Vol. III, No 1 2017 **ISSN: 3851-3068**

ABUAD JOURNAL OF PUBLIC AND INTERNATIONAL LAW (AJPIL)

CONTENT

ABUAD JOURNAL OF PUBLIC AND INTERNATIONAL LAW

AFE BABALOLA UNIVERSITY, ADO-EKITI, NIGERIA

VOLUME III No. I 2017

Print ISSN: 3851 - 3068

ABUAD Journal of Public and International Law
is a publication of the Department of Public and International Law,
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PRINTED BY: Afe Babalola University Press, Ado – Ekiti, Ekiti State
Km 8.5, Afe Babalola Way, P.M.B. 5454, Ado – Ekiti, Ekiti State Nigeria
E-mail: press@abuad.edu.ng
Tel: +2348168641975, +234806747495991.
Website: www.abuad.edu.ng

Citation: Cite as (2017) 3 (1) ABUAD Journal of Public and International Law (AJPIL)

CONTENT

CONTEXTUAL ANALYSIS OF THE PRINCIPLES AND PROCEDURES FOR MAKING RECOURSE AGAINST INTERNATIONAL ARBITRAL AWARD

FAGBEMI SUNDAY[1]

Abstract

An arbitral award once recognised by a court of competent jurisdiction, is on the same pedestal as the judgment of a court and therefore enforceable like court judgments. However, an award may be set aside on a good cause shown. The thrust of this paper is, therefore, to undertake contextual analysis of the principles and procedures for making recourse against arbitral award. The pertinent questions which the paper seeks to answer amongst others are: What are the requirements of a valid award? What are the procedures for making recourse against an arbitral award? And what are the grounds for making recourse against arbitral award? Taking into cognisance that the essence of successful recourse against arbitral award is to set it aside, this paper addresses the above questions and concludes with recommendation among others that parties and their legal representatives should ensure that both parties and arbitral tribunal comply with the provisions of the law regulating the agreement of parties and arbitral proceedings to avoid recourse against arbitral award.

Keywords: Principles; Procedures; Recourse, and International Arbitral Award

1.0. INTRODUCTION

An award is a final decision or outcome of an arbitral process and it is binding on and enforceable against the parties named in it. It is the decision or determination rendered by a third party neutral called arbitrator(s) upon a controversy submitted to them, or a document embodying such decision.

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Parties who go to the trouble and expense of taking theirs disputes to international arbitration do so in the expectation that, unless a settlement is reached outside their submission, the proceedings will end with an award. They also expect that, subject to any right of appeal or recourse, the award will be final and binding on them.[2] The award made by an arbitral tribunal has the same status in the adjudicatory process as the final judgment of a court of competent jurisdiction in determining issues brought before it with respect to litigation.[3]

A successful party in an arbitral proceeding, who has his award recognised for enforcement, assumes, as a matter of course, that the unsuccessful party will in good faith comply with the terms of the award. This is because, it is presumed that the parties having voluntarily submitted their dispute to arbitration also chose the arbitrators as the judge of their dispute for better or worse.[4] Although an award is binding and enforceable against the parties named on it. However, the law has made provisions and created circumstances where an award may be challenged in court by way of recourse. The reason for this is not farfetched. For instance, Craig,[5] observed that no one likes losing. So it is not surprising that when a client is disappointed with an arbitral award, the first question he asks his lawyer is; 'How can I appeal?' The answer to this question would depend on whether the relevant rules of arbitration establish an

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[2] Redfern, A and Hunter, M. *Law and Practice of International Commercial Arbitration* (4th ed. London: Sweet & Maxwell, 2004) p. 405.

[3] See the case of *Ras Pal Gazi Construction Company Ltd v FCDA*. (2001) 10 NWLR (Pt. 722) page 559 at 572. In that case, Hon. Justice Katsina-Alu pronounced thus: "Arbitration proceedings as I have already shown are not the same thing as negotiations for settlement out of court. An award made, pursuant to arbitration proceedings constitute the final judgment on all matters referred to the arbitrator. It has a binding effect and it shall upon application in writing to the court be enforceable by the court... I must say nowhere in the Act is the High Court given the power to convert an arbitration award into its own judgment.

[4] Buba, T. M. 'Enforcement of Award/Judgment in Nigeria' (May 2012) 2 (1) *University of Ibadan Law Journal*, 43-63:43.

[5] Craig. 'Uses and Abuses of Appeal from Awards' (1988) 4 *Arbitration International* 74 at 177

internal appeal procedure. Secondly, it would depend on whether the law of the seat of the arbitration contains any provisions for challenging an arbitral award; and if so, what provisions?[6] Even where the relevant rules of arbitration provide that an award is to be final and binding on the parties and that the parties had agreed to carry it out without delay,[7] the law of the seat of arbitration usually provides some ways of making recourse against an arbitral award.

The thrust of this paper is to undertake contextual analysis of the principles and procedures for making recourse against arbitral award. The pertinent questions which the paper seeks to answer among others include: What are the requirements of a valid award? What are the procedures for making recourse against an arbitral award? And what are the grounds for making recourse against arbitral award? In answering these questions, this paper is divided into six sections. The first section is this introduction, while the second section of the paper examines the requirements of a valid arbitral award. Section three highlights the procedures for making recourse against arbitral award. In section four, the paper discusses the grounds for making recourse against arbitral award. Section five analyses the consequences of a successful recourse against an arbitral award, while the sixth section concludes the paper with recommendations.

