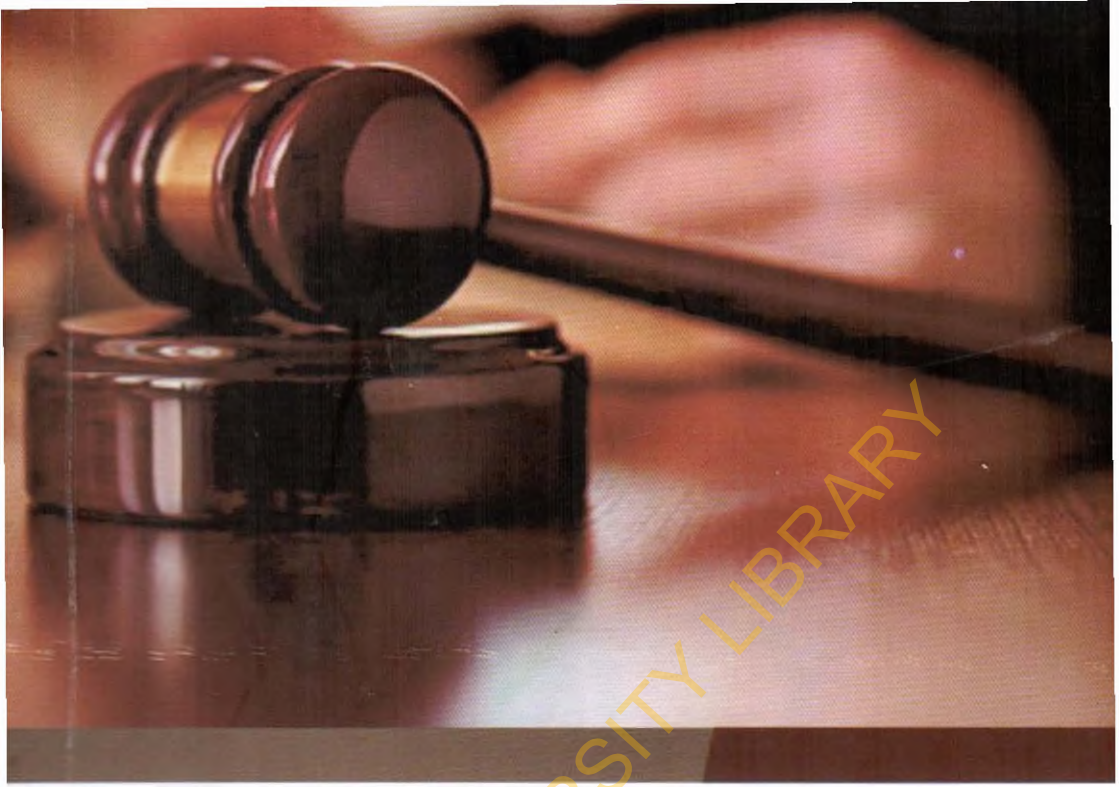

LAW AND POLICY THOUGHTS IN NIGERIA

Edited by:
Adeniyi Olatunbosun, PhD

LAW AND POLICY THOUGHTS IN NIGERIA

Edited by:

Adeniyi Olatunbosun, PhD

Law and Policy Thoughts in Nigeria

ISBN: 978-978-974-900-3

Published by
Faculty of Law
University of Ibadan
Ibadan, Nigeria

Printed by
HIRAS PUB LTD
0803 349 5663

Designed by:
DavidolladWox
wox.davidollad.com
Email: wox@davidollad.com
Phone: +234 703 8406 891

CONTENTS

CHAPTER TWELVE

PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION

S. Akinlolu Fagemi*

Introduction

International Commercial Arbitration has never been strictly defined. However, it is one of the many possible procedures for the settlement of disputes as regard economic transactions. According to Bergsten,[1] there are two basic methods of defining an international arbitration for the above-mentioned purposes. In international arbitration one has to consider if the transaction is in a state other than the place of transaction or takes place in two or more states.

The other method is to consider the parties; do they come from different States. It is usually the case that two natural persons who are citizen of different States might be considered to be from that State for the purposes of determining whether arbitration is international even though they are citizens of a different State.

Premised on the above, international commercial arbitration can be described as the process of resolving business disputes between or among transnational parties through the use of one or more arbitrators rather than through the courts. It requires the agreement of the parties, which is usually given through an arbitration clause that is inserted into the contract or business agreement, the decision

* Senior Lecturer, Department of Public Law, University of Ibadan.

1 Erick E. B, "Dispute Settlement". UNCTAD/EDM/Misc.232/Add.38, United Nations, New York and Geneva, 2005, p. 13 available at www.unctad.org/en/Docs/edmmisc232edd39. Retrieved on June 22, 2015.

is usually binding.[2] Such clause is included by the parties, who decide to submit disputes for binding resolution by one or more arbitrators. In essence, international arbitration is often a creation of contract. It is a private and effective method to resolve disputes. Nowadays, it tends to be the preferred means for settling disputes within the international community.[3] The process allows parties from different legal and cultural backgrounds to resolve their disputes, generally without the formalities of their respective legal systems. In the word of Moses,[4] it is a system whereby parties who arbitrate have decided to resolve their disputes outside of any judicial system. Thus, in International Commercial Arbitration, parties to dispute are governed by international law which is not necessarily identical to that of the disputing parties.[5] Since arbitration involves a final and binding decision, producing an award that is enforceable in a national court. The decision-makers (the arbitrators), usually one or three, are generally chosen by the parties. Parties also decide whether the arbitration will be administered by an international arbitration institution, or will be by *ad hoc,* which means no institution is involved. The rules that apply are the rules of arbitral institution, or other rules chosen by the parties. In addition to choosing the arbitrators and the rules, parties can choose the place of arbitration and the language of arbitration. Arbitration thus gives the parties substantial autonomy and control over the process that will be used to resolve their disputes.[6]

---

[2] Lawrence Craig W, 1995, *Trends and Development in the Laws and Practice of International Commercial Arbitration,* (Paris: Couder Brokers,) p. 3.

[3] Redfern, A and Hunter, M, 2003. *Law and Practice of International Commercial Arbitration,* (London: Sweet & Maxwell,), p. 6.

[4] Margret L. Moses. 2008. *The Principles and Practice of International Commercial Arbitration,* (New York: Cambridge University Press,), p. 1.

[5] Rene David, 1985. *Arbitration in International Trade* (Kluver Law and Taxation Publishers,), p. 414.

[6] Margret L. Moses, *op cit,* p. 1. Party autonomy as a principle is based on choice of law in a contract and , in general sense, started to develop as a principle in the nineteenth century. It is a principle which makes arbitral process flexible. See Dicey, Morris and Collins.*The Conflict of Laws,* vol. 2, 4th ed. (London: Sweet and Maxwell, 2010) p. 32 and Fagbemi, S. Akinlolu. 2015 "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality" *Journal of Sustainable*

National Laws, International Conventions and Institutional Rules grant parties and arbitrators a great deal of freedom to work out the rules of arbitral procedure. Indeed, parties' freedom to agree upon the arbitral procedure is a common feature in international commercial arbitration regulations.[7] The need for parties' autonomy, according to Moses,[8] is particularly important in international commercial arbitration because parties do not want to be subject to the jurisdiction of the other party's court system. Each party fears the other party's 'home court advantage'. Arbitration offers a more neutral forum, where each side believes it will have a fair hearing. Parties' autonomy with regards to the conduct of the arbitration process has been accepted throughout the word and recognised by international conventions. For instance, the UNCITRAL Model Law[9] provides that the arbitral tribunal shall decide the dispute in accordance with such rules that are chosen by the parties as applicable to the substance of the dispute. The UNICITRAL Arbitration Rules[10] also makes provision for party autonomy when it provides that the arbitral tribunal shall apply the rules designated by the parties as applicable to the substance of the dispute. In the same vein, the New York Convention[11] provides that the recognition and enforcement of an arbitral award can be refused if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, while the rules of International Chamber of Commerce provides that the parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute.[12]

Development Law and Policy AfeBabalolaUniverity, Ado-Ekiti Vol. 1 Issue 1; Fall , p.223.

