

Nature of Arbitral Awards in Nigeria: an Overview

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Abstract

The need to explore other means of dispute resolution has resulted in the development of Alternative Dispute Resolution mechanisms, prominent among which is arbitration. Arbitration is the most regulated mechanism and is best suited for commercial relationships because, while it seeks to preserve existing relationships, it also ends in an award which is binding on the parties to the proceedings. The study examined the nature of arbitral awards through the lens of decided cases and the Arbitration and Conciliation Act, 2004. The study adopted the doctrinal method of research and relied on primary sources of information such as statutes, cases and conventions; as well as secondary sources of information such as books, journal articles and materials gotten from the internet, all subject to content analysis. The study found that the award, which is final and binding on the parties, has the same status as a judgment of the court in Nigeria when recognised and enforced, but may be set aside where any of the essential requirements are lacking. The study concluded by stating the need for everyone involved to take conscious steps from the beginning of the arbitration in order to end up with a valid and an enforceable award.

Key words: Arbitration; Award; Recognition and enforcement; Setting aside

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1. INTRODUCTION

1.1 The Evolution of Alternative Dispute Resolution

Given the nature of mankind, it is well settled that disputes arising from human and societal interactions are inevitable. These disputes may arise from such human interactions as economic and commercial activities, community interactions and interpersonal relationships. The fact is “disputes are inevitable in modern societies be they traditional, industry or commercial. While the law seeks to avoid such disputes, it also provides different methods for resolving them when they arise” (Otuturu, 2014, pp.67-77), because disputes, whether commercial or not, have to be resolved (Otuturu, 2014, pp.67-77). The traditional method of resolving these disputes - and by far the most popular - is litigation. However, litigation as a means of resolving disputes has many drawbacks; prominent among which is its adversarial feature that often leaves a lasting division between disputants. Thus, while a disputant may gain legal justice through litigation, social justice may be elusive. Several factors such as high cost of litigation and legal services, coupled with delays in determining the substance of the dispute, issues of confidentiality, cumbersome and technical rules of procedure decidedly made litigation dispute resolution mechanism unattractive to disputants. Indeed, “[a]s the courts grew, delays, formalities, technicalities, corruption and the likes crept in. Similarly, the cause lists became overcrowded and court environment and sittings became intimidating and oppressive to the un-informed” (Anyebe, 2015).

It became necessary, therefore, to seek for “extra-judicial” methods and procedures of resolving disputes. This necessity became pronounced in civil disputes of commercial nature as “commercial men and women are by their nature and [the] practice of their business in a hurry, when a dispute arises in their business transactions,

to have their rights and liabilities determined as soon as possible without undue waste of time so that they can get on with their business (Temitayo, 2014, p.34). Hence the development of faster and cost efficient methods of dispute resolution which later became collectively known as “Alternative Dispute Resolution” mechanisms.

Alternative Dispute Resolution has been defined as any method of resolving a dispute other than by a binding dispositive decision imposed by a judge, generally but not necessarily involving the intercession and assistance of a neutral third party who helps the parties to a dispute settlement (Rhodes-Vivour, 2015, p.68). The term can also be defined as a collection of processes designed to assist parties to a dispute without recourse to formal judicial proceedings. The evolution of Alternative Dispute Resolution methods heralded an exodus from the formal process of dispute resolution to more informal means of settlement. Disputes were practically taken away from fixed, formal and intimidating settings called ‘court rooms’ to more informal and more convivial settings.. An author has aptly captured ADR mechanisms and their uniqueness by stating that they “refer to extra judicial dispute resolution methods designed to complement the courts and the parties in resolving disputes involving on-going relationships such as commercial disputes and family disputes with a view to maintaining such relationships between the parties after resolving the dispute between them.”¹ It is important to note at this juncture that Alternative Dispute Resolutions processes are usually employed in the resolution of civil or commercial matters or transactions and not criminal offences.

1.2 ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

There exist various Alternative Dispute Resolution mechanisms. Some of them are examined as follows:

1.2.1 Mediation

Mediation is a facilitative process in which disputing parties engage the assistance of a neutral third party respected by the disputants who acts as a mediator – a facilitating intermediary – providing a non-binding evaluation of the merits of the dispute, if so mandated, but who cannot make any binding adjudicatory decision. Usually the mediator meets the parties separately and brings them together to work out a settlement. His role in the dispute resolution is merely to facilitate an agreement between the parties and he cannot compel the parties to reach a settlement. Mediation is a non-binding procedure; this obviously implies that even where the parties have agreed to submit their disputes to mediation, a decision cannot be imposed on them. The mediator is not a decision maker. His main duty is to assist the parties to reach a settlement of the dispute often by proposing solutions for their consideration and acceptance. The opinion

expressed by a mediator in the process of assisting the parties to settle, no matter how fair such opinion may be, is not binding on the parties until they agree to accept it. Mediation could take place at different stages of a dispute: it could be employed immediately before negotiation or at renegotiation stages or even during the pendency of a dispute before the court but before judgement or before the commencement of arbitral proceedings (Nwakoby & Anyogu, p.148). Due, however, to the informal nature of mediation proceedings, it is mostly used in resolving family issues.

1.2.2 Conciliation

Conciliation refers to a dispute resolution process in which, at the request of the parties, a third party called the ‘conciliator’ seeks to bring the parties together to discuss the subject matter in the dispute and reach an amiable settlement. It is pertinent to note that conciliation proceedings are regulated by the Arbitration and Conciliation Act, 2004.² In conciliation, the initiating party sends to the other party a written request to conciliate, with such request setting out the subject of the dispute. If request is accepted, each party shall appoint one conciliator each while the third will be appointed by the two appointed conciliators.³

Conciliation as a dispute resolution mechanism is quite similar in outlook to mediation. They both involve the appointment of a third party who would play a facilitative rather than an adjudicatory role. It is, therefore, imperative at this point to bring out the distinction between a conciliator and a mediator as both sometimes are used interchangeably. A mediator is a person accepted by parties whose role is to help them reach a settlement. He will listen to the respective view points of both parties and try to bring them together in order that they may, by themselves, achieve a compromise solution. A conciliator on the other hand performs a different function, in that he himself draws up and proposes the terms of an agreement designed to represent what, in his view, is a fair compromise of the dispute after discussing the case with the parties without imposing the drawn agreement on them.

1.2.3 Negotiation

Negotiation takes place through discussions between the parties with a view to reconciling their differences and reaching a settlement which would be mutually beneficial to them. The settlement is essentially a compromise, that is, one party giving up something in order to get something.⁴ Thus, negotiation as an ADR process principally involves discussions or dealings about a matter with a view to reconciling differences and establishing areas of agreement, settlement, or compromise that would

¹ Gogo George Otuturu, *Op.Cit.* n. 1, p.68.

² See Part II of the Act for its provisions on Conciliation. See also the Third Schedule to the Act for the Conciliation Rules.

