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The Challenges of the Nigerian Arbitration and Conciliation Act

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Abstract

Arbitration is a form of alternative dispute resolution (ADR). ADR represents the entire mechanisms for settling disputes by means other than litigation. In this way, it is clear that the word 'alternative' in ADR includes arbitration. It is a good and valid alternative dispute resolution mechanism. Its end product technically known as 'award' is binding. In C.N. Onuselogu Ent. Ltd. v Afribank (Nig.) Ltd, the court held that arbitral proceedings are recognized means of resolving disputes and should not be taken lightly by both counsel and parties. Indeed, the Arbitration and Conciliation Act is the principal legislation regulating written arbitration agreements in Nigeria. There is no gainsaying the fact that Arbitration now plays a crucial role in our society. Little wonder, Arbitration clause can now be found in almost all standard contracts. The objective of this research work is to explore the challenges of the Arbitration and Conciliation Act with a view to addressing them. This work questions the hurdles and anomalies in relevant provisions of the Arbitration and Conciliation Act. The methodology adopted for this research is basically a review of the provisions of the Arbitration and Conciliation Act, case

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review and the opinions of Scholars in the field of Arbitration. This work shows that the Arbitration and Conciliation Act is in dire need of a total overhaul.

Keyword: Arbitration and Conciliation Act, Court, Agreement, Tribunal

The Arbitration Agreement

Apart from statutory arbitration, written arbitration as distinct from litigation is founded on the agreement of the parties. It is an arrangement where parties agree to refer anticipated or already existing disputes to an arbitrator or arbitrators. There must be agreement by parties to opt for arbitration. As a learned text writer puts it "the basis, and indeed the jurisdiction and power of an arbitral tribunal derive from the agreement of the parties".[1]

Enforcement of Agreement to Arbitrate

Every person is by virtue of section 6[2] entitled to have his or her dispute settled by the Court. However a person may waive this right and resort to arbitration or any other alternative form of settling dispute. Once there is mutual agreement by the parties as shown above, the requirement of law is met and any such arrangement is binding. What is the position of the law where a party who has agreed in writing to resort to arbitration fails to do so and instead proceeds to litigation? Is the innocent party compelled to litigate notwithstanding the arbitration agreement?

There are two somewhat contradictory provisions that deal with this issue. They are sections 4 and 5 of the Act. While section 4 provides that the court 'shall' stay proceedings brought in violation of arbitration agreement, section 5 provides that the court 'may' stay proceedings in the same instance. There is no doubt that in the interpretation of statutes the word shall is mandatory while the word may is discretionary. The confusion that now arises is this: is the Judge mandated to stay proceedings or is he at

[1] CE Ibe, *Insight on the Law of Private Dispute Resolution in Nigeria* (Enugu: El Demak Publishers, 2008) p. 103: see also CA Obiozor, *Courts and the Framework for Domestic Arbitration under the Act in Nigeria* (Onitsha: Allied Press House, 2010) p.37-39.

[2] 1999 Constitution of the Federal Republic of Nigeria (as amended 2011).

liberty to do so? In *M.V Lupex v NOC*[3] the Supreme Court held that it was an abuse of court process to institute a fresh suit during the pendency of arbitral proceedings. However, in the same case at the Court of Appeal, stay was refused.

Professor Ezejiofor agrees that the existence of both sections is a contradiction. He also opined that section 4 may have been intended to apply to international arbitration whereas section 5 applies to domestic arbitration. However, he admits that his view can be countered by the contention that section 4 would have been moved to part III of the Act which deals with international arbitration. He further suspects that the insertion of both sections by the draftsman was an error. He extols section 5 and calls for deletion of section 4.[4]

With respect, I beg to disagree with the final position of the learned Professor. His reasons for extolling section 5 are not all embracing though meritorious. He argues that if all application for stay is granted, then the court cannot prevent resort to arbitration in deserving cases. Also, disputes whose substances are such that cannot be adequately settled by arbitration will still end up in arbitration.[5]

The best solution it is submitted is to strike out completely section 5 of the Act. I maintain this position because l cannot see why a person without duress or undue influence,[6] will agree to arbitrate, only to rush to court to litigate. One cannot approbate and reprobate at the same time. By agreeing in the first place, the other party has altered his position. It could be that that is the only reason that motivated the other party to enter into the contract. Perhaps, he frowns at litigation. Why then, should the agreement of full-fledged men still be subjected to the discretion of a Judge who is not a party

