HUMBERSIDE JOURNAL OF LAW & SOCIAL SCIENCES
Volume 9 (2019) 42 – 60
ISSN 2051-7335 (PRINT) ISSN 2051-736X (ONLINE)
Publishers: Julia Law Publications, England, United Kingdom
Websites: www.juliapublishers.org
Cumulative Impact Factor: 6.50
Received: January 2019 Peer Reviewed Accepted: August 2019

Resolution Mechanisms and the Court in Contemporary Disputes Settlement

F. C. AMADI* & P. I. AZUBUIKE**

ABSTRACT

The need for fast and simplistic justice delivery when there is dispute is ageless. In the Middle Ages for instance, merchants who had disputes resorted to submission of same to experienced and older merchants who settled their disputes. With time, the usage and custom of this type of settlement metamorphosed into legal rules that gave birth to the earliest legislation, the Arbitration Act of 1698. On the other hand, the court with the main and traditional responsibility of dispute settlement made up of trained jurists, also existed. The merchants save for experience were not trained in dispute handling unlike the judges. Initially, there was some sort of resentment on the part of the courts on the propriety or capability of arbitrators and other dispute resolvers who, to them, dabbled into dispute settlement. This state of affairs of resentment seem not to exist anymore as cooperation is the order of the day. The relationship between arbitration and other methods of dispute settlement and litigation is no mean concern as dispute is global and ever present. Besides, Dispute Resolution methods are now largely regulated by legislation. For instance, the Protocol on Arbitration clauses made in Geneva on 24 September 1923 and New York Convention 1958, both touching on arbitral awards amongst others. What weight is attributable to the said methods of dispute settlement in the present day? It is on this premise that this paper is aimed at assessing the effectiveness of arbitration and other dispute resolution methods and their effectiveness when placed side by side litigation. The objective of this paper is to amongst others examine the relationship between arbitration and litigation and how arbitration has been accepted as a means of dispute resolution. The doctrinal research method was adopted as the primary and secondary sources of law were relied on. The paper found that while the comingling of litigation and arbitration are necessary and desirable in appropriate cases, misapplication or misunderstanding of the rules have been the basis for ineffective and unhealthy blend of the two methods of dispute resolution. The paper recommended that since arbitration and other dispute resolution mechanisms have come to stay, they should be properly integrated into the traditional dispute resolution method with complementarity.

Keywords: Arbitration, Alternative Justice, Courts.

INTRODUCTION

Indeed, Abraham Lincoln's quote over a century ago remains very instructive for lawyers today: "Discourage litigation. Persuade your neighbours to compromise whenever you can… As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough"[1]

It is well settled that owing to the nature of human beings and the number of activities engaged into, disputes and conflicts have become inevitable.[2] Human diversity with our varied needs and desires make it a given that conflict is bound to arise. The traditional method of resolving these disputes is through litigation. Courts exist and are maintained by the state to provide a dispute settlement mechanism for parties. It is a manifestation of state power and the responsibility of the state to ensure that courts exist, that appropriately qualified judges are appointed, that there are procedural rules to regulate the basis of jurisdiction and the conduct of cases before the court.

That notwithstanding, litigation in different jurisdictions has never been found to be perfect in resolving all disputes. With attendant problems pervading litigation such as overcrowded cause-list, unduly cumbersome procedure, unwholesome technicalities, its expensive nature and unprecedented bureaucracy has led to calls for reforms and alternatives for resolving disputes. Arbitration which is a procedure for resolving disputes through which parties in disputes appoints a person(s) who shall be preceding over them and any decision made by the appointed person(s) shall be final and legally binding, has come to remedy the flaws of litigation.

The relationship between arbitrators and the court early in history showed the feeling of disapproval by the court. Understanding the dissenting attitude of the court to arbitration was premised on the need to ensure that justice was done in handling of cases. The apprehension of the court was premised on the fact that early arbitrators were ill-equipped, lacked the expertise required for dispute resolution and avoidance of rivalry in the courts traditional or constitutional functions was also featured as a reason against arbitration. However, despite these apprehensions or feelings, the necessity for arbitration in dispute resolution never ceased to present itself as an indispensable method of dispute resolution till date.

This paper is divided in four parts, part one traced the history of arbitration and how it has evolved over the years as a means of dispute resolution. Part two examined disputes that can be resolved using arbitration. Part three appraised arbitration in Nigeria and the courts involvement in the arbitration process while pointing out the similarities between arbitration and litigation and part four concludes the paper.

HISTORY OF ARBITRATION

Long before laws were established, or courts were organized, or judges formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and

*Lecturer, Faculty of Law, Rivers State University, Port Harcourt. LL.B., BL, LL.M., Ph.D.
** Lecturer, College of Law, Achievers University, Owo Ondo State Nigeria. B.Sc., LL.B, BL, LL.M, Ph.D. Candidate at Nnamdi Azikiwe University, Awka, Nigeria, the author divides his research interest in International Law with a bias for Afro centric views, Constitutional Law, Commercial Arbitration and Oil and Gas law.

[1] J. Pine, *Wit and Wisdom of American Presidents* (New York: Dover Publications Inc. 2002) 27

[2] A. T. Bello, 'Why Arbitration Triumphs Litigation: Pros and Cons of Arbitration' available at <https://ssrn.com/abstract=3354674> accessed 10 May 2019; J. D. M. Lew, *Comparative International Commercial Arbitration* (New York: Kluwer Law International 2003)

the settlement of disputes.[3] Out of the dim recesses of fable and mythology, it appears that upon Mt. Ida in Greece, the royal shepherd, Paris, was also called upon to deliver a famous arbitration award. The dispute concerned the competing claims of Juno, Pallas Athene, and Venus for the prize of beauty. All other means of settlement having failed, Paris, by agreement of the parties, decided the issue by arbitration.

If the course of arbitration is traced through the centuries, it will be found in the most primitive society, as well as in modern civilization. Commercial arbitration was known to the desert caravans in Marco Polo's time and was a common practice among Phoenician and Greek traders. Civil arbitration also flourished. In the Homeric period, chiefs and elders held more or less regular sittings, in places of assembly, to settle the disputes of all persons who chose to appear before them. In the middle of the sixth century B.C., Peisistratus, the Athenian tyrant, furthered his policy of keeping people out of the city by appointing justices to go on circuit throughout village communities. If they failed to effect a friendly settlement, they were authorized to make binding arbitration decisions.

International arbitration was also known to the ancient world, for many political disputes seem to have been settled in such a manner. In a controversy between Athens and Megara for the possession of the island of Salamis, about 600 B.C., the matter was referred to five Spartan judges who, by arbitration, allotted the island to Athens. A dispute between Corinth and Corcyra for the possession of Leucas (480 B.C.) was settled by Themistocles, as arbitrator. A boundary line in dispute between the Genoese and Viturians was settled by arbitration (117 B.C.), this decision having been recorded upon a bronze tablet unearthed near Genoa. There are also instances in which a third strong power compelled other powers to resort to arbitration. Sometimes the arbitrator was an individual like Themistocles, or an institution such as the Areopagus at Athens, or a state such as Athens.

In the middle ages, Merchants who were knowledgeable and experienced in trade were approached by younger and less experienced colleagues who had disputes in their business. They arbitrated over the disputes submitted to them and gave binding awards. The practice and procedure progressed and developed into legal rules and formed the basis of the English Arbitration Act of 1698 which was passed by the Parliament. Industrial controversy was also arbitrated in ancient times in such matters as master and servant relations, terms of employment, working conditions and wages. One of the first disputes submitted to the earliest known American arbitration tribunal, organized in 1786 by the Chamber of Commerce of New York, involved the wages of seamen.

