A CRITIQUE OF THE LIMITATION PERIOD FOR ENFORCEMENT OF ARBITRAL AWARD IN NIGERIA

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SUPERVISOR:
PROFESSOR KENN NWOGU

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CERTIFICATION

Be it certified that this dissertation is an original work of the postgraduate student, OLADOYIN, OLUSEYI AWOYALE (with Registration Number 2012397006F). Be it further certified that this work has not been submitted, in part or whole, for any degree or examination in any other university or academic institution, and that all the sources used have been indicated and acknowledged by complete references.

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APPROVAL

This dissertation entitled "A Critique of the Limitation Period for Enforcement of Arbitral Award in Nigeria" has been approved for the Faculty of Law, Nnamdi Azikiwe University, Awka.

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DEDICATION

This dissertation is dedicated to my wife: Mrs. Adejoke Kehinde Awoyale, and my daughters, Oluwatoyinsola Ifeyinwa Awoyale and Oluwakanyinsola Beulah Awoyale.

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ABSTRACT

Over time, arbitration has gained popularity as a means of resolving disputes due to its flexibility, speed, confidentiality and the use of experts in resolving disputes. Unlike other dispute resolution mechanisms, the aim of arbitration is to obtain a final, binding and enforceable decision known as arbitral award. However, an arbitral award has to be enforced within a specified period, otherwise it becomes statute barred. The limitation period for enforcing arbitral award in Nigeria is surrounded by controversies particularly because the Arbitration and Conciliation Act did not make specific provisions for it. The core aim of this research is to examine the legal and institutional framework for arbitration in Nigeria with a view to analysing arbitral award and its enforcement procedure. In doing this, the work focuses squarely on limitation of period within which to enforce an arbitral award in Nigeria considering the damaging impact of the *lacuna* in the Arbitration and Conciliation Act and unwholesome Court decisions in Nigeria to that effect. The research equally undertook a comparative analysis of the limitation period for enforcement of arbitral award in selected developed jurisdictions. The work adopted the doctrinal research methodology involving the use of primary and secondary sources of material in this field of law. The primary sources of material for this research are national legislations and case laws. On the other hand, the secondary sources of materials include international Treaties and Conventions. Relevant textbooks, journal articles, research reports and internet materials were employed. Data were collected from materials accessed from the internet, which are handy in order to keep abreast with the most recent development in the field. During the course of the research, it was found that there is a serious lacuna in the Arbitration and Conciliation Act with regard to the time limit within which to bring an application to enforce arbitral award in Nigeria. As a result recourse is often made to the limitation laws of the States. The research also found that many judges and practitioners do not possess requisite knowledge of arbitration proceeding but view the proceeding as an attempt to compete with the Court of its jurisdiction. Against this backdrop, this work has strongly recommended among other things, the insertion in the relevant section of the Arbitration and Conciliation Act, specific provisions on the limitation period for enforcing both domestic and international arbitration in Nigeria.

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The Limitation Act No 88 of 1966…………………………..………………………….207

UNCITRAL Model Law…………………………………………..................4,25,27, 86,88,89

UNCITRAL Model Arbitration Rules……………………………4,25,27,52,82,86,87,88,89

United States of America Federal Arbitration Act……………………………………………..227

US Federal Arbitration Act……………..……………………………………………………... 235

TABLE OF ABBREVIATIONS

AC	-	Appeal Cases.
ADR	-	Alternative Dispute Resolution.
ALL ER	-	All England Reports.
ALL FWLR	-	All Federation Weekly Law Reports.
ALL NLR	-	All Nigerian Law Reports.
CA	-	Court of Appeal.
CH	-	Chancery.
ECLR	-	Ecowas Law Reports.
FSC	-	Federal Supreme Court.
GLR	-	Ghana Law Report.
JCA	-	Justice of the Court of Appeal.
JSC	-	Justice of the Supreme Court.
KB	-	Kings Bench.
LFN	-	Laws of the Federation of Nigeria.
LPELR	-	Law Pavilion Electronic Law Report.
NMLR	-	Nigerian Monthly Law Reports.
NSCC	-	Nigerian Supreme Court Cases.
NWLR	-	Nigerian Weekly Law Reports.
QB	-	Queen’s Bench.
SC	-	Judgments of the Supreme.
SCNLR	-	Supreme Court of Nigeria Law Reports.
UNCTRAL	-	United Nation Commission on International Trade Law.
WACA	-	West African Court of Appeal.
WLR	-	Weekly Law Reports.

TABLE OF CONVENTIONS AND TREATIES

Convention on Settlement of Investment Disputes Between States and Nationals of other States (ICSID Convention) 1965.

New York Convention 1958.

Nigeria's Treates in Force 1970-1990 Vol 24.

United Nation Commission on International Trade Law 1945.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Once men begin to live together, disputes are indispensable attributes of the different societies, invariably different methods for dispute resolution involving the submission of disputes to a neutral third party emerged. This form of ordering human society is of course, as old as society itself.[1] For instance in a typical African society, an adult of average intelligence is expected to be well grounded in the customs and the traditions of his society. Also there is customary involvement of family heads, tribal elders and village heads in the resolution of disputes. 'Arbitration' refers to a method of dispute resolution involving one or more neutral parties who are usually agreed to by the disputing parties and whose decision is final and binding.[2] According to Temitayo, the relative advantages of arbitration over litigation include the preservation of privacy; expedition of proceedings; freedom of parties to choose the applicable law and constitute the tribunal; the maintenance of friendly relationships; and its less formal nature.[3] On the other hand, Allen has posited that some of the shortcomings of arbitration include parties giving up their appeal rights particularly when the decision of the arbitral tribunal is final and binding; the restricted use of discovery; and the uncertainty in the standards employed by the arbiter to make the award.[4] A definite advantage of arbitration over other forms of dispute resolution is the relative ease with which arbitral awards can be enforced in other countries. The

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[1] K Noussia, *The History, Importance and Modern Use of Arbitration. In: Confidentiality in International Commercial Arbitration* (Heidelberg: Springer, 2010) p.11.

[2] B Garner, *Black's Law Dictionary* (9th edn, St Paul MN: Thomson Reuters, 2009) p. 119.

[3] B Temitayo, 'Why Arbitration Triumphs Litigation: Pros of Arbitration', https://dx.doi.org/10.2139/ssrn.3354674 Accessed on 2nd August 2017. *Singaporean Journal of Business Economics and Management Studies,* 35-37.

[4] R Allen, 'Arbitration: Advantages and Disadvantages,' https://www.allenandallen.com>blog>arbitration. Accessed on 2nd August 2017.

United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, is the basic tool for the enforcement of foreign arbitral awards. Considering the centrality or importance of the enforcement of the award to the successful party, this dissertation investigates and examines the limitation period on such enforcement in Nigeria. It proceeds with the analysis using the relevant statutes, case law jurisprudence and legal literature.

Arbitration is probably the oldest method of dispute resolution still in common use today. Xavier observed that according to biblical theory, King Solomon was the first arbitrator when he settled the issue of who was the true mother of a baby boy.[5] Two women who had been delivered of babies, one of which was alive, and the other stillborn, were both laying claims to the living child. After hearing both women, King Solomon was able to determine the true mother of the child by arbitration. Historical evidence also suggests that Alexander the Great's father, Phillip of Macedon, used arbitration as a means of resolving border disputes.[6]

These and several other references, show that arbitration was in use in ancient societies pre-dating the times of Christ. The Arabic word for arbitration is 'Tahkeem' and the arbiter is known as 'Hakam'. Likewise, in the Persian language, an arbitrator is called 'Salis' while the arbitration is known as 'Salisee'.[7]

Arbitration has long been associated with commerce. This began with trade disputes being resolved by peers dating back to the days of Babylon.[8] The Sumerian Code of Hammurabi

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[5] G Xavier, 'Evolution of Arbitration as a Legal Institution and the Inherent Powers of the Court: Putrajaya Holdings SDN. BHD. v. Digital Green SDN. BHD.' Asian Law Institute Working Paper Series No. 009, 2010, p.1.

[6] E Sussman and J Wilkinson, "Benefits of Arbitration for Commercial Disputes – American Bar …", http://www.americabar.org> publications accessed on 2 August 2017.

[7] Dhir and Dhir Associates, 'India: Evolution of Arbitration in India', https://www.mondaq.com> india > Evolution. Accessed on 4 August 2017.

[8] 'The History of Arbitration Online: Arbitration in Australia'. <

(c. 2100BC) was promulgated in Babylon, and under the Code, it was the responsibility of the sovereign to administer justice through arbitration.[9] The Greeks, later influenced by their Egyptian ancestry, continued the use of arbitration. This then developed with Roman civilization and was shaped by the Civil Law, and incorporated into trade relations between Rome and her business partners.[10] The post-World War II era has witnessed the expansion of international trade in goods and services. There has also been an exponential increase in the number of disputes between sellers and buyers.[11]

Arbitration evolved in England right before the establishment of Royal Courts.[12] England used arbitration as a means of settling disputes and for avoiding courts. Arbitration in pre-colonial Nigeria developed from customary law. Parties to a dispute would resort to customary arbitration by submitting their dispute to family heads, chiefs and elders of the community for resolution, and they would mutually agree to be bound by their decisions.[13] Thus, arbitration was a popular method of resolving conflicts on account of its emphasis on moral suasion, and its ability to maintain harmony in human relationships.[14]

The Nigerian legal system is based on the common law tradition. The transplantation of the common law system into Nigeria occurred between 1861 and 1960.[15] Nwakoby has

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https://www.australianarbitration.com/history.arbitration> Accessed on 4August 2017.

9 D Douglas, *The Historical Foundations of World Order: The Tower and the Arena*. (The Netherlands: Martinus Nijhoff Publications, 2008) p. 195.

10 Ibid.

11 M Rosenthal, 'Arbitration in the Settlement of International Trade Disputes,' (1946) Vol. 11. No. 4. Summer-Autumn. *Law and Contemporary Problems,*p.808.

12 W H Page, The Law of Contracts (Vol. 4, The W. H. Anderson Company, 1919).

13 A Oluwabiyi, 'An Overview of Similarities between Customary Arbitration and Native Courts as Platforms of Administration of Justice in Pre-Colonial Nigeria' (2015) Vol. 1. No. 1. *Journal of Asian and African Social Science and Humanities,* p.129.

14 Ibid.

15 J Arewa, 'The Evolution of the Nigerian Legal Order: Implications for Effectiveness, Economic Growth and Sustainable Development', (2013) *Restatement of Customary Laws of Nigeria.* https://www.nials-nigeria.org>journals >john. Accessed on 4 August 2017.

expressed the view that the primary sources of the Nigerian law of arbitration are the English common law; Nigerian customary law; and local statutes.[16] The English Common Law and the doctrines of equity, including statutes were received into Nigeria by the local legislature during the period of British rule.[17] The origins of Nigerian statutory law on arbitration can be traced to the Arbitration Ordinance of 1914, which was in turn derived from the English Arbitration Act of 1899. Nigeria adopted the UNCITRAL Model Law in 1988 with the enactment of the Arbitration and Conciliation Act, Chapter A18, Law of the Federation of Nigeria, 2004.[18] Some other relevant laws and regulations governing arbitration include the Limitation Act or Laws of the States; the High Court Civil Procedure Rules, the Sheriff and Civil Process Act 2004 Chapter S6, Laws of the Federation of Nigeria 2004, the Foreign Judgment (Reciprocal Enforcement) Act;[19] the International Center for Settlement of Investment Disputes (Enforcement of Awards) Act,[20] and so on.

Usually, the arbitral tribunal hands down a final and binding decision, known as the award. The award must be enforced within a given time; otherwise, it becomes statute-barred. Such Limitation Laws or Statutes are passed by the legislature in order to set the maximum time after an event within which legal proceedings may be initiated.[21] Thus it has been held that the first aim of the statutes of limitation is to protect citizens from being oppressed by stale claims, to protect settled interests from being disturbed, to bring certainty and finality to disputes and so

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16 G Nwakoby, 'Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004. for Amendment', (2010) Vol. 1. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* p.1.

17 *Ibid*.

18 A Rhodes-Vivour, 'Recent Arbitration Related Developments in Nigeria', (2010) Vol. 76. *Journal of the Chartered Institute of Arbitrators,* p.130-135.

19 Cap F35 Laws of the Federation of Nigeria 2004.

20 Cap I 20 Laws of the Federation of Nigeria 2004.

21 'Statute of Limitations'. https://www.en.m.wikipedia.org/wiki/Statute. Accessed on 4 August 2017.

on.[22] Although there is no limitation period for the enforcement of the arbitral award in the Arbitration and Conciliation Act, the Courts have always made reference to the limitation laws in order to identify the time within which an action for enforcement can be initiated.

1.2 Statement of the Problem

Arbitration has an ancient history in Nigerian societies. Traditionally, disputes were resolved by family heads, elders and chiefs, and their decisions were generally recognized and obeyed by the disputants. Nevertheless, the popularity of customary arbitration declined with the introduction of the common law system. However, Oni-Ojo and Roland-Otaru have declared that attempts at resolving conflicts in Nigeria have been conducted under institutional and legal frameworks that do not appear to have yielded any result at all.[23]It is worthy to note that the British common law provides an overriding background to human conduct and the dispensation of justice in many Commonwealth countries, including Nigeria.[24] In recent years however, there has been an increased awareness and agitation for the greater use of arbitration to resolve disputes in Nigeria.[25]

Nevertheless, despite being canvassed as an alternative to litigation, arbitration is beset by several problems, leading many to question its legitimacy as a veritable alternative to litigation. The Arbitration and Conciliation Act is the extant legislation regulating arbitral proceedings in Nigeria; yet, it contains no specific provision for the limitation period for the enforcement of arbitral awards. Nigerian Courts in interpretation of the limitation period for

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22 National Westminster Bank Plc v. Robin Ashe (2008) EWCA Civ 55. 2.

23 E Oni-Ojo and C R Roland-Otaru, 'Alternative Dispute Resolution Strategies for Sustainable Development in Africa: Insights from Nigeria,' (2013) Vol. 2. No. 1. *Journal of Management and Entrepreneurial Development,* p. 47.

24 C Ogbulogo, 'The Discourse of Arbitration in Pre-Colonial Nigeria: Insights from Igbo Literary Texts,' (2004) Vol. 6. No. 2. *Journal of Cultural Studie,*.p.3.

25 J Njoku, 'Experts Explore Arbitration as Alternative Dispute Resolution in Construction Industry,' *Vanguard,* 30 June 2015. http://www.vanguardngr.com/2015/06/. Accessed on 2 August 2017.

enforcement of arbitral award usually resort to foreign authorities as a guide. This has led to uncertainty and speculation in the interpretation of the limitation period for the enforcement of arbitral award in Nigeria. It has therefore, become imperative to investigate these issues which have stimulated this study.

1.3 Significance of the Study

It is an established principle of law in our case law jurisprudence that a successful litigant should not be deprived of the fruits of his victory.[26] However, often, the victorious litigant faces the stark reality of the enforcement of his award being statute-barred. In some instances, he may be ignorant of the existence of a limitation law, or if it exists, when it begins to run, or even the structure of an arbitration agreement. This situation leads to unhappy endings. This study seeks to contribute to knowledge by investigating and addressing the resulting legal complications. Therefore, this research will be relevant to disputants, researchers, academicians, arbiters, lawyers, judges, legislators, and institutions, involved or interested in arbitration.

This research is also significant in undertaking a comparative assessment of limitation laws in relation to arbitral awards in other jurisdictions, and in hopefully provoking further research on the topic. It is also significant in aggregating and organizing diverse scholarly views, literatures, case law jurisprudence, legislations and instruments into a single volume. Furthermore, the study is significant in discussing the legal framework within which the arbitration system has developed in Nigeria, pointing out the relevant national and international instruments.

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[26] *Union Bank of Nigeria Limited v. Odusote Bookstore Limited*, (1994) LPELR-3386 (SC) p. 27.

1.4 Purpose of Study

Generally, the study undertakes "A Critique of the Limitation Period for Enforcement of Arbitral Award in Nigeria". However, in specific terms, the purpose of the study is to:

(a) Examine the legal and institutional framework for arbitration in Nigeria.

(b) Discuss the structure and nature of an arbitration agreement.

(c) Critically discuss arbitral award and its enforcement procedure.

(d) Discuss limitation of actions with specific reference to enforcement of arbitral award.

(e) Identify and analyze the limitation period for enforcing arbitral award in Nigeria.

(f) Discuss the problems arising from the absence of a limitation period for enforcement of arbitral award in the Arbitration and Conciliation Act.

(g) Investigate the problems and challenges arising from the imposition of a time limit for enforcement of arbitral award.

(h) Undertake a comparative analysis of the limitation period for the enforcement of arbitral award in developed jurisdictions like England, the U.S and Canada to see the lessons Nigeria can draw from these jurisdictions.

1.5 Scope of Study

The research is conducted in Nigeria, and it concentrates on the limitation period for enforcing arbitral awards within the Nigerian legal system. The study is aided by an attempt to explore similar processes, statutes and institutions in selected jurisdictions. Admittedly, arbitration is only one of several Alternative Dispute Resolution (ADR) mechanisms, including

meditation, negotiation, case evaluation, early neutral evaluation, ombuds,[27] however, this dissertation will not undertake a discussion of these processes, hence, any mention of these procedures is only incidental to the study.

The subject matter of the study spans both national and international law. Therefore, the relevant provisions of the Arbitration and Conciliation Act;[28] the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards; the UNCITRAL Model Law, the Limitation Laws of the States in Nigeria, amongst others will be discussed. Furthermore, relevant statutes from other jurisdictions, case law jurisprudence, and scholarly views are explored.

1.6 Methodology

The dissertation adopts the doctrinal research methodology. Duncan and Hutchinson have stated that the doctrinal method is normally a two-part process because it involves first locating the sources of the law, and then interpreting and analyzing the text.[29] Doctrinal research methodology involves the location and analyses of the primary documents of the law in order to establish the nature and parameters of the law. Thus, the primary and secondary sources of

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27 (1) Mediation; in this process, a third party called the mediator facilitates the resolution process and may even suggest a resolution, known as the mediator's proposal, but does not impose it on the parties; (2) negotiation, that is where participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution; (3) case evaluation; a non-binding process in which the parties present the facts and the issues to a neutral case evaluator who advises them on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a Court; (4) early neutral evaluation; a process that takes place soon after a case has been filed in Court. The case is referred to an expert who is asked to provide a balanced and neutral evaluation of the dispute. The evaluation of the expert can assist the parties in assessing their case and may influence them towards a settlement; and (5) ombuds; which refers to a third party selected by an institution, for example, a corporation, to deal with complaints by employees, clients or constituents. 'Alternative Dispute Resolution, <https//:www.en.m.wikipedia.org/wiki/Alternative> accessed on 2 August 2017.

28 Cap A18, Laws of the Federation of Nigeria, 2004.

29 N Duncan and T Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) Vol. 17. No. 1 *Deakin Law Review*, p. 113.

materials in this field of law have been used. The primary sources of materials for this research are the relevant national legislations and case laws.

On the other hand, secondary sources of materials offer analyses, commentary, or a restatement of primary law, these include international treaties and conventions. Therefore, relevant textbooks, journal articles, research reports, unpublished papers, newspapers, internet materials, etc, are employed in the study. Data was collected from the internet, which are handy in order to keep abreast with the most recent developments in the field. This enables the researcher to find out critical details to hopefully add new ideas to the subject area.

1.7 Literature Review

The purpose of this section of the dissertation is to summarize, interpret and critically evaluate existing literature in order to establish current knowledge on the research topic.[30] The objective for doing so relates to ongoing research to develop knowledge. The first review in this section is the textbook: 'The Law of Arbitration in Nigeria' written by Ezejiofor is one of the earliest books on arbitration in the country.[31] The author posited that at the end of arbitral proceedings, the tribunal is obligated to carefully study the evidence and arguments presented to it, come to a decision upon the case and set down such decision in the form of an award.[32] The author examined arbitration under the provisions of the Arbitration and Conciliation Act;[33] international arbitration; and the recognition and enforcement of foreign arbitral awards in Nigeria. However, the textbook did not treat the limitation period for the enforcement of arbitral awards in Nigeria. Furthermore, the textbook pre-dated several significant developments in

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30 'Literature Review-Research-Charles Sturt University', https://www.csu.edu.au hdr-guide > lite> Accessed on 2 August 2017.

31 G. Ezejiofor, *The Law of Arbitration in Nigeria* (Ikeja, Longman Nigeria Plc 1997).

32 *Ibid* p. 93.

33, *Ibid,* Chapters 2-10, and Decree No. 11 March 1988.

arbitration in Nigeria such as the incorporation of arbitration into the Civil Procedure Rules of Courts and the Multi-Door Court House institution.

Although the dissertation addressed several issues which are relevant to this research,[34] the author did not explore the limitation period for the enforcement of arbitral awards. However, this study will address this issue by undertaking an analysis of the arbitral award, its enforcement procedure as well as the limitation period for doing so. Furthermore, a comparative assessment of the limitation period in other jurisdictions will be undertaken. This study will attempt to bridge these perceived gaps in the literature.

In Halsbury's Laws of England,[35] the learned authors emphasized the fact that arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons, other than a Court of competent jurisdiction.[36] The learned authors also posited that statutory arbitrators take their character from the statutes providing for them.[37] With reference to arbitration in English law, the authors opined that the Limitation Act 1939 and any other enactment relating to limitation of actions apply to arbitration, including statutory arbitration as they apply to actions in the High Court.[38] Furthermore, in applying the Act to a statutory arbitration, a right to proceed to arbitration is to be treated in the same way as a cause of action would be treated if the proceedings were in a Court of law.[39] The authors also posited that notwithstanding any term in arbitration agreement to the effect that no cause of action shall accrue in respect of any matter

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[34] *Ibid* Chapter 4 (Types of Arbitration; Arbitration Agreement, Merits of Arbitration, Recognition and Enforcement of award, multi-door court house, etc).

[35] Lord Haisham of St. Marylebone, *Halsbury's Laws of England* (4th edn, London, Butterworths & Co Publishers Ltd, 1997).

[36] *Ibid*, p 255.

[37] *Ibid*.

[38] *Ibid*, p 264.

[39] *Ibid*.

required to be referred until an award is made under the agreement, for the purposes of the Limitation Act 1939 and of any other enactment relating to the limitation of actions, whether in their application to arbitration or to other pleadings, the cause of action is deemed to have accrued in respect of any matter agreed to be referred at the time when it would have accrued but for that term in the agreement.

However, in as much as this analysis is insightful, it was not undertaken in the Nigerian context, neither does it contain observations on other legal systems. Furthermore, it was published well ahead of the enactment of the English Arbitration Act 1996 or the English Limitation Act 1980, hence the statutory analysis is far behind times. This study will attempt to address the observations made here.

"Law and Practice of Arbitration and Conciliation in Nigeria"[40] is another literature written by Orojo and Ajomo. The book contained seventeen chapters. Several arbitration principles were discussed in the book, however, the limitation period for enforcement of arbitral award was excluded in the book.

"Nigerian Law of Limitation of Actions."[41] Is authored by Apeh The thirteen chapter book discussed limitation of actions generally, by making copious reference to the limitation laws of Federal Capital Territory Abuja, Anambra State, Edo State, Benue State, Lagos State and Rivers State. The work did not examine in details the limitation period for enforcement of arbitral award in Nigeria.

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40 J Orojo and M AJomo, *Law and Practice of Arbitration and Conciliation in Nigeria*(Lagos: Mbeyi & Associates (Nigeria) Limited 1999).

41 E Apeh, Nigerian Law of Limitation of Actions (Benin City: Elaigwu Apeh Law Publishers, 2001).

In the 22nd edition of "Russell on Arbitration",[42] the learned authors posited that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.[43] The authors examined developments in English arbitration through the lenses of the Arbitration Act 1996, Arbitration Act 1950, the New York Convention 1958, UNCITRAL MODEL Law and even case laws. Although the areas discussed by the authors are significant to this study, they did not extend their analysis to the problems posed by limitation statutes on the enforcement of arbitration awards. Furthermore, the textbook is exclusively devoted to the study of English Arbitration law. In contrast, this dissertation will endeavour to address the enforcement of the award in the context of Nigerian arbitration law, and where possible, draw upon the experiences of other jurisdictions.

Nwakoby is the author of the thirteen-chapter textbook on arbitration entitled "The Law and Practice of Commercial Arbitration in Nigeria".[44] In the third chapter of the textbook treating 'the enforcement and impeachment of domestic arbitral awards', the learned author postulated that the Limitation Act of 1966 as well as the provisions of other limitation enactments apply to arbitration in the same way as they apply to actions in Court.[45] The author also pointed out that as no time limitation is stipulated in Section 31 of the Act, recourse would be had to the Limitation Act which placed a period of six years for bringing an action to enforce a contract.[46] The author's analysis here is very instructive and will form the fulcrum of this study. Yet, a number of developments in the law and practice of arbitration; changes in the

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42 D. Sutton, J. Grill, M .Gearing, *Russell on Arbitration* (22nd edn, Gloucester: Sweet and Maxwell, 2002).

43 *Ibid*, p. 4.

44 G Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (Enugu: Iyke Ventures Press, 2004).

45 *Ibid*, p 147, also the Limitation Act of 1966, otherwise known as Decree No. 88 of 31st December 1966, Sections 56 & 57.

46 *Ibid*, pp 147-148.

institutional framework, the impact of the limitation period on the enforcement of the award, and a cross-jurisdictional approach, which appear to have escaped the author's attention will be treated in this study using textual authorities and case law jurisprudence.

In his book, "Insight on Private Dispute Resolution in Nigeria",[47] Ibe expressed the view that recognition refers to ratification, confirmation and acknowledgement.[48] The learned author also projected the view that as the Act does not provide a time frame within which to make an application for recognition and enforcement of an award, recourse is under the circumstances had to the Limitation Act.[49] The Limitation Act stipulates that an action for enforcement of an award arising out of a statutory arbitration or submission not under seal shall not be entertained after six years from the date of accrual of the cause of action.[50] However, where the submission is under seal, the limitation period is twelve years.[51] Although this finding is helpful to this research, the author did not advert his mind to institutional developments in arbitral practice in Nigeria; the interplay between relevant conventions and arbitration statutes in Nigeria, as well as the enforcement of foreign arbitral awards. This research expands the views of this author in order to accommodate the areas mentioned.

Ekwenze is the learned author of "Video Conferencing in International Commercial Arbitration Law and Practice."[52] The author expressed the view that in Nigeria, arbitration is governed by the Arbitration and Conciliation Act. He also noted that Nigeria has ratified and implemented several arbitration conventions. These treaties will enable the country to arbitrate

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47 C Ibe, *Insight on the Law of Private Dispute Resolution in Nigeria* (Enugu: El Demak Publishers, 2008).
48 *Ibid*, p 199.
49 *Ibid*, p 206.
50 *Ibid*, p 206, Limitation Act 1966 s. 7 (1) (b).
51 S. 11 (1) (b) Limitation Act 1966 s. 11 (1) (b).
52 S Ekwenze, *Video Conferencing in International Commercial Arbitration Law and Practice* (Enugu: Snaap Press Ltd, 2010).

and enforce arbitral awards. In the second chapter of the textbook, the author briefly treated national laws in domestic arbitration, international laws, treaties and institutions in arbitration. The author explicitly stated that the Arbitration and Conciliation Act regulates arbitration arising from written and voluntary agreements, and that some statutes stipulate that specific disputes may be settled by arbitration.[53] Before the enactment of the Arbitration and Conciliation Act 2004, arbitrations arising from written agreements were regulated by the English Arbitration Act of 1889 which has gone through several amendments, reenactments and consolidations. However, the draftsmen of the Nigerian Arbitration Act did not follow the English model which is modernized and comprehensive.[54] As the title of the textbook suggests, it is devoted to the use of information technology in international arbitration. Therefore, developments in arbitration practice in Nigeria such as the incorporation of arbitration into High Court Civil Procedure rules, establishment of Multi-Door Court Houses; enforcement of arbitration awards, and the effect of limitation statutes on such enforcements, were not considered by the author. This dissertation will attempt to address the highlighted issues.

In his book: "Limitation of Action: Statutory and Equitable Principles,"[55] Amadi opined that in order to guard against the presentation of stale demands, law stipulates the time limit within which a claimant must redress his right.[56] He stated further that where a judgment is executory, then time begins to count from the date on which the judgment becomes enforceable.[57] Judgment includes arbitral award as Section 62 of the Limitation Law of Lagos

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53 *Ibid,* p 51.
54 *Ibid*, p52.
55 J Amadi, *Limitation of Action: Statutory and Equitable Principles*. Vol. II (Port Harcourt: Pearl Publishers, 2011).
56 *Ibid* p 1.
57 *Ibid,* p 1582, Vol. II, also Limitation Law of Rivers State s. 13 (1), Cap 80, Laws of Rivers State, 1999

State provides that: “This law and any other limitation enactment shall apply to arbitration as they apply to actions in the Court.”[58] However, the award must be final.[59] However, it is necessary to point out that the author merely expended very little effort to examine the limitation period for enforcement of arbitral awards. The book is on limitation of action generally, perhaps that explains the reason why arbitral award and its enforcement modalities were not treated by the author. Hence, this research will address these issues.

Ajogwu is the author of the 17-chapter book entitled: “Commercial Arbitration in Nigeria: Law and Practice”.[60] In the fourth chapter of the book, the learned author treated time limitation issues.[61] The author stated that there is no doubt that the issue of time limitation is very vital both in litigation and arbitration matters.[62] However, besides these passing remarks, the author did not treat limitation of actions under this head or elsewhere in the book. Thus, the effect of the Limitation Act on the enforcement of arbitral awards was not treated at all. This study intends to explore this vacuum in the literature.

“Commercial Arbitration Law and Practice in Nigeria” is a textbook comprising eleven chapters written by Idornigie.[63] The author emphasized that arbitral awards are generally self-executing, but when the losing party fails to comply with the award, the issue of recognition and enforcement arises.[64] Nevertheless, the Act has made elaborate provisions for the recognition and

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which provides that no action shall be brought upon any judgment or on interest on any debt after the expiration of ten years from the date on which the judgment becomes enforceable or the interest becomes due, as the case may be.

58 Cap. 118, Laws of Lagos State, 1994.

59 Amadi, op cit, p. 1583,

60 F Ajogwu , *Commercial Arbitration in Nigeria: Law and Practice* (Lagos: Centre for Commercial Law Development, 2013).

61 *Ibid*, p 49.

62 *Ibid*.

63 P Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Abuja: Lawlords Publications, 2015).

64 *Ibid*, p 292.

enforcement of both domestic and international awards.[65] The author also observed that although it is settled law that limitation laws apply to judicial proceedings, it is sometimes uncertain whether they apply to arbitration or alternative dispute resolution.[66] The investigation of this issue constitutes the motivation for this study. The study will therefore develop upon the ideas propounded by this author.

Akpata is the author of the book titled, "The Nigeria Arbitration Law in Focus"[67] comprising four parts. It discussed arbitration generally, arbitration agreement, arbitral award and its enforcement. As rich as the text is, it left out the time limit allowed for the enforcement of arbitral award in Nigeria.

In his article: "The Machinery for Enforcement of Domestic Arbitral Awards in Nigeria– Prospects for Stay of Execution of Non-Monetary Awards: Another View,"[68] Ibe stated that parties to arbitral proceedings are expected to accept the award as binding and enforceable immediately it is rendered.[69] However, a party may decide not to abide by the award, leading to the need to apply to the Court for enforcement and execution.[70] The author posited that there are three methods of enforcement of domestic arbitral awards, viz: (a) enforcement by action upon the award; (b) enforcement under S. 31 (1) of the Arbitration and Conciliation Act, and (3) enforcement pursuant to S. 31 (3) of the Act. The author extensively treated the modes of enforcement stated above. However, besides being merely confined to domestic awards, the

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65 *Ibid,* p 292.

66 *Ibid*, p 372.

67 E Akpata*, The Nigeria Arbitration Law in Focus*(Lagos: West African Book Publishers Limited, 2017).

68 C Ibe, 'The Machinery for Enforcement of Domestic Arbitral Awards in Nigerian – Prospects for Stay of Execution of Non-Monetary Awards : Another View' (2011) Vol. 2. *Nnamdi Azikiwe University Journal of International Law.*

69 *Ibid*, p 304.

70 *Ibid*, p 304.

article did not address the limitation period for such enforcements. This study will attempt to address the topics discussed by this author.

Bello is the author of the article: "Customary and Modern Arbitration in Nigeria: A Recycle of New Frontiers."[71] The learned author observed that before the advent of the Arbitration and Conciliation Act, arbitration was conducted in accordance with the customs and usages of the people.[72] He described this process as customary arbitration, which is the procedure for settling disputes conducted in accordance with indigenous customs and traditions.[73] The author further stated that with the advent of the adversarial system of justice, certain shortcomings of customary arbitration led to the reformation of customary arbitration and the development of modern arbitration in Nigeria.[74] Thus, an arbitral award would be enforced in the same way as the judgment or order of a Court.[75] Despite its title, the article deals overwhelmingly with customary arbitration, hence the enforcement of arbitral awards and the limitation period for doing so was not discussed at all by the author, neither did he advert his mind to the recognition and enforcement of foreign arbitral awards, which is an even more conspicuous oversight, given the global character of commerce today. This study will strive to discuss these areas.

In the article: "Some Aspects of the Law and Practice of Commercial Arbitration in Nigeria"[76] Ototuru opined that the decision in an arbitral award is known as an award, which is

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71 A Bello, 'Customary and Modern Arbitration in Nigeria: A Recycle of Old Frontiers' (2014) Vol. 2. No. 1. *Journal of Research and Development,* p. 50-58.
72 *Ibid*, p 50.
73 *Ibid*, p 51.
74 *Ibid*, p 55.
75 *Ibid*, p 56.
76 G Otuturu, 'Some Aspects of the Law and Practice of Commercial Arbitration in Nigeria' (2014) *Journal of Law and Conflict Resolution,* Vol. 6 (4), p. 67-77.

enforceable in the same way as a judgment obtained in a Court of law.[77] An application may be made directly to the Court or judge to enforce the award or to enter judgment in terms of the award.[78] He also declared that with the introduction of Multi-Door Court Houses in some states, the procedure for the recognition and enforcement of the award has become much easier.[79] Although this article proves useful for this research, the learned author did not advert his mind to the complexities arising from the limitation period for enforcing arbitral awards in Nigeria. Hence, this research will attempt to fill up this perceived vacuum in the literature.

Nwakoby and Aduaka in their article titled: "The Recognition and Enforcement of International Arbitral Awards in Nigeria,"[80] the learned writers expressed the view that time limitation for recognition and enforcement of foreign arbitral awards in Nigeria is governed by statutory provisions,[81] which set out the time within which an aggrieved person can submit a matter for determination before a judicial body.[82] They also observed that it is on account of the fact that the Arbitration and Conciliation Act and the New York Convention do not specify any time for the enforcement of awards that emphasis has been placed on limitation laws in Nigeria,[83] which prescribe a six-year period for the enforcement of arbitral awards.[84] The authors concluded by saying that time cannot begin to run before an award is made because an arbitration agreement constitutes two distinct contracts: the contract to submit the dispute to arbitration, and the contract to comply with the terms of the award.[85] The authors reached this

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77 *Ibid*, pp 72 -73.
78 *Ibid*, p 73.
79 *Ibid*.
80 G Nwakoby and C Aduaka, 'The Recognition and Enforcement of International Arbitral Awards in Nigeria: Issue of Time Limitation' (2015) Vol. 37. *Journal of Law, Policy and Globalization,* 116-125.
81 *Ibid*, p 123.
82 *Ibid*, p 123.
83 *Ibid*.
84 *Ibid*, 124.
85 *Ibid*, p 124.

conclusion after a very careful scrutiny of several leading cases on the issue.[86] These findings are indeed very helpful to this research which intends to build upon the principles established by these authors.

