

**THE LEGAL REGIME OF INTERNATIONAL
COMMERCIAL ARBITRATION**

BY

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DECLARATION

I, PAUL OBOARENEGBE IDORNIGIE do hereby declare that this thesis has been written by me and is a record of my own original research; and that no part of the thesis has, to my knowledge, been presented or published anywhere and at anytime for the award of any higher or other degree; and all quotations and references have been duly acknowledged.

PAUL OBOARENEGBE IDORNIGIE

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Meanwhile I do hereby declare that I owe every responsibility for any typographical or grammatical error that is contained in this work. My supervisor should not in any manner whatsoever be held responsible for such errors.

Paul Obo Idornigie

DEDICATION

This Thesis is dedicated to Mrs Roselyn Idornigie, my wife; Emo, Obo, Emeso and Imoudu, my children; and Tony, my ward who have borne the brunt of my long absence from Jos.

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Washington Convention, 1965

UNCITRAL Model Law on International Commercial Arbitration

ABBREVIATIONS

NIGERIAN REPORTS

All N.L.R.	All Nigeria Law Reports
Cap	Chapter
E.C.S.L.R.	East Central State Law Reports
F.S.C.	Federal Supreme Court
L.L.R.	Lagos Law Reports
N.C.L.R.	Nigerian Commercial Law Report
N.L.R.	Nigeria Law Reports
N.M.L.R.	Nigerian Monthly Law Reports
N.W.L.R.	Nigerian Weekly Law Reports.
Pt.	Part
S.C.	Supreme Court
S.C.N.J.	Supreme Court of Nigeria Judgments
U.I.L.R.	University of Ife Law Reports
W.A.C.A.	West African Court of Appeal
W.N.L.R.	Western Nigeria Law Reports

UNITED KINGDOM REPORTS

A.C.	Law Reports, Appeal Cases
All E.R.	All England Reports
K.B.	King's Bench Law Reports

LJ Ex	Law Journal Exchequer
Ll.L	Lloyd's Law Report
Lloyd's Rep	Lloyd's Law Report
Macq	Macqueen's Scottish Appeals, H/L
Q.B.	Queen's Bench Law Reports
Q.B.D.	Queen's Bench Division Law Reports
Ves	Vesey Jun's Report, Chancery
W.L.R.	Weekly Law Reports

OTHER JURISDICTIONS

A.L.R.	African Law Reports
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OTHER ABBREVIATIONS

A.A.A.	American Arbitrators Association
A.A.L.C.C.	Asian-African Legal Consultative Committee
A.D.R.	Alternative Dispute Resolution
I.C.C.	International Chamber of Commerce
ICSID	International Centre for the Settlement Of Investment Disputes
L.C.I.A.	London Court of International Arbitration
L.R.C.I.C.A.	Lagos Regional Centre for International Commercial Arbitration
UNCITRAL	United Nations Commission on International Trade Law

ABSTRACT

Conventionally disputes – commercial or otherwise were resolved by litigation but due to delays, costs, publicity and technicality associated with litigation, alternative dispute resolution (ADR) processes evolved. Arbitration is traditionally one of the alternatives to litigation. The specific objective of the study was to evaluate the legal regime regulating international commercial arbitration and ascertain to what extent our legal regime had advanced the cause. Secondly, the study focused on the criteria for establishing a nexus between a dispute and a process. Thus instead of focusing on alternative dispute resolution processes generally, the proper search should be on the appropriate dispute resolution process.

The contribution of this study is that it is a source material on international commercial arbitration which lawmakers, legal practitioners, accountants, surveyors, architects, businessmen, the academic and all those involved in commercial arbitration will find useful. The study has thus enriched knowledge in this virgin area of intellectual activity that is fast growing.

The methodology adopted in researching into this topic is based on doctrinaire research – content analysis of enactments, conventions, rules, reports, books, articles and journals. The non-doctrinaire method is based on interviews of scholars, jurists, businessmen and practitioners experienced in arbitration.

The study found that arbitration, as a discipline, was neglected by businessmen and tertiary institutions. Although there are indigenous variants of arbitration, they are limited to rural areas and not conducive to international commerce. From the composition of the arbitral tribunal through the conduct of the arbitral proceedings to the setting aside and enforcement of arbitral awards, it was found that the Arbitration and Conciliation Act

contains inadequate provisions, inconsistencies, technical oversight and typographical errors. There are also elements of inelegant drafting bordering on inadvertence.

At the close of the study, appropriate observations and recommendations were made especially in the area of review and reform of the Arbitration and Conciliation Act and the other laws dealing with international commercial arbitration. The implications of the findings are that our laws should be reviewed regularly in line with the recommendations.

CHAPTER ONE

INTRODUCTION

1.1 A DEFINITION OF THE BACKGROUND

As a colony, Nigeria was not a subject of international law but an object. Even in business terms, what were regarded as Nigerian companies were, in fact, integral parts of foreign corporate persons especially those of Britain, Holland and France. This was a deliberate policy of the British, Dutch and French Governments. The British Government found that customary laws regulated local legal relationships and therefore imposed the English legal system on Nigerians and such laws are referred to as the “Received English Laws”. These “Received English Laws” operated concurrently with local customary laws with primacy given to the former in most cases. This situation remained unchanged until the Companies Ordinance of 1912¹ and the Arbitration Ordinance of 1914² came into force. The foreign corporate persons operated through transnational corporations. As they saw Nigeria as an “outpost”, her interest was not paramount in their transactions.

The need for a legal framework on international commercial arbitration in Nigeria evolved from the provisions of these legislations. However, with political independence, Nigeria became a subject of international law, its doors were thrown open to other nationals to participate in the economic development of the country and local laws were passed. Nigerian also got involved in negotiating international contracts. It is worthwhile mentioning that at that time international commerce involved mainly the import of consumer goods and export of raw materials. In negotiating such contracts, Nigerians were

¹ Cap 37, Laws of the Federation, 1958, now repealed

² Cap 13, Laws of the Federation 1958, now repealed

usually disadvantaged as they lacked the expertise to ensure that the terms were favourable. This is so because international commerce has acquired a regime of technical rules and procedures. It involves persons usually domiciled in different legal jurisdictions and thus subject to different legal systems. Today, the situation has not changed much. This has given rise to the issue of how to resolve commercial disputes that could arise from such relationships.

Commercial disputes can be resolved through various processes. Indeed the conventional courts see this as their prerogative. However, over the years, there has been widespread dissatisfaction with the delays and costs associated with these conventional courts. Consequently a movement for an alternative dispute resolution (ADR) mechanism was initiated.³ Others advocated a “multi-door” court house instead of the “mono-door” approach.⁴ Hence mediation, conciliation, med-arb, mini-trial and full arbitration were resorted to by the commercial world. Essentially in a multi-door courthouse, it is the courts that initiate the non- adjudicatory process whereas under the ADR, the process is initiated by the parties themselves. Concomitant with these was the need for a legal regime to regulate these non-adjudicatory processes. The processes are seen as a continuum: at one end is the adversarial system and at the other non-adversarial. Whilst not discrediting the other non-adjudicatory processes, the focus of this work, *stricto sensu* is on international commercial arbitration. However in determining the process to adopt there should be a relationship before a dispute/ problem and a process.

³ See generally Wilkinson JJ. *Alternative Dispute Resolution Practice Book*, London, Wiley Law Publications, 1990; and Marriott AL and Brown H. *ADR Principles and Practice*, 2nd Ed., London, Sweet and Maxwell, 1999

⁴ A Multi-door court house is one that has many doors for litigation, mediation, conciliation and arbitration while a mono-door is for litigation only

Arbitration is not a new phenomenon having enured as a method of resolving disputes since biblical times.⁵ The object of this adversarial process is to ensure that the basis of any intra-party relationship is not destroyed and the interest of parties jeopardised. Arbitration produces a win/win situation while judicial adjudication produces a win/lose situation. It will be shown that during the pre-colonial time till the present, there existed traditional indigenous institutions that adapted a variant of this adversarial process⁶. In the absence of parties agreeing on modalities for dispute resolution, the rules of Private International Law (Conflict of Laws) provide some broad guidelines for arbitration. The rules are usually invoked when a transaction or event has a foreign element. The foreign element can be the parties' nationality and domicile, the place of business of the parties, the subject matter of the contract and the place where the contract is to be performed. Specifically in the case of arbitration the additional foreign elements include the nationality of the arbitrators, place of arbitration, place of enforcement and the language of the arbitration. The rules include for instance, criteria for determining the applicable substantive or procedural law. However such rules are sometimes vague and susceptible to the overriding political interest of the municipal laws of the parties. Even where there is agreement on the modalities for resolving disputes, there may be the problem of interpretation of such documents or the agreements embodied in them.

It was from the realisation of the inadequacies of the conflict of laws rules that institutionalised arbitration emerged. For instance the International Chamber of Commerce (ICC) has its Arbitration Rules and so also the London Court of International Arbitration. Some regional institutions/organizations like the American Arbitration Association (AAA)

⁵ For example see 1 King, Chapter 3 verses 16-18 where King Solomon resolved the dispute between two women over the motherhood of a child.

have their own rules. There are also Conventions like the Convention on the Enforcement and Recognition of Foreign Arbitral Awards (also known as the 1958 New York Convention)⁷ and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (also known as the 1965 Washington Convention).⁸ However, one global institution that has cut across geographical, regional, professional and other institutional boundaries is the United Nations. The United Nations Commission on International Trade Law (UNCITRAL) took the bull by the horn when it drafted a Model Law on International Commercial Arbitration⁹ and Arbitration Rules¹⁰ for adoption by its members. Many members of the United Nations have adopted this Model Law. Nigeria was the first African country to adopt the Model Law and hence the Act.¹¹ Consequently in addition to these various Rules and Conventions, the main thrust of this work will be a searchlight on the Act more so that the Act implemented the 1958 NY Convention.

Arbitral proceedings are usually held in private and thus publicity is minimal. It is for this reason, among others, that they are often called “private sector judicial proceedings”. Furthermore most arbitral awards are usually self-executing and therefore recourse to conventional national courts for either setting aside an award or non-recognition and non-enforcement are few and far between. The consequence of this is that there is paucity of national case law on the subject.

⁶ *Okpuruwu v Okpokam* 1988 4 NWLR (pt 90) 554 at 572

⁷ See the Second Schedule to the Arbitration & Conciliation Act, Cap. 19, Laws of the Federation of Nigeria LFN 1990, hereinafter referred to as “the Act”.

⁸ See the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, Cap 189 LFN 1990

⁹ Hereinafter referred to as “the Model Law”. See the UN General Assembly Resolution No. 40/72 of 11 Dec. 1985

¹⁰ UN General Assembly Resolution No. 31/98 of 15 Dec. 1976 (hereinafter referred to as “the Arbitration Rules”)

¹¹ Decree No. 11 of 1988 now the Arbitration and Conciliation Act, Cap 19, LFN 1990.

Despite the political and social problems presently facing Nigeria, she still remains a viable investment center. This quality attracts businessmen from Western Europe, the Americas, the Far East and the former communist block. Invariably disputes arise from such commercial transactions. Whereas originally such disputes were settled by conventional courts, alternative dispute resolution mechanisms have now been put in place. Arbitration is one such alternative. The law of international commercial arbitration is enjoying a period of expansion. This is so because the number of disputes submitted to arbitration is growing while new arbitration rules are being evolved and new arbitration centers opened. Increasingly, the watch words in international commercial transaction seem to be “arbitrate, don't litigate”.

Other major developments in the field of arbitration is that there are deliberate legislative efforts not only at the national but also international levels to advance the process. Thus, in adopting the Model Law, the General Assembly of the United Nations recommended that all states should give due consideration to it in view of desirability of uniformity of the law of arbitral procedure and the specific needs of international commercial arbitration practice.¹² Accordingly, the Federal Government of Nigeria promulgated the Act in 1988. The UK Government has also passed the 1996 Arbitration Act. The Model Law has limited the roles of national courts.

1.2 DEFINITION OF TERMS, PHRASES AND CONCEPTS

International commercial arbitration as a specialised field of study has acquired a regime of technical words, terms, concepts and phrases that can only be contextually understood. A doctrinaire definition of these terms is therefore imperative.

¹² *Id*

“An arbitration” is the reference of a dispute or differences between not less than two parties for determination, after hearing both sides by persons other than a court of competent jurisdiction. Although, an arbitration agreement may relate to present or future differences, an arbitration is the reference of actual matters in controversy.¹³ According to section 57 (1) of the Act, arbitration means a commercial arbitration whether or not administered by a permanent arbitral institution.

“An arbitration clause” is any reference in a contract to an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.¹⁴ Thus by an arbitration clause in a contract the parties agree that if disputes arise between them under that contract the disputes will be referred to arbitration.¹⁵ An arbitration clause creates a collateral contract.

“An arbitration agreement” is defined as an agreement to submit to arbitration present or future disputes. Arbitration agreement covers both an arbitration clause and an actual reference of a particular existing dispute to arbitration. An arbitration clause and a reference are distinguishable. While an arbitration clause is just one of the clauses in the agreement and a collateral agreement, a reference of a particular dispute is usually achieved by an entirely separate agreement dealing only with the setting up of a tribunal to resolve a dispute which has arisen. “Arbitration agreement”, “Submission agreement” and “reference” create problems when attempts are made to ascribe precise definitions to them. “Submission agreement” is an agreement to refer existing disputes while a “reference” is the submission of a dispute to arbitration and the arbitration proceedings themselves.¹⁶

¹³ Halsbury's Laws of England, 4th Edition, para 501 p. 225, and *K.S.U.D.B. v Fanz Construction Ltd* (1990) 4 NWLR (pt 142) 1 at 32

¹⁴ Section 1 (2) of the Act

¹⁵ Sutton, David St John, et. Al.: *Russell on Arbitration*, 21st Ed, (London: Sweet and Maxwell; 1997), p 40

¹⁶ *Id.* at 461 - 2

“Commercial arbitration” means all relationships of a commercial nature¹⁷

“Domestic arbitration”, in contradistinction to an international arbitration, is an arbitration involving nationals of a state only.¹⁸ Any arbitration which is not international is domestic.

An arbitration is “international” if the parties to the arbitration agreement have their places of business in different countries or one of the following places – place of arbitration, or a place where the substantial part of the obligation is to be performed or place where the subject matter of the dispute is closely connected – is situated outside the country in which the parties have their place of business; or the parties expressly agreed that the subject matter of the arbitration agreement relates to more than one country, or the parties, despite the nature of the contract, expressly agree that any dispute from the commercial transaction shall be treated as an international arbitration¹⁹

“Dispute” includes “differences”. Thus the term covers both an arbitration clause and an actual referral of a particular existing dispute. There is no “dispute” within the meaning of an agreement to refer disputes where there is no controversy in being, as when a parties admits liability but simply fails to pay, or when a cause of action has disappeared owing to the application, where it applies, of the maxim *actio personalis moritur cum persona*²⁰ A “dispute” can also be defined as a conflict of claims. Where provision is made that in the event of disagreement between the arbitrators (usually in such cases two in number) the dispute is to be referred to the decision of another, or third party, such person is called an “umpire”.²¹ “An umpire” is appointed by party-appointed arbitrators.

¹⁷ Section 57 (1) of the Act

¹⁸ Sections 1 – 36 of the Act

¹⁹ Section 57 (2) Id. See also Herrmann G. “THE UNCITRAL Model Law on International Comm. Arbitration: Introduction and General Provisions” in Sarcevic P (ed) *Essays on International Commercial Arbitration*, (London: Graham & Trotman; 1989) p.22. See also Article 1 of the Model Law

²⁰ *K.S.U.D.B. v Fanz Construction Ltd*, supra at 33

²¹ *Id.*

“A *Scott v Avery Clause*” is a term in an arbitration agreement to the effect that no cause of action shall accrue until an award is made. Such an award is a condition precedent to any litigation.

“*Atlantic Shipping Clause*” is a clause that aims at preventing arbitration by stipulating that if arbitration did not take place within a given period, parties may be barred from recourse to arbitration. It is advisable to have this clause and the “*Scott v Avery Clause*” in the same contract. Such insertion will ensure that there is no unreasonable delay in initiating the arbitral proceedings and the proceedings a condition precedent to litigation.

“Doctrine/Principle of separability” This is a legal fiction. It is to the effect that the arbitration clause is different and separate from the contract itself. Thus even if the main contract has been performed or invalid, the arbitration clause survives. The reasoning behind this is that the arbitration clause constitutes a self-contained contract collateral or ancillary to the main contract. The clause is treated as an agreement independent of the other terms of the contract.²²

“*Kompetenz/Kompetenz*” – this is an expression used as a shorthand for the question of whether a tribunal may decide on its own jurisdiction. In Nigeria, an arbitration tribunal is competent to rule on the question pertaining to its own jurisdiction.²³

“Party Autonomy”. Under the Act, parties are specifically given the right to make agreements about most aspects of procedure subject to the mandatory positions.²⁴ In other words, the provisions of the Act will apply if there are no contrary agreement by the parties. The principle is of fundamental importance. Thus the parties can choose the applicable law.

“The applicable law” Various laws apply to arbitral proceedings. Thus in case of corporate entity the law applicable to determine capacity is the law of the place of incorporation. On

²² Section 12 (2) of the Act

²³ Section 12 (1) Id

²⁴ Section 29, 30, 48 and 52 of the Act. Another constraint is on ground of public policy

the doctrine of separability the law applicable to the arbitration agreement may be different from the law applicable to the main contract; the *lex arbitri* – law applicable to the arbitral proceeding is usually the law of the place where the arbitration is taking place, the *lex causae* – the law applicable to the dispute. The parties often chose the applicable law which may be *lex fori* – the law of the forum where the arbitration is taking place or the Arbitration Rules or the conflict rules of the seat of arbitration. There is also the law applicable to the enforcement of the award which is the law of the country where the enforcement is sought. Essentially, there may be four or more laws. The law governing the performance of obligations under the contract is known as the “governing law” or the “proper law of the contract”. This law may be uncertain if the parties fail to make an express choice in which case the law of the seat of the arbitration – the *lex fori* which may be the *lex arbitri* will determine this by the ordinary conflict rules or the “equity clause”. The proper law of the arbitration agreement may be different from the proper law of the contract but may be the same. Matters usually covered in an arbitration agreement include the interpretation, validity, voidability and discharge of the agreement to arbitrate.

“The seat or place of arbitration” – the *locus arbitri* is the geographical location to which the arbitration is tied and which prescribes the procedural law of the arbitration. The procedural law may be different from the proper law of the contract and the proper law of the arbitration agreement. Generally the “Seat” refers to a city, for example, Lagos rather than a country.

“Equity clauses” are sometimes inserted in arbitration agreements. Such clauses empower the arbitral tribunals to decide not in accordance with the strict legal rights of the parties but rather in accordance with concepts variously known as "honourable engagement", "amiable composition" “*ex aequo et bono*”, “the general principles of law recognised by civilised

nations” or the “*lex mercatoria*”. In essence all these mean what is fair and reasonable unless there is a specific agreement between the parties to the contrary.

“The principle of arbitrability” is used to determine which particular legal systems determines whether a dispute is arbitrable. In Nigeria the following categories of matters cannot be the subject of an arbitration agreement and therefore cannot be referred to arbitration, namely (a) a criminal offence, (b) disputes arising from an illegal contract, (c) disputes arising under void agreements as being by way of gaming or wagering (d) disputes leading to a change of status such as divorce petition and (e) any agreement, purporting to give an arbitrator the right to give *judgment in rem*²⁵

“Appointing authority” is an arbitral institution or trade or professional body whose task it is to appoint arbitrators. Often the president of the association is specified as well. Thus if the parties fail to agree on the appointment of the tribunal, the arbitration agreement usually provides that those powers of appointment are exercisable by a third party known as the “appointing authority”.

“Mixed Cases” – this refers to where one party is from a common law country and the other from a civil law country.

“*Ad hoc* arbitration” is one conducted pursuant to an agreement which does not refer to an institution charged with setting up the arbitral tribunal and administering the proceedings, but is rather intended to be self-executing. The arbitration is usually conducted within the framework of the submission and any applicable law. The parties to such arbitration normally make provisions for the procedure to be followed. Most arbitrations in Nigeria were hitherto *ad-hoc* as there were no local arbitral institutions.

“Institutional arbitration”, is an arbitration conducted under the auspices of an arbitral institution which promotes or administers the arbitral process. Such institutions are the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and the Lagos Regional Centre of the Asian-African Legal Consultative Committee.

“Mixed Tribunal” is a tribunal made up of various experts, for example, Lawyers, Accountants, Surveyors, Engineers.

1.3 GENERAL OBJECTIVES OF THE STUDY

Arbitration, as a field of study, is neglected by tertiary institutions in Nigeria despite its practical relevance. Even at the Nigerian Law School, it is like a footnote to Company Law and Commercial Practice. In modern business practice on the other hand, international commercial disputes are resolved more by arbitration than by conventional courts. Indeed ADR processes have been highly developed and applied in other jurisdictions.

International commercial arbitration widens the parties choice of venue and of arbitration clauses. Apart from the parties, the arbitrators, unlike judges who are necessarily local, come from different countries and jurisdictions. They also have different backgrounds and specializations. Thus, in the absence of agreement by the parties, the rules of private international law may regulate the relationship of the parties. The United Nations Commission on International Trade Law (UNCITRAL) Model Law constitutes one of the major achievements of the Commission.

One of the objectives of this study therefore, is to highlight the benefits derivable from arbitration as an alternative dispute resolution mechanism and ascertain to what extent our legal regime has advanced this cause. Of necessity, we shall analyse the statutory

²⁵ *K.S.U.D.B. v Fanz Construction , supra*

enactments, rules and conventions as they apply in Nigeria. It is our contention that this area of law has not been sufficiently developed because of the lack of awareness of these benefits. Through works of this nature, organization of workshops and seminars, public awareness will be raised. Above all, this is a virgin area of intellectual activity. Consequently, this work will examine the nature, scope, form and contours of this field of human endeavour.

In highlighting the benefits derivable from arbitration, attention will be drawn to the problems of arbitration generally and its workability in Nigeria specifically. More fundamentally, criteria ought to be set for evaluating all dispute resolution processes/procedures to determine which procedure fits a particular dispute. In other words establish a criteria for determining a nexus between a dispute and a process. By learning from the experiences of other countries, we will be able to reap the benefits of arbitration instead of falling into the same pitfalls.

Above all, given the strategic location of Nigeria in world politics and commerce, arbitral institutions ought to be well developed so as to act as a forum for arbitration.

1.4 STATEMENT OF THE PROBLEM

Before the advent of colonial rule, we had our indigenous methods of resolving disputes. Indeed any dispute was seen as a social disequilibrium and attempts at resolving them were aimed essentially, at restoring equilibrium. While this method had traces of adjudication as later represented in the English-type courts, it can also be seen as variants of adjudication as represented in arbitration. Both of them are adversarial in nature. There seem to be no dispute as to whether adjudication was part of the traditional judicial institutions but there is controversy as to whether arbitration *per se* is alien to customary

jurisprudence. Judicial authorities in this regard are conflicting.²⁶ This work will attempt to show that there were forms of arbitration in pre-colonial judicial institutions.

Apart from the Act , it would seem that this field of law is neglected by businessmen and Universities alike. Indeed there were no standard Nigerian academic textbook in this area until lately. Such neglect is unfortunate and regrettable in view of the tremendous practical relevance of arbitration in international commercial relationships. In other jurisdictions, more commercial disputes are decided by arbitrators than by national courts. Furthermore, in view of the congestion of our courts and resultant delay in dispensing justice, resort to arbitration is a *sine qua non*. What is it that has accounted for this neglect and the dearth of materials in this area of law? Having adopted the Model Law and the Arbitration Rules, Nigeria ought to compete as an Arbitration Centre. We shall endeavour to provide some answers.

Herrmann²⁷ presented the typical feature of an international arbitration scenario. He states that such arbitration usually involves foreign nationals; for example, a Nigerian entering into a contract with a Ghanaian to be performed in Germany. Each national has confidence in his legal system and has misgivings about any other. This may be borne out of lack of familiarity with the other system or a feeling of discrimination. In such situation the usual recourse is to a third country, a neutral country. This type of problem will not normally exist in purely domestic arbitration. Be this as it may, Lagos being a Regional Centre for the Asian-African Legal Consultative Committee (AALCC), arbitration activities ought to be heightened. Why is it not so? Justice Akpata, a retired Justice of the Supreme Court, has eloquently stated the problems with litigation. He opines thus.²⁸

²⁶ *Okporowu v Okpakam, supra*

²⁷ Herrmann, G. Op. Cit. at 5

²⁸ Akpata E. *The Nigerian Arbitration Law in Focus*, (Lagos: West African Book Publishers Ltd; 1997), p. 11

Courts in this country and in the western world were and are still in the main the primary forum for resolving these disputes. It is not discrediting the judges that preside over litigations in courts to say that litigations are known to be unduly protracted. The judges have to adjudicate within the system. This legal machinery grinds slowly, perhaps in the interest of justice. It is axiomatic that it is the duty of courts to strive to reach a just decision and such decision must be reached by procedures designed for the purpose some of which admittedly are too technical and cumbersome for a quick resolution of dispute.

The problems led to the emergence of arbitration. However, things are changing. In this regard, Sir Thomas Bingham MR expressed the view that²⁹

the arbitral process by mimicking the process of the courts and becoming over-legalistic and over-lawyered, has betrayed its birthright by allowing itself to become as slow, as expensive and almost as formal as the court proceedings from which it was needed to offer an escape.

Why has the arbitral process that was meant to remedy the defects in litigation fallen into the same pitfalls? It is humbly submitted that research of this nature will try to elicit answers to such problems.

Nigeria is a developing country. Consequently, the need for transfer of technology is of utmost importance. There are various methods of acquisition of foreign technology and know-how. These include assignment of patent rights, international licensing agreements, joint venture agreements and technical design and engineering consultancy services. Improvement in technology, facilities and communications has reduced the world to a global village. All these developments create potentials for commercial disputes which require quick resolution. This is so because protracted litigation is costly and can harm business relationships. For these and other reasons, thoughts on dispute resolution has been ever changing.

²⁹ (1995) 61 *J. Arb.* 3 at 176.

Invariably, international commercial arbitration impinges on international rules, conventions and municipal systems. However, there is disparity in various legal systems on arbitrability. In other words which causes of action are arbitrable? Thus, the issue of which law shall determine whether a dispute is arbitrable is of great importance. This and other problems of technicalities of national legal systems, for example, limitation periods, effect of lack of consideration in a simple contract and privity of contract, have led to the development of a modern *lex mercatoria*. This is a judicial process which is based on application of legal rules, customs and usages of international trade, and most common rules of law in the states engaged in international trade or connected with the dispute. Where such common rules are not ascertainable, the arbitrator applies the rules or choose the solution which appears to him to be most appropriate and equitable. In so doing, the arbitrator considers the law of several legal systems. The *lex mercatoria* is a selective and creative process. Such clauses can be inserted in international commercial agreements to avoid the technicalities of national legal rules as well as rules which are unfit for international contracts. This places all parties on equal footing as there is no recourse to one municipal law. To what extent are such clauses (usually referred to as "equity clauses") inserted in contracts involving Nigerians and how have the arbitrators fared in their regard? Similarly, how effective are these clauses?. This is also one of the problems of this work more so that the arbitrators are not allowed to decide *ex aequo et bono* (in justice and fairness) or as *amiable compositeur* unless parties have expressly authorized them to do so.

1.5 METHODOLOGY

This proposed research is an attempt to make scholarly contribution in the Nigerian context by filling a vacuum hitherto neglected. Despite the attempt by the United Nations Commission to unify the rules on arbitration, the Model Law is a "model" and not a

convention. Consequently the proposed research will focus on both doctrinal and some non-doctrinal imperatives. Both primary and secondary sources of materials will be used. Legislative enactments, rules, conventions and protocols will constitute the primary source, while textbooks, journals, magazines, articles and related reports will form the secondary sources. Some scholars, jurists, businessmen and practitioners experienced in arbitration will be interviewed orally as well as staffers in arbitral centres in Nigeria. This will constitute the non-doctrinal aspect of the research.

1.6 LITERATURE REVIEW

There are lots of materials on international commercial arbitration. However, what makes this work imperative is the fact that these materials are based essentially on foreign enactments which are not identical with our own nor strictly applicable here.

The learned authors of *Russell on Arbitration*³⁰ based their current edition on the English Arbitration Act of 1996. Although the work remains a standard text on arbitration and the new edition has been totally re-written to take account of the Act, it was not based wholly on the Model Law whereas our Act is based largely on it. Thus, in reading the text and reported English cases, some circumspection is necessary. For example, under section 68(2) of the UK Arbitration Act, the courts can, in certain circumstances, remit an award back to the arbitrator. There is no such provision under the Nigerian Act.

The work of Ronald Bernstein *et. al.*,³¹ deals with the general principles of arbitration and veered off into specific areas like Commodity Trade Arbitration, Maritime Arbitration, Construction Industry Arbitration, Agricultural Property Arbitration and added International Commercial Arbitration and Alternative Dispute Resolution. Again all the

³⁰ Supra

³¹ Bernstein R, *et. al. Handbook of Arbitration Practice*, 3rd Ed, (London: Sweet & Maxwell; 1998). See also Alan Redfern & Martin Hunter *Law & Practice of International Commercial Arbitration*, 2nd Ed, (London: Sweet & Maxwell; 1991)

statutory enactments that form the basis of parts of the Book are alien to us and also not based wholly on the Model Law.

Most works³² on Private International Law (Conflict of Laws) have Chapters on Arbitration. Unfortunately these works deal with enforcement of arbitral awards only. They therefore cover a minute part of the area envisaged under the present research.

Alternative Dispute Resolution (ADR) is an area that is growing. While some people argue that arbitration is part of the ADR, others argue otherwise³³. ADR is developed in the USA. Philip Naughton in his article³⁴ discussed the origin and development of the process. He concluded by asserting that in the last few years the greatest growth in the use of ADR in the US may have been in the Courts rather than through private intervention. This is so because the courts have been forced to seek new methods of diminishing the dramatic congestion of court time in many jurisdictions. This writer would examine the issue of whether arbitration is or is not or ought to be part of the ADR.

Of particular relevance to this research is the collection of essays edited by Peter Sarcevic.³⁵ The essays were written by international arbitrators and scholars with special focus on the Model Law. The contributors critically evaluated the Model Law and analysed the various aspects from a comparative view point. Related topics like the New York Convention and the Washington Convention are also dealt with in these essays. Only passing reference was made to Nigeria without specific discussion of our enactment. In this research work, we shall attempt otherwise.

³² McClean JD: *Morris: The Conflicts of Laws*, 4th Ed, (London: Sweet & Maxwell; 1993) and Morris & North: *Cases & Materials on Private International Law*, (London: Butterworths; 1984)

³³ Naughton P "Alternative Forms of Dispute Resolution – Their Strengths and Weaknesses" *Arbitration: The Journal of the Chartered Institute of Arbitrators* (May 1990) Vol. 56, No.2, p 76

³⁴ *supra*

³⁵ Sarcevic P (ed) *Essays on International Commercial Arbitration*, (London: Graham & Trotman Ltd; 1989)

In Nigeria, there have been many articles on arbitration³⁶. There is also a pamphlet³⁷ on drafting and negotiating commercial agreements. However, one work that the author will find useful is the commentary on the Act.³⁸ This work³⁹ gives an illuminating account of the development of arbitration in Nigeria - from pre-colonial to the present, the history of statutory enactments on arbitration in Nigeria and a full commentary on all the sections of the Act, including the Schedules to the Act. In his commentary he drew heavily from his experience on the high bench. It is noteworthy that the learned jurist sat on appeal in one of the leading cases on arbitration in Nigeria⁴⁰ and since his retirement he has taken part in arbitral proceedings.

The work of Orojo⁴¹ was based on the repealed Arbitration Act of 1914. Besides the 1914 Act dealt with domestic arbitration and therefore its provisions are not relevant to this research, except perhaps as a historical source material. This researcher believes that there is a need for a standard work based on our legal regime. This can be achieved by blending the texts, statutes, articles and reports referred to above.

We would like to observe that after this work had reached an advanced stage, two other works on arbitration were launched by Ezejiofor⁴² and Orojo and Ajomo.⁴³ While the former focused more on commercial arbitration and gave prominence to domestic

³⁶ See generally Ezejiofor G. "The Nigerian Arbitration and Conciliation Act: A Challenge to the Courts" (1993) *Journal of Business Law*, London, Sweet & Maxwell, 1993; Ezejiofor G "The pre-requisites of Customary Arbitration" *Journal of Private and Property Law* (1992-93) Vols 16 and 18; Asouzu Amazu "Developing and Using Commercial Arbitration and Conciliation in Nigeria" (1994) *Lawyers Bi-annual*, Vol. No. 1; Agbaje, F "Law and Practice of Commercial Arbitration in Nigeria" (1997) *The Advocate, A Journal of the Law Students Society, University of Jos*, Vol. 3 and Nnalue, USF "Promoting Conflict Resolution through Non-adjudicatory Process" (February 1997) *Abia State University Law Journal*, Vol. I, p 57

³⁷ Mofunanya MB *Drafting and Negotiating International Commercial Agreements*, (Lagos: Friendship Publishers; 1990)

³⁸ Akpata, *supra*

³⁹ *Id*

⁴⁰ *Kano State Urban Development Board v Fanz Construction Ltd* (1990) 4 NWLR (pt 142) 1. See also *Ohiaeri v Akabeze* (1992) NWLR (pt 221) 1 where Justice Akpata read the lead judgement

⁴¹ Orojo JO *Nigerian Commercial Law & Practice*, (London: Sweet & Maxwell; 1983)

⁴² Ezejiofor G: *Law of Arbitration in Nigeria*, (Ikeja: Longman Nigeria PLC; 1997)

⁴³ Orojo J O and Ajomo M A: *Law and Practice of Arbitration and Conciliation in Nigeria*, (Lagos: Mbeyi & Associates (Nig) Ltd; 1999)

arbitration (including customary arbitration), the latter is essentially a practice book. Both works cover “conciliation” which is not the focus of this work. We must add, however, that the emergence of these works in the Nigerian market is indicative of the increasing awareness of the relevance and efficacy of arbitration.

1.7 CONCLUSION

In this introductory chapter, we have defined the background of arbitral proceedings, ascribed contextual definitions to the terms, phrases and concepts used in this work, highlighted the general objective of the study and posited what we consider as the statement of the problem. We also described the methodology that we intend to adopt and reviewed the existing literature in the area. We have observed that since the commencement of this work, other works have appeared in the Nigerian market and elsewhere on international commercial arbitration. We feel that this is a mark of awareness of the inadequacies in this virgin area of law. Through works like these, seminars and symposia, the consciousness of the public will be raised.

In the remaining chapters, we intend to consider the nature of arbitration by tracing its evolution, distinguish arbitration from litigation and other alternative dispute resolution processes. We are of the view that no one dispute resolution process suits all conceivable disputes and therefore there is the need to establish a nexus between a dispute and a process so as to ascertain which process fits particular dispute. We will also consider the form and character of arbitration agreements with particular emphasis on the guidelines on the choice of either *ad hoc* or institutional arbitration and the applicable law. The applicable law has more than more meaning and this should be borne in mind.

The essence of this work is a consideration of the legal regime of international commercial arbitration. Consequently, we intend to evaluate the legal regime regulating international commercial arbitration. In this regard, we will evaluate the modern *lex*

mercatoria, legislative enactments, conventions and rules. Like any other area in international law, the evaluation is fraught with the usual problem of the norms of international law more so that there is no global legislative body as is found in municipal systems. Be this as it may, we will evaluate the legal instruments referred to above. Finally, we will draw conclusions and make observations and recommendations.

CHAPTER TWO

NATURE OF ARBITRATION

2.1 INTRODUCTION

If one were living in a Robinson Crusoe's type of island, disputes will not arise because the person is alone. However, where two or more people co-exist it is in the nature of human affairs for disputes to arise. In any civilized society there are ways and means of resolving such disputes without recourse to violence or to other methods which are regarded as inconsistent with the fundamental principles which underlie such societies. It is a truism that one of such principles is the recourse to the rule of law as represented by the state judicial system. This judicial system is available to all and independent of the other arms of government. In a democratic setting, the citizens are also free to choose other means of resolving disputes without recourse to the state judicial system provided that there is no infraction of other fundamental principles of the society. Arbitration is one of such means. Generally the essence of arbitration is that a dispute has arisen or potential for a dispute will arise and the parties, instead of going to the conventional courts, decide to refer the dispute to a private tribunal (arbitrators) for settlement in a judicial manner. The implication of that agreement is that the decision of the arbitral tribunal (called an award) will be binding on them. In order to ensure that such a method of settling disputes is effective, assistance is usually given by the ordinary machinery of law to ensure that such awards can be enforced. Similarly, as a safeguard against impartiality, the court can, in certain instances, impeach an award.

In the case of international commercial arbitration, which is the main focus of this work, there is not only a dispute but a dispute of a commercial nature involving other nationals. A dispute is international if either it involves nationals of at least two different

countries or the parties to the agreement have, at the time of the conclusion of that agreement, their place of business in different states or the place of arbitration or any place where a substantial part of the obligations of the commercial relationship is to be performed; or the place with which the subject matter of the contract is most closely connected, is situated outside the state in which the parties have their places of business. Additionally, the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.⁴⁴

The 19th and 20th centuries have witnessed a growth in international trade. Concomitant with this growth is the increasing complexity in the nature of dispute arising therefrom. It is precisely because of these factors that Castel observes with justification that:

the phenomenal growth and increasing complexity of international trade in recent years have resulted in arbitration becoming the preferred method of settlement of international commercial disputes⁴⁵

The reference of a dispute to arbitration is usually embodied in an arbitration agreement. According to the learned authors of *Russell on Arbitration*.

An arbitration agreement is the contractual basis for the resolution of disputes by the arbitration process. An arbitration agreement may be a clause in the contract by which the parties agree to refer future disputes under that contract to arbitration (arbitration clause) or it may be a separate agreement to refer an existing dispute (sometimes known as a “submission agreement”). Thus the majority of arbitration agreement is included in and collateral, or ancillary, to a main contract, but some, relating to existing disputes stands alone as separate contracts.⁴⁶

It should be stressed that the arbitration agreement is a special type of contract. This is so because even if the contract is void, the arbitration agreement survives on the doctrine of

⁴⁴ Article 1 of the Model Law

⁴⁵ Castel, J.G. “International Commercial Arbitration” in Emond Paul (ed) *Commercial Dispute Resolution: Alternative to Litigation* (Ontario, Canada: Canada Law Book Inc.; 1989) p. 122

⁴⁶ Sutton, D *et. al*, *Op. Cit.* at 27

separability. Case law on this doctrine is legion⁴⁷ and we shall be addressing this later in this work. The reasoning behind this doctrine is that the arbitration clause constitutes a self-contained contract collateral or ancillary to the underlying or “main” contract. This doctrine has been given statutory recognition⁴⁸ Arbitration is distinguishable from other forms of dispute resolution mechanisms/processes. Just like litigation, it is adversarial in nature while the other alternative dispute resolution mechanism like conciliation, mediation, med-arbitration, mini-trials are non-adversarial. Similarly, while a final award is binding in the case of arbitration, there is no award in case of other alternative dispute resolution mechanisms and the resolutions are non-binding⁴⁹

In this chapter, therefore, it is instructive to consider the evolution of arbitration generally and specifically in Nigeria, distinguish arbitration from litigation, Alternative Dispute Resolution (ADR) Processes, and attempt to establish criteria for determining the nexus between a dispute and a process.

2.2 EVOLUTION OF ARBITRATION

Conventionally, litigation was almost the sole means of resolving dispute judicially whether commercial or otherwise. Historically, however, conciliation, mediation and arbitration had major roles to play in resolving disputes. According to Akpata,

Arbitration or mediation was used for resolving conflicts because of their emphasis on moral persuasion and their ability to maintain harmony in human relationship⁵⁰

⁴⁷ *Heyman & Ors v Darwin Ltd* (1942) AC 356, *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* (1981), Lloyd's Rep 253 at 259 and *Harbour Assurance v Kansa General International Insurance Co Ltd* (1993) QB 701

⁴⁸ Section 12(2) of the Act

⁴⁹ Sutton, Op. Cit. at 39. See also Marriott, A.L. “Alternative Dispute Resolution” in Ronald Bernstein et al, Op. Cit. at 583-585

⁵⁰ Akpata, E.O.I, Op. Cit. at 1

For ease of exposition, this section is broken down into two, namely, general evolution and evolution of arbitration in Nigeria.

2.2.1 General Evolution of Arbitration

International arbitration has its roots in history. This picture was graphically captured by Serge Lazareff thus:

International arbitration, it is said, has its roots in history. Modern commercial arbitration is a true product of the city, even though there were precedents in the late XVIIIth century. It is well known that the first contracts to be submitted to arbitration dealt with commodities. As the disputes involved in most cases perishable goods, they had to be settled rapidly and confidentially. London became, in the sixteenth century, the centre for maritime and financial matters, insurance, commodities and then metals. This is still the case today⁵¹.

Despite this development, the common law courts were slow to show interest in dealing with commercial matters. This was understandable because their jurisdiction had a geographical limitation. The courts were restricted to matters which had arisen in England and between English citizens. According to Smith & Keenan:

Foreign matters and many of these commercial disputes did involve either a foreign merchant or a contract made to be performed abroad, were left to some other body, especially if it could raise questions about the relations between the King and Foreign Sovereign....⁵²

Furthermore the Royal Courts did not have a monopoly of the administration of justice and certain local courts continued to hear cases. Mercantile law (*or lex mercatoria*) is based upon mercantile customs and usages. The law developed separately from common law. Disputes between merchants, local and foreign, were resolved at the fair or borough. As succinctly put by Smith & Keenan:

⁵¹ Lazareff, M.S. in Chapman M J *Commercial and Consumer Arbitration. Statutes & Rules*, (London: Blackstone Press Limited; 1997), p v

⁵² Smith K and Keenan D: *English Law*, 7th Ed, (London: Pitman; 1983), p. 11

Disputes between merchants, local and foreign which arose at the fairs where most important commercial business was transacted in the fourteenth century were tried in the courts of the fair or borough and were known as courts of pie powder' (*pieds poudres*) after the dusty feet of the traders who used them⁵³

The courts of the fair or borough were presided over by the Mayor or his deputy or, if the fair were held as part of a private franchise, the steward appointed by the franchise holder. These courts applied mercantile law and the jury was made up of merchants. As an institution, arbitration originated from the practices of merchants and traders of referring for settlement, disputes which arose among them upon matters of account and other trading differences to persons specially selected for that purpose.⁵⁴

With the development of the courts of the fair and borough, maritime disputes were heard by maritime courts sitting in major ports such as Bristol. Subsequently, the Court of Admiralty developed and took over the work of the mercantile courts. From the seventeenth century, the common law courts began to acquire the commercial work and many rules of the law merchant were incorporated into the common law. In doing this, the problem of jurisdiction over foreign nationals still arose. This was achieved partly by fiction. Smith and Keenan accurately captured the situation when they wrote thus:

... to get over the fact that technically it still lacked jurisdiction over matters arising abroad, the court accepted allegations that something that had occurred abroad had in fact occurred in England within its jurisdiction e.g. by using the fiction that Bordeaux (in France) was in Cheapside (in England).⁵⁵

⁵³ Smith & Keenan: Op. Cit. at 10

⁵⁴ Ezejiofor. G Op. Cit. at 20

⁵⁵ Smith & Keenan, Op. Cit. at 11

Historically, therefore arbitration had an attraction for merchants and traders especially those of them dealing in perishable commodities and the need to dispose of the disputes expeditiously and in accordance with mercantile law and custom. However, with time it became obvious that the common law courts had their own inhibitions. According to Ezejiofor:

As the value of this mode of dispute settlement became more pronounced it was discovered that the practice under the common law was not entirely satisfactory and needed amplification. Consequently provisions were made in successive statutes, to improve upon the common law practice.⁵⁶

Apart from the issue of technicality, at common law, arbitral agreement could be oral or in writing. For such agreements to be valid there must be an actual dispute and a submission to a particular arbitrator.⁵⁷ An arbitrator appointed by parol agreement can be removed by either of the parties.⁵⁸ Because of these deficiencies, it became clear that statutory intervention was imperative.

The United Kingdom Arbitration Act of 1698 was the first parliamentary act of intervention to remedy these defects. More fundamental is the Common Law Procedure Act of 1854. According to Ezejiofor⁵⁹ the object of these enactments were to reinforce the binding effect on the parties of submission to arbitration to make awards more easily enforceable and to remedy other defects which the common law practice had highlighted.

In 1889, the UK Parliament passed the Arbitration Act. This Act was itself, in large part, declaratory: either of previous statutes (that of 1854, the Civil Procedure Act

⁵⁶ Ezejiofor, Loc. Cit.

