

The Federal Arbitration Act and the Lagos State Arbitration Law: A Comparison

BY

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INTRODUCTION

On the 18th day of May 2009, the Lagos State Arbitration Law No. 10 came into force to provide for the resolution of disputes by arbitration in Lagos State¹.

Prior to this development the arbitration law on the statute books of Lagos State was the federal arbitration Act, the Arbitration and Conciliation Decree No. 11 of 1988, [the Federal Act]. The Act was passed during a military regime and is stated to apply throughout the federation². The Federal Act, the first modern arbitration law in Nigeria is a modification of the 1985 United Nations Commission on International Trade Law [UNCITRAL] Model Law³. The Act domesticated Nigeria's treaty obligations arising under the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards 1958⁴.

After two decades of applying the provisions of the Federal Act the consensus amongst practitioners and users was that the Act needed to be reviewed to ensure its continuing efficacy and effectiveness. Delays had crept into the system and arbitration oftentimes had become in practice a first step to litigation. Time spent during Court proceedings in support of the arbitral system contributed to the delay⁵. Modern means of communication resulted in outdated concepts and definitions under the Federal Act.

In 2005 Chief Bayo Ojo, SAN the immediate past Attorney General of the Federal Republic of Nigeria motivated by the need to ensure that arbitration and ADR process continue to meet the needs of users constituted a National Committee with the mandate to submit proposals for the reform of Nigeria's Arbitration/ADR laws. The work of the Committee resulted in a Draft Federal Arbitration Act and a proposed Uniform States Arbitration and Conciliation Law to be recommended to States for adoption. The Committee also introduced an innovation, the Arbitration Claims and Appeals Procedure Rules to apply to court applications relating to arbitration matters.

The rules are a set of specialized procedural rules aimed at enabling the expeditious determination of court applications in support of arbitration⁶. The recommended Federal Draft Bill is yet to be enacted into law.

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¹ The paper does not refer to the printing errors which are evident in the printed Lagos law No. 10 of May 2009. The writer is aware that steps are being taken to effect corrections.

² Section 58 of the Federal Arbitration Act

³ Nigeria adopted the Model Law on the 14th day of March 1988.

⁴ See Part III of the Federal Arbitration Act. Nigeria acceded to the New York Convention on the 17th day of March 1970.

⁵ Criticisms include delays in enforcement of awards and confusion caused by the effect of inconsistent provisions e.g. sections 4 and 5 of the Act

⁶ The discussion paper of the Committee highlight the essential features of the rules to be front loading of evidence and written submission, fast tracking and case management mechanism applicable at both trial and appellate state. The rules provide that a court may order that an arbitration claim be heard either in public or in private.

In 2007, Mr. Supo Shasore SAN the Attorney General of Lagos State constituted a Committee vested with the task inter alia to review the Arbitration and Conciliation Act as contained in the laws of Lagos State and propose a new arbitration law for Lagos State. The State was visualized as developing into the arbitration hub of West Africa⁷. The Lagos State Reform Committee drew largely from the work of the National Arbitration Reform Committee. The work of the National Committee including the arbitration claims and appeals procedure rules and the draft uniform States law were used as “templates for the proposed Lagos State arbitration law”⁸. The Lagos State law has consequently replaced the Federal Act on the statute books of the state, the commercial nerve centre of Nigeria.

In this paper a comparison will be made between the provisions of the Federal Act and the Lagos State law.

1. GENERAL PROVISIONS OF THE LAW

a. Guiding Principles

Unlike the Federal Act section 1[a] and [b] of the Lagos law states the principles on which the law is based and upon which it is to be construed.

Section 1[a] states thus:

“The object of arbitration is to obtain the fair resolution of disputes by an impartial Tribunal without unnecessary delay or expense⁹.”

The section further provides that parties should be free to agree on how their disputes are resolved subject only to such safeguards as are necessary in the public interest¹⁰. Section 1[c] and [d] reiterate the binding nature of arbitration agreements and stipulates that the agreement is binding and enforceable against each of the parties unless the parties agree otherwise at anytime or the agreement is invalid, non existence, ineffective or otherwise unenforceable. Parties, arbitral tribunals, arbitral institutions, appointing authorities and the Court are mandated to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

These provisions are essential in the construction of the provisions of the law. They clearly set out the expectations required of an arbitral tribunal and the courts in the quest for proper and expeditious dispute resolution by arbitration.

b. Applicability/Constitutional Questions

The law applies to all arbitrations within the state except where the parties have expressly agreed that another arbitration law shall apply¹¹. Thus party autonomy and parties’ freedom to contract; fundamental tenets in arbitration are accorded respect.

⁷ See page 5 of the report of the Lagos State Committee dated February 2008

⁸ See paragraph 2[1] of the report of the Lagos State Committee

⁹ Appears adopted from section 1[a] of the English 1996 Arbitration Act.

¹⁰ See section 1[b] of the English 1996 Arbitration Act. See also Article 19[1] of the Model Law.

¹¹ Section 2 of the Lagos State Arbitration Law 2009. The preamble to the Federal Act inter alia provides that the decree is to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation.

Questions have been raised with respect to the tier of government with constitutional competence to legislate on arbitration. Arbitration is not listed in either the exclusive or concurrent legislative lists of the Second Schedule of the 1999 constitution thus supporting the argument that arbitration is a residual matter within the legislative competence of the states. The National Committee considered the contents of items 62[a] and 68 of the exclusive legislative list in the constitution. Item 62[a] lists thus:-

“[a] Trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, and trade and commerce between the States”.

Item 68 lists thus-

“Any matter incidental or supplementary to any matter mentioned elsewhere in this list”.

The National Committee came to the conclusion that the federal government has constitutional power and competence to legislate on arbitration which are international or interstate whilst arbitration outside this purview is within the states legislative competence. The work of the National Committee thus resulted in a Federal Arbitration Act and a Uniform States Arbitration Law to be recommended to the states for adoption. The Lagos State Committee thought otherwise and took a position that arbitration is a residual matter within the legislative competence of the states. The Lagos State Committee argued that dispute resolution and the regulation of contracts is a matter which the constitution “expressly or by irresistible implication confers exclusively on states”¹². The Lagos State Committee argues that the subject matter of arbitration is contractual and not an issue of trade and commerce itself¹³.

The National Committee interpreted item 68 of the 1999 constitution to bring arbitration arising from international / interstate trade and commerce within the purview of section 62[a] and within the legislative competence of the Federal Government. However it must be borne in mind that the Federal Arbitration Act was promulgated as a Military Decree during a period of suspension of the constitution and that various States had and continue to have arbitration laws on their statute books. Arbitration like litigation is a dispute resolution mechanism and considering that States have the competence to promulgate their respective court laws and rules of court there appears to be no rationale for ousting States of the legislative competence to promulgate arbitration laws. No doubt the legislative competence to domesticate international treaties relating to arbitration is solely within the Federal legislative competence.

In reality the State and Federal Arbitration statutes have remained on Nigeria’s statute books for decades. The recently enacted Lagos law recognized the applicability of the principle of party autonomy to the choice of arbitration law and makes the law applicable to all arbitration in Lagos State except where the parties have expressly agreed that another arbitration law shall apply¹⁴. Only the Supreme Court can eventually finally determine the constitutional issues related to the co-existence or otherwise of the Federal and States legislation.

