NIGERIA

Country Report on Commercial and Investment Arbitration

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I. COMMERCIAL ARBITRATION

1. What domestic law(s) regulate(s) commercial arbitration in your country?

a. Is this legislation applicable to both domestic and international arbitration? Are these rules based on the UNCITRAL Model Law? If yes, what are the meaningful differences?

b. Are there any legislative initiatives ongoing to amend the domestic law? If yes, on what aspect of the arbitration law(s) and for which reasons?

c. By your expertise, is the legislative framework efficient and effective?

When it comes to understanding the legal framework for commercial arbitration in present-day Nigeria, there are two separate legislations important to bear in mind. First is the Nigeria Arbitration and Conciliation Act (hereinafter ACA),[1] secondly, the Lagos State Arbitration Law (hereinafter LSAL).[2] The reason why there is two separate legislation relevant to commercial arbitration in Nigeria is rooted in Nigeria's constitutional framework. As common in most federal systems of government where a federal state and the constituent states within the federation may share legislative competence in certain areas of governance, the Nigerian Constitution expressly delineates commerce as one of those areas where both the federal and the constituent states legislatures have shared competence in enacting laws aimed at commercial development.[3] Accordingly, aside from the ACA which is the principal national law on arbitration, the Nigerian Constitution allows for each of the thirty-six (36) states within the federation to enact an arbitration law towards the development of commerce within their respective territories. Thus far, amongst the 36 states of the federation, "Lagos state" Nigeria is renowned for its active arbitration law (LSAL) aimed at the development of commerce within the state.[4] The LSAL governs all arbitration proceedings within Lagos State Nigeria (domestic or international), except

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1 The Arbitration and Conciliation Act Chapter A18, Laws of the Federation of Nigeria 2004, available at: https://www.acerislaw.com/wp-content/uploads/2020 (accessed 17 December 2020).

2 The Arbitration Law of Lagos State No. 55, Vol. 42 of 2009.

3 Constitution of the Federal Republic of Nigeria 1999, Second Schedule Part II (concurrent legislative list), art. 18.

4 *See*, (fn 2).

where the parties have expressly agreed otherwise.[5] The LSAL is largely modelled after the UNCITRAL Model Law 1985 (hereinafter Model Law) and incorporates the 2006 amendments.[6]

With respect to the national law on arbitration, both domestic and international commercial arbitration are covered respectively in Part I and III of the ACA.[7] Part III specifically applies to international commercial arbitration. Notably, the ACA is equally an adoption of the Model Law, but yet to incorporate the 2006 amendments. However, this is expected to change shortly as a legislative bill to improve the ACA is currently before the national parliament, this bill is expected to incorporate the 2006 amendments to the Model Law once signed into force. Although the ACA is largely a replica of the Model Law, there are some notable differences worthy of mention. For example, the provision of Article 8(1) Model Law requires a court to refer a matter subject to an arbitration agreement back to arbitration, on the request of a party.[8] According to the related provision in the ACA, a Nigerian court further has the power to order a stay of proceedings.[9] Article 5 ACA further stipulates that the court will grant an applicant's stay of proceedings upon request if it is satisfied that:

(a) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement, and;
(b) the applicant remains ready and willing to do all things necessary for the proper conduct of the arbitration.

In contrast, the LSAL also empowers the court to order a stay of proceedings in disputes subject to an arbitration agreement but with only one requirement to be satisfied i.e. provided such request is brought not later than when submitting the first statement on the substance of the dispute.[10] On both reliefs in the ACA and LSAL, the Model Law is silent. A further distinction can be drawn from Article 13(3) Model Law, which permits a party the right to appeal to a competent court or authority within thirty days of receiving the notice of an unsuccessful challenge to an arbitrator. Unlike the Model law, the ACA grants no such provision for appeal once a decision on the challenge of an arbitrator has been made, either by the arbitral tribunal itself or by the appointing authority as the case may be.[11]

Concerning the efficiency and effectiveness of the legal framework, it is noted that the outdated nature of the ACA makes it quite unappealing for contemporary dispute resolution practice. The same however cannot be said of the LSAL that already incorporates the 2006 amendments to the Model law and other notable improvements to the ACA. For instance, the current ACA has no provision for the joinder of non-parties to an arbitration proceeding, which is an avenue to foster procedural efficiency in closely related disputes. However, the LSAL takes this factor into account, as "a party may, by application and with the consent of the parties, be joined to an

5 *See*, Arbitration Law of Lagos State No. 55, Vol. 42 of 2009, art. 2.
6 UNCITRAL Model Law on International Commercial Arbitration, 21 june 1985, amended on 7 July 2006; Also, Cf., Babajide Ogundipe and Olamide Aleshinloye, 'Nigeria – The International Arbitration Review' (*The Law Reviews* July 2020), available at: https://thelawreviews.co.uk (accessed 18 December 2020).
7 *See*, (fn 1).
8 Model Law, art 8(1): the court shall "[…] refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed".
9 *See* in this regard (fn 1), ACA art. 4(1).
10 Arbitration Law of Lagos State No. 55, Vol. 42 of 2009, art. 6(1).
11 *See* in this regard (fn 1), ACA Part I, art. 9(3) and Part III, art 45(9).