³ Cap A18, LFN 2004, s. 38-40 of the Act

⁴ Gogo George Otuturu, *Op. Cit.*, n. 1, p.68

be mutually beneficial to the parties or that would satisfy the aspiration of each party to the negotiation (Orojo & Ajomo, 1999, p.7). It is to be noted that the procedure to be adopted by the parties are largely dependent on their skills, knowledge, experience and nature of the issue. Essentially, the parties determine the result as they fully control the negotiation process.

1.2.3 Arbitration

Arbitration is by far the most popular of the alternative options to litigation and can be said to be the alternative mode of dispute resolution best suited to disputes arising from commercial transactions. It is also the most regulated ADR mechanism. Arbitration refers to a process of dispute settlement “between two or more persons by referring to an impartial third person or persons known as arbitrators specially appointed for that purpose. The dispute is determined in private with final and binding... [decision] by the impartial third person (or persons) acting in a judicial manner rather than by a court of competent jurisdiction.”⁵ It is the “voluntary submission of a dispute to a person or body of persons chosen by the parties for a binding decision. This may result either from agreement of the parties to the dispute or from statute which requires the settlement of certain disputes by arbitration. It may further arise by order of court.”⁶ The goal of arbitration is to produce quick, practical, and economical settlement of disputes.⁷

1.3 Types of Arbitration⁸

Arbitration may be customary, industrial or commercial.

1.3.1 Customary Arbitration

It is important to state herein that arbitration has been a part of the Nigerian legal system before the institution of the English court system in the country and is recognised by the courts as a means of resolving disputes between parties. It has been acknowledged that

Arbitration and Alternative Dispute Resolution (ADR) are not imported mechanisms in Nigeria. Litigation is the imported mechanism. Traditionally in Nigeria like most of Africa disputes were traditionally resolved through Arbitration and ADR. Indeed customary law arbitration and ADR remains part of the Nigerian Legal System.⁹

Customary arbitration is a process of having a dispute amicably settled between parties who voluntarily submit to the decision of traditional chiefs or elders of the community. The proceedings are very flexible and may differ according to the variety of cultures. In most cases, however, the parties would state their cases and put questions to the opposing parties and their witnesses. Where documents are tendered as it is done these days, the opposing parties are allowed to inspect them and ask questions on them. Once the parties accept the decision or award, then the matter is settled. If any party is not satisfied with the decision or award, he is free to reject it. It is this feature of the freedom of parties to accept or reject the decision or award that is the unique feature of customary arbitration when compared with adjudication by court of law.¹⁰ To buttress this position, the Supreme Court, *per* Karibi-Whyte noted in the case of *Agu v. Ikewibe*¹¹ that

It is well accepted that one of the many African modes of settling disputes is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based upon the subsequent acceptance of the suggested award, which becomes binding only after such signification of its acceptance and from which either party is free to resile at any stage of the proceedings up to that point. This is a common method of settling disputes in all indigenous Nigerian societies¹²

Thus, if parties voluntarily agree to submit their dispute to arbitration and to abide by the decision of the arbitrator, they cannot repudiate such a decision when it is made, especially when the conditions for a valid customary arbitration are met.¹³

Also in the case of *Oparaji vs. Ohanu*, the Supreme Court held that

Where two parties to a dispute voluntarily submit the issues in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it would no longer be open to either party to subsequently back out or resile from the decision so pronounced.¹⁴

In fact the Nigerian legal system allows customary arbitration and recognises practices such as oath taking before shrines. In *John Onyenge & Ors vs. Chief Love*

⁵ Adedoyin Rhodes-Vivour, *Op. Cit.*, n. 5, p2

⁶ G. Otuturu, *Op. Cit.*, n. 1, p. 68

⁷ <http://www.lawinfo.com/civil-litigation/alternative-dispute-resolution/what-is-arbitration.htm>, last accessed on August 8 2015

⁸ Types of arbitration should not be confused with forms of arbitration as the latter can be broadly classified into domestic and International, Ad hoc and Institutional arbitrations. There are also special forms of arbitration such as Construction Industry Arbitration, Maritime Arbitration, Investment Dispute (Investor-State) Arbitration and Multiparty Arbitration. See Orojo & Ajomo *Op. Cit.*, n. 12, p. 59, Y. Ovwigho, A Handbook on the Law of Arbitration and Conciliation in Nigeria, (Benin: Justice-Jeco Printing and Publishing Global Ltd, 2010), pp. 7-8 and Part II, S. 85, UK Arbitration Act, 1996 for the definition of domestic arbitration.

⁹ Adedoyin Rhodes-Vivour, *Op. Cit.*, n. 5, p.3

¹⁰ Gogo G. Otuturu *Op. Cit.*, n. 1, 69

¹¹ (1991) 3 NWLR (pt.180) 385 SC

¹² *Ibid* p.406

¹³ G. Ezejiogor, The Law of Arbitration in Nigeria, (Nigeria: Longman Nig. Plc, 1997) p. 25. Conditions for a customary arbitration are voluntariness of the parties in submitting to arbitration; express or implied agreement of the parties to be bound by the arbitral decision or award; none of the parties withdraw from the arbitration midstream; none of the parties rejected the award immediately it was made; the arbitration was conducted in accordance with the custom of the people; and the arbitrator handed down a decision or an award which is final. See *Agu v. Ikewibe* (1991) 3 NWLR (pt. 180) 385; *Eze v. Okwaranya* (2001) 12 NWLR (pt. 726) 181; *Ohiaeri v. Akabeze* (1992) 2 NWLR (pt. 221) 1.

¹⁴ (1999) 9 NWLR (pt. 618) 290 at 304

day Ebere & Ors,¹⁵ the court held that oath-taking is a valid process under customary arbitration and is one of the methods known to customary law for establishing the truth of a matter.¹⁶ It must be stated, however, that although customary arbitration is recognized under the Nigerian legal system, it cannot meet the needs of modern business relationships with their attendant intricacies.

1.3.2 Industrial Arbitration

Industrial arbitration is used to prevent or settle labour disputes that may arise between an employer and a union, union members, or union representatives in order to prevent legal actions in court and find less costly ways to settle disputes. It is also defined as “a method of settling disputes between and employer and employees by seeking and accepting a decision by a third party.”¹⁷ This type of arbitration is sometimes referred to as compulsory arbitration. The Trade Disputes Act¹⁸ makes provision for this type of Arbitration in Nigeria by providing for the Industrial Arbitration Panel (IAP). The Act enjoins parties to a trade dispute to settle it amicably by any agreed means of settlement apart from the Act. If the parties fail to settle the dispute, the parties shall, within seven days from the date on which the dispute arose, meet together by themselves or their representatives under the presidency of a mediator mutually agreed upon or appointed by or on behalf of parties with a view to resolving the dispute amicably.¹⁹ If within seven days of the date on which the mediator is appointed, the dispute is not settled, the dispute shall be reported in writing to the Minister of Labour by or on behalf of either parties within three days and the report shall be in writing, containing the points on which the parties disagree and describing the steps already taken by the parties to reach a settlement. Within fourteen days of the receipt by him of a report, the Minister shall refer the dispute for the settlement to the Industrial Arbitration Panel.²⁰ The award given by the panel shall be forwarded to the Minister for implementation.

