



**IBA TOOLKIT ON INSOLVENCY AND ARBITRATION**  
**QUESTIONNAIRE**  
**NATIONAL REPORT OF NIGERIA**

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\* For the avoidance of doubt, this report is not intended to provide legal advice applicable to specific fact situations.

## IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Nigeria produce on arbitration commitments (foreign as well as national/local) involving the insolvent party.]

### Part I: Impact of Insolvency Proceedings on Ability to Commence or Continue Arbitration

1. Does the law of Nigeria contain any provision on the effect that the opening of insolvency proceedings produces on arbitration? If so, what is the source of the provision or provisions providing for the effects? That is, are the effects provided by the insolvency legislation as part of the consequences produced by the opening of insolvency proceedings? Or, are they provided by the arbitration legislation or law as a matter concerning the arbitrability of disputes, the capacity of the parties to arbitrate, the validity and effectiveness of arbitration agreements, or any other arbitration-specific category?

1. In Nigeria, the laws which regulate insolvency matters are contained in the Companies and Allied Matters Act 2020 (hereinafter referred to as “Companies Act”)<sup>1</sup> and the Companies Winding-Up Rules<sup>2</sup> (hereinafter referred to as “Winding-Up Rules”). Although the insolvency provisions in the Companies Act do not specifically mention arbitral proceedings, some of the provisions will impact arbitration, as discussed below.
2. The Companies Act provides that insolvency proceedings could lead to the staying of pending court proceedings against the company, and possible referral of such proceedings to the court presiding over the insolvency proceedings, in the case of a winding-up of the company.<sup>3</sup> There is no stay of pending court proceedings where the company is subject only to a financial restructuring.
3. By extension, arbitration will be impacted where the insolvency proceedings seek a winding-up order against the company.<sup>4</sup>

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<sup>1</sup> Full citation: Companies and Allied Matters Act 2020. Please note that the Companies and Allied Matters Act 2020 was signed into law by the President of the Federal Republic of Nigeria on Friday, 7 August, 2020. This legislation repealed the Companies Act 1990.

<sup>2</sup> Companies Winding-Up Rules 2001. The Companies Winding-Up Rules is a subsidiary legislation made pursuant to the Companies Act and is contained in the Companies Act.

<sup>3</sup> Companies Act, s 575.

<sup>4</sup> The provisions which stipulate the stay of other actions will not apply where the Insolvency proceedings are commenced for purposes other than the winding up of a company (eg, receivership).

- 2. Does the insolvency legislation in Nigeria provide for the concentration of disputes concerning the insolvent debtor before the insolvency court (*vis attractiva concursus*)? If so,**
- a. Which disputes fall under the rules on *vis attractiva concursus*?**
  - b. Are disputes in arbitration or subject to an arbitration agreement covered by the *vis attractiva concursus*?**

4. Yes, insolvency legislation in Nigeria provides for the concentration of disputes brought against the insolvent debtor in the insolvency court in the case of a winding up of the company. Once a winding-up order is made or a provisional liquidator is appointed by the court over a company, no action or proceeding can be commenced or continued against the company without the leave of the court.<sup>5</sup> Furthermore, on the application of any party to the winding-up proceedings, the insolvency court shall request the transfer to him of any action pending in any other court brought or continued by the company, or against the company, for the purpose of enforcing a claim against the company's assets or property.<sup>6</sup>
5. The disputes which are subject to *vis attractiva concursus* are causes or matters brought or continued by or against the insolvent company, any action or proceedings by a mortgagee or debenture holder of the company against the company, for the purpose of realising his security or by any other person for the purpose of enforcing a claim against the company's assets or property which is pending in the Court.<sup>7</sup>
6. The power of the insolvency judge to order the transfer proceedings involving the insolvent company is expressly provided by the insolvency rules in relation to court proceedings.
7. Although the insolvency rules in the Companies Act and Winding-Up Rules do not specifically make reference to arbitral proceedings, given the broad wording of Section 580 of the Companies Act, (which refers to "action or proceeding", without qualification as to forum), leave of court would have to be sought to continue or commence arbitration against a company in respect of which winding-up proceedings have commenced. Arbitration proceedings would not be affected in the case of a proceeding to restructure (rather than wind-up) the company.

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<sup>5</sup> Companies Act, s 580: "If a winding-up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the court may impose."

<sup>6</sup> Winding-Up Rules, s 32.

<sup>7</sup> *ibid*, s 32(1).

