

Recent Arbitration Related Developments in Nigeria

THIS ARTICLE WAS ORIGINALLY PUBLISHED IN THE JOURNAL OF THE CHARTERED INSTITUTE OF ARBITRATORS (CIARB) ARBITRATION: REPRINTED FROM (2010) 76 ARBITRATION 130-135: RECENT ARBITRATION RELATED DEVELOPMENTS IN NIGERIA.

AUTHORED BY ADEDOYIN RHODES – VIVOUR LLB, LLM, M.A FCIARB (U.K)

1. INTRODUCTION

On May 18, 2009 Lagos, one of the constituent States of Nigeria and its commercial nerve centre, enacted two arbitration related laws. Law No.8 establishes the Lagos Court of Arbitration, Law No10 provides for the resolution of disputes by arbitration in Lagos State.

The origins of Nigerian statutory law on arbitration can be traced to the Arbitration Ordinance of 1914. The Ordinance was based on the English Arbitration Act 1899 and was applicable to the whole country which was then governed as a unitary system. The Ordinance-based law was later adopted by the various States. Nigeria adopted the UNCITRAL Model Law in 1988 with the promulgation of the Arbitration and Conciliation Act (Federal Act)¹. Lagos State thereafter adopted the Federal Act. Several States in Nigeria retain the Ordinance-based law. A few have adopted the Federal Act².

Law **No. 10** is the first modern State-enacted arbitration law in Nigeria and law **No. 8** establishes the first commercial court of arbitration in the country.

2. RATIONALE FOR THE LAWS

After over two decades of administering the model law, various concerns on the continuing efficacy of the existing legal framework emerged. Awards were getting locked up in the court system. Action had to be taken. In 2005, Chief Bayo Ojo SAN, the then Federal Attorney General, set up a National Committee to submit proposals on the reform of Nigeria's arbitration and ADR laws. The Lagos State Government followed suit in 2007. The recently enacted laws are the result of the work of the Lagos State Reform Committee, which Committee drew largely from the work of the National Committee, which had proposed a Uniform States bill on arbitration to be recommended to States for adoption.

1. Cap A18 LFN 2004. The Act is based on the Model Law and incorporates the UNCITRAL arbitration rules. The Act contains part II, which reflects Nigeria's treaty obligation under the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).

² Rivers State of Nigeria.

The desire to promote and establish Lagos as a regional and ultimately international arbitration centre as part of the broader efforts to transform Lagos into a leading financial centre motivated the establishment of the Lagos Court of Arbitration.

3. OVER VIEW OF THE LAWS

Arbitration Law No10-The law applies to all arbitrations within the state except where the parties have expressly agreed that another arbitration law shall apply, Lagos State Arbitration Law 2009 (LSAL) s1(2). The LSAL is closely based on the UNCITRAL Model Law but reflects some revisions and additional provisions. Thus the Model Law provisions on definition and form of arbitration agreement, s3(4) and (5), interim measures and preliminary orders, ss21-30, are incorporated. Article 26(1) requires the party applying for a preliminary order to provide security in connection with the order unless it is considered inappropriate or unnecessary by the arbitral tribunal. The threshold for the award of an interim order is harm which would not be adequately reparable by an award of damages and which if granted substantially outweighs the damage that is likely to result to the party against whom the measure is directed, s22(a).

The law corrected inconsistencies and inelegant provisions of the Model Law-based Arbitration Act (as enacted in Nigeria). The confusion caused by two seemingly contradictory provisions on stay of court proceedings in respect of matters brought in violation of arbitration agreements was tackled. Section 4 appears to impose a mandatory obligation on the court to stay proceedings in favour of arbitration whilst s5 appears to allow the court discretion in the matter. LSAL deleted s5 but incorporated s4 as s6 with its mandatory obligation on the court to stay proceedings of a matter subject to an arbitration agreement.

Additional provisions include conferring immunity on arbitrators, s18; conferring power to grant security for costs, s53; providing for an umpire, s9; arbitrator's power to exercise lien on award for unpaid fees, s49(2); specific provisions on powers of the tribunal as regards remedies, joinder and consolidation of arbitral proceedings, ss38 and 40. Except where otherwise agreed by the parties, proceedings under the law are to be conducted in accordance with the procedure contained in the Arbitration Rules of the Lagos Court of Arbitration in force from time to time, s31(1). The parties no longer have full opportunity to present their case but fair opportunity, s34. The law rendered invalid even-numbered tribunals in the absence of the parties' agreement. Except otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or other even number shall be deemed to require the appointment of an additional arbitrator, s7(2). Where there is no agreement on the number of arbitrators, the tribunal is to consist of a

sole arbitrator, s7(3)³. No person is to be disqualified from being appointed as arbitrator by reason only of nationality, except as otherwise agreed by the parties, s8(3)(i).

If parties have failed to designate an appointing authority and cannot agree on the arbitrator, the Lagos Court of Arbitration replaces the High Court, as the appointing body, as provided in the Federal Act, s8(4)(b). In challenge proceedings, the arbitrator is entitled to appear before and be heard by the court, before an order of court is made, s12(4). The law gives arbitrators power to award interest, s46, adopted from the English Arbitration Act 1996 s49 and, where the parties have failed to agree on the language or languages to be used in the proceedings, the law stipulates that English language shall be used, s36(1). The law states that parties are free to agree on the functions of the umpire, s9(1).