[6] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), Art.VI (e); United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (Model Law), art. 36 (1) (a) (v). Or if the parties have chosen a different procedural law to govern the arbitration, under that law.

[7] International Chamber of Commerce (ICC) Arbitration Rules art.28.6

1.1. The Requirements of a Valid Arbitral Award

Parties resort to arbitration to obtain a final and binding resolution of their dispute. It is the arbitrators' role to resolve the dispute by deciding all of the disputed issues and recording their decision in a document, called an arbitral award.[8] The arbitrator must bear in mind the relevant legislation not only during the conduct of proceedings but also when he is writing his award and he must be guided accordingly. The relevant laws would be the provisions of the applicable law of the disputes referred to as the substantive law, which determines the rights and obligations of the parties under the contract, as well as *lex arbitri,* which is the law of the arbitration agreement. The arbitrator must also bear in mind the applicable procedural rules and ensures compliance with the mandatory requirement of *lex loci arbitri*[9] irrespective of the provisions of any other law stipulated by the parties as the law of the arbitration agreement[10]. It is trite that an award must resolve a substantive issue, not merely procedural matter.[11] Thus, purely procedural or administrative decisions are not considered awards by international arbitration conventions or national arbitration laws[12].

Procedural issue should deal exclusively with matters regarding the conduct of the proceedings. However, the distinction between procedural and substantive issues may not always be clear-cut. For example, a decision on the burden of

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[8] Tim Hardy and others. 'Drafting Arbitral Awards. Chartered Institute of Arbitrators, (Nov 22, 2016) <http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidance-protocls0on-rules/international-arbitration.pdf>, accessed on 22nd July, 2017.

[9] That is the arbitration law of the place where the reference is being held.

[10] For instance, one of the principal advantages of arbitration over court proceedings is that arbitral awards can be enforced in over 150 jurisdictions around the world pursuant to the UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958).

[11] However, it is accepted that decisions on jurisdiction constitute awards. See. eg, *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, Award on Jurisdiction and Admissibility, PCA Case No 2012-12, 15 December 2015.

[12] Rouven Bodenheimer and Others. 'Toolkit for Award Writing IBA Arb', 40 Subcommittee September 2016, International Bar Association < www.ibanet.org> accessed on 1st June, 2017

proof might not require the form of an award, whereas such an order would deal with a legal question that could have a major impact on the outcome of the substantive decision. It is also important to bear in mind that even where procedural orders deal with clearly procedural issues, such as setting dates for the submission of statements, dates for hearings and containing decisions on whether certain witnesses should testify at a hearing or decisions on requests for the production of documents, they are likely to have a significant impact on the conduct of the arbitration proceedings and on their outcome.[13]

In spite of the dichotomy between substantive and procedural requirements, it is settled that failure to comply with the agreed procedures and the requirements as to forms and contents may lead to challenges and create difficulties with enforcement.Usually, parties may agree on the form of the award and once this is done, the arbitrators are required to comply with the parties agreement. In summary, an award should be in writing;[14] contain reasons for the decision, unless the parties have agreed otherwise or if it is a consent award;[15] state the date and the place of arbitration; signed by all of the arbitrators or contain an explanation for any missing signature(s). Award should also contains the following essential elements: the names and addresses of the arbitrators, the parties and their legal representatives; the terms of the arbitration agreement between the parties; a summary of the facts and procedure including how the dispute arose; a summary of the issues and the respective positions of the parties; an analysis of the arbitrators' findings as to

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[13] See Trittmann, R. 'The Interplay between Procedural and Substantive Law in International Arbitration'
. (2016) (1) *SchiedsVZ* 7.

[14] See ss. 31 and 32 (2) c, of the Indian Arbitration and Conciliation Act,1996; see also *Maharashtra State Electricity Board Vs Datar Switchgears Ltd*, 2003 (Supp) Arb LR 39, 63 (Bom).

[15] Dobson, P. *Charlesworth's Business Law* (16th ed. London: Sweet & Maxwell, 1997) p 24. In *Satwant Singh Sodhi v. State of Punjab* (1999) (3) SCC 457. It was held that once an arbitrator has signed an Award, he becomes *functus officio*.

the facts and application of the law to these facts; and operative part containing the decision(s).[16]

Apart from practical task of writing the award, the arbitrator must bear in mind the need to act and seen to have acted in accordance with the principle of natural justice. The arbitrator must act at all times in good faith during the proceedings and without bias, giving each party the opportunity of presenting his case, being aware of the opponent's case and contradicting that position with that of the opponent. The arbitrator must not have any interest in the subject matter of the dispute. The law of the arbitration agreement would usually stipulates the general principles to be adhered to in the proceedings. For instance, section 14 of the Arbitration and Conciliation Act (ACA)[17] stipulates that in any arbitral proceedings, the arbitral tribunal is to ensure equal treatment of the parties and give to each party a full opportunity to present his case. The arbitrator must comply with the applicable principles from the commencement of the proceedings to the writing and publication of the award.[18]

[16] Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International, 2014), p. 3037; Philipp Peters and Christian Koller, 'The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion in Christian Klausegger and others (eds), Austrian Yearbook on International Arbitration (2010), p. 162; Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), pp. 634-635. Bernardo M. Cremades, 'The Arbitral Award' in Lawrence Newman and Richard Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris 2014), p. 818. There is an exception where the parties have agreed upon the inclusion of a conditional element in the award. However, such awards should be avoided. See Peter Ashford, *Handbook on International Commercial Arbitration* (2nd ed, Juris 2014), p. 426. See generally Vikrant Sopan Yadav 'An Analytical Study of Arbitral Awards in India' (2015) 3, Issue 2, *International Journal of Advanced Research*, 827-832.

