

# New Developments in Arbitration Law and Practice in Nigeria

By

Prof Paul Obo Idornigie, SAN, PhD, FCIS, FCI Arb(UK)+

(Published in Adebambo Adewopo (ed), *New Developments in Law and Practice in Nigeria: Essays in Honour of Dele Adesina*, SAN, FCI Arb (Biographers Nigeria Limited, 2019) 362-387)

## Introduction

Conventionally, litigation was almost the sole means of resolving disputes judicially whether commercial or otherwise. This was in the western world. Historically, however, settlement, conciliation, mediation and arbitration had major roles to play in resolving disputes in Africa and indeed globally. According to Akpata “*Arbitration or mediation was used for resolving conflicts because of their emphasis on moral persuasion and their ability to maintain harmony in human relationship*”.<sup>1</sup> Arbitration is a means of resolving disputes. It starts by way of private negotiations between the parties to the effect that if in their commercial relationship a dispute arises, it will be resolved by persons (arbitral tribunal) appointed by the parties; conducted under the rules expressly or impliedly agreed upon by the parties and results in an award which is binding on the parties. Although the negotiations and arbitral proceedings are private, the award has public consequences as the award is recognized by states as binding and enforceable.

Indeed, in traditional African societies, any conflict or dispute was seen as social disequilibrium and any dispute resolution process adopted was an attempt to restore equilibrium. In such societies, we had various processes for resolving disputes. Sometimes it is difficult to ascribe a particular word like “settlement”, “mediation”, “conciliation”, “reconciliation”, “early neutral evaluation” or arbitration” to the process as they can be variants or an amalgam of all these processes. For instance, when a traditional ruler is sitting over a matter, he may be settling, mediating, reconciling or arbitrating. In rural and some modern communities, these processes for resolving disputes still play a prominent role. Depending on the perspective adopted – whether Afrocentric or Eurocentric, what has emerged today as modern commercial arbitration evolved from customary jurisprudence in Africa and the practices of the law merchant in the United Kingdom.

In examining new developments in Arbitration Law and Practice in Nigeria, this chapter will trace the evolution of arbitration generally and specifically in Nigeria to determine what are the new developments.<sup>2</sup>

## Historical Perspective

---

+Chartered Arbitrator and Head, Department of Commercial Law, Nigerian Institute of Advanced Legal Studies, Abuja, Nigeria. Email: [prof@paulidornigie.org](mailto:prof@paulidornigie.org)

<sup>1</sup> Ephraim Akpata, *The Nigerian Arbitration Law in Focus* (West African Book Publishers Ltd, 1997) 1

<sup>2</sup> This is a modified and updated version of an earlier paper titled ‘Arbitration’ published in Epiphany Azinge and Nnamdi Aduba (eds), *Law and Development in Nigeria* (NIALS Press, 2010) 943.

Commercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms, with mediation no doubt merging into adjudication. In all jurisdictions, the story is nearly lost forever. Even for historical times it is impossible to piece together the details, as will readily be understood by anyone who nowadays attempts to obtain reliable statistics on the current incidence and varieties of arbitrations. This is because private dispute resolution has always been resolutely private.<sup>3</sup> In its origin, arbitration must have been formless and rudimentary. This picture was graphically captured by Lazareff thus:

International arbitration, it is said, has its roots in history. Modern commercial arbitration is a true product of the city, even though there were precedents in the late XVIIIth century. It is well known that the first contracts to be submitted to arbitration dealt with commodities. As the disputes involved in most cases perishable goods, they had to be settled rapidly and confidentially. London became, in the XIXth century, the centre for maritime and financial matters, insurance, commodities and then metals. This is still the case today.<sup>4</sup>

Despite this development, the common law courts were slow to show interest in dealing with commercial matters. This was understandable because their jurisdiction had a geographical limitation. The courts were restricted to matters which had arisen in England and between English citizens. According to Smith & Keenan:

Foreign matters and many of these commercial disputes did involve either a foreign merchant or a contract made to be performed abroad, were left to some other body, especially if it could raise questions about the relations between the King and Foreign Sovereign....<sup>5</sup>

Furthermore, the Royal Courts did not have a monopoly of the administration of justice and certain local courts continued to hear cases. Mercantile law (*or lex mercatoria*) is based upon mercantile customs and usages. The law developed separately from

---

<sup>3</sup> Michael Mustill, 'Arbitration: History and Background' (1989) 6 *Journal of International Arbitration* 43. See also John Tackaberry and Arthur Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4<sup>th</sup> edn, Sweet & Maxwell, 2003) 12; Nigel Blackkaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6<sup>th</sup> edn, Oxford University Press 2015) 4 and David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (24<sup>th</sup> edn, Sweet & Maxwell, 2015) 6.

<sup>4</sup> Maire Serge Lazareff in M J Chapman, *Commercial and Consumer Arbitration: Statutes & Rules* (Blackstone Press Ltd, 1997), p v.

<sup>5</sup> K Smith and D Keenan D: *English Law*, (7<sup>th</sup> edn, Pitman 1983) 11.

common law. Disputes between merchants, local and foreign, were resolved at the fair or borough. As succinctly put by Smith & Keenan:

Disputes between merchants, local and foreign which arose at the fairs where most important commercial business was transacted in the fourteenth century were tried in the courts of the fair or borough and were known as courts of pie powder' (*pieds poudres*) after the dusty feet of the traders who used them.<sup>6</sup>

The courts of the fair or borough were presided over by the Mayor or his deputy or, if the fair were held as part of a private franchise, the steward appointed by the franchise holder. These courts applied mercantile law and the jury was made up of merchants. Thus as an institution, arbitration originated from the practices of merchants and traders of referring for settlement, disputes which arose among them upon matters of account and other trading differences to persons specially selected for that purpose.<sup>5</sup> With the development of the courts of the fair and borough, maritime disputes were heard by maritime courts sitting in major ports such as Bristol. Subsequently the Court of Admiralty developed. This court took over the work of the mercantile courts. From the seventeenth century, the common law courts began to acquire the commercial work and many rules of the law merchant were incorporated into the common law. In doing this, the problem of jurisdiction over foreign nationals still arose. This was achieved partly by fiction. Smith and Keenan accurately captured the situation when they wrote thus:

[t]o get over the fact that technically it still lacked jurisdiction over matters arising abroad, the court accepted allegations that something that had occurred abroad had in fact occurred in England within its jurisdiction e.g. by using the fiction that Bordeaux (in France) was in Cheapside (in England).<sup>6</sup>

Historically, therefore, arbitration had an attraction for merchants and traders especially those of them dealing in perishable commodities and the need to dispose of the disputes expeditiously and in accordance with mercantile law and custom. However with time it became obvious that the common law courts had their own inhibitions. According to Ezejiofor<sup>7</sup>

As the value of this mode of dispute settlement became more pronounced it was discovered that the practice under the common law was not entirely satisfactory and needed amplification. Consequently provisions were made in successive statutes, to improve upon the common law practice.

---

<sup>6</sup> Smith & Keenan (n 5) 10.

<sup>7</sup> Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (Longman Nigeria PLC, 1997) 20.