arbitral proceeding".[12] Further, the LSAL affords procedural immunity to arbitrators including their employees or agents in the discharge of their duties, save when they act in bad faith.[13] However, such protection is not available to arbitrators under the ACA. Overall, the LSAL as opposed to the ACA at present offers the most developed legal framework for effective and efficient commercial dispute resolution through arbitration in Nigeria. Noteworthy, that many of the gaps that exist in the current ACA are expected to be filled in the much-anticipated amendment bill awaiting passage before the national parliament.

2. Is there an arbitration institution in your country? If yes, how is it structured and are these structures sufficient? Did this institution create its own procedural rules?

There are quite a number of arbitration institutions in Nigeria,[14] which includes *inter-alia* the Chartered Institute of Arbitrators (CIArb) UK Nigeria Branch,[15] the Regional Centre for International Commercial Arbitration – Lagos (RCICAL),[16] the Lagos Chamber of Commerce International Arbitration Centre (LACIAC),[17] and the Lagos Court of Arbitration (LCA).[18] Albeit these institutions do not entirely share a similar structure, a common structural feature they mostly share is the incorporation of a board of directors (acting as governing council), and a secretariat supervising the day to day administration and management of the institutions. They are also set up to entertain both domestic and international arbitration cases.

While there is no recognized criterion to determine how sufficient the structure of each institution is, an acceptable standard for such determination could be the feedbacks received from the users of these institutions based on their direct experience. According to a 2020 survey report on arbitration in Africa, respondent-parties ranked the LCA fourth position amongst 91 arbitral institutions identified in Africa,[19] also the quality of the LCA administrative staff support was ranked very high.[20] This high recognition of the LCA based on the survey report can serve both as an attestation of its structural sufficiency, including its overall efficiency as an arbitral institution from the users perspective. Notably, it is unclear how the other institutions in Nigeria fared as the data only captured the top 5 arbitral institutions in Africa as ranked by respondents. However, on the downside, no arbitral institution in Nigeria made the top 5 list of institutions recommended by users for institutional arbitration.[21] One probable cause for this is that arbitration cases in Nigeria are mostly referred *ad hoc*, meaning that they are adjudicated only subject to the parties arbitration agreement and the applicable *lex arbitri* without an arbitral institution having administrative authority over the proceedings, or the proceedings been subject

12 Arbitration Law of Lagos State No. 55, Vol. 42 of 2009, art. 40(3).
13 Arbitration Law of Lagos State No. 55, Vol. 42 of 2009, art. 18.
14 See in this regard, ICCA Arbitral Institutes Directory, available at: https://www.arbitration-icca.org/institutes? (accessed 26 January 2021).
15 CIArb (UK branch Nigeria), https://www.ciarb.org/ (accessed 26 January 2021).
16 RCICAL, https://rcical.org/ (accessed 26 January 2021).
17 LACIAC, https://www.laciac.org/ (accessed 26 January 2021).
18 LCA, https://www.lca.org.ng/ (accessed 26 January 2021).
19 Emilia Onyema, "2020 Arbitration In Africa Survey Report: Top African Arbitral Centres And Seats", p. 11ff, available at: https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in% (accessed 26 January 2021).
20 Ibid, p. 14.
21 Ibid.

to an institutions arbitration rules.[22] Nonetheless, the number of institutional arbitration references in Nigeria can be expected to keep increasing as Nigerian arbitral institutions continue to grow and gain international reputation as world-class institutional centres with ease of conducting arbitration business.

Also, it is noteworthy that not all the bodies that identify as arbitral institutions in Nigeria qualify as institutional arbitration forums in the proper sense, as some of them only offer infrastructural facilities and other case support services excluding case administration or management which is the hallmark of institutional arbitration.[23] Nonetheless, there are some notable institutions that offer administrative and case management services, amongst which is the LCA and LACIAC. The LCA like its other competitors in the Nigerian institutional arbitration market maintains its own arbitration rules, which clearly defines the powers and functions of the institutions in the arbitral process.

Typically, the powers and functions are often derived from the arbitration rules of these institutions at various phases of an arbitral proceeding, including *inter-alia* at the point of submission of the claim (through the notice of arbitration) or during the constitution of the arbitral tribunal. For instance, during the process of submitting a claim, the LCA Arbitration Rules empowers the secretariat to close a file in the event the claimant does not comply with any of the requirements for filing the "notice of arbitration" and also fails to rectify the gap within the fixed time limit issued by the secretariat.[24] However, such power of interference by the secretariat is not granted under the LACIAC Arbitration Rules. Another example can be drawn in relation to the constitution of the tribunal, while the LCA Rules permits parties to agree on an appointing authority for arbitrators,[25] The LACIAC Arbitration Rules differs on this point as it provides the LACIAC Court shall be the appointing authority in all arbitral proceedings conducted under these Rules.[26] Given this divergence as to the level of interference the institutions are empowered to have on an arbitration process, it becomes imperative that litigants – in particular advising legal counsels – familiarize themselves with the differences in the arbitration rules of the respective institutions in Nigeria, in order to determine which institutional rules' will best suit the interest of their clients.

