

The International Comparative Legal Guide to:

International Arbitration 2009

A practical insight to cross-border International Arbitration work



Published by Global Legal Group with contributions from:

Advokaturbüro Dr. Dr. Batliner & Dr. Gasser
 ÉLEX

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Alexiou & Kosmopoulos Law Firm

Anderson Mori & Tomotsune

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Wilmer Cutler Pickering Hale and Dorr LLP

Nigeria

'Funke Adekoya SAN



Adedapo Tunde-Olowu



AELEX

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Nigeria?

An arbitration agreement must be in writing and satisfy the legal requirement of a contract. The agreement must be mutual and cover an arbitrable dispute.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

Apart from the requirement of legal capacity to enter into a contract, there are no special requirements or formalities required.

1.3 What other elements ought to be incorporated in an arbitration agreement?

The Act does not specify any other elements. However it is usual to state the place and language of the arbitration, applicable law, number of arbitrators and procedure for their selection.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

The Nigerian Supreme Court in *M.V Lupex v. NOC & S Ltd* (2003) 15 NWLR (Pt 844) 469 held that where parties have agreed to refer their dispute to arbitration, the court has a duty to enforce the agreement of the parties by staying any proceedings commenced in court contrary to the arbitration agreement.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

Ordinarily, the courts will enforce the agreement of parties. Some State High Court Rules provide for court annexed ADR.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Nigeria?

The Arbitration and Conciliation Act, Chapter A18, Laws of the Federation of Nigeria, 2004 (the "Act") which came into force on

14 March 1988 is federal legislation governing arbitration proceedings in Nigeria. The Act applies only to commercial arbitration. Some States also have Arbitration Laws.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

Although the Act governs both domestic and international arbitration, §43 stipulates that Part III of the Act which provides for appointment of arbitrators, making of awards, termination of proceedings, recognition and enforcement of awards applies only to international arbitration.

The mandatory provisions of §4 of the Act which empower a court to stay proceedings brought in breach of an arbitration agreement is believed to apply to international arbitration while the discretionary power to stay proceedings under §5 is thought to apply to domestic arbitration.

The Act contains mandatory arbitration rules for domestic arbitration, while parties may choose the rules to govern international arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

The Act is an enactment of the UNCITRAL Model Law of Arbitration, with a few differences. Unlike the Act, the Model Law defines an arbitration agreement (Article 7).

Unlike the Act, Article 13(1) of the Model Law allows parties to agree on the procedure for challenging the appointment of an arbitrator.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Nigeria?

There are no mandatory rules governing international arbitration sited in Nigeria.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Nigeria? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Disputes arising out of criminal matters, illegal and void contracts,

or leading to a change of status of the parties are not arbitrable. The test is whether the dispute can be compromised lawfully by way of accord and satisfaction (*United World Ltd Inc v. MTS* (1998) 10 NWLR (Pt 568)106.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The arbitrator is competent to rule on his own jurisdiction and any objections to the existence and validity of the arbitration agreement. An arbitration clause is treated as independent of the other terms of the contract; a decision by the arbitral tribunal that the contract is null and void does not invalidate the arbitration clause (§12).

3.3 What is the approach of the national courts in Nigeria towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The courts will stay litigation brought in breach of an arbitration agreement provided the stay does not prejudice the plaintiff or permanently deny him of any redress (*Sonnar (Nig) Ltd v. Partenreedri M.S. Nordwind* (1987) 3 NWLR (Pt 66) 520).

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

A court will address the issue of the jurisdiction and competence of an arbitral tribunal where it is raised in an application to set aside the award either on the ground that the award contains decisions on matters which are beyond the scope of the submission or that the arbitrator has misconducted himself (§31 of the Act), where a party seeks a refusal of recognition of an award (§32 of the Act) or where a party applies to stay an action brought in breach of an arbitration agreement.