The Arbitration Application Rules 2009, an innovation adopted from the work of the National Committee, apply to all applications brought before the court in respect of arbitrations under the law. Section 1 of the Schedule provides that “arbitration applications” means any applications to a court under the LSAL, including those relating to stay of proceedings and the recognition and enforcement of interim measures of protection and awards. The Schedule stipulates time periods for bringing applications, with a view to avoiding lengthy court proceedings which have impacted negatively on the expeditious conclusion of arbitral proceedings and resultant awards. Hopefully, this is expected to address concerns that arbitration remain a speedier and more effective means of resolving disputes and not a step to protracted litigation.

The LSAL makes provision for application of limitation statutes to arbitrations, a lacuna in the Federal Act. The effect of this is illustrated in *City Engineering Nigeria Ltd v FHA*⁴. The court held that the period of limitation for the enforcement of an award runs from the breach that gave rise to the arbitration. Delays in the arbitral system could effectively result in the lapse of the limitation period before the court grants enforcement. Under the LSAL limitation laws are to apply to arbitration proceedings as they apply to judicial proceedings. The law specifically provides that, in computing the time for the commencement of proceedings to enforce an award, the period between the commencement of arbitration and the date of the award shall be excluded, s35.

4. CONSTITUTIONAL COMPETENCE

Questions regarding the tier of government with constitutional competence to legislate on arbitration have come under considerable debate. Arbitration, conciliation and other ADR processes are not listed in the exclusive nor concurrent legislative list of the 1999 Constitution of

³ In international arbitration, the preferred number is three.

⁴ [1997] NWLR, Part 520, 224

Nigeria⁵. Thus it may be argued that such matters are residual and fall within the legislative competence of the States. The National Committee observed that the Federal Act was passed by a military regime and applicable to both Federal and State matters⁶. The Committee came to the conclusion that the National Assembly under a civilian regime cannot legislate on all aspects of arbitration and conciliation in Nigeria. It considered items 62 and 68 of the exclusive legislative list and recommended that whilst the Federal Government has the constitutional power and competence to legislate on arbitration and conciliation in respect of trade and commerce which are international or interstate, all other matters not covered by items 62 and 68 are residual and within the legislative competence of States. It recommended two sets of legislation, the Federal Arbitration Act and the Uniform States Arbitration Law for adoption by the States. The Lagos State Committee thought otherwise and premised the subject matter of arbitration on contracts and contractual dispute resolution, not trade and commerce in itself, thus within the legislative competence of States. Justice Olakunle Orojo, Chairman of the National Committee, in debates arising from the arbitration session at the Nigerian Bar Association, Section on Business Law, Conference in April 2009, reiterated the view of the Committee. Yemi Candide-Johnson SAN, Chairman of the Lagos State Committee, thought otherwise. He referred to the doctrine of Pith and Substance⁷ and the fundamental tenet of arbitration as hinging on the parties' freedom to contract and make a choice on law, place or territory as they wished. He argued that the Constitution of Nigeria does not confer power on any legislature to remove the parties' rights to contract, thus parties in international transactions may either choose to arbitrate under the Federal or State law as they prefer. This debate can only be finally settled by the Supreme Court should the matter be referred. The practice however to date is that the two regimes co-exist, dependent on the parties choice.

5. THE COURT OF ARBITRATION LAW

The principal function of the Lagos Court of Arbitration is the promotion of the resolution of disputes in the territory of Lagos State by arbitration and other ADR mechanisms apart from litigation⁸. The Court maintains a Panel of Neutrals and may carry out such other functions as

⁵ Matters listed in the exclusive legislative list **are** within the legislative competence of the Federal Government, those on the concurrent list within the competence of the States. Unlisted matters are regarded as residual and within the legislative competence of the States.

⁶ Section 315 preserves existing laws within the provisions of the 1999 Constitution.

⁷ A method developed by Canadian courts for dividing and balancing power between the Federal and Provincial Government in the Canadian Federation.

⁸ Lagos Court of Arbitration Law No. 8 of 2009 (LCAL) s9(a).

may be appropriate. The Court acts as an appointing authority under the provisions of the Lagos Arbitration Law, LSAL s8(4)(b). It is private sector driven and independent of regulation, direction or control by any branch of government, LSAL s1(2). The functions are carried out by the General Meeting, the Board of Directors and the Secretariat. An Executive Secretary shall be responsible for the day-to-day management and administration of the Court. The Board of Directors may, with the approval of the General Meeting, make regulations generally for the purposes of the law and due administration of the Court. Membership of the Court is open to any person or body corporate of good standing with *bona fide* interest in commercial arbitration or alternative dispute resolution, LSAL s2.

The Court's powers include powers to make and carry out any arrangement for co-operation with any other organization, whether incorporated or not, carrying on functions similar or complementary to any function for the time being carried on by the Court.

The Court is not a profit-making body. Its income and property are to be applied solely towards the promotion of its objects and functions. This provision does not prevent the payment in good faith, of remuneration to any of the Court's servants or members, or other persons, in return for services actually rendered to the Court, LCAL s11.

6. SUMMARY

This paper merely highlights the provisions of the new laws and is not intended to be a thorough review. The arbitration law establishes a reviewed arbitration legal framework in line with current developments. The developments are welcome. The UNCITRAL Model Law revised provisions are incorporated. This represents the acceptance of UN General Assembly Resolution 61/33 of December 18, 2006 recommending the enactment of the 2006 Revised Articles of the Model Law. Whether the intention of a more effective framework, particularly in terms of speed and efficacy of enforcing awards, is achieved or not will depend on the implementation of its provisions and the conduct of the courts.

The LCAL is expected to open up the potential of Lagos State as a seat of arbitration. To garner international confidence, the Court would have to establish strategic partnerships with similar organisations globally. The Court has yet to establish its arbitration rules, which hopefully will be based on the UNCITRAL Arbitration Rules, a familiar and tested regime domestically and internationally.