ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION AS INSTRUMENTS FOR ECONOMIC REFORM[1]

BY

ADEDOYIN RHODES-VIVOUR (MRS.)*

1. INTRODUCTION

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 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 effects 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? Is it affordable? Is it transparent, stable and predictable and would any eventual award or judgment be enforced without delay? In a survey of 3,600 firms in 69 countries, more than 70 percent of the participants said that an unpredictable judiciary was a major problem "in their business operations" (World Bank 1997:36). The report also found that the overall level of confidence in the institutions of government, including the judicial system, correlated with the level of investment and measures of economic performance.[2]

The role of the legal system in the improvement of a country's economic performance has been emphasized for centuries. The 15th century Jurist John Fortescue (1471) asserted that medieval England's prosperity was traceable to the quality of English legal institutions.[3] Thomas Hobbes the 16th century English philosopher argued that without a judicial system, traders would be reluctant to enter into wealth-enhancing exchanges for fear that the bargain would not be honored. In Hobbes's words, when two parties enter into a contract, "he that performeth first has no assurance the other will perform after because the bonds of words are too weak to bridle men's ambitions, avarice, anger, and other passions without the fear of some coercive power" ({1651} 1962:8).[4]

Conflicts are inevitable in business relationships. Foreign investors are however reluctant to submit to the courts of investor countries. Concerns are raised about the independence of the judiciary, the delays associated with judicial proceedings, unfamiliarity with the

---

[1] Delivered at the Nigerian Bar Association (Section on Business Law) Maiden Conference hld in Abuja on 27th-29th March 2006.

* LLB, LLM, MA, (London) FCIArb Chartered Arbitrator. Mrs. Rhodes-Vivour is currently Managing Partner of Doyin Rhodes-Vivour & Co (solicitors, advocates and arbitrators).

[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] Ibid Page 5

[4] Ibid Page 4

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 would be with the states either directly or indirectly.[5] Consequently Arbitration and Alternative Dispute Resolution mechanisms have grown to be the preferred means of international dispute resolution .Any country serious about its reform process must strive to bring the law and practice pertaining to same in line with international standards.

The availability of alternative means of dispute resolution other than 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 .The procedures attract invisible earnings that are quite valuable. An improvement in the current legal framework and practice of arbitration and alternative dispute resolution in our beloved country offers the possibility and hope of a new economic order.

In this paper the procedures would be explained, the current legal framework examined, problems highlighted through case studies and recommendations proffered in the light of local and international developments in the field.

2. THE PROCEDURES

Arbitration and Alternative Dispute Resolution are alternative options to litigation. Though included in the generic meaning of the term "alternative dispute resolution" arbitration is usually not classed as an ADR procedure.[6] 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.[7]

An arbitral award is at par with a judgment of the court as recognized by the Supreme Court in the case of ***Ras Pal Gazi Construction Company Ltd vs. FCDA***.[8] In that case the Hon. Justice Katsina-Alu pronounced thus:-

---

[5] See A.A. Asouzi, International Commercial Arbitration and African States (Cambridge University London 1999) Chapter 7 – ICSID Arbitration and Conciliation: The African Experience. See also Yves Derains, 'Soverign Immunity and Financial obligations" (2000) Business Law International issue No. 3, 141. Delaume, "Sovereign Immunity and Transnational arbitration" (1987) 3 Arbitration International 28 at 43. See also A. O. Rhodes-Vivour, "Sovereign Immunity and Arbitral Proceedings" (2003) Journal of the Nigerian Branch CIArb Vol.1 No 4.

[6] See Ibid Chapter 7

[7] See Encyclopedia of Forms and Precedents Vol. 3(1) paragraph 2(11).

[8] (2001) 10 NWLR Part 722 page 559

> "Arbitration proceedings as I have already shown are not the same thing as negotiations for settlement out of court. An award made, pursuant to arbitration proceedings constitute the final judgment on all matters referred to the arbitrator. It has a binding effect and it shall upon application in writing to the court be enforceable by the court……I must say nowhere in the Act is the High Court given the power to convert an arbitration award into its own judgment. See ***Commerce Assurance Limited vs. Alhaji Buraimoh Alli*** (Supra) what this means simply is this: An Award is on par with the judgment of the court."[9]

Alternative dispute resolution procedures on the other hand are non binding but voluntarily accepted or negotiated solutions to disputes. Alternative dispute resolution procedures are not equated to judgments but alternatives to judgment.[10] Learned authors in respect of the difference between ADR and Arbitration / Litigation 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"[11]

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 party who helps the parties to reach a settlement.[12] Alternative dispute resolution exists in various forms and the precise procedure can be tailored depending on the agreement of the parties and the circumstances of the particular dispute. The common aim behind any alternative dispute resolution process is to provide a flexible procedure through which the parties can reach a

---

[9] Ibid at page 572 paragraphs D-F

[10] See Jean Timsit, Mediation: An Alternative to Judgment, not an Alternative Judgment (2003) JCIArb Vol. 69 No. 3 at page 159.

[11] Alan Redfern 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 4 436 at 437

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

resolution of their dispute at less cost, in terms of both time and money and bearing in mind that the outcome will not necessarily be similar to what the parties would have achieved after a trial or arbitration.[13] When properly conducted the parties come out with their relationship intact irrespective of their dispute or differences.

The umbrella term ADR includes various procedures such as negotiation, mediation (the most common form) conciliation and expert determination which include adjudication and dispute review boards. Other newer variants such as mini - trials, rent-a-judge and hybrids such as med-arb are also being developed.

3. LEGAL FRAMEWORK

3.1 BACKGROUND

Arbitration and Alternative Dispute Resolution (ADR) are not imported mechanisms in Nigeria. Litigation is the imported mechanism. Traditionally in Nigeria like most of Africa disputes were traditionally resolved through Arbitration and ADR.