3.5 Under what, if any, circumstances does the national law of Nigeria allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The tribunal has no power to assume jurisdiction over non-parties to the arbitration agreement. The Act however empowers a court to support the arbitral process by issuing at the request of a party a *subpoena* to compel the attendance of witnesses or the production of documents by a non-party.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Nigeria and what is the typical length of such periods? Do the national courts of Nigeria consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The limitation laws of the various States and sometimes statutory corporations specify time limits for bringing actions. Claims in an action based on contract or tort must be brought within six years. The rules of limitation are considered substantive by our national courts.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

This depends largely on the agreement of the parties. Where there is no agreement, Nigerian law will apply to domestic arbitration as no conflict of law issues arise. With respect to international arbitration, the tribunal shall apply the law determined by the conflict of law rules it considers applicable.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The principle of mandatory rules of law has not been given any acknowledgment by the Act.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The law applicable to the substance of the dispute will govern the formation, validity and legality.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The only limits to party autonomy is with regards to the number [3] and the procedure for selection [§6 & 7 of the Act] where the agreement is silent on the point.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

§7 makes a court the appointing authority where the chosen selection method fails. The court must be guided by any selection criteria stated in the arbitration agreement.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court can intervene in domestic arbitrations where no procedure for selection is specified or where the procedure has failed. A copy of the notice of arbitration, the arbitration clause and the contract from which the dispute has arisen must be attached to the affidavit supporting the requesting party's intervention. (Article 8 of the Rules.)

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

§8 imposes a continuing obligation on an arbitrator to disclose anything that may give rise to doubts as to his independence or impartiality.

5.5 Are there rules or guidelines for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Nigeria?

There are no Nigerian rules or guidelines governing conflicts of interest.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Nigeria? If so, do those laws or rules apply to all arbitral proceedings sited in Nigeria?

The Rules set out in the First Schedule of the Act are mandatory for domestic arbitration but optional for international arbitrations. In international arbitration, procedural rules may be determined by agreement of the parties, by the tribunal or the law of the *lex arbitri*.

6.2 In arbitration proceedings conducted in Nigeria, are there any particular procedural steps that are required by law?

The Arbitration Rules are mandatory for domestic arbitrations only. The claimant is required to serve a notice of arbitration stating the names and addresses of the parties, the claim and the relief sought, and a proposal as to the number of arbitrators, if not previously agreed.

6.3 Are there any rules that govern the conduct of an arbitration hearing?

See question 6.1 above.

6.4 What powers and duties does the national law of Nigeria impose upon arbitrators?

The arbitrators have the power to order security for costs, to rule on its own jurisdiction, order interim measure of protection, appoint experts, conduct proceedings in such a manner as to ensure fair hearing, and terminate proceedings where parties have reached a settlement. They also have a duty to give adequate notice of date time and place of hearing, to ensure that parties are accorded equal treatment and to exercise due diligence in their duties.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Nigeria and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Nigeria?

The Legal Practitioners Act restricts foreign lawyers from practising law in Nigeria unless they are granted a warrant in respect of particular court proceedings. Since the representative of a party need not be a lawyer it is unclear whether this restriction would apply to arbitration proceedings.

6.6 To what extent are there laws or rules in Nigeria providing for arbitrator immunity?

Unlike judges who enjoy statutory immunity from suit while acting in a judicial capacity, there is no such statutory immunity for arbitrators.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Except where a challenge to an award is based on procedural issues which amount to misconduct [§30] or may have resulted in lack of fair hearing [§48], the court has no such power.

6.8 Are there any special considerations for conducting multiparty arbitrations in Nigeria (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

There are no special considerations for conducting multiparty arbitrations in Nigeria. Because arbitration is consensual, parties must agree to consolidate claims or allow third parties to join arbitral proceedings as co-claimants or co-respondents.

6.9 What is the approach of the national courts in Nigeria towards *ex parte* procedures in the context of international arbitration?

Nigerian courts are extremely wary about granting *ex parte* orders. An applicant must show an imminent danger that the subject matter of the arbitration will be destroyed, that there is extreme urgency, impossibility of serving the other party and an urgent need to maintain the *status quo*.

7 Preliminary Relief and Interim Measures

7.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

An arbitrator can grant preliminary or interim relief by way of an interim award. [Articles 26 & 32 of the Rules.] This may be a conservatory order, order for sale of perishable goods or order to provide security for costs. A party in whose favour an interim award has been made may approach the court for the purpose of enforcing such interim award (§31 of the Act).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

A court may grant interim relief although the Act does not specify under what circumstances. Such request is neither incompatible with the agreement to arbitrate, nor amounts to a waiver of such agreement (Article 26 [3] of the Rules).

