PARTY AUTONOMY AND ENFORCEABILITY OF ARBITRATION AGREEMENTS AND AWARDS AS THE BASIS OF ARBITRATION

Thesis submitted for the degree of

Doctor of Philosophy

at the University of Leicester

by


School of Law

University of Leicester

January 2014
ABSTRACT

This thesis starts from the perspective that although certain sections of the Nigeria’s Arbitration and Conciliation Act 2004 need to be reformed, the principles of the Act are centered on enforceability, fairness, impartiality, avoidance of unnecessary delay, party autonomy and the restriction of unnecessary court intervention. These principles reflect the basis of the UNCITRAL Model Law on International commercial arbitration 1985, the New York Convention 1958 and many modern Arbitration Laws. The object of the Arbitration and Conciliation Act can also be illustrated by Nigeria’s ratification of the New York Convention in June 1970 and the adoption of the UNCITRAL Model law on international commercial arbitration and model rules in 1985. With the ratification of the New York Convention, the Nigerian national courts have been supporting the enforcements of international commercial arbitration agreements and foreign arbitration awards rendered in any country that is a party to the New York Convention; unless such arbitration agreements and/or awards are contrary to Nigeria’s public policy as permitted by Article V (Vii) (b) (i) (ii) of the Convention. But, despite all the efforts Nigeria has made in modernising its arbitration laws, and signing up to the major treaties, Nigerian laws and venues are hardly selected in international commercial arbitration agreements most likely because of a lack of awareness by commercial parties that although a few sections of the Arbitration and Conciliation Act need to be reformed, the Act, and indeed, many modern Arbitration laws in Africa are capable of enforcing international commercial arbitration agreements and awards. Accordingly, the present researcher promotes the thesis that, although some sections of the Arbitration and Conciliation Act 2004 need to be reformed, the Act is effective, comprehensive, adequate, certain and predictable for the enforcement of international commercial arbitration agreements and awards as those of other countries with modern Arbitration laws.
ACKNOWLEDGEMENT

Many individuals and institutions were helpful during the preparation of this thesis. I wish to acknowledge my deep gratitude to them. I would like to thank my wife for all her support, I am grateful to her. My sons and daughters have also been supportive and helpful. I am very grateful to my supervisors, Prof. Du Bois Francois, Dr A Massod, for their patient reading of draft after draft. Their support and encouragement made the writing and completion of this thesis an enjoyable process. My appreciation also extends to C Andersen and Dr Abimbola, they have helped me with useful advice at the beginning of my research work. Special thanks are also due to Professor Panu Minkkinen, Professor Shaw (QC) and Professor Mac Bell for their precious advice and invaluable support. I am grateful to friends and colleagues, from Africa, USA, Canada, UK and the Caribbean who have always been supportive with their views and criticisms. Last but not least, I dedicate this thesis to my wife Esther, my daughters Sarah, Maxine, Awele and my sons Israel and Dean for their steadfast love.
Table of Contents

Abstract i
Acknowledgement ii
Table of Contents iii

CHAPTER ONE

1.1. Introduction .......................................................................................................................... 1
1.2. An Overview of Africa for the purpose of this thesis .......................................................... 4
1.2.1. Overview of the Nigerian Legal Framework ........................................................................ 5
1.3. Research Questions .................................................................................................................. 11
1.3.1 Aim/Objectives ......................................................................................................................... 13
1.3.2 Methodology ........................................................................................................................... 14
1.4. Synopsis of party autonomy in the context of Arbitration Agreement ....................................... 17
1.5. International Legal Infrastructure .......................................................................................... 20
1.6. Literature Review ....................................................................................................................... 24
1.7. Conclusion ............................................................................................................................... 38

CHAPTER TWO

Overview of Arbitration Method and the General Concept of International Commercial Arbitration

2.1. Introduction: The Meaning of Arbitration Method of Dispute Resolution .................. 40
2.2.1 The description of Arbitration Method .................................................................................. 40
2.2.2. The description of the Method under the ACA and other modern Arbitration Laws in Africa.. 44
2.3. Defining Arbitration Agreement ............................................................................................ 48
2.3.1 The Effect of the concept of Arbitration Agreement in Arbitration Laws in Africa................ 51
2.3.2 Arbitration Agreement as party autonomy Oriented .......................................................... 54
2.4. Principal Forms of Arbitration.................................................................................................. 56
2.4.1. Analysing ad hoc arbitration ......................................................................................... 58
2.4.2. Advantages of ad hoc arbitration ..................................................................................... 59
2.4.3. Disadvantages of ad hoc proceedings .............................................................................. 60
2.4.4. Ad hoc –less expensive than the Institutional? ............................................................... 61
2.4.5. Analysing Institutional arbitration .................................................................................. 62
2.4.6. Advantages of Institutional arbitration ............................................................................ 63
2.4.7. Disadvantages of Institutional arbitration .............................................................. 64
2.5. Theory of Arbitration

2.5.1 Jurisdictional Theory

2.5.2 The Contractual Theory

2.5.3 The Mixed or Hybrid Theory

2.6. Conclusion

CHAPTER THREE

Explaining the principle of party autonomy

3.1 Introduction

3.2. Choice of Applicable Laws

3.2.1 Comparative Example with Ghana Arbitration Act 2010

3.3 Lex marcatoria

3.4 The Courts

3.4.1 The Principle of Non-intervention by the Courts

3.5. Mandatory rules

3.5.1 Subject matter Arbitrability

3.5.2. Public Policy Issues

CHAPTER FOUR

An Analysis and Comparative Discussion of particular Sections of the ACA

4.1. Introduction

4.2. Analysis of ACA Section 1

4.2.1 ACA Section 1 Compared with the Model Law Article 7 and AA section 5

4.2.2. ACA Section 1 and AA Section 5 Compared with other modern Arbitration Laws in selected Developing countries

4.2.3. ACA Section 1 Compared with Kenya Arbitration Act 1996

4.2.4. ACA Section 1 Compared with Indian Arbitration Act 1996 section 7 and Egyptian Arbitration Law Article 10

4.5. Van de Berg Analysis of Article II(2) NYC

4.6. The Model Law Article 7 (2) and NYC Article II (2)

4.7. Learning from Examples made by Christopher Kuna’s Comparative Analysis of “writing” and hand “written signature” requirement

4.7.1. Learning from Christopher Kuna’s Analysis of written Signature in the Common law United States
4.7.2. Learning from Christopher Kuna’s Analysis of Written Signature in the Civil Law Germany................................................................. 125
4.7.3 Learning from Christopher Kuma’s Analysis of Policy Implications for Electronic Authentication.................................................. 129
4.8 Comparing the ACA section 1, AA section 9 and NYC Article II (3) .......................................................... 131
4.9. The Report of The Committee for the Reform of the ACA.......................................................... 132
4.10. The principles of the NYC Article II (3) compared with the ACA Sections 4 and 5. .................. 134
4.11. The provision for the Choosing of Arbitrators................................................................. 136
4.11.1 Learning from the Lagos State Arbitration Law 2009 Section 7........................................ 138
4.12. Specific Court Assistance.................................................................................................................. 139
4.13. ACA Section 7 (4) and the 1999 Nigerian Constitution; What are the effects?.................. 140
4.14. Procedure for challenging an arbitrator.......................................................... 142
4.15. The Courts Support for Arbitration.................................................................................. 145
4.16. The Roles of the Courts in the context of Intervention............................................................. 151
4.17. Recognition and enforceability of Awards........................................................................... 152
4.18. Refusal of Recognition and Enforcement............................................................................. 158

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions. .................................................................................................................. 162
5.1.1. Recognition and Enforceability................................................................................. 173
5.2. Refusal of Recognition and Enforcement........................................................................ 176
5.3. Recommendation for Reform of certain Sections of The ACA........................................ 176
5.3.1 The Court’s Power to Stay proceedings pending reference to arbitration .................. 177
5.3.2. Number of Arbitrators............................................................................................. 180
5.3.3 Immunity of Arbitrators......................................................................................... 180
5.4. Suggestion for further work.............................................................................................. 182
5.5. Contribution to existing knowledge.................................................................................. 182

BIBLIOGRAPHY ...................................................................................................................... 184

APPENDIX ............................................................................................................................... 205
CHAPTER ONE

1.1 Introduction

In June 1985, the United Nations Commission on International Trade Law adopted a Model Law on International Commercial Arbitration. The Law was a great step forward in international commercial arbitration, designed to promote international arbitration by providing a law consistent with the United Nations Convention on the Recognition and Enforcement of Arbitral Awards of 1958 and the UNCITRAL Arbitration Rules, which had been promulgated in 1976. The UNCITRAL Model Law on international commercial arbitration (hereinafter referred to as Model Law) was designed to provide nations with a modern arbitration law that would help in implementing the New York Convention. In December 1985, the United Nations General Assembly approved the Model law and encouraged its member states to consider adopting it as their law of international arbitration. The Model Law has been a success in promoting these goals. It has been adopted without significant change in more than 36 countries and special administrative regimes and it has served as the basis for reform of may other countries’ arbitration laws including Nigeria, France and Switzerland. In addition to several states in the United States, including California, Connecticut, and Texas have adopted variations of the Model law to govern

---


international arbitrations conducted there. The Departmental Advisory Committee on Arbitration Law (hereinafter referred to as the DAC), under the chairmanship of Lord Justice Mustill recommended against England, Wales and Northern Ireland adopting the Model Law, but the law played a part in encouraging England to improve its Arbitration Act. In its report of January 1996, the DAC stated:

“[T] he three general principles of Arbitration needed in any Arbitration Law for the upholding and enforcement of arbitration agreements and awards are the principles that reflect the object of arbitration; which are: the principle of fairness, impartiality and avoidance of unnecessary delay or expense. These are aspects of justice whose principles are that a dispute resolution system is to be based on obtaining a binding decision from a third party on the matter at issue. The second principle is that of party autonomy, which reflects the basis of the UNCITRAL Model Law. The third principle is that the courts shall in the arbitral process, not intervene more than they should in the arbitral process. This third principle is reflected in Article 5 of the UNCITRAL Model Law on International Commercial Arbitration” 3

In his PhD thesis of 1996, A Azousu said the first step for knowing the effectiveness of a legislative framework on International commercial Arbitration is to find whether the law is based on the principles of fairness, party autonomy and non unnecessary intervention by the courts in the arbitral proceedings.4 The importance of these principles and in particular the principle of party autonomy was explained in simple words by Julian Lew when he stated that since 1950, the principle of party autonomy has had a significant influence on how international commercial disputes are resolved, and (amongst other things) has been one of the factors why commercial parties prefer arbitration to litigation.5

---

3 Departmental Committee on Arbitration Law Report on Arbitration Bill/Chairman The RT Hon Lord Justice Saville February, 1996 at p10-11; English Arbitration Act 1996 section 1 (a); Arbitration and Conciliation Act 2004 section 2; See the nonmandatory sections of the Act; English Arbitration Act 1996 section 1 (b); compared with Ghana Arbitration Act 2010 sections 12 to 14;English Arbitration Act 1996 section 1(c); compared with Ghana Arbitration Act 2010 section 7 (5) and section 7(1); UNCITRAL Model Law Article 5 and 6; Arbitration and conciliation Act 2004 section 4(1); Arbitration Act of Kenya section 6
5 Lew J, Applicable law (Oceana Publishing 1998) 17 -18; Eric Sherby, ‘A Different Type of International Arbitration Clause’ (2005) 1 Int Law News American Bar Association10; Eg Number of countries signing up to
Moreover, that the method gives certainty, predictability and uniformity to the parties in commercial relations when dealing with personal rights and status. These benefits are derived from the enforceability of arbitration agreements and awards, which is one of the driving forces in encouraging parties to arbitrate their disputes rather than dealing with them in national courts. The method is such that when a subject matter of a dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed (but one cannot “choose the judge” in litigation). Furthermore, the method is often faster than litigation in court and can be cheaper in very limited circumstances; but it can be more expensive than litigation and definitely a most expensive ADR process. The proceedings and awards are generally non-public, and can be made confidential because of the provisions of the New York Convention (hereinafter referred to as NYC) which makes the award generally easier to enforce in other nations than court judgments. But, like court litigation, arbitration produces an enforceable result. Most other methods of dispute resolution produce non-binding solutions; but the method differs from court litigation in key ways that make it unique. For instance, the parties to an arbitration are free to formulate their own procedures as it suits them; thus, by designing their own procedure, the parties can make the whole process cheaper in some cases, more or less thorough and more or less quickly.

This thesis will analyse and discuss specific sections of the Arbitration and Conciliation Act 2004 of Nigeria (hereinafter referred to as ACA) dealing with party autonomy, the determination and enforcements of arbitration agreements and awards with references to selected modern Arbitration laws in Africa by means of basic comparison with the Model


6 Lew J, Applicable law (Oceana Publishing 1998) 17
9 New York Convention 1958 Art II
Law, the UK Arbitration Act 1996 and the NYC. The heart of this thesis is chapter four where the thesis will discuss and explain how the ACA determines and enforces arbitration agreements and awards with comparisons to the jurisdictions mentioned above. Accordingly, in order to pave the way for this discussion, it is necessary to give a brief overview of Africa first before proceeding into the main thrust of the discussion.

1.2 An Overview of Africa for the Purpose of this Thesis

Marriam made an observation long time ago that Africa is a continent that is characterised by legal pluralism and racial, linguistic, religious, and other diversities. Notwithstanding, some states in Africa have contributed to the development of International commercial arbitration, one of which is Djibouti, a former French colony, and so is a civil law jurisdiction. It is one of the few African states that had a comprehensive law on international commercial arbitration before 1985. It enacted a Code of International Arbitration in 1984, long before the work of the Model Law was concluded in 1985. The primary objective of the Code of 1984 was to make the Djiboutian Law on international arbitration ultra-modern so as to encourage those who wanted recourse to international arbitration to select Djibouti as the seat of arbitration. In the East, central and Southern Africa, Kenya and the Republic of South Africa, and Zimbabwe have each adopted the Model Law as their national arbitration laws. For example, an Arbitration Bill that adopted the Model Law for both domestic and International Commercial Arbitration in Zimbabwe was ready before the end of 1995 and was enacted by parliament without delay. So also did Cote d’Ivoire, Tunisia and Algeria; each of these African countries enacted a modern law on arbitration in 1993, Egypt in 1994, and Kenya in 1995 and quite recently Ghana enacted

---

12 Djibouti Code of International Commercial Arbitration [1984]
Arbitration Law (Ghana has not adopted the Model Law) which will be referred to in this discussion. The present researcher has chosen the ACA for this study because it is one of the arbitration laws that has enshrined the principles of the Model Law, the NYC and many other international arbitration treaties, and it also reflects the English common law system in African, some of which are discussed briefly in the overview of Nigeria below.

1.2.1 Overview of the Nigerian Legal framework

As stated earlier, Nigeria was the first country in Africa to adopt the Model Law in 1985, and many other countries followed suit. But, before the adoption of the Model Law, Nigeria acceded to the NYC on the 17th day of March 1970. Accordingly, as stated earlier, the ACA Cap 19 1990 Laws of Nigeria is based on the Model Law, albeit with some modifications and reflects the domestication of Nigeria’s treaty obligation under the NYC. The Decree came into force on the 14th day of March 1988. The Decree is now referred to as the ACA by virtue of the provisions of Section 315 of the Constitution of the Federal Republic of Nigeria 1999. The ACA applies to disputes arising from commercial transactions and contains provisions applicable to both domestic and international commercial arbitration. The preamble stipulates that the ACA is to provide a “united legal framework for the fair and efficient settlements of commercial disputes by arbitration and conciliation, and to make applicable the NYC. Part I contains provisions related to arbitration, Part II provisions relating to conciliation whilst Part III contains additional provisions relating to International Commercial Arbitration and Conciliation which makes the NYC applicable in Nigeria.

---

14 Nigeria was the first country in Africa to adopted UNCITRAL Model in 1985
15 Nigeria acceded New York Convention in 1970
16 Arbitration and Conciliation Decree No 11 1988 (“ACD”)
17 The Constitution of Nigeria 1999 section 315
18 Arbitration and Conciliation Act Chapter 19 Laws of the Federation of Nigeria 1990
The Act also contains three (3) schedules.\textsuperscript{20} The First Schedule, contains arbitration rules that are modeled on the Uncitrul Arbitration Rules, Second Schedule, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Third Schedule is a reproduction of the UNCITRAL Conciliation Rules. Part II contains provisions relating to conciliation and Part III additional provisions relating to international commercial arbitration and conciliation. Part IV contains miscellaneous provisions, including those in relation to receipt of written communication and the interpretation provision.\textsuperscript{21} The provisions of the Act reflect the flexible nature of arbitral proceedings and are premised on the principle of party autonomy.\textsuperscript{22} Most of the powers of the arbitrator are default powers, i.e the tribunal has the power unless the parties otherwise agree.

The Act states the objective of arbitration as the resolution of disputes by an impartial tribunal and reiterates the fundamental principles of arbitral proceedings as being the equal treatment of the parties and giving each party a full opportunity of presenting its case.\textsuperscript{23}

Concerning courts intervention, Section 34 prohibits the court from interfering in an arbitral proceeding, except in the limited circumstances specifically provided for in the Act.

As a major role player in International trade and as the most populous nation in Africa, having an estimated population of over 170 million;\textsuperscript{24} International commercial arbitration method has a vital role to play in commercial dispute resolution in Nigeria. Being an oil rich country, Nigeria offers investors abundant natural resources, a low-cost labour pool, and potentially the largest domestic market in sub-Saharan Africa. The Nigerian economy, including its non-oil economy, continues to grow strongly, and continues on track to become

\textsuperscript{20} ACA Schedule parts I, II, II
\textsuperscript{21} Arbitration and Conciliation Act, Rules in the third schedule, Articles 3, 7, 9, 15 and 20
\textsuperscript{22} Non Mandatory sections of the ACA
\textsuperscript{23} Arbitration and Conciliation Act 2004 section 14
the largest in Sub-Saharan Africa. Nigeria ranks as Africa’s largest oil producer and the twelfth largest in the world, producing high-value, low-sulfur content crude oil. The Nigerian economy is heavily dependent on its oil sector, which accounts for over 95 percent of export earnings and about 40 percent of government revenues, according to the International Monetary Fund (IMF). The agriculture sector in Nigeria accounts for over 40 percent of GDP and sustains over 80 percent of rural households. Nigeria’s merchandise trade with the world in the first quarter of 2012 came to a total of $42.5 billion, an increase of 4.7 percent year-on-year over the totals for the first quarter of 2011. Nigeria has remained a reliable crude oil supplier to international markets with international businessmen and investors from different parts of the world making international contracts in Nigeria on a daily basis, which may be faced with unforeseen circumstances in the course of their business activities. These circumstances may range from matters relating to the execution of contracts, variation of terms of international agreements caused either by inflation, lack of performance by parties and many other factors. These may result in disputes, which may lead to the arbitration clause being invoked for the resolution of the dispute in question. This in turn may require arbitrators and Arbitration Laws that are capable of upholding the three main objects of arbitration cited earlier as fairness, impartiality and avoidance of unnecessary delay which can obtain a binding decision from a third party on the matters at issue. Thus, the seat of the arbitration is of commercial importance for parties to consider the accessibility and availability of infrastructure, sites and applicability of treaties such as the NYC provided for the enforceability of arbitration agreements and arbitral awards when selecting their

26 Ibid
28 Ibid
29 Paper Delivered at the International Bar Association Conference ‘Arbitration in Maritime and Transport Dispute’ held in Hamburg Germany on 26-28 day of April 2007
31 Ibid note 2
choice of seat.\textsuperscript{32} As stated earlier above, Nigeria, including many African countries, has ratified the major International arbitration conventions such as the NYC and many others;\textsuperscript{33} and were influenced by the English common law or French law which would have meant that Nigeria and indeed most developing African countries’ arbitration laws are capable and suitable venues for the enforcements of international commercial arbitration agreements and awards.