[17] The Act was promulgated in 1988 but has been incorporated into the 2004 of laws of the Federation of Nigeria as Cap A18, Laws of the Federation of Nigeria 2004

[18] See *Buccleuch (Duke) v. Metropolitan Board of Works*, (1870) L.R. 5 Ex. 221

According to Nwadialo,[19] an award terminates an arbitral proceedings. Hence, an award once delivered creates rights in favour of the successful party and the parties to the arbitration are obliged to comply with the award of the arbitrator.[20] Furthermore, an award operates as *res judicata*.[21] Consequently, if any action or proceedings are commenced afterwards in respect of such matters, the defendant can plead the award as an estoppel.[22] In the case of *Cummings v. Heard,*[23] there was a dispute between the plaintiff and the defendant as to the amount of money owing from the defendant to the plaintiff. The matter was submitted to arbitration and the arbitrator awarded the plaintiff the sum of E145. Later, the plaintiff commenced another action in court claiming more than the said sum. It was held that the plaintiff was estopped from instituting such an action. In essence, the finality of an award is to bring an end to litigation.[24]

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[19] Nwadialo, F. *Civil Procedure in Nigeria*, (2nd ed. Nigeria: University of Lagos Press, 2000) p. 1110.

[20] Note that there are several types of awards namely consent award, interim award, interlocutory award, default award, final award and additional award. However, the focus of this paper is to address a recourse to final award. See Fagbemi, S. A. "Recognition and Enforcement of Arbitral Awards: The Law and Practice' (2006) vol. 5, *University of Ibadan Journal of Private and Business Law,* 111, 115-118; Orojo, J. O and Ajomo, M. A. *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates, 1999) p. 241 and Blackaby, N., Patasides, C., Redfern, A and Hunter, M. *Redfern and Hunter on International Arbitration,* (5th ed. New York: Oxford University Press, 2009) p. 525.

[21] That is, once a matter is adjudicated upon and decision reached, the claimant is barred, irrespective of whether it was successful or not in the proceeding, from bringing the same claim against the same party.

[22] In the case of *A. G. River State v A. G. Akwa-Ibom & Anor* (2011) 2 SCM 1, it was held that the term estoppel means an admission or something which the law views as equivalent to an admission. See also the case of *Philip Njoku v Felix Ekeocha & Other* (1972) 2 ECSLR 199. Ratio 2.

[23] 39 L.J Q.B. 9: 4 L.R Q.B. 669.

[24] See further the cases of *Ras Pal Gazi Construction Company Ltd. V FCDA* (2001) 10 NWLR (Pt. 722) 559 and *Gueret v. Audony* (1893) 62 L.J.Q.B 633. Note however that there are grounds on which the validity of an award may be impeached. These grounds are otherwise referred to as exceptions to "the finality of award rule" a discourse of these grounds are the gravamen of this paper. See also Ezejiofor G. *The Law of Arbitration in Nigeria,* (1st ed. Ikeja: Longman Nigeria Plc., 1997) 104. See further P Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules* (London, 2013); Bühler, M and Webster, T. *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (3rd ed., London, 2014); Fry, J and

2.0. PROCEDURES FOR MAKING RECOURSE AGAINST AN AWARD

The purpose or essence of challenging an award before a national court at the seat or place of arbitration is to have it modified in some ways by the relevant court, or more usually to have that court declare that the award is to be disregarded (set aside or annulled) in whole or in part. If an award is set aside or nullified by the relevant court, it will usually be treated as invalid and accordingly unenforceable, not only by the courts of the seat but also by national courts elsewhere. For instance, under Article V.I of the New York Convention and Article 36 (1) (e) of the UNCITRAL Model Law, the competent court may refuse to grant recognition and enforcement to an award that has been set aside by a court of the seat of arbitration.[25] However, once the award is recognised by a court of competent jurisdiction, it is on the same pedestal as the judgment of a court. It is therefore enforceable by all ordinary means of enforcing court judgments.[26] The relevant procedures provided for making recourse against an arbitral award are: 'internal challenges to an award' and 'correction and interpretation of award'. These are considered briefly below.

2.1. Internal Challenge

The rules under which an arbitration was conducted may contain provision for review of the procedure that was followed, or of the award itself. This is

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Other, *The Secretariat's Guide to ICC Arbitration: a Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC* (Paris 2012); Sutton, D and Others, *Russell on Arbitration* (24th ed., London 2015), p. 50; Redfern, A and Hunter, M. *International Arbitration* (6th edn, Oxford 2015) p. 65; C Partasides, 'Secretaries to Arbitral Tribunals' in Hanotiau, B and Mourre, A (eds), *Players' Interaction in International Arbitration* (Paris 2012), p. 23; Dossiers of the ICC Institute of World Business Law 9; Rodner, J 'The Applicable Interest Rate in International Arbitration' (2004) 15(1) ICC ICArb Bull 43 and Scherer, M. 'Drafting the Award' in Berger, B and Schneider, M (eds), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions* (Huntington 2013), p. 42 ASA Special Series 27.