Apart from the issue of technicality, at common law, arbitral agreement could be oral or in writing. For such agreements to be valid there must be an actual dispute and a submission to a particular arbitrator. An arbitrator appointed by parol agreement can be removed by either of the parties.<sup>8</sup> Because of these deficiencies, it became clear that statutory intervention was imperative more so that no state will allow private individuals to be resolving disputes without national regulation. The statutory intervention started with the UK Arbitration Act, 1698 until the Arbitration Act, 1996.<sup>9</sup>

This analysis is not to suggest that arbitration was conducted in England only. However, we are reminded by Lazareff<sup>10</sup> that arbitration does not only have its root in history but a true product of the City of London. He went further to assert thus:

International Commercial arbitration as we know it, started between the two World wars. Eisemann, Secretary General of the ICC Court of Arbitration, used to say that the first ICC arbitration he conducted, was spontaneous, without rules and horrendously, without a fee. International Commercial arbitration was then a procedure whereby gentlemen would settle in a gentlemanly way disputes between gentlemen. The penalty for non-compliance was blackballing nothing more. How far away that seems today!

It is far away indeed because there are various Arbitration Rules,<sup>11</sup> treaties, conventions<sup>12</sup> and Model Laws now.<sup>13</sup> Similarly arbitration proceedings are almost as costly and prolonged as litigation, the fees paid to arbitrators are high and the consequence for non-compliance is recourse to the courts for enforcement. London was the centre of trade worldwide. Indeed the London Court of International Arbitration was founded in 1892, it is located in London and is probably the oldest arbitration institution in the world. More fundamentally, at international level, commercial arbitration does not stay within national boundaries. On the contrary, it crosses them.

---

<sup>8</sup> See *Doleman & Sons v Ossett Corpn.* (1912) 3 K.B 257. See also *Halsbury Laws of England* (3<sup>rd</sup> edn, Vol 2) 3

<sup>9</sup> See also the UK Common Law Procedure Act, 1854 and Arbitration Acts of 1889, 1924, 1930, 1934, 1950, 1975, 1979 and 1996.

<sup>10</sup> Lazareff *ibid*

<sup>11</sup> The London Court of International Arbitration, Arbitration Rules of 2014; the International Chamber of Commerce, Arbitration Rules of 2012; the International Centre for Dispute Resolution (a division of the American Arbitration Association), International Dispute Resolution Procedures, 2014; the World Intellectual Property Organisation, WIPO Arbitration Rules, 2014; the Stockholm Chamber of Commerce, Arbitration Rules, 2010; the Vienna International Arbitration Centre, Arbitration Rules, 2013; the Singapore International Arbitration Centre, Arbitration Rules, 2013; the Arbitration Foundation of Southern African, Arbitration Rules and Clauses, 2014; the Institute of Arbitrators & Mediators, Arbitration Rules, 2014; the ADR Institute of Canadian (ADRIC) Arbitration Rules, 2014; the UNCITRAL Arbitration Rules, 2010; the London Maritime Arbitrators Association, The LMAA Terms 2012; and the Court of Arbitration for Sports, Court of Arbitration for Sport Rules, 2012.

<sup>12</sup> The Geneva Protocol on Arbitration Clauses, 1923; the Geneva Convention of 1927; the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and the 1965 International Centre for Settlement of Investment Disputes Convention.

<sup>13</sup> The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules of 1976 and 2010 and the Model Law of 1985 amended in 2006.

In Nigeria, evolution of arbitration can be treated under three broad sub-headings, namely, during the pre-colonial period, during the colonial period and during the post-colonial period. These three periods fit into the three classical types of arbitration in Nigeria, namely, customary, common law arbitration and statutory arbitration. A cursory look at the various ethnic groups in Nigeria reveal that before the advent of colonial rule, we had our indigenous methods of settling disputes. According to Justice Akpata:

In the environs of Benin City the Village Head (*Odionwere*) or the family head (*Okaegbe*) principally functioned as the arbitrator or the mediator to resolve conflicts or disputes among the people. The parties were also at liberty to request any member of the community in whom they reposed confidence to mediate or arbitrate with the undertaking to abide by his decision.<sup>14</sup>

In the Ibo-speaking part of Nigeria, the age-grade *or amala* performs arbitral functions. Similarly in the Yoruba-speaking parts, the Obas perform arbitral functions.<sup>15</sup> Professor Ezejiofor has scholarly discussed the main features of customary arbitration. According to the erudite scholar:

Customary law arbitration is particularly important institution among the non-urban dwellers in the country. They often resort to it for the resolution of their differences because it is cheaper, less formal and less rancorous than litigation. Because the system helps in the promotion of peace and stability within the communities and because it assists in the reduction of pressure on the over-worked regular courts, its employment as a dispute settlement mechanism should be encouraged by all organs of the state. arbitration.<sup>16</sup>

As observed by Holdsworth,

the practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of laws, and after courts have been established by the state and recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to courts.<sup>17</sup>

---

<sup>14</sup> Akpata (n 1) 1

<sup>15</sup> Nnalue, U. S. F "Promoting Conflict Resolution through Non-Adjudicatory Process" (1997) in *Abia State University Law Journal* 57. See also *Agu v Ekewibe* (1991) 3 NWLR (Part 180) 385 at 407.

<sup>16</sup> Gaius Ezejiofor, "The Pre-requisites of Customary Arbitration" in (1992-1993) *Journal of Private and Property Law* Vols 16 and 18 p. 34 and Ezejiofor (n 7) 22.

<sup>17</sup> Holdsworth *History of English Law* (1964) Vol. XIV p. 187.

The above is true of England and Nigeria. Thus despite the fact that we have embraced the English legal system, recourse to customary arbitration is still a method of settling disputes especially in rural areas.<sup>18</sup>

Lagos colony was ceded to England in 1861 by virtue of the Treaty of Cession of that year. However English Law was introduced to the Colony by virtue of Ordinance No. 3 of 1863. With this Ordinance especially Ordinance No. 4 of 1876, the statutes of general application, the rules of common law and doctrines of equity became part of our laws.<sup>19</sup> With this Ordinance both common law and doctrines of equity became sources of our laws.

Thus side by side with the customary arbitration we had common law arbitration. Both customary and common law arbitration can be entered into orally or in writing. The evolution of arbitration generally centered around the common law and trade usages what remains to be considered here is the relationship between common law and customary arbitration.