7 Giacomo Rojas Elgueta, 2011. "Understanding Discovery in International Commercial Arbitration Through Behavioural Law and Economics: A Journey Inside the minds of Parties and Arbitrators", *Harvard Negotiation Law Review*, vol. 15 , p. 165

8 Margret L. Moses *op cit*, p. 1

9 UNICTRAL Model Law, Articles 28 and 29 endorse party autonomy.

10 Article 35 of UNCITRAL Rules

11 Article V (1) (d) of the New York Convention on the Recognition and Enforcement of Foreign Awards, 1958. Nigeria is a signatory to the Convention having acceded to it on 17th March, 1970. It came into force on 15th June, 1970

12 Article 17 (1) of the ICC Rules of Arbitration.

Prior to the 1988 when Arbitration and Conciliation Decree[13] was promulgated, there was no statutory provision in Nigeria governing international arbitration. The result of this is that various commercial contracts entered into by Nigerians for foreign goods, expertise and finance with people and companies from more developed countries of Europe, America and Asia were governed by the law and practice of international arbitration of those countries.[14] With the coming into operation of the Arbitration and Conciliation Act, provisions were made for the resolution of commercial transaction having foreign elements.[15] In summary, international commercial arbitration has become the norm for dispute resolution in most international business transactions. This study presents a brief introduction to some basic principles and practice of International Commercial Arbitration.

DEFINITION OF TERMS

International

According to Redfern and Hunter,[16] the term 'international' in this regard is used to underline the difference between an arbitration which is purely national or domestic and that which in some ways transcend national boundaries and so, is international. Domestic legislations, scholars and international laws on international commercial arbitration have adopted different means in determining whether arbitration is domestic or international. Some have used two main criteria, either separately or in conjunction in defining the term international, in the context of an international commercial arbitration.[17]

While the first criteria involves focusing on the nature of the dispute in analysing whether a dispute is international or not, the second focuses on the parties, their nationality or habitual place of residence, or if the party is a corporate entity, the seat of its central

---

13 Now incorporated into the Laws of the Federation of Nigeria 2004 as Cap A18.(Hereinafter referred to as Arbitration and Conciliation Act (ACA)).

14 Olakunle Orojo and AyodeleAjomo, 1999. *Law and Practice of Arbitration and Conciliation in Nigeria,* (Lagos: Mbeyi& Associates (Nigeria) Limited,), pp. 53-54.

15 See section 57 (2) ACA

16 Redfern and Hunter, *op cit,* p. 14

17 Greg ChukwudiNwakoby, 2004 *The Law and Practice of Commercial Arbitration in Nigeria,* (Enugu: Iyke Ventures Production,), p. 145.

control or management.[18]For example, in the words of Laurence,[19] 'international arbitration' is the process of resolving business dispute between or among transnational parties through the use of one or more arbitrators rather than through courts'. Similarly, to Wenger,[20]international commercial arbitration is the binding resolution of the merits of business disputes between or among any transnational actors through the use of one or more arbitrators rather than the court. The UNCITRAL Model Law on International Commercial Arbitration, which by its general provision made the law applicable principally to international commercial arbitration,[21] provides that an arbitration is international if:

a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
b) one of the following places is situated outside the State in which the parties have their place of business:
   (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement
   (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place within which the subject-matter of the dispute is most closely connected; or
c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.[22]

From the above definition, the international character of an arbitration agreement depends on whether the parties have their places of business in different states, or the subject-matter of the dispute itself has close connection with a place foreign to the parties, or the place of the arbitration has a foreign 'situs'.[23] International

[18] Redfern and Hunter, *op cit,* p. 15

[19] Laurence Craig, W. 1995 *Trends and Developments in the Laws and Practice of International Commercial Arbitration,* (Paris: Couder Brokers,), p. 30

[20] Lean M, Wenger. June 2000. "International Commercial Arbitration Locating the Resources" *Law Library Resources exD (LLEX),* , p. 11.

[21] Article 1 (1) of UNCITRAL Model Law on International Commercial Arbitration

[22] Ibid. Article 1 (3); similar provision is in section 57 (2) of the Arbitration and Conciliation Act 1988 (as amended).

[23] Greg ChukwudiNwakoby, *op cit,* p. 147. See also section 57 (2) of ACA

arbitration is most frequently met in the shipping, construction and engineering, oil and gas industries and also in disputes involving insurance, banking and financial services.[24]

In a nutshell, there are essentially two kinds of arbitrations covering international arbitrations: these are *ad hoc* and institutional arbitration. Institutional arbitration is entrusted to one of the major arbitration institutions to handle, while *ad hoc* arbitration is conducted independently and without such an organisation, but according to the rules specified by the parties.

Commercial

The word 'commercial' by simple definition means, 'something relating to commerce or to buying and selling of goods and services'.[25] However, for the purpose of international arbitration, the word has gained new meaning. For instance, in section 57 (1) of ACA, the word 'commercial' is defined to mean, 'all relationship of a commercial nature, including any trade transaction for the supply or exchange of goods and services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other form of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.[26]

The definition of 'commercial' in this context is given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. However, the list of commercial transactions given in the Act is non-exhaustive, providing parties with a wider interpretation of the term 'commercial' to embrace all types of trade or business transactions.

Arbitration

Many definition of arbitration have been given by different notable writers and through judicial decisions. Some of the definitions are

[24]Blake, S, Browne, J and Sine, S. A. 2011.*A Practical Approach to Alternative Dispute Resolution,* (Oxford: Oxford University Press,), p. 432.

[25] Microsoft Encarta Premium Dictionary 2009 (Online)

[26] The definition of 'commercial' in section 57 (1) of ACA is a reproduction of Article 1 (1) of UNCITRAL Model Law in International Commercial Arbitration

considered for better understanding of the term. According to Orojo*et al,*[27] '[a]rbitration is a procedure for the settlement of dispute 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'. Ojukwu*et al,*[28] define 'arbitration' as 'a method of settling dispute through an impartial third party or parties called arbitrator(s) other than through the court'. Afolayan*et al*[29],described 'arbitration' as 'a mechanism for the resolution of disputes which take place usually in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations after a fair hearing, such decision being enforceable at law'.

Arbitration, therefore, is a non-judicial legal technique for resolving dispute by referring them to a neutral third party for a binding decision, called an arbitral 'award'. As a concept, 'arbitration' is a device whereby the settlement of a question which is of interest to two or more persons, is entrusted to one or more other person(s) – the arbitrator – 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.[30]

Broadly speaking, arbitration is 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, submit their controversy to such judges for determination, in the place of the tribunal provided by the ordinary process of law.[31] In practice, arbitration process derives its

---

[27]OlakunleOrojo and AyodeleAjomo*op cit,* p. 3

[28]Ojukwu, E and Ojukwu C. N. 2009. *Introduction to Civil Procedure,* (3rd edn.Abuja: Helen Roberts Ltd,), p. 301

[29]Afolayan, A. F and Okorie, P. C. 2009. *Modern Civil Procedure Law,*(Dee-Sage Nigeria Ltd,), p. 567.

