

GAR KNOW HOW COMMERCIAL ARBITRATION

Nigeria

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Infrastructure

1 Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?

Nigeria is a party to the New York Convention, and it acceded to the Convention on 17 March 1970. The Convention came into force in Nigeria on 15 June 1970. The Convention, however, will only apply on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of a state party to the Convention and to contractual or non-contractual disputes arising from legal relationships that are considered as commercial under the laws of the Federal Republic of Nigeria.

2 Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?

Nigeria is a party to the International Centre for Settlement of Investment Dispute Convention and consequently enacted the International Centre for Settlement of Investments Disputes (Enforcement of Awards) Act in November 1967 (ICSID Act). The ICSID Act provides that if the award duly certified by the Secretary-General of ICSID is filed in the Nigerian Supreme Court by the party seeking its recognition for enforcement in Nigeria, the award shall for all purposes have the effect as an award contained in a final judgment of the Supreme Court and be enforceable accordingly.

Nigeria at diverse times, has also entered into other bilateral investment treaties with China, Finland, France, Germany, Italy, Republic of Korea, Morocco, the Netherlands, Romania, Serbia, South Africa, Spain, Sweden, Switzerland, Taiwan and the United Kingdom. Some of these treaties such as the ones with Germany and South Africa provide that arbitral awards made under them shall be binding on the parties and enforceable in territories of the parties.

3 Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?

Though some federating states in Nigeria have their respective arbitration laws that are applicable in their respective states, the national arbitration statute is the Arbitration and Conciliation Act, which came into force on 14 March 1988. The Act is modelled on the UNCITRAL Model Law 1985 but with some minor variations.

The Act only applies to arbitral proceedings emanating from agreements where parties have expressly stated that the Arbitration and Conciliation Act will be the governing law of the agreement between parties. The Lagos State Arbitration Law 2009 applies to all arbitrations that arise in Lagos State, except where parties have stipulated another law. The Law is modelled on the UNCITRAL Model Law inclusive of the 2006 amendments. In addition, there is the Lagos Court of Arbitration Law 2009, which establishes a court of arbitration in Lagos State.

4 What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?

There are a number of arbitration bodies located in Nigeria. These include: the Chartered Institute of Arbitrators UK (Nigeria Branch), Maritime Arbitrators Association of Nigeria, the Institute of Construction Industry Arbitrators, the Regional Centre for International Commercial Arbitration Lagos, the International Chamber of Commerce (Nigerian National Committee) and the Lagos Court of Arbitration.

These bodies also act as appointing authorities.

5 Can foreign arbitral providers operate in your jurisdiction?

Foreign arbitral providers may operate in Nigeria subject to any requirement for registration as an entity by the Corporate Affairs Commission.

6 Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with, and supportive of, the law and practice of international arbitration?

There is no specialist arbitration court.

Nigerian courts are familiar with and are generally supportive of the law and practice of international arbitration. In addition, the civil procedure rules of many courts incorporate rules to facilitate resolution of disputes by use of alternative dispute resolution including Arbitration.

Agreement to arbitrate

7 What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?

An arbitration agreement will be valid and enforceable if it is evidenced in writing and can cover future disputes. Furthermore, parties must have mutually agreed or consented to the agreement and must have legal capacity to enter into the agreement which must be in respect of a commercial relationship.

8 Are any types of dispute non-arbitrable? If so, which?

In Nigeria, there is no codified law on the types of disputes that are not arbitrable. Judicial decisions have however been a good source of distinguishing between arbitrable and non-arbitrable disputes. Generally, the test applied 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). Criminal matters, bankruptcy, illegal and void contracts or matters leading to a change of the status of the parties are not arbitrable (*Mekwunye v Lotus Capital Ltd & Ors* (2018) LPELR-45546(CA.)) The courts have also determined that disputes, the resolution of which will impact upon a party's tax liability, are not arbitrable (*Eso Petroleum and Production Nigeria Limited & SNEPCO v NNPC*, Appeal CA/A/507/2012).

9 Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?

A third party cannot be bound by an arbitration clause (*Gamji Fertilizer Company Limited & Anor v France Appro SA S & ORS* (2016) LPELR-41245(CA)). While the Arbitration and Conciliation Act has no provisions for joinder or third-party notice, the Lagos State Arbitration Law allows joinder of a party that was not originally a party to the proceedings, but with the consent of the other parties.

10 Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?

The Arbitration and Conciliation Act does not give an arbitral tribunal the power to consolidate separate arbitral proceedings. However, the Lagos State Arbitration Law provides that parties are free to agree to consolidate arbitral proceedings with other proceedings or that concurrent hearings may be held on agreed terms.