In his article: "Modern Trends in Commercial Dispute Resolution through Arbitration in Nigeria: Prospects and Constraints,[87] Sanni expressed the view that globally, and particularly, in advanced jurisdictions, arbitration has evolved to become a quick, confidential and cost-effective procedure for the settlement of disputes.[88] However, the author duly observed that a major problem associated with arbitration is the enforcement of the award in non-binding arbitration. Notwithstanding this position, the author did not address the enforcement of arbitral awards in Nigeria, nor the limitation period for doing so, despite the fact that the author discussed arbitration under South African law,[89] Canadian law,[90] and the United States of America.[91] As this research intends to address these perceived gaps in the literature, it will explore the limitation period for enforcing arbitral awards not only in Nigeria, but some selected countries as well.

1.8 Organizational Layout

The research is organized in seven chapters. Chapter one is the general introduction of the work. It sets out the background to the study, statement of problem; scope of the study, research methodology, significance of the study; literature review and organizational layout.

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[86] *M. S.S Line v Kano Oil Millers Ltd* (1974) ALLNLR, 893; *City Engineering Nig Ltd v Federal Housing Authority* (1997) 9 NWLR (pt. 520) 224; *KSUDB v Fanz Construction Co Ltd* (1990) 4 NWLR (pt. 142) 37.

[87] A Sani, 'Modern Trends in Commercial Dispute Resolution Through Arbitration in Nigeria: Prospects and Constraints' *Journal of Marketing and Consumer Research,* (2015) Vol. 8, p. 14 -20.

[88] *Ibid*, p 17.

[89] *Ibid*, p 15.

[90] *Ibid*, p 16.

[91] *Ibid.*

In chapter two, the study examines the concept of arbitration; nature, typology, evolution of arbitration, statutory provisions on arbitration, and the arbitration agreement.

Chapter three discusses the arbitration agreement, arbitration clause, alteration, revocation and enforcement of the arbitration clause, remuneration of arbitrators and their removal from office.

In chapter four, the researcher analyzes the arbitral process and proceedings.

Issues such as the commencement of arbitration proceedings, notice of arbitration, venue, choice of law, jurisdiction of the tribunal and interim orders are discussed in the chapter.

Chapter five examines the arbitral award, its essential elements, binding nature and judicial intervention in arbitral proceedings.

Chapter six analyzes extensively the recognition and enforcement of the arbitral award and the use of judicial proceedings to set aside the award.

Chapter seven examines the limitation period for the enforcement of the arbitral award; and the accrual of cause of action.

Chapter eight concludes the study with summary of findings and recommendations.

CHAPTER TWO

LEGAL AND INSTITUTIONAL FRAMEWORK FOR ARBITRATION IN NIGERIA

The Arbitration and Conciliation Act[92] is the extant law on arbitration in Nigeria. Although some states like Lagos State[93] have gone a step further to pass their own law on arbitration laws, the Arbitration and Conciliation Act remains the principal legislation on arbitration in Nigeria.

2.1 Meaning of Arbitration

The Arbitration and Conciliation Act defines arbitration to mean: "A commercial arbitration whether or not administered by a permanent arbitral institution"[94]

This definition is very narrow particularly as it only referred to commercial arbitration without being mindful of the other types of arbitration. For this reason however, recourse has to be made to case law and definitions by learned authors on arbitration in stating what arbitration is.

Arbitration has been defined as;

> A process used by the agreement of the parties to resolve disputes. In arbitrations, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award.[95]

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[92] Cap A18 Laws of the Federation of Nigeria 2004.

[93] Ch A11 Laws of Lagos State 2015.

[94] Arbitration and Conciliation Act s.57 Cap A18 Laws of the Federation of Nigeria 2004.

[95] Lord Mackay of Clashferm, *Halsbury's Laws of England* (4th edn, Vol. 2, London: Butterworths & Co Publishers Ltd, 1997) p. 2.

Orojo and Ajomo defined arbitration as;

> A procedure for the settlement of disputes under which the parties agreed to be bound by the decision of an arbitrator whose decision is in general, final and legally binding on both parties.[96]

In *Kano State Urban Development Board v Fanz Construction Limited*,[97] the Supreme Court defined Arbitration as;

> The reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person 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 matter in controversy.

The Supreme Court in *Nigerian National Petroleum Corporation v Lutin Investments Limited & Anor*[98] defined arbitration as:

> The reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person other than by a Court of competent jurisdiction.

Again, arbitration has also been defined as:

> The process by which a dispute or difference between two or more parties as to the legal rights and liabilities is referred to and determined judicially and with binding effect by the application of

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96 J Orojo and M Ajomo, *Law and practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbayi & Associates Nigeria Limited, 1999) p. 238.

97 (1990) NWLR (pt 142) 1, (1990) LPELR 1659 (SC).

98 (2006) NWLR (pt 965) 506, (2006) LPELR 2024 (SC).

> law by one or more persons (the arbitral tribunal) instead of by a Court of law.[99]

From the foregoing definitions arbitration can be defined as:

> A dispute resolution mechanism involving one or more neutral third party, who the parties have agreed from the beginning of their contract to resolve their dispute and the decision of the neutral third party is final and binding on all the parties.

The foregoing definition speaks about a present and future dispute which the parties anticipate and put in a legally binding agreement which the Court has held severally to be legally enforceable.

2.2 Evolution of Arbitration in Nigeria

Before the advent of colonialism, Africans had their own way of settling disputes. The indigenous judicial system is less formal, cheaper, flexible and very efficient.

As a result of these features the colonialist as well as our Courts have classified our indigenous judicial system as customary arbitration. The Courts on several occasions have held that certain conditions must exist before a customary arbitration can be valid and enforceable.

The Supreme Court of Nigeria in *Duruaku Eke & Ors v Udeozor Okwaranyia & Ors*[100] held that for a customary arbitration to be valid the following ingredients must be present:

> For there to be a valid customary arbitration, five ingredients must be pleaded and proved, namely:

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[99] Lord Mackay of Clashferm, *Halsbury's Laws of England* (4th edn, Vol. 2, London: Butterworths & Co Publishers Ltd, 1997) p. 332.

[100] (2001) LPELR-1074 (SC), *Agu v Ikewibe* (1991) 3 NWLR (pt 180) 385, *Ohiari v Akabese* (1992) 2 NWLR (pt 221) 1.

a. That there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons.

b. That it was agreed by the parties either expressly or by implication that the decision of the arbitrator (s) would be accepted as final and binding.

c. That the said arbitration was in accordance with the custom of the parties or of trade or business.

d. That the arbitrator (s) reached a decision and published their award.

e. That the decision or award was accepted at the time it was made.

I submit that the position of the colonialist as well as our Court does not represent the position and the status of African indigenous judicial system. Sadly what the courts have constantly referred to as customary arbitration is the African judicial system.

It is important to note that the first legislation on arbitration in Nigeria was the Arbitration Ordinance 1914. This law was operational in Nigeria for a very long time. The Act was re-enacted as Arbitration Ordinance Act, Laws of the Federation of Nigeria and Lagos 1958. Section 1 (1) of the Arbitration Ordinance Act 1958 made the law applicable to the Northern, Western and Eastern, Federal Territory of Lagos and Southern Cameroon.

The provisions of the 1958 Act has a limited scope because the Act was limited to domestic arbitration only and no reference was made to international arbitration. It was the inadequacy of

the 1914 Arbitration Ordinance that led to the enactment of Arbitration and Conciliation Act 1988. The 1988 Act made adequate provision for both domestic and international arbitration.[101]

The recital to the Arbitration and Conciliation Act states as follows:

> An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) made in Nigeria or in any contracting State arising out of international commercial arbitration.

It should be further noted that Arbitration and Conciliation Act derived its source from UNCITRAL Model Law of Arbitration. The UNCITRAL Arbitration rules can be found in the first schedule to the Arbitration and Conciliation Act.

The Arbitration and Conciliation Act is divided into four segments:

1. Part one consists of Section 1 to Section 36, it provides for arbitration agreement, composition of the arbitral tribunal, the jurisdiction of the arbitral tribunal, conduct of the arbitral proceedings, making of award and termination of proceedings and recourse against awards.
2. Part 2 consists of Section 37 to 42 which provides for conciliation.
3. Part 3 consists of Section 43 to 55 which provides for international commercial arbitration and conciliation.
4. Part 4 has Sections 56 to 58 and it provides for miscellaneous provisions.

[101] Arbitration and Conciliation Act s.57 Cap A18 Laws of the Federation of Nigeria 2004.

Like other aspects of law in Nigeria, arbitration law derives its source essentially from common law and doctrine of equity.

2.3 Suitability of Arbitration over other Dispute Resolution Mechanism

Parties who go to arbitration enjoy privacy unlike litigation where Court proceedings are held in the open. Justice Mocatta noted in *Gunter Henck v. Anne & Co*[102] that; "One of the major attractions to arbitration undoubtedly is the lack of publicity in relation to the proceedings"

However, unlike conciliation, mediation, mini-trials and other means of dispute resolution arbitration is not adversarial.

Confidentiality is an integral part of arbitral proceedings. Arbitral proceedings are usually held in camera unless the parties agree otherwise. Arbitral proceedings are very simple and flexible in nature. Once the arbitral tribunal adheres strictly to the doctrine of fair hearing, it is at liberty to adopt any procedure that is most suitable. However, the provision or the first schedule of the Act must be complied with in domestic arbitration. While in international arbitration it is the parties that determine or adopt the Law to govern the transaction. In the absence of such agreement the arbitral tribunal can make rules to govern the proceedings or have recourse to UNCITRAL Model Law or ICSID rules.

The parties in arbitration are at liberty to choose the arbitral tribunal. One of the inherent features of an arbitration agreement is that the method of appointment of the arbitral tribunal is spelt out. In the absence of such provisions recourse is made to the enabling statute. While in litigation for instance parties are mandated to compulsorily comply with the rules of Court, and failure to comply with such rules may terminate the proceedings one way or the other.

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[102] (1970) Lloyd's Rep 235.

Arbitration provides parties to the arbitral proceedings the opportunity to choose their representation and the party to sit on the arbitration. That is the counsel as well as the arbitrators are appointed by the parties to the arbitral proceedings. Parties are not compelled to employ the services of a lawyer since arbitration is a flexible and friendly means of dispute resolution. Whereas in litigation a party cannot dispense with the services of a lawyer because of the complexity and technicalities involved in litigation.

The decision of the arbitral tribunal is final and no appeal lies against it. This is not the case in litigation where going by the judicial strata in Nigeria an appeal from the High Court goes to the Court of Appeal and finally to the Supreme Court, which can take several years to be dispensed with. However, an arbitral award can only be set aside upon good cause shown.[103]

It has been shown over the years that arbitration helps to preserve good business and personal relationship. More so since the proceedings in arbitration are friendlier and it is a win-win situation, unlike litigation where the winner takes all. This position has found expression in a popular Yoruba adage that says;"Aki ti kotu de sore."[104] This literally means, "You cannot come back from the Court with your friend and still `continue your friendship."

It was held in *Ezerioha v Ihezuo*[105] that Arbitration is most suitable where the issues for determination requires an expert consideration. Issues that require expert consideration are not suitable for the Court even though an expert could be called to testify in the course of the proceedings in the case. The analysis of the testimony of such a witness cannot be appreciated by the Court since the judge is only trained as a lawyer and not as an expert in that particular field.

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103 Arbitration and Conciliation Act s. 29,30 (i),48 Cap A18 Laws of the Federation of Nigeria 2004.

104 The Yoruba people are predominantly in Nigeria wherein they can be found in the south western part of Nigeria as well as in some states in the North central of Nigeria.

105 (2010) ALLFWLR (pt 540) 1259.

Disputes arising from international transactions and dealings with sovereign government are better referred to arbitration. This is because in many countries the government enjoys sovereign immunity from law suits and such government cannot be taken to the law Court. It is very much easier for government in such countries to submit to arbitration since certain international Conventions exist in relation to enforcement of arbitral awards against nation States that are members. The Washington Convention 1965[106] for instance provides for settlement of investment disputes between nation States and citizens of other countries.

2.4 Types of Arbitration in Nigeria

There are five main types of arbitration in Nigeria. They are;

1. Customary Arbitration
2. Common Law Arbitration
3. Arbitration under the Act
4. Ad-hoc Arbitration
5. Institutional Arbitration

2.4.1 Customary Arbitration

Customary arbitration existed in Nigeria before the advent of colonialism and as a matter of fact, customary arbitration existed in Nigeria from time immemorial.

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[106] It was this Convention that bought about establishment of International Centre for Settlement of Investment Disputes in 1966. By Article 28-35, 36-35 ICSID Convention there are two methods involved in the settlement of investments disputes which are through conciliation and arbitration.

For instance Akpata described the practice of customary arbitration with the following words;

> 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 undertaken to abide by his decision.[107]

While in the eastern part of Nigeria comprising predominantly the Ibos the age grade constitutes the arbitral tribunal. In Yoruba land on the other hand the Oba and his chiefs constitutes the arbitral tribunal.

In the words of Ezejiofor;

> "Customary law arbitration is a particularly important institution among the non-urban dwellers in this country. They often resort to it for the resolution of their differences because it is cheaper, 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[108]

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[107] E Akpata, *The Arbitration Law in Focus* (Lagos: West African Book Publishers Limited, 1997) p. 1.

[108] G Ezejiofor. 'The Pre-requisites of Customary Arbitration' (1992-1993) vol 16 and 18 *Journal of Private and Property Law*, p. 34.

Holdsworth also observed that:[109]

> 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 recourse to Courts.
>
> The very essence of arbitration is not only alternative dispute resolution, but the promotion of the public policy to the effect that it is in the interest of the community that there should be an end to disputes.

It can be said to be the traditional judicial system of the indigenous people. There existed several machineries of resolving disputes in a typical African society before the advent of colonialism. Even though with some level of imperfections.[110]

There are however, several misconceptions about customary arbitration. For instance Allot was of the view that customary arbitration is nothing other than a mere negotiation for settlement.[111] This position is unacceptable because parties to a dispute in an African society have always taken their disputes before an impartial arbiter from time immemorial and voluntary submission to the process by the disputant has always been a condition precedent.

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109 Holdsworth, *History of English Law* (Vol xiv 1964) p. 187.

110 A Emiola. *The Principles of African Customary Law*, (2nd edn, Lagos: Emiola Publishers Ltd, 2005) p.1.

111 Allot, *Essays in African Law (*London: Butterworth & Co Ltd, 1960) p. 126.

The Supreme Court in *Agu v Ikewibe,*[112] defined customary arbitration as;

> An Arbitration in the dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their communities and an agreement to be bound by such decision or freedom to resile where unfavorable.

It should be noted however, that the agreement of parties to arbitrate is entered into orally and the decision of the arbitral tribunal is also handed down orally. As such customary arbitration does not fall within the provisions of the Act and as such the provisions are not applicable to customary arbitration

The following ingredients must be present for there to be valid customary arbitration;

a. That there had to be a voluntary submission of the matter in dispute to an arbitrator of one or more persons.
b. That it was agreed by the parties either expressly or by implication that the decision of the arbitrator(s) would be accepted as final and binding.
c. That the said arbitration was in accordance with the customs of the parties or of their trade or business.
d. That the arbitrators reached a decision and published their award.
e. That the decision or award was accepted at the time it was made[113]

Unless these conditions are present a customary arbitration is unenforceable in Nigeria.

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[112] (1991) 3 NWLR (pt 180) 407. Okereke v. Nwakwo (2003) ALL FWLR (pt 158) 1258.

[113] *Duruaku Eke & Ors v. Udeozor Okaranyia & Ors* (2002) LPELR – 1074 (SC), *Agu v. Ikewibe* (1991) 3 NWLR (pt 180) 385, *Ohiaeri v Akabuaze* (1992) NWLR (pt 22) 1, *Ehoche v. Ijegwa* (2003) ALL FWLR (pt154) 596.

The Ghanaian Court of Appeal's decision in *Nyaasemhwe v Afibiyesan*[114]following an earlier Ghanaian decision in *Budu II v Caesar*[115] laid down the five conditions that customary arbitration in Ghana must fulfil as summed up by Ajogwu to be:

1. A voluntary submission of the dispute to be decided informally, but on its merits.
2. A prior agreement by both parties to accept the award of the arbitrators.
3. The award must not be arbitrary, but must be arrived at after the hearing of both sides in a judicial manner.
4. The practice and procedure for the time being followed in the Native Court or Tribunal of the area must be followed as nearly as possible and.
5. Publication of the award.[116]

This is a clear departure from the Nigerian Court's decisions which also laid down five requirements for customary arbitration. Nigerian authorities included the fact that the decision or the award must be accepted at the time it was made and the fact that parties to the arbitral proceedings can resile midstream. It provides an escape route to the party who lost in the award.

These decisions in Nigeria does not seem to conform with international best practice, since parties choose their arbitrators for better and for worse and as such the decision of the arbitrator should be accepted by all parties even though it may not be favourable to them.

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114 (1977) 1 GL.R. 27.
115 (1959) G.L. R 410.
116 F. Ajogwu, *Commercial Arbitration in Nigeria: Law & Practice* (Lagos: Mbeyi & Associates, 2013 p.9)

The judgment of Court in *Agu v Ikewibe* does not conform with judicial precedents as early as the time of the West African Court of Appeal where the Court held in the case of *Mensah v. Takyiam Pong & Ors*[117] that;

> In our opinion it is binding upon the parties as such decisions upon arbitrations 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

Idornigie[118] in interpreting the Privy Council's decision in *Larbi v Kwasi* opined that the Privy Council's decision is to the effect 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."

The Court held in *Larbi v Kwasi* that;

> Without laying down any general proposition as to native customary law on the material before it, the board was of the opinion that the appellants had no right to resile and the arbitration award was binding.

However, Chukwuemerie[119] was of the view that the position of the Supreme Court in *Agu v Ikewibe* was a misinterpretation of the Court's decision in *Njoku v Ekeocha*[120] which was read out of context, which did not reflect the daily practice and lifestyle of the indigenous people.

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117 (1940) 6 WACA 118.

118 (1952) 13 WACA 76. P Idornigie, *Commercial Arbitration Law and Practice in Nigeria*, (Abuja: Lawlords Publications, 2015) p. 15.

119 Chukwuemerie, *The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Appeal Courts,Studies and Materials in International Commercial Arbitration* (Port Harcourt : Law House Books, 2002) p 221.

120 (1972) 2 ECLR 199.

We entirely agree with the learned author more so several concepts of African Law have been misunderstood. For instance customary arbitration is an integral part of African law of which voluntary submission is a mandatory ingredient.

This Supreme Court's decision allowing parties to resile midstream is not known to African law particularly when a parties voluntarily submit themselves to the arbitration. The parties are not also bound to give their consent to the award. The Court seems to infuse the provisions of the old Arbitration Act[121], which has since been repealed and such provisions was excluded in the Arbitration and Conciliation Act[122]

The Supreme Court's decision in *Agu v. Ikewibe,*[123] is at variance with the Supreme Court's decision in *Oparaji v. Ohanu,*[124] where in the apex Court held that;

> Where two parties to a dispute voluntarily submit the issue 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 of or resile from the decision so pronounced---- it would be repugnant to good sense and equity to allow the losing party to reject or resile from the decision of the arbitrators to which he had previously agreed.

The Supreme Court in *Oparaji v. Ohanu,*[125] was however, very quick to make a swift distinction between customary arbitration and arbitration under the Act, wherein the Court held that;

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121 Cap 13 Laws of the Federation of Nigeria 1958.
122 Cap A18 Laws of the Federation of Nigeria 2004.
123 *Supra*.
124 (1999) LPELR 2747 (SC) p. 8-9.

> The Nigerian Law recognizes and accepts the validity and binding nature of arbitrations under customary law if it is established;
>
> i. That both parties submitted to the arbitration
>
> ii. That the parties accepted the terms of the arbitrators
>
> iii. That they agreed to be bound by the decision of the arbitrators.
>
> It ought to be pointed out that a customary law arbitration decision has the same authority as the judgment of a judicial tribunal and will be binding on the parties and this create an estoppel. Whether, however, such a decision will operate as estoppel *per rem judicatam* or issue estoppel can only be decided where the terms of the decision are clearly known and ascertained and where they so operates both parties are entitled to invoke the plea.

It is submitted that the Supreme Court's decision in *Agu v Ikewibe* is long overdue for a review and as such the Court should rise to the occasion and overrule the decision in *Agu v Ikewibe*. As it has been suggested by Oluduro[126] the valid ingredient of customary arbitration should be;

i. Voluntary submission to arbitration by the parties.

ii. Express or implied agreement by the parties to accept the award of the arbitrators.

iii. Conduct and constitution of the arbitration in accordance with customary law; and

iv. A decision or award of the arbitrators which was published to the parties.

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[125] (1999) LPELR 2747 (SC) p. 8-9.

[126] Oluduro, *Customary Arbitration in Nigeria: History and Development in Current Issues in Nigerian Jurisprudence,* (Lagos: Renaissance Law Publishers Limited, 2007) p.30.

We align ourselves with the position of this learned author.

2.4.2 Constitutionality of Customary Arbitration

The constitutionality or otherwise of customary arbitration has come under heavy criticism. Uwaifo JCA (as he then was) in *Okpuruwu v Okpokam,*[127] where the Court of Appeal held that;

The Court went further to hold that;

> I also hold that there is no concept known as customary or native arbitration in our jurisprudence. Even if they had ever been such (which I do not accept). It would have had no place under the 1979 Constitution which vests the judicial powers in the Judiciary under section 6.

This position was very strange particularly considering the facts that several Courts in Nigeria have made pronouncement about customary arbitration both before the pre-colonial era and after independence".[128]

The decision of Oguntade JCA (as he then was) in the dissenting judgment was a vivid disagreement with the lead judgment as read by Uwaifo JCA (as he then was). The eminent jurist was able to put customary arbitration in a better perspective when he held that;

> I find myself unable to accept the proposition that there is no concept known as customary or native arbitration in our jurisprudence. The regular Courts in the early stages of arbitration were reluctant to accord recognition to the decisions or awards of arbitrators. This attitude flowed

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127 (1988) 4 NWLR (pt 90) p.544.

128 *Assampong v. Amuaku & Ors* (1932) 1 WACA 192. *Foli v Akese* (1930) 1 WACA p.1. *Kwasi v Larbi* 3 WACA 76. *Inyang v Essien* (1957) 2 FSC p.39.

> substantially from reasoning that arbitration constitutes a rival body to the regular Courts. But it was soon realized that arbitration may in fact prove the best way of settling some types of disputes. The attitude of the regular Courts to arbitration therefore gradually changed. It was then realized that if parties to a dispute voluntarily submit their disputes to a third party as arbitrators and agreed to be bound by the decision of such arbitration then the Court must clothe such decision with the garb of *estoppel per rem judicatam*.[129]

However, the opportunity to make a far reaching decision on the constitutionality of customary arbitration by the Supreme Court came in *Agu v Ikewibe*[130] wherein Karibi Whyte (JSC) in the lead judgment held that:

> There seems to be some misconceptions about some of the provisions of the Constitution of 1979, and the freedom between disputing parties to settle their differences in the manner acceptable to them. It is clearly unarguable that the judicial power of the Constitution in section 6(i) is by section 6(5) vested in the Courts named in that section, not as a customary arbitration.
>
> ----it is well accepted that one of the African customary modes of settling dispute 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 by both parties of the suggested award, which becomes binding only after such signification of 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 societies.

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[129] *Okpuruwu v Okpokam*(1988) 4 NWLR (pt 90) p.544.
[130] (1991) 3 NWLR (pt.180) p.407.

The provisions of 1999 Constitution[131] (as amended) s.315 (3) (4) (b) made a robust provision to accommodate customary law and by extension customary arbitration.

The Supreme Court went further to hold in *Agu v Ikewibe*[132] that;

> …. In the first place, a customary arbitration is not an exercise of the judicial power of the Constitution not being a function undertaken by the Courts. Secondly customary law is by virtue of section 274 (3) and (4) (b) an "existing law" being a body of rules of law in force immediately before the coming into force of the Constitution of 1979. This customary law which includes customary arbitration was saved by section 274 (3) and (4) (b) of the Constitution of 1979.

Customary arbitration is binding on the parties to the proceedings and the successful party is at liberty to plead the award as estoppel. In *Ehoche v Ijegwa*[133] it was held that;

> Where parties to a dispute voluntarily submit their dispute to a customary body of persons such as the peace committee in this case, for adjudication and agree to be bound by the decision of the body on the issues in controversy between them, if the body goes into the matter, hears both sides and reaches a decision, the law takes the view that parties to the dispute had chosen their own forum rather than the Courts. None of the parties will be allowed later to back out of the decision if it does not favour him. It will be bound thereby and the successful party can plead the decision as estoppel. This is the result of a long line of decided cases.

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131 The Constitution of Federal Republic of Nigeria 1999 (as amended) s. 315 (3) (4) (b) is in *pari materia* with 1979 Constitution s. 274 (3) (4) (b).

132 *Supra*.

133 (2003) ALL FWLR (pt. 154) p.589.

2.4.3 Common Law Arbitration

Like other aspects of law in Nigeria one of the sources of arbitration law in Nigeria is common law. Common law arbitration is grouped into four categories, namely, domestic, international, ad-hoc and institutional.

Common law arbitration developed essentially as a result of tremendous increase in commercial disputes. However, common law arbitration agreement is entered into orally like the customary arbitration. This has prompted some learned authors to liken common law arbitration to customary arbitration with a thin line of demarcation. However, presently arbitration agreements are in writing and are governed by Arbitration Law. The enforceability of an oral agreement to arbitrate becomes an issue. There is no known decision of Court that establish the distinction between customary arbitration and common law arbitration.

Here an arbitrator is appointed orally and such can be removed at any time even before he renders his awards. As a result of the unwritten nature of the arbitration and proceed to the law court. There is no machinery to compel an unwilling party to common law arbitration to attend the arbitral proceedings.

However, as a result of the unenforceability of the oral nature of the arbitration agreement, the court will not enforce the performances of such an arbitration agreement. The remedy however, available to an aggrieved party is to sue for damages for breach of contract.

In *Dolman & Sons v Osset Corporations*,[134] Fletcher Moulton L.J held that;

> The present position therefore of agreements to refer disputes to private tribunals may be shortly expressed thus, the law will not enforce the specific performance of such agreement, but if fully appealed to, it has the power in its discretion to refuse a party the alternative of having the dispute settled by a Court of law, and thus leaves him in the position of having no other remedy than to proceed by arbitration….. speaking generally, it was not the practice of the common law to compel the specific performance of a contract. A party to a contract might break if subject to the liability to pay damages i.e to give full pecuniary compensation to the other party for the loss he suffered for the breach. To obtain specific performance, application must be made to Chancery. But Chancery would only specifically enforce certain types of contract of which a contract to refer to arbitration is not one. Hence a party to a contract containing an arbitration clause might refuse to perform it and the sole remedy of the other party was an action for damage for breach.

2.4.4 Arbitration Under the Act

Arbitration under the Act in Nigeria cannot be well appreciated without looking at the various arbitration statutes.

It is a known fact that Lagos Colony was ceded to England in 1861. After ceding Lagos to England the various English laws were applicable in Nigeria although in a skeletal form. However, in 1876 Ordinance provided for statutes of general application, the rules of common law and the doctrines of equity essentially became part of our law. By the Ordinance all the

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[134] (1912) 3 K B p. 257.

English statutes on Arbitration and in particular the Arbitration Act 1889 became applicable in Nigeria.

In 1914 the Northern and Southern protectorates were amalgamated to form a country know as Nigeria. However, this same year the Arbitration Ordinance[135] was passed making the first indigenous statute in Nigeria. The Arbitration Ordinance was a replica of the English Arbitration Act 1889. However, the applicability of the law was not so clear. This is because the law appeared as a law for Lagos in the revised edition of the Laws of the Federation 1958[136]

Although the New York Convention on the recognition and Enforcement of Foreign Arbitral awards was put in place on 10th June 1958, Nigeria could not fully subscribe and ratify the Convention because Nigeria was still under British rule. Akpata successfully put the position in the following words; "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."[137]

The Arbitration Act became applicable to the whole of Nigeria in 1963.[138] The law however, did not make any provision for international arbitration.[139]

At the attainment of Nigeria's independence in 1960 the various regions in Nigeria passed their own laws on arbitration[140]. By this, the earlier federal law on arbitration does not seem to be very relevant and has lost its nationwide application.

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135 Ordinance No 16 of 1914 reenacted as Arbitration Act Cap 13 Laws of the Federation and Lagos 1958

136 *Op cit,* p.13

137 *Op cit* p.12

138 *Op cit*, p. 13.

139 Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Abuja: Lawlords Publications 2015) p. 20.

In 1988 the Nigerian Military Government promulgated the Arbitration and Conciliation Decree[141]. The Law also incorporated the New York Convention 1958, contained in the second schedule of the Act. Section 58 of the Act made it applicable throughout the federation. The law perhaps incorporated the doctrine of "covering the field" by making its provisions applicable to the generality of Nigeria.

The Supreme Court in *Attorney General of Ogun State v Attorney General of the Federation*, held that;

> Where under a federal set up, both the Federal and State legislates, each empowered by the Constitution so to do, legislate on the same subject then if it appears from the provisions of the Federal Law on the subject that the Federal legislature intends to cover the entire field of the subject matter and thus provides what the law on the subject should be for the entire Federation, then the State law on the subject is inconsistent with the federal law and the latter must prevail and the state law on the subject is invalid….(2) if no general intention to cover the entire field on the subject can be gathered from the Federal law, then the mere concurrence of the two laws….on the subject is not *ipsofacto* an inconsistency although the detailed rules in the provisions of both laws may lead to different results on the same facts.[142]

From the decision above any law on arbitration that is inconsistent with the Act shall be void to the extent of its inconsistency.

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140 Arbitration Law of Northern Nigeria 1963, Arbitration Law of Eastern Nigeria 1963. It should be noted that some states have further domesticated this laws for instance Arbitration Law Cap 10 Laws of Bendel State of Nigeria 1976 and Arbitration Law Cap A13 Laws of Delta State of Nigeria 2006.

141 Now, Arbitration and conciliation Act cap A 18 Laws of the Federation of Nigeria 2004. Otherwise called the Act.

142 (1982) 1-2 SC (REPRINT) 7.

The Act for the first time provides for both domestic and international commercial arbitration[143]. However, States in Nigeria can only make laws on domestic arbitration in their States and not on international commercial arbitration. Section 58 of the Act provides that the Act shall be applicable throughout the Federation of Nigeria.

The Act has provided for easy settlement of commercial disputes and has limited the intervention of the Courts in commercial arbitration in Nigeria. The aim of the Act was well captured in the decision of Court in *Maritime Academy of Nigeria v Associated Quantity Surveyors*,[144] where it was held that;

> Arbitration and Conciliation Act was made for easy settlement of commercial disputes and ordinarily or as a general rule does not want the intervention of the Courts in proceedings subjected by the agreement of the parties to the jurisdiction of the arbitration panel. The commencement portion of the Arbitration and Conciliation Act Cap 19 Laws of the federation of Nigeria 1990 says;
>
> An Act to provide a unified legal framework for the fair and settlement of commercial disputes by arbitration and conciliation, and to make applicable the Convention on the recognition and enforcement of Arbitral Awards (New York Convention) to any award of international commercial arbitration. And in section 34 of the Act; A Court shall not intervene in any matter governed by this Act except where so provided by the Act.

143 *Compagnie Generale De Geophysique v Etuk* (2004) ALLFWLR (pt 235) p.59.
144 (2008) ALLFWLR (pt 406) p.1872.

Principally there are four types of arbitration under the Act they are namely;

1. Domestic Arbitration
2. International Arbitration
3. Ad hoc
4. Institutional

There is nowhere in the Act where domestic arbitration was defined. Therefore, it can be said that any arbitration that is not international Arbitration in Nigeria is a domestic arbitration.

International Arbitration;

Arbitration and Conciliation Act s.57 (2) of the Act provides thus:

> An arbitration is international if;
>
> (a) The parties to an arbitration agreement have at the time of the conclusion of the agreement their places of business in different states; or
>
> (b) One of the following places is situated outside the country in which the parties have their place of business, the place of arbitration if such place is determined in or pursuant to the arbitration agreement, any place where a substantial part of the obligation of the commercial relation is to be performed or the place with which the subject matter of the dispute is most closely connected.
>
> (c) The parties have expressly agreed that the subject matter of the arbitration relates to more than one country or

(d) 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.

In international arbitration knowing the applicable law is an important factor to be considered by the Arbitral tribunal. This is because parties are at liberty to choose the law that will be applicable to their contract.

Arbitration and Conciliation Act s.47 (2) contain further provisions on international arbitration as follows;

1. The arbitral tribunal shall decide the dispute in accordance with the rules in force in the country whose law the parties have chosen as applicable to the substance of the dispute.
2. Any designation of the law or legal system of a country shall unless otherwise expressed, be construed as directly referring to the substantive law of that country and not its conflict of law rules.
3. Where the law of the country to be applied is not determined by the conflict of law rules which it considered applicable.
4. The arbitral tribunal shall not decide *ex ae quo et bono* or as amiable compositor unless the parties have here expressly authorized it to do so.

5. 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.
6. 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.

The Act provides for an arbitration agreement in writing which shall be contained in;

a. In a document signed by the parties or
b. In an exchange of letters, telex, telegrams or other means of communication which provides a record of the arbitration agreement or
c. In an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another.

(2) Any reference in a contract a document containing an arbitration clause constitute an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.[145]

From the foregoing therefore it implies that an oral arbitration agreement is not provided for under the Act.

[145] Arbitration and Conciliation Act s.1 (i) (a) (b) (c) (2) Cap A18 Laws of the Federal of Nigeria 2004.

The Act provides for an arbitration clause in the following words;

> 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.[146]

The arbitration agreement is irrevocable except by the parties or by leave of court or judge. The principle of novation of contract is not applicable to an arbitration clause[147]. However, the Act made robust provisions on autonomy of arbitration agreement, enforcement, stay of proceedings pending arbitration, impeachment of arbitration agreement, appointment of arbitrator, duties and powers of the arbitrator, the arbitral tribunal and its jurisdiction, the arbitral award and so on. The Act is not without its shortcoming but by and large it is a great improvement over previous legislation on arbitration in Nigeria.

2.4.5 Ad hoc Arbitration

Usually in arbitration, parties by their agreement agree that their future dispute be referred to arbitration. However, in *ad hoc* arbitration, parties agree after a dispute has arisen to refer such dispute to arbitration. Here there is no initial arbitration agreement between the parties prior to the dispute. Parties in an ad hoc arbitral proceedings set the rules for themselves that will govern the arbitral proceedings which to their mind best suit the settlement of the dispute.

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146 Arbitration and Conciliation Act s.12 (2) Cap A18 Laws of the Federation of Nigeria 2004.

147 Arbitration and Conciliation Act s. 2 Cap A18 Laws of the Federation of Nigeria 2004.

2.4.6 Institutional Arbitration

In institutional arbitration, the parties by their arbitration agreement, usually provide that whenever disputes arise, that such dispute be referred to an arbitral institution. Some of the arbitral institutions include, Lagos Court of Arbitration and London Court of Arbitration.

2.5 Other Statutory Provisions on Arbitration in Nigeria.

Apart from the Arbitration and Conciliation Act other statutes in Nigeria contained specific provision on arbitration. This is perhaps in a bid to address the specialized areas for which those legislations were enacted. The following are some of the statutes that have made provisions for arbitration in Nigeria.

Nigerian Investment Promotion Commission Act[148] provides that;

> Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Decree applies which is not amicably settled through mutual discussions may be submitted at the option of the aggrieved party to arbitration.
>
> Where in respect of any dispute there is a disagreement between the investor and the Federal Government as to the method of dispute settlement is to be adopted, International Centre for Settlement of Investment Centre for Settlement of Investment Disputes Rules shall apply.

[148] Nigerian Investment Promotion Commission Act s.26 (2) (3) Cap N17 Laws of the Federation of Nigeria 2004.