[30] In the case of *N.N.P.C v Lutin Investment Ltd.* Ogbuagu (JSC) defined 'arbitration' in the following words: 'An arbitration is the reference of dispute or difference between not less than two persons for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction'.

[31] See *Gates v Arizona Brewing Co* (1999) Ari 266, 269, 95p. 2d, 49-50. See also Akeredolu, A. 2011. "Court Connected Alternative Dispute Resolution in Nigeria". *University of Ibadan Law Journal* vol. 1, No. 1, October, p. 49.

force principally from the agreement of the parties; however, the role of the state is to act as supervisor and enforcer of the legal process.

ARBITRATION WITHIN THE NIGERIA LEGAL SYSTEM

Arbitration is not an entirely new phenomenon in Nigeria; it has always been part and parcel of traditional dispute resolution mechanism in Nigeria. According to Elias,[32] arbitration is 'one of the many African Customary modes of referring a dispute to the family head or an elder of the community for a compromise solution based upon subsequent acceptance by both parties of the suggested award, which either party is free to resile at any stage of the proceedings.

The Supreme Court in the case of *Okere v Nwoke,*[33] adopted the above definition with an approval of the system as a common method of settling disputes in all Nigeria societies. However, the promulgation of Arbitration Ordinance 1914[34] set a new pace for the introduction of English system of arbitration into Nigeria. Due to the growth in commercial activities in Nigeria with some having international connections with attendant disputes, it was apparent that the 1914 Ordinance could not cope with the rate at which commercial activities blossom in Nigeria, the Military Government in 1988 promulgated Arbitration and Conciliation Decree. The Decree provides for both domestic and international commercial arbitration for the resolution of disputes arising from commercial transactions. To further consolidate international commercial transactions in Nigeria and mechanism for the resolution of dispute arising therefrom, the 1999 Constitution (as amended) provides in section 19 (d) for the 'respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication. This form the legal framework upon which the

[32] Elias, T. O. 1956. *The Nature of Customary Law,* (Manchester University Press,), p. 212 cited by Ayinla, L. A. in "ADR and the Relevancy of Native or Customary Arbitration in Nigeria" 2009. *University of Ilorin Law Journal* vol. 5, No 1, p. 258

[33] (1991) 8 NWLR (Pt. 209) 317

[34] This Ordinance later became Chapter 13 of the revised Laws of the Federation of Nigeria 1958

Nigerian Arbitration and Conciliation Act stands with reference to international commercial arbitration.

Premised on the foregoing, the principal law governing commercial arbitration in Nigeria is the Arbitration and Conciliation Act (ACA). Of equal importance is the Nigerian Investment Promotion Commission Act of 1995. This law governs all foreign investment and provides that in the case of a dispute between a foreign investor and the Federal Government, parties are entitled to utilize national or international machinery for the settlement of investment disputes.

One of the foremost international organisations relevant to international commercial arbitration in Nigeria is the International Centre for Settlement of Investment Disputes (ICSID).[35] The organisation has a code which is applicable to issues concerning international commercial arbitration. Nigeria is a signatory to the Agreement and has in fact adopted the code into the Nigerian Investment Promotion Commission Act (NIPC Act).[36]

The Nigeria Arbitration and Conciliation Act, is based on the UNCITRAL Model Law on International and Commercial Arbitration 1958. The implication of this is that the Nigeria ACA is similar to those other countries who had equally adopted the UNCITRAL Model Law either wholly or in part.[37]

DIFFERENCES BETWEEN DOMESTIC AND INTERNATIONAL ARBITRATION

From the stand point of the definition of international arbitration in section 57 (2) of the Arbitration and Conciliation Act 1988, domestic arbitration is one in which all the parties have their place of business in one country. However, the modern view is that arbitration is governed by the law of the place in which it takes place, therefore, in that sense every arbitration taking place within a state is a domestic arbitration in that state.[38]

---

[35] Odiase-Alegimenien, O.A(2007- 2009) "Limitations on Settling Disputes through Arbitration in Foreign Investor/Local Capital Joint Ownership Enterprises in Nigeria" in Atsegbua*et al* (eds) *Benin Journal of Public Law* 5 (7) 1-25.

[36] Section 26 (3) of the NIPC Act provides that the ICSID rules shall apply in the case of disputes between foreign investor and the Federal Government.

[37] Odiase-Alegimenien, O. A. *op cit,* 13.

[38] Erick E. Bergsten, *op cit* p.12. See also section 85 of the United Kingdom Arbitration Act 1996. However, since parties are free to choose the place

It follows that the distinction between domestic and international arbitration is a matter of national law. There is no general accepted distinction which might be necessary since the New York Convention applies to "foreign awards". However, there is always the need to make a distinction between international and domestic arbitration. The nationalities, legal backgrounds, cultures and legal systems of the parties are vital in distinguishing arbitration. In Nigeria, one distinguishing factor between domestic and international arbitration is the appointment of arbitrators, where the parties are unable to agree on a sole arbitrator or the parties are unable to agree on a third arbitrator, the appointment is made by the court on the application of a party in the case of a domestic arbitration, whereas in the case of an international arbitration, it is made by the appointing authority.[39]

Furthermore, before the promulgation of ACA in 1988, domestic arbitration was regulated by the Arbitration Ordinance of 1914, international arbitration was then governed either by *ad hoc* provision made by the parties or institutional rules incorporated by parties. The provisions of ACA are now available to both domestic and international arbitration. With the arrival of the ACA, the relevant questions for the purpose of determining international arbitration is to consider the transaction: does it involves a transaction that is either in a state other than the place of arbitration or that takes place in two or more states? The other method is to consider the parties: do they come from different states?[40]

It should pertinent to note that commercial arbitration whether domestic or international may be classified into two categories: Institutional arbitration or *ad hoc* Arbitration. These are discussed in the next section.

FORMS OF INTERNATIONAL ARBITRATION

of arbitration, they can choose the applicable law of arbitration. For instance, the New York Convention recognises the possibility that the law of arbitration might be other than that of the place of arbitration. Under Article V (1) (e) of the New York Convention, recognition and enforcement of an award may be refused it: 'the award ... has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made'.

[39] See section 44 (2) of the Nigerian Arbitration and Conciliation Act

[40] See section 57 (2) *ibid*

Institutional Arbitration

Institutional arbitration is one in which the arbitrator is appointed, the proceedings conducted and the award issued in accordance with the rules of a trade or arbitral organisation. Examples of these include: the International Chamber of Commerce (ICC);[41] the American Arbitration Association (AAA); the London Court of International Arbitration (LCIA);[42] the United Nations Commissions on International Trade law (UNCITRAL);[43] the WIPO Arbitration and Mediation Centre;[44] and the International Centre for Settlement of Investment Dispute (ICSID).[45]

Institutional arbitrations are conducted pursuant to institutional arbitration rules, almost always overseen by an appointing authority with responsibility for various issues relating to or constituting the arbitral tribunal, fixing the arbitrators' compensation and similar

---

[41] The Institution has its seat in Paris, France, ICC comprises a set of rules to guide the procedures, a permanent secretariat to assist the parties and arbitrators, and a court of Arbitration which supervises the smooth running of each case and scrutinises the arbitrator's award.

[42] LCIA is based in London, its rule are designed for use on a world-wide basis and under any legal system.

[43] The UNCITRAL Arbitration Rules were adopted by the United Nations Commission on International Trade Law in April 1976. The Rules were specifically designed for use in *ad hoc* common law/civil law arbitrations. It received the endorsement of the Asian-African Legal Consultative Committee (AALCC) in July 1976.