There is no reported Nigerian case based on the UK Arbitration Act 1889. It is also uncertain as to whether it was a statute of general application. When it is noted that there is no official listing of statutes of general application unless a matter based on a particular statute went to court this is understandable. It is however humbly submitted that since there was no local legislation on arbitration at that time, the Arbitration Act 1889 could be treated as such. Nigeria became a united country in 1914. This was when the hitherto Northern and Southern Protectorates were amalgamated to form a country called Nigeria. In the same year, an Arbitration Ordinance<sup>20</sup> came into effect. The provisions of this Ordinance were identical with the English Arbitration Act, 1889. Thus for the first time in the history of arbitration in Nigeria, we had a local enactment regulating arbitration. Unfortunately, the provisions of the Arbitration Act were scanty as they dealt with domestic arbitration only. According to Amazu Asouzu, the Arbitration Act, 1914 later proved inadequate for the settlement of commercial disputes in Nigeria thus leading to its repeal.<sup>21</sup>

As at the time of political independence in 1960, the 1914 Arbitration Act was the extant Nigerian legislation on arbitration. However on 10 June, 1958, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards came into force. According to Justice Akpata: "*Nigeria being a colony of the British at the material time and not having enacted any law relating to international commercial arbitration,*

---

<sup>18</sup> See *Larbi v Kwasi* (1952) 13 WACA 76; *Mensah v Takyiampong & Ors* (1940) 6 WACA 118; See *Ofomata & Ors v Anoka & Ors* (1974) 4 EC.S.L.R 251; *Assampong v Amuaku* (1932) 1 WACA 192; *Inyang & Ors v Essien & Ors* (1957) 2 F.S.C. 39; *Foli v Akese* (1930) 1 WACA. See also Asouzu, A A "Arbitration and Judicial Powers" in (2000) 3MILBQ pp 19-37; *Agu v Ikewibe* supra; *Ohiaeri v Akabeze* (1992) 2 NWLR (Pt 221) 1; *Awosile v Sotunbo* (1992) 5 NWLR (Pt 243) 514; *Oparaji & Ors v Ohanu & Ors* (1999) 6 SCNJ 27 at 38, *Odenigi v Oyeleke* (2001) 6 NWLR (Pt 708) 12 at 28-29; Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law & Practice* (Centre for Commercial Law Department, 2009) 9; Greg C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2<sup>nd</sup> edn, Snaap Press Limited 2014) 9 and Paul Idornigie, *Commercial Arbitration Law & Practice in Nigeria* (LawLords Publications, 2015) 6

<sup>19</sup> <sup>1</sup> See generally A O Obilade, *The Nigerian Legal System* (Sweet & Maxwell; 1979.) The effective date was 24 July 1874 until it was changed to 1<sup>st</sup> Jan 1900.

<sup>20</sup> Ordinance No. 16 of 1914 which was later re-enacted as Arbitration Act Cap 13, Laws of the Federation 1958

<sup>21</sup> See Amazu Asouzu "Developing and Using Commercial Arbitration and Conciliation in Nigeria" in (June 1994) *Lawyer Bi – Annual* Vol. 1, No 1.

could not subscribe or accede to the Convention.<sup>22</sup> Nigeria acceded to the 1958 New York Convention on 17 March, 1970.<sup>23</sup>

As at independence, we still had the Arbitration Act which was applicable to Lagos as the federal capital territory. The Regions (now states) had their own Arbitration Laws.<sup>24</sup> There was therefore no Federal enactment on Arbitration since the subject matter was neither in the Exclusive nor Concurrent Legislative Lists. Indeed as has been observed, arbitration evolved from trade practices and statutory intervention came subsequently.

There was no legislative instrument on international commercial arbitration in Nigeria until she adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration<sup>25</sup> and promulgated it into the Arbitration and Conciliation Decree.<sup>26</sup> Paradoxically, in the Laws of the Federation of Nigeria, 2004, the ACA neither expressly repealed nor saved the Arbitration Act/Laws. Section 54 (1) of the Act provides for the full domestication of the 1958 New York Convention while Section 53 provides for the application of other Arbitration Rules other than those in Schedule 1 to the ACA. However, Section 58 of the ACA provides that it shall apply to all arbitration throughout the country.<sup>27</sup> One wonders then, what is the effect of the existing laws which were neither expressly repealed nor saved. It is safe and reasonable to assert that the doctrine of "covering the field" can be invoked to fill the gap though strictly speaking the doctrine is usually applied to matters on the concurrent legislative list.<sup>28</sup> However when it is realised that the ACA covers commercial arbitration and the state laws cover both commercial and non-commercial, it can be held that the federal law has not completely, exhaustively and exclusively covered the entire field. Furthermore in Decree No 11 of March 14, 1988 under which the ACA Act came into force had section 58(2) which is not in the Laws of the Federation of Nigeria, 2004. Section 58(2) repealed the Arbitration Act of 1958 which only applied to the Federal Capital Territory and not the Arbitration Laws of the various states though section 58 of the ACA and other subsequent federal acts on arbitration provide that it shall apply throughout the federation. Consequently, the state laws can be applied to non-commercial arbitration. This was the position before the Lagos State Government passed its own Arbitration Law of 2009.

---

<sup>22</sup> Akpata (n 1) 3

<sup>23</sup> See J Olakunle Orojo and M Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nigeria) Limited, 1999) 16 and C A Candide-Johnson and Olasupo Shasore, *Commercial Arbitration Law and International Practice in Nigeria* (Lexis-Nexis, 2012) 13

<sup>24</sup> See the Arbitration Law of Northern Nigerian 1963, Arbitration Law of Western Nigeria 1959, Arbitration Law of Eastern Nigeria 1963 and later Arbitration and Conciliation Act, Cap A10, Laws of Lagos State of 2003. It is noteworthy that other than Lagos State, these laws are still in force in states created out of these Regions.

<sup>25</sup> See UN General Assembly Resolution No. 40/72 of 11 December, 1985. See also Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3<sup>rd</sup> edn, Sweet & Maxwell, 2010) and Patar Sarcevic (ed), *Essays on International Commercial Arbitration* (Graham & Trotman Limited, 1989)

<sup>26</sup> Decree No. 11 of 14 March, 1988 which later became the Arbitration and Conciliation Act, Cap A19, 1990 and Cap A18, LFN, 2004 (hereinafter referred to as "the ACA").

<sup>27</sup> It is noteworthy that in the original decree, Decree No. 11 of 14 March, 1988, section 58 had subsections (1) and (2). Subsection (2) provided that the Arbitration Act is hereby repealed. However in the Laws of the Federation, 1990 and 2004, this subsection (2) was omitted.

<sup>28</sup> On this doctrine, see *Attorney General of Ogun State v Attorney General of the Federation* (1982) 1 - 2 SC 13 at 16, *Oseni v Dawodu* (1994) 4 SCNJ Part II, 197 at 212 and *Lakanmi & Anor v AG WEST* (1971) UILR Vol I, Part II, 201 at 209. See also Paul Idornigie, "The Doctrine of Covering the Field and Arbitration Laws in Nigeria" *Arbitration: The Journal of the Chartered Institute of Arbitrators* Vol. 66, No. 3, August 2000, pp 193-198

Nigeria was the first African country to adopt the UNCITRAL Model Law in March 1988.<sup>29</sup> Most of the sections of the ACA are derived from the UNCITRAL Model Law. For example sections 1 to 28 of the ACA correspond with Articles 7 to 33 of the Model Law. Sections 29 to 36 of the ACA are purely for domestic arbitration while sections 37 to 42 of the Act deal with conciliation in domestic proceedings. Sections 43 to 55 of the ACA are additional provisions on international commercial arbitration. Essentially Sections 48, 51 and 52 of the ACA correspond with Articles 34, 35 and 36 of the UNCITRAL Model Law respectively. Nigeria is, therefore, an UNCITRAL Model Law country.<sup>30</sup> It is noteworthy that the UNCITRAL Model Law has now been amended.<sup>31</sup> Despite the amendment of the UNCITRAL Model Law in 2006 and other developments in arbitration world wide, Nigerian law on arbitration has remained the same. Reform is therefore imperative.