1.3.3 Commercial Arbitration

Generally, commercial arbitration is the most popular type of arbitration. It can be defined as “the voluntary submission of a dispute arising from relationships of commercial nature for determination in a judicial manner by a person or body of persons chosen by the parties.”²¹ Commercial arbitration in Nigeria is governed by the Arbitration and Conciliation Act, 2004.²² The scope of arbitration covered by the Act is “commercial arbitration

whether or not administered by a permanent arbitral institution.” However, while the Act does not define “commercial arbitration”, it defines “commercial” as

all relationships of a commercial nature including any trade transactions for the supply of goods and services, distribution agreement, commercial representation or agency, factoring, leasing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture, and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road.²³

Basically commercial arbitration is divided into domestic arbitration and international arbitration.²⁴ As with arbitration generally, international arbitration is a creation of contract, i.e., inclusion in the initial contract of the parties’ decision to submit disputes to one or more arbitrators selected by them or on their behalf for resolution through the application of adjudicatory procedures. The practice of international arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their disputes, generally without the formalities of their respective legal systems. In addition the parties may, despite the nature of the contract expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.²⁵ Domestic arbitration refers to an arbitration process in which all the parties to the dispute are resident in one country.

1.4 Arbitration and Other Forms of Alternative Dispute Resolution

Though included in the generic meaning of the term “alternative dispute resolution” arbitration is usually not classed as an ADR procedure. It is distinguished from other forms of ADR primarily because, unlike other forms of Alternative Dispute Resolution outcomes, an arbitration award is final and binding. Whilst in mediation and conciliation the parties retain the responsibility for and control over the disputes to be resolved and do not transfer decision-making powers to the third party, an arbitrator has the responsibility for controlling the process and making a binding decision. While arbitration arose

¹⁵ (2004) 12 NWLR (Pt. 889) 20 at 40.

¹⁶ See also *Ume v. Okoronkwo* (1996) 10 NWLR (Pt. 477) 133.

¹⁷ <http://www.encyclopedia.com/topic/industrialarbitration.aspx> accessed August 12 2015

¹⁸ CAP T8 LFN, 2004.

¹⁹ See S.4 of the Act.

²⁰ Ss. 5-10 of the Arbitration and Conciliation Act, Cap A18 LFN 2004.

²¹ Gogo G. Otuturu, *Op. Cit.* n. 1, p.69.

²² Cap A18 LFN 2004

²³ See S. 57 of the ACA

²⁴ Although most jurisdictions do not distinguish between international and domestic arbitration, Article 1(3) of the UNCITRAL Model Law states that arbitration is international if The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or

One of the following places is situated outside the state in which the parties have their place of business;

The place of arbitration if determined in, or pursuant to, the arbitration agreement;

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 dispute is mostly closely connected or

The parties have expressly agreed that the subjected matter of the arbitration agreement relates to more than one country.

²⁵ Otuturu opp. Cit p.70

as a result of the apparent inability of the courts to satisfy some of the expectations of people in the resolution of disputes, other ADR processes may have gained further ground largely because the arbitral process was becoming long and unduly expensive due to the gradual creeping in of some technicalities inherent in litigation.²⁶

An arbitral award is at par with a judgement of the court, as held by the Supreme Court in the case of *Ras Pal Gazi Construction Company Ltd v FCDA*²⁷ where *Katsina-Alu JSC* pronounced that,

Arbitrations proceeding as I have already shown is not the same thing as negotiations for settlement out of court. An award made, pursuant to arbitration proceedings constitute the final judgement on all matters referred to the arbitrator. It has a binding effect and it shall upon application in writing to the court be enforceable by the court... I must say nowhere in the Act is the High Court given the power to convert an arbitration award into its own judgement. See *Commerce Assurance Limited vs. Alhaji Buraimoh Alli (Supra)* What this means simply is thus: an Award is at par with the judgement of the Court.

However, decisions in other alternative dispute resolution procedures are non-binding but voluntarily accepted or negotiated solutions to disputes. Decisions in other alternative dispute resolution procedures are not equated to judgements but are alternatives to judgement. As has been observed,

Alternative Dispute Resolution, like litigation and arbitration, will often involve an independent third party but his function is fundamentally different from that of a judge or arbitrator and is best described as a neutral facilitator. He does not impose a decision on the parties but, on the contrary, his role is to assist the parties resolve the dispute themselves. He may give opinions on issues in dispute but his primary function is to assist in achieving negotiated solution.²⁸

Thus, it can be seen that whilst ADR may be generic term referring to all forms of dispute resolution other than litigation, arbitration is in a class of its own and with distinguishing features. Arbitration is, therefore, referred to as an ADR mechanism only in the sense that it is an alternative to litigation.

1.5 Arbitral Proceedings

Generally, arbitration proceedings are basically informal in nature. However, it can vary from the very informal at one extreme to court-like proceedings at the other. Whilst parties to an international arbitration are free to agree on the procedure to be followed by the arbitrator in conducting the proceedings²⁹, the parties to a domestic arbitration in Nigeria are bound to follow the rules set out in the first schedule to the ACA. Where, in domestic arbitration, the rules contain no provision in respect of any matter connected with the particular proceedings, the arbitrator may conduct the proceedings in such a manner

as he considers appropriate so as to ensure fair hearing.³⁰

Unless otherwise agreed by the parties, arbitral proceedings are deemed to have commenced on the day a request to refer the dispute to arbitration is received by the other party.³¹ The notice of arbitration must include a demand that the dispute be referred to arbitration; the names and addresses of the parties; a reference to the arbitration clause or the separate arbitration agreement which is invoked; a reference to the contract out of or in relation to which the dispute arises; the general nature of the claim as well as an indication of the amount involved, if any; the relief or remedy sought; and a proposal as to the number of arbitrators, if not previously agreed.³²

It is important to note that any person appointed as arbitrator must disclose any circumstances that could give rise to justifiable doubts as to his impartiality or independence at the time of the appointment.³³ This obligation remains throughout the period of appointment or of the proceedings.

The provisions of the Arbitration and Conciliation Act will apply only if the agreement to arbitrate is in writing. Any form of writing between the parties can constitute such an agreement, such as an exchange of telexes or telegrams, and even an exchange of points of claim and defence which assert the existence of an agreement to arbitrate that is not denied by the other side.³⁴ An arbitration clause within the main contract is sufficient for this purpose and no separate arbitration agreement is required.

At the hearing, the order of proceedings is the opening statement of the claimant, the evidence of the claimant, the opening statement of the respondent, the evidence of the respondent, the closing speech of the respondent, the closing statement of the claimant and the award. Where the arbitration is one which does not require hearing but production of documents alone, the parties would produce all documents sufficient for the tribunal to make a decision. The tribunal can only make an award based on the evidence before it.