A court cannot grant preliminary relief before the arbitration panel has been established, unless a substantive relief is also applied for (*Econet Wireless Ltd v. Econet Wireless (Nigeria) Ltd & 21 Ors* (Unreported decision of the Federal High Court, Lagos Division in Suit No. FHC/L/CS/832/2003)).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Nigerian courts will grant interim relief in the circumstances set out in question 6.9 above.

7.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Under §13 of the Act, an arbitral tribunal can order security for costs. A court can also do so when granting interim relief.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Nigeria?

The Evidence Act is not applicable to arbitral proceedings. The tribunal has the power to determine the admissibility, relevance, materiality and weight of evidence before it [§15(3)].

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

§19[2] permits parties to submit with their processes documents in support of their positions but does not otherwise make any specific provisions with regards to matters of disclosure/discovery. Unless otherwise agreed by the parties, the tribunal has the power to make an order of discovery against the parties. It has no power to order discovery against a third party.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery

§34 of the Act enables the court to intervene only in matters permitted by the Act; and disclosure/discovery is not one of such matters. §23 Act also empowers a court to order a *subpoena ad testificandum* or *duces tecum* to compel the attendance of a witness to testify and/or produce documents.

8.4 What is the general practice for disclosure/discovery in international arbitration proceedings?

As a matter of practice, parties tend to limit disclosure to submission of written witness statements and copies of exhibits to be relied upon. The extent of discovery practice will depend on the procedural rules chosen by the parties.

8.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

Subject to the agreement of the parties, the tribunal shall decide whether the proceedings shall be conducted by holding oral hearings or on the basis of documents or on both (§20 of the Act and Article 25) and can administer oaths or take affirmations of parties and witnesses. Cross-examination is allowed.

8.6 Under what circumstances does the law of Nigeria treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

The Evidence Act which governs the admissibility of evidence in judicial proceedings does not apply to arbitral proceedings. However general evidential principles regarding privilege and waiver may be applied by the arbitral panel.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award?

An award shall be in writing and signed by the arbitrator; state the reasons on which it is based unless the parties otherwise agree, the date it was made and the place of the arbitration.

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

There is no right of appeal under the Act. However, a party may challenge an award or request the court to refuse recognition or enforcement where for example; the award contains decisions on matters not covered by the submission; where the arbitrator has misconducted himself; incapacity of a party; where the arbitration agreement is invalid under the law agreed by the parties or where the award is against public policy.

10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

An agreement to exclude a challenge of an award on the ground of incapacity of a party or invalidity of the arbitration agreement or on the ground of public policy is not likely to be enforced. However, where parties have agreed that no reasons be given by the tribunal for the award (§26(3) (a) of the Act), the basis for challenging the award itself is removed.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The Act specifies the grounds for challenging an arbitral award. Therefore, parties cannot expand the scope beyond the grounds specified in the Act.

10.4 What is the procedure for appealing an arbitral award in Nigeria?

The Act simply provides that an award may be challenged by an application to the court. Recourse is therefore available to the various applicable High Court Rules which allow the application to be brought by originating summons or originating motion supported by an affidavit setting out grounds for the challenge. The award is usually attached to the affidavit.

11 Enforcement of an Award

11.1 Has Nigeria signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Nigeria acceded to the New York Convention in 1970 with a reservation that it will only enforce awards applicable to legal commercial relationships made in another contracting State. The Convention which is incorporated in the First Schedule of the Act has been made expressly applicable to Nigeria by §54 of the Act.

11.2 Has Nigeria signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

There are no such regional conventions.

11.3 What is the approach of the national courts in Nigeria towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In practice, Nigerian courts will be willing to grant leave to enforce a valid award in the same manner as a judgment or order. An award can be enforced by action or summarily by the successful making of an application to court. (*Eboka v Ekwenibe & Sons Trading Company* (2001) 2 NWLR (Pt 693) 32.)

11.4 What is the effect of an arbitration award in terms of *res judicata* in Nigeria? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

A valid award will create issue estoppel between the parties and their privies as regards matters and issues dealt with in the award. Either party will be precluded from re-litigating such matters or issues in subsequent litigation or arbitral proceedings.

12 Confidentiality

12.1 Are arbitral proceedings sited in Nigeria confidential? What, if any, law governs confidentiality?

Unless otherwise expressly agreed by the parties, there is an implied duty of confidentiality with respect to arbitral proceedings. The Rules specifically provide that “Hearing shall be in held in camera unless the parties otherwise agree”.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Disclosure in subsequent proceedings may be permitted with the consent of the party who produced the information or by an order of court.