⁵⁷ See *Doleman & Sons v Ossett Corpn.* (1912) 3 K.B 257

⁵⁸ Halsbury Laws of England 3rd Ed. Vol 2, p. 3

⁵⁹ Ezejiofor, Loc. Cit.

1833 and the Arbitration Act of 1698) or of commercial and conveyancing practice⁶⁰. There were other Acts of 1924, 1930 and 1934 that led to a Consolidation Act of 1950, known as the Arbitration Act 1950. Others were those of 1975 and 1979. On the sources of Arbitration Laws in England Sutton, *et. al.* state thus:

There is no single source of English Arbitration Law. Prior to the Arbitration Act 1996, there was not even a partial statutory code, for the conduct of arbitrations. The Arbitration Acts 1950-1979 were more concerned with filling the gaps in an incomplete arbitration agreement and specifying the powers of the High Court.⁶¹

Thus, the 1996 Arbitration Act restated the former arbitration legislation with some changes. It has codified principles established by previous case law and also adopted part of the Model law. Be that as it may, the Arbitration Act, 1996 is the principal UK arbitration statute. This Act was also influenced by the United Nations Commission on International Trade Law (UNCITRAL) Model Law.⁶²

This analysis is not to suggest that arbitration was conducted in England only. However, we are reminded by Lazareff⁶³ that arbitration does not only have its root in history but a true product of the City of London. He went further to assert thus:

International commercial arbitration as we know it, started between the two World wars. Eisemann, Secretary General of the ICC Court of Arbitration, used to say that the first ICC arbitration he conducted, was spontaneous, without rules and horrendously, without a fee. International Commercial arbitration was then a procedure whereby gentlemen would settle in a gentlemanly way disputes between gentlemen. The penalty for non-compliance was blackballing nothing more. How far away that seems today!.⁶⁴

⁶⁰ Walton, A: *Russell on Arbitration*, 19th Ed, (London: Steven & Sons; 1979), p. 3

⁶¹ Sutton, et al Op. Cit. at 17

⁶² Supra

⁶³ Id.

⁶⁴ Id.

It is far away indeed because there are various Arbitration Rules now.⁶⁵ Similarly arbitration proceedings are almost as costly and prolonged as litigation, the fees paid arbitrators are high and the consequence for non-compliance is recourse to the courts for enforcement.

There are two other reasons why the evolution centered around England. Firstly, London was the centre of trade world wide. Indeed the London Court of International Arbitration was founded in 1892, it is located in London and is probably the oldest arbitration institution in the world.⁶⁶ Secondly our legal history is intertwined with the English legal system. *A fortiori* our laws on arbitration leaned heavily on the English laws until 1988. Arbitration can be seen therefore as one of the invisible exports of England. Today, there are arbitral centres and institution world wide. Wherever they are located, the point has to be made that arbitration evolved essentially as a private sector judicial proceedings. The law came in to merely reinforce its importance and relevance.

2.2.2 Evolution of Arbitration In Nigeria

In Nigeria, evolution of arbitration can be treated under three broad sub-headings, namely, during the pre-colonial period, during the colonial period and during the post-colonial period. These three periods fit into the three classical types of arbitration in Nigeria, namely, customary, common law arbitration and statutory arbitration.

(a) During The Pre-Colonial Period

A cursory look at the various ethnic groups in Nigeria reveal that before the advent of colonial rule, we had our indigenous methods of settling disputes. According to Justice Akpata:

⁶⁵ For example, there are UNCITRAL Arbitration Rules, London Court of International Arbitration Rules, ICC Rules and American Arbitration Rules, among others.

⁶⁶ Ezejiofor, Op. Cit. at 144

In the environs of Benin City the Village Head (*Odionwere*) or the family head (*Okaegbe*) principally functioned as the arbitrator or the mediator to resolve conflicts or disputes among the people. The parties were also at liberty to request any member of the community in whom they reposed confidence to mediate or arbitrate with the undertaking to abide by his decision.⁶⁷

In the Ibo-speaking part of Nigeria, the age-grade *or amala* performs arbitral functions. Similarly in the Yoruba-speaking parts, the Obas perform arbitral functions.⁶⁸

Professor Ezejiofor, has done a lot of work in this area.⁶⁹ According to the erudite scholar:

Customary law arbitration is particularly important institution among the non-urban dwellers in the country. They often resort to it for the resolution of their differences because it is cheaper, less formal and less rancorous than litigation. Because the system helps in the promotion of peace and stability within the communities and because it assists in the reduction of pressure on the over-worked regular courts, its employment as a dispute settlement mechanism should be encouraged by all organs of the state.^{69(a)}

As observed by Holdsworth,

the practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of laws, and after courts have been established by the state and recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to courts⁷⁰

The above is true of England and Nigeria. Despite the fact that we have embraced the English Legal System, recourse to customary arbitration is still a method of settling disputes especially in rural areas. In land matters, arbitration was used to settle disputes relating to

⁶⁷ Akpata, Op. Cit. p. 1

⁶⁸ Nnalue, U. S. F "Promoting Conflict Resolution through Non-Adjudicatory Process" (1997) in *Abia State University Law Journal* p.57 See also *Agu v Ekwibe* (1991) 3 NWLR (Part 180) 385 at 407

⁶⁹ Ezejiofor G. : "The Pre-requisites of Customary Arbitration" (1992-1993) in *Journal of Private and Property Law* Vols 16 and 18 p. 34 and Ezejiofor. Op. Cit. at 22

^{69(a)} Ezejiofor, Loc. Cit

⁷⁰ Holdsworth *History of English Law* (1964) Vol. XIV p. 187

land. Thus, in *Larbi v Kwasi*⁷¹, the Privy Council held that a customary arbitration was valid and binding and that it was repugnant to good sense for a losing party to reject the decision of the arbitrator to which he had previously agreed. Similarly, in *Mensah v Takyampong & Ors*⁷² the West African Court of Appeal held, *inter alia*, that

.... in customary arbitration, when a decision is made, it is binding upon the parties, as such decisions upon arbitration in accordance with native law and custom have always been that the unsuccessful party is barred from reopening the question decided and that if he tries to do so in the Courts, the decision may be successfully pleaded by way of estoppel.

One distinguishing feature of customary arbitration is that it is usually oral. This takes it outside the ambit of statutory arbitration. From a long line of decided cases it is obvious that arbitration is not alien to customary jurisprudence⁷³. It is therefore surprising that Uwaifo JCA held in *Okpuruwu v Okpokam*⁷⁴ that:

No community in Nigeria regard the settlement by arbitration between disputing parties as part of native law and custom... there is no concept known as customary or native arbitration in our jurisprudence.

Although the pre-requisites of customary arbitration were, with due respect wrongly stated in *Agu v Ikewibe*⁷⁵ and *Ohiaeri v Akabeze*⁷⁶, they were correctly restated in *Awosile v Sotunbo*⁷⁷ as follows: (a) Voluntary submission of the dispute to arbitration by the parties; (b) agreement by the parties expressly or by implication, to be bound by the award;

⁷¹ 1952) 13 WACA 76

⁷² (1940) 6 WACA 118. See generally Orojo J.O and Ajomo Op. Cit. at 36

⁷³ See *Ofomata & Ors v Anoka & Ors* (1974) 4 EC.S.L.R 251; *Assampong v Amuaku* (1932) 1 WACA 192; *Inyang & Ors v Essien & Ors* (1957) 2 F.S.C. 39, *Foli v Akese* (1930) 1 WACA

⁷⁴ 1988) 4 NWLR (pt 90) 554 at 572. Cf Akpata, Id.

⁷⁵ Supra

⁷⁶ (1992) 2 NWLR (pt 221) 1

⁷⁷ (1992) 5 NWLR (pt 243) 514. See also *Oparaji & Ors v Ohanu & Ors* (1999) 6 SCNJ 27 at 38

(c) conduct of the arbitration according to customary law; (d) publication of a decision which is final.⁷⁸

(b) During the Colonial Period

Lagos colony was ceded to England in 1861 by virtue of the Treaty of Cession of that year. However, English Law was introduced to the Colony by virtue of Ordinance No. 3 of 1863. With this Ordinance especially Ordinance No. 4 of 1876, the statutes of general application, the rules of common law and doctrines of equity became part of our laws.⁷⁹ With this Ordinance both common law and doctrines of equity became sources of our laws.

Thus, side by side with the customary arbitration we had common law arbitration. Both customary and common law arbitration can be entered into orally or in writing. The defects in these two have been highlighted.⁸⁰ The evolution of arbitration generally centered around the common law and trade usages what remains to be considered here is the relationship between common law and customary arbitration. Although, there is no judicial authority in this regard, the internal conflict of law rules in Nigeria has taken care of these.⁸¹

Generally the effect of such conflict is dependent on whether the parties to such a transaction or event are both Nigerians or Nigerian and Non-Nigerian. If the parties are both Nigerians, the general rule is that the transaction will be regulated by customary law.⁸² However, there are two exceptions to this general rule, namely, where the parties agreed or

⁷⁸ For a detailed analysis of the pre-requisite, see generally Ezejiofor, *Supra* No. 69. See also *Odinigi v Oyeleke* (2001) 6 NWLR (Pt 708) 12 at 28-29 for the conditions for the validity of customary arbitration.

⁷⁹ See generally Obilade A.O. *The Nigerian Legal System* (London: Sweet & Maxwell; 1979.) The effective date was 24 July 1874 until it was changed to 1st Jan 1900.

⁸⁰ *supra*

⁸¹ See the various High Court Laws e.g. Section 20, High Court Law, Cap 61 Laws of Eastern Nigeria, 1963.

Section 12 High Court Law, Cap 44 Laws of Western Nigerian 1959, Section 12 High Court Law, Cap 49 Laws of Northern Nigerian 1963 and Section 26, High Court Law of Lagos State, Cap 60 1994

⁸² *Labinjo v Abake* (1924) 5 N.L.R. 33

seem to have agreed that English Law will regulate the transaction, and where the transaction is unknown to customary law.⁸³

If it is a transaction involving a Nigerian and a Non-Nigerian, the applicable law is the English Law unless where such application will result in substantial injustice to either of the parties in which case, customary law will apply.⁸⁴ Where the parties are non – Nigerians, then English law will apply.⁸⁵ There is no reported Nigerian case based on the UK Arbitration Act 1889. It is also uncertain as to whether it was a statute of general application. When it is noted, that there is no official listing of statutes of general application unless a matter based on a particular statute went to court this is understandable. It is however humbly submitted that since there was no local legislation on arbitration at that time, the Arbitration Act 1889 could be treated as such. Nigerian became a united country in 1914. This was when the hitherto Northern and Southern Protectorates were amalgamated to form a country called Nigeria. In the same year, an Arbitration Ordinance⁸⁶ came into effect. The provisions of this Ordinance were identical with the English Arbitration Act, 1889. Thus, for the first time in the history of arbitration in Nigeria, we had a local enactment regulating arbitration. Unfortunately, the provisions of the Act were scanty as they dealt with domestic arbitration only. According to Amazu Asouzu, the Act later proved inadequate for the settlement of commercial disputes in Nigeria thus leading to its repeal.⁸⁷

As at the time of political independence in 1960, the 1914 Act was the extant Nigerian legislation on arbitration. However on 10 June, 1958, the New York Convention

⁸³ *Griffin v Talabi* (1948) 12 WACA 371. See also section 26 (2) & (3) of the High Court Law of Lagos State, Cap 60 1994

⁸⁴ *Koney v UTC* (1934) 2 WACA 188 and *Nelson v Nelson* (1951) 13 WACA 248

⁸⁵ See generally Obilade, Op Cit at 154

⁸⁶ Ordinance No. 16 of 1914 which was later re-enacted as Arbitration Act Cap 13, Laws of the Federation 1958

⁸⁷ See Amazu Asouzu “Developing and Using Commercial Arbitration and Conciliation in Nigeria” (June 1994) *Lawyer Bi – Annual* Vol. 1, No 1

on the Recognition and Enforcement of Foreign Arbitral Awards came into force.

According to Justice Akpata:

Nigeria being a colony of the British at the material time and not having enacted any law relating to international commercial arbitration, could not subscribe or accede to the Convention.⁸⁸

One wonders then how foreign arbitral awards were enforced in Nigeria at that time. The British probably subscribed to the Convention and took advantage of its Article X which empowered such imperial states to declare that the Convention shall extend to all or any of the territories for the international relations of which it had responsibility. However with the combined effect of sections 2 (1) and 41 (2) of the Foreign Judgement (Reciprocal Enforcement) Act⁸⁹, such awards could be enforced provided, amongst other things they are registered in the High Court in the relevant region.

As at independence, we still had the Arbitration Act which was applicable to Lagos as the federal capital territory. The Regions (now states) had their own Arbitration Laws⁹⁰. There was therefore no Federal enactment on Arbitration since the subject-matter was neither in the Exclusive nor Concurrent Legislative Lists. This lacuna can be traceable to the fact that arbitral institutions are owned by either professional bodies or the various institutions. Indeed as has been observed, arbitration evolved from trade practices and statutory intervention came subsequently.

(c) During the Post - Colonial Period

It is noteworthy that although Nigeria gained political independence in 1960, there was no legislative instrument on international commercial arbitration until it adopted the

⁸⁸ Akpata, Op. Cit at 3

⁸⁹ Laws of the Federation of Nigeria, No. 31 of 1960

⁹⁰ See the Arbitration Law of Northern Nigerian 1963, Arbitration Law of Western Nigeria 1959 and Arbitration Law of Eastern Nigeria 1963.

UNCITRAL Model Law on International Commercial Arbitration⁹¹ and promulgated it into the Arbitration and Conciliation Act. Paradoxically, the Act neither expressly repealed nor saved the Arbitration Act/Laws. Section 54 (1) of the Arbitration and Conciliation Act provides for the application of the 1958 New York Convention while Section 53 provides for the application of the UNCITRAL Arbitration Rules. However, Section 58 of the Act provides that it shall apply to all arbitration throughout the country. One wonders then, what is the effect of the existing laws which were neither expressly repealed nor saved. It is safe and reasonable to assert that the doctrine of "covering the field" can be invoked to fill the gap⁹². However, when it is realised that the Act covers commercial arbitration and the state laws cover both commercial and non-commercial, it can be held that the federal law has not completely, exhaustively and exclusively covered the entire field. Consequently, the state laws can be applied to non-commercial arbitration.

Nigeria, was the first African country to adopt the Model Law. Most of the sections of the Act are derived from the Model Law. For example sections 1 to 28 of the Act correspond with Articles 7 to 33 of the Model Law. Sections 29 to 36 of the Act are purely for domestic arbitration while sections 37 to 42 of the Act deal with conciliation in domestic proceedings. Sections 43 to 55 of the Act are additional provisions on international commercial arbitration. Essentially Sections 48, 51 and 52 of the Act correspond with Articles 34, 35 and 36 of the Model Law respectively.

In Nigeria it is unsettled what the cut off date for common law is.⁹³ If the cut off date is 1st January 1900, then in Nigeria today it is only customary and statutory arbitration

⁹¹ Id.

⁹² On this doctrine, see *Attorney General of Ogun State v Attorney General of the Federation* (1982) 1 - 2 SC 13 at 16, *Oseni v Dawodu* (1994) 4 SCNJ Part II, 197 at 212 and *Lakanmi & Anor v AG WEST* (1971) UILR Vol I, Part II, 201 at 209. See also Idornigie, P O "The Doctrine of "Covering the Field" and Arbitration Laws in Nigeria" *Arbitration: The Journal of the Chartered Institute of Arbitrators* (London) Vol. 66, No. 3, August 2000, pp 193-198

⁹³ See Park A.E.W, *The Sources of Nigerian Law* (London, Sweet & Maxwell, 1963) pp. 5 – 42 Cf: Allot A. *Essays in African Law* (London, Butterworths, 1960) p. 3

that are in force. However if the cut off date is not 1st January, 1900, then common law and customary arbitration which are oral as eloquently stated by Ezejiofor ⁹⁴ will be in force. However, both of them are unattractive. In any case, we are concerned in this work with international commercial arbitration. This will, of necessity, mean statutory arbitration under the Act. Whatever the legal regime, arbitration is a private sector judicial proceeding. Consequently, the principle of party autonomy is predominant subject to the mandatory provisions. Such provisions are anchored on principles of public policy.

2.3 ARBITRATION AND LITIGATION DISTINGUISHED

One of the main thrusts of this work is that there are some disputes that are best resolved by arbitration than by litigation or any other dispute resolution mechanisms. Thus, in specific cases, litigation should be resorted to while in others any of the dispute resolution mechanisms may be more suitable. Arbitration and litigation are adjudicatory processes and adversarial in nature. There is finality in their decisions. However, they can be distinguished.

In the case of arbitration, the parties have the freedom to choose the particular arbitral tribunal. In such choice, the parties will take into account the personality of the arbitrators, their professional background, experience, availability and cost⁹⁵. However, where the parties fail to agree, there are usually provisions in the agreement between the parties, the arbitral rules or statutes for appointment of a tribunal by appointing authority or court. In the case of litigation, on the other hand, the parties have no such choice. A Judge who has never been involved in maritime matters may be required to hear a dispute in that area. In third world countries, the court may be congested and there are other difficulties caused by corruption, and the lack of independence of the judiciary.

⁹⁴ Ezejiofor, Op. Cit at 21

⁹⁵ See Bernstein et. al. Op. Cit at 15

Apart from choice of tribunal, parties to an arbitral agreement have to decide on the composition of the tribunal. It could be made up of arbitrators from various disciplines. In other words it will be a mixed tribunal made up of Lawyers, Accountants, Surveyors and the like. It is conceded however that in practice the parties may not choose the tribunal due to disagreement. All the same, it is the parties' reluctance to resort to litigation that drives them to other processes including arbitration. The right to choose a tribunal and its composition is an advantage in favour of arbitration.

Some businessmen have trade secrets and confidential information that should not be known publicly. Arbitration readily comes to their aid. This is so because as a private sector judicial proceeding, the tribunal sits in private. The arbitrators, the parties and representatives are the only parties allowed to participate unless the parties and the tribunal agree otherwise⁹⁶. The public have no right to attend a hearing before an arbitral tribunal. In the case of litigation, proceedings are usually conducted in public except in few cases.

Arbitral proceedings are characterised by the principle of party autonomy. Among others, the parties are free to choose not only the tribunal but the venue and the law. In choosing the venue, parties will take their convenience, that of the arbitrators and witnesses into account. Choice of law is a fundamental question in arbitration. Unless the parties choose both the substantive and procedural law, the tribunal may determine this by invoking the conflict of laws rules. Litigants generally have no choice of venue and the law applicable. Submission to any municipal system may imply submission to its legal system.

Arising from the choice of the arbitrators and composition of the tribunal is the advantage that evidence before an expert on a technical matter is usually shorter than evidence before a non-expert like a Judge. For instance, in commercial law, until lately, the term "merchantable quality" had no statutory definition. This was left to the courts to

decide. However, if the good is a machine and a member of the tribunal is an expert in such machines, less time will be wasted in determining merchantability.

In proceedings before the court, either the parties represent themselves or they seek the services of only legal practitioners of their choice. In arbitration, there is no restrictions upon a party's choice of representation.

Where the parties come from different jurisdictions, arbitration may be preferable to litigation because quite often neither party is willing to submit to the jurisdiction of the national court of the other. This is so because arbitration offers them neutrality in choice of law, procedure and tribunal. They can appoint an arbitrator from a third country or request an international arbitral institution (an appointing authority) to make such appointment. In so doing, the parties may be more confident that there will be equality of treatment⁹⁷. Disputes involving states are also in this category. For reasons of national sovereignty and prestige, such states will be unwilling to submit to the jurisdiction of a foreign court⁹⁸.

As private sector judicial proceedings, arbitral proceedings are informal and quite flexible. Thus, instead of queuing in court for resolution of their dispute, parties can choose a tribunal that will act promptly. As arbitration is consensual the parties can choose the most suitable procedures. The parties and the tribunal are not tied to the inflexible rules of courts. For instance, a hearing can be on basis of documents only or the guillotine system can be adopted.⁹⁹ All these will lead to speed in decision making which is not an attribute of litigation.

One area where litigation stands out is costs. The parties to an arbitral proceedings have to pay for the services of the arbitrators, the venue and other administrative charges

⁹⁶ Sutton, et al Op. Cit at 5

⁹⁷ Id. at 10

⁹⁸ Orojo and Ajomo, Op. Cit at 45

which are provided by the state in litigation. Indeed, where arbitration is “over-lawyered” and “over-legalistic”, it becomes more expensive. However, if the other advantages are properly utilized, arbitration should ordinarily be cheaper than litigation.

It is settled law that a litigation ends up in a “win/lose” situation and arbitration may end up the same way. When it is remembered that arbitration is consensual in nature like the other alternative dispute resolution processes this may not be the case. One reason for resorting to arbitration is that the parties are businessmen who have established personal and good friendly relationship over the years. They therefore do not want to jeopardize this relation. Arbitration, helps to preserve the relationship. Indeed some provide for successive arbitration arising from a contract while the performance of the contract continues. Litigation is generally confrontational and sometimes uncompromising.¹⁰⁰

It is easier to enforce an arbitral award in a foreign country than judgment of a court where the foreign country is a party to the New York Convention of 1958. Enforcement of court judgment in foreign countries is dependent on the nature of the reciprocal conventions or treaties or disposition of the courts. However Articles 35 and 36 of the Model Law apply irrespective of the country in which an award is made.^{100(a)}

The decision of an arbitral tribunal is final like a court judgment. However, whereas you can generally appeal against a court judgment, an arbitral award is final and no appeal lies. It should be stressed that in appropriate cases, an award can be set aside.

We can conclude this section by stating that despite the advantages that arbitration has over litigation, there are matters that are more suitable for litigation than arbitration. The obvious example is where the issue for resolution is a legal one and the issue also turns on the credibility of evidence. There are provisions in arbitral enactments and rules to summon

⁹⁹ Through this system a time-frame can be fixed for hearing of evidence

¹⁰⁰ See Orojo and Ajomo Loc. Cit

^{100(a)} See also sections 51(1) and 52(2) of the Act

an unwilling party to the tribunal. However, where intransigence is perceived, litigation may be preferable. Ideally, arbitration is consensual. Finally, legal aid is limited to individuals of modest means. Legal aid is usually available for litigation and not for arbitration. Thus, where legal aid is to be sought, litigation is preferable.¹⁰¹

2.4 ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCESSES

Traditionally, arbitration was the real alternative to litigation. Thus, reference to alternative dispute resolution (ADR) was reference to arbitration. As has been observed, arbitration was held in cities. London maintained a pre-eminent position as the leading centre for international commercial arbitration particularly in specialised fields as maritime and commodities. Unfortunately, in recent years arbitration was conducted in a similar fashion like litigation. No wonder then that Marriott observed thus:

The problems of delay, cost and denial of access which bedevil the courts in this country also afflict arbitration, perhaps indeed more so, for the cost of much English arbitration conducted in traditional fashion exceeds the cost of equivalent court proceedings, given that unlike the judge, the arbitrator has to be paid by the parties and, unlike court facilities which are provided by the state, the parties must provide hearing and other physical facilities at their own expense¹⁰²

Sir, Thomas Bingham, Master of the Rolls in England put it pointedly thus:

The arbitration process by mimicking the processes of the courts, and becoming over-legalistic and over-lawyered, has betrayed its birthright by allowing itself to become as slow, as expensive and almost as formal as the court proceedings from which it was intended to offer an escape.¹⁰³

These shortcomings led to radical procedural reforms, utilising other alternative dispute resolution (ADR) procedures which may streamline the process, rendering it less costly and permit early and fair settlement. Before examining these procedures, it is

¹⁰¹ See generally Bernstein et al Op. Cit at 15-18, Sutton et al Op. Cit at 9-11 and Orojo and Ajomo Op. Cit at 42-48

¹⁰² Marriott A.L Op. Cit 598. See Generally Marriott & Brown Id

¹⁰³ (1995) 61 J. Arb. 3 at 176

instructive to determine whether arbitration is or is not or ought to be part of these alternatives or whether the search should be on “alternative” or on the “appropriate” dispute resolution process. Most writers on ADR shy away from this evaluation. We feel that ascribing a meaning to ADR raises to the fore its philosophical or jurisprudential underpinnings. Being a generic acronym, we are reminded by Dias that the meaning and interpretation of a word is a function of linguistic precepts. According to the learned author.

It is generally accepted that words have an inner ‘core’ of settled applications surrounded by a ‘fringe’ of unsettled applications. Problems of interpretation arise in the fringe area. Words may also have more than one usual meaning in which case the context has to resolve which meaning is being considered.¹⁰⁴

In a rather concurring manner, Lord Lloyd of Hampstead in defining ‘Law’ has also postulated that much juristic ink has flowed in an endeavour to provide a universally acceptable definition. After clearing “two confusions” about the definition, namely “naming a thing” and “essentialism” in his analysis of words he opined thus:

The limits of defining should also be considered from a further view point. To define is strictly to substitute a word or words for another set of words, and these further words may and generally will stand in need of additional explanation.¹⁰⁵

ADR is an acronym for Alternative Dispute Resolution. On the surface therefore, it includes arbitration as arbitration is an alternative to conventional litigation. Thus, ADR is any process designed or devised to resolve disputes outside the judicial system. In the United States where ADR originated from, some analysts have narrowed the phrase to exclude arbitration whereas in Canada it is included.¹⁰⁶

However, Marriott, who is a leading writer on ADR has defined ADR thus.

¹⁰⁴ Dias, R.W.M *Jurisprudence* 5th Ed (London: Butterworth; 1985) p. 6

¹⁰⁵ Lord Lloyd of Hampstead and Freeman MDA *Lloyd’s Introduction to Jurisprudence* 5th Ed (London: Stevens & Sons; 1986) p 55

¹⁰⁶ Thompson, B.J. “Commercial Dispute Resolution: A Practical Preview” in Emond D.P.(ed), Op. Cit. 91

The range of procedures which serves as alternatives to the adjudicatory procedures of litigation and arbitration for the resolution of disputes, generally but necessarily involving the intercession and assistance of a neutral third party who helps to facilitate such resolution.¹⁰⁷

By this definition “arbitration” is excluded from ADR. In the words of the authors of *Russell on Arbitration*.

Alternative dispute resolution is regarded, by English practitioners as any system of dispute resolution which is non-binding. By “non-binding” is meant the absence of imposed sanctions.¹⁰⁸

Bernstein *et. al.* share this view. In their words, "the phrase 'alternative dispute resolution' or ADR is used in this book for all forms of mediation and conciliation".¹⁰⁹ In consolidating the English position on this, Marriott¹¹⁰ highlighted the differences between ADR and Arbitration. According to him whilst arbitral awards are enforceable by the courts, mediation which is at the core of ADR is generally unenforceable. Secondly, the object of arbitration is a final and binding award, a binding agreement is by no means an automatic consequence of mediation. Thirdly, while arbitration has a statutory regime regulating it, there is none for mediation. It is humbly submitted that given our legal history, arbitration in Nigeria should be seen as not included in the ADR procedures. Orojo and Ajomo share this view. After discussing the arguments for and against classifying arbitration as an ADR process, they opined thus:

... it is submitted that arbitration is in a curious position when discussing ADR processes. It is basically a form of adjudication, though like ADR properly so-called, it is also an alternative to litigation. The difference . . . stems from the fact that, in mediation or conciliation, the parties retain the responsibility for and control over the dispute to be resolved and they do not transfer decision-making power to the mediator, whilst in an arbitration, the arbitrator has

¹⁰⁷ Marriott Op. Cit 583

¹⁰⁸ Sutton et al Op. Cit at 39

¹⁰⁹ Bernstein, et al Op. Cit at 13

¹¹⁰ Marriott Loc. Cit.

responsibility for controlling the process and making a binding award. In the light of the above, it is submitted that arbitration should be left out of the ADR process.¹¹¹

In Australia, arbitration is excluded.¹¹²

It would seem therefore that ADR now has an inner core of settled applications and a fringe of unsettled applications. Within this inner core include, negotiation, mediation, conciliation, mini-trial or executive tribunal, structured settlement conference, med-arb, expert evaluation and non-binding appraisal.¹¹³ The fringe will include all of the above and arbitration. Similarly, by using words like “non-binding” or “non adversarial” on the one hand and “adjudicatory” or “adversarial” on the other, we are substituting words for another set of words. Be this as it may, what seem to draw a clear distinction between arbitration and other ADR procedures is whether the process is adjudicatory and the decision final and binding. If the process is adjudicatory like conventional litigation, it is not part of the ADR procedures. However, if the final decision is non-binding then it is part of ADR procedures. The whole process can be seen as a continuum. At one end of the continuum is negotiation and at the other is arbitration. The other ADR processes are in-between.

This work is not on ADR *per se* and therefore all the processes will not be examined. However, some of them will be mentioned. Conciliation is a process whereby a conciliator talks to the parties separately, diffusing animosities and identifying common grounds and assists them in arriving at a decision. In Nigeria, we have a legal regime regulating conciliation¹¹⁴.

¹¹¹ Orojo JO and Ajomo Op. Cit at 5

¹¹² See Pryles M. “Assessing Dispute Resolution Procedures” (May 1998) in *Journal of the Chartered Institute of Arbitrators*, pp. 106 – 116

¹¹³ Sutton et al; Loc. Cit

¹¹⁴ See the Arbitration and Conciliation Act

A mediator is a neutral party who sits at the negotiation table with both parties (and sometimes their counsel) and assists them to negotiate effectively. He facilitates communication between the parties. It is a private voluntary and informal process where a party-selected neutral assists disputants to reach a mutually acceptable agreement.¹¹⁵ The mediator is merely a catalyst and does not express his opinion. Mediation which is at the core of ADR is either facilitative or evaluative. According to Marriott

Broadly, facilitative mediation means interest based negotiation in which the mediator helps the parties to explore options and enhance their mutual interest. On the other hand, evaluative mediation tends to be more rights based, where the mediator makes or obtains an assessment and expresses a view on the merits of the dispute.¹¹⁶

In some jurisdictions like the US, UK and Canada very complex mediation procedures have been formulated.¹¹⁷ We are warned by distinguished writers on arbitration that

neither ADR nor the words mediation and arbitration have widely established consistent meanings. It is necessary to check precisely how the user intends to use them.¹¹⁸

A "mini-trial" is a structured settlement negotiation in which each party's advocate puts his best case to a forum which consists of decision makers from each side with power to settle the dispute and a neutral party after which the executives meet to endeavour to resolve their differences. It is erroneous to assume that it is a trial, properly so called. This is so because it has nothing in common with the traditional trial process, save the common objectives of resolving disputes. Indeed a "mini-trial" has been described as an anti-thesis of

¹¹⁵ Olagunju J. *Commercial Mediation: An Alternative Dispute Resolution Mechanism* (Kaduna: Multifirm Ltd; 1998) p 7

¹¹⁶ Marriott Op. Cit at 585

¹¹⁷ See Naughton, Op. Cit at 76-83 and Marriott Op. Cit at 587

¹¹⁸ Bernstein et al Op. Cit at 13

litigation. It is well developed in the US and actively promoted by the Centre for Public Resources in New York.¹¹⁹

The American Arbitration Association has rules for mediation combined with arbitration known as “med-arb”¹²⁰. Similar schemes exist in construction industries in South Africa. Basically the process starts as that of mere mediation and if it breaks down, then the mediator becomes an arbitrator. In some countries including England "med-arb" is regarded with some suspicion because of the private disclosures to the mediator who then becomes an arbitrator.¹²¹

2.5 ESTABLISHING A NEXUS BETWEEN A DISPUTE AND A PROCESS

One of the main thrusts of this work is the establishment of a nexus between a dispute and a process. In other words, how can we determine the particular process that fits a dispute. This will assist in determining the appropriate dispute resolution process. On the surface, there is nothing wrong with the traditional dispute resolution process as represented by the judiciary. After all there are no better ways of rigorously testing facts, witness credibility and evidence than the adversarial setting of a court room. While it is conceded that there is nothing inherently wrong with using adjudication and the judiciary, there is much wrong with using adjudication to solve all problems. As succinctly put by Emond,

The judicial process tends to transform social, political and economic disputes into legal disputes. Not only are some problems ill suited to a proper or full resolution through the adversarial process, the process may accentuate and exaggerate conflict rather than resolve it.¹²²

¹¹⁹ See Fisher, S.G. “Mini-Trial: A Guide to Success” in Emond D.E. (ed), Op. Cit at 203-222 and Naughton Op. Cit at 79.

¹²⁰ Marriott Op. Cit at 599

¹²¹ Sutton, et al, Op. Cit at 39. See also Ezejiofor G, Op. Cit at 8

¹²² Emond, D.P. “Alternative Dispute Resolution: A Conceptual Overview” in Emond D.P. Op. Cit at 4.

Consequently, the search for appropriate dispute resolution procedures can be seen as a search to properly locate adjudication and in particular judicial adjudication on the continuum of dispute resolution mechanisms instead of regarding it as the principal means. The search for a nexus represents a search for a more limited role for adjudication and to remedy some of its obvious inefficiencies. Professor Michael Pryles, has scholarly assessed all dispute resolution procedures.¹²³ He posed the following questions, namely

- (a) Why are some techniques used rather than others?
- (b) What is the most appropriate procedure to resolve a particular dispute?
- (c) How can the various procedures be improved?

While acknowledging that no one dispute resolution procedure is superior to all others he asserted that there are instances when one procedure is more appropriate than the other. Regrettably, the determination of which dispute procedure should be used in a particular case is complicated by the fact that the choice e.g. an arbitration clause or ADR clause is often made before a dispute arises. For example it is when an agreement is drawn up that an arbitration clause or ADR clause is included in the contract without knowing the type of dispute that may eventually arise. However, one way of evaluating dispute resolution procedures to establish a nexus is by reference to certain criteria which will highlight the benefits and detriments, strengths and weaknesses of the procedure. The first criterion according to Professor Pryles¹²⁴ focuses on the nature of the tribunal or its personnel. Thus, there is the need to consider the integrity of the personnel, the impartiality of the tribunal, its appropriateness and expertise. It is expected that if this criteria is met, the decision of the tribunal will be fair and correct. We share this view.

In addition to the tribunal itself, one other way of establishing a nexus is commercial consideration. Under this criterion, speed and cost feature prominently though they may

¹²³ Pryles, M. Op. Cit at 166 - 117

overlap. Mediation developed in response to the slow speed of litigation and in particular the high cost while litigation and arbitration are now considered as fairly expensive though arbitration offers opportunity for flexibility. According to the learned Professor,¹²⁵ the parties may agree to any one or more of the following:

- reduce or dispense with discovery of documents
- reduce or eliminate pleading
- implore strict limits e.g. guillotine
- dispense with hearing and have arbitration on documents only.

These are all ways of ensuring that arbitral proceedings are held expeditiously.

The third criterion is effectiveness of the procedure. What should be considered here is whether the result will be binding and enforceable. Arbitration results in an award and litigation in judgments. Both are binding. However mediation is non-adjudicative and consensual in nature. A court exercises the judicial powers of the state¹²⁶ and its judgment are enforceable by using execution process though this is easier in domestic cases than in international transactions. The enforceability of an arbitral award is the same as that of a court judgment especially for countries that have signed the New York Convention.¹²⁷ The settlement terms of a mediation can not easily be enforced as a party can renege.

Finally, there are other considerations like maintenance of the existing relationship and confidentiality. This criterion suites mediation more than litigation or arbitration. A mediation results in a “win/win” situation as opposed to litigation/arbitration that results in a “win/lose” situation. Although, if arbitration is properly conducted it will result in a “win/win” situation. Litigation/Arbitration adopts the adversarial procedures and court proceedings are generally held in public. This destroys harmony and confidentiality.

¹²⁴ Pryles, Id

¹²⁵ Pryles, Id

¹²⁶ For example, see section 6 of the Constitution of the Federal Republic of Nigeria, 1999

These criteria are then applied to litigation, mediation and arbitration to assess their various strengths and weaknesses. This evaluation will establish a nexus between a dispute and a process. For example, if it is a straightforward case bordering on points of law, then litigation is ideal. However, where it is a complicated one based on facts or mixed law and facts and the prime consideration is effectiveness, then litigation or arbitration is preferable to mediation. Where the prime consideration is to establish a legal precedent and decision according to law, litigation is preferable. Where speed, maintenance of continuing business relationship and harmony is desirable, then mediation will be more appropriate. Where confidentiality, specialist tribunal and technical expertise will be required then arbitration will have more advantages than litigation. Lastly, where the dispute is international, arbitration assumes qualitative leap over litigation. The result of all these is that instead of talking of “alternatives” to litigation, we will be talking of “appropriate” dispute resolution processes.

2.6 VALUATION

The functions of an arbitrator are similar to those of other experts like surveyors, and auditors who carry out valuation exercises. Their similarities lie in the fact that they are third parties, who decide issues between the parties and give decisions. However, whereas an arbitrator acts in a judicial manner in deciding an existing dispute, the expert exercises his professional judgment in seeking to prevent disputes from arising. Although, an expert can be made an arbitrator, the proper status can be determined by considering the intention of the parties as evidenced by their agreement or surrounding circumstances¹²⁸.

¹²⁷ The 1958 New York Convention

¹²⁸ Ezeiofor, Op. Cit at p. 8

The learned authors of *Russell on Arbitration*¹²⁹ highlighted other differences between expert determination and arbitration. These include the fact that the decision of an expert cannot be enforced simply as an arbitral award, and more importantly an expert can be sued for negligence while an arbitration has immunity.^{129(a)} Similarly, an expert can apply his own expertise in deciding the question referred and he is not bound to give each party an opportunity to put its case.

2.7 CONCLUSION

In this chapter, we have highlighted how arbitration evolved. As has been observed, arbitration is a private sector judicial proceedings. It evolved essentially out of the customs, usages and practices of early merchants. As the common law courts were not equipped to handle such matters, the merchants developed the law merchant (*lex mercatoria*). Subsequently, the common law courts got involved as well as the state providing the statutory frame work. To buttress the private nature of the proceedings, the doctrine of party autonomy is predominant. In other words, the laws or rules will apply if, and only if, the parties do not provide otherwise. Of course, there are mandatory provisions which are anchored on fundamental principles, for instance, public policy.

As a Colony of Britain, Nigeria was influenced by the British legal system, including arbitration laws. However, we had and still have customary arbitration which, on certain conditions highlighted above, can be enforced by the court or operate by way of estoppel. Side by side with this is statutory arbitration. The point was made that the Arbitration and Conciliation Act did not expressly repeal or save the various Arbitration laws for the States. While in the Laws of the Federation, 1990, there is no more Arbitration Act for the Federal Capital Territory as was in 1958; we still have Arbitration laws for the various States. In

¹²⁹ Sutton at el Op. Cit at p. 36

^{129(a)} See *Sutcliffe v Thackrah & Ors* (1974) AC 727 and *Arenson v Arenson* (1975) WLR 85

such circumstances the point was made that the doctrine of covering the field can be invoked.

Alternative Dispute Resolution (ADR) is now a catchphrase. Is arbitration part of it? It would seem that it is a jurisprudential issue. Our submission is that it is not part of it. However, the search should not be as to whether it is part of ADR but how to establish a nexus between a dispute and a process. Some criteria were discussed in this regard. It is hoped that these will assist in establishing the nexus and substituting the word “appropriate” for “alternative”.

CHAPTER THREE

THE FORM AND CHARACTER OF ARBITRATION AGREEMENT

3.1 INTRODUCTION

In any arbitral proceeding whether *ad hoc* or institutional, the most important document pertaining to it is the arbitration agreement. It is the fount of the whole process. Such agreement may take the form of a clause in the contract entered into by the parties or a separate arbitration agreement concluded by the parties either before or after the dispute has arisen. Generally, it is difficult for parties to agree to arbitrate when a dispute has arisen. Consequently, it is advisable to have an arbitration clause in a contract or enter into a separate arbitration agreement at the time the contract is entered into.

An arbitration agreement may relate to an existing or future dispute, controversy, claim or difference. Many trade or professional associations have their own arbitration rules. Such rules usually provide for an arbitration clause. In most cases, one of such clauses can be incorporated into the contract. For example, the International Chamber of Commerce, the London Court of International Arbitration, and the United Nations Commission on International Trade Law (UNCITRAL) all have Arbitration Clauses.¹³⁰ References to such clauses must be unambiguous. Furthermore, the rules must be suitable to the particular dispute. However, in some cases, adoption of a ready made arbitration rule may be inappropriate. This is usually the case with *ad hoc* arbitrations. In drafting such clauses, there are certain elements which are indispensable. For example the principle of party autonomy must be respected. In other words, the parties are free to agree on a number of issues including the number of arbitrators, the place of arbitration, the proper law of the contract, the law of the arbitration agreement, the procedural law, appointment of the

¹³⁰ See generally Sutton *et al* Op. Cit at 667-669 and Bernstein R *et al*, Op. Cit at 613-620

tribunal, the language of the proceedings, the scope of the reference, among others. There are also pitfalls to be avoided. These include uninformed tinkering with model clauses, equivocation, insufficient specification of the arbitral institution, designation of authorities intended to appoint arbitrators without verifying whether they are in fact willing to accept such responsibility and combining irreconcilable procedural laws.¹³¹

In this chapter therefore, the searchlight will be focused on the principle of party autonomy, the form of an arbitration agreement, the principle of separability, the choice between *ad hoc* or institutional arbitration, the choice of arbitration clauses, determination of applicable laws and the various modes of referring disputes to arbitration.

3.2 PRINCIPLE OF PARTY AUTONOMY

Arbitration, as already pointed out, evolved as private sector judicial proceedings. Consequently, arbitral proceedings have two basic elements or principles: party autonomy and the contractual nature of the proceedings. A cursory look at all arbitral rules will reveal a wide choice of laws and rules available to the parties. Similarly, the Model Law recognises and guarantees party autonomy. In commenting on this principle, Herrmann asserted thus:

The most fundamental principle underlying the Model Law is that of the autonomy of the parties to agree on the "rules of the game". Such recognition of the freedom of the parties is not merely a consequence of the fact that arbitration rests on the agreement of the parties but also the result of policy consideration geared to international practice.¹³²

One of the frustrations inherent in municipal laws is that such laws may have mandatory provisions that are not universal in nature. Such provisions produce unexpected

¹³¹ See Sutton Op. Cit at 28 and Bernstein Op. Cit at 550

¹³² Herrmann, Op. Cit at 9

and undesired consequences. The principle of party autonomy is intended to prevent such frustrations. Accordingly Article 19(1) of the Model Law provides thus:

Subject to the provisions of this law, the parties are free to agree on the procedures to be followed by the arbitral tribunal in conducting the proceedings.¹³³

The freedom of the parties to choose the laws and rules that govern their contract is however not absolute. In appropriate cases, the courts can intervene. Accordingly, Article 5 of the Model Law provides that in matters governed by this law, no court shall intervene except where so provided in this law¹³⁴. The import of this provision is that the parties are free to determine the rules of the game to the extent that the courts can intervene.¹³⁵ Similarly, under the grounds of public policy, there can be limitation on the freedom of the parties. There are also matters that are not arbitrable¹³⁶. In some jurisdictions,¹³⁷ a line is drawn between optional and mandatory provisions. The mandatory provisions are those that the parties cannot derogate from.

Prior to the adoption of the Model Law, there were national procedural laws that were inappropriate or inadequate for international commercial arbitration. There was therefore the need to detach arbitral proceedings from these local laws. According to Herrmann:

Article 19 which grants freedom to the parties to agree on the procedure and, failing agreement empowers the arbitral tribunal to conduct the proceedings as considered appropriate may be called the "Magna Carta of Arbitral Procedure". It is the central provision and clearest expression of what may be regarded as the most salient feature and greatest benefit of the Model Law for international cases: detachment from the traditional local procedural Law.¹³⁸

¹³³ Although there is no express provision on this under the Act, the principle permeates the Act. Compare Section 1(b) of the English Arbitration Act 1996.