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[3] [2003] 15 NWLR (pt 844) 469: *K.S.U.D.B v Fanz Ltd*. [1986] 5 NWLR (pt 39) 74.
[4] G Ezejiofor, *The Law of Arbitration in Nigeria* (Ikeja: Longman, 1997) pp. 42-43.
[5] *Ibid*
[6] These are vitiating elements of contract which will of course nullify the agreement to arbitrate.

to the arrangement? We must keep in view that arbitration is a method of settling dispute and is not inferior to litigation. Days have gone when courts frowned at arbitration because they considered it a rival to their powers.[7] Today, as can be deduced in a litany of decisions, our courts welcome arbitration.[8] Hence, the Act should be amended to follow suit.

Having made a case for the obliteration of section 5, I will proceed to analyze section 4 because the section is not perfect in itself. By virtue of section 4 a party must bring his application 'not later than when submitting his first statement on the substance of the dispute.' Once a party files his first statement on the substance of the dispute,[9] he is deemed to have waived his right to arbitrate. The need for timely disclosure of agreement to arbitrate is to save time and cost. It will amount to judicial mimicry to raise the issue mid-way into trial and expect the judge to stay proceedings. Still, there should be a way out. Picture this scenario; a recalcitrant client neglects or knowingly fails to disclose the existence of an arbitration agreement, and his counsel enters a defence only to find out later that an arbitration agreement exists. Since the whole essence of the law is time and cost, it is submitted that the defaulting party pay costs both to the court and to the other party. This will be geared towards encouraging arbitration and enforcing the integrity of arbitration agreements. It is therefore suggested that section 4 be re-framed to subsume payment of costs where a party makes application for enforcement of arbitration agreement after submitting first statement on substance of the dispute.

Subsection (2) of section 4 of the Act is another provision that has generated much controversy. Prof Ezejiofor opined that the subsection allows for arbitration and court proceedings to go on at the same time.[10] Ibe disagrees and maintains that 'pending' in that context would mean not yet decided; hence the two proceedings should not go on at the same time. Ibe adduced

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[7] See *Okpuruwu v Okpokam* [1988] 4 NWLR (pt 90) 544.

[8] *CN Onuselogu Ent Ltd v Afribank Nig Ltd* [2005] 1 NWLR (pt 940) 577.

[9] First statement on substance of dispute refers to statement of defence, an application e.t.c that substantially touches on the issue. A mere letter indicating intention to institute an action will not qualify.

[10] G Ezejiofor, *op cit*, p.44.

different meanings of 'pending' and argued that contextually and following reason that the court proceeding will stay.[11] Let me pause and acknowledge the wonderful reasoning of these scholars. However, this challenge as is the case with many others can be addressed. With respect, the above subsection to my humble view is worthless. What does the draftsman want to achieve? They have already mandated the court to stay proceedings, why create confusion with commencing arbitral proceedings again? Could it be that they are in doubt of the court complying with the mandate? Or maybe they don't want the delays in litigation to forestall the arbitral proceedings. Whatever be the case, the provision is unnecessary. Hence, I respectfully call for its deletion from the Act.

The provisions of section 7 (4) has attracted scathing remarks by scholars. The provision states that a court's decision in appointing arbitrators shall not be subject to appeal. The right of appeal is a constitutional right and cannot be derogated from.[12] Besides, any law that is inconsistent with the provisions of the Constitution is null and void to the extent of such inconsistency.[13] It is in the light of these provisions that section 7(4) of the Act has been faulted. As a learned author puts it:

> It is our view that section 7(4) of the Act has outlived its usefulness. It is our case that the provision be amended in order to divest it of its unconstitutional posture. Differently put, section 7(4) of the Act is inconsistent with the Constitution and is therefore, null and void and of no legal effect.[14]

On the other hand, another learned author sees nothing wrong with section 7 (4) of the Act. In his words 'Recourse against an unacceptable decision of the

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[11] CE Ibe, *op cit,* pp. 113-116.
[12] s.241 & 242 1999 Constitution of the Federal Republic of Nigeria (as amended) 2011.
[13] *Ibid* s. 1(3).
[14] CA Obiozor, *Courts and the Framework for Domestic Arbitration Under The Act in Nigeria, op cit,* p. 272.