¹² See page 24 paragraph 9 of the report of the Lagos State Committee, February 2008. The Committee refers also to the doctrine of Pith and Substance a method adopted by Canadian Court for dividing and balancing powers between the Federal and Provincial governments in the Canadian federation.

¹³ See the Report of the Lagos State Committee.

¹⁴ Section 2 of the Lagos State Arbitration Law.

2. OVERVIEW OF THE LAGOS LAW

The Lagos Arbitration Law is composed of sixty-four [64] sections with an attached schedule, the Arbitration Application Rules 2009. Generally the language of the law was modified thus dispensing with words regarded as archaic in the Federal Act and replacing such words with modern terminology¹⁵. Some phrases were simplified¹⁶. The Lagos law retained some provisions of the Federal Act, modified others and included some entirely new provisions.

3. Retained Provisions

The retained provisions are as follows: -

- i. Grounds for challenge¹⁷.
- ii. Jurisdiction¹⁸.
- iii. Tribunal's power to determine the admissibility, relevance, materiality and weight of any evidence placed before it¹⁹.
- iv. Arbitral meetings²⁰.
- v. Points of claim and defence²¹.
- vi. Hearing and writing proceedings²².
- vii. Default of a party²³.
- viii. Power to appoint expert²⁴.
- ix. Power of court to order attendance of witness²⁵.
- x. Decision making by the arbitral tribunal²⁶.

¹⁵ e.g. The word "null and void" in section 12[2] of the Federal Arbitration Act were replaced with the words "invalid, non existent or ineffective" as appears in section 19[2] of the Lagos State Arbitration Law. The words "ipso jure" was replaced with the words "shall not invalidate the arbitration clause". Words "ex aequo et bono" and amiable compositeur replaced with "in justice and in good faith".

¹⁶ The phraseology "may determine" was replaced with "free to agree". See section 9[1] of the Federal Arbitration Act and 11[1] of the Lagos State Arbitration Law.

¹⁷ Sections 8[1][2] of the Federal Arbitration Act. Sections 10[1][2] of the Lagos State Arbitration Law. Other provisions of section 8 were modified by sections 10[3][c][d] of the Lagos State Arbitration Law.

¹⁸ Section 12 of the Federal Arbitration Act. Section 19 of the Lagos State Arbitration Law replaced some words with terminology considered more modern.

¹⁹ Section 15[3] of the Federal Arbitration Act and Section 31[3] of the Lagos State Arbitration Law.

²⁰ Section 16[2] of the Federal Arbitration Act and Section 33[2] of the Lagos State Arbitration Law.

²¹ Section 19 of the Federal Arbitration Act and Section 37 of the Lagos State Arbitration Law.

²² Section 20 of the Federal Arbitration Act and Section 39[3] of the Lagos State Arbitration Law . Section 20[3] was slightly modified in section 39[3] to take account of the provision of section 24 on preliminary orders. Section 39[2] of the Lagos law modified Section 20 [2]of the Federal Act by the deletion of the words, "held for the purposes of inspection of documents, goods, or other property". Section 39 [2] of the Lagos Law merely states that sufficient advance notice of any hearing and of any meeting of the Arbitral Tribunal requiring the attendance of parties.

²³ Section 21 of the Federal Arbitration Act and section 41 of the Lagos State Arbitration Law . Sections 41[2][3][4][5][6] and [7] of the Lagos Law are however new provisions. Section 41[1][a] of the Lagos Arbitration Law also includes the words "unless the respondent desires to present a claim".

²⁴ Section 22 of the Federal Arbitration Act and section 42 of the Lagos State Arbitration Law. Slight modifications in section 42[1][b] with the section commencing with the added words "subject to any legal privilege that a party may assert". The relevant information the arbitral tribunal may require a party to give to the expert was expressly qualified to be that in the party's possession, custody or control. The Lagos law also adds the word "reproduction"

²⁵ Section 23 of the Federal Arbitration Act and Section 43 of the Lagos State Arbitration Law .

- xi. Settlement²⁷.
- xii. Form and contents of Award²⁸.
- xiii. Correction and interpretation of an Award²⁹.
- xiv. Costs/deposits³⁰.
- xv. Recognition and enforcement of Awards³¹.
- xvi. Waiver of right to object³².
- xvii. Extent of court intervention³³.
- xviii. Extent of the application of the decree to arbitration³⁴.
- xix. Extension of time³⁵.

4. MODIFIED PROVISIONS

4.1 Arbitration Agreement Irrevocable

Section 2 of the Federal Act provides that unless a contrary intention is expressed therein an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court or judge. Section 4 of the Lagos law deleted the reference to the judicial system and its officials and simply provides that unless a contrary intention is expressed, an arbitration agreement shall be irrevocable except by the express or written agreement of the parties.

4.2 Death of a Party

Section 3 of the Federal Act provides that an arbitration agreement shall not be invalidated by reason of the death of any party thereto but shall in such an event be enforceable by or against the personal representative of the deceased. Section 5[1] of the Lagos law replaced the word “invalidated” with “invalid” and states thus:-

²⁶ Section 24[1] of the Federal Act and section 44[1] of the Lagos State Arbitration Law 2009. The words “subject to any applicable mandatory provisions” **were added** to section 44[2] thus expressly curtailing the Presiding Arbitrator’s power to decide questions relating to procedure by subjecting same to the mandatory provisions of the law. **This is a** slight variation of the wordings of section 24[2] of the Federal Arbitration Act.

²⁷ Section 25 of the Federal Arbitration Act and Section 45 of the Lagos State Arbitration Law .

²⁸ Section 26 of the Federal Arbitration Act and section 47 of the Lagos State Arbitration Law . The Lagos Law modified 26[4] of the Federal Arbitration Act by the inclusion of the words “subject to the provisions of section 49 **of this law**”. Section 49 relates to the notification of an award/lien on award by arbitrators for unpaid fees.

²⁹ Section 28 of the Federal Arbitration Act and section 50 of the Lagos State Arbitration Law . Section 28[6] of the Federal Act was slightly modified by the deletion of the words “may if he considers it necessary” and replacing **with the words** “the arbitral tribunal may for good cause” in section 50[6] of the Lagos State Arbitration Law.

³⁰ Section 49[1][2] of the Federal Arbitration Act and section 51 and 52 of the Lagos State Arbitration Law 2009.

³¹ Section 51 of the Federal Arbitration Act and section 56 of the Lagos State Arbitration Law. Slight modification in Lagos Law by specifying that application to the court must be by a party. Section 56[3] a new provision also states that the award may by leave of the court or a judge be enforced in the same manner as a judgement or order with the same effect.

³² Section 33 of the Federal Arbitration Act and section 58 of the Lagos State Arbitration Law .

³³ Section 34 of the Federal Arbitration Act and section 59 of the Lagos State Arbitration Law . Section 59[2] of the Lagos State Arbitration Law is a new provision and states that all applications to the court are to be accordance with the rules set out in section 3 of the Schedule i.e. The Arbitration Application Rules 2009.

³⁴ **Section 35 of the Federal Arbitration Act and section 60 of the Lagos State Arbitration Law.**

³⁵ Section 36 of the Federal Arbitration Act and section 61 of the Lagos State Arbitration Law. Section 36 of the Federal Act was modified by Section 61 of the Lagos State Arbitration Law by substituting the words “may if it considers it necessary” with the words “for good cause”.