Indeed customary law arbitration and ADR remains part of the Nigerian Legal System. In the case of **Oparaji vs. Ohanu** the Hon. Justice Iguh (JSC) stated thus: -

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

In the case of **Okpuruwu vs. Okpokam** the Honorable Justice Oguntade JCA (as he then was) observed thus: -

> "In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a 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 system that they survive today as custom."[15]

Customary arbitration and alternative dispute methods of resolving disputes recognize practices such as oath taking before shrines. In the case of **John Onyenge & Ors vs.**

[13] Encyclopedia of Forms and Precedents Vol. 3(1) paragraph 38(71).
[14] (1999) 9 NWLR (Pt 618) 290 at 304. See also Onyenge & & Ors vs. Ebere & Ors (2004) 11 MJSC 184 at 199,Agu vs. Ikewibe (1991) 1 N.S.C.C at 385 at 398 -399
[15] (1998) 4 NWLR Part 90, 554 at 586

Chief Love day Ebere & Ors the Hon. Justice Niki Tobi delivering the lead Judgment stated thus: -

> "Learned Senior Advocate does not seem to like the tradition or custom of oath taking. He cited a number of cases including Nwoke Vs Okere, supra. This Court recognizes oath-taking as a valid process under customary law arbitration. It is my view that where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof to title of land no longer apply. In such a situation the proof of ownership or title to land will be based on the rules set out by the traditional arbitration resulting in oath taking. It is in this regard that I find it difficult to go along with counsel in his submissions bordering on the common law".[16]

Although customary arbitration is recognized under the Nigerian legal system it cannot meet the needs of modern business relationships. Therefore with the advent of development came the need to have in place a suitable legal framework for the conduct of arbitration and ADR in Nigeria. The first statute on arbitration in Nigeria was the 1914 Arbitration Ordinance. The ordinance came into force on the 31st day of December 1914.[17] The Law was based on the English Arbitration Act of 1889 and was applicable to the whole country which was then being governed as a unitary state. When Nigeria became regionalized in 1954 and later Federal the ordinance became the respective laws of the regions and later the states[18]. The provisions of the ordinance include the criticized "statement of case procedure" which obliged an arbitrator to state a case for the decision of the court.[19] The provisions did not limit court intervention in arbitration proceedings. The ordinance based law was enacted as Chapter 13 of the 1958 Revised Laws of Nigeria and Lagos. The Federal Government later repealed chapter 13 and promulgated the Arbitration and Conciliation Decree 1988 Laws of the Federal Republic of Nigeria hereinafter referred to as ACA .ACA is a modification of the United Nations Commission on International Trade Law (UNCITRAL)Model Law on International Arbitration .On the international arena states that have adopted the Model Law are regarded as "investor friendly ".Sadly the ordinance based arbitration law remains in the statute books of some of the states constituting the Federal Republic of Nigeria. These States are enjoined to bring their arbitration laws in line with modern developments.

---

[16] (2004) 11 MJSC 184 at 199-200.

[17] See J.Olakunle Orojo & M. Ayodele Ajomo Law and Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associates (Nigeria) Limited 1999) Chapter 1, pages 3 & 13.

[18] Ibid Page 135`

[19] See Sections 6, 9, 10, 11, 12, 13 & 15 of the Ordinance. Section 15 provides as follows "any arbitrator or umpire may at any state of the proceedings under reference, and shall if so directed by the court or a judge, state in the form of a special case for the opinion of the court, any question of law arising in the course of the reference. See also Section 7B & Section 19 of the 1889 Arbitration Act.

3.2 INTERNATIONAL LEGAL INFRASTRUCTURE

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") are regarded as the two pillars of international commercial arbitration.

The Model Law is the result of the comprehensive study by UNCITRAL into arbitration laws throughout the world with a view to providing a Model law on arbitration which would lead to uniformity/harmonization of the laws relating to International commercial arbitration[19]. The Law was adopted on the 21st day of June 1985 by the United Nations General Assembly. The perception in the international business world is that agreeing to arbitrate in a model law jurisdiction secures a minimum of rights in arbitral proceedings and reduces surprises. Indeed Model Law conformity is advertisement to attract international business .The Model law limits judicial intervention in arbitral proceedings generally referred to as the principle of non intervention. Article 5 of the Model Law states thus

> "In matters governed by this Law no court shall intervene except where so provided in this law" [21].

The intent of Article 5 was to exclude any general or residual powers given to the courts within the domestic system and which are not listed in the Model Law .Foreign parties were therefore protected from surprises. It was also intended that Article 5 would accelerate the arbitral process by disallowing delays caused by intentional tactics associated with the court system. The adoption of the model law worldwide signified a new era in international commercial arbitration. In recognition of the growing use of ADR and the enactment of laws by states to meet the demands of practice UNCITRAL adopted a Model Law on International Commercial Conciliation at its 35th session in 2002. UNCITRAL continues its mission to improve the legal framework of international dispute settlement and its recent work includes the review of the provisions of the Model Law on the form in which interim measures and preliminary orders should be presented by arbitral tribunals and the recognition and enforcement of interim orders.

The New York Convention made in NewYork in June 1958 obliges the courts of signatory 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

[19] The General Assembly United Nations in its resolution 40/72 of 11th December 1985 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 procedures and the special needs of International commercial Arbitration practice."

