RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS: NIGERIA AS A CASE STUDY

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LL.M/LAW/9930/2009-2010
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March, 2012

DECLARATION

I declare that this work in the thesis entitled "*Recognition and Enforcement of International Arbitral Awards: Nigeria as a Case Study",* has been performed by me. The work has never been presented anywhere. All quotations and references have been fully acknowledged.

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SANI, Dahiru Muhammad
March, 2012.

CERTIFICATION

This thesis entitled "*Recognition and Enforcement of International Arbitral Awards: Nigeria as a case study"* by Sani, Dahiru Muhammad (LLM/LAW/9930/2009-2010), meets the regulations governing the award of the degree of Master of Laws – LL.M of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to my parents Muhammad Sani Kaya and Hauwa'u Sani who have, right from childhood, been guiding me to success through their moral and financial support.

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First and foremost, I will be grateful to Allah Almighty for His guidance throughout my life from childhood to the present. It is He who redirected me from things I wanted to do to things He divinely, chose for me throughout my educational sojourn. He made me a Journalist when I never thought to be one. He made me a lawyer when I never thought to be one in a somewhat miraculous manner; the rest is now part of history.

My parents, Muhammad Sani Kaya and Hauwa'u, have been everything to me all my life. Being the eldest child in the family, they put everything on the line to make me what I am today. No words would be sufficient to thank them; only that I will say "Jazaakumullahu Khairan. My dear wife, Ruqayyah, has also been a source of encouragement to me throughout my six years exploit in this LL.M programme. She is the one who always reminds me of the importance and how much I need this LL.M in my career then, as a civil servant and now as a lecturer. To you, I also say thanks a lot.

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ABBREVIATIONS

A.A.A	American Arbitration Association
A.C	Appeal Cases
A.D.R	Alternative Dispute Resolution
All E.R.	All England's Report
A.N.L.R	All Nigeria Law Reports
Ch.	Chancery
Ch. D.	Chancery Division
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
I.L.R.	International Law Reports
J.C.A	Justice of the Court of Appeal
J.S.C	Justice of the Supreme Court
K. B.	King's Bench
L.C.I.A	London Court of International Arbitration
L.F.N	Laws of the Federation of Nigeria
N.W.L.R.	Nigerian Weekly Law Reports
P.C.A	Permanent Court of Arbitration
Pt.	Part
Q.B.	Queen's Bench
S.C	Supreme Court
S.C.N.J	Supreme Court of Nigeria Judgement
SERVICOM	Service Compact with Nigerians
UNCITRAL	United Nations Commission on International Trade Law
W.T.O	World Trade Organization

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TABLE OF STATUTES

a) Nigerian Statutes

b) Foreign Statutes

ABSTRACT

The issue of recognition and enforcement of arbitral awards obtained from other jurisdictions in Nigeria is so central to the principle governing International Commercial Arbitration. This is because for any arbitral award to be meaningful to the party who obtained it, it must be capable of being enforced. This is the only way that a party is guaranteed of benefitting from the fruits of the award, which he will do through the instrument of the court. There are, however, problems associated with recognizing and enforcing such awards by the Nigerian courts. Part of the problem is constitutional while part of it has to do with the laws governing the issue of enforcement of the award. Most of the laws and international conventions dealing with arbitration have barred courts from intervening in any matter which is the subject of arbitration. This provision is in a way, unconstitutional as the constitution grants courts power to adjudicate in any civil or criminal matter brought before them. Therefore barring the courts from entertaining such matters will be a contradiction of the constitutional provisions especially, Sections 1(3) and 272. The other aspect of the problem is the issue of reciprocity introduced by the Foreign Judgements (Reciprocal Enforcement of Awards) Act, Cap. F.35 L.F.N 2004 and the New York Convention of 1958. Having the enforcement of award to be based on reciprocity as it is the case under the above mentioned laws, is indeed not a good law in the 21st century, especially with regards to the laws dealing with commercial transactions. The issue of executing such awards against foreign sovereigns is another problem which this research has to contend with, especially where state parties are involved.

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CHAPTER ONE:

GENERAL INTRODUCTION

1.1 Introduction

Arbitration being one of the dispute resolution mechanisms as an alternative to litigation, no doubt plays a significant role in the settlement of commercial disputes at both domestic and international fronts. This is simply due to the fact that arbitration is to a large extent simpler and speedier than litigation, as it avoids all the technicalities with which litigation is characterized. More so, in the present day world where everything is virtually globalized, settling dispute through the instruments of the conventional court system, may be unwise because of the long procedure and time litigation takes, hence the need for arbitration.

However, even if parties to a commercial agreement submit themselves to arbitration where there is disagreement, such a dispute or disagreement cannot be said to have been settled if a party cannot readily enforce the award or judgment in his favour. Therefore, if an arbitral award cannot be enforced then, an important aspect of arbitration is missing.

In spite of all the legal instruments at both domestic and international levels, which provide an avenue for recognizing and enforcing international arbitral awards, some problems do present themselves, which have been analysed by this research. It has also analysed problems associated with recognition and enforcement of arbitral awards obtained in other jurisdictions, in Nigeria.

1.2 STATEMENT OF THE PROBLEM

As stated above, a dispute cannot be said to have been settled if a party cannot readily enforce an award or judgment in his favour. This is indeed one of the problems being faced especially in developing countries, such as Nigeria in the enforcement of international arbitral awards.

Principally, there are three basic problems, which this research has addressed, and they are as follows:

1. **Difficulty in levying execution against the property of a state situated abroad due to claim of sovereign immunity**. By the doctrine of sovereign immunity, a state (an independent sovereign state) cannot be made subject to the judicial processes of a foreign country. This made Shaw[1] to assert that '….the independence and equality of states made it philosophically and practically difficult to permit municipal courts of one country to manifest their power over foreign sovereign states, without their consent'. Even where consent manifests in the attitude of a sovereign state, this may not generally be considered as a waiver of immunity to execution or attachment of state property as stated by the English Court of Appeal in **Duff Development v. Government of Kelantan**[2]. This decision may have been taken in view of the fact that the doctrine of sovereign immunity is a general principle of customary international law. Also, even the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 is not very

[1] Shaw, M.N.(1997*) International Law* (Fourth Ed.) Cambridge Press U.K. p. 493.
[2] (1923) Ch. 385

clear on how awards obtained against a particular state can be enforced. Although, Article I of the Convention is categorical about the kind of persons (physical and legal), to whom the Convention is to apply, yet it is not clear whether sovereign states as against public corporations, fall under this category. The convention does not also state whether sovereign immunity should be an exception in the enforcement of such awards.

2. **The problem of unconstitutionality**: Generally, in a state which operates a written constitution, that constitution stands supreme above any other Act of the National Assembly or law of a state.[3] The constitution is thus, the *grundnorm*. In view of the above, any law which contradicts the provisions of the constitution is, to the extent of its inconsistency, void.[4] This provision therefore, puts certain provisions of both the Arbitration and Conciliation Act[5] to question when brought face to face with the provision of the constitution. For example, Section 34 of the Act (Article 9 of the United Nations Commission on International Trade (UNCITRAL) Law oust the jurisdiction of the court from intervening in any matter governed by the Act except where so provided by the Act. This section is undoubtedly, in contradiction with section 6 of the Nigerian constitution, which grants absolute judicial power to the courts. The section is also inconsistent with Section 272 of the constitution, which also grants unlimited jurisdiction to state High Courts, in all civil matters in which the existence or extent of legal right, power, duty,

[3] Section 1(1) Constitution of the Federal Republic of Nigeria, 1999. See also Savannah Bank v. First Atlantic Shipping and Transport Agency (1987) 1 NWLR (pt 499) 212.
[4] Section 1(3) of the Constitution. Ibid.
[5]. Cap. A 18 L.F.N. 2004

liability, privilege, interest or claim is in issue (including arbitration matters). Section 34 is in the same vein, inconsistent with Section 57 of the Act, which defines court as any High Court of the state. This issue had also been decided by the Nigerian Court of Appeal in some cases which shall be discussed later in the research.

3. The problem of Reciprocity. This is a problem that is created by the Foreign Judgement (Reciprocal Enforcement of Award) Act.[6] By the provision of this Act, only awards made in countries that give reciprocal treatment to awards made in Nigeria can be recognized and enforced by the Nigerian courts. The danger poses by this law is that it may not be a good law for the purpose of enforcing international arbitral awards in Nigeria in view of the growing level of free trade regime being advocated all over the world. This is because investors willing to do business in Nigeria may be driven away from Nigeria especially when they realize their home countries fall among countries that do not afford reciprocal treatment to awards made in Nigeria. This Act is therefore a clog in the wheel of Nigeria's drive to attracting Direct Foreign Investment. That notwithstanding, this Act may not be needed in view of the fact that the Arbitration and Conciliation Act has made adequate provision with regards to recognition and enforcement of international awards in Nigeria.

[6] Cap. F. 35 L.F.N. 2004

1.3 OBJECTIVES OF THE STUDY

This research, discusses to critically and analysed the various methods on the recognition and enforcement of arbitral awards, made outside Nigeria, by the Nigerian courts. In the course of this, reference has been made to the two major international legal instruments on the area i.e. the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, and the United Nations Commission on International Trade Law (UNCITRAL) Model Law, as well as other domestic legal instruments, such as the Arbitration and Conciliation Act[7]. Where the Nigerian laws happen to be lagging behind, it is the objective of this research to suggest ways on how to jack it up to meet the requirements of international law. This research has been chosen, having in mind, the fact that the world has been reduced into a 'global village' where there is more efficiency and perfection in human activities and for any nation to be part of this village, it must live above board.

In fact, recent economic reforms introduced by the Nigerian government for the purpose of attracting foreign investors (especially in the financial and investment sectors), would only be relevant if the laws are amended in line with international standard. This will encourage foreign nationals and corporations to come to Nigeria and do business.

1.4 SCOPE OF THE STUDY

This research principally focuses on the modes of recognition and enforcement of foreign arbitral awards in Nigeria, by making reference to both

[7] Cap A 18 L.F.N. (2004)

international and domestic legal instruments. In essence, the research deals specifically with the recognition and enforcement of International Arbitral Awards by the Nigerian courts. A critical analysis has been made into Nigeria's Arbitration process and suggested ways of integrating them into the global economic system.

1.5 JUSTIFICATION/SIGNIFICANCE OF THE STUDY

Nigeria has, since its return to civilian rule in 1999, embarked on economic reforms for the purpose of transforming the country into a liberal economy with the aim of integrating herself fully into the global economic system. As a result, several laws have been re-enacted by the National Assembly, while new ones have been enacted, to bring them in line with the current trend. These include laws such as those on the liberalization of the downstream sector of the oil industry, labour and industrial relations as well as the electricity sector, among others. The significance of this research is therefore, to have a critical look at the Nigeria's Arbitration process in order, or with a view to suggesting ways of integrating them into the global economy. The research has also assisted in finding ways on how to fill the lacuna existing in the Nigerian laws dealing with arbitration; more specifically, the aspect dealing with recognition and enforcement of international arbitral awards, which is the aspect that is somewhat problematic in developing societies, such as Nigeria. The research is expected to provide a little contribution on how to solve some of the problems associated with the enforcement of arbitral awards obtained abroad, in Nigeria. It will also be beneficial to academics,

students, legal officers and practitioners as well as professional arbitrators, among others.

1.6 METHODOLOGY

The methodology adopted in this research is mainly doctrinal. In other words, in sourcing for materials, attention has been wholly focused on writings by experts in the fields of arbitration. Reference has also been made to international legal instruments, Nigerian legislations and decided cases.

It is however, pertinent to state at this point that the law of arbitration in Nigeria (especially the aspect on international arbitration, which is the focus of this research), is up till this moment at its emerging state, hence, there are few decided cases in the area. That notwithstanding, reference has been made to the few available ones in addition to some foreign cases.

1.7 LITERATURE REVIEW

Generally, the importance of arbitration, not even at international but at national levels, cannot be overemphasized. The raging trend in legal parlance today, is a u-turn from litigation to settlement of disputes out of court, hence the importance of discussing arbitration. There may however, not be much problem in settling domestic commercial disputes through arbitration, as it is not as complex as international commercial arbitration, which involves the enforcement of an arbitral award obtained in one country in another, or where it involves a dispute between an individual and a state or its organ.

Few scholars have written in this area, giving diverse academic opinions on how the inadequacies of legal regimes in Nigeria, on the recognition and enforcement of foreign arbitral awards in the country can be addressed. Despite all the scholarly works in this area, there seems to be some issues that have either not been addressed or an additional effort is still required.

Writing on the inconsistency of some aspects of the Act with the Constitution of the Federal Republic of Nigeria, Chukwumerie,[8] explained that in the bid to enhance the law and practice of arbitration in the country, CAP 19 (now CAP A 18), denies every High Court the power to intervene in any matter governed by the Act, except where permitted by the Act. More specifically, according to Chukwumerie, Section 34 of the Act, which ousts the jurisdiction of the Courts to intervene in arbitration proceedings, except in a manner allowed by the Act, when read along with Section 57 which defined court as a High Court of a State or of the Federal Capital Territory or Federal High Court in Nigeria, restricts the power of the High Courts in Nigeria to supervise and intervene in arbitral proceedings. It also ousts the power of the courts to sit on appeal over decisions of arbitrators as well as removes the principle of case stated. This, to the learned author, invariably means, once arbitration commences, no court can entertain any suit arising out of the same subject matter and cannot issue any injunction against the arbitral proceedings or temper with it in any manner.[9] This, the learned author continues, preclude the court from granting an order of interim measure of

[8] .Chukwumerie A. I.(2002*) Studies and Materials in International Arbitration*. Law House Books, Port Harcourt, Nigeria, p. 86

[9] Section 32 gives any of the parties the power to ask the court to refuse to enforce an award. This, the court will do subject to Section 51 of the Act.

protection under Article 9 of the UNCITRAL Model Law, to protect the *res* of the dispute.[10]

The above provision of the Act in the words of the author[11], "….robs the court of enormous power in respect of arbitration and conciliation in Nigeria, while making the arbitral tribunal a sort of special tribunal from the decision or award of which no appeal can be lodged to any court or other higher authority. In this situation, the only remedy is to try and set aside the award under Section 29, 30 or 48 or to resist recognition and enforcement of award.[12] In the same vein, the above section of the Act (i.e. S. 34), contradicts Section 272 of the Constitution of Nigeria,[13] which confers an unlimited jurisdiction on High Courts of a State on all civil matters, on which liability, privilege, interest or claim, is in issue, subject to the provisions of Sections 7 and 8 of the Federal High Court Act as well as Section 251 of the Constitution which confers special jurisdiction on the Federal High Court.

In view of the above problems which Section 4 and 34 of the Model Law face when compared with the aforesaid provisions of the Constitution (being the *grundnorm*), Chukwumerie[14] suggests 3 solutions to resolve the problem. Firstly, is to provide expressly in the Constitution that matters covered by CAP 19 (now CAP A 18 LFN 2004), are exempted from the operation of Section 272 of the Constitution.

[10] Chukwumerie, A. I. ibid
[11] Ibid, the same page.
[12] Ibid.
[13] 1999
[14] Ibid.

The second suggestion (as problematic as it is), is to make Cap 19 (Cap A 18 of LFN, 2004), just like some other statutes considered as being very important (e.g. NYSC Act, NSO Act, Land Use Act e.t.c.), part of the Constitution.

Thirdly, the learned author suggests what he described as a theoretical solution. This is for the Supreme Court to hold that arbitration is a special area which is intended to be outside the court system and should not be caught by S. 272 of the Constitution.[15]

All the suggestions provided by the author above are virtually unrealistic. As to the first and second suggestions, they can only be possible (as he has admitted) with the amendment of the Constitution, a process which is to a large extent, cumbersome in a country with a written Constitution such as Nigeria. As to the second suggestion, making the issue of arbitration part of the constitution (as the learned author also admits), would make arbitration to lose its dynamism and the ability to quickly respond to changes in the business environment. This is perhaps due to the rigidity in the amendment procedure applicable to a written constitution. Therefore, if arbitration would be made part of the constitution, it would be difficult to amend the Act easily to adjust to prevailing changes in the business world.

Just as the two suggestions made above by Chukwumerie, the third cannot also be tenable. This is because there are laid down procedures for interpreting statutes and the Supreme Court cannot veer away from these principles just to favour arbitration. Also, it is not in all cases that matters bordering on arbitration

[15] Ibid, p.91.

go to court. If this is the case, for how long can people wait to get such a pronouncement from the Supreme Court assuming that is a possibility?

On the foregoing therefore, all the suggestions given by Chukwumerie leave some vacuum which needs to be filled. Even the author's first suggestion, which looks somewhat realistic, he does not tell us how to make arbitration exempted from the operation of Section 272 of the Constitution.

Writing under the same heading, Asouzu[16] is of the opinion that arbitration, *per se*, and under CAP 19 (now CAP A 18 LFN 2004), is not an exercise of judicial power in Nigeria and that arbitral tribunals under customary law or operating under CAP 19 or under Nigeria's international obligation, are not courts of law. This position according to the author is only true during a military rule, in view of the historical antecedent of the Act, as it was enacted in 1988 as a military decree. During that period it was possible for the provision of a decree to override that of the Constitution, as some parts of it were normally suspended during this period. He is however, quick to admit that Section 34 would be unable to fairly assert its constitutionality in the present time (i.e. in a civilian regime, where the constitution reigns supreme above any other law). Although the author concedes to the fact that Section 34 is in conflict with some provisions of the constitution, for example, Section 56 and 272 (which grants judicial power to the High Courts, and

[16] Asuozu A.A. (200) Arbitration and Judicial Powers. In: Nweze C.C (Ed.*) Essays In Honour of Justice Eugene Ikpeazonu (J.C.A).* Fourth Dimension Publishing Co. Ltd. p.92

unlimited jurisdiction in civil matters, by supporting his opinion with decided cases,[17] he did not provide a leeway on how to solve the problem.

The claim of sovereign immunity is one factor which remains a clog in the wheel of enforcing an arbitral award against states or their agencies. In this regards, Nwogugu[18] is of the opinion that the major difficulty against the property of states situated abroad is the claim of sovereign immunity. This problem present itself even if the state voluntarily submits to the jurisdiction of a foreign court such action may not be a waiver as stated by the English Court of Appeal in the case of **Duff Development Inc. v. Government of Kelantan[19]**.

The above assertion by the learned author presents an apparent vacuum which even some multi-national treaties on enforcement of foreign arbitral awards, such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, otherwise known as the New York Convention, fails to address. According to Nwogugu,[20] even Article 1 of the New York Convention which makes it obligatory on states signatories to the convention to recognize and enforce arbitral awards granted in other states, but brought before their courts, does not state in categorical terms whether the claim of sovereign immunity should be an exception to the enforcement of the awards or not. He is also of the opinion that the extent to which the convention extends to arbitral awards concerning an individual and a state depends on the interpretation of that part of Article 1 which

[17] Ibid.
[18] Nwogugu, E.I.(1965) *Legal Problems of Foreign Investment in Developing Countries*. Manchester City University Press, United States.
[19] (1923) Ch. 385
[20]. Ibid.

applies the convention to awards arising out of differences between persons, whether physical or legal.

The mere demarcation between “physical” and “legal” persons in Article 1 of the Convention makes Nwogugu to think that governments are exempted from the operation of the convention. But he quickly adds that where an agency of an investee state is involved, any arbitral award against it is enforceable in the territories of states who are signatories to the convention.[21] His decision was informed by the fact that the phrase “legal persons” does not cover government departments or governments when not acting through public corporations[22]. To the learned author, if the position is otherwise, the contracting parties would make an express declaration to the effect, in the absence of which one cannot validly extend the operation of the convention to states.[23]

The above position taken by Nwogugu, authoritative as it may sound, has admitted that there is a lacuna to the extent that he agrees that there is ... a subtle but significant difference in the ability of an investor (individual or company), to enforce an award from an investment dispute, depending on the entity with which the arbitration was held.[24]

1.8 ORGANIZATIONAL LAYOUT

This research mainly comprises five chapters, with chapter one constituting a general introduction. Chapter two contains an overview of Alternative Dispute Resolution (ADR) mechanisms and their role in the settlement of disputes. Chapter

[21] Ibid.
[22] Ibid
[23] Ibid.
[24] Ibid.

three focuses on international commercial arbitration as a dispute resolution mechanism in the settlement of commercial disputes, while chapter four discusses the various methods through which arbitral awards obtained from other jurisdictions are recognized and enforced in Nigeria. Finally, chapter five ends the work with Findings, Recommendations, Summary and Conclusion.

