Security for the respondent's costs of arbitral proceedings with particular reference to the Arbitration and Conciliation Act Cap 19, 1990 Laws of Nigeria (ACA[1])

By

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I. Introduction

In arbitration proceedings the winning party is usually entitled to its costs on the application of the general principle that 'costs follow the event.'[2] However there are risks that such costs could remain unpaid.[3] To minimize such risks for a winning respondent an order may be obtained in some situations during the proceedings whereby the claimant is required to provide security for some or all of the respondent's projected costs.[4] This order is referred to as "security for costs". The claim should normally be stayed in the event of non compliance by the claimant with an order for security for costs despite the effect of shutting out the claimant from having its claim determined. This may appear to be a derogation of the constitutional right to fair hearing as enshrined in the Nigerian constitution.[5] This emphasizes the need for an arbitrator when faced with an application for security for costs to carefully balance the right of the winning respondent to its costs with the claimant's constitutional right to fair hearing. The balancing of the two conflicting interests was succinctly put by Simon LJ in the case of ***Olakunle Olatawura vs. Abiloye*** as follows;

> "Before ordering security for costs in any case (i.e. whether or not within CPR Pt 25) the court should be alert and sensitive to the risk that by making such an order it may be denying the party concerned the right to access to the court. Whether or not the

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[2] See Article 40 of the Rules in the First Schedule to ACA. See also *Tony Bingham "Taking Issue with Events: A commentary about awarding costs" (2003) 69 JCIArb* 2 on discussion of general principle that "Costs follow the Event"

[3] E.g. in situations where claimant becomes insolvent, is plainly intransigent or for some reasons the award is unenforceable.

[4] The order may also be made against a respondent who is a counterclaimant in some situations. See Michael O'Reilly *"Costs in Arbitration Proceedings"* (2nd Edition LLP London Hong Kong 1997) page 85 paragraph 6.7.

[5] See section 36(1) Nigerian Constitution (1999)

> person concerned has (or can raise) the money will always be a prime consideration, not least since Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms became incorporated into domestic law. Paradoxically, of course, the more difficult it appears to be for the person concerned to raise the money, the more obvious becomes the need for an order for security to protect the other party against the risk of incurring irrecoverable costs. The court will have to resolve that conundrum as best as it may"[6]

In this paper the arbitrator's authority to order security for costs as well as the exercise of any such authority under the provisions of the Arbitration and Conciliation Act Cap 19 1990 Laws of Nigeria (hereinafter referred to as ACA) will be examined.

II. THE ARBITRATOR'S POWER TO ORDER SECURITY FOR COSTS

The arbitrator must first ensure that he/she has the power to order security for costs. The powers of the arbitral tribunal are those conferred by the parties as evinced from the arbitration agreement subject to such powers operating within the limits allowed by the applicable laws. Where powers are concerned the applicable law will usually be the proper law of the arbitration agreement and the law of the place of the arbitration i.e. the *Lex arbitri*.[7] Further extensive powers may also be given under the provisions of the applicable law subject to the parties' right to contract out of such powers. Accordingly the arbitrator must examine carefully the agreement of the parties, (the tribunals primary source of power), the law governing the arbitration agreement and finally the law governing the arbitration (*Lex arbitri*) which is the law of the place of the arbitration. Though the parties are at liberty to confer wide powers on the tribunal this can only be within the limits allowed by the applicable laws. The arbitrator has to be comply with the mandatory provisions of the Lex arbitri. The *Lex arbitri* needs to be carefully considered to determine to what extent it supplements or restricts the powers which the parties have conferred or purported to confer in the arbitration agreement.

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[6] (2003) 1 WLR 275(CA). Article 6 of the European Convention on Human Rights as enacted by the Human Rights Act 1998 gives everyone the right to a fair hearing.

[7] It is possible for the parties to agree on different laws governing the procedure of the arbitration and that governing the arbitration agreement. For discussion of applicable law generally see Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (2nd Edition London Sweet & Maxwell 1991) Chapter 2. See also Sutton, Kendall and Gill, Russell on Arbitration(21st Edition London Sweet & Maxwell 1997) Chapter 2 Paragraphs 2-091 – 2-106

II (a). THE ARBITRATION AGREEMENT

Arbitration is a consensual procedure. The parties are at liberty to confer wide ranging powers on the tribunal. Indeed case law has established that arbitration agreements in building and engineering contracts actually give arbitral tribunals' wider jurisdiction than that of the court[8]. The parties may well have agreed to confer on the arbitral tribunal the power to order security for costs either in the agreement or through the incorporation of procedural rules which contain security for costs provisions[9]. As indicated above any purported powers must however operate within the provisions of ACA and the laws of Nigeria being the *Lex arbitri*. Arbitral tribunals are bound by the mandatory provisions of the Lex Arbitri. Any power granted over and above what is allowed by the applicable law is invalid. An examination of the relevant laws in Nigeria pertaining to security for costs as may be applicable to arbitral proceedings is necessary even if the power is contained in the arbitration agreement.