[25] See also ACA s. 32.

[26] *Commerce Assurance Limited v Alhaji Buraimoh Alli* SC/73/1986

frequently the case with maritime and commodity arbitrations, and other forms of arbitration established by trade associations.[27] For instance, the arbitration rules of the Grain and Feed Association (GAFTA) provide a useful example of 'internal appeal procedures.[28] Under this rules, a party who is dissatisfied with the award of the arbitrators has the right to appeal to a Board of Appeal.[29] A time limit requires that notice must be given not later than 12noon on the 30th consecutive day after the date in which the award was made. The Board of Appeal consists of three members of the Association where the first tier award was made by a sole arbitrator, and five members where it was made by three arbitrators.[30] After submission of written statements and evidence, a date is set for the hearing of the appeal.[31] Upon hearing of the appeal, the Board of Appeal may confirm, vary, amend or set aside the award of the first tier tribunal.[32] The award of the Board of Appeal replaces that of the first tribunal and is expressed to be 'final, conclusive and binding'.[33] Accordingly, any further challenge to the award would have to be by recourse to a national court at the place of arbitration to set aside the award. A similar appeal procedure exists under the Rule of the *Chambre Arbitrale Maritime de Paris*, which deals with most of the Maritime arbitrations in France.[34] If a party is dissatisfied with an award, and the amount in dispute exceeds 30,000 euros, that party may ask for the case to be reconsidered by a new tribunal.[35]

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[27] It is also the case with the International Centre for Settlement of Investment Disputes (ICSID).
[28] GAFTA Form 15 Arbitration Rules. The rules became effective on January 1, 2003.
[29] GAFTA Arbitration Rules, art.10.1
[30] Ibid, art.11.1
[31] Ibid, art.12.1-3
[32] Ibid, art.12.4
[33] Ibid, art. 12.6
[34] Under the 2003 Rules of the Chambre, a list of persons of French and other nationalities, who are considered to have the necessary experience to act as maritime arbitrators are kept. A dispute is first referred to a tribunal of one or more arbitrators who make a decision upon it.
[35] Chambre Arbitrale Maritime de Paris art. XV (3).

2.2. Correction and Interpretation of Awards

It is usual for there to be some provisions either in the relevant arbitration rules, or in the law governing the arbitration, for an arbitral tribunal to correct any clerical or other errors in the award.[36] This power is usually given to an arbitral tribunal to correct in the award any error in computation, any clerical or typographical error or any error of similar nature in any claims that were presented in the arbitral procedures but which the tribunal omitted to deal with.[37] Hence, if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.[38]

Furthermore, under the International Convention on the Settlement of Investment Dispute (ICSID) Arbitration Rules, a party dissatisfied with the award of an ICSID tribunal may apply for the interpretation, revision or amendment of the award. The grounds for doing so include excess of powers on the part of the tribunal, serious departures from fundamental rule of procedure and failure to state reasons on which the award is based.[39] If the application is for annulment of award, then an *ad hoc* Committee of three members is constituted to determine the application.[40] If the award is annulled, in whole or in part, either party may ask for the dispute to be submitted to a new tribunal, which then delivers a new and final award.[41]

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[36] Redfern, A and Hunter, M (n 1) 408.

[37] See for example ACA, s, 28; Model Law Art. 33; UNCITRAL Arbitration Rules art. 37 and English Arbitration Act 1996, ss. 57 and 68 (s) (d).

[38] Model Law art. 33 (1) (b); Arbitration Act of Korea (Amended by Act No. 6083 as of Dec. 31, 1999) s. 35

[39] ICSID Arbitration Rules, r.50.

[40] Ibid, r.52.

[41] Ibid, r.55. If the original award has only been annulled in part, the new tribunal will not re-consider any portion of the award that has not been annulled, ICSID Arbitration Rules, r. 55(3).

The above in simple terms are the procedures for making recourse against arbitral award. Where recourse is made to a national court against an award, the grounds upon which recourse may be made to court are provided under the various arbitration rules and this is the subject of the next section.

3.0 GROUNDS FOR MAKING RECOURSE AGAINST ARBITRAL AWARD

The enabling statute regulating arbitration in Nigeria is the ACA. However, the Act did not define the meaning of recourse. Hence, an assistance is sought in Article 34 (1) of the Model law which states that a recourse to a court against an arbitral award may be made only by an application for setting aside of an arbitral award. Recourse, therefore, enables parties not satisfied with the outcome of an arbitral process to seek remedy in the national court of the seat of arbitration. The ACA makes provision for grounds for recourse against both domestic and international commercial arbitration award whose seat is Nigeria.

In the case of domestic arbitration, section 29 (1) of the ACA provides *inter alia* that 'a party who is aggrieved by an arbitral award may within 3 months from the date of the award or in a case falling within sections 28 of this Act, from the date of request for additional award is disposed of by the arbitral tribunal, by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section. The court may set aside an arbitral award if the party making the application furnishes proof 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 not submitted to

arbitration may be set aside.[42] Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award has been subject of improper procured, the court may, on the application of a party, set aside the award.[43]

Premised on the foregoing provisions, it is submitted that where a party is not satisfied with an arbitral award, he may apply for the award to be set aside and this must be done within a time frame of 3 months. In other words, there is no provision for extension of time, hence, an application made after three months will not be entertained by the court. Section 30 of the ACA further gives the court unfettered discretion whether or not to set aside an award by imputation of the word 'may'.[44] The implication of this is that where an aggrieved party failed to proof any of the circumstances enumerated in section 29 (2), the court will refuse the application for setting aside of arbitral award.

