos (1989). She is also a Barrister at Law (BL), Nigerian Law School (1987); and Bachelor of Law (LL.B), University of Benin (1986).

She has experience in arbitration which includes being: Lead Counsel to the Claimant in arbitration between Whassan Eurest Nigeria Limited v. Esso Exploration and Production Nigeria (Offshore East) Limited in respect of a dispute regarding unpaid invoices for services rendered on-board vessels belonging to the Defendant; Lead Counsel to the Claimant in arbitration between Royal Exchange Plc v. Mr Patrick Nyamemba Tumbo in respect of breach of contract of employment; Counsel to the Respondent in arbitration between Beneficial Endowment Limited & anor v. Victoria Water Service Limited in respect of dispute regarding charges made by a water supply company, to mention but a few.

She has also previously served as: General Manager HR/Corporate Services/ Company Secretariat, African Petroleum Plc; Company Secretary/Legal Adviser, Defunct Ivory Merchant Bank Limited; and Associate, Chike Chigbue & Co., Temple Chambers. She is a Member, International Bar Association; Member, International Trademark Association (INTA); Member, Business Recovery & Insolvency Practitioners Association of Nigeria (BRIPAN); Member, Women in Management & Business; Member, International Federation of Women Lawyers (FIDA); and Member, Advertising Practitioners Council of Nigeria (APCON).

Emuobonuvie Majemite
Tel: +234 1270 4791 ext 119 / Email: e.majemite@punuka.com

Emuobonuvie Majemite is an Associate at PUNUKA Attorneys & Solicitors. He has experience in arbitration and dispute resolution, legal consultancy and advisory services. He has acted as counsel to in several arbitral proceedings. Emuobonuvie holds a Bachelor of Laws (LL.B.) degree from the University of Nottingham and a Bachelor of Laws (BL) degree from the Nigerian Law School. He is a member of the Nigerian Bar Association and an Associate of the Chartered Institute of Arbitrators, UK of which he is an ardent member of the Young Members Group. He is accredited by the Corporate Affairs Commission. He has also published several essays ranging from constitutional law matters to intellectual property law to property law practice.

PUNUKA Attorneys & Solicitors

Plot 45, Oyibo Adjarho Street, Lekki Phase 1, Lagos, Nigeria
Tel: +234 1 270 4789 / Fax: +234 1 270 4790 / URL: www.punuka.com

Other titles in the **Global Legal Insights** series include:

- **Banking Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Commercial Real Estate**
- **Corporate Tax**
- **Employment & Labour Law**
- **Energy**
- **Fund Finance**
- **Initial Public Offerings**
- **Litigation & Dispute Resolution**
- **Merger Control**
- **Mergers & Acquisitions**

Strategic partner