CHAPTER TWO

AN OVERVIEW OF ALTERNATIVE DISPUTES RESOLUTION (ADR) PROCESSES

2.1 INTRODUCTION

Alternative Dispute Resolution, as the name implies, is a method of resolving disputes or disagreements without resort to litigation in certain cases.[25] According to Black's Law Dictionary[26], Alternative Disputes Resolution refers to a procedure for settling disputes by means other than litigation i.e. without recourse to the machinery of the court system.

The exigencies of 21st Century commercial practices coupled with more sophistication in human activities, have made the use of ADR more relevant. This is mainly due to the less costly nature and absence of delays in settling disputes through the use of ADR processes, when compared to litigation. It is therefore the focus of this chapter to make a general overview of the most prominent ADR processes, as a trailer to discussing arbitration which is an integral part of the whole ADR process.

2.2 MEANING, NATURE AND SCOPE OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

The concept of ADR, just like other social science concepts, does not have a universal definition. When viewed on its face value, Alternative Dispute Resolution suggests that it is a process of dispute settlement devised because another method has failed or is inadequate i.e. as an alternative to litigation.

[25] Disputes such as criminal matters are not normally settled through ADR.
[26] H.C. Black *et al.(* 1990) 16th Ed. Saint Paul Publishing Company Minnesota.

Although the use of the word "Alternative" has been criticized as misleading,[27] yet the definition by Black's Law Dictionary[28] which defines ADR as a procedure for settling disputes by means other than litigation has been adopted in this work as a working definition. This definition accords perfectly with Ojielo's,[29] who described ADR as ….a process which offers a particularly, complete supplement to traditional court adjudication for resolving disputes.

Mackie[30], is another author who recognizes the fact that definition in social practice are never universal or conclusive, hence he defines the concept as 'a dispute resolution method involving a structured process with third party intervention which does not lead to a legally binding outcome imposed on the parties.[31] This may not perfectly describe an ADR process because in some instances, such an agreement can be legally binding especially in arbitration. Where arbitration has taken place between contracting parties, award issued and recognized, it can be enforced through the machinery of the court.[32]

In view of the above, it can be summarily stated here that ADR is no more than an avenue used for the settlement of disputes between parties, through a process outside the conventional court system. ADR can be defined as a structured process of dispute settlement, sometimes through the use of a third party, who gives a verdict at the end of the hearing, which may or may not be legally binding.

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[27] Mackie K.(1995) *Commercial Dispute Resolution: An ADR Practice* Guide. Butterworth London, Dublin, Edinburgh, 1995 P.4. Some writers suggest that the word 'appropriate' should be used instead of 'alternative' see Ojielo, O.M. (2001*) Alternative Dispute Resolution (ADR)* CPA Books, Lagos, Nigeria p.1.
[28]H.C. Black Op.cit.
[29] Ibid at P.1
[30] Mackie K, Op.cit at P.7
[31] Ibid.
[32] See Article IV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on Procedure for enforcement. See also S. 3 of the Arbitration Conciliation Act Cap. A 18 L.F.N. (2004).

The most important thing here, is therefore, whether disputants achieve what they intended in settling their dispute, as against any particular form.

The nature of ADR has been described by Mackie[33] as a process which:

> ….avoids the rigidity and inflexibility of the traditional procedures and institutions for resolving disputes, and focus instead on analyzing what is appropriate to the parties in a particular case in order for them to achieve, with at least direct and indirect costs, a similar or better result than they might have achieved from a trial.

Any process which is able to achieve the above goal, is according to Mackie, an alternative dispute resolution, because it has succeeded in avoiding the complexity with which litigation is associated, and at the same time achieve the desired result, within a period far shorter than can be obtained through litigation.

By its nature, an ADR process is intended to supplement adjudication through the court system, and not supplant them.[34] It should however be noted that an ADR process can be applied in settling disputes among individuals such as, matrimonial and divorce issues, torts and contractual disputes among others.[35]Matters bordering on criminality cannot be subjected to ADR[36]. This is because of the fact that by its nature, crime is punishable by the state; hence stripping individuals of the prerogative to decide on such issue. Where however, a

[33] Mackie, K. Op.Cit. at P.8
[34] Ojielo, M.O. Op.cit, p. 8
[35] Golden Berg S.B, Fender F.E.A. and Rogers N.H.(1999) *Dispute Resolution, Negotiation, Mediation and Other Processes*. Little Brown and Co. Boston U.S.A. P.10.
[36] See *Queen v. Blakemore* (1850) 14 QB 544 quoted in Ezejiofor, G. *The Law of Arbitration in Nigeria* Op. Cit. at P. 4.

tort is involved, it is humbly submitted that the tortuous part of it can be settled by adopting an ADR mechanism.

2.3 ADVANTAGES/FEATURES AND DISADVANTAGES OF ADR

Resorting to other dispute resolution mechanisms, other than litigation, which takes unnecessarily longer period, is undoubtedly more advantageous and preferable than going through the cumbersome court process. This subhead has been captioned in the above manner because most of the advantages can at the same time stand for features. Although, scholars give variety of reasons on the advantages of resorting to ADR in settling disputes, Mackie[37] has in the following paragraph summed up the advantages and disadvantages thus:

> The essential advantage of A.D.R. is to extend the range of options on offer to businesses or litigants who find themselves in deadlocked negotiation with others. ADR offers many of the beneficial features of the legal system without some of its inherent disadvantages. It offers structured, formal third party intervention, but without either a requirement to fit into rigid routines of traditional litigation or the high risks of a legally binding judgment.

By way of inference, Mackie's statement reflects the major or key advantages of flexibility, party-controlled, and fastness as well as friendliness.

However, another author[38] has outlined more detailed advantages of ADR as follows:

1. **It saves time and money:** This is with respect to the amount of time wasted in litigation and the legal fees paid to legal practitioners. In some instances,

[37] Mackie K. Op.Cit p.4
[38] Ojielo M.O. Op.cit P.14

the time and resources wasted in litigation are not commensurate to the outcome of the case. This is not forgetting the fact that the money paid to arbitrators may be too exorbitant as to defeat this advantage, in some cases. In fact, there are times when monies spent on, say arbitration, will by far, exceed what might be spent on litigation. This is possible where arbitration takes place in another country.

2. **Increased Flexibility and Control:** In most A.D.R processes the atmosphere that is obtainable is completely at variance with the one obtained in the traditional court routines. Also, in ADR, parties have more control over the process, especially in arbitration, where parties have control over the appointment of the arbitrators.[39]
3. **Confidentiality:** This refers to the atmosphere in the place of conducting the ADR proceedings, unlike in the court, only parties interested in the subject matter of dispute or those invited, are allowed to attend. This is against the court proceedings where any other person is legally allowed to attend[40], except in some few exceptional cases.[41] Confidentiality therefore encourages openness; hence reduce the chances of wasting so much time. This in turn allows for a speedy settlement of the dispute.
4. **Preservation of a cordial relationship:** The adversarial nature of litigation makes existing relationships to go sour, even between members of the same family. This is in view of the fact that in a typical African traditional setting,

[39] See Section 44 of the Arbitration and Conciliation Act on the Procedure for Appointing an Arbitrator.
[40] See Section 36(6) of the Constitution of the Federal Republic of Nigeria, (1999).
[41] Example here is trial of juveniles.

people are so vehement when they are taken to court. This therefore destroys an age-long relationship but with ADR, which is about discussing and agreeing on certain terms, parties to a dispute may settle their disputes amicably and at the same time preserve their relationships.

5. **Reduced stress and increased satisfaction:** Regular attendance of court proceedings is undoubtedly stressful. This becomes more hectic if after a prolonged trial and parties, after investing so many resources, could not get what they wanted. Where however, parties to a dispute adopts ADR even if they do not get one hundred percent of what they want, they would at least be satisfied with what they have, especially where they are enlightened about the prolonged trial and stress they would have passed through if they had opted for litigation.

DISADVANTAGES

ADR processes are undoubtedly more advantageous to litigation, hence preferable; this does not mean ADR is completely faultless. In this regard, Ojieolo[42] has outlined some of these disadvantages, or shortcomings of ADR in the following paragraphs:

1. **Fewer Evidentiary and Procedural Protections:** As stated above, settlement of disputes under the ADR processes, as against the court system, is more relaxed and party controlled, with no stringent procedural and evidentiary rules. This creates concern about whether parties can get real justice. This is because under the ADR processes some procedural protections

[42] Ojielo M.O. Op.cit., at P.18

of litigation are given up in exchange for potentially faster, more cost effective and more flexible process.[43] In this kind of arrangement certain evidence may be refused to the ADR institution due to absence of a sinister court atmosphere which may force the attendance of a witness, through subpoena, and in some cases, under threat of imprisonment.

2. **Sometimes ADR may be more costly and time consuming:** This happens where a non-binding ADR process does not result in the resolution of a dispute; costs may be incurred for both ADR process and for litigation. This is due to the fact that cost may be incurred in two ways; i.e. to pay for the ADR, and where certain issues remain unresolved, pay for litigation (by virtue of legal fees to lawyers.) But, even where this is the case, the ADR process may still reduce the cost of litigation as some issues might have been resolved through the ADR processes, thereby scaling down the issues to litigate upon.
3. **No appeal is available in a binding ADR processes:** A disputant who submits himself to ADR process (e.g. arbitration) only appeals to the court for review of awards made by the arbitral tribunal, has been allowed by the law and nothing more.[44]
4. **ADR processes do not provide legally binding precedent:** In essence, resolutions or awards made by an ADR institution cannot be cited as precedent on a subsequent dispute. In other words, each case is treated based on its own merit.

[43] Ojielo M.O. Op.Cit. at P.18
[44] See Section 32 and 52 of the Act for requirements under which a disputant in arbitration can apply to court for setting aside an arbitral award.

2.4 TYPES OF ADR PROCESSES

There are basically three main ADR processes, negotiation, mediation and conciliation (otherwise called primary ADR processes). There are however other processes, which have either been offshoots of one of the above or a combination of some of them. These are termed 'hybrid' processes; and this work shall attempt to give a general overview of the processes.

2.4.1 Primary ADR Processes

2.4.1.1 Negotiation

Negotiation is a dispute resolution mechanism, normally employed in settling labour and commercial disputes.[45] This kind of method is also used at inter-personal level; among friends between husband and wife in the running of matrimonial homes, and even more typically in the market between buyers and sellers of goods. This is adopted in an open market where there is no fixed price for particular goods. The seller would mention a price and the buyer bargains for it until they agree. That is a typical negotiation.

Negotiation is undoubtedly a major feature of human relationship. Human beings do negotiate on a variety of issues to maintain the existence of a cordial relationship between them. This, human beings often do informally at interpersonal level. As a result, they unconsciously solve certain problems among themselves which could ordinarily lead to litigation. This, however, does not make one a good negotiator.[46] Technically, Negotiation is a dialogue between two or more people

[45] S. 3 Trade Disputes Act Cap T8 L.F.N (2004)
[46] Ojieolo M.O. Op.cit. P. 120

with the intention to reach an agreement or understanding with a view to resolve a difference between them or gain advantage over a certain issue or matter. Under this process, the parties involved try to gain an advantage for themselves by the end of the negotiation.[47] For anyone to become a recognized expert negotiator, he must have learnt and applied the skills in a professional sense. Apart from informal negotiations that take place in our daily lives, negation is also carried out in a professional sense in business, in government, in divorce and other courts proceedings e.t.c.

Negotiation, which can be described as the process of communication for the purpose of persuasion,[48] is one of the most powerful modes of dispute resolution. This is because negotiation is the business method that can be said to be used more than any other, and with good cause it is the most flexible, informal and party directed, closest to the parties own circumstances and control and can be geared to each party's own concerns.[49] Also, parties choose location, timing, agenda, subject matter and participants.[50]

In settling industrial disputes, negotiation in the form of collective bargaining, is normally employed by parties before agreeing on a particular issue. This typically takes place between governments or companies and their employees. A reference point here is the kind of negotiation which takes place between the Nigerian Labour Congress and the Federal or state Governments over issues that border on worker's welfare, or general national interest.

[47] www.wikipedia.com. Visited on April 12, 2012
[48] Goldenberg, S.B. Sandy, F.E.A. and Rogers W.H. Op.Cit. at p.17
[49] Mackie, K. Op.Cit. P. 9.
[50] Ibid

It may be recalled that the government of President Olusegun Obasanjo from 1999 – 2007 had cause to engage in several discussions with the Nigerian Labour Congress, over increase in fuel pump price. During the discussion, the issue was negotiated and re-negotiated as to how much should be the official pump price. Another example which typifies negotiation is the Academic Staff Union of Universities/Federal Government Agreement of June 1999, which was renegotiated in 2001, and up till now it is still being renegotiated.

Negotiation can be further subdivided into 'positional' negotiation and 'principled' negotiation. In positional negotiation parties adopt either the soft or hard bargaining, while in 'principled' negotiation, parties adopt the problem solving bargaining.[51] In other words, parties to principled negotiation are more inclined towards finding a way of solving the problem, which is the subject matter of dispute as against positional negotiation, where disputants refuse to shift ground or concede to the other party with a view to finding a lasting settlement. In essence, parties to a positional negotiation are mainly inclined to achieving that which is most favourable to them. Mediation share some features with Arbitration, one of which is the presence of a third party who assists the disputants arrive at a settlement. Mediation also differ from Arbitration in that the decision of a Mediator as against that of an Arbitrator, is not legally binding. The work of a Mediator is only to look at the dispute and suggest a solution while in the case of an Arbitrator his decision is binding on the parties.

[51] Ibid.

2.4.1.2 Mediation

Mediation has been defined[52] as a process in which an impartial third party helps parties to resolve a dispute or plan a transaction by assisting their negotiations.

Mediation is a dispute resolution mechanism conducted with the assistance of a neutral third party. The key feature in a mediation process is the presence of a neutral third party who assists disputants to resolve their difference, with respect to a particular dispute. But the third party must be acceptable to both parties.

According to the Family Mediation Manual (Multi-Door Dispute Resolution Division, Superior Court of the District of Columbia, 1999)[53], mediation is a process of resolving existing or potential disputes, or for mitigating the negative effects of such disputes. Mediation provides parties with the opportunity to develop a mutually satisfying outcome by creating solutions that are tailored to meet the needs of their peculiar dispute.[54] Mediation is also similar to conciliation in that both processes look to maintain an existing business relationship to rekindle a lost balance of power between the disputants[55].

The mediator, unlike a judge or an umpire (in arbitration), does not make an award nor does he or she, in the strict sense of mediation, evaluate party claims.[56]

[52] Per Agbaje J.S.C. in *K.S.U.B. v Franz Construction Limited* (1990) 4 NWLR (Pt 142) 23.
[53] Quoted in Ojielo, M.O. *Alternative Dispute Resolution (ADR)* Op.Cit. P. 103.
[54] www.mediate.com/articles/sgubinia2.cfm. visited on12-04-2012
[55] Ibid.
[56] Mackie, K. Op.cit at P.10.

The main objective of mediation as a dispute resolution process is in essence to heal or to repair an already battered relationship.[57]

However, even though a mediator's position cannot be equated to that of a 'judge' in litigation, or an 'arbitrator' or an 'umpire' in arbitration, his role can be summarized thus:

> …to help disputing parties focus on the future rather than question of punishment, revenge, who is responsible, and what went wrong in the past. To accomplish this, it is important that the mediator should (sic) not create a court-like atmosphere where one party wins and the other loses, but, instead to establish a willingness to negotiate in an atmosphere conducive to sharing ideas and not reconstruction of mutual settlement …. The purpose is not to 'fix' everything, but to give each party an opportunity to communicate constructively and toward a specific settlement – the mutual settlement.[58]

The West Virginia Supreme Court Rule of Procedure graphically sums-up what mediation means and what the functions of a mediator are in the following words:

> Mediation is an informal non-adversarial process whereby a neutral third person, the mediator, assists parties to a dispute to resolve by agreement, some or all of the differences between them. In mediation, decision-making authority remains with the parties, the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable settlement by facilitating communication; helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem solving, exploring settlement alternatives and other similar means. The procedures for mediation

[57] Ojielo, M.O Op.cit. at P. 3.
[58] Ibid at p.79.

> are extremely flexible and may be tailored to fit the needs of the parties to a particular dispute.[59]

Mediation can also take the form of 'voluntary' or 'court administered' mediation. Voluntary mediation is defined as dire, given, etc. by choice, not by accident or because of being forced. This suggests that parties subject themselves to mediation willingly without being coerced or induced to do so, which will be done by a third party. Court mandated mediation is, on the other hand, one administered or sanctioned by the court.

It should however, be stated at this juncture that, mediation is one of the ADR processes which lacks legislative backing in Nigeria. Mediation proceedings are highly confidential, to the extent that even at the multi-door Court Houses (especially in Abuja), details of the proceedings are not allowed to be disclosed.[60] As a result there are no judicial decisions to illustrate this. That notwithstanding, the most common illustration of mediation is the intermediary role played by the Minister of Labour in Nigeria, in settling industrial disputes between the Federal Government and Labour Unions.[61]

The Minister of Labour had at various times played this role in trying to settle industrial disputes between members of the Nigerian Labour Congress from 1999 – 2007, during the leadership of President Olusegun Obasanjo. The Minister of Education also played a similar role in trying to settle disputes between the Federal Government and Academic Staff Union of Universities (ASUU). In the

[59] Quoted in Cho, F.F.(2006) Alternative Dispute Resolution and the Legal Profession in Nigeria: Issues, Problems and Prospects, PhD Thesis (Unpublished) Faculty of Law, A.B.U., Zaria p. 184.
[60] See Rule 15 of the Practice Direction Manual Abuja Multi-Door Court House (2003).
[61] Op.cit.

course of both negotiations, the Ministers acted as mediators between government and the labour unions to try to broker a settlement. Even though the ministers are government representatives they play a role typical of a mediator because they take government position to the unions, take the union's position to the government, until a final settlement is reached at the end. The Minister may even propose steps for the purpose of settling the industrial dispute.[62]

Therefore, a mediator is just like a moderator in a radio or television programme, which features experts discussing a particular issue, with each expert voicing his own opinion on the matter. After their discussion, the moderator sums up their opinions and arrives at a conclusion but without imposing his position on any of them.

A mediator can be either 'facilitative' or 'evaluative'.[63] A facilitative mediator facilitates the parties' negotiation towards settlement; while 'evaluative' mediator assists the parties to settle their dispute by introducing a third party view of the merits of the case or of some of the issues between the parties.[64]

2.4.1.3 Conciliation

The Mediation Law of South Korea[65] defines conciliation as a process of settling disputes where the parties have an arbitration agreement which is governed by arbitration law. Conciliation can also be defined as a dispute resolution process whereby parties to a dispute employ the services of a neutral third party who will assist them to resolve their dispute and prevent the breakdown of an existing

[62] Section 5(1) Trade Dispute Act Cap. T8 L.F.N.(2004).
[63] Mackie Op.cit.
[64] Ibid
[65] Quoted in Cho F.F. Op cit. at p.43

relationship between them. In conciliating, the conciliator may not necessarily bring the disputants together, but he can still meet them se Conciliation differs from arbitration and conciliation in many respects; viz:

a) Unlike arbitration, conciliation proceeding is less adversarial; it seeks to identify a right that has been violated and searches to find the optimal solution.

b) As against a mediator, a conciliator plays a relatively direct role in the actual resolution of the dispute and even advises the parties on certain solutions by making proposals for settlement.

c) Conciliation is used almost preventively as soon as a dispute or misunderstanding surfaces. This is against mediation and arbitration which intervene in the substantial dispute that has already surfaced and became difficult to resolve without the use of professionals.[66]

Section 8(2) of the Trade Dispute Act Cap T8 also provides for the position of a conciliator in settling industrial disputes. He is appointed by the Minister when all efforts to settle the dispute fail. Going by our earlier discussion, if the Minister cannot broker a settlement between labour unions and governments, he may go a step further to employ the services of a conciliator.

Nigeria's Arbitration and Conciliation Act[67] does not give a clear -cut definition of the term, Conciliation; even the interpretation Section of the Act, which is, Section 57 fails to define this concept.

[66] See generally, www.mediate.com op cit.
[67] Cap A18 L.F.N. (2004).

