AN ANALYSIS OF THE CONCEPT OF NEGOTIATION AND ARBITRATION AS METHODS OF ALTERNATIVE DISPUTE RESOLUTION IN INTERNATIONAL LAW

BY

EZE, Felix Chukwuemeka

LLM/LAW/23833/2000-2001
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DECLARATION

I hereby declare that this thesis has been written by me and that it is a record of my own research work. No part of this thesis has been presented or published anywhere at time by anybody, institution or organization for the award of any academic degree.

_____

EZE, Felix Chukwuemeka

CERTIFICATION

This thesis title "An Analysis of the concept of Negotiation and Arbitration as alternative methods of Dispute Resolution in International Laws" meets the regulations governing the award of the Degree of Maters of Law (LLM) of Ahmadu Bello University Zaria, and it is approved for its contribution to knowledge and literary presentation.

_____ _____

Dr. Andrew Akume **Date**
Chairman, Supervisory Committee

_____ _____

Dr. D. C. John **Date**
Member Supervisory Committee

_____ _____

Dr. Yusuf Dankofa **Date**
Head Department of Public Law

_____ _____

Prof. A.A. Joshua **Date**
Dean, Postgraduate School
Ahmadu Bello University Zaria

DEDICATION

I dedicate this thesis to the eternal memory of my late father, Pa **ALPHONSUS. O. EZE,** whose love and fatherly advice and regular admonition encouraged me in no small measure in my chosen career may his kind, humble and gentle soul continue to rest in peace. Amen.

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ABSTRACT

Dispute or disagreements are unarguably and necessarily an inevitable part of human existence, flowing directly from communication, inter reaction and relationships. This can occur at individual, and commercial level, but even at international level in view of current trend of globalization, which pose some threat to international commercial transactions. Negotiation and arbitration are form of alternative dispute resolution in international law. They are the main focus of this thesis and will be death with in sufficient details in this work. Other forms will receive mention in passing. The former as an informal and unstructured bargaining process between parties in an effort to reach an agreement. The concept of negotiation is as old as mankind itself the latter also involve an in formal process unlike litigation. This study is Justified in that it attempts a fairly comprehensive analysis of the most popular forms of alternative dispute resolution in international law, including its pros and cons vis-à-vis the reason for its preference to litigation, including recommendation for improvement as a means to boosting international commerce, harmonious co-existence and international understanding both in trans-border transaction and ultimately a peaceful world.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Dispute, by whatever name called, i.e disagreements, misunderstanding, quarrel and the like are generally clearly an inevitable part of human interaction. These are common place in the affairs of men and are bound to arise at one stage or the other in all human interactions, be they social, political, industrial, international and national commercial activities. It is clear that disputes certainly occur daily in our private and public life and as well between nations. Concerns could also arise on the effect of the doctrine of sovereign immunity particularly as in most developing countries a large proportion of the larger contracts would be with the states either directly or indirectly[1]. No contract, engagement relationship e.t.c is totally devoid of problems no matter how we may try to avoid them. No two parties or nations are always totally agreed on everything that arises in connection with whatever it is that binds them. The choice of this topic is motivated by the fact that disputes whether it is under the national or international law, individual private commerce or not have to be resolved and the demands of the millennium development goals on quick but effective dispensation of Justice have exposed the shortcomings of litigation as a means of resolving disputes, as indeed the overall level of confidence in the institutions of government, including the judicial system

[1] See A. A. Asuzu, International Commercial Arbitration and African States (Cambrige University London 1999) chapter 7. ICSID Arbitration and Conciliation: the African experience. See also A. O. Rhodes vivour, "sovereign immunity and Arbtitral Proceedings" (2003) Journal of the Nigerian Branch Cl Arb Vol. 1 No. 4

correlates with the level of investment and measures of economic performance[2]. Happily, now many disputes are resolved amicably before they ever cross international or inter parties border line.

In others an unbiased third party intervenes in the resolution of the dispute. Different methods exist for the resolution of disputes, namely, litigation, mediation, conciliation, negotiation and arbitration. However ADR is a general term encompassing a wide variety of dispute resolution processes other then litigation and all share a common characteristic. They offer a partial or complete supplement to traditional court adjudication for resolving disputes[3].

The essence of this thesis would be mainly to consider the evolution, sustainability, uniqueness and advantages of negotiation and arbitration and the extent of both as models in the settlement of disputes in international law.

Globalization, with its attendant economic advantages also pose some threat to international commercial transactions. As earlier noted, conflict is an unavoidable consequence of any human interpersonal or business relationship, particularly if it takes place over a significant period of time. It is therefore expedient for concerned parties to make provisions for a proper and effective resolution of these conflicts when they do arise as indeed they could[4]. This becomes imperative in view of the growing size of modern day international commercial transactions which runs into multi-million dollars, as to do

[2] Richard E. Messick, Judicial Reform and Economic Developments. "A Survey of the issues" The World Bank Research Observer, Vol. 14 No. 1 February, 1999.
[3] Ojielo O. Alternative Dispute Resolution (ADR) chapter 1 page 1.
[4] Rhodes, Adedoyin Vivour, Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform Page. 1

otherwise could inadvertently result over time to become a dis-incentive to the growth of global trade and commerce. On the other hand, the availability of alternative means of dispute resolution other them litigation before an investor country court encourages foreign direct investment. Quite apart from the role in attracting foreign direct investment, arbitration and alternative means of dispute resolution encourage and sustain high levels of local private sector led investment. The procedures expand the options for dispute settlement and promote healthy competition capable of provoking improvements[5].

Early international commercial transactions did not make provisions for the inclusion of dispute resolution clauses with the attendant effect that litigation was almost always resorted to in the event of a dispute. This led to substantive practical and procedural problems, consequently resulting in a flood of litigation most of which are presumptuous.

Negotiation and Arbitration being the basic subject of this thesis shall be considered in greater detail in chapters three and four of this work. However a brief examination of the nature of both as models of dispute resolution in International law here will not be inappropriate.

According to Davison, "arbitration is the reference of a dispute for adjudication to a third party chosen by the parties in dispute. It has been described as proven

[5] Rhodes Adedoyin Vivour, Ibid at Page 2.

useful and well understood method whose social and commercial utility are obvious."[6]

The practice of Arbitration in a loose sense locally and internationally is as old as the History of human civilization. It is as old as mankind itself. Holds worth, in recognition of this fact spoke of arbitration as a practice which came naturally to the primitive body of laws[7]. It does appear that arbitration in the crude customary sense has a history that goes as far back as the medieval ages. In many parts of the world, forms of arbitration are known to have existed in much earlier times. It can be found in the most primitive society as well as in modern civilization[8]. Indeed it could be said that arbitration is as old if not older than litigation itself. In the scripture[9], Jesus admonished his followers that they should try to settle matters outside of litigation "settle matters quickly with your opponent who is taking you to court Do it while you are still with him on the way……"

Keller, had before now stated that, "of all mankind's adventures in search of peace and justice, arbitration is amongst the earliest. Long before law was established, or judges had formulated principles of law, man had resorted to arbitration, although without the formalities of today and the modern structures

[6] Davison, Ronald, "Arbitration – its Future, its Prospects. The Journal of chattered Institute of Arbitrators, Vol. 50, November 1982, page 147.
[7] See Holds Worth's History of English Law Vol. 14 at Page 187
[8] See Emmerson F.D. "History of Arbitration Practice and Law" Civil Society Law Review 1970 at page 155.
[9] See the book of Mathew in the Holy Bible Chapter 5 at Verse 25.

for resolving discords, the adjustment of differences and settlement of disputes"[10]

The point this researcher is trying to establish is that arbitration is clearly not new. For example the earliest case involving arbitration in English common law is found in the year Book of 21 EDW. IIIF.15,1340,[11] Though another source noted that there appears to be an earlier case recorded in 1231[12].

In Nigeria and indeed Africa it would also appear that some form of dispute resolution mechanism in the form of arbitration pre- dated the establishment of courts system. This can be gleaned from the observation of. Honourable Justice Oguntade JCA as he then was in the case of ***Opuruonu vs Okpokam,***[13] thus;

> *"In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the systems that they survive today as custom"*

In the course of time the court system gained more recognition, became institutionalized and more acceptable as a means of resolving disputes locally and internationally, but the obvious shortcomings of the system was there for all to see[14]. Before now the court guarding jealousy their own jurisdiction, coupled with the feeling of superiority were reluctant in recognizing arbitration

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[10] Keller, F.M. "American Arbitrator", Horper and Bros, 1984 at page.
[11] John, E.J. "Commercial Arbitration and the Rule of Law", University of Toronto Law Journal, 1941 at 9 – 11. See also Sagre, P.L. "Development of Commencial Arbitration Law, Yale Law Journal. 1927 at Page 598
[12] Tiewal, S. A. and Tesegah, F.A. "Arbitration and the Settlement of Commercial Disputes", I.C.L.P (1978) Vol. 24 at page 393.
[13] (1998) 4 NWLR Part 90, Page 554 at Page 586.
[14] See URL = http://www. Nigeria Village Square Com/mdex – php/content/view/7937/55, an Aiticle by Felix Adewumi, Alternative , Dispute Resolution (ADR): An Antidote to Court Congestion. Posted on 12/04/2007, 19:00:32pm.

and enforcing of arbitral awards. This antagonism of arbitration by the courts and the court's refusal and persistent reluctance to enforce arbitration agreement and award at the early stages were summarized and explained by lord campbell in the celebrated case of ***SCOTT VS AVERY***[15].

However as observed elsewhere in this work, conflicts are inevitable in business relationship and foreign investors are reluctant to seek relief in the courts of investor countries. Concerns are raised about the independence of the judiciary, the delays associated with judicial proceedings, unfamiliarity with the local law, and anxiety on how to relate within an unfamiliar legal system and culture. Concerns could also arise on the effect of the doctrine of sovereign immunity particularly as in most developing countries a large proportion of the larger contracts will be with the state either directly or indirectly[16]. Certainly an improved investment climate is essential to economic growth and the eradication of poverty. The nature of the legal systems is a key factor in assessing the country's investment climate. Foreign businesses as well as local investors are concerned about the legal environment in which they will be operating. An investor is concerned about the security of the investment and the possible effect or impact of disputes.

[15] See A. A. Asouzu, Op. Cit at page. 10

[16] See Commercial Arbitration and African States (Cambridge University London) 1999 Chapter 7 ICSID; Arbitration and Concilliation The African Experience. See Also Yves Drains, "Sovereignty, Immunity and Financial Obtigation", Business Law International Issue No. 3 at 141. See Delaine, Sovereign Immunity and Transnational Arbitration (1987) Vol. page 28 at page 43. See A. O. Rhodes Vivour", Sovereign Immunity and Arbitral Proceeding (2003) Journal of the Nigerian Branch CI Arbitration Vol. 1 No. 4.

Arbitration and alternative dispute resolution are alternative options to litigation. Though included in the generic name, "alternative dispute resolution" arbitration is usually not classed as an ADR procedure[17]. Unlike ADR outcomes, an arbitration award is final and binding. Arbitration is a term used to describe a process to settle disputes between two or more persons by referring to an impartial third person or persons known as arbitrators specially appointed for that purpose. The dispute is determined in private with final and binding effect by the impartial third person (or persons) acting in a judicial manner rather than by a court of competent jurisdiction[18]. Further, it has been held by the supreme court in the case of ***RAS PAL GAZI CONSTRUCTION COMPANY LTD VS FCDA***[19] that an arbitral award is at par with the judgment of the court.

This thinking and the desire of merchants, businessmen and persons who preferred arbitration to litigation, influenced to a great extent the attitude of the courts which hitherto was that of ambivalence. Judicially, courts and Judges have accepted and recognized that the pressures which favour arbitration and indeed other forms of alternative dispute resolution as alternative to litigation can no longer be ignored, resisted or refused. This attitude was adopted and endorsed by the United States Supreme Court in its decision in the case of

[17] See A. O. Rhodes Vivour, op. cit chapter 7.
[18] See encyclopedia of forms and precedents vol. 3 (i) paragraph 2 (ii)
[19] (2001) 10 NWLR Part 722 page 559.

MITSUBISHI MOTOR CORPORATION VS SOLAR CHRYSLER PLYMOUTH INC[20]. where Blackman J, observed that,

> *"We are well past the time which judicial suspicion of the desirability of arbitration and the competence of arbitral tribunal inhibited the development of arbitration as an alternative means of dispute resolution"*

Following on this, courts continued to play facilitative roles in the arbitral process. Provisions for arbitration now exist in the High Court rules of the states of Nigeria[21] and rules of conciliation and arbitration of the international chamber of commerce, international commercial codes, rules of the London court of arbitration and rules of the American Arbitration association.

Basically the legal phramework for the conduct of arbitration and ADR that emerged owing to the advent of development and the need to meet the requirements of modern business relationships was the arbitration ordinance of 1914 which came into force on the 31st day of December 1914[22] and was based on the 1889 English Arbitration Act. The most criticized aspects of the law is that it allowed for the statement of case procedure and did not limit court intervention in Arbitration proceedings. Happily this law has been repealed and in its place is a code promulgated in 1988 in tandem with the uncitral model law on international arbitration.

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[20] 1985 U.S.

[21] See High Court (Civil Procedure) rules 1988 of Kano State of Nigeria. See particularly order 19, see also High Court civil procedure rules 1987 of Kaduna State, particularly order 18 and other Uniform High Court Civil Procedure rules in the states.

[22] See Olakunle Orojo & M. Ayodele Ajomo, Law & Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associates Nig. Ltd) 1999 Chapter 1 Pages 3 & 13.

On the international scene, the efforts to unify and code an international law on Arbitration resulted in the adoption of a model law on Arbitration which would lead to uniformity/ harmonization of the law relating to International commercial arbitration[23] This led to the emergence of what is regarded as the twin pillars on which international commercial arbitration rests viz; the united nations commission on International trade law (UNCITRAL) model law on international commercial Arbitration ("Uncitral model law") (Uncitral Arbitration Rules) and the new York convention on the recognition and enforcement of foreign Arbitral awards of 1958 ("The New York Convention")

The uncitral law was adopted on 21st June 1985 by the United Nations General Assembly. It would seem that the basic reason for a uniform law was to stimulate international business by removing any surprises which would have been the case if Arbitration was subjected to local law hence the express provision in Article 5 of the model law, known as the principle of Non Intervention thus; In matters governed by this law no court shall intervene except where so provided in this law[24] The New York convention made in New York in June 1958 further strengthened the Arbitration process by obliging the courts of signature states to defer to the arbitral Jurisdiction when an action is brought under a contract containing an arbitration clause and to recognize and enforce a foreign award without any review of the arbitrator's

[23] The General Assembly of the United National in its resolution 40/72 of 11/12/85 recommended that all states give due consideration to the model law on international commercial arbitration in view of the desirability of uniformity of the law of arbitral process and the special needs of international commercial arbitration practice.

[24] Generally regarded as the principle of non-intervention which has also been co-opted into various national laws including the English arbitration act, section C, 1996.

decision subject to limited exception[25]. Taking a critical look at the local and international legal framework of arbitration and the recognition accorded arbitral awards by the courts, it could be said that there is presently a holy relationship between the courts and arbitration and for this justice and fair play is the ultimate victor.

However whether or not the parties desire Arbitration as a method of dispute resolution for them can be gleaned from the contents of the contract binding the parties[26]. It is expected that a clause on Arbitration must be inserted. But to be effective the clause should state the method of dispute resolution and the forum because the latter has a bearing on the choice of law to the extent that the parties need to expressly make provision for the law of a particular country or a set of rules for example rules of conciliation and Arbitration of the International chamber of commerce, International commercial codes, rules of the London Court of Arbitration, Rules of the American Arbitration association to apply. It appears once an arbitration agreement is reached, except otherwise provided leave of court or a judge is needed to revoke an arbitration agreement[27] in like manner, where a party to an arbitration agreement disregards his agreement to use arbitration by commencing court litigation in relation to a dispute agreed to be submitted to arbitration the High Court will

[25] See Articles II & V of the New York Convention.
[26] Ojieco, Ozonia. Alternative Dispute Resolution (ADR) Chapter 2 page 33.
[27] See S. 2 of Arbitration Act 1988, Cap. 19 Laws of Nigeria 1990.

use its powers to enforce the arbitration agreement by staying its own proceedings pending the party's honouring its/his undertaking[28].

Again, but very briefly certain elements showcase the uniqueness and currency of Arbitration as a model of dispute resolution in international law.

Although in international Arbitration there maybe delays which occur by reason of distance and difficulties of communication. Expenditure can also be said to be greater in certain cases due to the costs and fee payable for administrative charges, arbitrators, counsel, interpreters and transportation and there is the further uncertainty of foreign procedural systems and interim measures. But these notwithstanding arbitration appear though arguably to be a more cost effective efficient and timely dispute resolution mechanism than litigation both in international and domestic context. There is also the added advantage that by choosing arbitrators who are experts in that field of endeavour the risk of mis-informed Judgments would be reduced to the barest minimum[29].

Adversarial modes of dispute resolution have a tendency of damaging the business and political relationship and may stifle future collaborative arrangements[30]. Furthermore, most international energy transactions are long term ie 10-30 years with upfront investments running into hundreds of millions

[28] See S. 5 Op. Cit.
[29] See Ladan M. T. New approaches to dispute resolution, "in the New Nigerian Newspapers, Kaduna, Sunday December, 1 and 8, 1996 page 14.
[30] See Presenting Dispute Resolution to Judges, Developed by the American Bar Association – Section of Dispute Resolution Washington D.C. 1996 at Page. 10.

of dollars. Hence the sooner the dispute is resolved the quicker the parties can continue with the transaction. Choice of law and procedural rules is of fundamental importance and may work hardship for either party hence there is need to stipulate beforehand the forum and what rules will apply. Confidentially of transaction is also guaranteed in arbitral proceedings. Due to the fact that record of court proceedings are public documents the parties transaction is open to public scrutiny where as parties may want to keep the existence or nature of their dispute or transaction secret and by so doing avoid negative publicity. There has also been a consistent trend by losing parties that have resorted to arbitration as means of dispute resolution to abide by the awards pronounced, hence success of enforcement is assured. The International chamber of commerce has reported that at least 90% of awards pronounced according to ICC regulations are spontaneously observed by the losing party.

In concluding the general introduction remark on the subject of arbitration which shall form a substantial part of this thesis, it is worthy of note that the rapid growth of information and communication technology has considerably assisted international commercial transaction resulting in the tremendous attention which arbitration has so far been receiving.

This thesis also deals with the subject of ‘’negotiation’’ as its second arm under the broad heading of “Analysis of the concept of Negotiation and Arbitration as models of dispute resolution in international law.’’ We will now consider negotiation briefly.

One of the cardinal objectives of rules of courts is the speedy disposition of disputes before the courts. Unfortunately experience has shown that delayed trial has become the norm rather than the exception in national and international courts. Some of the reasons for this anomaly are as follows:

a) The use of long-hand recording by the Judges

b) Laziness of Judges and legal practitioners.

c) Undue regard to technicalities

d) Jurisdictional difficulties

e) The "I must win a case at all cost" syndrome on the part of litigants and legal practitioners engendered by lack of proper utilization of alternative dispute resolution.

The ultimate objective of speedy and conclusive trial and or settlement could be enhanced in the application of international law if we enthrone the culture of real settlement of disputes through additional procedures other than full trial before the Judges/courts; hence negotiation as a method of ADR becomes imperative.

Negotiation involves direct discussion or communication between the parties with a view to resolving their differences[31]. In most cases parties to a conflict would usually first explore the chance of resolving the disputes themselves. Sometimes they succeed sometimes they don't. Negotiation may fail because

[31] www.law.yourdictionary.com/negotiation.com assessed 2nd February, 2012.

the parties lack the skills to search for creative options for resolving their dispute.

Negotiation as a dispute resolution method is a bargaining process between parties in an effort to reach an agreement. In comparative terms it has unique characteristics as follows:

i) It is a voluntary process

ii) The parties have total control over the procedure, the settlement and its contexts.

As observed by professor .E. Werthiem[32] "In a successful negotiation everyone wins. The objective should be agreement not victory" Every desire that demands satisfaction and every need to be met at least is potentially an occasion for negotiation. Wherever people exchange ideas with the intention of changing relationship whenever they confer for agreement, they are negotiating. A conflict or negotiation situation is one in which there is a conflict of interests or when what one wants is not necessarily what the other wants and when both sides prefer to search for solutions, rather than giving in or breaking off contact.

Negotiation is therefore the process we use to satisfy our need especially when someone else controls or possesses what we want. Negotiation particularly in International law may be for the purpose of structuring international commercial transaction agreement, dispute concerning international

[32] "Negotiation and resolving conflicts", on overview

boundaries, resolving conflict between nations, managing operational problems arising from Joint venture agreement between multinationals etc.

It would appear therefore that on the whole negotiation and arbitration are not only the most popular but also the better preferred models of dispute resolution in international law. Both shall be death with in greater detail in subsequent chapters of this work.

1.2 Statement of the Problem

Alternative dispute resolution (ADR) under which broad head, negotiation and arbitration can be situated is a catchall term and has over time become associated with a variety of specific dispute resolution options such as negotiation, mediation, arbitration, conciliation, mini trial, case evaluation and a host of other hybrid mechanisms[33].

Its name/caption "alternative dispute resolution", captures its essence and circumstances of its emergence. It cannot be correctly argued that some of the method of dispute resolution now lumped under alternative dispute resolution did not pre-date the court system, but it is apparent that they owe their emergence in the current modified and codified form as well as their popularity and preference by individuals, groups, national and international interest more due to the apparent deficiency in the court system them any inherent advantages.

[33] See Generally, Goldberg, Sander and Rogers, Dispute resolution, 1992, 2nd edn., little, Brown & Coy., Boston U.S.A.

In Nigeria today and indeed similar jurisdictions with comparable jurisprudence, the courts are littered with cases which ought to have been disposed of in a matter of months. Cases however seen to be warehoused in the courts. This is due to the long adjournments, cumbersome procedure or several other artificial obstacles. The consequence of these are that litigants become frustrated. Criminals sometimes escape judgments and therefore justice while innocent citizens often suffer undue detention and prolonged imprisonment awaiting trial. Hardest hit by the fall out of this inefficient system are the downtrodden in the society with no hope of redress as they are being increasingly but systematically side lined by the poor economy and the high cost of legal justice. As long as this system subsists and because many citizens cannot afford the cost of legal justice they have to literally rot in jail[34].

As time goes by including events the judiciary and the justice system appear to be steadily losing the trust and confidence of the majority who had hitherto viewed it as capable of restoring hope to the oppressed but the current adjudicatory procedure are simply inadequate for the task. It is therefore safe to conclude that both the Bar and the Bench as the law makers are responsible for the incredibly slow process of justice administration and the high cost of legal

[34] See Ladan M. T. "A Crisis of Justice in Nigeria" in Africa Event Magazine Vol. 5 No. 1, January, 1989, London Pp. 32 – 34./

justice, hence the often mouthed cliché, justice delayed is justice denied[35]. The current system of justice through the courts is obviously in crises[36].

1.3 Aims and Objective of the Research

Ultimately, the focus/objective of this research is to attempt a fairly comprehensive analysis of available but arguably more popular options for dispute resolution[37], while doing an appraisal of the inherent difficulties and unsatisfactory outcome of litigation in international law. In doing so this work shall carry out an appreciable analysis on arbitration and negotiation as models in the settlement of disputes in international law. Mention will also be made in passing to other ADR methods, with specific attention on the pitfalls of litigation as a means of dispute resolution in international law.

For instance, litigation demands that parties are required to personally source for and provide their evidence, pay the fees for the originating processes and record of proceedings for cases on appeal, settle solicitors fees and bear other incidental cost. All these require substantial amount of resources before, during and sometimes even after the trial..

Apart from these well known instances of dis-incentive at litigation including cost, the institutional and structural weaknesses in judicial system had led to the situation where in majority of the cases, disputes spend an embarrassingly

[35] Ladan M. T. "New Approaches …." Op cit P. 14.

[36] See Aguda, T.A Crisis of Justice, Eresu Hill Publishers, Akure, 1986, pp. 1 – 30; Krishna, I, Law v Justice (Deep and Deep), New Delhi 1981 P. 29, powker M. and Hagin L. J. ADR Techniques in the Reformation Model of Civil Dispute Resolution, 46 SMU L. Rev. 1993, P. 1905 at 1906, Kaufman I.E. Reform for a System in Crisis. Alternative Dispute Resolution us the Federal Courts 59 Fordham L. Rev. 1990 P. 1 at P. 22 – 38.

[37] See Ladan M. T. Role of youth in inter ethnic and religious conflicts in Nigeria being a paper presented at a conference on conflict resolution in Nigeria, organized by the Carlifonia State University, Sacramento, U.S. between 29 – 30 January, 1997 Pp. 32 to 41, Venue Conference Centre, University of Ibadan, Ibadan.

long period in court, thus adding to the frustration of the parties. Though later in time the frustration resulting from litigation including time expended and the enormous cost led to the search for and rediscovery and acceptance of other options for dispute resolution. Since negotiation and arbitration in their uniqueness and processes provide soccour to disputants in most cases where litigation has failed as a means of securing justice, the study will entail the consideration of the subject within available international legal frame work

1.4 Scope of Research

The scope of this research would essentially be to attempt a brief exposure on the concept of ADR in general and negotiation and arbitration in particular and in regards to the latter two, also attempt an appraisal of its legal frame work. In the main various rules and codes of international commercial arbitration, which forms the bulk of instances of international arbitration will be analyzed, and the merits or otherwise of negotiation and arbitration in disputes resolution in international law shall be examined.

However, it should be noted that a study on dispute resolution models is clearly of great importance and or significance to every nation, multinational and individual parties. This is because it bears a direct correlation on international relationship, between nations and on international commercial transactions.

Accordingly, it will be most appropriate that this work deals with relevant discussions on practical situations, case law, international commercial

transactions as well as the effect of globalization on the concept which will also be undertaken within the scope of this work.

1.5 Methodology of Research

Basically the methodology of research adopted in this work and which is borne out by the style of presentation, is by way of research conducted in the libraries with an aim to discover the historical sequence of events ie to discover the age of the concept its eventual erosion by litigation and its ultimate rediscovery and underlying reasons. That done with, attempt will then be made to situate and re-state the legal principles as well as their application. Copious references is made to relevant books, Articles, Journals, law reports etc as sources of information.

Originality shall lie in the attempt at each point to express strong views regarding the role of negotiation and arbitration in the attainment of Justice, in the sphere of international law as opposed to litigation.

1.6 Literature Review

Copious references are made in the course of writing this thesis to several published works of international scholars on the subjects of Arbitration and negotiation. In particular mention must be made of reknowned authors such as Russel on Arbitration[38] Brown and Marruit[39] and Mustil and Boyd[40] similarly

[38] See Russel on Arbitration, 19th and 21st edition at page 6.
[39] ADR Principles and Practice, "1993 at page 15.
[40] See Particularly 1st Edn-Ibid.

the works of Gerald .R. Williams[41] and professor .E. Werthiem[42] to mention a few served as veritable sources of information from which this work benefited immensely. Though the foregoing authors expositions were as expected foreign based and did not embrace some aspects of local peculiarities. This should be clearly understandable in view of the scope of the work.

In Nigeria the writings of Dr. Amanze Asouzu[43] Gaius Ezejiofor[44] Chris Ohuruogu[45] and M.T. Ladan[46] provided a rich store of knowledge for this study. However these authors also have their shortcomings as they seem to centre largely on domestic arbitration and negotiation without extending to international commercial transactions and disputes between nations. For this, the writer had to place reliance on case law as fall back, including some recent works[47], such as G.C Nwakoby[48], Menkel meadow[49] and Ladan M.T.[50] that have to some extent touched on International Arbitration and negotiation which is the major concern of this thesis.

1.7 Limitation of Research

Like most other research work particularly on the subject of International Law, the major obstacle encountered by researchers in this area of study is that

[41] See Negotiation as a healing process, Journal of Dispute Resolution, 1996 Number I
[42] Negotiation and Resolving conflicts, an overview
[43] Arbitration and judicial powers.
[44] The Law of Arbitration in Nigeria
[45] Regional Centre for Internaitonal Commercial Arbitration, Decree No. 39 of 1999 – A Review
[46] Ladan M. T. "New Approaches to dispute resolution".
[47] Adedoyin Rhodes – Vivour, "Arbitration and Alternative Dispute Resolution as Instruments for economic reform
[48] Nwokoby G.C., ICSID Arbitration Practice, "Plea of Sovereign Immunity".
[49] Toward another view of legal negotiation the structure of problem solving, in 31 UCLA L. Rev. 1984.
[50] Ladan M. T. "ADR in the U.S Lessons for Nigeria.

created by the absence of the necessary statistical data which ought to provide the basis for any such research. This work has not been an exception. Case law that borders on negotiation and arbitration under international commercial disputes and disputes between nations are limited and do not enable for critical analysis.

Furthermore most International commercial transaction agreements fail to contain arbitration or ADR clauses. Despite these problems effort has been made to expose to a large extent the distinctive character of arbitration and negotiation as models in settlement of disputes in International Law using available literature.