[44] The Centre is part of the International Bureau (i.e. Secretariat) of the World Intellectual Property Organisation (WIPO) based in Geneva, Switzerland. The Centre provides specialised services for the resolution of international commercial dispute involving intellectual property through arbitration or mediation according to the WIPO Arbitration or Expedited Arbitration Rules or the WIPO Mediation Rules.

[45] The Centre was established under the Convention on the Settlement of Investment Dispute between States and National of other States in 1965. The Centre was part of the World Bank Institutions for dealing with dispute arising from investments on one contracting states by nationals of another contracting state. See the list of other Institutional Arbitrations in Oraegbunam, I. K. E, Uwenweke, M. N. and Okafor. C. April- June 2015 "Appraisal of the Legal Regime for Maritime Industry and Arbitration in Nigeria: Recipe for Economic Growth" *International Journal of Business& Law Research* Vol. 3 (2): 61-72, , p. 63; Fagbemi S. A. 2006 "Recognition and Enforcement of Arbitral Awards: Law and Practice" *University of Ibadan Journal of Private and Business Law,* Vol. 5, p. 121.

matters.[46]Institutional Arbitration Rules, in most cases, allows the parties to decide on the procedure to be followed in arbitration proceedings. For instance, the parties exercise this right by choosing an arbitration institution in which the arbitration may take place. Any arbitration that takes place in the context of an institution will be conducted in accordance with the rules of organisation.[47]

The rules of various arbitration institutions which constitute the third level of legal rules governing International Commercial Arbitration set forth the procedures for the commencement of the arbitration; the appointment of the arbitrators; the conduct of the proceedings and the issuance of the award. Although, all of these matters may be in the arbitration law as well, the institutional rules may reflect the particular needs of the type of arbitrations that take place at the institution. Rules for arbitrations in the commodity trades, for instance, need to be, and probably should not be the same as those in the construction industry. Most arbitration organisations have only one set of arbitration rules. The differentiation in procedure rules arise out of the specialisation of the particular organisations. However, some arbitration organisations have multiple rules for different types of disputes[48].

Ad hoc Arbitration

An *ad hoc* arbitration is one conducted base on the agreement of parties without any reference to an arbitration institution. The arbitration is conducted within the framework of the submission and any applicable law.[49] There are many reasons why parties may prefer an *ad hoc* arbitration over an institutionalised arbitration. Some of the reasons adduced for an *ad hoc* arbitration are: firstly, the parties can make provision for the procedure to fit the particular

---

[46] G. Born, 2009. International Commercial Arbitration 149 .

[47] Many arbitration organisations have indicated that they are willing to administer arbitrations where the parties have agreed on the use of the UNCITRAL Arbitration Rules.

[48] For instance, the American Arbitration Association lists on its web site 44 different sets of rules for use in a particular types of disputes. Some of the rules are specific to particular states within the United States retrieved from hhtp://www.adr.org./Rules/Procedures accessed on ----------

[49]OlakunleOrojo and AyodeleAjomo*op cit,* p. 55; Fagbemi S. A. (2006) *op cit.*,p. 120

facts of the dispute between them.[50] In this context, the parties will determine all aspect of the arbitration themselves such as the number of arbitrators, the applicable law and procedure for conducting the arbitration.

Secondly, arbitration involving a limited amount of money and two parties in agreement may be less expensive and cumbersome as an *ad hoc* arbitration than one in an institution. Lastly, the parties may also choose *ad hoc* arbitration because they were not able to agree on an institution.[51]

The major advantage of *ad hoc* arbitration is that, while at the time of concluding the contract, the parties may expect any dispute that might have to be settled in a friendly manner; at the time the dispute ripens, they may be less inclined to cooperate. In particular, since any particular procedural rule may favour one or the other party in the dispute that now exist, they are likely to be able to settle upon the rules of procedure for their arbitration. Without the rules of an arbitration institution as well as the impetus that a permanent structure can give, they may find it difficult even to commence the arbitration.[52]

The difficulties inherent in *ad hoc* arbitration can be solved in one of the two ways. According to Orojo*et al*,[53] the parties may incorporate the provisions of the ACA by reference, for example, by providing that the arbitration shall be governed by the Act, or sometimes simply 'by Nigerian law'. The relevant provisions of the Act will then apply together, of course, with the applicable rules of the common law or doctrines of equity. Secondly, the UNCITRAL Arbitration Rules may be incorporated by reference. Even here, it may be necessary to supplement or otherwise, amend the Rules as may be necessary in a particular case. For instance, by making provisions in respect of the appointing authority, the number of arbitrators, the place of arbitration and the language to be used in the arbitral proceedings.

With respect to international commercial arbitration, the use of *ad hoc* arbitration is rare where state is a party. Where it is however unavoidable, two sets of rules provided to overcome the problem are

[50] *Ibid*
[51] Erick E. Bergsten *op cit*p. 31.
[52] *Ibid*
[53] OlakunleOrojo and AyodeleAjomo, *op cit*, p. 55.

the Economic Commission for Europe Arbitration Rules (ECE)[54] and the UNCITRAL Arbitration Rules. The parties can provide in the arbitration clause in their contract that any dispute that might arise will be settled by arbitration in accordance with the Rules. If a dispute does arise that must be settled by arbitration, the rules of procedures have already been agreed upon and the arbitration can commence. While the ECE Arbitration Rules have been widely used on the continent of Europe, they have been eclipsed by far by the UNCITRAL Arbitration Rules, which has gained worldwide acceptance.[55] An *ad hoc* arbitration under the Rules can take place in two different ways: one is purely *ad hoc,* i.e. no institution plays any role on the arbitration. The other is that an arbitration institution takes on some administrative tasks at the request of the parties.[56]

ADVANTAGES OF INTERNATIONAL ARBITRATION

The benefits of international commercial arbitration are substantial. Several attributes of Arbitration, makes it more attractive than litigation and constitutes its advantages. Hence, from the point of view of authors, these advantages among others include procedural flexibility, neutrality, enforceability, finality, cost effective, quick disposition of arbitral proceedings and the ability to choose the arbitrator(s).[57] These features are considered in turn below.

Procedural Flexibility

[54] In 1996, the Arbitration Rules for *ad hoc* arbitrations were adopted by both the United Nations Economic Commission for Europe (ECE) and the United Nations Commission for Asia and the Far East (ECAFE). The same year, the European Convention providing a Uniform Law on Arbitration was adopted by the Council of Europe.

[55] Erick E. Bergsten *op cit*p. 31.

[56] *ibid*

[57] Margret L. Moses., *op cit,* 4; see further Christian Bu'hring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes,* in Christopher R. Drahozal & Richard W. Naimark, 2005. "Towards a Science of International Arbitration , p.31; United Nations Convention on Recognition and Enforcement of Foreign Arbitrarl Awards, 1958, UNDOC/CONF.26/8/Rev. 1(New York Convention) available at www.unicitral.org. see also Appendix A, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In arbitration, parties have enormous flexibility to tailor the procedure to suit their particular contract and needs. For instance, in the choice of arbitrators, unlike court proceedings, where parties generally have no input on the choice of judge for their case, the parties to arbitration usually appoint, nominate or at least have some input into the selection of the arbitrator(s).