The position of the law in the case of international commercial arbitration whose seat is Nigeria is that the national court is empowered to set aside an award upon a successful recourse. The grounds for making recourse to arbitral award is similar to what obtains in other jurisdictions. Hence, a party who wishes to challenge an award can apply to the court at any time after the award is made. It is however noteworthy to state that an application to set aside an award must be made before the successful party takes step to enforce the

[42] ACA s., 29(2).
[43] Ibid. s. 30 (2).
[44] It is trite law that when the word 'may' is used in a statute or rule of courts, it implies possibility or probability. See Bryan A. Garner, *Black's Law Dictionary* 8th ed. (United States of America: Thomwest Publishing Company, 2004) 1000; in the case of *Ejiogu v Onyeagocha* (2004) All FWLR (Pt. 204) 26 at 42, Para. G. the Court of Appeal held that the word 'may' can import discretion in some circumstances, but could be mandatory in others. In the case of section 136 (3) of the Electoral Act, the word should be read as connoting a discretion if only to ensure that a sensitive suit such as this is not unduly aborted.

award.[45] When a losing party has no other means of ventilating his grievance due to lack of provision for internal review of the award, for instance, it is a fertile ground on which a national court may review arbitral award at the place of arbitration.

Judicial review of arbitral awards constitutes a form of risk management. In most countries courts may vacate decisions of perverse arbitrators who have ignored basic procedural fairness, as well as those of alleged arbitrators who have attempted to resolve matters never properly submitted to their jurisdiction. In some countries, judges may also correct legal error or monitor an award's consistency with public policy.[46] In summary, the grounds upon which an aggrieved party may challenge arbitral award before a national court includes the issues of jurisdiction, arbitrability of subject matter of the award, incapacity of parties to arbitral proceedings , lack of due process and public policy[47] etc. These grounds are intertwined. However, for the purpose of clarity they are discussed hereunder.

3.1 Lack of jurisdiction

An award may be challenged on jurisdictional ground. For instance, it is a requirement of a valid arbitration that there should be an enforceable arbitration agreement.[48] Hence, if there is no valid arbitration agreement or if

[45] Imhanobe, S. O. *Lawyers Deskbook,* (2nd ed. Vol. 1, Abuja: Temple Legal Consult, 2010) p. 40

[46] Park, W. W. 'Why Courts Review Arbitral Awards' (2001) *Festschrift für Karl-Heinz Böckstiegel* 595. See further U.S. Federal Arbitration Act s.10; the 1996 English Arbitration Act s. 69 and UNCITRAL Model Law, Art 34(2)(b)(ii)

[47] See ACA s. 48; New York Convention art. V; UNCITRAL Model Law art. 34 (2); ACA s. 46; English Arbitration Act 1996 S.67 and Arbitration Act of Korea (Amended by Act No. 6083 as of Dec. 31, 1999) s. 36

[48] Although, the Nigerian ACA did not define arbitration agreement. However, section 1 (1) and (2) list the ingredients of a valid arbitration agreement. Article 7 of the UNCITRAL Model Law defined arbitration agreement as '.... An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in

the matters submitted to arbitration do not fall within that agreement, whether for reasons of public policy or otherwise, there can be no valid arbitral award. An arbitral tribunal may only validly resolve those disputes that the parties have agreed that it should resolve. This rule is inevitable and proper consequence of the voluntary nature of arbitration. In consensual arbitration, the authority or competence of the tribunal comes from the agreement of the parties and there is no other source from which it can come. The tribunal must therefore take reasonable care to stay within the terms of the mandate expressly given by the parties. Also, for an award to be enforceable, it must comply with the law of the place of arbitration and that of enforcement and legal principles of fairness.[49]

Two possibilities are open to a party wishing to challenge the jurisdiction of the arbitral tribunal. The first is to challenge jurisdiction at the outset of arbitration.[50] The second is to wait until the award is made and then challenge it, or attempt to resist enforcement on the basis that the tribunal had no jurisdiction and so its award has no validity.[51]Parties that take part in an arbitration but fail to raise a jurisdiction issue when they may have been entitled to do so, risk losing the right to object. For example, English law requires an objection to jurisdiction to be raised at the earliest possible

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respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in form of an arbitration clause in contract or in form of a separate agreement. In summary, the contractual basis for resolution of disputes or differences that may arise between parties by arbitration process is an arbitration agreement. See Owoazim, S. O. 'An Examination of Arbitrability of Issues in Nigeria under the Arbitration and Conciliation Act, 1988' (2016) 3 (1). *Nasarawa Journal of Public and International Law (NJPIL)* 61, 67; Paul O. Idornigie, *Commercial Arbitration and Practice in Nigeria.* (LawLirds Publication, 2015) p. 3.

[49] Idornigie P.O. 'The Relationship between Arbitral and Court Proceedings', (2002) 19 (5) *Journal of International Arbitration*, 443-459.

[50] Alan Redfern, A and Hunter, M (n 1).