1.8 Organizational Layout

This work is divided into five different but Inter related chapters, chapter one deals with Introduction and thereby provides the background to this study. The statement of the problem, objective and scope of this thesis as well as the techniques to be employed in this research and review of relevant literature also constitute part of chapter one.

Chapter two deals with a brief introduction as regards the methods of dispute resolution in international law prior to and as well as the problem leading to the advent of ADR. This chapter also outlines the nature and scope of alternative dispute resolution and deals further with the different approaches of negotiated method of ADR processes.

Finally the chapter discusses in sufficient detail the types of dispute resolution methods under international law.

In chapter three the concept of negotiation as a dispute resolution method will be considered and the meaning, nature and scope of negotiation will be critically examined. This chapter will also evaluate and assess the process and procedure for negotiation as a dispute resolution mechanism. The chapter concludes with discussion on the law, theory and practice of negotiation under international law.

Chapter four considers in detail the concept of arbitration as a dispute resolution mechanism. It also discusses the meaning, scope and form of arbitral agreements as well as the requirements and contents of the arbitral agreements, including ouster of court's jurisdiction and question of time limits in arbitration.

In this chapter the legal requirement for the composition and Jurisdiction of arbitral tribunal will be discussed with an insight on number of arbitrators, appointment of arbitrators, qualities of an arbitrator and disqualification of an arbitral tribunal.

The chapter concludes with discussions on the theory and practice of arbitration under international law vis-à-vis the arbitration rules, place of arbitration, law and language of arbitration, pleadings and evidence. Discussions here extend to making of an award and termination of proceedings

and finally recourse against an award for the aggrieved party and Judicial intervention in arbitration.

Chapter five is the conclusion chapter and is covered with a summary of the entire discussion on the subject. Findings are made and recommendations proffered to identified problems and these obviously are the basis of this exercise.

CHAPTER TWO

CONCEPT OF ALTERNATIVE DISPUTE RESOLUTION

2.1 Nature and Scope of Alternative Dispute Resolution

There is no universally accepted definition of alternative dispute resolution and a broad range of procedures may be categorized as such. At its broadest, alternative dispute resolution encompasses any method of resolving a dispute other than by a binding dispositive decision imposed by a judge or arbitrator, generally but not necessarily involving the intercession and assistance of a neutral third person who helps the parties to reach a settlement[1].

There is the general notion that the emergence of ADR was owing largely to the disadvantages associated with the formal court system of adjudicating disputes No doubt as the name suggest, obviously the mere fact of seeking to introduce an alternative method of doing things as opposed to a subsisting pattern is clearly an indictment on the subsisting method.

However it is the view of this researcher that it is erroneous to situate the emergence of ADR squarely on the deficiency of the formal court system, as this tends to suggest that the formal court system is as old as mankind itself. This is absolutely incorrect particularly in the African context, where the formal court system came only with the era of colonization. Even in the civilized world or so called developed nations of today the organized court system as it is known today was not in place at the beginning.

[1] The Encyclopedia of Forms and Precedents Vol. 3 (1) paragraph 38 (71)

As we have already noted in the introduction to this work, dispute by whatever name called is clearly an inevitable part of human interaction both in the individual, family, communal, national and international levels as in inter-personal social or international business relationship. It is the view of this researcher that the practice of resolving disputes through alternate means without the modern day structure has been in existence from time immemorial and has often been utilized by parties to disputes because of its practical advantage of settling disputes with less formality and expenses compared to what became operative as a result of the advent of the Law court. It was the belief that only a body with the organic structure as the courts had the power of coercion, bindingness & enforcement. However the obvious drawback of the court system in international commerce became apparent with the growth & development of international Law & commerce making a new and more effective system imperative, hence the need for an alternative method of dispute resolution.

The topic of this thesis when examined closely and critically leaves one with the impression that litigation is on one side while other forms of disputes resolution including arbitration occupy the other side as alternatives. On this there appears to be a sharp disagreement between writers on what constitutes ADR. Ladan[2] Sees Alternative dispute resolution as a term which has become associated with a variety of specific dispute resolution options such as negotiation, mediation, arbitration, conciliation, case evaluation -trial and a host of other hybrid mechanisms, On the other hand, Unarguably, Arbitration and Alternative dispute resolution are alternative options to litigation. Though included in the generic meaning of the term "alternative

[2] Alternative dispute resolution in Nigeria: Benefits, Processes and Enforcement.

dispute resolution" arbitration is usually not classed as an ADR procedure[3] Rhodes Vivour, excludes Arbitration from alternative dispute resolution methods insisting that there is no universally accepted definition of alternative dispute resolution and a broad range of procedures may be categorized as such. He goes further to say that at its broadest alternative dispute resolution encompasses any method of resolving a dispute other than by a binding dispositive decision imposed by a Judge or arbitrator[4]. Generally alternative Dispute Resolution, otherwise known as ADR may be defined as a range of procedures that serve as alternative to litigation through the courts for resolution of disputes generally involving the intercession and assistance of neutral third parties.

In some definition, but more commonly it excludes not only litigation but all forms of adjudication. We can also define ADR as a system of dispute resolution which is non-binding. By non binding is meant the absence of imposed sanctions[5]. Thus a proper ADR procedure does not guarantee a binding result although it can lead to one and the main distinction between ADR and Arbitration lies in this respect.

Unlike ADR outcomes an arbitration award is final and binding. The latter is used to describe a process to settle disputes between two persons by referring to an impartial third person or persons known as arbitrators specially appointed for that purpose. The dispute is determined in private with final and binding effect by the impartial third

[3] See Rhodes Vivour, Arbitration and Alternative Dispute Resolution as instruments for economic reform.
[4] See A. A. Asouzu, International Commercial Arbitration and African States (Cambridge university London 1999) Chapter 7.
[5] See Russel on Arbitration at page 6.

person (or person) acting in a judicial manner rather than by a court of competent jurisdiction[6].

It has been held by the Supreme Court, per Katsina-Alu JSC in Ras pal Gazi Construction Company Ltd vs FCDA[7] that an arbitral award is at par with a judgment of the court.

However alternative dispute resolutions on the other hand are non binding but voluntarily accepted or negotiated solutions to disputes. Alternative dispute resolutions are not equated to judgments but alternatives to judgments[8].

Fundamentally it would appear that the difference between ADR on the one hand and Arbitration/Litigation on the other is as stated thus:-

> "*ADR like litigation and arbitration will often involve an independent third party but his function is fundamentally different from that of a judge or arbitrator and is best described as a neutral facilitator. He does not impose a decision on the parties, but on the contrary, his role is to assist the parties resolve the dispute themselves. He may give opinions on issues in dispute but his primary function is to assist in achieving negotiated solution"*[9]

ADR procedures include Negotiation, mediation, conciliation, mini trials or executive tribunal. They place a premium on party involvement. According to Orojo and Ojomo[10] ADR is generally used to describe the methods and procedures used to

[6] See encyclopedia of form and precedents Vol. 3 (i) Paragraph 2(ii)
[7] (2001) 10 NWLR Part 722 page 559
[8] See Jean Timsit, Mediation: An Alternative to Judgment not an Alternative Judgment (2003) JCIArb Vol. 69 No. 3 at page 159
[9] Alan refern and martin Hunter, Law and Practice of International and Commercial Arbitration (London Sweet and Maxwell 1999 Third Edition) at page 32, see also carol and Dickson, Alternative Dispute Resolution Developments in London, the International Law Review (1990) part 4, page 436 at 437.
[10] Law and practice of arbitration and conciliation in Nigeria 1999 at Page 11

resolve disputes either as alternatives to the traditional dispute resolution mechanism of the courts or in some cases as supplementary to such mechanisms, whereas arbitration and litigation are adversarial and adjudicatory.

A proper ADR procedure is not adversarial and non adjudicatory and hence the seeming exclusion of Arbitration as part of the ADR process. A set of options are open to persons seeking relief through ADR processes. For instance preventive methods of ADR are used to attempt to pre-empt disputes. These mechanisms are decided in advance by the parties in order to govern how any disagreement or dispute will be handled. For example many business contracts now contain specific provisions for dealing with future possible disputes. The parties will give notice of any dispute, negotiate for a certain period of time, mediate and submit any unresolved issues to an arbitrator. This researcher holds the view that the word ''preventive'' may be a misnomer for these ADR methods because they do not actually stop disputes from occurring; rather they channel disagreements into a problem solving area early enough so that escalation of full blown disputes may be avoided. Traditionally, most preventive clauses were arbitration clauses, but increasingly parties are adding ADR clauses which utilize a variety of ADR methods including but not limited to arbitration. Preventive ADR can also include relationship building methods such as partnering, consensus building, negotiated rule making and training in joint problem solving.

To date, relatively little attention has been focused on preventive methods of ADR and most ADR models and charts do not include them. There is no gain saying that

preventive methods of ADR will become increasingly important in the future. Such methods recognize that conflict is inevitable and thus establish in advance mutually agreed upon mechanisms to channel conflict when it arises.

2.2 Negotiated Methods of ADR

The methods include interest based (also known as principal, mutual gain, win – win) positional (win lose, power based) and problem solving (agreeing on the issues to be resolved and setting an agenda for resolving those issues). In the negotiated form of ADR, the disputants reach their own resolution, unaided by a third party, neutral or decision maker. If they cannot come to a satisfactory resolution the parties are free to terminate the negotiation and to pursue other forms of dispute resolution including other ADR methods, litigation or administrative adjudication. Some contracts may require a "cooling off" period once the dispute is identified and then good faith attempts at negotiating prior to resorting to power or rights based resolutions.

2.3 Facilitated Method of ADR

Facilitated method of ADR involves a neutral third party assisting the disputants to reach a satisfactory resolution. The neutral party merely helps the parties and has no authority to impose a decision or result. Examples include mediation and the use of Ombuds persons. In facilitated ADR it is the parties not the neutral who retain control of and resolve the dispute. As in the negotiated forms of ADR, if the parties do not think the proposed resolution is satisfactory they are free to terminate the ADR process and pursue other resolution options.

The parties typically retain control as well as the final selection of the mediator, although some mediation institutions assign neutrals to the dispute or maintain panels of neutrals from which the disputants may select. It must be stated at the onset that there is no such things as "binding mediation" a phrase that is occasionally heard. One can be required to participate in mediation but one cannot be required or be compelled to agree to a proposed settlement derived through the mediation process.

As Ombuds persons do not have by tradition decision making authority, they are considered another form of facilitated ADR. In some Jurisdiction, for example Malawi, Ombuds persons have statutory and in some cases constitutional authority to intervene in disputes and in some cases impose settlement[11].

2.4 Fact Finding ADR

This method may be binding or non binding depending upon the agreement of the parties. These methods utilize a third party or technical expert to make findings (usually on factual issues) for example, neutral expert fact finding. The parties may use a third party to make findings of fact regarding technical issues as asset valuation, biotechnical data, actuarial statistics or construction specification. The parties can agree in advance on whether or not they will be bound by the findings and whether the findings will be admissible in any subsequent proceeding. Again the parties typically retain control over the selection of the neutral expert fact finder who is usually a subject matter expert and brings substantive expertise to the dispute.

[11] Erbe N.D. (2006) "Appreciating Mediation's Global role in Promoting Good Governance". Harvard Negotiation Law Review 11 (Spring)

2.5 Advisory ADR

In advisory ADR a third party neutral (usually selected by the parties) reviews certain aspects of the dispute and renders an advisory opinion as to the likely outcome. These methods include outcome prediction, mediation, early neutral evaluation, mini trials summary jury trials and non binding arbitration. For example the parties may chose to use a third party to provide an opinion on a legal issue in dispute such as contract provision or point of law or they may decide to hold a mini trial in which the attorneys for each side present the major aspects of their case to the clients and a presiding neutral. The neutral may then advise as to the probable outcome working with the clients in particular to facilitate settlement

2.6 Imposed ADR

Imposed methods of ADR are those in which a third party neutral makes a binding decision regarding the merits of the dispute. Most often, this method use some form of binding arbitration, either with a single arbitrator or with a panel (usually three in accordance with the Arbitration and conciliation Decree 1988) such arbitration is usually the result of an alleged breach of contract or agreement between the parties. Standard industry practice, regulations or a statutory provision may require the use of binding arbitration as well. In the imposed forms of ADR the parties have the least control over the process and the outcome. Binding arbitration is the method of ADR that comes closest to traditional forms of dispute resolution such as court litigation. There is very limited right of appeal from an arbitration award, based on such extra-ordinary circumstances as fraud, duress, coercions, bias, non-qualification of the arbitrator and absence of Jurisdiction etc. In imposed methods of ADR, particularly

where panel of arbitrators are used and the proceeding is formal and court like can be quite expensive and time consuming. Infact some research suggest that certain types of arbitration are not necessarily faster or cheaper than litigation.

2.7 The Pros and Cons of ADR Processes

ADR processes have advantages as well as disadvantages over the usual traditional method of dispute resolution through litigation. The advantages of ADR processes include:

(a) Time Saving and Money:-

ADR especially when used early in the life of a dispute can save substantial time and money[12]. By producing early settlements, ADR reduces the time[13] and money disputants and courts might otherwise spend on litigation. Even where ADR does not produce an immediate resolution it can still produce savings by clarifying and narrowing the scope of the dispute

(b) Increased Flexibility and Control:-

ADR typically gives the parties greater flexibility and control in the dispute resolution process. In the procedures followed, ADR typically offers greater procedural flexibility as the parties can design a dispute resolution process which best suits the particular situation. They select the process to use whether binding or non binding as

[12] The Subject of Cost Savings for Various ADR Procedures is a Complex One, and the Result Vary Significantly Depending on the Types of Cases and Court Settings as well as the Soplustication of the research. In Addition, a Distinction Must be Drawn Between Cost Savings to the Disputants and Savings to the Legal System. In General there has been no persuasive evidence of the latter, but some evidence of the former. See Mc Elven, Note on mediation research. In Goldberg, Sanders, Rogers and Cole at 162 – 164.

[13] Although mediation itself is not an enforcement mechanism and mediators alone do not possess powers of compelling the disputants to enforce a contract there are different ways in which mediation can shorten the time necessary to enforce a contract. Successful mediation can drastically shorten the time necessary for reaching a solution (mediation usually is resolved in one session) mediation out of court system can resolve the conflict at a very early stage, before the case in brought to court.

well as when it will take place. Further ADR processes take into account a wide variety of interest and concerns than can litigation. Non-legal interest are also the concern of ADR. Moreover a broader range of potential remedies is generally available through ADR than in litigation. Disputants are not limited to monetary remedy or other remedies than a court could order, particularly in the non adjudicatory ADR processes, parties can craft own creative solutions to resolving a dispute.

(c) Confidentiality:

ADR processes are generally confidential. The exact scope of confidentiality will depend on applicable statutes and the disputant's agreements to use ADR. Confidentiality encourages openness and candour and is considered an important factor contributing to ADR effectiveness[14].

d) Improved Communication:

The adversarial postures taken in litigation often exacerbate the communication problem inherent in most disputes and may further damage the relationship between the parties. In many situations such as when a dispute is between parties working on the same construction project, a Bank, its customer or between a manufacturer and a distributor, the parties would like to preserve their relationship. Many ADR process are designed to reduce the acrimony created by the dispute and to help disputants communicate with each other.

e) Reduced Stress and Increased Satisfaction:

[14] See Ozonnia Ojieto, Alternative Dispute Resolution ADR page 16.

Litigation can be highly stressful for the parties. Lack of control over the process or the outcome, prolonged uncertainty and mounting cost all contribute to this. The attributes of many ADR processes reduces stress greatly. Studies indicate that disputants who have used ADR process such as mediation are generally satisfied with both the process and the results and are more likely to abide by the term of a resolution because they participated in forming them.

Despite these advantages, including reduced court backlogs[15] disadvantages of ADR process persist and are considered hereunder.

a) Fewer evidentiary and procedural protection. Most ADR processes operate under less stringent procedural and evidentiary rules than litigation.

Even in arbitration and conciliation the procedural and evidentiary rules are typically more relaxed than in litigation. This can create concerns about whether the truth will come out and whether disputants will get real justice in an ADR process. Using ADR involves a trade off. Some procedural protections of litigation are given up in exchange for a potentially faster, more cost effective and more flexible process. This trade off is likely to be of most concern where the ADR process is mandatory and binding such as when a non negotiable contract includes a binding arbitration clause. Here, the fairness of the procedure followed is critical because the disputants cannot decline to use a process which lacks the perfection they believe are essential. If ADR process is non binding, one is also free to reject a proposed resolution that he believes is unfair and to pursue litigation.

[15] See dispute wise business management New York American Arbitration Association at 9 – 10.

b) Less Discovery is typically available

Most ADR processes involve less formal discovery than litigation. This raises concern that critical evidence will not be disclosed or that an accurate evaluation of the merits will not be possible. As in litigation the amount of information needed from the other side depends upon the nature of the dispute and the information already available. It also depend on the type of ADR process used Adjudicatory processes such as arbitration often require more information and greater assurance of reliability than process such as mediation, in which information sharing is part of the process itself. As in litigation there is no guarantee that every piece of information will surface in an ADR process. However when ADR is used unless the process is binding one is always free to reject any proposed resolution if he believes that critical information has been withheld.

(c) Evidence or Strategy May Be Revealed

During the course of an ADR process, parties may reveal information or strategy concerning the dispute. Much of the information revealed in an ADR process may be protected by statutory confidentiality requirements and by the parties own confidentiality agreements. However if the dispute is not resolved in the ADR process, the other side may still be able to use this information to develop their discovery or trial strategy. This same information would probably be revealed through discovery prior to trial if no ADR process were pursued, but it may come out earlier in an ADR process. The reason that such early revelation will negatively affect a party's case must

be weighed against the potential that the dispute will be satisfactorily resolved earlier and at a lower cost if ADR is used.

(d) Non Binding ADR May Add Time And Cost:

If a non binding ADR process does not result in the resolution of a dispute, costs may be incurred both for the ADR process and for litigation. It is possible that these combined costs may exceed the cost of pursuing litigation alone. Apart from this there is no recourse from, a bad decision in a binding ADR process. There is virtually no appellate review available for decisions reached in binding ADR process. For this reason the use of a binding ADR process should be considered carefully, moreover, ADR process do not provide legal precedent. Resolutions or decisions reached in ADR process are not legal precedent in subsequent proceedings. Thus if the goal is to establish legal precedent litigation is the appropriate option.

2.8 Types of Alternative Dispute Resolution under International Law:

With particular reference to commercial transactions, disputes often arise between parties in the performance of agreements relating to such commercial transaction. When these disputes arise, it is only natural that the parties will want to resolve them peacefully. The common methods of doing so are by negotiation, litigation, arbitration, conciliation, mediation and other ADR processes. A brief outline of the various techniques will be made as provided under international law

a) Negotiation:

Negotiation is an indispensable step in ADR process. It is a fundamental key to all consensual ADR activities, and infact the most satisfactory method of settling

disputes. Ability to negotiate is inherent in that it is an art which is learnt form the earliest stage. Usually negotiation consists in giving up something in order to get something in return. It involves discussions or dealings, about a matter with a view to reconciling differences and establishing areas of agreement, settlement or compromise, that would be mutually beneficial to the parties or that would satisfy the aspiration of each party to the negotiation[16]. Compromise here implies flexibility on both sides and flexibility arises from the genuine intentions on the part of the parties to reach agreement.

There are various approaches to negotiation. Its procedure and technique vary with each negotiation, depending on the nature of the issues being negotiated, the parties to the negotiation, together with their skill, knowledge and experience. The nature and scope of the negotiation is at once also relevant. A negotiator may be a tough and aggressive hard bargainer who by nature is always reluctant to concede, he may be a person who would always want to hackle or threaten his opponent. There are no formal institutions as such where negotiation skills are learnt other than in continuing education forums like seminars lectures and symposia. Learning negotiation is pragmatic, by experience and usually theoretical. However negotiating capability and ability is enhanced by a thorough knowledge of the theories and intricacies.

As in other human activities that involve skill and knowledge, an adequate preparation is essential for a successful negotiation. There are three distinct stages in every negotiation.

[16] See Ladan, M. T. Alternative dispute resolution in Nigeria: benefits Processes and enforcement, journal on current themes in Nigerian Law. A publication of faculty of law A.B.U. Zaria.

The first stage involves the definition of the problem, the clarification of objection, finding out exactly what the other side wants by trying to assess the underlying needs or preferences of the other party to enable you develop a strategy to meet them.

It is necessary at the second stage to have a brief but working knowledge of the habits, antecedents and inclinations of the other party to the negotiation. This information will help you tailor your strategy to meet his need.

The third stage otherwise referred to as the agreement stage is where compromises are made and a mutually satisfactory conclusion is reached. Surprisingly in civil law systems unlike in common law Jurisdictions there is an overriding principle of good faith in contract negotiation and performance.

The rules which apply to negotiation also apply to re-negotiation. The only difference is that re-negotiation, comes into play when a contract is already in existence. It is a model used to modify the terms of an existing agreement either at periodic intervals or if certain stated events occur. Re- negotiation involves adjusting and balancing of the contract terms so that neither Party remains at a disadvantage by initial terms. For a meaningful re- negotiation to be undertaken it is important to provide for a re-negotiation clause in the original contract that is precisely defined in such a way that events that could trigger re-negotiation are exhaustively enumerated. Re-negotiation may form part of settlement of a dispute. It is when negotiation and re-negotiation fail that resort is had to other modes of dispute resolution within the ADR processes or outside them.

(b) Mediation and Conciliation:-

Mediation occurs where a third party assists disputants to settle their own disputes. Mediation is at the core of ADR. The mediator does not make a decision much less impose it. Any settlement made by mediation only have the force of an agreement ie the force of a contract. Mediation procedures do not need to conform even to the basic legal principle required in arbitration. A mediator may meet separately with one disputant without damaging the process. In arbitration such an occurrence will be a serious breach of the principle of fairness which upholds the parties right to know the case against him. All evidence must be provided openly between parties. Conciliation on the other hand is an extension. This occurs where the disputants are unable to agree despite the mediator's assistance. The conciliator who has been acting upto this point is asked to give his opinion as to what should be the terms of a settlement. This opinion is then presented to the disputants and unless one or more of them rejects it within a specified time, it becomes their agreed settlement of the dispute.

Conciliation has a statutory framework. These are either process like MED ARB, ministerial or executive tribunal, Ombudsmen (Public complaints commission) and fast track arbitration.

It would be stressed that some of these terms are less familiar and not necessarily consistently employed. Unfortunately the position being canvassed is to determine the criteria to be used to establish a nexus between a dispute and process so as to ascertain which process fits a particular dispute.

Conciliation and mediation are often synonymous. At other times they are distinguished. The common feature of both is that they are based on the consensus of the parties. The conciliator provides the environment for negotiation. The mediator persuades the parties to focus on their underlying interests and concerns and move away from fixed positions that often cloud the real issues. Conciliation is governed by the agreement of the parties and it is only rarely that it is governed by statute. In the resolution of international disputes conciliation is becoming more and more widely used particularly because of the party autonomy and the consensual nature of the settlement. Where the parties to an agreement intend that any disputes or differences arising therefore shall be settled by conciliation, they only need to insert an appropriate conciliation clause in the substantive agreement sometimes it may be agreed that the conciliator or mediator be appointed by a special body or person. Furthermore, provisions may be made for the dispute to be referred to arbitration in the event of failure of conciliation or mediation. Disputes that may be referred for conciliation include commercial disputes, family disputes, community and neighborhood disputes as well as international disputes.

Conciliation can be used at any stage of a dispute. Thus it can be chosen as a first step towards seeking a solution to a dispute after negotiation or re-negotiation conducted by the parties, has failed. Conciliation can also be used at any time during litigation or arbitration where the parties wish to interrupt the litigation or arbitration process to explore the possibility of a negotiated settlement. One of the essential features of conciliation process is its confidentiality as in other ADR processes. Conciliation is by its nature a private and confidential process. Thus it can reduce or even contain the

escalation of disputes. The parties autonomy in the process is very high since the process is consensual. The parties retain a high degree of independence and autonomy and less reliance on the third party. The conciliator is appointed by the parties jointly and he must be a third party who is neutral and independent. This is fundamental to the conciliation process.

There are principally two ways in which mediators assist parties in reaching their decision[17]. First they facilitate mediation and conciliation. The mediator at this stage endeavour to facilitate communication between the parties and to help each side to understand the others perspective position and interests in relation to the dispute. This method is sometimes referred to as being interest based. The second method is the assessment of the respective merits of the issues between the parties. The evaluation though, not binding influence the parties to reach a negotiated settlement. Thus a mediator performs his functions as a conflict manager, information gatherer as well as facilitating a settlement.

d) Mini-Trial

The Mini-trial is a form of evaluative mediation which as a non binding ADR process assists the parties to a dispute to gain a better understanding of the issues in dispute, thereby enabling them to enter into settlement negotiations on a more informal basis. Mini-trial usually takes the form of a short presentation of the issues by the respective in house lawyers of the parties who now sit together on the opposite side of the table facing both disputants, or in the case of corporations their chief executive decision makers. The disputants literally become "the Jury" assisted by a neutral expert who

[17] See Russel on Arbitration at page 6.

may be a former Judge or some other person with authority in the field of the dispute, selected as a neutral/adviser to elucidate any problem which may arise during presentation. The executive then retire and try to negotiate a settlement. This enables them to view the dispute in a better perspective and helps them settle in a more dispassionate manner. Here again as in mediation, the neutral can have a significant role by acting as a facilitator of the parties negotiation.

e) Med-ARB

In Med-Arb which is an abbreviation for "mediation Arbitration" attempt is first made to resolve a dispute by agreement through mediation, and if that fails, then it proceeds to a binding arbitration. The advantages in this is that if settlement cannot be reached the initial mediator can now be appointed the arbitrator entrusted with the duty of making a binding determination, especially if during the course of the mediation a relationship of trust has developed between the mediator and the disputants.

In the Med-Arb process the decision to go to arbitration if mediation is unsuccessful is one of which the parties commit themselves in advance, before the process commences. This offers the advantages, real or perceived. First, that the process will produce a resolution one way or the other. Secondly, that parties may perhaps, try harder to be reasonable and to resolve the matter during the mediation phase. Thirdly, that if adjudication is required there will be no loss of time or cost in having to re-acquaint a new neutral party with the facts of the case and issues between the parties[18].

f. Arbitration:

[18] Henry J. Brown and Marrit, A. L, ADR principles and Practice 1993 at page 115.

Arbitration is a procedure for the settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is in general final and legally binding on both parties. The process derives its force principally from the agreement of the parties and in addition from the state as supervisor and enforcer of the legal process. So where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial persons of their choice, in a judicial manner the agreement is called an arbitration agreement. The enactment regulating arbitration in Nigeria is Arbitration and conciliation Act 1988 Cap 19 LFN 1990. The Arbitration agreement is considered fundamental in arbitral proceedings and thus the fountain of the whole process. The consensus of the parties and Jurisdiction of the tribunal are derived from the agreement. By section I of the act, essentially the agreement must be in writing as held in: ***COMMERCE ASSURANCES LTD v. ALLIS***[19] The agreement are of two types namely, submission agreements and arbitration agreements. Submission agreement is intended at submitting all disputes to arbitration while arbitration agreement is aimed at referring all future disputes to arbitration. An agreement may be adhoc or institutional. If adhoc, it means that the agreement is not generally regulated by the rules of an arbitral institution. In other words the parties will agree on the rules. However if institutional, it means that the proceedings will be conducted and administered by an arbitral institution.

Where there is an arbitration agreement and any of the parties instead of going for arbitration initiates an action in court the other party can apply for a stay of

[19] (1992) 3 NWLR Pt. 232, Page 701 at 725.

proceedings under section 5 of the act and the court has the power to refuse to entertain the court proceedings. Normally the basis of any preliminary objection shall be issue of competence of the suit for failure to comply with a condition precedent. This was the position in ***AFRICAN INSURANCE DEVELOPMENT CORP. VS NIG. LIQUIFIED NATURAL GAS LTD***[20].

An Arbitration agreement is generally irrevocable except by the agreement of the parties or leave of court[21]. The number of arbitrators to be appointed is determined by the parties and where not so stated is deemed to be three. The parties can further specify the procedure for appointment and if not so specified section 7 (2) of the Act shall apply. Under section 17 of the Act the party initiating recourse to arbitration called the claimant shall give to the other party called the respondent a notice of arbitration. Arbitral proceedings shall be deemed to have commenced, upon receipt by the other party of the Notice.

Under section 15 of the Act, the proceedings shall be in accordance with the arbitration rules and where there is a lacuna in the rules, 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. Under section 22 of the arbitration act the tribunal has power to appoint one or more experts to report to it on specific issues and also direct the expert to participate in the proceedings S. 23 gives powers to the court to order attendance of witnesses by issuing sub-poena ad testificandum or a writ of Habeas corpus to bring a prisoner for examination.