It is important to recall these early uses of arbitration at this time when, in the midst of a rising tide of controversy, doubts arise. Arbitration is sometimes thought to be something new, untried, and hazardous to good public relations; or its organization seems to be detrimental to judicial institutions that seem older, but are in reality next-of-kin. So soundly was arbitration initially conceived, and so generally was it applied to all kinds of controversy, that little change has taken place in its fundamental principles over the centuries. Despite efforts to narrow the early concept, or to put its practice in a legal strait jacket, arbitration remains the voluntary agreement of states or persons to submit their differences to judges of their own choice and to bind themselves in advance to accept the decisions of judges, so chosen, as final and binding.

This natural right of self-regulation is a precious possession of a democratic society, for it embodies the principles of independence, self-reliance, equality, integrity, and responsibility, all of which are

[3] T. J. Keller, *American Arbitration: Its History, Functions and Achievements* (Minnesota: Allridge Press 1948) 321

of inestimable value to any community. It was inevitable that, in the absence of the organization of the idea, a period of confusion should have followed. The primitive idea that parties in dispute should choose a judge to render a final and binding decision on the merits of the controversy on the basis of proof presented by the parties, later became confused with other processes for the amicable settlement of disputes. However, these were not judicial, but bargaining processes, and were in the nature of mediation or conciliation.

They were intended to effect compromises or to bring the viewpoints of the contestants into sufficient accord for them to settle the matter by themselves, rather than to administer justice. As the general term arbitration was rather indiscriminately applied to all of these processes, the effect was to lessen confidence in arbitration as a judicial process and to create misunderstanding as to its real purpose. One of the services which modern institutions of arbitration have rendered, aided by arbitration laws and the courts in interpreting these laws, has been the restoration of arbitration as a quasi-judicial process and the placing of conciliation and mediation in their proper perspective as bargaining processes without benefit of legal enforcement.

The concept of arbitration is not new in Nigeria. Arbitration and other alternative dispute resolution methods were used to resolve conflicts. Extra-judicial settlement of dispute has always been a feature of our indigenous customary law. Such settlements are accepted and enforced by the courts, provided they satisfy certain requirements.[4] Every community in what has become the Federal Republic of Nigeria evolved their own extra judicial method of dispute resolution, with similarity in formula and process.

According to Akpata, JSC (as he then was) he posits: "It is not hazarding a guess, but being factual to say that the Anglo-Saxons, the Romans and indeed every community that lived 'under the sun' in ancient times used arbitration or mediation or conciliation, in one form or another to resolve disputes".[5]

The Arbitration Ordinance of 1914 was the first Arbitration statute that applied to the whole of the territory now known as Nigeria. Based on the English Arbitration Act of 1889, the 1914 ordinance was passed on the 31st of December, 1914 after the amalgamation of the northern and southern parts of Nigeria. The 1914 ordinance was subsequently re-enacted as the Arbitration Ordinance of 1958.[6]

Each of the regions formally adopted the Arbitration Ordinance of 1958 into their own laws. For instance, it was enacted by the Western Region as the Arbitration Law, Chapter 18, Laws of the Western Region of Nigeria 1959, and subsequently by Lagos State as the Arbitration Law Chapter 10, Laws of Lagos State 1973.

The above legal framework for arbitration continued in force until the 14th of March, 1988 when the Arbitration and Conciliation Decree No. 11 of 1988 ("ACD") was enacted by the then Federal Military Government. Three significant features of the new regime introduced by the ACD were:

[4] G. Ezejiofor, *The Law of Arbitration in Nigeria* (Lagos: Longman Nigeria Plc.. 1997) 3

[5] Arbitration as a Tool for Dispute Resolution in Nigeria. How Relevant Today? Available at <http://www.oblaandco.com/wp-content/uploads/ARBITRATION-AS-A-TOOL-FOR-DISPUTE-.pdf> accessed 12 May 2019

[6] Amended Report of the National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria, September 2005. Available at <https://www.amendmentreport.gov.ng> assessed 10 May 2019.

a) It applied as a Federal enactment throughout the territory of the Federal Republic of Nigeria, and superseded all States arbitration legislations, this was possible because of the "unitary" legislative arrangements under the military regime, accordingly to which the Federal Military Government was competent to legislate on any subject for the entire federation including the states:
b) It included for the first time in the history of arbitration legislation in Nigeria, provisions on international commercial arbitration; indeed, the overall framework of the ACD consisted of a mix of provisions which existed for domestic arbitration under the previous arbitration legislation and provisions which were applicable to international commercial arbitration, inspired by the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
c) Thirdly, the new legislation contained provisions on conciliation, a form of Alternative Dispute Resolution (ADR) for which there had hitherto been no legislative framework.[7]
d) On the 29th of May 1999 a new constitutional and democratic regime emerged in Nigeria founded upon the constitution of the Federal Republic of Nigeria.[8] An important aspect of the new constitutional arrangement is the distribution of legislative powers among the Federal and State Legislatures. While the Federal Government had exclusive competence to make laws on matters itemized in the exclusive legislative list, the state governments had concurrent legislative competence in respect of matters in the concurrent list, and exclusive legislative competence in respect of matters that were not in the Exclusive or Concurrent lists, section 315 (1) CFRN 1999 (as amended) preserves the validity of the ACD as existing law, and provides that the ACD remains valid as a law enacted by the Federal and State legislature to the extent of their respective legislative competence. Nigerian's Arbitration legislation, the Arbitration and Conciliation Act (ACA) was passed into law on the 4th of March, 1988. It is apparent from the provisions of the legislation that one of the purposes of its enactment was to implement Nigeria's treaty obligations under the Convention on the Recognition and Enforcement of Arbitral Awards made in New York on the 10th of June, 1958 ("The New York Convention"). Also, since the legislation was to apply to international commercial arbitrations, there was a clear intention to incorporate the basic concepts of the UNCITRAL model law on International Commercial Arbitration of 1985.
e) Thirty years after the ACA was passed, it is clear that the legislation has not achieved the objectives that inspired its enactment. In a number of significant respects the standards for recognition and enforcement of international arbitration agreements and arbitral awards fall short of the standard prescribed by the UNCITRAL Model Law. Inelegantly drafted provisions have created confusion and generated conflicting or retrogressive judicial decisions. Outmoded concepts and definitions have prevented the arbitral process from keeping pace with contemporary trends in international trade and commerce. Above all, experience shows that the ACA has failed to achieve one of the underlying philosophies of the UNCITRAL model law and of most national arbitration legislations, viz, to minimise judicial intervention in the arbitral process. In Nigeria, arbitration is often perceived as the first step to litigation, and the arbitral process often becomes entangled in the extremely protracted and cumbersome process of Nigerian Litigation as the judicial process itself presently lack the capacity to give efficient support to the arbitral process.

[7] Ibid
[8] Ibid

MEANING OF ARBITRATION

Arbitration has been described as a contractual proceeding whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunal provided by the ordinary process of law.[9] Ezejiofor describes it as the fair resolution of a dispute between two or more parties by a person or persons other than by a court of law and concludes that an exercise is not arbitration if it does not answer this definition.[10]

David defines it as a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.[11] Furthermore Halsbury's Laws of England sees it as a process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.[12]
Essentially arbitration is a party-driven procedure. They are at liberty to choose whosoever is knowledgeable on the core principles surrounding their dispute, decide on where the arbitration will take place, agree on which rules and laws will be applied, the language to be used etc.