court under section 7 of the Arbitration and Conciliation Act 1988, which is not subject to appeal, can be taken up under sections 8-11 of the same Act.'[15] Though learned scholar omitted to elucidate his point further, still much merit is found in his argument. As will be demonstrated anon, sections 8-11 of the Act provides for circumstances where an arbitrator can be challenged and removed. It is a trite law that in the interpretation of statutes the entire provisions are read as a whole and carefully[16]. 'Put differently, therefore, in the construction of a statute, no section is meant to stand on its own nor is it permissible to do a piece meal construction of the statute'.[17] Hence, a holistic and liberal interpretation of the Act will show that a party who disagrees with the decision of the court can challenge the arbitrator on any ground in sections 8-11. He can challenge him on the ground that his impartiality and independence cannot be justified or that he does not possess the requisite qualification.[18] Interestingly, those sections do not preclude right of appeal.

It is however not conceded that section 7(4) is without defects. Granted, there is a reflection of drafting inelegance. However, there is a way round the issue pending any amendment. But it will be appropriate to pause at this juncture and attempt to proffer a reason for this provision. Perhaps, the draftsman is trying to reduce to the barest minimum delay in conducting arbitration proceedings. Since the resultant award can still be tested through litigation, let the arbitral proceedings start first, they might have reasoned. Most times in litigation we see counsel dragging a procedural matter up to the Supreme Court before coming back to try the substance of the case. The draftsman might have envisaged this attitude and decided to curb it. More so, since the decision is not a substantial one there appears to be no harm with it. That's why such provision cannot be found with respect to the award which is final and substantial. This also reminds us of the fact that it is the arbitral tribunal that decides questions of its jurisdiction and not the court. We also remember

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[15] Ibe, *op cit*, p.139.
[16] Ojokolobo v Alamu [1987] NWLR (Pt.61)377: *Matari v Dangaladima* [1993] 4 NWLR (Pt.285)72: *Awolowo v Shagari* [1979] 6-9 S.C. 37.
[17] CA Obiozor, *Nigerian Arbitration Jurisprudence, op cit*, p. 136.
[18] s.8(3) of the Act.

that the courts are not allowed to intervene in matters governed by the Act except where so provided in the Act[19]. A calm and complete look at the Act will indeed show that the Act intends to save time and cost which is the major reason why parties opted for arbitration in the first place.

For the avoidance of doubt, the foregoing argument does not imply that section 7(4) is compatible with the Constitution. It is clearly not compatible, and as stated above it is inconsistent with the Constitution and is null and void. The argument above merely intends to provide alternatives and the way forward. Interestingly, the Court of Appeal had held in *Ogunwale v Syrian Arab Republic*[20] that the provisions of section 7(4) of the Act constitute an infraction on the constitutional right of appeal and is therefore unconstitutional. It is hoped that the Supreme Court will one day be giving the opportunity to pronounce on the constitutionality of the provision. Meanwhile it is perfectly safe to conclude that section 7(4) of the Arbitration and Conciliation Act has become stifled of its strength. Unfortunately, the Laws of the Federation of Nigeria were further revised in 2004. Curiously, the wording and provisions of section 7(4) were repeated without regard to the decision in *Ogunwale's case*.[21]

Challenging an Arbitrator

Two grounds of challenge are provided for by virtue of section 8(3) of the Act. They are: (a) if circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or (b) if he does not possess the qualifications agreed by the parties. Hence, where an arbitrator lacks the requisite skill, knowledge and discernment, he can be challenged. In *Johnson v Cheape*[22] it was held that an arbitrator who has interest in the matter was not qualified to arbitrate.

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[19] s.34 of the Act.
[20] [2002] 9 NWLR (Pt 771) 127.
[21] CA Obiozor, *Courts and the Framework for Domestic Arbitration under the Act in Nigeria, op .cit.,* p. 203.
[22] (1817) 5 Dow PC 247.

