THE PRINCIPLES AND PRACTICE OF COSTS IN ARBITRAL PROCEEDINGS*

Abstract
Typically, arbitration revolves around the award on the merits and the order as to costs. Emergence of arbitration as a preferred method of speedy resolution of disputes compels understanding of the principles of award of costs. In this paper, the writer analysed the principles for award of costs in arbitral proceedings, and established that, as in judicial proceedings, an arbitral panel does not possess inherent powers to award costs, and its competence to award costs depends on existence of statutory powers to that effect. From this perspective, the writer examined the Arbitration and Conciliation Act, 1988 (ACA, 1988) which empowers an arbitral tribunal to fix costs payable in respect of proceedings, and scrutinised the rules regulating persons liable to pay or entitled to receive costs. We determined that aside powers of the arbitral tribunal when necessary, to apportion costs between parties, usually, the successful party is entitled to costs to indemnify him, and the unsuccessful party to bear the costs of the arbitration. Having examined items of costs and time within which awarded costs are required to be paid, the writer interrogated the rules to order payment of costs in both general and particular instances, and found that an arbitrator is required to act judicially in exercising his discretion, and apply the same principles applied in the high court, particularly, that costs follow the event. The writer then looked at the powers of the tribunal to make an order for security for costs of a foreign claimant, and concluded that where statutory authority exists, the tribunal may order a foreign claimant to provide security for costs, and order the proceedings stayed until the security is given; but for the arbitrator to competently exercise this power, it must be given expressly. Where it is not, the exercise will be ultra vires the arbitrator.

Keywords: Arbitral Tribunal, Arbitration, Costs, Discretion, Expenses, Indemnity

1. Introduction

Lately, desirability of arbitration as a method of dispute resolution increased. For close to six months of the year 2020, the court system was shut down due to the corona virus pandemic. For a substantial part of the year, 2021, the court system was shut down as a result of the industrial action of judiciary workers. Even before these two occurrences, the judicial system was already under the pressure of prolific election disputes with their limited timelines. In the face of systemic difficulty to cope with ever-increasing workload, recourse to arbitration provides a speedy access to justice for transactional disputes. A typical arbitration revolves around the award on the merits and the order as to costs. In this paper, the writer set out to conduct a concise examination of the rules and principles of award of costs in arbitral proceedings. In the section next, we will deal with definitions and delineations of the principles of costs. Thereafter, we will explain the general principles for award of costs, and set out the governing law on costs and interpretation of the governing law. Then we will consider the persons entitled to costs and the persons liable for costs. This will bring us to the items of costs and time for payment of costs. We will then investigate the mode and manner for exercise of discretion to order payment of costs in particular cases. We will lastly set out the principles that control the making of an order of security for costs against a foreign claimant. We will then conclude.

2. Definition of Costs

The term *costs* as applied to proceedings in a court of justice are pecuniary allowances made to a successful party, and recoverable from the losing party, for his expenses in prosecuting or defending an action or a distinct proceeding within an action.[1] In their origin, costs were awarded rather as a punishment of the defeated party for causing the litigation than as recompense to the successful party for the expenses to which he had been subjected.[2] Jurisprudence has however moved away from the penal theory of costs to the current indemnity theory,[3] so that

* **By Chike B. OKOSA, PhD**, Lecturer, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus, Anambra State.

[1] *Black's Law Dictionary*, (West, 6th edn.) 348; in *Mbanugo v Nzefili*, [1998] 2 NWLR Part 537, 343, the Court of Appeal held that the term '*costs*' mean two things in law. The first is the charge a Solicitor is entitled to make and recover from the client for professional services. The second is the sum of money which the court orders one party to pay another party in an action for indemnity for expenses incurred in the litigation. *See Maya v Oshuntokun*, [2001] 11 NWLR Part 723, 62