In Nigeria it is unsettled what the cut off date for common law is.<sup>32</sup> If the cut off date is 1<sup>st</sup> January 1900, then in Nigeria today it is only customary and statutory arbitration that are in force. However if the cut off date is not 1<sup>st</sup> January, 1900, then common law and customary arbitration which are oral as eloquently stated by Ezejiolora<sup>33</sup> will be in force along with statutory arbitration.

### **New Developments in Arbitration Law & Practice**

Since March 11, 1988 that the ACA was promulgated, all attempts made to reform it has failed. A National Committee on the Reform and Harmonisation of Arbitration and Alternative Dispute Resolution (ADR)<sup>34</sup> Laws was inaugurated by the then Honourable Attorney General of the Federation and Minister of Justice, Chief Bayo Ojo S.A.N., *FCI. Arb* on the 23<sup>rd</sup> of September 2005, and chaired by the late the Hon. Dr J. Olakunle Orojo C.O.N., *O.F.R., FCI.Arb*, Chartered Arbitrator. The Committee produced a Report and drafted two bills, a Federal Arbitration and Conciliation Bill and a Uniform Arbitration and Conciliation Bill. While the Federal Bill has not been passed, Lagos State modified the Uniform Arbitration and Conciliation Bill and passed the Arbitration Law of Lagos State, 2009. In Nigeria, it is unsettled whether the Federal Government can pass any law on arbitration.<sup>35</sup> My view is that it is a responsibility shared between the Federal Government and the State Governments.<sup>36</sup>

The following can be treated as new developments in arbitration law and practice in Nigeria.

- Emergency Arbitrator
- Interim Award

---

<sup>29</sup> See Decree No. 11 of March 14, 1988 now Cap A18, LFN, 2004

<sup>30</sup> Binder, *ibid*

<sup>31</sup> See UN General Assembly Resolution 61/33 of 4 December, 2006

<sup>32</sup> See A E W Park, *The Sources of Nigerian Law* (Sweet & Maxwell, 1963) pp. 5 – 42 Cf: A Allot, *Essays in African Law* (Butterworths, 1960) 3

<sup>33</sup> Ejiolora (n 7) 21

<sup>34</sup> Candide-Johnson and Shasore (n 23)15

<sup>35</sup> See Candide-Johnson and Shasore, *ibid* at 16-21 for a discussion on the legislative competence of states to pass laws on arbitration.

<sup>36</sup> Idornigie (n 18) 395-420



- Third Party Funding
- Multiparty Arbitration
- Investor-State Arbitration
- Statutes of Limitation
- Immunity of Arbitrators and Arbitral Institutions
- Expedited Arbitration

### Emergency Arbitrator

When parties resort to arbitration, sometimes there is a time lag between when a dispute arises and an arbitral tribunal is constituted. The appointment of an emergency arbitrator is a means of obtaining quick arbitral interim relief (pre-arbitral award) without having to resort to state courts because there is no arbitral tribunal in existence. Indeed resort to state courts has its own complications especially whether such course of action is consistent with the provision of arbitration in the contract and whether it will not make the proceedings public as opposed to arbitration which is private. This is compounded in the case of international arbitration where a party may resort to a state court in its jurisdiction. It is in realisation of these complications that emergency arbitrator has come to the rescue. However, what is the status of the emergency arbitrator and the enforceability of its decisions?<sup>37</sup>

There are several arbitral rules on emergency arbitration.<sup>38</sup> Consequently the procedures adopted in the various rules defer. A party seeking to use any of the rules must ensure that the requirements of the rules are complied with. For instance under Article 43 of the Swiss Rules, reference is made to emergency relief and not emergency arbitrator. However, on a total examination of this rule, it is clear that it is the same thing as emergency arbitrator. Thus each set of rules provide for its own pre-conditions to emergency relief, specific procedures, time limits, among others. This notwithstanding, all emergency arbitrator provisions draw on a common general procedural framework.<sup>39</sup>

In commenting on the nature of emergency arbitrator, Blackaby and Partasides stated thus:

In general, these rules allow parties to appoint an emergency arbitrator to determine applications for interim relief as soon as a request for arbitration has been filed, or, in some cases, even earlier. Indeed, some institutional rules now give the emergency

---

<sup>37</sup> See Fabio G Santacroce, 'The Emergency Arbitrator: a full-fledged arbitrator rendering an Enforceable Decision' in *Arbitration International*, 2015, 31, 283-312. See also William G Bassler, 'The Enforceability of emergency Awards in the United States: Or when Interim means Final' in *Arbitration International*, 2016, 32, 559-574.

<sup>38</sup> See the Rules of the International Chamber of Commerce (ICC), 2012; Stockholm Chamber of Commerce (SCC), 2010; London Court of International Arbitration (LCIA), 2014; the AAA International Centre for Dispute Resolution of the American Arbitration Association (ICDR), 2016; .the Singapore International Arbitration Centre (SIAC), 2016; The Hong Kong International Arbitration Centre (HKIAC), 2013; the Swiss Chambers Arbitration Institution (Swiss Chambers), 2012 and the Netherlands Arbitration Institute (NAI), 2010.

<sup>39</sup> Santacroce (n 37) 285

arbitrator the power to order *ex parte* relief, subject to the other party being heard immediately after the preliminary order is granted.<sup>40</sup>

We must state that the appointment of an emergency arbitrator is closely connected with the grant of interim reliefs or interim protection of property. Before now, interim measures were sought from an arbitral tribunal already constituted whereas with emergency arbitrator, one can be appointed before the constitution of the arbitral tribunal. The difference between interim measures of protection and emergency arbitrator is blurred in rules like that of the ICDR, 2016. Article 6 of the ICDR Rules deal with Emergency Measures of Protection. In Article 6.1, a party may apply for emergency relief before the constitution of the arbitral tribunal by submitting a written notice setting forth the nature of the relief sought, the reasons why such relief is required on any emergency basis, and the reasons why the party is entitled to such relief. The notice can be submitted concurrent with or following the submission of a Notice of Arbitration.<sup>41</sup>

Although there are several rules, that of ICC stands given the history of ICC – one of the oldest arbitral institutions. According to the provisions of Article 29(1) of the ICC Rules, reinforced by Appendix V to the Rules, a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (“Emergency Measures”) may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V to the Rules while Article 29(2) provides that the emergency arbitrator’s decision shall take the form of an order and that parties undertake to comply with any order made by the emergency arbitrator. The order made by the emergency arbitrator in the form of interim award or order may be conditional on provision of appropriate security by the party seeking the relief.<sup>42</sup> Similarly Article 29(3) provides that such order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. Thus the arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.