But one wonders why it is that despite the efforts made by the developing countries, especially the adoption of international treaties on the enforcement of arbitration agreements and awards;\textsuperscript{34} various research work including the work of Christopher R Drahozal and Richard W. Naimark have shown that there were only two international commercial arbitration agreements between 1996 and 2013 in which commercial parties selected ACA and Nigeria as a venue in contrast with the Western venues like the UK, France, and USA that are selected on a regular basis.\textsuperscript{35}

According to Christopher R Drahozal and Richard W. Naimark:\textsuperscript{36}

“Out of the one hundred per cent of the international commercial matters settled by commercial arbitration matters around the commercial world between 1996 and 2003 and 2003 and 2013, ninety nine per cent were settled in western venues with only two in Nigeria. The research work found that a variety of considerations go into the parties’ choice of the place of arbitration, including accessibility of the site to the parties, availability of necessary infrastructure, the applicability of a treaty (such as the NYC) providing for the enforceability of arbitration agreements and arbitral awards.”\textsuperscript{37}

\textsuperscript{32} Christopher R Drahozal and Richard W. Naimark Towards a Science of International Arbitration Collected Empirical Research (Kluwer Law International 2005) 344
\textsuperscript{33} Ibid at note 13 and 14
\textsuperscript{34} Ibid note 13 and 14
\textsuperscript{36} Ibid at note 35
Also, the data of the International Chamber of Commerce (hereinafter referred to as ICC) Arbitrations compiled from 1995 to 2003 and 1996-2004 showed that western venues were mostly selected as venues and choice of law with only one or two of the developing countries selected by the commercial parties. According to Stewart E and many other scholars, the attitude of many developing countries has been marked by distrust, hesitation or outright rejection, often based on perceptions about unfortunate past experiences, differences in interests and lack of involvement in shaping the ground rules and prevailing practices of the international arbitral process. In his Article, Stewart argued that developing countries are generally reluctant to enact arbitration laws that could be suitable for enforcing arbitration agreements without state intervention; that, to them, submission to arbitration is a challenge to the substantive rules of state responsibility; as this stance on arbitration was a response to a set of events rooted in economic history, especially in the dealings of the Latin American states with Europe and North America in earlier centuries. With the same view, Janicitevic stated that African courts are unsuitable for the settlement of disputes of commercial relations or for the enforcement of awards since they could be subjected to political pressures and accordingly, would not decide a case or enforce an award against an African party. On this, Jan Paulsson stated that it is not realistic for


Ibid note 40

most African parties to expect that foreign contracting parties in large contracts will accept
the jurisdiction of a local tribunal. Level headed Third World negotiators will in fact concede
that truly independent judiciaries do not yet exist in many of their countries. Jan Paulson
believes, if you have a large contract involving an African party, there is no reason to pretend
that the local judiciary will be exempt from political pressures; but that, in contrast, when an
important contract is concluded between French and German parties, neither is offended by
the other’s refusal to accept his own courts. Arbitration in Geneva or Zurich or London would
be altogether a routine as a contractual compromise.43

On the other hand, Sempasa argued that: …without sufficient information on how the arbitral
process benefits Africans; African lawyers and their governments are understandably
unwilling to get too involved in a process which they perceive as largely benefiting the
trading entities of the West.44 Amongst many other reports, is the Report of the National
Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria,
which reported that the defects in the legal and institutional framework are such that they
permit a high degree of judicial intervention in arbitration proceedings contrary to what is
permitted by well accepted international standards; and that arbitration in Nigeria is a “first
step toward litigation” rather than an “alternative to litigation”. Thus, that delay in the
disposal of “arbitration applications”, in Nigeria means that applications for court support,
court supervision or court enforcement in relation to the arbitration process means nothing
else, but departure from international standards that are reflected in the Model Law on
International commercial arbitration on enforcement of foreign arbitral awards, such as the

International and Comparative Law quarterly at p 8
failure to give effect to agreements to arbitrate on a mandatory basis. The present researcher wonders if these views are true reflection of the ACA, and some Arbitration laws in Africa; accordingly, this thesis seeks to explore the true reflection of Arbitration laws in Africa in the context of enforceability of arbitration agreements and awards by focussing on the ACA with the following research questions:

1.3 Research Questions

The present researcher agrees the attractiveness of the Model Law, the NYC and some of the western Arbitral systems is hinged on their capability to uphold the three main principles of arbitration mentioned earlier above, particularly the principle of party autonomy and the enforcement of arbitration agreements and awards and meet the expectations of the parties. Notwithstanding that certain sections of the ACA including the Arbitration laws in some African countries need to be reformed, but since these countries have adopted the principles of the NYC and the Model Law and were influenced by either the English law and/or French law;

(1) One wonders if the ACA and some of the Arbitration laws in African are not also capable of enforcing arbitration agreements and awards and upholding the three main principles of arbitration, particularly the principle of party autonomy as the Model Law, the NYC and the AA?

(2) What is the legislative definition or description of Arbitration under the ACA, Model law, the AA and other modern Arbitration laws in Africa?

(3) What is the principle of party autonomy in the context of arbitration agreement under the above-mentioned legislations and legal frameworks?

(4) Is the principle respected by Nigerian Courts?

(5) What is the enforceability of the above-mentioned legislations and legal frameworks?

(6) Are the above-mentioned legislations and legal frameworks not similar to each other in the context of legislative principles?

(7) Although a major part of the ACA may be capable for the enforcement of arbitration agreements and awards, but, one wonders if the ACA section 1 which requires there to be a document signed by the parties (“Signature”) in order for an arbitration agreement to be valid would not be an obstacle to parties’ autonomy whereby reducing the ACA’s level of certainty and predictability?

(8) One wonders if a simpler clarification of the principles of staying courts’ involvement for Arbitration under the ACA sections 4 and 5 will not be necessary in order to make the Act much more effective and predictable?

(9) One wonders if a three-arbitrators model under the ACA section 6 would not produce unnecessary expenses and also obstruct parties’ freedom to conduct their arbitration as they wish?

(10) One wonders if the lack of provision for Arbitrators immunity in the ACA will not pose a problem for the effective and efficient functioning of Arbitral process under the ACA?
Aim and Objectives

This thesis will be shaped around the above-mentioned research questions, in order to examine and show:

(1) The capability of the ACA for the enforcement of arbitration agreements and awards and how the Courts’ treat the principle of party autonomy in comparison with the Model law, the AA 1996, and the NYC with references to other modern Arbitration laws in Africa.

(2) The areas of the ACA where reforms will be suggested and why.

Thus, make an attempt of addressing the problem of the lack of selection of ACA and other African venues by commercial parties in arbitration agreements by providing an account of the ACA and some modern Arbitration laws in Africa. Accordingly, illustrate and show their capabilities to enforce arbitration agreements and awards. This will be done by means of basic comparison of the ACA with the Model Law, the AA 1996 and the NYC. Accordingly, assist in bringing a greater awareness that, although certain sections of the ACA and some Arbitration laws in Africa need to be reformed, the laws are adequate, effective and predictable for the enforcements of international commercial arbitration agreements and awards.

1.3.2 Methodology

The aim and objectives of this thesis will be achieved by first, considering what Arbitration Method is in dept and considering the principles of party autonomy; fairness, impartiality and avoidance of unnecessary delay; and the principle that the courts shall in the arbitral

---

46 Example from AA 1996 section 1 (b); compared with Ghana Arbitration Act 2010 sections 12 to 14
47 Example from AA 1996 section 1 (a)
process not intervene more than they should in the arbitral process.\textsuperscript{48} One of the purposes of the basic comparative analysis is to highlight the resemblances in internationally recognised principles relating to the enforceability of arbitration agreements, awards and safeguards for the principle of party autonomy. Although the UK Laws are more sophisticated than that of Nigeria and most developing countries, but, it is possible to compare them because of the signing of international treaties which has resulted in the integration of laws which unite the UK system with several others, with inevitable effects on legislation, case law and even the everyday practice of law.\textsuperscript{49} Thus, although the Arbitration Act 1996 (hereinafter referred to as AA) is more restrictive than the ACA, but UK still remains a good example of a stable Arbitration law compared to many others. An Article published in Arbitration International concerned a survey carried out to determine the workings of the AA 1996 and to see whether, in the light of ten years experience, any revisions to it might usefully be proposed;\textsuperscript{50} but, it was concluded in that report that no amendments or changes are required or desirable. In dealing with the research questions of this work, this thesis proposes to undertake an in-depth study aiming to analyse and explain the suitability of the ACA in the context of the ACA’s capability to enforce arbitration agreements and awards in comparison with universally accepted principles. In an attempt to justify the theme of this research, references have been made to the Model Law, AA 1996, and the NYC and Arbitration laws in Africa. Modern and contemporary legal research often depend on a combination of legal research methods to answer the research questions;\textsuperscript{51} the present research is no exception. Consequently the

\textsuperscript{48} Examples AA 1996 section 1(c); compared with Ghana Arbitration Act 2010 section 7 (5) and section 7(1); Model Law Article 5 and 6; Arbitration and conciliation Act 2004 section 4(1); Arbitration Act of Kenya section 6

\textsuperscript{49} Peter De Cruz, \textit{Comparative Law in a changing world} (second ed Cavandish Publishing Limited 1999) p 224


\textsuperscript{51} Generally T. Hutchinson, ‘Research and Writing in Law’ (Law Book Co. NSW, Australia, 2006); The Case Study Method is defined as ‘an in-depth study of just one person, group or event; HELPSHEET 9, Published by Rhodes University; Quoted in Xanthaki, Helen, \textit{Comparative Research Methods}, (The Institute for Advanced Legal Studies, London 2004) 12
The proposed research will focus on doctrinal analysis of the Nigerian ACA with a basic comparison with the AA 1996 and the Model law and the NYC.

Both primary and secondary sources of materials will be used. Examples of primary sources are legislative enactments like the ACA, Cases, AA, Model law, UNCITRAL rules, NYC conventions and protocols; while the secondary sources are textbooks, journals, magazines, articles and related reports. Some scholars, jurists, businessmen and practitioners experienced in arbitration were interviewed orally as well as personnel in arbitral centres in Nigeria.\(^{52}\)

The basic comparative law approach is useful to the present research for the purposes of comparing how these principles are enshrined in the ACA, and the laws of the other jurisdictions, therefore will assist in the discussions to achieve the aim and objectives of this research work. Making references to those jurisdictions is very useful because it not only has the advantage of giving a wide picture but it also lends an insight into prevailing tendencies. It also broadens one's horizons and potentially makes one more enlightened.\(^{53}\)

It is considered to be one of the most important means of assisting efforts to help in exchange of legal knowledge and in achieving harmonisation and unification between countries in specific fields. It is also useful due to the aspects of similarities and differences it shows and it may determine the area falling behind in legislation, especially those regarding guarantees related to fairness and justice in arbitration.\(^{54}\)


The Model Law, NYC and UK represent international arbitration laws and internationally recognised principles and are described as user friendly. Nigeria provides an example of the combination of some modern commercial practices with the common law and customary law values. In Nigeria, it has been the present researcher’s observation that materials (whether court decisions, arbitral awards or official reports) involving international commercial arbitration are rare. The only relevant material available on this is the body of (black letter) law of the ACA. Thus, in order to carry out this research using the method it has employed, the present researcher has put in a great deal of time and effort in arranging interviews with Nigerian legal experts and laymen who are mostly interested in arbitration, and whose opinions were either susceptible to debate or affirmation of the current arbitration practice in Nigeria. From among the legal circles, the present researcher streamlined the criteria in the selection of the interviewees on the following: (i) Judges of the High Court who are hearing and handling arbitration appeal cases in their respective courts, (ii) the Arbitrators who either have been past arbitrators of disputes or are currently sitting as arbitrators in arbitration panels, (iii) officers of the Nigerian Chamber of Commerce and Industry and the Nigerian Ministry of Commerce and Industry, who by virtue of their official functions practice arbitration and are considered as authorities in arbitration in their respective fields, (iv) academic professors in Nigerian universities, (v) legal practitioners who have gained considerable experience in arbitration and (vi) parties to past and present arbitration disputes (vii) Officers of Nigerian Institute of Arbitrators who have a good amount of practice experience in arbitration. The types of questions that were asked of the interviewees were the same that were presented section 1.3 above reflecting the aim of exploring the areas in which the current ACA is silent; in addition, interviewees were asked some general questions related to their qualifications and experiences in arbitration.

The forthcoming section will explain the context in which party autonomy and the other two principles of Arbitration mentioned earlier will be used in the discussions of this thesis.

1.4 Synopsis of party autonomy in the context of Arbitration Agreements

Most research work discussing Arbitration Laws in the context of enforceability and application of the main principles of Fairness, impartiality, the avoidance of unnecessary delay, respect of the principle of party autonomy and non court interventions in arbitral proceedings; should start by explaining the principle of party autonomy and arbitration agreement following the fact that the scope of the discussions in this thesis will be based on the explanation. The principle of party autonomy reflects the basis of the Model Law which is enshrined in the ACA and many other Arbitration laws in Africa.

An arbitration under an arbitration agreement is a consensual process. The parties have agreed to resolve their disputes by their own chosen means. Unless the public interest otherwise dictates, this has two main consequences. Firstly, the parties should be held to their agreement and secondly, it should in the first instance be for the parties to decide how their arbitration should be conducted. In some cases of course, the public interest will make inroads on complete party autonomy, in much the same way as there are limitations on freedom of contract. Some matters are simply not susceptible of this form of dispute resolution (eg certain cases concerning the status or many family matters) while other considerations (such as consumer protection) may require the imposition of different rights and obligations. Again as appears from the mandatory provisions of the ACA, the AA 1996 and some Arbitration Laws in Africa, there are some rules that cannot be overridden by parties who have agreed to use arbitration, (these will be discussed later on in this thesis). In
general the mandatory provisions are there in order to support and assist the arbitral process and the stated object of arbitration.

Lew states:

“[T]he arbitration agreement is based on party autonomy which is one of the foundations of every arbitration. There can be no arbitration between parties which have not agreed to arbitrate their disputes. The nature of arbitration requires the consent of each party to an arbitration to happen.”

Accordingly, party autonomy for the purpose of this thesis will be understood as freedoms that are permitted in arbitration agreement that focuses on dispute resolution in international arbitration agreement between parties to a contractual dispute. Furthermore, party autonomy as of this thesis means: freedoms or liberties to arbitration agreements, freedom of choice of law and/or non-national rules, choice of trade custom and usages, choice of principles of public International law, choice of general principles of law to govern arbitration proceedings. This includes the following: (1) freedom to determine the rules and procedures in arbitration, (2) determine costs of the arbitration, (3) choice of an arbitrator, (4) number of arbitrators, (5) language of arbitration, (6) seat of arbitration, (7) time of arbitration, (8) Institutional or Ad hoc arbitration, (9) qualification of Arbitrator. This may involve trade and investment, buying, selling, marketing and distribution of goods and services, both nationally and internationally. The principle of party autonomy may also be applicable to arbitration agreements in international trade involving transactions between

58 Tweeddale and Tweeddale, Arbitration of Commercial Disputes: International and English Law ( Sweet and Maxwell 2002) 15
residents of a given country and non-residents in pursuit of profit.\textsuperscript{59} This covers all commercial contracts where the parties are nationals of, or domiciled or carrying on business in different countries regardless of where the contract was concluded, where it is to be performed, or where the subject-matter is situated so long as they are based on parties’ freedom of choice.\textsuperscript{60} Dagmar stated “[P]arty autonomy may be defined as self-arrangement of legal relations by persons according to their respective will”\textsuperscript{61} The present researcher believes that whilst the application of the principle of party autonomy will not guarantee uniform or predictable solutions for all types cases, it does to some extent guarantee certainty, uniformity and predictability for the parties; as it enables the parties to be certain which law will be applied to their contract, the effect and the interpretation of the contract becomes predictable, and in turn ensures a uniform solution to the particular dispute whatever the nature of the tribunal, wherever it may be situated and whoever the judges.\textsuperscript{62} The principle was developed and enshrined in the international legal infrastructure dealing with arbitration agreements and the enforcement of arbitral awards as will be discussed below.\textsuperscript{63}

1.5 International Legal Infrastructure

As indicated earlier at the opening section of this thesis, the United Nations Commission on International Trade Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules and the NYC on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 are regarded as the two pillars of international commercial arbitration.

\textsuperscript{59} Ibid
\textsuperscript{60} Ibid
\textsuperscript{61} Dagmar, ‘Self Determination’ (Martinus Nijhoff Publishers 2005) 3; Article 17(1) ICC Rules, (2003); Article 24(1), The Rome Convention, Article 1(2)(d) applicable European Contract Law and must therefore be referred to in all discussions relating to contractual relationships within EU; Article 3(1), the Rome Convention, (1980)
The Model Law is the result of the comprehensive study by UNCITRAL into arbitration laws in many parts of the world with a view to providing a Model law on arbitration, which would lead to uniformity/harmonization of the laws relating to International commercial arbitration.\textsuperscript{64} The Law was adopted on the 21st day of June 1985 by the United Nations General Assembly. The perception in the international business world is that agreeing to arbitrate in a model law jurisdiction secures a minimum of rights in the arbitral proceeding and reduces surprises.\textsuperscript{65} Indeed Model Law conformity is advertisement to attract international business as it (amongst other things) limits judicial intervention in arbitral proceedings generally referred to as the principle of nonintervention. Article 5 of the Model Law states thus

“In matters governed by this Law no court shall intervene, except where so provided in this law.”\textsuperscript{66}

The intent of Article 5 was to exclude any general or residual powers given to the courts within the domestic system which are not listed in the Model Law.\textsuperscript{67} Foreign parties were therefore protected from surprises.\textsuperscript{67} It was also intended that Article 5 would accelerate the arbitral process by disallowing delays caused by intentional tactics associated with the court system.\textsuperscript{68} The adoption of the model law worldwide signified a new era in international commercial arbitration.\textsuperscript{69} In recognition of the growing use of ADR and the enactment of laws by states to meet the demands and practice of arbitration adopted a Model Law on International Commercial Conciliation at its 35th session in 2002.\textsuperscript{70} UNCITRAL continues its

\textsuperscript{64} UNCITRAL Model Law 1985 Explanatory Note
\textsuperscript{65} UNCITRAL Model Law 1985 Explanatory Note
\textsuperscript{66} Model Law 1985 Article 5
\textsuperscript{67} Model Law Article 5; Explanatory Note
\textsuperscript{68} Ibid
\textsuperscript{69} Ibid note 1
\textsuperscript{70} http://www.uncitral.org (obtained October 2006)
mission to improve the legal framework of international dispute settlement and its recent work includes the review of the provisions of the Model Law on the form in which interim measures and preliminary orders should be presented by arbitral tribunals and the recognition and enforcement of interim orders. The other one of such is the NYC made in New York in June 1958 obliges the courts of signatory states to refer to the arbitral jurisdiction when an action is brought under a contract containing an arbitration clause and to recognize and enforce a foreign award without any review of the arbitrator’s decision subject to limited exceptions.

Alan Redfern and Martin Hunter describe the recognition and enforcement procedures under the NYC as simple and effective, and as “the single most important pillar on which the edifice of international arbitration rests” and as a convention which “perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.” Justice Schwebel a former Judge of the International Court of Justice puts the matter succinctly when he stated thus:

“When a domestic court acts, it acts as an organ of the State for whose actions that state is internationally responsible. When a domestic court issues an anti-suit injunction blocking the international arbitration agreed to in a contract, that court fails ‘to refer the parties to arbitration…’ In substance, it fails anticipatorily to ‘recognise arbitral awards as binding and enforce them…’ and it pre-emptively refuses recognition and enforcement on grounds that do not, or may not, fall within the bounds of Article V.”

According to the Vienna Convention 1996 Article 31, a party to a treaty is bound under international law – as codified by the Vienna Convention on the law of Treaties – to perform

---

71 Explanatory Note
72 NYC Article II (3)
it in good faith. As the Vienna Convention prescribes, a party may not invoke the provisions of its internal law as justification not to perform a treaty; a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose. The object and purpose of the NYC is to ensure that agreements to arbitrate and the resultant awards – at any rate, the resultant foreign awards – are recognised and enforced. It follows that the issuance by a court of an anti-suit injunction that, far from recognizing and enforcing an agreement to arbitrate, prevents or immobilize the arbitration that seeks to implement that agreement, is inconsistent with the obligations of the state under the NYC. It is inconsistent with the spirit of the Convention. It may be said to be inconsistent with the letter of the Convention as well, at any rate, if the agreement to arbitrate provides for an arbitral award made in the territory of another State. There is room to conclude that an anti-suit injunction is inconsistent with the NYC even when the arbitration takes place or is to take place within the territory of the Contracting State provided that one of the parties to the contract containing the arbitration clause is foreign or its subject matter involves international commerce.” There are other international conventions relevant to international commercial arbitration worth mentioning, but are of Public International Law. They include the European Convention on International Commercial Arbitration of 1961, the Washington convention of 1965 (ICSID Convention), the Moscow Convention of 1972; the Panama convention of 1975, the Ohada Treaty of 1993, the North American Free Trade Agreement of 1994 (NAFTA). The ICSID Convention is particularly important as it has been ratified by over 140 states and various international agreements make provision for ICSID arbitration. The ICSID arbitration

---

76 Vienna Convention Article 31
77 Vienna Convention Article 31
78 Article 1
79 European Convention on International Commercial Arbitration of 1961
80 Washington convention of 1965 (ICSID Convention)
81 Moscow Convention of 1972
is meant to deal with disputes arising out of investments made in a contracting state by nationals of other contracting states either under an agreement with the state itself or the state agency. There are also bilateral treaties dealing with arbitration. Arbitration proceedings are subject to the mandatory provisions of the law applicable to the arbitral proceedings. The international infrastructure also includes the laws of the various states where international arbitrations are conducted. The various international institutions that administer arbitral proceedings or give support in some form or the other are also part of the international infrastructure. A number of these institutions have drawn up institutional rules to guide and assist parties in the conduct of the proceedings. The foremost international institutions include the various Regional Centres setup under the auspices of the Asian African Legal Consultative Committee which includes the Lagos Regional Centre For International Commercial Arbitration, International Court of Arbitration of the International Chamber of Commerce (“ICC”), the International Centre of Dispute Resolution (“ICDR”), the American Arbitrators Association (“AAA”), the Chinese International Economic and Trade Arbitration Commission, (“CIETAC”) the Chartered Institute of Arbitrators (CIArb) and the Centre for Effective Dispute Resolution(CEDR) are renowned internationally for the education and training of arbitrators and alternative dispute resolvers. In accordance with the fundamental principle of party autonomy, parties’ have the freedom to adopt the rules of these bodies or even a modified format for the conduct of their arbitration.