“An arbitration agreement shall not be invalid by reason of the death of any party to the agreement”.

The Federal Act stipulation as regards the enforceability of the agreement by or against the personal representative of the deceased was deleted. Sections 5 and 6 of the Lagos law however provides thus: -

“The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed”³⁶.

“Nothing in this section shall be taken to affect the operation of any law by virtue of which any right of action is extinguished by the death of a person”³⁷.

The Lagos law stipulates that for the purposes of the section the term death includes the meaning ascribed to it in section 63[1] which defined death thus: -

“death, includes in the case of a non natural person, dissolution or other extinction by process of law”

The term death **is not** defined in the Federal Act.

4.3 Court’s Power to Stay Proceedings

Section 4 and 5 of the Federal Act provides for stay of court proceedings of actions brought in violation of arbitration agreements. Section 4 imposes a mandatory obligation on the court to stay proceedings. The application under section 4 is to be brought not later than when the first statement or the substance of the dispute is brought. The arbitration proceedings may be commenced or continued and an award made by the tribunal when the matter is pending in court³⁸. In contradistinction, section 5 stipulates that an application may be made to the court by a party at any time after appearance and before delivering any pleading or taking any other step in the proceedings. The court upon being satisfied may make an order staying the proceedings. The provision of Section 5 would appear to allow the court a discretion on the matter and unlike Section 4 no pleading must have been delivered nor any step taken in the proceedings.

Section 6 of the Lagos law adopts the provisions of section 4 of the Federal Act, thus incorporating the mandatory obligation to stay proceedings. Section 5 of the Federal Act was abandoned. Section 6[2] of the Lagos law is in pari materia with section 4[2] of the Federal Act. Thus whilst an action in violation of an arbitration agreement is pending in court, arbitral proceedings may nevertheless be commenced and/or continued and an award made by the arbitral tribunal whilst the matter is pending before the court. The section however further provides unlike the Federal Act that, where an order for stay of proceedings is brought, the court may for the purpose of preserving the rights of the parties make such interim or supplementary orders as may be necessary³⁹.

³⁶ Section 5[2] of the Lagos State Arbitration Law.

³⁷ Section 5[3] of the Lagos State Arbitration Law.

³⁸ Section 4[2] of the Lagos State Arbitration Law.

³⁹ Section 6[3] of the Lagos State Arbitration Law.

4.4 Number of Arbitrators

Section 6 of the Federal Act provides that parties may determine the number of arbitrators. Where the parties have not determined, the number shall be three⁴⁰. By provision of section 7[3] of the Lagos law in the absence of determination by the parties, the tribunal will consist of a sole arbitrator⁴¹. The decision to opt for a sole arbitrator is likely hinged on the cost of three arbitrators which often is three times the burden of employing one. The Lagos law also rendered invalid even numbered arbitral tribunals unless otherwise agreed by the parties⁴².

4.5 Procedure for Appointment of Arbitrators

The Federal Act establishes two regimes for appointment of arbitrators. Section 7 is applicable to domestic proceedings and Section 44 to international commercial arbitration proceedings. The default appointment mechanism under the domestic provisions of the Federal Act vests responsibility for appointment on the courts in the absence of the parties' agreement or a party's failure to act⁴³. The international regime under the Federal Act provides for the appointment to be made by the appointing authority. The appointing authority is either agreed by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague⁴⁴.

The Lagos law establishes only one regime and provides that the appointment be made by an appointing authority [where so designated]. In the event that there is no designated appointing authority if two arbitrators fail to agree on a third or presiding arbitrator within thirty days of their appointments, the appointment shall be made by the Lagos Court of Arbitration on the application of any party to the arbitration agreement⁴⁵. In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the Lagos Court of Arbitration on the application of any party to the arbitration agreement within thirty days of such disagreement⁴⁶. Any party or arbitrator may request the Lagos Court of Arbitration to take the necessary measure [unless the appointment procedure agreed upon by the parties provides other means for the appointment] in the following circumstances:-

- “i. A party fails to act as required under the procedure.
- ii. The parties or two arbitrators are unable to reach an agreement as required under the procedure or
- iii. A third party, including an institution fails to perform any duty imposed on it under the procedure⁴⁷”.

Thus in Lagos State a specialized court of arbitration has assumed the powers exercised by the courts under the Federal Act.

The specialized Court of Arbitration was established under the provisions of the Lagos Court of Arbitration Law No. 8 of 18th day of May 2009. The establishment of the court was borne out of

⁴⁰ Section 6 of the Federal Arbitration Act.

⁴¹ Section 7[3] of the Lagos State Arbitration Law.

⁴² Section 7[2] of the Lagos State Arbitration Law.

⁴³ Section 7[2] and [3] of the Federal Arbitration Act.

⁴⁴ Section 49[3] of the Federal Arbitration Act.

⁴⁵ Section 8[4][a][iii] of the Lagos State Arbitration Law.

⁴⁶ Section 8[4][b] of the Lagos State Arbitration Law.

⁴⁷ Section 8[4][c][i-iii] of the Lagos State Arbitration Law.

the desire to promote and establish Lagos as a regional and ultimately, international arbitration centre⁴⁸.

4.6 Challenge of Arbitrator

Section 7[2] of the Federal Act provides that the court is required to appoint an arbitrator upon failure of a party to appoint an arbitrator. Section 8[4][a][i] of the Lagos law however provides that in such circumstances the other party may give notice in writing to the party in default proposing the appointment of its arbitrator⁴⁹ to act as the sole arbitrator. In the event that the party in default does not within seven [7] clear days of the notice make the required appointment and notify the other party of the name of its arbitrator, the other party may appoint its arbitrator as sole arbitrator whose award shall be binding on the parties as if the sole arbitrator had been so appointed by agreement⁵⁰.

The Federal Act establishes two regimes for the procedure for challenge of an arbitrator. Section 9 applies to domestic arbitration whilst section 45 applies to international arbitration. Under the domestic regime, in the absence of the parties' agreement the arbitral tribunal shall decide on the challenge if the challenged arbitrator does not withdraw from office or the other party does not agree to the challenge. The provision of section 45[9] applicable to international proceedings however vests the responsibility to decide on the challenge on an appointing authority⁵¹. In instances when the initial appointment was made by an appointing authority, by that authority⁵². When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority⁵³ and in all cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in section 44 of the Decree⁵⁴.

Under the provisions of the Lagos law the parties are free to agree on the procedure or may designate or agree to designate an appointing authority of their choice for the purpose of challenging an arbitrator⁵⁵.

The domestic regime of the Federal Act provides that an arbitrator may be challenged in circumstances where there exists justifiable doubts as to his impartially or independence or if he does not possess the qualifications agreed by the parties⁵⁶. The regime applicable to international commercial arbitration stipulates however the ground pertaining to doubts as to the arbitrator's impartiality or independence or omits the ground relating to qualifications agreed by the parties.

The grounds of challenge under the Lagos law include doubts as to the arbitrator's impartiality and independence and the lack of qualifications agreed by the parties. The Lagos law however included two additional grounds for challenge of an arbitrator. An arbitrator may be challenged if physically or mentally incapable of conducting the proceedings or there are justifiable doubts as

⁴⁸ See The Lagos State Arbitration Reform Committee Report, February 2008 at page 68.