¹³⁴ Section 34 of the Act

¹³⁵ Under the Act, the Courts can intervene vide sections 29, 30, 32, 48 and 52

¹³⁶ *Kano State Urban Development Board v Fanz Construction Ltd*, supra at 32; see also Section 52 (2) (b) of the Act

¹³⁷ Schedule 1 to the English Arbitration Act 1996

¹³⁸ Herrmann Op. Cit at 12

That the Article is not only the Magna Carta of arbitral procedure but also a central provision can be garnered from the use of words like "The parties are free to agree...." or "unless otherwise agreed by the parties" and similar words found in many provisions of the Model Law and statutory enactments based or modeled on it.¹³⁹

Consequently, out of 36 Articles in the Model Law, 14 have such words. If one deducts from the remaining provisions all those which relate to the internal organisation or implementation of the Model Law and those dealing with mandatory provisions, the balance tilts heavily in favour of the principle of party autonomy. Contributing to the importance of this principle, Goldstajn opines that the Model Law is based on the principle of freedom of contract, according to which the parties are free to determine numerous terms of the contract.¹⁴⁰

Another distinguished scholar, Julian D. M. Lew has also acknowledged the importance of this principle. In her words

Party autonomy gives the contracting parties the power to fashion their own remedial process within the limits of public policy. It follows from this principle that the arbitration agreement reflects the individual interests within the framework of bilateral and multilateral transactions, albeit agreed upon by both parties. For instance, a party from the Middle East may desire a provision calling for the appointment of at least one Middle Eastern arbitrator, such a provision would satisfy the individual interest and concerns of the party without prejudicing the other party.¹⁴¹

The paramountcy of this principle cannot be over-emphasised. Parties are advised to take full advantage of this principle otherwise the provision of the law/rules will apply. In

¹³⁹ Articles 3(1), 11(1), 13(1), 17, 19, 20,21,22, 24, 25, 26, 28, 31(1) and 33 of the Model Law

¹⁴⁰ Goldstajn A "Choice of International Arbitrations, Arbitral Tribunals and Centres: Legal and Sociological Aspects" in Sarcevic P (ed) Op. Cit at 28

¹⁴¹ Lew, Julian D. M. "Arbitration Agreements: Form and Character" in Sarcevic P (ed) Op. Cit at 51

other words, the provisions of the law, and rules will apply if there is no agreement by the parties to the contrary.

It is apposite to assert that where parties agree to adopt the rules of an established arbitral institution, they should bear in mind that there are those that can be modified in full¹⁴² and others that have limitations on modifications.¹⁴³ Alternatively the parties can take standard set of rules and supplement them with more detailed rules.¹⁴⁴

3.3 FORM OF AGREEMENT

Under customary and common law, there is no requirement that an arbitration must be in writing though most national laws provide for this. However, this uncertainty is now settled by the Model Law which provides that an arbitration agreement shall be in writing. According to Article 7(2) of the Model Law

An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.¹⁴⁵

This has found statutory expression in section (1) of the Act. It is therefore a fundamental requirement that arbitration under the Act must be in writing. It is not a requirement that there must be a formal agreement or that all the terms of the contract should be contained in one document. This is so because sub-section 2 of section 1 provides that

any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.¹⁴⁶

¹⁴² For example the UNCITRAL Arbitration Rules

¹⁴³ For example the Rules of the ICC Court of Arbitration

¹⁴⁴ Hermann Op Cit at 12

¹⁴⁵ See also Article II (2) of the 1958 New York Convention

¹⁴⁶ See also Article 7(2) of the Model Law

This is usually referred to as incorporation by reference.¹⁴⁷ There is no legal requirement that the agreement must be under seal except where one of the parties is a corporation. The contents of the agreement will depend on whether the arbitration is *ad hoc* or institutional. It is a fundamental requirement of the law of contract that parties must be *ad idem*. In arbitration does this imply mutuality? In other words, where in an arbitration agreement, arbitration can only be initiated at the instance of only one of the parties, is there any mutuality? There has been controversy as to whether mutuality is necessary or not.¹⁴⁸ In *Baron v Sunderland Corporation*¹⁴⁹ the Court of Appeal (English) held that it is a necessary ingredient of arbitration that it confers bilateral right of reference on both sides. However in *Pittalis and Ors v Sherefettin*¹⁵⁰, the Court of Appeal (English) re-defined this requirement, seeing no lack of mutuality in an agreement between two persons which conferred on one of them alone the right to refer the dispute to arbitration.

In their view, Sutton *et. al.* posit that

This is authority that it is not now the law that any arbitration agreement must allow either party to initiate a reference, but the court will consider whether adequate protection is provided by the contractual machinery for the party who is not empowered to initiate a reference to arbitration¹⁵¹

What is the position of the Nigerian Courts on this? There seem to be no judicial pronouncement on this. However, Ezejiofor, in commenting on this issue merely discussed the English case law and the positions of Russell and Halsbury to the effect that mutuality is unnecessary¹⁵². It is submitted that this can not represent the position in Nigeria. Parties must not only be *ad idem* but should have equal rights to resort to arbitration. A bilateral

¹⁴⁷ Orojo J. O. and Ajomo M. A. Op. Cit at 104, Akpata, Op. Cit at 20 and Ezejiofor Op. Cit at 32, See also *Commerce Assurance Ltd v Alli* (1992) 3 NWLR (pt 232) 710 at 721-722

¹⁴⁸ See the *Obiter dictum* in *Ronassen & Son v Metsano-mistajain Mertsakestus O/Y* (1931) 40 Lloyds Rep 267 where it was held that mutuality was unnecessary

¹⁴⁹ (1966) 2, Q. B. 56

¹⁵⁰ (1986) 2 WLR 1003

¹⁵¹ Sutton et al Op. Cit at 52

contract that confers a right to arbitrate on one party only cannot be held to be mutual. Indeed if the right is exercised without the consent of the other such exercise should be held to be repugnant and unconscionable. This position is reinforced by the fact that the party which has the option may fail to exercise it. If there is a *Scott v Avery* clause in such a contract, substantial injustice will be done.

Generally, there are two types of arbitration clauses: one contemplates the settlement of an existing dispute called a "submission agreement" and the other relates to future dispute and called "arbitration agreement". This second type is by far the most usual source of arbitrations.¹⁵³

It is conventional to distinguish between these two types of arbitrations. Indeed some national laws expressly distinguish between them.¹⁵⁴ In Latin and South American countries, their legal systems do not recognise agreements to arbitrate future disputes.¹⁵⁵ Consequently, there seem to be uncertainty surrounding arbitration agreement.

It is noteworthy that despite this uncertainty, writers, scholars and practitioners use both "submission agreement" and "arbitration agreement" or "arbitration clause" extensively. Besides, international conventions and instruments recognise their use¹⁵⁶. These international instruments require states to recognise any arbitration agreement as long as the dispute arises in international trade. The effect of these is that the instruments have strengthened arbitral agreements. Over and above all these instruments, Article 7(1) of the Model Law provides thus

An "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether

¹⁵² Ezeji for Op. Cit at 35

¹⁵³ See Lew Op. Cit at 52 and *Commerce Assurance Ltd v Alli*, supra

¹⁵⁴ Articles 1442 and 1447 of the French Code of Civil Procedure and Sections 1026 of German Code of Civil procedure

¹⁵⁵ Lew, *Id*

¹⁵⁶ Article 1 of the Geneva Protocol of 1923, Article II of the 1958 New York Convention and Article 1 of the Geneva Convention of 1961

contractual or not. *An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement*¹⁵⁷

A dispute or difference or controversy or claim which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference or dispute can be compromised lawfully by way of accord and satisfaction. According to Agbaje, JSC in *Kano State Urban Development board v Fanz Construction Ltd*¹⁵⁸

.....there is no dispute within the meaning of an agreement to refer disputes where there is no controversy in being, as, when a party admits liability but simply fails to pay, or when a cause of action has disappeared owing to the application, where it applies, of the maxim *actio personalis moritur cum persona*

The scope of a reference to arbitration should be clearly delineated. The wordings of the clause establishes the area of jurisdiction of the arbitral tribunal. In other words, the terms of the reference must be clear and unambiguous. According to Sutton *et. al.*

To be valid, the terms of an arbitration agreement must be clear and certain. This is assessed in the same way as the validity of any contract. An arbitration agreement is void if its terms are uncertain or there is no clear reference to arbitration. Even if not void, disputes about the meaning of terms, their incorporation and so forth can be costly and delay an attribution.¹⁵⁹

*In Finnegan v Sheffield City Council*¹⁶⁰, a construction contract which contained a clause to the effect that the question whether disputes under the contract were to be referred to arbitration was to be a matter for further negotiation was held not to be an arbitration clause. However in *Navigazione Alta Italia SPA v Concordia, Maritime Chartering AB*

¹⁵⁷ Emphasis mine

¹⁵⁸ Supra at 23

¹⁵⁹ Sutton et al Op. Cit at 27

¹⁶⁰ (1988) 43 B. L. R. 124

(*The "Stena Pacifica"*)¹⁶¹ a time charter contained a conditional or optional agreement to refer future dispute to arbitration, with the English courts having jurisdiction if the option were exercised or the condition not met, the court held that this did not prevent it from being a valid arbitration agreement.

The courts respect the freedom of the parties to enter into an arbitration agreement in the same way that it respects their freedom to enter into other contracts¹⁶². As a result the courts give effect to arbitration agreements except in cases of hopeless confusion. In *Lovelock Ltd v Exportless*¹⁶³ an agreement contained a clause referring "any dispute and/or claim" to arbitration in England. It was followed by a clause referring "any other dispute" to arbitration in Russia. It was held that the arbitration agreement was void for ambiguity and was neither effective nor enforceable.

The words "all differences", "all disputes", "all claims", are usually found in such clauses followed by "arising out of the contract" or "arising under the contract". These raise the issue of the scope of the reference. A general reference of all disputes by a contract with an arbitration clause, as for instance a commercial contract, articles of partnership or the article of association of a limited company is generally limited by the nature of instrument to disputes arising out of or in connection with the main articles of agreement. In such cases, the question may arise, for example in proceedings to stay action or to enforce or set aside the award whether the arbitration claim covers a particular claim or dispute. According to Agbaje, JSC in *Kano State Urban Development Board v Fanz Construction Ltd*¹⁶⁴

An arbitrator has jurisdiction to decide only what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority, and consequently the whole of

¹⁶¹ (1990) 2 Lloyd's Rep 234

¹⁶² Sutton et al at Op. Cit at 28

¹⁶³ (1968) 1 Lloyd's Rep 163

¹⁶⁴ Supra at 34

the arbitration proceeding including the award of the arbitrator will be null and void and of no effect.

On the authorities of *Anisminic v Foreign Compensation Commission*¹⁶² and *Nigeria Ports Authority v Panalpina World Transport*¹⁶⁶ if the arbitrator even in perfect good faith misconstrued the provisions giving it power to act and thereby failed to deal with the questions remitted to it but decided some question which was not remitted to it his decision in the arbitration proceedings will be a nullity¹⁶⁷.

The words "arising out of a contract" have been said to have a wider meaning than "arising under a contract" as the latter has been said not to cover rectification claims¹⁶⁸. It is advisable therefore to adopt arbitration clauses to cover future, as yet unknown, disputes in the widest possible terms¹⁶⁹. A formula like "any dispute or difference which arises or occurs between the parties in relation to any thing or matter arising out of or under this agreement" is recommended.¹⁷⁰ It is noteworthy that even most standard clauses are less comprehensive¹⁷¹.

The form of an arbitration agreement is a function of its intended purpose. We have earlier distinguished between present and future disputes (submission agreement or arbitration agreement) and a choice between *ad hoc* and institutional arbitration. If the clause is that of *ad hoc* arbitration, then the indispensable elements must be provided for. It must be stressed that the drafting of *ad hoc* arbitration agreement is fraught with difficulty and complexity. The matters usually provided for include the scope and the subject of the arbitration, the arbitration rules, number and appointment of arbitrators, place of arbitration,

¹⁶⁵ (1969) 1 All ER 208 at 213

¹⁶⁶ (1969) 5 SC 77

¹⁶⁷ See also *Kano State Urban Development Board v Fanz Construction Ltd.*, Supra at 35

¹⁶⁸ *Heyman & Ors V Dawins Ltd* (1942) AC 356

¹⁶⁹ Sutton el at Op. Cit at 64

¹⁷⁰ *Government of Gibraltar v Kenney* (1956) 2 Q. B. 410 See also LCIA Clause

¹⁷¹ For example the ICC recommends wording like "All disputes in connection with the present contract"

applicable law, nature of hearings, language, timetable, appeal, security for costs and immunity of arbitrators. The beauty of this freedom to agree on these is that the agreement can be “tailor-made” by the parties¹⁷². However, if the arbitration is institutional then the standard clause recommended by the institution should be used. Once the institution is selected, its rules will be applied to the arbitration. As will be seen shortly, both *ad hoc* and institutional arbitration have their merits and demerits.

An arbitration agreement may contain the so-called “*Scott v Avery Clause*”.¹⁷³ This is a clause that makes arbitration of disputes a condition precedent to any court action. In other words, the parties to a contract may properly agree that no court action shall be brought upon it until an arbitral award has been made or (what amounts to the same thing) may agree that the only obligation arising out of a particular term of the contract shall be to pay whatever sum an arbitral tribunal may award¹⁷⁴. This clause does not prevent litigation being initiated in respect of a contract containing a clause of this type, but the condition precedent is a defence to an action.¹⁷⁵

Another important class of arbitration clause is known as “*Atlantic Shipping Clause*”¹⁷⁶. This clause aims at preventing arbitration by stipulating that if arbitration did not take place within a given period, parties may be barred from recourse to arbitration. The effect of such a clause is that it makes parties to take reasonable steps to initiate and conduct the arbitration otherwise the aggrieved party has the right to take legal proceedings once the period stipulated for arbitration expires. If an arbitration clause is properly drafted the *Scott*

¹⁷² Sarcevic, P (ed), Op. Cit at 60

¹⁷³ *Scott v Avery* (1856) 25 L. J.Ex. 308 and *Obembe v Wemaboard Estates Ltd* (1977) 5 SC 129

¹⁷⁴ Sutton et al at Op. Cit at 54. See also *WKR Hallam & Niger Guards (Nig) Ltd v AG (Plateau)* (1996) 9 NWLR (Pt 471) 249

¹⁷⁵ *Viney v Bignold* (1887) 20 Q.B.D. 172

¹⁷⁶ *Atlantic Shipping & Trading Co. Ltd v Louis Dreyfus* (1992) AC 250

v Avery and Atlantic Shipping Clauses can be inserted in the clause. Such insertion will ensure that there is no unreasonable delay in initiating arbitral proceedings and the proceedings condition precedent to litigation.

In a document recently published by the United Nations Commission on International Trade Law,¹⁷⁷ one of the possible areas of future work of the Commission is the requirement that an arbitration agreement must be in written form. The document highlighted the exchange of letters and telegrams as a form of writing. There is usually a tacit or oral acceptance of such communications. Ordinarily, this will not meet the requirement of writing since under the Model Law, the agreement must be signed. Under English law, signature is unnecessary¹⁷⁸. As has been highlighted¹⁷⁹, oral agreements generally lead to uncertainty and litigation while lack of signature may lead to controversy regarding the validity of the agreement.

3.4 PRINCIPLE OF SEPARABILITY

An arbitration agreement can be seen as a special type of clause/agreement. It provides for how some or all disputes under the contract in which it is contained are to be resolved¹⁸⁰. This raises the issue concerning the effect of such a clause when the main contract has either been performed or brought to an end by breach or declared void or voidable. It is now settled law, that the clause survives the main contract under the principle/doctrine of separability or severability. The principle is a legal fiction essential to the efficient working of the arbitral process and developed in England in a long line of landmark decisions. In *Heyman & Ors v Darwins Ltd*¹⁸¹ the House of Lords dismissed the

¹⁷⁷ United Nations Document No A/CN.9/640 of 6 April, 1999 titled "Possible Future Work in the Area of International Commercial Arbitration"

¹⁷⁸ Section 5(2) of the English Arbitration Act See also Sutton et al Op. Cit at 44

¹⁷⁹ Supra

¹⁸⁰ *Union of India v McDonnell Douglas Corporation* (1993) 2 Lloyd's Rep 48

¹⁸¹ Supra. See also Bernstein, et al, Op. Cit at 27 and Sarcevic P, Op. Cit at 55

theory that an arbitration clause is terminated by breach of the contract of which it was part and held thus:

.....what is commonly called a repudiation or a total breach of contract ... does not abrogate the contract though all further performance of the obligations undertaken by each party in favour of the other party may cease. It (i.e. the contract) survives for the purpose of measuring claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of (this) contract have failed, but the arbitration clause is not of the purposes of the contract.

The principle was also predicated on the presumption that the parties have agreed to one round of dispute resolution and that is, arbitration and not several. In *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*¹⁸² it was held that the presumption “merely reassures one that the natural meaning of the words (of the arbitration agreement) produce a sensible and businesslike result”. This is so because the arbitration clause is treated as a separate and independent agreement which generally survives the termination of the underlying contract¹⁸³. Under the doctrine, the arbitration clause constitutes a self-contained contract collateral or ancillary to the underlying or main contract.¹⁸⁴

Other than case law, this doctrine has now been statutorily expressed. Accordingly Article 16(1) of the Model Law provides, in part, that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.¹⁸⁵ We humbly submit that the principle is fundamental to arbitral proceedings otherwise the whole purpose of resorting to the arbitration will be defeated if the contrary

¹⁸² *Supra*

¹⁸³ Sutton et al Op. Cit at 57. See also *Heyman & Ors V Darwin Ltd*, *Supra* and *Ezejiofor Op. Cit* at 67

¹⁸⁴ *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd* (1981) 1 Lloyd's Rep 253

¹⁸⁵ Section 12 of the Act and Section 7 of the English Arbitration Act 1996

were the case. However, there seem to be a typographical error in section 12 of the Act.

This is so because whereas Article 16 of the Model Law provides, in part, thus:

..... an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the *invalidity* of the arbitration clause.

Section 12(2) provides, in part, thus

..... an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the *validity* of the arbitration clause

It is obvious, therefore, that while the Article used the word “invalidity” as italicized, section 12(2) of the Act used the word “validity”, as italicized. Bearing in mind that the jurisdiction of the arbitral tribunal is derived from this clause, it will amount to a derogation of the principle of separability if the invalidity of the contract affects that of the clause. They are clearly independent and separable. This subsection is in need of review to bring it in line with accepted principle in arbitral law and practice.

3.5 CHOICE OF AD HOC OR INSTITUTIONAL ARBITRATION

The Model Law defines "arbitration" as any arbitration whether or not administered by a permanent arbitral institution.¹⁸⁶ The implication of this is that an arbitration can be conducted by an arbitral institution or on an *ad hoc* basis. We intend to discuss what informs the choice of either mode and consider their advantages and disadvantages.

Historically, private institutions and professional bodies owned arbitral institutions. These institutions were in developed countries. Indeed, the adoption of the UNCITRAL Arbitration Rules and the Model Law increased the participation of developing countries in arbitration. The UNCITRAL Arbitration Rules have in turn, been adopted with modifications, by regional centres like the Lagos and Kuala Lumpur Centres of the

Asian-African Legal Consultative Committees. Consequently, the choice between *ad hoc* and institutional arbitration is generally not only based on juridical considerations but also on political, sociological and psychological elements. Goldstajn captured the picture graphically when he asserted that

Arbitration could be regarded as a sociological phenomenon. Practice has shown to what extent political, psychological and even philosophical elements are decisive when the parties choose between institutional and *ad hoc* arbitration¹⁸⁷

To these must be added two complementary aspects: practical and judicial. How can parties from differing socio-economic and cultural groups reach a consensus as to the type of arbitration. In the words of Goldstajn

The answer varies depending on the situation. It will depend primarily on where the parties are from, to what country, social and legal system they belong, their experience in selecting arbitrator who, in their opinion could settle a particular dispute independently and impartially, etc.¹⁸⁸

As a guide to the parties in making their choice, it is apposite to consider how arbitrators are chosen. In the case of institutional arbitrations, the institutions offer their services to the parties in an organised form placing their arbitration facilities at their disposal and administering the proceedings. The institutions have established rules that are generally self-contained. In such rules, there is provision for appointing arbitrators if the parties fail to do so. Furthermore, some arbitral tribunals are so well known and organized that their awards are predictable and also enjoy considerable respect in the business community. Arbitrators in such institutions are generally preferred by parties.

¹⁸⁶ Article 2(a) of the Model Law

¹⁸⁷ Goldstajn, Op. Cit at 32

¹⁸⁸ Goldstajn Loc. Cit. See also Lalive, P “On the Neutrality of the Arbitration and the Place of Arbitration” in Reymond C and Bucher, E (eds) *Swiss Essays on International Arbitration* (Zurich: n.p.; 1984) PP 27 and 30 and Ezejiofor Op. Cit at 136

On the other hand, *ad hoc* arbitrations actually confer on the parties, the principle of party autonomy. As they do not have pre-established rules of organisation and proceeding, unless they adopt rules like that of UNCITRAL, the parties must provide for the reference to arbitration, the legal capacity of the parties¹⁸⁹ the number of arbitrators, their mode of appointment, power and how they can be challenged, the place of arbitration, applicable law, language of the arbitration and other matters peculiar to the arbitration¹⁹⁰

The main disadvantage of institutional arbitration is that it tends to be expensive especially where the amount in dispute is large and the administrative charges are on *ad valorem* basis (like the ICC arbitration). Furthermore delays are inherent in such proceedings especially because of the bureaucratic machinery of the institutions.

In the case of *ad hoc* the main drawback is where there is lack of cooperation between the parties. This is compounded by the fact that unless the parties agree to adopt institutional rules, lack of cooperation will affect not only the initiation but also the conduct of the arbitral proceedings.¹⁹¹ It is advisable therefore that even where arbitration is *ad hoc* adopting institutional rules with modification is worthwhile.

3.6 CHOICE OF ARBITRATION RULES

Ordinarily, a choice of arbitration rules pre-supposes institutional arbitration. However, in cases of *ad hoc* arbitration, the parties may opt to adopt the rules of any arbitral institution. Procedural rules are offered by many institutions for use in arbitration. According to Sutton *e.t al.*

¹⁸⁹ For example specific provisions for Infants, persons of Unsound Mind, Bankrupt, States and Corporations

¹⁹⁰ Orojo and Ajomo Op. Cit at 104, Castel, J.G. "International Commercial Arbitration" in Edmond Op. Cit at 128 and Ezejiofor Op. Cit at 65

¹⁹¹ Ezejiofor Op. Cit at 138

the United Nations does not supervise arbitrations but its UNCITRAL Rules are useful for *ad hoc* arbitrations particularly because they offer an effective means of appointing the tribunal.¹⁹²

Arbitral institutions exist to provide arbitration services, either as their sole or principal purpose, or as ancillary to other functions of a trade or professional association. They also play important roles in arbitration agreements because the institutions are specified in the arbitration agreement in various ways, namely, either.

- (a) as the appointing authority, or
- (b) as the body supervising the arbitration or
- (c) as the body providing rules, or
- (d) in one, two or all of these roles¹⁹³

In choosing arbitration rules therefore, the parties should consider the individual provisions within sets of institutional rules to determine which rules suit their interests. For instance, do the parties want to give the arbitral tribunal the additional powers that the London Court of International Arbitration Rules provide for¹⁹⁴ or the tribunal should not act as *amiable compositeur* as provided by the ICC Rules?¹⁹⁵ Some arbitral institutions give absolute and others qualified immunity.¹⁹⁶ Does this immunity extend to administrators, employees and agents of the arbitral institutions? This should be clearly spelt out.

In choosing arbitration rules, it should be borne in mind that the institutions also have arbitration clauses. The wording of such clauses vary from one arbitral institution to another. Care should be taken therefore that the wording actually reflects the intended arbitral institution.¹⁹⁷

¹⁹² Sutton et al Op. Cit at 82

¹⁹³ Id. at 107

¹⁹⁴ Article 22 of the LCIA Rules, 1998

¹⁹⁵ Article 17.3 of the ICC Rules of 1998

¹⁹⁶ In England, this is now statutorily provided for. See Section 74(1) of the 1996 Arbitration Act

¹⁹⁷ See generally Ezejiofor Op. Cit. at 139-159

3.7 APPLICABLE LAW

In arbitral proceedings, one area in which the principle of party autonomy is predominant is in the choice of applicable laws. Under this principle, the parties are free to choose the laws applicable to their arbitral proceedings. Accordingly, Article 28 of the Model Law provides thus

1. The arbitral tribunal shall decide the dispute in accordance with such rules of Law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise agreed, as directly referring to the substantive law of that state and not its conflict of laws rules.
2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
3. The arbitral tribunal shall decide *ex aequo bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.
4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

This has found statutory expression in section 47(1) - (5) of the Act. Generally the applicable law is either a national law or the conflict of law rules will be invoked.

However, section 47 has sub-section (6) which provides thus

If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the arbitral tribunal shall comply with this requirement within the period of time required by law.

These provisions can be discussed under various headings¹⁹⁸. For ease of exposition, we shall break the provision down into three areas, namely substantive law, law

¹⁹⁸ Orojo and Ajomo Op. Cit at 28-35. See also Bernstein, Op. Cit at 560 and Ezejiofor Op. Cit at 167

of arbitration agreement and procedural law. This accords with the position taken by Sutton *et. al.*¹⁹⁹ By virtue of the provisions of section 47 (6) of the Act, we can add a fourth area, namely law of place of enforcement, which may be different from the law of the place of award. There is also the *lex mercatoria* and inclusion of "equity clauses".

The choice of applicable law is very fundamental. This is so because the dispute will be decided in accordance with it. The parties are bound by the law that they have chosen²⁰⁰ Different laws can operate simultaneously on different aspects of the arbitration and if the parties fail to make express choice and/or fail to make a clear choice of the applicable law then the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable having due regard to *lex mercatoria* or equity clauses, where applicable.

3.7.1 Substantive Law (Proper Law Of The Contract)

This is the law governing the performance of the obligations under the main contract. This is also known as the "governing law" or the "proper law of the contract." Where the parties have expressly chosen the law, for example the law of Nigeria, as the law applicable to the substance of the dispute, then the tribunal must decide in accordance with the relevant rules of law in force in Nigeria.²⁰¹ Where the law or legal system is so determined by the parties, unless otherwise expressed the law shall be construed as referring to the substantive law of that country and not its conflict of laws rules²⁰². It is noteworthy that whereas the Model Law refers to "such rules of law as are chosen by the parties", the Act refers to "the rule in force in the country whose laws the parties have chosen".

The "rule in force in the country" which simply means the law of or the legal system in Nigeria. Thus, the Act would seem to restrict the parties to the law of Nigeria

¹⁹⁹ Sutton et al Op. Cit at 67

²⁰⁰ See *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* (1971) AC 752 at 604

while under the Model Law, they do not have to choose a national legal system. It is humbly submitted, therefore, that the area of coverage in the provision in the Model Law is wider than that in the Act. We share the view of Professor Ole Lando when he asserted thus:

The Model Law will allow the parties to choose the rules of law applicable to the substance of the dispute. They do not have to choose a national legal system. This is a concession to the advocates of *lex mercatoria* and other non-national sources of law²⁰³

The provision in the Act is unnecessarily restrictive. Could this be the intention of the lawmakers? It is submitted that the provision is irreconcilable with section 47(5) which provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade applicable to the transaction. Under this sub-section, the tribunal can apply *lex mercatoria*. The better view therefore seems to be that sub-section 1 should be read subject to sub-section 5 otherwise the provision of sub-section 1 is an unnecessary restriction of the freedom of the parties to choose the applicable law.

Where the parties do not make an express choice of the governing law, sub-section 2 of section 47 empowers the arbitral tribunal to determine the law by the conflict of laws rules which it considers applicable. It is in the interest of the parties to choose the applicable law and if they fail to, there may be uncertainty. This will arise from invoking conflict of laws rules. If there is no express choice, it is possible to infer a choice of law from the terms of the contract and the surrounding circumstance.²⁰⁴ Although sub-section 3 gives the arbitrator a discretion to apply the conflict of laws rules which he considers applicable, it is contentious whether he can apply any conflict rule or that of the forum.²⁰⁵

²⁰¹ Section 47(1) of the Act

²⁰² Section 47(2) Id. See generally Orojo and Ajomo Op. Cit at 29

²⁰³ Lando, Ole "The Law Applicable to the Merit of the Dispute" in Sarcevic, P (ed) Op. Cit at 133

²⁰⁴ *Compagnie d, Armement Maritime S A v Compagnie Tunrisenne de Navigation SA Supra* at 595

²⁰⁵ Lando Op. Cit at 137

In *Tzortist v Monark Line A/B*²⁰⁶ it was held that there was a rebuttable presumption that the proper law is the law of the forum. Naturally, the presumption may be rebuttable for a number of reasons. According to Orojo and Ajomo:

This may of course be rebutted for a number of reasons as showing that the forum was chosen for a totally different reason for example, the forum may be chosen for convenience, for its neutrality or indeed the available facilities for arbitration²⁰⁷

In a case where there is no express or implied choice, the common test is: with which legal system does the transaction have its closest and most real connection?²⁰⁸ Of course in international commercial arbitration, there are many connecting factors e.g. the law of the place where the contract was made (the *lex locus contractus*), the law of the place where the contract is to be performed (the *lex locus solutionis*), the seat of arbitration, and the national law of a state party to the contract where one of the parties is a state or state agency.

According to Sutton *et. al.*

If the parties expressly chose a seat but makes no express choice of the law which is to govern the performance of the obligations under the contract, that choice of seat was capable of being determinative of the choice of the governing law of the performance obligations²⁰⁹

Support for this view can be found in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*²¹⁰ where standard form building contract with an arbitration clause was made between an English company which owned land in Scotland and a Scottish company which was to do work on that land. The contract did not disclose a choice by the parties of either the governing law or the procedural law. The House of Lords

²⁰⁶ (1968) All ER 949

²⁰⁷ Orojo and Ajomo Op. Cit at 30

²⁰⁸ Sutton et al Op. Cit at 69

²⁰⁹ Sutton et al Loc. Cit

²¹⁰ (1970) AC 583

held that the proper law of the contract was English law, because of the use of the RIBA form of contract and that the procedural law of the contract was Scots law because of the conduct of the parties.

In *Compagnie d'Armement Maritime SA v Compagnie de Navigation SA*²¹¹, the House of the Lords held thus:

An agreement to refer disputes to arbitration in a particular country may carry with it, and is capable of carrying with it an implication or inference that the parties have further agreed that the law governing the contract (as well as the law governing the arbitration procedure) is to be the law of that country.

We submit, with respect, that such an agreement should not be treated as giving rise to a conclusive and irresistible inference.

Under sub-section 4 of section 47, the arbitral tribunal shall decide *ex aequo et bono* (in conscience and good faith) or as *amiable compositeur* if the parties expressly authorise it to do so. This is usually referred to as “equity clause”. Again, this gives wide discretionary powers to the tribunal. Where the parties so authorise the tribunal, it means that it is not obliged to decide the dispute in accordance with strict legal rights only. Such equity clauses come in various names and concepts known as “honourable engagement”, “*amiable compositeur*”, “equity”, “the general principles of law recognised by civilized nations” or the “*lex mercatoria*”²¹². The courts’ attitude to such clauses have been inconsistent. For example in *Deutsche Schachtbau-und Tiefbohrergesellschaft mbH v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. (Nos.1 and 2)*²¹³, it was held by the English Court of Appeal that an enforcement of an international arbitration award should not be denied because the arbitral award applied “internationally accepted principles

²¹¹ Supra at 588

²¹² See generally Sutton et al Op. Cit. at 163

²¹³ (1988) 2 Lloyd’s Rep. 293

of law governing contractual relations” in an arbitration governed by Swiss Law. The award was valid in Switzerland.

*In Home and Overseas Insurance Co. Ltd v. Mentor Insurance Co. (U.K.) Ltd (in liquidation)*²¹⁴ the English Court of Appeal upheld a clause under which the tribunal were to interpret the contract as

“honourable engagement with a view to effecting (its) general purpose in a reasonable manner rather than in accordance with a literal interpretation of the language.”

From our discussions so far, it is obvious that the proper law of the contract may be different from the law of the arbitration agreement and that of the procedural law. As succinctly put by Sutton *et. al.*

... one can deduce that the proper law is not necessarily the same as the law of arbitration; and where there is express provision about the proper law, even if the choice is unclear, considerable weight will be attached to it; and that where the only connection with a country is the arbitration venue, that connection will not be conclusive. The inference is not drawn however, where the place of arbitration is to be selected by a third party as the ICC or where the arbitration clause contemplates alternative places of arbitration²¹⁵

3.7.2 Law of the Arbitration Agreement

The point has been made that the arbitration agreement is distinct and separate from the main contract based on the principle of separability or severability.²¹⁶ The law of arbitration agreement or *lex arbitri* may be different from the governing law. The parties may choose different proper laws for the two agreements, and other factors may indicate that different laws should apply. Even within the arbitration agreement itself, the parties may agree that different laws may govern the substance of and the procedure for the

²¹⁴ (1990) 1 W.L.R. 153

²¹⁵ Sutton et al Op. Cit at 70. See also *Star Shipping AS v China National Foreign Trade Transportation*

arbitration. For example *ad hoc* arbitrations drawn up after a dispute has arisen do not form part of the main contract and there may be less reason to apply the same proper law.²¹⁷

Where the parties have made no specific choice of law for the arbitration agreement the applicable law may be the law of the country where enforcement is sought under the 1958 New York Convention²¹⁸.

In *Heavy Industries Ltd v Oil and National Gas Commission*²¹⁹ _ Potter J stated that the proper law of the arbitration agreement covered, *inter alia*,

questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the constitution of the tribunal and the question whether an award lies within the jurisdiction of the arbitrator.

In *Dalima Dairy Industries Ltd v National Bank of Pakistan*²²⁰, it was held that the proper law of an arbitration agreement includes in particular the interpretation and validity of the agreement. Other matters include voidability and discharge of the agreement to arbitrate. An issue as to whether a particular dispute falls within the wording of an arbitration clause will therefore be governed by the proper law of the arbitration agreement. In *Norske Atlas Insurance Commune Ltd v London General Insurance Company Ltd*²²¹, an arbitration award was issued in Norway. The English insurance company, the respondent, resisted enforcement of the award in England on the ground that the insurance policy which was the subject matter of the dispute had not been stamped. The court found that the validity of the award was a matter determined by the governing law of the arbitration

Corporation (The Star Texas) (1993) 2 Lloyd's Rep. 445

²¹⁶ *Supra*

²¹⁷ Sutton et al Op. Cit at 72

²¹⁸ *Star Shipping AS v China National Foreign Trade Transportation Corporation* (The "Star Texas"), *Supra*

²¹⁹ (1994) 1 Lloyd's Rep. 45 at 57

²²⁰ (1978 2 Lloyd's Rep 223

²²¹ (1927) 28 L.L. Rep 104

agreement, which was that of Norway and that the Norwegian law did not concern itself with questions of stamping.

We are warned by Sutton *et. al.*²²² that the line between substantive matters relating to the arbitration agreement governed by the law of arbitration agreement and procedural matters relating to a reference under that agreement governed by the procedural law of the arbitration is not always easy to draw²²³. We share this view.

3.7.3 Procedural Law (Lex Fori)

Generally, the procedural law is that of the place of arbitration. Consequently, it is a fundamental requirement in arbitral proceedings that an arbitration must have a "seat"²²⁴. A seat as a geographical location prescribes the procedural law of the arbitration. In *Union of India v McDonnell Douglas Corporation*²²⁵, it was held that the parties are free to choose a seat, or more specifically a procedural law for their arbitration, which may be different from the proper law of the contract and the proper law of the arbitration agreement.

Most jurisdictions do not recognise the possibility of "delocalised" arbitral procedures which do not have a connection with any national system of laws.²²⁶ Under English law and by extension Nigerian Law, the procedural law of an arbitration is generally the law of the country in which the arbitration has its seat²²⁷.

²²² Sutton et al Op. Cit at 73

²²³ See also *International Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC* (1975 Q.B 224

²²⁴ The "Seat" here is not a physical seat, it is rather a juridical seat, a legal concept rather than the physical place of arbitration. It is a geographical location to which the arbitration is tied

²²⁵ Supra

²²⁶ *Bank Mellat v Helliniki Techniki SA* (1984) QB 291 at 301 where Lord Justice Kerr made it clear that "the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal law" is not recognised in England

²²⁷ Section 3 of the English Arbitration Act 1966. The word "seat" is not used in the Act. However section 16 of the Act refers to the place of arbitration

According to Orojo and Ajomo, the procedural rules may be determined by agreement of the parties, by the arbitral tribunal and by the *lex arbitri*.²²⁸ Accordingly section 53 of the Act provides thus:

Notwithstanding the provisions of this Act, the parties to an international commercial arbitration may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the arbitration rules set out in the first schedule to this Act or the UNCITRAL arbitration rule or any other international arbitration rules acceptable to the parties.

It is instructive to note that both the Arbitration Rules under the Act and the UNCITRAL Rules are virtually the same. Parties can however choose other rules like that of ICC, LCIA and AAA. Where the parties adopt the rules, the arbitral tribunal will conduct the proceedings in accordance with the rules and in such a manner as it considers appropriate, provided that both parties are treated with equality and fairness.²²⁹ If the parties do not choose their own rules, they will specify their own procedure or give the arbitral tribunal a specific power to regulate the proceedings.²³⁰

The importance of the seat of arbitration is underscored by the fact that one of the grounds on which recognition or enforcement of an award may be refused under section 52(2) (vii) of the Act is where the arbitral procedure was not in accordance with the law of the country where the arbitration took place²³¹.

It should be noted that the expression "seat" is often used to refer to a particular city chosen, rather than the country and while the parties agreement is on the city, the crucial

²²⁸ Orojo and Ajomo Op. Cit at 32. See also Articles 19 & 20 of the Model Law

²²⁹ Article 15 of the Arbitration Rules and Article 18 of the Model Law. See also section 15 of the Act dealing with domestic arbitration

²³⁰ Article 19(1) of The Model Law which provides that subject to the provisions of the Law, the Parties are free to agree on the procedure to be followed by the Tribunal in conducting the proceeding

²³¹ Articles 48(a) (vii) and V.I(d) of the Model Law and 1958 New York Convention respectively. See also *James Miller v Whittworth Street Estates*, Supra

choice is of the jurisdiction in which the city is located²³². Theoretically, it is possible for the parties to choose to hold an arbitration in one country but make it subject to the procedural law of another country. In practice this has created a lot of difficulties²³³. The courts have been pragmatic in interpreting such clauses and resolving the conflicts emanating from them.

In *Naviera Amazonica Peruana SA v Compania Internacional del Seguros del Peru*²³⁴ printed conditions provided for the jurisdiction of the courts in Lima, Peru. A typed clause providing for arbitration according to the conditions and laws of London was held to be an express choice of arbitration in London. Kerr L.J. asked the rhetorical question: How would the judge in Lima like to conduct a case according to English procedural law?²³⁵

The matters covered by the procedural law vary from country to country. However, it generally covers matters like the appointment and revocation of the authority of the arbitrator, powers and duties of the arbitral tribunal, challenges to the award and the question which law is to apply to the substance of the disputes²³⁶.

Conflicts may also arise between the procedural Law, the proper law of the contract and of the law of the arbitration agreement or the law of the place of enforcement, particularly on the issue of arbitrability, validity of agreement and the form and validity of the award. However, if the principle of party autonomy is properly utilized, this may not arise. As has been observed, the courts are usually pragmatic in such matters²³⁷.

²³² Sutton et al Op. Cit at 75

²³³ *Union of India v McDonnell Douglas Corporation, Supra*

²³⁴ (1988) Lloyd's Rep. 116

²³⁵ See also *Paul Smith v H & S International Holding Ltd.* (1991) 2 Lloyd's Rep. 127 and *India Oil Corporation v Vanol Inc.* (1991) 2 Lloyd's Rep 634

²³⁶ Collins, L et al (ed) *Dicey and Morris, Conflict of Laws* 12th Ed, (London: Sweet & Maxwell; 1993) P. 582.

²³⁷ See also *Dalima Dairy Industries Ltd. v National Bank of Pakistan, Supra*

The Model Law seems to have rejected the idea of delocalising or denationalising arbitral awards, the relevant connecting factor being the place of arbitration. Accordingly Article 1(2) of the Model Law provides that the place of arbitration is instrumental for the application of the Model Law. In other words the Model Law would apply in a state if the place of arbitration were in that state. For purposes of setting aside recognition and enforcement, place of arbitration is fundamental. According to Article 31 of the Model Law, the award shall state its date and the place of arbitration as determined in accordance with Article 20(1).

In principle, it is also possible for the law governing the arbitration procedures to be different from the proper law of the contract. This is analogous to a situation where court proceedings are held in one country concerning a contract governed by the law of another. Such procedural matters are governed by the *lex fori*.²³⁸ In other words, the courts can give effect to the choice of law other than the proper law of the contract. Even where the parties fail to choose a law governing the arbitration proceedings, the proceedings must be considered as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings.²³⁹

3.7.4 Lex Mercatoria

This has been provided for in section 47(5) of the Act²⁴⁰. Consequently whether the parties have chosen the applicable laws or the arbitral tribunal has determined them, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of usages of the trade applicable to the transaction. Thus, the components of *lex mercatoria* include trade usages.

²³⁸ *Don v Lippmann* (1837) JCI 7 FI

²³⁹ *Hamlyn & Co. v Talisker Distillery* (1894) AC 202 and *N.V. Kwik Hoo Tong Handel Maatschappij v James Finlay & Co. Ltd.* (1927) AC 604

²⁴⁰ See also Article 28(4) of the Model Law, Article 17.2 of the ICC Rules of 1998, Article 33(3) of the UNCITRAL Arbitration Rules of 1976 and Article 1054 of the Netherlands Arbitration Act of 1986.

The *lex mercatoria* is not new. Indeed, commercial arbitration as we know it today evolved from it and hence the appellation "the new *lex mercatoria*". The beauty of this concept is that it frees arbitration from direct subjection to any national law. Instead the arbitration is determined by customs and usages of international trade. Governments and private persons generally insert such clauses in their contracts. For the government this arises from its unwillingness to submit itself before the national law of a foreign country. On the other hand, the private person would not want to have the contract governed by the laws of a foreign country since the laws can be changed to the foreigner's disadvantage after the contract has been entered into. The situation was graphically captured by Lando where he asserted thus:

By choosing the *lex mercatoria* the parties avoid the technicalities of national legal systems as well as rules which are unfit for international contract. Thus they escape peculiar formalities, short periods of limitation, and some of the difficulties created by domestic laws which are unknown in other countries, for example, the common law rules on consideration and privity of contract²⁴¹.

Although, the *lex mercatoria* is still a diffused and fragmented body of law²⁴² and there is controversy about its existence²⁴³, it is capable of application. Consequently, for countries that have accepted the Model Law and the provisions of Article 28(4) it is now mandatory for arbitral tribunal to take *lex mercatoria* into account even where the parties have not expressly agreed to do so. This is a laudable provision in the Model Law and its adoption has neutralised the effect of national laws. Even in countries where there is controversy about the existence of *lex mercatoria*, if arbitral tribunals are allowed to decide

²⁴¹ Lando, Op. Cit at 144

²⁴² It is made up of rules of public international law, uniform laws e.g. Uniform Law on the Sale of Goods; general principles of law, rules of international organisations, customs usages, standard Form contracts, etc.

²⁴³ See the argument of the legalists and inventors in the Article by Lando, Op. Cit at 147.

as amiable composition, this can be extended to cover *lex mercatoria*²⁴⁴. However, the contrary cannot be the same.

3.7.5 Law of Place of Enforcement

An arbitral award can be made in one country to be enforced in another. When this is the case the arbitral tribunal should bear this in mind. For arbitration in Nigeria, one way of enforcement under the Foreign Judgments (Reciprocal Enforcement) Act²⁴⁵ is registration of the award in the High Court provided that at the date of the application for registration, the award could be enforced by execution in the country where the award is made.²⁴⁶ Indeed one ground for setting aside an arbitration award is where the award is against public policy of Nigeria²⁴⁷ or that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria.²⁴⁸

It is important therefore that due regard be paid to the law of place of enforcement to ensure that the resulting award complies with the mandatory requirement that they might impose e.g. the capacity to enter into an arbitration agreement will usually be determined by the law of the place where the agreement was entered into in case of an individual and the place of incorporation in the case of the company.

3.8 APPLICATION OF THE EVIDENCE ACT

In Nigeria, arbitral proceedings are not regulated by the Evidence Act²⁴⁹. However this is not to say that the rules of evidence are not applicable to arbitral proceedings. As observed by Orojo and Ajomo.

²⁴⁴ Lando Op. Cit at 155

²⁴⁵ Cap 152. LFN, 1990

²⁴⁶ See also Section 47(6) of the Act

²⁴⁷ Section 48(b)(ii) Id

²⁴⁸ Section 48(b)(I) Id. This raises the issue of arbitrability. See also *Kano State Urban Development Board v Fanz Construction Ltd.* *Supra*

²⁴⁹ Section 1(2) of the Evidence Act, Cap 112 LFN, 1990 as amended

The rule of evidence is wider than what the Evidence Act provides. While an arbitrator cannot be compelled to apply the provisions of the Act, he will find that in order to do justice and be fair, he will have to give more consideration to the more fundamental rules of evidence.²⁵⁰

Such fundamental rules relate to relevance and admissibility of evidence, oral, real and documentary evidence and witnesses. Accordingly section 15(2) of the Act provides that where the Arbitration Rules contain no provision in respect of any matter related to or connected with a particular arbitral proceedings, the arbitral tribunal may, subject to the Act, conduct the arbitral proceedings in such manner as it considers appropriate so as to ensure fair hearing, and that this power conferred on the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence placed before it. Similarly, Article 25(6) of the Arbitration Rules²⁵¹ provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

In England, it was contentious whether reference to English law meant reference to rules regarding admissibility of evidence, which was part of that law. In the words of Sutton *et. al.*:

A comprehensive review of the authorities revealed that an arbitral tribunal was probably not bound to apply the rules of evidence in an arbitration conducted in England, whether domestic or international²⁵²

The United Kingdom Arbitration Act of 1996 freed the matter from doubt by providing that, subject to any specific matter agreed by the parties, the tribunal should

²⁵⁰ Orojo & Ajomo Op. Cit at 217, 219-237. See also Ezejiofor Op. Cit at 81-82

²⁵¹ 1st Schedule to the Act

²⁵² Sutton et al Op. Cit at 13. See also Buxton, R. "The Rules of Evidence as Applied to Tribunals" (1992) 58(4) *Arbitration* 229-234

decide whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of an material sought to be adduced as evidence.²⁵³

3.9. REFERENCE TO ARBITRATION

Basically, disputes can be referred to arbitration in three main ways, namely, under the order of the court, under an enactment and by agreement of the parties. We will consider them in a little more detail.