DISPUTES THAT CAN BE REFERRED TO ARBITRATION

Not every dispute or difference can be referred to arbitration. Professor Ezejiofor[13] succinctly encapsulated this fact, thus: "Disputes that can be referred must be justiciable issues which can be tried as civil matters. They must be disputes that can be compromised by way of accord and satisfaction. These include all matters in dispute about any real or personal property, disputes as to whether contract has been breached by either party thereto, or whether one or both parties have been discharged from further performance thereof. Terms of a deed of separation between husband and wife can be settled by arbitration. Since compromise by either spouse of suits for dissolution of marriage and other matrimonial actions are held not to be contrary to public policy or good morals, such references to arbitration have been held good.[14] Issues in an action before a court can, if the parties agree, and with leave of the court, be referred. Specific questions of law, such as the construction of a document, may be referred to arbitration.[15] On the other hand disputes arising out of illegal transactions cannot be referred. Thus, a difference relating to a contract which is illegal for being inconsistent with a government order cannot be referred. An award arising from such reference cannot be enforced and may be set aside. Disputes arising out of void transactions such as wagering and gaming contracts, cannot be referred. An indictment for an offence of public nature cannot be referred. It is a settled policy of the law that an arbitrator should not be empowered to settle a criminal charge which is a matter of public concern.[16]

[9] *Gates v. Arizona Brewing Co.* (1939) *Ariz* 269 Cited in M. Domke, *Commercial Arbitration: The Law and Practice of Commercial Arbitration* (3rd ed., Callaghan 2003) 1
[10] G. Ezejiofor (n. 4) 3
[11] R. David, *Arbitration in International Trade* (Netherlands: Kluwer Law and Taxation Publishers 1985) 5
[12] Halsbury's Laws of England (4th ed. England: LexisNexis Butterworths 1991) 332
[13] *Ibid* p. 3
[14] *Ibid*
[15] *Ibid*
[16] *Ibid*

COURT'S INVOLVEMENT IN ARBITRATION AND OTHER DISPUTE RESOLUTION PROCESSES

Arbitration is not a separate system of justice but one that functions within a legal system though one that essentially depends upon the agreement of the parties. To ensure that the principle of party autonomy prevails and limit the role of the courts in arbitral proceedings, Section 34 of the Arbitration and Conciliation Act provides that the court is generally barred from intervening in any matter governed by the Act. Nevertheless, it provides a scope for some measure of intervention in the arbitral process.[17] The nature of this relationship has been described as a relay race[18] where initially 'the baton is in the grasp of the court' as it is the sole organization with power to give effect to the arbitration agreement.[19] Then the arbitrators take over until making an award and once the award is made, their function is fulfilled so the baton is once again handed to the courts to 'lend its coercive powers to the enforcement of the award'.[20]

National court involvement in arbitration is a fact of life as prevalent as the weather. The great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself.[21] National courts become involved in arbitration for a whole host of reasons, but do so primarily because national laws are permissive and parties invite or encourage them to do so.[22] Parties in arbitration want a prompt, less expensive and final resolution of the dispute, whilst states also want to ensure, that the arbitral process is just and impartial.[23] While it is argued that arbitration must be free from courts, in order to be effective, it is also accepted that arbitration needs the support of national courts to be effective.[24]

Flowing from this, this interference takes place at the beginning of the arbitration, during arbitration process and at the end of the arbitral process. Consequently, this provision confers jurisdiction on the courts in respect of matters such as: stay of proceedings, revocation of arbitration agreement, appointment of arbitrator, attendance of witnesses, setting aside of award, remission of an award, enforcement of award and refusal of enforcement of award. The extent, to which court should supervise the arbitral process, if at all, must depend on the essential nature of arbitration.

COURT INTERVENTION IN NIGERIA

The involvement of courts in modern commercial arbitration generally begins even before the arbitral tribunal is established, when the courts are used to protect evidence or the res, to avoid damage.[25] Prior to the establishment of the arbitral tribunal, courts become involved where a party initiates proceedings to challenge the validity of the arbitration agreement; where one party institutes court proceedings despite, and perhaps with the intention of avoiding, the agreement to arbitrate; or where one party needs urgent protection that cannot await the appointment of the tribunal. The courts then enforce arbitration agreements for the arbitral process to start; during the

[17] "A court shall not intervene in any matter governed by this Act except where so provided in this Act"
[18] *Lord Mustill*, Comments and Conclusions in Conservatory Provisional Measures in International Arbitration, 9th Joint Colloquium (ICC Publication 1993) 118
[19] *Ibid*
[20] *Ibid*
[21] J. Paulsson, *Arbitration in Three Dimensions*, LSE Legal Studies Working Paper No. 12.2010 available at <www.ssrn.com/abstract=1536093> accessed 9 April 2019. P. 2
[22] C. Okezie, 'Judicial Supervision of Commercial Arbitration' (1999) 15(2) *Journal of International Arbitration.*
[23] *Ibid*
[24] A. Redfern, *International Commercial Arbitration, Jurisdiction Denied: The Pyramid Collapse* (New Orleans: JBL Publications 1986) 15
[25] J. D. M. Lew, *Applicable Laws in International Commercial Arbitration* (New York: Oceana Publications Inc. 1978) 51 - 52.

pendency of the arbitration itself, it issues interim orders and recognizes and enforces awards at the end of arbitration.

1. *Revocation Of Arbitration Agreement*

Arbitration is based on a valid agreement to arbitrate. As stated earlier, an arbitration is a product of an agreement by the parties to refer any or all existing or future disputes arising from their legal relationship to a neutral person or persons for determination of their respective rights and liabilities, in relation to a the dispute under reference. Arbitration is a creature of consent, and that consent should be freely, knowingly, and competently given.[26] Therefore, to establish that parties have actually consented, the Act provides that the agreement must be in writing and signed by both parties.[27] Section 2[28] provides that unless a contrary intent is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of court or a judge.

Even the death of any party does not revoke or render the agreement invalid, as it shall be made enforceable by or against the personal representatives of the deceased.[29] The choice or arbitration does not bar resort to the courts to obtain security for an eventual award.[30] It is pertinent to state that the private nature of arbitration does not oust jurisdiction of the courts, all that the agreement does is to postpone the right of access to court.[31] Since, the parties to a contract are allowed within the law to regulate their rights and liabilities themselves,[32] all that the court is required to do is to give effect to the intention of the parties as it is expressed in and by their contract.[33] This calls for two things from the courts. First, it must determine whether an arbitration agreement is valid and then whether to enforce a valid arbitration agreement which has not been mutually abandoned.[34] Once parties enter into a valid arbitration agreement, one of them cannot unilaterally revoke it, he must apply to the court for revocation under Section 2 of the Act.

However, the Act does not state in what circumstances the court will grant leave, but it is suggested that it must be in circumstances when a contract can be lawfully repudiated before performance.[35] The arbitration agreement was freely and voluntarily entered into by the parties. To depart from it, the party seeking a revocation has to show good reason. One of such circumstances is when something happens which makes the performance of the arbitration agreement impossible or which destroys the foundation of the contract to arbitrate.[36] Like any other contract, the arbitration contract will be frustrated and can be formally revoked by the court on application by a party. The court will then be empowered to exercise the power of revocation in the event of a supervening impossibility causing a frustration of the objects of the arbitration agreement.[37]

---

[26] *United Steel Workers v. Warrior & Gulf Navig. Co.* (1960) 363 U.S. 574, 582 (". . . [A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.")