⁴⁹ In reality as recognized under the law the arbitrator is independent of the parties and though appointed by a party it's a misconception to term such an arbitrator as "its" arbitrator.

⁵⁰ Section 8[4][a][ii] of the Lagos State Arbitration Law

⁵¹ Section 45[9][a][b][c] of the Federal Arbitration Act

⁵² Section 45[9][a] of the Federal Arbitration Act

⁵³ Section 45[9][b] of the Federal Arbitration Act

⁵⁴ Section 45[9][c] of the Federal Arbitration Act

⁵⁵ Section 11[1] of the Lagos State Arbitration Law

⁵⁶ Section 8[3][a][b] of the Federal Arbitration Act

to the arbitrator's capacity to do so⁵⁷. An arbitrator who refuses or fails to use all reasonable despatch in conducting the proceedings or making an award may be challenged in circumstances where substantial injustice has been or will be caused to the applicant.⁵⁸

The arbitrator being challenged in court is entitled to appear and be heard by the court with or without legal representation prior to a court order being made⁵⁹. The court concerned before removing an arbitrator may make such order as it thinks fit with respect to the arbitrator's entitlement (if any) to fees and expenses including indemnity for legal expenses or the refund of any fees or expenses already paid⁶⁰.

4.7 Joint Liability of the Parties [Arbitrators Fees]

The Federal Act recognizes that the costs of the arbitration includes the fees of the arbitral tribunal but does not specifically state the joint liability of the parties in respect of the payment⁶¹. Section 54 of the Lagos law provides that the parties are jointly and severally liable to pay the arbitrators such reasonable fees and expenses if any as are appropriate in the circumstances. Section 54[2] further provides that references to **arbitrators** includes an arbitrator who has ceased to act and an umpire who has not replaced the arbitrators.

4.8 Security for Costs

The Federal Act does not contain provisions on security for costs. Section 53 of the Lagos law makes provision for the arbitral tribunal to order security for costs. The provision appears to be an adoption of the London Court of International Arbitration [LCIA] Rules of Arbitration⁶². The arbitral tribunal shall have the power [upon application of a party] to order any claiming or counterclaiming party to provide security for the legal or other costs to any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the arbitral tribunal considers appropriate including the provision by that other party of a cross-indemnity, secured in such manner as the arbitral tribunal considers appropriate for any costs and losses incurred by such claimant or counterclaimant in providing security⁶³. The amount of any costs and losses payable under a cross-indemnity under subsection [1] of this section may be determined by the arbitral tribunal in one award or more awards⁶⁴. In the event that a claiming or counterclaiming party does not comply with any order to provide security under this section, the arbitral tribunal may stay that party's claim or counterclaim or dismiss them in an award⁶⁵.

4.9 Cessation of Office

The Federal Act does not contain provisions on the effect of the cessation of an office of arbitrator on any appointment made by the arbitrator [alone or jointly]. Section 16 of the Lagos law expressly stipulates that where an arbitrator ceases to hold office by challenge, termination, resignation or death the parties are free to agree on the effect [if any], that such cessation of office may have on any appointment made by the arbitrator [alone or jointly]. Where there is no such

⁵⁷ Section 10[3][c] of the Lagos State Arbitration Law

⁵⁸ Section 10[3][d] of the Lagos State Arbitration Law

⁵⁹ Section 12[4] of the Lagos State Arbitration Law

⁶⁰ Section 12[5] of the Lagos State Arbitration Law

⁶¹ Section 49[1] of the Federal Arbitration Act and Article 38 and 39 of the Arbitration Rules in the First Schedule.

⁶² Article 25.2 of the LCIA Arbitration Rules

⁶³ Section 53[1] of the Lagos State Arbitration Law

⁶⁴ Section 53[2] of the Lagos State Arbitration Law

⁶⁵ Section 53[3] of the Lagos State Arbitration Law

agreement the arbitral tribunal when reconstituted shall determine to what extent the previous proceedings stand. The arbitrator ceasing to hold office shall not affect any appointment made by the arbitrator [alone or jointly of another arbitrator and in particular any appointment of a presiding arbitrator or umpire⁶⁶.

Section 17 of the Lagos law further stipulates that unless otherwise agreed by the parties where the mandate of an arbitrator ceases, a substitute shall be appointed in accordance with the same rules and procedure that applied to the appointment of the arbitrator who is being replaced⁶⁷. This provision is in pari materia with section 11 of the Federal Act.

4.10 Commencement of Arbitral Proceedings

Section 17 of the Federal Act stipulates that unless otherwise agreed by the parties arbitral proceedings commence on the date the request to refer the dispute to arbitration is received by the other party⁶⁸. Section 32 of the Lagos law puts the date of commencement as when the request to refer the dispute is delivered to the other party.

4.11 Place and Time of Arbitration

Section 16 of the Federal Act stipulates that the place of the arbitral proceedings is to be determined by the arbitral tribunal having regard to the circumstances of the case including the convenience of the parties. Section 33 of the Lagos law specifically states that the tribunal determines not only the place of the arbitration but the date and time of the proceedings having regard to the circumstances of the case. The Lagos law deleted the reference to the convenience of the parties.

4.12 Language of the Proceedings

Section 18[1] of the Federal Act provides that the parties may by agreement determine the language or languages to be used in the arbitral proceedings⁶⁹. Where there is no determination the tribunal is vested with power to determine the language or languages to be used bearing in mind the relevant circumstances of the case. Section 36 of the Lagos law however stipulates that in the absence of the parties agreement the language shall be English⁷⁰.

4.13 Setting Aside of Awards

Sections 29 and 30 of the Federal Act pertains to setting aside of domestic awards. Section 29 provides that the court may set aside an award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration⁷¹. Section 30 provides that an award may be set aside where the arbitrator misconducts himself or where the proceedings or award has been improperly procured. The section further stipulates that an arbitrator who misconducts himself may on the application of any party be removed by the court⁷². Part III of the Federal Act applies to international commercial arbitration.

⁶⁶ Section 16[2] [b] of the Lagos State Arbitration Law

⁶⁷ Section 17[1] of the Lagos State Arbitration Law

⁶⁸ Section 17 of the Federal Arbitration Act

⁶⁹ Section 18[1] of the Federal Arbitration Act

⁷⁰ Section 36 of the Lagos State Arbitration Law

⁷¹ The award may be set aside in part only if the decision on matters submitted to arbitrator can be separated from those not submitted. Thus only that part of the award which contains decisions on matters not submitted may be set aside.

⁷² Section 30[2] of the Federal Arbitration Act.

Section 43 Part III of the Federal Act provides that the provisions of Part III shall apply solely to cases relating to international commercial arbitration and conciliation in addition to other provisions of the Act. Section 48 Part III provides that an international award may be set aside for the following reasons:-

- “[a] if the party making the application furnishes proof; or
- [i] That a party to the arbitration agreement was under some incapacity; or
- [ii] That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication that the arbitration agreement is not valid under the laws of Nigeria; or
- [iii] That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case; or
- [iv] That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or
- [v] That the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- [vi] That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate; and
- [vii] Where there is no agreement between the parties under subparagraph [vi] of this paragraph that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act”⁷³. or

The Act further provides that:

- [i] The subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; and

⁷³ Section 48[i-vii] of the Federal Arbitration Act

[ii] That the award is against public policy of Nigeria”⁷⁴.