[20] (2000) 4 NWLR Pt 653, Page 494 at 504.
[21] S. 2 Arbitration and Conciliation ACT 1990

Section 24 provides that in an arbitral tribunal of more than one arbitrator any decision of the tribunal shall unless otherwise agreed by the parties be made by a majority of all its members S. 25 provides for the settlement of the dispute by the parties in which case the proceedings shall terminate. An award made by the arbitral tribunal shall be in writing and signed by the arbitrators[22]. Section 27 provides for the termination of the proceedings when the final award is made or where the claimant withdraws his claims or the parties agree on the termination or where the continuation is unnecessary. An arbitral award is final and binding as was decided in ***ONWU & ORS V NKA & ORS***[23]. Although there can be no appeal against an award, it can be set aside under certain conditions. Accordingly, section 29 provides that an application can be made within three months from the date of the award or when the request for additional award is disposed of, thus, such an application must be made within time This was the position in ***COMERCE ASSURANCE LTD VS ALLI***[24]. An award can be set aside if it contains decision on matters beyond the scope of the submission to arbitration. Parties take their arbitrators for better for worse both as to decision on facts and that of law. However an award can be set aside if the Arbitrator Misconducts himself as tacitly demonstrated in ***TAYLOR WOODRAW NIG. LTD V S.E UMBH***[25] or where the arbitral proceedings or award has been improperly procured[26] or there is proof of bias as in:- ***LSDPC V ADOLD/ STAMM INT NIG LTD***[27]

Whereas sections 29-30 deals with recourse against a domestic award section 48 deals with setting aside an international award. The grounds for setting aside an international award are more elaborate.

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[22] Ibid, S. 26
[23] (1996) 7 SCNJ, 240 at 255.
[24] Supra at page 729
[25] (1993) 4 NWLR pt. 286 at 127
[26] See Section 30 Arbitration and Conciliation Act
[27] (1994) 7 – 8 SCNJ Part 3 page 625 at 647.

Section 31 provides that an arbitral award shall be recognized as binding unless any of the parties to an arbitration agreement requests the court to refuse recognition or enforcement of the award. If there is no such request a party relying on the award or applying for its enforcement shall supply the duly authenticated original award or duly certified copy thereof as well as the original arbitration agreement. An award made by leave of court or Judge will be enforced in the same manner as a Judgment or order of the court. However in the case of an international award section 51,52 and 54 of the Act provides for the application of the 1958 New York convention, whether domestic or international. The enforcement procedure is by a motion Exparte supported by an affidavit which inter alia exhibits the arbitration agreement and the awards or a certified true copy of each and a translation into English where the award is not made in English language.

2.9 The Development of ADR under International Law:-

While arbitration developed as a result of the apparent inability of the courts to satisfy some of the expectations of people in the resolution of disputes, ADR arose largely because the arbitral process was becoming unduly expensive and long because of the gradual creeping in of Judicial technicalities of dispute resolution. Thus there began a gradual shift of emphasis from the use of arbitration in commercial dispute resolution to a culture of systematic use of mediation and conciliation which are a formalized form of the age long use of negotiation in the settlement of disputes. The settlement is consensual. The conciliator or mediator only helps the parties to come to a consensus. He does not adjudicate.

This gradual prominence of ADR is a result of increasing dissatisfaction with the adversarial arbitration process, the negative dispute management in court litigation and later in arbitration which sees dispute only in terms of "right" and "wrong" and in which disputants are either " winners' or "losers," and the mounting costs of arbitration. All these go to enhance the status of ADR as a better option for resolving disputes of whatever nature.

This foregoing is apt, with particular reference to commercial disputes, apart from the fact that businessmen and women prefer private resolution of their disputes instead of exposure to the machinery available in the glare of regular courts. Here there is the advantage that settlement through ADR avoids what may be called brinkmanship and violence which may arise in an adjudicatory system. It prevents either of the parties from losing face after the settlement exercise might have been over. It breeds less hostility and antagonism and most importantly saves the business relationship of the parties and so business may continue in an atmosphere of cordiality as if nothing had happened. All these are possible largely because ADR provides greater room for compromise than the adjudicatory systems of litigation and arbitration.

The gravitation towards ADR has been welcomed in every sector whose commercial disputes arise in the ordinary course of events. Indeed, the literature on the subject has recently become erroneously over- whelming because of the increasing use of ADR processes in various fields of human endeavour.

CHAPTER THREE

THE CONCEPT OF NEGOTIATION AS A DISPUTE RESOLUTION METHOD

3.1 Meaning and Nature of Negotiation

The title of this thesis, "An analysis of the concept of negotiation and arbitration as methods of alternative dispute resolution in international law" on the face of it may somewhat create the impression that negotiation is only embarked upon, post – conflict. To the extent that impression is conveyed, to that extent the title may be said to be misleading.

However, some definition of the concept further reinforces the thinking that negotiation is only a problem-solving or post conflict concept. It has been variously defined as, 'a process by which parties involved or group resolve matters of dispute by holding discussion and coming to an agreement[1]. 'Any communication process between individuals that is intended to reach a compromise or agreement to the satisfaction of both parties[2], and again as noun discussion between adverse parties, with a goal of resolving their differences[3].

Alternative dispute resolution is a catchall term that describes a number of methods used to resolve disputes out of court. It is therefore a general term encompassing a wide variety of dispute resolution mechanisms. The concept of negotiation is one of these processes, and as an ADR process negotiation is one of the most common approaches used to make decision and manage disputes. It is also the major building block for

[1] www.legalexplanations.com/definition/Negotiations.html, assessed 2nd February, 2012
[2] www.definitions.USlegal.com/n /negotiation.com, assessed 2nd February, 2012
[3] www.law.your dictionary.com/negotiation.com, assessed 2nd February, 2012

many other alternative dispute resolution procedures, such as mediation, conciliation and arbitration.

Negotiation could and is private in most instances, but a typical case of negotiation manifest itself with a trained negotiator usually a lawyer acting on behalf of a particular organization or position. It can be compared to mediation where a neutral third party listens to each sides argument and attempts to help craft an agreement between the parties. It is also related to arbitration which, as with a legal proceeding, both sides make an argument as to the merit of their case and then the arbitrator decides the outcome for both parties.

We engage in negotiation in one form or the other everyday of our lives. Negotiation is therefore a fact of life applicable not only in times of resolution of conflict but also to avoid conflict. It is the process by which parties arrive at an agreement over an issue in respect of which they have different and varying positions, objectives and goals. Essentially, negotiation involves the prescription of the terms and conditions of the relationship. Though, not expressly recognized by statute in Nigeria as an alternative mechanism for dispute resolution it has become a useful ADR mechanism in the creation of new relationships and in the resolution of disputes amicably between disputants[4].

[4] See Ladan, M.T Alternative dispute resolution in Nigeria: benefits processes and enforcement journal on current themes in Nigerian law: a publication of Faculty of Law, Ahmadu Bello University, Zaria.

3.2 Nature and Characteristics of Negotiation

Negotiation as an ADR process is an indispensable step in ADR mechanisms. The concept is a fundamental key to all consensual ADR activities. It appears of all ADR mechanisms, to be the most satisfactory method of settling disputes. Beginning in the late 1970's and continuing even today there has been intense criticisms in the media and elsewhere that Americans are too litigious, that people and institutions are too frequently going to court against one another[5].

Negotiation occurs in business, nonprofit organizations, government departments, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting and everyday life, it has also been defined as a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter and this process usually involves complete autonomy for the parties involved, without the intervention of third parties[6].

Possession of the skills can save lives, de-escalate war, enhance business or family relationships, promote peace and recognition and perhaps reduce the need for litigation[7].

Ability to negotiate is inherent in that it is an art which is learnt from the earliest stage. Usually negotiation consists of giving up something in order to get something in return.

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[5] See Lori B. Andrews, Suing as a first Resort: A Review of mark's in the suing of AMERICA and Lieberman's the Litigious Society 1981

[6] See, Blacks Law Dictionary, Eight Edition, Bryan A. Garner at 1064

[7] OJIELO, O. Alternative dispute resolution (ADR) chapter 5, Pg. 120.

It involves discussions or dealings about a matter with a view to reconciling differences and establishing areas of agreement, settlement or compromise that would be mutually beneficial to the parties or that could satisfy the aspiration of each party to the negotiation. Compromise here implies flexibility on both sides and flexibility derives from a genuine wish on the part of the parties to reach an agreement.

On the other hand others believe that there are fewer litigation than ought to be[8] because most members of society suffer harms, inconveniences and injustices that infringe on their legal rights and could be if they choose, grounds for legal action. But most individual recognize that if they made a practice of using the courts to enforce every possible legal right they would soon be consumed by litigation. Life is too short for people to spend it litigating over every harm or offence that come their way[9].

Each adult person would at one time or the other have conscientiously negotiated one agreement or the other, personal or financial. We all might have developed our own individual approach in trying to persuade others to give what we want which is what negotiation is all about.

3.3 Scope of Negotiation

It has been suggested, and correctly so, in the opinion of the researcher that negotiation is one of the primary ADR processes most commonly used by disputants to resolve disputes[10]. Part of the characteristics is that it is usually voluntary, usually informal,

[8] See FASTENER, W.L.F, The emergence and transformation of disputes: naming, blaming and claiming, U.S law & society review 1981 pg. 631.

[9] Gerald R. Williams; Negotiation as a healing process: Journal of Dispute Resolution, vol. 1996, pg2.

[10] See Ladan, M.T., Alternative dispute resolution in Nigeria: Benefits, Processes and Enforcement, Journal of Current Themes in Nigerian Law, a publication of Faculty of Law, A. B. U. Zaria

unstructured process used by disputants to reach a mutually acceptable agreement. At the option of the parties the process, may be kept strictly private.

There may not be a third party facilitator as in mediation and disputants may or may not appoint individuals, such as lawyers to represent them in the negotiation and no limits are placed on the presentation of evidence, arguments and interest.

Naturally in the course of the week we are all involved in numerous situations that need to be dealt with through negotiation: This occurs at work, at home and at recreation.

A conflict or negotiation situation is one in which there is either a conflict of interests or what one wants isn't necessarily what the other wants and where both prefer to search for solutions, rather than giving-in or breaking off-contact. Negotiation occurs between spouses parents and children, managers and staff, employers and employees, professionals and clients, within and between organizations and between agencies and the public. The process requires participants to identify issues about which they differ, educate each other about their need and interests, generate possible settlement options and bargain over the terms of the final agreement[11].

Few people enjoy dealing with conflict particularly with bosses in the office or pears, especially when such conflict becomes hostile and when strong feelings become involved. Resolving conflicts can be mutually exhausting and emotionally draining. It is important to realize that conflicts that require resolution is neither good nor bad. The important point is to manage the conflict not to suppress the conflict and not to let conflict escalate out of control.

[11] See Christopher .W. Moore, Negotiation pg 1

Given that organizations are becoming less hierarchical, less based on positional authority, less based on clear boundaries of responsibility and authority it is likely that conflict will be an even greater component of organizations in the future, hence one may be constantly negotiating and resolving conflicts throughout one's personal and official life. Studies[12] have shown that negotiation skills are among the most significant determinants of career success. While negotiation is an art form to some degree, there are specific techniques that anyone can learn. Understanding these techniques and developing your skills will be a critical component of your career success and personal success.

Apparently, the scope of negotiation seems quite limitless, without boundary and all encompassing. Going by its intangible form and the role it plays to engender sustainable personal, family, corporate communal, national and global peace its importance can actually be compared to the air we breath and although it lacks statutory content globally, the right to negotiate and agree on civil rights and obligations is akin to national fundamental rights of citizens.

3.4 Types of Negotiation

Negotiation have based on strategies been classified into two broad heads, viz; distributive/co-operative bargaining and integrative/competitive bargaining. This classification seem to have emerged overtime flowing from observed behavioural pattern of parties in conflict or their representatives.

[12] Professor Wertheim, E; Negotiation and resolving conflict: An overview pg 7.

The literature on negotiation has persistently divided itself into essentially two camps: that which adopts a basically competitive view point and that which adopts a basically co-operative view point[13]. The co-operative view point, it appears claims a majority of legal practitioners (sixty seven percent according to 1986 study) and probably a majority of academics who teach and write about negotiation[14]. Approximately one third of the practicing bar and obviously lesser academics were found to be basically competitive in their approach to negotiation[15].

The researcher must however caution that much as this two broad heads represent the behavioural patterns in most negotiations by negotiators they are by no means exhaustive. Other less popular strategies including strategies like accommodating, avoiding, compromising, and collaborating also exist.

3.4.1 Distributive/Co-operative Negotiation

As the name implies, this method of bargaining proceed on the assumption that there is a fixed pie to be shared between disputing parties. The result of negotiation is that parties either share equally or one party gets more while the other get less. By its mere nature, there is a limit or finite amount in the thing being distributed or divided amongst the people involved. It is believed that the metaphor, 'negotiation is war', aptly describes the general attitude of negotiators who by innate ability, temperament

[13] For a brief illustration as to the literature on co-operative and competitive negotiation patterns and for an empirical description of the competitive or aggressive mode among lawyers, See Gerald . R. Williams, LEGAL NEGOTIATION AND SETTLEMENT (1983) pg 48-52. See generally Morten Deutsch, A theory of co-operation and competition, 1949 pg 129.

[14] The 1986 study is reported by Lloyd Burton et-al, feminist theory, professional ethics and Gender related Distinctions in Attorney Negotiating styles, 1991 Journal of Dispute resolution pg 199, 237. Note that as regards the fraction of teachers & authors of negotiation, this is my own assessment.

[15] See Lloyds et-al ibid pg61 & 237.

or strategic choice adopt a highly competitive or aggressive approach to negotiation[16]. A distributive bargaining usually involves people who have never had a previous interactive relationship, nor are they likely to do so again in the near future.

3.4.2 Integrative/Competitive Negotiation

The word integrative means to join several parts in to a whole. Conceptually this implies some co-operation, or a joining of forces to achieve something together. It usually involves a higher degree of trust and a forming of relationship. The metaphor that best captures the cooperative approach for lawyers is, 'negotiation is problem solving for mutual gain'[17]. This method of negotiation emphasizes problem solving approach involving both sides to seek a solution that meets their interest. The underlying interest of parties are considered reconcilable even if their position appear to be conflicting.

In integrative bargaining the goal is to reach a reasoned resolution. People are separated from the problem and the other party is treated as a collaborative problem solver. Therefore attempts are made to invent creative option for mutual gain by focusing on interests rather than on position, as the ultimate goal is to find something for both sides.

Wining and preserving relationships (win-win) are both important.

This researcher, in attitude and practice naturally and practically belongs to the class of advocates who believe in the integrative approach to bargaining and or negotiation. There is little doubt that this app-roach is more popular and obviously it is expected

[16] See Gerald .R. Williams, Negotiation as a healing process, Journal of Dispute resolution, vol.1996 pg 20.

[17] See Menkel meadow, Negotiation: strategies for mutual gain, 1993 Edn, Note 20 pg754- 843, See also Donald schon, the reflective practitioner: How practitioners think in action (1983)

that being an objective approach to conflict resolution more deals and agreements are concluded and formalized using this approach as opposed to the distributive method. On the basis of the foregoing the study will proceed to examine some basic elements of the integrative approach.

According to **Fisher** and **Ury**[18] the five basic elements of the integrative approach or principled negotiation are as follows:

a) **Separate the People From the Problem**: The negotiators should attack the problem not each other. Although various negative emotions affect negotiation outcomes, by far the most researched is anger. Angry negotiations plan to use more competitive strategies and to co-operate less, even before the negotiation starts[19]. During negotiations, anger disrupts the process by reducing the level of trust, clouding parties judgement, narrowing parties focus of attention and changing their central goal from reaching agreement to retaliating against the other side[20] Angry negotiators pay less attention to opponent's interest and are less accurate in judging their interests, thus achieve lower joint gains[21]. Moreover, because anger makes negotiators more self centred in their preferences, it increases the likely hood that they will reject profitable offers[22].

[18] See Roger Fisher, William Ury and Bruce Patton: Getting to yes: Negotiating Agreement without Giving in (New York: penguin 1991)

[19] Forgas, J. P(1998)`` On feeling good and getting your way: mood effects on negotiator cognition and behaviour'' Journal of personality and social psychology 74, 565-577.

[20] Maiese Michelle emotions beyond intractability eds Guy Burgess and Heidi Burgess, conflict research consortium, university of Tcolorado, Bowler- posted July 2005 down loaded 30/8/2007.

[21] Alfred, KG, Mallozi, J.S, Matsui, F, & Raia, C.P (1997) "The influence of anger and compassion on negotiation performance" organizational behaviour and Human decision processes, pg 70, 175- 187.

[22] See Maiese Michelle, Ibid.

b) **Focus on Interest and Positions:** Your positions are what you want. Your interests are why you want them. Focusing on interest may uncover the existence of mutual or complimentary interest that will make agreement possible.

One interest that **Fisher** and **Ury** suggest is typically important to both negotiators is that of maintaining a long term relationship between them.

This relationship is of much less concern to those who follow a competitive strategy and is often a casualty of such a strategy.

c) **Invent Options for Mutual Gain:-** Negotiation need not be a competitive game in which each negotiator seeks to gain the biggest slice of a fixed pie. To the contrary there may be bargaining outcomes that will advance the interest of both negotiators. One well known example involves the two children who are trying to decide which of them should get the only orange in the house.

After some frustrating negotiations they decide to divide the orange in half. If they had realized that one child wanted to squeeze the orange for its juice and the other wanted to grate the rind to flavour a cake, an arrangement that maximizes the interest of each child would have become apparent.

A good agreement is not one with maximum gain but optimum gain. This does not by any means suggest that we should give up our own advantage for

nothing. But a cooperative attitude will regularly pay dividends. What is gained is not at the expense of the other but with him[23].

d) **Insist on Using Objective Criteria:** There are some negotiations or at least some issues that are not susceptible to a win-win approach. The price of something can be such an issue. To maximize the risk of either inefficient haggling or a failure to reach agreement on such issues, **Fisher** and **Ury** suggested that the parties focus on objective criteria to govern the outcome. Even if they cannot agree on which standard should control, focusing on objective criteria may narrow the range of disagreement.

e) **Know Your Best Alternative to a Negotiated Agreement:-** The reason you negotiate with someone is to produce better results that you could not obtain without negotiating with the person. If you are unaware of the result you could obtain if the negotiations are unsuccessful you run the risk of entering into an agreement that you would be better off rejecting. For instance it would be unwise to agree to buy a car from a friend for N500,000.00 without knowing how much a similar car would cost you elsewhere. One of the important benefits of using negotiation is that the disputants retain control both over the process and the outcome. They decide what the important facts are and they decide together on the best solution.[24] Negotiation is not explicitly recognized by statute in Nigeria as an alternate mechanism for dispute resolution but it has

[23] Saner Raymond. The expert negotiator, the Netherlands: kluwer law international,(2000) pg 40

[24] Ladan, M.T. ``New approaches to dispute resolution'' in the New Nigerian Newspaper Kaduna. Sunday December 1 and 8, 1996 pg 14 each.

become a useful ADR mechanism in the creation of new relationships and in the resolution of disputes amicably between disputants[25]. It is highly accommodated in Nigeria. One important though indirect reference to negotiation in Nigeria can be found in section 26 of the Nigerian investment promotion Decree No. 16 of 1995. The section provides for two main dispute resolution procedures. First, all effort are to be made by the disputants to reach an amicable settlement through mutual discussions or negotiation. Arbitration comes next if negotiation or mutual discussion fails.

However, inspite of the section quoted above, there is no compulsion that once negotiation fails, a disputant must proceed to arbitration neither is there a legal sanction for not doing so. Disputants are at liberty to explore other dispute resolution methods if negotiation fails. As observed by the researcher in the introductory part of this study, negotiation by commonsense and several legislations ought ordinarily to be the first step in the ADR process[26].

Once a grievance has ripened into a formal dispute, and the parties have hired lawyers to represent them, there are basically four ways the conflict may be resolved. The first is negotiation which is the primary method of resolving disputes[27]. By virtue of negotiation, many cases settle without the necessity of a complaint being filed with a

[25] Laden, M.T., ``Alternative dispute resolution in Nigeria; benefits, processes & enforcement'' Journal on current themes in Nigeria. A publication of Faculty of Law, A.B.U Zaria.

[26] Lawyers by their ethics are enjoined to seek to negotiate out of court settlement for their clients especially as matrimonial/ divorces cases as a first resort, before embarking on litigation.

[27] Herbert, M . kritzer lets make a deal: understanding the negotiation process, in ordinary litigation (1991)

court. Even when complaints are filed in court an appreciable percentage are resolved by negotiation without the need for a full trial on the merits.

Suppose, however, that a particular case is not successfully resolved through negotiation, it appears the next step up is through mediation which has been described and appropriately so in the opinion of the researcher as "assisted negotiation"[28]. Mediation seem to address an obvious shortcoming of negotiations handled by lawyers an behalf of clients. A mediator is a facilitator or neutral third person who helps the parties move step by step through a process intended to help them find and agree upon a mutually acceptable resolution. The lawyers being adversaries cannot render neutral intercession between the disputants.

If, however, mediation also fails to produce a mutually acceptable resolution arbitration would seem the next natural option, hence crossing from a process in which they retain responsibility for making their own decision and now submit themselves to process that are by nature adjudicatory.

In arbitration as in trial, lawyers may present the evidence and make arguments to a person or panel on behalf of the client that is empowered to render a binding decision on the case[29]. It typically produces a clear winner and a clear loser. Compared to trial, its advantages is that they are private, less formal readily available, less costly etc and the parties could select arbitrators who are versatile in the subject. The traditional court

[28] Gerald. R. Williams writing on negotiation as a healing process attributed the usage of this term to describe mediation to professor frank Sander

[29] Note that parties may not be bound in Jurisdiction where parties are required to submit their dispute to arbitration as a pre- condition to obtaining a court or Jury trial.

system with its attendant high cost, delay and technicalities, etc will seem to be the only option if arbitration fails.

3.5 Reasons for Failure in Negotiation

a) **Relative Bargaining Strength:** Negotiations fail due to several factors, inter alia, people enter into negotiations generally with the objective of winning or achieving a stated goal. Although this is not objective, the main objective is that both sides are able to achieve their respective objectives of a win position. Where one side is only able to attain its objective, the negotiation is likely to be doomed to failure. This need not be the case in all situations as there are other variables that affect or may influence the outcome or effectiveness of the negotiation. Such variables include the relative bargaining strength or power of the parties and whether the party is rich or poor.

Some of the other factors that limit the success of negotiation could be that the terms of negotiation is probably beyond the parties or their representatives to the negotiation, wrong perception of needs, lack of adequate information, perception about legal outcome and lack of demonstration of skill and tact may account largely for such inadequacies. This may lead to a premature breakup of the negotiation. Therefore, for negotiation to be successful the parties must be ready, willing and able to compromise reasonably and to agree on common grounds. Effective negotiation can help in facilitating settlement of disputes, reduce the burden of the courts, save money, time and energy. This would equally better serve the interest of the disputants with the least eventual stress. In

fact negotiation is a healing process[30]. Even where there is no negotiated settlement, the fact that the parties have sat down to negotiate would have narrowed down their difference, giving them better understanding and appreciation of the other side's position and problems or interests[31].

3.6 Attributes of a Good Negotiator

a) Skill

Negotiation is a fact of life and which must be understood by the negotiator. Many people don't like negotiating. They feel put off by the whole process. Yet we are surrounded everyday by negotiation situation. Negotiation is therefore a process. It is important to understand that we all negotiate everyday of our lives. Such understanding would change the frame from which most people view negotiations. A lot of negotiators believe that the whole essence of negotiation is getting what you want out of the whole process. A good negotiator must appreciate that negotiation is much more than that. Negotiation is about building long term relationship, helping other people to forget what they want while the other party also gets what it wants. Success in business more than ever before is being built on ability to develop and maintain long term relationships. Successful negotiators therefore understand that successful negotiating is not just possessing the skills to get what they want, but includes the skills to facilitate a process that enables other people to have a sense of winning as well.

b) Understanding the Structure and Stages of Negotiating:

This is one good attribute. Successful negotiators have a certain structure to their process of negotiating. The process focuses an interaction and communication as tools

[30] See George Lakoff & Mark Johnson, Metaphors we live by (1980).
[31] See Robert L. Moore, Contemporary Psychotherapy as Ritual process: An initial reconnaissance, 18 ZYGON 283, 285 (1982)

for building win-win. This creates a "feel good'' attitude in the other party that the outcome is one they can live with. A good negotiator must therefore recognize the structure and stages of negotiation. This enables him to know what is happening at any stage and to determine the right moment for option generation when an impasse may have occurred and what to do next.

Creating win-win is not just a sense by each party that it has got what it wants, but a feeling by the parties that they won. Sometimes this concept of win-win is questioned by commentators who look at the statistics of the win and conclude that win/win is not possible[32]. Creating win/win is not about statistics, it is about process. Participants at the negotiation must feel that they had ample time to air their views, that their opinions counted and that the process and content of the agreement were as they agreed with the other parties without pressure or influence from any side.

c) Appreciating Negotiation is an Indisputable Fact.

A lot of people don't like negotiating. It puts them under stress to have to sit down with someone else and negotiate. They may also be cultural in many African societies[33]. No product is transferred or service rendered without the participants going through some form of negotiation. There may even be a ritual to it and a participant is not expected to jump the gun and go to another level unless the appropriate time has been reached. Good negotiators therefore feel good about negotiation and look for opportunities to do so[34].

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[32] Professor E. Wertheim, Negotiations and resolving conflicts: An over view (2005)

[33] Kopelman, S and Rosette, A.S (2008) Cultural variation in response to strategic display of emotions in negotiations 65- 77.

[34] Barry, B, Fulmer, I. S. & Van Kleef, G. A (2004) I Laughed, I cried, I settled: The role of emotion in negotiation. In M.J. Gelfand & J. M Brett (eds) The hand book of negotiation and culture PP. 71- 94 Stanford, CA: Stanford university press.

d) Fear of rejection

Seeking the other party approval should not from the onset be contemplated. Many people don't negotiate as often as they ought to, because they are afraid of rejection. They would prefer to conclude the negotiation and still be seen as nice persons or liked by the opposite party. In the desire to seek the other party's approval such negotiators don't say what is on their mind. They therefore end up with deals that can't stand the test of time. It is not necessary to seek the approval of the other party.

e) Being Fair and Assertive

A good negotiator should be fair and assertive. Being assertive is not being confrontational; it is simply being vigorous in pursuit of the person's needs and interests. Assertiveness does not therefore jeopardize win/win. On the contrary it brings out all the issues on the table, and through their resolution builds win/win.

f) Self Confidence

Lack of confidence may necessarily account for failure in negotiations. A good negotiator requires self confidence to achieve this. Once the skills are improved the confidence level goes up, fears diminish and the person begins to alter his or her views of negotiating[35]. Once therefore a party sees negotiation as something unpleasant or available this could have grave consequences including financial cost. A good negotiator should develop the skills to stay on top of the game. They should also continually update their skills by studying negotiating through continuing professional education and regular practice. A good negotiator understands that negotiating is just a

[35] Kramer R. M Newton, E & Pomerenke, P.L (1993) `` Self enhancement biases and negotiator Judgment: Effect of self esteem and mood.'' Organisational Behaviour and Human Decision processes, 56,110-133.

game and because it is a game, it is not viewed as a life `threatening experience. It is a game that needs to be enjoyed.

g) Everything Is Negotiable

It is helpful to believe that everything is negotiable. The obvious question would be to refer to departmental and other stores where price tags are fixed on the product. It may be true that in some of those stores the price of the products are fixed. It has however been demonstrated several times over that the prices of these products may be reduced or discounted if the buyer represents for example that the present purchase is a sample for testing preparatory to making a large order[36]. Where the prices cannot be changed, other things can, including free delivery, other accessories added or favourable terms of payment. What is important is for the negotiator to probe every opportunity for gain.

h) Thoughtful and Measured Reaction

A good negotiator should not be reactive, i.e reacting instinctively. The reaction should be thoughtful and measured. This way the negotiator has time to think of all possible implications of the proposed action.

i) Anchor Negotiation on People

A good negotiator must realize that the negotiating process is anchored on people. In a business negotiation, it is people that a negotiator deals with and not the big companies that they represent.

While these people represent companies, they have needs, emotions, egos that have to be dealt with. It is therefore important to lower the lever as it were and look beyond the

[36] Ojielo, O. Alternative dispute Resolution (ADR) chapt. 5 pp. 127.

façade of the company to unearth the forces driving the negotiator[37]. Those who represent these companies are just ordinary people with their own insecurities and fears. Such realization is a powerful tool for every negotiator.

j) Needs and Interest

A good negotiator must look out for his needs and interest. It is important to understand that the major driving force behind all requests made in every negotiation is the desire of the other person to satisfy a human need. What is important to one party may be unimportant to another party. It is therefore important to look behind a person's request or demand in a negotiation to seek to understand their real motive behind the demands[38]. There may be a number of ways of satisfying such needs than the demands made by the party.