[20] Generally referred to as the principle of non intervention which has also been opted into various National Laws including the English Arbitration Act section (c) 1996.

without any review of the arbitrator's decision subject to limited exceptions.[22] Alan Redfern and Martin Hunter describe the recognition and enforcement procedures under the New York Convention as simple and effective.[23] The New York Convention has been described as "the single most important pillar on which the edifice of international arbitration rests" and as a Convention which "perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law"[24] The purpose and effect of the New York Convention is to make it easier to enforce an arbitration award delivered in a different country party to the convention than it is to enforce in country A a judgment delivered in country B. The New York Convention being a treaty imposes serious obligations on signatory states .Non application of the New York Convention by the courts of signatory states constitutes a breach of the treaty obligations. Justice Schwebel a former Judge of the international Court of Justice puts the matter succinctly when he stated thus:-

> *"When a domestic court acts, it acts as an organ of the State for whose actions that state is internationally responsible. When a domestic court issues an anti-suit injunction blocking the international arbitration agreed to in a contract, that court fails 'to refer the parties to arbitration…' In substance, it fails anticipatorily to 'recognise arbitral awards as binding and enforce them…' and it pre-emptively refuses recognition and enforcement on grounds that do not, or may not, fall within the bounds of Article V.*
>
> *A party to a treaty is bound under international law – as codified by the Vienna Convention on the law of Treaties – to perform it in good faith. As the Vienna Convention prescribes, a party may not invoke the provisions of its internal law as justification not to perform a treat. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose. The object and purpose of the New York Convention is to ensure that agreements to arbitrate and the resultant awards – at any rate, the resultant foreign awards – are recognised and enforced. It follows that the issuance by a court of an anti-suit injunction that, far from recognizing and enforcing an agreement to arbitrate, prevents or immobilize the arbitration that seeks to implement that agreement, is inconsistent with the obligations of the state under the New York Convention. It is blatantly inconsistent with the spirit of the Convention. It may be said to be inconsistent with the letter of the Convention as well, at any rate, if the agreement to arbitrate provides for an arbitral award made in the territory of another State. There is room to conclude that an anti-suit*

[22] See Articles II & V of the New-York Convention.

[23] Alan Redfern and Martin Hunter Law and Practice of International Commercial Arbitration Page 455 Paragraph 10-22

[24] See Mustill, "Arbitration: History and Background" (1989) 6 Journal of International Arbitration 43; see also Schwebel, "A celebration of the United Nations' New York Convention" (1996) 12 Arbitration International 823. See also Wetter, "The Present Status of the International Court of Arbitration of the ICC: an Appraisal" (1990) 1 American Review of International Arbitration 91.

injunction is inconsistent with the New York convention even when the arbitration takes place or is to take place within the territory of the Contracting State provided that one of the parties to the contract containing the arbitration clause is foreign or its subject matter involves international commerce."

There are other international conventions relevant to international commercial arbitration. They include the European Convention on International Commercial Arbitration of 1961, the Washington convention of 1965 (ICSID Convention) Moscow Convention of 1972, the Panama convention of 1975, the Ohada Treaty of 1993, the North American Free Trade Agreement of 1994 (NAFTA). The ICSID Convention is particularly important as it has been ratified by over 140 states and various international agreements make provision for ICSID arbitration. The ICSID arbitration is meant to deal with disputes arising out of investments made in a contracting state by nationals of other contracting states either under an agreement with the state itself or the state agency. There are also bilateral treaties dealing with arbitration.

Arbitration proceedings are subject to the mandatory provisions of the law applicable to the arbitral proceedings. The international infrastructure also includes the laws of the various states where international arbitrations are conducted. The various international institutions that administer arbitral proceedings or give support in some form or the other are also part of the international infrastructure. A number of these institutions have drawn up institutional rules to guide and assist parties in the conduct of the proceedings. The foremost international institutions include the various Regional Centres setup under the auspices of the Asian African Legal Consultative Committee which includes the Lagos Regional Centre For International Commercial Arbitration, International Court of Arbitration of the International Chamber of Commerce ("ICC"), the International Centre of Dispute Resolution ("ICDR"), the American Arbitrators Association ("AAA"), the Chinese International Economic and Trade Arbitration Commission,{ "CIETAC") the Chartered Institute of Arbitrators (CIArb) and the Centre for Effective Dispute Resolution(CEDR) are renowned internationally for the education and training of arbitrators and alternative dispute resolvers.

In accordance with the fundamental principle of party autonomy in arbitration parties' have the freedom to adopt the rules of these bodies or even a modified format for the conduct of their arbitration.

In arbitral proceedings parties are generally free to agree on how evidence is to be led subject to any mandatory provisions of the law applicable to the proceedings. In most jurisdictions the strict rules of evidence are not applicable to arbitral proceedings. The International Bar Association (IBA) has drawn up IBA Rules of Taking Evidence in International Commercial Arbitration. The IBA felt they need to have rules of evidence which could be used in international arbitration irrespective of the legal background of the parties. The rules are increasingly used in international arbitration.

Furthermore various international organizations have drawn up codes of ethics to guide arbitrators and alternative dispute resolvers in the conduct of the proceedings.[25]

3.3 **DOMESTIC LEGAL FRAMEWORK**

Nigeria was the first country in Africa to adopt the UNCITRAL Model Law on International Commercial Arbitration

.

Nigeria acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (generally referred to as the New York Convention.) on the 17th day of March 1970. [26] The Arbitration and Conciliation Act Cap 19 1990 Laws of Nigeria (hereinafter referred to as the Act) is essentially based on the Model Law albeit with some modifications and reflects the domestication of Nigeria's treaty obligation under the New-York Convention. The Decree came into force on the 14th day of March 1988. The Decree is now referred to as an Act by virtue of the provisions of Section 315 of the Constitution of the Federal Republic of Nigeria 1999.[27] ACA applies to disputes arising from commercial transactions and contains provisions applicable to both domestic and international commercial arbitration. The preamble stipulates that the Act is to provide a "united legal framework for the fair and efficient settlements of commercial disputes by arbitration and conciliation, and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards……..." Part I contains provisions related to arbitration, Part II provisions relating to conciliation whilst Part III contains additional provisions relating to International Commercial Arbitration and Conciliation which makes applicable the New-York Convention. The Act also contains three (3) schedules. The First Schedule, arbitration rules modeled on the Uncitral Arbitration Rules, Second Schedule, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Third Schedule ,a reproduction of the UNCITRAL Conciliation Rules.