[2] 20 CJS 257

[3] In *NCC Ltd v SCOA (Nig) Ltd.*, [1991] 7 NWLR Part 201, 80 the Court of Appeal analysed the principles of costs and the controlling authorities per Justice Tobi JCA at 95H- 96B *'Costs are an indemnity to the successful party. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is ascertained. See Rewane v.*

presently, the object of awarding costs is not to punish the unsuccessful litigant but to compensate the successful party for amongst other things, the expenses to which he has been put because of the litigation.[4] The movement away from the penal theory to the indemnity theory of costs is brought out by the principle consistently upheld by the courts that costs should not be punitive. This has led appellate tribunals, on suspicions of penal or punitive underpinnings, to reduce or remit costs which are of such a large quantum that they deem it either inexplicable, or inappropriate for the circumstances.[5] Costs awardable in proceedings are identified and categorized in several ways. Costs of the day are costs which are awarded for the costs incurred in preparing for the proceedings of a cause on a specified day. It may include witnesses' fees, transport costs and other fees of attendance. Interlocutory costs are costs accruing upon proceedings in the intermediate stages of a cause, such as motions. Final costs are such costs as are to be paid at the end of the suit, the liability for which depends upon the final result of the litigation.[6] An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. The person to whom a reference to arbitration is made is called an arbitrator.[7] The ACA 1988 provides a unified legal frame work for the fair and efficient settlement of commercial disputes by arbitration and conciliation. In the terms of the Act, arbitration means a commercial arbitration whether or not administered by a permanent arbitral tribunal. Commercial in this context, means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea rail or road.[8] There is no common law principle that permits a successful litigant to recover from his losing adversary the costs and expenses of litigation, and therefore costs may only be imposed and recovered in cases where there is statutory authority therefore, and only to the extent, and in the manner provided by statute.[9] An arbitral tribunal, if authorised by statute, is allowed to fix the costs payable in the proceedings.

3. General Principles and Statutory Authorisation for Costs in Arbitral Proceedings

The arbitral tribunal is empowered to fix the costs payable in respect of the proceedings. The term *costs* as used in this context includes only the items of costs specified in the Act and Rules[10]. Ordinarily the word *includes* is used to enlarge the meaning of words and phrases occurring in the body of a statute[11]. It is a term of enlargement that creates a class larger than the items enumerated. It is not restrictive, but has an element of elongation *ejusdem generis*[12]. The word *includes* denotes to enclose or to comprise as a part. It conveys enlargement, expansion and extension. Where it is used in a statute, it indicates that the draftsman intends, and in fact anticipates

Okotie-Eboh (1960) 5 FSC 200, (1960) SCNLR 461. The object of awarding costs is not to punish the litigant, but to compensate the successful party for the expenses to which he had been put by coming to court. See Inneh v. Obaraye (1957) 2 FSC 58 (1957) SCNLR 180. Costs generally follow the event although the two are neither invariable inseparable or intertwined. See Adegbenro v. Akintola (No.2) (1963) 2 SCNLR 216; While the successful party is, as a matter of general principle entitled to costs, this cannot be arbitrarily awarded but rather, must reflect the party's reasonable expenses. See Kukoyi v. Odufale (1965) 1 All NLR 300, Haco v. Brown (1973) 4 SC 149, Obayagbona v. Obazee (1972) 5 SC 247'

[4] *Francis v Osunkwo*, [2000] FWLR Part 14, 2469; *see Sogunro v Yeku*, [2003] 12 NWLR Part 835, 644; *Akande v Alagbe*, [2001] FWLR Part 38, 1350; *Psychiatric Hospitals Management Board v Utomi*, [1999] 13 NWLR Part 636, 572; *Guda v Kita*, [1992] 12 NWLR Part 629, 21; *Ajagungbade III v Laniyi*, [1999] 13 NWLR Part 633, 92

[5] In *Coomasie v Tell Communications Ltd*., [2003] 1 NWLR Part 802, 551, the court had awarded costs of ₦400,000.00 against the appellant upon his discontinuing his action. It appeared from the record that the reason for such a large measure of costs was that; *'The plaintiff had the earliest opportunity to withdraw, but he failed to do so.'* The Court of Appeal in setting aside the award held that the reference by the trial Judge that the appellant had the earliest opportunity to withdraw but failed to do so showed that the purpose of the award was punitive. In *NBCI v Alfijir Mining (Nig.) Ltd* [1993] 4 NWLR Part 287, 346, the Court of Appeal per Justice Katsina-Alu, JCA quoting the Supreme Court per Justice Adetokunbo Ademola in *Rewane v Okotie-Eboh* (1960) 6 SCNLR 461 held '*Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as punishment on the party who pays them nor given as a bonus to the party who receives them. As a general rule, costs are an indemnity, and the principle is this, find out the damnification and then you find out the costs which should be allowed.' See also Harold v Smith* 157 ER 1229 at 1231 per Baron Bramwell.