II (b). THE PROVISIONS OF ACA

Most of the powers conferred on the arbitrator in the provisions of ACA are default powers - powers which could be exercised *unless the parties have otherwise agreed.* However ACA a modification of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on arbitration does not contain any express provisions relating to security for costs unlike the English 1996 Arbitration Act. The provisions in ACA refer to security in respect of interim measures of protection. By virtue of section 13(a) the tribunal may (at the request of any party order any party to take such interim measure of protection as considered necessary in respect of the subject matter of the dispute unless otherwise agreed. Section 13(b) confers power on the tribunal to order any party to provide appropriate security connection with any measure taken under Section 13(a). The procedural rules in the first schedule also do not contain any express provisions. Article 26(2) however repeats the provisions of Sections 13(a) and (b) of the Act conferring power on the arbitrator to order security for costs in relation to interim measures of protection.

It may be argued that an interim measure of protection includes one providing for security for costs. However it appears that there is no general power under the act to order such security in view of the apparent restriction of such measures to those necessary to protect the subject matter of the dispute. The purview of Section 13 and

[8] See Northern Regional Health Authority vs. Crouch (Derek) Construction Co. Ltd (1984) 1 Q.B. 644.See also Russell on arbitration Paragraph 2-074.

[9] See for example the JCT Arbitration Rules, the ICE Arbitration Procedure and the LMAA Rules. Rule 25(2) of the LCIA Rules states as follows:- The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any party ……. In the event that a claiming or counterclaiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that parties claims or counterclaims or dismiss them in an Award.

Article 26 appears limited to security in respect of injunctive remedies or other form of interim relief related to the preservation of the subject matter of the dispute[10].

In comparison the English 1996 Arbitration Act in Section 38 simply couched states as follows;

> "Unless otherwise agreed by the parties, the tribunal has the following powers. The tribunal may order a claimant to provide security for the costs of the arbitration"

By virtue of the provision of Section 82(1) claimant includes a counterclaimant unless the context otherwise requires.[11] Prior to the enactment of the 1996 Arbitration Act, arbitrators only had the power by express agreement of the parties. In the absence of any express agreement power to order security for costs in arbitration proceedings was reserved in the High Court in accordance with the provisions of Section 12(6) (a) of the English Arbitration Act 1950. Furthermore the High Court still had jurisdiction to entertain security for costs applications in arbitral proceedings notwithstanding the parties' express agreement clothing the arbitral tribunal with such powers.[12] The 1996 Act removed the power from the courts.[13]

Despite the lacunae in ACA and the rules in the first schedule the parties may well agree to vest the arbitral tribunal with the power to order security for costs. In the absence of any such agreement it is for the arbitrator to decide such an application within the limits of his/her jurisdiction and powers. Section 15(2) of ACA stipulates that where the rules contain no provision in respect of any matter related to or connected with a particular arbitral proceeding, the arbitral tribunal may, subject to this Decree, conduct the arbitral proceedings in such manners it considers appropriate so as to ensure fair hearing. Article 15 of the rules in the first schedule further stipulates the power of the arbitral tribunal to conduct the proceedings in such manner as it considers appropriate provided that the parties are treated with equity and each party given full opportunity of presenting his case. In the case of ***Re Unione Stearinerie Lanza and Weiner*** it was argued that section

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[10] See Report of the Uncitral working group on arbitration 37th session and David Altaras (2003) 69 JCIArb page 81 at 88 on proposals to amend the Uncitral rules to provide security for the enforcement f an arbitral award including an award of costs.

[11] Please note that the nature of the counterclaim in relation to the claim is a determining factor in considering whether security is appropriate against a counterclaimant. See Neck vs. Taylor (1893) 1 Q.B 560 at 562 per Lord Escher. B.J. Crabtree (Insulation) Ltd vs. GPT Communications Ltd (1990) 59 Build L. Rep 43 CA. See also Michael O'Reilly, *"Costs in Arbitration Proceedings"* (2nd Edition LLP London Hong Kong 1997) at pages 85 – 86 paragraphs 6.7.1 – 6.7.2.