3.9.1 Under an Order of Court

In Nigeria, the various High Courts (Civil Procedure) Rules²⁵⁴, provide for reference to arbitrators. Indeed, the current thinking in litigation is that the court should not be a mono-door court house where parties only litigate but a multi-door court house where arbitration, conciliation, mediation and other ADR processes are encouraged. In countries like the US, the courts use ADR processes more than private organizations.²⁵⁵ In the UK, the Woolf Report on "Access to Civil Justice" which culminated in the promulgation of the New Civil Procedure Rule²⁵⁶ is testimony to the importance of court-annexed arbitration and other ADR processes. The New Civil Procedure rules enjoin the court to actively manage cases and take steps for

.... encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.

²⁵³ Section 34(2)(f) of the Act. See also Article 19 of the Model Law

²⁵⁴ See for example Order 46, rule 1 of the High Court (Civil Procedure) Rules of Lagos State, Order 19, rules 1-14 of the High Court (Civil Procedure) Rules of Abuja, Order 19, rules 1-14 of the High Court (Civil Procedure) Rules of Plateau State.

²⁵⁵ Naughton, P. Op. Cit at 76.

3.9.2 Under An Enactment

In Nigeria, such enactments will include the Trade Disputes Act.²⁵⁷ Under such Acts, parties are compelled by law to settle disputes by arbitration or conciliation rather than disrupt economic activities by strikes and lock outs.²⁵⁸

The Act also provides for arbitration and conciliation. The Act provides for how an arbitration or conciliation is to be conducted.²⁵⁹

3.9.3 By Agreement of the Parties

This is the type of arbitration envisaged in this work. As has been observed²⁶⁰, arbitration evolved as private sector judicial proceedings. Initially, state intervention was minimal and the principle of party autonomy is an extension of the minimal role played by the state.

The agreement to arbitrate may be entered into at the time the contract is entered into (known as "arbitration agreement") or after the dispute has arisen (known as "submission agreement") and the agreed terms may be incorporated by reference²⁶¹

For arbitration under the Act to be valid, the agreement must be in writing.

3.10 CONCLUSION

In this chapter, we have considered the form and character of arbitration agreement. The subject-matter of an arbitration includes a dispute, difference, controversy or claim. Such a subject-matter must be arbitrable. In all arbitral proceedings, the parties are free to agree on the "rules of the game" and it is only where they fail to do so that the arbitral tribunal determines the rules.

²⁵⁶ The Rules came into effect on 26 April, 1999

²⁵⁷ Cap. 432, LFN, 1990

²⁵⁸ Sections 3, 5, 6, 7 and 8 of the Trade Disputes Act.

²⁵⁹ See also Schmitthoff C. M. and Sarre, D.A.G. *Charlesworth's Mercantile Law* 14th Ed, (London: Stevens & Sons; 1984) P. 688

²⁶⁰ Supra

²⁶¹ Section 57(5) of the Act

An arbitration clause may be an agreement entered into at the time the contract is being entered into (known as "arbitration agreement") or when the dispute has already arisen (known as "submission agreement"). The clause can be in a separate document and reference by incorporation. The arbitration clause is separate and distinct from the main contract. This is based on the "principle of separability or severability". In whatever form the clause is made, to be valid under the Act, it must be in writing.

Parties to an arbitration agreement have a choice between *ad hoc* and institutional arbitration. If *ad hoc*, some indispensable elements like the law applicable, appointment of arbitrators, language of arbitration and venue of arbitration must be present. On the other hand, if institutional arbitration, care should be taken to ensure that an appropriate institution is chosen. The choice of institution determines choice of clauses/rules. Under *ad hoc* arbitration, arbitral rules like the UNCITRAL Arbitration Rules can be adopted.

In arbitral proceedings, the concept of applicable law has more than one meaning. It can be the proper law of the contract, the proper law of the arbitration agreement, the procedural law, *lex mercatoria* or the law of the place of enforcement. Care should be taken, therefore, to ensure that there are no conflicts between these laws as they play various roles. Additionally, although the Evidence Act is not applicable to arbitral proceedings, the arbitral tribunals are usually guided by the rules of evidence.

Finally, arbitration arises in three broad ways, namely, by order of the court, by statute and agreement of the parties.

CHAPTER FOUR

EVALUATION OF THE LEGAL REGIME REGULATING INTERNATIONAL COMMERCIAL ARBITRATION

4.1 INTRODUCTION

In classifying laws, a distinction is usually drawn between municipal and international laws. One important sub-division within municipal laws is conflict of laws. The conflict of laws rules are normally invoked when a transaction or event has a foreign element.

An arbitration is "international" if the parties to the arbitration agreement have their places of business in different countries or one of the following places - place of arbitration, or place where the substantial part of the obligation is to be performed or place where the subject-matter of the dispute is closely connected - is situated outside the country in which the parties have their place of business; or the parties expressly agreed that the subject-matter of the arbitration agreement relates to more than one country; or the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.²⁶²

Thus, the foreign elements in an international arbitration include the nationalities of the parties, that of the arbitrators, the place of arbitration, place of enforcement and the applicable law. The applicable law usually impinge on different legal systems. According to Paulsson²⁶³ at least five different legal systems may become relevant during the course of international arbitration, namely the law that determines the capacity of the parties, the law that determines the validity of the arbitration agreement, the law governing the arbitration itself and in particular the procedure (*lex arbitri*), the law applicable to the substance of the

²⁶² Section 57(2) of the Act Cf Article 1 of the Model Law

²⁶³ Paulsson, J "International Commercial Arbitration" in Bernstein R et al , Op. Cit. at 60

dispute (*lex causae*); and if there is a conflict of applicable substantive law, the law under the conflict is to be resolved. We may add a sixth and that is the law applicable to the enforcement of the award where the place of enforcement is different from the place of arbitration.^{263(a)} Traditionally, the conflict of laws rules are invoked to determine the applicable law or the “governing law” or the “proper law” of the contract where there is no contrary agreement between the parties. This will, of necessity, involve considering more than one legal system.

In evaluating legal regimes regulating international commercial arbitration therefore, all conceivable legal systems ought to be evaluated. However, with the modern *lex mercatoria*, the Model Law, Conventions and Rules, international commercial arbitration has seen “internationalized” in the sense that there are international legal instruments regulating international commercial arbitration. Consequently, instead of evaluating more than one legal system, we will evaluate these legal instruments to determine their relevance, significance and efficacy. Our position is reinforced by the fact that sources of international law include, custom, treaties or conventions, decisions of judicial or arbitral tribunals and decisions or determination of the organs of international organizations²⁶⁴

Jurisprudentially speaking, evaluating international law is no mean task, *a fortiori* international commercial arbitration. This is so because there are no codes, statute books and other material sources in contradistinction to municipal laws where such evaluation is straightforward. This difficulty was alluded to by Starke when he considered the position of a legal adviser in a Foreign Office. In his view:

His task is by no means straightforward as that of a practising lawyer concerned only with state law. He has no codes, no statute books, and often he is in the realm of uncertainty either because it is not clear whether a customary rule of international law has been established or

^{263(a)} Idornigie, P O “Determining the Applicable Laws in Arbitral Proceedings” in *MODUS International Law & Business Quarterly* Sept 2000, Vol.5, No. 3 pp 11-18

²⁶⁴ Starke J.G. *Introduction to International Law* 9th Ed, (London: Butterworths; 1984) p. 31

because there is neither usage or practice nor opinion to guide him as to the correct solution. At all events he must quarry for the law among these material 'sources' assisted by his own faculties of logic and reasoning, and his sense of justice.²⁶⁵

Fortunately, there are usages, practices, international conventions and rules to guide us. However, we intend to be selective in evaluating the rules. This is so because while conventions are addressed to governments, rules are addressed to the parties with the principle of party autonomy being predominant and usages/practices have assumed the status of norms of international law. We are not concerned in this work with system differences between the common law and civil law jurisdictions. These differences are more pronounced in litigation than in arbitration. Besides, the legal instruments that we intend to evaluate are international in nature and have taken care of these system differences.

4.2 MODERN LEX MERCATORIA

The origin of the laws of arbitration is traceable to the practices, usages and customs of the merchants. Although, the modern law merchant (*lex mercatoria*) goes under various appellations including "transaction law", "the international law of contract", "international *lex mercatoria*", and international trade law²⁶⁶, the object is to regulate international commercial transactions by a uniform system of law. Paulsson asserts, with justification, that:

The increasing complexity and internationalization of modern trade and commerce have led some lawyers to conclude that what is needed to govern contractual relationships is not a particular national system of Law but a modern law merchant. Such a law it is said, would meet the requirements of international commerce in much the same way as the *lex mercatoria* met the requirements of traders living under the Roman Empire or as enactment's of customary law (such as the celebrated *Consolato de Mare*)

²⁶⁵ Starke, Loc. Cit

²⁶⁶ Paulsson, Op. Cit at 564

that met the needs of sailors and merchants in the Mediterranean in the 14th Century.²⁶⁷

The law merchant is a fragmented body of laws drawn from national laws, public international law especially treaties²⁶⁸, uniform laws²⁶⁹, general principles of law recognized by the commercial nations²⁷⁰, rules of international organisations²⁷¹, customs and usages of international trade especially the “codified” customs²⁷², and standard form contracts that have gained international popularity especially in the shipping trade, commodity markets and oil industry.

Although, the *lex mercatoria* is a selective judicial process which some arbitral tribunals have applied, its problems lies in its vagueness. Its components are too general and do not provide definite answers to particular questions. The controversy surrounding the application of the modern *lex mercatoria* has led to the emergence of two opposed schools of thought, namely, the legalists and the inventors. The legalists oppose the application of the *lex mercatoria* on the ground that

it does not derive its binding force from any state authority and does not provide a sufficiently substantial and solid system. It cannot be called a legal order and therefore it is not suitable as a basis for the settlement of legal disputes²⁷³.

On the other hand, the inventors favour the application of the law. They see themselves as social engineers and as such they assert that:

²⁶⁷ Paulsson, Loc. Cit

²⁶⁸ For example the Vienna Convention on Treaties of 13 May, 1969

²⁶⁹ For example Uniform Laws on the Sale of Goods of 1964 and Contracts for the International Sale of Goods of 1980

²⁷⁰ For example, the *pacta sunt servada* rules, that good faith is important in commercial relationships

²⁷¹ For example, the United Nations Conference on International Trade Development(UNCTAD)

²⁷² For example the ICC INCOTERMS – trade usages e.g. “ex work”, “c.i.f.”, the Uniform Customs & Practices for Documentary Credits

²⁷³ Lando Ole “The Law Applicable to the Merits of the Disputes in Sarcevic, P (Ed) Op. Cit at 149

the binding force of the *lex mercatoria* does not depend on the fact that it is made and promulgated by state authorities but rather that it is recognized as an autonomous body of rules by state authorities.²⁷⁴

Cornbelt agrees with this dichotomy. He opined thus:

The concept of the law merchant as a basis for decision in matters of commercial transactions can be very troublesome, because it is contained in no accepted document or authority and because of divergent views where some scholars assert that it is very well defined while others claim that it does not exist.²⁷⁵

In spite of its fragmentation and vagueness, Article 28(4) of the Model law provides thus:

In all cases, the arbitral tribunal shall decide in accordance with the terms of the contracts and shall take into account the usages of the trade applicable to the transaction.

This has found statutory expression in section 47(5) of the Arbitration and Conciliation Act. Thus in determining the applicable laws, the arbitral tribunals are enjoined to take into account *lex mercatoria*. In arbitral proceedings, therefore, *lex mercatoria* is still relevant especially in states where Article 28(4) of the Model Law has been adopted. In any case, until recent times International Law consisted, for the most part of customary rules.

4.3 LEGISLATIVE ENACTMENTS

In evaluating any international legislative enactment regulating international commercial arbitration, the starting point is the Model Law. This is so because until the General Assembly of the United Nations adopted the Model Law on International Commercial Arbitration there was no international legal instrument properly so-called on

²⁷⁴ Id.

²⁷⁵ Cornbelt, M.S. "US Perspective on International Commercial Transactions" in (1997) 22 ILP 114

international commercial arbitration. In adopting the Model Law, the General Assembly recommended that:

all states give due consideration to the UNCITRAL Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial practice.

Accordingly, a number of countries including Nigeria have adopted this Model Law. Others have amended their laws to take account of its provision.²⁷⁶ In Nigeria, the legislative enactment is the Arbitration and Conciliation Act.²⁷⁷ In evaluating the Model Law, *a fortiori*, the various legislative enactments modeled on it, it is pertinent to ascertain the position of the various national laws prior its adoption. It is instructive to observe that countries like the United Kingdom did not adopt the Model Law but passed a new law with similar and added provisions.²⁷⁸

The need for improvement and harmonization, according to a leading authority is based on findings that domestic laws are often inappropriate for international cases and considerable disparity exists between them.²⁷⁹

What can be garnered from this position is that there was a perceived lacuna in various national laws governing international commercial arbitration. Before the emergence of the Model Law, there were only conventions that covered some aspects of arbitration. These conventions did not fully address the need for improvement and harmonization. The disparity in various national laws on arbitration was not only in differences in individual provisions of the laws but also in terms of development and refinement. Some laws were outdated and others fragmentary. A case in point is the

²⁷⁶ Sutton *et. al.* Op. Cit at 640

²⁷⁷ Nigeria was the first African State to adopt the Model Law

²⁷⁸ See the Arbitration Act of 1996. See also Sutton *et al* Op. Cit. at 640 for a comparison of the Model Law with the English Arbitration Act 1996.

²⁷⁹ Bernstein, R Op. Cit at 741.

English Arbitration Laws. Apart from the 1899 Act that dealt with domestic arbitration, there were other Acts of 1950, 1975 and 1979 before the 1996 Act was passed. Even the 1996 Act is not comprehensive. In Nigeria, the 1914 Arbitration Act was modeled after the English 1899 Arbitration Act. National Laws on arbitral procedure differed widely. Frustration, uncertainty and unexpected and undesired consequences flowed from the disparity between national laws. The Model Law therefore provided a basis for the harmonization and improvement of the national laws. It covers all stages of arbitration from the arbitration agreement to the recognition and enforcement of the arbitral award. The provisions aim at reducing or eliminating the identified frustrations and difficulties. The legal regime presented by the Model Law is geared towards international commercial arbitration without affecting any relevant treaty in force in any state adopting the Model Law.

After diagnosing defects in national laws from the point of view of the special features and needs of international commercial arbitration, Herrmann asserted that the appropriate therapy can be readily deduced. Continuing, he asserted thus:

Generally speaking the cure lies in meeting the special needs of modern international practice by a good and comprehensive legal climate for international arbitration and commends itself as a basis for harmonization of the presently disparate national laws²⁸⁰

The diagnosed defects are manifested in the following areas: firstly in arbitration agreements. In some jurisdictions such agreements can be concluded orally while in some, it must be in writing. Furthermore, in some jurisdictions an arbitration agreement is valid and effective if concluded after a dispute has arisen or the doctrine of separability may not be recognized. Secondly, in the case of appointment of arbitrators, the freedom of the

²⁸⁰ Herrmann Op. Cit at 9. Professor Herrmann is currently the Secretary-General of the UNCITRAL Secretariat at Vienna, Austria.

parties may be restricted by a rule which disqualifies foreigners or women or which even requires court confirmation or party appointed arbitrators or prohibits the “appointing authority” from appointing an arbitrator. Thirdly, in the conduct of arbitral proceeding, there is disparity between rule of procedure and the applicable law of evidence. Furthermore there exist system differences between common law (adversarial style) and civil law (inquisitorial style). Fourthly, regarding delivery of an arbitral award, one finds the rule that as a necessary condition for validity or enforcement, all arbitrators must sign. As regards setting aside of an arbitral award, a variety of grounds exist in different jurisdictions while recognition and enforcement are subject to multi-lateral conventions.²⁸¹

One fundamental contribution of the Model Law in remedying these defects is the principle of “party autonomy”. The Model Law recognizes and gives effect to an agreement of the parties. Accordingly, Article 19(1) of the Model Law provides thus:

Subject to the provisions of this law the parties are free to agree on the procedures to be followed by the arbitral tribunal in conducting the proceedings.

This basic principle is found in many articles. The words “The parties are free to agree ...” or “unless otherwise agreed by the parties” and similar words are found in many provisions.²⁸² However, there are mandatory provisions and restrictions on grounds of public interest and policy.²⁸³ Similarly, court intervention is expressly excluded except as specified in the law.²⁸⁴ Under Art. 7(2), the arbitration agreement must be in writing.

²⁸¹ Herrmann Loc. Cit

²⁸² See also Articles 20 and 22. More particularly see Articles 3(1), 10, 11(1), 13(1), 17, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 31(2) and 33 of the Model Law. The Model Law has 36 Articles. Such provisions are also known as “default provisions” or the “two-level system” or the “fall back provisions”

²⁸³ Arts. 8, 12-14, 27, 35 Id.

²⁸⁴ Art 5 Id.

The principle of fair hearing and equality of the parties is also guaranteed by the Model Law. Accordingly, Article 18 provides thus: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” This provision complies with the fundamental requirement of procedural justice²⁸⁵. A breach of these requirements is one of the grounds for setting aside an arbitral award.²⁸⁶ In practice, the issue of equality may not be attainable because of the inequality of the bargaining powers of the parties.

One other salient feature of the Model Law is that the arbitral tribunal may rule on its own jurisdiction and the fact that the principle of separability is recognised.²⁸⁷ More fundamentally, unless the parties agree otherwise, no person shall be precluded from being an arbitrator by reason of his nationality and parties are free to agree on procedure for such appointment. One defect of national laws and the conflict of laws rule is the determination of the applicable law. The Model Law grants the parties the freedom to choose the applicable substantive law. Accordingly Article 28(1) provides that:

the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not its conflict of law rules.

However, when the parties have not designated the applicable law, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable. Furthermore, if expressly authorised by the parties the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* (in fairness and good conscience)²⁸⁸.

²⁸⁵ See also Art 24 dealing with oral hearing and written proceedings

²⁸⁶ Art 34(2)(a) (ii) Id

²⁸⁷ Arts 11 and 16 Id

²⁸⁸ Art. 28(2) and (3)

The Model Law has de-localised arbitral proceedings. In other words it has reduced the importance and impact of the place of arbitration by treating all arbitration agreements and awards as uniform irrespective of the place of arbitration²⁸⁹. Similarly recognition and enforcement of arbitral awards have a universal scope of application²⁹⁰. According to Herrmann:

The Model Law regime on recognition of arbitration agreements takes Article 11(3) of the 1958 New York Convention as a basis (Articles 8(1) and adds two rules favouring arbitration . . . The expected benefits of the Model Law's uniform treatment are probably greater when it comes to recognition and enforcement of arbitral awards.²⁹¹

Paulsson puts it thus”:

By treating awards rendered in international commercial arbitration in uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between “international” and “non-international” awards instead of the traditional line between “foreign” and “domestic” awards.²⁹²

Article 31 provides for the form and contents of the arbitral awards. The awards must be in writing and generally signed by the arbitrator and where there are more than one all or a majority of them provided that the reasons for any omitted signature is stated.

It has to be underscored that the Model Law is a “model” and not a convention/treaty. Adopting the Model Law gives the various states the flexibility whereas a convention would have meant either ratification or rejection with limited flexibility built in by way of reservation clauses. The beauty of the Model Law lies in its attractiveness. Nevertheless, Article 1(1) of the Model Law provides that it bows to treaty laws. All the same the Model Law is *lex specialis*.

²⁸⁹ Arts. 8 and 9 Id

²⁹⁰ Arts. 35 & 36 Id

²⁹¹ Herrmann, Op Cit at 15

²⁹² Paulsson, Op. Cit at 749

It is our view that this evaluation would be incomplete if it is not appreciated that the Model Law is an international formulation with global representation. This is so because representatives from all regions, economic blocks and legal systems participated in the work of the Commission. It is therefore surprising that although the Model Law was adopted in 1985, as at May 1999 only 30 countries and 4 States of the US have adopted it wholly or in a modified form.²⁹³ For countries like the United Kingdom the reason for this may lie in history and tradition rather than unattractiveness. Countries like Nigeria adopted the Model Law. The major difference is the re-arrangement of sections.²⁹⁴ In the course of this work, a more detailed evaluation of the Model Law will be carried out.

4.4 CONVENTIONS/RULES

International commercial arbitration started without arbitral conventions and rules. However, with the growth of arbitral institutions, there was concomittant growth in arbitral conventions and rules. A knowledge of these rules is fundamental to the understanding of the functioning of the institutions. Whichever arbitral institution is chosen, one recurring theme is the principle of party autonomy. This principle is to the effect that if there is no contrary provision by the parties, the conflict of laws rules will be invoked to resolve disputes that have foreign elements. Generally, the parties take advantage of this principle.

There are several arbitral institutions with their own rules. Similarly, there are also various Conventions on arbitration. The Conventions include Geneva Protocol of 1923, Geneva Convention of 1927, New York Convention of 1958, Geneva Convention of 1961, Paris Agreement of 1962 and the Washington Convention of 1965. Similarly, the rules

²⁹³ See UN Documents No. A/CN.9/462 of 19 May 1999. P. 16

²⁹⁴ Thus Articles 7-33 of the Model Law correspond with sections 1-28 of the Act; Articles 34, 35 and 36 correspond with section 48, 51 and 52 of the Act. Sections 29-36 of the Act deal with domestic arbitration while sections 37-42 of the Act deal with conciliation. Sections 43-55 of the Act deal with international arbitration while sections 56-58 cover both domestic and international arbitration. Lastly, Articles 1 & 2, 3, 4, 5 and 6 correspond with sections 57, 56, 33, 34 and 57 of the Act respectively.

include International Chamber of Commerce (ICC) Rules (1998), UNCITRAL Arbitration Rules (1976), London Court of International Arbitration Rules (1998), the American Arbitration Association Rules (1993), German Institution of Arbitration Rules (1992), the Geneva Chamber of Commerce and Industry Arbitration Rules (1992), Japan Commercial Arbitration Association: Commercial Arbitration Rules (1992), Milan Chambers of National and International Arbitration: International Arbitration Rules (1996), Permanent Court of Arbitration (The Hague) Optional Rules for Arbitrating Disputes between two parties of which one is a State (1993), WIPO Arbitration Rules (1994), International Commercial Arbitration Court (Moscow) (1995) and China International Economic Trade and Arbitration Commission Rules (1995). In addition, there is some level of cooperation among the various arbitral institutions. This is exhibited in the sense that they have similar provisions in their rules. Such co-operative bodies include the Federation of Commercial Arbitration Institutions, the Inter-American Commercial Arbitration Commission (IACAC) and the International Council for Commercial Arbitration (ICCA).

Businessmen resort to arbitration and other ADR processes because of their displeasure with conventional litigation. The rules formulated by these institutions usually provide for how arbitral proceedings can be commenced, filing of pleadings, appointment of arbitrators, conduct of proceedings, attendance of parties/witness, competence of the arbitral tribunal, making of award, correction of awards, recourse against the awards, intervention by the court and grounds for setting aside an award, among others.

In the case of the conventions, while the 1923 Geneva Protocol dealt with the recognition of the validity of arbitral agreements, Geneva Convention of 1927 dealt with the execution of foreign arbitral awards. These international documents were precursors to the New York Convention of 1958. In the hierarchy of norms of international laws as well as their sources, a Convention takes precedence over rules. Indeed whereas a convention is

addressed to states, rules are addressed to individuals. Put differently, a convention is ratified by states and thus binds them while rules are entered into by individuals and become a contract between them.

We do not intend to discuss all the Conventions and Rules because they are identical in many respects. The following were chosen not because of any particular purpose but to illustrate their origin, structure, relevance and pre-eminence.

4.4.1 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

This Convention²⁹⁵ is not concerned with the formulation of legal rules regulating international commercial arbitration, *per se*. Rather as the name suggests it is a convention regulating the recognition and enforcement of foreign arbitral awards. Nevertheless in the words of Justice Akpata the Convention

is regarded as the most important international treaty relating to international commercial arbitration. It is an improvement on the Geneva Convention of 1927 because it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards. It is therefore in essence applicable to international arbitration agreements rather than purely domestic arbitration agreement²⁹⁶.

It is noteworthy that when the Convention came into effect on 10 June, 1958, Nigeria was not a subject of international law but an object. Nigeria being a colony of Britain then could not have acceded to it. However, Nigeria acceded to it on 17th March, 1970²⁹⁷ and with the promulgation of the Arbitration and Conciliation Act in 1988, the Convention was made the Second Schedule to the Act. Accordingly, Section 54(1) of the Act provides thus:

Without prejudice to sections 51 and 52 of this Act where the recognition and enforcement of any award arising out of an international commercial

²⁹⁵ Also known as the 1958 New York Convention

²⁹⁶ Akpata Op. Cit at 5.

²⁹⁷ UN Document No. A/CN. 9/462 of 19 May, 1999 p. 22

arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (herein- after referred to as “the Convention”) set out in the second schedule to this Act (Decree) shall apply to any award made in Nigeria or in any contracting state:

- (a) provided that such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention.
- (b) that the Convention shall apply only to differences arising out of legal relationship which is contractual.

Thus, the Convention has provision for reciprocity and commercial reservation²⁹⁸.

According to Justice Akpata.

By the provisos to section 54(1), Nigeria has taken advantage of the reciprocity provisions contained in paragraph 3 of Article I of the Convention²⁹⁹.

Professor Ezejiofor shares a similar view. In his analysis, the learned Professor observes thus:

Nigeria has made the reciprocity reservation so that only awards made in a contracting state which undertake to recognise and enforce awards made in other contracting states, including Nigeria (known as “Convention Awards”), will be recognised and enforced in Nigeria. The reciprocity reservation apparently narrows the scope of the New York Convention”.³⁰⁰

The researcher does not totally disagree with the learned author on this. This position is informed by the fact that Article 1(3) of the Convention makes specific provision on this thus:

When signing, ratifying or acceding to this Convention, or notifying extension under Articles X hereof any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state. It may also declare that it will apply the convention to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the state making such declaration.

²⁹⁸ Article 1(3) of the New York Convention

²⁹⁹ Akpata, Loc. Cit

³⁰⁰ Ezejiofor Op Cit at 178.

Nigeria has mainly taken advantage of this provision and made the Convention applicable to legal relationships of contractual nature. Professor Ezejiofor accurately captured the situation when he observed that:

Therefore a Convention award arising out of a dispute founded on tort, for example, would not be recognised and enforced in the country³⁰¹

However, restricting the scope of the Convention's application to differences arising only out of contractual legal relationships is clearly in breach of a treaty obligation of Nigeria requiring that the New York Convention be applicable in Nigeria 'to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Laws of the Federal Republic of Nigeria'.^{301(a)} Section 54 of the Act is therefore clearly inconsistent with the Declaration that a review is necessary.

In international commercial arbitration, ability to enforce an award is very fundamental. Although, there had been other Conventions,³⁰² more countries have ratified the New York Convention than any other. No wonder that Paulsson has observed thus:

The New York Convention has been remarkably successful, because it has been signed by over 90 states on all continents³⁰³

The New York Convention has been described in the Departmental Advisory Commission (DAC) Report as

³⁰¹ Id at 179

^{301(a)} See Nigeria's Treaties in Force, 1970-1990, Vol.2, No. 24, p 269 for the Declaration which Nigeria deposited with the UN Secretary General in 1970. See also Orojo & Ajomo, Op Cit at 309

³⁰² For example the Geneva Protocol of 1923 and Convention of 1927

³⁰³ Paulsson Op. Cit at 553. See also paragraph 347 of the Departmental Advisory Commission (DAC) on Arbitration Law set up by the UK Govt's Dept. of Trade and Industry. As at May 1999, 121 countries have ratified the Convention.

Not only the cornerstone of international dispute resolution, it is an essential ingredient more generally of world trade.³⁰⁴

The significance of these comments cannot be compromised if we are to understand or appreciate the global relevance of the Convention. To this end, Paulsson stated thus:

Indeed, the first question when negotiating a disputes clause in an international contract is whether the country where one would be likely to seek to enforce an award has ratified the New York Convention. If that is so, a second question is whether the ratification was subject to either one of the two reservations that may be made under the convention.³⁰⁵

The Convention makes provision for both recognition and enforcement of awards to which it applies. Section 51 of the Act relates to recognition and enforcement of awards while section 52 deals with grounds for refusing recognition or enforcement. These two sections are in *pari materia* with Articles IV and V of the Convention respectively. It must be stressed that the beauty of ratifying this Convention is that the Courts in the contracting states have no discretion but to recognise and enforce a New York Convention award unless the party opposing the enforcement proves one or more grounds specified either in section 52 of the Act or Article V of the Convention. Sutton observed with justification that

these grounds of refusal are exhaustive and if none of the grounds are present the award will be enforced ... The onus of proving the existence of a ground rests upon the party opposing enforcement ...³⁰⁶

In other words, national courts in the countries where the Convention is in force are enjoined to enforce a foreign award without reviewing the merits of the arbitrator's decision unless one of the grounds is proved. Furthermore, courts of signatory states are

³⁰⁴ Sutton, et. al Op. Cit at 401

³⁰⁵ Paulsson Loc. Cit

³⁰⁶ Sutton, et al Op. Cit at 403-412 for a detailed discussion of the grounds

enjoined to defer to arbitral jurisdiction whenever an action is brought under a contract containing an arbitration clause.

It would seem that Article VII(2) of the Convention repealed the Geneva Protocol of 1923 and the Geneva Convention of 1927 when it provides thus:

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between contracting states, on their becoming bound and to the extent that they become bound, by this Convention.

As has been observed, Nigeria was not a subject of international law at that time and therefore this clause will not be applicable to her. However, under Part III of the UK Arbitration Act 1966, the Geneva Convention is still in force in the UK by virtue of the fact that Part II of the Arbitration Act 1950 continues to apply in relation to awards to which the Geneva Convention applies which are not also in New York Convention Award.³⁰⁷ This provision has become necessary because there are countries that have acceded to the Geneva Convention but have not yet acceded to the New York Convention³⁰⁸

Under Article VII of the Convention, its provisions shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards nor deprive any interested party of any right due under an arbitral award as provided in the treaty.

4.4.2 International Chamber of Commerce (ICC) Rules

The Court of Arbitration of the International Chamber of Commerce was created in 1920, shortly after the First World War and in 1989 the name was changed to the “International Court of Arbitration” in order to reflect its multinational membership. The

³⁰⁷ Section 99 of the Arbitration Act 1996 (UK). Section 102 of the Act saved Part II of the Arbitration Act 1950.

³⁰⁸ For example Malta and Jamaica. See generally Sutton et al Op cit at 410

first ICC case was decided in 1923 and since then it has become a leading international arbitration institution both in terms of volume of cases and significance of disputes.³⁰⁹

The seat of the ICC court is in Paris but only one-third of ICC arbitration are actually held in that city. During the 1980-88 period, no less than 62 countries served as venues for ICC Arbitration³¹⁰ The ICC Court of arbitration has Rules of Arbitration, the extant ones came into force in January, 1998.³¹¹

In the absence of any agreement by the parties as to the number of arbitrators, the Court will normally appoint a sole arbitrator if the dispute involves less than US \$1.5 million, three if the amount is greater. In the case of three man tribunal, the parties appoint an independent arbitrator and the Court appoints the chairman, on the recommendation of the National Committee where such a committee exists. Where there are no National Committee, the court will appoint the tribunal.

One of the criticism against the Court is the use of terms of reference. The Court normally draws out terms of reference signed by the arbitrators and parties. The main criticisms are that they are time-consuming and without commensurate benefits. Some leading writers on arbitration have justified the use of terms of reference thus:

The Term of Reference may be useful as a protection of awards against an attack, as a tool for organising the future path of the arbitral proceedings and sometimes as a means of rapprochement of the parties; it seems likely that they will remain in any future revision of the ICC rules³¹².

Indeed, Article 18 of the 1998 Rules of the ICC provides for Terms of Reference. Another criticism is that awards rendered by ICC arbitrators are not communicated to the parties directly. Such awards are scrutinized and approved by the ICC Courts. Through this

³⁰⁹ Paulsson, Op. Cit at 537 and Ezejiofor Op. Cit at 139

³¹⁰ Craig et al *International Chamber of Commerce Arbitration* 2nd Ed. (London: n.p.; 1990) App. Table 7

³¹¹ Bernstein, et al Op. Cit at 821

³¹² Craig et al Op. Cit at 253 quoted in Paulsson, Op. Cit at 538

process, the arbitrators are asked to clarify, reconsider or re-draft awards. In a three-man tribunal, this can be time-consuming and frustrating to the parties as there is a significant time lag between the completion of hearing and the receipt of awards. A recent study by the ICC arbitral process approved this practice³¹³. According to Paulsson,

The most persuasive argument in favour of the scrutiny process is that it ensures minimum standards notwithstanding the extra-ordinary diversity of arbitrators. In 1995 the ICC appointed arbitrators from 62 different countries including sole arbitrators chairmen from 40 countries ranging from Algeria to Argentina.³¹⁴

It should be noted that the ICC Court of Arbitration does not settle disputes itself. Its function is to provide a forum for the settlement by arbitration of business disputes of an international character in accordance with its Rules. Appendix III to the Rules deals with cost and fees.³¹⁵ The manner of assessment has made the ICC arbitration controversial. For example parties pay for administrative charges and the arbitrators fees calculated with reference to the amount in dispute.³¹⁶ Other arbitral institutions like the London Court of Arbitration base their assessment on time used for the arbitral process.

Since 1990, an interesting innovation in the procedure is the adoption of Rules for a Pre-arbitral Referee. This procedure gives to the parties provisional relief until the matter is finally decided.

Article 34 of the Rules grants immunity from suit to the arbitrators, the Court and its members, the ICC and its employees and National Committee.

³¹³ Id. at 32-33

³¹⁴ Paulsson Op. Cit at 539

³¹⁵ Articles 1 & 4 of the 1998 Rules of the Court. See also Bernstein et al Op. Cit at 821-837 for detailed Rules and Chapman, Op. Cit at 424.

4.4.3 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules

In evaluating the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,³¹⁷ the point was made that the Convention was more concerned with enforcement of awards than the initiation of arbitral proceedings. According to Ezejiofor³¹⁸

One of the specific objectives of the UNCITRAL is the promotion of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

This led to the formulation of the Arbitration Rules which were adopted by the Commission in April, 1976 and unanimously approved by the United Nations General Assembly in December, 1976.³¹⁹ In Nigeria, we have our own Arbitration Rules³²⁰. According to Section 53 of the Act:

Parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in Schedule I to this Decree, the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties.

In effect, our Arbitration Rules are by and large *ipsissima verba*^{320(a)} of the UNCITRAL Arbitration Rules³²¹ though there are minor differences between them.

Where parties to arbitral proceedings have submitted their disputes to arbitration under the auspices of one of the established arbitral institutions, the UNCITRAL Arbitration Rules are not applicable. Traditionally the older institutions are in the

³¹⁶ See also Paulsson Op. Cit at 540.

³¹⁷ Supra

³¹⁸ Ezejiofor, Op. Cit at 152

³¹⁹ UN General Assembly Resolution No. 31/98 of 15 December, 1976. See also Chapman, Op. Cit at 630.

³²⁰ Schedule 1 to the Arbitration and Conciliation Act

^{320(a)} In identical words

developed countries. All have their own rules. Ordinarily they will not resort to the UNCITRAL Arbitration Rules. However, the UNCITRAL Arbitration Rules are generally used for *ad hoc* arbitration in contradistinction to other institutional arbitrations. This is not to say that the other institutions do not use them but that the third world countries are the main beneficiaries. No wonder that Paulsson has observed thus:

The UNCITRAL Rules were prepared with the input of lawyers from around the world and are therefore thought to be more acceptable to parties from developing countries than the rules of institutions perceived as inspired by the western capitalist ethos.³²²

Sanders and Herrmann³²³ share this view. According to Sanders, the original title of the text included the fact that the rules were for Optional Use in *Ad hoc* Arbitrations but that eventually the Rules were designed for world wide use – both capitalist and socialist systems. The drafting of the rules took advantage of existing conventions.³²⁴ In the words of Herrmann:

The rules are known to be used in many ad-hoc cases i.e without any link to an arbitral institution ('private hotel-room justice'). Contrary to what is sometimes alleged or misunderstood, the UNCITRAL Arbitration rules are also, and probably even more frequently used in cases where arbitral institutions are entrusted with certain functions relating to appointment of arbitrators or to administration of a more technical nature.³²⁵

One major weakness of the UNCITRAL Rules, therefore, is that they do not provide for the administration of the arbitration. In other words, apart from the Rules, there is no institutional framework for carrying out its functions. This lacuna is filled by the concept of

³²¹ Akpata, Op. Cit at 6. For example there are 41 Articles in the UNCITRAL Arbitration Rules as well as the Arbitration Rules set out in Schedule 1 to the Act and corresponding articles in each set of rules.

³²² Paulsson Op. Cit at 548

³²³ Sanders P. "Commentary on UNCITRAL Arbitration Rules" in *Year Book Commercial Arbitration*, Vol. II 1977, PP 170-219 and Herrmann, G "UNCITRAL Conciliation and Arbitration Rules" (May 1989) *Arbitration*, Vol. 55 No. 2, pp. 85-91.

³²⁴ For example the 1958 New York Convention, the 1961 Geneva Convention and the 1965 Washington Convention.

³²⁵ Herrmann, Op. Cit at 90

“Appointing Authority”³²⁶. The “Appointing Authority” may be an institution or person. According to Professor Sanders “This ‘appointing authority’ constitutes an essential element in the functioning of the UNCITRAL Arbitration Rules”³²⁷.

Essentially, the “appointing authority” comes in by way of third party intervention. Thus, such a third party assists the arbitrating parties, for instance, when they cannot agree on a sole arbitrator, or the chairman of a three-member tribunal or a respondent fail to appoint an arbitrator that he is entitled to appoint, when an arbitrator is challenged or in connection with the fixing of the fees of an arbitrator³²⁸.

It should be observed that arbitral rules are not statutory but contractual provisions that only become operative by virtue of an agreement between the arbitrating parties. In the words of Herrmann, the rules are ‘thus not addressed to legislatures but to businessmen and their counsel’³²⁹. Consequently, in the course of the following chapters, the rules will be more extensively discussed. In the interim however, the UNCITRAL Arbitration Rules would seem to stand out from the other Rules. Quite unlike other institutional rules with either professional or regional representation, the UNCITRAL Rules had global representation in their formulation and this involvement ensures global acceptability.

Professor Herrmann who, incidentally, is now the Secretary-General of the UNCITRAL has chronicled how the Rules have been accepted world-wide³³⁰. In doing this the learned erudite Professor gave three categories of other arbitral institutions that are using the UNCITRAL Rules. The first category comprises those institutions which have adopted

³²⁶ Articles 3(4)(a) and 6(1)(b) Id.

³²⁷ Sanders Op. Cit at 174

³²⁸ Sanders, Id. See also section 54(2) of the Act which provides that the ‘appointing authority’ means the Secretary-General of the Permanent Court of Arbitration at the Hague.

³²⁹ Herrmann Op. Cit at 86

³³⁰ Id. at 90

the UNCITRAL Rules as their own institutional rules for international cases³³¹. The second category comprises those arbitral institutions which, while having their own commercial arbitration rules, act as appointing authority and provide administrative services in cases conducted under the UNCITRAL Rules.³³² The third category comprises arbitral institutions which in UNCITRAL arbitrations act only as appointing authority³³³. Continuing, the learned Professor observed thus:

This list is quite impressive and demonstrates the wide acceptance of these rules in the various parts of the world. The truly universal character of the UNCITRAL Arbitration Rules is particularly beneficial to parties involved over time in a number of arbitrations which, they may wish or have to hold at different places This is, in practical terms, what unification and thus UNCITRAL's work is all about³³⁴.

Above all, the universal and system-neutral character seems especially suited for the so-called “mixed cases”: where parties are from different legal systems. With all these contributions the UNCITRAL Arbitration Rules, apart from the issue of appointing authority creates fee problems. As eloquently put by Paulsson.

One seemingly irreducible problem with *ad-hoc* arbitrations is that the arbitrators set their own fees. This results in often uncomfortable discussions between the parties and the arbitrators at the very outset of the proceedings, when the issues of method of compensation and payment on account arises.³³⁵

Although the institution of ‘appointing authority’ plays an advisory role in this regard the parties are usually uncomfortable with it. For this and other reasons, *ad hoc* arbitrations are not popular except of course they are backed up by an arbitral institution.

³³¹ For example, Members of the Inter-American Commercial Arbitration Commission (IACAC), the Regional Arbitration Centres established under the auspices of the Asian-African Legal Consultative Committee (AALCC) in Cairo, Kuala Lumpur and Lagos.

³³² For example, American Arbitration Association (AAA), London Court of International Arbitration etc.

³³³ For Example, International Chamber of Commerce, etc.

³³⁴ Herrmann Op. Cit at 9

³³⁵ Paulsson, Op. Cit at 549.

The parties may also wish to consider the number of arbitrators, place of arbitration and language of arbitration.

4.5. OTHER BODIES/CENTRES

As has already been observed, arbitral rules/bodies are not statutory but contractual. However, their evaluation is fundamental to the consideration of the legal climate in which arbitral proceedings are conducted. We therefore intend to consider some of these bodies/centres.

4.5.1 London Court of International Arbitration (LCIA)

This body was founded in 1892. It is probably the oldest arbitral institution. It has a Joint Committee of Management made up of representatives of the Chartered Institute of Arbitrators, the London Chamber of Commerce and Industry and the Corporation of the City of London³³⁶.

According to Craig *et. al.*³³⁷ the London Court of International Arbitration has roughly one-tenth of the case load of the ICC. The LCIA is seen not as a competitor to ICC but an alternative. This is so because there are cases in which one system is more appropriate than the other. In the words of Paulsson:

The LCIA staff cannot match the linguistic proficiency of the ICC Court's secretariat which handles correspondence in English, French, German and Spanish as a matter of routine.³³⁸

On the other hand, the LCIA does not need to consult National Committees. This gives it institutional flexibility. Similarly, since 1985, the LCIA has shed its original English image and assumed an international one. This is buttressed by the fact that three quarters of the members of the court are from countries other than the United Kingdom.

³³⁶ Ezejiakor, Op. Cit at 144. See also Orojo and Ajomo, Op. Cit at 77

³³⁷ Craig *et al.*, Op. Cit at 5

³³⁸ Paulsson, Op. Cit at 541

However, just like the ICC, it can administer arbitrations anywhere in the world. Again just like ICC, it now has new rules that came into effect in January 1998.³³⁹

One striking feature of the LCIA rules is that they contain vigorous scheme designed to prevent abuse of the party-nomination process. As noted by commentators on the 1985 Rules.

The rules are designed to dissuade parties from abusing opportunities to nominate arbitrators. In cases where such an opportunity exists ... it is waived unless it is exercised within 30 days of the receipt by the respondent of the Request of Arbitration.³⁴⁰

It is a well-known practice in international commercial arbitration that nomination of such arbitrators is usually an opportunity for dilatory tactics or as a chance to nominate arbitrators whose independence and impartiality cannot be guaranteed. As is common with all arbitral rules, Article 5(2) of the LCIA Rules provides thus:

All arbitrators conducting an arbitration under these LCIA Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party.

Similarly, like most arbitral rules, the LCIA Rules give the parties and arbitrators maximum freedom to establish their rules as they seem fit and to choose the law applicable to the merits of the dispute with or without reference to the law of the place of arbitration³⁴¹ However, unlike the ICC Rules, LCIA rules do not provide for preparation of terms of reference nor scrutiny and approval of award. Instead, under Article 27(1) of the LCIA rules, the parties have 30 days within which to ask the arbitrators to correct awards

³³⁹ Bernstein et al, Op. Cit. App. 9, P. 805

³⁴⁰ Hunter & Paulsson, in *Yearbook of Commercial Arbitration* 157 (1985). See also Article 3(4) of the LCIA Rules (1985) and Article 2(3) of the 1998 Rules.