12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Arbitral proceedings will not be protected by confidentiality if the parties agree otherwise.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no limits on remedies that are available in arbitration. The tribunal is entitled to order pecuniary reliefs, injunction, specific performance, interest and declaratory reliefs. Since courts are reluctant to grant punitive damages except in laid down circumstances (i.e, where statutes prescribe such damages, in cases of oppressive, arbitrary and unconstitutional conduct by government servants; or where the defendant’s tortious act is outrageous or scandalous and has been done with guilty knowledge to merit punishment) an award of punitive damages may be subject to challenge.

13.2 What, if any, interest is available, and how is the rate of interest determined?

There are no provisions in the Act governing interest. However, by §15(2) of the Act which allows the tribunal to conduct the arbitral proceedings in such a manner as to ensure fair hearing where the Act is silent on any matter, an arbitrator has implied authority to award interest. Where there is no agreement on the rate of interest, the claimed rate must be pleaded and proved before the arbitrator.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The arbitrator must fix the costs of arbitration in its award. Recoverable costs include the fees, travel and other expenses of the tribunal, the cost of expert advice to the tribunal, travel expenses of witnesses and costs for legal representation of successful party if such cost were claimed in the proceedings (Article 38).

Article 40 of the Rules provides that costs of arbitration shall in principle be borne by the unsuccessful party provided that the tribunal may decide to apportion such costs between the parties.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An award in respect of personal or company income will be subject to personal or company income tax. Similarly, an award in respect of gross receipts of a company from contracts or in respect of various types of fees or in respect of interest, dividends, royalties and rents will be subject withholding tax. Where the award is in respect of the gain accruing on a disposal, it will be subject to capital gains tax.

14 Investor State Arbitrations

14.1 Has Nigeria signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Nigeria ratified the Washington Convention on 23 August 1965 and it entered into force on 14 October 1966.

14.2 Is Nigeria party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID)?

Nigeria has signed several bilateral investment treaties that allow for recourse to ICSID arbitration. These countries include France [1991], United Kingdom (1990), The Netherlands (1992), Taiwan (1994), Turkey (1996), China (1997), Korea (1999), Brazil (2005) but is not a signatory to the Energy Charter Treaty.

14.3 Does Nigeria have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Investment treaties signed by Nigeria usually contain terms dealing with expropriation and compensation, exchange controls and transfer of profits and investment dispute resolution.

14.4 In practice, have disputes involving Nigeria been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in Nigeria been to the enforcement of ICSID awards and how has the government of Nigeria responded to any adverse awards?

Nigeria has had only two disputes taken to ICSID. The first in 1978 was settled amicably and there was no recourse to national courts for enforcement. *Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria* (ICSID case No. ARB/07/18) was registered on 26 July 2007 in respect of a hydrocarbon concession and is still pending.

14.5 What is the approach of the national courts in Nigeria towards the defence of state immunity regarding jurisdiction and execution?

A defence of state immunity will not be accepted by a court if a foreign state enters into an ordinary commercial transaction (*African Reinsurance Corporation v. JDP Construction (Nig) Limited* (2007) 11 NWLR (Pt. 1045) 224).

15 General

15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Nigeria? Are certain disputes commonly being referred to arbitration?

Congested court dockets have made reference to arbitration a first option in the resolution of commercial disputes; with many more disputes in the energy sector than previously.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in Nigeria, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

Pending before the National Assembly are various bills to amend the current Arbitration and Conciliation Act. One bill seeks to prohibit Nigerian entities from using foreign substantive law for settling their arbitration disputes or from hosting their arbitration disputes outside Nigeria if the dispute itself arose from Nigeria.

The Lagos State House of Assembly has recently enacted its own law on arbitration.