This does not however mean, a working definition would not be provided, despite the fact that there is a difficulty in drawing a clear dividing line between mediation and conciliation. This is because some writers equate it with mediation, for sharing some key features, one of which is that both processes are based on the consensus of the parties with the assistance of a third party.[68]

Despite the above confusion, an attempt has been made by Ezejiofor[69]at differentiating between the two to the effect that:

> A conciliator performs a slightly different function. Like a mediator he is a neutral third party, trusted by the disputing parties. First of all, he inquires from the parties whether they are prepared to try to settle the dispute amicably. If the response is positive he then arranges a joint meeting with the parties, after studying the relevant documents. At the meeting the conciliator invites each party to set out his case, while he listens carefully to satisfy himself and he understands their various contentions. After the joint session, he may meet with each party separately, and privately, with a view to discussing the matter in confidence and finding out the point beyond which the party is not prepared to go… he then carefully considers each party's evidence and submissions against their rebuttal thereof by the other party. Against the background of all these the conciliator draws up and proposes the terms of settlement which represent in his own perception, a fair compromise of the disputes.

Based on the above, it can be seen that the major distinction between a conciliator and a mediator is that, while the former assists disputants to reach a compromise decision by suggesting a solution for them to consider among themselves, the latter only attempts to bring the parties together and encourage

[68] Ojieolo M.O. Op.cit P. 57.
[69] Ezejiofor Op.cit. P.7

them to resolve the dispute themselves. In other words, the conciliator plays a more active role than the mediator because he goes a step further to suggest a compromise position for the parties to consider. In essence, a conciliator is more or less an arbitrator, save that he cannot impose any award as an arbitrator can do. Although both mediation and arbitration share the feature of having a third party to settle dispute, the two also differ in the sense that an Arbitrator brings the disputants together while a Conciliator meets with them separately[70]. In conciliation parties try to achieve settlement by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement[71].

Due to absence of judicial decisions on substantial number of ADR processes in Nigeria[72] (especially negotiation, mediation and conciliation), the only illustrative quasi-judicial pronouncement which the present writer could lay his hands on, is the Cameroonian case of **Presbyterian Primary School Teachers; The Presbyterian authorities decided on 4th December 1990[73].** In the case, a meeting was conducted between staff representatives of the Presbyterian primary school teachers; Mr. Teday Henry, the Presbyterian Secretary for Education in the person of Mr. Zachariah Memoh, the provincial labour Inspector, Mr. Kimbu Nicoclemus, the Assistant Inspector of Education for Mezam, and Mrs. Sikod amongst others.

[70] www.wikipedia.com op cit.
[71] Ibid.
[72] Of all the ADR processes only Arbitration and Conciliation have legislative recognition as contained in Arbitration and Conciliation Act Cap A18 L.F.N. (2004)).
[73] Quoted in Cho, F.F. (2006) An Examination of the Statutory Procedure for Settling Industrial Dispute in Cameroon. *Journal of Private and Comparative Law*. 1(2) 44-45.

In the meeting, the teachers' leaders lamented the non-payment of their salary for several months, and that as at the date of the meeting most of the teachers in the province were *franc less* (they were broke). This situation and many more, he said, drove them to resolve on November 14th, 1990 to stop work as form November 30th, 1990 if by then the authorities have not yet responded to their demands.

The Presbyterian Education Secretary, in response to the above allegations explained why the staff salaries were always in arrears as follows:

i. Since 1976 the subvention and fees collected have never been enough to cover the salary bills let alone running costs and deficit started to mount.
ii. Salaries continued to rise every year as a result of presidential decrees or biennial increments or reclassification of teachers after passing external professional examinations.
iii. Government grants did not reflect these salary increases or reclassifications.
iv. Of late, the subventions have been late in coming and for this year they have gone down by one third.
v. The installment of the 1998/90 grant was still being expected.
vi. The recent fee increase authorized by the government had actually caused a drastic drop in student enrollment.

After listening to both parties the labour inspector pleaded that the teachers should call off the strike and return to work while the church and government find ways and means to normalize the situation. This made the staff to order their

members to resume work immediately. The Inspector's role in the above scenario is that of a conciliator.

2.4.1.4 Adjudicative Process

Under this process, parties contract an expert to determine all the issues between them or to determine certain facts, leaving the parties to negotiate the financial implications.[74] This like mediation and conciliation involves the use of an independent third party in resolving the problem between the disputants. But unlike the two processes, in adjudicative process, parties have limited control of the process because an adjudicative process culminates in some form of decision or judgment being delivered.[75] The two common and most prominent adjudicative processes are litigation and arbitration. A typical example of an adjudicative process is Pre-trial Conference recently introduced by the revised Civil Procedure Rules of majority of the states in Nigeria.

2.4.1.5 Hybrid Process

A hybrid process was devised to provide a more effective dispute resolution mechanism which best suits a particular dispute, hence the name 'alternative' or sometimes 'appropriate' or 'amicable' (as it is being contended by some scholars). This is what led to the emergence of the 'hybrid processes. This is a process which involves the combination of different ADR processes with a view to finding a potent process that will provide a suitable dispute resolution mechanism.[76] For example, an ADR process may choose to adopt a combination of mediation and

[74] Mackie K. Op.cit. P.11
[75] Ibid
[76] Ibid

arbitration i.e. Med – Arb, so that when mediation fails, arbitration can be resorted to, to resolve any outstanding issue from the mediation.[77]

2.4.1.6 Mini Trial

This ADR process was devised for the purpose of combining several ADR processes with a view to ensuring complete resolution of a dispute. It is in essence a hybrid process, as it combines different ADR processes to settle a particular dispute. The term 'mini-trial' was a coinage of a New York Times Journalist reporting in an early information exchange procedure.[78]

Mini-trial has been adequately described by an author[79] as follows:

> Mini-trial has been described as a 'hybrid' or 'blended' ADR procedure because it combines a more formal legal negotiation, neutral facilitation and case evaluation. It is a channel for streamlined information exchange between parties with a view to subsequent negotiation between clients. In essence, lawyers or other advisors for each party present a 'mini' version of their case to a panel consisting of a senior executive of their client and of the other party (ies) to provide the appropriate base from which the clients can get to grips with the problem and negotiate resolution, having been given a foretaste of what would occur at a trial of the action.

The above procedure has been described as mini-trial as it comprises some features of a trial, such as tendering of evidence and examination of witnesses, with a neutral party adjudicating even though it is not a trial property so-called, as it avoids court procedure.

[77] Ibid
[78] Ibid at P. 137
[79] Ibid

Mini-trial is widely used in business disputes where attorneys of both disputants would prepare their cases and make presentations to a panel consisting of neutral advisor and high level executives with settlement mandate.[80] The rationale for such quasi-judicial presentation is to enable parties to assess the merit or otherwise of their respect positions, thereby reducing uncertainty about the outcome of their dispute.

2.4.1.7 EARLY NEUTRAL EVALUATION

Cho[81], described this ADR process thus:

> This is a situation where the case is assessed early in its history by one or more experienced neutral persons after brief presentation by both sides. If the matter is not settled, the assessment is kept confidential and the evaluator helps the parties to simplify and anchor the case for non expeditious handling of other ADR processes in the court.

The above procedure seems abstract because it is not common in Nigeria; even though it shares some characteristics with pre-trial conference being introduced in civil trials in most states of Nigeria. The major difference is that at pre- trial conference level, preliminary matters and interlocutory applications are dealt with to ensure speedy trial. This unlike an early neutral evaluation, which is held for the purpose of dissecting the matter for parties involved to see the merit and demerit of the cases.[82]

[80] Cho, F.F. Op.Cit., at P.43.
[81] Cho, F.F. (2006) Alternative Dispute Resolution and the Legal Profession in Nigeria: Issues, Problems and Prospects. Op cit. P. 48
[82] Ibid

2.4.1.8 OMBUDSMAN

This concept has its origin from Sweden[83], where the Ombudsman is a public officer appointed to listen to complaints from citizens in order to conduct independent fact finding investigations with the aim of correcting abuses in public service. The Ombudsman's job is principally meant to resolve work related disputes through informal counseling, mediation, investigation and making recommendations to management. An Ombudsman in Nigeria can be equated to the Public Complaint Commission. The commission performs functions akin to that of an ombudsman.[84] The SERVICOM or Service Compact with Nigerians introduced during the regime of former President, Olusegun Obasanjo, also performs functions similar to that of an ombudsman, as it was established to ensure that government ministries and agencies deliver efficient services.

2.5 ARBITRATION DISTINGUISHED FROM OTHER ADR PROCESSES

Relevant Nigerian legislations dealing with arbitration have not defined what arbitration means. However, Harlsbury's Law of England[85] defines arbitration as the reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction. Therefore, when two disputing parties submit their dispute to a third party as against the conventional court system and agree that whatever the third party decides, shall be legally binding on them, that can be perfectly described as an arbitration agreement.

[83] Ibid
[84] See Public Complaints Commission Act Cap P.37 LFN (2004).
[85] Quoted in Ojielo M.O. Op.cit at P.30

However, for an agreement to become arbitration, it has to possess the following characteristics[86]:

1. Parties must intend to honour the decision of the arbitrator. The arbitrator being someone appointed by the parties to an arbitral process, it is only natural that they have resolved to abide by his decision.
2. Parties whose rights and obligations are in issue and those who are bound by the decision must be the same. What in essence this means is that only parties who are either directly or indirectly affected can be part of the arbitration process for the agreement to be an arbitration i.e. where strange third parties are made to benefit under an agreement it cannot be said to be an arbitration.
3. The power of the arbitral tribunal in a private arbitration to bind the parties by its decision must derive from the consent of the parties themselves. The decision of the parties to be bound by whatever the tribunal decides at the end of hearing must not have been taken by a third party on their behalf.
4. The arbitral tribunal must be appointed by the agreement of the parties. The arbitral tribunal must have been appointed by the parties not by any other person; not even the court, unless where allowed by law. This is in fact one of the beauty of ADR; that parties control the entire process, including the appointment of the arbitrator.

[86] Orojo, J.O. and Ajomo M.A.(1999) *Law and Practice of Arbitration in Nigeria*. Mbey and Associates (Nig.) Ltd. quoted in Ojielo M.O. ibid at P.31.

5. The tribunal is expected to act impartially and fairly. Where there is allegation of bias or misconduct on the part of the arbitrator, an aggrieved party can go to court to challenge whatever award must have been made by the tribunal.
6. The agreement to refer (the dispute) to the (tribunal) must be valid and enforceable. Where an agreement is not one that is enforceable, then it cannot be subject of arbitration.
7. There must be a dispute in existence when the arbitrator is appointed.

Arbitration is essentially meant to apply to commercial disputes which are contractual in nature. This is the position at least in Nigeria.[87] Therefore, in distinguishing between arbitration, on the one hand, and other main ADR processes, (i.e. mediation and conciliation), on the other, the former comprises an award which is legally binding as against the latter two which do not[88]. In other words, an arbitrator issues a verdict and imposes a solution[89] on the disputing parties as against a mediator or conciliator, i.e. an arbitrator's verdict is final; it can only be set aside by court.

In mediation however, the mediator merely attempts to bring the parties together and encourage them to reach a compromise position while a conciliator goes a step further to suggest a solution to them for consideration among themselves.[90] In essence, a conciliator falls short of an arbitrator because he does not impose the solution on the disputants. Rather, he is only to suggest. It may not be out of place if one describes arbitration (in a loose sense), to mean an advanced

[87] See the preamble to the Arbitration and Conciliation Act, Cap A18 L.F.N (2004)
[88] Ezejiofor G. Op.cit. P.9
[89] This takes the form of an award.
[90] Ezejiofor Op.cit. at P.9

form of conciliation. This is because most at times, arbitration is resorted to where conciliation fails.

An arbitrator, in essence occupies a position similar to that of a judge, as he is immune from action for negligence.[91] This is against a valuer or certifier[92] who is not. As stated above, arbitration is more often preferred by businessmen to other forms of alternative dispute resolution processes. This is not without reason; it is basically because it is more easily accessible to the businessmen, as there are available, several arbitration institutions, which are ready to provide facilities for arbitration subject to payment of the requisite fees.[93] Some of these arbitration institutions include the Permanent Court of Arbitration (P.C.A.), American Arbitration Association (A.A.A.), and London Court of International Arbitration (L.C.I.A.) e.t.c.

Also, arbitration can be more easily enforceable across multinational borders (where it is international). This is made possible through the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York) Convention, 1958; and the UNCITRAL Model Law; as well as other domestic legislations.

Another advantage which arbitration has over other processes is that it is more readily enforced by the court. This is due to the force of law (in terms of enforceability), it enjoys over other ADR processes.[94] In concluding this chapter, it

[91] Ibid
[92] Ibid
[93] This is specially the case where arbitration is international in nature
[94] This is because an Arbitral Tribunal is a quasi-judicial body, the judgment of which is legally binding by virtue of the New York Convention 1958 and the Arbitration and Conciliation Act cap. A. 18 L.F.N.(2004).

is pertinent to state that in spite of the advantages which arbitration enjoys over litigation and other processes; it does not mean arbitration does not have its own shortcomings. An arbitral tribunal, unlike the conventional courts, as stated earlier, does not have the power to compel the appearance of a witness, before it. It can also not order the consolidation of cases before it, even where their facts are similar. This, the ordinary courts can do in deserving circumstances.

Generally, however, arbitration is preferred to other ADR processes, or even to litigation. This is because arbitration is commonly more advantageous at least in the settlement of commercial disputes, which is the main focus of this work.

2.6 LITIGATION AND ADR COMPARED

1. Litigation is a delayed process when compared to ADR. While ADR is conducted within the shortest possible time, litigation takes some years to be concluded especially where it involves appeals from one court to the other, depending on the nature of the case and how congested is the court diary.
2. Unnecessary publicity is given to hearing of cases in litigation. This allow for all kinds of people to attend and listen to court proceeding, except in very few circumstances[95] where hearing would be conducted behind closed doors.
3. Litigation is adversarial in nature, hence likely to destroy a long standing existing relationship. This is against an ADR process which often keeps such relationships intact, as decisions are given based on agreements of disputants.
4. Loss of control of cases is another feature of litigation. Once the case is handed over to lawyers parties to a large extent; lose control of them. Even if

[95] Example here is proceeding in respect of juvenile trial.

the parties wants to withdraw the matter and settle out of court, they would have to first consult their lawyers before taking such action, as every step they take in the dispute would be based on the lawyer's advice. Also, proper procedure must be followed before that is done.

5. Outcome of cases in the common law system is determined by the evidence and arguments put before the court.[96] The court's duty here is therefore not to decide on grounds of truth or justice, or grounds of what makes for commercial sense or improved business relationship, but rather purely on the basis of the evidence and arguments put before it. This also affects the disputants' business, especially where one of the parties applies and gets an injunction against the other to stop the business.
6. Litigation does not establish a problem solving remedies or commercial solution to difficult issues. All litigation process seeks to know who is at fault and what remedy is the plaintiff seeking for? Once this has been established, the court would at the close of hearing issue its verdict and that is all. This is not the case where any of the ADR processes is adopted. Here a compromised position may be adopted to ensure peaceful settlement of the dispute without seeking to know who is at fault or who owes what obligation.

[96] Mackie, K. Miles, D. and Marsh, W. (1999) *Commercial Dispute Resolution: An ADR Practice Guide*. Butterworth London, United Kingdom p.5.

CHAPTER THREE

DISPUTE RESOLUTION THROUGH THE USE OF INTERNATIONAL COMMERCIAL ARBITRATION IN NIGERIA

3.1 INTRODUCTION

International commercial arbitration is generally a method of settling disputes arising from commercial transactions that are contractual in nature.[1] The type of disputes subject to international commercial arbitration include any trade or commercial transactions dwelling on the supply or exchange of goods or services, distribution agreement, commercial representation or agency, and all other related matters.[2] In essence, any dispute that does not arise from commercial contracts cannot be settled by international arbitration. For example, contract of marriage and contract of employment.

International arbitration[3] against other forms of arbitration[4], in Nigeria is largely guided by the Arbitration and Conciliation Act[5], (hereinafter referred to as the Act). This law is modeled, substantially based on the United Nations Commission on International Trade Law, otherwise known as the (UNCITRAL) Model Law, as well as the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958, (hereinafter referred to as the "Convention").

[1] S. 7(1) Arbitration and Conciliation Act, op cit.
[2] Ibid
[3] International Arbitration or International Commercial Arbitration means the same thing see Ezejiofor G. *The Law of Arbitration in Nigeria* Op.cit.
[4] S. 57(2) of Arbitration and Conciliation Act op. cit.
[5] Ibid.

International commercial arbitration is, therefore, a mechanism for settling disputes arising from contractual agreements with foreign elements.[6]

By way of definition, arbitration is international if:

a. The parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business, in different countries; or
b. One of the following places is situated outside the country in which the parties have their places of business.
    i. The place of arbitration, if such place is determined in or pursuant to, the arbitration agreement;
    ii. Any place where a substantial part of the obligation of the commercial relationship is to be performed, or the place with which the subject matter is most closely connected; or
c. The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or
d. The parties despite the nature of their contract expressly agree that any dispute arising from commercial transaction shall be treated as international arbitration.[7]

3.2 TYPES OF INTERNATIONAL ARBITRATIONS

International arbitrations can take the form of either institutional or ad-hoc arbitrations. Each has its own advantages and disadvantages and these shall be discussed below.

[6] Ezejiofor G. Op.cit. at footnote 3.
[7] S. 57(2) of the Act

3.2.1. Ad hoc Arbitration

This is the kind of arbitration which does not involve any permanent institution to be administered or supervised.[8] In other words, this type of arbitration is conducted without the assistance of any arbitration institution. All the arrangements required to carry out the arbitral proceedings are stipulated by the parties in the arbitration agreement,[9] or arbitration clause of the agreement. For example, in most building engineering contracts, parties often include an arbitration clause saying that in case of any breach of the agreement they should refer the matter to an arbitrator before going to court.

One major advantage of this type of arbitration is that, being a form of arbitration that is not supervised by any institution, there may be no-comprehensive rules adopted in the conduct of proceedings.[10]

Ad-hoc arbitration has, as one of its advantages, cheapness. This is because, parties appoint their arbitrators and also find a convenient place for them to arbitrate, instead of going to any institution, which charges them for the use of its facilities and also pay the arbitrators.

3.2.2 Institutional Arbitration

This is a form of arbitration which is being conducted under the supervision or administration of a particular arbitral institution. There are several arbitration institutions, in different parts of the world which provide facilities for the conduct of arbitral proceedings. These institutions provide facilities for the conduct and

[8] Ezejiofor, G. *Law of Arbitration in Nigeria*, Op.cit. P. 136
[9] Ibid
[10] Most arbitral institutions have their set of rules for the conduct of arbitral proceedings. Adopting institutional arbitration is in most cases advantageous for this reason.

supervision of arbitrations which take place in countries other than those in which they have their seats.[11] These institutions have their own set of arbitration rules and parties patronizing them must conduct their proceedings in accordance with the rules. These institutions assist in the constitution of arbitral tribunals as well as administrative and logistical support.[12] Examples of these institutions are International Centre for Settlement of Investment Disputes (ICSID) and London Court of International Arbitration (LCI).

The major advantage of institutional arbitration is that these institutions have well trained staff to handle proceedings. Its major disadvantage is that it is expensive,[13] formalistic and at times, inflexible.

3.3. DEFINITION AND FORM OF INTERNATIONAL ARBITRAL AGREEMENT

Article 7 of UNCITRAL Model Law[14] defines and provides the form which an arbitration agreement takes; and for the purpose of clarity the provision of the law would be reproduced verbatim hereunder. It is however, worthy of note that Section 1 of the Arbitration and Conciliation Act, Cap A18, L.F.N. 2004, has, *mutatis mutandis,* adopted the UNCITRAL Model Law's definition.

Article 7 states thus:

1. An Arbitration agreement is an agreement by the parties to submit to arbitration, all or certain disputes which have arisen or which arise between them in respect of defined legal relationship, whether contractual or not. An arbitration

[11] Ezejiofor, G.Op.cit. Footnote 10
[12] Ibid
[13] Ibid
[14] UNCITRAL Model Law on International Commercial Arbitration adopted by U.N. Commission on International Trade Law on 21st June 1985, and Amended by U.N. Commission on International Trade Law on 7th July,(2006).

agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2. (2) The arbitration agreement shall be in writing.
3. (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means.
4. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be sue able. For subsequent reference, 'electronic communication', means any communication that the parties make by means of data messages; data message means information generated, sent, received, or stored by electronic, magnetic, optical, or similar means, including, but not limited, to Electronic Data Interchange (EDI), electronic mail, telegram, telex or telecopy.
5. Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
6. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

The above definition is so elaborate on what amounts to an arbitration agreement and the form it should take. This is against the provision in the Arbitration and Conciliation Act, which fails to define the term "arbitration agreement". Instead, it has only defined the form which an arbitration agreement should take i.e. the types of channels through which commercial transactions can be channeled to make them part of an arbitration agreements. In other words, the Act does not provide a clear cut definition of the term arbitration agreement or arbitration clause. However, the UNCITRAL model law has defined an arbitration agreement in an elaborate manner, taking into account modern business transaction

tools. These include wireless communication, such as, internet and mobile telecommunication.