1.6 Literature Review

There are lots of materials on international commercial arbitration. Russell’s work on Arbitration based their current edition on the AA 1996. Although the work remains a standard text on arbitration and the new edition has been totally re-written to take account of the Act, it was not based wholly on the Model Law whereas the ACA is based largely on it. Thus, in reading the text and reported English cases, some circumspection is necessary. For
example, under section 68(2) AA 1996, the courts can, in certain circumstances, remit an award back to the arbitrator. There is no such provision under the Nigerian ACA except for section 4 (1) which states that a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request not later than when submitting his first statement on the substance of the dispute, order or stay of proceedings and refer the parties to arbitration. This shows the non intervention principle of the ACA in contrast to the AA. The work of Ronald Bernstein et. al. deals with the general principles of arbitration, but deals with specific areas like Commodity Trade Arbitration, Maritime Arbitration, Construction Industry Arbitration, Agricultural Property Arbitration and added International Commercial Arbitration and Alternative Dispute Resolution; again all the statutory enactments that form the basis of parts of the Book are alien to Nigeria and also not based wholly on the Model Law. Most works on Private International Law (Conflict of Laws) have Chapters on Arbitration. Unfortunately these works deal with enforcement of arbitral awards only. They therefore do not cover many parts of the area envisaged in the present research work.

Alternative Dispute Resolution (ADR) is an area that is growing. While some scholars argue that arbitration is part of the ADR, others argue otherwise. ADR is developed in the USA. Philip Naughton in his article discussed the origin and development of the process and asserted that in the last few years the greatest growth in the use of ADR in the US may have been in the Courts rather than through private intervention. This is so because the courts have been forced to seek new methods of diminishing the dramatic congestion of court time in many jurisdictions. This writer would examine the issue of whether arbitration is or is not or ought to be part of the ADR.

---

82 ACA section 4 (1)
Of particular relevance to this research is the collection of essays edited by Peter Sarcevic. The essays were written by international arbitrators and scholars with special focus on the Model Law. The contributors critically evaluated the Model Law and analysed the various aspects from a comparative viewpoint. Related topics like the NYC and the Washington Convention are also dealt with in these essays. Only passing reference was made to Nigeria without specific discussion of the ACA. This research work, shall attempt to do otherwise.

In Nigeria, there have been many articles on arbitration. There are pamphlets on drafting and negotiating commercial agreements. However, one work the researcher will find useful is the commentary on the ACA. This work gives an illuminating account of the development of arbitration in Nigeria - from pre-colonial to the present, the history of statutory enactments on arbitration in Nigeria and a full commentary on all the sections of the ACA, including the Schedules to the ACA. In his commentary he drew heavily from his experience on the high bench. It is noteworthy that the jurist sat on appeal in one of the leading cases on arbitration in Nigeria and since his retirement he has taken part in arbitral proceedings. The work of Orojo was based on the repealed Arbitration Act of 1914. Besides the 1914 Act dealt with domestic arbitration and therefore its provisions are not relevant to this research work except perhaps as a historical source material.

Following the above-mentioned observations, it can be assumed that the subject of arbitration in Nigeria has been studied without deep examination of the ACA. Some academics and researchers have dealt with the subject only from a court perspective. They have not gone in depth into the actual examination of the ACA. Others focused on the historical and modern principles and theories of arbitration as follows:

resolution, may make to the development of African states and peoples, while satisfying the legitimate expectations of inward investors and traders. Although focusing on dispute resolution regimes affecting or concerning African states and their nationals, the work has practical, policy and comparative implications for dispute resolution, commercial arbitration and foreign investment in other regions.\(^{83}\)

2. The National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria\(^ {84}\) analyses arbitration legislations, outlining the basic legal and jurisdictional systems. The role of arbitration in the field of foreign investment in Nigeria is also covered. The author excels in the minute description, historical as well as didactic, of the updated law in Nigeria.\(^ {85}\) This report has the advantage, as the reader is invited to review the ACA, and to emphasize their submission to the source which characterizes nearly all of them. This report covers, at a general level, an example of comparative law and the method of formation of a law. The subject of arbitration in Nigeria is covered by the authors in a way which has not yet been examined by academic writers. The report stated that the ACA has defects in the legal and institutional framework which permit: (1) a high degree of judicial intervention in arbitration proceedings, which according to their report, is contrary to what is permitted by international standards, and as a result of which arbitration in Nigeria has become a “first step to litigation”, rather than an “alternative to litigation”;\(^ {86}\), (2) causes delays in the disposal of “arbitration applications”, i.e. applications for court’s intervention, or court enforcement in relation to the arbitration process; (3) that the ACA significantly departed from international


\(^{84}\) The National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria (2005) 10-20

\(^{85}\) Ibid at note 60

standards that are reflected in the Model law on enforcement of foreign arbitral awards, e.g. failure to give effect to agreements to arbitrate on a mandatory basis.

The present researcher takes an opposite view from the above-mentioned perceptions, and asserts that, although some sections of the ACA need to be reformed, the report is not a true reflection of the ACA as will be shown in this thesis.

3. G.G, Otuturu, Law and Practice of Arbitration in The Settlement of Disputes Arising From Petroleum Operations. The Nigerian Law Journal. This article focuses on analysing the case of Petroleum Operations Baker (Nigeria) Ltd v Chevron (Nigeria) Ltd. The author discusses the enforceability of the ACA and the use of Arbitration in Nigeria, the decisions of the court and the provisions of NYC. The Author did not deal with enough case laws that could have shade enough light on whether the Nigeria courts respect arbitration agreements or not.

4. Okorie, ‘Does The Regime of Statutory Arbitration of Investment Dispute in Nigeria Negate The Sanctity of party autonomy in relation to the agreement of parties to arbitrate?’ The author discusses party autonomy and how different countries view regional and international arbitration in their domestic statutes, the decisions of their respective courts, and the provisions of the bilateral treaties and international conventions of which they are signatories. One outstanding gap of Okorie’s study is that, although it describes ACA as it is with references to many general and specialised works, enabling the reader to explore in depth specific aspects of ACA. The subject of arbitration in Nigeria is not covered in this

study. This current thesis dwells on International commercial Arbitration in Nigeria with references to some Arbitration Laws in Africa.\textsuperscript{89}

4. T Oyekunle, ‘Developing Nigeria into an International Arbitration Centre’ 2004. This is a material which extensively analyses the commercial arbitration within Nigerian Jurisprudence with clarification of its rules starting with the fundamental of its origins which are based on the Common Law, Customary Law and Statute.\textsuperscript{90} The opinions of scholars from various schools of thought are discussed in this material purposely to link it to modern Arbitration legislation both international and local, in an attempt to discover the similarities and differences between them and the extent to which international and local legislation is related to the acceptance of arbitration from the perspective of Nigerian Jurisprudence.

This Material also analyses the legal aspect of the ACA 2004 and its Implementing Regulations and aims to discover the extent of the role of ACA in the enforcement of arbitration agreements. The author shows the need for further modification in that sphere in order to develop the ACA so as to encourage more foreign investment and achieve more efficiency.

5. G.C, Nwakobi, ‘The choice of Arbitration: The Issue of Applicable Law’ Vol.6, No1 2007 Unizik Law Journal.\textsuperscript{91} This Article is aimed at offering knowledge and proof to those who think that the judicial system in Nigeria is an outdated one that cannot adapt to modern business transactions. It concentrates on studying the Nigerian Arbitration Law, revealing its harmony with International arbitration law using a comparative study approach. It deals with the history of arbitration before and after colonization as well as the history of arbitration in Nigeria and the Model Law. It also discusses the pillars of contract within the Nigeria

\textsuperscript{89} Ibid
\textsuperscript{90} T Oyekunle, ‘Developing Nigeria into an International Arbitration Centre’ (SCS Press 2004) 1-5
Arbitration law and the pillars of arbitration in the Model Law. It examines and clarifies the procedures of arbitration and the rules of evidence required in Nigerian law, in the ACA and in the Model Law. The author analyses a number of arbitral awards issued at different times and in different places within Nigeria. He also shows the need for further modifications in that sphere in order to develop the ACA with a view to encourage more foreign investment and achieve more efficiency. The present researcher takes an opposite view to the author, being that the author did not take account of the significant developments made in the ACA 2004 and the Lagos State Arbitration Law and decisions of both the High Court and Supreme Court to see their supportive roles in making sure international commercial arbitration agreements are enforced, unless where there public policy issues. Nwakobi tackles the subject from a Nigerian perspective whereas the present thesis aims to examine the subject from an international law perspective to explain, as mentioned earlier, the adequacy of the ACA and the supportive role of the Nigerian courts in the arbitration process to illustrate the predictability and certainty of the ACA. It is of great importance that new research in Nigeria should consider the findings and results that have been reached in these previous studies. Therefore, this research benefits from them and use some of their findings that are internationally widespread as assumptions in order to achieve the aims of this study and answer the research problems raised in this study. Further, there have been a lot of comments regarding the alleged ineffectiveness of the current ACA when it comes to implementation and enforcement of arbitration agreements, and arbitral decisions that have resulted in tremendous pressure from both the legal and business circles both locally and abroad to reform the ACA.

One popular publication is “Arbitration in the Developing World” 2000 by E Stewart in which the author stated that for a long time, the attitude of many developing countries has been marked by distrust, hesitation or outright rejection, often based on perceptions about
unfortunate past experiences, differences in interests and their lack of involvement in shaping
the ground rules and prevailing practices of the international arbitral process.\textsuperscript{92} It is worthy of
mention that a major revamp in the judiciary had already gained ground in view of the reform

7. In the Investment Promotion Commission Act in 1995, Nigerian Government intention was
to encourage, promote and co-ordinate investments in the Nigerian economy; and place
Nigeria in a position of being able to provide adequate arbitration venues for International
Commercial Arbitration and to reduce the number of African matters going elsewhere for
arbitration. Section 4 subsections (a) (b) (c) (m) (l) of the Act made provisions to support the
ACA in creating a legal environment that could restore investors’ confidence in Nigeria’s
legal system; particularly to create certainty, predictability, finality, cheapness, and
enforceability of arbitration agreements.

The Investment Promotion Commission Act (1995) states: [T]he Commission shall be the
agency of the federal Government to co-ordinate and monitor all investment promotion
activities to which this Act applies; initiate any measures which shall enhance the investment
climate in Nigeria for both Nigerian and non-Nigerian investors; promote investments in and
outside Nigeria through effective promotional means; advise the Federal Government on
policy matters including fiscal measures designed to promote the industrialization of Nigeria
or the general development of the economy; perform such other functions as are
supplementary or incidental to the attainment of the objectives of this Act.\textsuperscript{93}

Ajomo rightly stated that the resolution of commercial disputes is obviously a crucial aspect
of the operation of the national economy and of the judicial system.

\textsuperscript{92} E Stewart, ‘Arbitration in the developing World’ (2000) p28 \texttt{estewart@lawlibrary.ie} visited (2008)
\textsuperscript{93} Report of the Nigerian Investment Promotion (1995) at p 8

8. Emilia Onyema, ‘Arbitration in the New Act’ 2004,\(^94\) states that Ghana’s provisions of arbitration in the new Act are based on internationally-recognised principles, such as the autonomy of the arbitration agreement and supremacy of party autonomy.\(^95\) However, it pushes the boundary of current standards in arbitration laws by, for example, granting the appointing authority an expanded role in the arbitral process. The new Act also breaks new ground in legislating on customary arbitration and granting the settlement agreement from mediation proceedings an enhanced status akin to an arbitral award. In conclusion, this new ADR Act is comprehensive, modern and forward looking and should enhance Ghana’s chances of being chosen by parties’ as seat of their arbitration references within sub-Sahara Africa. The present researcher takes the view that the same development in Ghana is taken place in the ACA and Lagos State Arbitration Law.

9. Ola Olatawura (Nigeria’s Appellate Courts, Arbitration and Extra-Legal Jurisdiction:\(^96\) Facts, Problems and Solutions, volume 28 issue 1 Journal of Arbitration International) asserts that since the Model Law 1985 became the generally adopted standard, local courts' powers and roles in arbitration-related issues have been strictly limited, but contends that sections 34 and 57, Cap A.18 LFN 2004, which are based on Articles 5 and 6 of the Model Law 1985, limit litigation in arbitration matters to only first instance courts. The present researcher takes the view that the current state of the ACA is restrictive of freedom for appeals as it safeguards party autonomy, promotes finality and speedy settlement of disputes. Notwithstanding, sections 34 and 57 should be amended by restricting parties who choose arbitration from exercising their constitutional rights of appeal once they have voluntarily given up that right for arbitration.

---

The present researcher asserts that section 54 of the ACA 2004 that incorporated the NYC and makes it applicable to Nigeria, under sections 4 and 5 have been recognized by the courts for the enforcement of agreements to arbitrate. This has now changed the rulings in *Assurance Limited v Alli; Kano State Urban Development Board v Fanz Construction Co. Ltd* in which Nigerian courts were more willing to review arbitration agreements than enforce it on mandatory.97

10. In the words of Sanders “[m]odernisation of arbitration laws is inspired by the desire to make arbitration more attractive to its users.”98 Carbonneau sees it differently; he argued that “[c]ountries have, without shame, exhibited their desire to attract the business of arbitration” by “climb[ing] on the ‘hospitable-jurisdiction-to-arbitration’ bandwagon.”99 The present researcher takes the view that good law is good law whether it bears economic profits or not. Furthermore, there is no research yet available to prove that economic benefits are the only motive behind the enacting of good arbitration laws as suggested by Carbonneau. In the research work conducted by Drahozal from 1994 through to 1999, the study found a large and statistically significant increase in the number of the ICC arbitration proceedings held in the countries following enactment of arbitration laws with party autonomy at heart.100 The research provides evidence that the enactment of new or revised arbitration statute benefits the enacting countries.

11. Berger (1993) states that parties to international business transactions commonly include an arbitration clause in their contracts, providing for a neutral arbitrator (or arbitrators) to make a binding award resolving any dispute that may arise. The same view was taken by Park (1998) who stated that arbitration of international commercial disputes avoids

---

98 P Sanders, *Years of Arbitration Practice* (Kluwer Law International 1999) at p.12-30

32
“hometown justice” where a dispute is resolved by a court in the other party’s home country.\textsuperscript{101} Buhring-Uhle (1996) finds that arbitration results in an award that is more readily enforceable internationally than a court judgment.\textsuperscript{102} Finally, the ICC revealed an increase in arbitration proceedings, despite increasing competition from a number of national arbitral institutions.\textsuperscript{103}

12. The research by the ICC supports the finding that most parties provide in their arbitration agreement for the arbitration proceedings to be held in a particular place (Bond 1990).\textsuperscript{104} A variety of considerations go into the parties’ choice of the place of arbitration, including the accessibility of the site to the parties, the availability of necessary infrastructure, and the applicability of a treaty (such as the NYC) providing for the enforceability of arbitral awards.\textsuperscript{105}

The present researcher believes that legal and forum considerations should weigh heavily because the law governing the arbitration is typically considered to be the law of the country where the proceedings are held and the award enforced. For instance, the importance of the legal environment to the parties’ choice of place of arbitration led Nigeria (amongst others) to enact or revised its arbitration statutes to make itself more attractive to international arbitration proceedings.

13. Berger takes the same view that these new laws are ‘marketing strategies,’ intended to send a signal to the international arbitration community of the user-friendliness of their legal environment and of the quality of services offered in these jurisdictions.\textsuperscript{106} This is so, as literatures show that a variety of interest groups have an incentive to support the enactment of

\textsuperscript{101} W Park, \textit{International Forum Selection} (Kluwer Law International 1995) at p 5-7
\textsuperscript{104} S R Bond, ‘How to draft an Arbitration Clause’ (1996) Vol 66 Journal of International Arbitration, available at bulletin@iccwbo.org; www.iccbooks.com
\textsuperscript{105} Ibid
\textsuperscript{106} K P Berger, ‘International Economic Arbitration’ (Kluwer1993) at p.6
a new arbitration law, including: arbitration institutions, which earn fees from administering arbitration proceedings; local lawyers, who earn fees representing parties in arbitration; and hotels, which charge for conference rooms and accommodation, this includes good local arbitrators as commercial parties may have a good reason to select at least one local arbitrator on a panel of arbitrators because of his or her knowledge of local arbitration law. Therefore, if enactment of a law increases the number of arbitration proceedings held in the country, local arbitrators will benefit.

14. In one well-known example, during the Parliamentary debates on the Arbitration Act of 1979, LD Cullen of Ashborne predicted that a new arbitration law might attract to England as much as £500 million per year of “invisible exports”, in the form of fees for arbitrators, barristers, solicitors, and expert witnesses. Research shows that supporters of Ireland’s enactment of the Model Law in 1999 also cited the potential economic gains to the country.  

15. Christian Buhring-Uhle found that the number of international arbitration proceedings has increased significantly over the past decade. The vast majority of those proceedings, at least in institutional arbitrations, result from pre-dispute agreements to arbitrate. The present researcher adds that the two most significant advantages of arbitration are enforceability of international arbitration agreements and awards, and the neutrality of the arbitral forum.

16. In his foreword, Lew, Mistelis and Kroll’s essential work, Comparative International Commercial Arbitration, Lew stated that an arbitration agreement is based on party autonomy, which is the foundation of most arbitration as there can be no arbitration between

---

parties that have not agreed to arbitrate their disputes. The contractual nature of arbitration requires the consent of each party to an arbitration to happen. State courts derive their jurisdiction either from statutory provisions or from a jurisdiction agreement. In contrast, the arbitration tribunal’s jurisdiction is based solely on an agreement between two or more parties to submit their existing or future disputes to arbitration under an agreed law, rules, procedures, and non-legal or extra-legal measuring standards.

The entire arbitration may be directly controlled by party autonomy. Accordingly, party autonomy has the greatest control on international commercial arbitration. The effect of it is a major reason why arbitration has achieved worldwide acceptance as the favoured and principal mechanism for resolving disputes arising out of international commercial transactions. Party autonomy has been the main influence on the development of truly transnational rules and practices for International arbitration. However, if party autonomy is hindered by inadequate legal frameworks, the essential objects of arbitration would be defeated. In the United Kingdom, commercial arbitration may have contributed to the success of the City of London as the world’s leading centre for finance and business. According to previous research, the City of London plays a central role

110 J Lew, Applicable Law in International Commercial Arbitration (Oceana Publishing 1978) at p. 439; UNCITRAL Rules Article 33; AAA, ICDR Article 28(1); ICC Article 17(1); LCIA Article 22 (3); CCI of Russian Federation, section 13(1); NAI, Article 46; Stockholm Institute Article 24(1); WIPO Article 59(1); Zurich Article 4
113 Ibid
114 Ibid
in the success and reputation of London’s international arbitration services, which is a major employer and contributor to the UK economy. This is illustrated by the number of people employed in London’s largest 100 law firms, which in 2000 was 16,000, and the fee income for the largest 100 law firms in the United Kingdom, most of which are based in London, which amounted to £8.4 billion. In purely financial terms, the Arbitration and Commercial Court attract over £800 million pounds worth of business each year.

17. Thus Harris, in “The Journal of the Chartered Institute of Arbitrators” vol.70, 2002, stated: “[T]he City of London’s continued success as the world’s leading centre for finance and business depends on the continual success and excellence of the legal system in which it operates”. The present researcher believes that London should not be the only cornerstone of international commercial arbitration and commercial law, but for London to remain the cornerstone, two things must be ensured: first, the continued development, refinement and modernisation of the arbitral systems, and, secondly, the maintenance of a first class international arbitration and mediation system.

Although Nigeria gained political independence in 1960, there was no legislative instrument on international commercial arbitration until it adopted the Model Law on International Commercial Arbitration and promulgated it into the ACA.

ACA Section 54 (1) provides for the application of the 1958 NYC while Section 53 provides for the application of the UNCITRAL Arbitration Rules. However, Section 58 of the Act provides that it shall apply to all arbitrations throughout the country. Because the existing laws have neither expressly repealed nor saved the customary and common laws, it is safe and reasonable to assert that the doctrine of "covering the field" can be invoked to fill the gap. Notwithstanding, the ACA covers international commercial arbitration and the state laws cover both commercial and non-commercial, thus, it can be held that the federal law has

exclusively covered the entire field. As stated at the opening section of this thesis, Nigeria was the first African country to adopt the Model Law. Most of the sections of the ACA have been derived from the Model Law. For example sections 1 to 28 of the ACA correspond with Articles 7 to 33 of the Model Law. Sections 29 to 36 of the Act are purely for domestic arbitration while sections 37 to 42 of the Act deal with conciliation in domestic proceedings. Sections 43 to 55 of the ACA are additional provisions on international commercial arbitration. Essentially Sections 48, 51 and 52 of the Act correspond with Articles 34, 35 and 36 of the Model Law respectively.

In Nigeria it is unsettled what the cut off date for common law is; if the cut off date is 1st January 1900, then in Nigeria today it is only customary and statutory arbitration that are in force. However if the cut off date is not 1st January, 1900, then common law and customary arbitration which is oral will be in force as stated by Ezejiofor. However, both the common law and customary arbitration are effective. In any case, this study is concerned with international commercial arbitration. Whatever the legal regime, arbitration is a private sector judicial proceeding. Consequently, the principle of party autonomy is predominantly subject to the mandatory provisions. Such provisions are anchored on principles of public policy. The ACA will be discussed and analyzed in detailed in chapter four of this research work.
1.7 CONCLUSION

The above introduction in (Chapter One) has explained the basic concepts, and issues in this thesis. The chapter has defined the background of arbitral proceedings, and concepts that will be used in this research work, highlighted the general aim and objectives of the study and explained what has been considered as the research questions.

The chapter has also described the methodology that has been adopted and reviewed the existing literature in the area. Since the commencement of this work, other works on international commercial arbitration have appeared in Nigeria and elsewhere. This shows a mark of awareness of the developments taken place in this area of law. Implicit in the work is an indication of the thesis to be promoted.