[6] Black's Law Dictionary, (n. 1)

[7] *Kano State Urban Dev. Board v. Fanz Constr. Ltd* [1990] 4 NWLR Part 142, 1

[8] s. 57(1) of ACA, 1988

[9] 20 CJS 259

[10] s. 49(1) of ACA; art. 38 of Arbitration Rules (hereinafter Arb. Rls.)

[11] *Uhunmwangho v Okojie* [1989] 5 NWLR Part 122, 471

[12] *Peterside v IMB (Nigeria) Ltd* [1993] 2 NWLR Part 278, 712

inexhaustibility[13]. It comprehends not only such things as they signify, according to their natural import, but also those things the interpretation clause declares they shall include[14]. When it is used in a definition, it bears both its extended statutory meaning and its ordinary, popular and natural sense whenever that would be properly applicable[15]. It appears as if section 49(1) of ACA 1988 sought to specify without delimiting heads of expenses to be covered by an award of costs, so as to give arbitrators discretion on what items to indemnify by the award of costs. However, use of the word *only* seems to have fixed the qualifying categories to only those explicitly set out in the statute. Thus, though arbitrators have powers to award costs, their award must be in accordance with the items specifically set out in s. 49(1)(a) to (e) of ACA 1988.[16]

4. Persons entitled to Costs and Persons liable for Costs

In general, the arbitrators and the prevailing party are entitled to have their costs paid or reimbursed. Accordingly, arbitrators are entitled to have their fees paid and related expenses reimbursed as part of the costs of the arbitration.[17] Expenses of the arbitral tribunal are to be reimbursed from the award of costs.[18] A successful party is entitled to an award of costs to indemnify him for travel and other expenses of his witnesses[19]; and an award of costs to indemnify him for his expenses in the arbitration.[20] The general principle is that costs of arbitration shall be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such cost between the parties if it determines that apportionment is reasonable taking into account, the circumstances of the case.[21] This competence of the tribunal to apportion the incidence of the costs in a manner that reflects the relevant circumstances may be exercised so as to order that the entire costs be borne entirely by the unsuccessful party if he had by his particularly unreasonable, unconscionable and egregious conduct precipitated the recourse to arbitration. In the absence of apportionment, or award that they be borne by the unsuccessful party, both parties to arbitration are liable for the following costs; i.e. - the fees of the arbitral tribunal; travel and other expenses incurred by the arbitrators, and costs of expert advice and of other assistance required by the arbitral tribunal.[22] The unsuccessful party is liable to pay costs of the prevailing party, particularly, travel and other expenses of the witnesses and costs of legal representation and assistance of the successful party[23]. However, with respect to the costs of legal representation and assistance, the tribunal, taking into account circumstances of the case, is free to determine which party should bear such costs. It may however, apportion such costs between the parties if it determines that apportionment is reasonable[24].

5. Time for Payment of Costs

On inauguration, the arbitral panel may require parties to immediately make a deposit on account of the following costs - the fees of the arbitral tribunal; travel and other expenses incurred by the arbitrators; and, the costs of expert advice and of other assistance required by the arbitral tribunal.[25] During the course of the arbitral proceedings, the arbitral tribunal may request additional deposits from parties.[26] Award of costs to cover travel and other expenses of witnesses, and costs for legal representation and assistance of the successful party, would certainly have to await the end of the arbitration in order to fall due. This is because until conclusion of the proceedings, it is not possible to determine who the prevailing party is, who would be entitled to these costs. When the arbitral tribunal