The parties choose arbitration as a private dispute settlement and thus they can conduct all proceedings of arbitration by taking into account their needs and desires; such as arrange time table of hearings, choose anyone as arbitrator who has relevant expertise on specific requirement of the dispute.[58]

Final and Binding

International arbitral awards are final and binding.[59] Alternative dispute resolution procedures such as mediation and conciliation are consensual and will not result in a resolution of the dispute unless the parties agree on an outcome. Litigation produces a binding determination, but may be subject to appeal. International arbitration awards on the other hand are generally not subject to appeal.[60]

Enforceability of International Arbitral Award

In international litigation, parties must generally resolve their dispute in the national courts of one of the parties. If the unsuccessful party has no assets in that country, the successful party might need to enforce the judgment in another country. This will depend on the exercise of enforcement provisions in that country and can be expensive, time consuming and sometimes ineffective. Conversely, a simple procedure for enforcing international arbitral

[58] Dursun, "A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an assessment of its Role and Extent" retrieved from http://www.yalova.edu accessed on December 14, 2014

[59] Article 27 (1) of the American Arbitration Association (AAA) International Arbitration Rules – award shall be made in writing, promptly by the tribunal and shall be final and binding on the parties. See also Article 26 (9) of the London Court of International Arbitration (LCIA).

[60] See Article 32 of the Nigerian Arbitration Rules; Godwin Obla, SAN. 2013. "Arbitration as a Tool for Dispute Resolution in Nigeria.How Relevant Today" in JideOlakanmi.*ADR Alternative Dispute Resolution: Cases & Materials* (First Edition, LawLords Publication,) p. 17

award is provided for by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which is in force in some 145 countries[61] including most major countries involved in significant international trade and economic transactions.

When a party refuses to comply with its obligations arising out of an international arbitral award, the award may be enforced in a place where it is made or in another country under the New York Convention. Article III of the New York Convention deals with enforcement, and requires each member state to recognize foreign arbitral award as binding and to enforce them according to local rules of procedure. They must not impose onerous conditions or higher fees or charges than are imposed on the recognition and enforcement of domestic arbitral awards.

Neutrality

Neutrality of the forum is an important factor differentiating international arbitration from international litigation. Although judges in litigation are expected to be impartial and are thus neutral in that sense, however, reference to neutrality in the context of international disputes concerns the nationality of the decision maker. In international litigation, the judge is likely to have the same nationality as one of the parties. The mere perception that the judge shares an important characteristic, nationality, with one of the parties may itself be enough to cause concern to the other party.

International arbitration provides the opportunity for neutral resolution (e.g., with international rules being applied by a multinational tribunal in a mutually acceptable venue). In international arbitration, sole arbitrator will almost invariably be of a different nationality to the parties. Where the tribunal consists of three arbitrators, the chairman of the tribunal will be a person from a third country.

Confidentiality

Both the procedure and outcome of an international arbitration are (or can be made by agreement of the parties) private and

[61]Dough Jones A. O, Clayton Utz . "A Guide to International Arbitration", available at www.claytonutz.com accessed on 17th December, 2014

confidential. Court proceedings are usually public.[62] Although, the degree of confidentiality afforded by the arbitration law of different jurisdictions (absent express provision by the parties) varies, there can be no doubt that arbitration provides greater privacy and confidentiality than litigation. In addition, parties can add express provision in order to reinforce this confidentiality.[63]

Speed and Costs

Arbitral proceedings can be commenced and the dispute resolved faster than litigation if an appropriate procedure is used.[64] In arbitration, in contrast to litigation, the parties have to pay the fees and expenses of the decision makers. There is no simple answer as to whether arbitration is cheaper than litigation. However, arbitration may be cost effective if parties allow it to be. By designing and managing the procedure effectively, cost can be managed. This allows and encourages the parties and the tribunal to focus on the key issues at an early stage, and can avoid the process taking precedence over the real issues in disputes. Further, it is becoming increasingly common for the successful party to be awarded all or part of its costs of the arbitration, without having to resort to a cumbersome taxation process which is common in some States.

Technical Expertise and Experience

The parties can select arbitrators with relevant expertise or experience. Although some jurisdictions have very specialist courts,[65] in others, parties run the risk of their dispute being decided by a judge with little or no relevant experience.

[62] For instance, under section 36 (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) any proceeding whether civil or criminal shall be held in the open court. This provision is to satisfy the requirement that "'justice must not only be done, it must be seen to have been done". See the case of *AlhajiGaji v The State* (1975) NNLR 98

[63] Alan Redfern and Martin Hunter. 2001. *International Arbitration.* Student edition (Oxford University Press,) para. 2.176.

[64] Godwin Obla, SAN *op cit.*, p. 17

[65] For example, the Commercial Division of the New York Supreme Court and the English Technology and Construction Court

DISADVANTAGES OF ARBITRATION

According to Moses,[66] some of the disadvantages of arbitration are the same as the advantages, just viewed from a different perspective. There is no doubt that arbitration is not ideal in all circumstances. Although, the list is by no mean exhaustive, notable disadvantages of arbitration include the following:

i. If the arbitration is mandatory and binding, the parties waive their rights to access court and to have a judge or jury decide the case.[67]

ii. In some arbitration agreements, the parties are required to pay for the arbitrators, which add an additional layer of legal cost that can be prohibitive, especially in small consumer disputes. Similarly, grounds for attacking an arbitral award in court are limited, efforts to confirm the award can be fiercely fought thus necessitating huge legal expenses that negate the perceived economic incentive to arbitrate the dispute in the first place.

iii. There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned. The lack of any right of appeal may be a benefit in terms of ending the dispute, but if an arbitrator has rendered a decision that is clearly wrong in law or in facts, the lack of ability to bring an appeal can be frustrating to a party. For this reason, some parties in the United States have written into their arbitration agreements a right to a judicial appeal on the merit of an arbitral award. The federal circuit courts are divided on whether this is permitted under the Federal Arbitration Act.[68]

iv. Arbitration is usually thought to be speedier, however, when there are multiple arbitrators on the panel, juggling their schedules with hearing dates may lead to delays. Similarly, delay may occur at the beginning of proceedings as a result of the procedures for appointing the tribunal.

---

[66] Margret L. Moses, *op cit,* p. 4

[67] Godwin Obla, SAN. *Op cit*p. 18.

[68] *Ibid.* see also the case of *Hall Street Association v Mattel Inc.* 196 Fed App 476 (9th Cir. 2006), cert granted, (U.S. May 29, 2007)

v. In some legal systems, arbitral awards have fewer enforcement options than judgments; although in the United States arbitration awards are enforced in the same manner as court judgments and have the same effect. In Nigeria, there are five principal methods in which a foreign arbitral awards can be recognised and enforced. The options available to parties are: enforcement under the Foreign Judgment (Reciprocal and Enforcement) Act, 1960;[69] enforcement by Action upon the Award; enforcement under sections 51 and 52 of the Arbitration and Conciliation Act, 1988; enforcement under the New York Convention and enforcement under the ICSID Convention. It may take time before parties settle on any of these mechanisms for the enforcement of arbitral award and thus time consuming.[70]

Arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of member or a small group of members in arbitration due to increasing legal fees, without explaining to the members the adverse consequences of an unfavourable ruling.

vi. Rule of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law.

vii. In multiparty disputes, an arbitral tribunal frequently does not have the power to join all relevant parties, even though all may be involved in some aspects of the same dispute. Because the tribunal's power is derived from the consent of the parties, if a party has not agreed to arbitrate, usually it cannot be joined in the arbitration. A tribunal generally does not have the right to consolidate similar claims of different parties, even if it would be more efficient for all concerned to do so.

[69] Now Cap F35, Laws of the Federation of Nigeria 2004.

[70] See generally Fagbemi S. A. (2006),*op cit.*, pp. 111-140.