**3. What are the effects (if any) of the opening of insolvency proceedings in Nigeria on the possibility to commence or continue arbitration proceedings?**

**In answering this question, please address separately each of the following points:**

**a. Does the law draw any distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant?**

8. The Companies Act does not make any distinction between proceedings in which the insolvent company is the claimant or defendant. In both instances, all arbitration matters are concentrated before the insolvency court.

**b. Does the law draw any distinction between insolvency proceedings aimed at the liquidation of the company and proceedings aimed at the financial restructuring or rehabilitation of the company?**

9. Yes. Different provisions apply to liquidation proceedings and financial restructuring under the Companies Act. As discussed above, proceedings are stayed only upon the making of a winding up order or the appointment of a provisional liquidator. Proceedings are not stayed where the company is entering only into a financial restructuring.

**c. Does the law draw any distinction based on the subject matter or relief sought in the arbitration?**

10. The law does not draw distinctions based on the subject matter or relief sought.

**d. Do these effects (if any) also extend to pre-insolvency proceedings or restructuring proceedings which do not require a declaration of insolvency?**

11. Nigerian Insolvency law does not envisage pre-insolvency or restructuring provisions that do not require a declaration of insolvency. Rather, in certain instances of voluntary winding up, commencement of formal legal proceedings for the purpose of winding up the company is not required.
12. However, once there is any form of originating court process to effectuate any insolvency issue, the effects would of necessity extend.

**e. Does the law draw any distinction between arbitration proceedings which are pending at the time of the opening of insolvency proceedings and arbitration proceedings which commence after the opening of insolvency proceedings?**

13. No, the law does not draw any distinction.

**f. Does the law regulating the effect of insolvency on arbitration make any distinction between voluntary and compulsory insolvency proceedings?**

14. No. However, as stated in response to 3(d) above, there are instances in which voluntary insolvency is conducted without recourse to formal court proceedings.

**g. Do those effects intend to apply extraterritorially, ie to every arbitration regardless of the location of the seat in Nigeria or abroad?**

15. The current Companies Legislation in Nigeria does not have extra-territorial application or implications.

**h. When do the effects (if any) of insolvency on arbitration become operative (eg, from the time of the opening of insolvency proceedings, the declaration by the court, its publication or service of process through other means on the affected parties or even the arbitrators, etc.)?**

16. The effects become operative once the arbitrators receive formal notification of the insolvency proceedings.

**4. Does the law of the jurisdiction permit relief from the effects above? If so, what procedures must be followed in order to proceed with an arbitration?**

**a. Can an interested party seek to intervene in the insolvency proceeding in order to proceed with arbitration?**

**b. What considerations will the insolvency court take into account in making the decision of whether to send the matter to arbitration?**

17. Yes, the law permits an interested party to seek the leave of court in order to maintain an action against the insolvent company. The decision of the court is discretionary. The court, in exercising its discretion, will likely take into account factors such as the impact of the arbitration proceedings on the company.

**5. Can the insolvency courts give an order to stop arbitration proceedings (eg, an anti-arbitration injunction)? If so, does it depend on the seat of the arbitration being in the jurisdiction or abroad?**

18. In Nigeria, insolvency proceedings are commenced at the Federal High Court, and as a matter of general law, the Federal High Court has no jurisdiction to grant anti-arbitration injunctions,<sup>8</sup> save (controversially) in respect of foreign arbitral proceedings.<sup>9</sup> In the specific context of insolvency proceedings, the Companies Act does not make provision for the Federal High Court to stop arbitration proceedings (whether seated in Nigeria or abroad).

**6. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of contracts that contain arbitration agreements concluded by the insolvent party before the opening of insolvency proceedings? If so, on what basis?**

19. The commencement of insolvency proceedings does not imply that the existing contracts of the insolvent company will be automatically terminated, unless the contract expressly provides for termination on the ground that insolvent proceedings have commenced.
20. An insolvency administrator cannot unilaterally terminate or suspend the extant contractual obligations of an insolvent company. However, in circumstances where a contract relating to the property of the insolvent company is “unprofitable,” the Companies Act empowers the insolvency administrator to make an application to the insolvency court for leave to disclaim the contract on the ground that the contract is unprofitable.<sup>10</sup>

**7. What is the effect (if any) on the arbitration agreement of the decision of the insolvency administrator or insolvency court to terminate/disclaim the contract that contains such arbitration agreement?**

21. Under Nigerian law, an arbitration agreement is treated as a separate agreement from the main contract. It is independent of the other terms of the contract.<sup>11</sup> The arbitration clause/agreement, though part of a larger agreement, will survive the main contract.<sup>12</sup> As such, a disclaimer or cancellation of a contract containing an arbitration clause will not cancel an arbitration agreement unless the arbitration agreement is specifically disclaimed.