[12] See Hudson Strumpffabrik G.m.b.H v. Bentley Engineering Co. Ltd (1962) 2 Q. B. 587; Aeronave S.P.A. v. Westland Charterers Ltd. (1971) 1 W.L.R. 1445. Unione Stearinerie Lanza v. Wiener (1917) 2 K.B. 558; Mavani v. Ralli Brothers Ltd. (1973) 1 All E.R. 555 at 559, 560; Fal Bunkering of Sharjah v. Grecale Inc. of Panama (1990) 1 Lloyd's Rep. 369 at 371.

[13] Section 44 of the Arbitration Act 1996 lists the powers exercisable by the court in support of arbitral proceedings. Section 44(5) states "In any case the court shall act only if or to the extent that the arbitral tribunal …….has no power or is unable for the time being to act effectively".

12(1) of the English 1950 Arbitration Act which gave power to the arbitrator "to do all things during the proceedings ……. that he may require" gave him power to order security for costs[14]. The court thought otherwise.

In the absence of express provisions on security for costs in ACA an objecting party may well argue that it has not agreed to confer any such power on the tribunal and that in any event the exercise of the power is against its constitutional right to fair hearing and a derogation of the arbitrator's duty to give the parties full opportunity of presenting their case. In the circumstances parties are advised to include any such power in their arbitration agreements or ensure that the agreed procedural rules contain relevant provisions. This would save time spent on any claimant/counterclaimant's challenge to the arbitrator's jurisdiction to order security for costs.

II (c). THE LEX ARBITRI

The Lex arbitri i.e. the law of the place of the arbitration must be examined to confirm that there is no prohibition or curtailment of the arbitrator's power (if any) to order security for costs. The position of Nigeria Law on the subject can be ascertained from relevant statutes.

(i) DOMESTIC LAW

The provisions of the Companies and Allied Matters Act 1990 (CAMA) offer a good starting point in determining the position of Nigeria Law with respect to the subject. The Act subjects limited companies to special rules relating to security for costs.

Section 639 states as follows:-

> "Where a limited company is the plaintiff in any action or other legal proceedings any judge having jurisdiction in the matter *may if it appears by credible testimony that there is reason to believe that the company may be unable to pay the costs of the defendant if successful in his defence*, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

Section 303 of the Act pertaining to derivative action allows a minority shareholder to sue by leave of court on behalf of a company as distinct from sueing on behalf of the shareholders for a wrong done to the company. Section 307 provides that such an

[14] 1917 2 K. B 55. See also Fal Bunkering of Sharjah vs. Grecale Inc of Panama (1990) 1 Lloyds Rep 628

applicant shall not be required to give security for costs in any such application made, brought or intervened. Section 410 prohibits the court from hearing a winding up action from a contingent or prospective creditor until inter-alia sufficient security for costs has been given.

(ii) INTERNATIONAL CONVENTIONS

It is important to know that some International Conventions expressly forbid the requirement for security for costs. The arbitrator must therefore confirm whether any such conventions have been given force of law in Nigeria by domestication (where relevant).[15]

(iii) RULES OF COURT

In the ***Law and Practice of Arbitration and Conciliation in Nigeria*** the Hon. Justice Orojo observed that the courts in Nigeria have the power under the rules of court to make an order for security for costs and for claims[16].Though the rules of court are not applicable to arbitral proceedings they may be a useful reference to arbitrators on what obtains in the judicial system. By virtue of Order 55 Rule 2 of the old Lagos State Civil Procedure Rules which is in pari material with Order 23 Rule 1 of the Supreme Court Rules in England, where a plaintiff is ordinarily resident outside the jurisdiction the high court may order such plaintiff to pay security for costs.[17] Order 49 Rule 3 of the New Lagos State Civil Procedure Rules repeats the provision.[18]

It can be evinced that Nigerian judges have a discretion to order security for costs and there is no provision of Nigerian law prohibiting arbitrators from ordering security for costs assuming the jurisdiction/power to so do is not restricted or constrained by the arbitration agreement.

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[15] Such Conventions include Carriage of Goods by Rail (Berne) 1952, Art 55(4) carriage of Goods by Road (Geneva) 1956 Art 31(5) Carriage of Passengers by Road Convention Art 41(6). On the other hand the Warsaw Convention on Carriage by Air 1932 Art 28 impliedly permits a requirement of security for costs providing that the procedure is to be governed by the *Lex-Fori*

[16] Orojo and Ajomo Law and Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associates Nigeria Ltd. 1999)

[17] Under the provisions of the 1996 Arbitration Act security for costs may not be ordered on the basis that the claimant is foreign. This is to avoid England being perceived as an unfavorable place for the conduct of International Arbitration thereby deterring foreigners from choosing England as the place of arbitration. Note also that discrimination would no longer be possible on account of European Union Residence.