Under Article 29(6) of the ICC Rules, emergency arbitrator provisions shall not apply if (a) the arbitration agreement under the Rules was concluded before the date on which the Rules came into force; (b) the parties have agreed to opt out of the emergency arbitrator provisions or (c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures. Similarly, under article 29(7) of the ICC Rules, the emergency arbitrator provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement.

---

<sup>40</sup> Blackaby & Partasides (n 3) 235. See also LCIA, Art 9.4; ICC Art 29(1); SCC, Art 1(1), Appendix II and Swiss Rules, Art 43(1). All these rules permit the appointment of an emergency arbitrator before the notice of arbitration is filed. However, others like the SIAC (Art 1, Schedule 1 to the Rules and ICDR, Art 6(1) require that it be filed with or after the notice of arbitration.

<sup>41</sup> See also LCIA, Art 98(9.5) that provides that the application shall set out, together with all relevant documentation (i) the specific grounds for requiring, as an emergency, the appointment of an Emergency Arbitrator; and (ii) the specific claims, with reasons for emergency relief

<sup>42</sup> See ICDR Rules, Art 29(6)

However, any such application and any measures taken by the judicial authority must be notified without delay to the ICC Secretariat.<sup>43</sup>

As in normal arbitral proceedings, there are provisions for challenge. A challenge against the emergency arbitrator must be made within three days from receipt by the party making the challenge of the notification of the appointment or from the date when that party was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.<sup>44</sup> In commenting on the effectiveness of the emergency arbitrator provisions Guillaume Lemenez and Paul Quigley stated as follows: *“In a case where the emergency arbitrator was challenged and the replacement arbitrator resigned, the entire process – beginning with the initial appointment through the appoint of a second replacement emergency arbitrator – took only five days.”*<sup>45</sup>

As will be shown shortly, an interim measure issued by an arbitral tribunal in the form of interim award may be recognised and enforced unless otherwise provided by the arbitral tribunal.<sup>46</sup> This raises the issue of the enforceability of the decision or award of an emergency arbitrator. There are various views on this.<sup>47</sup> Under most rules, including the ICC Rules, the emergency arbitrator’s decision is interim in nature as it does not bind the arbitral tribunal.<sup>48</sup> Similarly such decisions do not qualify as an award for the purposes of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award. Since the consequences of non-compliance with such decisions are uncertain, it would seem that legislative action on the part of states is imperative.<sup>49</sup>

Understandably, there is no provision on emergency arbitrator in the ACA. It is noteworthy that there is provision for emergency arbitrator in the new draft of the Arbitration and Conciliation Act, 2017 that is now before the National Assembly.<sup>50</sup>

### Interim Award

Section 13 of the Arbitration and Conciliation Award, 2004 provides for the power of the arbitral tribunal to order interim measure of protection, unless otherwise agreed by the parties. It further provides that the arbitral tribunal may require any party to provide appropriate security in connection with any measure taken in this regard. However, Article 26 of the Arbitration Rules, Schedule 1 to the ACA developed the concept further by empowering the arbitral tribunal to take measures for the conservation of the goods forming the subject in dispute such as ordering their deposit with a third

---

<sup>43</sup> See also LCIA, Art 98(9.12).

<sup>44</sup> ICC, Emergency Arbitration Rules, Appendix V, Art 3. See also ICDR Rules, Art 2 that expects the emergency arbitrator to disclose to the Administrator any circumstances that may give rise to justifiable doubts as to the arbitrator’s impartiality or independence.

<sup>45</sup> Guillaume Lemenez and Paul Quigley, ‘The ICDR’s Emergency Arbitrator Procedure in Action in International August/October 2008 available at <[https://www.icdr.org/icdr/ShowPDF?doc=ADRSTG\\_004356](https://www.icdr.org/icdr/ShowPDF?doc=ADRSTG_004356)> accessed 5 May, 2017

<sup>46</sup> See also UNCITRAL Model Law, Art 17H

<sup>47</sup> Santacroce (n 37) 302

<sup>48</sup> Blackaby & Partasides (n 3) 236

<sup>49</sup> For example, the Singapore International Arbitration Act 2012 was amended so that the definition of ‘arbitral award’ included emergency arbitrator.

<sup>50</sup> See sections 17-20 of the Draft Bill

person or the sale of perishable goods. Such interim measures may be established in the form of an interim award. Conversely a request for interim measures addressed by any party to court shall not be deemed incompatible with the agreement to arbitrate, or a waiver of that agreement. The provisions in the rules are clearly incompatible with the provisions of the ACA. In such a situation, the provisions of the Act should prevail.<sup>51</sup> Furthermore, Article 32(1) of the Arbitration Rules provide that in addition to making a final award, the arbitration tribunal shall be entitled to make interim, interlocutory or partial award. The critical question is whether such interim awards are enforceable like a final or partial award?

This lacuna was cured in Section 17 of the UNCITRAL Model Law as adopted in 2006. Under these provisions, the arbitral tribunal has powers to grant interim measures that are meant to restore the status quo pending determination of the dispute, take action that would prevent or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself, preserve the *res* and the evidence.<sup>52</sup>

Article 17H deals with the recognition and enforcement of interim measures while Article 17I deals with grounds for refusing the recognition and enforcement of interim measures. Generally therefore interim measures shall be recognised as being, and unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued subject to the grounds for refusing recognition and enforcement under Article 17I. The grounds for refusal are essentially the same as the grounds for refusal of recognition and enforcement of an award. A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of the State, as it has in relation to proceedings in court.<sup>53</sup> These provisions are replicated in UNCITRAL Arbitration Rules, 2010.<sup>54</sup>

In the new draft Arbitration and Conciliation Act, 2017, there is provision for grant of interim measures, conditions for the grant and the recognition and enforcement of interim measures.<sup>55</sup>

### Third Party Funding

Third party funding is where someone who is not involved in an arbitration provides funds to a party to that arbitration in exchange for an agreed return. According to the provisions of section 85(1) of the Draft Arbitration and Conciliation Bill, 2017:

Third party funding means an arrangement between a specialist funding company, an individual, a corporation, a bank, an insurance company, or an institution (the funder) and party involved in the

---

<sup>51</sup> See Arbitration Rules, Art 1

<sup>52</sup> UNCITRAL Model Law, Art 17(2). Art 17A provides for conditions for granting interim measures; Art 17B – application for preliminary orders and conditions for granting preliminary orders; and Art 17D – provisions applicable to interim measures and preliminary orders.

<sup>53</sup> Ibid, Art 17J

<sup>54</sup> UNCITRAL Arbitration Rules, Art 26

<sup>55</sup> See sections 21-31 of the Draft Bill.

arbitration, whereby the funder will agree to finance some or all of the party's legal fees in exchange for a share of the recovered damages.<sup>56</sup>

Typically, the funding will cover the funded party's legal fees and expenses incurred in the arbitration. The funder may also agree to pay the other side's costs if the funded party is so ordered, and provide security for the opponent's costs.<sup>57</sup> However, if there is no recovery, no payment will be made to the funder nor the funds already advanced be refunded. There is no standard contract for third party funding. It depends on the circumstances of the particular case.