³⁴¹ Paulsson, Op. Cit at 543

containing mistakes of a clerical nature or any errors of a similar nature. Again, unlike the ICC rules, the arbitrators are remunerated on time basis. According to Paulsson.

As of August 1994 rates were estimated as falling within the range of £600-£2,000 per day for meetings or hearing and £100-£250 per hour for “other time spent on the arbitration. Time spent by the LCIA Secretariat in the administration of the arbitration was charged at £150 per hour for the Registrar and Deputy Registrar £75 per hour for the secretariat.³⁴²

Under Article 31(1) of the 1998 Rules, the LCIA, the LCIA Court (including its President, Vice Presidents and individual members), the Registrar, the Deputy Registrar, any arbitrator and any expert to the arbitral tribunal shall not be liable howsoever for any act or omission in connection with any arbitration conducted by reference to these LCIA Rules, save where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party. This is a qualified immunity

4.5.2. Asian-African Legal Consultative Committee (AALCC)

Since the Havana Conference held between 1947 and 1948, series of efforts, on the part of developing countries at regional and international levels, within and outside the United Nations Systems, have been made at providing fair, inexpensive, adequate and expeditious procedures for settlement of disputes arising out of international commercial transactions. As part of these efforts the Asian-African Legal Consultative Committee (AALCC) at its 19th Session at Doha (Qatar) on 23rd January, 1978 decided to set up four Regional Centres for dispute settlement in the economic and commercial field. The Lagos Regional Centre for International Commercial Arbitration was established in 1989 pursuant

³⁴² Paulsson, Loc. Cit

to that decision³⁴³. The establishment was in cooperation with and assistance of the Federal Republic of Nigeria.^{343(a)}

The Centre is a non-profit making institution with the prime objective of providing a system of settlement of disputes particularly those concerning development projects, commerce and foreign investment with and within the region so that resort to arbitration institutions outside the region may no longer be necessary. The Centre not only provides facilities for *ad hoc* arbitration but also assists in the enforcement of arbitral awards. According to Part I of the Rules.

The AALCC'S scheme has been brought into being in order to meet the growing and urgent need for an adequate and fair machinery for settlement of disputes in international transactions in the economic field particularly in the context of the emergence of the new international economic order.³⁴⁴

For the developing countries AALCC stands out. This is so because what informed the establishment of the Centre was a realisation that the older arbitral institutions belonged to private institutions or chambers of commerce located in the West. These institutions, according to the Rules:

had emerged during the colonial period as a necessary corollary of the colonial economic system and commercial activities of the metropolitan capitals and centres of the day Moreover, there had been a strong feeling in many circles that it was derogatory for governments and governmental institutions to submit themselves to arbitrations under the auspices of private arbitral institutions or chambers of commerce outside the region.³⁴⁵

³⁴³ See Arbitration Under The Auspices of the Lagos Regional Centre Arbitration Rules, P. 3. The other Centres are in Kuala Lumpur (1978), Cairo (1979) and Tehran (1997).

^{343(a)} See The Regional Centre for International Commercial Arbitration Act, No. 39 of 1999

³⁴⁴ Lagos Regional Centre Arbitration Rules, P.5

³⁴⁵ Id

However, the Rules for arbitration under the auspices of the Lagos Centre are the UNCITRAL Arbitration Rules of 1976 modified and adopted for institutional use. Accordingly, Rules I(b) of the Rules provides thus:

Where the parties to a contract have agreed in writing that disputes in relation to the contract shall be settled by arbitration in accordance with the Rules of Arbitration of the Centre then such disputes shall be settled in accordance with the UNCITRAL Arbitration rules subject to the modifications set forth in the present rules.³⁴⁶

When it is realised that the UNCITRAL Arbitration Rules are seen as rules for third world countries and also suited for *ad hoc* arbitrations, the adoption by the Centre is understandable. However, arguments for and against the UNCITRAL Rules are also applicable to the Arbitration rules of the Centre. Be this as it may, the AALCC aims to fill a gap especially in regard to disputes between parties of the same region comprising groups of countries which are so closely linked politically, culturally and economically. Such parties are encouraged to resort to local institutions within the area of disputes.³⁴⁷

4.5.3 The American Arbitration Association (AAA)

The American Arbitration Association (AAA) is an old arbitration centre founded in 1926. Its seat is in New York but has centres in the major cities in the United States. The Association encourages the use of arbitration and other alternative dispute resolution procedures.³⁴⁸

Its structure is similar to the ICC and LCIA systems in terms of commencement of proceedings and appointment of arbitrations. It has its own International Arbitration Rules

³⁴⁶ The Regional Centres of Kuala Lumpur and Cairo were the first arbitral institutions to have adopted the UNCITRAL Rules.

³⁴⁷ Lagos Regional Centre Arbitration Rules, P.9

³⁴⁸ Naughton, Op. Cit at 77

1993³⁴⁹. Like the LCIA Rules, the arbitrators are paid on time basis. Accordingly Article 33 provides thus:

Arbitrators shall be compensated based upon their amount of service, taking into account the size and complexity of the case. An appropriate daily or hourly rate, based on such considerations, shall be arranged by the administrator with the parties and arbitrators prior to the commencement of the arbitration.

As is common with all arbitral rules, the principle of party autonomy pervades the rules. However, one area where the Rules also stand out is that of exclusion of liability of arbitrators. Accordingly, Article 36 provides thus:

the members of the Tribunal and the Administrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under the Rules.

In some other jurisdictions, the immunity of arbitrators was established by case law³⁵⁰ and in the UK by case law and statute³⁵¹. The justification given for such immunity is that an arbitrator is acting in judicial capacity in that he is asked to determine a dispute between two or more parties and that he should therefore be afforded the same immunity as a Judge³⁵². However Lords Kilbrandon, Salmon and Frazer in *Arenson v Arenson*³⁵³ questioned why such immunity should exist in circumstances where an arbitrator selected by the parties for his expertise, is negligent in carrying out his duties. Although the researcher shares this view, it is humbly submitted that the basis of the arbitral proceedings will be defeated if arbitrators do not enjoy this immunity.

³⁴⁹ Chapman, Op. Cit at 315

³⁵⁰ *Papa v. Rose* (1817) LR 7CP 32, *In re Happer* L.R 20 QB 367; *Sutchiffe v Thackrah* (1974) 1 ALL ER 859 and *Arenson V Arenson* (1975)3 WLR 815

³⁵¹ Sections 29 and 74 of the Arbitration Act 1996

³⁵² Mulchaj C. "Arbitrators Immunity Under the New Arbitration. Act" (August 1996) *Arbitration*. p 202

³⁵³ Supra

This provision for immunity is also found in Article 17 of the Chartered Institute of Arbitrators' Arbitration Rules 1988³⁵⁴, Article 31(1) of the London Court of International Arbitration Rules³⁵⁵ and Article 34 of the ICC Arbitration Rules of 1998.³⁵⁶

4.5.4 The International Centre for Settlement of Investment Disputes between States and Nationals of other States.

In our evaluation of the legal climate within which international arbitration functions, we considered the 1958 New York Convention. One other Convention which is *sui generis* is the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Pursuant to this Convention, the International Centre for the Settlement of Investment Disputes (ICSID) was created in 1966³⁵⁷. The Centre has rules for arbitration, the latest is that of 26 September, 1984. The Convention is *sui generis* in the sense that the ICSID arbitration is available only with respect to disputes to which a state is a party. However, a state may designate one of its agencies as being sufficiently identified with the state as to qualify as the state for the purpose of the convention³⁵⁸. According to Professor Giardina, the Convention was:

prompted by the World Bank (and) provides a system for settling disputes that takes into account the interest of both foreign investors and the host states and, at the same time, guarantees continuous flow of private investment into the developing countries, a factor of vital importance if balanced growth is to be achieved in the world economy.³⁵⁹

³⁵⁴ Chapman, Op. Cit. at 338.

³⁵⁵ Supra at 107

³⁵⁶ Supra at 100

³⁵⁷ Hereinafter referred to as the "ICSID Convention" See also Cap 189, LFN 1990 and Chapman Op Cit at 282 for the Convention and P. 468 for the Rules.

³⁵⁸ Paulsson Op. Cit at 544. See also Ezejiofor Op. Cit at 150 and Orojo & Ajomo, Op Cit at 70

³⁵⁹ Giardina, A. "The International Centre for Settlement of Investment Disputes between States and Nationals of Other States (ICSID)" in Sarcevic, P. (ed.) Op. Cit. at 214

The Convention has been signed by 140 States and ratified by 129 States as at the end of 1997. Similarly, during its 30-year existence it has had over 30 arbitrations out of which 10 resulted in final awards. The paucity of arbitration should not be allowed to obscure ICIDS's considerable importance.³⁶⁰ In the words of the learned Professor:

This fact is generally not taken as an indication of inefficiency on the part of the system but rather as a sign of the deterrent effect of an effective arbitration system on arbitration³⁶¹.

Commenting on the number of states that have ratified the Convention, Professor Ezejirofor asserted that: "this is perhaps an indication that a large section of the international community thinks that it has potentials".³⁶² One vexed issue involving arbitration between states and nationals of other states is the question of applicable law. Article 42 of ICSID Convention provides for a special mechanism for identifying the law governing the investment contract. This article provides for the principle of party autonomy. Thus, it is when the parties fail to so provide that the tribunal has a discretion. Rules have been made to govern the proceedings of ICSID. One other striking feature of the Convention is the exclusion of challenge of the award. According to Paulsson:

There is no possibility of challenging an ICSID award before the courts of the place of arbitration. All states signatory to the ICSID Convention have bound themselves to recognise and enforce ICSID awards to the same extent as if they were final national court judgement.³⁶³

Giardina agrees with him. In her words:

the fact that ICSID awards have the effectiveness of final judgments and self-executing force in the legal orders of members

³⁶⁰ Paulsson Loc. Cit.

³⁶¹ Giardina Loc. Cit.

³⁶² Ezejirofor, Loc. Cit.

³⁶³ Paulsson, Loc. Cit. See also Article 54(1) of the Convention

states does not mean that all problems arising at the enforcement stage have been resolved.³⁶⁴

Indeed they have not been resolved because the manner in which the execution is to be carried out is governed by the law in force at the place of enforcement. This is acknowledged in Article 55 of the Convention which provides thus:

nothing in article 54 shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state of execution.

Under Article 52 of the Convention, although ICSID awards may not be challenged before national courts, disappointed parties have a right to ask the Chairman of ICSID's Administrative Council to appoint a three-member committee to review an award. Such reviews can lead to annulment. Finally, submission to ICSID has a special attraction for developing countries. This is so because the Centre creates and indeed confers credibility of investment protection on such countries. With the protection, foreign investors generally do not have any hesitation in investing in such countries. No wonder then that Section 26(3)(a) of the Nigerian Investment Promotion Commission Act³⁶⁵ provides for the application of ICSID Rules in the arbitration of investment disputes between the Federal Government and an investor in respect of his investment and there is disagreement as to the method of disputes settlement to be adopted.

4.6. CONCLUSION

Jurisprudentially, evaluating international legal instruments is not an easy task. International law, in contradistinction to municipal law has no codes, statutes books or other

³⁶⁴ Giardina, Op. Cit at 220

³⁶⁵ See Decree No 16 of 1995, as amended

enactments to evaluate. However, succour is found by considering the sources of international law. These include customs, conventions (treaties), decisions of arbitral tribunals and decisions or determinations of the organs of international organisations. Consequently, in evaluating the legal regime regulating international commercial arbitration, we considered custom and trade practices, usages as represented by *lex mercatoria*, conventions, the Model Law on International Commercial Arbitration and the various Arbitration Rules.

The usages and customs of the merchants played a prominent role in the development of arbitration. The Model Law also enjoins arbitrators to take such customs and trade practices into account. There is, however, some controversy as to the efficacy of the *lex mercatoria*.

Although, prior to 1958, there were other Conventions, we evaluated the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Side by side with this Convention is the ICSID Convention. Both play prominent roles in international commercial arbitration more than the other Conventions/Protocol.

The UNCITRAL Model Law on International Commercial Arbitration has globalised and internationalised commercial arbitration. Prior to the adoption of the Model Law, the existing national laws were not only inadequate or inappropriate for international commercial arbitration but there were disparities in them. We highlighted how the Model Law has taken care of these difficulties and evaluated some of its salient provisions. However, in the course of the rest of the work, the entire law will be evaluated in their proper perspective.

Lastly, we evaluated some arbitration rules and the functions of arbitral bodies and centres. The point was made that while conventions and international legal instruments were addressed to governments, the rules were addressed to businessmen. Consequently,

the rules are contractual in nature while the conventions and laws provide regulatory framework.

CHAPTER FIVE

COMPOSITION OF ARBITRAL TRIBUNAL

5.1 INTRODUCTION

One area where arbitral proceedings is fundamentally different from litigation is in the appointment and composition of the arbitral tribunal. Whereas the state appoints the judges in the case of litigation, the parties to the arbitral proceedings appoint the arbitral tribunal.³⁶⁶ The contractual nature of arbitral proceedings vests in the parties the powers to exercise this right. This is underscored by the principle of party autonomy. Thus, the jurisdiction of an arbitral tribunal is governed by the arbitration agreement, either expressly or by implication or by statute. In other words, the parties can expressly agree to appoint a sole arbitrator or one arbitrator each and the two so appointed will appoint a third. Such a third arbitrator presides over the arbitral proceedings either as chairman or an umpire. The agreement should clearly provide for the status of the presiding officer.

An implied term governing the composition of an arbitral tribunal is a provision in the arbitration agreement for such appointment to be made under the rules of an arbitral institution – the most popular ones are the International Chamber of Commerce (ICC) Rules and the London Court of International Arbitration (LCIA) Rules. In this regard, if the ICC or the LCIA Rules are adopted, subject to a contrary agreement by the parties, a sole arbitrator is presumed.³⁶⁷ This is so because Section 57(4) and (5) of the Act provides thus:

(4) Where a provision of this Act, other than section 47 of this Act, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination.

(5) Where a provision of this Act –

³⁶⁶ Section 57(1) of the Act provides that “arbitral tribunal” means a sole arbitrator or a panel of arbitrators. See also Article 2(b) of the Model Law

³⁶⁷ Article 8(2) of the 1998 ICC Rules, Article 5.1 of the 1998 LCIA Rules. See also Sutton et al, *Op Cit* at 110

- (a) refers to the fact that parties have agreed or that they may agree; or
- (b) in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in the agreement.

In various jurisdictions, certain terms are implied into an arbitration agreement in the absence of any specific provision by the parties. Accordingly, section 6 of the Act provides that the parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be three.³⁶⁸

It is of fundamental importance, therefore, that parties to arbitral proceedings should make specific provision on the number of arbitrators; procedure for their appointment; their qualifications; power and duties and liabilities. Furthermore, the issue of arbitrability, termination of mandate and appointment of substitute arbitrators should be sufficiently addressed. This is so because defects in the composition of the arbitral tribunal, misconduct on the part of the arbitrators, improper conduct of the proceedings, and exceeding the scope of the submission are all matters that can taint the entire proceedings and the resulting award and can therefore constitute grounds for setting aside or refusal of recognition and enforcement of an award. When it is borne in mind that some arbitrations are quite expensive, the consequences of setting aside an award are grave indeed.

In this chapter, all these matters will be critically examined.

5.2 COMMENCEMENT OF ARBITRAL PROCEEDINGS

There are various statutes and arbitral rules providing for how arbitral proceedings are commenced. In accordance with the principle of party autonomy, the parties are free to

³⁶⁸ See also Article 10 of the Model Law. Compare Section 15 of the UK Arbitration Act where the presumption is that of a sole arbitrator.

agree on when arbitral proceedings are to be regarded as commenced. However, if there is no such agreement, Section 17 of the Act provides thus:

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received by the other party.³⁶⁹

Similarly, section 53 of the Act provides thus:

Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties.

The point has already been made that the Arbitration Rules set out in the First Schedule to the Act³⁷⁰ are the same as the UNCITRAL Arbitration Rules apart from local variations.³⁷¹ Similarly, the Arbitration Rules of the Lagos Regional Centre for International Commercial Arbitration are modified versions of the UNCITRAL Arbitration Rules.³⁷² The consequence is that references to the Arbitration Rules are almost direct references to the UNCITRAL Arbitration Rules. Accordingly Article 3 of the Arbitration Rules provides that arbitration proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent. The notice should include the following: a demand that the dispute be referred to arbitration; names and addresses of the parties; a reference to the arbitration clause or the separate arbitration agreement that is invoked; a reference to the contract out of or in relation to which the dispute arises; the general nature of the claim and an indication of the amount involved, if any; the relief or remedy sought; a

³⁶⁹ See also Article 21 of the Model Law

³⁷⁰ Hereinafter referred to as “the Arbitration Rules”

³⁷¹ See page 103 *supra*

³⁷² See page 109 *supra*

proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon and the statement of claim.

Apart from the statement of claim referred to in Article 18 of the Arbitration Rules, Article 19 obligates the respondent to file a statement of defence. Such statements can be amended under Article 20 while Article 28 provides for default proceedings. The arbitral tribunal sets limits within which such statements must be filed. However, Section 36 of the Act empowers the tribunal to extend the time, if it considers it necessary. It is instructive, therefore that in initiating arbitral proceedings, all these requirements are borne in mind.

5.3 NUMBER OF ARBITRATORS

In arbitral proceedings, the parties have a choice between one or more arbitrators. If there are more than two arbitrators, the secondary issue is whether there should be a presiding officer referred to either as a chairman or umpire. In some jurisdictions such as in Switzerland and England, there is a possibility of an even number of arbitrators (for example two). In support of this view, Sutton et al posit thus:

Tribunals of two arbitrators have been and continue to be found in trade, insurance, shipping and commodity arbitrations in the City of London. English law presumes that parties' choice of a tribunal of two arbitrators where the arbitration agreement uses the simple word "arbitrators" on the basis that two is the irreducible minimum.³⁷³

This carries the implication that in the case of a deadlock in the course of the proceedings, an additional arbitrator – chairman or umpire will be appointed. In other jurisdictions, it is a violation of mandatory law to so appoint. Indeed French and Dutch law mandatorily excludes the possibility.³⁷⁴ In *Sumitomo Heavy Industries v Oil and Natural Gas*

³⁷³ Sutton *et al*, Op Cit at 129. See also *Fletamentos Maritimos SA v Effjohn International BV* (1995) 1 Lloyd's Rep. 311

³⁷⁴ Voskuil C.C.A. and Freedberg-Swartzburg JA "Composition of the Arbitral Tribunal" in Sarcevic, Op Cit at 68

*Commission*³⁷⁵, it was held that the two-arbitrator tribunal simply does not fit into the scheme of ICC's Rules.

Generally however, in England, there is a presumption that a sole arbitrator is intended unless the parties agree otherwise.³⁷⁶ In many other countries and particularly in Continental Europe, most references are to a tribunal of three legally qualified arbitrators.³⁷⁷ Accordingly section 6 of the Act provides thus:

The parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be three.

This provision raises the issue as to whether decision as to the number of arbitrators must be inserted into the arbitration agreement. There is no rule or authority on this. However, what is important is that the parties must agree on the number before the dispute is referred to arbitration. In which case, the parties can decide on a sole arbitrator or two or more arbitrators. It is only when they fail to exercise the right of determining the number that the provisions of the Act are invoked. Under the Nigerian law, if the parties fail to exercise this right, the "irreducible minimum is three". It should be noted that in the case of *ad hoc* arbitration and incorporation of other rules like that of ICC, where the parties have not agreed on the number of arbitrators, the court can, in certain circumstances, appoint a sole arbitrator.³⁷⁸ Thus, it is not in all cases that failure to determine the number of arbitrators that the number will be three.

The other issue that this provision raises is when and at what point can the statutory provision be invoked so as to fix the number at three. The Act is silent on this. However, the lacuna is filled by Article 5 of the Arbitration Rules thus:

³⁷⁵ (1994) 1 Lloyd's Rep 45

³⁷⁶ See Section 15(3) of the Arbitration Act 1996

³⁷⁷ See also Article 10(2) of the Model Law

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

The import of this rule is that if within fifteen days after the receipt by the respondent of the notice of arbitration and there is no agreement on the number, then three arbitrators shall be appointed.

In all jurisdictions, there are mandatory and non-mandatory provisions on arbitration. Arbitral proceedings and the resultant award can easily be challenged and set aside if the municipal law or the *lex arbitri* or the *lex fori* is not complied with. Similarly, to avoid uncertainty or invocation of statutory provisions, parties are advised to agree on the number of arbitrators before a dispute is referred to arbitration. This is not to say that particular arbitrators should be named. Indeed, it is unsafe to do this as the named arbitrator may die, be incapacitated or unwilling to act when necessary. However, it is advisable that the qualifications of the arbitrator should be in the agreement.

Germane to the issue of number of arbitrators is whether where the parties each appoint an arbitrator and the two so appointed appoint a third, that third arbitrator is a chairman or an umpire. As a chairman, he takes active part in the proceedings throughout. However, where he is an umpire, he only takes active part in certain circumstances, for example, where the two arbitrators disagree. In the repealed Arbitration Act of 1914, there was provision for an umpire. It is also provided for under sections 15, 16 and 21(4) of the UK Arbitration Act, 1996. However, neither the Model Law nor the Act has provided for an umpire. Be this as it may, we share the view of Orojo and Ajomo when they submitted thus:

³⁷⁸ See Article 8(2) of the ICC Rules (1998)

If it is intended to appoint an umpire in an arbitration governed by Nigerian Law, it is submitted that this may still be done, but the parties have to make detailed provisions for his appointment, power, duties, functions and other relevant matters since Nigerian law neither recognizes nor make provisions in respect of an umpire.³⁷⁹

In view of the fact that the roles of a chairman and those of an umpire are different, parties are advised that if they intend to provide for them, their roles should be clearly spelt out. It is noteworthy that the various High Court (Civil Procedure) Rules provide for umpires.^{379(a)} Consequently, if an arbitration is conducted under these Rules, the parties can avail themselves of this provision.

5.4 COMPOSITION OF THE ARBITRAL TRIBUNAL

In accordance with the principle of party autonomy, parties generally agree on how arbitrators are appointed. This is a very crucial decision that they have to make as the success or failure of arbitral proceedings, to a large extent, depends on how the proceedings were conducted. Generally, in the absence of the parties, a third party can appoint the tribunal or the two arbitrators so appointed or the court or appointing authority can appoint a third. The method of appointment depends on whether the tribunal is made up of a sole arbitrator or two or more arbitrators. For ease of exposition, this section will be broken down into

- (a) appointment by the parties;
- (b) appointment by a third party; and
- (c) appointment by a court or appointing authority

with distinctions being shown between sole and two or more arbitrators.

³⁷⁹ Orojo and Ajomo, Op Cit at 118

^{379(a)} For example, Order 19 of the High Court of the FCT, Abuja

5.4.1 Appointment by the Parties

In considering the appointment of arbitrators, it is instructive to note the distinction between “arbitration agreement” and “submission agreement”. In the latter, that is, an agreement to refer existing disputes to arbitration, the identification of the members of the arbitral tribunal is one of the matters for agreement between the parties. The agreement should set out the mechanisms by which the arbitrator(s) are to be appointed. However, in the case of “arbitration agreement”, that is, agreement to refer future disputes to arbitration, it is not advisable to name individuals. This is so because time is likely to pass between when the individuals are named and when the dispute will arise. During the interval, the individual may die, retire, become ill, have conflict of interest or be otherwise unavailable or unsuitable.³⁸⁰ In the circumstances, therefore, stating the qualifications required for appointment will suffice.

As a general rule, there is no formal way of conducting the appointment once the number has been agreed on. However, simultaneous written exchange of lists is advisable. Apart from the consensual nature of arbitration, in most jurisdictions, there are statutory provisions on the procedure to be followed in the appointment of arbitrators. Accordingly, section 7(1) of the Act provides thus:

Subject to subsections (3) and (4) of this section, the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator.

In practice, parties normally indicate the procedure to be followed. This they do expressly or by adopting the arbitral rules of an arbitral institution. Such arbitral rules specify the procedure.³⁸¹ Thus, if the arbitration is conducted under the Act, and the parties adopt the

³⁸⁰ Sutton et al, Op Cit at 126

³⁸¹ See Articles 6-8 of the Arbitration Rules, Article 8(2)-(4) of the ICC Rules (1998) and Article 7 of the LCIA Rules (1998)

Arbitration Rules, Articles 6-8 of the Rules provide for the mode of appointment whether it is a sole arbitrator or a panel of three arbitrators.

It is possible that either that the parties did not advert their minds to the procedure to be followed or there is no agreement on the procedure. If this is the case, there are separate statutory provisions for sole arbitrator or three arbitrators. Section 7(2) of the Act provides thus:

Where no procedure is specified under subsection (1) of this section

—

- a) in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third, so however that – (i) if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so by the other party; or (ii) if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointments, the appointment shall be made by the *court* on the application of any party to the arbitration;
- (b) in the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the *court* on the application of any party to the arbitral agreement made within thirty days of such disagreement.

In *Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Ltd*^{381(a)} the Court of Appeal considered the factors to be taken into account in appointing arbitrators under section 7 of the Act and held thus:

Where an application is made to the High Court for the appointment of arbitrators, the fundamental parameters within which the court is enjoined to exercise its discretion are defined by the following three factors:

- (a) whether there is an arbitration agreement;
- (b) whether the dispute alleged by the applicant falls within the nature of disputes contemplated in the agreement; and
- (c) whether the parties have failed or neglected to appoint arbitrators to wade into the dispute.

The court is not cloaked with any jurisdiction or duty to inquire into the sustainability or otherwise of the alleged dispute between the parties. Its functions on considering the application for appointment of arbitrators is restricted to

^{381(a)} (2001) 8 NWLR (pt 715) 333 at 337

the construction of the arbitration clause in the parties' agreement with a view to ascertaining whether the alleged dispute is within the contemplation of the agreement.

It should be emphasized that section 7 of the Act relates to domestic arbitration. However, the provisions in the section are reinforced in section 44 of the Act for purposes of international arbitration. Thus in place of the "court" referred to subsections 2(a)(ii) and (b) above, it is the "appointing authority" that does the appointment.³⁸² The time limit in both sections is thirty days. The consequence of this is that such appointment must be made timeously.

5.4.2 Appointment by a Third Party

It is of utmost importance that parties themselves agree on how the arbitral tribunal should be composed. If they fail to do this, they lose control over the composition of the tribunal to either a third party or the court. However, the parties may agree that the arbitrator should be appointed by professional bodies, trade organizations or institutions. For example, in a contract involving legal practitioners, they can agree that in case of any dispute, the President of the Nigerian Bar Association shall appoint the arbitrator. The engineers, the accountants, surveyors, and estate valuers can make similar provisions in respect of their profession. In such a case, once there is a dispute, the claimant will inform such third party.

5.4.3 Appointment by a Court or Appointing Authority

As pointed out above, section 7(2) empowers the court to appoint an arbitrator or three arbitrators where there is no agreement between the parties or provision on how such arbitrators are to be appointed. This is further reinforced by section 7(3) of the Act which provides thus:

³⁸² See section 44(5)-(7) of the Act. See also Articles 6-8 of the Arbitration Rules

Where under an appointment procedure agreed upon by the parties

—

- a) a party fails to act as required under the procedure; or
 - b) the parties or two arbitrators are unable to reach agreement as required under the procedure; or
 - b) a third party, including an institution, fails to perform any duty imposed on it under the procedure,
- any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment.

According to section 57(1) of the Act, the “court” means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court. The decision of the court is not subject to appeal.³⁸³ In *Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Ltd*^{383(a)}, the Court of Appeal interpreted section 7(4) of the Act thus:

Section 7(4) of the Arbitration and Conciliation Act, 1990, only renders non-appealable proceedings challenging the procedure for appointing arbitrators as specified in section 7(2) and 7(3) of the Arbitration and Conciliation Act, Laws of the Federation of Nigeria, 1990. Consequently, before the provisions of section 7(4) of the Arbitration and Conciliation Act, Laws of the Federation of Nigeria, 1990 can be invoked, the court must first be satisfied that the grounds of appeal and issues formulated for determination from the grounds of appeal relate to the appointment procedure as laid down by section 7(2) and 7(3) of the Arbitration and Conciliation Act, 1990 and not just matters that are peripheral to those specified therein.

Thus, if the appointment procedure agreed upon by the parties does not provide any other means of securing the appointment, any of the parties to the arbitration may request the court to make the appointment and such appointment is final. In commenting on this provision, Orojo and Ajomo stated thus:

This provision was made in a military regime when a Decree superseded the Constitution in the event of a conflict. It is doubtful if the provision will be valid in a civilian regime unless the Constitution is amended to provide for such exceptions.³⁸⁴

³⁸³ See section 7(4) of the Act

^{383(a)} *supra* at 339. See also *Nigerian Agip Oil Co Ltd v Kemmer & Ors* (2001) 8 NWLR (Pt 716) 506 at 525-526

³⁸⁴ Orojo and Ajomo, *Op Cit* at 121

While we share this view, we humbly submit that this is one area of the Act that needs urgent review. Although, this provision was merely lifted from the Model Law³⁸⁵, its jurisprudential basis is questionable. In any case, the former Decree is now an Act of Parliament. Can our parliament pass such a law and make the decision of the court final? We submit to the contrary. In England, sections 17(4) and 18(5) of the Arbitration Act, 1996 provide that in such situations, “the leave of the court is required for any appeal from a decision of the court under this section”. It is our submission that the Act should be amended along the English provisions. Lately, the Nigerian courts have been very active in this area. In *Nigerian Agip Oil Co Ltd v Kemmer & Ors*, *supra*, it was held by the Court of Appeal that in view of section 241 of the 1999 Constitution of the Federal Republic of Nigeria which provides for appeals as of right from the decisions of the Federal High Court or a High Court to the Court of Appeal, the decision of a court appointing an arbitrator is appealable. This is a welcome development.

In exercising its power under this section, the court is to be guided by the list-procedure provided in Article 6 of the Arbitration Rules especially Article 6.3(a)-(d). Essentially the court communicates to both parties an identical list containing at least three names; within fifteen days after the receipt of this list, each party may return the list to the court after having deleted the name or names to which he objects and numbered the remaining on the list in the order of his preference. However, if for any reason the appointment cannot be made according to this procedure, the court may exercise its discretion in appointing the arbitrator(s).³⁸⁶ Section 7(5) of the Act provides that the court in exercising its power of appointment under subsections (2) and (3) shall have due regard to any qualification required of the arbitrator by the arbitration agreement and such other

consideration as are likely to secure the appointment of an independent and impartial arbitrator. In supplementing this provision, Article 6(4) of the Arbitration Rules provides that the court “shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties”.

The duties imposed on an arbitral tribunal are onerous. Consequently, all these provisions are necessary to ensure that the award is seen to be fair to all parties. For example, if an arbitrator is of the same nationality as one of the parties, bias may be imputed.

If the Act is in need of reform, one area where the provisions are not only ridiculous but inelegant is in the provision relating to “appointing authority”. What ordinarily should have been merely copying the Model Law into our statute book has led to distortions and incomprehension. Article 11 of the Model Law from which sections 7 and 44 of the Act were drafted provides for the use of the “court or other authority” where there is no procedure for the appointment of arbitrator(s) or where the parties fail to act in accordance with the agreed procedure. The provisions in Article 11 of the Model Law were supplemented by Articles 6 to 8 of the UNCITRAL Arbitration Rules. Although, the Arbitration Rules have Articles 6 to 8, substantial parts of the provisions in the UNCITRAL Arbitration Rules were omitted in the Arbitration Rules. For example, Article 6.1 and 6.2 of the UNCITRAL Arbitration Rules provides thus:

1. If a sole arbitrator is to be appointed, either party may propose to the other:
 - a) The names of one or more persons, one of whom would serve as the sole arbitrator; and
 - b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of would serve as appointing authority.
2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not

³⁸⁵ Article 11(5) of the Model Law

³⁸⁶ See also Article 8 of the Arbitration Rules for the particulars to be furnished

reached agreement on the choice of sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.³⁸⁷

In incorporating this provision in our statute book, we took a bit of Article 11 of the Model Law and added parts of Article 6 of the UNCITRAL Arbitration Rules. We have already reproduced section 7(2) of the Act above.³⁸⁸ Section 44(1) and (2) of the Act, dealing with international commercial arbitration provides thus:

- (1) If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator.
- (2) If within thirty days after receipt by a party of a proposal made in accordance with subsection (1) of this section the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the *appointing authority*.(emphasis added)³⁸⁹

It is noteworthy that the provisions of Article 6.1 and 6.2 of the Arbitration Rules are similar to Section 44(1) and (2) of the Act except that in place of “appointing authority”, the appointment is to be made by the “court” and Article 6(1)(b) and part of Article 6(2) omitted. It is also noteworthy that before section 44 there was no reference to an appointing authority anywhere else in the Act and, therefore, there is no provision on the agreement to appoint one.

³⁸⁷ See Article 7 of the UNCITRAL Arbitration Rules for similar provisions in respect of three arbitrators.

³⁸⁸ See page 162-163 *supra*

³⁸⁹ See Section 44(5)-(7) of the Act for similar provisions in respect of three arbitrators.

It is obvious, therefore, that section 7 of the Act was derived from the Model Law while section 44 was derived from the UNCITRAL Arbitration Rules. Unfortunately, whereas Article 6.1(b) of the UNCITRAL Arbitration provides for how the “appointing authority” shall be appointed and its functions, and Article 6(2) provides for the default procedure. However, section 44(2) of the Act merely provides that the sole arbitrator shall be appointed by the appointing authority. In realization of the confusion caused by the provision, the draftsmen inelegantly provided in section 54(2) that “in this Part of this Act, “the appointing authority” means the Secretary –General of the Permanent Court of Arbitration at The Hague”. This provision has been severely criticized and rightly too by leading authorities in Arbitration in Nigeria.³⁹⁰ Indeed we agree with Orojo and Ajomo that section 44 of the Act should be amended.

We agree that the Act covers both domestic and international arbitration while the Model Law and the UNCITRAL Arbitration Rules were designed for international commercial arbitration only. Consequently, a little care was necessary in drafting the Act. An understanding of the role of an “appointing authority” would have shown that it cannot mean the Secretary-General of the Permanent Court of Arbitration at the Hague. Appointing Authorities are usually specialist professional institutions or trade associations or specialist arbitration bodies.³⁹¹ They are mostly used in international commercial arbitration as opposed to the courts. Indeed most nationals would not like to subject themselves to courts of other nationals. As aptly put by Sutton, et al:

This mechanism is most commonly applied in cases of the appointment of a sole or third arbitrator. It is a useful arrangement which provides a cheaper and quicker route to an appointment than application to the court. ...The means by which the parties apply to an appointing authority for the appointment of arbitrators is likely

³⁹⁰ See Akpata, Op Cit at 106-110, Ezejiofor, Op Cit at 164-166 and Orojo and Ajomo, Op Cit at 125-127

³⁹¹ See Sutton, *et al*, Op Cit at 679-680 for a List of Appointing Authorities

to be specifically laid down by each appointing authority. A fee is almost invariably charged.³⁹²

Thus, it is when the appointing authority, previously agreed or nominated or designated by the parties fails to act that the Secretary-General of the Permanent Court of Arbitration would do the nomination or himself acts as such authority. It should be noted that the provisions in Section 44(8) to (9) are similar to the provisions in Article 8 of the Arbitration Rules. However, subsection 10 provides that except as otherwise agreed by the parties, no person shall be disqualified from being appointed as an arbitrator by reason of his nationality. Article 11(1) of the Model Law is also relevant here. This seem to override the provision in Article 6.4 of the Arbitration Rules which states that the court shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties. Of course, contract is the basis of arbitration despite the views to the contrary. Consequently, the parties can agree that the nationality of an arbitrator is immaterial in so far as his impartiality and independence can be guaranteed.

5.5 CHALLENGE OF AN ARBITRATOR

In almost all jurisdictions, the right of parties to an arbitration to challenge an arbitrator is widely accepted and therefore provided for in municipal laws. Apart from the apparent inherent appropriateness of this right, it is universally acknowledged that parties to judicial proceedings are empowered to challenge their judges. Similarly, arbitral institutions frequently provide for this right in their arbitral rules.³⁹³ Since most arbitral proceedings are conducted or administered or supervised in accordance with arbitral rules, it is advisable to

³⁹² Sutton, *et al*, Op Cit at 135

³⁹³ See Article 11 of the 1998 ICC Rules, and Articles 9 – 12 of the UNCITRAL Arbitration Rules

check the procedure in the rules before resorting to statutory provisions. This is so because in some jurisdictions³⁹⁴, this internal means must be exhausted before recourse to the courts.

5.5.1 Grounds for Challenge

Sections 8 and 45 of the Act provide for two grounds on which the appointment of an arbitrator can be challenged, namely, where circumstances exist that give rise to justifiable doubts as to his impartiality or independence; and if the arbitrator does not possess the qualifications agreed by the parties. Just like the composition of the arbitral tribunal and the appointment of appointing authority, section 8 deals with domestic arbitration and thus copied from Article 12 of the Model Law while section 45 deals with international arbitration and copied from Articles 9 to 10 of the UNCITRAL Arbitration Rules. The two provisions (in sections 8 and 45) are essentially the same except that where the appointing authority rules on the issue of the challenge as provided in the UNCITRAL Arbitration Rules, the “court” makes such decision as provided in the Arbitration Rules. We humbly submit that merely copying the provisions of the UNCITRAL Arbitration Rules into our statute books is quite unnecessary since the Act provides in section 53 that parties can adopt the Rules or any other rules acceptable to the parties. Once the parties agree on the rules to be adopted, they become binding on them. Even where the arbitration is *ad hoc*, the parties must agree on the rules.

Sections 8 and 45 impose a duty on the arbitrator to disclose circumstances which are likely to give rise to justifiable doubts as to his impartiality or independence. What are these circumstances? Although, they are not specified in the Act or Rules, the generally acceptable circumstances include family relationship, business or professional relationship,

³⁹⁴ For example, England, see section 24(2) of the Arbitration Act 1996

previous familiarity with the case, connection with the subject matter, among others. As succinctly put by Bernstein:

It is of the essence of the function of an arbitrator that he should hold the scales of justice evenly between the parties and that he should be perceived by the parties to do so. His ability, or apparent ability, to do this may be in doubt:

- (a) if he has, or is perceived to have, some personal interest in the outcome of the dispute; or
- (b) if he has, or is perceived to have, some connection with one of the parties, or with the case presented by one of the parties, such as is likely to create bias.³⁹⁵

A distinction is usually drawn between independence and impartiality. The above circumstances can lead to independence.³⁹⁶ This can also lead to bias. The basic test for determining bias was formulated by Ackner L.J. in *Hagop Ardahalian v Unifert International S.A. (Elissar, The)*³⁹⁷ thus:

Do there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not, or would not, fairly determine the issue on the basis of the evidence and arguments to be adduced before him?

Once a reasonable man can so infer, then bias will be imputed. In all cases, however, it is a matter of degree.

In order to ascertain whether an arbitrator is *prima facie* independent, he should disclose any circumstances that may call his independence to question in accordance with the provisions of sections 8 and 45 of the Act unless the parties have already been informed by him of those circumstances. The duty to disclose imposed on the arbitrator continues after he has been appointed and subsists throughout the arbitral proceedings. It should be noted that a party may challenge an arbitrator appointed by him only for reasons of which

³⁹⁵ Bernstein et al, Op Cit at 56

³⁹⁶ Redfern A and Hunter M *The Law and Practice of International Commercial Arbitration* 2nd Ed.,(London, Sweet & Maxwell, 1991) p 220

³⁹⁷ (1984) 2 Lloyd's Rep 84 at 89

the party becomes aware after the appointment has been made.³⁹⁸ Consequently, if the party knew of the circumstances before the appointment, he cannot challenge the arbitrator.

Contrary to the general belief that it is only legal practitioners that can be arbitrators, there is legally no particular qualification required of any arbitrator. Anyone capable of adjudicating can generally be appointed one.³⁹⁹ Indeed legal practitioners generally conduct arbitral proceedings like court proceedings and therefore make them as technical as court proceedings. Even most retired judges now found a past time in arbitration. Again, caution is necessary here. Otherwise we will have ‘litigation without robes’. Be that as it may, it is advisable that in specialized areas like accountancy, engineering, insurance, architecture and law, specialists in these areas be made arbitrators. Mixed tribunals are usually the best. However, parties are advised to indicate the required qualification for the arbitrators to ensure that justice is done. Training alone may not be enough. Training and experience are the hallmarks of successful arbitral proceedings. Some arbitral institutions like the ICC and LCIA have panels of arbitrators with adequate training and experience. The Chartered Institute of Arbitrators also provide for education and training before a person can become a member of the Institute.

5.5.2 **Procedure for Challenge**

If an arbitration is administered or conducted or supervised by an arbitral institution, the arbitral rules usually provide for procedure for challenge.⁴⁰⁰ The parties, on their part, may provide in the arbitration agreement for the procedure to be followed in challenging an arbitrator. If there is such procedure, it must be followed. However, if the parties fail to determine the procedure, sections 9 and 45(5) to (9) of the Act provide for the procedure to

³⁹⁸ Section 45(4) of the Act

³⁹⁹ Orojo and Ajomo, Op Cit at 127

be adopted.⁴⁰¹ Whereas section 9 is derived from Article 13(1) and (2) of the Model Law, section 45(5) to (9) is derived from Articles 11 to 12 of the UNCITRAL Arbitration Rules. This is consistent with the practice of the drafters of the Act. We humbly submit that the practice of making arbitral rules part of a statutory enactment is not only ridiculous but unnecessary.

A challenge can delay or interrupt arbitral proceedings for an indeterminate length of time. The challenge poses two problems: first, should a challenge be postponed to the stage of setting aside the award in which case the proceedings will be continued. Secondly, should the challenge be decided forthwith once a party to the proceedings is aware of the ground for the challenge. If the latter is adopted, the consequence may be that the proceedings will be suspended pending the outcome of the challenge or the proceedings could continue while the challenge is being decided. It would seem that the Act supports the latter view. This is so because section 9(2) provides that a party who intends to challenge an arbitrator shall, within fifteen days of becoming aware of the constitution of the arbitral tribunal or becoming aware of any circumstances referred to in section 8 of the Act, send to the arbitral tribunal a written statement of the reasons for the challenge. This section says nothing about notifying the arbitrator concerned or to the other party. This is, however, provided for in section 45(6) of the Act which states thus:

The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral and the notification shall be in writing and shall state the reason for the challenge.⁴⁰²

If a party fails to challenge the appointment within fifteen days of becoming aware of the circumstances, is this a permanent bar or can the issue be raised at the stage of setting aside an award. It is humbly submitted that such a party is deemed to have waived his right

⁴⁰⁰ See Article 11(2) of the ICC Rules (1998) and Articles 11-12 of the UNCITRAL Arbitration Rules

⁴⁰¹ See also Article 13 of the Model Law and Articles 11 – 12 of the Arbitration Rules

⁴⁰² See also Article 11(2) of the UNCITRAL Arbitration Rules

if he fails to do so within the stipulated time. Support for this view can be found in section 33 of the Act which provides thus:

- A party who knows –
- (a) that any provision of this Act from *which the parties may not derogate*; or
 - (b) that any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance within the time limit provided therefore shall be deemed to have waived his right to object to the non-compliance.

Section 33(a) of the Act was adopted from Article 4 of the Model Law which provides, *inter alia*, that

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration

It is clear, therefore that while the provision in the Act is mandatory, that of the Article is permissive and non-mandatory. This technical error arose from inelegant drafting and should be reformed to bring out the intendment of the provision.

Arising from the challenge is the issue of the consequence of the challenge. Must a challenged arbitrator withdraw from office and if he refuses to withdraw, what is the option open to either the arbitral tribunal or the other party. More fundamentally, what happens if it is a sole arbitrator or even a panel of arbitrators? Section 9(3) of the Act tries inconclusively to answer this question by providing that unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.⁴⁰³ It is also the law that the fact that the other party

⁴⁰³ See also section 45(7) of the Act

agrees to the challenge or that the arbitrator withdraws does not imply acceptance of the validity of the grounds for the challenge. However, where the other party agrees to the challenge or the challenged arbitrator withdraws, the procedure provided in section 44 shall be used in full for the appointment of the substitute arbitrator.⁴⁰⁴

Section 9 deals with domestic arbitration. If the challenged arbitrator fails to withdraw or the other party does not agree to challenge, is the decision of the arbitral tribunal final? This is what section 9(3) seems to suggest. However, Article 13(3) of the Model Law from which Section 9 was derived provides that if the challenge is not successful,

the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

There is no such provision in section 9 of the Act. Consequently, the decision of the arbitral tribunal in domestic proceedings in such circumstances is final. We submit that this section should be amended to include the above provision of the Model Law so that the court or appointing authority can review the decision but the review should be subject to appeal.