3. How is the commercial arbitration practice in your country?

a. How many commercial arbitration cases are there annually in your country?

b. Which are the main subject-matters the cases deal with?

c. Are there any subject matters considered non-arbitrable in domestic laws?

Due to the preponderance of *ad hoc* arbitration cases in Nigeria, it is quite difficult to ascertain the exact figure of commercial arbitration cases prosecuted in the country annually. Commenting on the lack of accurate data on commercial arbitration cases in Nigeria, *Emilia Onyema* noted:

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22 On the difference between *ad hoc* and institutional arbitration, see Daniel Girsberger and Nathalie Voser, "International Arbitration: Comparative and Swiss Perspectives" (3rd edn), (Kluwer Law International; Schulthess Juristische Medien AG 2016), p. 14ff; Also *see*, Rémy Gerbay, "The Functions of Arbitral Institutions" (Kluwer Law International, 2016) p. 6ff.

23 On the essential characteristics of institutional arbitration, *see* Rémy Gerbay, "The Functions of Arbitral Institutions" (Kluwer Law Int., 2016) p. 11ff.

24 LCA Arbitration Rules, art. 3(7).

25 LCA Arbitration Rules, art. 7(1).

26 LACIAC Arbitration Rules, art. 8(1).

the difficulty with data collection for ad hoc arbitrations is that the numbers of such references is difficult to verify. This is unlike arbitral centres, that keep a record of the number of cases they administer.[27]

The difficulty in data collection is further exacerbated by the lack of a centralized data collection system for commercial arbitration, this challenge also makes it difficult to determine with accuracy the main subject matter of arbitration in Nigeria. Nonetheless, it is considered that majority of the cases submitted to arbitration in Nigeria pertains to commercial contracts, notably, the use of commercial arbitration for dispute settlement has been on the rise in specific industries such as construction, telecommunication, and the energy sector.[28]

Concerning the arbitrability of disputes, there is no expressly defined subject matter under Nigerian law that is non-arbitrable. However, by its very definition, arbitration under the Nigerian law means "a commercial arbitration whether or not administered by a permanent arbitral institution"[29], commercial is further defined as "all relationships of a commercial nature" which includes *inter alia* "any trade transaction for the supply or exchange of goods and services[…]".[30] From this definition, it is incontrovertible that all disputes of non-commercial nature are excluded from the scope of arbitration. Nevertheless, the mere fact that the Nigerian law does not expressly define non-arbitrable disputes leaves this subject open to interpretation. The Supreme Court of Nigeria has offered guidance as to non-arbitrable disputes in the case of *Kano State Urban Development Board v. Fanz Construction Limited* where it listed the set of disputes that cannot be subject to arbitration in Nigeria as follows:[31]

(a) Indictment for an offence of a public nature;
(b) Dispute arising out of an illegal contract;
(c) Disputes arising under agreements void as being by way of gaming or wagering;
(d) Disputes leading to a change of status such as divorce petition; and
(e) Agreement purporting to give an arbitrator the right to give judgment in rem.

Further, whether tax-related disputes are arbitrable in Nigeria is currently before the Nigerian Supreme Court.[32] The present position is that tax-related disputes are not arbitrable.[33]

4. What are the grounds for refusal of enforcement and recognition of arbitration awards in your country? Is your country party to the New York Convention (with reservations)? How strict are your national courts when enforcing awards (e.g. in relation to public policy)?

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27 Emilia Onyema, (fn 19) p. 15.

28 Olufunke Adekoya, et al.,"Arbitration Guide: IBA Arbitration Committee (NIGERIA)", p. 3 available at: https://www.ibanet.org/Document/Default.aspx?DocumentUid (accesed 3 Febraury 2021); Olufunke Adekoya, Prince-Alex Iwu "Arbitration Procedures and Practice in Nigeria: Overview", (Thomson Reuters 2017), available at: https://uk.practicallaw.thomsonreuters.com (accessed 5 February 2021).

29 *See* (fn 1), ACA art. 57(1).

30 Ibid.

31 *Kano State Urban Development Board v. Fanz Construction Limited,* Case Number: SC.45/1988.

32 Olufunke Adekoya, "National Report for Nigeria (2018 through 2020)", in: Lise Bosman (ed), ICCA International Handbook on Commercial Arbitration (Kluwer Int. 2020), p. 6.