11 Is the “group of companies doctrine” recognised in your jurisdiction?

No. Parties in an arbitration are the ones that signed or agreed to subject their disputes to arbitration. Each company will be treated as a separate entity.

12 Are arbitration clauses considered separable from the main contract?

Arbitration clauses are treated as separate agreements and will not be affected by the illegality or effluxion of time of the main contract. The separability of an arbitration agreement is however still subject to whether or not the dispute is arbitrable.

13 Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunals jurisdiction and competence?

Yes, the principle of competence-competence is recognised in Nigeria, as arbitral tribunals are competent to rule on questions pertaining to their jurisdiction, the qualification of their member(s) and the existence or validity of arbitration agreements. Where the jurisdiction of the arbitral tribunal is in issue, a party may also apply to the court to determine the jurisdiction and the competence of a tribunal to hear and determine the substantive dispute.

14 Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?

As the Lagos State Arbitration Law provides that its provisions apply to arbitration proceedings within Lagos State where the parties have not specified any other particular legislation, specific reference to the Arbitration and Conciliation Act should be included in the arbitration clause, where the venue of the proceedings may be Lagos.

15 Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?

Statistics to determine the ratio of use between institutional and ad hoc arbitrations in Nigeria are not available. The UNCITRAL Rules are usually selected by the parties in ad hoc arbitration proceedings.

16 What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your jurisdiction in mind? In relation to, for example, the appointment of arbitrators.

The Arbitration and Conciliation Act provides that where the number of arbitrators is not agreed, the default number is three. In multi-party disputes, if three arbitrators are to be appointed, the clause should indicate how the multiple parties, as claimant or as respondent respectively, are to jointly appoint an arbitrator. If the intention is that each party is to appoint an arbitrator the clause needs to say so, and also indicate as the maximum [and unequal] number of arbitrators that can constitute the panel. The clause should also indicate how the presiding arbitrator will be appointed.

Commencing the arbitration

17 How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?

Arbitration is commenced with a party serving the other party with a request to refer the dispute to arbitration.

The Arbitration and Conciliation Act does not provide limitation periods for the commencement of arbitration. However, state limitation laws provide either a five or a six-year period for commencement of contractual actions, depending on where the action is to be instituted.

Choice of law

18 How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?

Parties are at liberty to choose the law that will govern the agreement. Where the agreement does not provide for a substantive law, the tribunal will determine the substantive law based on the conflict of laws rules that it considers applicable.

Appointing the tribunal

19 Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?

The Arbitration and Conciliation Act does not stipulate the qualifications, gender, nationality, race and characteristics of arbitrators. Parties are at liberty to make their choice of arbitrators.

20 Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?

Yes, non-nationals can act as arbitrators. It is, however, expected that arbitrators of a different nationality would have the prerequisite permit to work in Nigeria.

21 How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?

Where parties are unable to agree, the default number of arbitrators is:

- three arbitrators for arbitrations governed by the Arbitration and Conciliation Act; and
- one arbitrator for arbitrations conducted under the Lagos State Arbitration Law.

The default appointing authority in the event that any of the parties fails to appoint an arbitrator or where two appointed arbitrators fail to appoint a third arbitrator, or a third-party imposed with the duty to appoint fails to appoint, is the High Court under the Arbitration and Conciliation Act and the Lagos Court of Arbitration under the Lagos State Arbitration Law.

22 Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?

There is no immunity from suit for arbitrators under the Arbitration and Conciliation Act. They may be sued alone or alongside others by a dissatisfied party. Under the Lagos State Arbitration Law, however, arbitrators have statutory immunity unless their act or omission is in bad faith.

23 Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?

Arbitrators do not have a right of lien over the award until fees are paid under the Arbitration and Conciliation Act; however, the right of lien is provided by the Lagos State Law. There are no designated fundholding service providers. However, the tribunal and parties are at liberty to choose a fund holder of their choice. The Lagos Court of Arbitration provides fund-holding services.

Challenges to arbitrators

24 On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?

An arbitrator may be challenged where there are circumstances that are likely to give rise to any justifiable doubt as to his or her impartiality or independence, or if the arbitrator does not possess the requisite qualification as agreed by the parties. In domestic arbitrations, the arbitral tribunal determines the challenge. In an international arbitration, the decision is made by the appointing authority, or if none is designated, then by the Secretary-General of the Permanent Court of Arbitration as the default appointing authority under the Act.

Under the Lagos State Arbitration Law, a party to an arbitral proceedings may apply to the High Court of Lagos State, upon giving notice to the other party and the challenged arbitrator, to remove an arbitrator on the grounds upon which the challenge is brought. The High Court may, however, exercise its power of removal only after the arbitral tribunal or the appointing authority has concluded the challenge procedure.