Section 55 of the Lagos law lists the grounds for setting aside an arbitral award. The section incorporates the provision of section 48 of the Federal Act with some modifications and additions. The provisions of section 48 [a][i][ii][iv][v][vi][vii] were however adopted.

Some provisions were modified. Section 48[a][iii] of the Federal Act was modified by deleting the reference to inability of the party to present its case by qualifying the opportunity to be given as “fair opportunity”.

Section 48[b][ii] of the Federal Act was modified by deleting the reference to the award being against the public policy of Nigeria as a ground for setting aside. The Lagos law provision merely states that the award is against public policy, deleting the reference to the public policy of Nigeria.

The Lagos law added the following grounds:-

- 55[2] the court may set aside an arbitral award if it finds that:-
 - [viii] the dispute arises under an agreement that is invalid, non-existent or ineffective; or
 - [ix] the subject matter of the dispute is otherwise not capable of settlement by arbitration under the Laws of Nigeria; or
 - [x] the arbitrators or any of them received some improper payment, benefit or other consideration;
 - [xi] the arbitrators do not possess the qualifications required by the Arbitration Agreement;
 - [xii] the arbitrator or arbitrators are guilty of any misconduct in the course of the proceedings; and
 - [xiii] the award is contrary to public policy”⁷⁵.

Thus section 55 of the Lagos State Arbitration law essentially incorporates the grounds for setting aside under Part I and III of the Federal Act. Provisions were also made for setting aside on the basis of lack of qualifications required by the arbitration agreement. Furthermore, under the Lagos law in order to succeed in setting aside an award the applicant must in addition to proving one or more of the stated grounds satisfy the court that the ground relied upon has caused or will cause it substantial injustice. Section 55[3] further provides that where one or more of the grounds have been proved and such has caused or will cause substantial injustice to the applicant the court may adopt any of the following three options: -

⁷⁴ Section 48 [b][i-ii] of the Federal Arbitration Act

⁷⁵ Section 55[2][viii-xii] of the Lagos State Arbitration Law

- a. remit the award to the Tribunal in whole or in part for reconsideration;
- b. set the award aside in whole or in part; or
- c. render the award to be of no effect, in whole or in part.

The court is not to exercise its power to set aside or to declare an award to be of no effect in whole or in part unless it is satisfied that it would be inappropriate to remit the matter in question to the arbitral tribunal for consideration⁷⁶.

The additional provisions would no doubt safeguard the validity and enforceability of arbitral tribunal awards in appropriate circumstances.

4.14 Recognition and Enforcement of Awards

Section 31 as contained in Part I of the Federal Act pertains to the recognition and enforcement of awards. Section 31 provides that an arbitral award shall be recognized as binding subject to the right of a party to request the court to refuse recognition and enforcement of the award. The award shall upon application in writing to the court be enforced by the court.

A party relying on an award or applying for its enforcement is to supply: -

1. the duly authenticated original award of a duly certified copy thereof.
2. the original arbitration agreement or a duly certified copy.

An award may by leave of the court or judge be enforced in the same manner as a judgment or order to the same effect⁷⁷.

Section 51 Part III applicable to international awards provides that arbitral awards shall, irrespective of the country in which it is made, be recognized as binding and subject to the section and section 32 of the Act, shall, upon application in writing to court be enforced by the court. Section 32 provides that any of the parties to an arbitration agreement may request the court to refuse the recognition or enforcement of the award. The party applying for its enforcement is to supply the same documents as required under the domestic provisions as well as a duly certified translation into English where the award or arbitration agreement is not made in English language.

Section 56 of the Lagos law is in pari materia with section 51 of the Federal Act. Thus the Lagos law adopted the Federal provisions applicable to enforcement of international awards.

4.15 Refusal of Recognition or Enforcement of Awards

Section 32 of the Federal Act provides that any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. Section 52 of the Federal Act states grounds for refusing recognition and enforcement of an award. The grounds are as follows:-

⁷⁶ Section 55[4] of the Federal Arbitration Act. See also section 68[3] of the English Arbitration Act 1996

⁷⁷ Section 31[3] of the Federal Arbitration Act.

- “2[a] If the party against whom it is invoked furnishes the court proof:
- [i] That a party to the arbitration agreement was under some incapacity; or
 - [ii] That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made; or
 - [iii] That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case; or
 - [iv] That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or
 - [v] That the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - [vi] That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties; or
 - [vii] Where there is no agreement between the parties under subparagraph [vi] of this paragraph, that the composition of the arbitral tribunal, or the arbitral procedure was not in accordance with the law of the country where the arbitration took place; or
 - [viii] That the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made⁷⁸”.

The Federal Act further provides that if the court finds: -

- b[i] That the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or

⁷⁸ Section 52[a][i-viii] of the Federal Arbitration Act

- [ii] That the recognition or enforcement of the award is against public policy of Nigeria”⁷⁹.

The corresponding provision is section 57 of the Lagos law. Section 57[2] states the grounds for the court to refuse the recognition or enforcement of an award. Subsections 2[a][b][d][e][f][g] and [h] of the Lagos law are in pari materia with the corresponding provisions of the Federal Act subsections 52[2], 1[ii][iv][v][vii][viii].

A slight modification occurs to section 52[2][a][iii] and section 52[2][b] of the Federal Act. Section 52[2][a][iii] was modified by deleting the reference to inability of the party to present its case by qualifying the opportunity to be given as “fair opportunity”⁸⁰. Section 52[2][b] was modified by deleting the reference to the award being against the public policy of Nigeria as a ground for setting aside⁸¹. The Lagos law merely states as a ground for refusal recognition and enforcement that the award is against public policy deleting the specific reference to the public policy of Nigeria.

4.16 Correction and Interpretation of an Award

Section 28 of the Federal Act states the circumstances upon which an arbitral tribunal may correct or interpret an award or make an additional award. Section 28 [6] of the section stipulates that the arbitral tribunal may also if considered necessary extend the time limit within which it shall make a correction, give an interpretation or make an additional award. The provisions of section 50 of the Lagos law is in pari materia with section 28 save for a slight modification in section 28[6]. Section 28[6] of the Federal Act states that the arbitral tribunal may, if it considers necessary, extend the time limit within which it shall make a correction, give an interpretation or make an additional award⁸². Section 50[6] of the Lagos law qualifies the basis upon which an extension of time may be granted by deleting reference to the tribunal considering the extension “necessary” and stating that the tribunal “may for good cause” extend the time limit.

4.17 Costs

Sections 49 and 50 of Part III of the Federal Act contains provisions dealing with international commercial arbitration. These provisions are in pari materia with Articles 35 – 41 of the Arbitration Rules contained in the First Schedule to the Act, a modification of the UNCITRAL Arbitration Rules. Section 49 and Article 38 of the Arbitration Rules lists the term costs to include only the fees of the arbitral tribunal, the travel and other expenses incurred by the arbitrators, the cost of expert advice and of other assistance required by the arbitral tribunal, the travel and other expenses of witnesses and the cost for legal representation and assistance to the successful party if such costs were claimed during the arbitral proceedings⁸³.