The forthcoming chapter is Chapter two. It proceeds to explain what Arbitration is as a Method of dispute resolution, accordingly, this chapter proceeds with an introduction and an overview of Arbitration method, and the general Concept of International Commercial Arbitration. It explains the meaning of the Arbitration Method of dispute Resolution and that International commercial arbitration is one of the various dispute resolution methods apart from court litigation. It discusses the descriptions of Arbitration under various legal frameworks and the ACA section 1 in particular and the Model law Article 7(1). This chapter compares the Tanzania Arbitration Act in the context of a similar description given to the Arbitration method in section 2 of the Tanzania Act which also compares with similar description given in the Kenya Arbitration Act of 1995 section 3. The chapter looks at the arbitration method under the Egyptian Law Concerning Arbitration in Civil and Commercial Matters, Comparing this with the Ghana Alternative Dispute Resolution Act, 2010, Section 2 and explains that the provisions of these laws are all similar to the principle of Article 4 (1) of the Egyptian Code mentioned above and that of the ACA, the AA and the Model Law. The chapter defines Arbitration Agreement and explains that the main rule of the principle under
the ACA section 1, NYC Article II, and AA section 6 is that where two parties freely enter an arbitration agreement there should be as few restrictions as possible on their freedom to formulate their own terms of the agreement in order to design a process which caters precisely to their needs. This chapter discusses the effect of Arbitration Agreement in Arbitration Laws in Africa and explains that some relatively modern Arbitration Laws in Africa including that of the other developing countries mentioned in this thesis are effective and predictable. It explains that the Arbitration agreement is party autonomy oriented, because the parties are the ones that choose the standards of the proceeding since the arbitration as such is based on an agreement between them. The chapter analyses the principal forms of Arbitration as being of two basic forms or types of arbitration are ad hoc and institutional arbitration method. And explains that both of these forms are based on parties’ agreement: it is a choice that the parties must make when selecting arbitration. It illustrates the advantages of ad hoc arbitration as being more cost effective, if properly structured. It explains that the disadvantages of ad hoc proceedings is that the approach can require considerable time, attention and expense with no guarantee that the terms eventually agreed will address all eventualities. This chapter looks at the question whether Ad hoc is less expensive than institutional and explains that in reality, an ad hoc arbitration may not prove to be less expensive than the institutional process.
CHAPTER TWO

Overview of Arbitration Method, and the General Concept of International Commercial Arbitration; The Meaning of Arbitration Method of dispute Resolution

2.1 Introduction

As explained in the introductory part of chapter one of this thesis, International commercial arbitration is one of the various dispute resolution methods apart from court litigation. The method is a mechanism for the final binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with the procedures, structures and substantive legal or non-legal standards chosen directly by the parties.

2.2.1 The description of Arbitration Method

As will be shown in this discussion, most legal frameworks have not defined arbitration method, but have described it instead or have left the definition for the courts to decide. The ACA section 1(a) (instead of defining the method), describes the requirements as arbitration agreement which must be in writing or must be contained in a written document signed by the parties or (b) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement. This is similarly to the AA which did not define arbitration but has rather described the object of the process in AA section 1(a) a method to obtain the fair resolution of disputes, by an impartial tribunal, without unnecessary delay or expense. The drafters may have thought that arbitration was better described than

---

3 C.N. Onuselogu Ent. Ltd. V Afribank (Nig.) Ltd. [2005]1 NWLR; ACA Section 1(a)
4 General Principle of AA Section 1 (a)
be given ambiguous definitions, as seen from the various definitions given at various times. One of such is that Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law. ⁵ Carl Watner defined the method as a consensual process whereby two parties to a dispute agree to accept as final the judgment of a third person or persons in settling the matter in question. ⁶ As Ercus Stewart points out “[a]rbitration is a method of dispute resolution which is not ‘litigation without wigs’, nor is it supposed to be litigation by another name”. ⁷ This is similar to the shorter Oxford English Dictionary that described arbitration as: “the settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain equitable decision.” ⁸

Another good example of such description is the Halsbury’s Laws of England defines the method as “the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal).” ⁹ In Domke’s view, the method is [A] process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal. The above descriptions are all similar considering that they all point to the principle that the parties should agree that the arbitrator’s determination, and award, will be accepted as final and binding upon them. ¹⁰

⁶ C Watner, ‘Voluntaryist’ Number (1997) Number 84
As for Lew, Arbitration method is an institution more easily identified than defined;\textsuperscript{11} thus, the above descriptions are incomplete as they ignored the private element and judicial responsibility of arbitrators. One of such mandatory judicial responsibility is stipulated in section 33 AA 1996 as the duty of the arbitrators to act fairly and impartially, and give each party a reasonable opportunity to put his own case and counter his opponent’s case, while avoiding unnecessary delay or expense. Similarly, the ACA section 14 states that in any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case. This was adopted from the Model law Article 18 which states that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Although, more instructive definitions can be found in the major arbitration texts, like\textsuperscript{12} the “English handbook” which defines arbitration as the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner of another person or persons, other than a court of competent jurisdiction. The description given by Robert is plainer than the others; it simply described the method “as a means by which litigations are withdrawn from the public jurisdictions, in order to be resolved by individuals vested, for a given case, with the powers to judge such litigations”.\textsuperscript{13} But this definition is also weak as it fails to recognize the importance of the agreement of the parties, but, took a narrow view that arbitration is a method by which disputes are resolved by a third and neutral person or persons (the arbitrator/s) specifically appointed. The point is that arbitrator/s are empowered to act by virtue of the authority vested in them by the parties’ submission to arbitration; thus, the arbitrator/s is expected to determine the dispute in a judicial way but not necessarily in accordance with the law, rather by giving equal opportunity to the parties to put

\textsuperscript{11} Julian Lew, \textit{Applicable Law in International Commercial Arbitration} (Oceana 1978) 51
\textsuperscript{12} Julian Lew, \textit{Applicable Law in International Commercial Arbitration} (Oceana 1978) 51; Dore, \textit{The UNICITRAL Framework for Arbitration in Contemporary Perspective} (London: Graham and Trotman, 1993) 17
their case across and by weighing, the evidence put forward by the parties in support of their respective claim. Thus, the method is a private system of adjudication as illustrated in the model law description of what arbitration is.

2.2.1 The Description of Arbitration Method under the Model Law

Just like the ACA, AA and most other conventions, the Model Law has not defined "arbitration", but has given some descriptions of the legal requirements of an arbitration agreement in”14 Article 7(1) as

“Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.15

Although these descriptions are different in context and do not give much detail, they provide an overview of what arbitration is and is not. Furthermore, in examining the structure of some arbitration laws and international conventions, one can have a clearer picture of the method.16

As Kendall rightly stated, there are a few essential features, i.e., arbitration is an alternative to a national court, a private mechanism for dispute resolution, selected and controlled by parties to which a final and binding determination must be the end result. These four features of arbitration help to distinguish arbitration from other dispute resolution mechanisms, therefore it is important to be clear that arbitration is not a national court procedure, not an expert determination,17 not mediation or conciliation and not one of any other alternative dispute resolution mechanisms which provide the basis to help the parties reach an agreed resolution or settlement.

14 Model Law Article 7
15 Model Law Article 7
16 See AA, AAA, ACA, etc
17 See Kendall, Expert Determination (3rd ed sweet & Maxwell 2001) 33
2.2.2 The description of the Method under the ACA and other modern Arbitration laws in Africa

As explained earlier above, the ACA has no definition of arbitration method but has described its legal requirements in the context of a binding and enforceable arbitration agreement and seems to have left the definition with the Courts. This lack of definition is seen by some as one of the many flaws inherent in the ACA. According to Bayo Ojo, the definition is necessary to bring better understanding that Arbitration is private and should be differentiated from the normal national courts in order to avoid it being perceived as the first step to litigation. Whilst Bayo Ojo may be right that a definition of “Arbitration” is necessary, the present researcher is of the view that the absence of a formal definition of the word “arbitration” does not and should not necessarily be a disadvantage in view of arguments that not every legal word or legal concept has a formal definition and sometimes it is preferable not to have one. For instance, Tanzania Arbitration Act did not define Arbitration but stated in section 2 that the “Act“, unless otherwise requires – “the court” means High Court; “Submission” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Similar brief description is given in Kenya Arbitration Act of 1995 section 3, which, rather than defining an arbitration, the drafters of the Act concentrated on defining arbitration agreement. It stated in subsection 1 paragraph 2 that an “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

18 C.N. Onuselogu Ent. Ltd. v Afribank (Nig.) Ltd. (2005) 1 NWLR
19 I McLeod, Classification of English Law (Macmillan 2008) 30
20 Ojo B, Outline Proposal for Reform of Nigeria’s Arbitration and Conciliation Act
21 Tanzania Arbitration Act section 2; Kenyan Arbitration Act section
But the Act gave a very brief description of “arbitration” in section 3 (1) as a means of any arbitration whether or not administered by a permanent arbitral institution. Similar view is expressed in the Egyptian Law Concerning Arbitration in Civil and Commercial Matters, but it would appear that the Egyptian Law defined arbitration method concurrently with arbitration agreement as for instance Article 4 (1) of the Law states that for the purpose of this Law, the term “arbitration” means a voluntary arbitration agreed upon by the two parties to the dispute according to their own free will, whether or not the chosen body to which the arbitral mission is entrusted by agreement of the two parties is a permanent arbitral organisation or centre. It went further in Article 4 (2) to state that the term “arbitral tribunal” denotes the tribunal composed of one or more arbitrators for the purpose of adjudicating the dispute referred to arbitration. The present researcher’s view is that the Egyptian Code mentioned above is more clear than the ACA, AA and the Model Law as it clarifies the meaning of the term “arbitration” and an “arbitration agreement” by first defining them concurrently in Article 4 (2) in order to explain the legal meaning of the term “arbitral tribunal” under the Egyptian law. When compared with the Ghana Alternative Dispute Resolution Act, 2010, the Ghanian Act rather than defining the term “arbitration” has only described the form of an arbitration agreement as the ACA and the AA did, without defining the term “arbitration”. Section 2 of the Ghana Act provides that parties to a written agreement may provide that a dispute arising under the agreement shall be resolved by arbitration.

As discussed earlier above, neither the Model law nor the AA or any Arbitration Law in Africa has actually defined arbitration. All they have done was to give a definition of arbitration agreements and have left the courts to deal with the legal basis of the principle and

---

22 Kenya Arbitration Act 1995 section 3
23 Egyptian Law Concerning Arbitration in Civil and Commercial Article 4.1 and Article 4.2
24 Ghana Arbitration Act section 3 compared with Egyptian Arbitration Law Article 4.1; ACA Section 1
the breath of certain of the exceptions, without talking about the existence of the general principles themselves.\textsuperscript{25}

This is illustrated in the Eastern Saga case:

that it is effective to regard classification or categorisation of legal theories (including the one under discussion-arbitration) as McLeod rightly opined as “only convenient short hand to indicate generalities rather than specifics” practice to allow users of a legal concept to prescribe the meanings they wish to assign to a particular word.\textsuperscript{26}

In addition to other cases, the Eastern Saga case mentioned above shows that the formal definition of the word “law” depends on the school of thought or the societal context as the term could be defined on the basis of an understanding of what “law” is or is not in a given legal environment. The explanation and possible justification for this lack of prescription of a formal definition of arbitration in the ACA and that of the other laws is to avoid the tendency of definitions to limit and cut off important shades of meanings to a word.\textsuperscript{27} Another argument is that the absence of a formal definition of the word “arbitration” allows the parties to choose a definition of “arbitration” that suits them, which is a reflection of flexibility that is a key characteristic of arbitration. Although the word “arbitration” has not been given a formal definition, but section 1 (2) of the ACA shows how comparatively capable the ACA is by describing that arbitration agreement “is any reference in a contract to a document containing an arbitration clause constitute an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract” thus, leaving the courts and academics to make definitions that would be adaptable with changes.\textsuperscript{28}

In the ruling in \textit{MISR (Nig) Ltd. v. Oyedele} referring to Halsbury’s Laws of England, arbitration was defined as the reference of a dispute between not less than two parties for

\textsuperscript{27}ACA 2004
\textsuperscript{28}C.N. Onualseogu Ent. Ltd v Afribank (Nig.) Ltd. (2005) 1 NWLR
determination, after hearing both sides in a judicial manner by a person(s) other than a court of competent jurisdiction.\textsuperscript{29} This definition was followed in \textit{NNPC v. Lutin Investments Ltd}, in which the Supreme Court as per Ogbuagu, JSC adopted the description.\textsuperscript{30} Accordingly, Arbitration can, therefore, be described as a private, voluntary procedure which two or more parties agree to use to resolve their dispute, wherein the arbiter is neutral, the decision is based on the merits and it is final and binding between the parties.\textsuperscript{31}

The ACA section 57, describes certain elements of “arbitration method” to include the relationship of a commercial nature: including any trade, transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.\textsuperscript{32} This is similar to the Model law which did not define “commercial” but explained its meaning in the annex\textsuperscript{33} footnote 2 of Article 1 (1) to include the relationship of a commercial nature: including any trade, transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road. In view of the lack of single definition of arbitration, the description of arbitration will be incomplete

\textsuperscript{29} \textit{MISR (Nig) Ltd. v. Oyedele [(1966) 2 ALR (Comm.) 157]}
\textsuperscript{30} \textit{NNPC v. Lutin Investments Ltd [2006] 1SCM 46 at 72)
\textsuperscript{32} ACA Section 57 compare with Article 1 (1) footnote 2
\textsuperscript{33} Annexed to Article 1 of Model law compare with ACA section 57
without examining its fundamental features and the forms. This will be done in the section of this thesis dealing with the forms of the method.

Following all the descriptions given to arbitration as a method, there has to be an agreement between the parties before they can resort to using the method; accordingly, the forthcoming section looks at the definitions of arbitration agreement under the Model Law, AA and the ACA as the scope of this thesis is based on party autonomy and the enforceability of an arbitration agreement under the ACA in comparison with other jurisdictions mentioned earlier.

2.3 Defining Arbitration Agreement

The definition of an arbitration agreement should be such as to capture the three principles of arbitration that were mentioned earlier in chapter one of this thesis. Accordingly, arbitration agreement may be defined as a binding promise made between two or more parties to a contract to settle the present and/or future disputes through international commercial arbitration instead of dealing with them in the national courts. This definition is important as the scope of the discussion in this thesis will depend profoundly on the definition. The binding force of arbitration and an award comes from the contractual commitment to arbitrate. Thus, an arbitration agreement derives its power from party autonomy the second principle of arbitration as illustrated in the Model Law Article 7 which defined an arbitration agreement as:

"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate contractual agreement."

---

The main rule of the principle of arbitration is that where two parties freely enter an arbitration agreement there should be as few restrictions as possible on their freedom to formulate their own terms of the agreement in order to design a process which caters precisely to their needs. The same principle is enshrined in NYC Art II (1) on recognition and enforcement of foreign arbitral awards; Article II of the convention states:

“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any different which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Article II (1)NYC.”

The same principle is found in the AA section 6 (1) which states that: In this part an “arbitration agreement” means an agreement to submit to arbitration present or future disputes (whether they are contractual or not). Section 6 (2) of the AA states that unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement. This imposes compulsory requirements that ensure arbitration agreements remain a fair way to settle disputes. For example, the agreement to include in the terms of the contract and the law to govern a contractual relation in arbitration stands as a good analogy of the making of an eventual determination of a proper law of a contract less difficult. Could this not be why the provisions of some of the national conflict of laws rules provide that where parties to arbitration in international contracts expressly choose how they want their agreement to be governed their choice and terms of agreement should be respected?

In the ACA a formal requirement that the arbitration agreement between the parties be in writing and should be a matter of substantive law, which covers disputes arising from a

---

35 Ibid.
commercial relationship, to which any form of writing between the parties can constitute such an agreement signifies the respect of party autonomy in the context that the act is worded in such a way to give parties the freedom to shape their agreement. Such agreement may include agreements such as exchange of telexes or telegrams, and even an exchange of points of claim and defence which assert the existence of an agreement to arbitrate which is not denied by the other side. Thus, under section 1 (b) an arbitration clause within the main contract is sufficient for this purpose. Accordingly, no separate arbitration agreement is required. The form requirement under ACA section 1 can also be compared with Article 10 (1) (2) of the Egyptian Arbitration Law which provides: that the arbitration agreement is an agreement by which the two parties agree to submit to arbitration in order to resolve all or certain disputes which have arisen or which may arise between them in connection with a defined legal relationship, whether contractual or not. According to the text, an arbitration agreement may be concluded before the dispute has arisen either in the form of a separate agreement or as a clause in a given contract concerning all or certain disputes which may arise between the two parties. In the latter case, the subject matter of the dispute must be determined in the request for Arbitration referred to in paragraph 1 of Article 30 hereof.

The arbitration agreement may also be concluded after the dispute has arisen, even if an action has already been brought before a judicial court, and in such case, the agreement must indicate the issues subject to arbitration, on penalty of nullity. With this, the reference in a contract to a document containing an arbitration clause will constitute an arbitration agreement, provided that such reference is such as to make that clause an integral part of the contract which is similar to the AA 1996, and the ACA and most modern Arbitration laws in Africa. Indeed, there are some common features discernable in most of the arbitration laws enacted in Africa since 1984. Although no two laws are identical, but there are some general or consistent trends. Most of the features are features drawn from or influenced by the
arbitration laws of most Western countries, but to a greater extent, by the Model law on international commercial arbitration.

2.3.1 The Effect of the concept of Arbitration Agreement in Arbitration Laws in Africa

Some of the relatively modern Arbitration Laws in Africa including that of other developing countries mentioned in this thesis are replicas of the Model law. These new arbitration Laws use the more modern and interchangeable phrases “arbitration agreement” or arbitration clause” instead of using “submission.” A comprehensive definition was made to include the two technical meanings of an “arbitration agreement.” That is, “the arbitration clause” which only relates to future disputes, and the “submission,” relating to an existing dispute. The Tunisian Code for example, defines an arbitration agreement as “... an undertaking of the parties to settle by arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.” With this, an arbitration agreement may be in the form of an arbitration clause or a submission” (Article 2). The Arbitration Act of Tanzania 1971 states that “Submission” means a written agreements to submit present or future differences to arbitration whether an arbitrator is named therein or not.

What is significant in these provisions is the recognition that present and future disputes are arbitrable or that an arbitrator need not be named in the agreement. The validity of arbitration agreements in relation to future differences was first recognised as an international

---

36 Eg., the 1965 Arbitration Act of South Africa provides that “arbitration agreement” means a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not” (section 1); The Djiboutian Code uses the terms “an agreement to arbitrate,” or “the submission” (Articles 2, 3 and 4)
37 Model Law, Article 7 (1); The Tunisian Code, Article 3
38 Model Law Article 7 (1); Tunisian Code, Article 4; The Djiboutian Code, Article 2; The Kenyan Arbitration Act, Section 4 (1)
39 The Tunisian Code, Article 3
40 See also Egyptian Law, Article 10
41 The Arbitration Act of Tanzania, section 2
rule in 1923. However, this feature was not always present in the old arbitration legislation. For instance, Article 501 of the Egyptian Code of Civil Procedure required, *inter alia*, that the subject matter of the dispute should be defined in the arbitration document or during the pleading otherwise the arbitration shall be deemed null and void. Further, Article 503 (3) provided that the arbitrator should be identified in the arbitration agreement or in a separate agreement. The implication of this was apparent that the parties cannot appoint their arbitrators indirectly by agreeing to the rules of an arbitral institution. Also, any agreement to submit future disputes will be impossible in some cases except if the disputes are identified in the pleadings. And such a reference will require the naming of an arbitrator with the effect that the agreement may be void if before the dispute arises the designated arbitrator has died, incapacitated or is otherwise disqualified.

As illustrated above, the situation has changed in most of the recent arbitration laws in Africa and most of the developing countries, as almost all modern arbitration statutes define an agreement to arbitrate in such terms that will show that party autonomy is accorded respect. These features are not unique as they were in the older arbitration laws and recognised in case law. However, what is innovative is that what constitutes “writing” in the new laws is flexible and consistent with the modern means of business communication and incorporates the principle of party autonomy. Also, an arbitration agreement by implication of incorporation in a standard form is possible provided it is recorded in writing.

42 The first multilateral treaty to recognise the validity of arbitral agreement for future disputes was the Protocol on Arbitration Clauses, done in Geneva, 24 September, 1923, 27 L.N.T.S. 157
44 Egyptian Law, Articles 10 and 502 (1) of the former Code of Egypt provided that an arbitrator should not be a minor, interdict, deprived of his civil rights because of a criminal sentence or bankrupt unless he restores his reputation. The 1994 Egyptian Law contains similar grounds for the disqualification of an arbitrator (article 16 (1); however, under that law, arbitrators need not be named in the agreement and institutional arbitration is expressly recognised.
45 Egyptian law, article 12; Nigerian ACA section 1; Tunisian Code Article 6; Djiboutian Code, article 2 (1); The Kenyan Arbitration Act, section 4 (2) (3) (a)
As the Tunisian Code of 1993 partly provides:

“The arbitration agreement is considered to be established in writing when it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or all other means of communication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract (Article 6).”

Accordingly, the need for writing will make for certainty and predictability as to the essential terms of the agreement to arbitrate. This will make enforcement by the court possible and easier. A written agreement will be easily identifiable especially during the challenge of an award or in an application to set it aside as required by most national laws. By this, the confusion and excessive litigation involved in contesting what in customary law arbitration constitutes a voluntary submission, or a prior agreement to be bound will be minimised. An ordered system for the appointment, removal of and disqualifications of arbitrators are or should be predicated on a written arbitration agreement. A concept easily assumed in the recent arbitration laws in Africa is the concept of the separability of an arbitration clause from the main contract. It may be joined with another concept, that of the competence of the arbitral tribunal to rule on its jurisdiction if challenged. These principles are now settled in most arbitration laws in Africa as they are important principles in arbitral law and practice more out of legal expediency than due to their legal correctness. For arbitration has to be effectively and fairly conducted, the principles must be conceded. Otherwise the institution cannot develop further.