Again, the parties are at liberty to determine the procedure for challenging an arbitrator[23]. Where no procedure is determined, a party who intends to challenge an arbitrator shall within fifteen (15) days send a written statement of the reasons for the challenge. Unless the challenged arbitrator withdraws, or the other party agrees to the challenge, the tribunal shall decide on the challenge.[24] This is another provision of the Act that is in dire need of amendment. This provision, specifically section 9(3), is an affront to one of the twin pillars of natural justice - *nemo judex in causa sua.*[25]

Professor Obiozor[26] expresses the view that if the arbitral tribunal comprises one arbitrator and such arbitrator is challenged, it will be difficult to fathom the propriety of throwing the question back to the challenged arbitrator to decide on the success or otherwise of the challenge. Then, such an arbitrator becomes a judge in his own cause. It is therefore necessary to amend the section to vest the authority to determine the challenge in an independent body. He further reasoned that even where the tribunal is made up of more than one arbitrator, the other members will show sympathy to their colleague especially where he wields some influence over them. Moreover, under UNCITRAL, where an arbitrator does not withdraw and the adverse party does not agree to the challenge, the deadlock is resolved by submitting the issue of challenge to the appointing authority for determination.

It is instructive to note that Article 12 appear conflicting to section 9 though on the same subject. The article provides that where the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision shall be made by the court or the appointing authority. Hence, while the Act gave the tribunal the deciding authority, the rule gave the court the authority. This is a clear conflict. One may reason that in interpreting the Act

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[23] s.9 (1) of the Act.
[24] s. 9(2&3) of the Act.
[25] One cannot be a judge in his own cause.
[26] CA Obiozor, *Courts and the Framework for Domestic Arbitration under the Act in Nigeria, op. cit.,* pp. 274 & 213-214.

as a whole[27] that the court should be resorted to finally. However, we must quickly state that where such conflict exists, the provision of the Act will supersede the rule.[28] It follows then that the decision is to be made by the tribunal.

Further, section 9(3) is also in conflict with section 45(9) of the Act which deals with international arbitration. By virtue of section 45(9), an aggrieved party resorts to an appointing authority. This is unfortunately not the case in domestic arbitration. It is hereby suggested that the Act be amended in the language of the rules and international arbitration which is preferable.

Jurisdiction of Arbitral Tribunal

Jurisdiction is fundamental to any proceeding. A court without jurisdiction lacks the *vires* to make any decision. In fact, the adjudication in its entirety is a nullity. For this reason, questions of jurisdiction once raised must be trashed out first. An arbitral tribunal must likewise have jurisdiction to determine questions before it. Otherwise, any resultant award will be unenforceable. The relevant provision for purposes of arbitration is section 12 and 13 of the Act. Section 12 enacts what we refer to as the doctrine of *competence-competence.*[29] There is much merit in allowing an arbitral tribunal to determine questions of its own jurisdiction. For one thing, it reduces courts involvement in matters of arbitration as contemplated by the Act. However, there is a serious departure of the Act from the provisions of Article 16 of the UNCITRAL Model Law which is the progenitor of section 12 of the Act. This departure is noteworthy. For ease of understanding I will reproduce the provisions. Article 16(3) of the model Law provides:

> If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in

[27] *Awolowo v Shagari supra.*
[28] Article 1 of the rules, found in the first Schedule to the Act.
[29] The doctrine holds that an arbitrator may determine questions of its own jurisdiction.

> article 6 to decide the matter, which decision shall be subject to no appeal: while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

On the other hand, section 12(4) of the Act provides as follows:

> The arbitral tribunal may rule on any plea referred to it under subsections (3) of this section either as a preliminary question or in an award on the merits; and such ruling shall be final and binding.

Clearly, the two provisions set out above are not the same. While ruling of arbitral tribunal under UNCITRAL can be challenged in court, a ruling under the Act is final and binding. It appears therefore, that from a cursory look at the provisions of section 12(4), the ruling of an arbitral tribunal cannot be challenged in court. To this extent, section 12(1) of the Act is an unnecessary usurpation of the function of the Court.[30] In practice however, it is not really the case. To appreciate this point, I will refer to the comment of a learned scholar.

> Where the issue of the arbitrator's jurisdiction arises, the Act as we saw earlier empowers the arbitral tribunal to determine the question. It is tantamount to misconduct for a tribunal to rule that it has jurisdiction when it has none. Where the tribunal determines the question, it would normally be in the form of an interim award. Where this is the case, there is authority for the rule that such interim award could be removed to court for purposes of setting it aside at that

[30] CA Obiozor, *Courts and the framework for Domestic Arbitration under the Act in Nigeria, op cit,* p. 234.