Nigerian LNG (Fiscal Incentives, Guarantees and Assurances) Act[149]provides that;

> In the event of any dispute in respect of a substantial matter arising from the provisions of the Decree, the aggrieved shareholder (s) in the company shall issue a letter of notification to Government and other shareholders of the dispute. The Government's representatives and one or more of the company's shareholders as the case may be, shall make serious effort to resolve amicably such dispute. In the event of failure to reach amicable settlement within 90 days of the date of the letter of notification mentioned above, such dispute may be submitted to arbitration before the International Centre for the Settlement of Investment Disputes.

Petroleum Act[150]

> First Schedule states that;
>
> If any question or dispute arises in connection with any license or lease to which this schedule applies between the minister and the Licensee or Lessee (including a question or dispute as to the payment of any fee, rent or royalty), the question or dispute shall be settled by arbitration unless it relates to a matter expressly excluded from arbitration or expected to be at the discretion of the minister.

Public Enterprises (Privatization and Commercialization) Act[151]provides as follows;

> There is hereby established under this Decree an *ad-hoc* body to be known as the Public Enterprises Arbitration Panel (in this Decree referred to as "the panel") which shall be responsible for effecting prompt settlement of any dispute arising between an enterprise and the Council or the Bureau.

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[149] Nigerian LNG (Fiscal Incentives, Guarantees and Assurances) Act s. 22 Cap N87 Laws of the Federation of Nigeria 2004.

[150] S. 27 Cap P10 Laws of the Federation of Nigeria 2004.

[151] Cap P38 Laws of the Federation of Nigeria 2004.

> The panel shall have power to arbitrate
>
> 1(a) in any dispute raising questions as to the interpretation of any of the provision of a performance Agreement or
>
> (b) In any dispute on the performance or non-performance by any enterprise of its undertakings under a performance agreement.
>
> 2. A dispute on the performance or non-performance by any of the parties to the performance by Agreement shall, in the case of a commercial enterprise lie to that panel provided that such reference may be made after all reasonable efforts to resolve the dispute have been made and have not been proved.
>
> 3. The ruling of the panel shall be bidding on the parties and no appeal shall lie from a decision of the panel to any Court of law or tribunal.

Nigerian Communications Act

Provides that;

> Examining and resolving complains and objections filed by and disputes between licensed operators, subscribers or any other person involved in the communications industry, using such dispute resolution methods as the Commission may from time to time including mediation and arbitration.[152]

[152] s. 4 (1) (p) Cap N97 Laws of the Federation of Nigeria.

2.6 Available Rules on Arbitration in Nigeria

Under the Arbitration and Conciliation Act,[153] there is flexibility of applicable rules on arbitration. The parties to the arbitration agreement may agree in writing the applicable rules to the arbitral proceedings

Arbitration and Conciliation Act s.53 of the Act provides that;

> Notwithstanding the provisions of this Act, parties to an international commercial agreement shall be referred to arbitration in accordance with the Arbitration rules set out in the first schedule of this Act or the UNCITRAL Arbitration Rules or other international arbitration rules acceptable to the parties.

From the foregoing therefore it is apparent that arbitral proceedings are essentially governed by the agreement of the parties. However, the parties to international arbitration may adopt the UNCITRAL Model Arbitration rules[154]. Most arbitral institutions in Nigeria have their rules which may be adopted by parties to an arbitration agreement.

2.7 Arbitration Distinguished From Other Alternative Dispute Resolution (ADR) Mechanisms

In recent times some writers have argued that arbitration is a form of alternative dispute resolution. This argument stem from the fact that proponents are of the view that arbitration has a lot of semblance with ADR especially in the areas of party autonomy, in choosing the arbitral tribunal, informality of the procedure, confidentiality etc.[155]

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[153] Cap A18 Laws of the Federation of Nigeria 2004.

[154] There is no similar provision on the adoption of UNCITRAL Model Arbitration Rules in the Act for domestic arbitration. The rules may however be adopted in domestic arbitration.

[155] Akpata, *Nigerian Arbitration Law in Focus,* (Lagos: West Africa Book Publisher Lagos 1997) p.46.

While others have argued that arbitration is not and cannot be categorized as ADR. The argument has been that firstly when an award is rendered in arbitration recourse is made to the Court for its enforcement. The parties choose the applicable law, while in other ADR processes like mediation the process can only be concluded with the assistance of the parties to the process. More so mediation is an interest based procedure[156].

We shall now examine Alternative dispute mechanisms as distinct from arbitration.

2.7.1 Conciliation

Conciliation is an alternative out of Court dispute resolution mechanism. To this end Conciliation has been described as; "a voluntary, flexible, confidential and interest based process. The parties seek to reach an amicable dispute settlement with the assistance of the conciliator, who acts as a neutral third party"[157]. Here the conciliator meets with the parties separately and jointly in an attempt to resolve their differences.

2.7.2 Negotiation

Negotiation has been defined as;

> A consensus bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation usually involves complete autonomy for the parties involved without the intervention of third parties.[158]

Negotiation can be seen as a process that leads to another process. In other words, it is not an end itself rather it is a means to an end. Here the parties are directly in charge of the

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156 N Uche, *International Commercial Arbitration in Practice Effective ADR or Just Exotic Litigation. Corpus of Topical Legal Issues: Collection of Legal Essay Written in Honour of Justice ONU*, (Kaduna: Rogent Printing and Publishing Ltd, 2008) p. 24.

157 www.dispute –resolutionhamburg.com. Assessed on 4th May 2018.

158 B Garner, *Black's Law Dictionary,* (8th edn, United States of America: West Publishing Co, 2004) p. 380.

proceedings without any third party intervening. Each party would present its case as strongly as it could to get a fair bargain at the long run.

2.7.3 Expert Determination

An expert is; "A person who through education or experience has developed skill or knowledge in a particular subject so that he or she may form an opinion that will assist the fact finder.[159]

There are instances where the party's contract stipulates that any dispute arising from the contract shall be determined by an expert in that field. The named expert may not be skilled in arbitration. However, since the Arbitration and Conciliation Act has not provided for any qualification for an arbitrator the Act and the rules provided therein will be applicable to such expert determination in the arbitral proceedings.

2.7.4 Valuation

Valuation has been defined as "The process of determining the value of a thing or entity. The estimated worth of a thing or entity"

Valuation however, can be likened to an expert advice in which experts are invited to carry out the task of valuation of the subject matter of the dispute to ascertain the actual value of it.

159 *Ibid.*

2.7.5 Certification

Certification has been defined as: "The act of attesting, the state of having been attested."[160]

Certification is usually rampant in building and construction contracts. Here the contract may stipulate that before the contract sum will be paid the work done must be certified by a structural engineer or architect. The person who does the certification is called the certifier.

However, where the certifier is jointly employed by the parties he can assume the position of the arbitrator. Where he is appointed by only one of the parties he cannot be called an arbitrator.

2.7.6 Mini-Trial

Mini-trial has been defined as;

> A private voluntary and informal form of dispute resolution in which each party's attorney presents an abbreviated version of its case to a neutral third party and to the opponents representatives who have settlement authority.[161]

Mini-trial as a form of evaluation of the dispute and it helps the parties to better understand the issues in the dispute, which would be of assistance to them in negotiating settlement on an informal basis. Mini-trial usually takes the form of a short presentation of the issues by the respective in house lawyers of the parties who now sit together on the opposite side of the table facing disputants, or in the case of corporations, their chief executive decision

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[160] *Ibid* p. 36.
[161] *Ibid* p. 36.

makers[162]. They are assisted by a neutral person who is usually an expert who plays an important role and acts as the facilitator of the party's negotiation.

Mini-trial is an advance mediation. The procedure is voluntarily entered into by the parties themselves.

2.7.7 Ombudsman

Ombudsman has been defined as "An official appointed to receive, investigate and report on private citizens complaints about the government"[163]

Usually an ombudsman is appointed by the government to investigate and report back to the government on any complaint made by citizens against a government body. In Nigeria the ombudsman is the Public Complaints Commission. The Public Complaint Commission is a creation of statute and has its presence in all States of the Federation.[164]

2.8 Validity of Arbitration Agreement

Russell defined arbitration agreement as;

> An agreement to submit to arbitration present or future disputes (whether they are contractual or not). An arbitration agreement is therefore a contractual undertaking by two or more parties to resolve disputes by the process of arbitration, even if the disputes themselves are not based on contractual obligations. The term "disputes" includes "any difference.[165]

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162 P Dele, *ADR Principle and Practice* (Lagos: Desage Nig Ltd, 2004) p. 220.

163 *Ibid* p.34.

164 Public Complaints Commission Act Cap P3 Laws of the Federation of Nigeria 2004.

165 D. Sutton, J. Grill, M .Gearing, *Russell on Arbitration,* (22ndedn, UK: Sweet and Maxwell Ltd, 2002) p. 29. English Arbitration Act (1996) s. 6(i), *Amec Cool Engineering Ltd v Secretariat of State for Transport,* (2005) EWHC2339.

The Arbitration and Conciliation Act did not specifically define what an arbitration agreement is. However, Article 7 (i) of the UNCITRAL Model Law defines arbitration agreement as;

> 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 contractual or not.[166]

The arbitration agreement has also been defined as; "A written contract in which two or more parties agree to settle a dispute outside the Court."

By writing under the Arbitration and Conciliation Act s. 1(1) (2), the section provide as follows;

> 1 (1) every arbitration agreement shall be in writing contained.
>
> a. In a document signed by the parties
>
> b. In an exchange of letters, telex, telegrams, or other means of communication which provides a record of the arbitration agreement or
>
> c. In an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other.
>
> (2) Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, if

[166] www. onlinetenders.com, Accessed on 15th May, 2017.

> such contract is in writing and the reference is such as to make the clause part of the contract.[167]

Russell on Arbitration sums up what constitutes writing as envisaged by the English Arbitration Act 1996 thus;

> i. The arbitration agreement being "evidenced in writing which includes the arbitration agreement recorded by one of the parties or by a third party, with the authority of the parties to the agreement or
>
> ii. The arbitration agreement being made in some medium other than writing which refers to terms which are in writing or
>
> iii. An exchange of written submissions (in arbitration or Court proceedings) in which the existence of an arbitration agreement in some medium other than writing is alleged and not denied.

The meaning of evidence of arbitration agreement in writing has been decided in the English case of *RJT Consulting v DM Engineering (Northern Ireland) Ltd*,[168] that for the arbitration agreement to be in writing the whole contract has to be evidenced in writing. It follows therefore that it is not enough to show that there are documents that indicate the existence of the agreement.[169].The arbitration agreement must be clear and unambiguous.

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167 Cap A18 Laws of the Federation 2004.
168 (2002) EWCA Civ 270.
169 *Carillion Construction Ltd v Devonport Royal Dockyard Ltd (2003) B.L.R 79.*

Arbitration agreement is very important in the appointment of the arbitrators. The Act has provided that an arbitrator may be appointed by[170];

a. Agreement of parties.

b. An appointing body.

From the foregoing therefore, the Act only provides for a written submission to arbitration and oral submission is not contemplated by the Act. Under the English law[171] oral or parole arbitration agreement is recognized. However, oral agreement to arbitrate is not subject to the provisions of the Arbitration and Conciliation Act. Where the whole of the contract including the agreement to arbitrate is oral, the existence and validity of the entire contract may also be in doubt[172].

It is therefore advised that oral agreement to arbitrate should be avoided in order to prevent its difficulty in enforcement.

An arbitration agreement may be in the form of a clause in a contract agreement or may be a separate document. The most important fact is that the arbitration agreement has to be in writing[173].

[170] Arbitration and Conciliation Act Cap A18 Laws of the Federation 2004 s. 7 (1).

[171] Section 81(1) (b) of the English Arbitration Act 1996 s. 81 (1) (b).

[172] Dst. J. Simion, *Russell on Arbitration* (22nd edn, Gloucester: Sweet and Maxwell Limited, 2002) p. 36.

[173] Article 7 (2) states that an arbitration agreement shall be in writing.

Arbitration and Conciliation Act s.12 (2) provides that;

> For the purpose of subsection (1) of the section
>
> 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.

The arbitration agreement is usually a clause in a contract agreement. Some State arbitration laws also made provisions for arbitration agreement to be in writing[174].

In the owners of the *MV. LUPEX v. N.O.C.S.L*[175], the Supreme Court of Nigeria defined arbitration clause in the following terms;

> An arbitration clause is a written submission agreed by the party to the contract and like other written submission, it must be construed according to its language and in the light of the circumstances in which it is made.

Arbitration clause has again been defined thus;

> Arbitration clause denotes a contractual provision mandating arbitration of dispute regarding the contracting parties (respective) rights, duties and liabilities[176].

Arbitration agreement is usually not a separate agreement from a usual contract. However, in most occasions it is a clause in a usual contractual agreement. In a dispute referred to arbitration, the arbitration clause is a precondition to the commencement of arbitral

[174] Lagos State Arbitration Law 2009.
[175] (2003) ALLFWLR (pt 170) p. 1428.
[176]*BSG Energy Holdings Ltd v Spears* (2013) ALLFWLR (Pt 694) p.105.

proceedings[177]since arbitration clause is voluntarily entered into between parties it must be construed in accordance with the language it was written[178]. The fundamental objective of an arbitration clause is to avoid litigation[179]. This is so because the arbitration agreement is the bedrock of any arbitration proceedings.

The legal requirement of an arbitration clause encompasses the ingredients of a void contract such as consensus *adi dem*, capacity and legal relationship. Arbitration agreement must be mutual. This then suggests that both parties have the same right to refer the dispute to arbitration.

In *Pittalis & Ors v Sherepehin*[180] it was held that it cannot be said that the arbitration clause lacks mutuality where the contractual agreement allows only one of the parties alone to refer the dispute to arbitration.

The arbitration clause has to be construed in accordance with the language of the contract and in accordance with the circumstances in which it was made.[181]

The major ingredient of arbitration agreements are;

1. Agreement in writing
2. Voluntariness in entering into the agreement
3. Submission

In *Olaniyi v Olayioye*[182] the court of Appeal defined voluntary and submission as;

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[177]*BSG Energy Holding Ltd v Spears*(2013) ALLFWLR (Pt 694) p. 126
[178]*LSWC v Sakamoris Construction (Nig) Ltd* (2012) ALLFWLR (pt 632) 1745
[179]*BSG Energy Ltd v Spears* (2013) ALLFWLR (Pt 694)126.
[180] (1986) 1 Q.B 868.
[181]*LSWC v Sakamori Construction (Nig) Ltd* (2012) ALLFWLR (pt 632) 1765.

> Voluntary means act done by design or intention, voluntary act, unconstrained by interference, not impelled by outside influence. Submission means a yielding to the authority or will of another. A contract in which the parties agree to refer their dispute to a third party for resolution.

The essence of an arbitration clause is to enable parties submit their dispute to arbitration. In *Maritime Academy of Nig v A.Q.S*[183] the court of Appeal held that;

> It is common place for parties to make contract to incorporate an arbitration clause in their agreement. It should be noted that the inclusion in an agreement to submit a dispute to arbitration does not generate the heat of ouster jurisdiction of the court.

2.9 Independence of Arbitration Agreement

An arbitration agreement is separate and independent of the main contractual agreement.

Article 21 (2) of the UNCITRAL Arbitration Rules provides as follows;

> An arbitration clause which forms part of an agreement and which provides for arbitration under the rules shall be treated as an agreement independent of the other terms of the contract.

The Arbitration and Conciliation Act s. 12 (12) of the Act provides that;

> For the purposes of subsection (1) of this section an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and in a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the validity of the arbitration clause.[184]

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[182] (2014)ALLFWLR (pt 745) 363.
[183] (2008) ALLFWLR (pt 406) 1892.
[184] Cap A18 Laws of the Federation of Nigeria 2004.

From the foregoing provisions it is apparent that the arbitration clause is distinct and detachable from the main contract. The contract talks about the substantive matter while the arbitration clause talks about the dispute.

In *Hayman v Darwin Ltd*[185] it was held that;

> Total breach of contract…. Does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligation, which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of obligations undertaken by each party in favor of the other may cease. It survives for the purpose of measuring the claim arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purpose of the contract has failed but the arbitration clause is not one for the purpose of the contract.

The arbitration clause survives the main contract and the principle of novation is not applicable to arbitration clause.

In *NNPC v CLIFCO (Nig) Ltd*[186] the Court defined Novation as:

> The substitution of a new contract for an existing one between the same or different parties. It is done by mutual agreement. It is never presumed. The requisites for novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation and the validity of the new one.

[185] (1942) A.C p.356.
[186] (2011) ALLFWLR (pt 583) 1876.

The Court went on to hold that;

> Generally in arbitration agreement, where the arbitration clause is a part, the arbitration clause is regarded as separate. So where there is novation, purpose of contract may fail but the arbitration clause survives.[187]

The English Arbitration Act 1996 also has a very robust provision for the independence of the arbitration clause. S. 7 of the Act provides that;

> An arbitration clause will remain valid despite an allegation of illegality affecting the substantive agreement (which allegation if proved would render the substantive agreement void) similarly. A decision by an arbitral tribunal that a main agreement is null and void or the termination of a main agreement by performance will not of itself entail a similar consequence for the arbitration clause. The validity of the latter as a separate, collateral agreement, must be examined as a separate issue.

Where the entire contract is illegal or obtained by undue influence the arbitration clause contained in the agreement will be void[188]

This position has found further expression in the Court's decisions in *Heyman v Darwin Ltd* wherein it was held that:

> If the contract does not exist (e.g because no contract was ever concluded or because force was used to induce the signature, or the person who signed operated under some legal disability such as being a minor) it cannot give rise to a valid arbitration clause and hence to a valid arbitration. However, where there is a main clause, the arbitration clause which it contains constitutes a platform upon

[187] *Ibid*
[188] *Ertel Bieber & Co v. Rio Tinto Co* (1978) AC p. 260.

> which so to speak, the arbitral tribunal may stand to judge the validity of the main contract and the consequences of its breach.[189]

2.10 Amendment of Arbitration Agreement

Arbitration agreement like other contractual agreements is liable to amendment or alteration. However, such amendments or alterations cannot be carried out solely by any of the parties to the agreement alone rather it has to be carried out by both parties to the agreement.

Parties must be very careful in amending an arbitration agreement and must ensure that the amendment is carried out before the arbitral award is rendered. However the amendment of the arbitration clause is the duty of the parties and not the arbitral tribunal.[190]

Since oral arbitration agreement is not recognized under the Arbitration and Conciliation Act therefore oral agreement to amend the arbitration agreement also does not have a place under the Act.

However, where the agreement is made under seal it can only be amended by a deed.[191]

2.11 Revocation of Arbitration Agreement

Section 2 of the Arbitration and Conciliation Act provides that;

> Unless a contrary intention is expressed therein an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the Court or a judge.

[189](1942) A.C p.356.
[190]*Thornburn v Barnes* L.R 2. C.P 394 *Re Morphel*t 1845 14 L.J.
[191]*Thames Ironworks & Shipping Co v. The Queen* (1869) 1QB p. 33.

In*BJ Export & Chem Co Ltd v KRPC Ltd*[192]. It was held that;

> On the surface of section 2 of the Arbitration and Conciliation Act, once parties enter into a valid arbitration agreement, as the parties did in the present case, one of them cannot unilaterally revoke that agreement. However, where a party has a good cause to want to revoke the agreement that party must apply to the Court or judge to be granted leave to do so as was correctly done by the respondent in this case. While the Court has no power to revoke such arbitration agreement between the parties who brought it into being, the Court has the power to grant leave to any of the parties to such agreement to go ahead to revoke the same on satisfying the Court of good reasons for the need to do so. This is because an arbitration agreement like any other contract properly entered into between parties can also be lawfully repudiate before performance.

An application to revoke an arbitration agreement can be brought before the Federal High Court, the High Court of the various States and the High Court of Federal Capital Territory Abuja.[193]

The Court of Appeal in *BJ Export & Chem Co Ltd v KPRC Limited*[194] held that;

> As to which Court or judge the application for leave to revoke arbitration agreement could be made, the answer is contained in section 57(1) of the Arbitration and Conciliation Act which defines 'Court' as the High Court of a State, the High Court of the Federal Capital Territory Abuja or the Federal High Court.

[192] (2003) ALLFWLR (pt 165) 445.
[193] Arbitration and Conciliation Act s. 57 (1).
[194](2003) ALLFWLR (pt.165) 445.

The Arbitration and Conciliation Act has not provided for the proper mode of commencing an action to revoke an arbitration agreement[195]. Originating summons would however, seem to be the most appropriate procedure to commence an action seeking to revoke an arbitration agreement. More so the action relates to the construction of the arbitration agreement.

It follows therefore that for a revocation of the arbitration agreement to be effective it has to be with the consent of both parties. However, where one of the parties fails to agree to the revocation the desiring party to the revocation may apply to the Court to revoke the arbitration agreement.

In *T.A Hammond Projects Ltd v. Federal Housing Authority*[196] it was held that;

> It is idle to say that no Court makes a contract for the parties but once they have of their own free will made one for themselves and it is before the Court would hold them bound to the terms agreed upon between them unless it is illegal and\or unreasonable.

2.12 Enforcement of Arbitration Agreement

Where parties to a contract have agreed that their dispute will be settled by arbitration, the attitude of the Courts have always been that the parties to the arbitration agreement[197]are bound by their agreement to arbitrate.

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195 By virtue of the Arbitration Laws (cap 7) Laws of Northern Nigeria 1963 s. 6 (2), the procedure for approaching the Court on the revocation of arbitration agreement is by commencing an action at the High Court by way of a motion on notice supported by affidavit.

196 (1977) 11 CCHJC 2468.

197 *Compagne Generale De Geophysique v Etuk* (2004) ALLFWLR (pt 235) p. 59.

In*Kupolati v. New Century Law Publishers Ltd*[198] it was held that;

> So long as arbitration clause is retained in a valid contract and the dispute is within the contemplation of the clause, the Court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed by them.

In *Maritime Academy of Nig v A.Q.S*[199] it was held that;

> The entire idea behind the Arbitration and Conciliation Act is to encourage parties to play by the rules of the game as agreed by them only to be subjected to the jurisdiction of the Courts when it is absolutely necessary as for example, when there is an unfair play between the participants.

The Court held in*L.S.W.C v Sakamori Construction (Nig) Limited*[200]

> An arbitration clause is a written submission agreed by the parties to the contract, and like other written submissions. It must be constructed according to its language and in the light of the circumstances which it is made. Where parties have chosen to determine for themselves that they will refer any of their disputes to arbitration instead of resorting to regular Courts, a *prima facie* duty is cast upon the courts to act upon their agreement. The Courts should not be seen to encourage to breach a valid arbitration agreement voluntarily entered into by the parties. This is because where an agreement made by the parties stipulates that any dispute arising therefrom must be referred to an arbitration or a referee, it would amount to jumping the gun or the queue for any of the parties to resolve to go to Court first before the dispute before them is referred to an appointed referee or arbitrator in their agreement.

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[198] (2005) ALLFWLR (pt 249) p.1811.
[199] (2008) ALLFWLR (pt 406) p.1892.
[200] Ibid.

> Where an arbitrator fails to produce an amicable settlement of the dispute, either party is at liberty to approach the Court for the determination of the dispute.

In recent times Nigerian Courts have adopted a pragmatic attitude towards the enforcement of arbitration agreement. Before this time Nigerian Courts have viewed arbitration clauses as robbing the Court of jurisdiction and as such arbitration clauses have been treated with disdain.

An example of this position was seen in the view expressed by late Justice Ibukun Ephraim Akpata JCA (as he then was) in *Kano Urban Development Board v Fanz Construction Limited*[201]where the learned justice held that; "Foolhardy references to arbitration and rough and ready decisions by arbitrators". This seem to represent the position of most Nigerian judges.

The parties to arbitration agreement have to look forward to the Court for the enforcement of arbitration agreement. Where a matter comes before the Court which contains an arbitration agreement the Court have to order a stay of proceedings and refer the parties to arbitration.[202]

However, Arbitration Law of Lagos State 2009 s. 6 (3) and s. 21 gives the Court the power to grant interim orders in order to preserve the *res* and the rights of the parties pending arbitration.

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[201] (1986) 5 NWLR (pt 39) p 74.
[202] Arbitration and Conciliation Act s. 4 and 5.

In *Onyekwuluje & Anor v Benue State Government & Ors*[203]

> The effect of an arbitration clause in an agreement was well stated in *Royal Exchange Assurance v Bentworth Finance (Nig) Ltd* (1976) 11SC (reprint) 96 at 107 line 22-30thus;
>
> An arbitration clause in a written contract is quite distinct from the other clauses, whereas the other clauses in a written contract set out obligations which the parties undertake towards each other, the arbitration clause merely embodies the agreement of both parties that if any dispute should occur with regard to the obligations which the other party has undertaken to the other, such dispute should be settled by a tribunal of their own constitution or choice. The appropriate remedy therefore for a breach of a submission is not damages but its enforcement.

The Supreme Court in *Owners of the MV Lupex v N.O.C.S.L* [204] held that;

> Where parties to a contract have under terms thereof, agreed to submit to arbitration if there is any dispute arising from the contract between them, a defendant who has not taken any steps in proceedings commenced by the other party may apply to the Court for a stay of proceedings of the action to enable the parties go to arbitration as contracted.

An application for stay of proceedings is not granted as a matter of course. For such an application to be granted the applicant must have taken no step in the proceeding. If a party makes any application whatsoever to the Court even though it be merely application for extension of time to do certain things, such cannot amount to taking steps in the proceedings.

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[203] (2015) LPELR – 24780 (SC) p.65

[204] Ibid.

2.13 Appointment of Arbitrator

The appointment of the arbitrator (s) is essentially provision of the arbitration agreement. Parties may appoint any number of arbitrator (s) they wish to preside over the arbitral proceedings and stipulate the procedure to be adopted in the arbitral proceedings

Arbitration and Conciliation Act s. 6 provides that:

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

From the foregoing therefore it follows that where the parties fail to agree on the number of the arbitrators the arbitrators shall be three.

Article 6 of the First Schedule to the Act provides that:

1. If a sole arbitrators 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 paragraph 1, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the Court.

3. The Court shall at the request of one of the parties appoint the sole arbitrator as promptly as possible, and in making the appointment, the Court shall use the following list-procedure, unless both parties

agree that the list-procedure should not be used or unless the Court determines in its discretion that the use of the list-procedure is not appropriate for the case, that is-

(a) at the request of one of the parties the Court shall communicate to both parties an identical list containing at least three names;

(b) within fifteen days after the receipt of this list, each party may return the list to the Court after having deleted the name or the names to which he objects and numbered the remaining names on the list in the order of preference;

(c) After the expiration of the above period of time, the Court shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the Court may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the Court shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as

> well, the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.[205]

This section provides that where the parties have not reached an agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority [206]

It should be noted that the provisions of Article 6(1) and 6(2) of the Arbitration Rules is in *pari-materia* with Arbitration and Conciliation Act s. 44(1) (2) , the only difference is as regard the appointing authority. The Act in s. 44 does not provide for the appointing authority and the section nearly provides that the sole arbitrators shall be appointed by the appointing authority.

Since the Act in s. 44 has failed to provide for the appointing authority, s. 54(2) however attempts to remedy the short fall of s. 44. s.54 (2) provides that in this part of this Act "the appointing authority means the Secretary General of the Permanent Court of Arbitration at the Hague."

While the Arbitration and Conciliation Act provides for both international and domestic arbitration it would seem that the Secretary General of the Permanent Court of Arbitration of the Hague would only seem to be applicable to only international arbitration.

The provisions of s.44 of the Act has come under heavy criticism by Orojo and Ajomo[207] who are of the view that section 44 of the Act be amended and the parties be allowed to provide for an appointing authority of their choice.

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[205] This is in *pari-material* with s. 44 (1) (2) (3) of the Act.

[206] S. 44(5) (7) of the Act provides for the procedure for appointing three arbitrators

S. 44 of the Act provides for the appointment of Arbitrator(s) in domestic arbitration. The procedure for the appointment of arbitrator(s) (the procedure) shall be followed by the parties. However where the parties did not provide for the procedure in their agreement in the case of three arbitrators, each party shall appoint its own arbitrator and the two arbitrators appointed by each party shall appoint the third arbitrator who shall be the chairman of the arbitral tribunal.

In a case where a single arbitrator is to be appointed and the parties failed to appoint the arbitrator either of the parties may approach the Court for the appointment. In *Compagne Generale De Geophysique v Etuk*[208] it was held that

> In a situation where a sole arbitrator is to be appointed but there is no specific procedure in the arbitration agreement for the appointment and the parties fail to reach an agreement on the appointment, one party cannot unilaterally appoint the sole arbitrator to the detriment of the other party without recourse to Court.

Where parties fail to agree on the appointment of the arbitrator(s) within 30 thirty days of such disagreement any of the parties may approach the Court for the appointment.

The Court has no power to appoint arbitrator for the parties except where one party refuses to appoint an arbitrator. This position was re-echoed in *EL-Assad v Misr (Nig) Ltd*[209] where it was held that:

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[207] Orojo and Ajomo, *Law and Practice of Arbitration in Nigeria* (Lagos: Mbeyi & Associates (Nigeria) Limited 1999) p. 127.
[208] (2004) ALLFWLR (pt 235) p.59.
[209] (1968) NCLR 173.

> The Court has no inherent jurisdiction to appoint an arbitrator or umpire or to compel any party to the agreement of reference to do so "The authority for this proposition is the case of *Re Smith & Service and Nelson & Sons* (1980) 25 QBD,545 (1886-90) ALLER Rep 1091. In that case their Lord Ships were dealing with the Arbitration Act 1889 and the head note of the Law Reports reads (25 Q.B.D at 545)
>
> Where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and one of the parties refuses to appoint an arbitrators, the Court has no power either under or apart from the Arbitration Act 1889, to order him to do so" Lord Esher M.R in his judgment (25 Q.B/D at 548-549 (1886-90) ALLER at 1092-1093) dealt at length with the jurisprudence of Common Law Courts of Equity with regard to the appointment by the Court of an arbitrator, and came to the conclusion that there was no power in law or at equity by which one party could be ordered to appoint an arbitrator. It is clear from the judgment of Lord Esher that in his view the Court had no inherent jurisdiction to appoint an arbitrator.

Again in *Magbagbeola v Sanni*[210]the Court held that;

> The appointment of an arbitrator in conformity with the agreement of the parties where there is a dispute is a matter that is regulated by the Arbitration and Conciliation Act Cap 19 Laws of the Federal Republic of Nigeria. 1990. Section of (2) (b) of the Arbitration and Conciliation Act provides as follows "where no procedure is specialized under sub-section (1) of this Section :-(b) in the case of an arbitration with one arbitrator, where the parties fail to agree on

[210] (2000) LPELR-10817 (CA). (2002) 4 NWLR (pt756) 193.

> the arbitrator, the appointment shall be made by Court on the application of any party to the arbitration agreement Made within thirty days of such agreement.

The Court here means the High Court of a State, the High Court of the Federal capital Territory or the Federal High court [211]

In *Magbegbeola v Sanni*the Supreme Court held that in explaining the meaning of court and judge in the appointment of arbitrator held that:

> By section 57 of the Arbitration and Conciliation Act, "Court" means the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court: and Judge means "Judge" of the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court. Therefore in an action before the Court where parties seek the appointment of an arbitrator, both the State High Court and Federal High Court have jurisdiction to appoint an arbitrator.[212]

The Act has provided a check list of procedure for the Court to follow where an application is brought for the appointment of arbitrator. Article 6(3) of the Act provides for the procedure the Court is to follow in appointing a sole arbitrator, unless the Court in the exercise of its discretion is of the view that the procedure will not be appropriate for the particular case. The procedure includes:

(a) At the request of one of the parties the Court shall communicate to both parties an identical list containing at least three names.

[211] Arbitration and Conciliation Act s. 57.
[212] (2005) ALLFWLR (pt 267) p.1367.

(b) 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 names on the list in the order of Preference.

(c) After the expiration of the above period of time the Court shall appoint the sole arbitrator from among the names approved on the list returned to it and in accordance with the order of preference indicated by the parties.

(d) If for any reason the appointment cannot be made according to this procedure, the Court may exercise its discretion in appointing the sole arbitrator.[213]

It must be emphasized that with Article (6) (3) (d) the check list is only to serve as a guide to the judge in making the appointment. The rule have made room for the exercise of discretion by the judge in making the appointment. In this regard, the judge is however enjoined to appoint an arbitrator that will be independent and impartial.

However where the arbitrators are stated to be three, the following are the check list or procedure to be followed by the Court: unless otherwise agreed by the parties or the judge in the exercise of its discretion thinks otherwise:

[213] *Ibid*

(a) A party fails to act as required under the procedure.

(b) The parties or two arbitrators, are unable to agree as required under the procedure.

(c) A third party, including an institution fails to perform the duty imposed on it under the procedure.[214]

The decision of the Court in the appointment of arbitrator is final and no appeal lies on it.

In *Celtel Nigeria BV v Econet Wireless Limited & Anor*[215] it was held that:

> Even in matters of appointment into public office the appointing authority that appoints or removes or suspends a person from work may change its mind to reinstate the person removed. See section 11 (1) of the Interpretation Act Cap. 123 contained in volume 8 of the Laws of the Federation 2004. It is only after a decision is reached under section 7 (3) of the ACA that the point of no return is reached, at that stage the parties have crossed the Rubicon, if I may say so, and there is no going back to another body or person to make the appointment. The statutory machinery is therefore uncompromising. Once applied on full throttle leading to appointment of arbitrator (s), that would be the end of the matter. That is why there is no right of appeal from the decision of the appointing authority in section 7 of ACA.

This is because allowing the decision of the Court in appointing an arbitrator to be a subject of appeal would rob the arbitral process of one of its cardinal attributes since speed has been one of the striking attributes of arbitration.

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[214] Article 7 (3), Arbitration and Conciliation Act s. 44 (5).
[215] (2014) LPELR- 22430 (CA) p.57.

S. 44 of the Act provides for the procedure for appointment of arbitrator in international arbitration. By s. 44(1) of the Act one of the parties may propose the name of an arbitrator who will serve as a single arbitrator

An application to appoint an arbitrator can be brought by any of the parties. A judge cannot appoint an arbitrator unless there is a proper application made before him in this regard. A proper application is made when both sides in controversy are heard only after a fundamental issue such as jurisdiction is heard and resolved

In*Kalagbor v General Oil Ltd* [216] it was held that:

> S. 6 of the Act does not give the trial judge the discretion to appoint an arbitrator. The provision make it mandatory for a judge to appoint an arbitrator when a proper application is made to him. In the instant case, it cannot be said that there was proper application before the trial court therefore as the fundamental issue of jurisdiction has not been heard and resolved, before the Court appointed, after hearing only one party.

2.14 Challenge of Arbitrator's Appointment

Independence, impartiality and possession of requisite knowledge are the essential characteristics and qualities an arbitrator must possess. These amongst other things are the qualities imposed on the arbitrator impliedly and by the provisions of the Act.

[216] (2008) ALLFWLR (Pt418) 303.

However, upon the appointment of the arbitrator he may be challenged. The Act provides that:

(i) If the circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

(ii) If he does not possess the qualifications agreed by the parties.[217]

Article 12 & (2) of the UNCTIRAL Rules Provides that:

> Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after appointment has been made.[218]

As a matter of fact the arbitrator is expected to be fair and accord equal treatment to the parties in the course of the arbitral proceedings. In order for the arbitrator to possess these qualities the implied duties and the statutory duties must be complied with.

Parties to an arbitration agreement may impose certain duties on the arbitrator in the arbitration agreement. Also parties may outside the arbitration agreement impose some other duties on the arbitrator before or after his appointment.

It is important to note that where the arbitrator after carefully studying the arbitration agreement and it becomes obvious to him that he will not be able to meet the duties imposed on

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[217] Cap A18 Laws of the Federation of Nigeria 2004 s. 8 (3).
[218] UNCITRAL Rules. Article 12(1) & (2)

him by virtue of the arbitration agreement. It will be good and pleasant for him to decline the appointment as an arbitrator in that regard.