ACA is composed of four parts and three schedules and goes through the arbitral process from beginning to the end in a simple format. Part 1 contains provisions pertaining to the following:-

The Arbitration Agreement.	Sections 1-4
Composition of Arbitral Tribunal.	Sections 6-11
Jurisdiction of Arbitral Tribunal.	Sections 12-13
Conduct of Arbitral Proceedings.	Sections 14-23

[25] In 2004 the International Bar Association published Guidelines on Conflicts of Interest in International Arbitration. See www. Ibanet.org/pdf/international arbitrationguidelines. Pdf (page 85 Phillip Capper).

22 . The Convention is described in the Departmental Advisory Committee on Arbitration Law set up by the UK's Department of Trade and Industry report of February 1995 as "the corner stone of International Disputes Resolution" [26] See Russell ***on Arbitration*** David Sutton John Kendall and Judith Gill (Editors) (21st Edition Sweet & Maxwell) page 19 footnote para 347.

[27] Section 315 stipulates that an existing law shall have effect with such modification as necessary to bring it into conformity with the provision of the constitution such existing law are to be deemed to be made by an Act of the National Assembly dependent on the powers of the National Assembly or a House of Assembly to make such laws.

Making of Award and Termination of Proceedings.	Sections 24-28
Recourse Against Award.	Sections 29-30
Recognition and Enforcement of Awards.	Sections 31-32
General.	Section 33-36

Part II contains provisions relating to conciliation and Part III additional provisions relating to international commercial arbitration and conciliation. Part III makes applicable the provisions of the New York Convention to Nigeria. Part IV contains miscellaneous provisions including those in relation to receipt of written communication and the interpretation provision.

The Act also contains three Schedules:-

First Schedule: - The Arbitration Rules (Based on the Uncitral Arbitration Rules)[28]

Second Schedule: - New York Convention.

Third Schedule: - Conciliation Rules (Based on the Uncitral Conciliation Rules)[29]

The provisions of ACA reflect the flexible nature of arbitral proceedings and are premised on the principle of party autonomy. Most of the powers of the arbitrator are default powers ,i.e *the tribunal has the power unless the parties otherwise agree*. ACA states the objective of arbitration as the resolution of disputes by an impartial tribunal and reiterates the fundamental principles of arbitral proceedings i.e. equal treatment of the parties and giving each party full opportunity of presenting its case[30]. Section 34 prohibits the court from interfering in arbitral proceedings except in the limited circumstances specifically provided for in the Act. The applicable provisions are:-

1. Section 2:- Prohibiting revocation of Arbitration Agreement except by agreement of the parties or leave of court.

2. Sections 4 and 5:- Arbitration Agreement and substantive claim before court/court's power to stay proceedings.

3. Section 7 / Article 12 First Schedule: - Appointment and challenge of arbitrators.

[28] See also the UNCITRAL Rules on organizing arbitral proceedings set out in Appendix J Redfern and Hunter See paragraph 6- 34 at page 295. See also the Arbitration Rules of the Lagos Regional Centre for International Commercial Arbitration which makes applicable the UNCITRAL Arbitration Rules.
[29] On December 4th 1980 the United Nations General Assembly adopted a resolution recommending the Conciliation Rules where a dispute arises in the context of International Commercial relation and the parties seek amicable settlement by conciliation.
[30] Section 14 of ACA

4. Section 23:- Power of court to order attendance of witnesses to testify or produce a document or produce a prisoner to be examined.

5. Section 29:- Application for setting aside an arbitral award.

6. Section 30:- Setting aside of award or removal of an arbitrator on the basis of misconduct by arbitrator.

7. Sections 31 and 32- Recognition and enforcement of awards / Refusal of recognition or enforcement.

PART III – ADDITIONAL PROVISIONS RELATING TO INTERNATIONAL COMMERCIAL ARBITRATION.

8. Section 48 – Setting aside of international arbitral awards.

9. Section 51 & 52 – Recognition and Enforcement of awards / Grounds for refusing recognition or enforcement.

The court's role in arbitral proceedings may be classified into its role prior to the constitution of the tribunal, during the arbitral proceedings and after the award has been delivered (Post Award). The role is basically supportive .

The conciliation rules in the third schedule are contained in 20 Articles each with a heading. There are provisions on the commencement and conduct of the proceedings and other salient matters such as the role of the conciliator, the fundamental principles of the process, the method of appointment of the conciliator, the mode of communication between the conciliator and the parties and mode of termination of proceedings.[31]

Nigeria having adopted the UNCITRAL Model Law and domesticated the New York Convention Nigeria could be regarded as having a favorable legal framework governing the conduct of arbitral proceedings and the enforcement of arbitral awards.

4. INSTRUMENTS OF ECONOMIC REFORM?

The effectiveness of arbitration and ADR as effective instruments of economic reform is hinged on the capability to meet the expectation of the investor and instill confidence in the Nigerian legal system. Does the Nigerian law and practice of arbitration and ADR ensure expeditious resolution of disputes ,are arbitration agreements respected ,does the supportive role of courts facilitate the expeditious determination of disputes, are the outcomes arrived at transparently and the decisions easily enforceable? Is Nigeria's treaty obligation under the New York Convention being complied with .

[31] See Articles 3, 7, 9, 15 and 20 of the Rules in the third schedule of ACA.

Unfortunately in Nigeria delays are being encountered in arbitral proceedings. Lawyers file all manner of applications to avoid compliance with the award. The resultant effect is that parties get locked up in the very court system they sought to avoid by entering into arbitration agreements. In a recent survey conducted by Mr. Tunde Fagbohunlu, Secretary of the National Committee set up on the reform and harmonization of Nigeria's Arbitration and ADR Laws it was found that the average length of time from the date of the high court Judgement to the Judgment of the Supreme Court in respect of arbitral matters was 9.3 years.[32]The result of the study is attached as Appendix A.