In essence, therefore, by the import of Article 7 of the UNCITRAL Model Law[15], an arbitration agreement may be in the form of an independent agreement, or in the form of a clause, contained in the main contract. Therefore, where in a written contract reference is made to a document containing an arbitration clause, such reference is deemed to incorporate the arbitration clause into the contract, if the reference is such as to make the clause part of the contract.[16] In essence, an arbitration agreement must not necessarily be part of the contract *stricto sensu;* it can also be an independent document separate from the main contract. All the court needs to do whenever reference is made to the document at a proceeding, it should be automatically incorporated into the main contract.

3.4 CHOICE OF LAW IN INTERNATIONAL ARBITRATION

One fundamental advantage of arbitration is that it gives parties the autonomy to determine the applicable rules in deciding their disputes. In this regard, parties to a dispute subject to arbitration, also have the prerogative to determine how their contract should be structured, including choice of an arbitral process and indeed the choice of the arbitrator.[17] In effect, parties to arbitration, unlike in litigation, have to a large extent, total control over proceedings. This

[15] Section 1 of Arbitration and Conciliation Act Op. Cit.
[16] Akpata, E.(1997) *The Nigerian Arbitration Law in Focus*, West African Books Publishers, Ltd., Lagos, Nigeria
[17] Yakubu, J.A. The Interplay of Adjudicative Functions Between Arbitral Tribunals and the Courts with Respect to Arbitral Proceedings. Kanam S.M.G. and Madaki A.M. (Ed). *Contemporary Issues in Nigerian Law: Legal Essays in Honour of Justice Umar Abdullahi (.PC.A.)* Browntel Books, Zaria (2007) pages 179 – 214.

allows parties the freedom to choose any law that best favour their arbitral proceedings, which in turn provides them with a suitable solution to their problems.

Ezejiofor highlights the principle of party autonomy, with regards to choice of law in the following words:

> According to the doctrine of party autonomy, parties to an international commercial contract are free to choose the applicable law, or the governing law, or the proper law of their contract. That is the law that regulates the substance of their disputes and thus governs the interpretation and validity of the contract, the rights and obligation of performance and the consequences of breaches of the contract.[18]

Choice of law here refers to the proper law, the law to be applied in deciding any dispute which may arise in the future or in the course of the transaction. The choice of the law may be made at the beginning of the contract. Parties' right to a choice of law is absolute and cannot be restricted.[19] In most cases, a national law is chosen as the proper law of the contract while in some instances, international law is chosen.[20] Where, however, parties have not expressly, or have not tacitly chosen the proper law of the contract, the choice is generally made by the court or arbitral tribunal in accordance with the conflict rules of the forum of trial or arbitration i.e. *lex fori.*

[18] Ezejiofor, G. Op.cit.
[19] Ibid at p. 168
[20] Ibid.

It is however, pertinent to state here that in order not to give room for 'forum shopping', especially where parties are not favoured by the *lex fori*,[21] it is advisable to state the proper law at the beginning; i.e. the choice of law clause in the main contract.

The above principle has been further adumbrated by **Diplock L.J.** in the case of **Compagnie D'armament Maritime S.A. v Compaignie De Navigation S.A.**[22] thus;

> I do not wish to throw any doubt upon the proposition that an arbitration clause is generally intended by the parties to operate as a choice of the proper law of the contract as well as the crucial law and should be so constructed unless there are compelling indications to the contrary in the clear terms of the contract or the surrounding circumstances of the transaction.

Articles 33 of the UNCITRAL Arbitration Rules provide a statutory backing to the above position on party autonomy in an arbitration proceeding, as follows:

> Article 33(1): The Arbitral Tribunals shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designing by the parties, the arbitration tribunal shall apply the law determined by the conflict of law rules which it considers applicable.
> (2) The Arbitral Tribunal shall decide as amiable compositeur or ex aequo et bono, only if the parties have expressly authorized the tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
> (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction.

[21] Ibid at p.169.
[22](1972) A.C 572, quoted in Yakubu, J.A. Op.cit at footnote 18 above.

The combined effect of the above judicial pronouncement and the provision of Article 33 of the UNCITRAL Arbitration Rules (1978), points to the fact that parties are free to choose the applicable law on their arbitration. This is however subject to some exceptions as provided in Article 33. Once those exceptions are considered and taken into account, parties, generally control the manner in which their disputes can be decided, by suggesting the applicable law to their disputes. It should however, be noted that Article 33 of the UNCITRAL Arbitration Rules, have been adopted verbatim by the Arbitration and Conciliation Rules.[23]

Generally, party autonomy is allowed in choosing the applicable law to guide an arbitral proceeding.

3.5 COMPOSITION OF THE ARBITRAL TRIBUNAL

Generally, an arbitral tribunal is to be comprised of three arbitrators.[24] This is where parties have not previously agreed on the number of arbitrators. This position only avails itself, where fifteen days after notice of arbitration was issued to a party (respondent), and no action was taken by either party to decide on the number of arbitrators.[25] See also Section 6 of the Act.[26]

3.5.1 Appointment of Arbitrators

The manner in which arbitrators are appointed in international arbitration has been provided by section 44[27] of the Act, which is in *pari materia* with Article 11 of the UNCITRAL Model Law thus:

[23] In Schedule I to the Arbitration Act Cap A18 LFN 2004.
[24] Article 5 of the UNCITRAL Arbitration Law, Op.cit.
[25] Ibid
[26] Arbitration and Conciliation Act Cap A. 18 op.cit.
[27] See also Section 7 of the Act for the procedure in the appointment of an arbitrator in domestic arbitration.

> S.44(1) If a sole arbitrator is to be appointed, either party may propose to the other, names of one or more persons, one of whom would serve as sole arbitrator.
> (2) If within thirty days after receipt by a party of a proposal made in accordance with subsection (1) 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.
> (3) the appointing authority, shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible; and in making the appointment, the appointing authority shall use the following list procedure unless both parties agree that the list procedure is not appropriate for the cases; that is:
> a) At the request of one of the parties, the appointing authority shall communicate to both parties, an individual 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 which he objects and numbered the remaining names on the list in order of his preference;
> c) After the expiration of the above period of time, the appointing authority shall appoint the sole arbitrator from among the names approved on the list returned to it and in accordance with the order of preference indicated by the parties.

It should however, be stated at this point, that the above provision has only given a guide on the procedure to be followed in appointing an arbitrator. Therefore, in making the appointment an appointing authority is required to be guided by such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account, the arbitrator of a nationality other than the nationalities of the parties.[28] This perhaps, is to avoid the possibility of bias in favour of any of the disputants.

[28] Section 44(4) of the Act.

Generally, if parties to an arbitration proceeding have not previously made any provision as to the number of arbitrators, the number shall be three.[29] Therefore, if three arbitrators are to be appointed, the rule is for each party to appoint one arbitrator and the two shall then appoint the third, who shall act as the presiding arbitrator of the tribunal.[30]

It is pertinent to state here that in the appointment of arbitrators time is of the essence. This may not be unconnected with the fact that an arbitration proceeding is expected to be speedier than the traditional court proceedings. In this respect, Section 44(6) and (7) of the Act provides:

> S. 44(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 has 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, he shall be appointed by the appointing authority, in the same way as a sole arbitrator would be appointed under subsections (1) and (4) of this section.

Subsection (8) goes further to provide the procedure for applying to an appointing authority to appoint the third arbitrator thus:

> (8) when the appointing authority is requested to appoint an arbitrator pursuant to the provisions of this section, the party which makes the request shall send to the appointing authority 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

[29] Section 44(5)
[30] Ibid.

> agreement if it is not contained in the contract, and the appointing authority may require from either party such information as it deems necessary to fulfill his function under this Act.

It should be noted that the above provision can only be invoked where there is disagreement between the disputants on the appointment of the presiding arbitrator or umpire. Where parties to an arbitration proceeding want specific arbitrators to be appointed their full names, addresses and nationalities shall be indicated together with a description of their qualifications.[31]

3.5.2. Challenge of an Arbitrator

When an arbitrator has been appointed by parties to arbitration, he must be a neutral party. Where however, he has any connection with any of the parties in such a way that it is likely to raise justifiable doubts as to his impartiality or independence, he has to disclose this to the parties before proceeding.[32] This may be a form of fiduciary relationship.

An arbitrator may therefore be challenged, if circumstance exist which gives rise to justifiable doubt as to the arbitrator's impartiality or independence.[33] An arbitrator can be challenged by any of the parties even by the party who appointed him. But where a party wants to challenge an arbitrator appointed by him, this can only be for reasons of which he becomes aware after the appointment has been made. This, invariably means, he cannot challenge an arbitrator for reasons which he was aware of before his appointment.

[31] Section 44(9) of the Act.
[32] Section 45(1)
[33] Section 45(3). See also Articles 9 and 10 of the UNCITRAL Arbitration Rules.

Section 45(5) and (6) however, provides the procedure for challenging an arbitrator thus:

> S. 45(5): A party who intends to challenge an arbitrator shall send notice of his challenge within 15 days after the appointment of the challenged arbitrator has been notified, to the challenging party, or within 15 days after the circumstances mentioned in subsections (1) to (4) of this section became known to that party.
> (6) The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal and the notification shall be in writing and shall state the reason for the challenge.

If an arbitrator is challenged, the other party may agree to the challenge and where this happens, the arbitrator must withdraw. But this does not imply acceptance to the validity of the challenge.[34] Where the other party agrees to the challenge and the challenged arbitrator withdraws, a new arbitrator shall be appointed in accordance with Section 44 of the Act.[35] Where however, the other party fails to agree to the challenge, or the arbitrator refuses to withdraw, decision to the challenge shall be made.

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

[34] Section 45(7)
[35] Section 45(8)

c. In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in Section 44 of the Act.[36]

d. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed in accordance with the procedure in Section 44 of the Act.[37]

3.5.3 Replacement of an Arbitrator

Where, for any reason whatsoever, an arbitrator cannot perform his assignment, he should be replaced. Section 46[38] of the Arbitration and Conciliation Act, provides the procedure and grounds for replacing an arbitrator thus:

> Section 46(1) 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 provided for in Section 44 and 45 of this Act that was applicable to the appointment or choice of the arbitrator being replaced.
> (2) Where an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in Section 44 and 45 of this act, shall apply.

In essence, the procedure for the replacement of an arbitrator is the same with the manner for which they are appointed. It should however be noted that where the sole or presiding arbitrator is replaced, by virtue of his appointment being challenged, any hearing held previously shall be repeated.[39] If any other

[36] Section 45(9). See Article 12 UNCITRAL Arbitration Rules.
[37] Section 45(10)
[38] Article 14 UNCITRAL Arbitration Rules
[39] Article 15 UNCITRAL Arbitration Rules

arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.[40]

3.6. JURISDICTION OF AN ARBITRAL TRIBUNAL

The issue of jurisdiction is so important that even in ordinary litigation, once it is raised, the court has to dispose of it before taking any further step in the action.[41] Any decision arrived at by the court without first addressing the issue of jurisdiction, would be void *ab initio*. This, to some extent is the case with arbitration, because an arbitrator can only decide what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority and consequently, the whole arbitration proceeding, including the award of the arbitrator will be null and void.[42] If he decides something else, he will be acting outside his authority and consequently, the whole of the arbitration proceeding, including the award of the arbitrator, will be null and void.[43] However, an arbitral tribunal is competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the agreement.[44] The plea of jurisdiction can only be raised not later than the time of submission of the points of claim and defence; and a party is not precluded from raising such plea by reason that he had appointed or participated in the appointment of an arbitrator.[45] This is because of the fact that, as stated above, the issue of jurisdiction is so fundamental

[40] Ibid
[41] Pedro, L. (2006) *Jurisdiction of Courts in Nigeria (Cases and Materials)* Ministry of Justice Law Review, Lagos, Nigeria, p.2.
[42] Per Agbaje J.S.C. in *Kano State Urban Development Authority v. Fanz Construction Ltd* (Supra) at P. 34.
[43] Supra.
[44] Section 12(1) o f the Act. See also Article 16 UNCITRAL Arbitration Rules.
[45] Article 12(3)(a) of the Rules

to the validity of any decision the tribunal may take. Therefore, the question of jurisdiction can be raised where the tribunal exceeds the scope of its authority, as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings.[46] This does not preclude the tribunal from admitting a latter plea if it considers that the delay was justified.[47]

The issue of jurisdiction, whenever it is raised, may be ruled upon by the tribunal, either as a preliminary question or in an award on the merits, and such ruling shall be final.[48] In essence, therefore, the issue of jurisdiction can be raised either as a preliminary objection or during the course of proceedings; and the tribunal must deal with it. It is however, pertinent to state at this point that as it is the case in court litigations, the issue of jurisdiction, once raised it would be determined by no other person, but the tribunal or court hearing it.

The arbitral tribunal shall, having regard to the circumstances of the arbitration, determine the place of arbitration, unless the parties have agreed upon the place where the arbitration is to be held.[49] Where this has not been agreed upon by the parties, the tribunal is the sole determinant of the place of arbitration.

3.7. POINTS OF CLAIM/DEFENCE

In an arbitral proceeding as it is the case with litigation, a claimant is required to file statement or point of claim; the respondent is also expected to file a statement of defence, to defend all claims made by the claimant. This is to avoid

[46] Section 12(3)(b) of the Act.
[47] Ibid
[48] Section 12(4) of the Act.
[49] Article of the Rules

parties springing up surprises and for clarity of claims of the claimant. In this regard, section 19 of the Act provides:

> 19(1) the claimant shall, within the period agreed upon by the parties or determined by the arbitral tribunal, state the facts supporting his points of claim, the points at issue and the relief or remedy sought by him, and the respondent shall state his points of defence in respect of those particulars unless the parties have otherwise agreed on the required elements of the points of claim and of defence.[50]
> (2) The parties may submit with their statement under subsection (1) of this section, all documents they consider to be relevant or they may add as reference to the documents or other evidence they hope to submit at the arbitral proceedings.[51]
> (3) Unless otherwise agreed by the parties, a party may amend or supplement his claim or defence during the course of the arbitral proceeding. 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 amendment or supplement.

The tribunal has the discretion to allow an amendment or supplement to points of claim or of defence, or not to permit such amendment. In doing this, time is of the essence. Therefore, where an unnecessarily long period has elapsed, the tribunal reserves the right to refuse such an amendment or supplement, on whatever ground. A statement of claim or of defence shall contain the following:

a. The names and addresses of the parties

b. A statement of the facts supporting the claim

c. The points at issue; issues for determination by the arbitral tribunal

d. The relief or remedy being sought[52]

[50] See also Article 18(1) UNCITRAL Arbitration Rule
[51] Section also Article (2) of the rules.
[52] Article 18(2) and 19 UNCITRAL Arbitration Rules.

3.8. NATURE OF HEARING IN AN ARBITRAL PROCEEDING

Unless parties agreed otherwise, an arbitral tribunal has the prerogative to determine the manner in which it will conduct its proceedings.[53] It may be by holding both oral hearings and on the basis of documents or other materials.[54] The tribunal shall conduct its hearing by giving sufficient notice to the parties; and where any party produces a document or other information to the tribunal, it must be communicated to the other party.[55] The same rule applies to expert report or evidentiary document on which the tribunal may rely in arriving at its decision.[56] The tribunal, unless the parties agreed otherwise, has the power to administer oaths, or take affirmations of the parties and witnesses appearing before it.[57] The tribunal also has the power to issue out a writ of *subpoena ad testificandum or subpoena duces tacum, (summon someone to come to present a documentary evidence or present document and also give testimony),* with the exception that it shall not compel any person under such writ to produce a document, he could not be compelled to produce at trial.[58] In essence, at an arbitral proceeding, the tribunal goes to any extent to find the truth about a claim and decide appropriately, save that its award can only be enforced by the court in the event of non-compliance.[59] However, an application can be made to a court or judge to order that a writ of *subpoena ad testificandum* or *subpoena duce tacum,* shall issue to compel the

[53] Section 20(1) of the Act
[54] Ibid
[55] Section 20(2) and (3)
[56] Section 20(4)
[57] Section 20(5)
[58] Section 20(6)
[59] See Section 51 of the Act dealing with Recognition and Enforcement of an Award.

attendance before any arbitral tribunal, of a witness wherever he may be in Nigeria.[60]

3.9. TERMINATION OF PROCEEDINGS

An arbitral tribunal terminates its proceedings whenever it has discharged its own assignment. This most at times, result in an award, in the form of judgment which may subsequently be enforced by the court in the event of non-compliance.[61] Section 27 of the Act mentions other circumstances, which could lead to the termination of an arbitral proceeding, as follows:

> Section 27(2): the arbitral tribunal shall issue an order for the termination of tribunal proceedings when:
> a. the claimant withdraws his claims, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute; or
> b. the parties agree on the termination of the arbitral proceedings; or
> c. The arbitral tribunal finds that continuation of the arbitral proceedings has for any other reason become unnecessary or impossible.

The above section has in effect proved one of the advantages of arbitration over litigation, which is speed. This is because it has empowered the arbitral tribunal to terminate arbitral proceedings without necessarily deciding any of the issues slated to be arbitrated upon once any of the conditions envisaged by the section are fulfilled. Doing this will ultimately, lead to a lot of time being saved.

[60] See Section 23 generally on the power of court to compel the attendance of witnesses and other orders.
[61] S. 27(1) See also Article 32 of the UNCITRAL Model Law Op.cit.

3.10. COURT INTERVENTION IN ARBITRAL PROCEEDING

An Arbitral proceeding is generally adopted with a view to avoid the cumbersome procedure and bottlenecks associated with litigation. It is therefore in order if an arbitral proceeding is restricted to the arbitral tribunal. The Arbitration and Conciliation Act,[62] Arbitration and Conciliation Rules and the UNCITRAL Model Law, have made adequate provisions to ensure this. Section 34 of the Act, which is in *pari materia* with Article 5 of the UNCITRAL Model Law,[63] provides that a court shall not intervene in any matter governed by this Act, except where so provided in this Act (in this law)[64]. This essentially, is to limit the level of intervention of the court in arbitration, which parties to a dispute chose out of their own free will, to be subjected to.

The above provisions raised certain constitutionality question, which is one of the problems, this research seeks to address. A critical look at Section 34 as well as Article 5 of the UNCITRAL Model Law; suggests inconsistency with Sections 1(3), 6 and 272 of the Constitution of the Federal Republic of Nigeria,1999 (hereinafter referred to as the Constitution). For clarity of understanding, the said sections will be reproduced hereunder.

> Section 1(3): If any other law is inconsistent with the provisions of this constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency, be void.
> S. 6(1) the judicial powers of the federation shall be vested in the courts to which this section relates, being courts established, for the federation.

[62] Cap. A.18 L.F.N. (2004).
[63] Op. cit.
[64] Section 7 of the Act is also to the same effect with regards to domestic arbitration.

> (2) The judicial powers of a state shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution.

The above provisions are a clear indication in unequivocal terms, that the Nigerian Constitution is the supreme law in Nigeria, from which all laws must derive their validity. Where this is not the case, then the other law, for example, an Act of the National Assembly is null and void to the extent of its inconsistency. It follows, therefore, that Section 34 of the Arbitration and Conciliation Act as well as Article 5 of the UNCITRAL Model Law cannot stand when brought face to face with the above provisions of the constitution for being inconsistent. The unconstitutionality flows from the fact that the Constitution, which is the *grundnorm*, i.e. the supreme law, vests Nigerian courts with judicial powers, while the above provisions seem to have taken them away.

Section 272(1) of the Constitution gives additional powers to state High Courts in civil matters which section 34 of the Act fails to recognize or at least overlook. Section 272(1) provides:

> Subject to the provisions of Section 251[65] and other provisions of this Constitution, the High Court of a state shall have jurisdiction to hear and determine any civil proceeding in which the existence or extent of legal right, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person, is in question.

In the same vein, Section 241 of the Constitution provides citizens with a general right of appeal in either civil or criminal matter, which neither Section 34

[65] Section 251 reserves jurisdiction on some matters to the Federal High Court

nor Article 5 can usurp. Section 272(1) is unequivocal in the unlimited jurisdiction given to state High Courts to hear and determine any civil matter. By implication, matters bordering on arbitral proceedings can also be referred to the court for determination. This, being the case, then Section 34 cannot stand, especially when it seeks to completely bar courts from entertaining any matter which is the subject of international commercial arbitration. Even the Act attests to this fact. In section 57(1), the Arbitration and Conciliation Act defines a "court" to mean the High Court of a state or the High Court of the Federal Capital Territory or the Federal High Court. This clearly suggests that some provisions of the Act contradict themselves.