> interim stage of proceedings when it was made, without necessarily waiting till the final award is made. *Federal Ministry of Works & Housing v MCC. Nig Ltd.*[31]

The reasoning above is sound. It reflects a community understanding of the provisions of the Act. Since the ruling will be in form of an interim award, an aggrieved person can challenge the award. The attempt to exclude court intervention in this instance is uncalled for.

Prof Nwakoby sees nothing wrong in the arbitral tribunal determining its jurisdiction and the arbitrability of the subject matter before it particularly when the parties are already before the arbitrators. It is merely an issue of assumed superiority of the court over arbitration to insist that arbitrators have no right to determine issues in respect of their jurisdiction.[32] On the other hand Ibe supports the idea of court intervention for the benefit of the parties. This is an instance he favours court intervention against the protestations against it.[33]

As highlighted above jurisdiction is fundamental and extrinsic to any proceedings. It has to be determined as soon as it is raised as to avoid any futile exercise of power. Besides, the model law recognizes the need for this as shown above. It is suggested that the Act be amended in the language of the model law.

Again, there is a typographical error in section 12(2) of the Act. The section used the expression 'validity of the arbitration clause'. Validity used in this section has no meaning if the entire section is read together. Maybe, it is printer's devil.[34] Article 16.1 of the model law which is *impari materia* with

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[31] CA Obiozor, *Nigerian Arbitration Jurisprudence, op cit*, p.223.
[32] GC Nwakoby, *Law and Practice of Commercial Arbitration* (Uwani-Enugu: Iyke Ventures Production, 2004) p.53.
[33] CE Ibe, *op.cit.*, p.150.
[34] See CA Obiozor, *Courts and the framework for Domestic Arbitration under the Act in Nigeria, op cit,* p. 280.

s.12 (2) of the Act used the word 'invalidity'. 'Invalidity' gives sense to that section as opposed to validity. More so, Article 21(2) of the rules to the Act used the word 'invalidity'. It is therefore suggested that the correct word is 'invalidity'.

Conduct of Arbitral Proceedings

The arbitral tribunal shall ensure that parties are accorded equal treatment and each party given full opportunity of presenting his case.[35] Also, the proceedings shall be in accordance with the procedure contained in the Arbitration rules set out in the First Schedule to this Act.[36] The effect of this provision is that in domestic arbitration under the Act, parties cannot make their own rules or resort to any other rule. They are bound by the rules in the Act. However, a holistic interpretation of the Act shows that parties are still at liberty to make their own rules. Section 22(4) of the Act allows the arbitral tribunal to 'decide in accordance with the terms of the contract and shall take account of the usages of trade applicable to the transaction'. Also, section 24(2) provides that 'in any arbitral tribunal, the presiding arbitrator may, if so authorized by the parties or all the members of the arbitral tribunal, decide questions relating to the procedure to be followed at the arbitral proceedings'.

From the above, the arbitral tribunal is enjoined to decide in accordance with terms of party's contract. The parties' term of contract may stipulate the procedure to be followed in determining the substance of the dispute. Where this is the case, the procedure stipulated by the parties overrides the procedure contained in the Act. Parties are not bound to a set of rules as in litigation. Again, the presiding arbitrator may decide procedure when authorized by the parties or tribunal. The implication of all these is that parties to an arbitral process may make their rules or empower the tribunal to make the rules that will govern the arbitral process. In either case, the parties would have dispensed of the procedure in the Arbitration Rules. This is what we refer to as party autonomy. It follows then, that the 'shall' in section 15(1)

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[35] s. 14 of the Act.
[36] s. 15(1) of the Act.

have to be construed as 'may'. To clear this confusion and reflect certainty which is the hallmark of any enactment, it is suggested that the word 'shall' be replaced with 'may'. It will make a holistic construction of the Act easier. We continue to remember that 'shall' is peremptory while 'may' is discretionary. Where the rules are silent on any matter the tribunal is empowered to conduct the proceedings in such a way as to ensure fair hearing.[37]