Third party funding is not new. Originally designed to support companies that did not have the means to pursue claims, its use has broadened to the extent that it has become a feature of the litigation landscape in several jurisdictions. Funders also look at international arbitration, attracted by the high-value claims, perceived finality of awards, and the enforcement regime provided by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>58</sup>

The last few years have seen a marked increase in funding activity, initially focused on investor-state arbitration, but now spreading to international commercial arbitration. However, unlike in national litigation where disputes are decided by court appointed judges, the use of third party funding in private arbitration, with party-appointed arbitrators, has given rise to various ethical and procedural issues.<sup>59</sup> There are other issues bordering on confidentiality and privilege, disclosure of third party funding agreement, potential conflict of interest and encouragement of non-meritorious claims.<sup>60</sup>

On the other hand, there are the common law doctrines of maintenance and champerty. In the 19<sup>th</sup> century Britain, maintenance and champerty were considered morally and ethically against public policy and, therefore, were made illegal. However, sections 13 and 14 of the English Criminal Law Act 1967 abolished both the crimes and torts of maintenance and champerty.<sup>61</sup> Nevertheless, the common law doctrines remain and extend to arbitration.<sup>62</sup> The question is can third party funding co-exist

---

<sup>56</sup> See also Art 1.1, Section 3, Chapter II of the Draft Transatlantic Trade and Investment Partnership (TTIP) available at <[http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)> accessed 10 May, 2017 where "third party funding" is defined as any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.

<sup>57</sup> Maya Steinitz *Whose Claim is This Anyway? Third Party Litigation Funding*, 95 Minn. L Rev. 1275-1276 (2011). See also Paul O Idornigie, 'Third Party Funding in International Arbitration' published in *The News Journal of The Chartered Institute of Arbitrators, Nigeria Branch*, Vol 7, No. 2, January-March 2016 4.

<sup>58</sup> See Quick Guides to Third Party Funding in International Arbitration – Ashurst ("Quick Guides"). Available at <[https://www.ashurst.com/doc.aspx?id\\_Resource=10384](https://www.ashurst.com/doc.aspx?id_Resource=10384)> accessed 5 May, 2017..

<sup>59</sup> See also the Evidence Act, 2011, sections 192 and 195 and Rules of Professional Conduct in the Legal Profession, Rules 17(3)(b), 19, 50, 51 and 53.

<sup>60</sup> See generally Jean-Christophe Honlet, 'Recent Decisions on Third-Party Funding in Investment Arbitration' *ICSID Review, Oxford Journals: Law & Social Sciences* Vol.30(3), 2015 and Quick Guides, *ibid*

<sup>61</sup> Lisa Bench Nieuwveld and Victoria Shannon *Third-Party Funding in International Arbitration* (Wolters Kluwer, 2012) 4041

<sup>62</sup> See *Ashford v Geoff Yeandle* (1998) 3 WLR 172 where the Vice-Chancellor Sir Richard Scott stated that the prohibition on contingency fees does extend to arbitration.

with maintenance and champerty? Is a third party agreement enforceable and in considering the costs of arbitration, is it a recoverable cost?

In treating this concept in Nigeria, I believe that if the contract is properly drafted, it is enforceable as it will not amount to maintenance or champerty. Why there is a challenge is whether it is recoverable cost. Section 49 of the ACA deals with recoverable costs in arbitration. In drafting the new law on arbitration in Nigeria, costs incurred by third party funders are treated as recoverable costs.<sup>63</sup>

### Multiparty Arbitration

Section 57 of the ACA defines “party” as a party to the arbitration agreement or to conciliation or any person claiming through or under him and “parties” should be construed accordingly. This made it impossible for multiple party actions under the ACA. Even the UNICITRAL Model Law has no provision for multi-party arbitration. Closely connected with this concept is that of joinder of parties and consolidation. Whereas in litigation, under certain conditions, the courts can consolidate suits, the arbitral tribunal has no powers to consolidate unless otherwise authorised by the parties.

Nigeria is increasingly getting involved in complex transactions like investor-state arbitration and public-private-partnership where there are usually multiple parties. In agreement, the consent to arbitrate is critical. This raises the issues of who are proper claimants and respondents in arbitral proceedings. Under the new ICC Rules<sup>64</sup> and LCIA Rules<sup>65</sup>, there is provision for multiparty, joinder and consolidations.

In the new draft Arbitration and Conciliation Bill, 2017, there is provision for joinder of parties.

### Investor-State Arbitration

Investor-State Arbitration describes the increasing importance of international investment and the necessary development of a new field of international law that defines the obligations of host states and creates procedures for resolving dispute. Investor-State Dispute Settlement (ISDS) is a mechanism included in treaties or contracts to ensure that commitments that countries have made to one another or to their nations to protect mutual investments are respected. If an investor considers that these basic rules have been breached, the contract or treaty provide the possibility for investors to bring the matter before specialized investment tribunals set up under international rules on arbitration. Most ISDS cases concern administrative acts by the executive branches of governments affecting foreign investors, such as the cancellation of licences or permits, land zoning or breaches of contract.

The concern of capital importing countries is that private arbitral tribunals are constituted to superintend over sovereign acts despite the provisions of the General Assembly Resolution of 1962 on Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties of States, 1974. Such arbitral proceedings

---

<sup>63</sup> See section 52(1)(g) of the Draft Bill

<sup>64</sup> ICC Rules, Art 8

<sup>65</sup> LCIA Rules, Art 7

are usually held in private. It is in reaction to these concerns that it is being advocated that in entering into contracts or treaties with investment protections, Nigeria should ensure that the following instruments have been adopted or domesticated:

- a) ICSID Arbitration Rules, 2006.<sup>66</sup>
- b) UNCITRAL Arbitration Rules, 2013.<sup>67</sup>
- c) UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, 2014.<sup>68</sup>
- d) UN Convention on Transparency in Treaty-Based Investor-State Arbitration, 2015 (“the Mauritius Convention”).<sup>69</sup>

The adoption of these instruments will ensure transparency in ISDS. Similarly in negotiating the instruments, the Southern African Development Community (SADC) Model BIT Template, July 2012,<sup>70</sup> and International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development – Negotiators’ Handbook, 2006<sup>71</sup> templates should be used, as appropriate.<sup>72</sup>

### Statutes of Limitation<sup>73</sup>

A statute of limitation is any statute which imposes a limitation of time upon an existing right of action. It is settled law that the reasons for the existence of such statutes are threefold: that long and dormant claims have more of cruelty than justice in them; that a defendant might have lost the evidence to disprove a stale claim; and that persons with good causes of actions should pursue them with reasonable diligence.<sup>74</sup>

Statutory time limits, whether imposed by the Limitation Act<sup>75</sup> or any other limitation enactment, apply to arbitrations as they do to legal proceedings.<sup>76</sup> The issue is when does time start to run? Is it from the date of the accrual of the cause of action or from

---

<sup>66</sup>See Rule 37(2) of the ICSID Arbitration Rules, 2006. See also Rule 41(3), Schedule C of the ICSID Arbitration (Additional Facility) Rules, 2006 available at <[https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)> accessed 5 May, 2017.