<sup>8</sup> *Statoil & Anor v NNPC* (2013) 14 NWLR.

<sup>9</sup> *SPDC & Ors v Crestar* (2016) 9 NWLR (Pt. 1517) 300 (which decision is the subject of an appeal at the Supreme Court).

<sup>10</sup> Companies Act, s 663(1).

<sup>11</sup> Arbitration and Conciliation Act, s 12(2), chapter A18, Laws of the Federation of Nigeria, 2004.

<sup>12</sup> *Stabilini Visioni Limited v Mallinson & Partners Limited* (2014) LPELR-23090 (CA).

**8. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of arbitration agreements themselves? If so, on what basis? What is the effect of such decision on pending arbitration proceedings derived from the arbitration agreement in question?**

22. Under Nigerian law, there is no express statutory provision that confers such powers on the insolvency administrator. However, the general right to challenge the validity of an arbitration agreement on the basis of a vitiating element, such as fraud, for instance, is available in all circumstances under Nigerian law.

**9. Does the insolvency regime require the alleged creditor to take any step in the insolvency process to be able to commence or continue with the arbitration (eg, file the claim within the insolvency proceedings for verification/registration/ proof)?**

**a. If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, does the existence of an arbitration agreement mean that an arbitral tribunal would have jurisdiction to decide on the existence and amount of the claim, so that it can be eventually submitted to the insolvency proceedings?**

**b. Does the filing of the claim with the insolvency proceedings amount to a submission of the jurisdiction of the insolvency court and a waiver of the arbitration agreement?**

23. As indicated in the answer to Question 1 above, the insolvency regime in Nigeria does not expressly address arbitration. There is therefore no provision for an alleged creditor to take steps in the insolvency proceeding which will enable it to commence or continue arbitration. However, it may be advisable for the litigious credit to be brought into the insolvency process by filing a proof of claim with the insolvency court in order to make sure the claim is recognized by the court.

24. Under the insolvency regime, if an alleged creditor files its claim in the insolvency proceedings and the claim is refused by the liquidator, the alleged creditor will be entitled to appeal that decision to the Federal High Court.<sup>13</sup> Given this framework (although the law does not expressly prohibit this), it is unlikely that an arbitral tribunal will have jurisdiction over the existence and amount of the claim, as there is no basis under the insolvency regime for an arbitral award to overturn the decision of a liquidator.

25. Given the above considerations, the filing of a claim with the insolvency proceedings will likely amount to submission to the jurisdiction of the insolvency court and a waiver of the arbitration agreement.

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<sup>13</sup> Winding-Up Rules, 91.

**10. In the event of a contract concluded by the insolvent party and a creditor prior to the opening of the insolvency proceedings, is an arbitration agreement contained in that contract enforceable in relation to an action commenced by the insolvency administrator to avoid that transaction based on grounds provided by insolvency law (insolvency *actio pauliana* or setting aside action)?**

26. In certain instances, if fraudulent preference of a creditor is established in the contract between the insolvent party and the creditor, the law permits the avoidance of such a transaction.<sup>14</sup> The arbitration agreement will not be enforceable in these circumstances.

**11. Can the insolvency administrator conclude new arbitration agreements after the opening of insolvency proceedings?**

27. An insolvency administrator is empowered to carry on the business of the company as far as may be necessary for its beneficial winding up and to do all acts and execute, in the name and on behalf of the company, all deeds and other documents.<sup>15</sup> In this capacity, the insolvency administrator may conclude new arbitration agreements.

**12. Do the effects of insolvency on arbitration (if any) operate after a creditors' arrangement has been agreed and approved by the competent authority?**

28. Prior to the restructuring of a company's obligations and liabilities through a scheme of arrangement,<sup>16</sup> it is assumed that all the existing assets, debts, liabilities, and securities (including contingent liability from a pending arbitration claim) would have been disclosed in the process of entering the arrangement.

29. Once a scheme of arrangement is approved by the creditors and sanctioned by the court, the scheme becomes binding on the creditors and enforceable by the court on the application of interested parties.

**13. Are any or all the rules regulating the effects of insolvency on arbitration mandatory? That is, can an agreement between the insolvent party and one or more of its creditors (eg, the parties to the arbitration) exclude the application of those rules?**

30. The rules regulating insolvency in Nigeria are mandatory. Although Nigeria's insolvency regime does not expressly deal with arbitration, in the instances in which arbitration may be impacted by insolvency proceedings, the insolvency regime will prevail.