Unless parties agree otherwise, arbitral proceedings commence on the date the request to refer dispute to arbitration is received by the other party.[38] Hence, once a party receives a request from the other party to refer to arbitration, proceedings have commenced. It is immaterial whether the arbitral tribunal has been constituted or not. 'This notice is of paramount importance for it confers jurisdiction on the arbitral tribunal.'[39] With respect, I am unable to appreciate the rationale behind this provision. What happens where A forwards a request to arbitrate to B and B rejects the request arguing that there is no agreement between them to arbitrate. In this case, will it be right to say that proceedings have commenced? Granted, parties may agree otherwise, but what if they fail to do so. It is suggested that the provision be rephrased to include acceptance by the other party at least. Still, it's not enough. What if the appointment of arbitrators creates issues and they go to court, will proceedings have actually commenced? The best provision, it is submitted, is that proceedings commence after appointment of arbitrators.

Making of Awards

An award is to an arbitral tribunal what a judgment is to a court. Therefore an award is the decision made by an arbitral tribunal – final or otherwise.[40] This

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[37] s. 15(2) of the Act.
[38] s. 17 of the Act.
[39] CE Ibe, *Insight on the law of Private Dispute Resolution in Nigeria* (Enugu: El Demak Publishers, 2008) P.160.
[40] CA Obiozor, *Nigerian Arbitration Jurisprudence*, *op cit*, p 159, relying on the decision of Court of Appeal in *Environmental Dev. Construction v Umara Associates where* it was held that 'the interim decision of an arbitrator or umpire, like his final decision is known as award'.

decision, unless otherwise agreed by the parties, is made by the majority where the tribunal consists of more than one arbitrator.[41] What happens where it is impossible to have a majority decision? There are two views by two scholars. One scholar posits that the arbitrators have to continue discussions and strive to achieve a compromise, unanimous or majority decision.[42] The other scholar argues that the correct understanding is that the arbitrators under such circumstance lack the ability to perform a vital function and has failed to act without undue delays which are grounds to terminate their mandate.[43] Both views are commendable. It is wise for the tribunal to make further deliberations and strive to strike a compromise. Where they fail to do so then it is obvious that they are unable to perform their function and their mandate can be terminated. However, the researcher finds it hard to envisage a situation like this. For instance, three (3) justices sit at our Court of Appeal. I have never read a law report where the Court of Appeal fails to arrive at a majority decision, although there can be dissenting views. Be that as it may, it is suggested that the Act be amended to address such a situation for the avoidance of doubt.

There is a conflict or an inconsistency between the Act and the rules as to time within which an arbitral tribunal is to entertain a request for the interpretation of awards. While section 28 (2) of the Act stipulates 30days, article 35.2 provides for 45days. Granted, the Act supersedes the rules.[44] However, this is drafting inelegance. An essential attribute of legislation is consistency. The Act has failed in this regard. It is inappropriate for a legal prescription on a given subject, emanating from same legislature to make conflicting provisions.[45] The researcher is not comfortable with these inconsistent provisions. The researcher humbly calls for amending the rules in the language of the Act. Thirty (30) days is enough time. We must

[41] s. 24 (1) of the Act.
[42] G Ezejiofor, *The Law of Arbitration in Nigeria* (Ikeja: Longman, 1997) p.94.
[43] CE Ibe, *op cit*, p.175.
[44] Article 1 of the rules.
[45] CA Obiozor, *Courts and the framework for Domestic Arbitration under the Act in Nigeria* (Onitsha: Allied Press House, 2010) p. 277.

continue to remember that arbitration should be as fast as practicable which is one reason why parties opt for it.

On termination of proceedings the mandate of the arbitral tribunal ceases.[46] However, this is subject to section 28 and 29(2) of the Act. Section 28 provides for amended and additional award. Hence, where a party makes an application under section 28 to amend or add to an award, the mandate of the tribunal does not cease. One cannot see the basis for subjecting section 29(2) as well. It appears that it is a typographical error. It is reasonable to conclude that the draftsman meant section 29(3).[47]

Recourse against Award

An unsuccessful party to an arbitration arrangement is not left in the lurch. An award is final like a judgment of court, unlike a court judgment though it is not appealable. Differently expressed, an aggrieved party cannot appeal against an award, but he can attack the award with the aim of setting it aside. The Act has set out grounds on which an award can be set aside. However, before making a detailed discussion of these grounds, let me highlight some important facts about an award.