It is important for the negotiator to focus his whole attention on the negotiation. The negotiator should have a sense of the present. He must concentrate wholly on what is happening in the present.

k) Focus and Listen

Active listening is turning out a negotiator's world view and turning into what is being said by the other party. The negotiator must appreciate the importance of being totally present and totally focused while negotiating.

l) Sensory Acuity

[37] Roger Dawson, `` Secrets of power negotiating- inside secrets from a master negotiator career press, 1999.
[38] See Moore, C. W. Negotiation, pg I

Studies in human communication show that 90% of our communication is non verbal. Many studies also demonstrate that we communicate at a much deeper level than most of us are aware of. It is therefore helpful to exercise full sensory acuity during negotiations, looking at the body language and other non verbal cues to gain a further understanding of what is really happening. Sensory acuity can be developed with practice. It's simply being more aware of what you notice, what you see, what you hear and what you feel. A good negotiator should determine what he hopes to get out of the negotiation and then work backwards from there to decide on the best way to get there. Before starting the negotiation, the negotiator should give thought to what an ideal outcome would be. Without knowing what he wants out of the negotiation, a negotiator may end up with any deal and would probably consider any such deal a good outcome.

m) Worse-Case Scenario

A good negotiator should determine worst case scenarios. It is also helpful for a negotiator to determine the point in the negotiation at which it is no longer worthwhile to continue negotiating. This is the point to simply walk-away from the negotiation. Worse case scenario is not all about money. It could also include behaviour, certain treatment such as bullying tactics, bad language, overtly expressed anger that a party considers unacceptable. A negotiator should know how far he is prepared to go before walking-away if such behaviour continues.

The point about the foregoing attributes is that they strengthen the negotiator who has them. In most cases therefore such a negotiator would end up with a good deal. It must be stated too that negotiation is not just about attributes. Other variables are important to a good outcome.

3.7 Processes and Procedure for Negotiation

Generally we can identify four phases in a negotiation[39]. These are preparation phase, the information gathering phase, the actual negotiation phase and the agreement phase[40]. These are important and if a negotiator skips one phase and goes to the next, this would probably impact on the negotiation. It is important therefore to understand these phases so that the participant may have productive negotiations.

1.7.1 Preparatory Phase

Good preparation enables the negotiator to create the outcome that he desires. Preparation therefore is hard work. A classic and detailed analysis of the focus is contained herein.

a) **Identify the Bottom Line:** that is how high or low the negotiator is willing to go. This basically touches on the behaviour and attitudes the negotiator would regard as offensive. Where the negotiator fails to identify the bottom line she may accept an agreement that on the face of it looks attractive. It is also important to clarify the best outcome for the negotiation. The negotiator should also identify his best scenario. The negotiators alternatives to negotiation must be strong.

[39] See Williams, Supra Note 16 at 70-72.

[40] Ojielo, O., Alternative dispute resolution opp cit. at pp. 140

b) **Needs and Satisfiers:** The negotiator should determine what he really wants. The starting point is to identify needs and interest. An outcome has no value to a party if the party's needs have not been considered and provided for in the outcome[41]. Needs are however different from satisfiers. Satisfiers provide a "feel good" attitude but they are not necessities. An example is where a party feels a need to attract other peoples respect and then buys a limousine in the belief that ownership of an expensive car confers respect. A real need here would be of mobility, conducing a party to buy a car. The Purchase of such an expensive car is clearly a satisfier, rather than a need. Further, the negotiator should attempt to clarify the other party's objective too.

c) **Contingency Plan:** Having a contingency plan increases the negotiators confidence while entering the negotiation. Alternatives are a source of power. The better the negotiator's alternatives, the more space he has to maneuver in the negotiations. The negotiator should give some thought to his strategies. It is important to create a partnership atmosphere for the negotiation. The parties should be able to leave the negotiation feeling that they have won. A successful negotiation is not just all about money, it is also about feelings and procedures.

d) **Time Frame:** The negotiator's time frame is equally important[42]. The issue is to examine whether there exist possible time pressure upon the negotiator. What are the possible impact of these pressures? Further, what concession is the negotiator willing to make and at what point? What would be the real cost of

[41] See Ojielo O. supra Note 40 at pp141
[42] Nierenberg, Gerard, fundamentals of negotiation. James Ware and Louis B. Barnes "managing interpersonal conflict", HBR, 1978.

any such concessions? And are the parties willing to give up something in this regard? The negotiator should try and do some research on the other party. Available sources would include newspapers, magazines, brochures, company reports, associational or industrial groups that can provide information and the corporate affairs commission. Such research could turn out a mine of information that would be critical to the outcome of the negotiation. The negotiator need further make some questioning assumptions necessary to test the parties to elicit information from them.

e) **Location of Venue for Negotiating:** Another vital issue is the location of the venue for negotiation. The environment plays an enormous role in setting the tone for a negotiation. It can also be used to create pressure or remove pressure[43]. If the other party is an aggressive loud person, would it be helpful to move the negotiation to a restaurant with quality clientele where decorum and quite talks are standard norm? Would that influence his behaviour in the negotiations?

f) **Capacity to Make Decision:** Preceding this point is the issue of decision making. Thinking about decision making capacity is vital. Indeed even before the actual negotiation, the negotiator should ask for the other party's authority to commit his own side. This is to avoid the "missing man" situation[44] where at the end of the negotiation the other party introduces a higher authority as the one with power to make a commitment on the subject of negotiation. This enables them to buy time to consider their options. It may be preferable to involve all the

[43] See professor E. Wertheim, Negotiations and resolving conflicts: An overview (2005)
[44] See Moore, C. W, Supra, Note 38 pp2

decision makers as early as possible in a negotiation. That way, a relationship is built with them right from the beginning.

g) **Building Rapport:** Building a rapport with the opposite party is useful to facilitate mutually acceptable outcomes. Rapport refers to a harmonious understanding relationship- Building rapport therefore is to seek to reduce the differences between ourselves and another person at a non-verbal as well as verbal level. The starting point for rapport with the opposite party is to have respect for the way in which the party views things from his own perspectives. A number of strategies have been identified which enables the negotiator to build rapport with another party. These include body language, voice qualities, representational systems, visual channel, auditory channel, breathing and general behaviour[45].

Just as demonstrated above in building rapport, breaking rapport is easy. A negotiator might want to break rapport if the other party has resorted to some unwholesome behaviour. Once a negotiator is in rapport with another person, he may then care to lead them to other behaviour, which is considered more appropriate for producing the outcome that is desired in the negotiation.

3.7.2 Information Gathering Phase

a) **Opening Statement:** From the negotiator's preparation, it is easier at this stage to have a fair idea of what the other party wants, to test the negotiators

[45] See Ruth. P. Rubinstein, Dress Codes, 73-80 (1995)

assumption and see how accurate or otherwise they are. This phase also enables the negotiator to know the other party's opening position[46]. Some of the opening statements may be designed to dampen or lower a negotiator's expectations. A number of books therefore recommend that the negotiator be the first to make an opening statement both to lower the other party's expectation and to set an acceptable time for the negotiation. There are obviously advantages and disadvantages to being the first to make an opening statement. Letting the other party speak first allows the negotiator access to the situation. If the negotiation involves a stressful or emotional issue by allowing the other party to speak first while the negotiator listens quietly and attentively may cause them to feel more relaxed, less aggressive and sometimes remorseful for the way they have verbally attacked the negotiator.

b) **Creating a Partnership Atmosphere:** It is advisable for the negotiator to attempt to create a partnership atmosphere at this phase of the negotiation. The negotiator tries to set the tones for discussions to find out the issues that are important to the other party and why; what the party's needs and interest are, and how the party would want the discussion to proceed.

c) **Agreeing on Ground Rules:** The starting point for a co-operative approach or partnership atmosphere is agreeing on ground rules or principles of engagement and discussions for the negotiation. This demonstrates that the parties have agreed on how the process should proceed. Such little agreements on the process serve also to build trust and confidence that the parties can indeed work

[46] See Ojielo . O. supra Note 40 at page 150

together. The parties can agree that they will both seek to understand the other persons point of view or at least to listen and to remain calm and courteous and concentrate only on certain issues on this occasion.

Thus, issues pertaining to personality may be waived at this point. This will make parties come out with a feeling that they have won. Other areas of agreement will include times, dates and venue for the negotiation. They will further agree on the level of authority of each party and their capacity to commit their respective sides to an agreement. It is also necessary to agree at this stage on how agreement will be reached. Such agreement makes it easier to fit the bits of the agreement on substance to where they belong and prevents a party from withdrawing if he finds that a subsequently accepted mode of agreement disadvantages that particular party.

It is critical if the parties are engaged in an ongoing relationship that the outcome of this particular negotiation does not jeopardize that relationship. The negotiator might want to restate this fact or propose it as one of the ground rules. In seeking to understand the other party's intentions, needs and interest, the negotiator may ask questions such as how the other party sees the situation, what would be an ideal outcome for the party, how what the party is asking for would be meaningful or create value for the party and why the issues are important for the party. The negotiator might want to encourage the party to prioritize their wants and needs. They need to be able to justify or rationalize their requests.

3.7.3 Substantive Negotiation Phase

In the substantive negotiation, parties can either become competitive by adopting positional negotiation or they can become co-operative by using interest based negotiation techniques. Positional negotiation refers to a competitive process in which

parties make offers or counter offers which they feel will resolve the dispute. Positional negotiations start with parties making an offer which will maximize their benefit. Each party then attempts to draw the other into their bargaining range by using series of offers to either converge on a solution which both parties find acceptable or, if parties remain far apart brings them to an impasse. This kind of process tends to end in compromise, where gains and losses to both parties are distributed according to the ability of negotiators and the strength of their negotiating position.

Positional negotiation process involves determining the parties best solutions. What solution would meet all of the negotiator's interests and needs? The bottom line is equally an important element in what is the point beyond which the negotiator cannot go. He should determine what outcome would be least beneficial but still acceptable. The negotiator should consider the order of issues and create a negotiating strategy. The subject matter of the negotiation must be in a logical order. He should open the negotiation with an offer which is close to their best solution. An eye must be closely kept on the bargaining range. They should look for offers which fall within this range. They should further keep track of the types of benefits or concession which they could offer to make certain alternatives favourable to other parties.

Negotiators, it should not be forgotten are human beings who have emotions, deeply held values, and different backgrounds and view points and are unpredictable. This human aspect of negotiation can be either helpful or disastrous. At any point during the negotiation the negotiator should ask himself whether he is paying enough attention on both parties. At a minimum a negotiator wants to maintain a working relationship good

enough to produce an acceptable agreement if one is possible, given each sides interests. Positional bargaining puts relationship and substance in conflict. Often in a negotiation people will continue to hold out not because the proposal on the table is inherently unacceptable but simply because they want to avoid the feeling or the appearance of backing down to the other side if the substance can be phrased or conceptualized differently, so that it seems a fair outcome, then they will accept it. Face saving involves reconciling an agreement with principle and with the self image of negotiators. Its importance should not be underestimated.

In searching for the basic interest behind a declared position, the negotiator should look particularly for these bedrock concerns which motivate all people. Taking care of basic needs means increasing the chance of reaching an agreement and the other side keeping to the agreement reached. The purpose of negotiating is to serve party's interest. The chance of that happening increases when one communicates them. If a party wants the other side to take his interests into account, he has to explain to them what these interests are, make their interest come alive and be specific. Concrete details not only make description credible, they also add impact.

3.7.4 The Agreement Phase

The final stage of negotiation requires the parties to formalize the agreement and design an implementation and monitoring procedure. Success in this final stage ensures both an immediate settlement and an agreement that will hold over time depending on the situation and the culture. The formalization of the agreement may occur either before or after the development of the implementation and monitoring plan.

Implementation generally refers to procedural steps that parties take to operationalize an agreement and to terminate a dispute. It may therefore be argued that implementation is a specific phase of negotiation because it poses critical problems that must be overcome if the agreement is to endure.

Indeed the success of a substantive agreement frequently depends on the strength of the implementation plan. Parties may and do often fail to reach substantive agreement because they cannot conceive how to implement it or they may fail to adhere to a poorly conceived plan. Where the parties do not give sufficient thought to the implementation, this may result in agreement that create devastating precedents. Such outcome may create reluctance to negotiate in the future. Other possible results are inter personal relationships and losses in money, time or resources.

There are two types of procedures for executing agreements. The first is a self executing agreement. This is one which is either carried out in its entirety at the time it is accepted or formulated in such a way that the extent to which the players adhere to its terms will be self evident. A non self executing agreement on the other hand is one which requires continuing performance which may be difficult to measure in the absence of special monitoring arrangement.

A self executing agreement is clearly a stronger and more effective means of ensuring that a settlement will be managed according to the negotiated terms. Compliance is tangible and immediate and chances of violation ore minimized.

However, not all disputes can be terminated or settlements completed in a self executing and immediate manner. Certain agreement may inherently or structurally require performance over a long period of time.

Compliance is difficult to measure in non self executing agreements and this type of agreement often results in latter discord due to differing interpretations. In disputes in which a self enforcing agreement cannot be reached the parties often prefer not to settle at all or use other settlement procedures rather than negotiate an agreement that may not be implemented or in which compliance is difficult to determine. In such cases, disputants may fail to agree not because, they are unable to reach a substantive settlement on issues in dispute but because they do not trust each other to perform according to the plan overtime.

Factors which are important for the successful implementation of an agreement include a consensual agreement about the criteria used to measure successful compliances, the general and specific steps required to implement the agreement; the identification of the people who have the power to influence the necessary changes; an organized structure, if (applicable) to implement the agreement; provisions that will accommodate both future changes in the terms of agreement and changes in disputing parties themselves; procedures to manage unintended or unexpected problems or violations of the agreement that may arise during implementation; methods to monitor compliance, as well as the identity of the monitors and determination of the monitors role.

The chances that one or more of the parties may renege on the agreement may increase in rough proportion to the number and complexity of issues in dispute, the number of

parties involved, the degree of psychological tension and distrust and length of time during which the obligation of the parties must be performed.

It is not being suggested here that parties will violate the agreement intentionally, but the structural variables can make violation more likely, because negotiated settlements are often conducted on an ad-hoc basis. They are more susceptible to violation than conflict resolution approaches with strictly defined implementation procedures such as judicial or legislative decision.

To deal with this weakness, negotiators should strictly define both criteria and steps to be used in implementing their decision.

The criteria for evaluating implementation steps are similar to those used to evaluate the effectiveness of a substantive agreement.

Implementation steps should be cost efficient, simple, enough to be easily understood, realistic and necessary. The final steps of negotiating a dispute, focus on formalizing the settlement. This depends on the implementation of a commitment that will enhance the probability of adherence and some form of symbolic dispute termination activity.

Negotiated settlements endure not only because their implementation plans are effectively structured and meet the interests of the parties but because parties are psychologically and structurally committed to the agreement. Negotiators should therefore be particularly concerned in this last phase of negotiation with building in psychological and structural factors that will bind the parties to the negotiated

settlement. Commitment inducing procedures can be voluntary and implemented unilaterally by the parties or can be voluntary measures executed by an external party.

Voluntary commitment procedures are activities initiated by the negotiator that enhance the probability that the disputants will voluntarily comply with the settlement. Specific measures include private and public oral exchange of promises, symbolic exchange of gifts, symbolic gestures of friendship and informal and formal written agreements.

Externally executed commitments procedures are mutually binding commitment procedure that once established are structural assurances that the settlement will be maintained. These structural assurances determine that performance of settlements will be enforced and that the parties will not have to rely exclusively on promises of good faith or the unpredictable pressures of public opinion. Some structural means of inducing commitment include legal contracts or written agreements.

3.8 Enforcement/Applicability

In this study the researcher set out to examine the concept of negotiation, in particular to examine its basic tenets in the context of its role as a dispute resolution mechanism. One thing is clear from this exposition, and that is that the negotiation is a subjective concept, judging by its tenets which vary based on the outlook, person or traits of the negotiator.

Negotiation is and will remain not only the most natural and elementary process of resolving disputes but preserving and defining relationships.

While arbitration developed as a result of the apparent inability of the courts to satisfy some of the expectation of people in resolution of disputes, latter forms of ADR arose because the arbitral process was becoming unduly expensive and long because of the gradual creping in of judicial technicalities of dispute resolution. Thus there began a gradual shift of emphasis from the use of arbitration in commercial and other dispute resolution to a culture of systematic use of mediation and conciliation which are formalized form of the age long use of negotiation in the settlement of disputes. The concept of negotiation is therefore undoubtedly the oldest form for settlement of dispute and defining relationships, preceding even the regular court system.

Negotiation is a process. Once that process has run its course, there ought to be an outcome, a sort of result. If the negotiation is successful the end product is an agreement and depending on the nature of the agreement as already discussed the conflict may have terminated and the parties may indeed be said to have achieved a resolution of their conflict. However if the result is a failure of negotiation the parties will definitely move on to other options.

Putting everything together it seems clear from this study without any fear of contradiction that negotiation is not a one-off event. Rather, it is a process whose outcome depends on the individual idiosyncrasies and dictates of the negotiators. It is therefore the view of this researcher that the claim that the concept has not been accorded statutory recognition in our statute save for S. 26 of the Nigerian investment promotion Decree No. 16 of 1995[47] can only be true to the extent that there is no single

[47] See Ladan, M.T., ``New approaches ''supra pg 267.

statute devoted to or dealing solely or exclusively on the subject of negotiation in a codified form[48].

This researcher hold the firm view that virtually all laws and regulations contain provisions though not necessarily expressly recognizing and encouraging negotiation and even according superiority to the end product (agreement) as binding above legislative enactments[49]. Even in criminal laws and processes, particularly with astronomical rise in corruption cases, negotiation in the form of plea bargain has of late began to assume position of pre-eminence[50].

The current state of the law, seem only to give legal recognition to the end product of a successful negotiation by way of enforcement of agreements and contracts, subject only to vitiating factors. It is less concerned about and does not regulate the process. It is recommended that the process which is no less important than the outcome ought to be regulated and not left wholly to the individual tendencies. A set of procedural rules regulating conduct of parties, prescribing venue for negotiation[51] and even prescribing team negotiation where appropriate will do. This is because due to globalization and growing business trends, negotiation in the form of teams is becoming widely adopted. Teams can effectively collaborate to break down a complex negotiation. There is more knowledge and wisdom dispersed in a team than in a single mind. Writing, listening

[48] Other subject of law like sale of goods etc have a codified act e.g the sale of goods Act, even some ADR methods like Arbitration and conciliation are regulated by codified law and rules, ie the Arbitration & conciliation Act, 1990, uncitral Arbitration rules etc

[49] See for example, s. 30(1) of the recovery of premises law of Kano State where statutory notices to quit becomes applicable where parties have not previously agreed on length of Notice. Similar provision exist in virtually all Jurisdictions.

[50] Apart from plea bargaining, the statutory provision in the criminal procedure code allowing certain offences to be compounded is a recognition of concept of negotiation as a means of conflict resolution.

[51] It is the rule of ethics of legal practitioners, who agree to negotiate settlement in a deal that the venue for the meeting of advocates is the chamber or office of the senior between the attorneys. This resolves the issues of venue.

and talking are specific roles team members must satisfy. The capacity base of a team reduces the amount of blunder and increases familiarity in a negotiation[52].

Finally, it need be stated that the global trend among businessmen, disputants, commentators and academics on conflict resolution is to promote negotiation and indeed all other forms of dispute resolution over and above litigation. This is apparently because of the inherent cost saving and other benefit of the former.

The irony however, is that despite these attractions, the efficacy of the process as a dispute determinant ultimately lies in the willingness of the parties to respect the end product – the agreement, otherwise the entire effort comes to naught as these alternatives lack machinery of enforcement and it is the court's enforcement structure, 'the sheriff department' that disputants ultimately resort. In the end the inescapable conclusion is that all methods of dispute resolution on the one hand are complementary to the court system.

[52] Sparks, D.B (1993) The Dynamics of effective Negotiation (second edition) Houston : texas: Gulf publishing Co.

CHAPTER FOUR

THE CONCEPT OF ARBITRATION AS A DISPUTE RESOLUTION MECHANISM

4.1 Meaning and Scope of Arbitral Agreements

An arbitration agreement is not defined by the Act[1]. The Act only deals with the form of agreement. However, Article 7(1) of the UNCITRAL Model Law defines "arbitration agreement" as,

> *"……. an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not."*

In Nigeria, in the recent case of ***CHIEF OLUNTA ALIBO & ORS vs CHIEF BENJAMIN OKUSIN & OTHERS***[2] arbitration was defined as a reference to the decision of one or more persons either with or without an umpire of a particular matter in a difference between the parties.

More traditionally at common law, an agreement to refer future disputes to arbitration is referred to as arbitration agreement whilst an agreement to refer to arbitration a dispute which has already arisen is referred to as a submission to arbitration or a submission agreement.

[1] Arbitration and Conciliation Act 1988, Laws of the Federation of Nigeria 1990 Cap. 19
[2] (2010) All FWLR Part 529, page 1059 at Page 1089 Para. C – D.

For the purpose of the Act, an arbitration agreement must be in writing[3], although at common Law an arbitration agreement may be oral for our purpose, it must be in writing. An arbitration agreement is an agreement by two or more persons to submit existing or future disputes to resolution by one or more persons selected by them directly or indirectly. The dispute must be one which is arbitral. This means that the agreement must not cover matters which by the Law of the state are not allowed to be settled privately or by arbitration usually because this will be contrary to Public Policy. Thus a criminal matter does not admit of settlement by arbitration. Neither will a matrimonial matter of General Interest or a status matter such as the winding up of a company or bankruptcy[4]. It has been suggested that in international commercial arbitrations, developing countries are more likely to impose strict limits on arbitrability so as to protect their nationals and even their national economy from being ripped off by nationals of more developed countries[5].

4.2 Requirement and Forms of Arbitral Agreements

The arbitration agreement must satisfy the normal legal requirements of a contract such as consensus, capacity and legal relationship. Like any other contract, the terms must be clear and certain. The court would however lean towards a construction that would give effect to the intentions of the parties. Thus where a contract contained an arbitration clause which merely reads, "Arbitration if any by I.C.C. rules London", the

[3] See S. I. (i), Arbitration and Conciliation Act 1988
[4] See Russel on Arbitration 21st Edn. P. 40
[5] See Redfern and Hunter, Law and practice of International and Commercial Arbitration (London Sweet and Maxwell (1999) 3rd Edition page 144.

court held that the words, "if any" which were the basis of the opposition were either surplusage or abbreviation for "if any dispute arises" and therefore sufficient[6].

There must also be valid underlying substantive contract in existence and an arbitration agreement, the terms of which are certain and enforceable. Although an oral agreement is a valid agreement, if it is intended that it should come under the Act then it must be in writing. Thus where in the course of the arbitration, the parties make any amendment to their agreement for example an extension of the Jurisdiction, this must be in writing for it to be valid.

Another important requirement of an arbitration agreement for it to be valid is that it has to be mutual i.e. it should give both parties the same right to refer disputes to arbitration[7]. This requirement has been more clearly defined in ***PITTALIS & ORS V. SHERE PETTING***[8] where it was held that there is not lack of mutuality where the agreement of the parties gives one party alone the right to refer the dispute to arbitration.

A clause in the arbitration agreement may provide for the "Union of India Clause". This was held in the case of ***UNION OF INDIA VS BHORAT ENGINEERING CORPORATION***[9]. In that case a clause in an agreement provided as follows,

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[6] Mop Association v United World Trade Inc. (1995) Lloyds Report 617
[7] Baron Vs Sunderland Corporation, 1996 (2) QB 56 at 64.
[8] (1986) I Queens Bench at Page 868
[9] LLR Delhi Series (1971) Vol. 2 Page 57

> *….in the event of any dispute or difference between the parties the contractor after 90 days of presenting his final claim on disputed matters may demand in writing that the dispute or difference be referred to arbitration; such demand for arbitration shall specify the matters which are in question dispute or difference and only such dispute or differences of which demand has been made and no other shall be referred to arbitration.*

It was held that while this clause was not itself an arbitration agreement, it provided a valid option which when exercised will result in an arbitration that will be fully mutual because either party can then make the difference.

The agreement may be drawn up separately or may form part of the contract for the transaction between the parties. Where the arbitration clause is a part of the contract, it is nevertheless regarded in law as a separate contract. In the case of ***HEYMAN V DARWIN LTD***[10] the court in considering the legal status of such a clause in a contract observed:

> *…… an arbitration clause in a contract is quite distinct from the other clauses. The other clauses set out the obligation which the parties undertake towards each other, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party has undertaken to the other such dispute shall be settled by a tribunal of their own constitution.*[11]

[10] (1942) AC, 356 at Page 373 - 4
[11] Ibid at 374

Accordingly where there is a repudiation or total breach of contract the arbitration clause survives, for as has been pointed out.

> *……although, further performance of the obligations under the contract by each party in favour of the other may cease, the contract survives for purpose of measuring the claims arising out of breach and the arbitration clause survives for determining the mode of their settlement. The purpose of the contract have failed but the arbitration clause is not one of the purposes of the contract.*[12]

It has been further explained with regard to the similar provision of section 7 of the English Arbitration Act 1996 that:

> *…..an arbitration clause will remain valid despite an allegation of illegality affecting the substantive agreement (which allegation if proved will render the substantive agreement void). Similarly a decision by an arbitral tribunal that a main agreement is null and void or the termination of a main agreement by performance will not of itself entail a similar consequence for the arbitration clause. The validity of the latter as a separate collateral agreement must be examined as a separate issue*[13]

However, if the arbitration clause itself is illegal then it will be void. Thus in ***ERTEL BIEBER & CO. VS RIO TINTO CO***[14]. it was held that in the event of war, if the agreement would in the ordinary course of performance or resolution of disputes

[12] Ibid also at 374+
[13] See Haruis, Planter use & Tecks, "The arbitration Act 1996", A commentary P. 6
[14] 1946 AC 21

arising therefore, involve interaction with the enemy, it would together with the arbitration clause be void.

The principle of the separability and autonomy of the arbitration clause is now enacted in section $12^{(2)}$ of the Arbitration and Conciliation Act which provides as follows:

> *for the purpose of subsection 1 of this section, an arbitration clause which forms part of a contract shall be treated as an arrangement independent of other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail Ipso Jure the validity of the arbitration clause.*

The autonomy and independence of the arbitration clause was illustrated in the JOC OIL CASE decided in the Bermuda Court of appeal in a case for the enforcement of an award[15] discussed by Redfern and Hunter[16]. In that case there was a contract between a soviet trade organization (SNE) and a Bermuda Company (JOC OIL) for the purchase of oil from JOC Oil. The contract contains an arbitration clause. Arbitration proceedings were subsequently brought by SNE and an award was made in favour of SNE and JOC Oil was ordered to pay Several Millions of dollars.

Enforcement proceedings were brought by SME in Bermuda. The defense of Joc Oil was that, the soviet law required such a contract to be signed by two authorized

[15] 1978 AC, 260 at 291 HL
[16] (1990) Vol. XX, Year Book on Commercial Arbitration P. 31

officials, where as this one was signed by only one. It was held by the court of appeal for Bermuda that although there was no valid contract, it cannot be said that there was a void arbitration agreement abinitio the arbitration agreement did come into existence and the arbitrators were right to have arbitrated and have made the award on the basis of restitution or unjust enrichment.

The rationale of the decision is that the distinction made is between the nullity of a contract and its non existence. If the contract does not exist (e.g. because no contract was ever concluded or because force was used to induce the signature or the person who signed operated under some legal disability such as being a minor) it cannot give rise to a valid arbitration clause and hence to a valid arbitration. However where there is a main contract, the arbitration which it contains constitute a platform upon which so to speak the arbitral tribunal may stand to Judge the validity of the main contract and the consequence of its breach.

Because of the importance of the arbitration clause to the agreement and the parties, section 2 of the Act provides that unless a contrary intention is expressed therein an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court or judge.

Therefore, where the parties do not agree to revocation, the party desiring it may apply to the court.

As stated earlier an arbitration under this Act must be in writing so where an agreement to arbitrate is oral it is not governed by the act. Thus, an oral customary agreement to arbitrate is not governed by the Act. Similarly any alteration of an arbitration agreement should be in writing if it is to be valid.

To further clarify the type of writing required section 1(1) of the Act provides that every Arbitration agreement should be in writing contained:

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

   Even a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract[17].

4.3 Contents of the Arbitral Agreement

The contents of an arbitration agreement will depend on whether the agreement is for an adhoc arbitration or an institutional arbitration. In the former all matters of importance and interest must be specifically provided for unless some rules or statute are incorporated by reference. In the latter case, it is sufficient to adopt the

[17] Arbitration and Conciliation Act, 1988, s. 2 (1)

procedure and rules of a specified arbitration institution of course in this case the parties may wish to supplement the rules of such institution. Some of the matters which need to be specifically provided for are stated in the preceding paragraphs.

4.3.1 The Reference

The essence of the arbitration agreement is to refer disputes arising between parties to arbitration. The words by which the reference is made must therefore be clear and express as a reference will not be implied. So also what is referred must be clearly and sufficiently stated to ensure that Jurisdiction is conferred on the arbitrator. A typical arbitration clause may run as follows:

> *"All disputes, differences or claims arising out of or in connection with or in relation to the contract shall be referred to a sole arbitrator…"*

Such a comprehensive provision is strongly recommended. This is because disputes or difference alone may not be sufficient to cover the resolution of the matters between the parties. For example there may be a claim which is not disputed and about which there is no difference. If the reference does not cover claims it may not be possible to arbitrate as claim simplicities. It has also been held that the expression "arising out of the contract" or arising under the contract does not cover disputes as to whether the contract was ever made in the first place[18].