Commenting on Section 34, in a very long paragraph, which despite its length, this writer decides to reproduce verbatim, Nwokoby[66] states as follows:

> If the essence of Section 34 of the Act is to minimize the level of intervention of these courts in arbitration practice, then there is nothing wrong with the section, but where the purport of the section is to limit the jurisdiction of the court as granted by the Constitution, particularly, as interpreted in the case of **Ogunwale v. Syrian Arab Republic[67],** I venture to state that the Arbitration and Conciliation Act of Nigeria, is subject to the provisions of the Constitution. Secondly, section 34 of the Act cannot vary, limit or qualify the jurisdiction conferred on any court pursuant to the Constitution. Thirdly, the court has a duty to ensure that anything done within its jurisdiction is done in accordance with the rules of fairness and in accordance with the law. The jurisdiction of the court to review the decisions of inferior bodies cannot be limited by the provisions of Section 34 of the Act. However, it is expected that the

[66] Nwakoby, G.G.(2003) The Constitutionality of Sections 7(4) and 34 of the Arbitration and Conciliation Act: Chief Felix Ogunwale v. Syrian Arab Republic Revisited. *Nigerian Bar Journal* 1(3): 345 – 358.
[67] (2002) 9 N.W.L.R.(pt. 771) 127

> court can only intervene in arbitration when the reason for doing so is most rational and legal.

Also, in the words of Nwakoby[68], "the Arbitration and Conciliation Act of Nigeria, as an enactment of the parliament, cannot be supreme over the constitution of the country[69]. Additionally, the unconstitutionality of Section 34 was reaffirmed by the Court of Appeal in the case of **Nigeria Agip Oil Co. Ltd. v Kemmer & 7 Ors**.[70] In that case, some elders and Chiefs of Twon-Brass community executed a Deed with Tenneco Oil Company of Nigeria whereby they leased some parcels of land to the company for 50 years. Subsequently Tenneco assigned the residue unexpired of its terms of years to Agip, the appellant. The respondents felt a dispute had arisen in connection with some aspects of their relationship with the appellants, hence the initiation of this action. The appellant raised a preliminary objection to the hearing of the summons brought by the respondent on the ground that the Federal High Court lacked the jurisdiction to hear same, and that whatever dispute might have arisen was not the arbitrable dispute envisaged by the arbitration clause in the lease agreement. The trial court dismissed the preliminary objection, heard the application and granted the relief sought. Aggrieved, the appellant appealed to the Court of Appeal. In resolving the appeal, the court considered the provision of Section 7 of the Arbitration and Conciliation Act and held that Section 7(4) - which bars the court from intervening in arbitration matters-, cannot override the right of appeal conferred by Section 241 of the 1999

[68] Ibid.
[69] Ibid at P. 352
[70] (2001) N.W.L.R. (Pt. 716) 506 at 525.

constitution. Before arriving at its decision, the court made the following statement:

> Mr. Nwosu's (respondent's counsel) objection to the appeal is predicated on the provisions of Section 7(4) of the Arbitration and Conciliation Act Cap. 19 L.F.N. 1990 (now Cap. A 18 L.F.N. 2004), which makes the decision of the court to appoint an arbitrator final and not subject to appeal. Mr. Okoro (S.A.N), however, provides a short answer to this objection when he drew the attention of the court to the provisions of Section 241 of the Constitution of the Federal Republic of Nigeria, which gives the appellant an unrestricted right of appeal and Section 1(3), which proclaims the superiority of the constitutionally guaranteed right. If section 7(4) of the Arbitration and Conciliation Act, to the extent that it restricted the right of appeal, had been good law, it ceased to be so when the constitution came into force. For this reason I can see no merit in Mr. Nwosu's objection.

The above extract indeed confirms the argument put forward by the present writer. This is notwithstanding the fact that the above case was decided based on section 7 of the Act as against section 44 which is the subject of this research. The rationale behind reference to the above case is because both sections 7 and 44 seek to oust or at least, limit the jurisdiction of the court to intervene in any matter which is the subject of arbitration. It should however be noted that the major difference between the two sections is that while section 7 deals with domestic arbitration, section 44 on the other hand, deals with international commercial arbitration. It is therefore humbly submitted that the inadequacies of the Act on international arbitration can be corrected by any other provision of the Act on domestic arbitration. Additionally, the provision of the Act and the UNCITRAL

Model Law dealing with Stay of Proceedings, have indeed recognized the role of the court in rectifying any anomaly that may be found in any arbitration agreement or award. This stand taken by the writer does not mean all issues dealing with arbitration agreement between parties should be subjected to new court litigation as doing so will negate the objectives of arbitration as an alternative to litigation. Instead, the court as an arbiter must be allowed to perform its constitutionally assigned responsibility.

On the foregoing, it is crystal clear, that the Constitution of the Federal Republic of Nigeria, 1999, is superior to any other law, the Arbitration and Conciliation Act inclusive. It follows, therefore, that whichever interpretation, would be given to Section 34, must be without prejudice to the provisions of the Constitution (being a superior law). Any interpretation, which aims at ousting the jurisdiction of courts in any manner, as conferred by the Constitution, would be a nullity.

3.11 STAY OF PROCEEDINGS

The same Act which ousts the jurisdiction of court to intervene in an arbitration proceeding under whatever ground, makes provision for a stay of proceedings, pending arbitration.

A stay of proceedings has been defined as a legal device by which an action which is pending in court is made to be in abeyance in consequence of the justice of the case which demands that proceedings be stayed or contained in another

judicial milieu.[71] The essence of staying proceedings is to stop parties who, ordinarily would lose, to avoid an arbitration clause, to which he signed. This power has been vested in the court by Sections 4 and 5 of the Act as well as Article 8 of the UNCITRAL Model Law thus:

> Section 4(1): a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order stay of proceedings and refer the parties to arbitration.
> (2) Where an action referred in sub-section (1) of this section has been brought before a Court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the Court.[72]

The effect of the above Section is that for a party to bring an action for stay of proceedings under it, that party must have filed his statement of defence. Also by the effect of Section 4(2), even though order to stay has been granted, arbitration can commence or continue. Section 5, which is also talking about stay of proceedings, has been differently worded as follows:

> (1) If any party to an arbitration agreement commences any action in any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings, apply to the court to stay the proceedings.
> (2) A court to which an application is made under subsection (1) of this Section may, if it is satisfied:
> a. That there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

[71] Yakubu, J.A.: The Interplay of Adjudicating Function Between Arbitral Tribunals and the Courts with Respect to Arbitral Proceedings, Op.cit.
[72] Article 8 of the UNCITRAL Model Law *is Mutatis Mutandis,* in the same manner as Section 4 of the Act. It is also similar to Article 11(3) New York Convention (1958.

b. That the application was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make another order staying the proceedings.

It should be noted that while Section 4 of the Act, was *mutatis mutandis,* adopted from the Model Law, Section 5 derives its origin from Cap 13 Laws of the Federation of Nigeria 1958 (Old Arbitration Act).[73] By mere looking, it can be seen that both sections are, as asserted by some authors, at least incompatible.[74] Another author[75] expressed his opinion on the two provisions, thus:

> It cannot be doubted that Section 4 and 5 of the Nigerian Arbitration and Conciliation Act 1990 cannot go together with respect to an application for stay of proceedings; it seems that Section 4 of the Act is wider than Section 5 and those could be used in all cases envisaged by Section 5. It can also be argued that Section 4 can be used for both domestic and international arbitration with respect to stay of proceedings as there is nothing objectionable to the arrival of this conclusion, notwithstanding the different sources of both sections, but contained in the same Arbitration and Conciliation Act.

In spite of the above submission by Yakubu[76], it should be stated here that different authors have different opinions on the intent and purpose of including both sections in the same Act. This makes Professor Gaius Ezejiofor[77] to submit that: *"... Section 4 was intended to apply only to international arbitrations, as does Section 7 of the English Arbitration Act 1975".*

[73] Akpata, E. *The Nigerian Arbitration Law in Focus* Op.cit at p. 26.
[74] Orojo and Ajomo quoted in Yakubu, J.A. The Interplay of Adjudicative Function Between Arbitral Proceedings and the Courts with Respect to Arbitral Proceedings Op.cit. p.196.
[75] Yakubu, J.A. Ibid.
[76] Ibid.
[77] Ezejiofor, G. Op.cit P.42-43.

This was not stated in the Act. It is however, the opinion of the present writer, that it is beyond doubt that both sections refer to stay of proceedings, with the latter i.e. Section 5, being favourable to parties and to arbitration generally. The reason for this is as explained by Ezejiofor and adopted by present writer:

> Firstly the Court will not have the opportunity to prevent resort to arbitration in deserving cases in order to save costs and inconvenience the parties; secondly, disputes whose substance and circumstances are such that they cannot adequately and effectively be settled by arbitration will nevertheless end up in arbitration and awards. This will in turn, result in the setting aside, by the court, of such awards, at the instance of the parties.

In addition, Section 5 has also provided proper guidelines to the Court on when and when not to order stay. The Supreme Court is of the opinion that …. *An application for an order for pleadings to be filed, constitutes a step in the proceedings within the provisions of Section 5 of the Arbitration Law*.[78]

In effect therefore, Section 4 and 5 have granted the Court the power to stay proceedings in an action brought in negotiation of an arbitration clause in a contract.

[78] See *Kano State Urban Development Board v. Fanz Construction*, supra at p.50.

CHAPTER FOUR

LEGAL FRAMEWORKS FOR THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS IN NIGERIA

4.1 Introduction

For any arbitral award to be meaningful to any party to arbitral proceedings, it must be capable of enforcement. It is after the arbitral award (Judgment) is finally enforced that he will be said to have derived any benefit or redress from the arbitration process, he has subjected himself to. Where this is not the case, then, he cannot be said to have achieved anything. It should however, be noted that the issue of recognition and enforcement arises only, where the losing party is not willing to honour the judgement of a validly constituted arbitral tribunal[1]. This chapter has discussed the various systems of enforcing international arbitral awards recognized by the Nigerian laws. Before proceeding further, it is however, pertinent to state at this juncture that for an arbitral award to be enforced, it has to be first recognized. When proceedings of an arbitral tribunal is brought before a court to be judicially noticed, (especially where one of the parties to the arbitration disputes it), it is deemed to be recognized. Where, however, the court has been invited, after recognition, of the arbitral award, to declare it as valid and binding, or even asked the court to go further to employ all necessary legal sanctions to see that it is carried out, that means it is being enforced.[2]

[1] Ezejiofor, G. (1996) *The Law of Arbitration in Nigeria.* Longman, Lagos, Nigeria p.173
[2] Ibid P175

4.2 ARBITRAL AWARD

Several attempts have been made to have a universal definition of an award but to no avail[3]. Despite this, an award has been defined to mean "the determination of a dispute by a third person, who is the judge of dispute, arising between two or more persons, to submit to the judgment of such third person, giving him power to decide, and the duty incumbent, upon the parties to obey to the decision arising from the contract of the submission"[4]. In essence, an award is no more than the judgment of an arbitral tribunal duly appointed with the consent of the disputing parties. An award has also been defined "to be in the nature of contract or in the nature of a judgment, and should also be admissible in evidence not only against the parties that are privy to the arbitral proceedings, but also against third parties"[5]. An arbitral award is essentially, the verdict which an arbitral tribunal issues at the end of its proceedings which determines the rights and obligations of parties who have submitted their dispute before it for resolution.

4.3 TYPES OF ARBITRAL AWARDS

There is no hard and fast rule on the categorization of awards to one class or the other. This is largely due to the fact that decisions of arbitral tribunals may traverse more than one category. However, some writers such as Akanbi[6], have attempted a classification of awards into various categories. But, since the categorization is not water tight, the present writer would only use Akanbi's

[3] See for example the definition provided in article 12 of the New York Convention of 1958
[4] *Winter v White* (1819) I Brod and Bing 350, quoted in Akanbi M.M.(2002) Arbitral Award: Validity, Recognition and Enforcement. *Modern Practice Journal of Finance and Investment Law*. (3-4) 319-359
[5] Ibid at p. 320
[6] Ibid

categorization as a guide, where necessary. This is to ensure a fuller understanding of the issue.

4.3.1 Default/Ex Parte Awards

A default award is one which is made due to the failure of one party to appear before an arbitration tribunal. In this kind of situation if the other party to the arbitral proceeding fails to appear before the tribunal to defend a statement, the arbitral tribunal may proceed with the hearing *ex parte*. The hearing is *ex parte* because the other party refuses to appear. Any award that is given by the tribunal in this situation is called "Default", award because it is based on the submission of one party, after the defendant has been served sufficient notice. The arbitral proceeding leading to that award is therefore *ex parte* because it is given at the instance of one party.

Arbitral tribunals are however not allowed to conduct an ex parte proceeding *suo muto;* there are guidelines which the tribunal has to consider before proceeding *ex parte*. Akanbi[7] has enumerated some of them as follows:

i. **Lack Of Jurisdiction**: A party may decide not to participate in the proceedings from the beginning on the grounds that the arbitral tribunal lacks jurisdiction or for no reason at all.

ii. **The Right To Reply Or Not**: A party may refuse to reply to correspondences from the arbitral tribunal or to comply with any procedural directions as to the submission of written dealings etc.

[7] Ibid at p. 328

iii. **The Right To Withdraw**: A party might have initially participated in the proceedings but later on refuse to appear again.

iv. **Assumption of Abandonment of Right**: A party though not expressly stating his unwillingness to participate, but he creates a delay so unreasonable that the arbitral tribunal on the application of the party present, would be justified in treating the other party as having abandoned his right in the present case. This is for example, where the defaulting party occasions unnecessary delay in the proceeding.

v. **Disruption of Proceedings**: A party so disrupts the hearing by making it impossible to be conducted in an orderly manner.

If any one or more of the above situations present themselves before the arbitral tribunal, it may be justified to proceed *ex parte*, and at the end of the proceedings, make a default award. But the tribunal should be mindful of the fact that its proceedings are based on the submissions of one party; hence the award is bound to be challenged or even set aside by the court. The tribunal must also consider the merits of the case and determine the substance of the dispute, instead of rubber stamping claims brought before it by one party[8].

4.3.1.1 Guidelines for a Default Award.

For a default award to be enforceable, the tribunal must ensure that the award is drafted based on the following guidelines[9]:

[8] Akanbi, M.M Ibid, at p. 329
[9] Ibid

1. The recital of the award should contain a detailed procedure of the arbitral proceedings.
2. The award should reflect the efforts made by the arbitral tribunal to inform the opposing party of the claimant's case.
3. The award should reflect the efforts made by the tribunal to secure the presence of the opposing party.
4. The award should also reflect the fact that the arbitral tribunal had genuinely addressed itself to the merits of the case.
5. The award must also show that the arbitral tribunal had satisfied itself on the question of jurisdiction, whether or not it was raised.

The idea behind earmarking the above guidelines is to ensure clarity as to what led to an *ex parte* proceeding and consequently, default award, instead of bringing both parties together. In the event the matter goes to court, the court in reviewing the award would satisfy itself that the decision of the tribunal was not arrived *mala fide*.

It should however, be noted that a default award, can still be final award, especially where it disposes of all disagreements between the parties. This award can only be set aside by following through the procedures provided by law in setting aside an arbitral award, which we shall discuss later in this chapter.

4.3.2 Settlement/Consent Award

This kind of award is one reached between the parties by *consensus ad idem*. In other words, a settlement award is one which results due to the agreement or

consensus of the parties to settle the matter even before the end of the arbitral proceeding. It is called consent award because it is made with the consent of both parties. This type of award has been given legislative backing by the Arbitration and Conciliation Act[10] provides: *"... if during the arbitral proceedings, the parties settle the dispute, the tribunal shall terminate the arbitral proceedings and shall if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms"*

As it is the case with default award, a settlement award can also be valid as a final award, subject to complying with all relevant laws.

4.3.3 Declaratory Award

This kind of award, as the name suggests, is just to make declaration by the arbitral tribunal that a legally binding agreement exists between the disputants, with no intention to make any of them liable for damages. The advantage of this kind of award is that it preserves the cordial relationship existing between parties[11].

In **Saudi Arabia V Arabian-American Oil Company (ARAMCO)[12],** when dispute arose between ARAMCO and the Saudi Arabian government for alleged infringement of the former's exclusive right to transport oil from its concession area in Saudi Arabia, the tribunal declared:

> There is no objection whatsoever to parties limiting the scope of the arbitration agreement to the question of what exactly is their legal position. When the competence of the arbitrators is limited to such a statement of the law and does not allow them to impose the execution of an

[10] See section 25 (1) Cap. A. 18 Op cit
[11] Akanbi M.M. ibid.
[12] (1963) 27 ILR 117 quoted in Akanbi M.M, op cit p. 327

> obligation on either of the parties, the Arbitration Tribunal can only give a declaratory Award.[13]

This was an arbitration relating to the interpretation of a concession agreement made on May 29, 1933 between the Government of Saudi Arabia and Standard Oil Company of California(which later changed its name to Arab-American Oil Company- for convenience called ARAMCO).Under the agreement Aramco was awarded contract for exploration and transportation of Saudi Arabian oil to international markets.

On January 20, 1954 the Saudi Arabian government concluded another agreement with Mr. A. S. Onassis and his company, Saudi Arabian Maritime Tankers Limited(for convenience called SATCO). By Articles IV and XV of the agreement SATCO was given a thirty years "right of priority" for the transportation of Saudi Arabian oil.

The shipment agreement with SATCO made ARAMCO to feel the exclusive concessionary right given to them, for the exploration and transportation of Saudi Arabian Oil was breached.Under the 1933 agreement between the Saudi government and ARAMCO it was agreed that any dispute arising therefrom should be settled by an arbitrartor agreed by both parties. ARAMCO therefore submitted this dispute to the arbitrator for determination.The tribunal was called upon to give a declaratory award based on its understanding of the arbitration agreement. After careful assesment of all the clauses in both the 1933 and 1954 agreements between ARAMCO and SATCO respectively, the tribunal held:

[13] Ibid

Neither of the parties claim damages for an alleged injury.The dispute is clearly limited to legal questions relating to the meaning of the 1933 concession, to its interpretation and not to its validity....parties are seeking the exact determination of their rights and obligations, and nothing more. There is no obligation whatsoever to parties limiting the scope of the arbitration agreement tothe question of what exactly is their legal position.When the competence of the arbitrator is limited to such a statement of the law and does not allow them to impose the execution of an obligation on either of the parties, the Arbitral Tribunal can only give a Declaratory Award.

4.3.4 Interim/ Preliminary Award

This kind of award is akin to an order of interim injunction, which is given by the court. It is an order given to the effect that it will remain in force until the final award is made[14]. This is an order which settles some interlocutory matters in order to allow for a proper determination of the main dispute, thereby saving considerable time and money[15].

An interim award may be issued by the court in respect of the following:

i. Jurisdiction of the tribunal: This is where the jurisdiction of the tribunal to entertain the matter has been challenged by one of the parties.[16] This is possible where an aggrieved party claims that he may not get justice because one, or all the arbitrators are biased towards the other party in the arbitral proceeding.

[14] Akanbi, M.M. op. cit at P.323
[15] Ibid
[16] See section 12 (1) Arbitration and Conciliation Act. Cap.A18 L.F.N.(2004)

ii. Applicable proper law of the transaction: This is where any of the parties to the arbitral proceeding alleges that the arbitration law applied by the arbitrators in resolving the dispute was not the one agreed by the parties to be applied whenever dispute arises.

iii. Separation of issues by the parties: This is where one of the parties decides to go into arbitration without consulting the other party to the arbitration to agree on the issues that are in dispute and those that are not.

iv. Conservation of goods forming subject matter/sale of perishable goods. This is for the purpose of preserving the '*res*'[17](i.e the thing or subject matter of the arbitration).

4.3.5 Additional Award

An additional award is one made as an *addendum* to the final award. This is normally made where certain claims have been made by one party to the arbitral tribunal in respect of which no award has been made. In this case the party dissatisfied can apply to the court for additional award. **UNCITRAL Arbitration Rules**[18]provide the procedure for applying for additional Award thus:

> Articles 37 (1): within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
> (2). If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearing or evidence, it shall complete its award within sixty days after the receipt of the request.