THE LAWS GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION

An international commercial arbitration usually takes place in a country that is neutral in the sense that, none of the parties to the arbitration has a place of business or residence there. This means that in practice, the law of the country in whose territory the arbitration takes place, the *lexarbitrix*, will generally be different from the law that governs the substantive matter in dispute. An arbitral tribunal with its seat in France, for example, may be required to decide the substantive issues in dispute between the parties in accordance with the law of Switzerland or the law of the state of the New York or some other laws, as the case may be.

Many countries have adopted as their arbitration law the UNCITRAL Model Law on International Commercial Arbitration.[71] The Model Law is meant to work in conjunction with the various arbitration rules, not to conflict with them. Thus, the Model Law also has many provisions that are essentially default provisions: that is, which apply "unless the parties have agreed otherwise." If the parties have chosen arbitration rules that provide for a process or rule that is

[71] UNCITRAL is the United Nations Commission on International Trade Law. Its mandate is to further the progressive harmonisation and unification of the law of international trade. The following countries, territories, or states within the United States have adopted the UNCITRAL Model Law on International Commercial Arbitration: Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia, Canada, Chile, China, Hong Kong, Special Administrative Region, Macau Special Administrative Region, Croatia, Cyprus, Denmark, Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of) Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, the Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey, Ukraine, within the United Kingdom of Great Britain and Northern Ireland, Scotland, Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland, within United States of America: California, Connecticut, Illinois, Louisiana, Oregon and Texas, Zambia and Zimbabwe,availableathttp://www.uncitral.org/uncitral/en/uncitral texts.arbitration/1985Modelarbitrationstatus.html, see Appendix B text if 1985 UNCITRAL Model Law; Margret L. Moses *op cit*, p.6.

different from the Model Law, normally the arbitration rules will govern, because they represent the parties' choice of how to carry out the arbitration, that is, they indicate how the parties have "otherwise agreed".

The substantive law chosen by the parties is the national law that will be used to interpret the contract, to determine the merit of the dispute, and to decide any other substantive issues. If the parties have not chosen a substantive law, then the tribunal will determine the applicable substantive law.[72] Beyond the national laws is the international arbitration practice, which tends to be utilised to various degrees in all arbitrations. This includes various practices that have developed in international arbitration, some of which have been codified as additional rules or guidelines. There are for example, rules that have been developed by the International Bar Association (IBA) on the taking of evidence and on Rules of Ethics. The IBA has also produce Guidelines on Conflicts of interest in International Arbitration. The American Arbitration Association and the American Bar Association have also produced a Code of Ethics for Arbitrators. UNCITRA: has also produced Notes on Organising Arbitral Proceedings, "to assist arbitration practitioners by providing an annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings.[73]The ICC Rules leave the choice to the ICC's own court of arbitration. The place of arbitration shall be fixed by the court unless agreed upon by the parties.

In considering whether or not to invoke the rules of any Institutional Arbitration; recourse must be first had to the validity of parties' agreement. For instance, when parties draft an arbitration agreement, they enjoy broad freedom to construction a dispute resolution system of their choice. It can provide for *ad hoc* or institutional arbitration, the parties can designate the number of arbitrators, their qualifications and matters relevant to the procedure to be followed. They can prescribe time limits and can, for example, stipulate that an award must be handed down within a prescribed time. After the

[72]Erick E. Bergsten *op cit*p. 32. See also section 19 of the Nigerian Arbitration and Conciliation Act.

[73] See www.uncitral.org. *op cit*

arbitration agreement has been concluded, and before an arbitration proceeding commences, the parties are free to modify their agreement in any way they deem fit. They can alter the number of arbitrators, the procedure for the appointment of arbitrators and other matters which they may have previously agreed upon such as the sequence of pleadings and time limits.[74] The parties' freedom to agree on an arbitration regime of their choice and to prescribe the procedure to be followed is subject to few limitations. For instance, the arbitration agreement must be a valid one according to the law which governs it. This will usually be the law governing the substantive contract and in which the arbitration clause is embedded, but is not necessarily that law.[75] The possibility of depecage arises because the arbitration agreement is regarded as a separate agreement to the substantive contract in which it is contained.[76] In addition, the arbitral procedure itself should comply with the mandatory rules of law of the *lexarbitri*. The *lexarbitri*is often the law of the place of the seat of the arbitrations, but not necessary so.[77] For instance, some of the provisions of the Model Law are mandatory and cannot, therefore, be excluded or modified by the parties. For example, Article 11 (2) provides that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provision of paragraphs (4) and (5). Thus, paragraphs (4) and (5) of Article 11 are mandatory. Similarly, the court is likely to construe Article 18 as mandatory. It provides that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". Hence, if the parties agreed that only the claimant would be heard during the arbitration proceedings, the agreement would be struck down as invalid on account of

[74] Michael Pryles. "Limits to Party Autonomy in Arbitral Procedure" p. 2, retrieved from http://www.arbitration.icca.org/media/0/12223895489 accessed on 30th May, 2015 at 1 52 pm

[75] Fagbemi S. A (2015) *op. cit*

[76] See Foucharg, Gaillard, Goldman, 1999. *International Commercial Arbitration* (Edited by Gaillard and Savage,) p 212

[77] *Ibid*

Article 18 of the Model Law.[78]Holtzmann and Neuhaus aptly observed that:

> The freedom of the parties [under the Model Law] is subject only to the provisions of the Model Law, that is, its mandatory provisions. The most fundamental of such provisions from which the parties may not derogate, is the one contained in the paragraph.[79]

Since parties agreement is essential to arbitral proceedings, the essential validity of the international arbitration agreement are discussed briefly in the next section.

FORMAL VALIDITY OF ARBITRAL AGREEMENT

An arbitration agreement is expected to have the following features. These features which determine its validity are written agreement, capacity of the parties, intention of parties, independent clause and arbitration agreement must be in respect of a dispute that is arbitrable. These are discussed seriatim.

(a) Written Agreement

An arbitration agreement must be in writing. The New York Convention on the Enforcement of Foreign Award of 1958 requires that an arbitration agreement must be in writing and signed by parties.[80] The UNCITRAL Model Law went further in this direction by providing in its Article 7 (2) that 'an agreement is in writing if it is contained in a document signed by the parties or in an exchange of letter, telex, telegrams or other means of telecommunication which provide a record of the agreement……". Also an arbitration agreement need not be in any particular form. It may be a single document containing all the terms or can comprise of two or more documents. Although, the Model Law and the New York Convention require that the agreement be signed. However, it appears that signature is not essential for the validity of arbitration agreement. For example,

[78]Holtzmann and Neuhaus. "A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary", p. 583

[79] See also Michael Prylesop *cit.* p. 3

[80] See Article II of the New York Convention on the Enforcement of Foreign Arbitral Awards of 1958

the English Arbitration Act 1996 states that there is an agreement in writing if the agreement is made in writing, whether or not it is signed by the parties.[81]

(b) Capacity of the Parties

An arbitration agreement to be valid must comply with all the requirements of a valid contract. One of such is that the parties must have the requisite capacity to enter into the contract. Lack of such capacity invalidates the contract. Broadly speaking, the manifestation of will by a party who is not legally entitled to assume obligations has no legal effects.

Similarly, the New York Convention establishes that the parties' capacity is governed by 'the law applicable to them'. This concept does not appear in the Model Law. There is no uniform understanding concerning the law applicable to the legal capacity of individuals. This may depend on the system of conflicts of law of the forum called to consider the arbitration agreement. However, the prevailing criterion is that legal capacity should be governed by the personal law of each party. This, according to Bergsten,[82] may in turn, open a new range of possibilities since that "personal law" may be the one governing either party nationality or their domicile.