[13] *Onagoruwa v Adeniji* [1993] 5 NWLR Part 293, 317
[14] *Arta Industries (Nigeria) Ltd v NBCI* [1998] 4 NWLR Part 546, 357
[15] *Onuzulike v CSD, Anambra State* [1992] 3 NWLR Part 232, 791; in *Utih v Onoyivwe* [1991] 1 NWLR Part 166, 166, the Supreme Court held that the word *includes* is used in a definition section of a statute, to enlarge the meaning of the expression occurring in the body of the statute. When so used, the expression must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the definition section declares they shall include.
[16] Art. 38 of Arb. Rls
[17] s. 49(1)(a) & (b) of ACA; art. 38 (a) & (b) of Arb. Rls.
[18] s 49(1)(c) of ACA; art. 38 (c) of Arb. Rls.
[19] s. 49(1)(d) of ACA; art. 38 (d) of Arb. Rls.
[20] s. 49(1)(e) of ACA; art. 38 (e) of Arb. Rls.
[21] Art. 40(1) of Arb. Rls.
[22] s. 49(1)(a)(b) & (c) of ACA; art. 38 (a)(b) & (c) of Arb. Rls.
[23] s. 49(1)(d) & (e) of ACA; art. 38 (d) & (e) of Arb. Rls.
[24] Art. 40(2) of Arb. Rls
[25] s. 50(1) of ACA; art. 41(1) of Arb. Rls.
[26] s. 50(2) of ACA; art. 41(2) of Arb. Rls.

issues an order for termination of the arbitral proceedings or makes an award on agreed terms, it shall then fix the costs of the arbitration in the text of the order or award.[27]

6. Items of costs

Items awardable as costs are restricted to the items specified. The tribunal may not award any other costs outside those specified in the law. The costs awardable by the tribunal are; the fees of the arbitral tribunal, travel and other expenses incurred by the arbitrators; costs of expert advice and of other assistance required by the arbitral tribunal; travel and other expenses of witnesses; costs for legal representation and assistance of the successful party. [28] If an appointing authority is agreed by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at the Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.[29] If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees. Where such a statement is provided, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers proper in the circumstances of the case[30]. In fixing its fees, the amount specified must be reasonable. In determining whether the amount requested is reasonable, the tribunal must take into account, the amount in dispute, the complexity of the subject matter, the time spent on the proceedings by the arbitrators and any other relevant circumstances of the case.[31] Although the fees of the arbitrators are fixed by the tribunal, the fees of each arbitrator must be stated separately[32]. Where an umpire awarded the aggregate sum of the fees of two arbitrators and of his own remuneration as costs of the award without assessing the value of the arbitrators' services, the award was remitted for reconsideration[33].

The arbitrators are entitled to charge the costs of their travel and their other expenses to the account of the parties. This however is restricted to travel relevant to the arbitration. It does not cover useless and irrelevant trips made solely for the curiosity or indulgence of the arbitrators. Costs of relevant air travel are covered. While it certainly covers the expenses of travelling business class, it is doubtful whether the same may be asserted for first class travel. Certainly, travelling by chartered aircraft is not covered. Costs of airport and city taxi service are covered; costs of limousine service are however not covered. Only reasonable expenses are included. Premium for travel insurance is permissible. Accommodation and living expenses in a decent hotel, motel or guest house are permissible. Restaurant tips and service charges are permissible only to the extent they are stipulated by law, if not, the arbitrator may not indulge his passions as a philanthropist or benefactor at the expense of the parties. Meals, beverages and necessary entertainment are permissible. However, gourmet meals, vintage wines, opera, night clubs and other unrelated activities may not be undertaken at the expense of the parties. The test for whether a particular expense is chargeable is first, whether it is relevant to the proceedings or may be reasonably permitted of the arbitrator during conduct of the proceedings and second, whether the amount spent on it is reasonable in the entire circumstances of the case.

The arbitral tribunal has the power to appoint one or more experts to report to it on a specific issue to be determined by the tribunal.[34] Upon receipt of the expert's report, the tribunal shall send a copy of the report to the parties who shall be given the opportunity to express in writing, their opinion on the report. A party is entitled to examine any document the expert has relied on[35]. Any expert so appointed may after delivering his written or oral report, participate in a hearing where the parties shall have the opportunity of putting questions to him, and presenting expert witnesses to testify on their behalf on the point in issue[36]. The costs of obtaining this expert advice are properly chargeable as costs on the parties. This does not however entitle the tribunal to procure experts whose utility to the proceedings are minimal or non-existent. Costs chargeable in respect of the expert must be reasonable,