Funke Adekoya San

AELEX Legal Practitioners and Arbitrators
7th Floor Marble House, 1 Kingsway Road
Ikoyi, Lagos
Nigeria

Tel: +234 1 463 0580
Fax: +234 1 461 7092
Email: oadekoya@aelex.com
URL: www.aelex.com

'Funke became Managing Partner and Head of the Dispute Resolution Practice Group at AELEX in 2004. 'Funke has advised on dispute resolution issues and been appointed as either counsel or arbitrator [party appointed, sole or presiding] in many domestic arbitrations in both the upstream and downstream energy sector. She has also acted as arbitration counsel in an UNCITRAL international arbitration between an international oil company and its deep water pipeline contractor and ad hoc international arbitrations in the energy and telecoms sectors. In 2001, 'Funke was elevated to the Inner Bar as a Senior Advocate of Nigeria (SAN). She is also enrolled as a solicitor in England and Wales. 'Funke was a member of the committee set up in 2003 by the Lagos State government to draft new Civil Procedure Rules for Lagos State. She received an inaugural award from a local financial newspaper and women's group as the Most Outstanding Female Legal Practitioner of the Year 2007. 'Funke has been made a Chartered Arbitrator by the Chartered Institute of Arbitrators, London. 'Funke holds an LL.M from Harvard Law School (1977).



Adedapo Tunde-Olowu

AELEX Legal Practitioners and Arbitrators
7th Floor Marble House, 1 Kingsway Road
Ikoyi, Lagos
Nigeria

Tel: +234 1 461 7321, 279 3369
Fax: +234 1 461 7092
Email: atolowu@aelex.com
URL: www.aelex.com

'Dapo is admitted to practise law in Nigeria. He holds an LLB degree from the University of Benin (1987) and an LLM from the University of Lagos (2003) and was appointed a Notary Public in 2006. He is a partner in the dispute resolution group of AELEX. He has broad experience in Arbitration, Commercial Litigation and Aviation and has practiced extensively before all the superior courts of record in Nigeria. He is a member of the Nigerian Bar Association, the International Bar Association, the Chartered Institute of Taxation of Nigeria as well as the Chartered Institute of Arbitration UK. He is also a member of the Nigerian Aviation Law Society.

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Oman

Abdelrahman El Nafie



Jamie Kellick



Denton Wilde Sapte & Co.

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of the Sultanate of Oman?

Part Two of the Law of Arbitration in Civil and Commercial Disputes, as promulgated by Sultani Decree 47/97, and amended by Sultani Decree 03/07 (the “**Law**”) prescribes the legal requirements of a valid arbitration clause.

Article 10(2) of the Law provides that the arbitration clause can be a part of the agreement to which the dispute relates or in the form of a separate agreement made after the dispute has arisen. Article 10(3) of the Law, as translated, provides that: “*Any reference appearing in the contract to a text containing an arbitration clause shall be deemed to be an agreement to arbitrate, if the reference is clear in holding such clause to be part of the contract.*”

Only agreements to arbitrate entered by individuals or entities with the required capacity to dispose of their rights are permissible. Matters in which compromise is not permissible cannot be settled by way of arbitration.

The agreement to arbitrate must be in writing, which covers all written means of communication between the parties, including correspondence exchanged between them. The terms of arbitration can, therefore, be contained in more than one document.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

The Law does not distinguish between individuals and entities. As mentioned above, the Law stipulates that both must have the capacity to dispose of their rights.

1.3 What other elements ought to be incorporated in an arbitration agreement?

Given that the Law provides default provisions in the absence of agreement between the parties, consideration should be given to: the place of arbitration; the constitution of the arbitral panel; the language of the arbitration proceedings; the governing law; and the procedure to be followed.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

Article 13 of the Law governs the enforcement of arbitration

proceedings. The said article provides that the court will rule any action before it as inadmissible if the respondent pleads the existence of an arbitration agreement prior to seeking any relief, remedy or presenting its defence before the court. This means that on application by the respondent, the court will stay any proceedings brought before them in circumstances where a valid arbitration agreement exists.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

As any settlement agreement reached by the parties will be considered a valid contract, such an agreement reached by way of ADR will be enforceable under the laws of the Sultanate of Oman.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in the Sultanate of Oman?

Arbitration proceedings in the Sultanate of Oman are enforceable under the Law of Civil and Commercial Procedures promulgated by Sultani Decree No. 29/2002.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

The Law governs both domestic and international arbitration proceedings. Article 3 of the Law sets out the specific characteristics of an international arbitration.

The only distinction made under the provisions of the Law is in relation to which court has the power to intervene in the arbitration. Pursuant to Article 9 of the Law, in domestic arbitrations such power is vested in the Primary Court whereas for international arbitrations (whether taking place in Oman or abroad) the competent court is the Court of Appeal.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

The Law is based on the UNCITRAL model.

The most notable difference is the additional provisions contained in the Law such as the broad application of the Law to both domestic and international arbitrations.