<sup>14</sup> Companies Act, s 658.

<sup>15</sup> Companies Act, ss 588(1)(e) and 588(2)(b).

<sup>16</sup> Creditors' arrangement, see Sections 715 and 716 of the Companies Act.

31. For instance, as mentioned in the answer to Question 2 above, once a winding-up order is made in respect of a company, leave of court must be obtained for the commencement or continuation of arbitration proceedings against the company.
32. Also, if the company is eventually wound up, its assets must be dealt with in the order of priority stipulated in the Companies Act.<sup>17</sup> If the party to the arbitration is an unsecured creditor, an agreement between the insolvent company and an unsecured creditor cannot place the unsecured creditor in a better position than the secured creditors.

**14. Are arbitrators seated in the jurisdiction bound by the rules discussed above in considering whether to proceed with an arbitration?**

33. Arbitrators sitting in an arbitration in Nigeria are bound by the mandatory rules in the Companies Act where such rules impact an arbitration.

**15. Does the court's personal jurisdiction over the party to the arbitration that is *not* in insolvency make any difference with respect to the effectiveness of the insolvency court's position on the arbitration?**

34. In the instances in which arbitration interacts with Nigeria's insolvency regime, the insolvency court's personal jurisdiction over the party that is not in insolvency is not material. For instance, the obligation to seek leave of court before commencing or continuing arbitration against a company, in respect of which a winding-up order has been made, will apply whether or not the insolvency court has personal jurisdiction over the party that is not insolvent.

**Part II: Considerations with Respect to the Arbitration Proceeding Where a Party Is Subject to Insolvency Proceedings**

**16. Will the insolvency administrator take part in the arbitration exclusively or will the insolvent party in some instances continue to have procedural capacity to participate in the arbitration in its own name (debtor in possession)?**

- a. **If the insolvency administrator takes part in the arbitration, does she step into the shoes of (ie, replace) the insolvent party or can the insolvent party continue to appear in its own name? [in the latter option, what are the roles of the insolvency administrator and the insolvent debtor?]**

35. The insolvency administrator is empowered to either institute or defend legal proceedings in the name and on behalf of the insolvent company.<sup>18</sup> The insolvency administrator will assume

<sup>17</sup> Companies Act, s 657.

<sup>18</sup> *ibid*, s 588(1)(a).

the position of the directing mind of the company (ie, he will displace the directors), and he will be entitled to exclusively direct the prosecution of the company's claim or defence in the arbitration.

36. In practical terms, the insolvent party will continue to appear in its name, annotated to reflect the appointment of an insolvency administrator over the company. (See also the answer to Question 18 below.)

**17. Do the considerations of confidentiality that apply in a non-insolvency scenario vary as a consequence of the opening of insolvency proceedings against one of the parties to the arbitration? For instance, are there any restrictions on the information that the insolvency administrator can share with the insolvency court or with the creditors in the insolvency concerning the conduct, status or content of the arbitration? Or can the creditors appear in the arbitration as parties interested in the outcome of the proceedings?**

37. The Companies Act does not make provisions in relation to this subject matter. The insolvency administrator has broad duties to provide information on the insolvent company to relevant authorities, such as the Corporate Affairs Commission<sup>19</sup> and the official receiver.<sup>20</sup> No restriction on the content of the information that may be shared is provided.

38. Nigerian arbitration laws do not make provision for persons who are not parties to an arbitration agreement to be a part of arbitration proceedings. As such, creditors will not be able to appear in arbitration proceedings involving the insolvent company as interested parties.

**18. Does the name of a party change as a consequence of the opening of insolvency proceedings over it?**

39. The name of the party will change once an insolvency administrator is appointed and the person takes charge of the affairs of the company. The fact that a receiver has been appointed, or that the company is in the process of liquidation, must be indicated on all relevant documents.<sup>21</sup>

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<sup>19</sup> *ibid*, s 683(1).

<sup>20</sup> *ibid*, s 589.

<sup>21</sup> *ibid*, ss 555(1) and 679(1).

**19. Is the insolvency administrator (or the debtor in possession) empowered to reach a settlement in the arbitration, or is the insolvency court required to authorise any settlement for it to be effective?**

40. The insolvency administrator is empowered to make a compromise with any creditor or alleged creditor in respect of any claim.<sup>22</sup> As such, he may reach a settlement in arbitration.