The Supreme Court held in *Taylor Woodrow (Nig) Ltd v S.E GMBH*[48] that parties to a transaction choose their arbitrator, for better or for worse, to be the judge, both as to decisions of law and decisions of fact in the dispute between them. Thus, none of them can, when the award is *prima facie* good on the face of it, object to the decision either upon the law or the fact, simply because the award is not in his favour. There is therefore a presumption of validity to an arbitral award.[49] Again, Nnaemeka-Agu JSC held in *Commerce Assurance Ltd v Alli* that the court has no power to alter an award. It can only set it aside or remit it to the arbitrator.[50]Also an application to set aside an

[46] s.27 (3) of the Act.
[47] CE Ibe, *op cit*, pp 184-185.
[48] [1993] 4 NWLR (pt 286) 127, 140; 155, 156-157.
[49] CA Obiozor, *op cit*, p.191.
[50] [2002] 15 NWLR (pt 232) 710, 725.

arbitral award is an invitation to the court to render the whole arbitration proceedings null and void.[51]

It has been argued by some scholars that section 29(3) of the Act does not confer jurisdiction on the court to remit awards to arbitral tribunal for reconsideration. The argument is based on autonomy of arbitral agreement which prevents a court from intervening in any matter governed by the Act without express authorization by the Act.[52] On the contrary another learned scholar disagrees arguing that though section 29(3) does not expressly employ the word 'remit', that it is indirect.[53] Much sound argument was advanced by this latter scholar that I am persuaded to adopt his views as mine. However, with greatest respect, I wish to buttress this position by correcting an anomaly in the views of the previous scholars. The restriction on court intervention as provided for in section 34 of the Act is subject to the exception-'except where so provided in the Act'. Question is: has the Act provided for intervention in this case? The simple answer after diffusing section 29(3) is yes. The specific word used is immaterial. It suffices that proceedings are suspended and tribunal afforded opportunity to correct the award. If the court does not remit the award, how will opportunity be afforded the tribunal to correct the award? Or is it argued by the scholars that the court should simply terminate proceedings and no more? Then what happens to the award and rights of the parties? It must be remembered that in the construction of statutes, the aim of the court is to give sense to the provisions. Little wonder, Nnaemeka-Agu JSC construed the Act properly and held in *Commerce Assurance Ltd v Alli*[54] that the court can remit the award to the tribunal. This decision was handed down in 2002. Prof Ezejiofor published his work before 2002. It would seem to appear with respect that Learned Professor did not advert his mind to this decision. Be that as it may, it is submitted that the Act be amended to specifically provide for power to remit. This will make for precision, specificity and accuracy.

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[51] *Arbico (Nig) Ltd v N.M.T Ltd* [2002] 15 NWLR (pt 789)1 at 40.
[52] GC Nwakoby, *op cit*, p.127: G Ezejiofor, *op cit*, p.105-106.
[53] CA Obiozor, *Nigerian Arbitration Jurisprudence, op cit*, p. 210-215.
[54] *Supra*.

Recognition and Enforcement of Award

An award is at par with a court judgment.[55] It operates as *estoppel* by way of *res judicata.* Oguntade JCA (as he then was) was clear on this in *Okpuruwu v Okpokam*[56] where his Lordship held *inter alia* '…if parties to a dispute voluntarily submit their dispute to a third party as arbitrator and agree to be bound by the decision of such arbitrator, then the court must clothe such decision with the garb of estoppel…' It follows therefore that an award must be recognized and enforced for it to be binding and operate as estoppel. Consequently, the Act has provided a mechanism for the recognition and enforcement of arbitral awards. Section 31(1) provides thus 'An arbitral award shall be recognized as binding…' Recognition conveys the idea of ratification, confirmation and acknowledgment. Here lies another distinction between award made under the Act and other types of award. An award made pursuant to the Act is automatically recognized while customary awards must be proved as a fact before it is recognized. No doubt the Act has elevated the status of an award made under it. This provision is commendable.