[18] See also Orders 49 rules 2 and 4 of the High Court of Lagos State (Civil Procedure Rules) 2004.

III. HOW SHOULD THE ARBITRATOR'S POWER TO ORDER SECURITY FOR COSTS BE EXERCISED?

The arbitrator must first determine that he or she is vested with jurisdiction to order security for the respondent's recoverable costs. Upon confirming that the jurisdiction exists questions then arise as regards the manner in which the power is to be exercised. As the Hon. Judge Peter Bowsher Q.C observed, "if it is within the jurisdiction of the tribunal, it is a matter for discretion. A party is not entitled to say "I am entitled to an order, you might give it to me"[19] Rules of court may act as a useful guide to arbitrators in the absence of any other express provision on the exercise of the discretion. In relation to this the Hon. Judge Peter Bowsher Q.C. O.R had this to say

> "Some people say that it is desirable, and they argue also that it is the intention of Parliament, that arbitrators should get away from court procedures and court practice as to the principles to be exercised on the exercise of a discretion. Others say that a measure of predictability and certainty is desirable in all commercial affairs (and also in personal business affairs), otherwise parties cannot make budgets and much injustice may be caused. At the extremes, there is a choice: on the one hand all of the thousands of arbitrators in the United Kingdom will go their own way and invent their own practices as to the way they will exercise their discretion: on the other hand, they will individually decide that while the arbitrator should not slavishly follow court procedures, it is in the interest of justice that there should be a measure of predictability and certainty in the exercise of the arbitrators' discretion and so the arbitrators should, unless there is good reason to the contrary, normally follow the wisdom of courts' express provisions of the Act, whatever those provisions may turn out to be……"[20]
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> "Under the Act, the principles applied by the court do not apply to arbitrations unless either the parties say that they do or you decide to abide by them. It is important that you should know about the principles followed

[19] D Mark Cato, Arbitration Practice and Procedure, Interlocutory and Hearing Problems (2nd Edition London LLP 1997) page 480.
[20] Ibid D Mark Cato page 476

> by the courts for two reasons: *(a) the parties may agree that you should follow those principles; (b) those principles may give you a starting point for any principles which you may choose to adopt and may be useful even if you decide that they are all inappropriate for your arbitration.....*"[21]

Arbitrators should be cautious and avoid radically departing from what the courts would do as such radical departure may affect the enforceability of their awards which must stand the test of the judicial system in accordance with the provisions of the applicable law. Arbitrators must however appreciate that by agreeing to arbitration parties have effectively agreed that their dispute is to be decided outside the court system.

In order to assist arbitrators the Chartered Institute of Arbitrators England has drawn up guidelines for arbitrators dealing with applications under Section 38 of the Arbitration Act 1996.[22] The guidelines differentiate between factors which arbitrators should normally bear in mind in dealing with such applications and those that should be taken into account only in exceptional circumstances as follows:-

Factors which arbitrators should bear in mind when weighing up whether to make an order for security for costs

(a) Has the claimant any reachable assets within or without the jurisdiction, and as a consequence, is there a real prospect that the claimant would be unable to pay, or may be able to avoid paying the respondent's costs if called upon to so do?

(b) Is the respondent using the application as a weapon against a weaker party, creating the risk that the claimant will be unable to continue with the arbitration and therefore have to abandon his possibly meritorious claim?

(c) What are the effects of the respondent's behavior on the claimant's want of means?

(d) Is there any justification in the timing of the application?

(e) Is the order appropriate in light of the specific nature of the arbitration?

(f) Would it be fair and just in all the circumstances of the case to make an order for security for costs?

[21] Ibid D Mark Cato page 480
[22] See www.arbitrators.org

The guidelines reiterate that the fact that the claimant is normally resident, or is a company having its central management and control, outside the United Kingdom is not by itself a justification for granting security for costs.

Factors which should only be taken into account in exceptional circumstances when deciding whether to make an order for security for costs

(a) The likelihood of the claimant absconding without having paid the amount that may be awarded against him.

(b) The bonafides of the claim.

(c) The merits of the case and the prospect of success.

(d) Any offers that the respondent might have made either before or during the course of the arbitral proceedings.

The guidelines basically follow the principles evolved by the English courts and there is no radical departure. In the case of ***Sir Lindsay Parkinson & Co. Ltd. vs. Triplan Ltd.***[23]

Lord Denning M.R. stated thus:

> "Counsel helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is *bonafide and not a sham* and whether the company has a *reasonably good prospect of success*. Again it will consider whether there is an *admission* by the defendants on the pleadings or elsewhere hat money is due. If there was a *payment into court* of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that, too, would count. The court might also consider whether the *application or security was being used oppressively* – so as to try to *stifle* a *genuine* claim. It would also consider whether the company's *want of means has been brought about any conduct by the defendants,* such as delay in payment or delay in doing their part of the work."