However, in international commercial arbitration, section 45(9) provides thus:

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made –

- (a) when the initial appointment was made by an *appointing authority*, by that authority;
- (b) when the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;
- (c) in all other cases, by the *appointing authority* to be designated in accordance with the procedure for designating

⁴⁰⁴ See section 45(8) of the Act

an appointing authority as provided for in section 44 of this Act.⁴⁰⁵

It is noteworthy that Article 12 of the Arbitration Rules refers to “court” in circumstances where the “appointing authority” was referred to in the Act. Consequently, Article 12 of the Arbitration Rules is clearly inconsistent with section 45(9) of the Act. The Act prevails over the Rules which are subsidiary legislation. This is reinforced by Article 1 of the Arbitration Rules which provides that

These Rules shall govern any arbitration proceedings except that where any of these Rules is in conflict with a provision of this Act, the provision of this Act shall prevail.

Where the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in section 44 of the Act.⁴⁰⁶ Section 11 of the Act provides for the appointment of a substitute arbitrator when the mandate terminates or because of his withdrawal from office for any reason whatsoever; or because of the revocation of his mandate by agreement of the parties; or because of any other reason whatsoever. Furthermore, Article 13 of the Arbitration Rules provides that in the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 6 to 8 that was applicable to the appointment or choice of the arbitrator being replaced. Where an arbitrator fails to act or in the event of *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the proceeding articles shall apply. In such situation, a substitute

⁴⁰⁵ See also Article 12(1) of the UNCITRAL Arbitration Rules

⁴⁰⁶ See section 45(10) of the Act and Article 12(2) of the UNCITRAL Arbitration Rules

arbitrator shall be appointed in accordance with the same rules and procedure that apply to the appointment of the arbitrator who is being replaced.

If a substitute arbitrator is appointed, this raises other issues. For example, will there be a re-hearing or should the arbitrator continue from where the other stopped? Ordinarily, this ought to be a matter for agreement between the parties and the arbitrator. However, if the Arbitration Rules are adopted, Article 14 provides that in the case of a sole or presiding arbitrator, any hearings held previously shall be repeated but if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal. Thus, a line is drawn between replacing the sole or presiding arbitrator and other arbitrators. In the case of a sole or presiding arbitrator, it is mandatory that any hearings held previously must be repeated but in the case of other arbitrators, it is at the discretion of the arbitral tribunal to decide whether there should be repetition or not.

We are of the view that where an arbitrator is challenged, instead of taking the parties through this rigorous process, it is more honourable to resign on his own volition. It is also contrary to one of the principles of natural justice for an arbitrator to be a judge in his own cause especially if a sole arbitrator. As graphically put by Ezejiofor

It therefore follows that if a sole arbitrator is challenged, he decides whether or not the challenge is sustained. If one of three arbitrators is challenged, the three decide whether or not the challenge succeeds since all of them, and no less, constitute the arbitral tribunal.⁴⁰⁷

5.6 POWERS AND DUTIES OF ARBITRATORS

The powers and duties of arbitrators are derived either from the express agreement of the parties or by implication or by statute. An example of the first class is an express provision in the arbitration agreement on the determination of the procedure for challenge or

⁴⁰⁷ Ezejiofor Op Cit at 58

the number of arbitrators. An example of the second class is the term implied by the custom of a particular trade to which both parties belong or terms of some trade or professional institute incorporated into the contract by adopting the rules of such body. The third class comprises the provisions expressed by the Act to be contained in every arbitration agreement unless a contrary intention is expressed in it.⁴⁰⁸

The whole essence of arbitral proceedings is that the arbitral tribunal is empowered to resolve the dispute between the parties and make an award. To enable the arbitral tribunal to achieve this objective, it requires some powers which are either general or specific. As will be seen shortly, powers and duties are interrelated. For example, it is both a power and duty to make an award.

5.6.1 **Powers of Arbitral Tribunals**

There are many powers conferred on the tribunals by various sections of the Act. However, we intend to consider the fundamental ones and mention the others. It is instructive to consider whether powers are distinct from jurisdiction. In legal proceedings, the issue of jurisdiction is very fundamental. Where a court or tribunal lacks jurisdiction, the whole proceeding is a nullity. If it has jurisdiction, it has the necessary competence or authority to conduct the reference but should consider the extent of its powers when determining how it should conduct the reference. No wonder therefore that some writers are of the view that powers and jurisdiction are distinct but interrelated.⁴⁰⁹ One of the specific powers of an arbitral tribunal is its competence to rule on its own jurisdiction. Accordingly, section 12(1) of the Act provides thus:

An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.⁴¹⁰

⁴⁰⁸ See generally Bernstein et al, Op Cit at 89, Sutton et al, Op Cit at 141 and Orojo and Ajomo, Op Cit at 142

⁴⁰⁹ Sutton et al, Op Cit at 145 and Orojo and Ajomo, Op Cit at 144

⁴¹⁰ See also Article 16 of the Model Law, Article 21 of the Arbitration Rules and section 30 of UK Arbitration Act, 1996

This issue is known as “competence-competence” or “*Kompetenz-Kompetenz*”. To enable the tribunal to fully exercise this power, the arbitration clause is separate from the arbitration agreement based on the doctrine or principle of separability.⁴¹¹

The arbitral tribunal can also rule on whether it is properly constituted and on what matters have been submitted to arbitration in accordance with the arbitration agreement. Consequently, such a challenge can be partial or total. If partial, it relates to some aspects of the claims but if total the whole basis upon which the arbitral tribunal is acting or is purporting to act is put into question. However, whether partial or total, the arbitral tribunal may either give summary ruling as a preliminary question or invite submissions from the parties on the issues and make an award on the merits and such ruling shall be final and binding.⁴¹² It should be noted that a plea that the tribunal does have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such plea by reason that he has appointed or participated in the appointment of an arbitrator. On the other hand, if the plea is that the arbitral tribunal is exceeding the scope of its authority, such a plea may be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings.⁴¹³ If the tribunal rules that it has no jurisdiction, then the whole proceedings are at an end.

If a tribunal lacks the jurisdiction to hear the dispute, what are the options open to the respondent? The respondent may boycott the entire proceedings in which case the tribunal will proceed *ex parte* and when an award is made, he will seek to set it aside on grounds of lack of jurisdiction or he may challenge the jurisdiction of the court or ignore the arbitral tribunal and have recourse to the court to resolve the issue of jurisdiction or continue

⁴¹¹ See page 79 *supra* and section 12(2) of the Act.

⁴¹² See Section 12(4) of the Act

⁴¹³ See Section 12(3) of the Act

with the proceedings and impeach the award. It is humbly submitted that the best course of action open to the respondent when the tribunal lacks jurisdiction is to raise the issue forthwith and insist that the plea be fully argued before the tribunal and that its decision should be made into an interim award. If the decision goes against him, as it is wont to, he should continue to participate in the proceedings and impeach the award or resist attempts at enforcement.⁴¹⁴ However, what a party cannot do is to participate fully in the proceedings without raising any plea and seek to challenge the tribunal's jurisdiction after the award has been made.

In the absence of any contrary agreement between the parties, the other specific powers of an arbitral tribunal include determination of the place of arbitration⁴¹⁵, the language of the arbitration⁴¹⁶, the admissibility, relevance, materiality and weight of any evidence placed before it⁴¹⁷, interim measures of protection as it may consider necessary in respect of the subject-matter of the dispute⁴¹⁸, correction and interpretation of the award⁴¹⁹, granting of additional award⁴²⁰, fixing the costs of the award⁴²¹, the appointment of one or more experts⁴²², the general conduct of the of the arbitration⁴²³, and extension of time⁴²⁴.

5.6.2 Duties of the Arbitrators

An arbitral tribunal is like a court. Thus, apart from the primary duty to decide the reference before it and make an award, it has other subsidiary duties imposed on it by the parties and the operation of law. The most fundamental of these subsidiary duties is the duty to act judicially. In other words, there must be fair hearing and impartiality.

⁴¹⁴ See also Ezejiofor, Op Cit at 71

⁴¹⁵ Section 16 of the Act

⁴¹⁶ Section 18 Id

⁴¹⁷ Section 15 Id

⁴¹⁸ Section 13 Id

⁴¹⁹ Section 28 Id

⁴²⁰ Section 28 Id

⁴²¹ Section 49 Id

⁴²² Section 22 Id

⁴²³ Section 14 Id

Accordingly, section 14 of the Act provides that in any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.⁴²⁵ This duty was alluded to by Sutton et al when they stated thus:

A tribunal must act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and adopt procedures suitable for the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. A tribunal has to comply with this general duty in conducting arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.⁴²⁶

Once it is established that an arbitrator is biased, this justifies his removal. In *Re The Owners of the Steamship "Catalina" and Others and The Owners of the Motor Vessel "Norma"*⁴²⁷, there was an arbitration between Portuguese claimants and Norwegian respondents. The arbitrator was overheard saying that Portuguese people were liars. The arbitrator was removed for failing to act fairly and without partiality between the parties.

Sometimes, the issue is that of imputed bias especially when there is a real danger of bias.⁴²⁸ Similarly, where arbitral tribunals have applied their own expertise and not given the parties an opportunity to comment, their awards have been set aside.⁴²⁹ Any confidential disclosure made by one party to the arbitrator must be disclosed to the other. However, with regard to confidentiality generally, the proceedings are held in private.

⁴²⁴ Section 36 Id

⁴²⁵ See also *Drew v Drew* (1855) 2 Macq., 1 p 3

⁴²⁶ Sutton *et al*, Op Cit at 157

⁴²⁷ (1938) 61 Ll.L Rep 360

⁴²⁸ *Bithrey Construction Ltd v Edmunds* (1996) unreported, July 29, 1996, Q.B.D., Clarke J.

⁴²⁹ *Fox, Annie and Others v Wellfair (PG) Ltd (in Liquidation) and Philip Fisher and Anor v Wellfair (Pg) Ltd (in Liquidation)* (19881) 2 Lloyd's Rep 514

The other duties include that of due care, diligence and compliance with the terms of submission. Above all, in making an award, the dispute must be decided according to the applicable law.⁴³⁰

5.7 LIABILITIES OF ARBITRATORS

It is a well established principle in our jurisprudence that judges are immune from personal liability in respect of any act done in their judicial capacity, even if they act maliciously or in bad faith.⁴³¹ This protection is anchored on grounds of public policy. As argued by Mulcahy:

If such immunity did not exist unsuccessful litigants would be free to embark upon fresh proceedings against the judge with a view to having their claim re-tried.⁴³²

Support for this view is found in *McC v Mullan*⁴³³ where Lord Bridge held thus:

If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that 999 honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.

Over and above all these, lack of immunity would also undermine a judge's independence. Besides, the appellate system gives the judiciary a self-checking mechanism. Consequently, it would seem that a few instances where a litigant is left without a proper remedy is the price that must be paid for an effective judiciary.

Is the case of a judge analogous to that of an arbitrator? In *Sutcliffe v Thackrah*⁴³⁴, it was held *obiter* that arbitrators should be treated in the same way as judges and therefore enjoy immunity from suit in respect of errors and omissions. This is so because an

⁴³⁰ See page 67 *supra*

⁴³¹ See *Sirros v Moore* (1974) 3 All ER 776

⁴³² Mulcahy, *Op Cit* at 202

⁴³³ (1984) 3 All ER 908

arbitrator acts in a judicial capacity in that he is asked to determine a dispute between two or more parties and that he should therefore be afforded the same immunity as a judge. This position has been seen to be rather simplistic.⁴³⁵ A different position was canvassed in *Arenson v Arenson*⁴³⁶ where Lord Kilbrandon, while recognizing the immunity of arbitrators for negligible acts, questioned why such immunity should exist in circumstances where an arbitrator, selected by the parties for his expertise, whether technical or intellectual, is negligent in carrying out his duties. A corollary of this debate is the correct categorization of the arbitrator. Does the relationship derive from contract or tort or status? A number of decisions point in the direction of contract.⁴³⁷ Others anchor their categorization on tort⁴³⁸ while the status explanation of the relationship is not widely favoured.

In England, while this issue is still interesting and unresolved, it is of diminished importance in the light of the statutory immunity which will cover any of the various possibilities.⁴³⁹ Thus arbitrators enjoy statutory immunity for their acts and omissions except where bad faith is shown. In *Melton Medes Ltd & Anor v Securities and Investments Board*⁴⁴⁰, bad faith was said to mean (a) malice in the sense of personal spite or desire to injure for improper reasons, or (b) knowledge of absence of power to make the decision in question.

⁴³⁴ (1974) AC 727. See also *Papa v Rose*, supra and *In re Harper*, supra

⁴³⁵ Mulchay, Loc Cit

⁴³⁶ (1977) AC 405

⁴³⁷ See *Crampton & Holt v Ridley & Co* (1887) 20 Q.B.D 48; and *Cohen & Ors v Baram* (1994) 2 Lloyd's Rep 139

⁴³⁸ See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) AC 465 and *Caparo Industries PLC v Dickman & Ors* (1990) 2 WLR 358

⁴³⁹ See Sections 29 and 74 of the Arbitration Act, 1996. See also section 24 of the Australian International Arbitration Amendment (No. 25 of 1989), section 25 of the Singapore International Arbitration Act (No. 23 of 1994), section 34 of the Bermuda International Arbitration and Conciliation Act 1993 and sections 20(5) and 66 of Malta Arbitration Act (No. II of 1996). See generally Asouzu, A A "Is a New Arbitration Law needed for Nigeria? If so, what Law?" Being a contribution to a panel discussion at a Seminar/Workshop organized by the AALCC Regional Centre for International Commercial Arbitration Lagos in association with SIC-FICA Training and Education, Abuja, Nigeria: 7-9 June, 2000.

⁴⁴⁰ (1995) 3 All ER 880

In Nigeria, however, the question is still unresolved as neither the Act nor the Arbitration Rules has provided for it. Furthermore, it is also not provided for in the Model Law. Could this be because of the argument that arbitrators are in a different position to judges? The judges derive their authority from the state while arbitrators derive their authority from the parties to whom they should be answerable for any neglect. Although, an arbitrator can be removed for misconduct or an award set aside, this does not necessarily address the issue of wasted costs or other damage suffered as a result of delay. Be that as it may, it is our submission that arbitrators should be accorded some immunity. Support for this view can be found in some arbitral rules where immunity is not only granted to the arbitrators but to the President, Vice-President and Registrar of the arbitral tribunal.⁴⁴¹ Furthermore, public policy consideration would appear to support the view.

Another remedy available to an aggrieved party is to terminate the mandate of the arbitrator where negligence is perceived. Accordingly, section 10 of the Act provides that the mandate of an arbitrator may be terminated and such mandate shall terminate –

- (a) if he withdraws from office; or
- (b) if the parties agree to terminate his appointment by reason of his inability to perform his functions; or
- (c) if for any other reason he fails to act without undue delay.

The fact that an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, is not to be construed as implying the existence of any ground or circumstance for termination or challenge. The mandate will, of course, also terminate if the arbitrator dies.⁴⁴²

⁴⁴¹ See Article 31.1 of the 1998 LCIA rules. See Article 34 of the 1998 ICC Rules and Art 17 of Chartered Institute of Arbitrators Arbitration Rules 1988

⁴⁴² See section 46 of the Act

5.8 PRINCIPLE OF ARBITRABILITY

This simply means the quality of being capable of resolution by arbitration. The question of whether particular disputes can be referred to arbitration should not be confused with the question of what disputes fall within the terms of a particular arbitration agreement (scope of the reference). In challenging the jurisdiction of an arbitral tribunal, the ground of challenge could be that of arbitrability. In the words of Sutton *et al*

The issue of arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration, when the opposing party claims that the tribunal lacks the authority to determine a dispute because it is not arbitrable; second in the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction and third, on an application to challenge the award or to oppose its enforcement.⁴⁴³

What this principle does is to circumscribe matters that are arbitrable and those that are not. These varies from country to country. For example, issues concerning the validity of patents and trademarks, and antitrust disputes are excluded from arbitration in Yugoslavia; in Austria, matters concerning bills of exchange, the validity of patents, bankruptcy, and attachment are not arbitrable.⁴⁴⁴ According to section 35 of the Act, the Act shall not affect any other law by virtue of which certain disputes:-

- (a) may not be submitted to arbitration; or
- (b) may be submitted to arbitration only in accordance with the provisions of that law or another law.

Similarly, section 48(b)(i) and (ii) of the Act provide that an arbitral award may be set aside if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria or that the award is against public policy of Nigeria.⁴⁴⁵

⁴⁴³ Sutton et al, Op Cit at 15

⁴⁴⁴ Madl, F “Competence of Arbitral Tribunals in International Commercial Arbitration” in Sarcevic, Op Cit at 95

⁴⁴⁵ See also section 52(b)(i) and (ii) of the Act and Article V.2 of the 1958 New York Convention

In *Kano State Urban Development Board v Fanz Construction Ltd*⁴⁴⁶, the Supreme Court comprehensively elucidated on the type of dispute or difference which the parties can refer to arbitration. Quoting from the Halsbury's Laws of England⁴⁴⁷, the Court held thus:

The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction. Thus an indictment for an offence of a public nature cannot be the subject of an arbitration agreement, nor can disputes arising out of an illegal contract nor disputes arising under agreements void as being by way of gaming or wagering. Equally, disputes leading to a change of status, such as a divorce petition, cannot be referred, nor, it seems, can any agreement purporting to give an arbitrator the right to give judgement in *rem*.

Consequently, none of the above matters can be subject of arbitration otherwise the award will be set aside or recognition will be refused.

5.9 CONCLUSION

In this chapter, we have considered how arbitral proceedings are commenced. Essentially, this area is dominated by the principle of party autonomy. Thus, the parties are at liberty to determine the composition of the arbitral tribunal either expressly or by implication. However, if they fail to agree on the composition, the provisions of the Act and relevant arbitral rules will apply. For example, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received by the other party. Parties were therefore advised to take full advantage of the principle of party autonomy and control the arbitral process.

In accordance with the principle, parties can determine how the arbitrators are appointed, how they can be challenged, their qualifications, powers and duties bearing in

⁴⁴⁶ *supra* at 45

mind the mandatory provisions that they cannot derogate from, when the mandate given to the arbitrator can be terminated and how substitute arbitrators can be appointed. In this regard, attention was drawn to the provisions in the Act that are meant for domestic arbitration and their reinforcement for purposes of international arbitration. The point was made that the drafters of the Act and the Arbitration Rules either omitted some Articles of the Model Law and the UNCITRAL Arbitration Rules from where the Act and the Arbitration Rules were derived or made arbitral rules part of the statute. We highlighted areas where the copying was inelegantly done.

The liability of arbitrators for breach of their duties is a vexed issue. Should they be immune from suit just like the judges? In some jurisdictions, there is qualified immunity but under Nigerian law, there is no immunity accorded arbitrators. We argued that some form of immunity is imperative in view of the duties imposed on them.

Finally, the principle of arbitrability is very fundamental to arbitration. An award, no matter how properly made may, be set aside if the dispute is not arbitrable.

⁴⁴⁷ 4th Ed, page 2565, paragraph 503

CHAPTER SIX

CONDUCT OF ARBITRAL PROCEEDINGS

6.1 INTRODUCTION

One of the attractions of arbitral proceedings is that it is less formal than court proceedings. Consequently, the proceedings can be tailor-made to suit the particular needs, interests and expectations of the parties, the arbitral tribunal and the witnesses. This is recognized in statutory provisions and arbitral rules. The result is that although parties are allowed to follow pre-determined scenario than court proceedings, there are complementary provisions in the statutes and rules. In *ad hoc* proceedings, the parties generally formulate the rules but in institutional arbitration, they adopt the rules of an arbitral institution. Such rules regulate the conduct of the proceedings.

Various issues arise in the course of arbitral proceedings. To ensure that these issues are properly addressed, after the composition of the arbitral tribunal, a preliminary meeting or a 'meeting for directions' is held to determine these issues and how the proceedings will be conducted. For example, there are two main families of legal systems used throughout the world for commercial litigation: the common law and the civil law (or continental family). The adversarial (or confrontational) system is to common law jurisdictions what the inquisitorial (or investigative) system is to civil jurisdictions. There are fundamental differences between the two. Thus, if a dispute involves parties from the two jurisdictions, what system to be adopted invariably arises. Arbitration has become trans-jurisdictional and employs no single jurisdictional procedure. Even when parties are from the same jurisdiction, the procedure employed is almost an admixture of the adversarial and inquisitorial since it is impractical for an international arbitral tribunal to carry on its job completely under either system. Other issues include whether there will be a hearing or the

proceedings will be by documents? If documents only, will there be discovery, inspection and interrogatories?

The aim of this chapter is to proffer solutions to these various issues and advise parties on how arbitral proceedings are conducted. This is to ensure that the parties derive the benefits of resorting to this means of dispute resolution. The chapter also examines the termination of the process and other incidental matters.

6.2 PRELIMINARY MATTERS

Prior to the constitution of the arbitral tribunal, the parties generally determine the direction of the proceedings. However, once the tribunal is constituted, it completely takes over the proceedings subject to whatever direction that may be contained in the agreement.

6.2.1 Preliminary Meeting or Meeting for Directions

Neither the Model Law nor the Act provides for the holding of any preliminary meeting or a meeting for directions. However, in practice such meetings are held by the arbitral tribunal where the parties are usually present. If there is any legal representations, the legal practitioners are also present. The parties may want to understand at least in broad terms the likely issues in the case before any procedural directions are made. On the other hand, the tribunal may also wish to consider certain substantive issues such as questions of jurisdictions or applicable law and the case of the parties. Such meetings are always useful in giving the participants an opportunity to meet and obtain directions from the tribunal for the future conduct of the reference and for the tribunal to ascertain the issues, their powers and applicable law. Generally, the need for a meeting will depend upon the extent to which the procedure and directions to be sought from the tribunal can be agreed between the parties.⁴⁴⁸

⁴⁴⁸ Sutton *et al*, Op Cit at 216

Text writers are divided as to the issues that should form these preliminary matters for discussion at the meeting.⁴⁴⁹ However, the following matters should be considered: whether it is necessary to hold a pre-hearing conference to clarify the issues, establish facts and legal rules and determine many procedural points; whether and if so what interim orders are appropriate; how the issues are to be defined – pleadings or “statement of case” procedure; whether particular issues must be determined before the others; whether there will be oral hearing or it is documents only and if documents, whether there will be discovery, inspection and interrogatories; means of obtaining evidence; whether expert evidence will be adduced or there will be need for an assessor; the method of note-taking – full longhand notes, jotting down a few notes, verbatim shorthand notes or recording proceedings on tape; how do the parties wish the arbitrator to deal with costs; the arbitrator’s remuneration; confidentiality restrictions; are there special terms, for example, can the arbitrator act as “*amiable compositeur*”; will there be reasons for the award; are the arbitrator’s powers adequate to deal with problems likely to arise or is the case appropriate for application to the court for an order; the arrangements for the hearing; the place or places at which hearings will be conducted; the time-frame for the conduct of the proceedings; and the language(s) to be used in the reference.

At the close of the preliminary meeting, it is usual to draw up Order for Directions, setting out the orders and directions of the tribunal, a copy of which is given to each party.

It is apposite to discuss some of these matters.

6.2.2 **Identifying the Issues**

It is of fundamental importance that quite early in the proceedings the parties should join issues. The issues in a reference are the matters in dispute between the parties, which

⁴⁴⁹ Id at 218, Bernstein et al, Op Cit at 128, Orojo and Ajomo, Op Cit at 190, Ezejiofor, Op Cit at 72, and Hans van Houtte “Conduct of Arbitral Proceedings” in Sarcevic Op Cit at 118

are often described in only the most general terms in the notice of arbitration. The nature, scope and number of the issues in a particular reference may have a considerable influence upon the procedure to be adopted. The need for this is the same as in civil proceedings. Two main ways of doing this are by ordering pleadings or “statements of case”.

Pleadings are formal documents in which the parties set out their respective cases.

According to Nwadialo,

Pleadings define with clarity and precision the issues or questions which are in dispute between the parties and fall to be decided by the court. ... By means of pleadings each party is required to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for the trial.⁴⁵⁰

In arbitral proceedings, the claimant files his points of claim while the respondent files his points of defence. If the respondent files a counter-claim, the claimant is entitled to file a reply. According to section 19(1) of the Act

The claimant shall, within the period agreed upon by the parties or determined by the arbitral tribunal, state the facts supporting his points of claims, the points at issue and the relief or remedy sought by him, and the respondent shall state his points of defence in respect of those particulars, unless the parties have otherwise agreed on the required elements of the points of claim and of defence.

The parties may submit with their statements all other documents or refer to other documents or other evidence that is relevant to the proceedings and the statements may also be amended or supplemented.⁴⁵¹ In practice, such other documents are exhibited as annexures to the pleadings.⁴⁵² In civil litigation, such documents will still be tendered in court at the hearing. In arbitral proceedings, is merely exhibiting the documents - whether primary or secondary evidence – enough? What of the issue of relevance, proper custody

⁴⁵⁰ Nwadialo, F *Civil Procedure in Nigeria* (Lagos, MIJ Professional Publishers Ltd, 1990) pp 249-250. See also *George & Ors v Dominion Flour Mills Ltd* (1963) 1 All NLR 71

⁴⁵¹ Section 19(2) and (3) of the Act. See Article 20 of the Arbitration Rules

⁴⁵² See Article 18(3) of the Arbitration Rules

and the form in which either primary or secondary evidence is admissible that always arise in court trials? It is humbly submitted that arbitral proceedings should be shorn of the technicalities associated with court proceedings. This point is underscored by the fact that section 1(2)(a) of the Evidence Act provides that the Evidence Act does not apply to proceedings before an arbitrator.

If the parties have not previously agreed on when the pleadings should be exchanged, at the preliminary meeting, the arbitral tribunal will fix the period within which they must be filed. Whatever the time frame, it should be borne in mind that Article 23 of the Arbitration Rules provides that the periods of time fixed by the arbitral tribunal for communicating written statements, including the points of claim and defence shall not exceed 45 days. However, this time may be extended. If the statement (points) of claim is not contained in the Notice of Arbitration, Article 18 of the Arbitration Rules provide that the statement of claim shall include the following particulars: (a) the names and addresses of the parties; (b) a statement of the facts supporting the claim; (c) the point at issue; and (d) the relief or remedy sought.⁴⁵³

If within the period either agreed by the parties or fixed by the arbitral tribunal, the claimant fails to state his claim without showing sufficient cause, the arbitral tribunal shall terminate the proceedings. On the other hand, unless otherwise agreed, if the respondent fails to state his defence as fixed, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations. Furthermore, if any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award.⁴⁵⁴ Under Article 22 of the Arbitration Rules, the arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the

parties or may be presented by them and shall fix the periods of time for communicating such statements.⁴⁵⁵

It is noteworthy that section 19 or any other section of the Act does not make any reference to a counter-claim or reply. It is humbly submitted that the provision in Article 19(3) of the Arbitration Rules on this should be read along with section 19. Indeed the rules are meant to complement the provisions in the Act.

In the alternative, the issues can be identified by filing “Statements of Case”. This method is less formal than pleadings. At its most informal level, a “statement of case” may consist simply of short letters from each of the parties, or written submissions prepared by the parties or their legal advisers. At its most formal level, each party is directed to deliver to the arbitrator, on or before a stated date, a statement of his case setting out in narrative form the material facts on which he relies, any evidence which he considers important enough to mention at this stage and any arguments of law that he intends to raise. This is done simultaneously. Then within a specified period thereafter, each party delivers to the arbitrator a statement in reply to the other party’s case, indicating which parts of it – law or fact - he accepts, and which he disputes. The procedure is usually quicker than pleadings, and usually gives a better idea to the arbitrator of the nature of the issues that he has to decide.⁴⁵⁶

6.2.3 Place (or Seat) of Arbitration

The parties to an arbitral proceeding should determine the place where the arbitration will have its seat. Apart from the fact that the proceedings will take place at the place determined by the parties, the seat also determines the procedural law and it is one of

⁴⁵³ Article 19 Id deals with Statement of Defence

⁴⁵⁴ See Section 21 of the Act

⁴⁵⁵ See also section 56 Id that provides for when written communications are deemed to be received, in the absence of any contrary agreement between the parties.

⁴⁵⁶ Bernstein et al, Op Cit at 131-132. See also Sutton, et al Op Cit at 220

the factors considered in determining the proper law of the substantive contract. The seat of the arbitration is also important in the context of the recognition and enforcement of any award especially under the 1958 New York Convention. This is so because the grounds for challenging or resisting enforcement of an award under the Convention are limited.⁴⁵⁷ The same principle applies to municipal laws.⁴⁵⁸

The applicable law has been extensively discussed.⁴⁵⁹ However, for purposes of conducting the proceedings, section 16(1) of the Act provides thus:

Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.⁴⁶⁰

Different criteria influence the choice of the place of arbitration – the place where the dispute has arisen, the place where the subject matter is located, the place where the arbitral institution is located, legal considerations, convenience of the parties, and ease of enforcement. Unless otherwise agreed, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.⁴⁶¹ Thus the tribunal has a wide discretion in these matters.

We therefore agree with His Lordship, Akpata, JSC when he stated thus:

It must again be pointed out however that to ensure that the award will be enforceable at law, the mandatory rules of national law applicable to international arbitrations in the country where the arbitration takes place must be observed, even if other rules of procedure are chosen by the parties or by the arbitrator.⁴⁶²

⁴⁵⁷ See Article V.I(d) of the Convention

⁴⁵⁸ See Section 52(2)(vii) of the Act and section 103(2)(e) of the UK Arbitration Act, 1996

⁴⁵⁹ See pp 86 *supra*

⁴⁶⁰ See also Article 16 of the Arbitration Rules

⁴⁶¹ See Section 16(2) of the Act. See also Article 16(2) and (3) ID

⁴⁶² Akpata, *Op Cit* at 51

6.2.4 **Evidence**

We have earlier argued that although the Evidence Act is not applicable to arbitral proceedings, this is not to say that the arbitrator is not bound to observe the rules of evidence.⁴⁶³ Accordingly section 15(2) of the Act provides *inter alia*, that where the Arbitration Rules make no provisions in regard to any matter in the arbitral proceedings, the arbitral tribunal shall conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing; and subsection (3) provides *inter alia*, that this power shall include the power to determine the admissibility, relevance, materiality and weight of any evidence placed before it. This is reinforced by Article 25(6) of the Arbitration Rules which is *in pari materia* with section 15(3) of the Act.

Similarly, section 20(5) of the Act provides that the arbitral tribunal shall, unless otherwise agreed by the parties, have power to administer oaths to or take the affirmations of the parties and witnesses appearing. Over and above these, arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules.⁴⁶⁴ Because of the apparent conflict between sections 15(1) and 53 of the Act, the former should be read subject to the latter. This is so because section 53 of the Act gives the parties powers either to adopt the Arbitration Rules or the UNCITRAL Arbitration Rules or any other rules acceptable to the parties while section 15(1) is rather restrictive.

Although, the arbitral tribunal is not bound by the strict rules of evidence, it is submitted that the tribunal should only act on the evidence before it and that where non-observance of the strict rules of evidence leads to substantial miscarriage of justice, the court should not hesitate to set aside such awards or refuse recognition. In accordance with the provisions of Article 25(4) of the Arbitration Rules, hearings shall be held in camera unless

⁴⁶³ See p 103 *supra*

the parties agree otherwise. This is one of the attributes of arbitration as compared with litigation.

6.2.5 **Language**

One other matter where agreement is needed is the language to be used in the proceedings and whether translations of documents are to be supplied. This is provided for in section 18 of the Act as follows:

- (1) The parties may by agreement determine the language or languages to be used in the arbitral proceedings, but where they do not do so, the arbitral tribunal, shall determine the language or languages to be used bearing in mind the relevant circumstances of the case.
- (2) Any language or languages agreed upon by the parties or determined by the arbitral tribunal under subsection (1) of this section, shall, unless a contrary intention is expressed by the parties or the arbitral tribunal, be the language or languages to be used in any written statements by the parties, in any hearing, award, decision or any other communication in the course of the arbitration.
- (3) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal under subsection (1) of this section⁴⁶⁵

The parties are therefore empowered to determine the language to be used in the proceedings and whether any documentary evidence should be accompanied by a translation into that language. If the parties fail to do this, then the arbitral tribunal shall, promptly after its appointment determine this. In taking this decision, the language of the contract and the language of the parties and their counsel should be taken into account.

6.2.6 **Hearing or Documents Only**

Subject to any contrary agreement between the parties, the arbitral tribunal has a choice between taking oral evidence from the parties and relying on documents only or a

⁴⁶⁴ See section 15(1) of the Act which provides that the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to the Act.

mixture of both. Unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at any appropriate stage of the proceedings if requested so to do by any of the parties.⁴⁶⁶ Oral evidence has the advantage of allowing the tribunal to watch the demeanour of witnesses during the hearing and the possibility of cross-examination and re-examination. Thus, in a simple arbitration where there is no complication, oral hearing may be advisable. If this procedure is adopted, the parties must be given sufficient notice of any hearing and of any meeting of the arbitral tribunal held for the purpose of inspection of documents, goods, or other property.⁴⁶⁷ The disadvantage of oral hearing is that it is usually expensive essentially because it requires a relatively large number of participants to set aside a specific period of time and partly also because the presentation of case requires specialist skills which are usually costly. Furthermore, finding a date that is convenient for the assembly of arbitrator(s), witnesses, parties, and their counsel takes longer than “documents only” arbitration.^{467(a)}

Akin to the issue of place of hearing is time. The arbitrator should determine the time of hearing subject to the convenience of the parties.

If the arbitration is going to be conducted on “documents only” basis, the parties must decide whether there will be discovery, inspection and interrogatories. In civil proceedings, these are processes employed by the parties aimed at facilitating proceedings by reducing areas of surprise and obtaining possible admissions. For instance Order 32, Rule 9(1) of the High Court of the FCT, Abuja (Civil Procedure Rules) provides that any party may, without filing any affidavit, apply to the court or a judge in chambers, for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in issue. Order 32 Rule 14(1)

⁴⁶⁵ See also Article 17 of the Arbitration Rules

⁴⁶⁶ See Section 20(1) of the Act. See also Articles 24 and 25 Id

⁴⁶⁷ See section 20(2) of the Act and Article 25(1) Id

provides that every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party in whose pleadings or affidavits reference is made to any document to produce that document for the inspection of the party giving the notice or of his legal practitioner and to permit him or them to have copies thereof. Order 32 Rule 1 provides for interrogatories. Interrogatories are written questions put by one party to an opposing party on oath or affidavit and answers thereto are admissible without further proof. These processes are also employed in arbitral proceedings but with the consent of the parties.

Every statement, document, or other information supplied to the arbitral tribunal shall be communicated to the other party by the party supplying it. Similarly every such information supplied by the arbitral tribunal to one party shall be supplied to the other. This includes any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision.⁴⁶⁸ The tribunal is obliged to fix a time frame within which to supply all these if it considers it appropriate. Similarly, if witnesses are to be heard, at least fifteen days before the hearing, each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses, the subject upon and the languages in which such witnesses will give their testimony.⁴⁶⁹ This is to ensure that justice is done to all. Generally, the hearing procedure is similar to that of civil procedure.

One contentious issue is whether an arbitrator can proceed *ex parte*? This depends on the fact of the particular case. If a hearing is adjourned with the knowledge of both parties and one of the parties is absent on the adjourned date without reason, the arbitrator can proceed with the hearing. Support for this view can be found in *Lagos State*

^{467(a)} Bernstein, et al, Op Cit at 106

⁴⁶⁸ Section 20(3) and (4) of the Act

⁴⁶⁹ See also Articles 24(1) and 25(1) of the Arbitration Rules

Development and Property Corporation v Adold/Stamm International (Nigeria) Ltd^{469a)}

where in such circumstances, the Supreme Court held:

An arbitrator may proceed with a reference in the absence of one of the parties if he does not choose to attend. The party ought to have notice that the arbitrator will proceed *ex parte* in the case if he does not attend. See *Gladwin v Chilcote* (1841) 9 Dowl 550 and *Featherstone v Cooper* (1803) 9 Ves. 67, 32 E.R. 526.

An arbitral tribunal does not have the coercive powers of the court. Consequently, if a witness is not willing to attend the hearing one way of securing attendance of such witnesses or the production of a document is the service of *subpoena ad testificandum* or *subpoena duces tecum*. The court or judge may also order that a writ of *habeas corpus ad testificandum* be issued to bring up a prison for examination before any arbitral tribunal.⁴⁷⁰ However, only such documents which a witness can be compelled to produce in court proceedings that a witness appearing before an arbitral tribunal can be compelled to produce.^{470(a)}

6.2.7 Pre-Trial Conference or Meeting

This is one of the matters that is usually discussed at the preliminary meeting. If there is agreement on this, after the exchange of pleadings or whatever method adopted in identifying the issues, it is useful to hold such conferences before hearing commences. This is to help the parties and the tribunal to prepare for the trial and save time and costs. The matters to be discussed vary from tribunal to tribunal but as a guide the following matters may be listed: settlement of issues and clarification of issues presented and the relief sought; identification of any issue which may require to be dealt with as a preliminary question;

^{469a)} (1994) 7 – 8 SCNJ 625 at 644

⁴⁷⁰ See sections 20(6) and 23 of the Act

^{470(a)} See sections 174 and 175 of the Evidence Act

whether there are moves for settlement and the status of the moves; whether experts will be appointed; fixing schedule of hearings and other appropriate matters.⁴⁷¹

6.3 EQUAL TREATMENT OF THE PARTIES

One distinguishing feature between arbitration and mediation is that in the latter, the mediator can deal with the parties separately and obtain information from them. In arbitral proceedings, the tribunal is required to comply with rules of natural justice in the conduct of the reference and an award may be challenged or enforcement resisted if it is made in breach of them.⁴⁷² The minimum requirements are set out section 14 of the Act thus:

In any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.

It is interesting to observe that although this section is based on Article 18 of the Model Law, this is amplified in 15(1) of the Arbitration Rules thus:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

These provisions reflect the two limbs of natural justice expressed in the Latin maxim: *audi alteram partem* and *nemo judex in causa sua*. We have already discussed the issue of impartiality.⁴⁷³ The arbitrator must be, and must be seen to be, disinterested and unbiased. We have earlier discussed the circumstances that could lead to bias.⁴⁷⁴ The best way of

⁴⁷¹ Redfern and Hunter, Op Cit at 347. See also Orojo and Ajomo, Op Cit at 196. Note that the ICC Rules provides for drawing up of Terms of Reference while the ICSID rules provide for a pre-trial conference: See Article 18 and Rule 21 respectively

⁴⁷² See sections 48(a)(iii) and 52(2)(iii) of the Act

⁴⁷³ See p 135 supra

⁴⁷⁴ See p 134 supra

adhering to this is to bear in mind the formulation by Ackner L.J. in *Hagop Ardahalian v Unifert International S.A. ("Elissar", The)*⁴⁷⁵ thus:

Would a reasonable man, not being a party to the dispute, think that the connection was close enough to cause the arbitrator to be biased?

If a reasonable man thinks that the connection was close enough, then he should not take part in the proceedings.

Each party should know what case is being made against him and be given the full opportunity of presenting his own case. We have earlier discussed how the issues in dispute are identified. Knowing the case of the party is one of the attributes of pleadings. If pleadings (or statement of case) are properly formulated, the parties will know in advance the opposing party's case. Similarly, the arbitral tribunal should give equal opportunity to both parties to present their cases. There should be fairness in the hearing, in fixing dates and decision-making. Over and above all these, the parties should not be misled. In *CCSU v Minister for the Civil Service*⁴⁷⁶, it was held that an arbitrator who creates a reasonable expectation in the mind of a party that he intends to adopt a particular procedure should not depart from that procedure without giving reasonable notice of his intention so to do. The legitimate or reasonable expectation may arise from an express intimation or from the existence of a regular practice which a party may reasonably expect to continue.

6.4 POWER TO APPOINT EXPERTS

Although, there is no rule providing that arbitral tribunals should be composed of legal practitioners, in practice, we find more legal practitioners or retired judges who are involved in arbitration. This is probably not unconnected with their training and experience. To assist, such arbitral tribunals, there is the need to appoint experts. Although the Act has

⁴⁷⁵ *supra*

not defined who is an expert, we can adopt the provision in the Evidence Act. According to section 57 of the Evidence Act, an expert is a person who is specially skilled in a particular field of human endeavour. Thus, in arbitral proceedings, when intricate technical issues arise, persons specially skilled in that particular area should be appointed to assist the tribunal. Accordingly, section 22 of the Act provides thus:

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may –
 - (a) appoint one or more experts to report to it on specific issue to be determined by the arbitral tribunal;
 - (b) require a party to give to the expert any relevant information or to produce or provide access to, any documents, goods or other property for inspection.
- (2) Unless otherwise agreed by the parties, if a party so request or if the arbitral tribunal considers it necessary, any expert appointed under subsection (1) of this section shall, 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 points at issue.⁴⁷⁷

Section 22 gives to the arbitrators a conditional power to appoint experts, that is, "unless otherwise agreed by the parties". If the parties decide to exercise their powers under this section and are of the view that the arbitrators cannot delegate the powers given to them or that they do not have any confidence on any specific expert, the arbitral tribunal cannot appoint the experts. In any case, it is not on every matter that the arbitral tribunal can appoint an expert, it must be on a specific issue before the tribunal for determination. Once it is agreed that the arbitral tribunal can appoint an expert, then the tribunal can require a party to give to the expert any relevant information or to produce or provide access to, any documents, goods or other property for inspection. All these can be taken care of if the parties agree on discovery, inspection and interrogatories.

⁴⁷⁶ (1984) 3 All ER 395

⁴⁷⁷ See also Article 27 of the Arbitration Rules

The provisions in section 22 are reinforced by the provisions in Article 27(3) of the Arbitration Rules which states thus:

Upon receipt of the expert's report, the arbitral tribunal shall communicate 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 shall be entitled to examine any document on which the expert has relied in his report.⁴⁷⁸

It should be noted that an expert can present an oral or written report. This will depend on the circumstances of the case but it is generally advisable that the report be reduced to writing. Unless otherwise agreed by the parties, the expert, after delivering his report, can participate in the hearing so as to afford opportunity to the parties to cross-examine him and present expert witnesses to testify on their behalf on the points at issue.

The provisions in section 22(3) and (4) of the Act are rather curious as they are repetitions of section 47(4) and (5) of the Act already discussed.⁴⁷⁹ Sub-sections (3) and (4) of section 22 have nothing to do with the appointment of an expert. They are neither derived from Article 26 of the Model Law nor from Article 27 of the Arbitration Rules. It is submitted therefore that they should be deleted as being superfluous and redundant.

6.5 POWERS TO MAKE INTERIM ORDERS

The *res* of the arbitral proceedings may be perishable goods or goods that can easily be taken out of jurisdiction or it may be in the hand, custody or control of one of the parties or irreparable damage may be done to them unless interim orders are made. In such a case, unless otherwise agreed by the parties, section 13 of the Act gives the arbitral tribunal powers before or during the proceedings to, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect

⁴⁷⁸ See also Article 27(4) of the Arbitration Rules which also empowers the parties to "present expert witnesses in order to testify on the points at issue..."

⁴⁷⁹ See p 67 *supra*

of the subject-matter of the dispute and also require any party to provide appropriate security in connection with any measure so taken.

The supplementary powers given by Article 26 of the Arbitration Rules would appear broader than that in section 13 of the Act. This is so because under section 13 of the Act, the parties can agree otherwise while under Article 26 of the Arbitration Rules, the arbitral tribunal can exercise the powers at the request of either party and the interim measure can be in the form of an interim award. Furthermore, bearing in mind that section 13 of the Act protects the *res* if it is in the hand, custody or control of a party to the proceedings and the arbitral tribunal cannot make such orders in respect of the *res* being with third parties, Article 26(3) of the Arbitration Rules provide that a request for interim measures addressed by any party to court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement. There is no such provision in the Act. Consequently, at the preliminary meeting, consideration should be given to this so as to ascertain whether interim orders should be made and the nature of the orders.

6.6 MAKING OF AWARDS

A court trial generally ends in a judgment given by the court. Similarly arbitral proceedings end in an award. Despite the importance and effect of an award in arbitral proceedings, neither the Model Law nor the Act has defined it. However, an award is the final determination of a particular reference. In other words, it resolves the issues in dispute between the parties. Its importance is underscored by the fact that it informs the parties of the decision of the arbitral tribunal and sometimes gives reasons for the award. The effect is that it is generally final, binding and enforceable. However, to be enforceable, it must comply with legal requirements. For example, it must comply with the law of the place of arbitration and that of enforcement and legal principles of fairness. If all these requirements are not complied with, an award can be impeached and in some jurisdictions remitted.