Enforcement is distinct from recognition. An award may be recognized but may not be enforced. Enforcement presupposes recognition. However, enforcement is weightier because it is only when an award is enforced that the beneficiary can enjoy the fruits of arbitration. Prof Nwakoby stated three principal methods for enforcement of awards under the Act in Nigeria, namely: (1) enforcement by action at law, common law method (2) enforcement by leave of court pursuant to section 31(3) of the Act and (3) enforcement by application under section 31(1) of the Act.[57]

A party making an application under section 31(1) of the Act shall look at the relevant High Court rules and approach the court accordingly. In addition, section 31(2) requires the applicant to tender (a) the duly authenticated original award or a duly certified copy thereof and (b) the original arbitration agreement or a duly certified copy thereof. Query? Can an application under

[55] *Ras Pal Gazi Const. Co. Ltd. v FCDA* [2001] 10 NWLR (pt. 722) 559.
[56] Supra.
[57] G Nwakoby, *op cit*, p.100.

section 31(1) be made *ex parte*? Simple answer is that you must put the other party on notice.[58] To avoid confusion and reading into a section what it does not say, it is suggested that the Act be amended to specifically provide for notice.

Enforcement pursuant to section 31(3) of the Act is a prompt and summary means of enforcement. Here it is enforced as a judgment or order of court. However, leave must be sought and obtained. The requirement of leave is reasonable because an award is not a judgment, though it is like it. Differently expressed, a Judge must know that an award is to be enforced as a decision he handed down. Otherwise, a person can start enforcing an award improperly procured as a judgment of court. What is unclear is whether a party seeking leave to enforce an award will be required to supply a copy of award or certified true copy and original arbitration agreement as provided for in section 31(2). Prof Obiozor states that the original award or a certified true copy and original arbitration agreement or certified true copies are legal requirements to annex to the originating summons under this provision.[59] This view is reasonable because one will not expect a court to grant leave to enforce what it does not have knowledge of. The opening word of section 31(2) provides that 'the party relying on an award or applying for its enforcement shall supply….' The section did not limit the provision to section 31(1). However, for clarity the requirement could have been made in a manner as to easily encompass section 31(3).

By virtue of section 32 of the Act an aggrieved party may request the court to refuse recognition or enforcement of the award. Recall that recourse against award is dealt with in section 29 and 30 of the Act. Is there any distinction between sections 29 and 30 on the one hand and section 32 of the Act on the other hand? Yes there is. Recourse under sections 29 and 30 of the Act renders the award null and void without any effect whatsoever as highlighted above. However, refusal of recognition under section 32 does not render the

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[58] See Obiozor, *Nigerian Arbitration Jurisprudence, op cit*, pp.267-268. See also *Imani & Sons Ltd v Bill Const. Co. Ltd*. [1999] 2 NWLR (pt 630) 254,261.

[59] CA Obiozor, *Nigerian Arbitration Jurisprudence, op cit*, p. 274.

award null and void. It merely suspends the enforcement pending a future occurrence. It could be that the enforcement is premature or that a condition precedent to enforcement has not been made. Hence, a party may subsequently initiate action for enforcement. Another relevance of section 32 can arise where a party makes an application for setting the award aside while the other party simultaneously commences action for enforcement, then it will be appropriate to refuse recognition pending the determination of action on setting aside. Therefore, if a party desires an award to be set aside, he should attack the award itself and not merely ask for refusal to recognize the award.

Conclusion

We have considered the challenges of the Arbitration and Conciliation Act. Much arguments, suggestions and submissions have been made in this work. It is therefore unnecessary to itemize the challenges again. Suffice it to say that the Act is in dire need of a total reform. As we saw, many provisions of the Act are problematic. Some provisions contain clear errors that even a lay man can discern. Some have outlived their relevance and need amendment. Others are totally irrelevant. More so, the Act is not all embracing considering modern trends.

The importance and relevance of arbitration cannot be over-emphasized. Arbitration affords parties great latitude to control the mechanism for resolution of dispute unlike litigation. It is a wonderful alternative to litigation. Many persons especially foreigners have been recipients of the flexibility and speed of arbitration. It reasonably follows that the Act which is the principal Law that regulates arbitration should be sound and devoid of uncertainties.

The researcher calls on the Legislature to consider these challenges and address them at the earliest opportunity. This will increase peoples love and appetite for arbitration. It will divest our courts of congestions. It will bring about speedy and cheaply resolution of everyday disputes. Moreover, it will encourage foreign investors to contract with Nigerians, knowing that our country is a nice forum for resolution of disputes. This will inevitably increase employment. The list of benefits can go on and on.