[17] See article 26 of the UNCITRAL Model Rules. See also section 13 of the Act.
[18] Article 37

The aforementioned provision of the United Nations Commission on International Trade Law (UNCITRAL) model rules, in addition to providing for how to apply for additional award, it has also set a time limit within which to apply for such award. The tribunal also has a time limit within which to make or not to make the award. Article 37 of the model rules is in *pari materia* with the provisions of the Act[19] on additional award.

4.3.6. Final Award

A final award as the name suggests is an award which disposes of all issues which have been raised during the arbitration. An award becomes final when it closes every point of a subject matter of the dispute[20].

What should however, be noted at this point is that with whatever name an award is called, once it disposes of all issues at stake in the arbitral proceedings, it can still be final award as there are no further issues to be arbitrated upon. Once the arbitral tribunal is able to do this, it has fulfilled the purpose for its establishment, hence becomes *functus officio* (has ceased to have any power with espect to the matter).

4.4 FORM AND EFFECT OF AN ARBITRAL AWARD.

(a) Form:

For any award made by a legally established arbitral tribunal to be enforceable, it must fulfill the requirement of the law. In this regard, Article 32 of

[19] See section 28(4) to (7) Arbitration and Conciliation Act op cit.
[20] *Kahinathsa Yamosa Kabadi v Narasimagasa Bhaskarsa Kabadi*. Air 191, S.C 1077, quoted in Akanbi M.M at P.322.

the *UNCITRAL* Model Law provides guidelines as to what form an arbitral award should take for it to be valid. They are as follows:

i. **Writing**: The award shall be made in writing and shall be final and binding on the parties; and the parties undertake to carry out the award without delay.

ii. **Reasons For Award**:The arbitral tribunal shall state the reasons upon which the award is based; parties may however, agree that no reason shall be given whatsoever.

iii. **Signature of Arbitrators**: The award shall be signed by the arbitrators, containing the date and place of the arbitration. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for such failure.

iv. **Copies of the Award:** Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

Where the above requirements of the law have been fulfilled, the arbitral award issued at the end of the proceeding becomes valid and binding on the parties. This was the position of the Court of Appeal in the case of **African Re Insurance Corporation V A.I.M. Consult Ltd**[21] where Aderemi (**JCA**) delivering the leading judgment stated as follows:

> Parties, who have chosen their own arbitrator to be the judge in a dispute between them, cannot as long as the award is good on the face of it, object to the decision of the arbitrator, either on grounds of law or of facts. This is because in arbitration matters parties take their arbitrator

[21] (2004) 11 NWLR (P.t 884) at P.238

> for better or for worse both as to decisions of fact and or decisions of law.

In essence therefore, when parties to an arbitration process submit themselves to the arbitral tribunal, in the absence of any vitiating elements(which we shall see later), they are generally bound by its decision.

(b) Effect: the general effect of an arbitral award on parties to an arbitral proceeding is as stated by the Supreme Court of Nigeria in the case of **Kano State Urban Development Board V Fanz Construction Ltd.**[22]

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

In effect, the above pronouncement of the Supreme Court is a pointer to the fact that any arbitral award which is validly made has the effect of deciding any disagreement between the parties and act as an equivalent of a court judgment. The only difference being that an arbitral award cannot be enforced simply by levying execution.[23] Katsina Alu J.S.C (as he then was), delivering the leading judgment of the Supreme Court in **Ras Construction V Federal Capital Development**

[22] (1990) 4 NWLR (pt 142) 11 at p37
[23] Akanbi, M.M. Arbitral Award: validity, Recognition and Enforcement op. cit footnote 4

Authority,[24] explained the position of the law in a similar manner when he said: "a valid award on a voluntary reference no doubt operates between the parties as a final and conclusive judgment upon all matters referred.

4.5 CORRECTION AND INTERPRETATION OF AN AWARD

An arbitral tribunal may in some circumstances be asked to correct the award which it had made, by a party who is dissatisfied with the award. This is however allowed with regards to errors in computation, clerical or typographical errors or any errors of a similar nature[25]. This suggests that for an arbitral tribunal to be asked to correct its award, such an error must border on clerical/typographical errors, errors of computation or any error that is related to that. Any error not of the type mentioned above cannot be made subject of correction under section 28 of the Act. Where a party is aggrieved by an award not related to the types mentioned above, he can only seek redress through the court to set aside the award. The tribunal is not in any way allowed to make any correction with respect to the substance of the award. One writer[26], buttressed this point thus:

> … Apart from the correction of errors in computation, no other matter of substance can be taken up under the provision. The section is not designed to correct the mistakes of the arbitral tribunal. In other words, the provisions are not meant to be employed by the arbitral tribunal to impeach its own award. What is contemplated by the section include the correction of spelling errors, supplying of wrongly omitted words or punctuations and deletion of words and punctuations inadvertently introduced into the award.

[24] (2001) 10 NWLR (pt)
[25] Section 28(1) of the Arbitration and Conciliation Act. Op cit. See also Article 33 of the *UNCITRAL* model law On International Arbitration, which is in *pari materia* with section 28 of the Act.
[26] Ezejiofor, G.(1997) *The Law of Arbitration in Nigeria*, Longman, Ibadan, Nigeria p.96

It should however, be noted that if not because of the express provision of section 28 of the Act, which allows for correction of such minor mistakes in an award, it would have been illegal for the tribunal to make the corrections. The reason for this position is that at common law, by making an award, the arbitral tribunal has already become *functus officio*, as far as the arbitral proceedings where such an award was made is conducted[27].

Any party praying for correction of an award must do so thirty days from the receipt of the award. He shall also serve a notice to the other party of his intention to do so[28]. This is where no other period has been agreed upon by the parties. Where such period has been fixed, it is submitted that such period shall override the thirty days fixed by the Act; this is by virtue of doctrine of party autonomy recognized in arbitration. The arbitral tribunal may also in its own volition correct any errors of the types mentioned above in the award[29]. This, it has to do also within thirty days of the date of making the award[30].

(C) Interpretation:

The arbitral tribunal may in some circumstances be asked to give an interpretation of a specific point or part of the award[31]. All the rules which apply to correction also apply to interpretation, with regards to limitation period, power of the tribunal[32]etc.

[27] Ibid at p94
[28] Section 28(1) of the Act
[29] Section 28(3) of the Act
[30] Ibid
[31] Section 28 of the Act. See also article 33 of the *UNCITRAL* model law (1991)
[32] See section 28 of the Act and Article 33 ibid

If parties to an arbitration process submit themselves to the arbitral tribunal, in the absence of any vitiating elements (which we shall see later), they are generally, bound by its decision.

4.6. SETTING ASIDE OF AN ARBITRAL AWARD

As earlier highlighted, if an arbitral tribunal has been validly established, whatever it decides at the end of its proceedings is binding on parties to the proceedings[33]. Where any party is aggrieved by an arbitral award, he can challenge it before the court. If successful, the court would have no option, but to set aside the arbitral award. But this is only possible upon fulfilling certain requirements of the law, which are discussed below. Therefore, an aggrieved party can apply to court for the arbitral award to be set aside within three months from the date of the award.[34]

A party applying to set aside an arbitral award can only do that basically on grounds of exceeding jurisdiction, [35] and misconduct on the part of the arbitrator[36], in addition to the aforementioned grounds upon which an award may be set aside by the court. It should however, be noted that Nigerian courts only have the power to set aside arbitral awards made in Nigeria, and not one made outside the country[37].

[33] Per Katsina Alu J.S.C. in *Ras Construction V F.C.D.A* (supra)
[34] See section 29 (1) (a) of the Arbitration and Conciliation Act op cit.
[35] Section (2)
[36] Section 30 (1) see also rule 32 of UNCITRL Model Rules
[37] Ezejiofor G. *Law of Arbitration in Nigeria* op cit p. 170

4.6.1 Grounds for Setting Aside an Arbitral Award.

In addition to the grounds upon which an arbitral award can be set aside, Nigeria's Arbitration and Conciliation Act[38], provides additional grounds which we shall proceed to discuss.

The Supreme Court of Nigeria had in the case of **Kano State Urban Development Board V Fanz Construction LTD,**[39] set out in clear terms the grounds upon which an arbitral award can be set aside as follows:

1) That the arbitration proceeding or award has been improperly procured, as, for, example, where the arbitrator or umpire has been deceived, or material evidence concealed, and
2) That the arbitrator or umpire has misconducted himself during the proceedings
3) That there is an error of law on the face of the award.

The Supreme Court, fourteen years later reaffirmed the above position in the case of **African Reinsurance Corporation V A.I.M Consult Ltd**[40] as follows:

In determining whether or not an arbitral tribunal exceeds its authority so as to warrant the setting aside of its award, the court will consider the following:-

a) Whether the arbitration or award was improperly procured. Instances of such improper procurement include the arbitral panel being deceived, or the fraudulent concealment of material evidence.
b) Whether the arbitrator misconducted himself during the proceedings
c) Whether there is an error of law on the face of the arbitral award.

[38] Cap A 18 L.F.N. 2004
[39] (1990) 4 NWLR 9pt 142) 1 at p37
[40] (2004)11 NWLR (pt 554) 238 the same grounds are those provided under section 30 of the Arbitration and Conciliation Act cap A18. Op cit. see also *G.C de Geophysique v Etuk* (2004), NWLR (pt 853) 20

From the aformentioned cases it can be seen that the ground upon which an arbitral award can be set aside by the court are misconduct, error of law and improper procurement of the award. What is however, not so clear is what act of the arbitrator constitutes misconduct. We shall now attempt to look at the provisions on the definition of misconduct and what amounts to such a misconduct that may warrant the setting aside of an arbitral award.

Misconduct:

The term misconduct is one word which has refused to make itself susceptible to a universal definition, because it has not been defined by the Act. However, the courts have made several attempts to define what amounts to misconduct. **Lord Atkin** in **Williams's v Wallis and Cox**[41] defined misconduct "as such a misleading of the arbitration as is likely to lead to a substantial miscarriage of justice". It seems Lord Atkins' definition of what amounts to misconduct, is still vague. But the Nigerian Supreme Court came in and scale down the definition to a particular parameter, to the effects that:

> …One thing however, that is certain is that misconduct in the context of a long line of authorities does not mean willful misconduct but conduct in the sense of mistaken conduct. There being no moral turpitude, there can be no doubt that it is of wide import and so, an exhaustive definition of what amounts to misconduct becomes impossible[42]

However, what can be deduced from the above decision, is that the apex court has confirmed the present writer's assertion that the term misconduct is not

[41] (1914) 2 K.B 478 at 485
[42] See *Arbico Ltd. v N.M.T Ltd.* (2002) 15 NWLR (pt 789)

susceptible to a satisfying definition even at the bench. This is despite the effort made by the court to provide a more satisfying definition than the one provided by Lord Atkins. Recent pronouncements from the court on what constitutes misconduct have rather compounded the problem and make the term vaguer than ever. For example in the case of **C.G. Geo-Physique V Jackson D. Etuk**[43], the respondent was the owner of a landed property which he rented to the appellant in Eket, Akwa Ibom State at the cost of sixty thousand naira for a period of two years. A tenancy agreement between the parties contained a clause which required them to refer any dispute arising out of the tenancy to an arbitrator, comprising two arbitrators, one to be appointed by each of the parties. Subsequently a dispute arose and the appellant packed out of the premises but was unwilling to give up possession. After some correspondences the respondent entered the premises and found it in a serious state of disrepair. On realising this, he contacted a valuer to prepare an estimated cost for rehabilitation, which was said to be around N104,038.60.

Based on the above, the respondent instituted an action at High Court, Eket, claiming among others, the payment of the sum of N104,038.60, from the appellant as cost of rehabilitation of the building and general damages costing around One Hundred and Ninety Six Thousand naira for breach of the tenancy agreement. Following the services of processes on the appellant they applied for stay of proceedings in the action pending reference to arbitration, which was granted by the trial court. Thereafter the respondent's counsel wrote the appellant informing

[43] *supra*

him of the appointment of an arbitrator by the respondent. The appellant's counsel also wrote to the respondent's counsel notifying him of the appointment of an arbitrator by the appellants and rejection of the arbitrator appointed by the respondent. The respondent in another letter notified the appellant of the appointment of another in substitution of the one earlier appointed, and also of the rejection by the respondent of the arbitrator appointed by the appellants.There was no reply by the appellant to this letter, hence after six months of inaction the respondent filed at the High Court, Notice of Appointment of Sole Arbitrator as a result of the appellant's failure to appoint his own arbitrator. The notice was also served on the appellants' counsel through a bailiff, and a seven days notice was given for the appellant to appoint their own arbitrator. There was no reaction by the appellants as a result of which the respondent wrote his arbitrator and formally appointed him as a Sole Arbitrator. The arbitrator invited the parties for hearing but the appellant did not put up any representation. In the end the sum of N198,700.00 was awarded in favour of of the respondent. As a result, the respondent brought an application at the trial court, seeking to enforce the arbitral award. The appellant in turn filed a motion praying for among other reliefs, an order to set aside the arbitral award. The trial court dismissed the appellant's motion but granted the prayers in the respondent's motion seeking to enforce the arbitral award.

Dissatisfied, the appellants appealed to the Court of Appeal, and the court held inter alia, that:

"....where an arbitrator has misconducted himself or where the arbitral proceedings or award was improperly procured, the court has power to interfere and set aside the award. The onus is on the appellant to establish that there are grounds for setting aside the award."

The above decision has in effect confirmed this writer's earlier statement that recent pronouncements by courts on the meaning of 'misconduct', have rather compounded the problem instead of solving it. Even in the above case, the court was able to identify misconduct as one of the grounds upon which an arbitral award can be set aside, but did not go ahead to determine what type of action amounts to misconduct

However, in spite of the seeming difficulty faced by even the courts which are interpreters of our laws, the Supreme Court in **Kano State Urban Development Board v Fanz Construction Ltd**[44], has provided certain acts which amounts to misconduct; these are just a guide but never meant to be exhaustive. **Agbaj**e **J.S.C** (as he then was) delivering the leading judgment of the court said:

> …misconduct occurs for example: if there has been irregularity in the proceedings, as for example where the arbitrator failed to give the parties notice of time and place of meeting, or where the agreement required the evidence to be taken orally and the arbitrator received affidavits, or where the arbitrator refused to hear the evidence of a material witness or where the examination of witness was taken out of the parties hands, or where the arbitrator failed to have foreign documents translated, or where the documents translated, or where the reference being to two or more arbitrators, they did not act together, or where the umpire, after hearing evidence from both arbitrators, received further evidence from one without informing or

[44] (1990) 4 NWLR (Pl 142) p1 at p37

> hearing the other, or where the umpire attended the deliberations of the appeal board reviewing his award.

The court may also consider other act of the arbitrators, not forming part of the above list to amount to misconduct, such that it would warrant the setting aside of any award the tribunal might have given.

Guided by the aforementioned decision in **K.S.U.B. v Fanz construction Ltd**[45], the Supreme Court three years later, elaborated further on what amounts to a misconduct in **Taylor of Woodrow (Nigeria) limited v Suddeutsche Etna-werk G.M.B.H.**[46] **In this, examples of** misconduct were given as follows:

1. if the arbitrator or umpire fails to decide all the matters which were referred to him,
2. if in the award the arbitrator or umpire purports to decide matters which have not in fact been included, or construed the lease (wrongly), or instead of determining the rental and the value of buildings to be maintained on the land; or where the award contains unauthorized directions to the parties or where the arbitrator has power to direct what shall be done but his decision affect the interests of third persons; or where he decided as to the parties' rights, not under the contract upon which the arbitration has proceeded but under another contract;
3. if the award is inconsistent, or is ambiguous or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond reasonable doubt;

[45] *supra*
[46] *(1993)* 4 S.C.N.J 32 at 42 per Ogundare J.S.C.(as he then was)

4. if the arbitrator fails to give the parties notice of time and place of meeting;
5. if the arbitrator or umpire fails to act fairly towards both parties
6. if the arbitrator or umpire refuses to state a special case himself or allow an opportunity of applying to the court for an order directing the statement of a special case
7. if the arbitrator or umpire delegates any part of his authority, whether to a stranger or to one of the parties, or even to a co arbitrator,
8. if the arbitrator or umpire accepts the hospitality of one of the parties, being hospitality offered with the intention of influencing his decision
9. if the arbitrator or umpire acquires an interest in the subject matter of reference, or is otherwise an interested party;
10. If the arbitrator or umpire takes a bribe from the other party.

Detailed as the above list looks, it is still not exhaustive. It is just a guide. There may still be other acts, not mentioned in the above decisions of the Supreme Court, but still, amount to misconduct depending on the circumstance of each particular case.

However, for a party praying the court to set aside an arbitral award, he has to prove the following:

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

b) That the arbitration agreement is not valid under the law which the parties have indicated should be applied; or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria.

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

d) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

e) that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that if the decisions on matters submitted to arbitration can be separated from those not submitted only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

f) That the composition of the arbitral tribunal, or the arbitral proceeding was not in accordance with the agreement of the parties[47].

g) where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Act[48]

h) That the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria[49].

i) That the award is against public policy in Nigeria.

[47] See section 48 of the Arbitration and Conciliation Act cap. A18 L.F.N. (2004)
[48] This occurs where there is no agreement between the parties
[49] For example where the matter is criminal in nature

4.7. RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARD

Some writers[50] have made attempts at distinguishing between the terms 'recognition' and 'enforcement'. The present writer also deems it necessary to adopt the same method for the purpose of clarity. This distinction is important because even though the two terms sound somewhat similar, but practically they are different. Therefore, when a dispute arises in respect of an arbitral award, the disadvantaged party would naturally go to court to seek recognition i.e. to ask the court to recognize the award as legally obtained and binding between the parties. If a court accepts the plea, it has recognized the award. On the other hand, if a court is asked to not only recognize the award, but to also enforce it, there it is required to not only recognize its legal consequences, but also to ensure that it is carried out, by employing the appropriate legal sanctions.[51] Therefore, if a court takes a step to sanction the enforcement of an award, it will do so because it has recognized the award as valid and binding upon the parties to it, thus suitable for enforcement[52].

In a more simpler term, however, if a court agrees that there is a valid and binding award between two parties, it has recognized that such an agreement exist between them. On the other hand, if in addition to recognition, it sees to the carrying out of such an agreement or an award, then it is enforcing it. The above distinction to a large extent sounds academic than real. However, for practical purpose the distinction can not be tenable, because there can hardly be recognition

[50] Such as Gaius Ezejiofor, and Akanbi,M.M. in their works Law of Arbitration in Nigeria op cit.
[51] Ezejiofor, G. Op. Cit. at P.174
[52] Ibid.

without enforcement. This is in view of the fact that whenever an aggrieved party goes to court with respect to an award from which he is trying to derive a benefit, it is doubtful if he will only go for recognition alone, without seeking its enforcement. This may be the reason why even writers who belong to this school that recognition and enforcement are two distinctive concepts practically, have not provided a convincing reason as to how the distinction can be tenable in practical terms.

4.8 ENFORCEMENT SYSTEMS RECOGNISED IN NIGERIA

There are basically five different enforcement systems recognized in Nigeria with respect to international arbitral Awards.We shall now go ahead to discuss them in details.

4.8.1 Enforcement By Action Upon the Award

Generally, the most direct method of enforcing an arbitral award obtained either domestically or internationally, is by commencing a court action, praying the court to enforce the award against a defaulting party. This rule is formulated based on the doctrine of obligation which prescribes that where a foreign court of competent jurisdiction has adjudicated on a certain sum to be due from one person to another, the liability to pay the same becomes a legal obligation that may be enforced by an action of debt[53]. This is also the case even in transactions that are not pecuniary in nature, such as the performance of a particular duty. Enforcement through this process is done by the party seeking for enforcement by making that

[53] Ibid at p 175

as a basis of the suit against the other party[54]. The applicant can also pray the court to declare that the award is binding and order specific performance of the terms of the award[55]. The application may be made by originating summons on notice, attaching therewith, necessary affidavit to the application, stating justifiable grounds why the application should be granted, as well as the original or certified true copy of the award and the arbitration agreement[56].

For a party seeking enforcement under this system to be successful, he has to prove the following:

a) That there was an arbitration agreement between the parties.
b) That the arbitral tribunal conducted the arbitration in accordance with the arbitration agreement
c) That the award was made in accordance with the provision of the arbitration agreement and is valid under the law of the place where the arbitration was held, and where the award was made[57].

On the other hand however, a party against whom an award is sought to be enforced can also raise the following as a defence[58].

1) That the award was not made in accordance with the provision of the agreement between the parties.