On the above point, A Azouzu is of the view that, from an era where arbitral agreements were in their rudimentary stage, the lawmaker has developed the instrument to recognise its applicability to future disputes without the necessity of expressly naming an arbitrator therein.

---

47 Tunisian Code of 1993 Article 6
48 The Djiboutian Code, Articles 3 & 11; Tunisian Code, Article 61; Nigerian ACA section 12; Egypt law, Articles 22 & 23; Kenyan Arbitration Act, section 17; Model Law, Article 16 (1)
as was hitherto. These developments are for the predictability of how commercial disputes should be settled when they arise so that the parties would know where they stand before hand. All in all, the predictability of how the dispute is to be settled is subject to agreement between the parties.

2.3.2 The Arbitration agreement as Part autonomy Oriented

The parties are the ones that choose the standards of the proceeding since the arbitration as such is based on an agreement between them. This is so, regardless of whether the arbitral proceeding is ad hoc or institutional, the foundation of arbitration remains the same, as arbitration is founded on the agreement of the parties.

This means that the arbitral tribunal should be chosen by the agreement of the parties to resolve a specific dispute and given directions on how to deal with it. This authority is derived from the parties and the scope of the authority is determined by the agreement between the parties. In the majority of the arbitral proceedings, the arbitrators do not have to look beyond the contractual agreement to decide the outcome of the dispute, as the contract itself regulates the obligations and responsibilities which the party must be held liable if there is failure to perform. The relationship is such that an international commercial contract creates and exists within a legal framework to supervise the legality and interpretation of the contract, the parties’ duties and rights, mode of performance and the consequences of any breach of the contract. Notwithstanding whatever supervision there might be, the parties are in charge of the proceedings and have the full right to manage their proceedings within a permitted legal framework. Thus the agreement of the parties creates the procedure for the

---

50 H Crowter, *Introduction to Arbitration* (LLP Reference Publishing 1998) 6; Model Law Article 2, it states that in interpreting this law, there should be regard to its international origin and to the need to promote the principles of party autonomy. [www.sooblaw.com](http://www.sooblaw.com) (obtained 3/8/06); [www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html); Article 7, 8, 9 on arbitration agreements
arbitral proceeding which can be kept from national law so long as the parties are in agreement. To re-emphasise: an “international arbitration agreement” in this thesis refers to a method by which commercial disputes can be settled by a third and neutral person or persons (arbitrators, that have been specifically appointed by contractual agreement of the parties. Accordingly, the arbitrators are empowered to act by virtue of the authority vested in them by the parties’ submission to arbitration; and are expected to determine the dispute in a contractual way; this means a determination of the dispute based on the arbitration agreement. Thus, as arbitration is a private system of adjudication; it is the parties themselves, and not the state, which control the powers and duties of the arbitrators. The solution or decision of the arbitrators (the award) is final and conclusive and puts an end to the parties’ dispute. In this way, the award of the arbitrators binds the parties by virtue of the implied undertaking when agreeing to arbitration that they will accept and voluntarily give effect to the arbitrator’s decision. The ordinary courts will only interfere within the strict confines of the place of arbitration in order to give effect to the arbitration agreement, regulate the arbitration proceedings or to give effect to the award in situations where parties fail to comply voluntarily.

These characteristics are appropriate to all types of arbitration: commercial, industrial, labor and professional and apply at the domestic and international level. On the domestic plane, most countries have some legal provisions for the regulation of arbitration in general. Such provisions define the right parties have to submit to arbitration, provide the rules for the conduct of arbitration and specify what matters may be submitted to arbitration. Some countries have further specific legislation relating to particular types of arbitration (for example, labour arbitration) or a requirement for disputes of a certain kind to be resolved exclusively by arbitration (statutory arbitration). Whilst there are characteristics that are
appropriate for all types of arbitration, there are also principal forms of the method which will be discussed below.

2.4 Principal Forms of Arbitration

The two basic forms or types of arbitration are ad hoc and institutional arbitration method.\(^{52}\) Both of these forms are based on parties’ agreement: it is a choice that the parties must make when selecting arbitration. By way of explanation, Ad hoc arbitration is where the arbitration mechanism is established specifically for the particular dispute; and where the parties are silent although not always, as they may agree it will be resolved under AA 1996 and have not selected an institutional arbitration, the arbitration will be ad hoc. This is explained in ACA sections 6 and 7 and established also in *Ogunwale v Syrian Arab Republic* that when agreeing on ad hoc arbitration the parties’ also agree on the arrangements for initiating the procedure, selecting the arbitrators and determining the procedural rules.\(^{53}\) In Ogunwale case cited above, the Court held that when the parties fail to agree on these issues, for example, they have agreed only “arbitration” or “arbitration” in [a nominated city]”, usually default provisions of the law of the place of arbitration will be applicable. Thus, the essential characteristic of ad hoc arbitration is that it is independent of institutions. The arbitration system selected or provided for in the agreement does not exist except in the context of the dispute between the parties. The arbitration system is activated if a dispute arises between the parties and one of them calls for arbitration or otherwise initiates the procedure in accordance with the terms of the arbitration agreement or, where appropriate, by some subsidiary rules that have been selected to apply to arbitration.

Whilst every arbitration institution has its own characteristics and therefore mechanisms for establishing and controlling the arbitration process, with ad hoc arbitration, there are none of


\(^{53}\) ACA sections 6 and 7; *Ogunwale v Syrian Arab Republic* (2009)
these procedures. For this reason, in ad hoc arbitration the parties have maximum degree of flexibility to agree and specify those aspects of the procedure that they wish, subject only to any mandatory law and public policy issues in the place of arbitration.\textsuperscript{54} This would include how the arbitrators are to be appointed, how many arbitrators there should be, the procedure to be followed, the arrangements for the presentation of evidence and how the arbitration should be pleaded. The parties can also agree on the timetable for the arbitration and any other special requirements to reflect the specific characteristics of the contract in dispute. The express selection of the arbitration and appropriate arbitration rules is a relatively simple way to regulate an ad hoc arbitration. Such rules will generally provide for all or most of the above matters. Particularly popular for international arbitration are the UNCITRAL Rules.\textsuperscript{55} Although initially intended for use in non-institutional arbitration it is now also used in some institutional arbitration.\textsuperscript{56} The one exception where there may be the involvement of an institution in an ad hoc arbitration is with respect to the appointment of the arbitrators. On occasion, where parties are unable to agree, they can select an appointing authority which has responsibility for selecting and appointing the arbitrator.

Both ad hoc and institutional arbitration are also recognized and used in Nigeria. This is understood to apply where parties submit their disputes to an arbitration procedure, which is conducted under the auspices of or administered or directed by an existing institution.\textsuperscript{57} These institutions aim to provide an arbitration service specifically, or within the context of their overall activities and objectives, and due to their infrastructure will in some cases assist with the running of the arbitration. Due to the lack of accurate statistical information, no one really

\textsuperscript{54} Model law Article 19
\textsuperscript{55} UNCITRAL Model Rules; CPR Institute for Dispute Resolution; Sanders, 'Commentary on UNCITRAL Arbitration Rules', II YBCA 172 (1977) 173; The American Arbitration Association; The London Court of International Arbitration; The Inter-American Commercial Arbitration Commission
\textsuperscript{56} See HKIAC and CRCICA
\textsuperscript{57} Kuala Lumpur Regional Centre for Arbitration; The Cairo Regional Centre for International Commercial Arbitration; The ICC Rules; The LCIA Rules; The IBA Rules etc
knows how many arbitration matters take place in any year, and whether there is more ad hoc or institutional arbitration.

2.4.1 Analysing ad hoc arbitration

By way of analogy, an ad hoc arbitration is one which is not administered by an institution such as the ICC, LCIA, DIAC or DIFC. The parties will therefore have to determine all aspects of the arbitration themselves - for example, the number of arbitrators, appointing those arbitrators, the applicable law and the procedure for conducting the arbitration.

Provided the parties approach the arbitration with cooperation, ad hoc proceedings have the potential to be more flexible, faster and cheaper than institutional proceedings. The absence of administrative fees alone provides an excellent incentive to use the ad hoc procedure. The arbitration agreement, whether reached before or after a dispute has arisen, may simply state that 'disputes between parties will be arbitrated'. It is infinitely preferable at least to specify the place or 'seat' of the arbitration as well since this will have a significant impact on several vital issues such as the procedural laws governing the arbitration and the enforceability of the award. If the parties cannot agree on the detail of all unresolved problems and questions relating to the implementation of the arbitration - for example, how the tribunal will be appointed or how the proceedings will be conducted – will be determined by the 'seat' or location of the arbitration. However, this approach will only work if the seat of the arbitration has an established arbitration law. Ad hoc proceedings need not be kept entirely separate from institutional arbitration. Often, appointing a qualified arbitrator can lead to the parties agreeing to designate an institutional provider as the appointing authority.

---

60 Ibid
61 Blanke G, Institutional versus Ad Hoc Arbitration: A Practical Alternative (Published on online: Academy of European Law, 2008) p 7
Additionally, the parties may decide to engage an institutional provider to administer the arbitration at any time.

2.4.2 Advantages of ad hoc arbitration

A properly structured ad hoc arbitration should be more cost effective, and therefore better suited to smaller claims and less wealthy parties. The ad hoc process places a heavier burden on the arbitrator to organise and administer the arbitration. A distinct disadvantage of the ad hoc process is that its effectiveness is dependent on how willing the parties are to agree on the arbitration procedures at a time when there may already be a dispute. The failure of one or both parties to fully cooperate can result in time spent resolving issues or an ultimate recourse to court. A primary advantage of the ad hoc process is its flexibility, enabling the parties to decide the dispute resolution procedure themselves. However, this will of course require a greater degree of effort, cooperation and expertise from the parties to determine the arbitration rules.\(^6^2\) Often the parties may misunderstand each other if they are different nationalities and come from different jurisdictions, and this can cause delays. Again, once a dispute has arisen this may frustrate the parties' intention to resolve the dispute on an ad hoc basis. Such situations can be avoided if the parties agree that their arbitration should be conducted under certain arbitration rules. This will result in reduced deliberation and legal fees, and parties will be able to begin proceedings early as they will not have to engage in negotiating specific rules. The UNICITRAL Arbitration Rules, revised in 2010, are among the most suitable rules for this purpose. Another reason why ad hoc arbitration is less

\(^6^2\)Abraham C, Importance of Institutional Arbitration in International Commercial Arbitration, Symposium on Need for Speed: International Institutional Arbitration, Federation House, New Delhi, India, November 22, 2008 UNICTRAL Model Rules; CPR Institute for Dispute Resolution; Sanders, ‘Commentary on UNICTRAL Arbitration Rules’, II YBCA 172 (1977) 173; The American Arbitration Association; The London Court of International Arbitration; The Inter-American Commercial Arbitration Commission; See HKIAC and CRCICA Kuala Lumpur Regional Centre for Arbitration; The Cairo Regional Centre for International Commercial Arbitration; The ICC Rules; The LCIA Rules; The IBA Rules etc
expensive than institutional arbitration is that the parties will only have to pay fees for the arbitrators, lawyers or representatives and the costs incurred in conducting the proceedings rather than paying fees to an arbitration institution. If the amount in dispute is considerable, these fees can be prohibitively expensive. The arbitrators' fees will be negotiated directly between the parties and the arbitrators, allowing them the option to negotiate, whereas in institutional arbitration the arbitrators' fees will be set by the institution. The disadvantage here is that this can involve an uncomfortable discussion and, in certain cases, the parties may not be able to negotiate a fee reduction. The arbitrators are the 'judges' in the case and no party would wish to upset the judge, particularly before the proceedings have even commenced.

2.4.3 Disadvantages of ad hoc proceedings

According to Sundra Rajoo, parties wishing to include an ad hoc arbitration clause in the underlying contract between them, or seeking to agree the terms of arbitration after a dispute has arisen, has the option of negotiating a complete set of rules which meet their needs.63 However, this approach can require considerable time, attention and expense with no guarantee that the terms eventually agreed will address all eventualities. Furthermore, if parties have not agreed on arbitration terms before any dispute arises they are unlikely to fully cooperate in doing so once a dispute has arisen. Bodies such as UNCITRAL have rules available which are designed specifically for ad hoc proceedings.64 Other options available to parties wishing to proceed in this way, who are not in need of rules drawn specifically for them, include:65

---

64 UNCITRAL Model Rules 1985
65 ICC Rules, LCIA Rules, AAA Rules
• using or adapting a set of institutional rules such as the ICC Rules of Arbitration;
• incorporating statutory procedures, such as the AA 1996;
• adopting an ad hoc provision from another contract.

These options all carry certain risks. For example, where rules drawn up by an institutional provider are incorporated into ad hoc proceedings existing provisions which require administration by the provider - such as making appointments - will need to be amended or excluded. This runs the risk of creating ambiguities, or of the parties unintentionally creating an institutional process.

2.4.4 Ad hoc – less expensive than institutional?

In reality, an ad hoc arbitration may not prove to be less expensive than the institutional process. Firstly, the parties are required to make arrangements to conduct the arbitration but they may lack the necessary knowledge and expertise. Arbitrations are generally conducted by people who are not lawyers - however, this may result in misinformed decisions especially in international commercial arbitration. Secondly, where there is a lack of cooperation between the parties or delay on the part of the tribunal conducting the arbitration or writing the award, a party may need to seek court intervention. Litigation costs would not only negate the cost of the advantages of ad hoc arbitration, but also the parties' intention to avoid the courts through alternative dispute resolution methods. Thirdly, in complex cases the tribunal may seek to appoint a secretary to deal with the considerable administrative work involved. The additional costs of the secretary's fees will add to the cost burden of the arbitration.

67 Ibid
Although ad hoc arbitration is more flexible and often best suited to the parties' individual needs, it will only be cost effective where:

- there is the required cooperation between the parties;
- the parties understand arbitration procedures; and
- the arbitration itself is conducted by experienced arbitrators.

### 2.4.5 Analyzing Institutional Arbitration

Whilst ad hoc arbitration is popular, an institutional arbitration is one in which a specialised institution intervenes and takes on the role of administering the arbitration process. Each institution has its own set of rules which provide a framework for the arbitration, and its own form of administration to assist in the process. Some common institutions are the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Dubai International Finance Centre (DIFC) and the Dubai International Arbitration Centre (DIAC). There are approximately 1200 institutions worldwide which offer arbitration services, and some will deal with a particular trade or industry. The present researcher is of the view that, care should be taken in the selection process as some of the institutions may act under the rules which may not be adequately drafted. However, the contract between two parties will often contain an arbitration clause which will designate a particular institution as the arbitration administrator which the parties are familiar with. Thus, if institutional administrative charges are not a concern for the parties, this approach is usually preferred to less formal 'ad hoc' methods of arbitration.

---

69 LCIA; [www.lcia-arbitration.com](http://www.lcia-arbitration.com)
70 ICC; [www.iccwbo.org/index_court.asp](http://www.iccwbo.org/index_court.asp)
71 DIFC; See also, [www.crcica.org.eg](http://www.crcica.org.eg); [www.klrca.org](http://www.klrca.org); [www.gafta.com](http://www.gafta.com); [www.fosfa.org](http://www.fosfa.org)
72 DIAC
2.4.6 Advantages of institutional arbitration

For those who can afford institutional arbitration, the most important advantages are:74

- the availability of pre-established rules and procedures which ensure the arbitration proceedings begin in a timely manner
- administrative assistance from the institution, which will provide a secretariat or court of arbitration;
- a list of qualified arbitrators to choose from;
- assistance in encouraging reluctant parties to proceed with arbitration; and
- an established format with a proven record.

Institutional arbitration saves parties and their lawyers the effort of determining the arbitration procedure and of drafting an arbitration clause, which is provided by the institution. Once the parties have selected an institution, they can incorporate that institution's draft clause into their contract. These clauses can be amended from time to time by the institution, drawing on experience in conducting arbitrations regularly, and ensures there is no ambiguity in relation to the arbitration process. An institution's panel of arbitrators will usually be made up of experts from various regions of the world and include many different vocations. This allows parties to select an arbitrator possessing the necessary skill, experience and expertise to provide a quick and effective dispute resolution process. It should be noted, however, that the parties merely nominate an arbitrator - it is up to the institution to make an appointment and the institution is free to refuse an appointment if it considers that the nominated arbitrator lacks the necessary competence or impartiality.

A further benefit of institutional arbitration is that the parties and arbitrators can seek assistance and advice from institutional staff. In a less formal ad hoc arrangement, parties to the arbitration would have to approach the court in order to take the arbitration forward and this would inevitably incur further expenditure. One of the perceived advantages of arbitration generally is that it provides a final and binding award which cannot be appealed. However, there is an inherent risk that a mistake made by a tribunal could not be rectified at a later stage. To counterbalance this risk, some institutional rules provide for scrutiny of the draft award before the final award is issued. A dissatisfied party could then appeal to an arbitral tribunal of second instance which would be able to confirm, vary, amend or set aside the draft award. Less formal processes provide no such option.

2.4.7 Disadvantages of institutional arbitration

The present researcher agrees with the view that inasmuch as there are advantages in institutional arbitration as mentioned above, the primary disadvantages are: administrative fees for services and use of the facilities, which can be considerable if there is a larger amount in dispute - sometimes, more than the actual amount in dispute; bureaucracy from within the institution, which can lead to delays and additional costs.75

Whilst the main focus of this thesis is on a discussion of ACA to show that it is effective as the AA 1996 and the Model law, it is also important to look at the roots of the theories of arbitration as a method and show which of the theories has influenced or is applicable in the Nigeria arbitral system.

---

75 A good example of unnecessary delay is *NNPC case*, which started on 23/12/92 and ended in 2006.
2.5 Theory of Arbitration

As mentioned earlier in chapter one and other sections of this thesis, Arbitration in Nigeria as those of other countries basically depend on the agreement of the disputing parties. Nevertheless, in Nigeria it is recognised that the state provides the basic legal framework within which arbitration takes place. In other words, the state gives legal backing through the legislation in the arbitral process. This is illustrated in ACA sections 5 (1) which states that if any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings. The invocation of the process however still depends on the parties agreeing to use this private method to settle their differences or disputes. These apparently conflicting roles of the state and the parties gave rise to some diametrically opposed theories attempting to explain the juridical nature of arbitration. Each theory has a policy implication, especially as to how the legislature will treat arbitration and the autonomy to be given to the parties to an arbitration agreement in international commercial arbitration. The discussion of this topic will be based on the seminal work of J Lew in which he identified four theories with respect to the juridical nature of arbitration; namely: the jurisdictional or seat, the contractual, the mix or hybrid, and autonomous theories. For the purposes of this thesis, three of the theories will be discussed.

The present researcher considers these three theories credible. The fourth theory, which is also the most recent, denies the validity and reality of the jurisdictional, contractual and mixed theories of arbitration. Instead, it prefers to look at the “use and purpose” of arbitration

in order to determine its nature. The autonomous theory is the intellectual foundation for the
denationalisation of arbitration and unlimited party autonomy. However, it is crystal clear
that international commercial arbitration cannot be an autonomous institution without any
legal backing, both at the national and international levels. Only ICSID regime nearly
achieved that. But the later, admittedly found on a multilateral treaty, in most of its features,
does not completely delocalise arbitration to the extent of making it an “autonomous”
institution. Any attempt to make arbitration autonomous will lead to a problem which will
also expose its inherent weaknesses as a contractual and private adjudicative process.

The contractual nature of arbitration cannot be easily denied or emphasised without doing
violent harm to its very foundation. Likewise, excluding or undermining the jurisdictional
basis for arbitration may lead to the defeat of the ultimate purpose of the process, that of
rendering an effective and enforceable award. Thus, any theory of arbitration that purports to
disregard or undermine the two basic planks on which the arbitral process is built does not
deserve any serious consideration. The first theory put forward to explain the juridical nature
of the arbitral process is the jurisdictional theory.

2.5.1 Jurisdictional Theory

This theory, which is positivist in orientation, is based on the premise that the judicial power
is the exclusive preserve of the state and that what the arbitrators exercise, are powers given
to them by the state. The jurisdictional theory attaches consideration importance to the place
of arbitration, the law of arbitration and to the influence of the court at the place of
arbitration. By this theory, an arbitral proceeding must conform to the mandatory rules of the
place of the proceedings in order to be valid and effective. According to Hong-Lin Yu,

78 using delocalisation as an example, for both French and US courts who have placed more

78 According to Hong-Lin Yu, ‘Contemporary Asia Arbitration’ (2008) 1
emphasis on contractual element and have enforced some arbitral awards which have been set aside at the place of arbitration; whereas the English courts are still embracing the jurisdictional nature by following LD Mustill’s statement that at all events it cannot be the law of England, for otherwise the House would have dismissed at the very outset the attempt in *Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd.* to procure an interim injunction during the currency of an ICC Arbitration. The “seat of the arbitration” is the one that governs the validity of the entire arbitral process even if it involves international aspects. This means that an arbitral tribunal should respect the mandatory norms of the country (place) where it sits. The parties in the exercise of their contractual freedom may choose the substantive law of the contract or the internal procedural rules applied by the arbitrator; but they do not have control of the seat except indirectly through the choice of the situs for arbitration.\(^7^9\) The court at the place of an arbitral proceeding has the power to enforce the arbitration agreement or to set aside an award or to deny recognition and enforcement to the same on grounds of what is public policy in that place. The court may even exercise its statutory power by removing the arbitrator. This is because the lex arbitri contains a body of rules which sets a standard external to the arbitration agreement and the wishes of the parties or the directions of the arbitrator for the conduct of the arbitration. The jurisdictional theory seems to form the foundation of the power of the court to intervene in the arbitral process.