33 *See* in this regard, Elizabeth Idigbe, Betty Biayeibo, "Nigeria", in: International Arbitration 2020 - A Practical Cross-Border Insight into International Arbitration Work (17th ed., ICLG 2020), p. 324.

The grounds for refusal of recognition and enforcement of an arbitral award in Nigeria, particularly within the context of international commercial arbitration is covered under Article 52(2)(a)(b) ACA. Since the Nigerian ACA is an adoption of the UNCITRAL Model Law, Article 52(2)(a)(b) ACA is largely verbatim Article 36(1)(a)(b) UNCITRAL Model Law which sets out the grounds for the refusal of recognition or enforcement of an arbitral award. The same submission applies to the LSAL,[34] except that the Lagos law also expressly provides that an award may be refused recognition and enforcement for failure to comply with Article 47,[35] which specifies the required *form and content of an award.*[36]

Nigeria is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).[37] The NYC forms an integral part of the Nigerian arbitration law as it is directly incorporated in the Second Schedule of the ACA. However, the application of the NYC in Nigeria is subject to two reservations as conceived in Article I(3) NYC. First, the contracting state where the award was made must also have legislation recognising the enforcement of arbitral awards made in Nigeria (reciprocity), and second, the NYC only applies to legal disputes of contractual nature.[38] Notably, even where the NYC does not apply nor any other convention on enforcement, a foreign arbitral award may still be enforced in Nigeria pursuant to Article 51(1) ACA which provides that;

> *"An arbitral award shall, irrespective of the country in which it is made, be recognised as binding […]".*

A foreign arbitral award essentially needs to satisfy the definition of "commercial" and "international" as conceived in Article 57(1) and (2) respectively and it will be enforceable in Nigeria subject to other conditions provided in the ACA.[39] In the event that the NYC does not apply, nor any other convention on enforcement, the grounds for refusal of recognition or enforcement of an award provided in Article 52(2)(a)(b) ACA will apply,[40] which is nevertheless identical to Article V(1)(2) NYC.

In general, Nigeria can be considered as an arbitration-friendly jurisdiction towards arbitral awards (both domestic and international). Arbitral awards are final and only subject to limited grounds of challenge. For instance, Article 48 ACA sets out the limited grounds upon which an international arbitration award may be set aside in Nigeria which is identical to that provided in Article 34 Model Law and V(1)(2) NYC. The Nigerian Court of Appeal in *NAEL v. NNPC* stating the justification for the limited grounds for setting aside an award opined that:

> *"the underlining principle of arbitration is to ensure that parties who have voluntarily elected independent umpires whom they trust to settle their matters should be bound by the decision of the arbitrator without resort to the courts".*[41]

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34 See, Arbitration Law of Lagos State No. 55, Vol. 42 of 2009, art. 57(2).
35 Ibid, art. 57(2)(i).
36 Ibid, art. 47.
37 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, United Nations, Treaty Series, vol. 330, p. 3.
38 *See* in this regard (fn 1) ACA, art. 54(1)(a)(b).
39 Olufunke Adekoya (fn 32), p. 28.
40 Ibid, p. 29.
41 *NAEL v. NNPC*, (unreported, 25 February 2014) CA/A/628/2011.

Thus, giving this underlying principle, the ACA only provides limited grounds for the courts to intervene in the interest of justice and fair play.[42] Noteworthy, that while an award may also be set aside or refused recognition and enforcement for been contrary to public policy under Article 48(2)(b)(ii) and 52(2)(b)(ii) ACA respectively, the term "public policy" is not defined under the ACA, however, Nigerian courts have interpreted this term along the lines of public interest. For instance, the Nigerian Court of Appeal in *Total Nigeria Plc v. Ajayi* held *inter alia*:

> *The phrase public policy, therefore, means that policy of the law of not sanctioning an act which is against the public interest in the sense that it is injurious to public welfare or public good.*[43]

In similar reasoning, the Supreme Court of Nigeria has defined "public policy" as:

> *The ideals which for the time being prevail in any community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally injurious to the public interest.*[44]

Given the antecedent, it can be said that an arbitral award may only be set aside or refused recognition and enforcement on public policy grounds if it is found injurious to Nigerian public interest, such will be the case were to enforce the award will negate the very fabric of the Nigerian legal system, which the Nigerian judiciary is sworn to protect.[45] Certainly, this requires a very high threshold of proof, and even where a party can satisfy the high burden of proof, there is still no guarantee that a Nigerian court will set aside or refuse recognition and enforcement of an arbitral award on grounds of public policy, as the courts hold the ultimate discretion on whether or not to make such an order. So far, Nigerian courts have adopted a restrictive approach when it comes to setting aside or refusing enforcement of an arbitral award on the grounds of public policy.[46]

5. Is commercial arbitration in your country perceived as a viable alternative to taking cases in front of national courts?