I will try to highlight some of the problems through case study.

4.1 **CASE STUDY ONE**

The claimant a licensed bank with office in Lagos took out an insurance policy against any losses, destruction or damage suffered by its business in respects of risks specified in a schedule to the policy which contained an arbitration clause. The clause provided for a sole arbitrator. Disputes arose between the parties as regards the performance of the contract of insurance. The claimant submitted a request for arbitration vide letter dated the 24th day of June 2005. In that letter it nominated a seasoned legal practitioner and a trained arbitrator to resolve the dispute. By letter dated 6th July 2005 the respondent agreed that the person nominated by the claimant be the sole arbitrator. The parties informed the nominated person. He accepted to act vide letter dated the 9th day of July 2005. The tribunal held a preliminary meeting or preliminary conference(as it is called in some jurisdictions) on the 20th day of July 2005 for the purpose of agreeing on the procedure and time table for the reference. The purpose of the meeting is to plan for the expeditious and efficient conduct of the arbitration.[33] Orders for Directions were issued. A further preliminary meeting held on the 10th day of August 2005.[34] The orders were complied with in accordance with the directed time frame. The reference proceeded to a hearing. Hearing was on the 7th of September 2005.

A monetary award was delivered on the 21st day of October 2005 in favour of the claimant. The respondent complied with the award without the need for enforcement proceedings.

Case Study No.1 illustrates the effectiveness of arbitration as an expeditious method of resolving business disputes. It may be argued that the issues involved in this matter may not have been complicated but even in complicated disputes there are effective time management procedures which may be used.[35] A trained arbitrator knows how to use them.

---

[32] The survey is attached herewith as appendix "A".

[33] See UNCITRAL Notes On Organizing Arbitral Proceedings for check list on agenda for preliminary meetings . See also Phillip Capper International Arbitration Handbook(LLP Singapore)2004 at 92

[34] Arbitrators usually call further preliminary meetings depending on the requirements of the matter.

[35] The procedures include time guillotines ,chess clock etc

There were no protracted arguments on the acceptance or otherwise of the sole arbitrator proposed by the claimant. In reality, Nigerian parties are usually reluctant to accept a sole arbitrator proposed by the other party. Whilst genuine objections are in order oftimes the objections are basically due to the misconception that an arbitrator appointed or nominated by one party is that party's arbitrator or likely to show bias to that party. An arbitrator is independent of the parties and is to conduct the proceedings in an impartial manner. Section 8 ACA obliges an arbitrator to disclose circumstances likely to give rise to justifiable doubts of his independence and impartiality. Where the parties cannot agree and the appointment has to be made by the court sitting this usually constitutes a source of delay.[36]

4.2 **CASE STUDY NO. 2**

An international firm of consultants and an international company whose shareholders are composed of African States entered into a consultancy agreement dated the 7th day of January 1995. The consultancy agreement provided for arbitration in the event of any dispute arising. Disputes arose. Notice of arbitration dated the 1st day of August 1999 was issued by the claimant, the international firm of consultants. A three (3) man arbitral panel was appointed. Preliminary meetings were held on the 1st day of October 1999, the 22nd day of November 1999 and the 15th day December 1999. Orders for Directions were issued. They were duly complied with. After completion of pleadings the parties agreed to apply to the tribunal for a partial award on part of the claims not requiring a hearing and expressed the view that amicable settlement may be reached on the other matters in issue. The Arbitral Tribunal delivered its partial award on the 27th day of April 2000. Parties hope for an amicable settlement was not successful. Hearing was conducted on the 1st day of May 2000 in respect of the other matters in dispute. The final award was delivered on the 7th day of March 2001. The claimant's claim was successful in part.

By way of originating summons dated the 20th day of April 2001 claimant applied for the recognition and enforcement of the Award before the High Court. The respondent on the other hand brought an application dated the 4th day of May 2001 seeking to set aside the award on the ground that it had immunity against legal process and the court lacked jurisdiction to entertain the action. It also contended that the award ought to be set aside as the arbitral tribunal had gone beyond the issues submitted to it . The trial Judge in a considered ruling dated the 18th day of December 2001 dismissed the respondent's objections, refused to set aside the award and ordered the recognition and enforcement of the Award. The respondent appealed to the Court of Appeal. Notice of Appeal dated the 19th day of December 2001 was filed.

The Court of Appeal dismissed the appeal against the high court decision on the 18th day of March 2004. The respondent appealed to the Supreme Court. Prior to the matter being heard by the Supreme Court the respondent/appellant complied with the award.

[36] See sections 7 and 54(2) ACA.

The respondent applied to have the award set aside and also raised the issue of sovereign immunity .These applications delayed the payment of the sums awarded to the claimant which delay may have been of a longer duration had the respondent not eventually complied voluntarily after the appeal court decision was reported in the newspapers.

Arbitral proceedings are being locked in the court system the parties sought to avoid by entering into the arbitration agreement. There are instances of lawyers confusing setting aside proceedings with the appeal process. Lawyers need to understand and advise their clients that arbitral awards in Nigeria are not appealable and should only be set aside in certain limited circumstances. Sections 29 and 30 of ACA deal with setting aside of domestic awards whilst Part 11 section 48 deals with setting aside of international awards on specific grounds .Section 52 deals with grounds for refusing to recognize and enforce an international award . The provisions of section 30 stipulate that an award may be set aside for misconduct of the arbitrator or in circumstances where the award was improperly procured .However counsel formulate all manner of baseless allegations of misconduct against arbitrators in attempts to delay complying with awards.