6.6.1 **Types of Awards**

An award may be final, interim, partial, agreed, additional, interlocutory and default. Just like a distinction is drawn between final and interim or interlocutory order in civil litigation, so it is in arbitration. An award is final if it has resolved or determined the issues in dispute. Article 32(2) of the Arbitral Rules provides that an award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay while paragraph (1) provides that in addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or partial awards. Once an award is final and binding, the arbitral tribunal becomes *functus officio*. As has been observed above, Article 26 of the Arbitration Rules empowers the arbitral tribunal to take any interim measure it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter, such as ordering their deposit with a third person or the sale of perishable goods. Such interim measure may be established in the form of an interim award.

An interim award, therefore, is one which deals with a preliminary question such as the issues of jurisdiction of the arbitral tribunal or the law applicable. In some jurisdictions, this is known as provisional order.⁴⁸⁰ A partial award is similar to interim awards in that both of them are not generally final. A partial award is one which disposes of a part of a monetary or other issues in dispute leaving the rest to be dealt with subsequently. It can be used to order payment on account in respect of a particular claim or claims. To that extent therefore, a partial award is final in respect of the issues so decided and may be enforced.⁴⁸¹

⁴⁸⁰ See section 39 of the UK Arbitration Act, 1996

⁴⁸¹ Orojo and Ajomo, Op Cit at 241 and Ezejiofor Op Cit at 94

An interlocutory award is a decision on a procedural question. It is not a final decision and cannot be enforced as an award. Strictly speaking, this is not an award but a procedural order.

After an award has been made, the arbitral tribunal can be requested to make an additional award in respect of any matter, including interest or costs which was presented to it in the course of the reference but which the tribunal did not deal with in the award.

Accordingly, section 28(4) provides thus:

Unless otherwise agreed by the parties, a party may within thirty days of receipt of the award, request the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceedings but omitted from the award.

If the tribunal considers any request made under subsection (4) justified, it shall, within sixty days of the receipt of the request, make the additional award. The tribunal has powers to extend the time within which to make the additional award. It should be noted that the additional award must comply with the requirements of an award as provided in section 26 of the Act.⁴⁸²

Instead of continuing with an arbitration, the parties to the dispute can decide to settle the matter on their own and request the arbitral tribunal to record the settlement in the form of an award. If the arbitral tribunal does not object to the settlement, it shall so record it. This is usually referred to as an agreed award or consent award. Such an award shall be in the form prescribed in section 26 of the Act and has the same status and effect as any other award on the merits of the case. This is known as settlement out of court in civil proceedings. The effect of recording the settlement as an award is that it is enforceable as an award. A bare agreement by the parties is not enforceable.⁴⁸³

⁴⁸² See Section 28(5) – (7) of the Act.

⁴⁸³ See section 25 of the Act

It must be stressed that arbitral proceedings are not the same thing as negotiations for settlement out of court. This is so because such terms of settlement do not operate as a final and conclusive judgment unless and until the court adopts them as a judgment of the court. The Supreme Court restated this position in *Ras Pal Gazi Construction Co v FCDA*^{483(a)} where it held thus:

Arbitration proceedings are not the same thing as negotiations for settlement out of court. An award made pursuant to arbitration proceedings constitutes a final judgment on all matters referred to the arbitrator. It has a binding effect and it shall upon application in writing to the court, be enforced by the court. In other words if an award is not challenged then it becomes and is a final and binding determination of the matters between the parties.

Similarly, just as we have default judgment in civil proceedings, we have default award in arbitral proceedings. This will arise where the arbitral tribunal proceeds *ex parte* to conclusion as provided in section 21(b) and make an award.

As earlier explained⁴⁸⁴, section 54 of the Act provides for the application of the 1958 New York Convention to any award made in Nigeria or in any contracting state. When an award is governed by the Convention, it is usually referred to as “Convention Award”.

Section 48 of the UK Arbitration Act, 1996 provides for other reliefs and remedies available to the arbitral tribunal. In Nigeria, there are no such statutory provisions. However, since the common law is one of the sources of arbitration, some of the reliefs and remedies available to the High Court are also available to an arbitral tribunal.⁴⁸⁵ These include payment of money as damages, declaratory relief, specific performance, rectification, injunctive relief, contribution, indemnity, interest, setting aside or cancellation.⁴⁸⁶

^{483(a)} (2001) 10 NWLR (Pt 722) 559 at 571

⁴⁸⁴ See p 96 supra

⁴⁸⁵ Orojo and Ajomo, Op Cit at 251

⁴⁸⁶ Sutton et al, Op Cit at 286,

It is trite law that an arbitral tribunal cannot delegate its decision-making powers to a third party. The tribunal must exercise its judgment in making an award. In an arbitral tribunal comprising more than one arbitrator, any decision of the tribunal shall be made by a majority of its members unless otherwise agreed by the parties. Similarly, the presiding arbitrator may, if so authorized by the parties or all the members of the arbitral tribunal decide questions relating to the procedure to be followed at the arbitral proceedings.⁴⁸⁷ In other words, while the tribunal must decide the issue of an award as a body, the presiding arbitrator can rule on procedural issues. Under Nigerian law, there is always the possibility of having a presiding officer or chairman unless the parties decide otherwise. In which case, if there is a dissenting opinion, the member need not assent to the award but may give a minority award. A party wishing to impeach an award may find such dissenting opinion useful.

6.6.2 Formal Requirements

The form that an arbitral award takes vary from jurisdiction to jurisdiction. In most jurisdictions however, this is one area where the principle of party autonomy is totally absent. In other words, it is usually a mandatory provision.⁴⁸⁸ However, if it is not a mandatory provision, then the parties must agree on the form or adopt institutional rules such as ICC or LCIA. Such rules will determine the form. Once this is done, the form must be complied with. This is so because an arbitral award can easily be impeached if it does not conform to the law of the place of arbitration or the agreement of the parties or that of the rules incorporated.⁴⁸⁹

Unless otherwise agreed by the parties, statutory enactments usually provide that an award must be made in writing, signed by the arbitrator and where there are more than one

⁴⁸⁷ Section 24 of the Act

arbitrator, the signatures of a majority of all the members of the arbitral tribunal shall suffice if the reason for the absence of any signature is stated. The arbitral tribunal shall state in the award the reason upon which it is based, the date it was made and the place of the arbitration. A copy of the award, made and signed by the arbitrator(s) or a majority of them shall be delivered to each party. All these formal requirements have found statutory expression in section 26 of the Act and serve different purposes. For example, the date of an award is important for calculating when time begins to run for purposes of challenge or the interest on the award or for determining whether the award was made within the specified time and the place of the award is important for purposes of enforcement – whether there is a treaty or convention like the 1958 New York Convention.

An award must be published and notified to the parties to indicate the completion of the proceedings. There is some controversy as to whether the reasons for the award should be given. Apart from the statutory provision under Nigerian law that reasons for the award should be given, it is reinforced in Article 32(3) of the Arbitration Rules. There is no formal way of giving reasons. However, the award must be a complete document giving sufficient history of the dispute, its view on the evidence, findings of fact in relation to the applicable law, succinct explanation of how the tribunal reached its decision on the various issues. It need not be too detailed.⁴⁹⁰

Arbitral proceedings are usually held in private. Consequently, an arbitral award cannot be made public without the consent of the parties.⁴⁹¹

⁴⁸⁸ See section 26 of the Act and Article 32 of the Arbitration Rules. Cf section 52 of the UK Arbitration Act, 1996 where the parties can exercise this right.

⁴⁸⁹ See Section 52(2)(a)(ii) of the Act and section 68(2)(h) of the UK Arbitration Act, 1996

⁴⁹⁰ See *Cefetera BV v Aalfred C Toepfer International GmbH* (1994) 1 Lloyd's Rep 93; cf *Transcatalana De Comercio S.A. v Incobrasa Industrial E Commercial Brasileira S.A.* (1995) 1 Lloyd's Rep 215. See also *Universal Petroleum C Ltd v Handels and Transport GmbH* (1987) 1 Lloyd's Rep 517 and *Bremer Handelsgesellschaft GmbH v Westzucker GmbH* (No.2) (1981) 2 Lloyd's Rep 130

⁴⁹¹ See Article 32(5) of the Arbitration Rules

Although there is no statutory requirement for recitals in an award, it is common practice to have one. Generally, the recitals show the uncontroversial background, for example, the substantive contract, arbitration agreement, summary of the proceedings, nature of the dispute, issues for determination and decision thereon before the award. An award should identify the parties very clearly otherwise it may be uncertain for the purposes of enforcement.

6.6.3 Substantive Requirements

Making an award is one area in arbitral proceedings where legal advice is necessary especially when the tribunal is composed of non-lawyers. Thus, apart from the formal requirements of an award provided in statutes, there are other substantive requirements. Bearing in mind that an application can be made to a court to set aside an award or to refuse recognition, the award must generally show that its decisions are the logical conclusions from the evidence before it. The tribunal must not exceed its jurisdiction nor must the award be obtained by fraud nor contrary to public policy. Furthermore, apart from provisional or interim awards, the award must show clearly that it has finally disposed of all the issues in dispute so as to ensure certainty and completeness. More fundamentally, an award must be enforceable. This can only be so if all legal requirements as to form and substance are complied with. It should be stressed that the need for compliance with these requirements is underscored by the fact that a valid award will serve as a defence of *res judicata*. A court has no jurisdiction to make an arbitral award its own judgment.^{491(a)}

6.7 TERMINATION OF ARBITRAL PROCEEDINGS

Section 2 of the Act provides that unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by the agreement of the parties or by leave of the court or a judge. The issue that this provision raises is what happens when the

agreement is not revoked? How does the proceedings come to an end? The power to conduct the proceedings is vested in the tribunal so also is the power to terminate it. There is no power vested in the courts to terminate an arbitral proceeding and therefore the court cannot intervene.⁴⁹² Thus when an arbitral tribunal gives a final award and it becomes *functus officio*, the proceedings come to an end. However this is only one of the ways in which arbitral proceedings can come to an end. According to section 27(1) of the Act, the arbitral proceedings shall terminate when the final award is made or when an order of the arbitral tribunal is issued under subsection (2) of the section. The tribunal shall issue such an award when (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute; or (b) the parties agree on the termination of the arbitral proceedings⁴⁹³; or (c) the arbitral tribunal finds that continuation of the arbitral proceedings has for any other reason become unnecessary or impossible.⁴⁹⁴

These statutory provisions are silent on what happens if there is want of prosecution or where the conduct of the claimant amounts to an abandonment of the proceedings. In civil proceedings, the courts can be moved to dismiss an action for want of prosecution if there is inordinate and inexcusable delay in pursuing the claim and the delay has given rise or likely to give rise to a substantial risk that it is not possible to have a fair resolution of the issues or the delay will cause or likely to cause serious prejudice to the other party. In arbitral proceedings, does the courts have inherent powers to terminate such proceedings? In *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation, The*

^{491(a)} See *Ras Pal Gazi Construction Ltd v FCDA*, *supra* at 571-575

⁴⁹² See section 34 of the Act

⁴⁹³ See *Chimimport Plc v G D'Alesio SAS (The "Paolo D'Alessio")* (1994) 2 Lloyd's Rep 366

⁴⁹⁴ See also Article 32 of the Model Law

*Bremer Vulkan*⁴⁹⁵, the court rejected the proposition. Is there any contractual power to dismiss for want of prosecution contained in the arbitration clause or in the arbitral rules incorporated by reference? This depends on the rules. We submit that if there is any such contractual power in the rules, such proceedings should be dismissed. Support for this view can be found in Article 2.9 of The Grain and Feed Trade Association (GAFTA) Rules, 1994 which provides *inter alia*

If neither the claimants nor the respondents submits any documentary evidence or submissions to the Association with a copy to the other party within the period of 1 year from the date of the appointment of the first named arbitrator, then the claim to arbitration shall be deemed to have lapsed on the expiry of the said period of 1 year unless before that date the claim is renewed by either party notifying the other during the 30 days prior to the expiry date.

Can a party to the proceedings treat inactivity of the other party as a repudiatory breach of the arbitration and bring the arbitration to an end by accepting it? In *The Bremer Vulkan*⁴⁹⁶ and *The Hannah Blumenthal*⁴⁹⁷, it was held that there is a mutual obligation on both parties to an arbitration to keep the arbitration moving and that it is not merely a matter of each party cooperating with any initiative taken by the other but a positive obligation imposed on each party to take the initiative himself, with or without the cooperation of the other party. Consequently, both parties are under a mutual duty to one another to join in applying to the arbitrator for appropriate directions to put an end to a delay which would involve a substantial risk that justice could not be done. As succinctly put by Lord Diplock in *The Bremer Vulkan*⁴⁹⁸

⁴⁹⁵ *supra*. Or (1981) AC 909. See also *Paal Wildon & Co A/S v Partenreederei Hannath Blumenthal, The Hannah Blumenthal* (1983) 1 All ER 34 and *Food Corporation of India v Antclizo Shipping Corporation, The Antclizo* (1988) 2 All ER 513

⁴⁹⁶ *Supra*

⁴⁹⁷ *Supra*

⁴⁹⁸ *Supra* at 987-8. See also *Thai-Europe Tapioca Service Ltd v Seine Navigation Co. Inc. (The "maritime Winner")* (1989) 2 Lloyd's Rep 506 and *Cargill S.p.A v P. Kadinopoulos S.A.* (1990) 2 Lloyd's Rep 32

Respondents in private arbitrations are not entitled to let sleeping dogs lie and then complain that they did not bark.

Similarly, in *The Hannah Blumenthal*⁴⁹⁹, it was held that an arbitration agreement cannot be frustrated by delay.

Under English law, under certain conditions, there is now a statutory power given to the arbitral tribunal to make an award dismissing a claim for want of prosecution.⁵⁰⁰ The conditions are the same as in civil proceedings as outlined above. It is humbly submitted that our laws should be reformed to include such provisions so as to give the same statutory power to tribunals set up under our laws.

If the arbitral tribunal is minded to exercise its powers under section 27(2)(c) of the Act to wit, give an order to terminate the proceedings if it “finds that continuation of the arbitral proceedings has for any other reason become unnecessary or impossible”, Article 34(2) of the Arbitration Rules provides that the tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable ground for objection.

Arbitral proceedings can also be terminated by settlement of the dispute.⁵⁰¹ Such settlement will be recorded in the form of an award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award but termination on such terms must be communicated to the parties.

In all these cases, subject to sections 28 and 29(2) of the Act, the mandate of the arbitral tribunal shall cease on termination of the proceedings.⁵⁰²

⁴⁹⁹ Supra

⁵⁰⁰ See section 48 of the Arbitration Act, 1996

⁵⁰¹ See section 25 of the Act, Article 34 of the Arbitration Rules and p 146 supra

⁵⁰² See section 27(3) of the Act

It should be stressed that under the Act, there is no power of remission. In other words, the court has no power to remit an award back to the arbitral tribunal for re-trial nor is there any provision for case stated.⁵⁰³ However, under the High Court (Civil Procedure) Rules, there is provision for remission.

6.8 CORRECTION OF AWARDS AND INTERPRETATION

The point has been made that once the arbitral tribunal makes the final award, it becomes *functus officio*. In other words, the tribunal cannot tamper with the award in terms of the substance. However, in certain circumstances, the arbitral tribunal has power to carry out formal corrections on the award. This power is derived from section 28 of the Act which provides thus

- (1) Unless another period has been agreed upon by the parties, a party may, within thirty days of the receipt of the award and with notice to the other party, request the arbitral tribunal –
 - (a) to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature;
 - (b) to give an interpretation of a specific point or part of the award.
- (2) If the arbitral tribunal considers any request made under subsection (1) of this section to be justified, it shall, within thirty days of receipt of the request, make the correction or give the interpretation, and such correction or interpretation shall form part of the award.
- (3) The arbitral tribunal may, on its own volition and within thirty days from the date of the award, correct any error of the type referred to in subsection (1)(a) of this section.

Such corrections are known as the slip rule in civil proceedings. Under this section, on the request of either party, accidental slip can be corrected. What are accidental slips? In *Food*

⁵⁰³ Cf sections 8(b) and 11 of the Arbitration Act, 1914

*Corporation of India v Marastro Cia Naviera S.A (The "Trade Fortitude")*⁵⁰⁴, Lloyd L.J.

explained the meaning of "accidental slip" thus:

In one sense, all errors are accidental. You do not make a mistake on purpose. But here the words take their colour from their context. I do not suggest that (section 57(3)(a)) is limited to clerical mistakes. But, in general, the error must, in the words of Rowlatt J in *Sutherland & Co v Hannevig Brothers Ltd* (1921) 1 K.B. 336 at 341, be an error affecting the expression of the tribunal's thought, not an error in the thought process itself ... The fact that the error ... was an elementary error is not sufficient to make it accidental.

Thus, the section covers clerical mistake, a slip of the pen or something of that kind or accidental slip or omission, for example, incorrect dates, computation, transcription, conversion and names of the parties. However, if the tribunal assesses the evidence wrongly or misconstrues or fails to appreciate the law, it cannot correct the resulting errors in its award under this heading.⁵⁰⁵ The corrections can also be made at the instance of the tribunal. In all cases, the correction must be made within thirty days of the receipt (or from the date) of the award.

The arbitral tribunal is also empowered to interpret a specific point or part of the award. An interpretation enables the tribunal to clarify the meaning of a specific point or part of an award which is obscure, ambiguous, enigmatic or incomplete. This does not involve altering or revoking the terms, but rather merely clarifying awkward expressions, explaining individual words or correcting the form without affecting the main issue. Such an interpretation is an integral part of the award.⁵⁰⁶

It should be noted that whether it is a mere correction or interpretation, the provisions of section 26 of the Act relating to the form and content of an award should be

⁵⁰⁴ (1986) 2 Lloyd's Rep 209

⁵⁰⁵ See also *Mutual Shipping Corporation v Bayshore Shipping Co Ltd (The "Montan")* (1985) 1 Lloyd's Rep 189

⁵⁰⁶ Schweizer P and Knoepfler F "Making of Awards and Termination of Proceedings" in Sarcevic, Op Cit at 174

complied with.⁵⁰⁷ Similarly, the interpretation shall be given in writing within forty-five days after the receipt of the request.⁵⁰⁸

6.9 COSTS OF ARBITRATION

It is noteworthy that there is no provision for costs in respect of domestic arbitration but sections 49 and 50 of the Act cover costs for international arbitration. The lacuna in the law can be taken care of by Articles 38 to 41 of the Arbitration Rules. These Rules cover both domestic and international arbitration. Article 38 of the Arbitration Rules gives the arbitral tribunal power to fix the costs and provides for permissible costs. These include 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 and the costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings. The fees of the arbitral tribunal shall be reasonable in amount, taking into the account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.⁵⁰⁹ In practice, there are three methods of fixing arbitrators' fees, namely, *ad valorem*, *per diem* (fees payable per day) and the fixed fee, irrespective of the amount in dispute. The Act has adopted the *ad valorem* i.e. the fee paid is proportional to the amount in dispute. Generally, the arbitral institutions have schedule of fees which also serve as guidelines to arbitrators in fixing their fees in ad hoc arbitrations.

In general, the costs of arbitration is 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.⁵¹⁰ If an appointing authority is used and the authority has issued a schedule of fees, the arbitral

⁵⁰⁷ Section 28(7) of the Act

⁵⁰⁸ Article 35(2) of the Arbitration Rules

tribunal in fixing its own fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case. However, if the appointing authority has not issued such a schedule, any party may request the appointing authority to furnish statement setting forth the basis for establishing fees which is customarily followed in international cases. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account.⁵¹¹

The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs of the reference and may request for supplementary deposits in the course of the proceedings. Where an appointing authority is used, the arbitral tribunal shall also fix the amount of any deposits or supplementary deposits that should be paid.⁵¹² If the required deposits are not paid in full within thirty days after the receipt of the requests, the arbitral tribunal shall so inform the parties in order that one or other of them may make the required payment; and if such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings. On the other hand, after the award has been made, the arbitral tribunal shall render an account to the parties of the deposits received and return any unexpended balance to the parties.⁵¹³

The issue of costs is one area where litigation is cheaper than arbitration. This is so because all the above costs exclude the cost of hiring the venue for the arbitration, the administrative fees paid to registrars or secretaries, verbatim reporters and other miscellaneous expenses which in litigation are borne by the state. Furthermore, the award of costs is part of the award and so it may be enforced against the party liable in the same way as any main award.

⁵⁰⁹ See also section 49(1) and (2) of the Act and Article 39 of the Arbitration Rules

⁵¹⁰ Article 40(1) of the Arbitration Rules

⁵¹¹ Section 49(3) and (4) of the Act

⁵¹² Section 50(1)-(3) Id

⁵¹³ Section 50(4)-(5) Id and Article 41(3) and (4) of the Arbitration Rules

6.10 STAY OF PROCEEDINGS

When parties have entered into an arbitration agreement, the usual issue is whether they can refer any dispute arising from such agreement to the court for determination. Secondly, does such agreement oust the jurisdiction of the court? An arbitration agreement has never been regarded as such ouster. Thus, even if there is such a clause in an contract, it is trite law that it does not amount to an ouster. For arbitral proceedings under the Nigerian law, the usual problem is whether to rely on the statutory provision or the contractual provision. Paradoxically, there are two provisions in the Act dealing with such matters. While section 4 of the Act provides that:

- (1) A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.
- (2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court,

section 5 of the Act provides that:

- (1) If any party to an arbitration agreement commenced any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivery any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.
- (2) A court to which an application is made under subsection (1) of this section may, if it is satisfied –
 - (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and
 - (b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

It is noteworthy that section 4 is the same as Article 8 of the Model Law while section 5 is the same as section 5 of the Arbitration Act of 1914. Under section 4 of the Act, a party to the proceedings who desires to request for a stay of proceedings must do so before, or at any time before filing his pleadings, not after. And once a request is made, a stay must be ordered since the court has no discretion in the matter. However, under section 5 of the Act, the court has a discretion whether or not to grant an application for a stay. Support for this view can be found in *United World Limited Inc. v Mobile Telecommunication Services Ltd*^{513(a)} where the Court per Onalaja, JCA held thus:

A close interpretation of the said section 5 discloses that it is not automatic that once there is an arbitration clause any action instituted and a prayer for stay of proceedings must be granted as a matter of course, my understanding of section 5 aforesaid is that whether to grant or refuse stay of proceedings pending arbitration shall depend on the peculiar facts and circumstances of each case.

The need to have two sections in the Act dealing with the same thing has, justifiably, been severely criticized.⁵¹⁴ The issue that normally arises in connection with section 5 of the Act is the meaning of “taking any steps in the proceedings?” In a long line of decided cases, this has been interpreted to mean (a) an application for an order for pleadings to be filed⁵¹⁵; or (b) an application whatsoever to the court, even though it is merely an application for time⁵¹⁶; or (c) where a party filed a motion to strike out the case so that the matter goes to arbitration⁵¹⁷ or (d) where the party defended the action without asking for a

^{513(a)} (1998) 10 NWLR (Pt 568) 106 at 119. See also *Ogun State Housing Corporation v Ogunsola* (2000) 14 NWLR (Pt 687) 431 at 446

⁵¹⁴ See Ezejiofor, Op Cit at 38-43 and Orojo and Ajomo, Op Cit at 316-321

⁵¹⁵ *Kano State Urban Development Board v Fanz Construction Co Ltd*, supra at p 50

⁵¹⁶ *Id*, *Obembe v Wemaboard Estate Ltd*, supra and *N.P.M.C. Ltd v Compagne Noga I & I.SS* (1971) 1 NMLR 223 at 226

⁵¹⁷ *Achonv v National Employers Mutual & General Insurance* (1971) 1 ALR Comm. 449

stay but later in the proceedings challenged the plaintiff's right to bring the action.⁵¹⁸ It is submitted, therefore, that in view of the incompatibility between sections 4 and 5 and their intendment, section 4 should regulate international commercial arbitration while section 5 should regulate domestic arbitration. This position is reinforced by the fact that the repealed Arbitration Act of 1914 was meant to regulate domestic arbitration while the Model Law is meant to regulate international commercial arbitration.

If an arbitration agreement is framed in such a way as to prevent any right to court proceedings until an award is made then this clause must be complied with. An award is a condition precedent to a right to sue. This is usually referred to as the *Scot v Avery Clause*⁵¹⁹. Once there is such a clause in a contract, it constitutes a complete defence to any proceedings commenced before the publication of an award. This clause is independent of the statutory provision. Consequently, if an arbitration agreement contains this clause, the party has a choice between this clause and the statutory provision. While in the case of the latter, he must show that he has not taken a step in the proceedings like delivery of the pleadings, in the case of the former, it will not be a valid answer to his application that he has filed pleadings or taken some other steps in the proceedings.

Akin to the *Scot v Avery Clause* is the *Atlantic Shipping Clause*^{519(a)}. The latter is a clause in a contract to the effect that arbitration must commence within a stipulated period and if it is not so commenced, then a claim by the injured party is barred. It may take the form of a provision that if arbitration is not commenced within a given time, recourse to it and to action at law will be barred or a stipulation that if arbitration is not commenced

⁵¹⁸ *Union Merchantgs (Overseas) Ltd v Odeh Trading Co* (1962) WNLR 229. See also *Hastings v Nigerian Railway Corporation* (1966) LLR 135 and *Chemia Products (UK) Ltd v Idowu* (1963) 2 All NLR 249

⁵¹⁹ *Supra*

^{519(a)} *Supra*

within a given time the parties will lose only their right to arbitrate. In that case an injured party will be free to enforce his claim by action.⁵²⁰

Parties to arbitral proceedings are therefore advised to have the two clauses in the contract instead of relying on the statutory provisions. This is one of the ways to ensure that the practice of arbitration is enhanced and resort to litigation minimized.

6.11 CONCLUSION

In this chapter, we have considered how arbitral proceedings are conducted. We advised that there is the need to hold a preliminary meeting whereby issues associated with the proceedings will be discussed and directions issued accordingly. For instance, there is the need to agree on whether pre-hearing conference will be held; how the issues for consideration will be identified; whether the hearing will be oral hearing or documents only and if documents, whether there will be inspection discovery and interrogatories.

In arbitral proceedings, the issue of the seat of the arbitration is very fundamental. The parties should agree on where the seat will be located. Similarly, the parties should agree on the place of hearing and the time-table for the hearing.

The Evidence Act is not applicable to arbitral proceedings but the rules of evidence especially those relating to fair hearing relate to arbitral proceedings. This should be observed. Germane to the issue of evidence is the language of the proceedings. This is a matter for agreement between the parties.

To assist the arbitral tribunal to arrive at a just decision especially where the members are not versed in the area of the dispute, experts can be appointed. Apart from the appointment of experts, the tribunal has powers to make interim orders especially as to the preservation of the *res*.

⁵²⁰ Ezejiofor, Op Cit at 46

In making awards, the tribunal should bear in mind the various types. The more fundamental one is the final award because when this is issued, the tribunal becomes *functio officio*. It should be noted that the award must meet the formal and substantive requirements otherwise it can be impeached.

Arbitral proceedings can be terminated in various ways. One of them is the making of the award or where the claimant withdraws his claim or the parties agree on the termination or where the continuation has come unnecessary or impossible. We suggested that these should include where there is delay or want of prosecution. When an award is made, it can be corrected or additional award made or the award is interpreted. The point was stressed that the corrections relate to accidental slips and not issues of substance.

One area where the arbitral proceedings is different from court proceedings is the issue of costs. The parties bear the cost of arbitration while in litigation, it is borne by the state. We discussed how the costs are apportioned and calculated.

Parties cannot resort to arbitration in the case of a dispute arising from their contractual relationship and instead of this contract, one of the parties resorts to litigation. Once the parties have agreed to go for arbitration in the case of any dispute arising from the relationship, they are prevented from resorting to litigation either statutorily or contractually. In the case of statutory provisions, there are conditions to be fulfilled but in the case of contract, there are no such conditions. Parties are advised to insert the contractual conditions in the agreement.

CHAPTER SEVEN

SETTING ASIDE AND ENFORCEMENT OF AWARDS

7.1 INTRODUCTION

Parties (including their privies) to arbitral proceedings expect that their dispute will end peacefully and satisfactorily since the arbitral award is conclusive, final and binding, subject to the right of recourse against the award. That an award is conclusive, final and binding can be garnered from the fact that it operates as *estoppel per rem judicata*⁵²¹ and no appeal lies against it except under certain conditions.⁵²² Furthermore, an implied term of an arbitration agreement is that the parties will carry out the terms of the award without delay. On the part of the arbitral tribunal, it becomes *functus officio* unless there is a statutory function to perform, for example, interpretation and correction of the award under section 28 of the Act. Unfortunately, this rational expectation is not usually realized as the unsuccessful party sometimes exercises the right of recourse against the award and thus refuses to honour it. On the other hand, the successful party normally takes measures to enforce the award if the unsuccessful party fails to honour it voluntarily. The option usually open to the unsuccessful party is to challenge the award by impeaching it in order to have it set aside or oppose the enforcement.

This chapter examines the grounds for impeaching an award, the procedure for enforcement and the extent of the courts' intervention in arbitral proceedings. It also examines the relationship between arbitral and court proceedings.

⁵²¹ *Cummings v Heard* (1869) LR 4 QB 669, *Fidelitas Shipping Co Ltd v V/O Exportchleb* (1965) 1 Lloyd's Rep 223, *United Nigeria Insurance Co Ltd v Stocco* (1973) NCLR 231 and *Ras Pal Gazi Construction Co v FCDA*, *supra*. See also Article 28.6 of the ICC Arbitration Rules, 1998

⁵²² In Nigeria, no appeal lies against an arbitral award. See *Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Ltd*, *supra*. However, in England, section 69 of the Arbitration Act, 1966

7.2 NATIONALITY OF AN AWARD

It is of fundamental importance that an arbitral award must have a nationality. This is so because this is decisive in determining which national court has jurisdiction for either setting aside or enforcing an award. A national court will only assume the jurisdiction if the nationality of the award is determined, otherwise it is a foreign award. However, the contentious issue is the criteria for determining such nationality: is it the law of the place where the award is rendered or the nationality of the arbitrators or the law applicable to the arbitral proceedings? In some jurisdictions like Austria, this is determined by the law of the place of the rendering of the award.⁵²³ The consequence of this is that an award rendered outside Austria will be considered a foreign award. In Greece and German Federal Republic, the nationality is determined by the law applicable to the arbitral proceedings⁵²⁴ while in Yugoslavia it is determined by both the law of the place of award and that law of the arbitral proceedings.⁵²⁵ In Hungary, the nationality is determined by not only the place of the proceedings but also the nationality of the arbitrators.⁵²⁶ One way of resolving this difficulty is to delocalise or denationalize an award. However, this was not acceptable to the drafters of the Model Law and Article 1(2) of the Law provides that the place of arbitration is instrumental for the application of the Model Law. Thus, the relevant connecting factor is the place of arbitration.⁵²⁷

provides for qualified right of appeal on questions of law if there is no exclusion agreement between the parties.

⁵²³ See sections 1(16) and 79 of the Austrian Enforcement Order. See also Article 761 of the Libyan Law of Civil and Commercial Procedure of 1954 as amended and Article 299 of the Code of Civil and Commercial Procedure as enacted in Law No. 13 of 1968.

⁵²⁴ Sarcevic P “The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law” in Sarcevic, *Op Cit* at 178

⁵²⁵ See Article 97 of the Private International Law Act of 1982

⁵²⁶ Sarcevic, *Op Cit* at 179

⁵²⁷ See Article 20(1) of the Model Law and Article 16 of the Arbitration Rules

The parties to the arbitral proceedings are free to choose the place of arbitration and if they fail to exercise this right of choice, the arbitral tribunal determines it. Accordingly, section 16(1) of the Act provides thus:

Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.⁵²⁸

As will be seen shortly, the statement of the place of arbitration is required for the determination of the nationality of the award, the recognition and enforcement procedure as well as in claims for setting aside the award. Similarly, the place of arbitration is one of the matters that must be contained in the award required by section 26(2)(c) which provides thus: “the place of the arbitration as agreed or determined under section 16(1) of this Act which place shall be deemed to be the place where the award was made”.⁵²⁹

The importance of the nationality of the award is underscored by the fact that under section 48 of the Act, such award can be set aside if the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria;⁵³⁰ or if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or that the award is against public policy of Nigeria.⁵³¹ In addition, any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award under the same grounds and where the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.⁵³²

⁵²⁸ See p 74 *supra*

⁵²⁹ See p 72 *supra*

⁵³⁰ See section 48(a)(ii) of the Act

⁵³¹ See section 48(b) of the Act

⁵³² See section 52 of the Act particularly subsections (2)(a)(ii), (viii) and (b) of the Act

7.3 RECOURSE AGAINST AN AWARD

It is pertinent to state here that the Act has four parts: namely, Part I dealing with domestic Arbitration⁵³³, Part II dealing with Conciliation⁵³⁴, Part III dealing with Additional Provisions Relating to International Commercial Arbitration and Conciliation⁵³⁵, and Part IV dealing with Miscellaneous Matters⁵³⁶. It is also noteworthy that most of the provisions in Part III were adapted from the Model Law while Part I is an admixture of the provisions of the Model Law and sections of the repealed Arbitration Act of 1914. Ordinarily therefore, in discussing recourse against an international arbitral award in a work of this nature, the focus should be on Part III only. However section 43 of the Act which is in of Part III provides thus:

The provision of this Part of this Act shall apply solely to cases relating to international commercial arbitration and conciliation *in addition to the other provisions of this Act*⁵³⁷

The import of this provision, therefore, is that although Part III relates to international commercial arbitration, these provisions are in addition to the provisions in Part I dealing with domestic arbitration. With respect, therefore, we do not share the view of His Lordship, Justice Akpata when he stated that sections 29 and 30 of the Act which are in Part I relate solely to domestic arbitration.⁵³⁸ We also respectfully do not share the view of Ezejiogor that the time within which to apply to set aside an international award is not stated in the Act because there is no provision for this in Part III of the Act⁵³⁹ when section 29(1) of the Act clearly provides for this. Our position is re-enforced by the fact that the

⁵³³ See sections 1 – 36 Id

⁵³⁴ See sections 37 – 42 Id

⁵³⁵ See sections 43 – 55 Id

⁵³⁶ See sections 56 – 58 Id

⁵³⁷ Emphasis added

⁵³⁸ Akpata, Op Cit at 84 and 87

⁵³⁹ Ezejiogor, Op Cit at 172

provisions in Part III of the Act are “in addition to the other provisions of this Act”. In *Araka v Ejeagwu*^{539(a)}, an application was made to the High Court on 25 April, 1995 under section 29 of the Act to set aside an arbitral award made on 8 September, 1994, that is, seven months after the award had been made and the Supreme Court, per Katsina-Alu, JSC held thus

The prescribed time within which to make an application to set aside an arbitral award under the Arbitration and Conciliation Act, 1988 is three months from the date of the award irrespective of whether the application is predicated under section 29 or section 30 of the Act.

Consequently, any action brought after the prescribed time “is unquestionably statute-barred and/or incompetent as it was filed outside the three month period prescribed by the Act”,^{539(b)}

7.3.1 Setting Aside an Award

Arbitral proceedings are traditionally alternatives to litigation. Parties resort to it because of the problems of litigation. Ordinarily, therefore, the courts should have no business interfering with arbitral proceedings. Paradoxically, all municipal systems have measures of control over arbitral proceedings either by way of judicial review or appeal. Through such measures, the national courts interfere with arbitral proceedings. If parties embrace the doctrine of party autonomy and take the arbitral proceedings for better or for worse, the courts will have no role to play in this regard. However, when an award is given, the unsuccessful party instead of honouring his side of the bargain takes steps to set it aside. The grounds for setting aside are statutory and will now be considered.

^{539(a)} (2000) 15 NWLR (pt 692) 684 at 700-701. See also *Commerce Assurance Ltd. Alli, supra, Home Development Ltd v Scancila Contracting Co Ltd* (1994) 8 NWLR (Pt 362) 252 and *B.I.P. Ltd v NIPOL Ltd* (1986) 5 NWLR (Pt 44) 767

^{539(b)} per Iguh, JSC in *Araka v Ejeagwu, supra* at 711-712

a) **Procedure for Setting Aside under Section 29(1) of the Act**

Section 29(1) of the Act provides thus:

A party who is aggrieved by an arbitral award may within three months –

- (a) from the date of the award; or
- (b) in a case falling within section 28 of this Act, from the date the request for additional award is disposed of by the arbitral tribunal, by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.

An aggrieved party who intends to challenge an award must act timeously. Consequently, if the application is not made within three months, the right is lost and barred.⁵⁴⁰ The court to which the application must be made is the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court.⁵⁴¹

b) **Grounds for Setting Aside**

The grounds for setting aside an arbitral award under the Nigerian law are now statutory.⁵⁴² Accordingly section 29(2) of the Act provides that

The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.

In an arbitration agreement or a submission, the parties agree that particular types of disputes should be referred to arbitration. It is important therefore that the agreement/submission should be so drafted as to show what types of disputes are to be

⁵⁴⁰ *UNIC v Stocco, supra*

⁵⁴¹ See section 57 of the Act

⁵⁴² See sections 29, 30(1) and 48 Id. See also Article 34(2) of the Model Law and Article V of the New York Convention

referred to arbitration. The authority of the arbitral tribunal is derived from the nature of the reference. Where the arbitral tribunal exceeds this authority, the proceedings may be set aside. In *Araka v Ejeagwu*⁵⁴³, the Supreme Court held that “if the arbitrator makes an award on a matter which the parties have not asked him to arbitrate upon, the arbitrator would be acting beyond his powers and his decision may be set aside”.

Another ground for setting aside an arbitral award is when the arbitrator misconducts himself or where the award was improperly procured. Section 30(1) of the Act provides thus:

Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on the application of a party set aside the award.

It is noteworthy that although the Act has used the word “misconduct”, it has not been defined anywhere in the Act. However, case law on this is legion. In *Taylor Woodrow (Nig) Ltd v S.E. GMBH Ltd*⁵⁴⁴, the Supreme Court quoted with approval the reasoning of the learned authors of Halsbury’s Laws of England⁵⁴⁵ as to what may constitute a misconduct. Although, the learned authors acknowledged the difficulty in giving exhaustive definition of the word it “includes on the one hand that which is misconduct by any standard, such as being bribed or corrupted, and on the other hand mere ‘technical’ misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement or reference”. The learned authors then proceeded to give ten examples of “misconduct” which include exceeding of authority, inconsistent or ambiguous awards, irregularity in the proceedings, infraction of the right to fair hearing, acquisition of interest in the subject

⁵⁴³ Supra. See also *Taylor Woodrow (Nig) Ltd v S.E. GMBH Ltd*, supra, *Commerce Assurance v Alli*, supra, *KSUDB v Fanz Construction Ltd*, supra, *Shell Trustees Nig Ltd v Imani & Sons (Nig) Ltd* (2000) 6 NWLR (Pt 662), 639 and *Savoia Limited v Sonubi* (2000) 7 SC (Pat I) 36

⁵⁴⁴ Supra at 141 – 143. See also *KSUDB v Fanz Construction Ltd*, supra, *Araka v Ejeagwu*, supra, and *Savoia Ltd v Sonubi*, supra

⁵⁴⁵ 4th Ed, Vol. 2, para 22, at 330-331

matter and delegation of authority to a stranger. Apart from case law, these examples have been expounded and properly articulated by other learned authors that we do not intend to repeat them.⁵⁴⁶

However, the refusal by an arbitrator to consider matters outside his jurisdiction cannot amount to a misconduct. In *Taylor Woodrow (Nig) Ltd v S.E GMBH*, an application was made to the court to set aside an arbitral award on the ground that the arbitrator had misconducted himself. In the course of hearing the application, the applicant sought to amend its pleading to incorporate a clause that was irrelevant to the dispute. The Supreme Court held thus:

.... the refusal by the arbitrator to allow the appellant to amend its pleadings to incorporate clause 7(1) on the ground of its being irrelevant to the dispute before him was right in that to allow the issue of clause 7(1) to be introduced would amount to widening the scope of the reference by the parties to the arbitration.

Similarly, a mere error of fact or law, delay of the arbitrator and misunderstanding of the submission of counsel may not amount to misconduct.

As to how an arbitral proceeding or award can be said to be improperly procured, the Act is also silent. Orojo and Ajomo⁵⁴⁷ have given examples of such grounds. These include improper relationship between the arbitrator and a party or his solicitor, or bribing the arbitrator, fraudulent concealment of matters which ought to be disclosed, corrupting the arbitrator and employing the arbitrator for reward.

Under section 29 of the Act, an aggrieved party must apply to court to set aside an arbitral award within three months from the date of award or when the request for additional award is disposed. However section 30 of the Act which deals with misconduct of the arbitrator did not provide for the period within which the application to set aside should be

⁵⁴⁶ Akpata, Op Cit at 88, and Orojo & Ajomo, Op Cit at 273-286

⁵⁴⁷ Op Cit at 286

made. Does this then mean that any aggrieved party who feels that the arbitrator has misconducted himself can apply to set aside the arbitral award at any time – *ad infinitum*? In *Araka v Ejeagwu*⁵⁴⁸, an arbitral award was made on 8 September, 1994. On 6 February, 1995, by an originating summons, the appellant applied to the High Court for the recognition and enforcement of the award pursuant to section 31 of the Act. However, on 25 April, 1995, an application was made by the respondent under 30(1) to set aside the award – seven months after the award. After reviewing the submissions of counsel for the parties, the learned trial Judge, in a reserved ruling, found thus:

I hold that the arbitrator went outside the limits of his jurisdiction as provided for in clause 4(c) *supra*. To that extent the arbitrator misconducted himself. It follows that the application would be brought under section 30 of the Act, and subsequently is not statute-barred.

It is clear that section 30 did not place any time limit within which an aggrieved party may recourse against the award by an arbitrator. I hold therefore that the application is not statute-barred if it is proved that the arbitrator exceeded the terms under which he was to arbitrate.

The appellant appealed against this ruling to the Court of Appeal. In a majority decision, the Court of Appeal dismissed the appeal. However, in his dissenting judgment, Akpabio, JCA, held as follows.

. . . I hold that the learned trial Judge Amaizu, J, was in error when he held that the application of the respondent to set aside the award was not statute-barred, merely because the application was made under section 30(1) and not 29(1) of the Arbitration and Conciliation Act, 1990. In my view it does not matter under what section of the Act, an application is made, because there is only one period of limitation prescribed in the Act.

Still dissatisfied with the majority decision of the Court of Appeal, the appellant appealed to the Supreme Court. In the leading judgment, Katsila-Alu, JSC held thus:

⁵⁴⁸ *Supra*. See also *Home Development Ltd v Scancila Contracting Co Ltd* (1994) 8 NWLR (Pt 362) 252 at 262

In the present case, although the award was made on 8th of September, 1994, the motion to set it aside was brought on 25th April, 1995. Consequently, since the motion on notice to set aside the award was filed long after three months in violation of section 29(1) of the Arbitration and Conciliation Act, it was incompetent and the trial High Court had no jurisdiction to entertain it.^{548(a)}

In interpreting the combined effects of sections 29 and 30, Kutigi, JSC held thus:

Both sections 29 and 30 thus provide for recourse against an award made by an arbitrator as can be seen above. And under both sections it is an aggrieved party who must apply to have an award set aside whether because of the misconduct by the arbitrator (section 30) or because of any other thing (section 29). Will it therefore be correct and proper to say that an aggrieved party under section 29 has three months within which to apply to set aside the award, while another aggrieved party has eternity under section 30, to apply to set aside an award? My answer must be in the negative and it is negative. I am firmly of the view that the limitation period of three (3) months under s.29 being the only period of limitation prescribed under the Act applies to all aggrieved parties to all arbitral awards whether because of the misconduct or what have you.^{548(b)}

An arbitral award can also be set aside under section 48 of the Act. It is noteworthy that the provisions of this section were adopted from Article 34 of the Model Law which is similar to Article V of the New York Convention. These provisions are so well known to anyone dealing with international arbitration and extensively discussed by learned authors that they need not be elaborated upon here.⁵⁴⁹ Suffice it to say however, that the provisions provide for seven instances when the party applying to set aside an award must furnish proof of the facts alleged and two instances when there must be a finding by the court. The seven instances include incapacity on the part of a party to the proceedings, invalidity of the agreement, improper notice of the appointment of an arbitrator, acting without jurisdiction or that the composition of the arbitral tribunal was not in accordance with the

^{548(a)} supra at 701

^{548(b)} supra at 702-703

⁵⁴⁹ See Orojo and Ajomo, Op Cit at 287, Akpata, Op Cit at 124 and Ezejiofor, Op Cit at 171

agreement or conflicts with the provisions of the Act. However, where the subject matter of the dispute is not arbitrable⁵⁵⁰ or the award is against public policy in Nigeria, there must be a specific finding by the court. Some of these instances are amongst the grounds which amount to misconduct as was held in *Taylor Woodrow (Nig) Ltd v S E GMBH, supra*.