The IBA Guidelines on Conflicts of Interest in International Arbitration may be taken into account during a challenge either before the appointing authority or the courts, if referred to by the parties during the challenge proceedings.

Interim relief

- 25 What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?**

Interim reliefs vary from interim injunctions, measures for the conservation of goods forming the subject matter in dispute, or the provision of security for costs. These interim reliefs can be granted by both the court and the tribunal. The high courts can issue interim measures pending constitution of the tribunal. Where a party commences an action in court in defiance of the arbitration agreement, Nigerian courts may grant anti-suit injunctions to support the parties' agreement to resolve their disputes by arbitration.

- 26 Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?**

Yes the court or tribunal may make an order for a party to provide security for costs.

Procedure

- 27 Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?**

The parties generally have the powers to direct the conduct of the arbitral proceedings. However, the Arbitration Rules contained in the Arbitration and Conciliation Act mandates the arbitral tribunal to ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting its case. While the Rules are optional for international arbitration, for domestic arbitrations, the application of the Rules is mandatory.

- 28 What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?**

Section 14 of the Arbitration and Conciliation Act requires the arbitral tribunal to give each party a full opportunity of presenting its case. If a respondent fails to participate in the arbitration, the tribunal will continue with the proceedings and publish its award after confirmation that the respondent is aware of the ongoing proceedings and has been given the opportunity to participate.

- 29 What types of evidence are usually admitted, and how is evidence usually taken? Will the IBA Rules on the Taking of Evidence in International Arbitration generally be taken into account?**

Both oral and documentary evidence are admitted. Witness statements are usually filed, with witnesses being made available for oral cross-examination and re-examination. Tribunals may agree to be guided by the IBA Rules on Taking of Evidence in International Commercial Arbitration or the Prague Rules if the parties agree to its use, but are not bound to use it.

- 30 Will the courts in your jurisdiction play any role in the obtaining of evidence?**

Upon application by a party, the court can make an order compelling the attendance of a witness wherever the witness may be within Nigeria. Similarly, the court may also order that a prisoner be produced to testify before the tribunal.

- 31 What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?**

The parties have the obligation of providing all the documents they consider to be relevant at the arbitral proceedings. Where documents are in the possession of the opposing party, the tribunal can at the request of a party, order the production of such documents, if the tribunal is convinced that the documents are relevant to the determination of the dispute. The tribunal, however, does not have the power to enforce the production of documents. Upon application being made, the court may assist by compelling the production of documents for use at the tribunal.

32 Is it mandatory to have a final hearing on the merits?

No. Parties can agree on a documents-only procedure. Where the parties settle their dispute, the tribunal may either terminate the proceedings or upon the request of the parties, make an award on the agreed terms.

33 If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?

Even though the seat of arbitration is Nigeria, hearings and procedural meetings may be conducted elsewhere.

Award

34 Can the tribunal decide by majority?

Yes.

35 Are there any particular types of remedies or relief that an arbitral tribunal may not grant?

The tribunal cannot make orders against third parties.

36 Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?

Dissenting opinions are permitted, as the Arbitration and Conciliation Act provides that unless otherwise agreed by the parties, an award must be by the majority of the arbitrators. They are however not common.

37 What, if any, are the legal and formal requirements for a valid and enforceable award?

The award must be in writing and signed by the arbitrators or a majority of them (with the reasons for non-signature stated). The reasons upon which the award is based should be stated unless the parties have agreed otherwise. It must be dated and state the place of the arbitration. A copy of the duly signed award must be delivered to each of the parties.

38 What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

A party may, within 30 days of the receipt of an award and with notice to the other party, request the tribunal to correct any computation, clerical or typographical errors or any errors of a similar nature in the award, or to give an interpretation of a specific point or part of the award.

Costs and interest

39 Are parties able to recover fees paid and costs incurred? Does the “loser pays” rule generally apply in your jurisdiction?

Parties can recover fees paid and costs incurred if they ask for it and to the extent that the tribunal finds the fees and costs incurred reasonable. Costs follow the event unless the parties have agreed to bear their respective costs. Thus, subject to any factors that may make the tribunal order reduced costs or shift the burden of costs, the loser bears the ascertained costs of the arbitration.

40 Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?

The Arbitration and Conciliation Act does not prohibit a tribunal from ordering interest. The rate of interest must be pleaded and proved unless the rate is agreed by the parties. There is an implied power on the tribunal to award post award interest based on bank rate as approved from time to time by the Central Bank of Nigeria.