Nigeria today may be regarded as one of the fastest-growing arbitration reliant states when it comes to the settlement of commercial disputes. Despite having a significant proportion of commercial disputes still been litigated before national courts, the reception of arbitration as an alternative to domestic court proceedings keeps growing exponentially. This is particularly true of high-end commercial relationships like in the energy, construction or telecommunication sector where contracting parties mostly favour the submission of contractual disputes to arbitration. Some reasons why commercial arbitration has become increasingly attractive to commercial actors in Nigeria can be attributed to the short duration it takes to have a dispute settled with the binding force of law in comparison to how long the same dispute might take if brought before a state court that is already gridlocked with a huge commercial caseload. This is in addition to the ability of parties to appoint their own arbitrators with specific expertise in certain fields in which a state court judge may not be adequately trained or at all specialized.

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42 Idigbe and Biayeibo (fn 33), p. 333.
43 *Total Nigeria Plc v. Ajayi* (2003) LPELR-6174(CA) p.28f.
44 Okonkwo v. Okagbue (1994) 9 NWLR Pt. 368, p. 301.
45 Mayowa M. Abiru, "Setting Aside International Arbitral Awards In Nigeria: Public Policy Considerations" para 32. available at: https://poseidon01.ssrn.com/delivery (accessed 3 March 2021).
46 See, Dorothy Ufot, "Nigeria: Public Policy As A Ground For Setting Aside Or For The Refusal Of Enforcement Or Recognition Of Awards Under The New York Convention", p. 8ff. Available at: https://www.ibanet.org/Document/Default.aspx?DocumentUid= (accessed 3 March 2021).

With the steadily increasing number of arbitration practitioners in Nigeria, there is a growing awareness amongst commercial actors about arbitration as an alternative to litigation in state courts, as lawyers are becoming more inclined to advising their clients on the advantages of adopting arbitration as a dispute resolution mechanism as opposed to actions before state courts. Further, as already discussed, the legal framework for arbitration in Nigeria is favourable and overall in harmony with international legal standards, this also includes the supportive role the Nigerian courts play in giving effect to parties' arbitration agreement. This favourable climate for arbitration in Nigeria has increased its use and popular perception amongst the locals. Nonetheless, a lot still needs to be done especially on the international front to position Nigeria as a popular seat for international commercial arbitration.

II. INVESTMENT ARBITRATION

6. How is the international legal framework for investment arbitration constituted?

a. Do(es) your country's arbitration law(s) also apply to investment arbitration?

b. Has your country signed and ratified the ICSID Convention?

c. Which arbitration rules are the most often used?

d. Is your country party to many BITs and/or regional investment treaties (such as the Energy Charter Treaty)?

e. Does your country have a Model BIT, or otherwise use model language in its BITs?

As principal legislation, the ACA applies to all forms of arbitration in Nigeria be it related to the settlement of commercial or investment disputes. However, pursuant to Article 35 ACA the application of the ACA provisions can be waived where another law exists that requires an arbitration to be submitted only per the provisions of that other law. Thus, while providing the general legal framework for arbitration in Nigeria, the ACA permits arbitration to be governed under other legislations. This is the case of the Nigerian Investment Promotion Commission Act (NIPC),[47] which is the most relevant legislation on the promotion and protection of both domestic and foreign investment in Nigeria. The NIPC Act provides access to arbitration for the settlement of investment disputes to both domestic and foreign investors.[48] In the case of foreign investors, the NIPC Act foresees investment arbitration within the framework of any bilateral or multilateral investment agreement in force between Nigeria and the home state of the investor;[49] or in accordance with any other national or international dispute settlement machinery agreed by the parties.[50] In the event that parties cannot agree on the method of dispute settlement, the NIPC Act provides that the International Centre for Settlement of Investment Disputes (ICSID)

47 Nigerian Investment Promotion Commission Act (NIPC), Chapter N117 Laws of the Federation of Nigeria 2004.

48 Ibid, NIPC Act, art. 26(2).

49 Ibid, NIPC Act, art. 26(2)(b).

50 Ibid, NIPC Act, art. 26(2)(c).

Rules shall apply.[51] Nigeria signed the ICSID Convention in July 1965, the Convention was ratified in August of the same year and entered into force in October 1966.[52]

Besides the NIPC Act which provides both substantive and procedural rights to foreign investors similar to those found in traditional BITs,[53] Nigeria is also a Party to several investment treaties. As currently reported on the United Nations Conference on Trade and Development (UNCTAD) database, Nigeria has signed about 31 BITs with 15 of this in force,[54] this is excluding other regional agreements containing investment provisions to which Nigeria is a Party,[55] the most recent of which is the African Continental Free Trade Area (AfCFTA).[56] There is also the likelihood that Nigeria may accede to the Energy Charter Treaty (ECT) in the nearest future, as the current government has signalled a strong political will in that direction.[57]