According to Mustill and Boyd:

“The arbitrator is a delegate of the judicial powers which are essentially the property of the State. The power of enforcement or control is attached to the arbitral process because that process belongs to the State, even if called into existence by a private bargain. The State has the right and duty to ensure, through the medium of the courts, that the reference is conducted in accordance with procedural norms which

the State itself lays down”. 80

With regard to the jurisdictional theory, therefore, the arbitral process is authorised by a statute enacted by the state, and the latter (through one of its organs, the court), will intervene in the arbitral process. This is done in order to bring the process in line with the public policy of the state, its procedural norms, or other laws, when the arbitral process is being abused, or in order to use the state’s coercive powers to reinforce the arbitral process at the latter’s points of weakness. In most cases, national courts intervene in the arbitral process in order to enforce or to ensure the observance of the state’s international arbitral obligations. In comparison with the court, arbitration is seen as a subordinate dispute resolution method authorised by the state. 81 Following this view, Francis Mann went further that every arbitration is a national arbitration, that is to say, subject to a specific system of national law as every power or right of a private person is inexorably conferred by or derived from a system of municipal law. 82

Thus, a cardinal feature of the jurisdictional theory is the localisation of the arbitral process to a specific national system. This is done in order to accord the outcome of the process (the award) a nationality, with the hoped, of ensuring its effective enforcement. This was exactly the view of Judge Lagergren in B.P. v Libya, 83 while disagreeing with the views expressed in previous awards. 84 The tribunal in the B.P.’s case also noted that “the attached to a developed legal system is both convenient and constructive.” Underlying the jurisdictional theory is the political implication of arbitration. States see it as an attribute of their territorial (judicial) sovereignty that every controversy of a legal nature arising within their domains has to be

81 Okpuruwo v Okpokam (1988) 4 NWLR (Pt. 90) 554, 585 per Oguntade, JCA
82 FA Mann, ‘Lex Facit Arbitrum’ (reprinted in a Arb Inter 1986) 241, 244, 245
83 British Exploration Company (Libya) Ltd / Government of The Libyan Arab Republic (1979) 53 I.L.R 300, 309
settled by their courts. But the practice of arbitration, which is a private, but judicial process, is seen as a challenge of the state's monopoly of the apparatus of justice and thus, its sovereignty. However, in *QH Tours Ltd & Anor v Ship Design & Management (Aus) Pty & Anor.*, the Australian Court of Appeal noted that arbitration does not entail an exercise of the judicial power of the constitution which is only exercisable by the judiciary as the third arm of Government. Nevertheless, it was conceded by the Court that an arbitrator may by contract between the parties be authorized to make decisions which are in their nature judicial. In fact, the early days of the development of arbitration in the U.K, U.S.A and France were characterised by judicial and academic hostilities. The United States of America acceded to the NYC only in 1970. The delay was attributed not only to constitutional obstacles but also to the fact that arbitration was seen as a challenge to the personal jurisdiction of the U.S. over its nationals and their properties. The U.S. Supreme Court rightly observed that the Arbitration Act of 1925 reversed “centuries of judicial hostility to arbitration agreements...”

As Nigeria was influenced by the English Common law system, it appears that the jurisdictional theory is the one that appeals to her as illustrated in *M.V. Lupex* case that the court has a supervisory role thus, ACA allows some minimal measure of national control, as seen in England. But unlike France and some other Western European states and countries

---

*85 QH Tours Ltd & Anor v Ship Design & Management (Aus) Pty & Anor*
*88 Fritz Scherk v Alberto-Culver Company, 417 US 506, 510-511; Sturges & Murphy, ‘Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act” (17 Law & Contemp. Prob. (1952) 580*
that have fully adopted the Model Law have delocalised arbitration more than Nigeria and UK. 89 This has however been contended, in defence of the Malaysian position, that for developing states that are in need of foreign investment and wish to create a legal structure and environment favourable to international commercial arbitration, delocalisation is “inevitable”. 90 Whilst this point is appreciated, it should also be recognised that the financial gains and speed which may be derived from delocalisation are not the only essence of arbitration. Also, judicial control is not the only policy consideration surrounding the court’s involvement in the arbitral process. Judicial support and assistance, however minimal, are advantageous for the system and beneficial to the parties to arbitration, which as a private process. 91 Nigeria has a supportive attitude towards international commercial arbitration 92 following the customary rule that arbitration agreement is consensual and its adoption of the Model law and Rules. The jurisdictional and contractual theories appear to be acceptable as the state will allow arbitration by providing the basic legal framework for its conduct but will couple this with a measure of supervision. The present researcher agrees with the view that the consequences of allowing arbitration to float without any judicial supervision may be disastrous, especially for parties and the state and ultimately for the institution of arbitration. 93

89 Eg., the Judicial Code of Belgium (as amended in 1985), art. 1717 (4); Swiss Private International Law Act (Chapter 12) (International Arbitration) 1987, art 192 (1); Draft Arbitration Act of Sweden 1994, section 52
90 P.G Lim, ‘Means of Dispute Resolution in Malasia’ (58 JCI Arb 1992) 34, 35
93 The present researcher is of the view that the relative autonomy allowed international commercial arbitration does not imply loss of all State control. Such arbitration will not be so drastic a ‘removal of a dispute from the ordinary courts of law... as to revive memories of the exorbitant 19th century regime of capitulations and mixed tribunals which betrayed so obvious a denial of sovereignty.’
The existing legal regimes in Nigeria support jurisdictional theory, but also recognise the contractual theory of arbitration. For an arbitration to be validly conducted in Nigeria, all its incidents and ingredients, from the arbitration agreement to the award must comply with the mandatory provisions of the ACA and other laws and treaties of Nigeria. The courts are given the powers to assist, support and to minimally supervise the arbitral process as it has been doing in other forms of contracts. The present researcher re-asserts that Nigeria’s concept of arbitration from the customary arbitration era to ACA on international commercial arbitration is that arbitration is consensual. This is one of the principles enshrined in both the NYC and the Model law which are based on the principles of contract with an understanding that arbitration is an essentially consensual process which attributes primacy to the cardinal of the principle of party autonomy.

2.5.2 The Contractual Theory

In Nigeria it is well understood and accepted that arbitration is founded on contract, and is voluntary. Arbitration is based on a contract thus it is an aftermath of a contract. The relationship between the disputant *inter se*, and between the disputants and the arbitrator is governed by the implied and express terms of the agreement to arbitrate. If parties choose an arbitral institution, it has been stated that their relationship with that institution is contractual.

According to one other version of this theory, there can “never” be arbitration without a valid agreement by the parties to submit their disputes or differences to this type of private determination. The present researcher agrees with the view that the validity of an arbitral proceeding and the binding force of international arbitral award are derived from the contractual commitment to arbitrate in and of itself, that is to say, with a national legal system

---

96 A Redfern, ‘Enforcement of International Arbitral Awards and Settlement Agreements’ 54 JCIArb (1988) 157
treatting it as other forms of contracts. This is the underpinning idea of party autonomy.\textsuperscript{97} In Nigeria, the parties’ agreement to arbitrate is prime and it is what determines which disputes are to be submitted to the jurisdiction of the arbitrator, the procedure and the law they would like the arbitrator to apply. Most importantly is that the jurisdictional competence of the arbitral tribunal is derive from the consent or will of the parties and consequently, the tribunal’s powers and duties are those that the parties have agreed to confer, and must be legal. According to the Supreme Court of Nigeria, in \textit{Lupex} case, the legal basis of all arbitrations is voluntary agreement. The voluntary submission of both parties of their cases or points of differences between them to arbitration is basic to a binding award. Existing and previous arbitration laws in Nigeria recognise the contractual implications of the parties’ arbitration agreement.\textsuperscript{98} The ACA section 5 provides that a valid arbitration agreement has the effect of staying a court proceeding relating to a dispute agreed to be referred.

The effect of this is to accord arbitration under the ACA the status of an autonomous and an effective dispute resolution option. Also, the ACA gives full effect to the principle of party autonomy as most of the important steps before and during the arbitration depends, in general, on the intention or agreement of the parties or even on their disagreement. This is manifested by the use throughout the ACA of such phrases as, “unless a contrary intention is expressed therein..." (Section 2); “unless otherwise agreed by the parties...” Section 13); “The parties may by agreement determine (Section 18). Such phrases apply to a wide variety of steps, situations or decisions under the ACA.\textsuperscript{99} Thus, consensus, as an essential element of contract, would, \textit{prima facie} seem indispensable in arbitration under the ACA. Most importantly, is that the ACA provides for a limited judicial intervention in the arbitral

\textsuperscript{97} J Paulsson, ‘Arbitration unbound: Award Detached from the Country of its Origin,’ 30 I.C.L.Q (1981) 358, 368
process. The high water-mark of this is Section 34 which provides: “the Court shall not intervene in any matter governed by this Act except where so provided in this Act.’

Finally, the final award of an arbitral tribunal is binding and enforceable not because of the coercive powers of the state, but because it is itself a contract which the parties had undertaken to voluntarily comply with in good faith. The court comes in only when there is a refusal to abide by the award. This is an essentially supportive role.

2.5.3 The Mixed or Hybrid Concept

The third theory of the juridical nature of arbitration, the mixed or hybrid theory, posits that both the jurisdictional and contractual theories are extreme; a moderate view should combine the elements of both.

As Pieter Sanders observed:

“Arbitration must be based on an agreement of the parties to arbitrate; no arbitration can take place when there is not a valid agreement of the parties to submit their differences to arbitration. If emphasis is laid upon this starting point and the line is drawn further, covering as well arbitral procedure and award, it leads to the contractual theory on the nature of arbitration. On the other hand, emphasis may be put upon the quasi-judicial character of arbitration. Arbitration is a judicial process. The arbitrators, once appointed, act as judges. Their function is to give a final decision on the differences submitted to them. Their decision has, in principle, the same effects as a judgment of a court. The dualistic character of arbitration has led to the intermediary view taken by those who adhere to what may be called the Mixed Arbitration Theory: the character of arbitration is influenced by its contractual origin and by the judicial process it involves”

Arbitration, it is argued, though borne out of a private contract, must have a legal foundation as arbitration cannot be beyond every legal system and control or supervision. This theory

---

100 Agu v Ikewibe, [1991] 3 N.W.L.R. (Pt. 180) 385, 417-418; ACA Section 16 (place of Arbitration); ACA Section 17 (Commencement of arbitral proceeding); ACA Section 18 (language (s) of the proceeding); ACA Section 20 (hearing and written proceedings) ACA Section 21 (effects of default by a party; ACA Aection 22 (1) (power of arbitral tribunal to appoint experts); ACA Section 22 (3) (power of arbitral tribunal to decide ex aequo et bono or as amiable compositeur); ACA Section 24 (1) (the majority principle in decision making by the arbitral tribunal; ACA Section 26 (3) (a) (reasoned award); ACA Section 28 (1) (correction and interpretation of award), etc

101 This will be discussed in Chapters 4 & 5

accepts that the agreement to arbitrate, the form of arbitration and the regulation of the proceedings are within the exclusive control of the parties, but further qualifies this by noting that the legal effect of the parties’ agreement and the enforceable character of the award depends on the attitude taken by the law of the country seised. Notwithstanding these apparently conflicting views on the juridical nature of arbitration, an attempt has been made by scholars to reconcile their diverse contentions. Thus, the present researcher takes the same view submitted by Lew that despite their apparently diametrically opposing views, the jurisdictional and contractual theory can be reconciled if one accepts that the character of arbitration conforms with reality, it follows both private and the law of procedure at the same time. This is because, Arbitration contains elements of both private and public law; it has procedural and contractual features. For instance, the agreement to arbitrate is a contract and must be treated as such, its validity being determined by the criteria applicable to contracts. The arbitration proceedings, however, must be subject to the supervision of the national law when and where the need arises just like other contracts.

Take Hong-Lin Yu’s example of Arbitrability in which the issue of jurisdiction over the arbitration proceedings and arbitral awards was analysed. In relation to supervisory powers over the arbitration proceedings, Hong-Lin Yu showed arbitrators can only deal with a dispute to the extent that the law to which the parties have subjected it allows; and such a choice cannot overrule the mandatory rules of the lex fori. Furthermore, an arbitral award may be challenged before the courts if the arbitrator deals with the disputes that are outside the scope of arbitrability under the applicable laws, for example, the lex arbitri or the lex loci

---

103 J Lew, The Applicable Law in International Commercial Arbitration (Oceana 1978) 51-61
104 Ibid note 78
contractus, chosen by the parties, and possibly under the lex fori if the arbitration is running under the concurrent procedural rules of law in the place of arbitration.\textsuperscript{105}

2.6 Conclusion

This chapter has dealt with the meaning of Arbitration, its definitions, and its fundamental characteristics; the theories and what arbitration is not have been discussed. An examination has been made of the concept of arbitration agreement and the basic theories of the method. The main discussions of this thesis have been about the respect for party autonomy and the enforceability of arbitration agreements and awards with the ACA with references to some Arbitration Laws in Africa; compared with the Model Law, AA 1996 and the NYC with regard to their similarity.

The forthcoming chapter (Chapter three) attempts to explain that the respect and recognition of the principle of party autonomy are a fundamental ingredient of the ACA as that of most modern laws on arbitration, so far as it is consistent with the mandatory laws and requirements of public policy; and that parties to arbitration agreements have the maximum possible freedom to choose how their tribunals are to be structured, how their case is to be run, what their awards are to contain and other details of the arbitration. This chapter explains in the simplest of terms the principle of party autonomy as a key characteristic of arbitration which means is that parties must have the substantial autonomy and control to decide how their arbitrations are to be conducted without the court interfering except for the purpose of supervision and enforcement of the arbitral award.

The chapter explains that the crucial difference between arbitration and courts lies in the fact that the basis of the jurisdiction of an arbitral tribunal is the principle of party autonomy (the will of the parties), while courts owe their competence to procedural norms of a state or of an

\textsuperscript{105} Ibid
international convention. It explains that the parties are free to choose the law, procedure, venue, arbitrators and almost everything related to the resolution of the dispute.

This chapter explains that one area in which the principle of party autonomy is predominant is in the choice of applicable laws. Under this principle, the parties are free to choose the laws applicable to their arbitral proceedings. The chapter makes comparisons with Article 28 of the Model Law and discusses the importance of E Rabel and Kerr Charles writing on party autonomy and the Hague Convention on the law applicable to International Sales of Goods, 1955 Article 2 and ACA section 47 (6), and Article 3 of the Uniform law 1964 on the International Sale of Goods.

The chapter discusses the principle of party autonomy within the non-mandatory sections of the AA 1996 section 3 in particular which emphasizes the freedoms given to the parties under the Act by providing that: In this Part “the seat of the arbitration” means the juridical seat of the arbitration designated (a) by the parties to the arbitration agreement, or (b) by any arbitral or institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorized by the parties; or determined, in the absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances. The chapter uses the AA section 4 (3) (4) and (5) as an example of the parties' freedom to make arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided. The chapter compares Ghana Arbitration Act 2010, with the AAAs an example of the respect for the general principle of party autonomy, and discusses Section 5 (1) of the Act which provides that a party to a dispute in respect of which there is an arbitration agreement may, subject to the terms of that agreement, refer the dispute to arbitration. This chapter explains the views of J Lew, Mistelis, and Kroll’s that the freedom of the parties to decide the substantive law of the arbitration is expressly recognised. It explains the principle of Lex Mercatoria as provided under section 47(5) of the ACA is such
that whether the parties have chosen the applicable laws or the arbitral tribunal has determined them, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of usages of the trade applicable to the transaction. The chapter uses as an illustration the February 2006, U.S. Supreme Court’s landmark judgment – *Buckeye Check Cashing v. Cardegna* – in which the Court held that regardless of whether the challenge is brought in Federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitration as the party's choice. The chapter uses Indian Arbitration Act 1996 as one of the examples of the Principle of Non-intervention by the Courts.

This chapter explains the tensions between party autonomy and state legal controls, following the impact of mandatory rules on party autonomy. This chapter explains that such rules are laws that apply irrespective of a contract’s proper law and procedures selected by the parties as illustrated by Justice Ayooola in *MV Panormos Bay v Plam Nig. Plc.* The chapter explains that in Nigeria, as in other countries, the ACA is designed in such a way that the national courts would want arbitration agreements and awards not to conflict with various domestic policies before they can be enforced or given recognition. It explains that no arbitration agreement may be allowed if it is likely to oust the courts’ jurisdictions or where party autonomy is inconsistent with public policy or Nigeria’s sense of justice and/or legal forum, the Nigerian courts may refuse the enforcement of arbitration agreements or recognition and enforcement of the awards.
CHAPTER THREE
Explaining the principle of Party Autonomy

3.1 Introduction

In most modern Arbitration laws, the parties to arbitration agreements are provided with the maximum possible freedoms to choose how their tribunals are to be structured, how their cases are to be run, what their awards are to contain and other details of the arbitration.¹ For instance, the written texts of most sections of the ACA and that of some Arbitration laws in Africa show legislative intention for the courts to respect the principle of party autonomy, so far as it is consistent with the requirements of public policy. In the simplest of terms, what the principle of party autonomy as a key characteristic of arbitration means is that parties must have the substantial autonomy and control to decide how their arbitrations are to be conducted without the court interfering except for the purpose of supervision and enforcement of the arbitral award.² Thus, the crucial difference between arbitration and courts lies in the fact that the basis of the jurisdiction of an arbitral tribunal is the principle of party autonomy (the will of the parties), while courts owe their competence to procedural norms of a state or of an international convention. The parties are free to choose the law, procedure, venue, arbitrators and almost everything related to the resolution of the dispute. The parties are also free to decide whether they would like to go to arbitration or not. No one can compel them to resort to arbitration. In other words, the whole pattern of decision making depends on party agreement. The freedom of the parties to shape the arbitral tribunal and the

¹ ACA Section 2 and most of the non-mandatory part of the Act provide “Unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the partie; Similar to AA 1996 section 1 (b) which states that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest this includes several sections of the Act where the Act stated “Unless otherwise agreed by the parties”.
² Ibid note 187
arbitral process though not unlimited is certainly very wide.\(^3\) As Harold Crowter rightly put it that party autonomy is one of the greatest advantages of arbitration.\(^4\) The Report of the Institute of International Law affirms that party autonomy is one of the fundamental principles of private international law as it is an important requirement of all rules to provide certainty, predictability, and uniformity whether substantive or choice of law.\(^5\) As international commercial contracts have increased in value, complexity and duration, so also is the importance of certainty, uniformity, predictability and enforceability of arbitration agreements. Although party autonomy will not guarantee uniform or predictable solutions for all cases, but leading cases like *Vita Food v Unus Shipping Co Ltd* and *Bonython v Commonwealth of Australia* have shown that party autonomy does guarantee certainty, uniformity and predictability for parties.\(^6\) The present researcher agrees with the belief that the principle enables the parties to be certain about which law will be applied to their contract, the effect and the interpretation of the contract becomes predictable, and in turn ensures a uniform solution to the particular dispute whatever the nature of the tribunal, wherever it may be situated and whoever the arbitrators may be. The next section discusses the principle of party autonomy as applicable under the ACA with references to the other two principles mentioned earlier in chapter one of this thesis and with comparisons to other jurisdictions.

---

3 See the nonmandatory sections of the ACA which is similar to the nonmandatory sections of the AA 1996 ie, section 30
5 Report of Institute of International Law, ‘Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities’ (64 II Yearbook 1992) 383
6 *Vita Food v Unus Shipping Co Ltd* [1993] AC 277; *Bonython v Commonwealth of Australia* [1951] AC 201
3.2 Choice of Applicable Law

As stated earlier in chapters one and two of this thesis, one area in which the principle of party autonomy is predominant is in the choice of applicable laws. One of the major principles is that the parties are free to choose the laws applicable to their arbitral proceedings. The Model law Article 28 is a good example, where it provides that:

the arbitral tribunal shall decide the dispute in accordance with such rules of the Law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise agreed, as directly referring to the substantive law of that state and not conflict of laws rules. But the principle is such that failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable and shall decide ex aequo bono or as amiable compositeur only if the parties have expressly authorised it to do so.\(^7\)

Furthermore, in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction but depending on the manner in which the agreement is couched, the parties are free under Nigerian law to choose the applicable law to the transaction. The ACA makes it clear in the First Schedule Arbitration Rules Article 33 (1) that, “the arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.” Thus, the principle of party autonomy largely influences the choice of law applicable to the dispute.