**20. Can an arbitral tribunal adopt interim measures concerning a party subject to insolvency proceedings?**

41. An arbitral tribunal can adopt interim measures as it deems necessary in relation to the dispute before it.<sup>23</sup> However, where the interim measure will affect the rights of the other creditors, the enforcement of such measure will be subject to the rights of other creditors.

**21. Does the opening of insolvency proceedings in Nigeria affect the validity of interim measures adopted against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings?**

42. The interim measures adopted prior to the commencement of the insolvency proceedings will ordinarily not be affected by the proceedings, save for instances where such interim measures will affect the rights of other creditors.

**22. Is the capacity of the insolvent party to settle the dispute in the arbitration affected by the opening of insolvency proceedings in the jurisdiction?**

43. Generally, an insolvent party will retain the power to deal with its affairs including settling its disputes in arbitration, subject to the consent requirements of the Companies Act, as earlier indicated.

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<sup>22</sup> *ibid*, s 588(1)(e).

<sup>23</sup> ACA, s 13.

### **Part III: Ability to Enforce an Arbitration Award in Insolvency Proceedings**

**23. Does the opening of insolvency trigger a general prohibition of individual enforcement actions by creditors against the insolvent estate?**

44. Once insolvency proceedings commence, creditors will not be in a position to enforce their claims in individual proceedings. Instead, creditors will be required to file their proofs of claims in the pending insolvency proceedings.
45. The creditors will be required to prove their respective claims against the insolvent company before such a claim will be recognised.
46. If the creditor is an unsecured creditor, the claim will be subordinated to the claims of secured creditors of the insolvent company.

**24. What is the status of a claim that is being pursued in arbitration but has not yet reached a final award? Will that claim be converted to a different status once the arbitration award has been rendered and/or becomes enforceable?**

47. The insolvency regime requires that all claims against the insolvent company be made in the context of the insolvency proceedings. The liquidator is empowered to make any compromise or arrangement with “creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company.”<sup>24</sup> As such, if the litigious credit is not brought into the insolvency process before or after the conclusion of the arbitration, it will remain unproven and it will not be admitted by the liquidator as a debt of the company.
48. A pending claim will not be treated as a debt owed by the insolvent company, as the law requires all creditors to prove their claims before the liquidator. It may be advisable for the creditor to file its proof of claims in the insolvency proceedings during the pendency of the arbitration proceedings.
49. After an award is rendered, the claim will not take on a different status. It will still be required to be proved<sup>25</sup> and admitted by the liquidator as a debt. Thereafter, its satisfaction will depend on the state of the pool of assets of the insolvent company after the secured creditors have been compensated.

<sup>24</sup> Companies Act, s 588(1)(e).

<sup>25</sup> The manner in which debts are proved is prescribed in Sections 76 to 79 of the Winding-Up Rules.

**25. Is a credit contained in an arbitration award a valid proof of credit (ie, valid title) for the purposes of the insolvency proceedings? If it is a foreign award, will it need to be recognised under the New York Convention for it to be accepted or is there any other requirement that needs to be satisfied?**

50. As indicated in the immediately preceding answer, a credit in an arbitration award will still need to be proved and admitted by the liquidator. Naturally, a liquidator will be unlikely to have good grounds to refuse to admit a credit contained in an award. A credit contained in a foreign award will be proved via the same mechanism as used for domestic awards. Because the purpose of proving the credit in the insolvency proceedings will not be “enforcement of the award” in the ordinary way, there would be no need for recognition via the New York Convention. Nonetheless, the grounds for refusing enforcement under the New York Convention would still apply and might be invoked.

**26. Are any or all the rules regulating the effect of insolvency on arbitration considered part of public policy?**

51. The rules regulating insolvency in Nigeria are primarily aimed towards discharging the obligations of the insolvent company in the best interest of the creditors and the contributories of the company. To the extent that they could be considered as intended to protect creditors in particular, and foster an organised, fair, and co-ordinated process of resolving disputes over credit, the rules are part of public policy. However, as indicated above, Nigeria’s insolvency regime only has limited effects on arbitration.