[54] Yakubu J. (2007) The Interplay of Adjudication Function Bbetween Arbitral Tribunals and the Courts with respect to arbitration. in Kanam S.M.G and Madaki A.M (Ed) *Contemporary Issues in Nigerian Laws*. Browntel Ltd. Zaria, Nigeria pp.179-214
[55] Ibid at p206
[56] Ibid

[57] Offornze A.D. (2002) Recognition and Enforcement of International Arbitral Awards in Nigeria. *Modern Practice Journal of Finance and Investment Law*. 6 (1-2), 61-80
[58] Ibid at p65

2) That the award is not valid under the law of the place where the arbitration was held and where the award was made.

3) That the award was not conducted in accordance with the arbitration agreement between the parties.

4) That the award was made without jurisdiction.

The major advantage of this enforcement system is that it allows for foreign judgment to be enforced in Nigeria by an action upon the award without the requirement of reciprocity.[59] This method is however, criticized as being cumbersome as it gives room for reopening by way of defence, issues already determined by the tribunal.[60] Thee present writer however, disagrees with the above assertion. According to the present writer, the method, cumbersome as it may look, (as suggested by the aforementioned writers), is still better than other methods which are discussed below. The requirement of reciprocity under the Foreign Judgments (Reciprocal Enforcement) Act[61], is undoubtedly not encouraging as it completely goes against the 21st century commercial practices and exigencies. The present writer therefore, still sees this method (enforcement by action on the award), as a favourable one. It may, however, be quickly, said that courts need to give such cases accelerated hearings to avoid the unnecessary delay associated with litigation.

[59] *Alfred C. Toepfler Inc orporated of New York V John Edokpolor* (1965) 1 ANLR 292.
[60] See Offornze A.D op cit at footnote 54 and Ezejiofor G. *Law of Arbitration in Nigeria* op cit at footnote 48
[61] See cap F35 LFN (2004)

4.8.2. Enforcement under Foreign Judgments (Reciprocal Enforcement) Act[62]

The foreign judgment (Reciprocal Enforcement) Act is basically an Act which provides for the enforcement in Nigeria, of judgments given in foreign countries which accord reciprocal treatment to judgments given in Nigeria, for facilitating the enforcement in foreign countries of judgments in Nigeria and for other purposes in connection with the matters aforesaid[63].

The problem with enforcement under the Act is that only judgments of countries scheduled under an order of the Minister of Justice as being countries which extend similar reciprocal treatment to Nigerian laws can be enforced under it.[64]

The Minister, if after issuing such an order realizes that judgments of Nigerian courts are not given equal treatment in that other country, the judgment which is sought to be enforced in Nigeria, he can withdraw the approval he had earlier given.[65] To the best of the knowledge of the present writer the Minister has never issued such an order.

The idea of reciprocity being introduced by this Act, makes it, in the opinion of the present writer, somewhat antithetical to the 21st century commercial practices. This is in view of the high level sophistication in commercial activities of a world that is fast transforming into a global village where nothing seems to be impossible. The Act as rightly posited by Ezejiofor,[66] is of limited scope for

[62] Cap F 35, L.F.N. (2004)
[63] See the long title to the Act
[64] Section 3(1) (a) and (b) of the Act
[65] Section 12 of the Act
[66] *The Law of Arbitration in Nigeria* op cit p176

making only award in respect for payment of money applicable, and for making reciprocity as a cardinal condition for enforcement. This in effect, makes the Act irrelevant as it has been overridden by the provisions of Arbitration and Conciliation Act[67], which makes provision for enforcement of all types of award. It is indeed submitted by the present writer that this Act can only be applied in the enforcement of foreign judgment but not foreign arbitral awards. In fact, to the best knowledge of the present writer, this Act has never been applied in deciding any case dealing with enforcement of foreign arbitral awards.

It will be pertinent to state here that the Foreign Judgments (Reciprocal Enforcement) Act, is not a good law, in the present day world, which has been turned into global village, where businesses are conducted across international borders, sometimes through the internet. In this kind of situation businessmen would want an unrestricted access to international market while at the same time having optimum security for their funds. In the event they encounter problem, such as may be subjected to for example, arbitration, they would want to see any award they obtain at the end, enforced irrespective of the place where it was issued. If for instance, an arbitral award is obtained in a country which does not give reciprocal treatment to judgments, or awards made in Nigeria, but the beneficiary of the award is having a business interest in Nigeria, it will be unwise if he is refused enforcement on the basis of reciprocity. It may in addition, affect Nigeria's bid to lure foreign investors, if the investors realize they do not have security for their

[67] Cap. A18 L.F.N.(2004). The case of *Alfred C. Topfler v Edokpolor (supra)* also made nugatory of the reciprocity doctrine introduced by the Act.

investments in Nigeria. Not only that, this law, is in fact irrelevant as it has very limited scope and application, when brought face to face with the Arbitration and Conciliation Act[68], which is a more modern law. Moreover, the judicial pronouncement made by the Nigeria's Supreme Court in **Topfler v Edokpolor'**[69] which states that a foreign arbitral award is enforceable in Nigeria by an action upon the award without the requirement of reciprocity, is a pointer to the fact that the Act is irrelevant. It is therefore, the strong opinion of the present writer that the Foreign Judgment (Reciprocal Enforcement) Act[70] be repealed as it has become completely irrelevant based on the reasons given above. The writer has come across a single case where this Act was used since its enactment in 1960. The lack of relevance of this Act came to lime light few years after its enactment, when the court gave its pronouncement in 1965 in Edokpolor's case. If the Act was proved irrelevant in 1965, when Nigeria was just emerging from colonialism; and when modern commercial activities were still at rudimentary stage, it could not have been more relevant today.

4.8.3. Enforcement under the Convention on Recognition And Enforcement of Foreign Arbitral Awards 1958

The Convention on Recognition and Enforcement of Arbitral Awards, otherwise known as the New York Convention, is a multi-lateral treaty, which came into existence in 1958. As the name suggests, the purpose of the Convention is to ensure recognition and enforcement of awards:

[68] Cap. A 18. Op cit.
[69] *Supra*
[70] Cap F 35. L.F.N. (2004)

a. made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, arising out of differences between persons, whether physical or legal; and

b. Awards not considered domestic in the state where their recognition and enforcement are sought.

The New York convention[71] has been ratified and domesticated in Nigeria, by virtue of section 54 of the Arbitration and Conciliation Decree (now Act) Cap. 19 L.F.N.1990.[72] Its ratification in 1970 was the first time the Convention was given legislative recognition[73]. Section 54 of the Arbitration and Conciliation Act[74], provides thus:

1. without prejudice to sections 51 and 52 of this Act , where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the Convention) set out in schedule 2 of this Act shall apply to any award, made in Nigeria, or in any contracting state:

a. provided that such contracting state has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria, in accordance with the provisions of the convention.

b. that the Convention shall apply only to differences arising out of legal relationship which is contractual in nature.

[71] Article 1(1) of the convention
[72] Now Cap. A 18 LFN (2004)
[73] Ezejiofor G. *Law of Arbitration in Nigeria* op. Cit. at p179
[74] Cap A 18 L.F.N (2004)

It can be seen that the above provision of the Act has in clear terms adopted the New York Convention as a legal framework for recognizing and enforcing international arbitral awards, but the said provision can only be applied subject to sections 51 and 52 of the same Act.

The two sections allow for recognition and enforcement of arbitral awards in Nigeria, irrespective of the country of award. This in essence, means that the reciprocity clause contained in the commercial reservation is to a large extent, inconsequential. According to section 1(3) of the New York Convection countries have the right to refuse to recognise awards made in another country if that other country does not give reciprocal tretment to awards made in their jurisdictions. In this regard, it will be unwise for anybody seeking enforcement of foreign awards in Nigeria to come through the New York convention, as it may not be favorable to him. This is especially true where he obtained the award from a country that does not give similar treatment to awards made in Nigeria. A critical look at section 54 therefore, would reveal that it is not relevant, in the present day burgeoning commercial world. Its lack of relevance will come to the fore in view of the fact that its application is subject to section 51 of the Act which is a more favorable law, and which shall be discussed in the next sub-head. It will therefore be recommended that the section be expunged from the Act through an amendment process for losing relevance.

However, the Convention would only lose relevance when being implemented in a country like Nigeria, where application of the convention is

based on reciprocity. But where the award sought to be enforced was obtained from a country that gives a reciprocal treatment to awards obtained in Nigeria, there may be no problem, hence it can still be good law.That notwithstanding, it is still the opinion of the present writer that the reciprocity and commercial reservations do not depict the character of a good legislation in the 21st century business practices. Borrowing the words of Offornze,[75]

> The reciprocity reservation narrows the field of the New York convention and it has been criticized as being inconsistent with the trend toward multi-lateralism prevalent in the world today as evidenced by the UNCITRAL Model law. The problem with the commercial reservation is that each state may determine for itself what relationship it considers commercial. This creates so many problems in the application of the convention that it is now difficult to have a uniform application of the convention[76].

4.8.3.1. Procedure for Recognition under the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958

A person applying for recognition and enforcement of awards made under the convention must:-

a) Supply the duly authenticated original award; or certified copy thereof;

b) Supply the original agreement referred to in article II (in writing) or duly certified copy thereof.

[75] Offornze A.D. (2002*)* Recognition and Enforcement of International Arbitral Awards in Nigeria. *Modern Practice Journal of Finance and Investment Law*, 6 (1-2) 60-82

[76] Ibid at p69

c) The applicant shall also produce a translation of those documents if they are not in the official language of the country where it is sought to recognize and enforce the award[77].

However, a party against whom the award is invoked may request the court to refuse recognition and enforcement once he can prove that:-

a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or falling any indication thereon, under the law of the country where the award was made, or

b) The award deals with a difference not contemplated by, or not falling within the terms of submission, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

c) That the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or was not in accordance with the law of the country where the arbitration took place.

d) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made[78].

Article V (2) of the convention also provides additional grounds upon which recognition and enforcement of an arbitral award may be refused. They are:

i) If the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

[77] Article IV of the New York Convention 1958
[78] Article V(1) of the New York Convention, 1958.

ii) The recognition and enforcement of the award would be contrary to public policy.

4.8.4 Enforcement of Award under the Arbitration and Conciliation Act[79]

Section 51 of the Act provides a more encompassing and comprehensive procedure for the recognition and enforcement of international arbitral awards.This, in the opinion of the present writer provides a more potent and business oriented procedure than all the enforcement systems discussed above. The section provides as follows:

Section 51:

(1) 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[80] of this Act, upon application in writing to the court, be enforced by the court.

(2) The party relying on an award or applying for its enforcement shall supply:

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

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

(c) Where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language[81].Where, for example the award happened to have been in

[79] Cap. A 18 L.F.N. (2004).
[80] Section 32 deals with enforcement in the case of domestic arbitration
[81] this is couched in the same manner with article 35 of the UNCITRAL model law

made either German or French languages, and the language of the court being sought to enforce it is English, it has to be translated into English.

A cursory look at the above provision of the Act, would reveal that the section is more comprehensive and business-oriented, as it allows for an unrestricted enforcement procedure, unlike the New York Convention and the Foreign Judgments (Reciprocal Enforcement) Act, 1960, which provides for reciprocity as a pre-condition for enforcement. It will therefore, be difficult for any aggrieved party to seek for enforcement under either the Convention or the Foreign Judgment (Reciprocal Enforcement) Act[82], as against a more favorable procedure provided under section 51 of the arbitration and Conciliation Act[83].

In applying for enforcement under section 51, all the awardee needs to do is an application to the high court, supported by the prescribed documents, consequent upon which the court will grant recognition and enforcement of the award made in any country whatsoever[84]. The application may be by originating motion, exhibiting with affidavit the duly authenticated original award or a duly certified copy of it, the original arbitration agreement or its duly certified true copy. Where any of the documents is not in English, a duly certified translation thereof needs to be translated into the language of the Court and attached[85]. The award is normally authenticated by signature, but even an award that is

[82] Cap. F 35 L. F. N. (2004)
[83] Cap A18 L. F. N. (2004)
[84] Akanbi M.M: Arbitration Awards: Validity, Recognition and Enforcement. *Modern Practice Journal of Finance and Investment Law.* Op cit.
[85] Chukwumerie, A. I. *Studies and Materials in International Commercial Arbitration*. Op cit.

inadvertently unsigned can still be enforced, so far as it contains other authenticating factors which have been admitted by both parties as the true award. Upon fulfilling these conditions, the court will order enforcement i.e. execution[86]. It is entered as a judgment of the court over which a unit of *fifa* is issued for execution by the Bailiff[87].

It should however, be noted that in Nigeria as against China for example, there is no time frame within which application for recognition and enforcement must be made[88].

Based on the above discussion, it can be reiterated that the enforcement procedure provided under section 51 is more favourable and business oriented, especially to non-Nigerians with business- interest in the country.

An aggrieved party can however, pray the court to refuse recognition and enforcement sought under section 51, by relying on any of the grounds provided under section 52(2) of the Act. The grounds are:

a) That a party to the arbitration agreement was under incapacity such as insanity, bankruptcy, e.t.c.
b) That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award is made.

[86] Ibid
[87] Ibid
[88] Ibid at p 196

c) That the award deals with disputes not contemplated by, or not falling within the terms of the submission to arbitrate

d) That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceeding, or was otherwise not able to present his case; or

e) That the award contains decisions on matters which are beyond the scope of the submission to arbitration so however that if the decision on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

f) That the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

g) Where there is no agreement between the parties (as suggested above), that the composition of the arbitral tribunal or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place.

h) that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which or under which law the award was made

i) That the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, for example, criminal matter.

j) That the recognition or enforcement of the award is against the public policy of Nigeria[89].

4.8.5 Recognition and Enforcement Arbitral Awards under International Centre for Settlement of Investment Disputes (ICSID) Convention.

The Convention on the Recognition and Enforcement of Arbitral Awards is one which is unique among all legal frameworks dealing with the issue of recognition and enforcement of international arbitral awards. It is unique in the sense that all awards made by the International Centre for Settlement of Investment Disputes are truly international in nature[90]. The convention has also given states signatory to the convention the freedom to devise a suitable means of enforcing ICSID awards, within their own territory.

One major purpose of the Convention is to maintain a careful balance between the interests of investors and those of contracting states[91]. An award rendered under the convention is in a class of its own and is unlike any ordinary ad-hoc or institutional arbitral award normally covered by the New York Convention on Enforcement of Arbitral Awards[92].

In essence therefore, an arbitral award rendered under the ICSID convention is equivalent to a court judgment, in the country where it is supposed to be executed. It is for this reason that it is treated with the finality, with which a court judgment is treated. This is in spite of the fact that a party to the award is aggrieved

[89] Recognition and enforcement of any form of arbitral award can be refused based on any of the above grounds, except ICSID awards, in some circumstances. see *Taylor Woodrow of Nig Ltd v S.E GMBH* (1993) 4 NWLR (pt 286) 27

[90] This is against the position under the Nigeria's Arbitration and Conciliation Act, where domestic arbitration can also be international, even though, it is not in strict sense.

[91] Offornze A.D. *Recognition and Enforcement of International Arbitral Awards in Nigeria*. op cit at p.76

[92] Ibid

and vows to appeal against the decision. In fact, any aggrieved party to the award can only apply for its annulment to the Secretary General of the ICSID Tribunal on certain grounds, such as improper constitution, lack of jurisdiction; composition[93] etc. whatever the court decides is non appellable through the court. The words of Chukwumerie[94] buttress this point thus:

> …the Convention seems to clearly adopt the view that the fact that an award is executory or still subject to appeal or capable of being appealed against at the seat of arbitration is not a ground for non-recognition or non-enforcement. The situation would therefore be the same even if the court of enforcement is the high court; the merits of award cannot be subject of an appeal.

However, recognition and enforcement of awards made by the Centre for Settlement of Investment Disputes, is virtually the simplest in the world[95]. This is perhaps the reason why since 1965 when Nigeria ratified the ICSID convention no detailed rules were made as to the procedure for recognizing and enforcing award made by the centre in Nigeria. Instead, the convention was adopted in whole to the extent that the Act which presently deals with ICSID award only has two sections[96]. The Act only contains procedure on how to apply for recognition and enforcement of the award, by making the Supreme Court the court where such enforcement should be sought[97]. This is in compliance with Article 54 of the

[93] Chukwumerie A.I. Op cit. at P. 190. See also article 53 and 54 of the convention
[94] Op cit
[95] Ibid
[96] See International Centre for Settlement of Investment Disputes (ICSID) Enforcement of Award Act Cap. I. 20 L.F.N. (2004)
[97] See section 1(2) of Cap. I 20

Convention which directs contracting states to recognize and enforce awards made by ICSID through its courts, which we shall now examine.

4.8.5.1 Procedure for Recognition and Enforcement of ICSID Awards in Nigeria.

The legislation dealing with this process is the International Centre for Settlement of Investment Disputes (Enforcement of Award) Act[98]. The Act as its long title indicates is meant to provide for the enforcement in Nigeria of an award by the International Centre for Settlement of Investment Disputes. For the purpose of clarity, the section which provides for the procedure for enforcement of ICSID awards shall be reproduced in full hereunder:

section 1 (i) where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for Settlement of Investment Disputes, a copy of the award duly certified by the secretary General of the centre as aforesaid, if filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly.

Once the above procedure has been duly followed, recognition would be given to the award and enforcement commences immediately. No formal

[98] Contained in Cap. I. 20, L. F. N. (2004)

application is required to be made before recognition or enforcement is accorded to the award. At most, the applicant may be required to pay the requisite filing fees[99].

The Chief Justice of Nigeria or his representative may examine the award after it has been filed to make sure it is in order[100], and that decision is binding on the parties[101]. Where, however, the opposing party wishes to challenge enforcement he cannot do that through the court, especially in view of the fact that the Supreme Court is the court of first instance in this situation, hence its decision is not appellable. The Act also does not make any provision for appeal; the only option available to the aggrieved party is to contest the enforcement through the convention. By this, he can request the Secretary General of the centre for annulment of the award on the following grounds :

a) improper constitution of the tribunal
b) Serious departure from a fundamental rule of procedure.
c) Failure to state reasons for the award.
d) that the tribunal exceeded its powers
e) Corruption on the part of one or more of its member's[102].

The party has 120 days to make such an application from the date of the award, or in the case of corruption not discovered immediately, 120 days from the date of discovery thereof, provided the period in the latter case does not exceed 3 years on the whole.

[99] Offornze A.D op cit
[100] Ibid at p77
[101] Article 53(1) ICSID convention
[102] See article 52 ICSID convention

It is however, trite, that a judgment of the Supreme Court once executed can not be reversed[103], hence if while the period of 120 days is still running the other party rushes to file the award in the Supreme Court, it automatically becomes enforceable and can be quickly executed as a judgment of the Supreme Court;[104] and once executed it becomes valid. One fundamental question is whether, execution of such awards against sovereign states is as easy as it is in the case of individuals? This is what we shall now attempt to address.

4.9 IMPEDIMENTS TO THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS AGAINST STATES BY INDIVIDUAL AWARDEES

On the foregoing, it can be clearly seen that all necessary machineries for ensuring the enforcement of international awards have been put in place. This is made possible through the various domestic[105] and international legal instruments[106]. Enforcement of award made internationally by a *forum* Court in favour of individual awardees does not necessarily pose any problem, once such award has been recognized by a court of competent jurisdiction. Problems normally arise where an individual is seeking to enforce an award made in his favour against the interest of a state party to arbitration. This is mainly due to claim of sovereign immunity as decided by the English case of **Miguel v. Sultan of Jahore[107]**. This, therefore, brings us to the fundamental question. What will

[103] Chukwumerie A.I op cit p. 86
[104] Ibid
[105] In Nigeria for example, the Arbitration and Conciliation Act has made adequate provisions in this direction.
[106] A typical example of these international legal instruments includes the New York Convention of 1958 and the ICSID Convention.
[107] (1894) QB 149 quoted in O.O Adejo (2001-2002) Sovereign Immunity and the Enforcement of contract. *Ahmadu Bello University Law Journal*, 19-20, 63-76

happen where an individual or even a corporate body enters into a contract for the supply of goods to a particular country, and that country refuse to pay the contract sum after the goods have already been supplied? Also, what will happen where an arbitration clause has been inserted in the contract, which the plaintiff has exhausted and award has been given against the country, which it refuses to respect, even after a court of competent jurisdiction has decided against the country? In this situation, how can execution be levied against the country to enforce such an award, especially where the country being a sovereign state claims Sovereign Immunity? In answering this question, it should be stated that in the United States of America for example, the foreign sovereign may decide to waive his immunity from jurisdiction of domestic courts, but this does not constitute waiver from execution[108]. In the United Kingdom, the position initially, was that foreign sovereigns were generally, immune both from jurisdiction from prosecution and execution[109]. This general position was however changed by the English Court of Appeal in the case of Trendtex Trading Corporation v Central Bank of Nigeria.[110] In that case, Lord Denning and Lord Shaw, sitting on the bench of the Court of Appeal, held that the respondent in the case, though an agent of the Nigerian government would not benefit from absolute immunity since it had engaged in commercial activity; that the issue of immunity here, would be interpreted restrictively. The learned law Lords drew no distinction between immunity from suit and immunity from enforcement, despite all the pieces of

[108] Adeojo O.O. (2002), Sovereign Immunity and the Enforcement of Contracts, op cit. p. 64
[109] See the statement of Lord Atkin in the case of *Compania Naviera Vascongado v S.S Cristina* (1935) A.C. 485 at 490
[110] (1977) 1 All E.R. 881

evidence called to show that the funds which the appellant sought to retain by injunction were part of the Foreign Reserves of the Nigerian government. The above decision represents the law in the United Kingdom not the one given earlier.