In accepting the principles established by the court in ***Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd*** the Hon. Peter Gibson LJ in ***Keary Developments v. Tarmac Construction Ltd*** reiterated the need for the court to carry out a balancing exercise by weighing the

[23] (1973) 1 Q.B. 609 T

injustice to the plaintiff "if prevented from pursuing a proper claim by an order for security against the injustice to the defendant if no security is ordered, the plaintiff's claim fails and the defendant thereafter finds himself unable to recover the costs incurred in his defence of the claim"[24]His Lordship stated inter-alia that the court in considering the amount of security that might be ordered must be mindful that it can order any amount up to the full amount claimed by way of security provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.[25]

Nigerian Judicial authorities on the subject do not reflect a departure from the basic principles enunciated above. In the Nigeria case of ***Houtmangracht vs. Oduba*** the court set out the underlying principles the court must bear in mind in an application for security for costs but that the discretion to be exercised must have full regard to the circumstances of the case and the court must be fair and just in making the order.[26] The court followed the principles set out in the English cases.

The Court of Appeal in a unanimous decision reversed the order of the lower court granting the order of security for costs. The order granted by the lower court was perceived as oppressive and a bid by the defendant to stifle the plaintiff's claim. The Hon. Justice Pat Acholonu had this to say:-

> "The court below seems to be concerned with the interest of the respondent and became oblivious of the pleadings of the appellant. I wonder what nature of justice one has to give when a party cannot comfortably agitate for remedy in the court of law in our country, unless he pays an enormous sum as security for costs when the subject matter of the suit is the recovery of the money it has paid to the other party. Justice must be evenly handed. Judgment which is more concerned with the interest of one party alone is obliviously bereft of any rational basis and is not reflective of the nature of our judicial system. Friedrich Von Savigny who founded the Historical School of Jurisprudence stated thus: "The law is the rule whereby the invisible border line is fixed within which the being and the activity of each individual obtains a secure and free space."

[24] (1995) 3 ALL E.R 534, 539 - 542
[25] Ibid page 540
[26] 1995 1 NWLR part 371, 295 at 308 paragraph H . See also UBA Ltd vs. Stahlbau GMBH & Co KG (1989) 3 NWLR (pt 110) 374 at 388H, 409 and Gulab (Nigeria) Ltd vs. Sachdeva (1965) 1 A.N.L.R 266 at 267. In the Gulab case the court in allowing the appeal against the lower court's decision not to make an order for security for costs against the plaintiff considered the fact that the plaintiff was resident in Italy, a country to which the Reciprocal Enforcement of Judgment Act did not apply and had no assets in Nigeria.

The court in that case also faulted the action of the trial Judge in ordering an amount as security on a full indemnity basis. The court decried that it cannot be the practice of courts to order such an amount.

The position in the courts is that order for security should be granted only upon consideration of all the circumstances. This fundamental requirement is not different in arbitral proceedings. Arbitrators should consider such applications bearing in mind the fundamental principles of justice and the obligation to adopt procedures as are fair and just whilst conducting the proceedings without unnecessary delay and expense. An applicant must place before the arbitrator *credible cogent evidence* justifying the exercise of the arbitrator's discretion in its favour.

The arbitrator must take submissions on issues such as his/her jurisdiction to make the order, whether an appropriate case for security has been established by the applicants, the extent and reasonableness of the quantum requested as well as the appropriateness of the form in which the security is requested.[27] Should the arbitrator decide that security be provided a formal order giving directions as to the provision of security and the consequences of disobedience of the order should be drawn up.

CONCLUSION

In this paper I have only tried to cover some of the issues to be considered in an application for security for costs. There are no definitive answers. It is for the arbitrator to ensure that the *conundrum* between the claimant's rights to access to the tribunal is properly balanced with the successful respondent's right to be protected from the risk of non payment of its awarded costs within the purview of the jurisdiction of the arbitral tribunal, legitimate exercise of the tribunal's powers and the applicable laws.

[27] The security may take various forms depending on the circumstances e.g. bank or insurance bond, guarantee which could even be from a third party, cleared funds held by the arbitrator or some other stakeholder e.g. solicitor's undertaking. On the issue of solicitors undertaking see A Ltd v. B Ltd 1996 1 `Weekly Law Report 665

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