**27. Is the principle of *par conditio creditorum* part of public policy? If so, is public policy linked to the equal treatment of creditors from a substantive point of view (ie, proportion of their credit that is satisfied in the insolvency process) or does it extend to the equal treatment of creditors from a procedural point of view (eg, prohibiting individual proceedings [eg, arbitration] outside the insolvency process)?**

52. The equal treatment of creditors in Nigeria’s insolvency regime is both substantive and procedural.

53. Substantively, the claims of creditors are required to be satisfied in equal proportion in the insolvency process.

54. Procedurally, while individual proceedings (such as arbitration) are not expressly prohibited, the Companies Act requires that after a winding-up order is made, those proceedings can only be continued with the leave of court.<sup>26</sup> This will allow the court to take a view as to whether those proceedings would be inconsistent with the insolvency process. In addition, no

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<sup>26</sup> Companies Act, s 580.

execution against the assets of an insolvent company can be made after the commencement of the insolvency proceedings.<sup>27</sup> This ensures that even where individual proceedings are permitted, the assets of the company will still be distributed in the context of the insolvency proceedings.

**28. Are there any other provisions or case law of Nigeria concerning the effect of national insolvency on arbitration that have not been mentioned in the previous answers?**

55. No.

### **IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION**

**[These questions focus on the effects that foreign insolvency proceedings produce on arbitration seated in Nigeria concerning the insolvent party.]**

**29. Do foreign insolvency proceedings need to be recognised under any formal procedure to produce effects in Nigeria?**

56. There is currently no framework under Nigerian law for the recognition of foreign insolvency proceedings.

57. However, in general, foreign court orders/judgments are capable of being registered and enforced in Nigeria, provided that they relate to the payment of money.<sup>28</sup>

**30. Has the jurisdiction adopted legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency? If so, does that legislation adopt the Model Law in full, or does it amend any provision of the Model Law related to the effect of insolvency on arbitration?**

58. Nigeria has not adopted the UNCITRAL Model Law on Insolvency, nor does Nigeria currently have a legal framework in respect of cross-border insolvency.

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<sup>27</sup> *ibid*, s 577. However, this section in its application will exclude a fixed charge or a validly created and perfect security interest other than a floating charge.

<sup>28</sup> Reciprocal Enforcement of Judgments Ordinance, s 2, cap. 175 LFN 1958; Foreign Judgments (Reciprocal Enforcement) Act, s 3(2)(b).

**31. Does the opening of insolvency proceedings outside of the territory of Nigeria produce any effect on arbitrations seated in the jurisdiction? What is the source of the rule or legislation providing for such effects?**

59. Nigerian insolvency law does not contemplate cross-border issues. As such, there is no provision in respect of the effect on Nigeria-seated arbitration of the opening of insolvency proceedings outside Nigeria.

60. That said, where the company which is the subject of foreign insolvency proceedings is the claimant in Nigeria-seated arbitration, to the extent that the applicable foreign law may impose limitations on the legal capacity of the company (or other effects), the respondent would be entitled to draw them to the tribunal's attention. Where the subject company is the respondent, it will be entitled to invoke foreign law in respect of any effects on arbitration against it while the foreign insolvency proceedings are pending. In either case, the tribunal will have to consider whether to give effect to the relevant foreign law, applying relevant conflict of laws rules.

**32. Are arbitrators seated in the jurisdiction required to take into account the rules on recognition of foreign insolvencies (if any) to evaluate the effects of such insolvencies in the arbitration, as described in the previous question?**

61. As indicated above, Nigeria currently has no rules for the recognition of foreign insolvencies.

**33. Are the rules that regulate the effects on arbitration of foreign insolvency proceedings of mandatory application for arbitral tribunals seated in the jurisdiction?**

62. As indicated above, Nigeria currently has no rules for the recognition of foreign insolvencies.

**34. Will an award which does not respect the effects of insolvency provided by the relevant regime in the jurisdiction be set aside?**

63. In Nigeria, arbitral awards can only be set aside in limited circumstances, that is, misconduct of the arbitrators, improper procurement of the award, and the award being beyond the scope of the submission.<sup>29</sup> As there are no rules in Nigeria dealing with cross-border insolvency, it is unlikely that failure to respect the effects of foreign insolvency proceedings will lead to an award being set aside (eg, on the ground of misconduct).

64. That said, as indicated in the answer to Question 31, where the effect of the foreign insolvency strikes at the foundation of the arbitration (eg, it erodes the legal capacity of a company or

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<sup>29</sup> ACA, ss 29 and 30.

makes the arbitration agreement ineffective) and (under the applicable conflict of laws rules) the relevant foreign law properly governs those threshold matters, an award which does not take into account the effects of the foreign insolvency could be set aside.

**35. Are there any other provisions or case law concerning the effect of foreign insolvency on arbitration seated that have not been mentioned in the previous answers?**

65. No.