[18] Ethiopean Oil Seeds and Pulses Expurt Corporation V. Rio Del Mar Foods Inc. 1990 Lloyds Report 86

Under the uncitral arbitration rules, the following arbitration clause is recommended:

> *any dispute controversy or claim arising out of or related to this contract or the breach termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Arbitration rules as at present in force.*

Some arbitration institutions recommend arbitration clauses for inclusion in contracts where the arbitration is to be held under their auspices. Thus the I.C.C recommends the following arbitration clause:

> *All disputes arising out of or in connection with the present contract, shall be finally settled under the rules of arbitration of the ICC by one or more arbitrators appointed in accordance with the said rules*

The institutions model may be modified by adding provisions in respect of arbitrators, the place of arbitration, the Language of arbitration and the applicable law.

Apart from the arbitrability referred to above i.e. conformity with public policy and the law, certain rules of arbitrability had been formulated at common law. Thus at common law, an undisputed claim cannot be the subject matter of an arbitration. It has been said that "….unless there is a dispute, there is nothing to be referred to arbitration"[19].

The claimants proper claim is to bring an action and obtain a judgment.

[19] Mustil and Boyd at Page 122

In ***LONDON & N.W. RY CO. V JONES***[20] it was held that where a claim is partly admitted, the claimant is entitled to judgment on the admitted portion and he may go to arbitration for the remainder.

Indeed it has been said that, "where the defendant has not actively admitted the claim, but has so far failed to deny it, it would seem that there is no dispute in existence, and the claimant not only can but must prosecute his claim by action, rather than by arbitration[21]. However, if as noted earlier the arbitration clause refers inter alia "claims" to arbitration. Then the arbitrators will have jurisdiction.

Sometimes, the dispute arises after the appointment of the arbitrator. The question is whether or not the arbitrator will have jurisdiction over such a dispute. Since the dispute was not in existence at the time when the arbitrator was appointed he cannot have jurisdiction to hear it. On this question, the learned authors of commercial arbitration[22] have observed:

> *A second consequence of the general rule that only disputes may be the subject of arbitration is that the arbitrator has no jurisdiction over disputes which were not in existence when he was appointed to act. The appointment defines his jurisdiction at the same time as creating it and cannot be*

[20] (1915) 2 KB at Page 35
[21] Mustyl and Boyd, Op. Cit Still at Page 122
[22] Ibid at Page 125

taken to give jurisdiction over something which does not at that time exist.

It is suggested that where the arbitration covers all disputes arising from a contract or transaction without a limit as to time the arbitrator ought to have power to deal with such a dispute and so avoid a multiplicity of proceedings.

Other area which at common Law creates problems is that of amendment of the claim or that of the defence after commencement of proceedings. This is now resolved by section 19(3) of the arbitration and conciliation act which provides that unless the parties otherwise agree, a party may amend or supplement his claim or defence during the arbitral proceedings. If the arbitral tribunal considers it appropriate to allow such amendment or supplement having regard to the time that has elapsed before the making of the amendment or supplement.

Reference may also be made to disputes resolved before the award. If the disputes are settled after commencement of arbitration, then where all the matters referred are so settled, the arbitration is required to terminate the proceedings and if requested by the parties and not objected to by the tribunal record the settlement in the form of an arbitral award on agreed terms[23]. If the settlement relates to only part of the dispute or claim, the settlement is embodied in the award. If on the other hand

[23] S. 25 (i) Arbitration and Conciliation Act 1990

this takes place before the arbitral proceedings, the arbitrator will not have jurisdiction.

An arbitration clause apart from stating the reference may sometimes also provide that the award of an arbitrator shall be a condition precedent to the enforcement of any rights under the contract. The result of this is that a party will have no cause of action in respect of a claim falling within the clause unless and until an award has been obtained or unless the clause is cancelled by the court or the party has by his conduct forfeited the right to rely on it[24]. Such a clause is referred to as ***SCOTT VS AVERY*** clause, from the leading case of ***SCOTT VS AVERY***[25] where the issue was considered.

In that case, an insurance company inserted in all its policies a condition that when a loss occurred the suffering member should give up his claim and pursue his loss before a committee of members appointed to settle the amount; that if a difference arise between them the matter should be referred to arbitration and that no action should be brought except on the award of the arbitration. In considering the scope of these provisions, the court held that the condition was valid and not illegal as arresting the jurisdiction of the court[26].

[24] Mustill and Boyd Op. Cit at page 161
[25] 1856 5 HL Cos. 811
[26] See also London NW and GW Toin Rly Co. vs Bulington, 19899 Ac at 79.

In ***OBEMBE VS WEMA BOARD ESTATES LTD***[27] the Supreme Court considered this issue and observed that arbitration claims speaking generally falls into two classes. One class is where the provision for arbitration is a mere matter of procedure for ascertaining the rights of the parties with nothing in it to exclude a right of action on the contract itself, but leaving it to the party against whom an action may be brought to apply to the discretionary power of the court to stay proceedings in the action in order that the parties may resort to that procedure to which they had agreed. The other class is where arbitration followed by an award is a condition precedent to any proceedings being taken. Any further proceedings then being strictly speaking, not upon the original contract but upon the award made under the arbitration clause. Such provisions in an agreement are sometimes termed ***SCOTT V AVERY***"

An example of an arbitration clause in the first class was according to the Supreme Court that in the case of ***OBEMBE VS WEMA BOARD LTD***[28] where the agreement was that:

> *Any dispute or differences arising out of this agreement shall be referred to arbitration of a person to be mutually agreed upon or failing agreement of some person appointed by the president for the time being of the institute of consulting engineers*

[27] (1977) 5 supreme court at 115
[28] Ibdi Supra

The ***SCOTT VS AVERY*** clause may take the form of an express or implied term that no action shall be brought in respect of any dispute arising from the contract until an arbitration has been conducted and an award made. It may also be a provision that the only obligation of the defendants is to pay such sum as the arbitrator may award.

The power of the court to protect an arbitration agreement does not depend on whether or not there is a **SCOTT VS AVERY** clause for sections 4 and 5 of the Act provide for stay of proceedings by court where an issue referred to arbitration is being litigated whether or not there is a ***SCOTT V AVERY*** clause in the arbitration agreement.

4.3.2 The Parties

An arbitration agreement is a contract on its own Just like the substantive agreement. Therefore the parties to the arbitration agreement must have contractual capacity. They must be recognized by the law of the contract as Legal persons. This is important not only for the arbitration procedure but for the enforcement of the

award[29]. This position is now expressly recognized in the case of international arbitration by section 52(2) of the act, which provides inter alia.

> *the court where recognition or enforcement of an award is sought or where an application for refusal of recognition or enforcement thereof is brought may irrespective of the country in which the award is made refuse to recognize or enforce an award.*

a. if the party against whom it is invoked furnishes the court proof:

   i. that a party to the arbitration was under some incapacity….."

The party to the arbitration may be a party to the arbitration agreement or an agent duly authorized a trustee, a personal representative, an assignee or any other privy. He must however have legal capacity to enter into a contract, since the arbitration clause is an agreement and subject to the same test of validity as any other contract. A party to an arbitration agreement is usually either an individual or a partnership, a corporation sole or state agency.

Every individual is prima facie capable of being a party to an arbitration agreement provided that he has contractual capacity. However certain individuals have limited or restricted capacity. They include infants, persons of unsound mind and bankrupts.

[29] See S. 32 Arbitration and Conciliation Act 1988

With respect to infants, an infant may be a party to an arbitration agreement, provided that he has contractual capacity. However, certain individual have limited or restricted capacity. They include infants, persons of unsound mind, and bankrupts.

With respect to infants, an infant may be a party to an arbitration agreement and it will be binding on him, if it relates to the supply of necessaries or to a reasonable contract of service or otherwise for the benefit of the infant. Other agreements are voidable by him. In ***SLADE VS MATRODENT***[30] an infant entered into a contract of apprenticeship, which contained an arbitration clause for the resolution of disputes. It was held that even if the arbitration agreement standing alone by itself was not beneficial to the infant, the contract of apprenticeship as a whole was and so the infant was bound by that agreement including the arbitration clause.

Whether or not a party has the capacity is generally determined in the case of a natural person by the law of the place where the arbitration agreement was entered into and in the case of an artificial legal person like a company law of the place which created it.

A bankrupt person may enter into a contract, including an arbitration agreement but the estate passes to his trustee in Bankruptcy subject to the Bankruptcy Law.

[30] 1977 5 Supreme Court at 120

With respect to a state there is no restriction in Nigeria as to whether it can be a party to an arbitration agreement. In a developing country like Nigeria, international commercial, construction or investment contracts are entered into by the governments itself or some government agencies and very often guaranteed by the government itself. Such state or state agencies are not allowed to claim immunities against arbitration.

In ***TRENDT EX TRADING CORPORATION LTD VS C.B.N***.[31], the question came up for consideration by the English Court.

The action followed the "cement Armeda" of 1974/75 in Nigeria when cement was imported indiscriminately and without any control or regulation thus creating almost a total congestion and blockage of the Lagos ports. In one of the actions against the central bank of Nigeria as an agent of the Nigerian government liable for the claim of loss incurred by the foreign exporters, it was contended on behalf of the central bank of Nigeria that it was entitled to claim sovereign immunity as such agency. The English court of appeal rejected the contention and Lord Dening M.R. in his judgment observed inter alia as follows:

> *…. If a government department goes into the market places of the world and buys boots of cement as a commercial transaction – that government should be subjected to all the rules of the market place.*

[31] (1953) 2 QB 112

Thus, "it is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of Law". So observed Lord Denning in the case of ***RAHIMTOOLA V THE NIZAM of HYDERABAD***[32].

With regard to a corporate body it can enter into an arbitration agreement, but if it ceases to exist as such any arbitration in which it was involved lapses absolutely and cannot be revived[33]. In the case of a guarantor/surety guaranteeing the performance of a contract containing an arbitration clause, it is advisable that both the arbitration agreement and the contract containing guarantee or surety should contain a clause providing that an award against the principal debtor will bind the guarantor or surety, Otherwise the award may be ineffective against him.

An arbitration agreement shall not be invalid by reason of the death of any party thereto but shall in such an event be enforceable by or against the personal representative of the deceased[34].

4.3.3 The Arbitrators

The arbitration agreement usually makes detailed provisions about the arbitrator either directly as in adhoc arbitration or indirectly through appropriate institutions or

[32] (1979) All ER 881
[33] See Nizam of Hyderabad Alternative Citation at 1958 Ac, 379.
[34] See morris v Harris, 1927 Ac 252

incorporated rules or statutes. The agreement should make provision for such matters as the number of arbitrators mode of appointment, power as well as challenge of the arbitrator.

The number of arbitrators may be one or more, usually a sole arbitrator or three arbitrators. Where an umpire is desired, this should be spelt out. Usually a sole arbitrator is appointed jointly by the parties and where there are to be three arbitrators, one is to be appointed by each of the parties and the appointed arbitrators appoint the third and presiding arbitrator. If the parties are or any of them is unable or fails to make the appointment, the court may (in a domestic arbitration, do so on application by either party. In an international arbitration this may be done by an appointing body designated by the parties. If it is required that arbitrator should have a specific qualification this should be stated in the arbitration agreement. Provisions should also be made for the replacement of arbitrator if necessary.

If any special powers are to be exercised, this should be stated. Under section 29 and 45 of the Act, provisions are made for the challenge of the arbitrator regarding their competence to act as such.

4.3.4 Place of Arbitration

The arbitration agreement should contain provisions as to the place of arbitration. This is determined largely by convenience, but in international arbitration, economic, social, political and legal considerations are very important. With regard to the legal

consideration the choice of venue may determine the procedural law especially the mandatory rules which in turn can affect the enforcement of the award.

Provisions are made in the Act for choice of venue where the agreement makes no provision or the parties do not agree[35], to the effect that unless otherwise agreed by the parties, the place of the arbitral proceeding shall be determined by the arbitral tribunal having regard to the circumstances of the case including the convenience of the parties. It also provides that unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case including the convenience of the parties. It also provides that unless otherwise agreed by the parties, the arbitral tribunal may meet any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties or for the inspection of documents, goods or other property. Under the ICC rules the venue is determined by the ICC court of arbitration unless the parties agree upon it.

4.3.5 Applicable Law

The arbitration clause should specify at least the law governing the contract. But even here it is not quite certain that the validity, scope and effect of the arbitration clause will be governed by that chosen law because the arbitration clause is autonomous and

[35] See Section 15 and 16 (i) of the Act and Article 16 Arbitration Rules, First Schedule to the Arbitration any Conciliation Act.

independent of the contract. With regard to procedural law, the general rule is that unless the parties agree, otherwise the arbitration procedure is governed by the law of the place of arbitration, at least the mandatory rules of law in that place[36].

The importance essentially in international arbitration of the law of the place of arbitration is emphasized by section 52(2) (vii) of the act, which provides that recognition and enforcement of award may be refused by the court if the party against whom the award was made proves:

> *where there is no agreement between the parties…. That the composition of the tribunal or the arbitral procedure was not in accordance with the law of the country where the arbitration took place.*

The parties are perfectly free to provide for the procedure (both substantive and procedural) that will apply to the arbitration and the contract and provisions for those are contained in most institutional rules[37].

4.3.6 Arbitration Procedure

The arbitration clause should provide for the procedure either directly in an adhoc form or indirectly by incorporation of some institutional or other arbitration rules. Such provision will cover matters such as the commencement of the arbitration process, the pre-trial meeting, the terms of reference or settlement of issues, the

[36] See Article 33 of the Arbitration Rules
[37] See Section 3 of the Act.

pleadings and other documentation, the hearing and evidence, the award and cost. These matters will be considered in the latter chapters.

4.3.7 Language of the Arbitration

In international commercial arbitration it is important to specify the language of the arbitration in arbitration agreement. This is because the parties may be nationals of different countries with different languages. Section 18(1) of the Act provides that the parties may by agreement determine the Language, but where they did not do so, the arbitral tribunal shall determine the language or languages to be used bearing in mind the relevant circumstances of the case.

4.4 Ousting the Jurisdiction of the Arbitral Tribunal

Sometimes a contract provides that any dispute arising from the transaction shall be resolved by a person acting as an expert and not an arbitrator. Such a person is not arbitrator and not subject to the arbitration and conciliation Act, or any other arbitration rules or regulations. He is under no obligation to hear evidence or argument although he may if he wishes. He is entitled to rely solely on his expertise if any and any investigation he may carry out on his own.

Arbitration has its own advantages over resolution by experts but it has its disadvantages also. The following advantage may be mentioned.

a. Thoroughness: In an arbitration there will be the views and submission of the parties, evidence may be tested by cross examination and as a result, the investigation is likely to be more thorough than where the expert relies solely on his knowledge, expertise and investigation which does not involve the parties.

b. Available rules: there are arbitration rules which have been fully documented and tested and with which the parties and lawyers are familiar. In adhoc cases the parties may formulate their own rules. In any case, there are certain rules of procedure. This is not so in the case of expert determinations.

c. Supportive power of court: the law provides for the support of the court in an arbitration. As noted above these includes the issues of sub-poena, order for inspection of documents and enforcement of the determination. These are not available in determination of an expert.

On the other hand the determination by an expert may in certain circumstances be advantageous. Such case includes the following:-

a. Saving in time and cost: The expert may make his determination without hearing evidence and without hearing lawyers and experts. Accordingly much time and cost can be saved over the arbitration proceedings where these are all usually required.

b. Determination of a price and value: Where some price or value is to be determined, an expert can best produce the required result cheaply and quickly.

It may be noted that in some trade the two processes have been combined in settling trade disputes. The arbitrator is chosen for his expertise in the particular trade and he is given the materials relevant to the disputes after which he may inspect the goods and come to a decision.

4.5 Time Limit in Arbitration

A cause of action is barred if action is not taken in court or a claim made in an arbitration within the period stipulated by law e.g. six years in the case of a contract. Under the act, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration was received by the other party, unless otherwise agreed[38].

Statutes relating to limitation of time of action also apply to arbitration. For example section 26(1) of the arbitration laws of Ondo State 1978 which is typical provides as follows:

> *"The law and any other enactment relating to the limitations of action shall apply to arbitration as they apply to actions in court[39].*

[38] See Art 14, ICC Arbitration Rules
[39] See Art 17 of the ICC Arbitration Rules

A cause of action remains a cause of action whether it is sought to assert it in the court or in an arbitration[40]. The parties to an arbitration agreement may agree to bar any proceedings to assert a right arising from the agreement unless such right is exercised within a given time which is shorter than the statutory time of six years[41]. But they cannot agree to give a period longer than the statutory one[42].

Time runs from the accrual of the cause of action to the commencement of action or arbitration subject of course to any acknowledgement, disability, part payment, fraud or mistake[43].

4.6 Number of Arbitrators

The arbitral tribunal is composed of the arbitrators. It may consist of a sole arbitrator or more than one arbitrator more usually of three arbitrators. The act makes provisions for the appointment of a sole arbitrator and of three arbitrators[44]. It provides that where the parties to an arbitration agreement do not determine the number of arbitrators, the number of arbitrators is deemed to be three[45].

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[40] Section 17 of the Act.
[41] See also Section 62 Limitation law of Lagos State, Cap 70.
[42] Pegler vs Rly Executive (1984) All ER 559 HL
[43] Pegler vs Rly Executive (1984) All Er 559 HL
[44] Ford & Co. v Compagene Earness (Rance) (1922) 2 KB 707
[45] See Article 5 of the Uncitral Arbitration Rules

However, the rules of many arbitral institutions such as the I.C.C. and L.C.I.A provide that where the parties do not specify the number of arbitrators, it will be deemed to be one. Apparently, this is to reduce cost and possibly save time. The only disadvantage is that the sole arbitrator does not have the advantage of discussing the findings and the law.

Under the repealed arbitration Act 1914 and in some other jurisdictions notably the United Kingdom and some commonwealth countries, two arbitrators may be appointed with power if they disagree in their decision or award, to refer the arbitration to an umpire. The practice under the English system was that Arbitration clauses often provide that each party should nominate an arbitrator, and that in the event of disagreement, the reference should be entrusted to an umpire of their choice. If the arbitrators were able to agree on a joint award, the umpire played no part in the decision, if. On the other hand, the arbitrators did not agree then the umpire became the sole member of the tribunal, and the powers of the two original arbitrators came to an end[46].

The concept of an umpire is unknown to most legal systems outside the commonwealth. It is not provided for in the **UNCITRAL** Model Law which is the source of the Act. It is therefore not surprising that the act contains no provisions about an umpire.

[46] Mustill & Boyd, Op Cit Page 8 – 9

Accordingly, provisions for the appointment of an umpire is no longer part of the arbitration law in Nigeria, with the repeal of the arbitration Act 1914. Neither is there such a provision in the UNCITRAL Arbitration Rules nor in the rules of most arbitration institutions. However arbitration clauses involving Nigerian parties may still provide for the appointment of umpires especially if the arbitration is governed by English law. The English Arbitration Act 1966 makes provisions for the appointment of an umpire. First, section 15(1) provides that "the parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire". Secondly section 16(6) provides for the procedure for appointing an umpire. Thirdly section 16 provides that where the parties have agreed to appoint on umpire but have not agreed on his functions and powers the umpire shall attend the proceedings. When the arbitrators disagree he shall replace them as the tribunal "with powers to make decisions, orders and awards as if he were sole arbitrator"[47].

It is important for parties to be quite clear as to whether they want to appoint a third arbitrator and chairman of the arbitral tribunal or an umpire who may step into the shoes of the tribunal and replace it. It cannot be too strongly emphasized that their function and powers are quite different. If it is intended to appoint an umpire in an arbitration governed by Nigerian Law, it is submitted that this may still be done, but the parties have to make detailed provisions for his appointment, powers, duties,

[47] See S. 21 (4) U.K Arbitration Act 1996

functions and other relevant matters. Since Nigerian law neither recognized nor make provisions in respect of an umpire.

4.7 Appointment of Arbitrators

Arbitrators may be appointed by agreement, by a third party, by two arbitrators or by the court. The tribunal consists of a sole arbitrator or of three arbitrators.

4.7.1 Appointment of a Sole Arbitrator in a Domestic Arbitration

Section 7(1) of the Act Provides that the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator. In practice the parties usually provide expressly or indirectly by incorporation of other rules on how the arbitrator should be appointed. Sometimes, the agreement merely states the number of arbitrators without specifying how they should be appointed. In such a case, section 7(2)(b) of the Act provides that:

> *In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator the appointment shall be made by the court on the application of any party to the arbitration agreement made within thirty days of such disagreement.*

In making the appointment, the practice is that the claimant will submit to the respondent the name of a proposed arbitrator for approval or a list of arbitrators from which the respondent may chose. If the parties agree on a name, one of them will

contact the proposed arbitrator to inform him and seek his consent. If he consents, the parties will jointly send him a written invitation to act as an arbitrator. If he agrees he will then write back to accept the invitation. It is necessary for the invitation to set out a summary of the arbitration agreement under which the appointment is made so as to assist the arbitrator in making up his mind, especially with regard to jurisdiction and qualification. The procedure is now governed by Article 6 of the arbitration rules which sets out the detailed procedure. It provides that if a sole arbitrator is to be appointed, either party may propose to the other, names of one or more persons, one of who would serve as sole arbitrator[48].

The parties may agree that the arbitrator be appointed by a third party. This is often the president or chairman of some professional or trade organization or institution e.g the president of the Nigerian Society of Engineers or an arbitration institution such as the chartered institute of arbitrators. It will usually be the responsibility of the claimant to inform the third party if the third party is not an institution, it is advisable to obtain his consent before the agreement is executed.

In the event of failure to agree on the arbitrator, one party may apply to the court to appoint an arbitrator, and the court may do so where no procedure is specified in the arbitration agreement for the appointment of an arbitrator. In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the

[48] Article 6 (i) Arbitration Rules

appointment shall be made by the court on the application of any party to the arbitration agreement[49].

Under section 7(3) of the act, where under the appointment procedure agreed upon, by the parties: -

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

(b) The parties are unable to reach agreement as required under the procedure or

(c) A 3rd party, including an institution, fails to perform any duty imposed on it, by the procedure, any party may request the court to take necessary measure unless the appointment procedure agreed upon by the parties provides other means for securing the appointment"

The decision of the court in any such case is not subject to appeal. This provision was made in a military regime when a Decree superseded the constitution in the event of conflict. It is doubtful if the provisions will be valid in a democratic regime, unless the constitution is amended to provide for such exceptions.

In exercising its powers in any of the above cases the court is required to "have due regard to any qualifications required of the arbitrators by the arbitration agreement and such other consideration as one likely to secure the appointment of an independent and impartial arbitrator"[50]. Where the arbitration agreement provides

[49] See S. 7 (2) (b) Ibid
[50] See S. 7 (5) of the Arbitration Act

for the appointment of a person with specified qualification and a person without that qualification was appointed, it was held that the appointment was void.[51]

The court also has power to appoint to fill a vacancy resulting from termination or revocation of appointment, removal or withdrawal from office, where the parties fail or are unable to replace him. Under Article 6.2 of the arbitration rules in the first schedule to the act, if within thirty days after receipt by a party of a proposal for approval of an arbitrator made by the other, parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by court.

The procedure of the court for the appointment of a sole arbitrator is set out in article 6.3 which provides inter alia, that the Court shall, at the request of one of the parties appoint the sole arbitrator as promptly as possible and in making the appointment the court shall use the list procedure unless both parties agree that the list procedure should not be used, or unless the court determines in its discretion that the use of the list procedure is not appropriate in the case. The list procedure as set out in Article 6.3(a) – (d) of the arbitration rules is as follows:

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

[51] Rahcassi Shipping Co. s. A v Blue Starline Ltd 1967 (3) ALL ER 3001

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

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

4.7.2 Appointment of Three Arbitrators in a Domestic Arbitration

An arbitration agreement may specify how the arbitrators are to be appointed. This is stressed by section 7(1) of the Act which provides that subject to subsection 3 and 4 of the section which provide for appointment in case of default the parties may specify the procedure to be followed in appointing an arbitrator. Such agreement may be direct or may be by incorporation of some rules such as the UNCITRAL arbitration rules or, the I.C.C arbitration rules. Sometimes the third arbitrator is appointed by a third party which may be an institution.

By section 7(2) (a) of the act in the case of an arbitration with three arbitrators, where no procedure is specified, each party shall appoint one arbitrator and the two thus appointed shall appoint a third. Article 7.1 of the arbitration rules makes a similar provision but goes further to provide that such a third arbitrator shall act as the presiding arbitrator to the tribunal.

It is however provided that:

(i) If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so by the other party, or

(ii) If the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made by the court on the application of any party to the arbitration agreement[52].

Where under the appointment procedure agreed upon by the parties the two arbitrators are unable to reach agreement as required under the procedure or a third party (including an institution) fails to perform any duty imposed on it in respect of an appointment any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provide other means for securing the appointment[53].

As with the appointment of a sole arbitrator, section 7(4) provides that a decision of the court in this regard is not subject to appeal and the court in exercising its powers must have due regard to any qualification required of the arbitrator by the agreement and such other considerations as are likely to secure the appointment of an independent and impartial arbitrator. Under section 8(3)(b) an arbitrator may be challenged on grounds that he does not possess the qualification agreed by the parties.

[52] S. 7 (2) (iv) of the Arbitration and Conciliation Act
[53] S. 7 (3) fo the Arbitration and Conciliation Act

Article 8 provides that where the court is requested to approve a sole arbitrator or a third arbitrator, the party which makes the request shall send to the court an affidavit together with a copy of the notice of arbitration a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The court may require from either party such information as it deems necessary to fulfill its function where the names of one or more persons are proposed for the appointment as arbitrator, their full names and address shall be indicated together with their qualifications[54]. In making the appointment the court must as stated earlier have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties[55].

4.7.3 Appointment in an International Arbitration

With regard to international commercial arbitration the applicable provisions are contained in section 44 of the Act which is based on articles 6 to 8 of the UNCITRAL model law. The procedure for the appointment of arbitrators for an international commercial arbitration is substantially the same as for a domestic commercial arbitration except that where the parties are unable to agree on the sole arbitrator or the two arbitrators are unable to agree on a third arbitrator, the appointment is made by the appointing authority designated by the parties and not by the court as is the case in domestic arbitration.

[54] See Article 8 (2) of the Arbitration Rules
[55] Ibid Article 6 (4)

In the case of sole arbitrator, section 44(2) provides that

> *If within 30 days after receipt of proposal made in accordance with subsection I of this section the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority.*

Similarly in the case of three arbitrators, subsections(6) and (7) of section 44 provides as follows:

"(6) If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he appointed the first party may request the appointing authority previously designated by the parties to appoint the second arbitrator. (7) If within 30 days after the appointment of the second arbitrator, the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under subjection (1) to (4) of this section.

In making the appointment, the appointing authority will use the list procedure, unless both parties agree that the list procedure should not be used or unless the

appointing authority determines in its discretion that the use of the list procedure is not appropriate in the case[56]. The list procedure is as follows:

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

(b) Within fifteen days after the receipt of the said list each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list as the order of his reference.

(c) After the expiration of the above period of time, the appointing authority shall appoint the sole arbitrator from among the names approved and in the order of reference indicated by the parties[57].

The appointing authority in making the appointment is required to have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing as arbitrator a person of a nationality other than the nationalities of the parties.[58]

Section 44(4) of the act does not define the term, appointing authority. Section 57 of the act which deals with interpretation have equally failed to define this term. However, rather strangely it is section 54 that has nothing to do with appointment of

[56] S. 44 (3) Arbitration and Conciliation Act
[57] Ibid, Section 44 (3) C
[58]

arbitrators which provides the definition namely that in part II of the act (which includes section 44) the appointing authority, means "the Secretary General of the Permanent Court of arbitration at the Hague".

This definition and the provisions for the appointment in section 44(2), (3) (4) and (6) of the act have been severely criticized (and justifiably so, it is submitted) as "inherently contradictory" of section 446 (which speaks of appointing authority previously designated by the parties….." and as being palpably wrong and should be corrected[59].

Under Article 6.2, 7.2 and 7.3 of the **UNCITRAL** Arbitration rules which are apparently sought to be enacted in section 44 of the Act the appointment is made by the appointing authority designated by the Secretary General of the Permanent Court of Justice at the Hague.

Furthermore Article 6 of the UNCITRAL model law provides that each state enacting the model law should specify the authority, such as a court, courts or other authority competent to perform the functions of resolving default in appointment. One cannot but agree that the provision in our act in this regard must have resulted from a misconception or a careless miscopy of the relevant provisions of the UNCITRAL

[59] E. I., Akpata, the Nigerian Arbitraiton Law in Foucs page 109

Arbitration rules[60]. The introduction of the concept of an appointing authority designated by the parties was apparently intended to support the modern trend especially in international arbitration to minimize the intervention of the court at the place of arbitration. It has also been observed that although the parties may designate a court as the appointing authority the intention of the rules is that they should nominate a person or more usually an institution which is more likely to maintain a list of names of suitable arbitrators and that, if the parties have not agreed on an appointing authority then after fulfilling certain preliminary requirements, a party may request the Secretary General of the Permanent court of arbitration to designate one.

This intention has obviously not been properly or adequately represented in section 44 and 54 of the Act and there is therefore need to amend the Act to correct this error and save the court the unnecessary problems of construction and parties unnecessary expenses and delay. Furthermore, such an amendment will reflect the true intention of the law maker in this regard. Until the suggested amendments have been effected, a simple way out is for the parties to designate an appointing authority of their choice. This may be an individual or an institution.