[51] *Ibid.* 410

opportunity[52] and provides that if this is not done, the right to object is lost.[53] Accordingly, the award would be a valid award under the law of England (as the law of the seat of arbitration) and enforceable under the New York Convention. The risk of losing the right to object in this way does not only exist in England, and is not limited to jurisdictional objections alone. The *Cour d' appel de Paris* has also rejected challenges based on objections that the challenging party failed to raise the issue of jurisdiction at the outset of arbitration and was therefore deemed to have waived during the arbitration itself.[54]

A similar provision to the effect that a plea as to lack of jurisdiction should be raised at an early stage is also in the provision of the UNCITRAL Rules and Model Law.[55] The implication is that if this is not done the right to object is lost unless the delay is justified. Under the doctrine of Competence/Competence,[56] the present practice is generally to regard an arbitral tribunal as being empowered to decide for itself whether or not it has jurisdiction over a particular dispute. If its jurisdiction is challenged, the arbitral tribunal may decide the point as a preliminary issue in an interim award,[57] or as part of its awards on the merits. In either case, however, the decision of the arbitral tribunal is not necessarily the last word on the subject. That rests with the national courts.[58]

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[52] English Arbitration Act 1996, s 31.
[53] English Arbitration Act 1996, s 73.
[54] *Cour d' appel de Paris* decision in *SA Caisse Federale de credit mutual du Nord de la France v Banque De lubac et Compagnie*, 2001 Revue d' Arbitrage 918.
[55] UNCITRAL Arbitration Rules (as revised in 2010) art. 23(2); Model Law, art. 16(2).
[56] This is sometimes described in a form of shorthand as Competence/Competence; it is expressed in German as Kompetenz/Kompetenz, and in French as Competence de la competence. See generally UNCITRAL Arbitration Rules (as revised in 2010) art 23(1).
[57] The term 'partial award' is usually reserved for decisions on substantive claims of the parties.
[58] See for instance, Model Law, art. 16(3).

3.2. Arbitrability of the Subject-Matter of Dispute

The Model Law provides that an award may be set aside if the court of the place of arbitration finds that 'the subject-matter of the dispute is not capable of settlement by arbitration' under its own law.[59] Arbitrability involves determining which types of dispute may be resolved by arbitration and which belongs exclusively to the domain of the national courts.[60] For instance, arbitral proceedings under the New York Convention and the Model Law as well as arbitration laws of various jurisdictions are limited to disputes that are capable of settlement by arbitration.[61] In principle, any dispute should be just and capable of being resolved by a private arbitral tribunal as by the judge of a national court. The French Civil Code,[62] for example, provides that 'all persons may enter into arbitration agreements relating to the rights that they may freely dispose of'. Although it further provides that parties may not agree to arbitrate disputes in a series of particular fields (for example family law), and more generally in all matters that have a public interest.[63] This limitation has been construed in a very restrictive way by the French courts. Similarly, the German Code of Civil Procedure[64] provide that any claim involving an economic interest can be subject to arbitration, as can claims not involving an economic interest of which the parties may freely dispose. In Nigeria, disputes that can be referred must be justiciable issues which can be tried as civil matters. [65] The reason for the above position is due to the fact that arbitration is a private proceeding with public consequences. Hence, some types of

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[59] Model Law, Art.34(2)(b)(i)

[60] Sanders, A. 'The Domain of Arbitration', p. 113 et seq. in the Arbitration section of the Encyclopaedia of International and Comparative Law Vol. XVI, Ch.12; Hanotiau, D. 'The Law Applicable to the Issue of Arbitrability'. ICCA Congress, 1998 Series 14, Paris.

[61] New York Convention, art.II.1 and art. V.2 (a); Model Law art.34 (2) (b) (i) and art.36 (1) (b) (i).

[62] Art. 2059 of the French Civil Code

[63] Art. 2060 French Civil Code.

[64] Section 1030(1) & (2).

[65] Ezejiofor, G. (n 23) p. 3.

dispute are reserved for adjudication before national courts, whose proceedings are generally in the public domain. It is also in this context that they are not capable of settlement by arbitration.[66] More generally, criminal matters and those which affect the status of an individual or a corporate entity (such as bankruptcy or insolvency) are usually considered as not arbitrable.[67] In addition, disputes over the grant or validity of patents and trademarks may not be arbitrable under the applicable law.[68]

3.3. Lack of capacity

The provision of the ACA states the importance of capacity to contract as fundamental requirement between contracting parties in ensuring that a valid, binding and enforceable contract is created. An arbitration agreement is a contract on its own just like the substantive agreement. Therefore, the parties to arbitration agreement must have the contractual capacity. They must be recognised by the law of the contract as legal person. This is important, not only for the arbitration procedure, but for the enforcement of an award. This position is expressly recognised in Article V (a) of the New York Convention and section 52(2) (a) (i) of the ACA, which provide *inter alia* that 'the court where recognition and enforcement of an arbitral award is sought or where application for refusal of recognition or enforcement thereof is brought may refuse to recognise or enforce an award if the party against whom it is invoked furnishes the court proof that a party to the arbitration agreement was under