Circumstances in which proceedings may be terminated include where an award of termination is made by the tribunal after the conclusion of proceedings; where the parties mutually consent to the termination of proceedings; where the claimant withdraws his claim; where the tribunal finds that it is manifestly impossible to continue with the proceedings; or where the parties settle their dispute before the conclusion of proceedings.³⁵

²⁶ J. O. Orojo & M. A. Ajomo, *Op. Cit.*, n. 11, pp. 5-6.

²⁷ (2001) 10 NWLR (Pt. 722) 539.

²⁸ Adedoyin Rhodes-Vivour, *Op. Cit.* n. 5, p.3

²⁹ S.53 ACA

³⁰ Gogo G. Otuturu, *Op. Cit.* n. 1, p.72, S.14 ACA

³¹ S.17 ACA

³² B. Fagbohunlu and O. Ajayi, *Arbitration Procedure and Practice in Nigeria: An Overview*, [http://uk.practicallaw.com/1-542-4705?](http://uk.practicallaw.com/1-542-4705?Source-related-content)

³³ S.8 ACA

³⁴ S 1(b) ACA

³⁵ See Section 27 of the Act, Art. 34 of the Rules and Art. 32 of the UNCITRAL Model Law.

At the end of the proceedings the tribunal is expected to make an order based on the totality of the evidence brought before it as well as the particulars of the contractual agreement. This order is referred to as award.

2. TYPES OF AWARD IN ARBITRATION

The decision of the tribunal in arbitration is known as an award and it is final on all issues submitted. Arbitration (like litigation) is a decision making process. At the conclusion of the hearing, the tribunal will make findings of fact and conclusions of law and thereby adjudicate on the issues between the parties.

An award is not a mere recommendation. It is a final settlement of the matters contained in it. The award may simply declare the rights of the parties, and such a declaration settles the dispute and permits the parties to continue the contract peacefully. The award may order one of the parties to pay a sum of money to the party, to perform an act or to refrain from performing an act (United Nations Conference on Trade Development, 2005, p.3). There could also be an agreed award resulting from the settlement of issues by the parties themselves during the arbitral proceedings, and if requested by the parties, the tribunal may record the settlement in the form of an award on agreed terms, which shall have the same status and effect as any other award on the merits of the case.³⁶ It is important to note that section 24 of the ACA stipulates that where an arbitral tribunal comprises more than one arbitrator, any decision of the tribunal shall, unless otherwise agreed by the parties, be made by a majority of all its members. A similar provision is contained in articles 31.1 of the Arbitration Rules.

2.1 Categories of Arbitral Award

There are different categories of awards which can emanate from an arbitral proceeding. These categories are discussed below.

2.1.1 Final Award

Although a final award is often held to mean a final, complete and binding decision on the subject matter of the arbitration which disposes off all the issues between the parties,³⁷ the term has also sometimes been held to mean a decision that finally settles a portion of the dispute which can be separated from the remainder of the dispute but does not necessarily terminate the arbitration or the mandate of the arbitrators to consider the remaining portion of the dispute. Such an award has all the consequences of a final award in that it constitutes *res judicata* in respect of what is contained in it, and may only be enforced or set aside by proper proceedings for enforcement or setting aside of

an arbitral award as the case may be.³⁸

2.1.2 Partial Award

This category of award is one which disposes off a part of a monetary or other issue in dispute leaving the rest to be dealt with subsequently. The partial award is final in respect of the issues so decided and may be enforced.³⁹

Although the term suggests that what is envisaged is an award on the substance of the dispute, it might as well refer to an award on such a matter as jurisdiction or conservatory measures.⁴⁰ Partial awards are also used frequently to separate the decision on liability from the decision on the quantum of damages or on the allocation of costs.⁴¹ In a complex arbitration it may be a practical solution for the parties and for the arbitral tribunal to decide those parts of the dispute that can be clearly separated from the other parts through partial awards.⁴²

2.1.3 Interim Award

An interim award is one that is issued during the subsistence of the arbitration. An interim award may be made where the arbitrator, in the course of the proceedings, determines matters which are susceptible to determination during the course of the proceedings and which, once determined, may save considerable time and money for all involved.⁴³

Although the term is often used interchangeably with partial award,⁴⁴ more appropriately, however, the term interim award is limited to those awards that do not finally settle any aspect of the dispute. The most typical example of an interim award is an award on interim measures of protection. There is however, an active controversy as to whether interim measures should be ordered in the form of a decision or an award and whether the court should enforce the decision of the arbitral tribunal against a recalcitrant party. The ICC Arbitration Rules in Article 23.1 specifically authorise the arbitral tribunal to order any interim or conservatory measure it deems appropriate either as an order or in form of an award.⁴⁵ Also Article 26.2 of the Nigerian Arbitration Rules provides that the interim measures of protection taken by the arbitration tribunal may be established in form of an interim award.

Also, the Spanish Arbitration Law provides that arbitral decision in respect of interim measures of protection, regardless of the form of the decision ordering those

³⁸ United Nations Conference on Trade Development, *Op. Cit.*, n. 42, p.7.

³⁹ J.O.Orojo and M.A. Ajomo, *Op. Cit.*, n. 11, p.241

⁴⁰ United Nations Conference on Trade Development, *Op. Cit.*, n. 43, p.8

⁴¹ *Ibid*

⁴² *Ibid*

⁴³ J. O. Orojo & M. A. Ajomo, *Op. Cit.*, n. 11, p. 238

⁴⁴ Such an award may decide the jurisdiction of the tribunal, the applicable law, liability in respect of all or a portion of the dispute or damages. While the specific issue is determined definitively, there are other issues to be decided by the arbitral tribunal. See United Nations Conference on Trade Development, *Op. Cit.*, n. 43, p.8.

⁴⁵ *Ibid*

³⁶ G. Otuturu, *op. cit* p.72

³⁷ J.O Orojo and M.A. Ajomo, *Op. Cit.*, n. 11, p.238

measures, can be brought before the court by the obligated party to have them set aside and that, conversely, the successful party can seek enforcement in the court against a recalcitrant party.⁴⁶

2.1.4 Agreed or Consent Award

This category of award is that which results from the settlement of the issues by the parties themselves. Section 25(1) of the ACA provides that

If, during the arbitral tribunal proceedings the party settles the dispute, the arbitral tribunal shall terminate the arbitral proceeding, and shall if requested by the parties and not objected by the arbitral tribunal, record the settlement in the form of an arbitral awards on agreed terms

Furthermore, Section 25(2) provides that an award on agreed terms recorded as above shall conform to the provisions of Section 26 of the Act, state that it is such an award and shall have the same status and effect as any other award on the merits of the case.