Courts in different jurisdictions have different approach to the issue of immunity as a way of exonerating foreign sovereigns from the jurisdiction of their courts. In some countries such as the United States of America, foreign sovereigns are only excluded from the jurisdictions of U.S courts for acts done *jure imperii*, acts done in fulfillment of the state's public responsibility. They are however, not excluded for acts done *jure gestionis*, acts done in private capacity or when the foreign sovereign engages in private commercial transaction.[111] Where the act is public in nature the doctrine of Absolute Immunity is applied as against when the sovereign engages in private commercial activities, in which case the principle of Restricted Immunity is applied. In other words, where the sovereign engages in private commercial activities he will not be immuned from the jurisdiction of U.S courts. Even on this, the U.S courts recognize as a rule of International Law, a general immunity from execution, hence waiver of immunity from jurisdiction does not constitute waiver of execution.[112] In essence, immunity with regards to execution is absolute as against jurisdiction with regards to trial where, if the sovereigns decide to waive the immunity, he can be tried[113].

In Britain on the other hand, the doctrine of immunity is applied generally without any demarcation between when immunity should be applied strictly or

[111] Ibid.
[112] . See *New York and Cuba Mail S.S. Co. V Republic of Korea* 132 F. Sup. 684(S.D.N.Y. 1955) quoted in Adeojo O.O. ibid.
[113] This is partly the case in Nigeria. See *Dimitrov V Multichoice Nig. Ltd*.(2005)13 N.W.L.R. 575 at 595

absolutely. The approach is that general doctrine of immunity was adopted extending to both actions *in personam* and *in rem*, whether or not related to commercial or private dealing.[114] As Lord Atkins said in the case of **Compania Naviera Vascongado V S.S Cristina**,[115] "the doctrine of Sovereign Immunity applies to both any form of prosecution, whether for private commercial or other purpose. Almost forty years later Lord Denning however, had cause to change this position in **Thai-Europe Tapioca Services Ltd. V Government of Pakistan**[116] thus:

> ……Sovereign Immunity should not depend on whether a foreign sovereign is impleaded directly or indirectly but rather, on the nature of the dispute…….Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislations or international transactions of a foreign government on the policy of its executive, the court should grant immunity if asked to do so….but if the dispute concerns for instance, the commercial transactions of a foreign government(whether carried out by its own departments or agencies) or by its separate legal entities and it arises properly within the territorial jurisdiction of our courts there is no ground for granting immunity.

Lord Denning had the opportunity to restate his position two years after in the case of **Trendtex Trading Corporation Ltd. V Central Bank of Nigeria**.[117] In this case, the Federal Government of Nigeria, in 1975, ordered a considerable quantity of cement from overseas. Suppliers' payment was to be made through letters of credit established by the Central Bank of Nigeria against presentation of shipping documents to the bank's correspondents in various countries. At a point it became clear that the volume of cement arriving in Nigeria was too large for the

[114] Adeojo Ibid at P. 65
[115] *(supra)*
[116] (1975) 3 All E.R. 961 at 966-967(quoted in Adeojo O.O ibid)
[117] (1977) 1 All E.R. 881

country to handle. The federal government therefore ordered the C.B.N. not to pay against further presentations of document until certain new procedures had been put into force. Trendtex, a Swiss company was one of the beneficiaries of a letter of credit for an installment contract who was affected by the federal government directive with respect to shipment of the cement. Trendtex was therefore told by one of the correspondent banks in London that the C.B.N. had countermanded its instructions to pay. Unhappy with this decision, Trendtex sued the C.B.N. at the High Court of London. In the suit, Trendtex claimed the price of the shipments made damages for non- acceptance of the balance to be shipped and in addition, sought an injunction, requiring the C.B.N. to retain within the jurisdiction of the court, sufficient funds to meet the claim. Donaldson J. held that the C.B.N. though constituted in Nigeria as an entity separate from the government, was for the purpose of International Law to be regarded as part of the Nigerian state, as such it was absolutely immune, since English law drew no distinction between acts *jure imperii* and *acts jure gestionis.*

Dissatisfied with the above decision, Trendtex appealed to the Court of Appeal, where all the Lord Justices in the appeal, Lords Denning, Shaw, and Stevenson, held that the Central Bank of Nigeria was not part of the Nigerian government; hence immunity should only be applied strictly, rather than absolutely. Though the C.B.N. appealed to the House of Lords, the matter was later settled out of court before judgment.

In Nigeria the law is still at its developing stage, as a result, there is yet to be available, (based on the researchers work) as to what is exactly the law in Nigeria. Despite this, it is the opinion of the present writer that the position in the United States should be adopted but with some amendments. The position is that foreign sovereign can be subjected to jurisdiction of U.S courts once he waives his immunity. This is where he engages himself in commercial activities that have nothing to do with the state which he represents. It should however, be noted that, even in the United States it is still not clear whether the foreign sovereign can waive his immunity against execution. That notwithstanding, the law in Nigeria is that a foreign sovereign can waive his immunity from prosecution but it is not clear whether the same is true for execution.[118]

However, recent developments suggest that immunity will only be accorded to the acts of foreign sovereigns that are public in nature, and to his property serving public purposes, leaving it to the forum state to grant or refuse to grant immunity to the acts of the foreign sovereign that are private in nature.[119] This is based on the simple logic that the principle of independence protects essentially, the substance and exercise of the public, governmental functions of the states, but not their conduct or property outside this public sphere.[120] This in essence should be the position of the law in Nigeria so that the sovereignty of Nigeria will not be compromised even where a foreign sovereign decides to hide under the guise of immunity to avoid his own obligation under a commercial contract to which he

[118] *Dimitrov v Multi-Choice Nigeria Ltd.* (2005) 13 N.W.L.R. 575 at 595
[119] Adeojo O.O. op cit. p. 65
[120] Ibid.

was a party. Alternatively, Nigerian courts should be allowed the leverage to determine whether a particular matter brought before them in which a foreign sovereigns is involved, is one requiring the invocation of absolute immunity or restricted immunity.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS, SUMMARY AND CONCLUSION

5.1 FINDINGS

At the conclusion of this study, the following are the findings.

5.1.1 International Commercial Arbitration in Nigeria is at Developing Stage

The study found that arbitration, particularly international commercial arbitration, is still at its developing stage in Nigeria. This is despite dedicating a whole Act to dealing with the issue of arbitration, which has been found to be substantially perfect, though not without some shortcomings.

5.1.2 The Issue of Court Intervention in Arbitral Proceeding and Awards is still unresolved.

The Arbitration and Conciliation Act which deals with both domestic and International arbitration is a good law for the purpose of enforcing international arbitral awards in Nigeria. The Act is however, not without its shortcomings, one of which is the issue of court intervention or interference in an arbitral proceedings and awards. Being originally a military decree, the Act fails to address itself to the issue of constitutionality and supremacy tests as enshrined in the preamble and sections 1(3) and 241 of the constitution. Section 34 for example, bars the court from interfering in any matter which is the subject of arbitration without having in mind, the constitutional effects of the provision. At the time the Act was passed it was a military decree, hence it was as supreme as the constitution; they ranked *pari passu*, since some sections of the Constitution were suspended. Now that we are in a fully and totally democratic period where all parts of the Constitution are alive

and effective, this section seems unconstitutional as confirmed by the court in the case of **Nigeria Agip Oil Co. Ltd. V. Kemmer & 7 Ors**[121]**.**

5.1.3 The Reciprocity Doctrine is a clog in the Proper Enforcement of International Arbitral Awards.

The issue of enforcement is very fundamental to any award. It is in fact, the fulcrum upon which the issue of any arbitral award is hinged. In this regard, it has been found that the foreign Judgments (Reciprocal Enforcement of Awards) Act is not a good law with regards to the enforcement of International Arbitral Awards in Nigeria. This is because of its insistence on the issue of reciprocity. It is doubtful if any foreigner will seek enforcement under this Act governing the surrounding circumstances. It may however, be good law for the purpose of enforcing foreign judgements, but not arbitral awards.

5.1.4 Only Awards in Countries that give Reciprocal Treatment to Awards made in Nigeria are enforceable.

Under the Foreign Judgments (Reciprocal Enforcement) Act, only awards made in countries that give reciprocal treatment to awards made in Nigeria can be enforced by the Nigerian Courts. Where however, the award sought to be enforced by the Nigerian Court was made in another country that does not give reciprocal treatment to awards made Nigeria, then Nigerian courts cannot enforce such awards even when called to do so. This is not a good law in view of the on-going 21st Century Commercial Practices, where the entire world has become a free trade zone, especially those countries that are signatories to the WTO/GATT Agreement.

[121] (2001) N.W.L.R. (Pt. 716) 506 at p. 522

Not only that, the Nigeria Investment Promotion Commission Act[122] is to some extent, against reciprocity. This is because it has given foreigners who want to invest in any business enterprise in Nigeria, the guarantee over the security their investments. Section 24 of the Act has guaranteed a foreign investor unconditional transferability of his funds, which he can do through any dealer of his choice, and in a freely convertible currency. This includes all dividends or profit from the investment, payments in respect of loans servicing where a foreign loan has been obtained; as well as remittances of proceeds made from the investment.[123]

The above provision has been made to attract foreign investors to invest in Nigeria through Direct Foreign Investment. It therefore goes without saying that, in the event conflict accrues with regards to the above provision, which has been made subject of arbitration and leads to an award against for example, Nigeria Investment Promotion Commission, which it is not willing to honour; the foreigner will normally go to court. Once this matter is before the court it will be illogical if the court refuses enforcement on the basis that the country of the foreigner does not accord similar treatment to awards made in Nigeria. Doing this will of course, scare prospective investors from investing in Nigeria rather than attract them. For this reason then, the Foreign Judgment (Reciprocal Enforcement) Act,[124] is not a good law.

[122] Cap. N117 L.F.N. (2004)
[123] See generally, S. 24(a)-(c)
[124] Cap. F. 35 L.F.N. (2004)

5.1.5 Sovereign and Diplomatic Immunities

Sovereign or diplomatic immunity is a concept of Customary International Law which grants foreign sovereigns and their agencies immunity from prosecution and execution in foreign courts. This has been found to constitute a bottleneck in enforcing arbitral awards before another country's court. The law has been found to be well developed in some jurisdictions such as the United States and Britain to the extent that acts of foreign sovereigns have been divided into public and private. For public acts, the foreign sovereigns enjoy absolute immunity from both prosecution and execution. With regards to private acts on the other hand, the foreign sovereign can waive his immunity from prosecution but not from execution. With regards to the agencies of the foreign sovereigns engaging in commercial activities, the law is that immunity here is applied restrictively rather than absolutely.

In Nigeria, it has been found that the development of the law has attained this level, though the courts have affirmed that a foreign sovereign can waive his immunity from prosecution,[125] whether the same can be said with regards to immunity from execution, this is unclear at the moment.

5.2 RECOMMENDATIONS

The following recommendations are hereby made to address the problems raised in the work, with regards to recognition and enforcement of arbitral awards made in other jurisdictions, in Nigeria.

[125] *Dimitrov v Multi choice (Nig.) Ltd.* (2005) 13 N.W.L.R. (Pt. 943) 575

5.2.1 The Constitutionality Problem be Addressed or Abolished.

Arbitration is undoubtedly, an effective means of resolving commercial disputes without resorting to the traditional court system. This has been proved by the few cases that go to court seeking to enforce the awards. Majority of arbitrations are executed smoothly without any problem. However, despite these, the constitutionality question is in a way, a clog in the wheel for the success of the process. In this regard, section 34, which bars the courts from interfering in any matter which is the subject of arbitration, needs to be amended to be able to pass the constitutionality and supremacy test set out by the preamble and section 1(3) and section 241 of the constitution of Nigeria 1999 (as amended). As it is, section 34 of the Act is an affront on some constitutional provisions such as the ones enumerated above, as confirmed by the court in some cases[126] brought before it. The section has to be amended for the Act to compete favourably with the Nigerian constitution.

5.2.2 Annex Arbitration and Conciliation Act to the Constitution.

Alternatively, the writer wants to adopt as part of his recommendation, the view of Chukwumerie[127], that the Arbitration and Conciliation Act be annexed or made part of the constitution just as it is the case with the Land Use and N.Y.S.C. Acts. This will treat the unconstitutionality question which is hovering around section 34. Doing this will make the Act equal to the constitution, the amendment of which will require an amendment of the constitution. Some people may argue

[126] See *Nigeria Agip Oil Co. Ltd. V. Kemmer & 7 Ors.(Supra).*
[127] Chukwumerie A. I. (2002) *Studies and Materials in International Arbitration.* Op cit. p. 86

that doing this will make it difficult for the Act to be amended in the future. This may be a valid argument but it is the opinion of the present writer that despite that, it will still give parties the opportunity to be guided by the terms of their arbitration instead of using court proceedings to thwart them by the party who will want to decline on his initial commitment. In this case, the constitutionality question will not be raised as it was done in the Agip's case.[128]

5.2.3 The Doctrine of Reciprocity be removed.

The Foreign Judgments (Reciprocal Enforcement) Act is undoubtedly an international legal instrument domesticated in Nigeria, hence giving it the force of law. This Act is in the opinion of the writer, not a good law, at least for the purpose of enforcing international arbitral awards in Nigeria. This is because the Act, by restricting its application to the recognition and enforcement of awards issued only in a country that gives reciprocal treatment to awards made in Nigeria, it has completely negate the exigencies of 21st Century commercial practices. This may be the reason why the writer could not find a simple case where the Act was invoked to enforce any foreign arbitral award, though it had been applied in the enforcement of foreign judgment.[129] It is therefore recommended that the Act should be amended by inserting a clause restricting its application to the enforcement of foreign judgments and excludes its application to enforce arbitral awards. Note that despite the fact that the Foreign Judgments (Reciprocal

[128] *Supra*
[129] See for example the case of *Macaulay v. R.Z.B. Austria* (2003) 18 NWLR (Pt 852) 282 S.C.

Enforcement) Act is solely talking about enforcement of foreign judgments, foreign judgment by the definition section of the Act also includes awards.

5.2.4 The Doctrine of Sovereign Immunity be re-defined to reflect new developments evolved in other jurisdictions.

Sovereign immunity is one of the stumbling blocks against the enforcement of international arbitral awards even in developed democracies, such as the United States of America and United Kingdom. However, the situation in Nigeria is more worrisome, in the sense that one doubts whether such awards can be enforced against foreign sovereigns. Although the law through the cases has recognized that where the foreign sovereign waives his immunity from prosecution, he can be subjected to the jurisdiction of Nigerian courts.[130] What is however, not clear is whether, he can be immune from execution when he waives the immunity. It is therefore recommended that the Diplomatic Immunity Act[131] be amended to the extent that once the foreign sovereign waives his immunity, he should be made subject to the jurisdiction of Nigerian Courts, both for the purpose of prosecution and execution. In essence, once a foreign sovereign fails to honour his obligation under an international arbitration agreement and the matter comes before Nigerian court to enforce an award made pursuant to that breach, the court should not hesitate to entertain the matter, once the foreign sovereign waives his immunity.[132] The amendment should however, be in such a way that the arbitral award which is sought to be enforced must be a product of a private commercial contract. In other

[130] *Dimitrov v. Multi choice (Nig.) Ltd. (supra)*
[131] Cap D9 L.F.N. (2004)
[132] The case of *Domitrov v. Multi choice (Nig.) Ltd. (supra)* is an instance where the foreign sovereign waives his immunity.

words, only awards that border on commercial contracts or agreements should be subjected to the law. It must only be applied when the foreign sovereign engages in business for private commercial purpose. Where it is for public purpose then the foreign sovereign should be immune absolutely because doing otherwise will be in breach of a fundamental principle of customary international law. This is the law that operates in the United States of America and it is humbly submitted that it should be adopted in Nigeria, This is because America is substantially, a model for free trade in the 21st century and to a large extent, a success story in International Trade, hence the need to follow its footsteps to in order to succeed.

5.3 SUMMARY AND CONCLUSION

Based on the preceding discourse on Recognition and Enforcement of International Arbitral Awards in Nigeria, the work can be summarized as follows:

That arbitration, particularly international arbitration, being an alternative to litigation, is a very effective means of resolving international commercial disputes in the 21st Century. This can be seen from the international legal instruments promulgated to deal with the issue which has proved to be sufficient. Although this area of law has developed greatly in other parts of the world, its development in Nigeria is largely dependent on the political will of governments to be able to pursue it as a policy by copying the trend of development of the area in other parts of the world, such as U.S. and Britain. Despite the establishment of multi-door court houses in majority of the States in Nigeria to handle arbitration matters, the growth of this area of law is still slow.

- The number of institutional arbitration panels is still negligible in Nigeria. This makes some parties to arbitration to travel overseas to arbitrate, which costs them huge sums of money. This in a way jeopardizes one of the cardinal objectives of arbitration, which is cheapness.
- Certain constitutional bottlenecks such as the one provided by Sections 1(3) and 241 of the Constitution of Nigeria 1999 exist, which may hinder the development of this area of law, International Commercial Arbitration. This is because some sections of the laws dealing with International Commercial Arbitration for example, Section 34 of the Arbitration and Conciliation Act[133], could not pass the constitutionality and supremacy test when brought face to face with the provisions of the Constitution 1999 (as amended). Section 34 of the Act, bars courts from intervening in any matter which is the subject of arbitration. This is in contradiction with section 241 of the constitution which grants courts general powers in both criminal and civil litigations. The approach taken by the Act on this issue might not be unconnected with the fact that the Act was a brain child of a military regime, a period when substantial part of the constitution was suspended. For the Act to stand the test of time and remain an effective means of resolving international commercial dispute, it has to put into consideration, this problem.

[133] Cap. A 18 L.F.N. (2004)

- In the 21st Century; any law dealing with commercial transactions, especially across international borders must take into cognizance, the burgeoning increase in commercial activities. It must also be able to accommodate innovations in technology and trade. In this regard, laws such as the Foreign Judgments (Reciprocal Enforcement) Act[134] have not actually taken this into account by insisting on reciprocity before any foreign judgments can be enforced in Nigeria. The world has grown into a global village where these kinds of laws are obsolete and out of date. Direct Foreign Investment can only flow into Nigeria when such obsolete laws are either amended or abrogated completely, to usher in the new era of e-commerce.
- The claim of sovereign immunity by foreign sovereigns from jurisdictions of courts of other states is one issue that constitutes a stumbling block in the enforcement of foreign arbitral awards, not only in Nigeria but in other jurisdictions. The problem is more glaring when it involves the issue of execution of foreign awards against the asset of another state, its agency or diplomats either before its own courts or before the courts of other states. This problem is more complex in Nigeria than in other jurisdictions in view of the fact that the law is still at a developing stage.

However, as stated above, the recent developments which suggest that immunity will only be accorded to the acts of foreign sovereigns that are public in nature, and to his property serving public purposes, leaving it to the forum state to

[134] Cap F35 L.F.N. 2004

grant or refuse to grant immunity to the acts of the foreign sovereign that are private in nature, should be adopted as the law in Nigeria This is both to maintain the integrity of Nigeria as an independent nation, and at the same time, carry out the obligations of the country under International Law. This in essence should be the position of the law in Nigeria so that the sovereignty of Nigeria will not be compromised even where a foreign sovereign decides to hide under the guise of immunity to avoid his own obligation under a commercial contract to which he was a party. Alternatively, Nigerian courts should be allowed the leverage to determine whether a particular matter brought before them in which a foreign sovereigns is involved, is one requiring the invocation of absolute immunity or restricted immunity.

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