[27] F. Ajogwu, *Commercial Arbitration in Nigeria: Law & Practice* (2nd ed. Lagos: Centre for Commercial Law Development 2013) 1

[28] Arbitration and Conciliation Act, LFN 2004

[29] Section 3 Arbitration and Conciliation Act

[30] *Scheep v. "Mv' Araz"* [2000] 15 NWLR (Pt. 691) 622; *Obembe v. Wemabod Estates* [1977] 5 SC 115

[31] *City Eng. (Nig) Ltd v. Federal Housing Authority* [1997] 9 NWLR (Pt 520) 224 at 248 per Belgore JSC; *Lignes Aeriennes Congolaises (L.A.C) v. Air Atlantic Nigerian Limited (A.A.N)* (2006) 2 NWLR (Pt. 963) 49 at 73 paragraph D

[32] *Gott v. Gandy* 2 E & B 845 at p. 847 per Erle, J.

[33] *Sonar (Nig) Ltd. v. Nordwind* [1987] 4 NWLR (PT.66) 520 Para G

[34] *Kurubo v. Zach Motison (Nig.) Ltd* (1992) 5 NWLR (Pt.239) 102

[35] J. O. Orojo, and M. A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates (Nigeria) Limited 1999) 2

[36] L. J. Mustill, and S. C. Boyd, *Law and Practice of Commercial Arbitration in England* (2nd edn, London: Butterworths 1989) 631

[37] *Ibid*

In addition, where some supervening issues of law would arise to make a continuation of the performance of the arbitration agreement illegal,[38] the contract will be deemed frustrated and an application for revocation on this ground by a party where the other party does not agree will be held by the court. Arbitration will only apply when the dispute or difference which the parties to an arbitration agreement agree to refer is a justiciable issue which can be tried as civil matters.[39] The court's role is to decide whether a dispute is arbitrable or not. The court will revoke an agreement to arbitrate when the agreement relates to disputes that cannot be settled by arbitration.[40]

2. Stay of Proceedings

A stay of court proceedings literally means the postponement or halting judicial proceedings or an order to suspend all or part of such proceeding.[41] The parties' agreement that their dispute shall be settled by arbitration is a solemn contract like any other and so a party to the agreement will not be allowed to unjustifiably breach that agreement by bringing a court action in respect of the same subject-matter. When a party to an arbitration agreement decides to institute proceedings in court, rather than explore arbitration as agreed by parties, if the other party agrees, the court action will proceed. Where the Defendant[42] insists on his right to have the matter resolved by means of arbitration, the court's responsibility is to ensure that the parties' agreement is valid and will be enforced by referring them to arbitration.[43]

There are plethora of cases where parties notwithstanding the provisions of an arbitration clause, institute matters in court for determination.[44] Sections 4 and 5 of the Arbitration and Conciliation Act[45] empowers the court to stay proceedings and preserve the res.[46] It is a well settled principle of law that proceedings in the court may be stayed, pending arbitration, in circumstances where an arbitration clause is inserted in the agreement between the parties in order that a stay might be granted. The applicant for a stay must satisfy certain conditions, one of which is that no steps shall have been taken by him after appearance.[47] It is worthy of note that the power of the court as conferred by statute is discretionary which must be judicially and judiciously exercised.[48] The role of the court is to lean towards ordering a stay of court proceeding and make such consequential orders as to the preservation of the res only where the parties have agreed to refer their dispute in a contract within the contemplation of the clause to arbitration and the court considers such agreements valid; it is not for the court to attend to other prayers which an applicant may make in his motion since the court lacks jurisdiction to hear the matter.[49]

---

[38] I. E. Sagay, *Nigeria Law of Contract* (Ibadan: Spectrum Books Limited 2009) 359 - 456

[39] A. E. Akeredolu, 'Attitude of the Nigerian Supreme Court to Commercial Arbitration in Retrospect: 2001-2010' (2012) 4(5) *Journal of Conflict resolution* Pp. 77 - 84

[40] *KSUDC V. Fanz Construction Ltd* (1990) 4 NWLR (Pt. 142) 1 at 32

[41] C. A. Candide Johnson, and O. Shashore, *Commercial Arbitration Law and International Practice in Nigeria* (Durban: LexisNexis 2011) 5 - 7

[42] Since it is the defendant to the action or the party who counterclaims who would want to take the matter away from the court, it is he who will apply to court and that before he has filed his defence to the action or the counterclaim.

[43] Section 4(2) Arbitration and Conciliation Act

[44] *United World Ltd Inc. v. Mobile Telecommuniations Services Ltd* (1998) 10 NWLR (Pt 568) 106; *Mehr v. Nig. Inv. & Ind. Co. Ltd* [1996] N.C.L.R. 351 at 358; *M.V Lupex v. Nig. Overseas Chartering & Shipping Ltd* [2003] 15 NWLR (Pt 844) 469 SC; *Confidence Ins. Ltd Trustees of O.S.CE* [1999] 2 N.W.L.R (Pt.373) at 388; *A.J.D.C v. L.G.N* [2000] 4 NWLR (Pt. 653] 494 at 504.

[45] CAP A18 LFN

[46] The subject matter of the dispute

[47] Per Taylor, C.J in *Mehr v. Nig. Inv. & Ind. Co. Ltd* [1966] NCLR 351 at 358

[48] *Backbone Connectivity Network (Nig.) Ltd & 16ors v. Backbone Technology Network Inc & 2 Ors* Suit No. CA/A/399/2013 of 10/7/2014.

[49] J. O. Orojo, and M. A. Ajomo (n. 35) 2

The court ought to give due regard to the voluntary agreement of the parties by enforcing the arbitration clause as agreed to by them. However, for the court to exercise such discretionary powers conferred by statute, the applicant for a stay of court proceedings must have asserted the right to evoke the arbitration provision before taking other steps in the proceedings. Orojo and Ajomo[50] suggest that this application must be made after appearance and before the applicant has delivered any pleadings or taken any other steps in the proceedings.

What constitutes *'Step in the proceedings'* still remains unsettled in Nigeria; nevertheless, it has been defined as 'action which impliedly affirms the correctness of the proceedings and the defendant's willingness to be bound by the court's decision'.[51] Thus, an exchange of correspondence between parties or their counsel after entering appearance or efforts made out of court to settle the matter in controversy between the parties or moving the court to seek a party's right to rely on the arbitration provision will defeat a defendant's right to rely on arbitration provision.[52] A party who requests for days within which to file a statement of Defence will be deemed to have taken steps in the proceedings.[53]

A step in the proceeding means something in the nature of an application to the court and not mere talk of some step, such as taking out a summons or something of that kind, which is in the technical sense, a step in the proceedings.[54] Hence, a motion to strike out an action after summons had been issued[55] or to counterclaim[56] will amount to steps in the proceedings. Taking steps may also include filing necessary processes as required by the rules of court after appearance.[57] It therefore means that a party desiring to file an application for a stay of proceedings in view of an arbitration clause need not take any steps in the proceedings commenced by the plaintiff; where he does, the implication is that the defendant may be deemed to have waived his right or the agreement as contained in the arbitration clause. It readily shows the defendant's willingness to advance his case against a party and abandon his right to arbitration.