However, though the Act directs tribunal to record the agreement as an award, the tribunal may refuse to do so if the agreement is contrary to public policy, otherwise unlawful or incapable of being enforced or if the tribunal suspects ulterior motives.⁴⁷ This is so because it is the responsibility of the arbitral tribunal to assure itself that is not lending its assistance to injustice with regards to a party and and that the requested award on agreed terms does not constitute a fraud or a violation of mandatory rules of law.⁴⁸

Since the agreed award has the same status and the same effect as any other award on the merits, it is enforceable even though the tribunal has not actually made a decision but simply recorded the agreed terms. An agreed award must state that it is an award of the tribunal though it need not state that it is an agreed award.⁴⁹ However, the advantage of an agreed award duly recorded is that a mere agreement between the parties would be unenforceable without obtaining a court judgment, but an agreed award duly recorded is enforceable as an arbitral award.⁵⁰

2.1.5 Default Award

Where a respondent without showing sufficient cause, fails to state his defence as required by law, the arbitral tribunal will continue the proceedings and at the end make an award.⁵¹ Such an award is described as a default award. Also, if any party fails to appear at the hearing or to produce documentary evidence without showing sufficient cause, the arbitral tribunal may continue the proceedings and make an award. This award is also referred to as

default award. Hence, a party cannot claim he is not bound by the award merely because he resiled from arbitration proceedings before the award was made.⁵²

It is important to note that the absence of the respondent does not relieve the claimant from the obligation to present sufficient evidence to sustain his claims. The award issued at the end of an arbitration in which the respondent has not participated will be enforced as long as the respondent has been given proper notice and an opportunity to present his case.⁵³

2.1.6 Additional Award

An arbitral tribunal may be requested to make an additional order to supplement the final award where, for example, evidence has been led in respect of a claim which was not covered by the initial final award.⁵⁴ Such an order is known as an additional award. In essence, a final award may be interpreted, corrected, or complimented by way of an additional award which should be made within 30 days of its receipt at the request of any party.⁵⁵

While the Model Law⁵⁶ permits the arbitral tribunal to make an “additional” award only on the request of a party, some national laws permit the arbitral tribunal to make the additional award *suo motu*. Some national arbitration laws do not permit additional awards while some may restrict them to limited issues, such as a decision on costs. Some national arbitration laws may permit a court to remit an award to the arbitral tribunal to complete it with regard to a claim that was not decided in the award. This, however, is not the general rule and must be specifically provided for under the national law.⁵⁷ In Nigeria, the making of additional awards is strictly regulated by the ACA.⁵⁸

2.1.7 Interlocutory Award

The Arbitration Rules provides that – “addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or partial awards”⁵⁹ An interlocutory award, therefore, is a decision on a procedural question and would cease to subsist upon the conclusion of the arbitral proceedings. It is not a final decision and cannot be enforced as one.⁶⁰

2.2 Form and Contents of an Award

The Arbitration and Conciliation Act sets out the form and contents of an award. These statutory requirements which are contained in section 26(1)-(3) of the Act are discussed below.

⁴⁶ Art. 23.2

⁴⁷ J. O. Orojo and M. A. Ajomo, *Op. Cit.*, n. 11, p. 239

⁴⁸ United Nations Conference on Trade Development, *Op. Cit.*, n. 43, p.10.

⁴⁹ J. O. Orojo & M.A, Ajomo, *Op. Cit.*, n. 11, p.239

⁵⁰ *Ibid*

⁵¹ Section 21(b).

⁵² J. O. Orojo and M. A. Ajomo, *Op. Cit.* n.11, p. 242.

⁵³ United Nations Conference on Trade Development, *Op. Cit.*, n. 43, p. 12.

⁵⁴ J. O. Orojo & M. A. Ajomo, *Op. Cit.* n.11, p. 240

⁵⁵ Art. 35-37 of the Rules

⁵⁶ UNCITRAL Model Law on International Commercial Arbitration, 1985

⁵⁷ United Nations Conference on Trade Development, *Op. Cit.*, n. 43, p. 12.

⁵⁸ See Section 28(4)-(7)

⁵⁹ Articles 32.1

⁶⁰ J. O. Orojo & M. A. Ajomo, *Op. Cit.*, n. 11, p.241

2.2.1 Writing and Signature

An arbitral award must be in writing. The writing can take any form such as handwriting, typing or printing. Oral award is not contemplated nor accepted under the current Nigerian law.⁶¹

Although, the award is expected to be signed by all members of the tribunal, it is sufficient if the majority of the members of the tribunal sign it, provided that the reason for the absence of any necessary signature is stated on the face of the award.⁶² However, where an arbitrator does not assent to an award he needs not sign it and he could set out his own view in a dissenting opinion. This, however, would not form part of the award if the dissenting opinion does not constitute the majority opinion and it may be delivered to the parties separately for their information.⁶³

2.2.2 Place of Signing

The ACA provides that the place of the arbitration shall be deemed to be a place where the award was made.⁶⁴ Where there are more than three arbitrators and they sign the award at different locations the document is deemed to be made at the place where the last signature was affixed. The place of arbitration plays a significant role throughout the arbitration. It determines the law governing the arbitration and the courts empowered to act in support of, or to intervene in, the arbitration. Hence, the place of arbitration as stated on the award would determine the court before which the losing party can seek any recourse against the award.⁶⁵

2.2.3 Reason for the Award

The ACA provides that reason must be given for the award unless the parties have agreed otherwise or the award is based on an agreement.⁶⁶ It is, therefore, mandatory that the reason for the award must be stated in the award. The ACA however, did not state the style or extent of the reasons that must be given in the award. What is, thus, needed is a sufficient explanation for the parties to understand the process by which the arbitral tribunal reached its decision since, in principle, the awards remain confidential.

2.2.4 Date of the Award

The date of award is required to be stated. This will help in determining if the award was made within the specified time, if any, and to calculate the time within which any step may be taken against the award. The date is also relevant in the computation of interest on the award where applicable. The date of the award determines when the

award has *res judicata* effect and can be executed by a court. It also begins the period within which the losing party can move to have the award set aside, though the time limit may be stated to begin when the award is received.⁶⁷

2.3 Publication and Delivery of the Award

It is important to state that an arbitral award is not a public document. In fact one of the attractions of arbitration is its confidential nature. However, an award may be made public with the consent of the parties. It is a mandatory feature of arbitration that a copy of the award should be sent to each of the parties.⁶⁸ However, in construing this provision, it has been argued that no time limit should be imposed as to when this must be done.⁶⁹ Generally, when the award is ready, the arbitrators write the parties simultaneously informing them that the award is ready for collection. An award is deemed published when the arbitral Tribunal gives the notice to the parties that the award is ready. Therefore this provision is deemed satisfied if the award has been signed and notice given to the parties within the given period. Thus an award is ready to be delivered when it has been made, and if the parties are then so informed by the date specified, the fact that it is not actually delivered by that date will not affect its validity.⁷⁰

2.4 Features of an Arbitral Award

Apart from conformity with the requirements of a valid award as have been examined above, there are also some features which an award must possess before it can be valid and enforceable. Some of these features are examined below.