The following are the duties imposed on the arbitrator by both the parties and the statute:

A. The arbitrator is expected to be independent and impartial.[219] There should be no conflict of interest on the part of the arbitrator. Communication must be in presence of both parties. The arbitrator must conduct himself in such a way and manner that he is independent and impartial. 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 if he has, or is perceived to have some personal interest in the outcome of the dispute 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.[220]

In determining whether the arbitrator is independent and impartial the arbitrator should pass the test especially the fact that:Does 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 before him and the arguments to be adduced before him.

B. The duty of disclosure. An arbitrator must disclose every information at his disposal which would have affected his appointment as an arbitrator in the first place. This duty is

[219] Arbitration and Conciliation Act Cap A 18 Laws of the Federation of Nigeria 2004 s. 8.
[220] Lord Haidsham of St, Marylebone, *Halsbury's Laws of England* (4th edn, London: Butterworths & Co Publishers Ltd, 1997) p. 105.

a continuous one and continues even after his appointment and throughout the duration of the arbitral proceedings.

In a situation where the arbitrator has made an honest disclosure of his interest it will be out of place for a party to the arbitration to challenge the arbitral award on the basis of the earlier disclosure by the arbitrator: where upon disclosure is not convinced about the impartiality of the arbitrator after the disclosure, such party has the right to reject or challenge the appointment of the arbitrator. However where there is an objection to the appointment of the arbitrator based on the disclosure by the arbitrator, such objection should be raised in good time. Failure to do so would amount to a waiver and submission to the jurisdiction of the arbitrator. [221]

An inadvertent non-disclosure of a fact which may affect the appointment of the arbitrator may not necessarily render the award void unless it goes to the root of the award.[222]

C. The arbitrator has a duty to render a valid award. The arbitrator must not misconduct or misdirect himself in reading an award. The award must be within the scope of submission otherwise such award may be set aside. [223] However, once the arbitrator renders the award he becomes *functus officio* and it is the duty of the successful party to ensure the enforcement of the award.

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[221] Cap C20 LFN 2004 s. 8(1).
[222] *AT & T corporation v Saudi Cable Company* (2000) ALLER p.657.
[223] *Kano State Urban Development Board v Fan3 Construction Limited* (1990) LPELR 1659 (SC) Or (1990) NWLR (Pt 142) p.1.

D. The arbitrator must possess the requisite ability to conduct the arbitral proceedings. Where the arbitrator is found to be unable to perform his functions credibly, the parties can terminate his appointment [224]

E. Duty to adapt a practice Procedure suitable for the arbitral proceedings. The arbitrator has the right to determine the way and manner the proceedings will be conducted subject to the governing law. In determining the practice procedure the arbitrator must design a procedure that will be fair and just to the parties.[225]

In international arbitration an arbitrator may be challenged on the following grounds:

1. That circumstances exist that give rise to justifiable doubt as to his impartiality.

2. That he does not possess the qualifications required by the arbitration agreement.

3. That he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.

4. That he has refused or failed to properly conduct the proceedings or use all reasonable dispatch in conducting the proceedings or making an award and that substantial injustice has been or will be caused to the applicant. [226]

The aforementioned lists are not exhaustive. However it is important for the arbitrator to make recourse to the applicable law and case laws to draw the appropriate check list of what his duties are in the course of the arbitral proceedings.

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[224] *Belleview Airline Limited v Aluminum City Limited* (2007) LPELR (8465) CA
[225] Article 15(1) of the first Schedule to the Act
[226] F. Ajogwu, *Commercial Arbitration in Nigeria Law & Practice* (2nd edn, Lagos: Mbeyi & Associates (Nig) Ltd 2013) p. 67.

2.15 Procedure For The Challenge of Arbitrator's Appointment

Parties to an arbitration agreement may in the arbitration agreement stipulate the procedure to be adopted in challenging the appointment of the arbitrator. Where an arbitration is conducted by an arbitral institution, there is usually a provision for the challenge of the arbitrator in the arbitration rules[227] Where the parties have failed to provide for the procedure for challenging the arbitrator s. 9, s. 45 of the Act have made robust procedure to follow[228]

Where there is no provision for the challenge of the arbitrator in the arbitration agreement, a party who intends to challenge the arbitrator may do so within 15 days of becoming aware of the constitution of the arbitral tribunal or becoming aware of the circumstance that could lead to a doubt as to his impartiality and independence. It is the arbitral tribunal that rules on the challenge of its appointment unless the arbitrator withdraws from the office or the other party agrees to the challenge.

Idornigie has posited two problems the challenge may pose in his view:

> "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 forth with 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."[229]

[227] Article 14 (2) of the ICC Rules (2012) and Article 11-12 of the UNCITRAL Arbitration Rules.
[228] Article 13 of the UNCITRAL Model Law and Article 11-12 of the Arbitration Rules.
[229] P Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Abuja: Lawlords Publications, 2015)p. 206-207.

S. 45 (6) of the Act provides that:

> "The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal and the notification shall be in writing and shall state the reason for the challenge".[230]

The question that then readily comes to mind is that what happens to a party who fails to challenge the arbitrator's appointment within 15 days as stipulated by section 9(2) of the Act? Would the failure amount to a bar? We submit that failure to challenge the appointment of the arbitrator should not amount to a bar notwithstanding the provisions of section 33 of the Act

S. 33 of the Act provides that:

> 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.

[230] Article 11 (2) of the UNCITRAL Arbitration Rules.

S. 33 (a) of the Act is in *pari-materia* with Article 4 of the UNCLTRAL Model Law which provides:

> 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 proceed with the arbitration.

It is our humble view that while the provisions of section 33 of the Act is mandatory the provisions of the UNCITRAL Mode Law is permissive. Again it is our view that the provisions of section 33 is very harsh. More so there may be a need for the party to investigate the circumstances leading to the challenge of the appointment of the arbitrator. We would however, suggest an amendment to the provisions of section 33 of the Act to increase the time limit to 30days instead of the 15 days already provided for

In an arbitral proceedings usually there is a single or sole arbitrator or a three man panel arbitration. Where the appointment of the sole arbitrator is challenged it is incumbent on the sole arbitrator to rule whether or not the challenge is sustainable or not. In a three panel arbitration where the appointment of one or more members of the arbitral tribunal is challenged the three members must sit to determine the sustainability of the challenge. In doing this, however, it is incumbent on the arbitral tribunal to strictly observe the principles of natural justice.

Article 12 of the Arbitration Rules provides:

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw the decision on the challenge will be made.

(a) When the initial appointment was made by the Court

(b) When the initial appointment was not made by Court but an appointing authority has been previously designated, by that authority.

(c) In all other cases, by the Court as provided for in Article 6.

Article 13 (3) of the UNCITRAL Model Law provides:

> 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 challenger which decision shall be subject to no appeal while such a request is pending before the arbitral tribunal, including the challenged arbitrator may continue the arbitral proceedings and make an award.

This provision is inconsistent with s. 9 (3) of the Act. However, Article 1 of the Arbitration rules stipulates that where there is an inconsistency between the Articles and the Act, the Act shall take precedence. It is our view that section 9 of the Act be amended. This is because of the seeming inconsistency of the provisions. It would seem out of place to allow the Arbitral Tribunal to determine issue concerning a challenge of his appointment. It is however our view that the appropriate provision would have been to vest the Court with the jurisdiction

to determine a challenge on the appointment of the arbitrator and not the arbitral tribunal whose appointment or that of a member of the tribunal is challenged. Although in Courts where the judges' jurisdiction is challenged, the judge rules on the challenge either by striking out the suit for want of jurisdiction or overruling the application challenging the jurisdiction of the Court, the scenario in an arbitral tribunal is not the same.

S. 45 (9) of the Act provides for the procedure for the challenge of the appointment of the arbitrator in international arbitration. It provides:

> 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 an appointing authority as provided for in section 44 of this Act.

2.16 Extent of Arbitrator's Authority

In deciding whether a dispute has been submitted to arbitration two preliminary questions arise in all cases namely:

(a) Whether there has been any valid agreement to submit any dispute to arbitration;

(b) Whether the dispute that has, in fact, arisen is one within the scope of any agreement to refer.

These two valid ingredients are essential in determining the arbitrator's authority. However, where the arbitrator exceeds his authority it could be a valid ground to set aside the award rendered by the arbitral tribunal.

2.17 Termination of the Arbitrator's Mandate

Termination of the mandate of an arbitrator is provided for in s. 10 of the Act. The section provides:

1. The mandate of an arbitrator shall terminate

(a) If he withdraws from office

(b) If the parties agree to terminate his appointment by reason of his inability to perform his functions

(c) If for any other reason, he fails to act without undue delay

2. The fact-

(a) That an arbitrator withdraws from office under section 9 (3) of this Act;

(b) That a party agrees to the termination of the mandate of an arbitrator, shall not be construed as implying the existence of any ground or circumstance referred to in sub-section (1) of this section or section 8(1) of this Act.

Whenever the mandate of the arbitrator terminates the arbitral tribunal shall not take any further steps in the arbitral proceedings. The wordings of s. 10 of the Act is mandatory, as such, any steep taken by the arbitral tribunal when the mandate or the tribunal has been terminated will be void.

The question is what happens after the mandate of the tribunal has been terminated? The Act has provided for the appointment of a substitute arbitrator. This is because the arbitral proceedings cannot be terminated for the fact that the mandate of the tribunal has been terminated.

S. 11 of the Act provides that:

Where the mandate of an arbitrator terminates-

(a) Under section 9 or 10 of this Act;

(b) Because of his withdrawal from office for any reason whatsoever;

(c) Because of the revocation of his mandate by agreement of the parties;

(d) Because of any other reason whatsoever, a substitute arbitrator shall be appointed in accordance with the same rules and procedure that applied to the appointment of the arbitrator who is being replaced.

The question that arises therefore is whether the new arbitral tribunal will start *de novo* (a fresh) or continue from where the previous tribunal stopped. It is our view that starting de novo seems to be the best approach. Usually the previous arbitrator may not likely cooperate with the new arbitrator in making available the record of previous proceedings hence the need to start *de novo*.

Our view has found expression in the provisions of Article 14 of the Arbitration Rules which provides:

> If under Articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated, if any other arbitrator is replaced such prior hearing may be repeated at the discretion of the arbitral tribunal.

2.18 Removal of an Arbitrator

S. 30 (2) of the Act provides that: "Any arbitrator who has misconducted himself may, on the application of any party, be removed by the Court."

From the above provision the major reason for removal of an arbitrator is misconduct. In the English case of *Bremmer Gmbh v Soule's & Anthony Scott*[231]it was held that: Where it is proved that the arbitrator suffers from what may be called 'actual' bias. In this situation, the complaining party satisfies the Court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavourably towards him, for reasons peculiar to that party, or to a group of which he is a member. Proof of actual bias entails proof that the arbitrator is in all incapable of approaching the issues with the impartiality which his office demands.

> b. Where the relationship between the arbitrator and the parties or between the arbitrators and the subject matter of the dispute is such as to create a risk that the arbitrator has been or will in the future be incapable of acting impartially. In this category to establish a case of misconduct, proof of actual bias is unnecessary.
>
> c. Where the conduct of the arbitrator is such as to show that questions of partiality aside he is through lack of talent, experience or diligences, incapable of conducting the reference in a manner, which the parties are entitled to expect.

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231 (1985) 1 Lloyd's Rep p.160.

In *Saliba v Labededi & Ors*[232]it was held that:

> There can be no argument in any case that a Court which itself has appointed a referee or an arbitrator may by order remove him if from circumstances so deserving, such arbitrator or referee can no more be entrusted with the duties of that office.

Arbitration Law of Lagos State[233] s. 12 provides that:

> (1) A party to an arbitral proceeding may (upon notice to the other parties to the arbitrator concerned and to any other arbitrator) apply to the Court to remove an arbitrator on the grounds that:
>
> (a) Circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
>
> (b) The arbitrator does not possess the qualifications required by the arbitration agreement.
>
> (c) The Arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to the arbitrator's capacity to do so.
>
> (d) The arbitrator has refused or failed to use all reasonable dispatch in conducting the proceedings or making an award and that substantial injustice has been or will be caused to the applicant.

From the provision of s. 30(2) of the Act it seems that misconduct is the only ground for the removal of an arbitrator. However s. 12 (1) of the Arbitration Law of Lagos State has a more

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232 (1972) LPELR 2993 (SC). *East and West India Dock Co v Kirk and Randale* (1887) 12 APP Cas 738 (Observation of House of Lords Lord Halsbury LC).

233 Cap A11 Laws of Lagos State of Nigeria 2015

robust provision than s. 30(2) of the Act. The section provides for other grounds for the removal of an arbitrator other than misconduct

In NNPC v Lutin Investments Ltd & Anor [234] the Supreme Court held that:

> This is settled that where an arbitrator has misconducted himself the Court may set aside the arbitration if improperly procured or where an award has been made by him.

Misconduct has been defined as: "A dereliction of duty, unlawful or improper behavior".[235]

The Supreme Court in *A. Savoia Ltd v Sonubi*[236] States what amounts to misconduct by the arbitrator and held that:

> What is misconduct is of course not defined in the laws nor in the Act. But the Court has in *Taylor Woodrow (Nig) Ltd v Suddentsche Etna-Werk GMBH* (1993) 4 NWLR 127 spelt out some conduct within the law, some of these are:
>
> (1) Where the arbitrator fails to comply with the terms of the arbitration agreement.
>
> (2) Where even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of Public Policy ought not to be enforced.
>
> (3) Where the arbitrator has been bribed or corrupted.

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234 (2006) LPELR- 2024 (SC) or (2006) 2 NWLR (pt 965) p.506

235 B Garner, *Black's Law Dictionary* (8th edn, United States of America: West Publishing Co, 2009) p.1089.

236 (2000) LPELR-7 (SC) or (2000) 12 NWLR (pt 682) p.539.

(4) Technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement or reference. This however does not mean that every irregularity of procedure amounts to misconduct.

(5) Where the arbitrator or umpire fails to decide all the matters which were referred to him.

(6) Where the arbitrator or umpire has breached the rules of natural justice.

(7) If the arbitrator or umpire has failed to act fairly toward both parties, as for example;

    (a) By hearing one party but refusing to hear the other

    (b) By deciding the case on a point not put by the parties.

2.19 Remuneration of Arbitrator

s. 49[237] of the Act provides that:

(1) The arbitral tribunal shall fix costs of arbitration in its award and the term "Costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself.

(b) The travel and other expenses incurred by the arbitrator.

(c) The cost of expert advise and of other assistance required by the arbitral tribunal.

(d) The travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal.

(e) The costs for legal representation and assistance of the successful party, if such costs were claimed during the arbitral proceedings and only to the extent that an arbitral tribunal determines the amount of such cost is reasonable.

(2) The fees of the arbitral tribunal shall be reasonable in amount taking into 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.

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237 Cap A18 Laws of the Federation of Nigeria 2004.

Until the arbitrator renders an award he is not entitled to any remuneration. Where the arbitrator has refused to render an award he will not be entitled to any remuneration except for *quantum meruit*. In the English case of *Re Hall & Hinds*[238] it was held that where an arbitral award has been set aside by the Court for misconduct, he will be liable to return the fees or remuneration received for conducting the arbitral proceedings.

[238] (1821) 2M & G 847, 10 L.J.C. J p.210.

CHAPTER THREE

THE ARBITRAL AWARD

A judgment is the end of a judicial proceedings, however, in arbitral proceedings the award brings the proceedings to an end. There is no statutory definition of arbitral award in the Arbitration and Conciliation Act. Arbitral award has been defined to mean:

> A determination on the merits by an arbitral tribunal in an arbitration, and is analogous to a judgment in a Court of law[239]

> An arbitral award or arbitration award refers to a decision made by an arbitration tribunal in an arbitration proceeding.[240]

> Arbitral award is a final determination of a particular issue of claim in an arbitration.[241]

In *Maritime Academy of Nig v A.Q.S*, the Court held thus;

> An arbitral award extinguishes any right of action of former matters in difference between the parties thus, the other party's claims in the substantive and stated matter becomes extinguished when the arbitral award is made.[242]

However where the parties choose arbitration as a means of settling their dispute, parties should take the arbitration and the arbitral award for better or for worse.[243]

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239 Enwikipedia. Org/wiki/arbitral award, accessed on 5th August 2017.
240 Us Logical.com, accessed on 5th August 2017.
241 D Simion, *Russell on Arbitration* (21st edn, Gloucester: Sweet and Maxwell, 2001) p. 249. Quoted in J Orojo & M Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbayi & Associates Nigeria Limited 1999) p. 238.
242 (2008) ALLFWLR (pt 406) p.1892.
243 *Compagine Emirate De Geophysique v Etuk* (2004) ALLFWLR (pt 235) p.59.

Mustill and Boyld in writing about an arbitral award stated that:

> The arbitrator should in delivering his award determine whether award should be interim or final. In other words should it decide only one or some of the issues in the case or should it dispose of all of them? He must also consider whether the award should be in such a form as to enable a question of law to be brought before the Court for a decision.[244]

s. 24 of the Act provides:

> (1) In an arbitral tribunal composing 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.
>
> (2) In any arbitral tribunal 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.[245]

The arbitral award must be final and must totally dispose of all the issues raised by the parties in the arbitral proceedings.

In *Taylor Woodrow of Nigeria Limited v Suddeutsche Etna-Werk GMBH*, it was held that:

> The law has for many years been settled, and remains so at this day, that where a cause or matter in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully

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244 Mustill & Boyld, *Commercial Arbitration* (London: 1989) p.303.
245 Cap A18 Laws of the Federation of Nigeria 2004.

> established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, "you have constituted your own tribunal, you are bound by its decision. The only exceptions to that rule are cases where the award is the result of corruption or fraud and one other which though it is to be regretted is now, I think firmly established, viz where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted. I think it may be considered as established. This is simply the case of a reference to an arbitrator before whom has arisen a question of law which he has decided and for the purpose of this motion must be assumed to have decided ill. I think we have no right to interfere.[246]

3.1 Valid Ingredients of Arbitral Award

The ingredients of an arbitral award is provided for by virtue of s. 26 of the Act. The section provides:

(1) Any award made by the arbitral tribunal shall be in writing and signed by the arbitrators.

(2) Where the arbitral tribunal comprises of more than one 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.

(3) The arbitral tribunal shall state on the award;

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[246] (1993) LPELR 3139 (SC) p. 12-13.

(a) The reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 25 of this Act.

(b) The date it was made and

(c) 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.

(4) A copy of the award made and signed by the arbitrators in accordance with and signed by the arbitrators in accordance with subsection (1) and (2) of this Section, shall be delivered to each party.

The English Arbitration Act also has a similar provision. Arbitration Act s. 52 provides that:

(1) The parties are free to agree on the form of an award.

(2) If or to the extent that there is no such agreement, the following provisions apply,

(3) The award shall be in writing signed by all those assenting to the award,

(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

(5) The award shall state the seat of the arbitration and the date when the award is made.[247]

From the foregoing therefore it becomes apparent that there is no particular form an award should take, particularly since the proceedings are governed essentially by the agreement of the parties. This view is supported by Lord Justice Donaldson in *Bremer v West Bucilear* where it was held that:

> No particular form of award is required that is necessary if the arbitrators should set out what in their view of evidence did or did not happen and should explain succinctly why in the light of what happened they have reached their decision and what decision is. This is all that is meant by reason decision.[248]

It should be noted that the provisions of s. 26 of the Act is to act as a guide for the arbitral tribunal in rendering the award.

3.2 Types of Arbitral Award

The types of arbitral award are as follows:

a. Interim awards

b. Ex-Parte awards

c. Partial awards

d. International awards

e. Self-executory awards (declaratory awards)

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247 English Arbitration Act 1996 s. 52.

248 (1981) Lloyds Law Reports (Vol2) p.132.

f. Additional awards

g. Consent awards

h. Final awards[249]

3.3 Binding Effect of an Arbitral Award

Award once it is set, rendered and published until it is set aside by a Court of competent jurisdiction is final and binding on all the parties in the arbitration. In *Ezerioha & Ors v Ihezuo*[250] it was held that:

> Acceptance of arbitral award can be proved by evidence other than the parties signing the arbitral award. In the instant case the evidence of the parties established that the defendants accepted the arbitral award, therefore, the trial Court rightly held that they were bound by it.

In *Kano State Urban Development Board v Fanz Construction Company Limited* it was held that.

> The effect of an award by an arbitrator on the parties concerned is such as the agreement of reference expressly or by implication prescribes. Where no contrary intention is expressed and where such a provision is applicable, every arbitration agreement is deemed to contain a provision that the award is to be final and binding on the parties and any persons claiming under them respectively. The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement

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249 G Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd edn, Enugu: Snaap Press Nigeria Ltd, 2008) p.110.

250 (2010) ALLFWLR (pt540) p.1259.

> between the parties to perform the award which is implied in every arbitration agreement.[251]

3.4 The Difference between an Arbitral Award and a Court Judgment

The Supreme Court of Nigeria has repeatedly held that the arbitral award is at par with a judgment of a Court of law and it has the same effect and it is incapable of being interfered with except as provided for in the Constitution.

In *Ras Palgazi Construction Limited v Federal Capital Development Authority*, it was held that:

> It is a rule of practice that parties may settle their dispute by consent in the course of the trial. Such settlement is a composure and in order to have a binding effect on the parties. It is imperative that it should have the blessing of the Court. So when the Court adopts the terms of settlement and makes it its judgment, the settlement assumes the status of judgment binding upon the parties; see *Woluchem v Wokoma* (1974) All NLR 605 at 607 (Reprint) (1974) All ER 543, Arbitration proceedings as I have already shown 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. What this means is this, if an award was not challenged, then it became and was a final and binding determination of the matters between the parties. The simple question to be resolved is whether a Court can make the award a judgment of the Court. I am in agreement with the Court of Appeal that the Court has no such jurisdiction. The reason is obvious as I shall show shortly. Once an award has been made and not challenged in court it should be entered as a judgment and given effect accordingly. The

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[251] (1990) LPELR 1659 (SC) or (1990) NWLR (pt142)1.

> losing party cannot be heard to say he wants to argue some point or other. Just as he would not be allowed to do so in the case of a judgment not appealed from he should not and would not do so in the case of an award that is not challenged.[252]

Be that as it may, the arbitrator (s) must be mindful of the fact that they are not judges nor the arbitral award, Court judgment. Hon Justice Nnaemeka Agu JSC (as he then was) held in *Agu v lkewibe* that: "It must be borne in mind that arbitrators are not Court. They are not backed by the Constitution with any judicial authorities."[253]

From the above cited authority the source of authority of the arbitrator is derived from the arbitration agreement, while the source of the authority of a judge is derived from the Constitution.

A judge may not necessarily indicate the source of his authority in his judgment whereas the arbitrator is mandated to state the source of his authority in the arbitral award. An arbitrator therefore in discharging his responsibility must identify the limit and extent of his powers so as not to render an invalid award.

An arbitral award is not a judgment of the Court and as such it requires no legal skills in writing the arbitral award.

Lord Justice Donaldson in *Bremer v West Zucker* held that:

> It is sometimes said that this involves arbitrators in delivering judgments and that this is something of a half-truth much of art of giving a judgment lies in telling a story logically, coherently and accurately. This is something which requires skill but it is not a legal skill and it is not

252 (2001) 10 NWLR (pt722) p.559. (200)1 LPELR 2941 (SC).
253 (1991) 3 NWLR (pt 180) p.385.

> necessarily advanced by legal training. It is certainly a judicial skill, but arbitrators for this purpose are judges and will have no difficulty in acquiring it. Where a 1979 Act award differs from a judgment is the fact that the arbitrators will not be expected to analyse the law and authorities. It will be quite sufficient that they should explain how they reached their conclusion e.g; We regarded the conduct of the buyers as we have described it as constituting repudiation of their obligations under the contract and the subsequent conduct of the sellers also as described as amounting to acceptance of that repudiator conduct putting an end………… to a professional judge if leave to appeal is given to analyse the authorities. This is not to say that where the arbitrators are content to set out their reasoning on question of law in the same way as judges this will be unwelcome to the Courts far from it. The point which I'm seeking to make is that a reasoned award in accordance with the 1979 Act is wholly different from an award in the form of a special case. It is not technical. It is not difficult to draw and above all, it is something which can and should be produced promptly and quickly at the conclusion of the hearing. That is the time when it is easiest to produce an award with all the issues in mind.[254]

This position was further reinforced by Lord Bingham in his paper; "Difference between a Judgment and Written Award."

> An arbitrator is not called upon to make any detailed analysis of the legal principles canvassed before him or to review in any detail the legal authorities cited. It is enough if he briefly summarizes the argument put to him and expresses his legal conclusion in a way that makes it intelligible.[255]

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[254] (1981) Lloyd's Law Report (Vol 2) p.130.

[255] As culled from lecture 3 Notes. Chartered Institute of Arbitrators 'Concentrated Course on Award Writing' held in May 1999 in London.

Is appointing an arbitrator having a qualification in law mandatory? In other words is it mandatory that a lawyer should be appointed as an arbitrator? The answer is not farfetched as an arbitrator need not be a lawyer before he can be appointed as an arbitrator.

Therefore an arbitral award may not contain any legal sagacity like the judgment of Court. This however, does not imply that an arbitrator should not possess a good knowledge of judicial process, having a good legal skill will enable an arbitrator evaluate the evidence before him. The judge on the other hand while delivering his judgment must ensure that the laid down principles of law is followed as contained in judicial precedents

Also the Court in writing its judgment must follow the doctrine of *stare decisis,* that is judicial precedence. In *Nigeria Agip Oil Company Limited v Nkweke & Anor* the Supreme Court held that:

> The position of this Court on the principle of *stare decisis* raised by the appellant has been made clear in a number of authorities of this Court that the lower court is bound by the decision of a higher Court. The Court will hold itself bound by its previous decisions except where it is satisfied that any of its previous decision is erroneous or was reached *per incuriam*.[256]

The arbitral tribunal is not under any obligation to hand down its award based on precedent.

3.5 The Place of the Arbitral Award.

[256] (2016) LPELR p.26060 (SC).

The Arbitration and Conciliation Act as well as the New York Convention have provided that an arbitral award should be made at the place of the Arbitration. Section 26 (3) (c) of the Act provides that:

> The arbitral tribunal shall state on the award
>
> (c)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.[257]

Unless otherwise agreed by the parties to arbitration, the *lex loci arbitri* (the law of the place of arbitration) should be considered to determine the binding effect of the arbitral award.[258]

Mann's position seems more apt in this instance, wherein he said:

> Is no more than a part, the final and vital part of a procedure which must have a territorial central point or seat? It would be very odd. If possible without the knowledge of the parties or even unwittingly. The arbitrators had the power to severe that part from the proceeding procedure and thus give a totally different character to the whole.[259]

This further buttresses the fact that the award must comply with the law of the place of arbitration to ensure easy enforceability of the arbitral award.

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[257] *Ibid*, Article V (i)(e) New York Convention and also English Arbitration Act 1996 s.2.

[258] J Paulson, 'Arbitration Unbound. Award Dethatched the Law of its Country of Origin' (*ICLQ* 1982) p.360-361.

[259] F Mann, *Where is An Award Made?* (Arbitration International) 107

3.6 Judicial Intervention in Arbitral Proceedings

Nigerian Courts have an unfettered power to grant stay of proceedings pending arbitration. The Courts also have the power to appoint an arbitrator.

s. 4 of the Act provides that:

> (1) A Court before which an action which is the subject of arbitration agreement is brought shall if any party so request not later than when submitting his first statement on the subsistence of the dispute order a stay of proceeding and refer the party to arbitration.
>
> (2) Where an action referred to in subsection 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.

However, s. 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 delivering any pleadings or taking any 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.

However, the provisions of s. 4 (2) of the Act implies that an action which is a subject matter of an arbitration agreement and an arbitral proceedings commenced before or after the action in Court can run side by side.

In *Maritime Academy of Nigeria v Associated Quantity Surveyors,*[260] it was held that:

> The provisions of section 4 (2) Arbitration and Conciliation Act provides that when an action referred to in sub-section (3) that is an action before a Court which is subject of an arbitration agreement, 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 going on. Section 4 subsection 2 permits an action which is subject matter of an arbitration agreement and an arbitral proceedings commenced before or after the action in Court to run along side by side thus, what would have been an infringement to the principle of fair hearing is saved by the specific statutory provision in section 4 subsection 2 of the Arbitration and Conciliation Act Cap 19 Laws of the Federation of Nigeria 1990.

The interpretation of the Court in the above case in our view is a contradiction of the provisions of s. 5 (1) of the Act, which allows any party to an arbitration agreement to apply to the Court for stay of its proceedings pending arbitration. It is our humble view that the interpretation of the Court that a pending case can go on simultaneously with arbitral

[260] *Ibid*.

proceedings would defeat the whole essence of arbitration. This will create a lock jam and will leave the parties in confusion as to which of the decision is to be obeyed.

Where the Court stays it proceedings for arbitration, and the arbitration is concluded and an award rendered therefrom, it extinguishes any right of action on the matter in dispute between the parties and as such the other party who has a claim in the substantive and stayed matter before the Court. Such disputes becomes extinguished the moment the arbitral award is rendered.[261]

What is not however, clear about the power of the Court to stay proceedings for arbitration is whether the Court can also grant stay of the arbitral proceedings in the course of an arbitration?

It is imperative to note that apart from the power of the Court to stay proceedings for arbitration the Court also has the power to carry on a judicial review of an arbitral award.[262]

To my mind s. 5 of the Act should have come before s. 4. Particularly because it is s. 5 that gives a party to an arbitration agreement the opportunity to approach the Court to stay the proceedings for arbitration. s. 4 speaks of the extent of the power of the Court. It would therefore seem illogical therefore for section 4 to come before section 5. It is our view that in the future amendment to the Act the sections will be rearranged.

It is important to note that Section 4 of the Act is in *pari materia* with Article 8 of the UNCITRAL Model Law and s. 5 is *pari material* with s. 5 Arbitration Act 1914.

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[261] *City Engineering Nig Ltd v Federal Housing Authority* (1997) 9 NWLR (pt 520) p.224.

[262] Arbitration and Conciliation Act s. 29, 30.

In *Obembe v Wemabod Estate Limited*,[263]the Supreme Court held that:

> Any agreement to submit a dispute to arbitration, such as the one referred to above does not oust the jurisdiction of the Court. Therefore either party to such an agreement may, before a submission to arbitration or an award is made, commence legal Proceedings in respect of any claim or cause of action included in the submission (see Harris v Reynolds (1845) 7 QB.71) At common law, the Court has no jurisdiction to stay such proceedings. Where however, there is provision in the agreement, as in Exhibit 3 for submission to arbitration, the Court has jurisdiction to stay proceedings by virtue of its powers under section 5 of the Arbitration Act (Cap 13 of the Laws of the Federation).

In *Fawehinmi Construction Company Limited v Obafemi Awolowo University*,[264] the Supreme Court held that:

> When parties enter into agreement and there is an arbitration clause whereby the parties must first go to arbitration before trial in Court. It is natural for the defendant in a case where the other party has filed a suit to ask for stay of proceedings pending arbitration. That does not amount to submission to trial. In the case where such application is refused the next step is to invoke a statutory right where it exists if that right will make the suit incompetent.

Like every application before the Court, the Court has a discretion to either grant an application for stay or refuse same. The Court of Appeal in *United World Limited Inc v Mobile Telecommunication Service Limited*[265] held that:

> A close interpretation of the said section 5 discloses that it is not automatic that once there is an arbitration clause and action instituted and a prayer for stay of proceedings must be granted as a matter of

263 (1977) 11 NSCC p.264.
264 (1998)LPELR 1256 (SC) or (1998) 6 NWLR (pt 553) p.171.
265 (1998) LPELR -13291 (CA) p. 19.

> 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 Court in exercising its discretion in this instance must exercise same both judicially and judiciously within the ambit of the law. In *United World Limited Inc v Mobile Telecommunication Service Limited*,[266] it was held:

> Thus exercise of the power to stay proceedings in the Court pending the determination of the arbitration proceedings can only be and must be exercised in accordance with the provisions of the law.. Failure to exercise the power in accordance with the provisions of the law renders the decision or order a nullity.[267]

What then would amount to taking steps? This was answered by the Supreme Court in *Obembe v Wemabod Estate Limited* where in it was held that.

> A party who makes any application whatsoever to the court, even though it be merely an application for extension of time, takes a step in the proceedings. Delivery of a statement of defence is also a step in the proceedings.[268]

It is important to note that stay of proceedings pending arbitration is only available to the parties before the Court and parties to the arbitral agreement and not to a party who is not a party to the arbitration agreement

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266 *Ibid.*

267 *Ibid.*

268 (1977) LPELR-2161 (SC) p. 19-20.

In *African Insurance Development Corporation v Nigeria LNG Limited*, the Supreme Court held:

> I now turn to the main question in this case which is whether the defendant, who is neither a party to the arbitration agreement not a derivative party is entitled to a stay of proceedings section 5 (1) of the Arbitration and Conciliation Decree 1988 provides that: "if any party to arbitration agreement commences 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 delivering any pleadings or taking any other steps in the proceedings" it is evident from the provisions of section 5 (1) that the applicant for a stay of proceedings must be a party in the arbitration agreement, and that the subject matter of the action must be with respect to any matter which is the subject of an arbitration agreement.[269]

It was held in *Ives & Barber v Williams*:

> The authorities show that a step in the proceedings means something in the nature of an application to the Court, and not more step such as taking out a summons or something of that kind which is in the technical sense a step in the proceedings.[270]

Again in *Achonu v N.E.M & Gen Insurance Co*[271] the Court in deciding what amounts to taking steps held that:

> On these two authorities, it is not difficult to reach a decision that the defendant by filing a motion to strike out the plaintiff's action has taken a step and cannot avail himself of s. 5 of the Arbitration Law (cap 10) The matter however, does no end here. Counsel for the defendant

[269] (2000) 4 NWLR (pt 653) p.494.

[271] (1971) 1NCLR p.449.

submitted that the step he took, although it was for striking out the action was under s.5 of the Arbitration Law. He argued that his application under the section was a blunder, and following the case of *Ojikutu v Odeh* (1954) 14 WACA 640 where the West African Court of Appeal confirmed that dictum of Thesger L.J in *Collings v Paddington Vestry* (1880) 50Q.B.D. 368; 42 L.T 573 that blunders must take place from time to time and it would be unjust to hold that because a blunder during interlocutory proceedings has been committed the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon merits. The earlier application should not be regarded as a step in the proceedings but a blunder, Ojukutu's case was a case of non-observance of the rules, whereas this case is not. It is conceded that the application was brought under s.5 of the Arbitration Law (Cap 10) but the substance of the application is to strike out the claim and that is the most material part of the application. I am inclined to the view that an application of that nature amounts to taking steps in the proceedings.

3.7 The Power of Court to Set Aside an Arbitral Award

s. 48 of the Act provides that:

The Court may set aside an arbitral award.

(a) If the party making the application furnishes proof-

(i) That a party to the arbitration agreement was under some incapacity.

(ii) That 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.

(iii) That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case or,

(iv) That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or,

(v) That the award contains decisions on matters which are beyond the scope of 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 to arbitration may be set aside or,

(vi) That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision on this Act from which the parties cannot derogate or,

(vii) Where there is no agreement between the parties under subparagraph (vi) of this paragraph that composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Act or

(b) If the Court finds-

(i) That the subject matter of the dispute is not capable of settlement by arbitration under laws of Nigeria or

(ii) That the award is against public policy of Nigeria.

From the foregoing therefore, it is apparent that there are three grounds to set aside an arbitral award, namely:

i. Where the award was rendered without jurisdiction.
ii. Where the arbitral proceedings or award was improperly procured.
iii. Where the arbitrator misconducted himself.

The power of the Court to set aside an arbitral award was well illustrated by the Supreme Court in *Kano Urban Development Board v Fanz Construction Limited* where it held that:

> Parties take their arbitrator for better or worse both as to decision of fact and decision of law. However, by virtue of the provisions of section 12 (2) of the Arbitration law where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the Court has the power to set the award aside.[272]

It should be noted that despite the Courts power to stay proceedings, it will not in any way affect the validity of the exercise of the power to set aside the arbitral award or to grant leave for its enforcement.