[27] s. 50(2) of ACA; art. 40(3) of Arb. Rls.
[28] s. 49(1) of ACA; art. 38 of Arb. Rls.
[29] s. 49(3) of ACA
[30] s. 49(4) of ACA
[31] s. 49(2) of ACA
[32] s. 49(1)(a) of ACA; art. 38(a) of Arb. Rls.
[33] *Government of Ceylon v Chandris* [1963] 2 All ER 1; *see* Supreme Court Practice 1997 vol. 1 para 62/B/12
[34] s. 22(1)(a) of ACA; art. 27(1) of Arb. Rls,
[35] Art. 27(3) of Arb. Rls.
[36] s. 22(2) of ACA; art. 27(4) of Arb. Rls.

and in accordance with the going rate of similar experts in the same field. Other assistance required and received by the tribunal are chargeable. These would include secretarial services, service and delivery of processes and documents, telephone, fax and other essential communication. If the arbitration seats in a specialised or dedicated arbitration centre, or, facilities are hired for hosting the proceedings; costs of procuring the facilities are chargeable. This would also where necessary include the cost of emergency power, janitorial services and concierge.

A party entitled to an award of costs of the arbitration may be entitled to the travel and other expenses of his witnesses. This is nevertheless limited to the extent to which the tribunal approves the expenses claimed[37]. It is not clear from the text whether these travel and other expenses of the witnesses sought as costs must be approved by the tribunal before being expended or must be approved before being awarded. The phrasing of the text permits either interpretation. It is however not compatible with logic and common-sense to require a party to request approval for the expenditure of yet unknown sums. It is only after these sums have been expended that the party will know the total sums to claim as costs. It is sufficient for the party to state in either the points of claim or points of defence that he would seek an order for costs in respect of travel and other expenses of his witnesses. Details of these costs may afterward be amplified in the oral or written address. Costs allowable for travel and other expenses of witnesses are only to the extent permitted by the tribunal. The tribunal is competent to review the mode of travel, the sums expended on it, the heads of expenses incurred, the sums spent on each item, and the relevance and utility of both the witness and the expenses incurred. It is sensible that travelling expenses of witnesses be allowed according to sums reasonably and actually paid. It is also reasonable that no allowance should be made for an officer of the public service who is summoned as a witness by the Government or by any department of the government. In all other cases he may be allowed costs and travelling expenses as if he were not an officer in the public service[38]. The tribunal may quite properly refuse compensation in respect of any unnecessary witness or irrelevant expenditure. The tribunal certainly does not have the power to compensate any party for doing useless acts. Upon the request of a tribunal, a court or judge may order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel attendance before any arbitral tribunal of a witness wherever he may be within Nigeria[39]. A court or judge may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before any arbitral tribunal[40]. Where a witness attends in respect of a process issuing out of a court, it is proper to determine his costs in accordance with the provisions of the relevant rules of court pertaining to allowances for witnesses[41]. It does not appear as if the tribunal is competent to allow a *per diem* or other allowance in respect of the witnesses for testifying. While this may be allowable for witnesses compelled to testify by a process issuing out of court on the request of the tribunal, it may not be permissible for witnesses voluntarily appearing to testify on behalf of a party. All they would be entitled to are, their travel and other expenses to the extent that these are approved by the tribunal.

The tribunal is entitled to award the costs for legal representation and assistance of the successful party if such costs were claimed during the proceedings, and only to the extent that the tribunal determines that the amount of such costs is reasonable[42]. Legal representation in this regard refers to actual representation in the proceedings by Counsel, while assistance refers to legal assistance in the preparation and presentation of the party's case. Legal representation is inevitably limited to services of Counsel in the proceedings. Legal assistance extends to research of associate counsel, paralegal activity, and the entire process relevant to an efficient preparation and presentation of the party's case. A party who is not qualified as legal counsel who represents himself at the arbitration may not be entitled to an award of the costs of legal representation. However, if he utilised legal support in preparing for the proceedings, he quite properly may claim costs of such legal assistance. It is unclear if a legal counsel who represents himself at the hearing may be entitled to costs for legal representation. Before a party may claim costs of legal representation and assistance, such representation and assistance must have been actually utilised. The assistance claimed must also be necessary to the case. There is no inherent right to be reimbursed or compensated for useless assistance. If a party desires to claim an award of costs for legal representation and assistance, he must

[37] s. 49(1)(d) of ACA; art. 38(d) of Arb. Rls.
[38] *See* note to appendix 4 of FHC (Civil Procedure) Rules 2019
[39] s. 23(1) of ACA
[40] s. 23(2) of ACA
[41] For example, o. 55 r. 1 of FHC (Civil Procedure) Rules 2019 and its appendix 4 provide for allowances payable to various categories of witnesses
[42] s. 49(1)(e) of ACA; art. 38(e) of Arb. Rls.