<sup>67</sup>Available at < <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>> accessed 5 May, 2017.

<sup>68</sup> Available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html)> accessed 5 May, 2017.

<sup>69</sup>Available at <[http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2014Transparency\\_Convention.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html)> accessed 5 May, 2017. As at 12 December, 2016, 17 countries have signed the Convention. They include Netherlands, Belgium, Canada, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Mauritius, Sweden, Switzerland, Syria, the UK and the US.

<sup>70</sup> Available at <<http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>> accessed 5 May, 2017 See also the 2012 United States Model Bilateral Investment Treaty available at <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> accessed 5 May, 2017.

<sup>71</sup> Available at <<https://iisd.org/pdf/2005/investment-model-int-handbook.pdf>> accessed 5 May, 2017.

<sup>72</sup> See the Nigeria-Morocco BIT signed on 3 December, 2016. Compare it with the Nigeria-Singapore BIT signed on 4 November, 2016.

<sup>73</sup> Idornigie (n ) 372

<sup>74</sup> *Nwadiaro v Shell Development Com,pany Ltd* (1990) 5 N.W.L.R. (Pt 150) 322 at 337-338. See also *Egbe v Yusuf* (1992) 6 N.W.L.R. (Pt 245) 1 at 13 and *UBN Ltd v Oki* (1999) 8 N.W.L.R. (Pt 614) 244 at 253-254

<sup>75</sup> See sections 59-66 of the Limitation Act, Cap 522, Laws of the Federation. See also section 13(1) of the English Arbitration Act

<sup>76</sup> See section 61 of the Limitation Act (Nigeria)

the date of the making of the award.<sup>77</sup> More fundamentally does the publication of an award extinguish any right of action in respect of the former matters in difference and thus give rise to a new cause of action based on the arbitration agreement? In *Murmansk State Steamship Line v Kano Oil Millers Ltd*<sup>78</sup>, the plaintiff brought his action on the award less than six years after the date of the award but more than six years after the defendant's breach of the charter party. The Supreme Court, affirming the judgment of the court of first instance, dismissed the claim as statute-barred. The Court further held that the period of limitation runs after the date of award only when a party has by his own contract waived his right to sue as soon as the cause of action had accrued but "if there is no such *Scot v Avery* clause, the limitation period begins to run immediately (that is, from the breach of the substantive contract)"<sup>79</sup> However in *Kano State Urban Development Board v Fanz Construction Ltd*<sup>80</sup>, Agbaje, JSC quoted with approval Halsburys Laws of England, Fourth Edition paragraph 611 page 323 thus:

The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement.

In other words, time starts to run from the date of the award. This decision is in accord with the law and practice in other jurisdictions.<sup>81</sup> In England, section 13(2) of the Arbitration Act, 1996 empowers a court to order that in computing the time prescribed by the Limitation Acts for the commencement of proceedings (including arbitral proceedings) in respect of a dispute which was the subject matter (a) of an award which the court orders to be set aside or declares to be of no effect, or (b) of the affected part of an award which the court orders to be set aside in part, or declares to be in part of no effect, the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.<sup>82</sup>

However, section 7(1) of the Limitation Act<sup>83</sup> provides that actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under an enactment other than the Arbitration and Conciliation Act shall not be brought after the expiration of six years from the date on which the cause of action accrued. This is a rather curious provision. This is so because the provision fails to draw a line between actions founded on simple contract or quasi-contract and those regulated by arbitration agreement. Arbitration agreements generally involve two

---

<sup>77</sup> Section 7(1)(d) of the Limitation Act (Nigeria) provides that actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under an enactment other than the Arbitration and Conciliation, shall not be brought after the expiration of six years from the date on which the cause of action accrued.

<sup>78</sup> (1974) 1 A.L.R. Comm. 1 at 4 and 7. or (1974) 12 SC 1

<sup>79</sup> See also Asouzu, A A *The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards* (1999) J.B.L. March Issue; 185-204.

<sup>80</sup> (1990) 4 NWLR (Pt 142) 1 at 37.

<sup>81</sup> See *Agromet Motorimport v Maulden Engineering Co.* (1985) 1 W.L.R. 762 and Sutton, *et al*, *Op Cit* at 400.

<sup>82</sup> See also section 34(5) of the English Limitation Act, 1980 and section 63 of the Limitation Act of the Federal Capital Territory, Abuja and similar provisions in the States of the Federation.

<sup>83</sup> This provision is the same in all the States of the Federation of Nigeria and the Federal Capital Territory of Abuja



contracts, namely, the main or principal contract which is regulated by the proper law of the contract and the collateral or ancillary contract which is regulated by the *lex arbitri*<sup>84</sup>. This has led to the emergence of the doctrine of separability.<sup>85</sup> The reasoning behind the doctrine is that the arbitration clause constitutes a self-contained contract collateral or ancillary to the underlying or “main” contract.<sup>86</sup> However, the provisions of the Limitation Acts in the various States in Nigeria do not seem to take this distinction into account. It makes sense to provide that in the case of a simple contract, time begins to run from the date on which the cause of action accrued because it is a simple contract. It does not make sense to have a similar provision for arbitration where commencement of arbitral proceedings is different from an application to enforce or set aside an award. Different statutory periods generally govern such actions.

In *City Engineering Nigeria Ltd v Federal Housing Authority*<sup>87</sup>, the issue before the court was when time began to run for the purpose of the enforcement of an arbitration award. In that case, there was a breach of contract on 12 December, 1980, arbitral proceedings started on 11 December, 1981 and ended in November 1985 and application to enforce the award was made in November 1988. There was no counter-affidavit praying for an order of the court to set aside the award. The Supreme Court, in replying on the provisions of sections 8(1)(d) and 63 of the Limitation Law of Lagos State<sup>88</sup>, held that the limitation period ran from 12 December, 1980 when the cause of action accrued and not November 1985, the date of the making of the arbitration award. Consequently, the action was statute-barred. This case has been troubling worrisome.

In the new draft Arbitration and Conciliation Bill, 2017, section 36 deals with the issue of statute of limitation. Thus in computing the time prescribed by the applicable Limitation Laws for the commencement of judicial, arbitral or other proceedings in respect of a dispute which was the subject matter –(a) of an award which the court orders to be set aside or declares to be of no effect, or (b) of the affected part of an award which the court orders to be set aside in part, or declares to be part of no effect, the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded. Secondly, in determining for the purposes of the Limitation Laws when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement applies shall be disregarded. This new provision is consistent with arbitral practice.<sup>89</sup>

### Immunity of Arbitrators and Arbitral Institutions<sup>90</sup>

An arbitrator performs judicial functions like a court or tribunal. However, whereas it has been settled that a judge enjoys immunity from suit, that of the arbitrator has not been that settled. Reliance has always been on common law rules.<sup>91</sup> It is a well established principle in our jurisprudence that judges are immune from personal liability in respect of any act done in their judicial capacity, even if they act maliciously

---

<sup>84</sup> John, Gill and Gearing, (n 3) 93

<sup>85</sup> John, Gill and Gearing, (n 3) 27.