Concerning the arbitration rules often adopted by Nigeria in its investment treaties, most Nigerian BITs provides for investment arbitration under the ICSID rules or an ad hoc tribunal established under the UNCITRAL Arbitration Rules. However, in addition to ICSID and UNCITRAL based arbitration, there are treaties where Nigeria allow investors to also submit investment disputes under any other arbitral institutions or arbitration rules agreed by the parties, notable examples are the Nigeria-Morocco BIT,[58] and Nigeria–Kuwait BIT.[59] Other notable arbitration rules that have been adopted by Nigeria in its BITs include the International Chamber of Commerce (ICC) Rules,[60] and the Regional Centre for International Commercial Arbitration in Cairo and Lagos.[61] From the foregoing, it can be deduced that Nigeria is currently not averse to investment treaty arbitration, a position which appears to be in contrast with the new EU policy approach for the settlement of investor-state disputes through a permanent Investment Court System.[62] While Nigeria has maintained an open-door policy towards the negotiation and signing of investment treaties, the country does not have a model BIT upon which the negotiations are built. This however might change soon as Nigeria has expressed its intention to reform its International Investment Agreements, a move that would involve developing a new

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51 Ibid, NIPC Act, art. 26(3).

52 See, Database of ICSID Member States (Nigeria), available at: https://icsid.worldbank.org/about/member-states/database-of-member-states (accessed 3 March 2021).

53 See, (fn 47) NIPC Act, art. 24 "transferability of funds"; art 25 "guarantees against expropriation"; art. 26 "ISDS procedures".

54 See, UNCTAD Investment Policy Hub "Nigeria", available at: https://investmentpolicy.unctad.org/international-investment-agreements (accessed 4 March 2021).

55 Ibid.

56 See, Economic Commission for Africa (ECA) Report, 5 December 2020, available at: https://www.uneca.org/storys/nigeria-becomes-34th-country-ratify-afcfta-agreement (accessed 4 march 2021).

57 See, International Energy Charter Annual Report (2019), p. 27, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/AR/AR_2019.pdf (accessed 4 march 2021).

58 Nigeria-Morocco BIT (2016), art. 27(1)(c).

59 Nigeria-Kuwait BIT (2011), art. 8(3)(c).

60 Nigeria-Austria BIT (2013), art. 14(1)(iv).

61 Nigeria-Egypt BIT (2000), art. 6(2)(d).

62 See, Submission of the European Union and its Member States (UNCITRAL Workig Group III) on: Establishing a Standing Mechanism for the Settlement of International Investment Disputes, A/CN.9/WG.III/WP.159/Add.1; Also see, Marc Bungenberg, and August Reinisch "From bilateral arbitral tribunals and investment courts to a multilateral investment court: options regarding the institutionalization of investor-state dispute settlement" (2nd ed. Springer, 2020), p. 1.

Model BIT that will serve as a framework for future negotiations.[63] At the moment, it can be said that Nigeria's recent BIT with Morroco captures its present stance on investment policy lawmaking. Hence, it can be foreseen that the Nigeria-Morroco BIT will have a huge impact on Nigeria's future BIT negotiations.[64]

7. How is the investment arbitration practice in your country?

a. How many investment arbitration cases are there annually against your country?

b. How many investment arbitration cases are there annually initiated by investors from your home country?

Since taking up the membership of ICSID in 1965, Nigeria has recorded all together five investment arbitration cases. Three of these cases are already concluded as captured in the table below, with two discontinued, and one resulting in a tribunal award.

Year of Initiation	Case Name	The outcome of the Original Proceedings	Summary
1978	Guadalupe Gas Products Corporation v. Federal Republic of Nigeria ICSID Case No. ARB/78/1	Case discontinued upon a settlement agreement reached by the Parties'	The case involved a dispute arising out of a contract in the Mining and quarrying, including hydrocarbons (oil and gas) sector. The award detailing the terms of the Parties' Settlement Agreement reached 22 July 1980 has not been made public.
2007	Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria ICSID Case No. ARB/07/18	Case discontinued. The order taken note of the discontinuance of the proceeding not made public.	The case involved a treaty-based claim arising out of an alleged breach of a production-sharing contract concluded between Shell Nigeria and Nigeria's state oil company (NNPC). The applicable treaty being the Netherlands-Nigeria BIT. Tribunal issued an order taken note of discontinuance on 1 August 2011.
2013	Interocean	Tribunal	The dispute arose over a joint venture interest the

63 All Africa Report, "Nigeria Begins Reforms of International Investment Agreements", (9 August 2020), available at: https://allafrica.com/stories/202008100025.html (accessed 5 March 2021).

64 Okechukwu Ejims, "The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?", ICSID Review, Vol. 34, No. 1 (2019), p. 64f.

	Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria ICSID Case No. ARB/13/20	rendered its award on 6 October 2020 and decided in favour of Nigeria	claimant held together with Nigeria's state oil company (NNPC) on the operation of two oil blocks in the country. Claimant submitted the dispute under the Nigerian foreign investment law i.e. the NIPC Act alleging violation of the guarantee against illegal expropriation *inter alia*, and likewise relied on customary international law minimum standard of treatment. Despite dismissing Nigeria's challenge on the jurisdiction, the tribunal unanimously upheld Nigeria's arguments on the merits by holding that none of the alleged acts by the state-owned organ "NNPC" is attributable to Nigeria, and hence dismissed the claims in their entirety.