2.4.1 A Decision of the Tribunal

The award must be in fact a decision of the tribunal and not a mere opinion or recommendation. Further, where there is more than one arbitrator in the arbitral tribunal, any decision must be made by at least the majority of the members of the tribunal, unless it is an agreed award. Also the award must be based on the adjudication of the dispute and not merely an expression of an expectation, hope or opinion.⁷¹ The tribunal cannot delegate the making of the decision to a third party as the arbitrator(s) must “own” the decision. While the arbitrator may, with the consent of the parties, obtain the assistance of an expert where necessary, he can only use such expert assistance to arrive at his own decision.⁷²

2.4.2 The Award Must Be Complete

An award is said to be a complete award if it contains

⁶¹ *Ibid.*

⁶² Section 26(2) of the ACA. See also J. O. Orojo and M. A. Ajomo, *Op. Cit.* n. 11, p.243.

⁶³ *Ibid.*

⁶⁴ Section 26(3) (c)

⁶⁵ United Nations Conference on Trade Development, *Op. Cit.*, n. 43, p. 24.

⁶⁶ Section 26(3) (a) and Article 32.3 Arbitration Rules.

⁶⁷ United Nations Conference on Trade Development, *Op. Cit.*, n. 43, p. 25.

⁶⁸ Section 26(4)

⁶⁹ J. O. Orojo and M. A. Ajomo, *Op. Cit.*, n. 11, p.246.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*, p. 247.

adjudication on all the issues submitted to the arbitrator for determination. In fact it has been argued that the duty of the tribunal is to make a complete and final resolution of the issues by its award, and that it is a breach of that duty to leave any part of the decision to be determined subsequently or by another.⁷³ Thus where claims and counter claims are made, the tribunal must decide upon each of them unless there is clear evidence of abandonment and the issues should be dealt with separately.⁷⁴

2.4.3 The Award Must be Certain

This basically means that the award must clearly state what duties and obligations are imposed on any of the parties. For instance where the arbitral tribunal directs in the award that money be paid, it must state the amount payable, to whom and by whom it is to be paid. Ideally, where the award is uncertain or inconsistent, the court will not enforce it, but it has been argued that where some part of an award is certain and others uncertain, it may be possible to enforce the valid part and set aside the uncertain part.⁷⁵

2.5 Remedies Available in an Arbitral Award

The Act and Rules do not specify the remedies or reliefs that can be ordered by an arbitral tribunal. It can, therefore, be said that any remedy available under the applicable law in litigation in a state is available in arbitration.⁷⁶ However, the arbitral tribunal must be aware that its authority to fashion a remedy appropriate to the dispute may be limited by the arbitration agreement.⁷⁷ The tribunal must also be aware of the limits of its powers in giving an award as the tribunal lacks the powers to make coercive orders⁷⁸. This limitation must be taken into consideration when the award is being prepared.

One of the remedies available to the high court which is also available to the arbitral tribunal is 'Specific performance'. Specific performance is ordered to make a party perform an act in accordance with his contractual obligation.⁷⁹

Another remedy is an order for payment of money. The arbitral tribunal may order a party to pay to the other party some money either as repayment of debt or as payment of damages. The money is usually paid in the currency of the contract, though the tribunal may order that the money be paid in a foreign currency. The parties may also make specific provisions on this and such provisions

shall prevail. Also the tribunal may fix the time when payment may be made or direct that payment be made in instalments and that the whole shall be come due in default of one instalment.⁸⁰ Some countries, particularly the United States, allow arbitral tribunals to award non-compensatory damages intended to punish and deter fraud or substantial malice. Such damages are referred to as punitive damages when assessed by the tribunal.⁸¹

The arbitral tribunal may also declare the rights of one or more of the parties. This is referred to as declaratory relief. This relief, however, does not include hypothetical declarations.⁸²

2.6 Costs and Remuneration

The award, apart from specifying the reliefs awarded will also specify the costs of the arbitration and allocate them between the parties. Sometimes the award on costs is a separate award rendered after the main award has been issued and the winning party has been determined. In Nigeria, the Arbitration Rules not only gives the tribunal the power to fix costs but also set out the items of cost that can be allowed.

Article 33 of the Nigerian Arbitration Rules provides that the arbitral tribunal shall fix the cost of arbitration in its award. The arbitration costs include the administrative costs of the arbitral institution, the fees and travel expenses, if any, of the arbitrators and the cost of such services as the renting of rooms for hearings and the fees of translators or experts appointed by the tribunal. In institutional arbitration the institution normally has a schedule of administrative and arbitrator fees and the award will conform to it.⁸³ In *ad hoc* arbitration, the arbitral tribunal will estimate the amount reasonably sufficient for the administrative expenses, taking into account the circumstances of the particular case.⁸⁴

In the absence of an express agreement for remuneration, "the right to remuneration has been understood to depend on an undertaking, to be implied from the appointment of an arbitrator, to pay reasonable remuneration for his services." (Sutton, Kendall, & Gill, 1997, p.136)

3. RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

For the purpose of clarity, it is important to differentiate the enforcement of domestic award from enforcement of international awards.

⁷³ *Ibid*, p. 248.

⁷⁴ *Ibid*, p. 248.

⁷⁵ *Ibid*, p.249.

⁷⁶ United Nations Conference on Trade Development, *Op. Cit.*, n. 43 p. 26.

⁷⁷ *Ibid*.

⁷⁸ For example, the tribunal cannot order the compulsory production of witnesses or documents through a subpoena or a Writ of habeas corpus. Such powers are reserved for the court.

⁷⁹ J. O. Orojo and M. A. Ajomo, *Op. Cit.* n. 11, p.251.

⁸⁰ *Ibid*, p.252.

⁸¹ United Nations Conference on Trade Development, *Op. Cit.*, n. 43, p. 26.

⁸² J. O. Orojo and M. A. Ajomo, *Op. Cit.*, n. 11, p.253.

⁸³ United Nations Conference on Trade Development, *Op. Cit.*, n. 43, p. 27.

⁸⁴ J. O. Orojo and M. A. Ajomo, *Op. Cit.*, n. 11 P.255

3.1 Enforcement of Domestic Arbitral Award

Domestic arbitration may be enforced by action at law. In such a case, the award creditor institutes an action by a Writ of Summons wherein he pleads the entirety of his case as well as the arbitration of the dispute and award given. For the enforcement of a customary award, the requirements to be pleaded and proved as stated in *Eke v Okwaranya*⁸⁵ are:

- That there had been a voluntarily submission of the matter in dispute to an arbitration of one or more persons.
- That it was agreed by the parties either expressly or by implication that the decision of the arbitrators would be accepted as final and binding.
- That the said arbitration was in accordance with the customs of the parties or of their trade or business.
- That the arbitrators reached a decision and published their award.
- That the decision or award was accepted at the time it was made.

These ingredients must be proved because customary awards, although recognised by the law, are not accorded the status of an award under the Act which is recognised as binding and enforceable immediately it is rendered (Ibe, 2011, p.305).

However, where the arbitral award is made pursuant to the ACA, enforcement of such an award is governed by the provisions of Section 31 of the Act. The section, apart from providing that the application shall be in writing further provides that the party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof.