Section 51 of the Lagos law is a slight modification of the provisions of the Federal Act. The Federal Act does not include the expenses of the parties in the term costs. The Act refers only to the travel and other expenses of the witnesses. In reality expenses would also be incurred by party

⁷⁹ Section 52[b][i][ii] of the Federal Arbitration Act

⁸⁰ Section 57[2][c] of the Lagos State Arbitration Law

⁸¹ Section 57[2][j] of the Lagos State Arbitration Law

⁸² Section 28[6] of the Federal Arbitration Act

⁸³ Section 49[i][a-e] of the Federal Arbitration Act. The travel and other expenses of witnesses are only to the extent that such expenses are approved by the arbitral tribunal.

representatives who may not be witnesses. Thus section 51[d] of the Lagos law inter alia specifically provides for the travel and other expenses of the parties and states thus: -

“[d] The travel and other expenses of parties, witnesses and other experts consulted by the parties to the extent that such expenses are approved by the Arbitral Tribunal having regard to what is reasonable in the circumstances”⁸⁴.

The Lagos law also took cognizance of the customary practice in arbitral proceedings for costs to include the administrative costs such as cost of venue, sitting and correspondence. The Federal Act does not specifically refer to these items of cost. However, the Lagos law does with section 51[f] specifically providing for the administrative costs such as cost of venue, sitting and correspondence⁸⁵.

Sections 52[1] and [2] of the Lagos law incorporates in pari materia the provisions of Sections 50 [1] and [2] of the Federal Act on deposit of costs. The provisions provide that the arbitral tribunal may request deposit on account of costs from the parties.

5. NEW PROVISIONS

5.1 Form of Arbitration Agreement

Section 1 of the Federal Act prescribes the requirements arbitration agreements must fulfill as precondition for its validity. The agreement must be in writing contained in a document signed by the parties⁸⁶, in an exchange of letters, telex, telegram or other means of communication which provide a record of the arbitration agreement⁸⁷ or in an exchange of points of claim and of defence in which the existence of an arbitration is alleged by one party and not denied by another⁸⁸. In reality modern forms of communication rendered obsolete the form of arbitration agreement as envisaged and captured in the writing requirements stated in section 1 of the Federal Act. Arbitration agreements which may be invalidated under the provisions of the Federal Act include those concluded through electronic means of communication⁸⁹. The revised model law 2006 expatiated the writing requirement to incorporate modern means of communication. Section 3[3][4] and [5] of the Lagos law incorporated the revision and the law states thus:

“[3]An Arbitration Agreement shall be in writing.

[4] “Writing” includes, data that provides a record of the Arbitration Agreement or is otherwise accessible so as to be usable for subsequent reference.

[5] “Data” includes information generated, sent, received or stored by electronic, optical or similar means, such as

⁸⁴ Section 51[d] of the Lagos State Arbitration Law

⁸⁵ Section 51[1][f] of the Lagos State Arbitration Law

⁸⁶ Section 1[1][a] of the Federal Arbitration Act

⁸⁷ Section 1[1][b] of the Federal Arbitration Act

⁸⁸ Section 1[1][c] of the Federal Arbitration Act. See also Article 11[1] of the New York Convention. The 1985 Model Law followed Article 11[2] of the New York Convention on other forms of arbitration agreements which may be invalidated under the provision of the Federal Act.

⁸⁹ See a proposal for the reform of Nigeria’s Arbitration Laws as prepared by Aluko & Oyeboode.

but not limited to Electronic Data Interchange [EDI], electronic mail, telegram , telex or telecopy”.

Thus unlike the Federal Act, arbitration agreements concluded in modern formats such as emails and other means of communication are valid, binding and enforceable.

5.2 Interim Measures / Preliminary Orders

Section 13 of the Federal Act confers power on the arbitral tribunal to order interim measures of protection in respect of the subject matter of the dispute before or during an arbitral tribunal. The arbitral tribunal may also require any party to provide appropriate security in connection with any measure taken in respect of an interim measure of protection. The provision of Section 13 is modeled on section 17 of the UNCITRAL Model Law 1985. The grant and enforcement of interim measures are increasingly being relied on in the practice of international commercial arbitration and the 1985 Model law provisions proved inadequate to deal with the need of current arbitration. Thus the revised Model Law 2006 includes detailed provisions on interim measures and preliminary orders⁹⁰.

The Lagos law incorporates detailed provisions on the grant, recognition and enforcement of interim measures and preliminary orders based on the Model Law 2006 revisions. Section 21 of the Lagos Law stipulates the power of the High Court to issue interim measures for the purposes of and in relation to arbitration proceedings as it has for the purposes and in relation to proceedings in the Court. The Courts are to exercise the power in accordance with the Arbitration Application Rules 2009, a Schedule to the law. The rules contain provisions on the procedure for applying for interim measures of protection, the recognition or enforcement of such measures made by arbitral tribunals and the refusal of recognition or enforcement⁹¹.

Section 21[3] defines an interim measure thus:

“.....any temporary measure whether in the form of an award or in another form, prior to the issuance of the award by which the dispute is finally decided, the Arbitral Tribunal may order a party to:

- (a) maintain or restore the status quo pending the determination of the dispute;
- (b) take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the subject matter of the dispute or the arbitral process itself;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) preserve evidence that may be relevant and material to the resolution of the dispute”.

⁹⁰ See sections 17, 17[a] 17[b], 17[c], 17[d], 17[e], 17[f], 17[h], 17[i], 17[j] of the 2006 Revised Model Law.

⁹¹ See section 1[c], 1[d], and 7 of the Arbitration Applications Rules 2009.

The law contains provisions on the conditions for grant of interim measures, application for preliminary orders, procedures for preliminary orders and security for preliminary orders⁹². Preliminary orders enable the arbitral tribunal preserve the status quo pending the issuance of an interim measures either adopting or modifying the tribunal's preliminary order.

Parties may stipulate in their arbitration agreement that a party may without notice to any other party apply to the arbitral tribunal for a preliminary order directing a party not to frustrate the purpose of the interim measures requested. This provision is without prejudice to any law in force in Nigeria guiding the grant of interim measures⁹³. The application may be made by a party at the same time as it makes a request for the interim measure⁹⁴. In circumstances where parties had stipulated this in their arbitration agreement the tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it was directed risks frustrating the purpose of the measure⁹⁵.

Section 25 stipulates that the tribunal may extend, modify, suspend or terminate an interim measures or a preliminary order it has granted in the following circumstances:

- “[a] important facts were concealed from the Tribunal;
- [b] the interim measures or Preliminary Order was obtained by fraudulent representation;
- [c] facts come to the knowledge of the Tribunal, which if the Tribunal had known, it would not have granted the Order; and
- [d] it is just and equitable in the circumstance to extend, modify or suspend the Order⁹⁶”

Section 26 stipulates that the arbitral tribunal unless it considers it inappropriate or unnecessary shall require the party applying for preliminary order to provide security in connection with the order where:

- “[a] important facts were concealed from the Tribunal
- [b] the interim measures or Preliminary Order was obtained by fraudulent representation;
- [c] facts come to the knowledge of the Tribunal which if the Tribunal had known, it would not have granted the Order; and

⁹² Section 22[1], section 24 of the law.