[272] *Ibid.*

Where a party is aggrieved by the decision of the arbitrator (s) as rendered in the award, he may file an application before the Court to set aside the arbitral award. Such application must be brought within three months from the date of the award and in situation requiring an additional award from the date the request was made. By s. 29 (1) of the Act, the limitation period of three months will only be applicable where the grounds relied upon for setting aside of the award is based on the arbitrator acting in excess of its jurisdiction. Section 30 of the Act which talks about what amounts to misconduct of the arbitrator on the other hand. The section did not impose any time limit for bringing an application to set aside the arbitral award for the reason of misconduct on the part of the arbitrator.

s. 29 of the Act provides that:

> (1) 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 of falling within section 28 of this Act from the date of 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.
>
> (2) 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 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.

(3) The Court before which an application is brought under subsection (1) of the 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.

First City Monument Bank v Nagogo[273] it was held that:

Section 29(1) of the Arbitration and Conciliation Act 1988 provides:

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 in accordance with subsection (2) this section"

The provision of section 29(1) (a) of the Act is to the effect that a party to an arbitration who is aggrieved by an award has a period of three

[273] (2016) LPELR p.40211 (CA)

> months from the date of the award to apply to the Court for the award to be set aside. It is a limitation provision, the essence of which is that the legal right to apply to set aside an arbitral award is not a perpetual right but is limited to the period of time given therein.
>
> Where the time given expires, legal proceedings cannot be validly instituted to set aside the award. The aggrieved party is left with a bare and impotent cause of action which he cannot enforce by judicial process.

s. 30 of the Act also provides that:

> (1) Where the 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.
>
> (2) An arbitrator who has misconducted himself may on the application of any party be removed by the court.

In *Araka v Ejeagwu*, the Supreme Court held that:

> The prescribe 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.[274]

The application must be brought within the time frame stipulated in the Act. However failure to bring the application within the stated time frame will render the action statute barred.

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[274] (2000) 15 NWLR (pt 692) p.684.

An action to set aside an arbitral award after the stipulated period was held to be statute barred and the right of action lost.[275]

The major ground for setting aside an arbitral award is where the arbitral tribunal has acted beyond the scope of submission by the parties.

In the *Vessel MV Naval & Ors v Associated Community International Ltd*,[276] the Court held that:

> I am of the opinion that the only way an award can be set aside, is by way of an application to the Court, this should be the standard no matter the type of the award. The law also stipulated a time limit within which such an action can be commenced to set aside the award within 3 months see subsection one above. Furthermore an arbitral award can be challenged on the ground that there was no valid arbitration agreement or that the matter submitted before the tribunal does not fall within that agreement, whether for reasons of public policy or otherwise.

Where it is established that the arbitral tribunal has acted beyond the scope of the submission by the parties, such award will be set aside. However this may also amount to misconduct. In *Kano State Urban Development Board v Fanz Construction Limited*,[277] the Supreme Court held that:

> Where an arbitrator even in perfect good faith misconstrued the provisions giving him power to act and thereby failed to deal with the questions remitted to him his decision in the arbitration proceedings will be a nullity. In other words, if the complaint of a party, in this case the

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275 *United Nigerian Insurance Co v Stocco* (1973) All NLR p.168.
276 (2015) LPELR p.25973.
277 *Supra* 35-36.

> appellant, to the effect that the arbitrator did not decide the issue remitted to it but decided some other issue not remitted to it is valid, the whole of the arbitral proceedings would be declared a nullity.

The arbitrator does have the power to expand the scope of reference by the parties to the arbitration. In *Taylor Woodrow (Nig) Ltd v S.E GMBH Ltd*,[278] the Supreme Court held that:

> 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.

Where a party alleges that an arbitral award is beyond the scope of submission of the parties, the onus to prove is on the party alleging same.[279] A party cannot challenge the arbitral award and seek to set same aside basically because the award is against him. He can only bring an application to set same aside under the grounds set out in sections 29 and 30 of the Act. This principle has long been established in Nigeria right from the West African Court of Appeal's decision in *Foli v Akese*[280] wherein the Court held that:

> However, it will be as well to consider first the principles by which the Court should be guided in setting aside the award of an arbitrator whose decision it has been agreed shall be final. These may be summed up in the statement that in submissions to arbitration. The general rule is that as the parties choose their own arbitrator to be the judge in the dispute between them, they cannot when the award is good on its face object to its decision either upon the law or the facts.

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278 (1993) 4 NWLR (pt 286) 127.

279 *Obaseki Bros v Reif & Sons Ltd* (1952) 2 Lloyd's Rep 364.

280 (1930) WACA 1.

Also in *Gunter Henck v Andre & Cie SA*[281] it was held that

> If parties choose to have their disputes settled by arbitration then subject to certain limited expectations the attitude of the Court has been that the parties should take arbitration for better for worse. They have chosen their tribunal.

The Court may set aside an arbitral award on the ground of misconduct of the arbitrator. This position was re-echoed by the Supreme Court in *Kano Urban Development Board v Fanz Construction Limited*.[282]

Several instances have been held by the Court to amount to a misconduct by the arbitrator. It should be noted that it is not or mishandling of an arbitral proceedings that can be termed as misconduct. For such a mishandling to amount to a misconduct it must occasion a miscarriage of justice.

It is important for the Court to be careful in setting aside an arbitral award on the ground of misconduct where it is manifestly shown that the arbitral tribunal has observed the principle of fair hearing. Cockburn. J observed in *Re Hopper*[283] wherein he held that:

> We must not be over ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings.

It should be noted that the word misconduct is not used in a manner to suggest ineptitude. However, certain instances have been held to amount to misconduct, they include.

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281 (1970) 1 Lloyd's Rep p.236.
282 *Op cit*
283 (1961) 3 LJCH p.420.

a. Where the arbitrator fails to decide all the issues referred to him.[284] However in this instance the Court will not set aside an arbitral award merely on the fact that only one issue was excluded by the arbitrator

b. Where the arbitrator construed the lease wrongly instead of determining the rental and building on the land.[285]

c. Where the award is inconsistent or uncertain or ambiguous.[286]

The list is in exhaustive and it depends on the circumstance of each case. It should however be noted that the proceedings of Court is different from that of the arbitral tribunal. Therefore there are certain circumstances that can vitiate a Court proceedings and cause such proceedings to be set aside on appeal. Such circumstance may not warrant the setting aside of the award based on a similar fact for setting aside the vitiated Court proceedings.

It is submitted that the fact that an arbitrator did not take several evidence in arriving at the award rendered may not amount to a misconduct. Lord Denning MR held that;

> The weight of evidence and the inferences from it are essentially matters for the arbitrator. I do not think that the awards of arbitrators should be challenged or upset on the ground that there was not sufficient evidence or that it was too tenuous or the like. One of the very reasons for going to arbitration is to avoid the technical rules of evidence and so forth... questions of evidence and discovery and so forth are essentially matters for the arbitrator and not matters for the Court.[287]

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284 *Samuel v Cooper* (1835) 2 AD & EL p. 752.

285 *Ames v Milward* (1818) 8 Tenant and also *Tribe v Upperton* (1835) 3 AD & ELp. 295.

286 *Stabilini Visinoni Limited v Mallinson & Partners Limited* (2007) LPELR p.8661 (CA).

287 *GKN v Mattro* (1976) 2 Lloyd's Rep p.555.

The inadmissibility of certain evidence under the Evidence Act may not be applicable to arbitral proceedings. It is imperative to note that it is not mandatory for an arbitrator to be a lawyer which may not permit evidence under the Evidence Act. Again because arbitral proceedings are flexible, the arbitral tribunal may in other words admit such evidence even though it violates the provisions of the Evidence Act provided it is guided by relevancy.

An award reached where there is no evidence supporting a finding of fact by the arbitral award will not be set aside unless it is abundantly clear that there was no evidence at all supporting the findings.[288]

Again a mistake of law will not amount to misconduct on the part of the arbitrator[289]. This is because the arbitrator may not be well grounded in the principles of laws since he may not necessarily be a lawyer. The Court will not set aside the award because of the misapplication of law or error of law

However, an arbitral award may not be set aside on the mere fact that the arbitrator delayed the proceedings. Where the arbitrator had unduly delayed the arbitral proceedings, the proper application available to the aggrieved party is to bring an application before the Court to remove the arbitrator.[290]

However, where[291] there is an application to set aside an arbitral award filed before the Court, it does not stop the successful party in whose arbitral award is rendered in his favour from bringing an application to enforce the arbitral award. This is for the fact that an application for setting aside an arbitral award is separate from an application for enforcement of arbitral award.

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288 *Oleifficio Zucchi SPA v Northern Sales Ltd* (1965) 2 Lloyd's Rep p. 496.
289 *Taylor Woodrow (Nig) Ltd v GMBH* (1993) NSCC p.415.
290 *Lewis Emmanuel & Sons Ltd v Sammut* (1959) 2 Lloyd's Rep 629.

We submit that once an arbitral award has been enforced as opposed to an application to enforce an arbitral award it will be too late to apply for the same arbitral award that have been enforced to be set aside.

3.8 The Effect of Setting Aside an Arbitral Award

Where the arbitral award has been set aside wholly or in part by the court the decision of the Court in this regard may not merely nullify the award but affect the arbitral proceedings and an order made to recommence the arbitral proceedings.[292]

While s. 11 of the Arbitration Act 1914 has a provision that where the judge before whom an application is brought to set aside an award can remit same back to the tribunal to recommence the arbitral proceedings. However there are no similar provision in the Arbitration and Conciliation Act. The only provision that appears close to s. 11 of the Arbitration Act 1914 is s. 29 (3) of the Act which provides that.

> The Court before which an application is bought 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 of the award.

Although learned authors like Orojo & Ajomo[293] have argued that s. 29 (3) of the Act empower the Court to remit an award back to the arbitral tribunal. It is our view that the provisions of s. 11 of the Arbitration Act 1914 and s. 29(3) of the Arbitration and Conciliation Act are not the same and cannot be construed as having the same effect. It is also our view that

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[292] Mustill & Boyld, *Commercial Arbitration* (London: 1989) p. 447.

[293] J Orojo and M Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria (Lagos: Mbayi & Associates Nigeria Limited, 1999) p. 272-273.

the omission of a similar provision to s. 11 of the Arbitration Act 1914 is one of the *lacuna* in the Act. It is however hoped that in a future amendment to the Act a similar provision to s. 11 of the Arbitration Act 1914 will be provided for.

It is however, important to note that three (3) months is the limitation period allowed by the Act for an aggrieved person to approach the Court to set aside an arbitral award.

In *Araka v Ejeagwu*, [294]the Supreme Court per Kutigi JSC (as he then was) in interpreting s. 29 and 30 of the Act held that:

> Both sections 29 and 30 thus provide for recourse against an award 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 section 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.

Also in *First City Monument Bank Plc v Nagogo,*[295] it was held that:

> The provision of Section 29(1) (a) of the Act is to the effect that a party to an arbitration who is aggrieved by an arbitral award has a period of three months from the date of the award to apply to the Court for the

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[294] *Op cit.*

[295] (2016) LPELR 40211 (CA).

> award to be set aside. It is a limitation provision, the essence of which is that the legal right to apply to set aside an arbitral award is not a perpetual right but is limited to the period of time given therein. Where the time given expires, legal proceedings cannot be validly instituted to set aside the award and an incompetent cause of action which cannot be enforced by judicial process.

The Court can also vary the arbitral award. In *Maritime Academy of Nigeria v AOS*,[296] it was held that:

> It is only if there is a failure of an arbitral process that recourse could be had to the judicial process, otherwise judicial proceedings is for the Court to give its fiat to or withhold same from the award made in the arbitration proceedings or to vary the award.

However, where the Court has set aside an arbitral award, such an award will not be capable of enforcement.

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[296] (2008) ALLFWLR (pt 406) p.189.

CHAPTER FOUR

ENFORCEMENT OF ARBITRAL AWARD

After an arbitral award has been rendered by the arbitral tribunal, the next stage in arbitration is the enforcement of the award. Enforcement of an arbitral award is of great importance in an arbitral proceedings, as it allows the successful party to enjoy the outcome of the arbitral proceedings. However, in a situation where an unsuccessful party complies with the award, there will be no need to take a further step to enforce the award.

The need for the successful party to be able to enforce the arbitral award was well captured in the words of Asouzu as follows:

> One of the reasons business people enter into arbitration agreement or may insist on inserting an arbitration clause in a contract is to hope for a binding and enforceable award should one be rendered. An arbitral agreement or award without an enforcement mechanism may in practice, be valueless. If an agreement or award which is not voluntarily carried out cannot be coercively enforced against a recalcitrant party, then the rationale for arbitration is eroded and confidence in the arbitral process would be shaken.[297]

[297] A Asouzu, 'The Adoption of the UNCITRAL Model Law in Nigeria, Implication of the Recognition and Enforcement of Arbitral Awards' (1999) *Journal on Business Law* p. 1856.

The arbitral award sought to be enforced must be final. In *Ake Shareholdings Ltd v Optimum Construction & Property Dev Company Ltd*[298] it was held that:

> 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. Once an award has been made, and not challenged in Court, it should be entered as a judgment and given effect accordingly. The losing party cannot be heard to say he wants to agree to some point or other. Just as he would not be allowed to do so in the case of a judgment not appealed from, he should not and would not do so in the case of an award that he has not challenged.
>
> The only jurisdiction conferred on the Court is to give leave to enforce the award as a judgment. Unless there is real ground for doubting the validity of the award. In other words if upon an application to enforce the award, the judge finds that the validity of the award is doubtful, he can refuse leave. See section 29, 30 and 31 of the Arbitration and Conciliation Act. The Court has no other business with regard to the award except where it is expressly provided in the Act. Section 34 of the Act buttresses this point. It provides: A Court shall not intervene in any matter governed by this Act except where so provided in the Act. I must say nowhere in the Act is the High Court given the power to convert an arbitration award into its own judgment…. What this means simply is this: An award is at par with a judgment of the Court. It is in the light of all this that a Court cannot make the arbitrator's award its own judgment.

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298 (2015) LPELR p.24536 (CA).

4.1 Recognition of Arbitral Award

Recognition means "confirmation that an act done by another was authorized"[299]. Section 31 (1) provides that 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. This is a major distinction between arbitration under the Act and other forms of arbitration. For instance customary arbitration does not require recognition before it can be enforced as the Court has laid down the condition precedent before a customary arbitral award can be enforced. A party who seeks to enforce customary arbitral award must plead same and prove that the valid ingredients of customary arbitration was present. Where a party has met this conditions precedent, the customary award will be recognized as binding and enforceable.

A party seeking recognition alone of an arbitral award can only rely on the award for the purpose of defence or set off or in some other way in subsequent Court proceedings on the same subject matter.

Where an arbitral award has been recognized, it provides a shelter for the arbitral award and will preclude any attempt to raise the issues decided in the award in a subsequent or fresh proceedings. In other words, it would preclude a party from raising issues that have already been decided earlier in the arbitration which has resulted to the rendering of the arbitral award which is now sought to be recognized.

In a situation where an arbitral award has been rendered in favour of a party, such party will be entitled to object to any subsequent arbitration in respect to the dispute which was the subject matter of the earlier arbitral proceedings. The new arbitration will be prevented by the

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[299] B Garner, *Black's Law Dictionary* (9th edn, St Paul MN: Thomson Reuters, 2009) p.1385.

doctrine of *res judicata*. Ajogwu succinctly captures the applicability of the doctrine of *res judicata*, he stated in his view:

> Like judgments delivered in national courts, arbitral awards can have a *res judicata* effect. An arbitral award can finally resolve the disputes between the parties that were submitted to arbitration. Short of the award being nullified, therefore an arbitral award operated as *res judicata* between the parties where a subsequent dispute may arise between the same parties on the same subject matter.[300]

However, after an arbitral award has been rendered, such an award has to be recognized and the decision in the award carried out by all the parties to the arbitral proceedings. The Arbitration and Conciliation Act s. 31 (1) provides that " 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." The provisions of this section is similar to the provisions of section 51 of the same Act, which provides that; 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. The operative word in both section 31 and 51 is shall, which connotes a command and it is not permissive.[301]

It should be noted that word recognition and enforcement of arbitral award as contained in the Act are similar and closely related but with distinct procedure. In fact, the two words are often used interchangeably as if they connote the same meaning. The word recognition is used more where a party seeks to rely on the award as a shield in a new action where the

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[300] F Ajogwu, *Commercial Arbitration in Nigeria Law & Practice* (Lagos: Mbeyi & Associates Nig Ltd, 2013) p.30.

[301] *Buhari v INEC & Ors* (2008) LPELR-814 (SC) p.274.

subject matter is the same as the one already determined by the arbitral tribunal. In other words the word features more where a party intends to use the award as a defence mechanism. Whereas, enforcement is a practical and realistic step taken by the successful party in whose favour the award was rendered to ensure that the award is executed against the party against whom the award was made.

4.2 Enforcement of Arbitral Award

Enforcement is a process of compelling compliance with a law, mandate, command, decree, or agreement. There are two principal methods of enforcement of arbitral award in Nigeria under the Act. The first method is by way of an application in writing to the Court by virtue of the provisions of section 31 (1) of the Act. While the second method is obtaining the leave of Court to enforce the award under the summary procedure by section 31 (3) of the Act. The third method is suing upon the award. It is important to state that the Act only provides for application in writing and leave of Court under the summary procedure of enforcement.

In *Commerce Assurance Limited v Alli*,[302] it was held that:

> Two alternative methods of enforcement of an award are open to applicant namely:
>
> 1. By application directly to enforce the award or
>
> 2. By application to enter Judgment in terms of the award and so to enforce the judgment by one or more of the usual forms of execution.

[302] (1992) LPELR-883 (SC) or (1992) NWLR (pt 232) p.710.

> Thus the two alternative methods are fundamentally different. The summary method treats the award as an existing judgment and only seeks to enforce it. The enforcement by action seeks to get a judgment in terms of the award. There can therefore, be no question of a proceeding, the award being pleaded as *estoppel per rem judicatam*, as in that case the Court itself decides nothing. It simply enforces the award as if it were a judgment. Where there is doubt as I have stated and it becomes unwise to enforce the award summarily, the Court simply strikes out the application to enforce the award summarily making the applicant free to commence an action.

4.3 Enforcement of Customary Arbitral Award

Customary arbitration has been defined as:

> An arbitration in the dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their communities and an agreement to be bound by such decisions or resile from the decision where unfavourable.[303]

From the above definition it is apparent that voluntary submission of the parties is the main ingredient of a valid customary arbitration.[304]

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303 *Agu v Ikewibe* (1991) 3 NWLR (pt.180) p.407.

304 *Ohiaeri v Akabese* (1992) 2 NWLR (pt.221) p.1.

In *Duruaku Eke & Ors v Udeozor Okwaranyia & Ors,*[305] the Supreme Court per Uwaifo (JSC) itemized the elements or ingredients of a valid customary arbitration to include:

(a) That there had been a voluntary submission of the matter in dispute to an arbitration of one or more persons.

(b) That it was agreed by the parties either expressly or by implication that the decision of the arbitrator (s) would be acceptable as final and binding.

(c) That the said arbitration was in accordance with the custom of the parties or of their trade or business.

(d) That the arbitrator (s) reached a decision and published their award.

(e) That the decision or award was accepted at the time it was made.

The fifth ingredient stated in the above cited case seems impracticable. If this decision is anything to go by, it will suggest that parties to customary arbitration has a choice to pick and choose the customary award to accept or reject. More so that most losing party most times will not ordinarily accept defeat.

The Supreme Court however, in a later decision in *Egesimba v Onuzuruike*[306]held that:

> The four ingredients usually accepted as constituting the essential characteristics of a binding customary arbitration are:
>
> (i) Voluntary submission of the dispute to the arbitration of the individual or body;

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[305] (2001) 12 NWLR (pt.726) p.181
[306] (2002) LPELR-1043 (SC) p. 24

(ii) Agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding;

(iii) That the arbitration was in accordance with the custom of the parties ; and

(iv) That the arbitrator reached a decision and published their award.

This decision seems more apt, realistic and preferable to the decision of the Supreme Court in *Duruaku Eke & Ors v Udeozor Okwaranyia & Ors*[307]

These elements stated above must be present for customary arbitral award to be enforceable. It must be noted that customary arbitral award can only be enforced by action at law. Therefore, the presence of the above listed ingredients allows the successful party to plead the customary award as an estoppel in subsequent actions with the same subject matter. A party relying on customary arbitral award, can rely on it as a shield by way of estoppel and as a sword by way of an action at law for its enforcement in Court.[308]

Customary arbitration is usually conducted orally, so also the arbitral award are rendered orally. There is no provision for customary arbitration as well as its enforcement under the Arbitration and Conciliation Act. This particularly so by virtue of the provisions of Arbitration and Conciliation Act s 1[309], which mandates that every arbitration agreement shall be in writing. It has been held severally that customary arbitral award is not a judgment of Court and as such

[307] *Op cit.*
[308] G Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (Enugu: Snaap Press Nigeria Ltd, 2004) p.13.
[309] Cap A18 Laws of the Federation of Nigeria 2004.

cannot be enforced ordinarily like the judgment of Court unless such a customary arbitral award has been pronounced upon by the Court.

The Supreme Court in *Ufomba v Nwosu Ahuchaogu & Ors*,[310] per Niki Tobi held that:

> Native or customary arbitration is only a convenient forum for the settlement of native dispute and cannot be raised to the status of a Court of law………..in view of the fact that a customary or native arbitration is not a court of law, the learned trial judge, with greatest respect was in error when he equated decisions of native arbitration with those of Courts of law. While I concede to the learned trial judge that a customary arbitration could be binding on the parties when certain ingredients are fulfilled, decisions of such bodies do not qualify as "concurrent findings" with those of the High Court.

While it may be sufficient to simply plead the fact of a previous judgment by a regular Court as a basis of an estoppel, merely pleading such a decision in respect of a customary arbitration without pleading the ingredients that project it as creating estoppel will not be proper pleading. This is more so because not every customary arbitral award unlike judgment of court can create estoppel. In other words, the party alleging customary arbitration has a duty to adduce credible evidence showing the presence of the valid ingredients of a customary arbitration to sustain the plea of estoppel.

[310] (2003) LPELR-3312 (SC) p. 37.

The Supreme Court in *Ohiaeri & Anor v Akabeze & Ors*[311] held that:

> For a party to be deprived of his right to seek redress in the regular Court where he can appeal, if dissatisfied, up to the Supreme Court, and for customary arbitrators to be vested with jurisdiction of having the final say in the subject-matter placed before them, the opposing party relying on the decision of the customary arbitrators as an estoppel must adduce sufficient evidence showing that the decision has the essential elements to raise an estoppel.

Where a party merely pleads customary arbitration and award in the statement of claim without pleading these ingredients, such customary arbitration and the award will not create estoppel.

However, Ghana has made provisions for customary arbitration and its enforcement in Alternative Dispute Resolution Act 2010. It is imperative to note that the inclusion of customary arbitration in Ghana's case laws dated back to the West African Court of Appeal's decision in *Asampong v Amuaka & Ors,*[312]wherein the Court held that:

> Where matters in dispute between the parties are by mutual consent investigated by arbitrators at a meeting held in accordance with native law and custom and a decision was given, it is binding on the parties and the Supreme Court will enforce such decisions.

In Ghana the apex Court is the Supreme Court, however, there exists other intermediate courts. The paucity of intermediate Courts in Ghana makes the role of traditional chiefs very vital in dispute resolution. Apart from Ghana Arbitration Act 1967, Ghana has gone a step

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311 (1992) LPELR-2360 (SC) p. 30.
312 (1932) 1 WACA. p. 201.

further by enacting Alternative Dispute Resolution Act in 2010. The Act made a robust provision for customary arbitration as well as its enforcement.

For instance Section 112 of the Act allows a party in customary arbitration to apply to the Court of law to set aside a customary arbitral award where the award:

a. Was made in breach of the rules of natural justice.
b. Constitutes a miscarriage of justice ; or
c. Is in contradiction with the known customs of the area concerned.

It must however, be noted that parties in customary arbitration usually find it difficult to prove the existence of customary arbitration principles, more so since the arbitral award is handed down orally.

4.4 Enforcement of Domestic Arbitral Award under the Arbitration and Conciliation Act

There are two principal methods of enforcement of arbitral award in Nigeria under the Act. The first method is by way of an application in writing to the Court by virtue of the provisions of section 31 (1) of the Act. While the second method is obtaining the leave of court to enforce the award under the summary procedure by section 31 (3) of the Act.

s. 31 of the Act provides that:

> (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

(2) The party relying on an award or applying for its enforcement shall supply:

(a) A duly authenticated original award or apply certified copy thereof ; and

(b) The original arbitration agreement or duly certified copy therefrom;

(3) An award may by leave of the Court or Judge be enforced in the same manner as a judgment or order to the same effect.

4.4.1 The Nature of Application for Leave of Court to Enforce Arbitral Award

The Act did not provide for the nature of the application for leave to enforce arbitral awards in Nigeria. However, the mode of application for leave of court to enforce an arbitral award depends largely on the rules of the Court where such an arbitral award is sought to be enforced.

Application to enforce arbitral award is usually brought by a motion *ex-parte*.[313] However where necessary the other party may be put on notice. The Supreme Court has held that the Court in considering an application in a civil matter must be mindful of the fair hearing provisions of the Constitution.[314]

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[313] The Supreme Court decision in *KSO & Allied Product Limited v Kofa Trading Co Limited* (1996) 3 NWLR (pt 436) p.244.

[314] *Kotoye v Central Bank of Nigeria* (1989) 1 NWLR (pt 98) p.419, also Constitution of the Federal Republic ofNigeria 1999 (As amended) s. 36.

It should be noted that the Court has an unfettered power to set aside an arbitral award or refuse to enforce the arbitral award where there is a failure to comply with the provisions of the Arbitration and Conciliation Act and the Constitution.[315] The Court in this instance includes both the Federal and State High Courts, who have supervisory jurisdiction on arbitral proceedings in Nigeria[316]

An application for leave to enforce an arbitral award shall be supported by an affidavit which should contain:

(a) The duly authenticated award or a duly certified copy.

(b) The original arbitration agreement or a duly certified copy thereof[317]

Where in international arbitration where the award or arbitration agreement is rendered in another language other than English Language a certified translation in English should be attached to the application.[318] Upon the grant of leave by the Court the arbitral award is deemed enforced unless an application is brought before the Court by the losing party to refuse recognition and enforcement of the arbitral award.[319] Once the leave of Court is granted, the award can be enforced in the same way and manner a judgment of Court can be enforced.[320]

Even though both s. 31 and s. 51 of the Act provides that an application must be made to the Court to enforce an arbitral award, the two sections are silent on the nature and mode the

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315 *Op cit.*
316 Arbitration and Conciliation Act s. 57.
317 Arbitration and Conciliation Act s. 31(2) and 51 (2).
318 *Curacae Trading Co v Harkiscandas & Co* (1992) 2 Lloyd's Rep p.186.
319 s. 31(2) and 51 (2) cap A18 Laws of the Federation of Nigeria 2004.
320 s. 31 (3) cap A18 Laws of Federal of Nigeria 2004 also s. 66(1) of the English Arbitration Act 1996 which has a similar provisions with s. 31(3) of the Act.

application should take. An application has been defined to mean a request or petition.[321] It is pertinent to state that in judicial process and procedure applications connote the same meaning. As a matter of fact, applications are brought before the Court by a way of motion. However, a motion is a written or oral application requesting a Court to make a specified ruling or order.[322] In Nigerian legal jurisprudence, applications are an integral part of the substantive suit.[323]

Be that as it may, an application can either be by way of a motion on notice or motion *exparte*. The distinction between the two was illustrated by the Court in *Njokanma & Anor v Uyana*[324], where it was held that:

> The Supreme Court in Leedo v Bank of the North (1998) 7 SCNJ 328 at 352-353 per Ogundare JSC (of blessed memory) noted with approval a drawn up distinction between motion on notice and motion *ex-parte* and when they can be applied -a holden of Mohammed JCA (as he then was) in Bayero v Federal Mortgage Bank of Nigeria Ltd & Anor (1998) 2 NWLR 509 at 525-530 where he said; Motions generally are of two types; Motion on Notice and *Ex-parte* Motion. A motion is on notice where the applicant has put on notice or awareness. The attention of the other party or parties involved of the existence of the motion. An *ex-parte* motion is one in which the applicant for some cogent reasons, cannot put the other party or parties on notice or awareness of its existence. Both are acceptable in law. The general practice, however is that motions are filed in Court on notice. *Ex-parte* motions are filed but sparingly

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321 B Garner, Black's Law Dictionary (9th edn, St Paul MN: Thompson Reuters, 2009). p. 115.
322 B Garner *op cit* p. 1106.
323 *Odedo v PDP & Ors* (2015) LPELR -24738 (SC) p.37-38.
324 (2006) LPELR-9805 (CA) p. 9-13.

> considered by the Court in extreme or special circumstances. The decision whether an application should be brought *ex-parte* or on notice is one to be considered in the light of the prevailing circumstances and not based on the dictates of the applicant's or the judge's whims.

An application *ex-parte* may be entertained by the Court in two circumstances, namely;

1. Where by the nature of the application, the interest of the adverse party will not be affected.
2. When time is of the very essence of the application.

However, the grant of an application, whether by way of motion *ex-parte* or motion on notice is based essentially on the discretion of the Court.

There are provisions in the rules of both the Federal and State High Courts on the mode of enforcement of an arbitral award. For instance the Federal High Court Rules provide that an application to enforce an arbitral award may be made *ex-parte*.[325] Order 52 rule 16[326] provides as follows:

> (1) An application to enforce an award on an arbitration agreement in the same manner as a judgment or order may be made *ex-parte*, but the Court hearing the application may order it to be made on notice.
>
> (2) The supporting affidavit shall-
>
> (a) Exhibit the arbitration agreement and the original award or in either case certified copies of each.

[325] Order 52 Rule 16 Federal High Court (Civil Procedure) Rules 2019.
[326] Federal High Court (Civil Procedure) Rules 2019.

(b) State the name, usual or last known place of abode or business of the applicant and the person against whom it is sought to enforce the award;

And

(c) State as the case may require either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

It is pertinent here to examine what *ex-parte* means. This latin expression literarily means: "Done or made at the instance and for the benefit of one only and without notice to or argument by any person adversely interested"[327]. Usually, the motion ex-parte is explored where there is urgency and injunctions obtained on *ex-parte* applications are interim in nature to keep the matter in *status quo* until a named date, when the respondent will be put on notice.

The High Court (Civil Procedure) Rules of Lagos State, requires that the application to enforce an arbitral award should by leave of a judge in the same manner as a judgment or order of Court may be enforced.[328] The rule went on to provide that an application in any ADR proceedings under the rule shall be by originating motion on notice.[329] To our mind the procedure laid down by the High Court of Lagos State (Civil Procedure) Rules seems more preferable. In my view since an arbitral award has the effect of a judgment of the Court there by rendering the asset of the award debtor vulnerable to attachment once the award is enforced, it seems it would be fair and just to put the award debtor on notice.

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327 B Garner, *opcit,* p. 657.

328 Order 28 Rule 4 High Court of Lagos State (Civil Procedure) Rules 2019 also Order 39 Rule 3 High Court of Ogun State (Civil Procedure) Rules 2014.

329 Order 28 Rule 3 High Court of Lagos State (Civil Procedure) Rules 2019

This view has found expression in the Court of Appeal decision in *Imani & Sons Limited & Anor v Bill Construction Company Limited*,[330] wherein Oguntade JCA (as he then was) held that:

> 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 may be put on notice… the procedure followed by the lower Court was an infraction on appellant's right to fair hearing.

By the decision cited above, the Court interpreted the provisions of section 31 of the Act in a very restrictive sense, which suggests that the Court has the discretion to determine the mode which the application should take. This with respect does not represent the intentions of the legislature. It will however, seem that the mode of the application has been left for the various High Court (Civil Procedure) Rules.

By the nature of a motion on notice it is a process designed for proceedings where a suit is already pending. A motion on notice is however different from an originating motion. The distinction was pronounced on in *Federal Ministry of Works and Housing & Anor v Monier Construction Co (Nig) Ltd & Anor,*[331] wherein the Court held:

> As earlier stated there is a difference between an originating motion and a motion on notice This much is clear from the

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330 (1999) 12 NWLR (pt630) p.254.

331 (2009) LPELR p. 8261 (CA).

> provision of Order 2 Rule 2 (3) of the Federal High Court (Civil Procedure) Rules 2000 which shows that an originating motion is one of the ways by which an action is commenced, while Order 9 shows that motions on notice are for interlocutory proceedings.

In *Stabilini Visinoni Limitedv Mallinson & Partners Limited,*[332] it was held that:

> In both cases – *K.S.U.D.B v Fanz Const. Co Ltd* (*supra*) and *Shell Trustees v Imani & Sons Ltd (Supra)* there was an order for stay pending arbitration; the parties submitted to arbitration whereupon an award was made and one of them sought to enforce the award in the same Court that ordered arbitration. The first case *K.S.U.D.B v Fanz Const. Co Ltd* (*supra*) does not state how an application for the enforcement of the award is made. Its decision is simply to the effect that the Court that ordered that parties resort to arbitration can also entertain an application for purposes of enforcing the arbitral award.
>
> The decision in the *Shell Trustee v Imani & Sons Ltd (supra)* is that whilst a party can bring an application before the same Court for the enforcement is a fresh one for purposes of enforcing the award but cannot qualify as an originating process because it is relative to the proceeding suit in the same Court.

It must be noted that the adoption of a wrong procedure in commencing an action would only amount to a mere irregularity and would not render the entire proceeding a nullity.[333]

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332 (2014) LPELR p. 23090 (CA).

333 *Adebayo v Johnson* (1969) ALLNLR 176, *Ariori v Elemo* (1983) 1 SC p. 13, also *Duke v*

Neither motion *ex-parte* nor motion on notice is appropriate for obtaining the leave of Court to enforce an arbitral award. It is my humble suggestion that originating motion would seem most appropriate in obtaining the leave of the Court to enforce an arbitral award since originating motion is one of the mode of commencing action in both the Federal High Court[334] and State High Courts in Nigeria.

4.4.2 The Effect of Obtaining Leave of Court to Enforce Arbitral Award under the Arbitration and Conciliation Act

The enforceability of arbitral awards is a major distinction from other forms of dispute resolution. The effect of obtaining leave of Court was enunciated in the Supreme Court's decision in *Ras Pal Gazi Construction Limited v Federal Capital Development Authority*,[335]thus;

> The role of the High Court in the arbitral award is merely to enforce when the award is not challenged, otherwise an arbitral award once made is enforceable like the judgment of the court. It follows therefore from both statutory and judicial authorities that once the leave of Court is obtained the arbitral award has the force of the judgment of the Court and can be enforced as such. The Court enforces an arbitral award as contained in section 6(6) (b) or the Constitution.

This buttresses the fact that the arbitral award has the same effect and force as the judgment of Court. This is more so as the Court has no business with regard to the award, except as expressly provided for by the Act.[336]

Akpabuyo Local Government (2005) 12SC (Part1) p. 1.

334 Order 3 Rule 1 Federal High Court (Civil Procedure) Rules 2019.

335 (2001) 10 NWLR (pt722) p.559 or (2001) LPELR p.2941 SC.

336 s. 34 Cap A 18 Laws of the Federation of Nigeria 2004

4.5 Enforcement of Domestic Arbitral Award by Action

The Act has not specifically provided for enforcement of arbitral award by action, however, learned authors have recognized action as a form of enforcing arbitral award. Mustill and Boyd illustrated the procedure as follows:

> Parties to an arbitration agreement impliedly agree to perform a valid award, if the award is not performed, the successful claimant can proceed by action in the ordinary Courts for breach of this implied promise and obtain a judgment giving effect to the award. The Court may give judgment for the amount of the award or damages on failure to perform the award.[337]

As earlier pointed out that the summary means of application to the Court is what is provided for in the Act.[338] However, it has been argued that where an arbitration agreement contains an implied obligation to perform the award, failure to perform the award would then amount to a breach of the arbitration agreement which will in turn entitle the wining party to bring an action to seek the enforcement of that implied term.