The courts have taken the position that where a party has expressly or impliedly waived his right to arbitration, he is barred from applying to court to stay proceedings. He cannot approbate and reprobate.[58] However, the subject matter must be the type which ought or should be referred to arbitration.[59] Although, party barred from staying proceedings for taking steps in it could still independently proceed with his right against the plaintiff for damages for breach of the arbitration clause,[60] the court in *Ighoroje v. Maude Sokoto*[61] held that the effect of Section 5 of the Act therefore was that once a defendant has filed a Defence, he could not have the proceedings stayed to proceed to arbitration, but that did not interfere with his right to proceed independently against the plaintiff for damages for breach of the arbitration clause. It needs to be stated that the right to

[50] *Ibid*
[51] *Eagle Star Insurance Co Ltd v. Yuval Insurance Co. Ltd* [1978] 1 Lloyd's Rep 357.CA
[52] *Confidence Ins. Ltd Trustees of OSCE* [1999] 2 NWLR (Pt.373) at 388
[53] *NPMC Ltd. v. Compagne Noga I & I. SS* (1971) 1 NMLR 223 at p. 226, Obember v. Wemaboard Estate Ltd. (1977) 5 SC. 115 at p. 132
[54] Per Lindley, L.J in *Ives & Barber v. Williams* [1894] 2 Ch. at 484
[55] *Achonu v. N.E.M & Gen. Ins. Co* [1971] 1 SCLR 449 at 455-456
[56] *NPA v. Cogefa* [1971] 2 NCLR 44
[57] F. Ajogwu, *Commercial Arbitration in Nigeria: Law & Practice* (2nd edn. Lagos: Centre for Commercial Law Development) 1
[58] *Wuraola v. Northern Assurance Co. Ltd* [1966] 1966 NCLR 138-139
[59] *Kano State Urban Development Board v. Fanz Construction Co. Ltd* [1990] 4 NWLR (Pt. 142)
[60] O. Bamigboye, 'Arbitration Law and Practice in Nigeria: Does National Court Involvement Undermine the Arbitration Processes?' available at <https://www.googlescholar.com> accessed 19 May 2020.
[61] [1966] NCLR 301 at 305, Williams J

apply for a stay of proceedings has a time limit within which it must be made. The Supreme Court in the case of *KSUDB v. FANZ Construction Ltd*[62] held that the defendant is "not given by the law a *carte blanche* as to when to apply for the stay of proceedings". Hence, it must be raised timeously[63] and only a party to an arbitration agreement can bring an action before the court for the grant of an order to stay proceedings.[64] As a condition, a party applying for stay of proceedings must show in his affidavit, evidence in support of the application by means of documentary evidence the steps he took or intends to take for proper conduct of the arbitration. It is not enough to merely depose that he is ready and willing to do all things necessary to cause the matter to be decided by arbitration and for proper conduct of such arbitration for he is mandated to show that "*at the time when the action was commenced …., he remains ready and willing to do all things necessary to the proper conduct of the arbitration."*[65].

The court is bound to stay proceedings unless it is satisfied that there is sufficient reason to justify a refusal to refer the dispute to arbitration despite the agreement of the parties. The court may only refuse to order a stay of proceedings where the defendant establishes that he would suffer injustice from the arbitration tribunal or that agreement between the parties is null and void, inoperative and incapable of being performed.[66]

3. *Protecting The Res*

Parties to a dispute choose arbitration because of the flexibility and privacy of the proceedings, their ability to choose the tribunal and the *enforceability of the award*.[67] Enforceability entails ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party. Interim measures are very important in arbitral proceedings because they protect the rights and interests of the parties before or during the arbitration[68] and ensure the smooth execution of an arbitration award.[69] Such interim measures are made prior to the issuance of the award by which the dispute is finally decided for the purpose of preserving and maintaining the status quo.[70] An aggrieved party may request the court or the Arbitral Tribunal as the case may be to make an interim order to protect the property for the following reasons:[71]

- To ensure that the property in dispute is not allowed to waste or be depleted to the detriment of either party.
- It may be too late should the Tribunal wait till the final Award. The threat is that the Award may be rendered nugatory.
- To ensure that the value of the res is not depleted.
- Property/Res may be preserved for its evidential value so that one party is not unduly prejudiced.
- The need to ensure that the party in possession of the Res does not abuse same such that should the other party succeed in his claim, he will still get the full benefit of the Award.

[62] [1990] 4 NWLR (Pt 142) 1 at 28
[63] This is known with the latin maxim *viigilantibus non dormientibus jura subveniunt*.
[64] *AJDC v. LGN* [2000] 4 NWLR (Pt 563) 494 at 504 Per Ayoola, JSC
[65] Section 5(b) Arbitration and Conciliation Act 150 *M.V Lupex v. Nig. Overseas Chartering & Shipping Ltd* [2003] 15 NWLR (Pt 844) 469 SC
[66] *M.V Lupex v. Nig. Overseas Chartering & Shipping Ltd* [2003] 15 NWLR (Pt 844) 469 SC
[67] A. Hirsch, 'The Place of Arbitration and The Lex Arbitri' (1979) 34 *Arb. J*. 43.
[68] For example by preserving assets and evidence and maintaining the status quo of the parties
[69] M. S. C. Hwang, and C. M. Rajesh, 'The Role of Courts in Arbitration: Singapore and Other Asian Countries in Perspectives' (2002) 68(3) *Journal of the Chartered Institute of Arbitrators* p. 223 - 237
[70] C. A. Candide Johnson, and O. Shashore (n. 41) p. 5 - 7; A. Zuckerman, *Zuckerman on Civil Procedure: Principles and Practice* (London: Sweet and Maxwell 2006) 265
[71] J. O. Orojo, and M. A. Ajomo (n. 35) 2

Section 13 of the Arbitration and Conciliation Act[72] vests the tribunal with powers to *order any party to take such interim measures of protection as the arbitrator may consider necessary in respect of the subject matter of the dispute and request any party to provide appropriate security in connection with the subject matter*[73] The implication of this provision is that the Arbitral Tribunal shall have the power to make interim orders directing either party to preserve the res pending the completion of the proceedings. It should be noted that this provision applies only where the property to be protected is in the custody of one of the parties. Where the property is in the hands of a third party, the Arbitral Tribunal (for obvious reasons) has no such power against a third party.

The power to make an interim order of preservation or conservation against a third party lies with the national courts since it has powers over all persons within its jurisdiction. Article 26 (3)[74] of the Arbitration and Conciliation Act which applies by virtue of Section 53 of the Act provides that *"...A request for interim measures addressed by any party to court shall not be deemed incompatible with the agreement to arbitrate, or a waiver of that agreement. Such interim measures includes "measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods"* This provision can also be extended to a situation where a party as a first step approaches the court for an order of preservation or conservation of the res pending the constitution of the arbitral tribunal.[159] Candide Johnson and Olashore submit that even where a party has only applied to the court for a stay of proceedings under Sections 4 and 5 of the Arbitration and Conciliation Act. The court shall stay proceedings if the matter ought to be before arbitration and that, inherent in the court's power to stay proceedings is its power to make preservatory orders either by making them a condition for a stay or by making an order for interim protection before making the order for stay of proceedings.[160]

In granting an order of protection of the res, the court may under the Rules of courts request any party to provide appropriate security for cost, should it turn out that the order was wrongly made and the other party suffers injury on account thereof. This could be expedient where the defendant is resident outside the country and has no asset in the country; the plaintiff runs the risk that any judgment against the defendant may not be satisfied. The plaintiff by a request for interim preservation restraining the respondent from removing his assets outside the country can ensure that any judgment obtained is not a hollow one.[161]

4. Appontment And Removal Of Arbitrator

Once a decision to refer a dispute to arbitration has been made, selecting an arbitrator is critical not only for the reputation of the arbitral tribunal process but for its standing. In deciding on a choice of arbitrator, the parties need to pay attention to the claim to determine whether it is essentially a legal problem or whether a particular expertise is required to evaluate facts quickly and appropriately. Parties do this essentially to ensure that their disputes are resolved by "judges of their own choice".[75] The court does not have an inherent jurisdiction to appoint an arbitrator or umpire or to compel any party to the agreement of reference to do so.[76] Where the parties have failed to make adequate provision for the constitution of the arbitral tribunal, or fail to agree on one arbitrator and

[72] Cap A. 18 Laws of the Federation of Nigeria 2004

[73] This is in order to maintain the status quo as between the parties to prevent one party suffering detriment against the other. It could be by a Mareva injunction, appointment of receivers, detention, custody and preservation.