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[66] Redfern, A and Hunter, M (n 1) p. 138.
[67] Ibid. 139; Ezejiofor, G. (n 64)
[68] *Ibid.* see for instance the United States of American case the case of *American Safety Equipment Corp v J.P. Maguire & Co* 391 F. 2d 821, 826 (2d Cir. 1968), in that case, it was held *inter alia* that 'a claim under the antitrust laws is not merely a private matter…Antitrust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage. We do not believe Congress intended such claims to be resolved elsewhere than the courts'

some incapacity.[69] The party to an arbitration may be a party to the arbitration agreement or an agent duly authorised, a trustee, a personal representative, an assignee or any other privy. He must however, have legal capacity to enter into a contract since the arbitration clause is an agreement and subject to the same test of validity as any other contract. The rules governing capacity to contract can be found in standard text books on the law of contract.[70] They vary from state to state. Thus, in the context of an arbitration agreement, it is generally necessary to have regard to more than one systems of law. In practice, the issue of capacity rarely arises in international commercial arbitration. If a party who lacks capacity enters into an arbitration agreement, the provisions of the New York Convention (or the Model Law where applicable) may be brought into operation, either at the beginning or at the end of the arbitral process.[71] At the beginning, the requesting party may ask the court to stop the arbitration, on the basis that the arbitration agreement is void, inoperative, or incapable of being performed.[72] At the end of the arbitral process, the requesting party may ask the competent court to refuse recognition and enforcement of the award on the basis that one of the parties to the arbitration agreement is under some incapacity[73] under the applicable law.

A party to an arbitration agreement is usually either an individual, partnership, a corporation, state or state agencies. Determination of the legal capacity of a party depends, in the case of a natural person, on the law of the place where the arbitration agreement was entered into, and in the case of an artificial legal

[69] Similar provision is also contained in the UNCITRAL Model Law art. 34 (2) (a) (i).
[70] The general rule is that the validity of a contract may be vitiated where one or more of the contracting parties has not full contractual capacity. See Major, W. T. *Law of Contract* (7th ed. Great Britain: M & E Handbook Series, 1988) 108.
[71] Redfern, A and Hunter, M (n 1) 145.
[72] New York Convention, art.II.3; Model Law, art. 8(1).
[73] New York Convention, art. V.1(a); Model Law, art. 36(1)(a)

person on the law of the place which created it. For capacity of Corporations to enter into arbitration agreement, regard shall be had to its constitution or articles and the law of its place of incorporation.[74]

With respect to states and its agencies, it is more usual, however, to find states or state agencies that are not permitted to refer disputes between them and a private party to arbitration. In Nigeria, there is no such restriction. Hence, international contract are entered into by the government itself or its agencies. Such state or state agencies are not allowed to claim immunity against arbitration.[75]

3.4. Lack of Due Process

The law requires that for international commercial arbitration to be conducted fairly and properly, certain procedural standards must be observed. These procedural standards are designed to ensure that the arbitral tribunal is properly constituted; that the procedure is in accordance with the agreement of the parties (subject to any mandatory provisions of the applicable law); and that the parties are given proper notice of the proceedings.[76] The aim is to ensure that the parties are treated with equality and are given fair hearing, with a full and proper opportunity to present their respective cases.[77] In the United States of America for example, the Federal courts have regarded failure to

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[74] See *Sarhank Group v Oracle Corporation* 404 F.3d 657(2d. Cir. 2005).

[75] Immunity is the right enjoyed by a sovereign state or its entities from actions against it either in its court or courts of other jurisdiction. Thus, it is uncommon to see nations objecting from being sued for either their actions or that of its agent or agency. Though, the general attitude is that where a sovereign state or its agency engages in commercial transaction with another country or an individual, it does so with the understanding that it shall be bound by the rights and obligations created thereto and either of the parties is at liberty to seek for the compliance with the terms and conditions of the contract against the unyielding party. See the case of *Trendtex Trading Corporation Ltd. v Central Bank of Nigeria* (1977) All ER 881.

[76] See Model Law, art. 34(2)(a)(ii); Redfern, A and Hunter, M (n 1) 413.

[77] Swiss Private International Law Act 1987, Ch.12. Art.190

give the parties an oral hearing as a violation of due process and it recognises this as a ground for setting aside an award or for refusing recognition and enforcement under the New York Convention.[78]

3.5. Public Policy

Another major ground for recourse against an award is where the award is in conflict with the public policy of the country where the award was issued.[79] Each country has its own concept of what is required by its public policy. For example, a dispute over the division of gaming profits from a casino is taken to the arbitration and an award is made. In many states, the underlying transaction (gambling) that led to the award would be regarded as a normal commercial transaction and the award would be regarded as valid. However, in states that does not tolerate gambling, the award might well be set aside on the basis that it offends public policy and is illegal.[80] Most arbitral jurisdictions have similar conceptions of public policy. For instance, in the Indian case of *Oil & Natural Gas Corporation Ltd. v/s SAW Pipes Ltd,*[81] it was held that the term "public policy of India" should be given wider interpretation. Hence, an award could be set-aside on the ground of public policy if the award is made in contravention to: fundamental policy of India; interest of India; justice or morality; or if it is patently illegal. It was further held that the term "Public Policy" is not defined under the Act. It has to be

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[78] *Parsons & Whittemore Overseas Co. Inc v Societte Generale de L' Industrie du Papier* (RAKTA) 508 f.2d. 969 (2d. Cir. 1974).
[79] See Model Law, Art.34(2)(b)(ii)
[80] Godwin Obla, 'Arbitration as a Tool for Dispute Resolution in Nigeria: How Relevant Today' in Jide Olakanmi & Co., *ADR Alternative Dispute Resolution: Cases and Materials*, (1st ed. Abuja: LawLords Publication, 2013) p. 7
[81] AIR 2003 SC 2629

constructed in the context it has been used and its definition may vary from generation to generation.[82]