It is instructive to assert that the grounds for setting aside an award in Nigeria are statutory. Consequently, the common law rule of error of fact or law on the face of the record is no longer a valid ground. However such errors may, in appropriate cases, be treated as misconduct. For comparative purposes, in the UK an award can only be challenged under two grounds, namely, lack of substantive jurisdiction⁵⁵¹ and serious irregularity⁵⁵². What amounts to serious irregularity will generally fall under either section 30 or 48 of the Act.

7.3.2 Right of Remission under Section 29(3) of the Act

Section 11 of the impliedly repealed Arbitration Act of 1914 gave the court or judge the right to remit an award to the arbitral tribunal for its reconsideration. However, there is no such direct provision in the Act as section 29(3) merely provides thus:

The court before which an application is brought under sub-section (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine, to afford the arbitral tribunal an opportunity to resume the arbitral proceedings, or take such other action to eliminate the grounds for setting aside the award.

While Justice Akpata argues⁵⁵³ that “this section provides a saving device for avoiding the drastic consequences of setting aside an award . . .”, Orojo and Ajomo are of the view⁵⁵⁴ that it “makes provisions that ensures substantially the same result (as remission)”. We

⁵⁵⁰ See also *KSUDB v Fanz Construction Ltd, supra* at 32-33

⁵⁵¹ See section 67 of the UK Arbitration Act, 1996

⁵⁵² See section 68 Id

⁵⁵³ Akpata, Op Cit at 86

⁵⁵⁴ Orojo & Ajomo, Op Cit at 273

agree with these submissions except to add that a party may only make the request where there is a pending proceeding for setting aside an award. Under section 68(3) of the UK Arbitration Act, 1996, the court cannot exercise its power to set aside or declare an award to be of no effect unless it is satisfied that it would be inappropriate to remit the matter in question to the tribunal for reconsideration. Considering the drastic consequences of setting aside an award, we humbly submit that reform of this area is imperative so as to re-introduce remission as a separate and independent remedy in the arbitral process. It is noteworthy that where the arbitration is conducted under any of the High Court (Civil Procedure) Rules^{554(a)}, there is provision for remission of the award for the reconsideration of the arbitral tribunal.

7.3.3 Effect of Setting Aside an Arbitral Award

Where there is a recourse against an arbitral award, the court can set aside the award in whole or in part. In jurisdictions, like in the UK, where remission is statutorily provided for, the court will only set aside the award if it is satisfied that it would be inappropriate to remit it to the tribunal for reconsideration. In jurisdictions like Nigeria, where there is no direct provision on remission, the arbitral tribunal can, under section 29(3) suspend the proceedings to set aside an award and remit it to the arbitral tribunal for reconsideration.

When an award is set aside in whole or in part, the effect is that it deprives the award or part of it of any legal effect and therefore becomes unenforceable. Indeed where an award is set aside in the country in which it was made, this is one of the grounds for refusal of recognition and enforcement under the New York Convention⁵⁵⁵ and the Model Law⁵⁵⁶.

The usual problem that arises from annulling an award is the effect on the arbitration agreement itself. Does such an annulment also annul the arbitration agreement? This

^{554(a)} For example under Order 19 of High Court (Civil Procedure) Rules, Abuja, Order 46 of High Court (Civil Procedure) Rules, Lagos and Order 19 of the High Court (Civil Procedure) Rules, Plateau

depends on the effect of the award. If the award is set aside on the ground that the arbitration agreement was null and void, an aggrieved party cannot re-commence arbitration proceedings nor litigate on it. This is so because no cause of action can be based on a contract which is null and void. However, where the defect is merely procedural, for example the infraction of the right to fair hearing, the arbitration agreement will still subsist to the extent that it is not statute-barred. It is to be noted that the court has a variety of orders that it can make where the arbitration agreement is still valid, for example, it can set aside the award and order that fresh arbitrators be appointed to re-commence the arbitral proceedings.

7.3.4 Refusal of Recognition and Enforcement

Ordinarily, an arbitral award is self-executing. In other words, when an arbitral award is made, it is expected that the losing party will honour his obligations on the contract. However, such a party may merely refuse to recognize or enforce an award. In practice, there are statutory provisions to assist the aggrieved party to apply to court to refuse or recognize the enforcement of the award. Accordingly, section 32 of the Act provides that any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. However, this section has not provided for the grounds under which such recognition and enforcement may be refused. It is humbly submitted that an aggrieved party may apply to court under section 30 of the Act but he must do this within three months from the date of the award as provided in section 29 of the Act. The danger here is that if the aggrieved party takes steps to challenge the award and he fails, he cannot, when the claimant seeks to enforce the award, resist enforcement on any

⁵⁵⁵ See Article V.1(e) of the New York Convention

⁵⁵⁶ See Article 36(1)(a)(v) of the Model Law and Section 52(2)(viii) of the Act

ground which he either did or could have relied on in the proceedings to challenge the award.⁵⁵⁷

What is the position of the law in a situation where there is an application to set aside an award and another to enforce it? This issue arose for consideration in *Shell Trustees (Nig) Ltd v Imani & Sons Ltd*⁵⁹⁸. In an arbitral proceeding, the arbitral tribunal made awards in favour of the claimant on 27 February, 1998. The claimant then approached the High Court, Abuja for an order to enforce the award since the subject-matter of the dispute known as “The United States of America Embassy Project” was situated at Abuja. Thereafter, the respondent filed an application at the High Court of Lagos to challenge the arbitral award and filed a preliminary objection at the High Court, Abuja, contending, *inter alia*, that the application for enforcement cannot be heard until the determination of the application filed at the High Court of Lagos State. The trial court dismissed the preliminary objection and granted the application for enforcement of the award. On appeal to the Court of Appeal, Abuja Division, one of the issues for consideration was the priority of pending applications to respectively enforce and set aside an arbitral award. In a majority decision, Muntaka-Coomassie, JCA held thus:

If there are two applications before a court of law pending side by side one to enforce an arbitral award and the other to set it aside, the latter must be taken first. However, those two applications must be pending before the same Judge in the same action. In a situation where one application is before a particular judge and another before another court, the principle will not apply. In the instant case, it is wrong for counsel to file an application to enforce an award before an Abuja High Court and another counsel to deliberately decide to file an application to set aside the same award in a Lagos High Court.^{598(a)}

⁵⁵⁷ *Hall & Wodehouse Ltd v Panorama Hotel Properties Ltd* (1974) 2 Lloyd’s Rep 413

⁵⁹⁸ *Supra*

^{598(a)} *supra* at 659

Consequently, a court seised of an application for the recognition and enforcement of an arbitral award should stay such proceedings until the consideration of another application before it seeking to set aside the arbitral award is determined. However, this rule does not apply to a situation where the court dealing with an application for recognition is a court of coordinate jurisdiction within the provisions of section 57 of the Act with another court before which an application to set aside the award is pending. This is more so when the application to the other court to set aside is shown to have been later in time to the receipt of process issued in connection with the application to recognize and enforce. Such conduct will not only be contrary to public policy but an abuse of process.

Section 52(1) of the Act also provides for refusal of recognition and enforcement of an award. Under the section, any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. However, unlike section 32, section 52(2) of the Act provides that the court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to recognize or enforce an award on certain grounds. It is noteworthy that the grounds are the same as those set out in section 48 for setting aside an award except that there is a new ground under section 52(2)(a)(viii), namely,

That the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.

As has been pointed out, where the award is set aside, it becomes void and ineffectual and there is no award to recognize or enforce. Furthermore, according to section 52(3) of the Act, where an application for the recognition or enforcement of an award has been made to a court referred to in subsection (2)(a)(viii) of section 52, the court before which the

recognition or enforcement is sought may, if it considers it proper, postpone its decision and may on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security. It is humbly submitted that in *Shell Trustees (Nig) Ltd v Imani & Sons Ltd, supra*, the Court of Appeal should have relied on this subsection, postpone its decision and order the respondent who filed an application to set aside in another court to provide appropriate security.

It should be stressed that in Nigeria, unlike in the UK, there is no provision for appealing against an arbitral award – either on point of fact or law. Thus the only recourse is application to set aside the award or the limited right of remission.

7.4. RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARD

The point has been made that arbitral awards are generally self-executing. In other words, the parties are bound to comply with the decision of the arbitral tribunal. It is when and only when the losing party fails to comply with the award that the issue of recognition and enforcement will arise. To assist the winning party, the Act has made elaborate provisions for the recognition and enforcement of both domestic and international awards. In Nigeria, domestic awards can be enforced under the summary procedure as provided for in section 31 of the Act and by common law action while foreign awards are enforced under sections 51 and 52 of the Act and the under section 54 of the Act dealing with the New York Convention. It is instructive to assert that unlike application to set aside where the nationality of the award is a dominant factor, in the case of enforcement, nationality of the award is not relevant except enforcement under the New York Convention. We will consider the provisions in greater detail.

7.4.1 **Summary Procedure under Section 31 of the Act**

The summary procedure under section 31 of the Act is normally used to enforce an arbitral award including an agreed award provided for in section 26 of the Act. Section 31 of the Act provides thus:

- (1) An arbitral award shall be recognized as binding and subject to this section and section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.
- (2) The party relying on an award or applying for its enforcement shall supply –
 - (a) the duly authenticated original award or a duly certified copy thereof;
 - (b) the original arbitration agreement or a duly certified copy thereof.
- (3) An award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

The application for leave is made *ex parte*, by originating summons⁵⁹⁹ (but the court may order that notice be given)⁶⁰⁰, supported by an affidavit to which the arbitration agreement and the award or a copy of them is exhibited. The application is normally granted unless there is a request to refuse recognition or enforcement of the award under section 32 as discussed above. When the leave is granted, it is usually on terms that the award may “be enforced in the same manner as a judgment or order of the court to the same effect”. The consequence of this is that all methods of enforcing a judgment of the court are then available to enforce the award, including an injunction.⁶⁰¹

In *Ebokan v Ekwenibe & Sons Trading Co*^{601(a)} one of the issues before the court was the proper interpretation of section 31 of the Act. In other words, how is an arbitral award enforced and what documents must the applicant put before the court? While the

⁵⁹⁹ *K.S.O & Allied Products Ltd v Kofa Trading Co Ltd* (1996) 3 NWLR 244 at 254

⁶⁰⁰ Orojo & Ajomo, Op Cit at 299

⁶⁰¹ *Aiglon Ltd and L'Aiglon S.A. v Gau Shan Co Ltd* (1993) 1 Lloyd's Rep 164

^{601(a)} (2001) 2 NWLR (Pt 696) 32 at 41. See also *Imani & Sons Ltd & Anor v Bil Construction Company Ltd* (1999) 12 NWLR (Pt 630) 254 at 261-263

applicant tried to enforce the award, the respondent tried to set it aside. The trial court struck out the two applications on the ground that the arbitrator was not properly appointed and the arbitral award was not filed as part of the record of proceedings before the trial court. In determining the appeal, the Court of Appeal considered the provisions of section 31 of the Act and held per Oguntade, JCA thus:

In the instant case, the appellant only needed to bring before the trial court the original award or a certified thereof and the original arbitration agreement or a duly certified copy thereof. In the course of the proceedings before the trial court, the appointed arbitrator, Mr Uche Chigbo filed the award and also the arbitration agreement. There was therefore no doubt that all the necessary documents as prescribed under section 31 of Cap 19, Laws of the Federation, 1990 were before the trial court. It could therefore be no valid excuse to the trial court that the relevant proceedings were not before it.

In *Imani & Sons Ltd & Anor v Bill Construction Company Ltd, supra*, one of the issues that arose for consideration was whether in enforcing an arbitral award under section 31, the originating summons must be on notice. The trial court reasoned that the purpose of section 31 of the Act was merely to inform the respondent of the application and that it was not meant that such respondent should file a counter-affidavit nor address the court. On appeal, the Court of Appeal, per Oguntade, JCA held thus:

Although the provisions of section 31 of the Arbitration and Conciliation Act, do not stipulate that a respondent to an application for the enforcement of an arbitral award shall be put on notice, however, since the procedure is one that will lead to the granting of an order which may affect another's proprietary interest, the Court must read into it a provision to the effect that a party against whom the order is sought must be put on notice. . . . The procedure followed by the lower court was an infraction of appellants' right to fair hearing.^{601(b)}

We agree with His Lordship.

^{601(b)} *supra* at 263

The second method of enforcement is action on the award. This is based on the premise that the arbitration agreement contains an implied obligation to perform the resulting award and failure to do so is a breach of that arbitration agreement. As succinctly put by Sutton *et. al.*, “the successful party would be entitled to bring an action in respect of such breach and to obtain a judgment in the terms of the award”⁶⁰². The essential elements of the plaintiff’s cause of action are that he must plead and prove:

- (a) an arbitration agreement;
- (b) that a dispute has arisen which falls within that arbitration agreement;
- (c) the appointment of a tribunal in accordance with the arbitration agreement;
- (d) the making of the award pursuant to the arbitration agreement; and
- (e) failure to perform the award.⁶⁰³

The same objections that can be raised to oppose the grant of leave to enforce an award can be raised by way of defence to an action on the award. It is noteworthy that unlike section 66(4) of the UK Arbitration Act, 1996 which expressly saves this common law remedy, there is no similar provision under the Act. Although the summary procedure is the most popular, the common law action can be resorted to if, for any reason, the summary procedure is not available.⁶⁰⁴

7.4.2 Recognition and Enforcement under Sections 51 and 52 of the Act

Prior to the promulgation of the Act in 1988, there were two methods of enforcing foreign awards in Nigeria, namely, by registration under the Foreign Judgments (Reciprocal Enforcement) Act⁶⁰⁵ and under the New York Convention. According to section 2 of the Foreign Judgments (Reciprocal Enforcement) Act such an award must, according to the law of the foreign country, be enforceable as a judgment of a court in that country while sections

⁶⁰² Sutton, et al Op Cit at 398

⁶⁰³ Id

3 and 4 of the Act empowers the Minister of Justice to make an order declaring the foreign country as one whose judgments are to be given that treatment if that foreign country gives a reciprocal treatment to judgments given in Nigeria and the judgment is registered by the judgment creditor in any of the High Courts of Nigeria within six years after the date of its delivery. However a judgment shall not be registered if at the date of the application it has been wholly satisfied, or if it could not be enforced by execution in the foreign country. Since the Arbitration and Conciliation Act came into force, the Act has provided for the recognition and enforcement of such judgment. Although the Act is deemed to have repealed the Foreign Judgments (Reciprocal Enforcement) Act because it covers all types of award (including those which come under the Foreign Judgments (Reciprocal Enforcement) Act), it is noteworthy that the Act makes no reference to it. It is submitted, therefore that at the earliest opportunity, the Act should be reformed to repeal consequentially the Foreign Judgments (Reciprocal Enforcement) Act.

Section 51 of the Act provides thus:

- (1) An arbitral award shall, irrespective of the country in which it is made, be recognized as binding and subject to this section and section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.
- (2) The party relying on an award or applying for its enforcement shall supply –
 - (a) the duly authenticated original award or a duly certified copy thereof;
 - (b) the original arbitration agreement or a duly certified copy thereof; and
 - (c) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.⁶⁰⁶

The fact that under this section and indeed the Model Law, an award is made binding irrespective of the country in which is made is the main distinction between awards made

⁶⁰⁴ Orojo & Ajomo, Op Cit at 303

⁶⁰⁵ Cap 152, Laws of the Federation of Nigeria, 1990

under these instruments and the New York Convention. In the case of the latter, the award is only binding in a contracting state and where there is reciprocal treatment of international awards. However, the procedure for enforcement under the Act is the same as for the domestic award as dealt with under section 31 of the Act except that a translation into English is provided for where appropriate. Thus without a reciprocal provision in the foreign country, the award is enforceable in Nigeria unless one or more of the grounds of refusal listed in section 52(2) are present.

It is curious, therefore, that instead of reference to section 52 in section 51 of the Act, reference is to section 32 of the Act. It is humbly submitted that section 32 of the Act deals with domestic arbitration while section 52 of the Act deals with international commercial arbitration. Consequently, section 52 should be substituted for section 32 referred to in section 51 of the Act. Akin to section 48, there are eight grounds in section 52(2) that the party against whom the award is invoked must furnish proof thereof while there are two grounds under which the court must make findings.⁶⁰⁷

The second method of enforcing a foreign award is under the New York Convention.⁶⁰⁸ As has been pointed out, section 54 of the Act provides for the application of the Convention to any award made in Nigeria or in any contracting state (reciprocity reservation) and to legal relationships of a contractual nature (commercial reservation).⁶⁰⁹ It appears that section 54 of the Act especially its provisions on commercial reservation is in conflict with the declaration made by the Federal Government when it acceded to the Convention on 17 March, 1970. While the declaration refers to differences arising out of legal relationships whether contractual or not, which are considered as commercial under

⁶⁰⁶ See also Article 35 of the Model Law

⁶⁰⁷ See also Ezejiofor, *Op Cit* at 177. Akpata, *Op Cit* at 142 and Orojo & Ajomo, *Op Cit* at 306

⁶⁰⁸ See p 96 *supra*

the national law of the State making the declaration, section 54 of the Act provides for its application to differences arising out of legal relationship which is contractual. We humbly submit that this is in need of reform.

The provision for obtaining recognition or enforcement under the Convention is the same as under section 51(2) of the Act⁶¹⁰ and the grounds for refusal are the same as section 52(2) of the Act⁶¹¹. Similarly Article VI of the Convention is similar to section 29(3) of the Act dealing with “remission” of the award. It should be noted however that the provisions of section 51 are wider than those of the Convention. Consequently, an award made in a country not a party to the Convention or giving reciprocal treatment to Nigerian awards cannot enjoy in Nigeria the recognition and enforcement provided in the Convention but such award may be recognized under section 51 of the Act.

The International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act⁶¹² provide for the enforcement in Nigeria of an award by the International Centre for Settlement of Investment Disputes. Article 54(1) of the Convention provides that each contracting state shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state. A contracting state with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of a court of a constituent state. Sub-article (2) provides that a party seeking recognition or enforcement in the territory of a contracting state shall furnish to a competent court or other authority which such state shall have designated for this purpose a copy of the award certified by the

⁶⁰⁹ Although in relying on Nigeria’s Treaties in Force, 1970-1990, Vol.2, No. 24, p 269 Orojo & Ajomo submit that the Convention applies to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the laws of the Federal Republic of Nigeria.

⁶¹⁰ See Article IV of the Convention

⁶¹¹ See Article V Id

Secretary-General of the Centre. Each contracting state shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

Accordingly section 1(1) of the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act provides that “a copy of such award if filed in the Supreme Court by the party seeking its recognition for (or) enforcement in Nigeria, shall for all purposes have effect as it if were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly” while subsection (2) provides that the Chief Justice of Nigeria may make rules of court or may adapt any rule of court necessary to give effect to this section.

7.4 EXTENT OF COURT’S INTERVENTION

To ensure that the principle of party autonomy prevails and limit the role of the courts in arbitral proceedings, section 34 of the Act provides that “a court shall not intervene in any matter governed by this Decree (Act) except where so provided in the Decree (Act)”.⁶¹³ Consequently, there are express provisions in the Act for the intervention of the court in the following areas: stay of proceedings⁶¹⁴, revocation of arbitration agreement⁶¹⁵, appointment of arbitrator⁶¹⁶, attendance of witnesses⁶¹⁷, setting aside of award⁶¹⁸, remission of an award⁶¹⁹, enforcement of award⁶²⁰ and refusal of enforcement of award⁶²¹. In *Savoia v Sonubi*, *supra*, one of the issues for consideration was the extent of a

⁶¹² Cap 189 LFN, 1990. See also p 113 *supra*

⁶¹³ See also Article 5 of the Model Law. See also section 57 of the Act for the definition of “court” and *Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Ltd*, *supra*

⁶¹⁴ Sections 4 and 5 of the Act

⁶¹⁵ Section 2 Id

⁶¹⁶ Section 7 Id

⁶¹⁷ Section 23 Id

⁶¹⁸ Sections 29, 30 and 48 Id

⁶¹⁹ Section 29(3) Id

⁶²⁰ Sections 31 and 51 Id

⁶²¹ Sections 32 and 52 Id

court's jurisdiction to interfere with the arbitral award under sections 11 and 12 of the Arbitration Law of Lagos State dealing with setting aside of an award or remitting a matter to the arbitrator for re-consideration. The trial court remitted the award to the arbitrator to enable him look further into the applicant's claim and to make such other awards as the justice of the matter deserved. Dissatisfied with this judgment the appellant appealed to the Court of Appeal which dismissed the appeal, affirmed the judgment of the trial court and made other consequential orders. On further appeal to the Supreme Court, it was held that the court's jurisdiction to interfere with the award of an arbitrator under the sections is limited to setting aside an award or remitting a matter to the arbitrator for reconsideration and has no jurisdiction to determine any matter, the subject of an arbitration proceedings. It is humbly submitted that although this decision was based on the repealed Arbitration Law, under the Act, no court has an jurisdiction to interfere except as provided by the Act.

7.5 CONCLUSION

In this chapter, we considered how an arbitral award can be impeached, the procedure for enforcement and the relationship between arbitral and court proceedings. Ordinarily, arbitral awards are self-executing. However, where an unsuccessful party is desirous of challenging an award, the nationality of such an award is fundamental in determining which national court has jurisdiction. This can be determined by the law applicable to the arbitral proceedings or that of the place where the award is made.

The Act has elaborate provisions on recourse against an award. The point was made that a party challenging an award, must apply to a High Court to set aside the award within the prescribed period otherwise it would be state-barred. The grounds for setting aside are generally that the award contains decisions on matters which are beyond the scope of the reference or that the arbitrator misconducted himself or that the arbitral proceedings or award has been improperly procured. Although, in other jurisdictions, instead of setting

aside an arbitral award, such award can be remitted to the arbitral tribunal for reconsideration, there is no similar provision in the Act. However, the right under section 29(3) of the Act is essentially the same as that of remission. When an award is set aside, it may annul the whole or part of the award or the arbitration agreement. It is important therefore to determine the real effect of setting aside an award.

When an unsuccessful party fails to voluntarily honour the award, the Act also made provisions for recognition and enforcement. There are grounds for refusing recognition and enforcement. These grounds are fundamentally the same as those for setting aside. There is a summary procedure and action on the award for purposes of enforcing domestic awards. However, in the case of foreign awards, there are also provisions in the Act and where it is a Convention Award, the New York Convention has provisions for this.

Sometimes, when the winning party files an application to court to enforce an award, the unsuccessful may oppose the application by filing another application to set aside the award. In such a case, the position of the law is that the application for setting aside takes priority over the one for enforcement.

Finally, the chapter, considered the jurisdiction of the courts to intervene in arbitral proceedings. Under the Act, the courts cannot intervene except as expressly provided for.

CHAPTER EIGHT

CONCLUSIONS, OBSERVATIONS AND RECOMMENDATIONS

8.1 CONCLUSIONS

This work attempts to critically evaluate the legal regime regulating international commercial arbitration as applicable in Nigeria and other Model Law countries. This involved the examination of the origin and evolution of arbitration generally and commercial arbitration specifically. As a former British colony, Nigeria is part of the common law family. However before the advent of colonial rule, the country had her own indigenous ways of resolving disputes. Initially this indigenous system (customary laws) operated concurrently with the “Received English Laws” with primacy given to the latter in most cases. The first statutory regulation of commercial transactions were models of English law.

With political independence, the doors of Nigeria were wide open and Nigerians got directly involved in negotiating international contracts. With this development, there was the need to fashion out a regulatory framework. It is worthwhile mentioning that at that time, international commerce involved mainly the import of consumer goods and services and export of raw materials. Thus, in negotiating such contracts, Nigerians were usually disadvantaged as they lacked the expertise to ensure that the terms were favourable. This was because international commerce had acquired a regime of technical rules and procedures which Nigerians were yet to fully embrace. Besides, it involves persons usually domiciled in different legal jurisdictions and thus subject to different legal systems.

Commercial disputes can be resolved through various processes. Indeed the conventional courts see this as their prerogative. However, over the years, there has been widespread dissatisfaction with the delays and high costs associated with these

conventional processes. Consequently, a movement for an Alternative Dispute Resolution (ADR) mechanism was initiated. Initially, this movement included arbitration, mediation, conciliation, med-arb and mini-trial. The processes are seen as a continuum: at one end is the adversarial (adjudicatory) and at the other non-adversarial (non-adjudicatory). The adversarial is represented by litigation and arbitration and the non-adversarial is represented by mediation, conciliation, med-arb and mini-trial.

The main thrust of this work is to examine how international commercial disputes can be resolved by arbitration. To achieve this, the work was structurally arranged to evaluate the legal regime regulating international commercial arbitration. Applicable legal instruments were considered. This is not to suggest that the other dispute resolution processes are of no consequence but to highlight the benefits derivable from arbitration as compared to other processes. Judicial adjudication produces a “win/lose” situation while arbitration, if properly conducted, could produce a “win/win” situation. The point was made that in the pre-colonial period, there existed traditional indigenous institutions that adapted a variant of arbitration. Consequently, arbitration is not alien to our jurisprudence. Furthermore, the point was also made that instead of attempting to establish whether arbitration or other alternative dispute resolution (ADR) processes were really alternatives to litigation, the focus should be on establishing a relationship between a dispute and process. With this objective, criteria would be set to determine which dispute fits litigation, arbitration, mediation, conciliation and other processes. Indeed the discourse should shift to the level of discussing appropriate dispute resolution processes instead of the use of the word “alternative”. All the same it has generally been accepted that arbitration is not part of the ADR processes but adjudicatory in nature, just like litigation. Consequently, most contemporary writings on ADR focus more on mediation and negotiation than arbitration.

One area where arbitration is different from other ADR processes is that an arbitral award (like a judgment of a court) is final and binding on the parties. Once an award is made, the arbitral tribunal becomes *functus officio* and the award can be pleaded by way of *estoppel per rem judicata*. In arriving at an award, the thesis discussed how the arbitral proceedings are conducted, the composition of the arbitral tribunal and how an arbitral award can either be set aside or enforced. In Nigeria, once an arbitral award is made, there is no provision for appealing against it to a court. The main remedy for an aggrieved party is to apply to the court to set it aside or explore the limited right of remission for reconsideration by the arbitral tribunal. In setting aside an award or enforcing it, the relationship between arbitral and court proceedings was critically appraised. Statutorily, a court cannot intervene in arbitral proceedings except as expressly provided by the Act. This is to ensure that the principle of party autonomy which is fundamental to arbitral proceedings is respected and observed.

8.2 OBSERVATIONS

Traditionally, arbitration was the real alternative to litigation. Thus, reference to alternative dispute resolution process was reference to arbitration. Unfortunately, when arbitration became over-legalistic and over-lawyered, it seemed to have betrayed its birthright by allowing itself to become as slow, as expensive and almost as formal as the court proceedings from which it was intended to offer an escape. ADR is a generic acronym. It has been observed therefore that ascribing a meaning to it raises to the fore its philosophical and jurisprudential underpinnings. It is generally accepted that every word (or acronym) has an inner 'core' of settled applications surrounded by a 'fringe' of unsettled applications. Consequently, problems of interpretation arise in the fringe area. Similarly, words may also have more than one usual meaning in which case the context has to resolve which meaning is being considered. It is now generally accepted that ADR is regarded as

any system of dispute resolution which is non-binding. By “non-binding” is meant the absence of imposed sanctions. Arbitration leads to a binding award and therefore it is not part of the ADR processes.

It has also been observed that the Government of Nigeria has created the enabling environment for the growth and development of arbitration in Nigeria. Firstly, it ratified both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Secondly it passed the Arbitration and Conciliation Act. In realization of its position in the West African sub-region, the Federal Government has established the Regional Centre for International Commercial Arbitration in Lagos under the auspices of the Asian-African Legal Consultative Committee. The Centre has been very active. In June 2000, it organized an introductory course/workshop at Abuja. This was a follow up to the one it organized in Lagos in April 1999. Through such workshops, the level of awareness of arbitral processes is raised.

Despite the existence of these legal instruments on arbitration, the Act is in need of review and reform. This is not an indictment of its drafters but the review and reform are aimed at properly locating Nigeria in the commercial arbitration world. After all Nigeria was the first African country to adopt the Model Law. It should be noted, however, that before the adoption of the Model Law in 1988 (thirteen years ago!), the country had the Arbitration Act/Law of 1914. The Act was, to some extent, an amalgam of the 1914 Arbitration Act/Law and the Model Law (including the UNCITRAL Arbitration Rules). Due to inadvertence some provisions of the instruments were repeated in the Act resulting in inelegant drafting, inadequate provisions, inconsistencies, technical oversights and typographical errors. In view of all these a review of the Act is imperative. Accordingly,

we will recommend areas that should be reviewed to bring the Act in consonance with current law and practice of arbitration.

8.3 RECOMMENDATIONS

In this work, attempts have been made to examine the nature, scope, form and contours of this virgin field of human endeavour. Although commercial arbitration is well developed in other jurisdictions, a lot still has to be done to raise the consciousness of businessmen and the academia in Nigeria to its importance. Increasingly, there is a shift from litigation to arbitration whenever there are commercial disputes.

The Federal Government of Nigeria has done a lot in terms of providing the regulatory framework. However, since government is also involved in commercial transactions, the Ministry of Justice should ensure that all government departments and parastatals fully embrace arbitration otherwise the efforts thus far will be worthless.

Apart from government, the various Chambers of Commerce and professional associations should encourage their members to fully embrace arbitration in resolving commercial disputes. One way of doing this is to ensure that there is an arbitration clause (or ADR clause) in all commercial agreements and when commercial dispute arise, arbitration should first be resorted to before litigation. A proper safety valve is to have *Scott v Avery* and *Atlantic Shipping Clauses*. With such clauses in a contract, resort will be made to arbitration before litigation and the arbitral process must be started within a time frame.

The issue of applicable law is very vital in arbitral proceedings. Applicable law means several things to several people. It means the law governing the substantive contract, the law governing the arbitral proceedings, the procedural law, the law of the place of enforcement and the law used to resolve any conflict if there is a conflict-of-laws problem. It can also mean the *lex mercatoria*. Care should therefore be taken in drawing up the

applicable law otherwise unexpected and unintended consequences may follow. If the arbitrators are to decide *ex aequo at bono* or as *amiable compositeur*, it should be so provided as they do not have such implied powers.

There are various arbitral institutions and rules. Consequently, arbitration can be institutional and/or *ad hoc*. It is generally advisable to adopt institutional rules than drafting all the rules in *ad hoc* arbitration. Drafting such rules is fraught with the possibility of omitting some indispensable elements. Under the Arbitration and Conciliation Act, the agreement must be in writing but the agreement is distinct and separate from the main contract based on the principle of separability. Furthermore, parties should take full advantage of the principle of party autonomy. Under this principle, parties can agree on the “rules of the game” instead of allowing the arbitral tribunal to resort to the conflict-of-laws rules. In doing so, the benefits of the use of *lex mercatoria* should be fully explored. If all these precautions are taken it will become apparent that arbitration suits most commercial disputes more than conventional litigation.

In view of the foregoing, the following recommendations are made:

- a) In most common law jurisdictions, the doctrine of case management has been adopted. Under this doctrine, there is a duty imposed on a judge to settle a case by other means than litigation, if the case is one that can be subjected to the other processes. Ultimately, this will lead to a reform of the court process and increase access to justice. The Lagos State Government is working on this. All the States of the Federation and indeed the Federal Government are enjoined to embrace the doctrine. This will assist in decongesting our courts. In reforming the court process, criteria should be set to determine which process fits any particular dispute.

- b) One of the attributes of arbitration is flexibility and informality. If arbitral proceedings are over-lawyered and over-legalistic, then we will be reverting to “litigation without robes”. Therefore, arbitral proceedings should be as simple and informal as possible.
- c) Nigeria is becoming a big player in world politics and commerce. In the African continent, it has the potentials of being a leader. Consequently, the Lagos Regional Centre for International Arbitration should be strengthened to take its rightful place in dispute resolution. Similarly, instead of the Secretary-General of the Permanent Court of Arbitration at The Hague being designated as the only “appointing authority” under the Act, the Director of the Centre or the Centre or any other institution can be so designated so as to accord the parties to arbitral proceedings under the Act, the right to choose.
- d) The issue of immunity of arbitrators generated a lot of controversy in the leading case of *Arenson v Arenson*, supra. While it is conceded that an arbitrator should be appointed based on his qualification and experience, it is pertinent to remember that he performs quasi-judicial functions. In order to sustain this status and attract persons of high integrity to act as arbitrators, the Act should expressly provide for their immunity as is now done in other jurisdictions. This is not to suggest that arbitrators should be granted absolute immunity but qualified immunity covering acts done or omitted to be done in the process unless willfully done or actuated by malice or improper consideration. Such a provision will reinforce their independence and impartiality and protect them from unnecessary and unwarranted harassment. Furthermore, just like the American Bar

Association Rules and that of the London Court of International Arbitrators, the immunity should also extend to the arbitral institutions and their employees.

- e) In western jurisprudence, the generally held view is that arbitration or mediation is their preserve. It has been observed that these processes are indigenous to Nigeria and are still prevalent in rural communities. However, given the nature of customary jurisprudence (largely unwritten), a study should be carried out with a view to formalizing these processes. This can be done at state levels bearing in mind the internal conflicts of law rules.
- f) In articulating the attributes of arbitration, the principle of party autonomy should be given prominence. Its paramountcy cannot be over-emphasised. This is one area where arbitration is fundamentally different from litigation.
- g) In contract, there is a presumption of equality of bargaining powers. Similarly, parties must be *ad idem*. Since arbitration is consensual in nature, there must be mutuality. Therefore where it is shown that there is lack of mutuality, such arbitral proceedings should, on grounds of public policy, be declared null and void.
- h) In line with the practice in other jurisdictions, Nigerian courts should not be “mono-door” court houses where the only product is litigation but “multi-door” court houses where litigation, arbitration, mediation and negotiation are available. With these, the ADR processes will be annexed to the courts and settlements reached will be treated as court judgments. This will entail

the active involvement of the judges in the process instead of being passive.

- i) The composition of the arbitral tribunal and the appointment of the arbitrators are matters that the parties must address. Although, the Act does not provide for the appointment of an umpire in the case of a disagreement, the parties can expressly provide for this. In that case, the role of the umpire should be clearly defined. It is noteworthy that if arbitration is conducted under the High Court (Civil Procedure) Rules, there is provision for the appointment of an umpire.
- j) The Act provides that where the parties fail to appoint arbitrator(s) or a third party fails to perform the function of appointing arbitrator(s) under section 7 of the Act, any party may request the court to make such appointment and such appointment shall be final. We submitted that this provision cannot be sustained in a democratic dispensation and in a judicial structure that has appellate system. In consonance with the practice in other jurisdictions, the leave of court should be sought for any appeal from a decision of the court under the section. This should be incorporated into the section accordingly.
- k) Section 44 of the Act deals with appointment of “appointing authority”. This provision was adopted from Article 11 of the Model Law and Article 6 of the Arbitration Rules. Unfortunately, while Article 6.1 of the Arbitration Rules provide for how the appointing authority shall be appointed and its functions defined, section 44(2) merely provides that an arbitrator shall be appointed by the appointing authority without providing for how and its functions. To remedy this defect/lacuna, section 54(2)

provides that the appointing authority means the Secretary General of the Permanent Court of Arbitration at The Hague. The term “appointing authority” is not used in this context. Appointing authorities are usually professional institutions, trade associations or specialist bodies. Therefore, sections 7, 44, 45 and 54 of the Act should be amended along the provisions in the Model Law and Arbitration Rules and the law and practice of arbitration. This will ensure that the procedure for appointment of “appointing authority” and the functions are provided for. It is also important to designate other bodies/institutions as appointing authorities instead of providing that appointing authority means a public functionary.

- l) Prior to the commencement of arbitral proceedings, preliminary meetings or meeting for directions are usually held. Such meetings are very helpful in giving the parties the opportunity to meet and obtain directions from the arbitral tribunal on the conduct of the proceedings, identify the issues in dispute, the language of the proceedings, whether oral evidence will be taken or it is going to be “documents only”, place of arbitration and the applicable law. This practice should be statutorily provided for.
- m) Whereas section 15(1) of the Act provides that “the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to this Act”, section 53 gives parties powers either to adopt the Rules or the UNCITRAL Arbitration Rules or any other rules acceptable to the parties. Because of the apparent inconsistency in the two provisions, the former should be read subject to the latter whether the arbitration is domestic or international.

- n) The provisions in section 22(3) and (4) of the Act on the powers to decide *ex aequo et bono* and incorporation of *lex mercatoria* are repeated in section 47(4) and (5) of the Act. More fundamentally, sub-sections (1) and (2) of section 22 of the Act deal with the appointment of experts. It is obvious therefore that sub-sections (3) and (4) of section 22 have nothing to do with the appointment of experts. These last mentioned two sub-sections of section 22 should be deleted as being superfluous and redundant.
- o) The Act makes no provision for the dismissal of arbitral proceedings for want of diligent prosecution as is done in other jurisdictions. In order to avoid inordinate delays in arbitral proceedings, statutory powers should be given to arbitral tribunals to dismiss arbitral proceedings in such a situation.
- p) Curiously, sections 4 and 5 of the Act deal with stay of proceedings. Whereas section 4 of the Act is adopted from Article 8 of the Model Law, section 5 of the Act is the same as section 5 of the Arbitration Act/Law of 1914. The conditions for their exercise are different. Section 4 provides for mandatory stay of proceedings once an application is made while section 5 of the Act provides for discretionary stay and none is expressly subject to the other. Bearing in mind that the Act regulates both domestic and international commercial arbitration, section 5 should regulate the former while section 4 regulates the latter. Alternatively, the two sections should be re-drafted so that stay of proceedings cannot be mandatory when requested for but discretionary.

- q) On an application to set aside an arbitral award, section 29 of the Act provides for limitation period while section 30 of the Act dealing with the same subject does not so provide. Accordingly, section 30 should be read subject to section 29 of the Act. Similarly the provisions in Part III of the Act dealing with international commercial arbitration should be read subject to other provisions in Part I of the Act dealing with domestic arbitration.
- r) The limitation on the powers of the court to refuse the enforcement of an arbitral award as provided in section 51 is section 32 of the Act. However, section 32 deals with domestic arbitration and does not provide for the grounds for such refusal. Therefore, section 52 of the Act should be substituted for section 32. This is so because section 52 not only deals with international arbitration but the grounds for refusing recognition and enforcement.
- s) Arbitration is now a subject of its own. Given its growing importance especially in international trade, the National Universities Commission should develop the syllabus and list it if not among the core subjects to be taught in the Universities but as an optional subject. It is noteworthy that some Universities are already teaching the course.
- t) In international law, you cannot plead a municipal law to avoid a treaty obligation. When Nigeria acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards in March 1970, the Declaration and Reservations that it made were to the effect that the Convention will only apply to the recognition and enforcement of awards made in the territory of another contracting state (reciprocity declaration)

and also to “differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law” (commercial declaration). However section 54(1)(b) of the Act provides that “the Convention shall apply only to differences arising out of legal relationship which is contractual”. Section 54(1)(b) is clearly in breach of a treaty obligation and should be amended accordingly.

- u) Prior to the promulgation of the Act in 1988, we had the Arbitration Act/Law of 1914 and the Foreign Judgments (Reciprocal Enforcement) Act of 1960. Unfortunately, the Act which has covered the entire field previously covered by these laws has not expressly saved or repealed the laws; they are impliedly repealed. At the earliest opportunity, these laws should be expressly repealed instead of invoking the doctrine of “covering the field”.

8.4 SUGGESTIONS FOR FURTHER WORK

Arbitration is a fast growing discipline. The Nigerian Law Reform Commission should be current with developments in other jurisdictions so that our laws are reviewed regularly. The Act was passed in 1988 and now overdue for review. A further study should be commissioned by the Commission to bring the Act in line with the law and practice in other jurisdictions along the lines recommended in this work. More particularly, the Commission should consider the issue of immunity of arbitrators bearing in mind its perception in both common law and civil law jurisdictions.

On its part, the Federal Ministry of Justice should commission a study on the relationship between treaties signed by the Government and their effect on our municipal

laws so as to avoid any inconsistency like the one in this work where the Act is inconsistent with our Declaration when we acceded to the 1958 New York Convention.

In almost all common law jurisdictions, the civil justice system has been reformed and case management doctrine adopted. This has been done in Lagos State. The National Assembly and State Assemblies should commission a study on the reform of the civil justice system so as to increase access to justice.

CONTRIBUTION TO KNOWLEDGE

Contrary to the perception in western jurisprudence that arbitration, mediation and conciliation are alien to customary jurisprudence, arbitration, as a means of settling disputes, is indigenous to African traditional societies including Nigeria. The various ethnic groups in Nigeria use arbitration to resolve disputes. Accordingly, this thesis traced the origin and evolution of arbitration from pre- to post-colonial period and its general evolution. No other work in Nigeria has comprehensively done this. Consequently, the work is a source material in this area.

Generally, the essence of arbitration is that a dispute has arisen or potential for a dispute will arise and the parties, instead of going to the conventional courts, decide to refer the dispute to a private tribunal (arbitrators) for settlement in a judicial manner. The implication of that agreement is that the decision of the arbitral tribunal (called an award) will be final and binding on the parties. In order to ensure that such a method of settling disputes is effective, assistance is usually given by the ordinary machinery of law to ensure that such awards can be enforced. Similarly as a safeguard against impartiality, the court can, in certain instances, impeach an award. This thesis has brought to the fore the relationship between arbitral and court proceedings. This is novel bearing in mind that it is the defects in court proceedings that led to arbitration.

Arbitration, as a field of study has been neglected in Nigeria, a fortiori commercial arbitration. The neglect was not only by businessmen but at the tertiary institutions. In modern business practice especially in international business, disputes which are inherent in such relationships are resolved more by arbitration than by litigation. Indeed alternative dispute resolution (ADR) processes have been fully developed in other jurisdictions as means of resolving commercial disputes. There are various types of disputes and processes. The thesis established the criteria for determining which particular process fits a dispute.

This is what case management is all about. The doctrine of case management has been embraced in other jurisdictions. This thesis is a scholarly attempt to locate arbitration in a continuum of dispute resolution processes.

Essentially, this thesis critically evaluated the legal instruments regulating international commercial arbitration. The norms regulating international law are complex. They derive from conventions, rules, enactments, usages and practices and decisions of arbitral tribunals. Although the UNCITRAL Model Law on International Commercial Arbitration is a model and not a convention, its wide acceptability has led to its adoption resulting in statutory enactments. Similarly the UNCITRAL Arbitration Rules are essentially the same as most rules of arbitral institutions like the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). This thesis is not only a collection of these instruments – legislative and non-legislative, but critically evaluated them.

One of the legal instruments that featured prominently is the Arbitration and Conciliation Act which is the extant law in Nigeria on arbitration and mediation/conciliation. After a critical appraisal of the Act, it is obvious that it is in dire need of review. This is because the Act contains inadequate provisions, inconsistencies, technical oversight and typographical errors. Similarly, the Act is an embodiment of inelegant drafting due essentially to inadvertence. In our recommendations, we highlighted the defects in the Act and proffered solutions. For example, the Act did not expressly repeal the existing laws dealing with the same subject matter like the Arbitration Act/Law of 1914 and Foreign Judgment (Reciprocal Enforcement) Act of 1960; there are two sections on stay of proceedings; there are also two sections on powers to act as *amiable compositeur*; the meaning of the term “appointing authority” was not appreciated by the drafters; there is no provision for the immunity of arbitrators; there is no express provision on remission of an

award; the provisions of section 54(1)(b) of the Act dealing with the application of the 1958 New York Convention is in breach of a treaty obligation and there are references made to wrong sections. The law-makers will, therefore, find this work useful while it can be a working document for the Nigerian Law Reform Commission and the Federal Ministry of Justice.

Before this project was conceived, there were few basic local materials in arbitration. There was also paucity of reported Nigerian cases on the topic. However, as the work progressed, works emerged on it and various seminars/workshops were organised to advance the cause. This is an appreciation of the importance now attached to this field of human endeavour. In all these, there has been no collection of the legal instruments as in this thesis. Local and foreign cases on arbitration have been reported and fully discussed. Thus it has not only made literature on arbitration readily available but also the relevant instruments easily accessible to legal practitioners, accountants, surveyors, architects, businessmen and the academia. The thesis has expounded the benefits derivable from arbitration and also cautioned on the pitfalls to be avoided. Consequently, it examined the nature, scope, form and contours of this field of human endeavour. This will enrich knowledge in this virgin area of intellectual activity that is fast growing.

Finally, this thesis has highlighted the need to formalize traditional arbitral institutions so that the western world can learn from our rich cultural heritage instead of the euro-centric view that arbitration and indeed the ADR processes are alien to customary jurisprudence.

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