first of all claim such costs in the course of the proceedings. This would either be in his points of claim or points of defence. He would subsequently amplify this claim by itemising the actual sums expended and the purpose for which they were expended. The discretion whether or not to award such costs belongs to the tribunal. In reaching a determination on whether or not to make the award, the tribunal must first determine that the services claimed for were in fact utilised. The tribunal would then determine whether the sums claimed were in all the circumstances of the case reasonable. Beyond determining that the amount of such costs was reasonable, no specific criteria is stated for the tribunal to use in evaluating the sums claimed as costs. It may however be reasonable to use the same criteria that the tribunal uses in setting the fees of the members of the tribunal. These are; that the tribunal shall take into account the amount in dispute, the complexity of the subject matter, the time spent on the matter, and other relevant circumstances of the case[43]. Costs are wholly in the discretion of an arbitrator. The court is slow to interfere with the discretion of an arbitrator, especially where he is one of the official arbitrators dealing with matters well within his experience. The award of such an arbitrator will not be interfered with[44].

The duty of an arbitrator in exercising his discretion on the issue of costs does not in any way differ from the duty of a judge. If in his award, he stated reasons for which he had acted and the court could see from those reasons that he had not exercised his discretion judicially, it ought to set the award aside[45]. Where it appears on the material before the court that an arbitrator exercised his discretion as to costs in a non-judicial manner, the court has jurisdiction to set aside the award so far as it relates to costs. It does not matter whether the material on which the court comes to a conclusion that there has been a non-judicial exercise of discretion appears on the face of an award, or appears by affidavit evidence which comes before the court[46].

7. Security for Costs of Foreign Claimant

Where either the statutes governing recourse to arbitration, or court rules that provide the procedure for enforcement of awards authorise, the arbitral tribunal may make an order that a foreign claimant provide security for costs, and an order staying proceedings until the security is given. This order is made on the same basis and principles as apply to proceedings in the high court.[47] In *Hudson Strumpffabrik GmbH v. Bentley Engineering Co. Ltd*[48], it was held that where claimants in a reference under an arbitration agreement are a foreign corporation without assets within jurisdiction, the court considering an application by a respondent [local] English company for order for security for costs, pursuant to s. 12(6)(a) of Arbitration Act, 1950[49], will act on the same principle as it does when a defendant in an action applies for security for costs against a plaintiff resident abroad without assets which can be reached within jurisdiction. On such an application it was held to be an inflexible rule of practice that apart from particular exceptions, provided the defendant makes timely application, the court will exercise its discretion in favour of an order requiring the plaintiff to give security for costs.

The general consensus is that the High Court is competent in a worthy case, and subject to a timely application, to make an order for security for costs against a foreign claimant who does not have assets within jurisdiction. In *the Re Bjornstad and Ouse Shipping Co. Ltd* case, the court relied upon its inherent jurisdiction to attach requisite conditions to the exercise of its discretion. However, in *Hudson Strumpffabrik GmbH v. Bentley Engineering Co. Ltd*, it relied on specific statutory authority for making the order for security for costs. Generally, where the High

[43] s. 49(2) of ACA; art. 39 of Arb. Rls,
[44] *P Rosen & Co. Ltd v Dowley & Selby* [1943] 2 All ER 172; *see also Bradshaw v Air Council* [1926] Ch. 329
[45] *Lloyd del Pacifico v Board of Trade* [1930] 46 TLR 476
[46] *Heaven & Kesterton Ltd v Sven Widaeus A/B* [1958] 1 All ER 420
[47] *Re Bjornstad and Ouse Shipping Co. Ltd* [1924] All ER Rep. 568, per Scrutton, LJ, at 572C-573A, here, s. 5 of Arbitration Act, 1889 provided that in any of the following cases: *(a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after difference have arisen concur in the appointment of a single arbitrator…..any party may serve the other parties…with a written notice to appoint an arbitrator. If the appointment is not made within 7 days after the service of the notice, the court or a judge may, on application by the party who gave the notice, appoint an arbitrator*'. Here a contract had been made between a British firm and a firm which resided out of jurisdiction. Disputes arose and parties failed to concur in appointment of arbitrator. The foreign resident applied to the court to appoint an arbitrator. The court held that in view of the fact that applicants were a foreign firm resident outside jurisdiction and the court had a discretion under s. 5 of the Act whether to appoint an arbitrator or not, and, if they granted the application, were entitled to attach such conditions to the exercise of their discretion as they thought reasonable.
[48] [1962] 3 All ER 460
[49] *'The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of –(a) security for costs ;…as it has for the purpose of and in relation to an action or matter in the High Court'*