Challenging awards

41 Are there any grounds on which an award may be appealed before the courts of your jurisdiction?

There are no grounds to appeal against an arbitral award.

42 Are there any other bases on which an award may be challenged, and if so what?

A party to a domestic arbitration may apply to the high court to have an award set aside on the ground that the tribunal exceeded its jurisdiction; was guilty of misconduct; or the award was procured fraudulently.

In international arbitration, the High Court may set aside an award if it is proven that a party to the arbitration agreement was under some legal incapacity; the arbitration agreement is invalid either under Nigerian law or under the law chosen by the parties; the aggrieved party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case; the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; the tribunal went beyond the scope of the arbitration; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or the Act; the subject matter of the dispute is incapable of settlement by arbitration under Nigerian law; or the award is against Nigerian public policy.

43 Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?

There is no right of appeal against an award, and parties cannot by their agreement vest a right of appeal against an award. Though generally, parties by their contracts can decide to waive their rights, the ACA does not give parties to arbitration agreements governed by the ACA, the right to agree that no party can apply to challenge the recognition or enforcement of an award. Arguably, the court will entertain an application to challenge the recognition or enforcement of an award despite an otherwise agreement of the parties not to so challenge a final award.

Enforcement in your jurisdiction

44 Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?

No, it cannot be enforced in Nigeria.

45 What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?

There are no known recent issues on enforcement. Except that a party seeking to enforce an arbitral award has to apply to a high court that could ordinarily exercise original jurisdiction of the cause of action.

46 To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

A state or state entity against which enforcement proceedings are brought could argue that the arbitral award is contrary to public policy. The state or state entity will likely raise a successful defence of state immunity where the assets against which enforcement is sought can be shown to be non-commercial assets.

Further considerations

47 To what extent are arbitral proceedings in your jurisdiction confidential?

Proceedings are held in camera and impliedly confidential unless the parties agree otherwise.

48 What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?

In such circumstances, the award can be relied upon in other proceedings. There are no legal restrictions that prevent a party from relying on documents produced in the arbitration in subsequent court or arbitral proceedings.

49 What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?

- The Legal Practitioners Act;
- Rules of Professional Conduct for Legal Practitioners;
- Rules of conduct for arbitrators as issued by several arbitral bodies; and
- court decisions on conduct of legal practitioners.

50 Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?

Pleadings must not be signed by a law firm but by a party or its legal practitioner.

A legal practitioner within the definition of Nigerian law is one called to the bar in Nigeria. This, therefore, means that a legal practitioner without a licence to practise in Nigeria issued by the Supreme Court of Nigeria cannot represent a party in proceedings taking place in Nigeria.

51 Is third-party funding permitted in your jurisdiction? If so, are there any rules governing its use?

At the moment, third-party funding is not permitted in Nigeria. It may potentially be recognised tacitly if the Arbitration and Conciliation Act (Repeal and Amendment) Bill is eventually passed into law, as the proposed section 51(1)(g) of the Bill provides that “the arbitral tribunal shall fix costs of arbitration in its award and the terms costs include the cost of obtaining Third-Party Funding.”



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Olufunke Adekoya, SAN is a founding partner at the firm and heads the dispute resolution practice group. Appointed notary public in 1986 and elevated to the rank of senior advocate of Nigeria (SAN) in 2001, 'Funke has over 45 years' experience in litigation and arbitration. As a litigator, she represents clients regularly before the Nigerian courts at all levels. She also provides expert opinions and has appeared as an expert witness on Nigerian law issues before the courts of England, the United States and Turkey.

In the field of arbitration, she represents both local and transnational parties as counsel in domestic and international arbitration proceedings within Nigeria and abroad and has acted in numerous disputes as either party appointed arbitrator, sole arbitrator or presiding arbitrator. She was appointed to the Panel of Arbitrators of the International Centre for Settlement of Investment Disputes (ICSID) for a period of six years, commencing on 16 September 2017. She lectures regularly on arbitration law and procedure and has been approved by the Chartered Institute of Arbitrators as a tutor at the Associate to Fellowship Course level.



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Oluwaseun is a senior associate in the dispute resolution practice group of the firm. She has over nine years advocacy experience, representing clients in employment, intellectual property, contracts, competition and trusts, debt recovery, insolvency and business restructuring litigation.

A graduate of the University of Hertfordshire, she is particularly active in LCIA, UNCITRAL and ICC international arbitration disputes, covering the construction, retail, manufacturing, energy, oil and gas industries.

In 2016, she was appointed a director of the Lagos Court of Arbitration-Young Arbitrators Network (LCA-YAN) for a term of two years and in 2018, was appointed a co-chair of the association.

She regularly writes and speaks on international arbitration and advocacy.



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