4.8 Qualities of an Arbitrator

[60] Ibid Page 106

Like any other professional, certain qualities are required of an arbitrator. Some of these qualities are innate while others can be acquired by training and experience. The common qualities required of a good arbitrator are qualification and experience, independence and impartiality.

4.8.1 Qualification and Experience

Anyone who is capable of adjudicating may as a general rule be appointed as an arbitrator. The law does not stipulate any particular qualification. Among the uninformed, it is often thought that only a lawyer can be an arbitrator. This is not so. Many professionals in other fields such as engineering, architecture, survey, accountancy or insurance are appointed. But because the process of arbitration is a legal one, somebody trained in the legal profession should prima facia have an advantage, but that is not necessarily always so. Indeed experience in this country has shown that the arbitral process may be made unduly cumbersome by the lawyers who bring into arbitration the legalistic approach of the court process. Worse still there is the danger that some judges who act as arbitrators may be unable to divorce themselves from the rigid and meticulous court process and are thus capable of hindering the cause of arbitration as an alternative to litigation.

This raises the question of training of arbitrators in the process of arbitration. The professional education in any particular discipline is not enough. The arbitrator must in addition have experience in the law and practice of arbitration. In this connection it

has been said particularly in respect of international arbitration that there is no sense in appointing as a sole or presiding arbitrator someone who is an experienced lawyer, if that experience does not include practical experience of arbitration. Nor for that matter, is it sensible to appoint a civil engineer or an expert in nuclear physics, however distinguished he may be, and however relevant his experience may be to issues in dispute unless at the same time he has practical experience in the arbitral process. This may be less important when there is an arbitral tribunal of three arbitrators, but only if the presiding arbitrator at least has relevant experience of international arbitral process[61].

It is apparently in recognition of this that some arbitration institutions provide for education and training in the arbitral process; e.g there are minimum qualifications for admission as members or fellows of the chartered institute of arbitrators. Similarly some institutions such as the A.A.A, the I.C.C. and L.C.I.A have their panels of arbitrators with necessary experience who are recommended for appointment as arbitrators.

With further reference to the professional qualification, it has been observed that; "where the arbitral tribunal is to consist of three arbitrators, at least one member of the arbitral tribunal (preferably the presiding arbitrator) should be a lawyer or at least a person specifically qualified as an arbitrator, having studied arbitration law. There is

[61] See S. 8 Arbitration and Conciliation Act

no reason why the other two members of the arbitral tribunal should also be lawyers unless the dispute is one in which the issues involved are principally issues of law[62].

Where there is a sole arbitrator he need not be a lawyer unless substantial points of law are in issue. In such a case it is preferable to have an arbitrator with a good knowledge of law.

With regard to special expertise it is obvious that an arbitrator with special relevant expertise together with an experience in the law and practice of arbitration is likely to understand the issues more readily and save time and cost. So, parties often look for persons versed in such discipline and who have some experience as arbitrators. This is particularly important where technical expertise is required as in complicated financial and accounting disputes or in complex constructions.

Another important qualification in international arbitrations is that of language. An arbitrator who does not understand the language of the arbitration will obviously be at a great disadvantage so, a person should before accepting an appointment give careful consideration to this.

4.8.2 Independence

[62] See Reelfern and Hunter Op. Cit Page 22

In order to ensure confidence in the arbitral process, the arbitrator is required to be independent and impartial. This independence and impartiality is required both by law and by the rules of many arbitration institutions e.g Art. 7.1 of the ICC rules and Art. 5.2 of the L.C.I.A rules.

The concept of independence must be distinguished from that of impartiality "independence" is said to be concerned with the relationship between an arbitrator and one of the parties (usually the party appointing him) whether financial or otherwise[63], while by contrast, partiality" may be concerned with the bias of an arbitrator either in favour of one of the parties or in relation to issues in dispute[64]. Lack of independence may arise from the relationship of the arbitrator to one of the parties whether by blood or business. Although the mere fact of relationship does not necessarily negate independence, nevertheless it can create a likely hood of dependence and bias, i.e "a predisposition to decide for or against one party without proper regard to the true merits of the dispute[65].

A business relationship should be carefully watched. The relevant question is whether the proposed arbitrator is likely to be influenced by the interest of the party. If a solicitor or an engineer acts for a client in a matter which subsequently goes to arbitration there is a high probability of his being biased if appointed arbitrator in the matter. Even where the matters are different but the parties are the same, he should

[63] Mustill and Boyd, 1st Edn. P. 214
[64] Ibid P. 215
[65] Ibid P. 217

still carefully examine his position. An arbitrator may be biased either because of his relationship with one of the parties or because of the relationship, between him and the subject matter of arbitration. In the first case the bias can take the form of favouritism or antipathy to one of the parties which is likely to affect his decision. It has been said that this may arise "where the person nominated has a formal and continuous business relationship with one of the parties, for example if he is an officer of an associated company or of a managing company of that party, or if he has a substantial shareholding in one of the parties, or becomes a member even after appointment, of a corporate body which is one of the parties"[66].

Another case of bias is where there is a connection between the arbitrator and the subject matter, as where he stands to gain or to lose anything, there may be a reasonable likelihood of bias where he has earlier taken a position such as expressing himself on any of the issues for decision or where he has decided the same issue of fact or law in course of arbitration between different parties. The view has been expressed[67]. That this latter relationship should not necessarily disqualify an arbitrator. It is, however, our view that an arbitrator should disclose their relationship to the parties and unless they approve, he should disqualify himself.

It is not possible to list all the situations which may or may not lead to dependence or partiality. Each case will have to be considered on its own facts and circumstances.

[66] See Article 7 (3) Arbitration Rules
[67] Redfern and Hunter Op. Cit. 224

This is why section 8 of the Act puts the onus of disclosure on the person being proposed for the appointment.

Again, independence should be distinguished from neutrality. A party appointed arbitrator is not neutral but he may be independent of the parties, that is have no relationship as above with that party. Only the third arbitrator is likely to be truly neutral. But whether an arbitrator is neutral or non-neutral, he must be impartial. There is no half way measure in this.

The arbitration rules of the arbitration institutions usually make provisions for the independence and impartiality and also for disclosure of interest. For example, Art 7, rule 1 of the I.C.C Rules provides inter alia, that every arbitrator must be and remain independent of the parties involved in the arbitration". Furthermore, Rule 2 requires a prospective Arbitrator to "disclose in writing to the secretariat any fact or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties….".

In international arbitration, the nationality of the arbitrator may be relevant. Section 44(10) of the Act enacting article 11(1) of the UNCITRAL model law, provides that except as otherwise agreed by the parties, no person shall be disqualified from being appointed as an arbitrator by reason only of his nationality. However Article 6.4 of the Arbitration rules, enacting Article 11(5) of the UNCITRAL Model Law provides inter alia that the court in making appointment of a sole arbitrator where parties are unable to

do so shall also, "…. Take into account as well as the advisability of appointing an arbitrator of a nationality other than nationalities of the parties." The same procedure and considerations apply in the case of appointment of a presiding arbitrator[68].

The question of nationality is obviously unimportant in a domestic arbitration, than in international arbitration, it has been found to be relevant and the practice is said to be "…. To appoint a sole arbitrator (or a presiding arbitrator) of a different nationality from that of the parties to the dispute. Indeed it is taken to be vertically axiomatic that such a person should be of neutral nationality"[69]. Thus Article 9.5 of the I.C.C. Rules provides inter alia, that,

> *"The sole Arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties"*

Similarly article 6.1 of the L.C.I.A. rules provides that

> *Where the parties are of different nationalities a sole arbitrator or chairman of an arbitral tribunal shall not have the same nationality as any party unless the parties who are not of same nationality as the proposed appointed all agree in writing otherwise.*

[68] Ibid Page 225
[69] Succula Ltd vs Harland and Wolf (1980) 2 Lloyds Report page 81

In order to ascertain whether an arbitrator is prima facie independent he should disclose any circumstances that may call his independence to question.

Section 8(1) and (2) of the act[70] deals with disclosure and provide as follows:

"(1) Any Person who knows of any circumstance likely to give rise to any justifiable doubts as to his impartiality and independence shall when approached in connection with the appointment as arbitrator forthwith disclose, such circumstances to the parties.

(2) The duty to disclose imposed under subsection 1 of this section shall continue after a person has been appointed as arbitrator and subsists throughout the arbitral proceedings unless the arbitrator had previously disclosed the circumstances to the parties".

There is a similar provision in section 45(c) of the act in respect of international arbitration.

It follows that if any new circumstances arise in the course of the arbitral proceedings which may affect the arbitrator's independence or impartiality he must disclose it. Most arbitration institutions have their special procedure for disclosure for example, on the I.C.C, Article 7 Rule 2 provides inter alia, that before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and

[70] See Russel on Arbitration 20th Edn. At page 233

disclose in writing to the secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrators independence in the eyes of the parties. There is a similar requirement in Article 6(2) of the ICSID Arbitration rules.

4.8.3 Impartiality

One of the hall marks of an arbitrator is impartiality. As a judge he is expected to hold the scale evenly between the parties. This means that he must be free from bias and undue influence and be objective. He must not come to the arbitration with a pre-conceived position or give such an impression or indeed allow such an impression to be created. He must be open to evidence and to agreement, and must bring a fresh mind to bear on these.

One other important aspect is the personal contact or communication of an arbitrator with one party during the reference. Although an arbitrator is appointed by a party, once he is duly appointed, he must not allow his judgment to be influenced by his appointer. He must maintain a judicial approach. In this connection it has been said that.

> *An independent and impartial arbitrator must not engage in any exparte Communication with the parties regarding the merits of the case during the course of proceedings*[71].

[71] Report on the mission insurance case in the wall street journal of 14th February, 1990 P. 1

Still on this, rule 5(3) of the international Bar Association, (I.B.A) ethics for International Arbitrators, 1989, provides as follows:

> *Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives. If such communications should occur, the arbitrator shall notifythe other party or parties and the arbitrators of its substance.*

The position has also been expressed as follows:

> *The Arbitrators selected, one by each side ought not to consider themselves the agents or advocates of the party who appointed them. When once nominated, they ought to perform the duty of deciding impartially between the parties and they will be looked upon as acting corruptly if they act as agents or take instructions from either side*[72].

Even undue social interaction by an arbitrator with either party or his representative is to be avoided. Thus where a presiding Arbitrator after rendering an award and before it was confirmed was discovered to have spent two nights in the hotel room of a female lawyer representing the successful party in the arbitration, a challenge was successfully brought against him[73].

[72] Craig, pak and Paulson at Para II 13.03 page 38
[73] Ibid at Page 40

It is not always easy to determine what may or may not amount to a likelihood of bias. In this connection the observations of the authors of I.C.C. Arbitration[74] are very instructive. They said inter alia that

> *An Arbitrator may be biased intellectually or financially. The most classic case of the former is where the arbitrator has previously served as a counsel to the party appointing him and had given legal opinions on points in issue. Some commentators have viewed such participation as an absolute bar to serving as a party appointed arbitrator, even with the agreement of the party.*

They also noted that it has been said that, "it is a more serious obstacle to impartiality to have given prior consultation in a case than to have ties of friendship with the party. Ties of friendship may be disregarded in a matter of professional rigor, but pride in adhering to one's earlier opinion is a stronger emotion.

With further reference to financial independence which may create likelihood of bias, the authors explained: Lack of financial independence is most evident when the nominee is otherwise employed by the nominating party or has some other financial interest in the arbitration such economic interest, creating a relationship of subordination between the party and the arbitrator or a pecuniary interest in the outcome are strong grounds for challenge"[75].

[74] See Again Arbitration Rules, Article 10 (2)
[75] SS. 9 (2) and (3) Arbitration and Conciliation Act

4.9 Challenge and Replacement of Arbitrators

The challenge of an arbitrator follows from the requirement of independence and impartiality and of appropriate qualification section 8(3)(1) of the Act provides as follows:

> *"(3) an arbitrator may be challenged: (a) if circumstances arise that give rise to justifiable doubts as to his impartiality or independence"*[76].

A person is not permitted to challenge an arbitrator appointed by him except for reasons of which he becomes aware after the appointment has been made.

The parties to an arbitration agreement may provide in the agreement or subsequently for the procedure to be followed in challenging an arbitrator. Where no procedure is agreed upon by the parties, the party who intend to challenge an arbitrator must within fifteen days of becoming aware of any circumstances which will be sufficient ground for a challenge send to the arbitral tribunal a written statement of the reasons for the challenge[77].

The detailed procedure is set out in article 11 and 12 of the arbitration rules. A party who intends to challenge an arbitrator shall send notice of the challenge as above. The challenge must be notified to the other party to the arbitration, who is challenged

[76] Article 11 (2) Arbitration Rules.
[77] Ibid, Article 11 (3)

and to the other members of the arbitral tribunal. The notification must be in writing and state the reasons of the challenge[78].

With regard to international arbitration, the procedure is similar to the challenge in a domestic arbitration. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also after the challenge, withdraw from his office, but this does not imply the acceptance of the validity of the grounds of challenge[79]. Where the challenge is sustained, the challenged arbitrator will be removed and his mandate to act terminated. A substitute arbitrator will then be appointed[80]. Where an arbitrator is challenged, if there is good ground for the challenge, he should be trusted to resign on his own as an honourable person.

An arbitrator may be replaced where his mandate is terminated in the course of the proceedings; or he is otherwise unable to act e.g where he is removed following a successful challenge, he withdraws or his mandate is withdrawn by agreement. In any of these cases, a substitute arbitrator will be appointed in accordance with the same rules and procedure that applied to the appointment of the arbitrator who is being replaced.

Section 46 which deals with international arbitration would appear to re-enact substantially the provisions of Article 13 namely:

[78] See S. 45 (6) of the Act and Article 12 of the Arbitration Ruels
[79] See S. 10 Arbitration Act
[80] See Redfern and Hunter Op. cit page 282 - 283

(a) That where an arbitrator dies or resigns during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure in section 44 and 45 for appointing the arbitrator being replaced.

(b) That where an arbitrator fails to act or in the event of the dejure or defacto impossibility of his perfuming his functions, the procedure in respect of the challenge and replacement of an arbitrator in an international arbitration i.e as in sections 44 and 45 of the Act shall be followed.

In this connection, article 14 of the Arbitration rules provides that where the sole or presiding Arbitrator is replaced, any hearing held previously shall be repeated; but if any other arbitrator is replaced such previous hearing may be repeated at the discretion of the arbitral tribunal.

4.10 Termination of Arbitrator's Mandate

The mandate of an arbitrator may be terminated and such mandate shall terminate:

(a) If he withdraws from office, or

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

(c) If for any other reason he fails to act without undue delay[81].

[81] See Article 30 Arbitration Rules and Section 33 Arbitration Act

The fact that an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator is not to be construed as implying the existence of any ground or circumstance for termination or challenge. The mandate will of course terminate if the arbitrator dies.

4.11 Jurisdiction of Arbitral Tribunal

An arbitrator is appointed to deal with disputes that have arisen in a transaction. Therefore he will only be able to exercise his powers and functions if he deals with the matters for which he was appointed. He cannot arbitrate in respect of matters which are outside the transaction or which are not in dispute or do not come within the dispute which he is supposed to resolve. He must not exceed his mandate. If he does not keep within it but tries to go outside it he will be exceeding his jurisdiction and accordingly he may be removed or his award set aside on that ground. It is the duty of the tribunal to ascertain for itself, whether or not it has jurisdiction in the matter. It will ascertain this by obtaining from the parties and studying the arbitration agreement, the notice of arbitration and any other documents which are relevant to the issue of Jurisdiction. Once it is satisfied that it has jurisdiction, it can proceed with the arbitration, leaving either party to challenge it, if it is so desired. Where it finds that it has no jurisdiction it should so rule and inform the parties and withdraw.

Where an arbitrator exceeds his jurisdiction, he may be challenged. The challenge may be partial i.e relating only to some of the issues or claims as in a construction agreement or it may be total. i.e affecting the whole process e.g where the issue in dispute arises after the appointment of the arbitrator. The challenge to the jurisdiction is different from the challenge provided for in section 8 and 45 of the arbitration Act and Article 10 ie on the ground of lack of impartiality and independence or on the ground of lack of qualification. Section 12(3) of the arbitration and conciliation Act provides that in any arbitral proceedings, a plea that the arbitral tribunal does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such a plea by reason that he has appointed or participated in the appointment of an arbitrator[82]. Similarly, a party may raise a plea that the arbitral tribunal is exceeding the scope of its authority. It must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceeding and the tribunal may in either case admit a latter plea if it considers that the delay was justified.

The arbitral tribunal is competent to rule on a question pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement. The tribunal may rule on any pleas as to jurisdiction either as a preliminary question or in an award on the merits and such ruling shall be final and binding. Thus in ruling on the challenge of its jurisdiction the arbitrator may take one of three steps.

[82] See N.N.P.C. vs Chifco Nig. Ltd (2011) 2 CLRN, Page 101 at page 112 para 15.

1) He may decide as soon as the challenge is made that he has no jurisdiction. If he does, then the proceedings come to an end. The other party will decide what steps if any to take.

2) He may decide to issue an interim award. In this case he will usually need to take evidence and hear arguments and submission. In the end he will make an interim award. If he decides that he has jurisdiction, he will proceed and the party who is aggrieved by the decision may take appropriate steps

3) He may join the issue of jurisdiction with the merit of the case. Sometimes the issue of jurisdiction may depend very much on facts. In such case he may have to take much evidence and arguments relating closely to the merits of the case and render an award which will include his decision both on the issues of jurisdiction and also the merits[83]. The other party may then decide whether or not to attack the award. Absence of Jurisdiction ab-initio is not fatal to arbitration because the parties may decide to confer jurisdiction on the arbitrators, but jurisdiction cannot be unilaterally conferred by one party.

4.12 The Arbitration Rules

The conduct of arbitration is of paramount importance to the parties. Before the arbitration and conciliation decree 1988, the parties were in particular in domestic arbitration free to chose their rules of procedure subject to any requirements of public

[83] See I.C.C. Arbitration Rules Article 15 (1)

policy by the law of the place of arbitration. However the position is now governed by the Arbitration and conciliation Act. First, section 15(1) provides that:

> *"The arbitral proceedings shall be in accordance with the procedure contained in the arbitration rules set out in the first schedule to this act".*

However a party who knows that any provision of or requirement under these rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object[84]. Secondly Section 15(2) provides:

> *Where the rules referred to in subsection (1) of this section contain no provision in respect of any matter related to or connected with particular arbitral proceedings the arbitral tribunal may subject to this Act conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair nearing.*

Furthermore, Article I of the rules provides that"

> *These rules shall govern any arbitration proceeding except that where any of these rules is in conflict with a provision of this act the provisions of this act shall prevail.*

Again article 15(1) provides that:

> *Subject to these rules the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case*

Finally with regard to international commercial arbitration, section 53 of the Act provides as follows:

> *Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing*

[84] Arbitration Rules, Art 6.1

> *that dispute in relation to the agreement shall be referred to arbitration in accordance with the arbitration rules set out in the first schedule to the Act, or the UNCITRAL Arbitration rules or any other international arbitration rules acceptable to the parties.*

The effects of these provisions are first, that in domestic arbitration the parties as well as the arbitral tribunal are bound by the provisions of the arbitration rules in the first schedule. Thus the much flaunted party autonomy in respect of arbitral procedure is very much more limited in domestic arbitration under our law than under the UNCITRAL Model law. Article 19 to the model law provide simply that subject to the provisions of the law "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". Under our law, the parties are bound to adopt the arbitration rules in domestic arbitration; they cannot draw up an arbitration agreement with provision that conflict with the arbitration rules. It also follows that in a domestic arbitration the parties are not free to adopt the rules of arbitration institutions like the ICC if the rules conflict with the Arbitration rules in the first schedule. Where no provision are made the arbitral tribunal may conduct the proceedings in a manner that ensures fair hearing e.g. that the rules of natural justice are observed. This includes that the parties be treated with equality and each party be given an opportunity of presenting his case.

It also follows that in the absence of a provision in the rules the arbitral tribunal is free to adopt any suitable procedure including the rules of arbitration such as the I.C.C. Secondly in international commercial arbitration the arbitration rules in the 1st schedule are not mandatory but optional. The parties may decide to incorporate the UNCITRAL Arbitration rules or those of any other international institutions. Since they are not bound to apply any of these they can infact apply their own rules. The point should

however be made that the provision of the Arbitration rules in the 1st schedule are practically a verbatim copy of those of the UNCITRAL Arbitration rules.

Also the UNCITRAL model law on which the Arbitration and conciliation Act was based retains the autonomy of the parties by providing that:

> *Subject to the provisions of the law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*

This characteristic autonomy of the parties in international arbitration is contained in the rules of most of the international arbitration institutions for example the I.C.C. rules provides that.

> *The proceedings before the Arbitral tribunal shall be governed by these rules and, where these rule are silent by any rules which the parties or failing them, the arbitral tribunal may settle on, whether or not reference is hereby made to the rules of procedure of a national law to be applied to the arbitration*[85]

4:13 Place of Arbitration

The parties to an arbitration may and usually chose the place of arbitration. This may not be a serious problem in a domestic arbitration especially in a relatively small country. However in International Arbitration, the venue of the arbitration can be important for legal political and economic considerations.

Where the parties have not chosen the venue the arbitral tribunal, may do so. In this connection section 16(1) of the Act provides;

> *Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral*

[85] See Arbitration and Conciliation Act, Section 16 (2)

tribunal having regard to the circumstances of the case, including the convenience of the parties[86].

Similarly, unless otherwise agreed by the parties the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties or for the inspection of documents, goods or other property[87]. Under the arbitration rules, the tribunal may determine the venue of the arbitration within the country or place agreed upon[88] and the tribunal may meet any place it deems appropriate for inspection of goods, other property or documents[89].

In deciding on the venue the arbitral tribunal will take into account several factors which will be considered in the unfolding paragraphs.

4:13:1 Legal Consideration

The law of the place of arbitration (lex arbitri) governs the procedure, at least the mandatory rules. So if the parties or one of them is foreign to the law of the country there may be problems. The legal environment ought to be a friendly and conducive one.

4:13:2 Political Consideration

The venue should be a place where there is no political antagonism against any of the parties resulting in unnecessary inconvenience. This may take the form of refusal or delay of entry, uncomfortable and embarrassing shadowing or restrictive treatment of parties, arbitrators and even witnesses.

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[86] Section 16 (2) Arbitration Rules
[87] Ibid, Article 16 (3)
[88] Section 76 (2) Arbitration Act
[89] Ibid Section 16 (2)

4:13:3 Economic Consideration

The cost of arbitration is an important factor. Conducive as Australia may be it will be imprudent to chose Canberra for an arbitration involving Nigerians and French persons unless for some reasons they find it convenient.

4:13:4 Provision of Facilities

The chosen country should be one where the facilities for the proceedings will be readily available e.g. suitable accommodation, secretarial facilities and support, good transportation good communication and other infrastructure.

4:13:5 Nationality of the parties

This of course is relevant only in international arbitration. In practice, parties usually go for a neutral country and place. Over the years, places like Geneva, London, paris, washington and recently cairo and Kuala lumpur have become popular for arbitration. It is the practice to hold an international arbitration in a country other than that of the parties.

4:14 Law and Language of Arbitration

In domestic arbitration it is obvious that the applicable law is the relevant law of the country. But in international commercial arbitration since there is no international code of procedure the need to consider the applicable law becomes move urgent. Inspite of

this the arbitration and conciliation Act makes little provisions in this respect. Section 4(6) provides that;

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

More importantly in the case of international arbitration, where the parties have not agreed on the arbitral procedure recognition and enforcement of an award may be refused by the court on the ground that the arbitral procedure was not in accordance with the law of the country where the arbitration took place[90].

Sometimes the parties may specify both the proper laws and the procedural law. In ***COMPAGNIE ARMAMENT MARITIME S.A. V COMPAGNIE TUNISIENNE DE NAVIGATION S.A.[91],*** the court observed that it is not now open to question that if parties to a commercial contract have agreed expressly upon the system of law of one country as the proper law of their contract and have settled a different PROCEDURAL law by providing expressly that disputes under the contract shall be submitted to arbitration in another country, the arbitrations must apply as the proper law of the contract, that system of law on which the parties have expressly agreed. Now with particular reference to the lex arbitri in international commercial arbitration the lex arbitri will generally be different from the substantive law of the contract. In considering the importance of the lex arbitri it has been stated that;

> *The concept that on arbitration is governed by the law of the place in which it is held and that this is the seat or forum or*

[90] Redfern and Hunter Op. Cit Pg. 81
[91] (1991) 2 WLR, 1321

> *locus arbitri of arbitration is well established in both the theory and practice of international arbitration*[92].

This view is supported by Article VII - 2 of the New York Convention 1958, Article I (2) of the UNCITRAL Model law and section 52 (2) (vii) of the arbitration and conciliation Act. This appears to be the law and practice inspite of efforts to encourage a theory of delocalization.

In international commercial arbitration therefore, the general rule is that arbitration is governed by the national law of the country in which it takes place. The common exception is the ICSID Arbitration where the proceeding is governed by international law and treaties[93]. Any mandatory provisions of the governing law must be taken into account.

A further problem concerns the place where the award is made as distinct from the seat of the arbitration where these are different. This often arises where the award is circulated for signatures. The question may arise as to where the award is made. The predominant view would appear to be that the award is part of the proceedings and should be deemed to take place at the seat of arbitration. There is however the other view that the award is made where the last signature is subscribed and that should be the place of award. In ***HISCOX V OUTHWAITE***[94] where an arbitration was held in England but the award was signed in paris the award was held to be made in Paris. However S. 26 (3)(c) of the arbitration and conciliation Act would appear to have concluded the matter. It provides interalia that "the place of the arbitration shall be deemed to be the place where the award was made".

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[92] Redfarn and Hunter, Op. Cit, P. 299
[93] See Article 19 (2) ICSID Convention
[94] 1965 ALL ER Page 71 at 77

The language of the arbitration on the other hand is of particular importance especially in a foreign arbitration. Though it is desirable that the Language should be the language of the contract this need not be so especially where the arbitrators are appointed by a third party. Where one or more of the arbitrators do not understand the language or do not have sufficient knowledge of it, an interpreter may be employed. This of course is not only likely to increase cost, but it may jeopardize the fairness of the proceedings, because of the likely inacuracies especially because not only documents but also oral evidence may have to be interpreted.

It is usual for the parties to agree on and determine the language of the arbitration in the arbitration agreement. They may of course determine this at any time before the commencement of arbitration. Where the parties fail to determine the language or languages, the arbitral tribunal will determine the language or languages to be used, bearing in mind the relevant circumstances of the case. Article 17.1 of the Arbitration rules provides that the arbitral tribunal shall "promptly after the appointment determine the Language or languages to be used in the proceedings. Such circumstances of the case would include the language of the contract the language of the parties the lawyers and of the arbitrators.

Unless the parties or the arbitrators express a contrary intention the language agreed by the parties or determined by the arbitral tribunal shall be the language to be used in any written statements by the parties in any hearing, award or decision or any other communication in the course of arbitration. If there is oral hearing the language will be similarly determined.

As stated earlier, documents or proceedings may have to be translated or interpreted. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language agreed upon by the parties or determined by the arbitral tribunal as above. In particular, the statement of claim or statement of defence and any supplementary documents or exhibits submitted in the course of the proceedings delivered in their original language shall be accompanied by a translation into the language agreed.

4:15 Pleadings and Evidence

Like a judge in a court trial the arbitrator will usually make on order that parties should make their respective cases to the other party and to the arbitrator. First, the claimant sets out his case against the respondent. On receipt the respondent states which of the facts he admits and those which he denies. He then states his own case in answer to the claimants case. If he has a case against the claimant, he will state it. The claimant on receipt of this will reply and admit or deny the allegations of the respondent. In Nigeria, these pleadings are now regulated by statute[95]. In some countries, the statement of the claimants case and that of the defence are made concurrently but here they are consecutive.

Section 19(1) of the Act provides that

> *the claimant shall within the period agreed upon by the parties or determined by the arbitral tribunal, state the facts, supporting his points of claims, the points at issues, and the relief or remedy sought by him and the respondent shall state his points of defence in respects of those particulars unless*

[95] Arbitration and Conciliation Act, 1988, See Generally Provision of S.S. 19 (1), (2) & (3)

the parties have otherwise agreed on the required elements of the points of claim and of defence.

It also provides that:

The parties may submit with statements under subsection I of this section all the documents they consider to be relevant or they may add as reference to the documents or other evidence they hope to submit at the tribunal[96]

Since it is mandatory to attach the documents, in practice it is usual to exhibit the documents as exhibits or annexure to the points of claim or points of defence[97]. The aim is to give notice of the case to be met which enables either party to prepare his evidence and arguments upon the issues raised and saves either party from being taken by surprise[98]

4:15:1 Points of Claim

At the preliminary meeting the arbitral tribunal will order the points of claim to be filed within a period of time agreed by the parties or failing their agreements as fixed by the arbitral tribunal. The time will take account of the convenience of the parties and the need to facilitate the arbitral proceedings. However the period of time fixed by the arbitral tribunal for communicating written statements including the points of claim and points of defence shall not exceed 45 days. But this time may be extended, if there are reasons to do so. The points of claim are served on the respondent and on the arbitral tribunal. Points of claim should state the following;

a) The facts supporting the points of claim

b) The points at issue; and

[96] S. 19 (2) Arbitration Act
[97] Article 28.1 Rules
[98] See Again Article 19 (1) Ibid

c) The relief or remedy sought by the claimant.