Court is approached to exercise its jurisdiction to compel a reference or to nominate arbitrators or an umpire[50], it may properly predicate an order for security for costs as a basis for compelling the reference or making the nominations. Even where the power is not expressly and statutorily given, it is easily accommodated within the inherent jurisdiction of the court. The situation is however different with an arbitrator. Unless either the submission or a statute confers upon the arbitrator, the power to order security for costs of a foreign claimant, and to stay proceedings until such security is given, the arbitrator is incompetent to make such an order. It is not sufficient that a statute or the submission provides, *'[a]nd do all other things which during the proceedings on the reference on the reference the arbitrator or umpire may require'*. It is also not sufficient to state that *'[t]he costs of the reference shall be in the discretion of the arbitrator or umpire, who may direct in what manner those costs or any part thereof shall be paid'*.[51] For the arbitrator to be competent to exercise the powers, it must be given expressly. Where it is not, the exercise will be *ultra vires* the arbitrator.

8. Exercise of Discretion to Order Payment of Costs

Proper exercise of discretion is required both in determining suitable factors in items of costs, the amount to be awarded and the liability for costs. An arbitrator is required to act judicially in exercising his discretion as to costs. He must apply the same principles as are applied in the high court, in particular, the principle that costs follow the event. It is an error of principle, in the exercise of an arbitrator's discretion as to costs, not to award a claimant the entirety of his costs, solely on the ground that he has recovered significantly less than he has claimed[52]. Statutorily, parties must bear the costs of the fees of the tribunal. The arbitrator, unlike a judge in a court, finds himself in a peculiar situation. He fixes his fees and orders the parties to pay the fees. For the purpose of setting a proper amount as fees, proper exercise of discretion is required to avoid a potentially embarrassing situation of the demanded fees being challenged as excessive. The basis for exercise of the arbitrator's discretion to award costs remains the basic principle that costs follow the event.[53] It also requires a good exercise of discretion to ascertain which of the expenses of the arbitrators would be covered by the costs awarded. Other items of costs, to the extent that their minutiae and quantum must be approved by the tribunal before being awarded as costs, all require a proper exercise of discretion in order to be sustained.

9. Conclusion

Upon commencement of arbitration, the tribunal is generally saddled with the duties of, determination of matters in controversy between the parties, making of order as to costs of the proceedings and, quantum of costs. Initially, the purpose of award of costs was not to reimburse the prevailing party for his expenses. Rather, it was a penalty to the losing party for his role in initiating the unsuccessful proceedings. Legal theory no longer supports the punishment motive for award of costs. The current jurisprudence of costs is to compensate the successful party and not to punish the unsuccessful party. Since a right to an award of costs does not exist at common law, and due to the fact that costs are penal in nature, powers to award costs do not exist in the absence of statutory authority. The ACA, 1988 regulates the conduct of arbitrations in Nigeria and gives powers to the arbitral tribunal to make an order as to costs upon enumerated grounds. In making this order, the tribunal is required to exercise its discretion on well-settled and principles. If the award relates to an un-enumerated ground, the exercise will be *ultra vires* the arbitrator; so also, where the award is upon an enumerated ground, but based upon an improper exercise of discretion.

[50] *See* o. 52 of FHC (Civil Procedure) Rules 2019; o. 19 of High Court of FCT Abuja, (Civil Procedure) Rules 2018
[51] *Re Unione Stearinerie Lanza and Weiner* [1916-17] All ER Rep. 1079
[52] Supreme Court Practice (n. 33)
[53] *Tramountana Armadora SA v Atlantic Shipping Co. SA* [1978] 2 All ER 870; *L Figueiredo Navegacas SA v Reederei Richard Schroeder KG,* [1974] 1 Lloyd's Reports, 192