Counsel need to have a good understanding of the term "misconduct" and appreciate the ambit of the limited grounds for the setting aside of awards. Though misconduct is not defined in ACA its meaning has been considered in various court decisions. In the case of ***Taylor Woodrow vs. Etina - Werk*** the Supreme Court considered the nature of the power of the High Court to set aside arbitral awards as laid down in the Arbitration Law of Lagos State.[37] The court placed reliance on the common law in its determination of what would amount to misconduct, Halsburys Law of England Volume 2 paragraph 622 providing guidance to the court. [38] The court unanimously dismissed the appeal in the absence of any errors of law or fact justifying the setting aside of the award and stated that an error of law must appear on the face of the award for the award to be set aside. The fact that an appellate court would have come to a different conclusion from the tribunals cannot be said to be misconduct.[39] The examples of misconduct as restated in Taylor Woodrows case have been generally criticized as broadening the scope of the term..[40] The position of the law as stated in Halsburys was pre the model law and the parameters of misconduct ought to be considered within the context of ACA. On the state of Nigeria Law it is clear that the arbitrator's findings of facts are conclusive and that not every irregularity or mistake on the part of the arbitrator would amount to misconduct .The court also recognizes the duty of arbitrators to act within their jurisdiction. In the case of ***A. Savoia Ltd vs. Sonubi*** the court made it clear that an arbitrator could not be right in making an award over and above what was claimed.[41]

Nigerian courts have also emphasized that allegations of misconduct against arbitrators be substantiated whilst extreme caution be exercised in the application of the courts

[37] See Taylor Woodrow vs. Etina Werk (1993) 4 NWLR Part 286 at page 127
[38] See Halsburys Laws of England 4th edition vol.2 Para 622
[39] see Taylor Woodrow vs. Etina Werk 1993 1 NSCC page 330 at 331 See also Halsburys Laws of England footnote 38, Kano State Urban Development Board vs. Franz Construction Co. Ltd (1986) 5 NWLR (pt 39) 74
[40] See ibid at 142-143
[41] 2000 12 NWLR part 682 at page 245

powers to remove arbitrators. In the case of ***LSDPC vs. Adold Stamin International Ltd*** the court was of the view that "an application to remove an arbitrator is to be treated with great caution" [42]

The Supreme Court stated thus:-

> "To hold otherwise would open a wide door for all sorts of attempts to get rid of arbitrators deliberately chosen by parties to contracts"[43].

In the case of ***Baker Marine (Nig) Ltd vs. Chevron (Nig) Ltd***. the principles governing the setting aside of arbitral awards was restated relying on the statement of Lord Atkin in ***Gillcapee Brothers vs. Thompson Brothers***:

> "It is not ground for coming to a conclusion in an award that the facts are wrongly found. The facts have got to be treated as found ……. Nor is it a ground for setting aside an award that the conclusion is wrong in fact. Nor is it even a ground for setting aside an award that there is no evidence on which the facts could be found, because that would be mere error in law, and it is not misconduct to come to a wrong conclusion in law and would be no ground for ruling aside the award unless the error in law appeared on the face of it ……."

The Supreme Court in the Baker Marine case went to great detail to explain the meaning of error of Law on the face of the award and emphasized that the court does not sit as an appellate court over the award of the arbitral tribunal and therefore has no power to determine whether or not the findings of the arbitrators and their conclusions were wrong in law.

The Supreme Court placed emphasis on a subjective test – the state of the law as understood by the arbitrator and not the actual position of the law. Indeed the fact that an arbitrator comes to an erroneous finding does not render the award subject to being set aside.[44] It was held not to be misconduct to come to a wrong conclusion in law and it would be no ground for setting aside an award unless the error in law appeared on the face of the award.[45]

---

[42] LSDPC vs. Adold Stanim International Ltd 1994 7 NWLR page 545 at 560-561 para H-A
[43] Ibid page 561 para A
[44] See also the case of COMPT, COMM and Industry Ltd 2002 9 NWLR part 773 page 629 where the Supreme Court said as follows also if a specific question of law is submitted to an arbitrator for his decision and he decides it the fact that the decision is erroneous does not make the award bad on its face as to permit it being set aside page 655-656 para G-E.
[45] See Baker Marina (Nig) Ltd Vs. Danos & Curole Marina Contractors Inc. (2001) 7 NWLR Part 712 Page 337 at Pages 350-351 Paragraphs H-D

The Supreme Court affirming the decision of the lower court setting aside the award reasoned thus:

> "In the instant case the arbitrator found that the respondent was in breach of the agreement with the appellant. They themselves said that the appellant didn't call evidence in proof of the damages claimed they said that claimant in such a situation was only entitled to norminal damages. The arbitration members recognized that the agreement of the parties excluded the award of punitive damages"
>
> "It seems to me that since the arbitrators had stated in the award that the appellant did not prove that it suffered any pecuniary damages, it was no longer open to them to award 'substantial damages' in the place of nominal damages which they recognized in the award as applicable. It is in my view another way of awarding punitive damages which parties by their contract have excluded. The award clearly carried an error of law on its face."
> ……
> ……...
>
> "
>
> :-
>
> . But where an error of law throws up itself on the face of the award such an award must be set aside".

A legal system that has a good record of expeditious dispute resolution improves its image before investors. Arbitration and ADR offer the benefit of expediency in dispute resolution. Challenges should be brought only in circumstances when an award is patently bad or an arbitrator has in fact committed some wrong doing.

.

Sovereign Immunity was raised in this case study as an obstacle to enforcement .It is not unusual for the doctrine to be raised by states and international organizations to avoid subjection to the arbitral process (immunity from jurisdiction) and / or to resist the enforcement or execution of arbitral awards (immunity from execution).

The plea of sovereign immunity may be regarded as a risk when investors enter into transactions with state entities .The applicable law in determining whether any such

immunity exists in enforcement proceedings would be the law of the state from which the enforcement is being sought. A number of states have legislated on the issue of sovereign immunity as it affects arbitral clauses. Nigeria has no legislation on this subject.