In bringing an action under this category the following ingredients must be present.

a. That there is in place an arbitration agreement.[339]

b. That a dispute has arisen which falls within the arbitration agreement.

c. That there is an arbitral tribunal in accordance with the arbitration agreement.

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337 Mustill & Boyd, *Commercial Arbitration* (London: Butterworths, 1989) p. 417.

338 Cap A18 Laws of the Federation of Nigeria 2004.

339 English Arbitration Act s. 6.

d. That the making of the award is pursuant to the arbitration agreement.

e. That the defendant has failed to perform the award.[340]

The party seeking to enforce an arbitral award by action would be entitled to the following remedies from the Court, according to Russell on Arbitration;[341]

> In the case of an award of a sum of money, the Court may give permission to enforce the award by any means of execution available for a judgment of the Court or give judgment for that sum excluding interest as a debt. The Court may similarly enforce an award of damages. The Court may also enforce an award for specific performance. It is also possible to sue for a declaration that the award is binding.
>
> The Court may grant an injunction to assist in the enforcement of an arbitration award.

4.6 Enforcement of Foreign Arbitral Award in Nigeria

Usually in a contract agreement where the contract is to be enforced in a foreign country and it contained an arbitration clause, parties usually agree on the currency upon which the contract will be performed. A foreign arbitral award that is sought to be enforced in a place other than the place of the arbitration would of course be in a foreign currency. Nigerian Courts have an unfettered power to order the performance of a contract in any country which the parties have agreed.

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[340] *Christopher Brown Ltd v Oestemeichischer v Waldbesitzer Etc R GmbH* (1954) 1 QB p.8.

[341] D Simion, *Russell on Arbitration* (22nd edn, Gloucester: Sweet and Maxwell Ltd, 2002) p. 457.

Foreign arbitral award can be enforced by virtue of the provisions of the Arbitration and Conciliation Act,[342] as well as under other statutes and international treaties and conventions, like Foreign Judgment (Reciprocal Enforcement) Act, International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act and New York Convention 1958. For the purpose of this work, we shall discuss enforcement of foreign arbitral award under the following categories:

1. Arbitration and Conciliation Act.
2. Foreign Judgment (Reciprocal Enforcement) Act.
3. International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act.
4. New York Convention 1958.

4.6.1 Enforcement of Foreign Arbitral Award under the Arbitration and Conciliation Act

Before the enactment of the Arbitration and Conciliation Act, enforcement of foreign arbitral award is governed principally by the New York Convention of 1958 and the Foreign Judgments (Reciprocal Enforcement) Act[343].

Arbitration and Conciliation Act ss. 51 and 52 of the Act provides for this procedure for enforcing foreign arbitral awards in Nigeria. s. 51 of the Act provides that:

> (1) An arbitral award shall irrespective of the country in which it is made be recognized as binding and subject to this

[342] Cap A18 Laws of the Federation of Nigeria 2004 Sections 51 and 52.
[343] Cap F35 Laws of the Federation of Nigeria 2004.

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; and

(b) The original arbitration agreement or a duly certified copy thereof; and

(c) Where the award or arbitration agreement is not made in English Language a duly certified translation thereof into English Language.

However, under the New York Convention 1958 an arbitral award issued in contracting State can generally be freely enforced in any of the contracting State.

Article 1.1 of the New York Convention 1958,[344] provides that;

> The Convention shall apply to the recognition and enforcement of territory awards made in the territory of a state other than the State where the recognition and enforcement of such difference 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.

[344] The New York Convention 1958 has long been domesticated as far back as 17th March 1970. Nigeria's Treaties in Force 1970-1990 Vol2 No24 Page 269 and also Arbitration and Conciliation Act s. 54 (1) (a) of the Act.

It is important to note that the New York Convention 1958 has been domesticated by virtue of s. 54 (1) of the Act which provides that:

> (1) Without prejudice to sections 51 and 52 of this Act where the recognition and enforcement of any award arising out of an international commercial arbitration are sought the Convention on the Recognition and Enforcement of Foreign Awards (herein after referred to as the Convention) set out in the Second Schedule of this Act shall apply to any award made in Nigeria or in any other contracting state:
>
> (a) Provided that such contracting state has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria in accordance with the provisions of this Convention.
>
> (b) That the Convention shall apply only to difference arising out of a legal relationship which is contractual."

Akpata in discussing the domestication of the New York Convention stated thus:

> It is also relevant to state that even though the Convention was not adopted before 1988 and the country enacted law relating to international Commercial arbitration, a foreign arbitral award in an international commercial arbitration made outside the country could be enforced in Nigeria by the combined effect of Sections 2(1) and 4 (2) of the Foreign Judgment (Reciprocal Enforcement)

> Act Laws of the Federation of Nigeria 1960, provided amongst other things, it was registered in the High Court of this country.[345]

Before the enactment of the Act in 1988 the New York Convention 1958 was not properly domesticated in Nigeria. However s. 54 (1) of the Act has now incorporated the provisions of the New York Convention 1958. s. 54 (1) of the Act for instance is in *pari-materia* with Article X of the New York Convention which provides that:

> Any State may at the time of signature, ratification or accession declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible.

The scope of enforcement of arbitral award under the New York Convention 1958 appears broader than the provisions for section 51 of the Act. Under the New York Convention arbitral award is binding and enforceable regardless of the country where it is made whether the country is a party to the Convention or not.

It should be noted that most countries in the world are signatories to the New York Convention 1958. However, it is saddening to note that only few countries have a comprehensive network for cross border enforcement of judgments of foreign Courts. Incidentally, this is not the situation with arbitration. In many countries foreign arbitral award is easier to enforce than the judgment of their local Courts. This is possible because of many Conventions like the New York Convention which provides a robust cross border enforcement of arbitral awards.

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[345] Akpata, *The Nigerian Arbitration Law in Focus* (Lagos: West African Book Publishers Ltd, 1997) pp. 84 and 87.

The provisions of s. 51 of the Act is similar to Article IV of the New York Convention, which provides that:

> 1. To obtain the recognition and enforcement mentioned in the proceeding article, the party applying for recognition and enforcement shall at the time of the application supply
>
> (a) The duly authenticated original award or a duly certified copy;
>
> (b) The original agreement referred to in Article 11 or duly certified copy;
>
> (2) If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translation or by a diplomatic or consular agent.

Article III of the Convention also provides that:

> Each contracting State shall recognize arbitral award as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on

> the recognition or enforcement of arbitral award to which this Convention applies than are imposed in the recognition and enforcement of domestic arbitral awards.[346]

The Court would refuse an application for enforcement of arbitral award in the following instances.

a. That a party to the arbitration agreement is under some incapacity.

b. That the arbitration agreement is not valid under the law in which the parties have indicated should be applied.

c. That he was not given proper notice of the appointment of the arbitrator or the arbitral proceedings.

d. That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.

e. That the award contains decisions on matters which are beyond the scope of the submission to arbitration.[347]

From the foregoing therefore it is apparent that the New York Convention has a provision that is more robust than the provisions of s. 51 of the Act on enforcement of foreign arbitral award. It should be noted that from the provisions of the New York Convention, it appears that

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346 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York on 10th June 1958 Entered into Force on 7th June 1959. 330 UNTS 30 (1959).

347 G Nwakoby. C Aduaka, 'Recognition and Enforcement of International Arbitral Awards in Nigeria: The Issue of Time Limitation,' (2015) *Journal of Law, Policy and Globalization Vol 37* p. 118.

the convention is only applicable in a country that is a signatory to the Convention and where there is a reciprocal treatment of enforcement of international arbitral awards.

The word 'reciprocity' as used in the New York Convention, simply implies that a signatory country can pick and choose the countries whose arbitral award will be recognized and enforced. A vivid look at the Convention shows apparently that there are four major provisions that features the concept of reciprocity.

Article 1 (3) for instance allows states to make reservations. The provision expressly used the word reciprocity and it provides that:

> When signing, ratifying or acceding to this Convention or notifying extension under Article 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 only 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.

Article X is the second provision of the Convention that discussed reciprocity. Article X (1) of the New York Convention provides that:

> Any State, may at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for international relations of which it is responsible. Such declaration shall take effect when the Convention enters into force for the State concerned.

Article X makes the Convention applicable to the colonial territories, who most times do not have the power to enter into any international relations or treaties without recourse to their colonial masters.

By Article XI, the Convention is applicable to federal and non-unilateral States that made up a constituent or provinces.

Article XIV provides that: 'a contracting State shall not be entitled to avail itself of the present Convention against other contracting State except to the extent that it is itself bound to apply the Convention."

The argument for this doctrine is that it is an avenue to protect nationals of the State where the foreign arbitral award is sought to be enforced.[348]

4.6.2 Enforcement of Foreign Arbitral Award by Registration under Foreign Judgments (Reciprocal Enforcement) Act

By the provisions of the Foreign Judgment (Reciprocal Enforcement) Act,[349] a judgment or an arbitral award obtained from a foreign country may be enforced in Nigeria within six years of judgment or the arbitral award.

Foreign Judgment (Reciprocal Enforcement) Act s. 3 provides that:

1. The minister of justice if he is satisfied that in the event of the benefits conferred by this part of this Act being extended to judgments given in the superior Courts of any

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[348] Y. Mok, The Principle off Reciprocity in the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958, *21 Case W. Res. J. Int'l. 123* (1989) p.136

[349] Cap F35 Laws of the Federation of Nigeria 2004.

foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior Courts in Nigeria may by order direct-

a. That this part of the Act shall extend to that foreign country and

b. That such Courts of that foreign country as are specific in the order shall be deemed superior Courts of that country for the purpose of this part of this Act.

2. Any judgment of a superior Court of a foreign country to which this part of this Act extends other than a judgment of such a Court given on appeal from a Court which is not a superior Court shall be a judgment to which this part of the Act applies if:-

a. It is final and conclusive as between the parties there to.

b. There is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in or in respect of a fine or other penalty and

c. It is given after the coming into operation of the order directing that this part of this Act shall extend to that

foreign country, or if it is a judgment to which section 10 of this Act applies.

3. For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it or that it may still be subject to appeal in the Courts of the country of the original Court.

4. The Minister of Justice may by a subsequent order vary or revoke any order previously made under this section.

For such foreign judgment to be registered in Nigeria such judgment must not be wholly satisfied or it must be enforceable by execution in the country of the original Court.[350]

It is important to note that the foreign award or judgment has to be enforceable and must be registered first in the Nigerian Court that has jurisdiction to hear the matter if the dispute had occurred or arisen in Nigeria

The foreign arbitral award must be final and conclusive as between the parties and there must be payable there under a sum of money, not being a sum payable in respect of a fine or other penalty.

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[350] Foreign Judgments (Reciprocal Enforcement) Act Cap F35 Laws of the Federation of Nigeria 2004 s. 4.

In *Harka Air Services (Nigeria) Ltd v Keazor,*[351] the Supreme Court held that:

> In the case of Koya v U.B.A (1997) 1 NWLR (Pt481) p. 251, the Supreme Court per, M.E Ogundare JSC of blessed memory had this to say
>
> "It is my respectful view that Courts in this country can claim jurisdiction to entertain and determine cases where sums in foreign currency are claimed. The old rule in England as well as in Nigeria, is judge made and in the light of present day circumstances of extensive international commercial relationships, that rule should give way to a new rule as now in England, more so that the difficulties hitherto experienced in enforcing such judgments no longer apply." My Lord had in the foregoing judgment supported the foregoing conclusion with reasons as follows-
>
> (1) The Exchange Control Act 1962 has been repealed and the Naira allowed to float on market forces may determine.
>
> (2) By section 7 of the Admiralty Jurisdiction Decree 1991- the Federal High Court is given jurisdiction to award judgment in foreign currency.
>
> (3) The Arbitration and Conciliation Act, Cap 19 Laws of the Federation of 1990, provides that the Courts in Nigeria can enforce arbitral awards in foreign currency.

[351] (2011) LPELR p.1353 (SC).

(4) The Foreign Currency (Domiciliary Accounts) Act Cap 151 Laws of Nigeria 1990 authorizes citizens, corporate bodies, diplomats, foreign diplomatic missions and international organizations to import foreign currency and deposit same in designated local bank account maintained in an approved foreign currency.

(5) The Foreign Judgments (Reciprocal Enforcement) Act Cap 152 allows for the enforcement in Nigeria of Judgments given in foreign countries in their currency. These legislations are still intact and applicable and there are cases to support that the Courts, in appropriate cases, have power to enter judgment in favour of a party in any foreign currency claimed.

However, it is the prerogative of the Minister of Justice to determine the country whose arbitral award would be recognized and registered in Nigeria. This then would suggest that countries whose arbitral awards or judgments are registered in Nigeria have a moral obligation to extend similar gesture to Nigeria in that regard.

In *Macaulay v R.Z.B Austria*,[352] the Supreme Court per Kalgo JSC held that:

> The Reciprocal Enforcement of Judgments Act (Cap 175 of 1958) herein after referred to as the 1958 Ordinance deals *inter alia* with the issue of registration of judgments obtained in Nigeria and United Kingdom and other parts of Her Majesty's dominions and territories. It is pertinent to observe that the Foreign Judgments

[352] (2003) 18 NWLR (pt 852) p.282 (2003) LPELR p.1802.

> (Reciprocal Enforcement) Act (Cap 152 of 1990) hereinafter referred to as the 1990 Act did not specifically repeal the 1958 Ordnance. This means that it still applies to the United Kingdom.
>
> It was extended by proclamation under section 5 of the Ordnance before the coming into force of the 1990 Act.
>
> Section 3 of the 1990 Act empowers the Minister of Justice of the Federation of Nigeria to extend the application of Part 1 of that Act with regard to registration and enforcement of foreign judgments of superior Courts, to any foreign country, including the United Kingdom if he is satisfied that the judgments of our superior Courts will be accorded similar or substantial reciprocity in those foreign countries and once an order is made section 3 of the 1990 Act in respect of any part of Her Majesty's dominions to which the 1958 Ordinance earlier applied, the latter case ceases to apply from the date of that order.

The Supreme Court in this decision held that the applicable law for enforcement of foreign judgements in Nigeria not the Foreign Judgment (Reciprocal Enforcement) Act 1990.

The implication of the decision above is that, the 1990 Act did not Specifically referred the 1958 0rdinance and as such the 1958 Ordinance continues to have effect until it is repeated by the legislature.

The crux of the judgment is the interpretation of s.3 (1) of the 1990 Act which provides as follow:

> The Minister of Justice if satisfied that in the event of the benefits conferred by this part of this Act being extended to judgements given in the superior Courts of any foreign country, substantial reciprocity of treatment

> will be assured as respects the enforcement in that foreign country, sustained reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgements given in the superior Courts in Nigeria may be order direct
>
> (a) That this part of this Act shall extend to that foreign country, and;
>
> That such Courts of that foreign country as are specified in the order shall be deemed superior Courts of that county for the purpose of this part of the Act.

Section 3 deals with the power of the Minister of Justice in respect of judgment from superior Courts outside Nigeria from countries giving Nigeria a reciprocal treatment.

However, as it is now the decision of the Supreme Court represent the current position of the law until the Supreme Court departs from it.

The parties to a foreign arbitral award or judgment must have submitted to the jurisdiction of the foreign arbitral tribunal or Court, before such arbitral award and judgment can be enforced by registration in Nigeria. The application under the Act has to be by way of an Originating Summons.[353]

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[353] Cap F35 Laws of the Federation of Nigeria 2004 s. 8.

s. 6 of the Foreign Judgments (Reciprocal Enforcement) Act[354] provides for the conditions under which a registered award or judgment may be set aside upon an application of a defendant to include.

1. That the Act has not been complied with; or

2. That the original court had no jurisdiction; or

3. That the Judgment was obtained by fraud; or

4. That the enforcement would be contrary to public policy; or

5. On ground of *res judicata;* or

6. That the rights under the judgment are not vested in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly.

Nwakoby and Aduaka sums up the grounds upon which the Court will refuse to enforce a foreign arbitral award or judgment as follows:

> The superior Court in Nigeria will not enforce that award if at the time of the application for its enforcement there exists an appeal in any Court on the award for the purpose of setting it aside or if it has wholly been satisfied or it could not be enforced by execution in the country of the original Court. The enforcement of foreign award under this Act shall not be made if the Court is satisfied that the arbitral tribunal had no jurisdiction in the circumstances of the case to deal with the matter, if the successful party or the arbitral tribunal failed to serve notice of its

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354 Cap F35 Laws of the Federation of Nigeria 2004.

> proceedings to the defendant, if the award was obtained by fraud, and if the enforcement of the award will be contrary to the public policy of Nigeria. [355]

4.6.3 Enforcement of Foreign Arbitral Award under International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act

The International Centre for Settlement of Investment Disputes Convention is one of the international arbitration institutions founded in 1966 pursuant to ICSID Convention. Nigeria ratified the ICSID Convention in 1965. This prompted the Nigerian legislature to enact the International Centre for Settlement of Investment Award (Enforcement of Awards) Act[356] which provides that:

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

One of the aims of ICSID Convention according to Ibrahim Shihata, who was a onetime Vice President and General Counsel of the World Bank and Secretary-General of the ICSID is

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[355] G Nwakoby and C Aduaka, Recognition and Enforcement of International Arbitral Awards in Nigeria: The Issue of Time Limitation (2015) *Journal of Law, Policy and Globalization Vol 37*, p.118.

[356] International Centre For Settlement of Investment Disputes Enforcement of Awards Act s. 1 Cap I 20 Laws of the Federation of Nigeria 2004.

promotion of a climate of mutual confidence between investor State and increase the flow of resources to developing countries under reasonable conditions.[357]

The Convention has ensured protection of foreign investors under the International Laws, and has provided a level plain ground for foreign investors. ICSID Convention has been described in the following words:

> The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute settlement institution. Its availability to investors and states held to promote international investment by providing confidence in the dispute resolution process. It is also available for state-state disputes under investment treaties and free trade agreement, and as an administrative registry.
>
> ICSID provides for settlement of disputes by Conciliation, arbitration or fact finding. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, maintaining a careful balance between the interest of investors and host states.
>
> ICSID also promotes greater awareness of international law on foreign investment and the ICSID process.[358]

Article 54(1) of the ICSID Convention provides that:

> Each contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligation imposed by the award within its territories as if it were a final

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357 I. Shihata, Towards a Greater De-politicization of Investment Disputes: The Roles of ICSID and MIGA, (ICSID REV-F.L.L.J 1,4 1986).

358 https://ICSID.worldbank.ng. accessed on 14th April 2018.

> judgment of a Court in that State. A contracting State with a federal Constitution may enforce such award, as if it were a final judgment of a Court of a constituent State.

Article 54 (2) provides for the procedure to adopt by a party who is seeking recognition or enforcement against a contracting State to satisfy its contractual obligations.

The enforcement of foreign arbitral award under International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act is the fastest procedure for the enforcement of foreign arbitral award in Nigeria. This is particularly so because the application to enforce foreign arbitral award under this Act is filed directly at the Supreme Court.[359]The Supreme Court is the highest Court in Nigeria.[360]

However, where parties to a dispute seek to apply the rules of ICSID Convention to their disputes, there must be in place a written agreement to that effect. Therefore, where parties submit their disputes to ICSID the national Courts will be precluded from entertaining such disputes.[361]

ICSID arbitral award is enforceable in Nigeria as if the award is a final judgment of the Supreme Court of Nigeria. The application for enforcement of such an award must contain a copy of the award sought to be enforced duly certified by the Secretary General of the Centre and filed directly at the Supreme Court.

The Convention is not applicable where the dispute is between individuals of the same country. For the Convention to be applicable to the dispute one of the parties must be a state and

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[359] International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, s.1 Cap I 20 Laws of the Federation of Nigeria 2004.

[360] The Constitution of the Federal Republic of Nigeria (1999) (as amended), s.230.

[361] Article 26 of ICSID.

a national of another country. However the Convention is not applicable to the settlement of all dispute, the dispute to which the Convention is to apply has to be an investment dispute.

The major concern about enforcement of foreign arbitral award under ICSID is that most times the procedure does not allow for outright enforcement. To Delaume,[362]the holder of ICSID award has just executory title. Also if the award is enforceable against an investor or its assets, it may not be the case where enforcement is sought where a State is a party to the dispute.

In as much as the procedure for enforcement of foreign arbitral award under International Centre for Settlement of Investment Dispute (Enforcement of Awards) Act is quicker, the procedure is rarely utilized in Nigeria. Perhaps this is so by virtue of the provisions of Article 54 (1) of ICSID Convention which mandates that the award must be for monetary payments and the judgment must first have become enforceable as a judgment of Court according to the existing laws of the country where the award was made.

4.7 Partial Enforcement of Arbitral Award under the New York Convention

In recent times there has been an argument as to whether an award under New York Convention that is being challenged can still be enforced despite the challenge. This was the position in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation*. [363] The facts of this case are as follows:

IPCO a Nigerian company which is a subsidiary of a Hong Kong company that specialized in the construction of oil and gas facilities. In March 1994 IPCO entered into a contract with Nigeria National Petroleum Corp ration (NNPC), which is a corporation of the

[362] G. Delaume, 'ICSID Arbitration, In Contemporary Problems in International Arbitration' (1987) *J. Lew, ed*. p.23-24.
[363] (2009) Lloyd's Rep p. 89.

Federal Government of Nigeria to design and construct a petroleum export terminal in Port Harcourt. IPCO alleged that the contract was delayed by 22months as a result of variation by NNPC and IPCO sought compensation from NNPC.

However, the contract between IPCO and NNPC has an arbitration clause, and all disputes in the contract are to be referred to arbitration with Lagos as the place of the arbitration and Nigerian law to govern the contract. When a dispute arose IPCO referred the dispute to arbitration. After the arbitral proceedings the arbitral tribunal rendered its award and the sum of USD 152,000,000 was awarded to IPCO in October 2004. Thereafter IPCO sought to enforce the award in an English Court and NNPC on the other hand filed an application before a Nigerian Court to set aside the arbitral award while an application is before the English Court at the instance of IPCO to enforce the same arbitral award. NNPC also filed another application before the same English court where an application for enforcement of the arbitral award is pending to adjourn proceedings for the enforcement of the award since another application is pending in a Nigerian Court to set aside the award.

The proceedings before the Nigerian Court suffered series of adjournments and dragged unnecessarily. Thereafter the English Court held that by virtue of Articles III, V and VI of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Act 1996, held that an award can be enforced in part despite an application to set same aside.

However, NNPC dissatisfied with the decision of the English Court filed an appeal before the Court of Appeal and that the decision allowing partial enforcement of the award be set aside on the grounds that:

a. Both the New York Convention and the UK Arbitration Act 1996 did not make provisions for the partial enforcement of an arbitral award.

b. The enforcing Court cannot pick and choose the part of the arbitral award to enforce.

Upon canvassing this argument before the English Court of Appeal, the Court dismissed the application of NNPC. The Court of Appeal's decision can be summarized as follows:

1. The purpose of the New York Convention is to ensure the effective and speedy enforcement of international arbitral award, which is not inconsistent with the partial enforcement of awards in certain circumstances.

2. The fact that a challenge has been made to the validity of an award in the home Court does not prevent a Court in a country that New York Convention is operational from enforcing the award. Anything to the contrary "would exchange unscrupulous parties to mount minor challenges to awards so as to frustrate their speedy and effective enforcement".

3. Part of an award maybe enforced provided it is from the face of the award, and judgment can be given in the same terms as those in the award.

The English Court of Appeal's decision in *IPCO v Nigerian National Petroleum Corporation* has provided a guide to parties seeking to set aside an international award to do so timeously. It further suggests that the fact that an application has been filed in one jurisdiction to set aside an international arbitral award, it does not necessarily prevent the award from being enforced whether in part or in whole particularly in a country that has adopted the New York Convention.

4.8 Objection to Recognition and Enforcement of Arbitral Award in Nigeria

Arbitration and Conciliation Act s. 32 of the Act provides that: "Any of the parties to an arbitration agreement may request the Court to refuse recognition of the award". This provision suggests that where any party in an arbitral proceedings intends to challenge the arbitral award, such a party may apply to the Court to set aside the award. The application may be brought either *ex-parte* or on notice depending on the rules of the Court applicable.

Section 32 of the Act earlier discussed has left a very great *lacuna* because the section did not set out the grounds upon which the Court will refuse to recognize and enforce an arbitral award obtained in Nigeria. Unlike s. 52 of the Act which has a very robust provision for the enforcement of international or foreign arbitral award.

Where a party seeks to object to the recognition and enforcement of an arbitral award he may do so at any time after the award is rendered.

S. 52 of the Act provides for the grounds upon which the Court can refuse to recognize or enforce international arbitral award, the section provides that:

1. Any of the parties to an arbitration agreement may, request the Court to refuse recognition or enforcement of the award.

2. 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 any award-

(a) If the party against whom it is invoked furnishes the Court proof-

i. That a party to the agreement was under some incapacity or

ii. That 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 law of the country where the award was made; or

iii. That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case or

iv. That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or

v. That the award contains decisions on matters which are beyond the scope of submission to arbitration so however that if the decision on matters submitted to arbitration can be separated from these not submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

vi. That the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or

vii. Where there is no agreement within the parties under sub-paragraph (VI) of this paragraph that the composition of the arbitral tribunal, or the arbitral procedure was not in accordance with the law of the country where the arbitration took place; or

viii. 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 or

(b) If the court finds-

i. That the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or

ii. That the recognition or enforcement of the award is against public policy of Nigeria.

The Court in interpreting s. 52 of the Act held that:

> Section 52 of the Arbitration and Conciliation Act 2004 provides for the grounds for Courts refusing recognition and enforcement or arbitral awards in subsection 2 II (a) of section 52 it provides "….any of the parties to an arbitration agreement may request the Court to refuse recognition or enforcement of the award (a) if the party against whom it is invoked furnishes the Court proof (ii) that 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 law of the country where the award was made.[364]

Section 32 of the Act did not stipulate the grounds upon which the Court can refuse to recognize or enforce domestic arbitral award in Nigeria. The grounds to refuse the recognition and enforcement of an arbitral award are set out in s. 52 of the Act. S. 52 can only serve as a guide in an application before the Court to refuse recognition and enforcement of a domestic arbitral award in Nigeria.

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[364] *Sundersons Limited & Anor v Crusier Shipping PTE Limited and Anor* (2014) LPELR 22561 (CA).

CHAPTER FIVE

LIMITATION OF ACTION GENERALLY

To commence action there is usually a time frame allowed by the law to commence such actions. After the expiration of the time frame such action becomes stalled and not maintainable. In other words such action becomes statute barred. This process has been in place from time immemorial.

5.1 Background of Limitation of Action

Moses as part of the commandments he gave the Israelites stated that:

> And if a man sell a dwelling house in a walled city, then he may redeem it within a whole year after it is sold; within a full year he may redeem it. And if it be not redeemed within the space of the full year, then the house that is in the walled city shall be established forever to him that brought it throughout his generation: it shall not go out in the jubilee. [365]

Going through this biblical passage one year is the time limit to recover a house sold out within a walled city.

Limitation of action was formally put in place in England in 1963 with the promulgation of the Limitation Act that year. Thereafter the Limitation of Actions and Costs Act 1842 was passed. Also the Limitation of Actions Act and Real Property Limitation Act were passed in 1843 and 1874 respectively. The Limitation Act 1939 however, repealed all the limitation laws earlier promulgated. However, the rationale behind the promulgation of Limitation Act 1939 was summed up by Apeh as follows:

[365] Leviticus 25:29-30 (King James Version)

All these enactments was superseded and repealed by Limitation Act 1939 was to substitute for the various limitation periods which formerly governed different classes of action in a uniform period of six years from the accrual of the cause of action, except where some special consideration seemed to call for a shorter or longer period. Further rationalization of the law of limitation were attempted by the Law Reform ((Limitation of Actions) Act 1954, Limitation (Enemies and War Prisoners) Act 1945, Limitation Act 1963, Law Reform (Miscellaneous Provisions) Act 1971, Limitation Act 1977 and Limitation Act 1980. [366]

5.2 Rationale Behind Statute of Limitation

The rationale behind statute of limitation was well captured by the Supreme Court in *Aremo II v Adekanye*[367] wherein the Court held that:

> Where a statute of limitation prescribes period within an action must be commenced, legal proceedings cannot be properly of validly beinstituted after the expiration of the prescribed period. Where an action is statute-barred, a plaintiff who might otherwise have had a cause of action loses his right to enforce it by judicial process because the period of the time laid down by the limitation of instituting such an action has elapsed. See the cases of *Eboigbe v N.N.P.C* (1994)5 NWLR (pt. 347) 649; *Odubeko v. Fowler* (1993) 7 NULR (pt. 308) p. 637; *Sauda v. Kukawa Local Government* (1991) 2 NWLR (pt.174) p. 379, *Ekeogu v. Aliri* (1991) 3 NWLR (pt. 179) p. 258. The rationale or justification supporting the existence of statute of limitation includes the following:-
>
> (1) That long dormant claims have more of cruelty than justice in them. R.B Policies at *Lloyd's v Butler* (1950) 1 KB p. 76 at pp. 81-82.

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[366] E. Apeh *Nigerian Law of Limitation of Actions* (Benin City: Eleigwu Apeh Law Publications 2001) p. 2.

[367] (2004) 13 NWLR (pt. 891) p.532 at pp.592-593

(2) That a defendant might have lost the evidence to disprove a stale claim. *Jones v Bellgrove Properties Ltd* (1949) 2 KB p.700 at p.704 and,

(3) That persons with good cause of action should pursue them with reasonable diligence. *Board of Trade v Cayzer Irvine & Co* (1927) AC p.610 at p.628. The period of limitation begins to run from the date of which the cause of action accrued. To determine whether an action is statute- barred, all that is required is for one to examine the writ of summons and statement of claim alleging when the wrong was committed which gave the plaintiff the cause of action and comparing that date with the date on which the writ of summons was filed. If the time on the writ is beyond the period allowed by the limitation law, then the action is statute- barred: see the case of *Egbe v. Adefarasin* (1987) 1 NWLR (pt 47) p. 1 at p. 20 at p.21.

The decision of the court in *P.N Uddoh Trading Co. Ltd v Abere*[368] further illustrates the rationale behind limitation laws where the Court held that:

> One of the principles of the statute of limitation is that a person who sleeps on his right should not be assisted by the Courts in an action for the recovery of his own property. Equity aids the vigilant and not the indolent.

[368] (1996) 8 NWLR (pt. 467) p.467 at p.469.

Also in *Nigerian Railway Corporation v Nwanze*[369] the rationale behind limitation was illustrated further to mean:

> A time frame within which an aggrieved plaintiff can commence his action. When claims are stale, the evidence is also stale. Sometimes causes of action are overtaken by prevailing circumstances. In the case of a big corporation like the Railways, officers who are conversant with the fact might have been transferred or retired and sometimes memories of witness would have failed. Limitation Law is to guard against stale claims which become an inconvenience to the defendant. Outside the limitation period the plaintiff still had a cause of action that unfortunately cannot be enforced any longer.

From the foregoing, it can be said that limitation law was put in place for public policy and to bring litigation to an end.[370] It will also make the litigant to be vigilant and be at alert. The Court's decision in *Union Bank of Nigeria Ltd v Oki* is very apt in this regard wherein the Court held that:

> The philosophy behind the application of statute of limitation is that barring of actions by effusion of time will encourage and secure reasonable diligence in litigation and to protect defendants from stale claim when the evidence which might have answered them has perished. I find support for this statement in the diction of Lord Pearce in *Cart ledge & Ors v Jopling & Sons Ltd* (1963) 1 A.E.R p.341 or (1963) AC p.758 at p.782. And perhaps the rationale for that piece of legislation is to give peace to a defendant after the lapse of a given period. See *Biss v Lambeth Health Authority* (1978) 1 WLR p.382, Eternal vigilance is the price of freedom.[371]

[369] (2007) LPELR p. 4616 (CA).
[370] *Yakubu v Nitel Ltd* (2006) 9 NWLR (pt. 985) p.367.
[371] (1999) 8 NWLR (pt. 614) 244

5.3 Limitation of Action under Common Law

In discussing the concept of limitation of action under the common law, the influence of the Roman law and culture cannot be over emphasised. This is more so that during the Roman conquest, the Romans introduced the Roman law and culture to England. The erudite Oputa JSC (of blessed memory) captured this as follows:

> And I dare say that there is nothing wrong with that. Law and culture cannot be over emphasised. This is more so that during Law like culture (and law is part of people's culture) cannot be static. It grows, and it continues to grow. It grows by borrowing as well as by lending. Our colonial contact with England exposed us to the English common law and statutes of general application. There is nothing wrong, nothing to be ashamed of, or apologetic about our assimilation of the positive aspect of the received English law into our *Corpus Juris*. After all English Law itself was highly coloured and radically influenced by Roman law concept as England was once a Roman Colony, and the American restatement bears a visible scars and easily discernable makes of its English Common law Origin.[372]

It is apparent therefore that limitation of action is derived from the English Customs.

5.4 Statute of Limitation

The statute of limitation is laws put in place to set a time limit to initiation of legal proceedings in respect of a particular claim.

In *Texaco Panama Incorporation v S.P.D.C (Nig) Ltd*,[373] the Supreme Court defined Statute of Limitation as follows:

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[372] *Folarin v Durojaiye* (1988) 19 NSCC (pt1) p.255 at p.264.
[373] (2002) FWLR (pt. 96) p.579.

> A statute of limitation is one which provides that no Court shall entertain proceedings for the enforcement of certain right if such proceedings were set on foot after the lapse of a definite period of time, reckoned as a rule from the date of the violation of the right. A cause of action is statute barred if it is brought beyond the period laid down by the statute within which such action must be filed in Court.

The essence of limitation law is that the legal right to enforce an action is not a perpetual right but a right generally limited by statute, where a statute of limitation prescribes a period within which an action should be brought, legal proceedings cannot be properly or validly instituted at the expiration of the prescribed period. Therefore, a cause of action will be statute barred if legal proceedings did not commence in respect of the claim within the period stipulated in the limitation law.

Statute of Limitation was defined in *NNPC v Emelike*[374] to mean:

> A statute prescribing limitation to the right of action on certain described causes of action or Criminal Prosecutions; that is declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued.

This definition to our mind is not comprehensive enough as it does not represent the correct position of the law. A statute of limitation is not applicable to criminal offences as a crime can be prosecuted at any time after the commission of such crime. Also, a look at most of the limitation laws, it will be apparent that there is no provision for a limitation period for criminal prosecutions.

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[374] (2018) LPELR 44180 (CA) pp.31-32.

This position was buttressed by the Court of Appeal in its decision in *FIRS v Michael*[375] the Court relying on the decisions of the Supreme Court of Nigerian in *Yabugbe v Police*[376] and *Nyame v FRN*[377] held that:

> I do not agree with the appellant, without reservations, that time does not run against criminal prosecution of a criminal offender in that crime is an offence against the State. That remains the position of the law.

The definition of statute of limitation in the 9th Edition of the Black's Law Dictionary seems more apparent. Statute of Limitation was defined as follows:

> A law that bars claims after a specified period. A statute establishing a time limit for suing in a civil case, based on the date when the claim accrued.[378]

Where the law prescribes a period within which to bring an action, any legal proceedings brought after such stipulated time would not be countenanced by the Court.[379]

This concept is founded on the legal principle of *ubi jus ubi remedium*. That is where there is a legal right there is a remedy. The Supreme Court in *Adejumo & Ors v Olawaiye* held that:

> Once a legal right is established, there must be a remedy. A party claiming a legal right must act quickly to avoid a situation where the other party would have acted in the belief that no one was offended or hurt by his act. Where a party who claims a right does not act quickly, it would be difficult or inequitable to request the adverse party to revert to his previous position. It is for this reason that right of action is limited by statute, a statute of limitation. Furthermore,

[375] (2013) LPELR-20485 (CA) p.35.
[376] (1992) 4 SCNJ p.116.
[377] (2007) NWLR (pt. 1193) p.344.