4.0 THE CONSEQUENCES OF A SUCCESSFUL RECOURSE TO AN ARBITRAL AWARD

The effects of a successful challenge differ depending on the grounds of the challenge, the relevant law and the decision of the court that dealt with it. This decision itself may take several forms. The court may decide: to confirm the award; refer it back to the arbitral tribunal for reconsideration, the award may be varied, the award may be set aside, either in whole or in part. [83] For instance, under the Italian Law,[84] if the state court upholds a challenge for the annulment of an award, it sets aside the whole award, unless it finds that there is no agreement to arbitrate, that is, the parties have not agreed to arbitration or the subject matter of the agreement to arbitrate relates to disputes that are not even theoretically capable of being referred to arbitration.

If an award is set aside by a court of appropriate jurisdiction in the place of arbitration, then the award will no longer have any legal force and effect in

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[82] Vikrant Sopan Yadav (n 16) p. 831; see further the case of *United Mexican States v Marvin Roy Feldman Karpa*, File No. 03-CV-23500, Ontario Superior Court of Justice, December 3, 2003. In that case, the Ontario Superior Court of Justice refused to set aside an award rendered by a NAFTA tribunal on the ground that the applicant must establish that the awards are contrary to the essential morality of Ontario'.

[83] Redfern, A and Hunter, M. (n 1) p. 429, see further Lagos State Arbitration Law 2009 s. 55, which provides *inter alia* that where one or more of the grounds have been proved and such has caused or will cause substantial injustice to the applicant, the court may adopt any of the following three options: remit the award to the Tribunal in whole or in part for reconsideration; set the award aside in whole or in part; or render the award to be of no effect, in whole or in part.

[84] See Italian Civil Code Procedure, art.830 first paragraph; see also Ferdinando Emanuele and Milo Molfa .Recent developments in the challenge of arbitral awards under Italian law, Arbitration Newsletter, February, 2013 <https://www.clearygottlieb.com/-/media/cgsh/files/other-pdfs/recent-development-in-the-challenge-of-arbitral-awards-under-italian-law> accessed on 29th July, 2017, p. 67

that country.[85] In this situation, the party who won the arbitration but lost the challenge is in an unenviable position. For instance, if the award has been set aside completely on the basis that the arbitration agreement is null and void, a further resort to arbitration on the basis of the void agreement would be out of question. The party may consider resort to litigation, but there could be problem of limitation law, or other substantive difficulties such as the absence of a valid contract. Similarly, if the award was set aside for procedural defects, the party who won the arbitration but lost the challenge is still in an unenviable position. Although the arbitration agreement will usually be effective, but the dispute must have to be submitted to arbitration afresh and the whole gamut of process started over again. This, according to Blackbay *et al*,[86] is a daunting prospect for even the most resilient claimant.

6.0 CONCLUSION

Ordinarily, an arbitral award rendered by a competent arbitral tribunal ought to constitute a binding and final decision upon parties to the arbitration as per the dispute between them. However, the law has created grounds by which party not satisfied with the decision of the arbitral tribunal can challenge such by way of recourse against the award in the national court, usually at the seat of arbitration. From the discussion and references to various jurisdictions in this paper, justice and strict adherence to law is germane to an arbitration process or proceedings. For instance, where the law is not follow to letter in terms of want of jurisdiction on the part of arbitral tribunal, or failure to follow due process in the course of arbitral proceedings, or where the subject matter of the dispute is not capable of settlement by arbitration or the award is contrary to

[85] Ibid; see also Jack M. Graves and Joseph F. Morrissey. 'International Sales Law and Arbitration: Problems, Cases, and Commentary. Chapter 10 – Arbitration as a Final Reward: Challenges and Enforcement (2008). *Faculty Scholarship at Digital Commons @ Touro Law Center*, 458-484: 470

[86] Blackbay, N. (n 19)

public policy, then recourse may be made against the award. The essence of recourse against award is to set it aside either in whole or in part.

Unlike other jurisdictions, once an arbitral award is successfully challenged, the courts in Nigeria has no power to vary the award or reconsider it under the provision of the ACA.[87] Everything returns to the *status quo a*nd the parties are left with the option of commencing afresh arbitration proceedings. It must be stated that even though recourse to arbitral award has the tendencies to put the arbitrators on their toes in ensuring proper hearing of any dispute brought before them. It is recommended that parties and their legal representatives should at the onset of arbitration proceedings ensure that both the parties and arbitral tribunal comply with the provisions of the law regulating the agreement of the parties and arbitral proceedings in order to avoid recourse against the award. Parties should also ensure that the subject matter of their dispute is arbitrable. The courts should be cautious in delving into arena of arbitral proceedings to checkmate parties from bringing frivolous application to stall the enforcement of arbitration award unless it is manifestly shown that failure to set aside an award will result into irreparable substantial injustice to the losing party. Finally, it is recommended that the extant ACA, being a federal law should be amended to give Nigerian courts the opportunity to vary arbitral award in deserving cases to avoid cost of fresh arbitral proceedings.

[87] This position had been taken care in Lagos State by section 55 of the Lagos State Arbitration Law 2009