Ways of avoiding delays in the arbitral process in the interest of our economic development must be looked into .We may learn from what obtains in other jurisdictions. In Malta arbitral awards are enforceable by application to the Court of Appeal. Implementing a reform such as this in Nigeria would not only shorten the process by cutting out proceedings in the high court but also avoid the delays due to jurisdictional contentions or questions whether jurisdiction in respect of the particular subject matter is vested in the state high court or the federal high court. Some countries like China have created specialized courts for maritime and trade disputes. The China International Economic and Trade Arbitration Commission (CIETAC) is authorized to handle all international Trade disputes.

Consideration could be given to specifically providing in the rules of court that applications in respect of arbitral proceedings be treated as urgent applications.

4.3 **CASE STUDY No. 3**

The claimant and the respondent entered into an agreement dated the 23rd day of December 1992. The agreement provided for arbitration by a sole arbitrator in the event of any dispute. A dispute arose between the parties and a sole arbitrator was duly appointed. The claimant commenced arbitral proceedings by issuing the required notice.[46] The proceedings duly commenced. The arbitral tribunal moved part of the sittings outside Nigeria. The respondents counsel objected to the continuation of the proceedings on the ground that the agreement provided for arbitration under the Nigerian Law and it was wrong to have moved the arbitration outside Nigeria for any reason.

The arbitrator overruled the objection on the basis that he had full powers to decide the locale of the arbitration.[47]The respondent dissatisfied with the arbitration ruling filed a civil summons against the claimant and the arbitrator as 2nd defendant seeking declarations that the arbitrator had misconducted himself when without authority and beyond the scope of the parties' agreement he ordered that the arbitration moves to sit outside the country. The respondents wanted the arbitrator removed.

The High Court dismissed the claim on the 20th day of January 1998. The respondent appealed to the Court of Appeal. The appeal was also dismissed on the 22nd day of March 2001. The respondent then appealed to the Supreme Court. The claim was dismissed by the Supreme Court on the 13th day of January 2006. The court found that the arbitrator did not misconduct himself as section 16 of the Arbitration Act gave the arbitrator power to decide the place of the proceedings in the absence of the parties' agreement.

[46] See Section 17. of the ACA
[47] Section 16 of the ACA

Judgment was delivered by the Supreme Court on the 13th day of January 2006. Thirteen (13) years since the notice of arbitration was issued. One of the principal complaints against the arbitrator was his decision to move the proceedings outside Nigeria to hear evidence. Did the arbitrator have the power as the court found? Sections 15(2)16(1) & (2) of ACA are clear on this matter. Parties are free to agree on the place of the arbitration and in the absence of the parties' agreement the arbitrator decides. Proceedings may be held at any place irrespective of the juridical seat. However arbitrators must bear in mind that the purpose of arbitration is dispute resolution without undue delay or unnecessary expense. The English Arbitration Act paraphrases the guiding principles of Arbitration in section 1 of the English Arbitration Act as follows 'to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense".

We also see in this case an arbitrator being sued in court for his actions as arbitrator. ACA has no provision on the immunity of arbitrators. In some other jurisdictions arbitrators are immune for acts done or omissions in the discharge of their functions during the conduct of the proceedings except where the act or omission is shown to have been in bad faith.

4.4 **CASE STUDY No. 4**

The plaintiffs commenced action at the Federal High Court for loss of commodities covered by Bills of Lading. The defendants applied to the Federal High Court to stay all proceedings pending reference to arbitration pursuant to sections 4(1) and 5(1) of ACA on the basis that the Bill of Lading provided for arbitration in London. The defendants relied on sections 2, 4 and 5 of ACA. Section 2 renders an arbitration agreement irrevocable except by agreement of the parties or by leave of court unless a contrary intention is expressed therein. Sections 4 & 5 makes provisions for stay of proceedings brought in respect of matters subject of an arbitration agreement. Section 4 makes it mandatory for a court to grant a stay whilst section 5 allows the courts discretion in the matter.

The lower court refused the defendant's application for stay of proceedings pending arbitration. The plaintiffs appealed to the Court of Appeal. The appeal was dismissed.

The Appeal Court found that section 20 of the Admiralty Jurisdiction Act No 59 (AJA) 1991 had altered the hitherto existing position in respect of admiralty matters thereby modifying the provisions of sections 2&4 of the Arbitration Act by limiting enforceable agreements to those having Nigeria as their forum.[48]

The court found that the object of the arbitration clause was to oust the jurisdiction of the Nigerian court to exercise its admiralty jurisdiction over the case and came to the conclusion that the clause was null and void considering the provisions of section 20 of the AJA.

[48] See also M.V Panormous Bay v Olam Nig Plc (2004)4 NWLR Part 865 1,Owners of M.V Lupex v Nigerian Overseas Chartering and Shipping Limited (1993 -1995) NSCC 182 and the Supreme Court decision in Vol 9 MJSC 156 , See also Sonnar Ltd v. Nordwind (1987) 4 NWLR

This case study illustrates the problems associated with the enforcement of maritime arbitration agreements in the light of the provisions of section 20 of AJA: Section 20 was presumably enacted to protect Nigerians from the adverse effects of foreign jurisdictional clauses particularly in standard form contracts.

It is now settled that arbitration agreements do not oust the courts jurisdiction .However the reluctance of Nigerian courts to enforce maritime arbitration agreements with a foreign forum stipulation is still being discerned. In the case of **LIGNES AERIENNES CONGOLAISES v AIR ATLANTIC Nig LTD**[49]. The court found that arbitration agreements do not oust the courts jurisdiction but held that the combined effect of the relevant clauses in the agreement i.e. the arbitration clause which indicated Congolese law as the applicable law and the choice of residence clause was to oust the courts jurisdiction.