⁹³ Section 23[1] of the Lagos State Arbitration Law

⁹⁴ Section 23[1] of the Lagos State Arbitration Law

⁹⁵ Section 23[2] of the Lagos State Arbitration Law

⁹⁶ Section 25 of the Lagos State Arbitration. This power may be used upon the application of any party or in exceptional circumstances and upon prior notice to the parties on the arbitral tribunal's own initiative.

- [d] it is just and equitable in the circumstance to extend, modify or suspend the Order⁹⁷”

Section 27 provides that the party applying for a preliminary order is obliged to disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal’s determination whether to grant the order. The obligation continues until the arbitral tribunal has made a determination on the request for an interim measure⁹⁸. The party who desires to maintain a preliminary order shall disclose all circumstances that are likely to be relevant to the arbitral tribunal’s determination whether to maintain the order⁹⁹. The party applying for an interim measure is also obliged to promptly disclose any material change in the circumstance on the basis of which the measure was requested or granted¹⁰⁰. Section 28 goes on to provide that the party applying for a preliminary order or requesting any measure shall be liable for costs and damages caused by the measure or the order to the party to whom it is directed if the tribunal later determines that in the circumstances the measure of order should not have been granted. The tribunal may award such costs and damages at any point during the proceedings¹⁰¹. Section 29 provides that an interim measure issued by an arbitral tribunal shall be binding unless otherwise provided by the arbitral tribunal recognized and enforced upon application to the High Court irrespective of the jurisdiction or territory in which it was granted subject to the provisions of subsections [2] and [3] of the section. The relevant subsections provide that the party seeking or who has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure. Furthermore, the Court to which a request for recognition and enforcement of an interim measure is presented may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties¹⁰².

The law contains detailed provisions of circumstances in which the recognition or enforcement of an interim measure may be refused upon the satisfaction of the Court¹⁰³.

5.3 Specific Powers of the Arbitral Tribunal on Remedies

The Federal Act does not specifically state the power of an arbitral tribunal with respect to remedies. Section 38 of the Lagos law specifies that the parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies¹⁰⁴. Section 38[2] goes on to state that unless or otherwise agreed by the parties the arbitral tribunal has the following powers: -

- “[a] May make a declaration as to any matter to be determined in the proceedings;
- [b] May order the payment of a sum of money, in any currency; and

⁹⁷ Section 26 of the Lagos State Arbitration Law

⁹⁸ Section 27[1] of the Lagos State Arbitration Law

⁹⁹ Section 27[2] of the Lagos State Arbitration Law

¹⁰⁰ Section 27[3] of the Lagos State Arbitration Law

¹⁰¹ Section 28 of the Lagos State Arbitration Law

¹⁰² Section 29[1][2][3] of the Lagos State Arbitration Law

¹⁰³ Section 30[1] and [2] of the Lagos State Arbitration Law

¹⁰⁴ Section 38[1] of the Lagos State Arbitration Law

- [c] The same powers as the Court;
- i) to order a party to do or refrain from doing anything;
- ii) to order specific performance of a contract (other than a contract relating to land); and
- iii) to order the rectification, setting aside or cancellation of a deed or other document¹⁰⁵.

5.4 Appointment of Umpire

The Federal Act does not contain provisions on the appointment of umpires in arbitration proceedings.

Section 9 of the Lagos law appears to have adopted the applicable provisions of section 21 of the English Arbitration Act. Parties are free to agree on the functions of the umpire and in particular whether the umpire is to attend the proceedings and when the umpire may replace the other arbitrators with powers to make decision, orders and awards¹⁰⁶. In the event that there is no agreement between the parties the law stipulates the functions of the umpire¹⁰⁷. The umpire shall attend the proceedings and be supplied with the same documents and other materials as are supplied to other arbitrators¹⁰⁸. The decisions, orders and awards shall be made by other arbitrators unless they cannot agree on a matter relating to the arbitration. In that event, they shall immediately give notice in writing to the parties and the umpire, whereupon the umpire shall replace them as the arbitral tribunal with power to make decisions, orders and awards as if the umpire was the sole arbitrator¹⁰⁹. If the arbitrators cannot agree but fail to give notice of that fact or if any of them fails to join in the giving of notice, any party to the arbitral tribunal may [upon notice to the other parties and to the arbitral tribunal] apply to the Lagos Court of Arbitration which shall give the required notice in writing to the parties and the umpire that the umpire shall replace the arbitrators as the arbitral tribunal. The umpire shall then have the power to make decisions, orders and awards as a sole arbitrator¹¹⁰.

5.5 Consequence of Resignation of an Arbitrator

The Federal Act does not contain specific provisions in respect of the resignation of arbitrators. Section 14 of the Lagos law contains specific provisions as regard the consequence of the termination of an arbitrator's appointment. The Lagos law provides that the parties are free to agree with an arbitrator as regards the consequences of his resignation as regards his entitlement to fees or expenses and any liability incurred by the arbitrator¹¹¹. Where there is no such agreement an arbitrator who resigns may [upon notice to the parties] apply to the court to grant relief from any liability incurred and to make such order it thinks fit with respect to the arbitrator's entitlement [if any] to fees or expenses or the repayment of any fees or expenses

¹⁰⁵ Section 38[2] of the Lagos State Arbitration Law

¹⁰⁶ Section 9[1] [a] and [b] of the Lagos State Arbitration Law

¹⁰⁷ See section 9[2] [a-d] of the State Arbitration Law

¹⁰⁸ Section 9[2][a] of the Lagos State Arbitration Law

¹⁰⁹ Section 9[2][b] of the Lagos State Arbitration Law

¹¹⁰ Section 9[2][c] of the Lagos State Arbitration Law . The English Arbitration Act section 21[5] simply refers to the court.

¹¹¹ Section 14[1][a] and [b] of the Lagos State Arbitration Law

already paid. Should the Court be satisfied that in all the circumstances it was reasonable for the arbitrator to resign it may grant such relief or such terms as it thinks fit¹¹².

5.6 Immunity of Arbitrators

The Federal Act does not confer immunity on arbitrators. In the case of **NNPC v Lutin Investment Ltd**, Hon. Justice Uche Omo learned arbitrator was named as a party in a judicial proceedings for action taken as an arbitrator¹¹³. Section 18 of the Lagos law confers immunity on arbitrators and hence under the framework in Lagos State an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of the arbitrator's functions as arbitrator unless the act of omission is determined to have been in bad faith. The immunity extends to an employee or agent of the arbitrator as it applies to the arbitrator but does not affect any liability incurred by an arbitrator by reason of resignation¹¹⁴.

5.7 Applicable Arbitration Rules

The Federal Act contains as its First Schedule the UNCITRAL Arbitration Rules. Article 1 of the First Schedule provides that the rules shall govern any arbitration proceedings. In international proceedings parties may adopt the Arbitration Rules set out in the First Schedule, UNCITRAL arbitration rules or any other arbitration rules acceptable to the parties¹¹⁵. Section 31 of the Lagos law however stipulates that except as otherwise agreed by the parties the proceedings shall be conducted in accordance with the procedure contained in the Arbitration Rules in the Lagos Court of Arbitration in force from time to time. The rules of the Lagos Court of Arbitration have not been made a Schedule to the Court of Arbitration Law No. 8 of 2009.