[379] *INEC v Enasito* (2017) All FWLR (pt. 903) p.958

limitation periods protect a defendant from the injustice of having to face a stale claim. For example if a claim is brought a long time after the event in question there is a strong likelihood that evidence which was available earlier may have been lost, and the memories of witnesses may have faded. A party though would not be allowed to take advantage of the limitation law where there is a clear evidence of disability, mistake, fraud and in certain cases involving personal injury or death. Outside the limitation period the plaintiff still has a cause of action but sadly one that can no longer be enforced. This was my explanation of the limitation law in *Sanni v Okene* Government Traditional Council (2005) 14 NWLR (pt. 944) p. 60 and *Ejure v Idris* (2006) 4 NWLR (pt. 971) p.538[380]

5.5 Introduction of Limitation Law in Nigeria

Nigeria was colonised by Britain, and by virtue of this colonial experience English laws and statutes were introduced to Nigeria and limitation law was part of the laws that were introduced to Nigeria. The English Common Law, doctrine of equity and statutes of general application were introduced. Statute of general application were the laws passed by the British parliament to be generally applied to its colonies at a particular date and subject matter before 1st January 1900.[381]

Apeh is of the view that:

> By virtue of Interpretation Act, the Common Law of England and the doctrines of equity, together with the statute of general application that were in force in England on the 1st day of January 1900, shall be in force in Lagos for as they relate to any matter within the exclusive legislature competence of the Federation.[382]

[380] (2014) LPELR-22997 (SC) pp. 28-29
[381] E. Malemi, *The Nigerian Legal System Test and Cases* (Lagos: Princeton Publishing Co. 2016) p.5. Lawal v Younan (1960) ALLNLR p.257 SC.
[382] E. Apeh, *Nigerian Law of Limitation of Actions* (Benin City: Elaigwu Apeh Law Publications 2001) p.6.

This position has since become outdated first by virtue of the fact that Lagos is no longer the Federal Capital Territory but now a State in Nigeria and the provisions of section 32(1) of the Interpretation Act,[383] which provides that:

> Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the Common law or England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January 1900, shall in so far as they relate to any matter within the legislative competence of the Federal legislature be in force in Nigeria.

It is important to note that after the Littleton Constitution Nigeria became a Federation with the Federal, and Regions empowered to make laws. This gave the regions the impetus to make laws that are similar to the English laws to accommodate the indigenous need of those regions at that time.

Subsequently, the Northern and Eastern Regions made the English Statutes of General Application applicable in their regions.[384] For instance the Section 34 of the High Court Laws of Northern Nigeria provides that:

> 34(1) The High Court shall observe and enforce the observation of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force and nothing in this law shall deprive any person of the benefit of any such native law or custom.
>
> (2) Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are native and also in causes and matters between

[383] Cap I 23 Laws of the Federation of Nigeria 2004.
[384] Cap 49. Laws of Northern Nigeria 1963 and cap Cal, Laws of Eastern Nigeria 1963

natives and non- natives where it appears to the Court that substantial injustice would be due to either party by a strict adherence to the rules of English Law.

(3) No party shall be entitled to claim the benefit of any native law and custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party that his obligations in connection with such transactions should be regulated exclusively by English Law and that such transactions are transactions unknown to native law and custom.

(4) In cases where no express rule is applicable to any matter in controversy, the Court shall be governed by the principles of justices, equity and good conscience.

The provision appears more comprehensive than other similar provisions in the High Court Laws of other Regions. For instance the law made adequate provisions for the application of native laws and customs. Also the law provides for a general provision that may fill any *lacuna* which may be left in the English laws and statute by virtue of subsection 4 of the section. The various States have however, made provisions for limitation of action.

However, in the Western Region of Nigeria the Statutes of General Application were not applicable.[385]

In Lagos for instance the High Court Law made no provision for Statutes of General Application, but provided for Law and Equity. Section 11 of the High Court Law of Lagos State[386] Provides that:

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[385] S. 3 and 4 of Law of England (Applicable) Law Cap 60. Laws of Western Nigeria 1959.
[386] Cap 115 Laws of Lagos State 2015.

> Subject to the express provisions of any enactment, in every civil cause or matter commenced in the High Court, law and equity shall be administered by the Court concurrently and in the same manner as they are administered by the High Court of Justice of England.

Section 71 of the Limitation Law of Lagos State[387] clearly precludes the applicability of statutes of general application in respect of limitation of action in Lagos State. The section provides that:

> Any English Statute of General Application relating to the limitation of actions which were in force in Nigeria immediately before the commencement of this law shall cease to apply.

Statutes of General Application is very much applicable in Nigeria, however determining the applicable law most times can be very confusing. The Supreme Court of Nigeria per Tobi (JSC) (of blessed memory) provided a succour in *Chigbu v Tonimas Nig. Ltd*,[388] where the Court held that:

> Where a local statute is available and applies to a particular local situation, Courts of law have no jurisdiction to go all the way to England to search for an English Statute. This is because by the local statute, the law makers intend it to apply the locality and not any English Statute which is foreign and in applicable. Much as I appreciate the colonial tie between England and Nigeria, it will seriously hamper and compromise our sovereignty if we continue to go on borrowing spree, if I may so unguardly call it, to England for the laws of that country.

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[387] Cap L84 Laws of Lagos State 2015.

[388] (2006) All FWLR (pt. 320) p.984 at p. 1005.

5.6 The Challenge Posed By Limitation Law

In as much as limitation law is to create a time frame to institute action in respect of a claim most of the limitation period allowed is usually inadequate. For instance the limitation period provided for bringing an action against a public officer is three months from the date the cause of action arose.

Section 2 of Public Officers Protections Act[389] provides:

> Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, Duty or Authority, the following provisions shall have effect.
>
> (a) Limitation of Time- the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of or in case of a continuance of damage or injury, within three months next after the ceasing thereof.

The Supreme Court in giving credence to this provision held in *Ibrahim v Judicial Service Committee, Kaduna State & Anor*[390] that:

> The general principle of law is that where the Statute provide for the institution of action within a prescribed period, proceedings shall not be brought after the time prescribed by such Statute. Any action that is instituted after the period stipulated by the Statute is totally barred as the right of the plaintiff or the injured person to commence the action would have been extinguished by such law.

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[389] Cap P. 41 Laws of the Federation of Nigeria 2004.
[390] (1998) LPELR- 1408 (SC) p. 19.

It is our view that to allow the time limit of three months to commence an action against a public officer will be most oppressive to the would be claimant. More so three month is not adequate to decide whether to pursue a claim or not. The three months limitation provided also did not made room for a possibility of exploring alternative dispute resolution mechanism in case of a claim against a public officer. In *Nwake v H.O.S Ebonyi State*[391] the court in accessing the short comings of the provisions of section 2 Public Officers Protections Act[392] held:

> I am oblige to comment on the unfortunate outcome of this case. There is no doubt that the appellant may have indeed suffered some wrong in the hands of the respondents. As could be gleaned from a very close study of the record of appeal, it is quite clear that the Public Officer Protection Law, the controversy in this appeal arose from an administrative tangle of the appellant with the respondents in relation to her retirement benefits which could have been resolved without recourse to the law Courts. Despite the outcome of this appeal, parties are enjoined if they so desire to sue for peace and endeavour to settle their administrative differences amicably. It appears to me that Public Officers Protection Act is providing an undeserved shield for public officers against ordinary citizen who as it were, may be ignorant of the Provisions of the Act. It is my humble view that laws should operate to enhance the lives of citizens and not to deprive the citizenry the opportunity to ventilate his grievances especially when there is an infraction of their entitlements and constitutional rights.

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[391] (2008) 3 NWLR (pt. 1073) p.156 at p.177.

[392] Cap P41 Laws of the Federation of Nigeria 2004.

5.7 Suspension of Limitation Time during the Pendency of an Action

Usually where matters are struck out they can be relisted upon bringing a proper application to that effect.[393] . The question to then ask is,, whether a matter struck out can be caught by statute of limitation?

In *Sifax (Nig) Ltd v Migfo (Nig) Ltd*[394] it was held that:

> Where an aggrieved person commences an action within the period prescribed by statute and such action is subsequently struck out for one reason or the other without being heard on the merit or subjected to an outright dismissal, such action is still open to be recommenced at the instance of the Claimant and the limitation period shall not count during the pendency of the earlier suit. In other words, computation of time during the pendency of an action shall remain frozen from filing of the action until it is determined or abates.

Judicial authorities are unanimous on the fact that the limitation period is suspended when a matter is pending before the Court. It is most logical in our view to state that when a matter is pending the limitation period is suspended. The implication of the pendency of an action on limitation period was well illustrated in the case of *Renner v Thensu & Ors*,[395] where the West African Court of Appeal held:

> Pending does not mean that it has not been tried. It may have been years ago. In fact, in the days of the old Court of Chancery, we were familiar with cases which had tried fifty or even one hundred years before and which were still pending. Sometimes no doubt, they require a process which we call reviving but which the Scotch call waking up; but nevertheless they were pending suits.

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[393]*Benbok Ltd v First Atlantic Bank Plc* (2007) LPELR- 9003 (CA) p.10.

[394] (2015) All FWLR (pt. 803) p.1857 at p. 1901.

[395] (1930) 1 WACA p.77 at p. 78

The issue of applicability of the limitation laws to a pending matter in Court falls within the area of paucity of authorities in Nigeria. The Court in *Sifax (Nig) Ltd v Migfo (Nig) Ltd*[396] held that:

> There is a passage in the book titled 'Limitation periods' (8th Edition) paragraph 2001 in pages 29-30 written by Professor Andrew McGee, (Professor of Law), which was cited by the respondents, where it is stated inter alia that:
>
> 'Time ceases to run when the plaintiff commences legal proceedings in respect of the cause of action in question'.

The decision of Court cited above is more apt on the issue and in our humble view, where and action that has been struck out is revived, it suggest that the action is continuing.

It suggests further that within the period a case is struck out and relisted or revived, the stoppage of the running of the limitation period during the pendency of the struck out matter would continue in favour of the Claimant.

Where an action has been discontinued or struck out by the Court, the Claimant cannot bring subsequent action until the terms imposed on him by the judge in the earlier suit struck out has been fully compiled with.[397] It is important to note that where an action has been declared incompetent by the Court for reason of want of jurisdiction, such action cannot be revived or relisted.

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[396] *Op cit.*

[397] Order 25 Rule 2 (2) High Court of Lagos State (Civil Procedure) Rules 2019.

The decisions above has given credence to section 35 (5) of the Arbitration Law of Lagos State,[398] which provides that: In computing time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded." That is, once the arbitral proceedings is commenced the limitation period should cease to run.

Applying the provisions of section 35 (5) of the Arbitration Law of Lagos State and the decision of Court in *Sifax (Nig) Ltd v Migfo (Nig) Ltd* it suggests that the Supreme Court decision in *City Engineering Nigeria Limited v Federal Housing Authority*[399] may have been different. This is particularly so because the cause of action arose in 1980 and the suit was instituted same year. The limitation period would have been suspended within the time the action was instituted and the time the decision was reached in 1985. After 1985 the limitation period the action can be reactivated. Then application to enforce the arbitral award would have been within the six years limitation period allowed.

5.8 How to Determine Whether an Action is filed within the Limitation Period

Where a defendant challenge a suit for being filed outside the statutory prescribed period, such challenge is a challenge on the jurisdiction of the Court, which can be raised at any time even for the first time on appeal.[400]

When determining whether an action is statute barred or not it is the Writ of Summons and Statement of Claim that is examined. In *Sobowale & Ors v Gov. of Ogun State & Ors*[401] it was held that:

[398] Ch. A11 Law of Lagos State 2015.
[399] (1997) LPELR p.868 (SC).
[400] *Ugwu v Reagan Remedies Nig Limited* (2018) LPELR- 46255 (CA)

In the case of *Egbe v Adefarasin* (No. 2) (Supra), the Supreme Court held: "the period of limitation in any limitation statute is determined by looking at the writ of summons and the statement of claim alleging when the wrong was committed which gave rise of the cause of action and by comparing that date with the date on which the writ of summon was filed. If the time on the writ of summon is beyond the period allowed by the limitation law, the action is statute barred." From the above, it seems it is only the writ of summons and the statement of claim that can be looked at to determine when the cause of action accrued….. If the date the cause of action accrued is not reflected in the writ and statement of claim but can be deduced from the affidavits filed by the parties, it is quite in order for the Court to act on the date deduced from the affidavit. [402]

[401] *Ado v The State* (2017) All FWLR (pt. 897) 1938 at 1952
[402] (2018) LPELR- 43735 (CA) p. 21-23

CHAPTER SIX

LIMITATION PERIOD FOR ENFORCEMENT OF ARBITRAL AWARD

There exist limitation period for different claims or action. For instance actions on simple contracts, recovery of debts, areas of interest, tort, negligence etc, has to be instituted within six (6) years the claim arose. Nigeria is a federation with federating units.[403] The legislative powers of the Federation is vested in the National Assembly, comprising of the Sanate and the House of Representative,[404] to the exclusion of the State Houses of Assembly to legislate on the item listed in the Exclusive Legislative list contained in parts of the Second Schedule to the Constitution.[405] Furthermore the National Assembly also has the power to legislate in respect of the items listed in the concurrent legislative list.[406]

The Supreme Court in *AG Federation v AG Lagos State*,[407] in interpreting what exclusive and concurrent legislative list means held that:

> The Constitution itself has given the interpretation of the terms "Exclusive Legislative List" and "Concurrent Legislative List". Whereas the former refers to the "List" in Part 1 of the Second Schedule to the Constitution, the latter refers to the "List" of matters set out in the First Column Part II of the Second Schedule to the Constitution, the latter refers to the "List" of matters set out in the First Column in the Part II of the Second Schedule to the Constitution with respect to which National Assembly and the House of Assembly may make laws to the extent prescribed, respectively, opposite thereto in the second column thereof. The

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[403] S. 2 Constitution of the Federation Republic of Nigeria 1999 (as amended).
[404] S. 4 (1) Constitution of the Federation Republic of Nigeria 1999 (as amended).
[405] Section 4 (3) Constitution of the Federation Republic of Nigeria 1999 (as amended).
[406] S4 (4) Constitution of the Federation Republic of Nigeria 1999 (as amended).
[407] (2013) LPELR- 20974 (SC) pp. 121- 122.

> exclusivity referred to in the Exclusive Legislature List, although not comprehensively defined, may perhaps, refers to a point where the enactment in question is capable of excluding all others, shutting out other considerations not shared by or divided between others. The enactment is sole and single in its form and application as appropriated by its exclusive right. See *Abraham Onyeniran & ors v. James Egbetola & Anor* (1997) 5 NWLR (pt. 504) p.122 at p.131.
>
> Therefore, apart from the National Assembly, no other legislature whether of State or Local Government (if any) can legally and effectively legislate on any matter listed under the Exclusive Legislative List. As for the Concurrent Legislative List, it is clear that both the National and State Assemblies can competently legislate on a matter concurrently having at the back of the legislative mind, the operation of the doctrine of covering the field.

The legislative powers of the States of the federation is vested in the House of Assembly of each state. Section 4 (7) of the Constitution provides that the State House of Assembly shall make laws for order and good governance of the State, matters not in the Exclusive Legislative List.

Under the Constitution of Nigeria limitation of action is contained in the Exclusive Legislative List as well as Concurrent Legislative List contained in Parts I and II of the Second Schedule. Perhaps, this explain for the omission of Limitation Act in the Compilation of the Laws of Federation in 2004. However, by the provisions of s. 4 (7) of the Constitution, Limitation of Action falls within the legislative competence of the State Houses of Assembly.

For the purpose of this work therefore, we shall focus on the Limitation Laws of Anambra State[408] Benue State,[409] Edo State,[410] Lagos State,[411] Rivers State[412] and the Federation Capital Territory.[413]

6.1 Limitation of Action and Enforcement of Arbitral Award

The limitation in bringing an action to enforce an arbitral award in Nigeria and even in more developed jurisdictions like England is not with certainty. The Arbitration and Conciliation Act did not provide for the time limit within which to bring an application to enforce arbitral award in Nigeria. To this end, reference is usually made to s. 7 (1) (b) of the Limitation Act. By this provision it is mandatory to bring an application for enforcement of arbitral award emanating from statutory arbitration or submission which is not under seal to be brought within six years from the date the course of arbitration arose. Where however, the submission is under seal twelve years. Regrettably, the 2004 compilation of the laws of the Federation of Nigeria left the Limitation Act in the compilation. However, States in Nigeria have made legislations on limitation of action and as such recourse is made to the various State limitation laws in determining the time limit for enforcement of arbitral awards in Nigeria. However, it is the statute of limitation applied in each jurisdiction where an arbitral award is sought to be enforced that will determine the time limit allowed. The Foreign Judgments (Reciprocal Enforcement) Act defines the judgment to which the Act applies to include arbitral award.

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[408] Law of Actions Law 1981, applicable in Anambra, Enugu and Ebonyi State of Nigeria.
[409] Benue State of Nigeria Limitation Law 1988.
[410] Cap 64, Laws of Western Region 1959.
[411] Cap L64 Laws of Lagos State of Nigeria 2015.
[412] Rivers State of Nigeria Limitation Law 1988.
[413] Federation Capital Territory Abuja Limitation Act.

Foreign Judgment (Reciprocal Enforcement) Act s. 2(1) provides that:

> Judgment" means a judgment or order given or made by a Court in any civil proceedings and shall include an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a Court in that place, or a judgment or order given or made by a Court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.[414]

6.2 Statutory and Contractual Time Limit for the Commencement of Action for Enforcement of Arbitral Award.

For the purpose of this work, I shall be focusing on the Limitation Laws of Anambra State[415], Benue State[416], Bendel State[417], Lagos State, Federal Capital Territory Abuja and Rivers State.

Going through majority of the Limitation Laws of the various States, limitation of action in arbitration is not different from the limitation laws applicable to the various actions before the High Court of those States[418]. It should also be noted that many of the limitation laws of these States under examination did not state its applicability to enforcement of arbitral award[419].

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414 Cap F35 Laws of the Federation of Nigeria 2004.

415 No 5 1981, Applicable in Anambra, Enugu and Ebonyi States of Nigeria.

416 No 16 1988.

417 Cap 64 Laws of Western Region of Nigeria 1976 which is now applicable in Edo and Delta State of Nigeria.

Limitation Act for Federal Capital Territory Abuja s. 61, Limitation Law of Bendel State s. 26 (1), Law of Actions of Anambra State s. 43 (1), Limitation Law of Lagos State s. 62, Limitation Law of Benue s. 36, Limitation Law of Rivers State 1988 s. 34.

419 Limitation Law of Bendel State s. 4 (1) (c).

However, the Limitation Law of Lagos State specifically provides that:

> This law and any other limitation enactment will apply to arbitration as they apply to actions in the Court.[420]

Limitation Law of Federal Capital Territory Abuja s. 7 (1) (d) provides that:

> (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued-
>
> (d) Actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the Arbitration Act.

On the other hand, the Limitation Law of Bendel State s. 4 (1) (c) provides that:

> (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-
>
> (c) Actions to enforce an award, where the instrument is not by an instrument under seal.

Limitation Law of Benue State s. 18 provides that:

> No action founded on contract, tort, or any other actions not specifically provided for in parts I and II of this edict shall be brought after the expiration of five years from the date on which the cause of action accrued.

[420] Ch. L84 Laws of Lagos State 2015 s. 52.

Limitation Law of Lagos State s. 8 (1) (d) provides that:

> (1) The following actions will not be brought after the expiration of six (6) years from the date on which the cause of action accrued:
>
> (d) Action to enforce an arbitration award where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the Arbitration and Conciliation Act.

Limitation Law of Rivers State s.16 provides that:

> No action founded on contract tort or any other actions not specifically provided for in parts I and II of the edict shall be brought after the expiration of five years from the date on which the cause of action accrued.

An examination of the various laws cited above shows that the limitation period for the States are six years with the exception of Rivers and Benue state. It is instructive to note that the Limitation Laws of Rivers and Benue state did not categorically mention the law as it affects enforcement of arbitral award. The two laws referred to actions founded on contract.

However, since arbitration is a contract on its own, the provisions of the law is applicable to arbitration and enforcement of arbitral award.

Again a vivid look at the provisions of these laws the word shall was used in illustrating the limitation period allowed, with the exception of the Limitation Law of Lagos State. This suggest that the provision is not permissive but mandatory.

The Supreme Court in *Ameachi v Independent National Electoral Commission & Ors*[421] held that:

> If a section of a statute contains the mandatory "shall" and it is so construed by the Court, then the consequences of not complying with the provisions follows automatically.

Again in *ACN v INEC*[422] the Supreme Court held that;

> The word shall in the statute signify command. It is made in mandatory terms, the envisaged act must be complied with.

The Supreme Court in *Salik v Idris*[423] held that:

> The word shall denotes obligation or a command and gives no room for discretion. By its nature, it is mandatory and one cannot wriggle out from same. It imposes a duty. Where a thing shall be done it goes without equivocation that a preemptory mandate is enjoined.

We submit that since the wording in the statute are clear and unambiguous it should be given a literary interpretation. In *Visitor Imo State University & Ors v Okonkwo & Ors* it was held that:

> It has been long settled that provisions of a Constitution or statute must be construed literally giving the words in such Constitution or statute their ordinary grammatical meaning.[424]

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[421] (2008) 5 NWLR (pt 1080) 227.
[422] (2014) All FWLR (pt 716) 460.
[423] (2015) All FWLR (pt 790) 1307.
[424] (2014) LPELR- 22458 (CA).

The English Limitation Act of 1980 as well as many statute of limitation of developed world puts the limitation period for bringing an action to enforce arbitral award at six years[425]. The application of the English Limitation Act is also applicable to arbitration[426].

6.3 Accrual of Cause of Arbitration

In most jurisdiction arbitral award is enforceable by action. However, the cause of action cannot accrue until the arbitral award has been rendered. Resolving the issue surrounding when a cause of arbitration arose is a very serious one and has led to serious controversies especially in Nigeria. It is however important to note that cause of action is not different from cause of arbitration.

In *Pegler v Railway Executive* [427]the House of Lords held that "cause of arbitration" is the same as the "cause of action" and that a fireman who brought his action more than six years after his detriment was statute barred from the date of the alteration, not when his exact losses were later quantified at arbitration.

Since most Arbitration law did not expressly provide for limitation period for enforcing an arbitral award cause of arbitration is however given the same connotation as cause of action. Particularly this classification is important in determining the limitation period applicable to the enforcement of arbitral award.

425 English Limitation Act 1980 s. 7.
426 English Limitation Act 1980 s. 34 (1).
427 (1948) 1 All ER 559: (1948)AC p. 332.

For instance in *Pegler v Railway Executive*[428]where the plaintiff a railway worker was employed by a railway company and the railway company was taken over by the defendant in this case.

However, after the company was taken over by the defendants a reorganization took place and the plaintiff lost his seniority and his promotion was delayed. Usually the plaintiff ought to be promoted in 1933 but he was not promoted until 1936.Earlier the takeover process of his original company was completed in 1924. In the agreement between the two companies issues of employment, compensation and wages are to be referred to arbitration. The plaintiff commenced arbitration in 1942. The Court held that the plaintiff's cause of arbitration accrued in 1924 and therefore the claim is statute barred.

6.4 Running of Time for the Purpose of Enforcement of Arbitral Award

Arbitration and Conciliation Act s. 17[429] provides that;

> 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.

Limitation Act of the Federal Capital Territory s. 60 (1)[430] provides that:

> (1) For the purpose of this Act and any other limitation enactment, an arbitration shall be deemed to have commenced when one party to the submission serves on the other party or parties a

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428 (1946) W.N 132 or (1947) ALLER p.355 CA also the English Court's decision in *Christian Salvation (Properties)Ltd v Central Electricity Generating Board* (1985) 48 P &C.R p.465.

429 Cap A18 Laws of the Federation of Nigeria 2004.

430 Cap 522 Laws of the Federal Capital Territory 2006,also English Arbitration Act 1996 s. 14, German Code of Civil Procedure s. 1044.

> written notice requiring him or them to appoint or concur in appointing an arbitrator or where the submission provides that the reference be to a person named or designated therein requiring him or them to submit the dispute to the person so named or designated.

The commencement date in arbitration is the most important and fundamental in arbitration particularly because it is of importance, in determining the limitation period.

The Limitation Act 1966[431]provides a limitation period of six years for enforcing an arbitral award from the date the cause of arbitration accrued. Limitation Act s. 62 provides that:

> Notwithstanding any term in a submission the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purpose of the Act and any other limitation enactment, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission.

Ezejiofor in interpreting this section express the view that:

> It follows, therefore that when an arbitration clause is in the Scott v Avery form (stipulating that an award is a condition precedent to bringing of an action in Court) the cause of action is deemed to have accrued at the time it would have accrued but for the Scott v Avery clause.[432]

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431 No 88 of 1966.

432 G. Ezejiofor, *The Law of Arbitration in Nigeria* (Ikeja: Longman Nigeria Plc, 1997)p. 118.

Regrettably, the Limitation Act has been left out in the compilation of the Laws of the Federation 2004 although the Act has not been specifically repealed by the National Assembly. This seems to have left limitation of action for the States to legislate on.

It is however imperative to note that Scott v Avery clause is not applicable in Lagos State.[433] Also the Arbitration Law of Lagos State[434] has specifically provided for the computation of time for the purpose of enforcement of arbitral award under the law. The law provides that in computing time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded. This then suggests that time will start running for the purpose of enforcement of arbitral award under this law is from the date the arbitral award was rendered. This is highly commendable as the provisions have remove the uncertainty associated with the time limit allowed for the enforcement of arbitral award. We submit that it is most plausible that time should start running from the date of the award. Particularly for the fact that the Court plays a vital role in enforcing arbitral award.

Our view has found expression in the position of Halsbury's Laws of England where it was stated that:

> The effect of award is such as the agreement of reference expressly or by implication prescribes. Where no contrary intention is expressed and where such a provision is applicable, every arbitration agreement is deemed to contain a provision that the award is final and binding on the parties and any person claiming under them respectively the publication of the award thus

[433] *Computer Commercial & Ind. SPR Limited v Ogun State Water Corp & Anor* (2002) 9 NWLR (pt 773) p. 629.

[434] Cap, A11 Laws of Lagos State 2015.

> extinguished any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement.[435]

The English Court in *Turner v Midland Rly Co*[436] held that:

> When an action is brought upon an award, the six- year period of time, limitation runs from the date of the award and not from the moment when the claim arose, for the award itself gives rise to a new cause of action.

It should be noted that limitation period for commencing an arbitral proceedings is different from the period of time allowed to enforce an arbitral award. However, some authors are of the view that limitation period in arbitration can be postponed. This is particularly so where the High Court set aside an award upon an application. The Court may direct that the period between the commencement of the arbitration and the date of its order is to be excluded in computing any statutory period of limitation in arbitration.

It is therefore our opinion that an arbitral proceedings cannot be commenced in a dispute that is already statute barred. The English court in Pegler v Great Western Railway Co[437] held that:

> Logically, the first question to be considered is whether the provision of the Act 1939, which made statutory arbitrations for the first time subject to the law of limitation, applies to a case

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435 Lord Haidsham of St, Marylebone, *Halsbury's Laws of England* (4th edn, London: Butterworths & Co Publishers Ltd, 1973) p. 514-515.

436 (1911) 1 K.B 832.

437 (1947) 1 ALLER p.355 CA.

> where the time limit laid down by the Act has expired before the Act came into force. Counsel for the claimant, indeed, argued that it did not, but he frankly admitted that he found difficulty in doing so. In our opinion the argument cannot succeed unless the claimant can show that the period does not begin to run until; the raising of the "question" or the making of the award, the period must on any view have elapsed (as to the whole, or on the claimant's alternative submission as to part, of his claim) before the Act received the Royal Assent. As, however, s.33(6) provides that the Act is not to effect any arbitration begun before the commencement of the Act, and as the Act did not commence until July 1, 1940, he had over a year in which to preserve his position by commencing the arbitration. The language is quite general in its terms and we can see no ground for implying any such limit on its operations as is suggested. Indeed, the considerations to which we have just referred appear to us to make it impossible to read in any such implication.

However, parties are at liberty to choose the commencing date to commence the arbitration. Where parties did not agree recourse can be made to the rules to fill in the gap.

6.5 A Comparison of the Limitation Period for Enforcement of Arbitral Award in Nigeria And Other Jurisdictions

The limitation period for enforcement of arbitral award in some selected countries have been carefully examined, some of whom have colonial ties with Nigeria. For instance Nigeria was colonized by Britain and such reference were made to English decisions in deciding the cases of *Murmansk State Steamship Line v Kano Oil Millers Limited*[438] and *City Engineering*

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438 *Op cit.*

Company Limited v Federal Housing Authourity.[439] Also developed jurisdictions like Canada and the U.S have introduced innovation and certainty on the time limit allowed to enforce an arbitral award.

6.5.1 England

English Arbitration Act s. 14 (4) provides that

> Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

In a case where the arbitrator (s) is to be appointed by a person in arbitral proceedings, the arbitral proceedings is deemed to have been commenced when one party gives notice in writing to the person requesting him to make the appointment.[440]

Murmansk State Steamship Line v Kano Oil Millers Ltd[441] is the *locus classicus* on the limitation period for enforcing an arbitral award in Nigeria. In the case a party to an arbitration agreement in 1972 sought to enforce a foreign arbitral award delivered in 1966 in respect a dispute that arose in 1964. The Supreme Court refused to enforce the arbitral award on the ground that the limitation period for the enforcement of an arbitral award is 6 years. The Court went further to hold that time begins to run from the date the original cause of arbitration arose and not from the date the arbitral award was rendered. The Supreme Court held that:

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[439] *Op cit.*

[440] English Arbitration Act 1996 s. 14 (5),also English Limitation Act 1980 s. 34 and T prime & G Scanlan, *The Law of Limitation* (2nd edn, London: Oxford University Press, 2001) p. 332.

[441] (1974) MSCC p. 590 or (1974) LPELR p.1927 (SC).

> The whole purpose of the Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them.

The Supreme Court decision in this case has been widely criticized by many scholars who are of the view that the arbitral award gives rise a new action, since the award rendered is final and binding on the parties in the arbitration, time should begin to run from the date of the award and not from the date the cause of arbitration arose. Nwakoby in further discussing the criticism of this decision stated in his book as follows:

> Parties at the time of entering into arbitration agreements were in fact entering into two agreements. Firstly, to decide any dispute arising from the contract by arbitration and, secondly, to perform the award without delay. Thus while the cause of action in respect of the former begins to run from the date of the breach of the contract, the cause of action in respect of the latter takes effect from the making of the award and not earlier. Accordingly, the date of the publication of the award and not the date of the original cause of action is decisive. [442]

However, others are of the view that limitation provisions in the limitation laws on enforcement of arbitral award should be given literary interpretation. Ibe is of the view that:

> The correct legal position is that where the words of a statute are clear and unambiguous, it is not the duty of the court to do violence to the statute by injecting into it what the legislature has not deemed fit to include. The Act does not envisage a situation

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442 G Nwakoby, *The Law and Practice of Arbitration in Nigeria* (2nd edn, Enugu: Snapp Press Nigeria Limited, 2004) p.148.

> where arbitration and enforcement of resultant award would last more than 6 years in the case of a simple contract and 12years in the case of contract under seal. This is commendable and in line with the underpinnings of arbitration which does not tolerate of dilatory elongations. Thus, both parties to an arbitration agreement and the arbitral tribunal are expected to act timely.[443]

It is however, our humbly view that the criticism of the decision of the Supreme Court in the case under review by Nwakoby appears to be more appropriate. It is our position that the publication of the award extinguishes the right of action in respect of the dispute already determined by arbitration and the award gives rise to a new cause of action. It seemed right therefore, to say that in the case of simple contract time can begin to run from the date the cause of action arose. It is however, impracticable to say that the time begin to run for enforcement of arbitral award from the date the cause of arbitration arose. Furthermore, it should be pointed out that commencement of arbitral proceedings is different from application for enforcement of arbitral award as envisaged by the Arbitration and Conciliation Act.

A case which though not on limitation of action, is nevertheless instructive on the question as to when a cause of action arises in any matter involving arbitration is *Bremer Oeltransport G.M. B.H.v Drewry*[444]

There the plaintiffs as members of a limited partnership a British subject resident in France. The charter party, which was made in England under English Law contained an agreement to refer any dispute to arbitration in Hamburg. A dispute which later arose was duly referred and the award was in favour of the plaintiffs who, there upon, brought an action in

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443 C Ibe, *Insight on the Law of Private Dispute Resolution in Nigeria* (Enugu: EL'Demak Publishers, 2008) p. 208.

444 (1933) 1 K.B p.753.

England for the amount due and payable under the award. The English Court made an order for service out of jurisdiction and defendant objected on the ground that the action being on the Hamburg award was not maintainable.

The Court of Appeal, however held that the action of the plaintiff was an action upon the charter party and not one upon the award itself and that, being really upon the charter party made in England, the action was maintainable and the order for service out of jurisdiction was proper. It follows therefore that if the action in such a case is really one on the charter party and not on the award which we think is the case in the present appeal, the statutory period of limitation must begin to run from the breach of the Charter party in 1964 and not from the making of the award in Moscow in 1966.

Alternatively there is clear authority for the proposition that the statutory period of limitation should run from the date of the breach of the charter party in 1964 when the "cause of arbitration" arose and not from the date when the award was made in 1966 unless the charter-party agreement contains what is called a *Scott v Avery* clause to the effect that arbitration shall be a condition precedent to the commencement of any action at law"

It seems irrelevant here to refer to Russell on Arbitration 18th Edition at pages 4 and 5 where the learned authors are of the view that:

> Date from which time runs: The period of limitation runs from the date on which the "cause of arbitration" "accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to acquire that an arbitration take place upon the dispute concerned.

Where parties stipulate, time limit for the enforcement of the arbitral award, and agreed that time should run from the date of the occurrence of an event and the event did not eventually occur, the Court would be left to decide the particular time the event would eventually occur to determine when time would begin to run.

In *Bulk Transport Corporation v Stinnes Inter Oil AG*[445], parties agreed that time would begin to run when the cargo has been discharged. However, there was a dispute from the fact that the cargo was never loaded in the first place. The Court held that the burden is on the defendant to prove that the operative date for time to run have come so as to make the claimant's claim time- barred.

The decision of the Supreme Court in *Obembe v. Wemabod Estate Limited*[446] followed the earlier decision in *Murmansk State Steamship Line v Kano Oil Millers Ltd*[447].

As far reaching as the decision of the Supreme Court was in this case it did not touch the limitation period for enforcing an arbitral award. The decision essentially was on an application to stay proceeding for arbitration and particularly the fact that a party applying for the Court to stay its own proceedings for arbitration ought not to have taken any step in the proceedings. The Court went further to hold that:

> A party who makes any application whatsoever to the Court even though it be merely an application for extension of time takes step in the proceedings, delivery of a Statement of Defence is also a step in the proceedings.

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[445] Unreported judgment delivered by QBDon February 27 1992.
[446] (1977) NSCC p.264.
[447] (1974) 12 SC.p.1.