The Act does not stipulate the mode of application, only that the application must be in writing. This *lacuna* has given rise to some argument as to the propriety of Motions *ex parte* or 'on Notice' as provided in various rules of court. While some are of the view that the application should be by a Motion *ex parte*,⁸⁶ others are of the opinion that the application should be by way of Motion on Notice. It is submitted that the application should be by a Motion on Notice in order for the other party to be aware of the steps being taken to enforce the award. Where, however, there is no provision made in the Rules of a Court for application to court by way of Motions, the application would be by Originating Summons. Once an application for the enforcement of an arbitral award succeeds, such an award shall have the status of a judgement of the court and it may be enforced as such.⁸⁷

3.2 Recognition and Enforcement of International Arbitral Awards

⁸⁵ (2001) 4 SCNJ 300 at 323-324

⁸⁶ J. O. Orojo and M. A. Ajomo, *Op. Cit.*, n. 11, p.299

⁸⁷ Section 31(3) ACA, LFN 2004

This is provided for under Sections 51 and 54 of the Act. Before the promulgation of the ACA in 1988, foreign awards were enforced in Nigeria by means of registration under the Foreign Judgements (Reciprocal Enforcement) Act. The Foreign Judgements (Reciprocal Enforcement) Act provided that such an award be registered in the High Court at any time within six years⁸⁸ after the date of the award if it has been wholly satisfied and if at the date of the application for registration, it could be enforced by execution in the country of award.⁸⁹

Section 51 provides that an arbitral award, irrespective of the country in which it was made shall, subject to the section and Section 32, be recognised as binding and be enforced by the court. The application for the enforcement of an award under Section 51 of the ACA must be in writing to the court and the party seeking to rely on such an award must supply the original or duly certified copies of the award and the arbitration agreement and a duly certified translation of the award where it was not given in English language.⁹⁰

Section 54, on the other hand, provides that any award arising out of an international commercial arbitration will be enforced under the New York convention where the award is made in Nigeria or any contracting state. Article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 otherwise known as the New York Convention provides that

This convention shall apply to the recognition and enforcement of arbitral awards in the territory of the State other than the State where the recognition and enforcement of such awards is sought, and arising out of differences between persons whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Further, Article 111 provides that the enforcement of the award shall be according to the rules of procedure of the territory in which the award is to be enforced but such enforcement shall be under the conditions spelt out in the convention. The convention protects the party seeking such enforcement by further providing that the charges to be imposed on the recognition and enforcement of foreign awards shall not be greater than those imposed upon the parties for the recognition and enforcement of domestic awards.

⁸⁸ See *City Engineering Nig. Ltd v F.H.A* (1997) NWLR, Pt 520 where the Supreme Court held that "where an arbitration agreement is not under seal or made under any other enactment other than the arbitration law, the limitation period applicable to its six years. The limitation period for the purposes of an action... begins to run from the date of accrual of the cause of action in the arbitration agreement and not from the date of making of arbitral award... Under the common law, where, in an arbitration agreement, there is a Scott v. Avery clause, (which is to the effect that arbitration shall be condition precedent to the commencement of any action at law) the limitation period runs from date of an award."

⁸⁹ Ss. 2, 4.

⁹⁰ See S. 51 of the ACA.

Under the Section 54, it must be proved and shown that such a contracting state has a reciprocal legislation authorising the recognition and enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention (Aduka, 2014). Reciprocity is very important in determining whether to enforce any foreign award under this section (Nwakoby and Aduka, 2015). The award must also be in respect of a dispute arising out of contractual obligations.

The provisions of Section 51 of the Act was adopted from the Article 35 of the UNCITRAL Model Law, It should be noted that while the section has the same objectives as the New York Convention, it is wider in scope as the award is made binding and enforceable irrespective of the country in which the award was made. In effect the award will be binding and enforceable irrespective of whether the awarding jurisdiction is a convention country and notwithstanding that the awarding country is does not have reciprocal relations with Nigeria.⁹¹

It should be noted that domestic or national courts in contracting states cannot refuse the recognition or enforcement of International Centre for the Settlement of Investment Dispute (ICSID) awards as there is a treaty obligation imposed on all state parties to ensure the recognition and enforcement of ICSID awards within their respective states. Hence, the power of states to refuse the recognition and enforcement of international arbitral awards applies to all other foreign arbitral awards with exception of ICSID awards. ICSID has a limited jurisdiction and scope both as to parties and subject matter. One of the parties in any proceedings made pursuant to ICSID must be a contracting State or any constituent subdivision or agency thereof designated to the Centre by the State, and the other party must be a national of another contracting party. The subject matter in the proceedings must be an investment matter. For arbitration proceedings to be conducted pursuant to ICSID, the parties must have consented and agreed that ICSID Convention shall apply to the settlement of their dispute. Once the parties agree as to ICSID Convention, the provision of the Convention shall apply to the exclusion of all other laws.⁹² Nigeria has enacted the International Centre for the Settlement of Investment Disputes (Enforcement of Award) Act.⁹³ The Act which has only two sections provides in a section 1 that:

Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for the Settlement of Investment Disputes, a copy of the award duly certified by the Secretary-General of the Centre aforesaid, if filed in the Supreme Court by the party seeking its recognition for the enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgement of the Supreme Court, and the award shall be enforced accordingly.

However, the Act does not prescribe the procedure for the recognition and enforcement of ICSID awards in Nigeria. The responsibility for making such rules of procedure was placed by section 1(2) on the Chief Justice of Nigeria who has not made or adopted any such rules till date. However, once an ICSID award is registered at the Supreme Court, it ranks on the equal level as a final judgement of Supreme Court of Nigeria,⁹⁴

4. RECOURSE AGAINST ARBITRAL AWARDS

An award, once given, is final, binding and not subject to appeal by any party. However, the ACA provides two reliefs which an aggrieved party can seek in court against an award. The aggrieved party may either apply that the award be set aside or that the court should refuse to recognise and enforce it.

4.1 Setting Aside of the Award

Sections 29 and 30 of the Act provide the grounds on which the Court may set aside an award in domestic arbitration, while Section 48 which is a reproduction of Article 4 of 1958 New York Convention and the Model Law provides for the grounds on which the court may set aside arbitral awards in international arbitration⁹⁵. Section 29 (2) of the Act provides that the court, upon application by an aggrieved party, may set aside an arbitral award where the applicant furnishes proof that the award contains decisions on matters which are beyond the scope of submission to the arbitration. Where the matters which are not beyond the scope of submission can be separated from those *ultra vires*, only the latter will be set aside.⁹⁶

It is important to note that the person applying for the setting aside of the award must be a party to the arbitration as a third party lacks *locus standi* to make such an application. The only exception to this is where the third party's right would be affected or infringed upon by the award, as seen in the case of *Statoil (Nigeria) Limited & Anor v. Federal Inland Revenue Service & anor.*⁹⁷ In that case the Court of Appeal held that:

If a party to an arbitral agreement can challenge the jurisdiction of the Arbitration Tribunal, or that the arbitral agreement was, ab initio, null and void, what about a person or authority, such as the FIRS, who was not a party to the agreement but complains... that the proceedings or subsequent award by an arbitral tribunal constitute an infringement of some provisions of the Constitution or the laws of the land or impedes her constitutional

⁹⁴ G. C. Nwakoby and C. E. Aduka, *Op. Cit.*, n. 101, p.120. See Article 54(1) of the ICSID Rules.