There are two schools of thought on the effects of Section 20 and its interpretation by the courts. One school of thought holds the view that foreign parties may be reluctant to enter into agreements with Nigerian parties where such agreements would be covered by the Admiralty Jurisdiction Act. Another school perceives that the reluctance to uphold arbitration clauses with a foreign forum/foreign law stipulation on the basis of section 20 of AJA could lay the foundation of Nigeria's development as a centre for maritime arbitration. Which ever view is upheld I believe that our country has the capability to become a major centre for maritime arbitration and with it the hope of invisible earnings which would positively impact on our economic development.

CONCLUSION

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 The 2005 World Bank Development Report referred to China's story as fascinating. China 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 protection and dispute resolution.

.

Investors lay great premium on the availability of effective dispute resolution mechanisms as alternatives to the court system. Arbitration and ADR are the preferred options. Necessary reform will improve the level of investor confidence in our dispute resolution system. Laying a good record of respect for arbitral\Adr agreements and building a system noted for regular and expeditious contract enforcement is crucial. This builds confidence in our system. Unfortunately delays are creeping into the arbitral process. Lawyers must avoid importing legal technicalities associated with litigation into the process to avoid adverse impact on the investment climate of our country.

Business lawyers have a significant role in the reform process. We must be prepared to pass on the gospel of Arbitration and ADR. The mechanisms do not pose threats to our

[49] (2005) 11 CLRN Page 55-57 Lignes Aeriennes Congolaises v. Air Atlantic Nig. Ltd

revenue. We should actively encourage our clients to take part in the proceedings and in good faith.

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.

The executive appreciates the need to effect necessary reform and bring our Arbitration and Adr laws in conformity with international developments. The Hon Attorney General upon resumption in office constituted a National Committee on the Reform and Harmonization of our Arbitration and Adr laws.

The reform process is expected to culminate in economic development and improvement in the standard of living of our people. However emphasis must be on the right type of investment. Quality investment should be the focus. Nigeria's priority should be on foreign investments that result in transfer of strategic technology, knowledge and skills, which is job creating, for the long term and which results generally in an improvement in the standard of living of our people.

BIBLIOGRAPHY

TEXT BOOKS

Alan Redfern and Martin Hunter, Law and Practice of International and Commercial Arbitration (London Sweet and Maxwell) 1999 Third Edition.

A.A. Asouzu, International Commercial Arbitration and African States (Cambridge University London 1999) Chapter 1.

Halsburys Laws of England 4th edition Vol.2.

J.Olakunle Orojo & M. Ayodele Ajomo Law and Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associates (Nigeria) Limited 1999).

Phillip Capper, International Arbitration: A Handbook (3rd Edition LLP London Singapore 2004)

Russell on Arbitration David Sutton John Kendall and Judith Gill (Editors) (21st Edition Sweet & Maxwell).

ARTICLES

A. O. Rhodes-Vivour, "Sovereign Immunity and Arbitral Proceedings" (2003) Journal of the Nigerian Branch CIArb Vol.1 No 4.

Carol and Dickson, Alternative Dispute Resolution Developments in London, The International Law Review, (1990) Part 4 436 at 437.

Delaume, "Sovereign Immunity and Transnational arbitration" (1987) 3 Arbitration International 28 at 43.

Jean Timsit, Mediation: An Alternative to Judgment, not an Alternative Judgment (2003) JCIArb Vol. 69 No. 3 at page 159.

Mustill, "Arbitration: History and Background" (1989) 6 Journal of International Arbitration 43.

Regional Centre of International Commercial Arbitration Decree (No. 39) of 1999" a review by Chris C. Ohurogu M.P.J.F.I.L (October 2004) Vol. 4 No. 4 at Page 236.

Richard E. Messick "Judicial Reform and Economic Developments: A survey of the Issues" The World Bank Research Observer, Vol. 14 No. 1 (February 1999).

Schwebel, "A celebration of the United Nations' New York Convention" (1996) 12 Arbitration International.

Wetter, "The Present Status of the International Court of Arbitration of the ICC: an Appraisal" (1990) 1 American Review of International Arbitration.

Yves Derains, 'Sovereign Immunity and Financial obligations" (2000) Business Law International issue No. 3, 141.

STATUTES

Arbitration and Conciliation Act Cap A18 2004 Laws of the Federation of Nigeria

CASES

Agu vs. Ikewibe (1991) 1 N.S.C.C at 385 at 398 -399

Baker Marine (Nig) Ltd vs. Chevron (Nig) Ltd Part 681 2000 12 NWLR 393 C.A

Baker Marina (Nig) Ltd vs. Danos & Curole Marina Contractors Inc. (2001) 7 NWLR Part 712 Page 337 at Pages 350-351 Paragraphs H-D

COMPT, COMM and Industry Ltd (2002) 9 NWLR Part 773 page 629

Commerce Assurance Limited vs. Alhaji Buraimoh Alli

Kano State Urban Development Board vs. Franz Construction Co. Ltd (1986) 5 NWLR (pt 39) 74

LSDPC vs. Adold Stanim International Ltd 1994 7 NWLR page 545 at 560-561 para H-A

Okpuruwu vs. Okpokam (1998) 4 NWLR Part 90, 554 at 586

Onyenge & Ors vs. Chief Love day Ebere & Ors (2004) 11 MJSC 184 at 199,

Oparaji vs. Ohanu (1999) 9 NWLR (Pt 618) 290 at 304

Ras Pal Gazi Construction Company Ltd vs. FCDA (2001) 10 NWLR part 722 page 559

Savoia Ltd vs. Sonubi 2000 12 NWLR part 682 at page 245

Taylor Woodrow vs. Etina Werk (1993) 4 NWLR Part 286 at page 127

PRECEDENT BOOKS

The Encyclopedia of Forms and Precedents, fifth edition (Butterworth's London) 1999 Reissue Vol. 3 (1) page 13.