<sup>86</sup> See *Bremer Vulkan Schiffbau und Maschinenfabrik v South Indian Shipping Corporation Ltd* (1981) 1 Lloyd’s Rep 253 at 259

<sup>87</sup> (1997) 9 N.W.L.R. 224.

<sup>88</sup> Which is the same thing as sections 7(1)(d) and 62 of the Limitation Act of the Federal Capital Territory, Abuja

<sup>89</sup> See also section 35 of the Lagos State Arbitration Law, 2009.

<sup>90</sup> Idornigie (n 18) 220

<sup>91</sup> *Sutcliffe v Thackrah* (1974) AC 727 and *Arenson v Arenson* (1977) 405.

or in bad faith.<sup>92</sup> This protection is anchored on grounds of public policy. As argued by Mulchay: “If such immunity did not exist unsuccessful litigants would be free to embark upon fresh proceedings against the judge with a view to having their claim re-tried.”<sup>93</sup> Support for this view is found in *McC v Mullan*<sup>94</sup> where Lord Bridge held thus:

If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that 999 honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.

Other arbitral rules have provided for the immunity of arbitrators and the arbitral institutions.<sup>95</sup>

The new draft Arbitration and Conciliation Bill has provided for immunity of arbitrators and arbitral institutions.<sup>96</sup>

### Expedited Arbitration

This is a form of arbitration that is conducted in a shortened time frame and reduced cost.<sup>97</sup> In the LCIA, it is Expedited Formation of Arbitral Tribunal.<sup>98</sup> This procedure can only be adopted in the cases of exceptional urgency. The Expedited Arbitration Rules administered by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), 2017 is appropriate for disputes of a simpler nature; a faster procedure than the arbitration procedure under the Arbitration Rules and requires that the parties have agreed that the dispute shall be resolved by arbitration under the SCC Rules for Expedited Arbitration. The parties most often include such a clause in their arbitration agreement. However, the parties can also agree to settle the dispute by arbitration after the dispute has arisen. In the absence of such an agreement between the parties, the SCC is prevented from administering the dispute in accordance with the expedited procedure. In accordance with the Rules for Expedited Arbitration, the parties may submit a limited number of petitions and shorter deadlines are applied in the expedited procedure than in the procedure under the Arbitration Rules.<sup>99</sup>

However, in the case of the World Intellectual Property Organisation Expedited Arbitration, it refers to both the conduct of the arbitral proceedings and costs of arbitration. What makes the WIPO Arbitration exciting is as follows:

---

<sup>92</sup> See *Sirros v Moore* (1974) 3 All ER 776

<sup>93</sup> C Mulchay, ‘Arbitrators Immunity under the New Arbitration Act’ in *The Journal of the Chartered Institute of Arbitrators*, August 1996, 202

<sup>94</sup> (1984) 3 All ER 908

<sup>95</sup> See ICC, Art 40 and LCIA Art 31

<sup>96</sup> See section 15 of the Draft Bill.

<sup>97</sup> Blackaby & Partasides (n 3) 361

<sup>98</sup> LCIA, Art 9A

<sup>99</sup> SCC Expedited Arbitration available at <<http://www.sccinstitute.com/dispute-resolution/expedited-arbitration>> accessed 5 May, 2017.

- (i) The registration and administration fees are lower than those applicable to an arbitration conducted under the WIPO Arbitration Rules. Fixed arbitrator's fees apply to disputes of up to US\$ 10 million.
- (ii) The Statement of Claim must accompany (and not be filed later and separately from) the Request for Arbitration. Similarly, the Statement of Defence must accompany the Answer to the Request.
- (iii) Unless otherwise agreed, there is always a sole arbitrator.
- (iv) Any hearings before the arbitrator are condensed and may not, save in exceptional circumstances, exceed three days.
- (v) The time limits applying to the various stages of the arbitral proceedings have been shortened. In particular, the proceedings should, whenever reasonably possible, be declared closed within three months (as opposed to nine months under the WIPO Arbitration Rules) of either the delivery of the Statement of Defence or the establishment of the Tribunal, whichever event occurs later, and the final award should, whenever reasonably possible, be made within one month (as opposed to three months under the WIPO Arbitration Rules) thereafter.<sup>100</sup>

It is hoped that other arbitral proceedings will emulate WIPO. We must state however that emergency arbitrator is seen as a form of expedited arbitration.

In the ICC Arbitration Rules, 2012, as amended in 2017, there is provision for Expedited Procedure Rules.<sup>101</sup> The most significant of the 2017 amendments is the introduction of an expedited procedure providing for a streamlined arbitration with a reduced scale of fees. This procedure is automatically applicable in cases where the amount in dispute does not exceed US\$2 million, unless the parties decide to opt out. It will apply only to arbitration agreements concluded after 1 March, 2017.<sup>102</sup>

One of the important features of the Expedited Procedure Rules is that the ICC Court may appoint a sole arbitration, even if the arbitration agreement provides otherwise. The procedure is also available on an opt-in basis for higher value cases, and will be an attractive answer to users' concern over time and cost. To further enhance the efficacy of ICC arbitrations, the time limit for establishing Terms of Reference has been reduced from two months to one month, and there are no Terms of Reference in the expedited procedure.

Under the 2017 Rules, ICC arbitrations will become even more transparent for the Court will now provide reasons for a wide range of important decisions, if requested by one of the parties.<sup>103</sup>

### Arbitration Proceedings Rules

The ACA has provided for various references to the court for assistance without providing for the procedure. A new procedure that will soon emerge in Nigeria is the Application Claims and Appeals (Procedure) Rules. Application claim means any

---

<sup>100</sup> WIPO Expedited Arbitration available at <[www.wipo.int/amc/en/arbitration/what-is-exp-arb.htm](http://www.wipo.int/amc/en/arbitration/what-is-exp-arb.htm)> accessed 5 May, 2017

<sup>101</sup> See ICC Rules, 2012, as amended in 2017, 1-2.

<sup>102</sup> See ICC Rules, *ibid*, Art 30 and Appendix VI.

<sup>103</sup> See ICC Rules, *ibid* at Art 11(4).

application to a High Court under the Arbitration and Conciliation Act to revoke arbitration agreement, stay proceedings, remove an arbitrator, grant interim measures, among others. The Rules provides for how to start the claim, the mode, service outside jurisdiction, notice and hearing. It also provides for enforcement of arbitration awards and interim measures of protection, case management, amongst others.

### Concluding Remarks

In this chapter, we have traced the evolution of arbitration generally and in Nigeria in particular. We classified the evolution into three namely, pre-colonial, colonial and post-colonial. We then examined the new developments in arbitration law and practice in Nigeria. In this connection we examined emergency arbitrator, interim award, Third Party Funding, multiparty arbitration, Investor-State Arbitration, statutes of limitation; immunity of arbitrators and arbitral institutions and Expedited Arbitration.

Arbitration, is like an uncompleted building. It remains work-in-progress. It is only hoped that the laws and rules will be updated regularly to keep pace.