Again in *Kano State Urban Development Board v. Fanz Construction Company Ltd*[448] even though the Supreme Court decided many issues on arbitration the limitation period for enforcing arbitral award was not decided in this case. However, even though the decision did not discuss limitation of action the decision is far reaching and useful in interpreting limitation of action as regard enforcement of arbitral award. The Supreme Court per Agbaje JSC, quoted with approval Halsbury's Laws of England, Fourth Edition paragraph 611 page 3232 thus:

> The publication of the award thus extinguishes any right of action in respect of the former matters in difference bur gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement.[449]

The learned authors have stated that the limitation period on enforcement of arbitral award as follows:

> The limitation period for an action on the award will usually be six years. Time runs from the date of the breach of the arbitration agreement or the date of the award[450]

The opportunity for the Supreme Court to pronounce on the limitation period for enforcing arbitral award came in the case of *City Engineering Nigeria Ltd v. Federal Housing Authority*.[451] The Court held that:

> When parties by their contractual agreement provide resort to arbitration first and only after failure of agreement on arbitral award, can a party pursue a cause of action in Court, time starts

[448] (1990) LPELR -1659 SC.
[449] *Op cit.*
[450] D. Sutton, J. Grill, M .Gearing, *Russell on Arbitration* (22nd edn, Gloucester: Sweet and Maxwell, 2002) p.367.
[451] (1997) LPELR p.868 (SC).

> running for purpose of limitation, from the date of the award. This is not to say the parties by their agreement oust the Court's jurisdiction, far from it. It only postpones resort to litigation before the Court. In these type of cases, the clause to stay access to the Court commonly referred to as "Scott v. Avery Clause" defers the application of statute of limitation to the date of the arbitral award.
>
> "In the absence of such a clause the time starts to run, for the purpose of limitation statute from the date of the breach of contract. This is based on common sense of respecting the intention of the parties as contained in the contract signed by them. Nothing should be read into a contract other than what it's clear and plain words indicates…

It is significant to mention that *Scott v Avery* Clauses, which provide in agreements that no action or proceedings in Court in a dispute should be taken until the dispute had been referred to arbitration and an award had been made, have been rendered ineffective in Lagos State by the provisions of the Limitation Law which provides that:

> Notwithstanding any term in a submission to the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purpose of this law and of any other limitation enactment whether in their application to arbitrations or to other proceedings) be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission.[452]

[452] Cap 70 of the Laws of Lagos State, 1973 s. 63

The facts of the *City Engineering Limited v Federal Housing Authority*[453] is that an attempt was made to enforce an arbitral award by the Appellant who approached the High Court of Lagos State. The Court refused to enforce the award. The application failed and the Appellant went on appeal up to the Supreme Court. The Supreme Court held that by virtue of section 6 of the Limitation Law of Lagos State an action for the enforcement of an arbitral award in 1988, became statute barred having been brought in excess of 6(six) years after 12th December 1980 when the cause of arbitration arose.

In *Williams v Williams*[454] the Supreme Court held that:

> In the case of Sanda v Kukawa Local Government & Anor (1991) 2 NWLR (Pt. 174) p.379 at pp.381, 389 (1991) 3 SCNJ p.35 it was held that it is settled that where the law prescribes a period for instituting an action, proceedings cannot be instituted after the prescribed period.
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> The case of Obiefuna v Okoye (1961) 1 ANLR p. 357 at pp,388, 389, was referred to. That the period of limitation will begin to run from the date when the cause of action accrues. The case of Egbe v Adafarasin (1985)1 NWLR (pt.3) 549 was referred to. That ignorance of statutory limitation provision by a party and / or his counsel, is no defence. In the case of Lasisi Fadare and Ors v. AG Oyo State (1982) 4S.C p.1 at pp. 24, 25: (1982) NSCC p. 52 at p.60. (1982) ALL NLR p.26 at p.37, it was held that time begins to run, when the cause of action arises. The cases of Solomon v. African Steamship Co. Ltd. 9 NLR p.99 and Board of Tracle v. Cayner, Irvine & CO Ltd (1927) A.C. p.610 were referred to. That time therefore, begins to run, when there is in existence, a person

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453 *Op cit.*

454 (2008) LPELR p. 3493 (SC).

> who can sue and another, who can be sued and when all the facts, have happened which are material to be proved to entitle the plaintiff, to succeed. The cases of Cooke v. Gill (1873) L.R.1.Q.B. p.222, p.242, were also referred to. See also the case of Chief Wolerem J.P v Emeruwa & 4 Ors (2004) 13 NWLR (pt 890) p.398; (2004) 7 SCNJ. p.19 at pp.130, 132 per Ogbuagu, JSC (P 37, Paras A-F).

The English Court's decision in England has been radically different from the position in Nigeria.

Mustill and Byod[455]illustrates that the limitation period thus:

> When an action is brought upon an award, the six year period of limitation runs from the date of the award and not from the moment when the claim arose for the award itself gives rise to a new cause of action.

In *Agromet Motor Import Ltd v Moulden Engineering Co (Bed) Ltd*[456] the English Court Per Otton J held that time begins to run on the collection of an arbitration award, not from the date upon which the award is made or published, but from the date when the paying party is in breach of its implied obligation to pay the award. In other words time begins to run from the date of the breach of the implied term to perform the award, and not from the date of the actual accrual of the original cause of arbitration give rise to submission.

The English Court in following the decision in Agromet's case held in *IBSSL v Mineral Trading Corp*[457] held that time begins to run from the date on which the implied promise

[455] Mustill & Boyld,*Commercial Arbitration* (London: 1989) p.162.
[456] (1985) 2 All ER p.436.
[457] (1996) All ER p.1.

to perform the award is broken and not from the date of the arbitration agreement nor from the date of the award.

6.5.2 Canada

In *Yugraneft Corp v Rexx Management Corp*[458] where the main issues for the Court to determine is section 11 of Alberta Limitation Act[459] which provide that:

> If within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for payment of money, the defendant on pleading this Act as a Defence is entitled to immunity from liability in respect of the claim and article 3 of the New York Convention which provides that recognition and enforcement shall be in accordance with the rules of procedure of the territory where the award is relied upon.

The fact of the case is that Yugraneft Corp entered into a contract with Rexx Management corp. However, there was a contractual dispute which prompted Yugraneft to commence an arbitral proceeding at the International Commercial Arbitration Court at Chamber of Commerce and Industry of the Russian Federation. In September 6, 2002 the arbitral tribunal rendered an award in favour of Yugraneft ordering Rexx to pay USD 952614.43 in damages to Yugraneft. Yugraneft thereafter applied to Alberta Court of Queen's Bench for recognition and enforcement of the award on January 27 2006 more than three years after the award was rendered.

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458 (2010) SCC p.19.
459 R.S.A 2000 CL- p.12.

The plaintiff passionately urged the Court to apply the 10 years period as provided for in section 11 of the Limitation Act which deals with a claim based on a judgment or order for the payment of money.

It was held that going by the clear wording of the statute (Limitation Act of Alberta) the award did not fall within this language. Therefore the claim was governed by the general two year period and so was on the facts time and statute barred.

The Court went further to hold that the two years period of enforcement of foreign arbitral award will not start to run until the plaintiff discovers or should have discovered that the defendant has assets in the place where the enforcement is sought.

Regrettably, Nigerian Courts stuck to the old principle in the earlier English cases in deciding the limitation period for the enforcement of an arbitral award without being mindful of the fact that the English Courts have long departed from the decision in those old cases in their recent decisions.

It is my view that the learned authors of Russell on Arbitration on which the Supreme Court of Nigeria based its decision in Murmansk's case have since been reviewed. This is in apparent conformity with the English court's decision in Agromet's case. The learned authors in the 22nd edition of the book stated that:

> The limitation period for an action on the award will usually be six years. Time runs from the date of the breach of the arbitration agreement or the date of the award. [460]

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[460]D. Sutton, J. Grill, M .Gearing, *Russell on Arbitration* (22nd edn, Gloucester: Sweet and Maxwell, 2002) p. 367.

The Nigerian authorities we have earlier cited did not separate the commencement of an action in litigation and commencement of an action to enforce an arbitral award.

Again the learned authors of Russell on Arbitration 22nd Edition[461] stated that:

> The limitation period for an action on the award will usually be six years, although if the arbitration agreement is under seal it will be 12 years. Time runs from the date of the breach of the arbitration agreement not from the date of the arbitration agreement or the date of the award.

It is my view that the Supreme Court in these decided cases confused an action on the arbitral award with an application in writing to enforce an arbitral award as contemplated by the Act.

The Nigerian Courts followed the learned authors without being mindful of the fact that the decisions of the court interpreted by learned authors were based on amended laws, whereas in Nigeria, such similar laws have not been amended which with respect makes those English decisions not to be in all fours with the position of Nigerian statutes on arbitration and limitation of action.

For instance the Act s. 36 allows the arbitral tribunal to extend time in performing any act under the Act. We submit that such extension would not be applicable to extension of time where there is a statutory time limit. It would, however, seem that the limitation period would

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[461] *Ibid*

only be extended in a case of desirability or a party acknowledgment of part payment and mistake.[462]

It is also important to state that statutory time limit is different from that of contractual time limit. The learned authors of Russell on Arbitration in 23rd Edition of the book stated that:

> A time limit in an arbitration clause (or in arbitration rules incorporated by reference) may (1) impose a time limit for commencing arbitration proceedings and / or (2) provide that a claim shall be barred or extinguished if arbitration is not commenced within the time limit. These provisions are not necessarily found together.[463].

Idornigie in his book is of the opinion that:

> The effect of such a clause or rule seem to be that the dispute is removed from the jurisdiction of the Court. However since such provisions are not necessarily found together, the contract may limit the time for commencing arbitration without barring or extinguishing the claim, depriving a party who is out of his right of claim in arbitration but leaving open a right of action in the Courts.[464]

Even though the learned counsel for the Appellant in *City Engineering (Nig) Ltd v Federal Housing Authority*[465] made frantic effort for the Court to depart from its decision in Murmansk's case and align itself to the decision of the English Court in Agromet's case. His argument did not persuade the Supreme Court. It should be noted that English Courts' decisions

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462 Limitation Act of the Federal Capital Territory s. 34-58.

463 *Op. cit* p. 184.

464 P Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Abuja: Lawlords Publications, 2015) p. 386.

465 *Op cit.*

are not binding on the Supreme Court or any other Court in Nigeria. Such English decision can only have a persuasive effect on the Nigerian Court[466].

It is our view that the Supreme Court's decision in City Engineering's case with due respect did not accommodate the position of Nigeria laws and the current realities on enforcement of arbitral award. In our opinion it will be out of place to hold that the limitation period for the enforcement of arbitral award runs prior to the time the arbitral award was rendered. Experience has shown that some arbitral proceedings even lasts for more than six years. There is no provision under the Act that stipulates the duration for an arbitral proceeding.

Of what use would an arbitral award be, where the party seeking to enforce same is precluded by the limitation law? Arbitration Law of Lagos State for instance has gone a step further to provide leeway in this regard. The law provides that in computing the time limit for enforcement of arbitral award the period between the commencement of arbitration and the date of the arbitral award shall be excluded.[467] This provision is apparently in tandem with the position in developed countries and represents the current trend on enforcement of arbitral award. It clearly suggest that an application for enforcement of arbitral award under this law can be brought after the award has been rendered. It is our view that while the Nigerian Courts could borrow a leaf from the decisions of the English Courts, the decision of the law should be based on the Nigerian law and the current and realistic global trend. To our mind since arbitration is essentially on parties' agreement, time should begin to run for the enforcement of an arbitral award where the award states a date for performance, from the last date of the date specified in

466 *British American Tobacco Plc v Attorney General of Ogun State & Ors* (2011) LPELR –p.11960 (CA).
467 s. 35 (5) Cap. A11 Laws of Lagos State 2015.

the award for a voluntary performance. However, where there is no date stated for performance in the award then from the date of the award.

6.5.3 The United States of America

Arbitration as well as enforcement of arbitral award in the United States of America is governed by Federal Arbitration Act. An arbitral award rendered in the United States can also be enforced under the Federal Arbitration Act and the various State Arbitration Laws or under both the Federal Arbitration Act and the State Law where the arbitral award was rendered.[468] However the time limit for enforcement of arbitral award has been provided for in Federal Arbitration Act s. 9 which provides that:

> If the parties in their agreement have agreed that a judgment of the Court shall be entered upon the award made pursuant to the arbitration, and shall specify the Court, then at any time within one year after the award is made, any party to the arbitration may apply to the Court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States Court in and for the district within which such an award was made. Notice of the application shall be served upon the adverse party, and thereupon the Court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the

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468 *Robert Lawrence Co v Devonshire Fabrics Inc.*271 f.2D 402, 408(2d ar. 1959.

> same Court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the Marshal of any district within which the adverse party may be found in like manner as other process of the Court.

Aside the Federal Arbitration Act, States Arbitration Laws also made provision for the time limit to enforce arbitral award in the United State. For instance the New York Civil Practice Law Rules s. 7510 provides that:

> The Court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in Section 7511

Both the Federal Arbitration Act and the State Arbitration Laws have provided certainty in the time limit for enforcing arbitral award in the United State. The essence of the United States Federal Arbitration Act was captured in *Consolidated Rail Corp v Del & Hudson Rwy. Co*[469], where the United States Court went on to hold that;

> Arbitration should provide not only a fast resolution but one which establishes conclusively the rights between parties. A one year limitation period is instrumental in achieving this goal. This court is of the view that a one year confirmation period provides the parties with a time and thereupon the Court must grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this tittle. If no Court is specified in the agreement of the parties, then such application may be made to the United States Court and for the district within which such award was made.

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[469] 867 F. Supp. 25(D.D.C 1994).

> The plain reading of s.9 indicates that if a party does not bring an action to confirm its arbitration award within one year after the award is made, the party will be time-barred from availing itself of the summary confirmation process provided by s.9. Since s.9 was meant to supplement and not preclude other remedies. A party is not prevented from using either State law or Common law procedures to confirm the award. To rule otherwise would constitute a legal incongruity which this Court determines was not intended by Congress.

The above cited case confirms the provisions of section 9 of the United States Federal Arbitration Act, has given certainty to the time limit for enforcement of arbitral award in the United States of America. Unlike in Nigeria, in the United States of America awards are confirmed within one year and have the effect of a judgment and awards not confirmed are unenforceable under the Federal Arbitration Act.

This was further reiterated in *Florasynth v Pickholb*[470] , wherein it was held that:

> The confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the Court. The award need not actually be confirmed by a Court to be valid. An unconfirmed award is a contract right that may be used as the basis for a cause of action.

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470 (750 F2d 171, 176 (2nd ar. 1984) Noah Rubins, Time Limits for Confirmation of Arbitral Awards in United States Court.2001 www.modaq.com lase accessed on 5th August 2017.

CHAPTER SEVEN

CONCLUSION

7.1 Summary of Findings

It is instructive to note that the findings and recommendations contained in this study are germane and not exclusive analysis of the provisions of both case law and statute. This work started by outlining the qualities that make arbitration more suitable than other dispute resolution mechanism, the appointment of the arbitrator, the arbitral proceedings, the arbitral award and the enforcement of arbitral award in Nigeria.

Apparently, arbitration is most suitable for disputes arising from international commercial activities. This is because Conventions exists that allow sovereign State to easily submit to the jurisdiction of an arbitral tribunal, which ordinarily will be difficult in litigation because of the concept of sovereign immunity. A cause of major concern is the growing complexity and diversity of disputes and parties, arbitration experts, practitioners, the arbitration institutions are currently wrestling with the issues

However, enforcement of arbitral award and particularly the limitation period for enforcing arbitral award in Nigeria has been our focus in this work. Even though there is a fairly robust legislation on arbitration in Nigeria, the judicial interpretation of the laws especially the limitation period for enforcing arbitral award had not been helpful.

In this work it was found that many judges as well as practitioners in Nigeria do not possess a considerable knowledge of arbitration. Most of the judges see arbitral proceedings as an attempt to rub them of jurisdiction and that the arbitral proceedings will compete with their judicial powers.

The dictum of the late Justice Ibukun Ephraim Akpata JCA as (he then was) in *Kano Urban Development Board v Fanz Construction Limited*[471] is very instructive. The learned Justice stated that: "Foolhardy reference to arbitration and rough the ready decisions of the arbitrators."

It was also found that the Arbitration and Conciliation Act did not make any provision for the time limit within which an application must be brought before the Court to enforce arbitral award in Nigeria. As a result of this, recourse is usually made to the limitation laws of the State, where the arbitral award is sought to be enforced.

The judicial interpretation of the limitation laws as regard enforcement of arbitral award has also not been encouraging. Nigerian Courts have always held that the time limit allowed for the enforcement of arbitral award is six years, and time begin to run from the date the cause of arbitration arose and not from the date the arbitral award was rendered.

This was the decision of the Supreme Court in Murmansk State Steamship Line v Kano Oil Millers Ltd[472]. The Court in relying on Russell on Arbitration 18th edition as well as the English decision in Pegler v Railway Executive,[473] held that:

> It seems relevant here to refer to Russell on Arbitration 18th Edition, at pp. 4 and 5 of which the following passage occurs:
>
> Date from which time runs: The period of limitation runs from the date which "cause of arbitration" accrued: that is to say from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned."

[471] (1990) 4 NWLR (pt.142) p.1.
[472] (1974) LPELR-1927 (SC) p.9
[473] (1948) All E.R p.559.

> Thus in Pegler v Railway Executive (1948) 1 All E.R 559; (1948) AC 332, the House of Lords held that the "cause of action" and that a fireman who brought his action more than six years after his condition of service had been altered to his detriment was statute-barred from the date of the alteration, not when his exact losses were later quantified at arbitration.

In City Engineering Nigeria Limited v Federal Housing Authority,[474]the Supreme Court had the opportunity to depart from its earlier decision in Murmansk State Steamship Line v Kano Oil Millers Limited.[475]The Court however, went on to hold that:

> When parties by their contractual agreement, provide resort to arbitration first and only after failure of agreement on arbitral award, can a party pursue a cause of action in Court time starts running, for purpose of limitation form the date of the award. This is not to say the parties by their agreement oust the Court's jurisdiction; far from it. It only postpones resort to litigation before the court. in this type of cases, the clause to stay access to the Court commonly referred to as "Scott v Avery Clause" defers the application of statute of limitation to the date of arbitral award. In the absence of such clause the time starts to run for the purpose of limitation statute, from the date of the breach of contract. This is based on common sense of respecting the intention of the parties as contained in the contract signed by them. Nothing shall be read into the contract other than what its clear and plain word indicate.

The Supreme Court was not persuaded to depart from its earlier decision in Murmansk State Steamship Line v Kano Oil Millers Limited,[476] despite the citation of more recent

[474] (1997) LPELR-868 (SC) pp.41-42
[475]*Op cit.*
[476]*Op cit.*

authorities like the English decision in Agromet Motor Import Limited v Moulden Engineering Co (Bed) Limited.[477]

These decisions have precluded the successful parties from enjoying the fruit of their victory at the arbitral tribunal; a situation which has made arbitration less attractive in comparison with other alternative dispute resolution mechanisms. Regrettably, many arbitral proceedings in Nigeria suffered inordinate delay, ranging from the challenge of the arbitral award and its enforcement proceedings which often lasted for more than six years. For instance, in Kano State Urban Development Board v Fanz construction Company Limited.[478]The Plaintiff, Fanz Construction Company Limited sued the Defendant Kano State Urban Development Board v Fanz Construction Company Limited for the sum of ₦ 6,922,742.00 for breach of an agreement dated 16th July 1975 to build 840 units of dwelling houses. After suing the Plaintiff informed the Court of its decision to refer the dispute to arbitration and the matter was stayed for arbitration.

The arbitral award was thereafter rendered in favour of the plaintiff, who then brought an application to enforce the award, and the defendant also brought an application to set aside the award the same award sought to be enforced. The matter then went up to the Supreme Court and the final decision was reached on 15th June 1990. A period of 11 years after the commencement of the action. If the six years period of limitation is applied the award creditor in this case would not be able to enforce the award, since apparently the six year limitation period has passed since the date the cause of arbitration arose.

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[477] (1985) All E.R. p.436.
[478] (1990) LPELR-p.1659 (SC)

It is also our finding, that the learned authors of Russell on Arbitration whom the Supreme Court largely relied upon in deciding the case of Murmansk State Steamship Line v Kano Oil Millers Limited[479] has departed from its age long position and stated in its recent edition that:

> The limitation period for an action on the award will usually be six years. Time runs from the date of the breach of the arbitration agreement or the date of the award.[480]

We further found that the judicial pronouncements referred to above is different from the situation in developed worlds. For instance in the English case of Agromet Motor Import Limited v Moulden Engineering Co (Bed) Limited,[481]where it was held that time begin to run for the enforcement of arbitral award from the date the arbitral award was received and not from the date the award was made or published or from the date when the paying party is in breach of its obligation to pay the sum in the award. That is time begin to run from the date of the breach of the implied term to perform the award and not from the date of the actual accrual of the original cause of arbitration which gave rise to the submission.

The decision in Agromet's case, was followed in the IBSSL v Mineral Trading Corp,[482]where it was held that, time begin to run from the date when the implied promise to perform the award is broken.

In developed jurisdictions like Canada and the U.S the limitation period for enforcement of arbitral award is contained in the arbitration laws and not left to speculation and diverse

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[479]*Op cit.*
[480] D. Sutton, J. Grill, M. Gearing, *Russell on Arbitration* (22nd edn, Gloucester: Sweet and Maxwell, 2002) p. 367.
[481]*Op cit.*
[482] (1996) All E.R p.1.

interpretations. For instance in Canada, the limitation period for enforcement of arbitral award is ten years from the cause of arbitration arose.[483] In the U.S on the other hand, the time limitation period for enforcement of arbitral award is one year from the date the arbitral award was rendered.[484] The position in the U.S seems more preferable, as it has given a clearer position on when time would start running in calculating the limitation period for the enforcement of arbitral awards.

We found that the Arbitration Law of Lagos State has specifically provided for the time for commencement of proceedings to enforce arbitral award under this law. The law states that in computing the time for the commencement of proceedings to enforce arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.[485] This clearly implies that time will begin to run for the purpose of enforcement of arbitral award under this law from date the award was rendered and not from the date the cause of arbitration arose.

It is the further finding of this work that in the recent case of *Sifax Nigeria Limited v Migfo Nigeria Limited,*[486] though not particularly on enforcement of arbitral award, it was decided that: computation of time during the pendency of an action shall remain frozen or suspended from the filing of action until it is determined or abates. This position is applicable to arbitral proceeding in Lagos State. Section 35 (5) of the Arbitration Law of Lagos State[487] which provides that: In computing time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall

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[483] Alberta Limitation Act s. 11.
[484] U.S Federal Arbitration Act s. 9.
[485] S. 35 (5) Ch. A11 Laws of Lagos State 2015.
[486] (2015) LPELR-p.24655 (CA)
[487] Ch. A11 Laws of Lagos State 2015.

be excluded." That is once the arbitral proceedings is commence the limitation period should cease to run.

7.2 Recommendations

Arbitration has become a very useful tool in resolving disputes in modern times. There is the need for Nigerian legislature to work towards enacting an effective and efficient legislation on arbitration in Nigeria that will ensure a suitable enforcement procedure for arbitral awards in Nigeria.

This work therefore, recommends for the amendment of sections 31 and 51 of the Arbitration and Conciliation Act. These sections are vague regarding the form and procedure the application for leave to enforce arbitral award should take. These sections only provided that an application to enforce an arbitral award should be brought before the Court. It is our recommendation that originating motion would seem most appropriate in obtaining the leave of the Court to enforce an arbitral award and not on a motion *ex-parte*. More so, originating motion is one of the mode of commencing action in both the Federal High Court[488] and State High Courts in Nigeria.

The work further recommend the amendment of section 32 of the Arbitration and Conciliation Act to fill up the *lacuna* created by lack of provision for grounds upon which the Court can refuse to recognize and enforce domestic arbitral award. We submit that just as section 52 of the Act provides for grounds upon which the Court would refuse to recognize and enforce a foreign arbitral award, section 32 should take a step further to provide for a distinct ground for

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[488]Order 3 Rule 1 Federal High Court (Civil Procedure) Rules 2019.

refusal of court to enforce a domestic arbitral award apart from the grounds provided for in section 52 of the Act.

We recommend that the Arbitration and Conciliation Act be amended to specifically provide for the limitation period for enforcing both domestic and international arbitration and not left to the Limitation Laws of each state. A leaf could be borrowed from the U.S. The U.S Federal Arbitration Act s.9, which provides a limitation period of one year for enforcement of arbitral award and time to begin to run from the date the arbitral award was rendered. The Arbitration Law of Lagos State has also made provisions for the time limit for commencement of proceedings to enforce arbitral award. This is a welcome development as other states in Nigeria could emulate Lagos State by making similar legislation.

However, in regard to the attitude of Courts in interpreting the limitation period for enforcing arbitral award, it is our view that the Supreme Court of Nigeria should depart from its decision in *Murmansk State Steamship v Kano Oil Millers Limited*[489]. This will allow for certainty of the law in arbitration practice in Nigeria. After all the principle followed in the said decision was based on the old English principle as contained in Russell on Arbitration 18th Edition which has been reviewed up to 22nd edition now.

Our Courts and in particular the Supreme Court are called upon to hand down decisions that will be in tune with modern practice on arbitration. It is appalling that the Supreme Court will apply the principle laid down in Murmansk Steve Steamship Line's case decided in 1974 to its decision in City Engineering Limited's case decided in 1997.

[489]*Op cit.*

It is instructive to note that the learned authors of Russell on Arbitration has since reviewed the book to be in tune with current trend on arbitration in its 22nd Edition. The review is in apparent compliance with the English Court's decision in *Agroment Motor Import Limited v Moulden Engineering Co (Beds) Ltd*[490] and also the English case of *IBSSL v Mineral Trading Corp*[491].

It is the candid view of this work that even though the English Court's decisions are only of persuasive effect and are not binding on Nigerian Courts, the Supreme Court should see those decisions as a guide and could align itself with them. This is because it will completely be out of place for limitation period for enforcing an arbitral award to start counting prior to the time the arbitral award is rendered.

To avoid the application of the interpretation of the Supreme Court in City Engineering Nigeria Limited v Federal Housing Authority, it is our suggestion that parties should ensure that the arbitration agreement is under seal in order for the limitation period to be twelve years as against six years for arbitration agreement not under seal. Parties must also clearly state the applicable arbitration law in their agreement to arbitrate.

In international arbitration there is the need for a major structural reform on the enforcement procedure. For instance where there is an institution of two separate suits one seeking to enforce and another seeking to set aside the award, in two different jurisdictions, each Court in the different jurisdiction is at liberty to hand down a separate decision. This will not in any way improve the practice of international arbitration in Nigeria or anywhere.

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[490] *Op cit.*
[491] *Op cit.*

This work recommends a communicating solution wherein in cases of actions instituted in different jurisdictions to enforce arbitral award, the last Court in time should strike out the new case seeking to enforce the same arbitral award, pending before the first Court. Where this is done it prevents an abuse of the process of Court in enforcement of arbitral award. This will further strengthen and improve confidence in international arbitration practice in Nigeria.

It recommends that the Courts should come to the rescue in enforcing arbitral award in Nigeria by refusing any frivolous application in this regard. The Court of Appeal should be the last Court for arbitration cases since speed is one of the sterling qualities of arbitration against litigation.

Of a major concern is the fact that most arbitrators in Nigeria do not have the required training on arbitration and as such they confuse an arbitral proceeding with litigation in court. This work strongly recommends that even though the Act did not mandate a formal training for arbitration practitioners in Nigeria there is the need for them to possess a formal qualification on arbitration. In order to assist them in the discharge of their duties effectively. In this regard, the Chartered Institute of Arbitrators (UK) Nigeria Branch for instance usually organize training courses for its intending members, other arbitral bodies in Nigeria also include the Association of Construction Arbitrators in Nigeria, maritime Arbitrators Association of Nigeria just to mention a few.

From the foregoing, therefore there is an urgent need for the amendment of the relevant sections of the Arbitration and Conciliation Act since most of its provisions can no longer accommodate modern practice of arbitration. Particularly the enforcement procedure contained

in the Act should undergo an urgent amendment for it to be in tune with modern arbitration practice.

BIBLIOGRAPHY

Books

Ajogwu .F, Commercial Arbitration in Nigeria: Law and Practice (Lagos: Centre for Commercial Law Development, 2013).

Akpata .A, The Arbitration Law in Focus (Lagos: West Africa Book Publishers Limited, 1997).

Allot, Essays in African Law (London: Butterworth & Co Limited, 1960).

Amadi .J, Limitation of Action Statutory and Equitable Principles (Port Harcourt: Pearl Publishers, 2011).

Apeh E, Nigerian Law of Limitation of Actions (Benin City: Eleigwu Apeh Law Publications, 2001).

Chukwuemerie A.I, Studies and Materials in International Commercial Arbitration (Port Harcourt: Law House Books, 2002).

Dele P, ADR Principle and Practice (Lagos: Desage Nig Ltd, 2004).

Dst. J. Simion, Russell on Arbitration (23rd Ed, Gloucester: Sweet and Maxwell, 2002)

Emiola .A, The Principle of African Customary Law (2nd edn, Lagos: Eniola Publishers Limited, 2005).

Ezejiofor .G, The Law of Arbitration in Nigeria (Ikeja: Longman Nigeria Plc, 1997).

G Scanlan The law of Limitation (2nd Ed, London, Oxford University Press, 2001).

Garner B.A, Black's Law Dictionary (9th Ed, St Paul MN: Thomson Reuters, 2009).

Hulealt James & I Necholas Gould: International Commercial Arbitration (London :(LLP). 1999).

Ibe .C.E, Insight on the Law of Private Dispute Resolution in Nigeria (Enugu: El Demak Publishers Limited, 2008).

Ibidapo-Obe .A and Williams F.A, Arbitration in Lagos State a Synoptic Guide (London: Concept Publications Limited, 2010)

Lord Haidsham of St, Marylebone, Halsbury's Laws of England (4th Ed, London: Butterworths & Co Publishers Ltd, 1973)

Mustill & Boyld Commercial Arbitration (London: 1989) P.303.

Noussia .K, The History, Importance and Modern Use of Arbitration. In: Confidentiality in International Commercial Arbitration (Heidelberg: Springer, 2010).

Nwakoby .G, The Law and Practice of Arbitration in Nigeria (2nd Ed, Enugu: Snapp Press Nigeria Limited, 2008).

Oluduro, Customary Arbitration in Nigeria: History and Development in Current Issues in Nigeria Jurispondence (Lagos: Renaissance Law Publishers Limited, 2007).

Orojo and Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria (Lagos: Mbeye & Associates Nigeria Limited, 1999).

P Idornigie, Commercial Arbitration Law and Practice in Nigeria (Abuja: Lawlords Publications, 2015).

Journals

A A Oluwabiyi, 'An Overview of Similarities between Customary Arbitration and Native Courts as Platforms of Administration of Justice in Pre-Colonial Nigeria' (2015) Vol. 1. No. 1. Journal of Asian and African Social Science and Humanities, 129.

A Akinbote, Arbitration in Africa- The State of Arbitration in Nigeria (A Paper Presented at the 2008 Colloquium of the Association For The Promotion of Arbitration in Africa Held at Djeuga Palace Hotel Yaounde from 14th-15th January, 2008, 10.

A Rhodes-Vivour, 'Recent Arbitration Related Developments in Nigeria', (2010) Vol. 76. Journal of the Chartered Institute of Arbitrators, 130-135.

Amazu A Asouzu The Adoption of the UNCITRAL Model Law in Nigeria, Implication of the Recognition and Enforcement of Arbitral Awards (Journal on Business Law 1999) P. 1856.

Bello.A.T, 'Customary and Modern Arbitration in Nigeria: A Recycle of Old Frontiers' (2014) Vol.2. No 1. Journal of Research and Development.

C E Ibe, 'The Machinery for Enforcement of Domestic Arbitral Awards in Nigerian – Prospects for Stay of Execution of Non-Monetary Awards: Another View' (2011) Vol. 2. Nnamdi Azikiwe University Journal of International Law.

C Ogbulogo, 'The Discourse of Arbitration in Pre-Colonial Nigeria: Insights from Igbo Literary Texts, (2004) Vol. 6. No. 2. Journal of Cultural Studies.

D M Douglas, The Historical Foundations of World Order: The Tower and the Arena. (The Netherlands: Martinus Nijhoff Publications, 2008) 195.

E E Oni-Ojo and C R Roland-Otaru, 'Alternative Dispute Resolution Strategies for Sustainable Development in Africa: Insights from Nigeria,' (2013) Vol. 2. No. 1. Journal of Management and Entrepreneurial Development, 47.

Ezejiofor .G 'The Prerequisite of Customary Arbitration' (1992 -1993) Vol 16 and 18.

G C Nwakoby, 'Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004 – Call for Amendment', (2010) Vol. 1. Nnamdi Azikiwe University Journal of International Law and Jurisprudence, 1.

J Paulsson, Arbitration Unbound. Award Dethatched the Law of its country of Origin (ICLQ 1982) Page 360-361.

K Noussia, The History, Importance and Modern Use of Arbitration. In: Confidentiality in International Commercial Arbitration (Heidelberg: Springer, 2010) 11.

M S Rosenthal, 'Arbitration in the Settlement of International Trade Disputes,' (1946) Vol. 11. No. 4. Summer-Autumn. Law and Contemporary Problems, 808. W H Page, The Law of Contracts (Vol. 4, The W. H. Anderson Company, 1919).

Mann. F. Where is An Award made? (Arbitration International) Page 107.

N J Duncan and T Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) Vol. 17. No. 1 Deakin Law Review, 113.

Nwakoby G.C and Aduaka 'Recognition and Enforcement of Internal Arbitral Awards in Nigeria': The Issues of Time Limitation (2015) Vol 37 Journal of Law, Policy and Globalization.

Otuturu. G.G, 'Some Aspects of the Law and Practice of Commercial Arbitration in Nigeria' (2014) Vol.6 Journal of Law and Conflict Resolution.

Sanni. A.M, 'Modern Trend in Commercial Dispute Resolution Through Arbitration: Prospects and Constraints' (2015) Vol.8 Journal of Marketing and Consumer Research.

Temitayo. B.A 'Why Arbitration Triumphs Arbitration: Pros of Arbitration (2014) Vol.13. No 2. Singaporean Journal of Business Economics and Management Studies.

Uchey N, 'International Commercial Arbitration in Practice Effective ADR or Just Exotic Litigation Corpus of Topical Legal Issues Collection.

Xavier. G ' Evolution of Arbitration as a Legal Institution and the Inherent Powers of the Court: Putrajaya Holdings SDN, BHD. V. Digital Green SDN, BHD.' (2010) Asian Law Institute Working Paper Series No.009

Internet (Electronic Material)

Us Logical. Com, accessed on 5th August 2017.

'Alternative Dispute Resolution', <https//:www.en.m.wikipedia.org/wiki/Alternative> accessed on 2 August 2017.

'Literature Review-Research-Charles Sturt University', https://www.csu.edu.au hdr-guide > lite……..> accessed on 2 August 2017.

'Literature Review-Research-Charles Sturt University', https://www.csu.edu.au hdr-guide > lite……..> accessed on 2 August 2017.

'Statute of Limitations'. https://www.en.m.wikipedia.org/wiki/Statute... accessed on 4 August 2017.

'The History of Arbitration Online: Arbitration in Australia'. <https://www.australianarbitration.com/history.arbitration> accessed on 4August 2017.

Dhir and Dhir Associates, “India: Evolution of Arbitration in India”, https://www.mondaq.com> india > Evolution … accessed on 4 August 2017.

E Sussman and J Wilkinson, “Benefits of Arbitration for Commercial Disputes – American Bar …”, http://www.americabar.org> publications accessed on 2 August 2017.

Enwikipedia. Org/wiki/arbitral award, accessed on 5th August 2017.

http/interarb.com/v/g-co 1927 also arbitration data base http.II www. arbitral award, accessed on 5th August 2017

https://www.allenandallen.com>blog>arbitration.... accessed on 2 August 2017.

J A Arewa, ‘The Evolution of the Nigerian Legal Order: Implications for Effectiveness, Economic Growth and Sustainable Development’, (2013) Restatement of Customary Laws of Nigeria. https://www.nials-nigeria.org>journals >john...accessed on 4 August 2017.

J Njoku, ‘Experts Explore Arbitration as Alternative Dispute Resolution in Construction Industry,’ Vanguard, 30 June 2015. http://www.vanguardngr.com/2015/06/ accessed on 2 August 2017.