(c) Intention of Parties

Another very important element of arbitration agreement is the intention of the parties to refer disputes already in existence or likely to arise to arbitration. A binding contract requires consensus *ad idem*. These generally include appointment of arbitrators, seat and the venue of the arbitration proceedings and pleadings. If the intention of the parties is clearly discernible from terms of the agreement, the presence or absence of the word 'arbitration,' arbitrator or 'arbitral tribunal' does not matter. Simply put, the parties must take care to ensure that the arbitration agreement is crystal clear and leaves no room for creative and ingenious misinterpretation. Their intention to resolve disputes by way of arbitration and the manner in which such arbitration is to be conducted must come through without a

[81] See section 5 (2) of the English Arbitration Act 1996

[82] Erick E, Bergsten *op cit* p. 4

doubt.[83] The parties' consent is the basic requirement for the arbitration agreement. Their intention to submit to arbitration must unequivocally arise from the agreement. Article II (1) of the New York Convention requires that in their agreement, the parties must "undertake to submit to arbitration" their dispute. This expression means that: the agreement must contain a mandatory, rather than permissive, undertaking, and the agreement must provide for arbitration, rather than another process of dispute resolution. The agreement must have originated from the parties free will. Therefore, if one of them has acted or induced by error or as a consequence of fraud, coercion or undue influence, there has been no real consent and the agreement to arbitrate is not valid.

d. Independent Clause

An arbitration clause as a contract is treated as an independent contract and even if the main contract itself is illegal and void, it does not make the arbitration clause invalid. The contract survives for the purpose of determining and measuring the claims arising out of breach and the arbitration clause survives for the mode of their settlement. This provision was incorporated with a view to give power to the arbitral tribunal not only to rule on its own jurisdiction but also to decide objection with respect to the existence or validity of the arbitration agreement.[84]

e. An Arbitration Agreement must be in respect of a Dispute that is Arbitrable

The dispute submitted to arbitration by the parties under an arbitration agreement must be 'arbitrable'. The concept of arbitrability is related to the nature of the dispute rights. The range of disputes covered by arbitration agreement is a matter of contractual construction to determine what parties intended. The

[83]RajendaBarot and SahilKnuga."An Arbitration Agreement-Demystified-Lexology. Retrieved from http://www.lexology.com/library/detain.aspx/g=ffdt7296-d3be-433c-bb7d-475398236924 accessed on June 2, 2015.

[84]Vending Mishra. "Essential Elements of an Arbitration Agreement" retrieved from http://lex-warrier.in/2013/07/essential -elements-of-an-arbitration-agreement/. accessed on December 21, 2014

underlying principle is that an arbitral tribunal can only have jurisdiction to determine matters that the parties have agreed should be referred to arbitration.

The parties may agree to refer all disputes arising out of the substantive contract to arbitration, whether they are based on the law of contract, tort, unjust enrichment or any type of cause of action. Alternatively, the parties may agree that only certain types of dispute will go to arbitration.[85] The Model Law does not directly lay out the requirement for arbitrability. However, in Article 36 (1) (b) (i) the requirement of arbitrability of arbitration dispute is not unfamiliar to the Model Law, the article stipulates that 'if the subject matter of the dispute is not capable of settlement by arbitrators, that would be a ground for requesting for the setting aside of the award or for rejecting its recognition or enforcement. Unlike the Model Law, the New York Convention expressly sets out that the content of the agreement must be 'concerning a subject matter capable of settlement by arbitration'.[86] Apart from this general rule, the New York Convention includes arbitrability of the subject matter as a requirement whose omission precludes recognition or enforcement of the award.

In international arbitration, the question as to whether a dispute is arbitrable arises most often with regard to such matters as antitrust, securities exchange or disputes involving other statutes expressing a strong public policy. For instance, in the case of *Labinal v Mors Revue de l'arbitrage,*[87] in that case, two parties (a Fench and a British Corporations) related by a joint venture agreement that included an arbitration agreement. The French party alleged that the counterparty entered into an agreement with its main competitor and filed a suit asking for damages. Taking into account the existence of an arbitration agreement, the Appeal Court of Paris ruled that the arbitrators should decide on their own jurisdiction and on the arbitrability of the matter

[85] Blake S. Browne J and Simes 2011. *A Practical Approach to Alternative Dispute Resolution.*(New York: Oxford University Press Inc,). P. 380

[86] Article II (1) of the New York Convention on the Enforcement of Foreign Arbitral Awards 1958

[87] Appeal Court of Paris, May 19, 1993, p. 957

subjected to them, even though their decision might be subject to judicial control in a subsequent setting aside procedure.[88]
Finally, an invalid arbitration agreement may be declared null and void at any of the following stages:

i. When discussing the enforceability of the arbitration agreement;[89]
ii. When the arbitral award is challenged by a party during the setting aside proceedings;[90] and
iii. When the enforceability or recognition of the arbitral award is claimed by a party.[91]

AWARD

An award is a final determination of a particular issue of claim in the arbitration. That is, the final decision of the arbitrator in the settlement of controversy.[92] Article 32 (1) of the Arbitration Rules provides for the following types of awards: final award, interim award, interlocutory or partial award. An award is final if it determines all the outstanding issues submitted by the parties for arbitration. It is considered final, binding and subsisting being a complete decision on the issue (s) dealt with during the arbitral proceedings. In the case of *Ebokan v Ekwunibe& Sons Trading Co.*[93] it was held that:

> Once an arbitral award has been made and there is nothing intrinsically wrong with the proceedings or even the time limit for challenging it has expired, the award becomes final and binding and it should be entered as judgment of the court and enforced accordingly

A final award by its nature, once delivered renders the arbitral tribunal *functus officio* and it ceases to have competence to deal with the dispute and its relationship with it and the arbitrating parties determines save that the arbitral tribunal may only revisit

[88]Erick E, Bergsten *op cit*p. 13
[89]Article 8 (1) of the UNCITRAL Model Law
[90]Article 34 (2) *ibid*
[91]Article 36 *ibid*
[92]Fagbemi, S. A (2006) *op cit.*, p. 115
[93](2001) 2 NWLR (Pt. 696) 32 at 44

the award under the exception of the slip rule to correct errors in order to give effect to the award and nothing more substantial.[94]
An interim award is one that deals with a preliminary issue or question such as jurisdiction of the arbitral tribunal, qualification of the arbitrator (s) or applicable law. It is not easy to distinguish between an interim and partial award. The two terms are sometimes used interchangeably. However, in civil law jurisdiction, partial award is used to describe an award, which disposes of one or more of the monetary or other main issues between the parties. Often, it orders payment on account to be made in respect of a particular claim or claims. An interlocutory award refers to a decision of the arbitral tribunal on a procedural question.[95] It is not a final decision and cannot be enforced as an award.[96]

Foreign Award

A 'foreign' award may be regarded as any award made outside Nigeria whether or not it will qualify as an 'international' award under the Arbitration and Conciliation Act 1988 and UNCITRAL Model Law on International Commercial Arbitration upon which the ACA is substantially based. The ACA provides for the recognition and enforcement of foreign awards in Nigeria 'irrespective of the country' where they are made. This covers countries not members of New York Convention of 1958. The provision follows the Nigerian case law on the point, which has always been to the effect that a foreign award could be enforced even in the absence of a treaty guaranteeing reciprocal treatment of awards. It was in fact when Nigeria acceded to the New York Convention in 1972 that the country adopted the reciprocity principle in respect of arbitral awards. Since the ACA incorporated all the relevant provisions of that convention on the recognition and enforcement of foreign arbitral awards, the conventions in effect becomes dormant in Nigeria.