Besides the three aforementioned cases, Nigeria is also currently involved in two other investment arbitration cases recently registered against it before ICSID. Both cases involve two Dutch entities with investments in Nigeria's downstream sector. The table below captures the data on these cases.

2020	Eni International B.V., Eni Oil Holdings B.V. and Nigerian Agip Exploration Limited v. Federal Republic of Nigeria ICSID Case No. ARB/20/41	Pending	Case Particulars is currently not public.
2021	Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited (SPDC) v. Federal Republic of Nigeria ICSID Case No. ARB/21/7	Pending	Case Particulars not public.

Regarding *Eni International v Nigeria*,[65] While the case particulars for this dispute submitted under the Netherlands-Nigeria BIT is unknown, it has been reported by Reuters that Eni contends certain Nigeria's actions violate multiple provisions of the bilateral investment treaty by pursuing a campaign of unfounded claims against Eni and improperly conditioning the conversion of an Oil Prospecting License (OPL 245) into an Oil Mining License (OML).[66] As reported on the ICSID website, the last procedural update on the case is the acceptance of Kamal Hossain (Bangladeshi National) on 17 January 2021 as Nigeria's appointed arbitrator.[67]

On the other case involving *Shell Petroleum NV v Nigeria*,[68] This dispute is also initiated under the Netherlands-Nigeria BIT. The claimant's Nigerian subsidiary "SPDC" is a party to a joint venture agreement for oil exploration and production with Nigeria's state oil company (NNPC), et al. While the particulars of the claim registered at ICSID on 10 February 2021 is also not public, the claim may not be unconnected to the protracted legal battles SPDC has been engaged in on compensation to victims in local communities that lost their means of livelihood (mostly fish farmers) due to oil spillage occasioned by SPDC's exploration activities in the Niger Delta region of Nigeria. While SPDC denies any negligence on its part and blamed the damaged oil pipelines on rebel activities in the Niger Delta region, it has since incurred a judgement debt in June 2010 when a Nigerian Federal High Court ordered SPDC to pay 15 billion Nigerian Naira to local communities.[69] SPDC has since then been contesting the award, and in November 2020 lost in its attempt to review the 2010 judgement before the Nigerian Supreme Court, as the Supreme Court dismissed its review application.[70] In January 2021, it was reported that the community members (judgement creditors) with the aid of government enforcement agents started seizing the assets of First Bank Nigeria, a banking enterprise that signed an agreement in 2012 to act as guarantor for SPDC.[71] SPDC however allege that this act of seizure is unlawful as the Supreme Court only refused to entertain its application for review, but did not decide the liability nor the quantum of the award, while it still holds an injunction preventing enforcement of the award pending the determination of the quantum issue before Nigerian courts.[72] Whether or not these developments in Nigeria triggered the request for arbitration before ICSID remains unknown.

Aside from the ICSID arbitrations reported above, another ongoing development on Nigeria's investment arbitration profile that is worthy of mention is the contract based arbitration award (non-ICSID) that Nigeria is currently challenging before English Courts. In a favourable decision

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65 *Eni International B.V., Eni Oil Holdings B.V. and Nigerian Agip Exploration Limited v. Federal Republic of Nigeria*, (ICSID Case No. ARB/20/41).

66 Reuters Report, "Eni seeks World Bank arbitration in Nigeria oilfield dispute" (13 October 2020), available at: https://www.reuters.com/artide/us-eni-nigeria/ (accessed 5 March 2021).

67 *Eni International B.V., Eni Oil Holdings B.V. and Nigerian Agip Exploration Limited v. Federal Republic of Nigeria*, (ICSID Case No. ARB/20/41 – Case Details), available at: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/41 (accessed 5 March 2021).

68 *Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited (SPDC) v. Federal Republic of Nigeria*, (ICSID Case No. ARB/21/7).

69 See, *Isaac Agbara and ors. v. Shell Petroleum Development Country and ors.* (FHC/ASB/CS/231/2001), available at: https://www.informea.org/sites/default/files/legislation/NigeriaCourtCase.pdf (accessed 5 March 2020).

70 Bloomberg Report, "Nigerian Supreme Court Upholds Oil Spill Award Against Shell" (27 November 2020), available at: https://www.bloombergquint.com/markets/nigerian-supreme-court-upholds-oil-spill-award-against-shell (accessed 5 March 2021).

71 Reuters, "FirstBank, Shell oppose Nigerian group's bid to seize assets in oil spill dispute" (15 January 2021), available at: https://www.reuters.com/artide/us-nigeria-banks-shell-idUSKBN29K2JK (accessed 5 March 2021).