[74] Borrowed from Article 26 of the UNCITRAL Arbitration Rules

[75] This expression comes from the Hague Convention of 1907

[76] *El-Assad v. Misr (Nig) Ltd* [1968] NCLR 173 at 176

there is no applicable institution or other rules[77] Hence, Section 7 of the Act provides for the intervention of the court in domestic arbitration to appoint an arbitrator on the application of any party to the agreement.

The court may ask the solicitors to the parties to nominate possible candidates.[78] In making the appointment the court must have due regard to any qualifications required of the arbitrator by the arbitration agreement and such other consideration as are likely to secure the appointment of an independent and impartial arbitrator[79] and such powers so exercised is not subject to appeal. In the case of international arbitration, the domestic court is not permitted to intervene. The appointing authority designated by the parties performs the functions of the court in appointing an arbitrator.[80] A person who knows of any circumstances likely to give justifiable doubts as to his impartiality or independence if appointed, is obliged to disclose such circumstances when approached in connection with an appointment as arbitrator. This duty to disclose continues after the person has been appointed as an arbitrator and subsists throughout the proceedings, unless the arbitrator had previously disclosed the circumstances to the parties.[81]

Generally, the parties may determine the procedure to be followed in challenging an arbitrator's independence and impartiality and the courts play a limited role in the challenge process.[82] There is also the danger of parties using the issue of jurisdiction to cause unnecessary delay particularly when there is an application before the court.[83] Unless the arbitration agreement provides other directions as to challenges, a party who intends to challenge an arbitrator must give notice of its challenge within 15 days after the appointment of the arbitrator it wishes to challenge or within 15 days after the circumstances it complains of became known to it. The challenge must be in writing with the reasons for the challenge and must be served on the other party, the arbitrator being challenged and the other members of the tribunal. Upon receipt of the challenge, the other party may agree and the arbitrator may also agree and withdraw from his appointment. However, in domestic arbitrations,[84] where the other party does not agree or the challenged arbitrator refuses to withdraw, the decision on the challenge will be made by the arbitral tribunal or by the court[85] or other appointing authority (if the initial appointment was by the court or other appointing authority). Redfern and Hunter[86] suggest that an application to the court to challenge the appointment of an arbitrator must be brought timeously and that failure to comply with the time limits should bar any attack of the award. For international arbitrations, the challenge will be determined by the appointing authority (if the initial appointment was made by an appointing authority); or in all other cases, by the designated appointing authority or the Permanent Court of Arbitration where none was designated.

[77] J. O. Orojo, and M. A. Ajomo (n. 35) 2
[78] Especially in accordance with Section 7(2). Ogunwale v. Syruan Arab Republic [2002] 9 NWLR (Pt. 717) 127
[79] *Bremer Gmbh v. Soules & Anthony Scott* [1985] 1 Lloyd's Rep. 160 at 164
[80] J. O. Orojo, and M. A. Ajomo (n. 35) 2
[81] Section 8 Arbitration and Conciliation Act
[82] Court Control of Arbitral Process.2006 Op.cit. The final decision on jurisdiction rests with the court as a dissatisfied party may choose to apply to court. The result is that there is concurrent control of the arbitration by the court and the arbitral tribunal on the question of jurisdiction.
[83] *Ibid*
[84] *Ibid*
[85] Section 11 Arbitration and Conciliation Act
[86] Section 30(2) Arbitration and Conciliation Act

5. *Attendance Of Witnesses*

More often than not, a party may wish to call a witness and the witness is willing to appear on his or her behalf. There are however instances in which a prospective witness is unwilling to appear.[174] Section 175 of the Evidence Act[87] provides that *"All persons shall be competent unless the court considers that they are prevented from understanding the questions out to them, or from giving rational answers to those questions, by reasons of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.*

A witness of a party may voluntarily attend and testify at an arbitral proceeding either to give evidence or corroborate already adduced evidence, but sometimes a witness may not wish to attend voluntarily and it then becomes necessary to compel his attendance where the applicant who requires it shows the evidence is relevant.[88] Since the arbitral tribunal has no coercive power. It relies on the court to exercise such powers and assist the arbitral process by compelling attendance before any tribunal of a witness wherever he may be within Nigeria. It may also order to bring up a potential witness in prison for examination before the arbitrator. *Section 23* of the Act provides inter alia as follows:

(1) The court or the judge may order that writ of subpoena ad testificandum or of subpoena duces tecum shall issue to compel the attendance before any arbitral tribunal of a witness wherever he may be within Nigeria.

(2) *The court or a judge may also order a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before any arbitral tribunal.*

It is important to note that while any party to an arbitral proceeding may sue out a writ of subpoena ad testificandum[89] or subpoena duces tecum[90] no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.[91] If a witness summoned by writ of subpoena refuses without reasonable excuse to attend or refuses to answer a question, he is liable for contempt of court provided that the writ has been served on him not less than four days before the day on which his attendance before the arbitrator is required by writ.[92]

Sometimes, a witness whom a party desires to call is resident outside Nigeria. Section 23 of the Act makes no provision in this respect. Orojo and Ajomo[93] suggest that accordingly, Section 15(2)[94] will apply and the arbitral tribunal "may subject to the Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing." Where such witness is overseas and reasonably unavailable, a written statement by him as to matters within his personal knowledge is admissible under Section 83 of the Evidence Act 2011[95] and the court may order proof by affidavit.[96]

[87] 2011
[88] *Omoregbe v. Lawani* (1980) 3 - 4 SC 108.
[89] Black's Law Dictionary 8th edn. at 1467, A subpoena ordering a witness to appear and give testimony in court
[90] A subpoena ordering a witness to appear and to bring specified documents, records or things referred to in the judicial proceedings. Black's Law Dictionary 8th edn at 1467
[91] Section 20(6) of the Arbitration and Conciliation Act. See Competence and Compellability. Section 175 to 186 of the Evidence Act 2011
[92] L. J. Mustill, and S. C. Boyd (n. 36) 350
[93] J. O. Orojo, and M. A. Ajomo (n. 35) 230
[94] Arbitration and Conciliation Act
[95] Section 83(1) & (2) Evidence Act 2011
[96] Section 110 of the Evidence Act 2011

6. Setting Aside Of Award

The power to set aside an award in domestic arbitration is statutory and is contained in Sections 29, and 30(1) of the Act[97] The combined effect of this section allows a party who is aggrieved by an arbitral award[98] may within 3 months from the date of the award or in a case falling within Section 28 of the Act, from the date the request for additional award is disposed of by the arbitral tribunal apply to the court to set aside the award. If the application is not made within the stated time limit, the right is lost and barred.[99] Like a judgment, there is a rebuttable presumption in favour of an arbitral award and the burden of proof is on the party who is aggrieved and wishes to set aside the award[100] and such application must be made by a party to the agreement or his personal representative.[101] The Court in *Arbico (Nig) Ltd v. NMT Ltd*[102] gave interpretation to the Section 29 and 30 stating the grounds on which an award will be set aside to include where the award contains decisions on matters which are beyond the scope of the submission to arbitration,[103] where the arbitral proceedings or award has been improperly procured,[205] where the arbitrator has misconduct himself,[206] and where there is an error of law on the face of the award.[207] Nevertheless, subject to section 43 of the Arbitration and Conciliation Act[104] which provides that Part III of the Act shall apply solely to international arbitration and conciliation, section 48[105] provides for the setting aside of an award by the court in an international arbitration on any of the nine circumstances or grounds set out in the section which includes where the subject matter of the dispute is not capable of settlement by arbitration under laws of Nigeria or where the award is contrary to public policy of Nigeria.[106] It must however be noted that the grounds under the first subsection must be proved with facts by the party who alleges, however, the court must make a finding by itself under subsection (b).