E Rabel states:

“autonomyendeavours to remove the unpredictable findings of unforeseeable tribunals and to consolidate the contract under one law while negotiation is in course.”\(^8\)

\(^7\) Model Law Article 28
On this, Kerr Charles thinks that the freedom to make a choice of law will provide contracting parties with the mechanism with which to avoid the contract from being regulated by ambiguous law, or being given an undesired effect. Because, by so doing, it may prevent the parties from alleging that the tribunal or court applied inappropriate law for their contract since the choice of law is the express will of the parties. Furthermore, Kerr Charles believes that that will keep the arbitrator/s from the difficulties involved in determining the applicable law since the arbitrators do not have their own substantive law or conflict of law system hence give effect to the expectations of the parties. This is so, because all the arbitrator has to do is to look to see whether the parties agreed as to the law to govern their contract which will simply be found either in an express choice of law clause or in an agreement before the judge or arbitrator at the time of hearing. The importance of this principle is seen in the majority of the treaties or uniform law affecting international contracts or arbitration agreements in the last sixty years as for example; the Hague Convention on the law applicable to International Sales of Goods, 1955 which provides in Article 2 that:

“A sale shall be governed by the domestic law of the country designated by the contracting parties”

---


10 Lew, “Applicable Law” para 439; According to Statistics of the ICC approximately 20% of arbitrations do not have an express choice of law in the contract. In 1998 82.1% of cases, in 1999 82% in 2000 77% and in 2001 78% included an express choice of law. See Model Law Article 28(1); England Arbitration Act section 46(1); XVI YBCA 236 (1991) 238. Article 6 states: The parties have full autonomy to determine the procedural and substantive rules and principles that are to apply in the arbitration. In particular, (1) a different source may be chosen for the rules and principles applicable to each issue that arises and (2) these rules and principles may be derived from different national legal systems as well as from non-national sources such as principles of international law, general principles of law, and the trade usages of international commerce.


12 International Sales of Goods, 1955 Article 2
In Nigeria, by virtue of the provisions of section 47 (6) of the ACA, a fourth area could be added as the law of the place of enforcement, which may be different from the law of the place of award. Accordingly, the freedom to choose the applicable law is very fundamental; reason being that the dispute will be decided in accordance with parties choice of law, as the parties are bound by the law that they have chosen.\(^\text{13}\)

One of the principles of the ACA section 47 (6) cited above can be compared with the provision of Article 3 of the Uniform law 1964 on the International Sale of Goods which provides that although the uniform law was to govern international sales, the parties to a contract are free to exclude the application of the uniform law. While article 3 talks about the freedoms; Article 9 talks about the obligations in which it provides that the parties shall be bound by any usage which they have expressly or impliedly made a choice of law to their contract. This is similar to the provision under the Benelux Uniform law relating to private International law which stated in Article 13 (1) that contracts are governed by both the imperative and the subsidiary provisions of the law chosen by the parties. The same principle is enshrined in Article 2 Draft EEC Convention on the law applicable to contractual and non-contractual obligations which states that a contract shall be governed by the law chosen by the parties. In stressing the importance of party autonomy, the UN Convention on the Recognition and Enforcement of Foreign Arbitral awards made clear in Article V (1) (a) that the recognition and enforcement of a foreign arbitration award may be refused if the arbitration agreement is not valid under the law chosen by the parties. This is also agreed in Article V (1) of the above-mentioned convention.

\(^{13}\) J Lew, *Applicable Law in International Commercial Arbitration* (Oceana 1978) para 439
Even the public international law recognised in the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States that the principle of party autonomy is the way forward by providing in Article 42 that tribunal shall decide a dispute in accordance with such rules as may be agreed by the parties.

According to Schmitthoff:

“the determination of the proper law of the contract will not involve any difficulty if the parties have been wise enough to record expressly which legal system is to apply to their agreement.”\(^{14}\)

As far back as 1945, Rabel stated:

“the practice allowing parties to make the choice of law to their contractual relations has for many centuries been applied by courts throughout the world with slight dissent.”\(^{15}\)

In Nigeria, all the non-mandatory sections of the ACA, including Article 33 of the First Schedule Arbitration Rules of the Act recognise the principle of party autonomy to the extent that the arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. As stated earlier, Article 33 (2) of the Act makes it clear that the tribunal shall decide as amiable compositeur or aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration. Furthermore, in subsection 3 of Article 33, the ACA is


clear that in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

A good comparative example can be drawn also from Part I of the Indian Arbitration Act 1996. As a modern Arbitration Law, the principle is that in determining the rules of law applicable to the substance of the dispute, the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute and, failing any such designation, the rules of law the tribunal considers appropriate given all the circumstances.\textsuperscript{16}In Bhatia International v Bulk Trading SA [2002] INSC 132, the Supreme Court of India held that Part I of the Indian Act applied to arbitrations which took place outside India, including foreign awards, unless the parties expressly or impliedly excluded all or any of its provisions.

The non mandatory sections of the Indian Arbitration Act 1996 can be compared with the non-mandatory sections of the AA 1996 section 3 in the context of the freedoms given to the parties under the Act. The text of the law states that: In this Part “the seat of the arbitration” means the juridical seat of the arbitration designated (a) by the parties to the arbitration agreement, or (b) by any arbitral or institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorized by the parties; or determined, in the absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances. The AA section 4 (3) (4) and (5) gives the parties' freedom to make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided. Thus, under AA section 4 subsection 4, it is immaterial whether or not the law applicable to the parties’ agreement is the law of England.

\textsuperscript{16}Bhatia International v Bulk Trading SA [2002] INSC 132; see also Venture Global Engineering v Satyam Computer Services Ltd [2008] INSC 40); Yograj Infras Ltd v Ssang Yong Engineering & Construction Co Ltd [2011] INSC 769
and Wales or, as the case may be, Northern Ireland. Because, under section 4 subsection 5, the choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter. For this purpose an applicable law determined in accordance with the parties’ agreement, or which is objectively determined in the absence of any express or implied choice, is treated as chosen by the parties.

Accordingly, with the principle of party autonomy, parties’ are free to designate the seat of arbitration themselves or in some other manner authorized by them. In situations where a conflict of laws embraces the principle, the principle is upheld; that is “the power of the parties to determine for themselves their choice of law” rather than impose a law on them. The preference is to have a law subjectively ascertained by the parties themselves, i.e. a law objectively determined for the type of case in question. This will initially remove the responsibility of determining the applicable law from the judge or arbitrator thus giving such responsibility to the parties themselves. So when a contract has connections with more than one legal system, “the law chosen by the parties will be the governing law. Moreover, the choice of law becomes an independent contract within the principal contract.” This illustrates that one of the main purposes of the principle of party autonomy is to give the parties the power to determine the law or non legal measuring standard (i.e lex Marcatoria) which they intend to govern their contract. In the foregoing discussion, one other country in Africa with a modern Arbitration that respects the principle of party autonomy comparable with the ACA, the AA and the Model law is the Ghana Arbitration Act 2010.

3.2.1 Comparative Example with Ghana Arbitration Act 2010

The three main principles of arbitration enshrined in Ghana Arbitration Act 2010 is the general principle of party autonomy, respecting and securing the ability of parties to choose how to deal with the disputes between them, such as by arbitration and how such arbitration should be conducted.\(^{18}\) Section 5 (1) of the Ghana Act provides that a party to a dispute in respect of which there is an arbitration agreement may, subject to the terms of that agreement, refer the dispute to arbitration. In this way the first thing the Act does is to recognise and uphold the freedom of contracting parties to agree to arbitrate. For instance, Sections 12 to 14 provide that the parties are free to agree the identity and make-up of the tribunal, stipulate any requirements as to the arbitrator or arbitrators' experience, qualifications or nationality, designate an appointing authority, determine the number of arbitrators (the default number being three) and determine procedure for appointment.\(^{19}\) Pursuant to section 48 (1) (a) of the Act, the arbitral tribunal is required to decide the dispute according to the law “chosen by the parties as applicable to the substance of the dispute”. As J Lew, Mistelis, and Kroll put it, the freedom of the parties to decide the substantive law of the arbitration is expressly recognised, the parties may choose different proper laws for the two agreements, and other factors may indicate that different laws should apply,\(^{20}\) and even within the arbitration agreement itself, the parties have the freedom to agree that different laws may govern the substance of and the procedure for the arbitration. For example \textit{ad hoc} arbitrations drawn up after a dispute has arisen do not form part of the main contract and there may be less reason to apply the same proper law.\(^{21}\)

\(^{18}\) Ghana Arbitration Act Section 5 (1)
\(^{19}\) Ghana Arbitration Act Sections 12 to 14
\(^{21}\) Ibid note 44
In *Heavy Industries Ltd v Oil and National Gas Commission*\(^22\) the Nigerian High Court Judge, Potter J stated that the proper law of the arbitration agreement chosen by the parties or by the arbitrator covered, *inter alia*, questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the constitution of the tribunal and the question whether an award lies within the jurisdiction of the arbitrator. This is similar to the principle used in *Dalima Dairy Industries Ltd v National Bank of Pakistan*\(^23\), where the Court held that the proper law of an arbitration agreement includes in particular the interpretation and validity of the agreement.

In the case of *Norske Atlas Insurance Commune Ltd v London General Insurance Company Ltd*\(^24\), in which an arbitration award was issued in Norway the English insurance company, the respondent, resisted enforcement of the award in England on the ground that the insurance policy which was the subject matter of the dispute had not been stamped. The court found that the validity of the award was a matter determined by the governing law of the arbitration agreement chosen by the party which in this case was Norway and that the Norwegian law did not concern itself with questions of stamping. Although the line between substantive matters relating to the arbitration agreement governed by the law of arbitration agreement and procedural matters relating to a reference under that agreement governed by the procedural law of the arbitration is not always easy to draw.\(^25\) The same or similar principle is found in Kenya Arbitration Act 1996 section 29 subsections (1) (2) (3) (4) (5) which make it mandatory for an arbitral tribunal to decide the disputes before them in accordance with the rules of law chosen by the parties as applicable to the substance of their dispute. The choice of the law or legal system of any designated state shall be construed, unless otherwise agreed by the parties, as directly referring to the substantive law of the state.

\(^22\) Potter J, *Heavy Industries Ltd v Oil and National Gas Commission* [2003]
\(^23\) *Dalima Dairy Industries Ltd v National Bank of Pakistan* [2003]
\(^24\) *Norske Atlas Insurance Commune Ltd v London General Insurance Company Ltd* [2002]
and not to its conflict of laws rules. But, when the parties fail to make a choice of the law under subsection (1) of Kenyan Act, the tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute. Subsection 4 reinforces the need that the tribunal shall decide the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law, only if the parties have expressly authorized it to do so. Can the above not be compared with section 1 subsection (b) of the AA 1996, which state that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest? Similar provisions are stipulated in the Egyptian Code of Civil and Commercial Procedures Articles 25 and 28 which provides that the two parties to the arbitration are free to agree on the procedure to be followed by the arbitral tribunal, including the right to submit the arbitral proceedings to the rules prevailing under the auspices of any arbitral organisation or centre in the Arab Republic of Egypt or abroad. In the absence of such agreement, the arbitral tribunal may, subject to the provisions of this law, adopt the arbitration procedures it considers appropriate. Furthermore, under Article 28 of the Code, the two parties to the arbitration agreement are free to agree on the place of arbitration in Egypt or abroad. Only when there is no such agreement that the arbitral tribunal shall determine the place of arbitration having regard to the circumstances of the case including the convenience of the place of the parties. The present researcher takes the view that the Arbitration Laws in Africa that have been discussed so far confer extensive autonomy on the parties to determine how their arbitration will be conducted. Further examples could be drawn from the Ghana Arbitration Section 5 (2) which provides that, save for when the dispute is referred to the Alternative Dispute Resolution Centre, the procedure and rules governing the arbitral proceedings shall be “as the parties and arbitrators determine”. Accordingly the parties may agree on a set of arbitration rules to

26 Egyptian Code of Civil and Commercial Procedures Articles 25 and 28
27 Egyptian Code Article 28
govern the arbitration. It should be noted, however, that inclusion of the words “an arbitrator” in this section perhaps reflects a slight difference in approach to the equivalent provision under the Model Law, which simply provides that “the parties” are free to determine the procedure. This raises a question as to whether the wishes of the parties or tribunal are paramount with regard to determining the procedure, and therefore whether the parties have full autonomy in this regard. This question appears to be resolved in favour of the parties by section 31(3) of the Ghana Act. This section concludes that the parties have the freedom to agree matters of procedure, and that the tribunal shall only determine such matters in the event that an agreement between the parties cannot be reached. There is also statutory support for the freedom to choose non legal measuring standard, like Lex Mercatoria which is sometimes used in international dispute resolution between commercial entities, thus, the forthcoming section discusses this principle as it can be chosen by the parties under the principle of party autonomy.

3.3 Lex Mercatoria

The principle of Lex Mercatoria is sometimes used in international disputes between commercial entities. The arbitrators are allowed (explicitly or implied) to apply *lex mercatoria* principles.\(^{28}\) This has been provided for in section 47(5) of the ACA to the extent that whether the parties have chosen the applicable laws or the arbitral tribunal has determined them, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of usages of the trade applicable to the transaction.

---

According to JH Baker, the *lex mercatoria* is not new, the commercial arbitration as we know it today evolved from it and hence the appellation "the new *lex mercatoria*”.

The adequacy of this concept is that the arbitration is determined by customs and usages of international trade. Governments and private persons generally insert such clauses in their contracts. For the government, this arises from its unwillingness to submit itself to the national law of a foreign country. On the other hand, the private person would not want to have the contract governed by the laws of a foreign country since the laws can be changed to the foreigner’s disadvantage after the contract has been entered into. The situation was observed by Lando when he asserted that: by choosing the *lex mercatoria* the parties avoid the technicalities of national legal systems as well as rules which are unfit for international contract. Thus they escape peculiar formalities, short periods of limitation, and some of the difficulties created by domestic laws which are unknown in other countries, for example, the common law rules on consideration and privity of contract. Although, the *lex mercatoria* is still a diffused and fragmented body of law and there is controversy about its existence, it is capable of application. Consequently, for countries that have accepted the Model Law and the provisions of Article 28 (4) it is now mandatory for arbitral tribunal to take *lex mercatoria* into account even where the parties have not expressly agreed to do so. This is also a provision in the Model Law and its adoption has neutralised the effect of national laws. Even in countries where there is controversy about the existence of *lex mercatoria*, if arbitral tribunals are allowed to decide as amiable composition, this can be extended to cover *lex mercatoria*. The essence of the principle is the freedom it bestows on the parties once there is that agreement to choose it in the context of party autonomy. But all boils down to how the principles are treated by the courts.
3.4 The Courts

A good analogy could be drawn from the February 2006, U.S. Supreme Court’s landmark judgment in Buckeye Check Cashing v. Cardegna – in which the Court held that regardless of whether the challenge is brought in Federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitration as the party’s choice. This case had a narrowly split of 7–1 decision with one of the judges (Justice Alito) not taking part in the consideration of the decision, and Justice Thomas gives a dissenting judgment. But the Supreme Court relied on the established body of federal substantive law relating to arbitration that is applicable to both federal and state courts.

The basis of which was formed by combining the opinions of Prima Paint Corp. v. Flood & Conklin Mfg. Co. and Southland Corp. v. Keating. In the United States of America, this judgment finally puts to rest the notion that an attack on the underlying agreement containing the arbitration provision based on alleged illegality is for the court rather than the arbitrator to decide. In the USA, the Courts have now started to follow the Buckeye case as is evident from the decision of the Seventh Circuit Court of Appeals which ruled in the Wausau case that an arbitrator, not the court, should decide whether an arbitration agreement prohibits consolidated arbitration. This case represents another appellate court decision that favours party autonomy and the use of arbitration and entrusts decisions to arbitrators. The same principle is expressed in the Ghana Arbitration Act, which expressly provides for the courts of Ghana to play a significant role in relation to arbitration, both in upholding the freedom to arbitrate and facilitating the just and effective conduct of the arbitration itself.

Under section 7(5), where a court becomes aware that any action before it is the subject of an

[31]Ghana Arbitration Act section 57 (5)
arbitration agreement, the court “shall stay the proceedings and refer the parties to arbitration”. Accordingly, the Act expressly obliges the courts to uphold the wishes and autonomy of the contracting parties as expressed in the arbitration agreement. Additionally, under section 7(1), even where there is no arbitration agreement the court may, with the consent of the parties, refer all or part of any action pending before the court to arbitration if it considers that arbitration would be appropriate. This allows for the court to “steer” parties towards arbitration in circumstances where it is considered that a dispute proceeding before the court could be more effectively resolved by arbitration, even in the absence of a clear arbitration agreement. The Act confers extensive powers to the courts to assist and support the arbitral process. In relation to the constitution, fee entitlement and liability of the tribunal, the court is empowered to:

(a) Determine a challenge to the appointment of a sole arbitrator (section 18)

(b) Remove an arbitrator (section 18)

(c) Make a determination regarding the entitlement to fees/expenses and/or liability of an arbitrator who has resigned (section 19; and

(d) Make a determination regarding the fees payable to an arbitrator (section 22). In relation to the conduct of the arbitral proceedings, the court is empowered to:

(a) Make a determination regarding the arbitrator’s jurisdiction (section 26);

(b) Hear a challenge by a party who is subject to arbitration proceedings of which he had not been notified (section 28);

(c) Make orders with regard to evidence, property and goods, grant an interim injunction and appoint a receiver (section 39); and

(d) Determine a preliminary question of law (section 40).

The court has the power to:
(a) Order the tribunal to deliver the award (and determine the fees/expenses payable to the tribunal if the award has been withheld pending payment) (section 56(2); and enforce or set aside an arbitral award, both domestic and foreign (sections 57 to 59).

3.6 The Principle of Non-intervention by the Courts

The principle that the courts shall not interfere in arbitral proceedings is a fundamental theme underlying the ACA. The Act as that of India and other modern arbitration laws in the developing countries contemplate of only three situations where judicial authority may intervene in arbitral proceedings. In India, for example, these are only:

i. appointment of arbitrators, where the parties’ envisaged method for the same fails (s 11);

ii. ruling on whether the mandate of the arbitrator stands terminated due to inability to perform his functions or failure to proceed without undue delay (s 14(2)); and

iii. provide assistance in taking evidence (s 27).

iv. As would be noticed, Indian law, the ACA and most modern arbitration laws in Africa are far more restrictive in allowing court intervention compared with the AA 1996, as for example the Indian Act section 5 provides, through a non obstante clause in Part I that no judicial authority shall interfere except where so provided for. Section 8. As a companion section, it states that a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement shall refer the parties to arbitration. The only condition being that the party objecting to the court proceedings must do so no later than his first statement on the substance of the dispute. In the meanwhile, the arbitration proceedings may be commenced and continued with and an award rendered. Two points are noteworthy.

32 Indian Arbitration Act 1996 sections 11, 14 and 27
The first is that section 5 (departing from the Model Law) contains a non-obstante clause. Section 8 also departs from the Model Law. The corresponding provision (Art 8 of the Model Law) permits the court to entertain an objection to the effect that the arbitration agreement is ‘null and void inoperative or incapable of being performed’. The departures made by the Indian law demonstrate the legislative intent to keep the courts out and let the arbitral stream flow unobstructed. By and large the Indian courts, as their developing countries counterparts with modern arbitration laws have well understood the spirit and intent behind the principle of nonintervention. This is well illustrated in *CDC Financial Services (Mauritius) Ltd v BPL Communications*[^33] in which the respondent obtained an anti-arbitration injunction from the High Court on the ground that the pledge of shares which was sought to be enforced through arbitration would enable the claimants to take control of a telecom company which (as it was a foreign company) would be contrary to Indian law. On appeal, the Supreme Court rejected this contention, stating that this was a plea on the merits and thus within the sole jurisdiction of the arbitrators. The court not only vacated the injunction, it also restrained the respondent from moving any further applications ‘which would have the effect of interfering with the continuance and the conclusion of the arbitration proceedings’.[^34] Although in *Sukanaya Holdings v Jayesh Pandya*,[^35] the Supreme Court refused to stay the court action on the ground that the subject matter of the arbitration agreement was not the same as the subject matter of the civil suit. Besides, the parties in the two actions were not identical. The court held that the entire subject matter of the suit should be the subject matter of the arbitration agreement in order for the mandatory provisions of section 8 of the Act to apply. As indicated earlier, notwithstanding the provisions of non-interventions, there are mandatory rules and public policy issues that must be taken into consideration in the enforcement of arbitration agreements and awards.

[^33]: Indian High Court decision in *CDC Financial Services (Mauritius) Ltd v BPL Communications* [1996]
[^34]: The Indian Supreme Court decision in *CDC Financial Services (Mauritius) Ltd v BPL Communications* [1996]
[^35]: *Sukanaya Holdings v Jayesh Pandya* [1996]
3.5 Mandatory rules

Although there is respect for party autonomy, but the most contentious areas is the tensions between the principle and state legal controls following the impact of mandatory rules on the principle. Mandatory rules may be defined as the laws which will apply irrespective of a contract’s proper law and procedures selected by the parties. According to the Court ruling in *MV Panormos Bay v Plam Nig. Plc*, mandatory rules of Nigeria, like that of most countries reflect the state’s internal or international public policy, and generally seek to protect the state’s economic, social or political interests; such as certain tax, competition and import/export laws. Its role in international commercial arbitration is to make clear the interests of public policy and what parties are not permitted to do which could be a subject of arbitrability and public policy issues as will be explained below.