⁹⁵ See the following cases on setting aside on grounds of misconduct: *Taylor Woodrow (Nig.) Ltd vs. Suddeutsche Entawerk GmbH* (1993) 4 NWLR Part 286 Page 127 At 141 – 144; *Baker Marine Nigeria Ltd vs. Chevron Nigeria Ltd* (2000) 12 NWLR Part 681 Page 393.

⁹⁶ See Section 29(3).

⁹⁷ (2014) LPELR-23144(CA).

⁹¹ J. O. Orojo and M. A. Ajomo, *Op. Cit.*, n. 11, p.304.

⁹² Prof. G. C. Nwakoby and Dr. C. E. Aduka, *Op. Cit.*, n. 101, p.119.

⁹³ CAP I20 LFN 2004.

and statutory functions or powers? Would the person be debarred from seeking declaratory remedies, or by originating summons? I do not think so. Where there is a proved wrong, there has to be a remedy...

The application for setting aside an arbitral award must be brought within 3 months from the date of the award or 3 months from the date where requested for additional award was disposed of by the arbitral tribunal.⁹⁸

Further grounds on which an arbitral award may be set aside⁹⁹ include misconduct of the arbitrator¹⁰⁰ or improper procurement of the award,¹⁰¹ legal or mental incapacity of the arbitrator, invalidity of the arbitration agreement, failure to give proper notice of the proceedings to a party, where the award deals with issues not contemplated or where the composition of the tribunal is not in conformity with the agreement, where the matter is cannot be arbitrated and where the award is against public policy.¹⁰²

4.2 Refusal to Recognise and Enforce the Award

The second recourse against an arbitral award is refusal to recognise and enforce it. Section 32 of the Act relates to the enforcement of domestic arbitral awards and does not give any ground on which the recognition and enforcement of an arbitral award may be refused. It merely provides that “any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award”. It thus, appears that section 52 which makes provision for international arbitration would also apply in domestic arbitration.

Section 52 provides grounds on which the recognition or enforcement of an international arbitral award may be refused and the provisions of the section are on all fours with Section 48.¹⁰³ The only distinction between the two sections is found in Section 52(2)(viii) which provides that the court may also refuse to recognise and enforce an award where it has not yet become binding on the parties or has been suspended by a court of the country in which or under the law of which it was made (Akpata, 1997, p.143). Hence, the court may refuse recognition and enforcement of an international arbitral awards in Nigeria either on the application of a party or suo motu.¹⁰⁴ In the case of the former, the circumstances include incapacity of any party to the agreement, invalidity of the arbitration agreement, failure to give proper notice of appointment of arbitrator or the commencement of arbitral proceedings which may give rise to ability to present his

case, where the award is beyond the scope of submission to the arbitration or where it deals with matters not contemplated, etc. 105

It should be noted that there is a distinction between setting aside of an arbitral award and refusal of recognition and enforcement of such award. Setting aside, where it is done by the court of the seat of arbitration may affect the validity of the award in such a way that no other national court in any other country will regard the award as valid for recognition and enforcement. On the other hand, mere refusal to recognize and enforce an award does not affect the validity of such an award in other national courts. This indeed is a significant difference for practitioners to note in making their decision in challenging an award.

4.3 Remission of the Award

This is provided for in Section 29(3) which provides that

The court before which an application is brought under subsection (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 of the award. (Emphasis supplied)

Remission, thus, takes place where the award is referred back to the arbitrators by the court for consideration. This remedy was specifically provided for in Section 11(1) of the Arbitration Act, 1914 which provided that “in all cases of reference to arbitration, the court or a judge may from time to time remit the matters referred,..., to the reconsideration of the arbitrators or umpire”. Remission does not, however, constitute an independent remedy under the Arbitration and Conciliation Act unlike in the UK Arbitration Act, 1996 in Section 63(3). The Section provides that

...The court shall not exercise its power to set aside or declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration. (Emphasis supplied)

It can be seen that under the UK Act, the court is bound to consider remission as a remedy first before setting aside or declaring the award to be of no effect except in situations where it would be unreasonable to do so. This is considered as a defect in the Nigerian law which only puts remission as an option which the court may or may not choose to explore in its discretion.

CONCLUSION

Arbitration as a dispute resolution mechanism has, over the years since its evolution, proved its mettle especially in the resolution of commercial disputes. It is favoured all over the world and various regions and institutions have come up with rules to regulate its conduct. In Nigeria, the Arbitration and Conciliation Act, 2004 is the extant

⁹⁸ See. S. 29(1), ACA.

⁹⁹ For international arbitral awards.

¹⁰⁰ Section 30(1), ACA. The Act is however not explicit on what constitutes ‘misconduct’. It has been held in *William v. Wallis & Cox* (1914) 2K.B 497 at 485 that mishandling of the arbitration which caused substantial injustice amounts to misconduct.

¹⁰¹ *Ibid*. Instances of this is where the arbitrator is misled, deceived or bribed into giving an award.

¹⁰² See Section 48 of the ACA.

¹⁰³ *Ibid*

¹⁰⁴ See S. 52 of the Act.

¹⁰⁵ See S. 52 (2).

law on the regulation of the arbitration process as well as the procedure to be followed and options open to the parties when an award is given by the tribunal. The Award informs the parties to a dispute of the Arbitrator's decision. It is a reasoned decision of an Arbitrator which disposes off all issues submitted to the arbitral tribunal, after taking into consideration the evidence adduced by the parties to the reference. An award is complete in itself and it is a final decision on the matters to which it relates. Pursuant to Section 34 of the Act, settlement of matters incidental to the award constitutes some of the instances where the court intervenes in arbitration as provided for by the Act (Adewole, 2017, pp. 243-258).

In order for parties to truly achieve their aim of having their disputes resolved by a valid arbitral award, conscious steps must be taken towards attaining such an award right from the beginning of the arbitration. Issues such as competence and impartiality of the arbitrators as well as the validity and scope of the arbitration agreement must be taken into consideration as they may have adverse effects on the award at the end of the process. Also, incidental matters of judicial intervention at the end of the arbitration must be taken into consideration. Parties must demonstrate sound knowledge of court rules in order to secure the enforcement of the award as, according to Charles N. Brower, 106

Every aspect of the post-arbitral phase is directed towards a single goal: To ensure the execution of valid awards. This goal, however, has two aspects: while a true award... "final and binding", should be... enforced by a national court, it is equally important that an "award" not be enforced if it is not... truly valid and...deserving of that status.

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