7. *Recognition And Enforcement Of Awards*

According to the learned author of *Commercial Arbitration in Nigeria,*[107] the recognition and enforcement of arbitral awards is an important part of the Nigerian and international legal system, providing the final legal mechanism for the conclusion of disputes governed by an arbitration clause. Without a legal framework for recognizing or enforcing arbitral awards, the arbitration process would be of little value to anyone. An award will only be worth it for the winning party when such a party can enforce the stipulations of the award against the losing party. The recognition and enforcement of awards can arise in either a domestic or international legal context. However, there are certain specific matters that need to be proved in an action to enforce the award, which include that a submission has been made, or that there is a contract containing an arbitration

[97] Arbitration and Conciliation Act

[98] This must be a party to the agreement and consequently to the arbitral award and not under any contractual incapacity.

[99] *Araka v. Ejeagwu* [2000] 15 NWLR (Pt. 692) 684; *United Insurance v. Stocco* [1973] 8 NSCC 96; *Middlelemis & Gould v. Hartlepool Corpn* (1971) I WLR 1646; (1973) All E.R. 175

[100] Section 29(2) Arbitration and Conciliation Act "…if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of submission to arbitration…"

[101] Section 3, Arbitration and Conciliation Act. The award being a product of the valid arbitration agreement with which the parties and their personal representatives are bound.

[102] [2002] 15 NWLR (Pt. 789) 7

[103] *Samuel v. Cooper* (1835) 2 Ad. & El. 752

[104] *South Sea Co. v. Burnstead* (1734) 2 Eq. Cas. Ab. 80; *Moseley v. Simpson* (1873) L. R. 16 Eq. 226; *Re Haigh and London & N.W & G.W. Railways* (1896) 1 QB 649

[105] *William v. Wallis & Cox* (1914) 2 K.B. 497 at p. 485; *Re Hopper* (1961) 31 L.J. Ch. 420; J. O. Orojo, and M. A. Ajomo (n. 35) 275; *Kano State Urban Development Board v. Fanz Construction Co. Ltd.* [1990] 4 NWLR (142) at 37; *LSDPC v. Adold Stamm International Ltd.* (1994) 7 NWLR 545.

[106] *Baker Marine v. Chevron* [2000] 12 NWLR (Pt. 681) at 393; *R.S. Hartley Ltd. v. Provincial Ins. Co. Ltd.* (1957) Lloyd's Rep. 121

[107] F. Ajogwu (n. 57) 129

clause. Unless set aside, the decision arrived at by arbitrators is conclusive between the parties and is unimpeachable as the decisions of any constituted court of law.[108] Every arbitral award duly made is to be recognized as binding[109] and is expected to be complied with.[110] Thus, while Section 31(1) recognizes the award as binding, it is only *"upon application in writing to the court"* that it can be enforced. If we recall the words of Nikki Tobi, JSC[111] that *"an arbitral award per se lacks enforcement or enforceability…., and is a toothless dog which cannot bite until a court of law gives teeth to it"* The Act provides that the duly authenticated original award (or certified true copy) and the original arbitration agreement (or duly certified copy) shall accompany such application.[112] Russell[113] adds that the applicant must also make full disclosure of any matters which he knows may affect the granting of the leave to enforce the award. Section 31(3) provides that "the award may by leave of the court or judge be enforced in the same manner as the judgment or order" of the court. To this end, when an award orders the specific performance of an act in accordance with his contractual obligations, it has been suggested that[114] the award still requires the leave of court for its enforcement unlike an order of a court for specific performance which immediately obtains the force of law. The award for specific performance must stipulate a date for the performance of the act ordered so as to facilitate enforcement of the award. Asides this, the court has the power to make further similar orders for the purpose of enforcing an arbitral award.[115] It should be noted that Section 51 of the Act provides for the procedure for the enforcement of awards in international arbitration.

8. *Refusal Of Recognition And Enforcement Of Award*

Section 32 of the Act provides for any of the parties to an arbitration agreement to request the court to refuse recognition or enforcement of the award; this application must be made at any time after the award is made, especially as the application and order for enforcement may be made *ex parte*.[116] The grounds upon which the court is to refuse recognition or enforcement of the award is not stated under this section, nevertheless Section 52 provides for grounds upon which an application for recognition and enforcement may be refused in international arbitrations; and the Courts have in the exercise of their discretion applied them to domestic arbitrations in Nigeria. Where an award is being refused recognition and enforcement because it has not yet become binding on the parties or has been set aside or suspended by a court in the country where the award was made; the court where refusal is sought may if it considers necessary postpone its decision and may on the application of the party claiming recognition or enforcement order the other party to provide

[108] *Environmental Development Construction v. Umara* [2000] 4 NWLR (Pt. 652) 293

[109] This is the basis for res judicata which means that an award operates as a bar to a fresh arbitration or action unless an award as been nullified. See F. Ajogwu (n. 35) 130. According to Oguntade JCA in *Okpuruwu v. Okpokam* supra, "…it operates as estoppels per rem judicatam"

[110] *Arbico Nigeria Ltd v. Nigerian Machine Tools Ltd* [2000] 15 NWLR (Pt 789) 1 CA at p.32; Article 32 (2) Arbitration Rules in the First Schedule to the Arbitration and Conciliation Act which states that "the award…shall be final and binding on the parties. The parties undertake to carry out the award without delay". Thus the parties are "bound by his (arbitrator's) decision whether the conclusion be right or wrong, that is, for better for(sic) worse unless it appears on the face of the award clearly that the arbitrator has decided contrary to the law"

[111] *Okechukwu v. Etukokwu* supra

[112] Section 51(2) Arbitration and Conciliation Act. An award or arbitration agreement not made in English language must be accompanied by a certified translation in English where appropriate, *Curacao Trading Co. B.V v. Harkisandas & Co.* (1992) 2 Lloyd's Rep 186.

[113] Russell on Arbitration

[114] F. Ajogwu (n. 57) 138

[115] *City Engineering Nigeria Ltd v. Federal Housing Authority* [1997] 9 NWLR(520) 224 at 245

[116] *K.S.O & Allied Products Ltd. v. Kofa Trading Co. Ltd.* (1996) 3 NWLR 244 at page 254 where the Supreme Court approved the use of originating Notice of Motion and followed earlier decisions that "…where it is sought to enforce a right conferred by a a statute and in respect of which no rules of practice and procedure exist, the proper procedure is an originating Notice of Motion.

appropriate security.[117] The court in Nigeria[118] shall recognize and recognize an award of a foreign tribunal as binding and enforce them in accordance with its rules of procedure.[119] In line with the award of a foreign tribunal, it must be stated that setting aside where it is done by the court of the seat of arbitration may affect the validity of the award in such a way that no other national court in any other country will regard the award as valid for recognition and enforcement. On the other hand, mere refusal to recognize and enforce an award does not affect the validity of such an award in other national courts. This indeed is a significant difference for practitioners to note in making their decision as to challenge of an award. Another significant issue in recognition and enforcement is information as to existence of assets of the losing party. It is important to shop for execution of an award in those countries where there are assets to satisfy the award.[120] Finally, when the winning party files an application to court to enforce an award, the unsuccessful party may oppose the application by filing another application to set aside the award. In such a case, the position of the law is that the application for setting aside takes priority over the one for enforcement.