5.8 Applicability of Limitation Laws

The Federal Act is silent on the applicability of limitation laws to arbitral proceedings. Section 35 of the Lagos law provides that limitation laws shall apply to arbitral proceedings as they apply to judicial proceedings. In **City Engineering Nigeria Ltd v FHA**¹¹⁶ the court held that the period of limitation for the enforcement of an award runs from the breach that gave rise to the arbitration. The court was considering the issue of when the statutory period of limitation starts to run for the purpose of enforcement of arbitration awards i.e. does time start to run from the date of the accrual of the original cause of action or is it at the date of the arbitral award. Disputes arising from arbitral proceedings are being locked in the court system. The effect of the decision is that the limitation period for the enforcement of an award may lapse before the successful claimant is able to enforce such an award¹¹⁷. The Lagos law specifically provides in computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded¹¹⁸.

¹¹² Section 14[2][a] and [b] of the Lagos State Arbitration Law

¹¹³ [2006] 2 CLRN 1 at 16. See also Associate Quantity Surveyor v Maritime Academy Oron [2006] 4 CLRN, 138

¹¹⁴ Section 18[2] and [3] of the Lagos State Arbitration Law

¹¹⁵ See section 53 of the Federal Act and Article 1 of the First Schedule. See also the definition section of the Federal Act on the definition of international commercial arbitration.

¹¹⁶ [1997] 9 NWLR, Part 520, 224

¹¹⁷ To avoid the time running out an application may be brought under the relevant laws suspending the running of the limitation statute pending court proceedings e.g. section 64 of the limitation law of Lagos State.

¹¹⁸ Section 35[5] of the Lagos State Arbitration Law

5.9 Consolidation, Concurrent Hearing and Joinder of Parties

The Federal Act does not contain provision on consolidation, concurrent hearings and joinder of parties. Section 40 of the Lagos law provides that parties are free to agree that arbitral proceedings shall be consolidated with other proceedings or that concurrent hearings be held on such terms as may be agreed¹¹⁹. Where the parties have so agreed the arbitral tribunal shall give effect to the agreement unless it is of the view that it is not in the interest of justice to do so¹²⁰. A party may by application and with the consent of the parties be joined to arbitral proceedings¹²¹.

5.10 Interest

The Federal Act does not contain provisions on interest. Arbitrators award interest in proceedings governed by the Act on the basis of the parties' express agreement or the common law principle of interest. The Lagos law specifically provides that parties are free to agree on the power of the arbitral tribunal as regard the award of interest. The provisions, as adopted from the English Arbitration Act 1996 sets out the powers of the arbitral tribunal unless otherwise agreed by the parties¹²². The provisions vests the arbitral tribunal with power to award simple or compound interest as it considers just up to the date of the award or any later date until payment¹²³.

5.11 Notification of Award /Arbitrator's Lien on Award

The Federal Act does not contain specific provisions on notification of award to the parties nor for an arbitrator to exercise a lien on award for unpaid fees and expenses. Section 49 of the Lagos law specifically provides that the award is to be notified to the parties without delay after the award is made¹²⁴. The law stipulates that the arbitrators have a lien on the award for unpaid fees and expenses¹²⁵. The Lagos law also states in the event that there is a dispute on fees and expenses where not agreed and the arbitral tribunal refused to deliver the award, an application may be made to the court¹²⁶. In determining the fees properly payable the court is to have regard to section 51[2] of the law. Section 51 [2] provides that the fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other circumstances of the case. Section 51[2] is in pari materia with the provisions of section 49 of the Federal Act [applicable to international arbitration] and Article 39 of the Arbitration Rules in the First Schedule usually applicable in domestic proceedings. Furthermore the Lagos law specifically provides that no application to the court is to be made where there is any available arbitral process for appeal or review of the amount of the fees or expenses¹²⁷.

¹¹⁹ Section 40[1][a][b] of the Lagos State Arbitration Law

¹²⁰ Section 40[2] of the Lagos State Arbitration Law

¹²¹ Section 40[3] of the Lagos State Arbitration Law

¹²² See section 49 of the 1996 English Arbitration Act.

¹²³ Section 46 of the Lagos State Arbitration Law

¹²⁴ Section 49 [1] of the Lagos State Arbitration Law

¹²⁵ Section 49 [2] of the Lagos State Arbitration Law

¹²⁶ Section 49 [3] [a] [b] [c] of the Lagos State Arbitration Law

¹²⁷ Section 49 [5] of the Lagos State Arbitration Law

5.12 Definition Section

The definition section contains definitions not stated in the appropriate section of the Federal Act. Thus section 63 of the Lagos law unlike the Federal Act defines ad hoc arbitration¹²⁸, appointing authority¹²⁹, arbitration¹³⁰, arbitration agreement¹³¹, award¹³², death¹³³ and the place of arbitration¹³⁴.

Arbitration is defined in both enactments albeit differently. The Federal Act defined arbitration as a commercial arbitration whether or not administered by a permanent arbitral institution. The Lagos law however defines arbitration as a reference of an existing or future dispute between two or more parties to an independent person(s) chosen by them [the arbitrator] to adjudicate upon. The definition section also defines the Lagos Court of Arbitration and modified the definition of court to restrict same to the High Court of Lagos State.

6. CONCLUSION

This paper has attempted to compare the provisions of the Federal Arbitration Act and the recently passed Lagos arbitration law whilst highlighting some of the major changes. The law was motivated by the need to ensure that the legal framework for the conduct of arbitral proceedings remains responsive to the needs and requirements of the users, is modern, suitable and relevant to the socio-economic circumstances of the state, and meets contemporary international standards.

The text of the Lagos law contains the most recent review of the UNCITRAL Model Law, the international parameter upon which arbitration laws are assessed. Other innovations in the light of the country's specific experience have also been incorporated. This includes the Arbitration Applications Rules 2009, rules aimed at avoiding delays in the conclusion of arbitration related matters before the court. The need for all States of the Federation to promulgate modern and up to date arbitration legislation cannot be over-emphasized.

Effective and appropriate implementation by the judicial system and arbitrators will no doubt determine the extent of the law's efficacy. Courts and arbitrators are enjoined to pay utmost regard to the overriding principle of the law as encapsulated in Article 1, expeditious resolution of disputes fairly by impartial tribunals with respect for party autonomy subject only to such safeguards that are necessary in the public interest. The overriding principles should inform the approach taken by parties, arbitrators and indeed the courts in the conduct of arbitration in Lagos State.

¹²⁸ Ad-hoc arbitration means a proceeding that is not administered by an institution or other body and which requires the parties themselves to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support.

¹²⁹ Appointing authority means a body or institution designated to appoint an arbitrator or arbitrators under the Arbitration Agreement.

¹³⁰ Arbitration means the reference of an existing or future dispute between two or more parties to an independent person[s] chosen by them [the arbitrator] to adjudicate upon.

¹³¹ Arbitration agreement has the meaning given to it in section 3.

¹³² Award means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders, measures or directions made by the arbitral tribunal.

¹³³ Death includes, in the case of a non-natural person, dissolution or other extinction by process of Law.

¹³⁴ The place of arbitration means the juridical seat of the arbitration designated by the parties to the arbitration or any arbitral or other institution or person authorized by the parties for that purpose or the arbitral tribunal as authorized by the parties.