Furthermore, article 18 provides, inter alia that the statement shall include the names and addresses of parties and that a copy of the contract and of the arbitration agreement if not contained in the contract shall be annexed to the points of claim. The claimant may annex to his statement of claim all documents he deems relevant or may add a reference he will submit at the proceedings.

4:15:2 Default of Claimant

If within the period fixed by the Arbitral tribunal the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the proceedings[99]. In practice it does not get to that stage because the claimant will normally apply for extension of time within which to file and communicate the points of claim.

4:15:3 Points of Defence and Counter Claim

The points of defence are filed within a period of time as determined by the arbitral tribunal. They are filed after receipt of the points of claim. The respondent must communicate the statement of defence in writing to the claimant and each of the arbitrators[100]. The statement of defence must reply to the claimants statement of fact, the point at issue and the relief or remedy sought.

The respondent may in his statement of defence, include any counter claim he may have, arising out of the contract or out of the statement of claim for the purpose of a set

[99] See S. 21 a, Arbitration and Article 28 (1) of the Arbitration Rules
[100] See Article 19 (1) Arbitration Rules

off. He may attach any relevant document. The counter Claim must comply with the requirements of points of claim as in Article 18-2 of the arbitration rules. In a court action, a party may set off any claim or counter claim in respect of any claim but in an arbitration this will not be permitted if such matters are not within the dispute referred to the arbitrators.

4:15:4 Amendment of the Claim or Defence

Unless the parties agree otherwise either party may add or supplement his claim or defence during the arbitral proceedings if the arbitral tribunal considers it appropriate to allow such amendment or supplement having regard to the time that has elapsed before the making of the amendment or supplement[101]. Thus, if the arbitral tribunal considers that an amendment will be prejudicial to the other party because it is being made too late it may refuse it[102].

If the respondent fails within the period fixed for communicating the points of defence to do so without showing sufficient cause the arbitral tribunal shall order that the proceedings shall continue.

The arbitral tribunal shall decide which further written statements in addition to the points of claim and points of defence shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

4:15:5 Evidence

[101] See Article 20 of the Arbitration Rules
[102] Bid, Article 20.

At the hearing by an arbitral tribunal, evidence will be taken from the parties as well us prospective witnesses who are well acquainted with the facts grounding the arbitration. The act empowers the arbitral tribunal unless the parties expressly provide otherwise, to examine on oath or affirmation the parties and witnesses appearing before it[103]. This power notwithstanding the arbitral tribunal is not obliged to take evidence on oath or affirmation. It has discretion as to whether or not to exercise the power. If however the agreement stipulates that evidence should be taken on oath or affirmation, then the arbitral tribunal must comply. If the agreement provides that evidence should be taken on oath or affirmation and the arbitral tribunal receives evidence otherwise than on oath or affirmation but the parties raise no objection then that amounts to a waiver of the objection[104]. If an objection is raised but is ignored by the arbitral tribunal, the complainant does not walve such an objection merely because he thereafter participates in the proceedings[105].

If it is expressly provided in the agreement that witnesses should be examined on oath then this implies that oral examination is intended[106] and the taking of evidence by affidavit is not sufficient compliance with the provision[107].

The oaths and affirmation act[108] provides that if an oath or affirmation is required by any law to be made otherwise than in proceedings before a court it shall be made in the form prescribed in schedule 2 of the Act with such variations if necessary as the

[103] S. 20 (5) fot he Arbitration Act.
[104] Prideout vs. Pye 1797 16 Bos and Pul 91
[105] Wakefield vs Wanly Ply Cooking Co., 1864, 34 Bier 245
[106] Banks vs Banks (1835) I Gale 46
[107] Ibid at Page 82
[108] Cap 333 LFN, 1990

circumstances of the case may require[109] if an oath is prescribed by any enactment, an affirmation may be made instead[110]. In any case, a person may make an oath or affirmation in such a manner as the person authorized to administer the same shall consider binding on his conscience[111].

4:16 Making of an Award and Termination of Proceeding

At the conclusion of proceedings the arbitral tribunal is obliged to carefully study the evidence and arguments presented to it come to a decision upon the case and set down such a decision in the form of an award. In making the award the arbitral tribunal has to pay particular attention to certain crucial issues. The way in which such issues are handled determines the validity or otherwise of the award. Neither the act nor the rules stipulate the time from the commencement of an arbitration within which the award must be made. It is of course competent for the parties to prescribe such a time in the arbitration agreement. If they have made such a provision, the arbitral tribunal may be unable to hand down an award within the stipulated time. It is submitted that in such a situation, the arbitral tribunal can extend the time with the consent of the parties. It also seems that such an extension can be done retrospectively[112] if the parties do not agree the arbitral tribunal can extend the time pursuant to section 15(2) of the act which provides that if the rules are silent on a matter, relevant to an arbitral proceeding the arbitral tribunal can conduct the arbitral proceedings in such a manner as it considers appropriate, so as to secure a fair hearing. The arbitral tribunal in the absence of any agreement as to time within which to make the award is however bound to make the

[109] S. 12 of the Oaths Act
[110] Ibid S. 13 (1) and S. 8.
[111] S. 14 Ibid.
[112] A. G. Leventis and Co. Ltd v. jace (1962) 2 ALL NLR 38

award within a reasonable time having regard to the circumstances of each case. If there is unexplained delay by the arbitral tribunal to hand down an award, the parties can terminate the mandate of the arbitrators constituting the arbitral tribunal under section 10 of the act.

Any decision including an award of an arbitral tribunal made up of more than one arbitrator is by a majority of all its members unless the parties agree otherwise[113]. It may not be possible for the arbitral tribunal to secure a majority decision in a particular case. In other words in an arbitral tribunal made up of three arbitrators, for example it may not be possible to get two of them to agree on a decision. In some jurisdiction an impasse is prevented by a provision that if the arbitral tribunal is not able to arrive at a majority decision the presiding arbitrator should make a decision[114]. There is no such provision in the act. It follows that wherever the arbitral tribunal is unable to reach a majority decision the arbitrator have to continue discussion and strive to achieve a compromise unanimous or majority decision.

Article 32(1) of the arbitration rules provides for the various types of awards which an arbitral tribunal can make. This include the final award, interim, interlocutory as well as partial awards. In addition to these two other types of awards has been recognized in arbitral proceedings namely default and consent awards. These awards as stated above have some semblance as recognized in the various types of judgment under the court system.

[113] S. 24 (1) of the Act
[114] Redfern and Hunter, Op. cit P. 369

Section 26 (1) – (3) of the Arbitration act and article 32 of the Arbitration rules provides for the formal requirements of an arbitral award. An award must therefore be in writing and in terms clear and certain so that there will be no argument about them in the future.

It is within the discretion of an arbitral tribunal to introduce the award by recitals. Though they are not essential, recitals are nevertheless useful and are usually added because they help to explain the operative part of the award and show prominently that the tribunal has authority to award as it has done and that it has fully performed its duty. Recitals should be comprehensive and clear and be an adequate introduction of the operative part of the award. An arbitral tribunal cannot by a recital enlarge its powers beyond what is contained in the arbitration agreement[115] but an inaccurate recital will not invalidate the award. However, since an inaccurate recital may lead to a misconstruction of the award, care should be taken to ensure that recitals contain no error.

The operative part is the section of the award that contains the findings and decision of the arbitral tribunal upon the matter in dispute in the reference. It is the only essential part of an award and which alone constitute the award. If recitals are not incorporated once the decision of the arbitral tribunal as contained in this part is clear, and unequivocal, it is immaterial in which form it is expressed. It is most important that the reasons being the basis of which the decision was reached are very clearly set out. Unless the parties had agreed that no reasons are to be given or the award is such on

[115] Price vs Popkin (1839) 10 A & E 139

agreed terms following a settlement under section 25 and 26 (3) of the arbitration and conciliation act.

In addition an award must be signed by the arbitrator or arbitrators as the case may be. If the arbitral tribunal is constituted by more than one arbitrator, the signatures of a majority of them are enough to give validity to the award, provided that the reason for the absence of any signature is stated therein. The award must also state the date on which it was made and the place of the arbitration as agreed by the parties or determined by the arbitral tribunal. This is deemed to be the place where the award was made.

The arbitral tribunal is obliged to deliver a copy of the award duly signed and dated by the arbitrators to each of the parties. This delivery constitutes publication of the award, but the award must not be made public, unless the consent of both parties is obtained. An arbitrator may not delegate the making of his award to another. There is however, no objection to an arbitrator employing a legal adviser to put the award into a proper form and to advise him upon its preparation. The adviser employed should, however be quite disinterested and unconnected, with any party to the dispute. It is usual for the arbitrator to sign a written award at the foot, and for the signature to be attested by a witness. In the case of an award by more than one arbitrator all the arbitrators making the award should execute it at the same time and in the presence of each other. An award does not require to be stamped. Where an award is made under seal, and is delivered merely as an award it requires no deed stamp. It would be otherwise if it were delivered as a deed and not merely as an award[116].

[116] Brown vs Vawser 1804, 4 East, 584

4:16:2 Termination of Proceedings

Arbitral proceedings may be terminated in any of the following circumstances:-

a) When the proceedings are concluded and an award is made or an order of termination is issued by the arbitral.

b) When the claimant withdraws his claim and the respondent does not object. The respondent may, however, object to the withdrawal, and if the tribunal finds that there is a legitimate interest of his requiring that a final settlement of the dispute is obtained, it will uphold the objection and order the proceedings to continue. A withdrawal will not however sustain a plea of res judicata.

c) Where the parties agree on the termination of the arbitral proceeding. Here the arbitral tribunal is bound to order the termination.

d) When the arbitral tribunal finds that continuation of the arbitral proceedings has for any reason become unnecessary or impossible. The tribunal shall inform the parties of its intention to terminate the proceedings and afford them an opportunity to comment.

e) By settlement where before the award is made the parties agree on a settlement of the dispute the tribunal must either order the termination or if requested by both parties and accepted by the tribunal, record the settlement in form of an award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award[117].

Copies of the orders for termination of the arbitral on agreed term must be sent to each party. Any power to terminate an arbitration is rested in the arbitral tribunal not in the court. Section 34 of the act is conclusive on this matter. The section provides that a

[117] S. 27 of the Arbitration Act and Article 34 (1) of the Arbitration Rules

court shall not intervene in any matter governed by this act except where so provided in the act". Therefore all the arguments at common law as to whether or not the court can terminate an arbitration by injunction are irrelevant in Nigeria[118].

4:17 Recourse against Award

There are grounds on which the validity of an award can be impeached in the courts. The court will however confirm the award if the impeachment fails, but if it succeeds the award must be set aside. An application to set aside an award can be made under section 29 of the act. Such an application must be made within three months from the date of the award. There is no provision for extension of time within which to make the application and consequently such a request must be dismissed. The award will be set aside only if the aggrieved party furnishes satisfactory proof to the court that the impugned award contains decisions on matters outside the scope of the submission.

An arbitral tribunal must decide the dispute submitted to it in accordance with the terms of the agreement made by the parties. Consequently it is incompetent for the arbitral tribunal to award what it considers to be a fair compromise or an equitable settlement of the matter before it[119]. Indeed it is expressly provided in the act that the arbitral tribunal shall not decide unless the parties have expressly authorized it to do so.

Under section 30 of the act, the court has an unfettered discretion to decide whether or not to set aside an award. Misconduct on the part of the arbitrator is one of the grounds upon which the court can exercise this discretion. Misconduct in this context has acquired a technical meaning. It certainly does not refer to the personal character of the

[118] Mustill and Boyd Op. Cit page 518 – 823.
[119] Re-Green and Bolfour 1890, 62 LT, 97

arbitrator but refers to such a mishandling of the arbitration as is likely to lead to a substantial miscarriage of justice[120].

The courts have given the word a very wide interpretation to cover wide range of irregularities including amongst others where any of the parties is not notified with respect to te place and time of meeting as well as the arbitral tribunal refusing to hear evidence on a material issue and where the tribunal hears the evidence of one party without listening to the evidence of the other. The list of instances is in exhaustive.

Another ground where an award may be set aside is improper procurement of the arbitral proceedings or award. An arbitral proceeding would be held to have been improperly procured if either of the parties misconduct himself in the negotiations culminating in the execution of the submission. An example would be where one of the parties was induced by fraud or misrepresentation on the part of the other to sign the submission. In that case the court may set aside the resultant award. It is on the other hand, easier to imagine situations in which an award itself would be said to have been improperly procured. Any willful deception or fraudulent concealment or suppression of material evidence by either of the parties would warrant an application to set aside the award[121]. The result would be the same where the arbitral tribunal depends wholly on hearsay evidence which is inadmissible. Further an award can be set aside for perverseness of the arbitrator, where having regard to the evidence the award cannot be

[120] Williams v. Wallis and Co (1914) 2KB 478
[121] South Sea Co. vs Bumstead 1734 12 eq Las 630

supported, the arbitrator can be said to be guilty of perverseness. An example is where the award is overwhelming against the weight of the evidence led at the proceedings[122].

The legal effect of setting aside an award is that an award once set aside renders the entire arbitration a nullity. The authority of the arbitral tribunal which made the award is terminated and it becomes functus officio. The parties are returned to their status quo ante. Thus the time between the commencement of the arbitral preceding and the date of the order setting the award aside is excluded from the running of time for the purpose of limitation of action. Similarly if the court orders the cessation of arbitration after its commencement, the period between its commencement and the order is excluded from computing the period of limitation.

4:18 Judicial Intervention in Arbitration

The essence of commercial arbitration is to avoid court proceedings in the resolution of commercial disputes. The parties having chosen their judges ought to stick to them and abide by their decision and it negates the arbitral process if the court can interfere freely in the process. Thus section 34 of the act provides "a court shall not intervene in any matter governed by this act except where so provided in the act". This provision was taken from Article 5 of the UNCITRAL Model law on International Commercial Arbitration.

The act however permits the court intervention in the following areas, namely, stay of court proceedings, revocation of arbitration agreement, appointment of arbitration,

[122] Pyizer Products Ltd vs Arifatu Favora CHJ/6/73/1

attendance of witnesses production of documents, setting aside of award, remission of award, enforcement of award and refusal of enforcement.

The stay of proceedings can be brought under section 4 and 5 of the act. The applicant can make his application not later than when submitting his first statement on the substance of the dispute. The taking of merely formal steps in the proceedings will not deprive him of the right to apply for stay. The court action does not stop the arbitral process which may be commenced or continued and an award made while the matter is pending in court. What is being stayed is the court action and not the arbitration.

Concerning revocation of arbitration agreement, section 2 of the act 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. Once the parties enter into a valid agreement, one of them cannot unilaterally revoke it. Where however, a party has good cause to want to revoke it he must apply to the court for this. Two circumstances may warrant an application under this head, namely supervening impossibility of performance and supervening illegality of per formance. In both cases the result is that the contract to arbitrate is frustrated, giving one party the right to apply to the court under this section for revocation of the arbitral agreement.

On appointment of arbitrators by parties, there may be difficulties either because a party will not make the appointment as agreed or provided or that the two parties cannot agree on a sole arbitrator or the two arbitrators cannot agree on a third arbitrator, where this is required, thus stalling the arbitral process. In such a case unless the agreement provides otherwise, the act gives the court power in a domestic arbitration to

make the appointments and no appeal can be allowed on this ground. In the case of international arbitration the domestic court is not permitted to intervene. The appointing authority designated by the parties performs the function of the court. Thus the appointing authority appoints the arbitrator.

On attendance of witnesses while parties are often able to persuade their witnesses to attend and give evidence at the arbitral proceedings, there may be instances where such potential witnesses require to be compelled. Since the arbitrator has no power to compel a third party to attend, the coercive power of the court is required. This is provided for in section 23 of the Act.

With reference to production of documents, the need may arise for one party to the proceedings to require the other to produce certain documents in the possession and custody of that other and the power of the arbitral tribunal in that respect. The question here is whether and to what extent the court can assist the parties and the tribunals in ensuring that what are required by the parties are produced by the party having possession and custody of them. It seems that section 34 of the act which enables the court to intervene in respect of matters not governed by the act on application by an aggrieved party gives the court power when called upon to make an order for discovery and production of documents.

Another area of intervention by court is setting aside of award by the court. Although an arbitral award is final and binding, there are certain situations when it can be set

aside[123]. The setting aside can only be ordered by a court on application by aggrieved party[124].

On this section 29(1) of the act provides inter alia, that a party who is aggrieved by an arbitral award may within three months, *"……. by way of an application for setting aside the award ….. on the ground that the award contains decisions on matters which are outside the scope of submission"*.

Section 30(1) of the act also provides for the setting aside by the court of an award. It states that;

> *where an arbitrator has misconducted himself or where the arbitral proceedings or award has been improperly procured, the court may on the application of a party, set aside the award.*

Finally section 48 provides for the setting aside by the court of an award in an international arbitration on the grounds set out in the section. Section 29(3) of the act provide for the remission of an award to the arbitrator in a limited circumstance. It provides that where an application is brought before the court for setting aside an award under sub-section (1) of this section, the court may at the "request of one of the parties suspend proceedings for such period as it may determine, to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the ground for setting aside the award".

[123] See Triana Ltd vs Universal Trust bank Plc (2009) 2 CLRN at 300 at 3007. See also chevron Nig. Ltd vs Max Miller International Ltd (2009) 3 CLRN at 366 at 368.
[124] See Aye – Fenus Enterprises Ltd vs Saipem Nig. Ltd (2008) 1 Clrn 27 AND ALSO Okey Jim Nwagbara vs Jadcom Ltd (2008) 2 CLRN at 63.

Another area of intervention by the court is the enforcement of an award. Section 31 of the act provides for the enforcement of an award by leave of the court. An application is made to the court for this and when the order is made the award may be enforced in the same manner as a judgment or order to the same effect with regard to an arbitral award in international arbitration. Section 51(1) of the act makes a similar provision; it states inter alia that;

> *An arbitral award shall irrespective of the country in which it is made be recognized as binding and subject to this section and section 32 of this act shall upon application in writing to the court be enforced by the court.*

It should also be noted that under the foreign judgments (reciprocal enforcement) act cap 152 LFN 1990, a foreign arbitral award may be registered in the High Court provided at the date of the application for such registration the award could be enforced by execution in the country where the award was made.

Last but not the least on the items with which the court can intervene is in the area of refusal of enforcement of an award. Section 32 of the act provides that any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. With regards to award in international arbitration, section 52(1) makes a similar provision. The section sets out details of the grounds for such refusal and provides that the court may post pone its decision and order the provision of security.

Although the act provides for application to court, as stated above it does not make provision for the procedure for such application. Recourse is therefore had to the rules of the High Court. In this case the court means the high court of a state the High Court

of the Federal Capital Territory Abuja and the Federal High Courts. The procedures that have been used in these courts are the same namely by originating summons or originating notice of motion supported by an affidavit[125].

4:19 Enforcement of Awards

Every arbitral award duly made is to be recognized as binding and thus expected to be complied with. The question of enforcement by the winning party arises when there is non compliance with the terms of the award by the defaulting party. The unsuccessful party may be so dissatisfied with the award that he does not wish to implement its terms. In that case he does one of two things. He either commences legal proceedings challenging the award or prepares to oppose any action that may be brought to enforce the award. On the other hand the successful party will be left with no option than to seek to enforce the award through judicial process.

The first option open to the winning party to enforce the performance of the terms of the award is an action at law. It is a principle of common law that a party to an arbitration is entitled to enforce the resultant award by an action at law. Arbitral awards according to the common law, are inherently binding and enforceable. Parties to an arbitration agree in a contract that disputes between them shall be settled by a private tribunal. When a particular dispute is settled by such a tribunal, its awards binds the parties and brings the dispute to an end. This is so because the parties have in effect agreed that their rights in respect of the dispute shall be as stated in the award[126]. The remedy claimable in such an action depends on the terms of the award. The plaintiff

[125] Ekpo v ITA (1960) 4 ENLR 14 at 18
[126] See S. 63 of Limitation Act 1963

may simply claim a declaration that the award is binding[127]. He may on the other hand claim a sum of money ordered by the award, or an order for specific performance of the award.

An arbitrator may be called as a witness in such an action. He may be questioned as to the course of the argument before him and as to what claim were made and admitted. But no questions may be put to him in order to elicit information on how he arrived at the award or to explain or contradict what is on the face of the award which must speak for itself[128]. In an action on the award, certain things must be specifically proved namely:

a) That a submission has bean made or that there is a contract containing an arbitration clause and that a dispute within the clause has arisen.
b) That an arbitrator or arbitrators have been appointed in accordance with the agreement.
c) That an award has been made
d) That the amount awarded has not been paid or that the award has not been otherwise performed.

All the above matter must be affirmatively proved because the principle (all things are presumed to have been duly done) does not apply to arbitration proceedings[129].

If the award is not for the payment of a sum of money but for the doing of some specific act and if damages are not an adequate remedy the court may order specific

[127] K.S.O. Allied products Ltd vs K of a Trading Co. Ltd 1996 (3) NWLR 224 at 254.
[128] Per Fletcher Moulton L.J. in doleman and Sons v Osset Corporation (1912) 3 KB 257
[129] Brittey District Co-operative Society Ltd. Vs Windy Nook and District Industrial Co-operative Society Ltd. 1960 (2)

performance of the Act – for example, in ***WOOD V. GRIFFITH***[130] W and G agreed jointly to purchase an estate out of which W had already paid £7,000 out of the purchase price of £23,000. Disputes arose between them and were referred to an arbitrator who awarded that they should put the estate up for sale and respectfully execute all proper and necessary conveyance and do all other acts necessary to carry the sale into effect. Lord Chanceller Eldom decreed specific performance of the award.

Where only part of the award is good and the other part void, the court may nevertheless decree specific performance of the good part if the two are clearly separable[131]. Ordinarily the court will not enforce specific performance of part of an award if it appears that it cannot be enforced wholly[132]. The court may however decree specific performance of an award if there has been part performance of it. In this context part performance means complete performance of his obligation by the party seeking the decree[133].

As an equitable remedy, specific performance is discretionary and the discretion will not be exercised if:-

(a) Full relief cannot be given to both parties. In ***BLACKETT V. BATES***[134]. The plaintiff was the owner of a colliery firm which ran a railway to River tyne. The railway was constructed under a private arrangement over the land of six land owners including the defendant. A dispute arose between the parties and an action instituted in pursuance of the dispute was referred to arbitration. The award, inter alia, directed a lease in the form set out in a schedule to be executed

[130] 1818 (1) wills 34
[131] Bucc Kuch (Duke) vs Metropoliton Board of Works (1972) L.R. 5 HL 418
[132] See Chirstopher Browns Case 1954 1 Q.B.D 8 at 9.
[133] Selby vs Whitebreed & Co. 1917 1 KB 736
[134] (1965) L.r- I Hl App. 117

by the defendant in favour of the plaintiff. It further awarded that in addition and without prejudice to the exceptions and reservations in favour of the defendant contained in the lease, the defendant should have during the continuance of the lease, full power of passing and re-passing with wagons etc along the railway and that the plaintiff should during the continuance of the lease keep the railway in good repair and condition for the use and exercise of the liberties and privileges awarded. The court refused to decree specific performance of the award on the ground that it could not give full relief to both parties. Lord cranworth L.G., felt that the rights of the parties in respect of specific performance are the same as if the award had been simply an agreement between them. Had it been an agreement would there have been a case for specific performance? I think not, and for this short and simple reason hold that the court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks, the lease; but the defendant cannot get what he is entitled to, for his rights is not a right to something which can be performed at once but a right to enforce the performance by the plaintiff of daily duties during the whole term of the lease. The court has no means of enforcing the performance of these duties[135].

(b) The award and the submission together constitute unreasonable agreement or an agreement which is not capable of being worked out in a manner consistent with the intention of the parties[136].

[135] Ibid at Page 124
[136] Nickles vs Hancook 1855 QR GM 89. 300

(c) There was an unreasonable delay in seeking the remedy[137].

(d) There was no part performance and because of section 4 of the statute of frauds or its equivalent, the award is not enforceable at law[138].

A party wishing to enforce an award simply lodges an application to the High Court Supplying the following information:-

(a) Duly authenticated original award or a duly certified copy thereof and

(b) The original arbitration agreement or a duly certified copy thereof[139].

The court does not have to recognize and enforce any and every award which is the subject of an application under the section. This is because any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award[140]. Thus under section 31(3) of the act an award may by leave of the court or judge be enforced in the same manner as a judgment or order to the same effect. An application for leave should be made by an originating summons[141] and if it succeeds, the applicant is put in exactly the same position as if he had obtained a judgment in the court. In that case he will be entitled to put in motion any of the actions designed to enforce judgments of the court. In this connection he may take out a writ of fieri facias in order to seize and sell property belonging to the defaulting party[142].

Recognition and enforcement of foreign awards has also been provided for, under section 51 and 52 of the Act which is an adoption from Article 35 of the UNCITRAL

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[137] Ibid at 306
[138] Walters vs Norgan 1792 (2) Cox Ch. 269
[139] See S. 31 (2) fot he Arbitration Act
[140] See S. 32 of the Act
[141] Kuforiji v. Nig. Rly Corpn. 1972 UKR 29
[142] See sherriff and Civil Process Act, 1945 Cap 407 LFN, 1990

model law. Thus on arbitral award shall, irrespective of the country in which it is made be recognized as binding. The procedure shall be upon application in writing to the court in the same manner as applicable in domestic enforcement of awards.

CHAPTER FIVE

CONCLUSION

5.1 Summary

The concept of Negotiation and arbitration as a dispute resolution mechanism have been discussed in five distinct chapters. This chapter is however concerned with summarizing all the contents of this work as well as bringing out the observations and as well preferring recommendations.

ADR are generally non- binding in nature. By this is meant the absence of imposed sanctions. ADR procedures include negotiation, mediation, conciliation mini trial or executive tribunal. While these methods lack the traditional sanction approach adopted by trial courts, arbitration and litigation are adversarial in nature and hence adjudicatory.

These mechanisms are decided in advance by the parties in order to govern the settlement of disagreements that may arise in the event of conflicts in their trade agreements. Thus disagreements are channeled into a problem solving arena early enough to avoid escalation into a full blown dispute.

There are different ADR methods. These include the negotiated method, facilitated method, fact finding ADR and the imposed ADR[272]. The details of these methods had been discussed including the pros and cons of ADR processes.

[272] See Ozonnia Ojielo, Alternative Dispute Resolution (ADR) 2001 at pages 10 - 14

While Arbitration in its current form developed as a result of the apparent inability of the courts to satisfy some of the expectations of people in resolution of disputes[273], ADR arose largely because the arbitral process was becoming unduly expensive and long because of the gradual creeping in of Judicial technicalities of dispute resolution[274]. Thus there began a gradual shift of emphasis from the use of arbitration in commercial dispute resolution to a culture of systematic use of mediation and conciliation which are a formalized form of the age long use of negotiation in the settlement of disputes. The settlement is consensual, the conciliator or negotiator only helps the parties to come to a consensus. He does not adjudicate. With particular reference to commercial disputes, apart from the fact that businessmen prefer private resolution of their disputes, instead of exposure to the machinery available in the glare of regular courts. Here there is the belief that settlement through ADR avoids what may be called Brinkmanship and violence which may arise in an adjudicatory system[275]. This breeds less hostility and antagonism and most importantly saves the business relationship of the parties.

Various mechanisms for the resolution of disputes have earlier been discussed in detail. These include mediation, negotiation, litigation, conciliation, mini trial and Arbitration. It must be stated here that ADR provides greater room for

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[273] See ladan, M.T. A Crisis of Justice in Nigeria in Africa Events magazine, Vol. 5 No. 1 Tannay 1989, London, Pp. 32 to 34. Also see Ladan, M.T. New approaches to dispoute resolution, in the new Nigerian Newspaper, Kaduna, Sunday December 1st and 8th 1996 P. 145 each.

[274] See A. A. Asouzu, International Commercial Arbitration and African States (Combridge University London 1999) Chapter 7 ICSID Arbitraiton and Concilliaiton. The African experience. See also A. O. Rhodes – Vivour "Sovereign Immunity and Arbitral proceedings" 2003, Tournal of the Nigerian Branch CL Arb. Vol. 1 No. 4

[275] See 1996 report of the Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution, June 18th, 1996 at page 6 – 7 (Common Wealth of Massachusetts)

compromise than the adjudicatory systems of litigation and arbitration[276]. The gravitation towards ADR has been welcomed in every sector where commercial dispute arise in the ordinary course of events. Indeed the literature on the subject has recently become enormously overwhelming because of the increasing use of ADR processes in various fields of human endeavour.