CONCLUSION

This paper has examined the legal regime regulating commercial arbitration in Nigeria. It discussed the origin and evolution of commercial arbitration. It considered the effect of Section 34 of the Act *which provides that a court shall not intervene in any matter governed by this Act except where so provided in the Act* and has been able to establish that the principle of party autonomy underscores the arbitral process. It also considered the express provisions in the Act for the intervention of the court in the following areas: stay of proceedings, revocation of arbitration agreement, appointment of arbitrator, attendance of witnesses, setting aside of award, remission of an award, enforcement of award and refusal of enforcement of award.

It also established that sometimes, the relationship between national courts and arbitral tribunal is one of "partnership"; although not a partnership of equals, but that the relationship is not only complementary but necessary. It asserts that Arbitration may depend upon the agreement of the parties, but it is also a system built on law and which relies upon that law to make it effective nationally and internationally and contends that national courts could exist without arbitration, but arbitration could not exist without the courts.

RECOMMENDATIONS

In view of the forgoing, the following recommendations are made to limit the abuse of court intervention and obstruction of the arbitration process and promote party autonomy in regulating how disputes should be determined.

It has also been observed in this paper that the attitude of Nigerian courts to arbitration has changed from one of suspicion to one of support for the arbitral process. Although, it is the observation of the present writers that arbitration is still not widely known not only among lawyers but also among judges; if arbitration will take root in Nigeria, it is imperative that lawyers and judges through the Nigerian Bar Association and National Judicial Institute respectively are trained in the field of arbitration. This can be done through regular seminars and workshops.

[117] Part III of the Arbitration and Conciliation Act
[118] Section 52(3) Arbitration and Conciliation Act
[119] Nigeria enacted the Arbitration legislation based on the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985 which wholesomely recognizes the Convention of the Recognition and Enforcement of Foreign Arbitral Awards done in New York on June 10, 1958. Available at <https://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 14 May 2019.
[120] Article III of the Arbitration Rules as contained in the Second Schedule.

The Act is in need of review and reform. This is not an indictment of its drafters but the review and reform are aimed at properly locating Nigeria in the commercial arbitration world. After all, Nigeria was the first African country to adopt the Model Law. It is however necessary for the Federal Government to adopt the recommendations of the National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria (the National Committee), which it established in 2005 and whose report served as a bedrock in the enactment of the Lagos State Arbitration Law 2009. This uniform law if enacted will help in positioning Nigeria as a global arbitration hub.

The Act provides that where the parties fail to appoint arbitrator(s) or a third party fails to perform the function of appointing arbitrator(s) under section 7 of the Act, any party may request the court to make such appointment and such appointment shall be final. It is submitted that this provision cannot be sustained in a democratic dispensation and in a judicial structure like Nigeria that has an appellate system. In consonance with the practice in other jurisdictions, the leave of court should be sought for any appeal from a decision of the court under the section.

It is highly expedient that there should be a strengthening of interim measures like investing in an arbitrator more coercive powers of preservation (injunctions) as well as those necessary to command obedience to directions issued by the Arbitral Tribunal. This should be incorporated into the Act accordingly.

The issue of immunity of arbitrators need be mentioned. While it is conceded that an arbitrator should be appointed based on his qualification and experience, it is pertinent to remember that he performs quasi-judicial functions. In order to sustain this status and attract persons of high integrity to act as arbitrators, the Act should expressly provide for their immunity as is now done in other jurisdictions. This is not to suggest that arbitrators should be granted absolute immunity but qualified immunity covering acts done or omitted to be done in the process unless wilfully done or actuated by malice or improper consideration. Such a provision will reinforce their independence and impartiality and protect them from unnecessary and unwarranted harassment. Furthermore, just like the American Bar Association Rules and that of the London Court of International Arbitrators, the immunity should also extend to the arbitral institutions and their employees.

In tandem with the above, no section of the Act talks about ethics as it concerns arbitration; it is our recommendation that the Act should make provisions for the discipline of arbitrators who has misconduct himself in the course of arbitration. For example, a court setting aside an award as a result of such misconduct should be able to recommend such arbitrators to a body created by the Act similar in function to the Legal Practitioners Disciplinary Committee (LPDC). This misconduct must however be grave, and not merely an error of law, for example, an arbitrator who demonstrates grave impropriety or takes bribe or wilfully grants undue communication with a party for the purpose of perverting justice should qualify for discipline since he puts himself in the position of a quasi-judicial arbiter.

On an application to set aside an arbitral award, section 29 of the Arbitration and Conciliation Act provides for limitation period while section 30 of the Act dealing with the same subject does not so provide. Accordingly, section 30 of the Act should be read subject to section 29 of the Act. Similarly the provisions in Part III of the Act dealing with international commercial arbitration should be read subject to other provisions in Part I of the Act dealing with domestic arbitration. Also flowing from the above and in reaction to the regularity with which unsuccessful parties launched actions to challenge awards on the slightest pretext under sections 29 and 30 of the Act, it

is recommended that a reviewed Act should expressly provide that a party seeking to challenge an award must show proof of substantial injustice in order to discourage frivolous applications. Courts should also be empowered to award cost against any party who seeks to delay the arbitral process by recourse to courts on frivolous grounds. This should be deemed as an abuse of court process and deserving of penalty in order not to defeat the expectation of a speedy trial, which is an essential feature of arbitration.

The limitation on the powers of the court to refuse the enforcement of an arbitral award as provided in section 51 is section 32 of the Act. However, section 32 deals with domestic arbitration and does not provide for the grounds for such refusal. Therefore, section 52 of the Act should be substituted for section 32. This is so because section 52 not only deals with international arbitration but the grounds for refusing recognition and enforcement.

As stated in this paper, the rationale behind the introduction of arbitration to our jurisprudence was to relieve the courts of its heavy load of cases and to afford the parties a quicker and cheaper method of dispute resolution. However, the fact that the parties have to make recourse to the courts under certain circumstances defeats the whole rationale behind arbitration because when this matters are brought before the court, they join the backlog of cases that are already before the courts. In light of this, it is recommended that courts should devise a system whereby arbitral matters that are taken to the courts as of necessity via section 34 of the Arbitration and Conciliation Act do not have to join the backlog of cases so as not to defeat the whole rationale behind arbitration. The courts can make it mandatory for any matter taken before it, which is the subject of arbitration to be heard in chambers.

Although commercial arbitration is well developed in other jurisdictions, a lot still has to be done to raise the consciousness of businessmen and the academia in Nigeria to its importance. Increasingly, arbitration is now a subject of its own and there is a shift from litigation to arbitration whenever there are commercial disputes. Given its growing importance especially in international trade, the National Universities Commission should develop the syllabus and list it, if not among the core subjects to be taught in the undergraduate levels in our Universities, as an optional subject. The Council of Legal Education should also do ditto in its curriculum at The Nigerian Law School.