72 Ibid.

on 4 September 2020, the English High Court in *P&ID v. Nigerian Ministry of Petroleum* granted Nigeria's application to challenge a +9 billion US dollars award outside the original time limit for bringing such challenge.[73] The contested arbitral award had been issued by an ad hoc tribunal seated in London and constituted under the Nigerian Arbitration and Conciliation Act Rules, which found Nigeria in breach of its obligations under a Gas Supply and Processing Agreement (GSPA) with P&ID.[74] In its attempt to set aside the award out of time, Nigeria argued that P&ID procurement of the GSPA is tainted in gross corruption and fraud, including an allegation of perjury during the arbitration and bribery of Nigeria's counsel.[75] The English court satisfied that Nigeria has made a *prima facie* case that the award is tainted in fraud granted the country leave to set aside the award outside the specified time limit for such actions to be brought under English Law. The challenge is now expected to resume for a full hearing at a future date. Whether Nigeria will succeed in this bid to set aside the award is an interesting outcome to await, especially due to the colossal sum involved.

On the participation of investors from Nigeria in investment arbitration, there is no known public record from which such data can be gathered at the time of drafting this report. However, this does not suggest that such disputes cannot exist.

8. Are there any further noteworthy trends or current discussions in your country that are worth mentioning?

At the time of this report, the most important discussion permeating the Nigerian arbitration community is the Arbitration and Conciliation Act (Repeal and Re-enactment) Bill, which is expected to replace the current ACA which is now obsolete. Aside from bringing the Nigerian arbitration law up to date with the 2006 amendment of the UNCITRAL Model Law, the Bill once passed into law will also introduce additional innovations that will enhance the ease of conducting arbitration proceedings in Nigeria. Some of the noteworthy provisions currently anticipated includes;[76]

- definite provision on the limitation period for enforcing an arbitral award;
- immunity guarantee for Arbitrators, Appointing Authority and Arbitral Institution from liability for anything done or omitted in the discharge or purported discharge of their 'official' functions;
- provision for the appointment of an Emergency Arbitrator to attend to any urgent relief any party to an arbitration agreement may have;
- introduction of provisions on joinder and consolidation;

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73 *The Federal Republic of Nigeria v Process & Industrial Developments* [2020] EWHC 2379 (Comm).

74 See, *P&ID v. Nigerian Ministry of Petroleum*, (Ad hoc Arbitration, Award of 31 January 2017), available at: https://jusmundi.com/fr/document/decision/en-process-and-industrial-developments (accessed 5 March 2021).

75 See, Herbert Smith Freehills, "English High Court Grants Nigeria Extension Of Time To Challenge Usd 6.6 Billion Award For Fraud", (18 November 2020), available at: https://hsfnotes.com/arbitration/2020/11/18/ (accessed 5 November 2020).

76 See, Ademola Bamgbose, "The proposed amendment of Nigeria's Federal Arbitration Law could see the arbitration landscape in Nigeria improve significantly",(Reuters Arbitration Blog, 2020), available at: http://arbitrationblog.practicallaw.com/ (accessed 6 March 2021); Joseph Onele, "Demystifying the Nigerian Arbitration and Conciliation Bill 2017", (Kluwer Arbitration Blog, 2018), available at: http://arbitrationblog.kluwerarbitration.com/ (accessed 6 March 2021); Isaiah Bozimo, "Nigeria: Delos Guide to Arbitration Places (GAP)", p. 11f, available at: https://delosdr.org/wp-content/uploads/2018/06/Delos-GAP-1st-edn-Nigeria.pdf?pdf=GAP1-Nigeria (accessed 6 March 2021).

- introduction of an award review tribunal (second-tier tribunal);
- introduction of provisions on third-party funding.

Apart from the ongoing legislative reform agenda, the Nigerian judiciary also plays a crucial role in the development of Nigeria's arbitration law, hence, it is important to take note of legal developments on the subject matter of arbitration before Nigeria courts. One notable decision that is currently been awaited is the issue of legal appearance by foreign lawyers in domestic arbitration. In an August 2016 decision of the Nigerian Court of Appeal, the Appellate Court had found a "Notice of Arbitration" and "Statement of Claim" incompetent simply because they were not signed by lawyers licensed to practise law in Nigeria.[77] This decision is now subject to appeal, but until overturned by the Nigerian Supreme Court, it remains the law that non-Nigerian counsels cannot enter legal representation for parties in domestic arbitration. It should however be noted that this restriction does not apply to foreign lawyers representing parties in international arbitration not governed by the Nigerian ACA rules.[78] Whether the Nigerian Supreme Court will overturn the lower court's decision and uphold the sacrosanct principle of party autonomy in arbitral proceedings, is a question to which members of the Nigerian legal community awaits an answer.

77 *Shell (Nig.) Exploration and Production Ltd & 3 others v. Federal Inland Revenue Service,* (Appeal No. CA/A/208/2012).

78 Olufunke Adekoya (fn 32), p. 14.