[94]See section 28 of the Nigerian Arbitration and Conciliation Act
[95]See Article 32 (1) of the Arbitration Rules
[96]Redfern& hunter *op cit.*, p. 380

LEGAL FRAMEWORKS FOR THE RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

The legal frameworks for the recognition and enforcement of international arbitral awards includes but is not limited to the following which are considered as primary and secondary legal framework depending on the jurisdiction under review:

1. Geneva Protocol on Arbitration Clauses of 1923
2. Geneva Convention on the Execution of Foreign Arbitral Awards of 1927
3. The New York Convention of 1958
4. The UNCITRAL Model Law on International and Commercial Arbitration of 1985.
5. Foreign Judgment (Reciprocal Enforcement) Act (Nigeria).
6. The Arbitration and Conciliation Act 1988 (now Cap A18, Laws of Federation of Nigeria 2004)
7. The Arbitration Act 1996 (United Kingdom)
8. Federal Arbitration Act (United States of America)
9. Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention)
10. BITS/MITS: Bilateral or Multilateral Investment Treaties.

It should be noted that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards have been overtaken by events, and mentioning them is only for historical relevance.

METHOD OF ENFORCEMENT OF INTERNATIONAL COMMERCIAL AWARDS IN NIGERIA

There are five principal ways in which a foreign arbitral award can be recognised and enforced in Nigeria. They are:

1. Enforcement under the Foreign Judgment (Reciprocal Enforcement) Act 1960[97]
2. Enforcement by Action upon the Award
3. Enforcement under sections 51 and 52 of the Nigerian Arbitration and Conciliation Act, 1988
4. Enforcement under the New York Convention, and
5. Enforcement under the ICSID Convention.

[97] Cap F35, Laws of the Federation of Nigeria 2004

Enforcement under the Foreign Judgment (Reciprocal and Enforcement) Act

This Act was enacted to make provisions for the enforcement of judgment given in other countries in Nigeria, and for facilitating the enforcement in foreign countries of judgments given in Nigeria. In other words, for an award to merit enforcement in Nigeria, it must have acquired the character of a judgment in the foreign country and must be valid and subsisting as at the time it is being sought to be recognised and or enforced in Nigeria. Also, the courts in Nigeria will only enforce such foreign award made in any other country if that other country accords substantial reciprocity of treatment to judgment or awards made in Nigeria.

In practice and before the promulgation of the ACA, sections 2 and 4 of the Foreign Judgment (Reciprocal and Enforcement) Act provide *inter alia* that a foreign award may be registered in the High Court if it has not been wholly satisfied and if the date of the application for registration, it could be enforced by execution in the country of the award. With the ACA, there is no need for registration, since section 51 makes it clear that such an award shall be recognised as binding and shall be enforced by the court on application.[98]

Enforcement by Action upon the Award

This method of enforcement is of common law origin because, arbitral awards according to the common law, are inherently binding and enforceable owing to the fact that by the arbitration proceedings thereto, the parties have considered that their rights and obligations be regulated by the award. According to Orojo*et al.*[99] '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 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. It may also, in appropriate cases, decree specific performance of the

[98]OlakunleOrojo and AyodeleAjomo, *op cit.*, p. 304
[99]*Ibid,* p.417

award, or make a declaration that the award is valid, or as to its construction and effect.[100]

Enforcement under Sections 51 and 52 of the ACA

Section 51 of the Arbitration and Conciliation Act provides as follows:

(1) An arbitral award shall irrespective of the country in which it is made, be recognised as binding, and subject to this section and section 32 of this Decree, shall, upon application in writing to the court, be enforced by the court.

(2) The party relying on an award or applying for its recognition shall attach:

(a) The duly authenticated original award or a duly certified copy thereof

(b) The original arbitration agreement or a duly certified copy thereof

(c) Where the award or arbitration agreement is not made in English language, a duly certified translation thereof into English language

The above positions have been given judicial impetus in the case of *Ebokan v Ekwunibe& Sons Trading Co.*[101]

The procedure for enforcement or recognition of award under this section is rather simple. In fact, it is virtually the same as that for a domestic award in section 31 of ACA. All that is required is an application to the High Court, supported by the prescribed documents that is, the award, the arbitration agreement and a translation into English language if the award or arbitration agreement is not made in English language. Enforcement pursuant to this section is made subject to section 32 which did not state the grounds on which the enforcement should be made. However, section 52 of the ACA listed the following grounds amongst others upon which a foreign award may be denied recognition and enforcement to wit: incapacity of parties to arbitration agreement, invalid arbitration agreement, absence of proper notice of appointment of

[100] In the case of *Toepher of New York v Edokpolor (Trading as John Edokpolor& Sons)* the Supreme Court of Nigeria held that a foreign award could be enforced in Nigeria by suing upon the award

[101] *(supra)*

arbitrators or of the proceedings, award dealing with dispute not contemplated by parties, award beyond the jurisdiction of arbitral tribunal.

Enforcement under the New York Convention

The New York Convention was adopted by the United Nations Conference on International Commercial Arbitration of 1958. Nigeria acceded to the Convention on 17th March, 1970, but no domestic legislation was enacted to make the provision of the Convention operational in the country, until the promulgation of the Arbitration and Conciliation Act in 1988. The Convention thus applies in Nigeria by virtue of section 54 (1) of the Act, which provides as follows:

(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 (hereinafter 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 contracting state.

(a) provided that such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provision of the convention;

(b) that the convention shall apply only to differences arising out of legal relationship which is contractual. Premised on the foregoing, the convention provides for the recognition and enforcement of two types of arbitral awards namely:

(i) awards made in a country other than where the recognition and enforcement are sough, and

(ii) awards not considered domestic in the country where recognition and enforcement are sought.

Enforcement under the ICSID Convention

Immunity is the rights enjoyed by a sovereign state or its entities from actions against it either in its court or courts of other jurisdiction. Thus, state or state-owned entities are generally immune from suits by individuals or companies. However, if the state entity engages in a commercial deal, and particularly if it enters into an arbitration agreement, normally it will be considered to have waived its immunity. Moreover, it

may be obliged to arbitrate under the provisions of a bilateral investment treaty. For contracting states who agree to arbitration under the International Centre for the Settlement of Investment Dispute (ICSID) Rules of Arbitration, any resulting award is not appealable to a court, and national laws are not applicable to the process. The award can, however, under the ICSID Rules, be reviewed by an *ad hoc* committee of three arbitrators, and, if annulled, will have to be arbitrated again by yet another tribunal. A monetary award is enforceable in a contracting state as though it were a final judgment in the court of that state.[102]

CONCLUSION

International arbitration can provide better quality justice than many domestic court systems, which are overburdened or, at times, corrupt. It also has an established format with a proven record. It has enjoyed growing popularity with business and other users over the years. This paper is generally an introduction to international commercial arbitration. Thus, it touches, albeit briefly, on some international arbitral institutions with the rules applicable to them.

Of course, there are many reasons why parties may elect to have their international disputes resolve through arbitration; these amongst other include the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain a quicker and more efficient decision, the relative enforceability of arbitration agreements and arbitral awards, the commercial expertise of arbitrators, the parties' freedom to select and design the arbitral procedures, confidentiality and other benefits. All these had been highlighted in this paper.

[102]Margret L. Moses *op cit*p. 12. See also Victor Opera. 2013. "Beating the System: Enforcement of Arbitral Award against State-Owned Entities" *Templars solicitors Newsletter*.