Usually, negotiation[277] as an ADR process consists of giving up something in order to get something in return. It involves discussions or dealings about a matter with a view to reconciling differences and establishing areas of agreement, settlement or compromise that would be mutually beneficial to the parties. Compromise therefore implies flexibility on both sides. Flexibility derives from a genuine wish on the part of the parties to reach agreement.

Negotiation is a voluntary, usually informal, unstructured process used by disputants to reach a mutually acceptable agreement[278]. At the option of the participants the process may be kept strictly private. There is no third party-facilitator.

Negotiation is not explicitly recognized by statute in Nigeria as an alternative mechanism for dispute resolution, but it has become a useful ADR mechanism in the creation of new relationships and in the resolution of disputes amicably between disputants. It is highly accommodated in Nigeria. One important, though

[276] Refer to, Presenting Dispute Resolution to Judges, Developed by the American bar Association Section of Dispute Resolution Washington D.C., 1996 at P. 10

[277] See Generally Goldberg, Sauder and Rogers, Dispute Resolution, 1992, 2nd Edu. Little, Brawn and Co; Boston U.S.A., 17 – 102.

[278] See ladan, M. T., Alternative dispute resolution in Nigeria; Benefits processes and Enforcement page 254.

indirect reference to negotiation in Nigeria can be found in section 26 of the Nigerian investment promotion Decree No 16 of 1995.

Some of the factors that limit negotiation could be that the negotiation is probably beyond the parties or their representatives to the negotiation. Effective negotiation can help in facilitating settlement of disputes, reduce the burden of the courts, save money, time and energy. A good negotiator therefore must be fair to both parties to enable him settle the issues amicably. Thus negotiators should strictly define both criteria and steps to be used in implementing their decision.

An agreement by the parties to submit to Arbitration all or certain disputes which have arisen between them in respect of a defined legal relationship whether contractual or not is what is defined as an arbitration agreement[279]. An arbitration agreement must satisfy normal legal requirements of a contract such as consensus, capacity and legal relationship. Like any other contract, terms must be clear and certain. There must equally be a valid underlying substantive contract in existence and terms of which are certain and enforceable. Thus unless a contrary intention is expressed therein an arbitration agreement shall be irrevocable except by agreement of the parties or by the leave of the court[280].

An arbitral agreement[281] must contain the reference, the parties the arbitrators, the place of arbitration, the applicable law, the arbitration procedure and the language of the arbitration[282]. Thus a cause of action is barred if action is not

[279] See Black's law Dictionary (St. Paul, Minni West Publishing Co. 1990) 6 Edn. Page 105
[280] See S. 2 Arbitration and Conciliation Act 1980
[281] See C.N. Onuselogu Int. Ltd Vs Afribank Plc, (2006) ALL FWLR Pt. 310 at 1744 page 1748
[282] See Generally SS. 1, 16 & 18 of the Arbitration and Conciliation Act 1988.

taken in court or a claim made in an arbitration within the period stipulated by law e.g six years in the case of a contract. Under the act, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received, by the other party unless otherwise agreed. Statutes relating to limitation of time of action also apply to arbitration[283].

The arbitral tribunal is composed of a sole arbitrator or more than one arbitrator but more usually of three arbitrators. It is important for parties to be quite clear as to whether they want to appoint a third arbitrator and chairman of the arbitral tribunal. Thus the arbitrator may be appointed by agreement by a third party by two arbitrators or by the court. The procedure depends on whether the tribunal consists of a sole arbitrator or of three arbitrators. In the event of failure to agree on the arbitrator, one party may apply to the court to appoint an arbitrator and the court may do so[284].

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

Like any other professional certain qualities are required of an arbitrator, some of these qualities are innate while others can be acquired by training and experience. The common qualities required of a good arbitrator are qualification and

[283] See Tulip (Nig. Ltd) v Noleggioe Tran Maritime S.A.S. (2001) ALL FWLR (Pat. 578) at 945.
[284] See General S. 6 and 7 of the Arbitration and Conciliation Act 1988.

experience, independence and impartiality. The challenge of an arbitrator follows from the requirement of independence and impartiality. The parties to an arbitration agreement may provide in the agreement or subsequently for the procedure to be followed in challenging an arbitrator. Where no procedure is agreed upon by the parties the party who intends to challenge an arbitration must within 15 days of becoming aware of any circumstance which will be sufficient ground for a challenge send to the arbitral tribunal a written statement of the reason for the challenge[285].

The mandate of an arbitrator may be terminated and such mandate shall terminate if he withdraws from office or if the parties agree to terminate his appointment by reason of his inability to perform his functions or if for any other reason he fails to act without undue delay an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator is not to be construed as implying the existence of any ground or circumstance for termination or challenge. The mandate will of course terminate if the Arbitrator dies.

It is the duty of the tribunal to ascertain for itself whether or not it has Jurisdiction in the matter. It will ascertain this by obtaining from the parties and studying the arbitration agreement, the notice of arbitration and any other document which are relevant to the issues of Jurisdiction. Once it is satisfied that it has jurisdiction it can proceed with the arbitration leaving either party to challenge it, if so desired. Where it finds that it has no Jurisdiction, it should so rule and inform the parties and withdraw. Where an arbitrator exceeds his Jurisdiction he may be challenged.

[285] See S. 9 (1) 2 Ibid.

The arbitral tribunal is competent to rule on a question pertaining to its own Jurisdiction and on any objection with respect to the existence or validity of an arbitration agreement[286].

In domestic arbitrations the parties as well as the arbitral tribunal are bound by the provisions of the arbitration rules. Under Nigerian law therefore the parties are bound to adopt the arbitration rule in domestic arbitration

The parties to an arbitration whether domestic or international may and usually chose the place of arbitration. This may not constitute a problem in a domestic arbitration[287]. In international arbitration the venue of the arbitration can be important for legal, political and economic considerations. Where the parties have not chosen the venue, the arbitral tribunal may do so. It is however advisable that parties specify the venue of arbitration in the terms of their contract so as to avoid undue delay when the dispute does occur as indeed it may. Often times state parties want the venue to be within their own territory. This is very wrong and should be discouraged at the onset. A sovereign state who is minded to do justice in a contract she entered into with a private individual should be bold to submit herself to trial outside her own environment.

In domestic arbitration it is obvious that the applicable law is the relevant law of the country. In international commercial arbitration the general rule is that arbitration is governed by the national law of the country in which it takes place.

[286] Ibid Section 12 Generally
[287] This is obviously without prejudice to the proviso Contained in Section 16 (2) of the Arbitration Act 1988. In Practice parties to arbitration do not normally provide otherwise.

It is usual for the parties to agree on and determine the language of arbitration in the arbitration agreement at the onset, so as to save themselves and their arbitrators the problem of having to determine the applicable law to the dispute based on either delocalization theory which are subject to a lot of criticisms. The issue of applicable law is fundamental as a lot of issues in arbitration practice depend on this. Where one or more of the arbitrators do not understand the language or do not have sufficient knowledge of it, an interpreter may be employed.

Pleadings in an arbitration usually takes the format enabling the claimant to set out his case against the respondent. On receipt the respondent states which of the facts he admits and those which he denies. He then states his own case in answer to the claimant's case. If he has a case against the claimant, he will state it. The claimant, on receipt of this will reply and admit or deny the allegations of the respondent. In Nigeria these pleadings are regulated by statute[288]. Unless the parties agree, otherwise either party may amend or supplement his claim or defence during the arbitral proceedings. At the hearing by an arbitral tribunal, evidence will be taken from the parties as well as prospective witnesses who are well acquainted with the facts grounding the arbitration. The tribunal may examine on oath or affirmation the parties appearing before them.

At the conclusion of the proceedings the arbitral tribunal is obliged to carefully study the evidence and arguments presented to it, come to a decision upon the case and set down such a decision in the form of an award. Any decision

[288] See generally S. 19 of the Arbitration and Conciliation Act 1998.

including an award of an arbitral tribunal made up of more than one arbitrate is by majority of all its members unless the parties agree otherwise. The arbitration rules provides for the various types of awards which an arbitral tribunal can make. This include final award, interim, interlocutory as well as partial awards. In addition default and consent awards are also recognized in arbitral proceedings.

Every Arbitral award duly made is to be recognized as binding and thus expected to be complied with. A dispute cannot be said to have been settled if a party cannot readily enforce the award or judgment in his favour. The efficient and effective recognition and enforment of arbitral awards is critical to the raison d'etre of arbitration[289]. The question of enforcement by the winning party arises when there is non compliance with the terms of the award by the defaulting party. The remedy claimable in such action depends on the terms of the award.

5:2 Findings

An improved investment climate is essential to economic growth and the eradication of poverty. The nature of the legal system is a key factor in assessing the country's investments climate. Foreign business as well as local investors are concerned about the legal environment in which they will be operating. An investor is concerned about the security of the investment and the possible effect or impact of disputes. An investor wants to be assured that the available dispute resolution mechanism in the investor country is effective. Is it readily available?

[289] Asouzu Asouzu, "African States and the Enforcement of Arbitral Awards: Some Key issues, (1999) 15 Arbitraiton International page. I.

Is it affordable? Is it transparent, Stable and Predictable and would any award or judgment be enforced without delay[290]?

Commercial men and women are by nature and practice of their business in a hurry. When a dispute arises in their business transaction they want their rights and liabilities determined as soon as possible without undue waste of time. This is to enable them get on with their business. They would further prefer a situation where their differences are ironed out in a friendly congenial and business like atmosphere. They would also prefer a situation where the matter in dispute is resolved by persons who are experienced and knowledgeable in the particular subject matter of the dispute. These and more are lacking in the courts and hence the resort to arbitration and other dispute resolution methods.

Some disputes are sensitive and of a confidential nature and disputants would wish to settle them in private rather than in the glare of public proceedings. In addition, the complexity of litigation had greatly increased the cost to disputants who are quite naturally anxious to reduce them. This is particularly so where the claim involve small sum which are hardly worth the expenses of litigation. These are matters of grave concern to businessmen who therefore sought alternative methods of resolving their disputes. These types of circumstances are those that have given rise to search for alternative methods of dispute resolution, in contrast to litigation.

[290] Rhodes Vivour, Arbitraiton and Alternative Dispute Resolution as Instruments for Economic Reform Page 1.

Arbitration is a procedure for the settlement of disputes under which the parties agreed to be bound by the decision of an arbitrator whose decision is in general, final and legally binding on both parties. The process derives its force principally from the agreement of the parties and in addition from the state as supervisor and enforcer of the legal process. So where two or more persons agree that a dispute or potential dispute between them shall be decided in a manner/way legally binding by one or more impartial persons of their choice in a Judicial manner, the agreement is called an arbitration agreement.

It would appear that the overall level of confidence in the institution of government, including the judicial system, correlated with the level of investment and measures of economic performance[291].

However the greatest drawback of Arbitration lies in its nature i.e the relationship between arbitration and judicial power (or the court) is normally explained in the context of two opposing thesis i.e. jurisdictional and contractual theories.

According to the former, the judicial power is the exclusive preserve of the state[292]. The court may also exercise its statutory powers to support or remove arbitrators[293]. But the contractual conception of arbitration is that it is a private

[291] Richard E. Messick, "Judicial reform and Economic Developments: A Survey of the Issues" the World bank Research Observer, Vol. 14 No. 1 February, 1999

[292] Julian D. M. Law, The Applicable Law in International Commercial Arbitration 1978 P. 52 – 54, see also Okezie Chukwunenje, Choose of Law in International Commercial Arbitration Westport Quorum Books 1994 p. 9 – 15.

[293] Lord Mustill, "The Goff Lecture 1996: Too Many laws: 63 JCL Arb (1997, No. 4) P. 248

and contractual judicial procedure wholly dependent on the contract between the parties[294].

In Nigeria the relationship between arbitration and judicial powers has arisen mainly in the context of cases dealing with customary law arbitration[295]. But it is safe to state that arbitration is neither entirely jurisdictional or entirely contractual in nature. It is a private consensual procedure for resolving disputes it might be perceived as a challenge to, or in competition with the state's administration of justice its final outcome - the arbitral award has like a judgment juridical implication. It resolves the dispute with binding effect. A non compliance with an arbitral award could be visited with legal proceedings to secure its enforcement by a court of law. Most importantly, the state provides the basic legal framework within which parties contract and indeed arbitrate. Arbitration begins as a private arrangement between the parties – it continues by way of private proceedings in which the wish of the parties are of great importance, yet it ends with an award that has binding legal force and effect and which on appropriate conditions the court of most countries of the world will recognize and enforce. The private process has a public effect, implemented with the support of the public authorities of each state and expressed through its national law[296].

[294] Panlson: Arbitration Unbound: Award Detached from the Law of the Country of origin ICL Q 30 (1981), 358. See also W.W. Park "The Lex Loci Arbitrator and International Commercial Arbitration ICL Q 32 1983 at 21.
[295] A. A. Kolajo, Customary Lawa in Nigerians Though the Cases (Ibadan Spectrum 2000) Pp. 219 – 234.
[296] Redfern and Hunter, International Arbitration Para. 1 - 16

The essence of an arbitration agreement is to ensure quick dispensation of Justice where the parties do not need to unnecessarily waste time to reach a decision, particularly where the dispute is of a commercial nature[297].

However an examination of the various methods adopted by the parties in the course of the arbitration shows these grounds upon which arbitration is based, is often lost not only by the action of the parties to the arbitration agreement but also by other factors inherent in the process.

For instance where there is non compliance with the term of an award by the defaulting party, the winning party may have no option than to go to court to enforce the awards[298]. The unsuccessful party too may commence legal proceedings challenging the award or prepare to oppose any action that may be brought to enforce the award[299]. It is a principle of common law that a party to an arbitration is entitled to enforce the resultant award by an action at law[300].

In addition to these there are grounds on which the validity of an award can be impeached in the courts. The courts will however confirm the award if the impeachment fails, but if it succeeds the award must be set aside. An application to set aside an award must be made within three months from the date of the award. The award will be set arise only if the aggrieved party furnished

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[297] See Generally Goldbeng, Sauder and Reogers, Dispute Resolution 1992, and Edn. Little, Brown and Coy. Bosten, U.S.A

[298] See Generally S. 31 of the Arbitration and Conciliation Act 1990.

[299] Ibid, Section 32.

[300] Note that avenue or scope for Enforcement or Recognition of International Arbitral Awards are Wider Than Domestic arbitration. These include, Enforcement by action upon the award, enforcement under the foreign judgment (reciprocal enforcement act 1990; enforcement under S. J. under S. 51 of the Arbitration and Conciliation Acts 1990, Enforcement under the New York Convention on the recognition and enforcement of foreign arbitral awards, 1958 and enforcement under the ICSID Convention.

satisfactory proof to the court that the impugned award contain decisions on matters outside the scope of the submission[301].

The lack of coercive power or powers of enforcement is an obvious set back of most forms of alternative dispute resolution. An essential attribute of judicial power is not only the power to decide on the principles of law, but also the power to enforce those decision[302]. By contrast arbitral tribunals are made up of private individuals and their jurisdiction immediately depends on the agreement or consent of the disputing parties before them. Accordingly, the arbitral tribunal's power of compulsion (which are non-existent unless given by legislation) are inferior to those possessed by the courts as organs of sovereign states. The quantum of powers exercised by arbitral tribunals is less than those encapsulated in judicial powers[303]. Flowing from this, it does appear that no other body or institution or authority within the state except an independent and impartial court, can effectively and legitimately administer justice[304] and therefore by implication controlling the arbitral process[305].

In the same vein, a limited role is reserved for the court in the recognition and enforcement of ICSID arbitral awards between states and nationals of other states[306].

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[301] See Generally S. 29, Arbitration and Conciliation Act 1990.
[302] Adesanya vs President of Nigeria, (1981) 2 NCLR 358 at 392: Bronik Motors vs Wema Bank, (1983) ISCNLR 296 at 356. Nwobueze, Judicialism in Commonwealth Africa, (London: Hurst 1977) Pp. 1 – 19.
[303] A redfern and M. Hunter, the Law and Practice of International Commercial Arbitration; (London, Sweet and Maxwell 1999), Para. 7 – 35.
[304] Obaseki J.S.C. in Chief Gani Fawelunin U.N.B.A No. 2 (1989) 2 NWLR Pt. 105 at 558.
[305] Mustill and Boyd, the law and practice of Commercial Arbitration in England. 2nd Edn. (London Butter Worth 1989) P. 4.
[306] A. A. Asouzu, International Commercial Arbitration and African States (Combinge University Press).

The court also has a discretion to set aside an award on grounds of misconduct on the part of an arbitrator. Thus, such a substantial misconduct on the part of an arbitrator which shows a mishandling of the arbitration is conclusive for the court to invoke this power. Improper procurement of the arbitral proceedings or award is another ground upon which the court can set aside the award[307].

Perverseness of the arbitrator having regard to the evidence at hand which weight cannot support the award is yet another ground where the court can set aside an award. The legal effect of setting aside an award is that an award once set aside, renders the entire arbitration a nullity. The authority of the arbitral tribunal which made the award is terminated and it becomes functus officio. The parties are returned to their status quo ante, thus the court has power to order cessation of an arbitration after its commencement.

Further a stay of proceedings can also be ordered by the court[308]. The Applicant must make his application not later than when submitting his first statement on the substance of the dispute[309]. The essence of commercial arbitration is to avoid court proceedings in the resolution of commercial disputes. The parties having chosen their Judges ought to stick to them and abide by their decision and it Negates the arbitral process if the court can interfere freely in the process.

No doubt the extent of court intervention have a great impact on modern day arbitrations, and this is inspite of statutory provision limiting the extent of court intervention. Time lost as a result of court intervention has resulted in the

[307] See S. 30 Arbitration and Conciliation Act 1990.
[308] Owena Bank Ltd vs Vita Construction Ltd and Awor (2006) 5 CLRN, 89 at 90.
[309] Section 5 Arbitration Act 1990

warning interest now accorded arbitration. This is an area that the law ought to have a great impact in the promotion of modern day commercial activities.

5: 3 Recommendations

The essence of arbitration with which this thesis is concerned is that some dispute is referred by the parties for settlement to a tribunal of their own choosing instead of a court. In order that such a method of settling dispute should be effective, it became necessary that some assistance should be lent by the ordinary machinery of law; in particular recourse to this machinery may be necessary for enforcing the arbitrator's decision. Some degree of control by the courts inevitably accompanies the official status thus accorded to duly constituted arbitrations. In as much as arbitrations differ from legal proceedings proper, in the choice of tribunal, all ordinary legal defences are available.

Trade and investment are essential to growth. Effective dispute resolution mechanisms encourage investment and engender economic growth. Today China is regarded as one of the world's fastest growing economies because it focused on four key areas in its bid to bring its legal system in line with world standards and attract investment. The areas were foreign trade, foreign investment, intellectual property and dispute resolution[310].

Investors lay great premium on the availability of effective dispute resolution mechanism as alternative to the court system. Arbitration and ADR are the preferred options. Necessary reform will improve the level of investor confidence

[310] Adedoyin Rhodes Vivour, Arbitration and Alternative Dispute Resolution as Instrumetns for economic reform P. 19.

in the dispute resolution system. Laying a good record of respect for arbitral/ADR agreements and building a system noted for regular contract enforcement is crucial. This builds confidence in the system. Unfortunately delays are creeping into the arbitral process.

Litigations are known to be unduly protracted. The Judge have to adjudicate within the system. It is axiomatic that it is the duty of courts to strive to reach a just decision and such decision must be reached by procedure designed for the purpose, some of which admittedly are too technical and cumbersome for quick resolution of disputes. Because of the enormous number of cases that are filed in courts there is bound to be delay in disposing of them. Protracted litigation can harm business relationship and for this and other reasons bordering on the above dispute resolution has been changing. Alternative methods of dispute resolution have increased attention as possibly providing more appropriate methods of solving particular kinds of dispute

This explains why most agreements respecting contractual or commercial interests between individuals based in different countries reflect arbitration agreement. Parties take to arbitration because proceedings are expected to be short of in built complexities and technicalities associated with court proceedings and they expect their dispute resolved as quickly as possible without the acrimony attendant to litigation. In addition there is the added advantage that arbitration is usually a private and confidential process for the resolution of private civil disputes.

Quick dispensation of Justice in arbitration should be the order of the day. It was so in the past, but things are changing and arbitration is catching up with litigation in lack of speed even though the rules are not complex and are devoid of technicalities associated with court proceedings. The view which is widely held is that this state of affairs is attributable in part to the increasing domination of arbitral proceedings by the lawyers.

Lawyers must avoid importing legal technicalities associated with litigation in to the process to avoid adverse impact on the investment climates. Business lawyers have a significant role in the reform process. They must be prepared to pass on the gospel of arbitration and ADR. The mechanism do not pose threat to their revenue and they should actively encourage their client to take part in the proceedings and in good faiths.

Additionally the attitude of lawyers and others that appear before arbitral tribunals or before court matters arising out of arbitration must positively change as training and education in the dispute resolution techniques should be hastened. The emphasis should not be in avoiding the court in all events but in comprehensively reforming the judicial process and its personnel to make them responsive to the needs of arbitration for efficiency, rapidity and economy - all within fairness[311].

One other great advantage of arbitration is that procedures can be much more easily adopted to suit the resolution of a particular dispute than is in the case in courts. Decisions should be reached by procedures which are not unnecessary

[311] A. A. Asouzu, Arbitration and Judicial Powers, Chapter 11 pages 376 – 377.

slow and expensive. In the western world arbitration proceedings are becoming unnecessarily contentious and slow and that arbitration as an alternative to litigation has not met the yearnings of many. These unnecessary issues should as much as possible be eliminated to put arbitration in the place where it ought to be.

Courts in Nigeria had generally shown a positive attitude to arbitration. They had not regarded it as a challenge to their jurisdiction or authority. Courts play an important supportive role. Legal authorities indicate that Nigerian courts appreciate their supportive role. Our courts should however in the spirit of the object of arbitration and ADR treat applications arising from arbitration and ADR proceedings as urgent applications.

However if arbitration has to be sustained in Nigeria Courts should reasonably be advised to support S.34 of the arbitration act. In any event, sound legal and arbitral policies suggest the retention of essential roles for the court in arbitral matters.

This main advantage of arbitration is no longer feasible as the quick dispensation of Justice which is known within the arbitration circle continue to disappear. It is recommended that for parties to continue to use this medium as a dispute resolution mechanism time must be of essence in this regard. Furthermore, costs which should be reduced to the barest minimum multiply as a result of protracted proceedings by an arbitral tribunal. This is not in consonance with the ideals known in arbitration[312].

[312] See S. 49 and 50 Arbitration Act 1990.

Despite the elaborate provisions of S.49 & 50 of the Arbitration Act, it is doubtful whether reduced cost is still an incentive for preferring Arbitration and Alternative dispute resolution to litigation. But these section deal solely with cost in international Arbitration, part 1 of the Act which deals with domestic arbitration contain no provision on cost of Arbitration. In any event, it is an implied term in a commercial arbitration contract that the arbitrator shall be paid a reasonable sum of money for his services[313]. Similarly an undertaken to pay reasonable remuneration to experts and others invited, or employed to assist the arbitral tribunal should be implied in the contract by which they are engaged.

The Arbitrators can fix cost and incorporate same in the award. As an integral part of the award these decision bind the parties[314]. An award is therefore not final if it is silent on costs and can be set aside on that ground[315].

Also there could be a case of increased cost as both parties have to transport their witnesses to the foreign venue and possibly pay the cost of official interpreters and translators. Hence an international arbitral process is bound to be more expensive and time consuming and the arbitrators may be of the opinion that since the arbitral process is an international process their fees should be paid in hard currency. The parties may not be in a position to do this. It is for this reason that it is recommended that in international trade, contracting parties should insist on arbitration, particularly ICSID arbitration particularly where issues of investment

[313] Brown v Llandovery Terra Cotta Co. (1909)
[314] Re-Gilbert and Wrigat (1904) 20 T.L.R. 104
[315] Re Becker, Shilan & Co. (1921) IKB 391

are involved[316]. The act is however silent on what the parties should do if they consider the fees fixed by the arbitral tribunal excessive and therefore unreasonable it is recommended that they should be able cause such fees to be taxed by the court in order to determine a fair and reasonable amount[317].

Again it is recommended that if the arbitral tribunal fixes fee which are so outstandingly high that they have no relationship whatsoever to the circumstances of the reference, the arbitrators should be held guilty of misconduct for which the award can be set aside[318].

Arbitration is usually a private and confidential process for the resolution of private civil dispute. Confidentiality attaches to the proceedings. Pleadings, written submissions and documents tendered in the course of the hearing are regarded as private documents which are not to be made public[319]. An expert witness called by one party owes an obligation not only to the side for whom he appeared, but also to the other side to respect the confidentiality of the Arbitration proceedings. This element of confidentiality binds the parties, their successors and assigns and extends not only to documents disclosed (in the sense of documents produced as a result of the discovery process) but also to documents generated in the course of the Arbitration. This covers pleadings and written submissions, witnesses proof and exhibits. The confidence extends to transcripts and notes of

[316] Nigal Rawding "protecting Investment Under State Contracts Some Legal and Ethical Issues" Arbitration International, L.C.I.A Vol. II No. 4 London, 1995, 341 at 343.
[317] See Fernly vs. Branson, (1851) 20 L.J. QB 178; Roberts vs Ebenhardt (1857) 28 LJCP, 74; Barres vs Hayward, 1857 H & H 742; Llandchidod wells water Co. vs Hawkaley (1904) 20 T.L.R. 241.
[318] See Re Prebble & Robinson (1892) 2 QB 6021 at P. 604 Per Cord Coleridge C.J and see also in re an Arbitration between Steplun, smith & Co. 36 Sol. J. 464.
[319] Patrick Neil, "Confidentiality in Arbitration" Arbitration International L.C.I.A. Vol. 12 No. 3 London 1996 287 at 289.

the evidence and arguments and also to the awards[320]. Just as arbitration has in a number of cases become unnecessarily slow, so also has the advantage of confidentiality been disappearing speedily. Nowadays, in some cases without real valid grounds a party that has lost seeks the order of the High court to set aside an award. The proceedings in the High court are conducted in the glare of the public. What was confidential becomes an open secret so to speak. This is not saying that because parties have elected to arbitrate, they should be taken to have agreed to be bound by an award no matter how blatantly wrong it is. What those who rightly regard arbitration as providing the parties the benefit that their trade or business profit will not be exposed to the public are against is the mad rush to go on appeal in litigation even on flimsy grounds.

However, because of the role the arbitration Act has assigned to the High court it can be said that the duty to uphold confidentiality is not absolute. It is subject to some exceptions namely; disclosure can be made by consent of the parties by compulsion of law or by leave of court[321]. It has to be recognized that there is an implied obligation of confidence arising out of the nature of the arbitration process and that the parties have chosen to entrust the resolution of their dispute to an arbitrator. If the parties had wanted the court to be the final arbitrator, they would not have chosen to arbitrate. Before a party therefore applies to the court to set aside an award, he must be absolutely certain that he can establish at least one of the grounds contained in section 29 and 30 of the Act for setting aside an award in domestic arbitration and section 48 for setting aside an award in international

[320] Ibid at 289
[321] Science Research Council vs NASSE (1980) AL, 1028, Dolting Baker – marret (1990) 1 WLR. 1205

arbitration. Care should also be taken that not more than necessary disclosure is made in applying for an award to be set aside.

Privacy and confidentiality is very essential when parties have chosen arbitration as the means for resolving their dispute. Consequently it is recommended that unnecessary recourse to the courts for resolution of disputes arising out of the arbitral process should as much as possible be discouraged. Legislation aimed at discouraging this ought to be in place to encourage this model of dispute resolution in commercial circles. Indeed it will not be out of place to maintain the confidentiality of the process even when processes are commenced at the High Court concerning an arbitration issue. What to do is simply legislate that the process and proceeding be kept private even at the High Court as is the case in juvenile and rape cases.

Lawyers themselves undoubtedly appreciate the merit of the arbitral process and should advice their clients to write arbitration clauses into insurance policies, leases, construction contracts, partnership agreements, international and domestic trade agreements, employment agreement and other business and personal arrangements. Any disputes or differences that may arise in respect of the meaning and application of the terms of such contracts are then resolved through arbitration by arbitrators who are often selected by the parties themselves; on the basis of their expertise in the particular fields. Lawyers can also enter in to agreements submitting existing dispute to arbitration. They should not see the courts as the exclusive forum for the settlement of civil disputes. In other Jurisdiction around the world, only a small percentage of business claims are

decided as a result of trials in the normal Judicial process. About 90% are settled mainly through arbitration. It should therefore not be difficult to convince Nigerian businessmen that commercial arbitration is a very sensible way of resolving disputes.

It seems that arbitration under the general law is yet to take its proper place in the country's growing economy as dispute settlement mechanism derives from the failure of some sections of the business community to appreciate the advantage of arbitration over litigation as a dispute resolution process. In some countries industrial and trade Associations did take the lead in creating arbitration systems to resolve disputes in accordance with the procedure that reflects the need of a particular industry and indeed initiated the enactment of arbitration statues in those countries.

In conclusion, it is still relevant to state here that lawyers have a greater role to play in this regard. This is because advice to their clients to adopt this method of dispute resolution will be in the form including this method in draft agreements clauses and referring disputes to arbitration will go a long way in promoting arbitration as a means of dispute resolution in commercial transactions.

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