3.5.1 Subject Matter Arbitrability/Public Policy

According to Azousu, the first generation arbitration laws in Africa did not always delimit the scope of subject matter arbitrability. However, some like the Egyptian Code of Civil Procedure (Article 501 (3) provided that the “subject matter of the dispute should be defined in the arbitration document or during the pleading....” It further required that the subject-matter for arbitration must be one which can be the subject of a compromise by those capable of legally disposing their rights (article 501 (4). These provisions are more or less retained in the new Egyptian Law. In the developing countries, the South African Act of 1965, is clear on this subject as it stipulated that a reference to arbitration shall not be permissible in respect of:

(a) Any matrimonial causes or matter incidental to any such cause; or

(b) Any matter relating to status (section 2)

---

36 F Goldman *International Commercial Arbitration* (Dalloz 1965) para 1511-1528, 1529-1536
37 *MV Panormos Bay v Plam Nig. Plc* (2004) 5 NWLR (Part 855) 1 at 14; Tawa Petroleum v MV Sea Winner 3 NSC 25
38 Egyptian Law, Articles 10 (2) & 11
Most recent arbitration laws in Africa maintain the tendency on subject-matter arbitrability. For instance, the International Arbitration Code of Djibouti Article 2 (2) makes it plain that “Any actual or future dispute arising out of a specific juridical relationship as to which parties have capacity to settle their claim can be made the subject of an arbitration”. The flexibility in this provision becomes obvious when it is recalled that the Code states in Article 1 that “arbitration is international if it implicates international commercial interests” which is not unlikely that these provisions will be applicable to arbitration agreements to which only nationals of Djibouti are parties provided they “implicate international commercial interests.” The provision will certainly cover disputes involving nationals and non-nationals of Djibouti. Further trends that could be discerned in relation to subject-matter arbitrability are:

1. Where an attempt may be made in some laws to omit entirely any reference to a subject-matter restriction or criterion either by not mentioning or by deleting “commercial,” and stipulating those subject-matters that are considered not-arbitrable. For instance, the Tunisian Code was largely an adoption of the Model Law, especially its provision relative to international commercial arbitrations. However, like Hong Kong’s adoption of the Model Law (1990), and the recommendation of the Law Development Commission of Zimbabwe (1994), the scope of the Tunisian Code is not expressly limited to or restricted by any reference to “commercial” arbitration. The word “commercial” is also not mentioned in the title of the Code. However, Article 7 indicates those matters that may not be subject of an arbitration agreement are:

(1) matters affecting public policy;
(2) questions relating to nationality;
(3) questions relating to personal status with the exception of questions arising therefrom concerning pecuniary obligations;

---

39 Kaplan N, “The Model Law in Hong kong: Two years On”, 8Arb. Int. 223 (192)
40 Final Report of Law Development Commission of Zimbabwe, 1994
(4) matters regarding a compromise which cannot be made;
(5) disputes concerning the state, state administrative agencies and local communities with the exception of disputes arising in international relations on economic, commercial or financial nature which are governed by Chapter Three of the Code (on International Arbitration). In the interim Report on Arbitration of Zimbabwe which was accepted by the Full Committee and now forms the basis of their current Act, it was recommended that the new Arbitration Law would cover every matter that could lawfully be arbitrated. As the Arbitration Committee said:

... in adopting the UNCITRAL Model Law as the law for Zimbabwe, it would not be confined to commercial arbitrations as the Model law was, but would cover any subject that could lawfully be arbitrated upon. (For guidance and clarification, a list of matters that definitely could NOT be the subject of arbitration would be set out).

The present researcher’s view is that the domestic laws would always be there as a safeguard for upholding the arbitration agreement and protecting party autonomy from being abused by one party against the other. These laws are predominantly the laws of the seat of the arbitration, and the laws of the country where enforcement is sought. This means that, in determining the law applicable to either, the merits or procedure, arbitrators would have to be mindful of the domestic laws, in particular the laws of the seat. This does not mean that the parties and arbitrators are therefore constrained from applying foreign laws, or must do so by recourse to conflict of laws rules. The mandatory rules play supervisory role. In the event that one party tries to avoid its contractual obligations (either to submit to arbitration or carry out the arbitrator’s award) the state will be invited to intervene, in order to enforce the parties’ deal as an unexecuted contract. Thus, arbitration is not unbound from its seat and

41 Tunisia Code Article 8
42 Final Report of Law Development Commission of Zimbabwe, 1994
43 Ibid
cannot be hostile to mandatory rules. Although party autonomy is paramount in arbitration, mandatory rule may be needed, either by the parties or the arbitrator. For example, mandatory rules are relevant to prove the validity or illegality of a contract. On the other hand, the arbitral tribunals, international conventions and national laws will still accord a primary place to the “intention” of the parties when deciding the substantive and procedural law applicable to arbitration.

The only exceptions being force majeure, which arbitrators may take into account under the rules of mandatory law, which makes performance of contractual obligations impossible provided they were neither foreseeable nor provided for in the parties’ contract. According to the rule, arbitrators need to identify the applicable rules of force majeure and then decide if the terms and practices of the mandatory rule in issue satisfy that test, following that force majeure is not uncontroversial, as it requires arbitrators to do no more than apply the law chosen by the parties. 44 For example, if a contract governed by English law for the shipment of goods from the US to Guatemala were interpreted by US trade sanctions, the sanctions may constitute a force majeure under the place of contract.

3.5.2 Public policy issues

In Nigeria, as in most countries, the ACA is designed in such a way that the national courts would want arbitration agreements and awards not to conflict with various domestic policies before they can be enforced or given recognition. 45

As such, no arbitration agreement may be allowed if it is likely to oust the courts’ jurisdictions. For instance, where party autonomy is inconsistent with public policy or

44 Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc., 473 US 614 (1985)
Nigeria’s sense of justice and/or legal forum, the Nigerian courts may refuse the enforcement of such arbitration agreement or recognition and enforcement of the awards.\textsuperscript{46} The ACA section 52 (2) (ii) states that the court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to recognise or enforce any award— that recognition or enforcement of the award is against public policy of Nigeria. The same view is taken in the AA 1996, section 103 (3) that recognition or enforcement of award may be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award. Accordingly, where there is a public policy intervention to exclude the enforcement of an arbitration agreement, the court may fall back on to the law to replace party autonomy.\textsuperscript{47}

The present researcher submits that Asouzu is right in stating that public policy is fundamental in international law and in international relations, and invariably part of the public policy of most national and multi-national communities. The present researcher’s view is that, although Asouzu is right, one of the problems is that public policy is not defined in the international laws because of its complex nature. By way of analogy, in the UK, the national public policy is made up of internal or domestic public policy and external public policy. Its internal public policy comprises both national and policies recognised in customary law (for example) to uphold moral standards, discourage gambling, (facilitate unrestricted trade) and legislation promulgated to regulate certain situations which cannot be avoided or by-passed by the parties (for example contract formalities, credit legislation, the right to submit to

\textsuperscript{46} Ibid note
These principles and laws are only of relevance where domestic law is applicable; that is in domestic relations or where it is deemed applicable by the domestic conflict of laws and rules. Similarly, the Nigerian public policy is comprised of certain international concepts of rules of natural law, the principles of universal justice in public international law and the general principles of morality and public policy accepted by most countries. Although the terminology used by the various national courts and academic writers differ, they all refer to the existence of what may be called universally recognised international public policy issues.

For instance, in Nigeria, international public policy issues that would restrict party autonomy include an abhorrence of slavery, racial, religious and sexual discrimination, kidnapping, murder, piracy, terrorism; and efforts to subvert or evade the mandatory laws of the country. So, for example, a contract to kidnap or murder would not be enforced in Nigeria as it is contrary to national and international public policy; equally, an agreement to commit an act of terrorism or to violate the laws or independence of some sovereign state would not be enforced. The Nigerian courts would apply public policy as the minimum standard acceptable to its national legal system to which the courts owe allegiance. The refusal to apply an applicable foreign law or to recognise a foreign judgment because it infringes Nigeria’s forum’s public policy is not a question of discretion for the judge as the court is under an obligation to uphold the forum’s doctrine of public policy.

In concluding this chapter, it could be stated that there respect of the principle of party autonomy is a fundamental ingredient of the ACA and most modern laws on arbitration, so far as it is consistent with the requirements of

---


public policy. The next chapter is chapter four. The chapter starts with an introduction and cites *C.N. Onuselogu Ent. Ltd. v Afribank Ltd.* as an illustration of how the existence of an arbitration agreements is determined by the Nigerian courts. Thus show that Nigerian courts have declined to create judicial limitations through narrow textual interpretation, and generally have held that the spirit of an agreement to arbitrate will prevail over technical limitations on the scope. Accordingly, the courts have interpreted Article 7 (2) particularly broadly, accepting many different forms of communication in satisfaction of the writing requirement. The chapter cites the text and principle of the Ghana Act and that of many other African countries to show that, in addition to Nigeria, there other developing countries which have effective Arbitration Laws that are similar to the ACA as stated for example in section 2 subsection (1) of the Ghana Act; Kenya Arbitration Act 1996 which has the same principle of the formal requirements set out under Section 4 of the Act. It uses the Indian Arbitration Act 1996 as a good example of a modern arbitration law in a developing country with effective provisions of enforcement of arbitration agreements and awards. The chapter illustrates by way of comparisons that the ACA, India Act, Egyptian Arbitration Law, Ghanian Arbitration Act, Kenyan Act are all modern laws, that are similar to the Model Law. With Egypt, the similarity is exemplified in the wording of Article 10 (1) of the Egyptian Arbitration Law. This chapter cites Van den Berg’s view that the definition of what constitutes a written arbitration agreement given in Article II(2) can be deemed an internationally uniform rule which prevails over any provisions of municipal law regarding the form of the arbitration agreement in those cases where the Convention is applicable.

The chapter examines case laws to illustrate the ability of the ACA to enforce arbitration agreements and awards with references to other Arbitration laws in Africa. The chapter explains that the Committee for the Reform of the ACA may be done in different and apparently contradictory terms as section 4 of the Act provides that the court “shall” stay
proceedings brought in violation of an arbitration agreement. But section 5 (2) provides that the court “may” stay proceedings brought in apparently the same circumstances. The chapter explains that whilst the Committee for the Reform of the ACA may be right that there could be contradictions if there is a legal proceedings that are brought in violation of arbitration agreements in which the courts applied sections 4 and 5 either together or interchangeably, notwithstanding the different standards (i.e. Obligation vs discretion) that are inherent in the respective wordings of each section; there is no case law to show that the courts have applied sections 4 and 5 together. As shown in _MV Lupex_ case, the Supreme Court has either applied each section as obligatory or discretionory, but not together or interchangeably as stated by the Committee for the Reform of the ACA. The chapter discusses the concept of choosing Arbitrators under the ACA section 6 and that of Article 15 of the Egyptian Law dealing with the composition of arbitrators to show that they are similar to Article 10(2) of Model law that stipulates a three-arbitrator model. Section 6 of the ACA provides that where the parties fail to make use of their right to determine the number of arbitrators in the agreement, the number of arbitrators shall be deemed to be three arbitrators. In this chapter the present researcher expresses the view that both ACA section 6 and the Egyptian Arbitration Law Article 10 should be reformed to adopt the principle set in the Kenya Arbitration Act section 11 and the AA 1996 section 15 (3), and the Lagos State Arbitration law section 7 which provides for a single arbitrator, but leaves the parties to increase the number if they wish to do so. These are good examples of saving costs.

The chapter explains with disagreement that the Committee For the Reform of the ACA’s proposal for a general review of the concept of constitutionally entrenching rights of appeal as the rights of appeal have already been protected under sections 7 (2) (3) 30 (1) and Article 12 (2) of the Arbitration rules of the Regional Centre for international commercial arbitration cited above. The chapter explains that the grounds and procedure for challenging an arbitrator
are largely the same in both domestic and international arbitration; section 30(2) of the ACA provides that an arbitrator who has misconducted himself may be removed by the court. This provision for the removal of arbitrators is located in close proximity to other provisions of the ACA that deals with the related subject of challenging arbitrators to clarify the context in which arbitrators can be challenged as the term misconduct is not fully described in section 30 (1) and (2) mentioned above, notwithstanding that it could be compared with the AA 1996 concept of “misconduct” as a ground for removal of arbitrators under the AA section 24 (1).

The chapter discusses Lew, Mistelis, and Kroll’s views on the questions of arbitrators jurisdiction, and uncooperative respondent. The chapter explains and agrees with the view that a party could easily frustrate another parties’ autonomy or agreement to have their dispute decided by arbitration or at least create considerable delay by merely contesting the existence or validity of the arbitration agreement in court. In this chapter, the present researcher explains that, by virtue of section 12 (4) of the ACA, a ruling by the tribunal in its jurisdiction should be final and binding and not subject to appeal unless there is impartiality and unfairness in the handling of the proceedings as strengthened by section 34 of the ACA which provides that “A Court shall not intervene in any matter governed by this Act, except where so provided in this Act. This chapter demonstrates that there is courts support for Arbitration in Nigeria as demonstrated Lupex case, in which the Court illustrated that one of the main principles of contract law applicable to arbitration agreements is that when parties enter into a binding and enforceable arbitration agreement they express their intention that all disputes between them be referred to and settled by arbitration. This section of this thesis will demonstrate that with the acceptance of party autonomy the level of court intervention in Nigeria has significantly diminished over the years. The general trend is towards limiting court intervention in those cases where it is either necessary to support the arbitration process
or required by public policy considerations. This section uses the NNPC case, as a good illustration of the view taken by the Nigerian courts on the issues of fairness and impartiality.

This section of the chapter discusses the enforcement of foreign arbitral awards in Nigeria with the aim of showing that, like the arbitration agreements, the ACA is a comprehensive body of law to enforce arbitral awards in Nigeria. In addition, it will also attempt to provide insight into the various provisions that are available in the Act to avoid difficult challenges when enforcing foreign arbitral awards in Nigeria. Emmanuel Oki, believes that, despite the fact that Nigeria is a federal system of government, it has a unified system of enforcement of foreign arbitral awards. Amongst other cases, this chapter uses Toepher of New York v Edokpolor (trading as John Edokpolor & Sons) in which the Supreme Court of Nigeria held that a foreign award could be enforced in Nigeria by suing upon the award to show the enforceability of the Act. This section explains how the Refusal of Recognition and Enforcement under the NYC applies in Nigeria as a way of showing that the courts may refuse recognition or enforcement, if the enforcing party suffers from incapacity, or the arbitration is invalid under the relevant or applicable law or for lack of proper notice of the arbitrator’s appointment or of the arbitral proceedings or a party’s inability to present his case or the award deals with an extraneous dispute or matters outside the scope of the submission or the arbitral tribunal was not properly constituted, or its procedure was not in accordance with the parties agreement, or the award had not become binding or has been set aside, or has been suspended by the relevant court or if the award is contrary to the public policy of Nigeria. Chapter five gives an overall conclusion and recommendations and the way forward in Nigeria.
CHAPTER FOUR

4.1 Introduction

The Supreme Court (in addition to many other cases) has shown in *C.N.Onuselogu Ent. Ltd. v Afribank Ltd.*\(^1\) that in determining the existence of an arbitration agreement, Nigerian courts respect the encompassing language of the Model law by looking for the intentions or the understanding of the parties. The courts have declined to create judicial limitations through narrow textual interpretation as they have generally held that the spirit of an agreement to arbitrate will prevail over technical limitations on the scope. Accordingly, the courts have interpreted Article 7 (2) particularly broadly, accepting many different forms of communication as satisfying of the writing requirement.\(^2\)

In the above-mentioned landmark ruling, the Court held that the validity of arbitration agreements rests on the fulfillment of the requirements set in Section 1(a) (b) (c) of the ACA; and that they are in the alternative so as long as the arbitration agreement fulfills one of them it has fulfilled the requirement of section 1] which state that the agreement must be contained in a document signed by the parties to the agreement, or must be contained in an exchange of letters, telex, telegrams or other means of communication which provides a record of the arbitration agreement.\(^3\)

The present researcher agrees with the Court’s ruling in the context that, except for signature requirement under section 1, the “writing requirement” is adequate as it can also enforce say arbitration agreements entered into by any other means of communication; i.e. arbitration agreements entered by oral, email communications etc. Thus, the “writing requirement”

---

\(^1\) *C.N. Onuselogu Ent. Ltd. V Afribank Ltd.* (2005) 1 NWLR; Model law Article 7; This is similar to *SKandi International Insurance Company and Mercantile & General Company, et al.* Supreme Court of Bermuda (Merrabux J) 21 January 1994, Published in English: [1993] No. 381

\(^2\) *C.N. Onuselogu Ent. Ltd. V Afribank Ltd.* (2005) 1 NWLR; Model law Article 7; This is similar to *SKandi International Insurance Company and Mercantile & General Company, et al.* Supreme Court of Bermuda (Merrabux J) 21 January 1994, Published in English: [1993] No. 381

\(^3\) ACA 2004 Section 1 (a) (b) (c), *C.N. Onuselogu Ent. Ltd. V Afribank Ltd.* (2005) 1 NWLR
under the ACA can be compared to other legal instruments for certainty and predictability. Thus, the forthcoming section analyses the principle against Article 7 of the Model law.

4.2 Analysing ACA Section 1

The principle of the “writing requirement” of the ACA section 1 conforms with the Model law Article 7 which provides that parties are free to exercise their rights and power in shaping their contracts as they deem fit subject only to mandatory laws or public policy issues.\(^4\) It can be asserted that the provisions are similar to each other as they both reflect the needs of international commerce having been reformed to give effect to parties’ intentions with regard to freedom to choose their law of choice, parties’ right to design procedural rules according to their contract\(^5\) etc. The present researcher takes the view that the ACA section 1 and the Model Article 7 (4) will have an impact on a choice of law agreement which is a form of contract, that will fulfill the writing requirement that is contained in a document signed by the parties to the agreement, or contained in an exchange of letters, telex, telegrams or other means of communication which provides a record of the arbitration agreement. These requirements are effective because they recognise that parties to a contract may incorporate into their contract an arbitration clause contained in another document and that such incorporation by reference will also be valid if the underlying contract itself is in writing.

Furthermore, the ACA writing requirement is in line with contemporary rules as for example, Sections 1(1) and (2) will extend to agreements that are reached, say, in computer software licensing agreements which, upon acceptance occurs when the offeree breaks the seal on the


disk or CD-Rom container or click on an “I Agree” button on an initial screen of a computer. With this provision, sections 1(1) and (2) form of acceptance (by conduct or performance) will be sufficient to validate parties’ intention contained in the licensing agreement since there is no “signature” requirement per se or “exchange.” The only difference is that the above-mentioned form of agreements are rarely signed by both parties’ and are rarely “exchanged”; they are similar to common law principles of contracts that signature is only a requirement in contracts of hire purchase contracts, Wills, Land contracts, and Mortgages, but is not a requirement for all other forms of contracts including arbitration. Further comparisons could be drawn from maritime salvage agreements which would usually be concluded by radio telecommunication (i.e. oral offer and oral acceptance) by reference to the Lloyds Open Form (LOF) a standard industry set of terms which is a format that has been approved by a recognized Standards Organisation or is accepted as a de facto standard by Industry i.e. Shipping Bill of Lading which is defined as document evidencing receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods and it includes an airbill. It is an Instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place. It is a receipt for goods, contract for their carriage, and is documentary evidence of title of goods as in Schwalb v Erie R. Co.

---


---

7 Model law Article 7; ACA section 1; M.V. Panormos Bay v Plam Nig. Plc (2004) 5 NWLR (Part 855) 1 at 14; Tawa Petroleum v M.V Sea Winner 3 NSC 25
The text may also state that:

"writing" means any form, including without any limitation a data message that provides a record of the agreement or is otherwise accessible so as to be usable for future reference. “Data Message” means information generated, sent, received or stored by electronic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.  

As a general practice, telex, and telegrams do not usually require signatures. One of the terms used in ACA section 1 “any means of communication” means that parties are free to use any method they find suitable to their agreement. This could be an oral agreement similar to an agreement entered into via a radio telecommunication. This is also found in AA 1996 section 5 (3), which, according to the DAC on The Arbitration Bill 1996, AA section 5 (3) is designed to cover, amongst other things, extremely common situations such as salvage operations, where the parties make an oral agreement which incorporates by reference the terms of a written form of agreement, which contains an arbitration clause, similar to the provision of Article 13 of the Model law which states:

“the reference in a contract or a separate arbitration agreement to writing containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing thus, the writing containing the arbitration clause constitutes the arbitration agreement”.

Moreover, the Model law Article 7 explains that arbitration agreements can be validly concluded as the parties wish other than in the form of paper-based documents. This view will support arbitration agreements made say, by electronic communications or other forms of data messages, provided such message is “accessible so as to be usable for subsequent

---

8 ACA 2004 section 1 (2)
9 For example Lloyd’s Open Form for shipping
10 Model Law Article 7: NYC Article II (2)
This can be compared with both the Model law Article 7 and NYC Article II (2) as there are both capable of validating an arbitration agreement without ambiguities.

4.2.1. ACA Section 1 Compared with Model Law Article 7 and AA section 5

An examination of the provisions of the Model law Article 7, ACA Section 1 (1) and (2) of and NYC Article II (2) shows they have liberal requirements for formal validity of an arbitration agreement. That is to say that “writing” includes all forms of communications and not limited to paper-based documents as is specifically made clear in NYC Article II (2) that an arbitration agreement must either be: (I) an arbitral clause in a contract or an arbitral agreement signed by the parties or (ii) contained in an exchange of letters or telegrams. And in defining “agreement in writing”, Article II (2) states that “writing” includes all forms of writing, and not limited to paper-based documents. When compared with the AA, section 5, it can be asserted that both Article II (2) of the NYC and section 5 of the AA 1996 have given a wider definition to “writing” whereby making it simple for parties to have a wider autonomy to do as they deem fit in entering arbitration agreements subject only to mandatory rules and public policy.

The above principle is similar to the Nigerian Court of Appeal’s ruling in Ogunwale v Syrian Arab Republic in which the Court held that the provision of Article II NYC is wide.13 For the purpose of this thesis, the nature of Article II, section 5 (3) of the AA 1996 and section 1 ACA means that parties have wider autonomy to choose how to enter their arbitration agreements.14 The “agreement in writing” can on this ground be held to include arbitration agreements concluded by exchanges of emails as satisfying the writing requirement of the NYC. A good example of this is the case of Tribunal Supremo [Supreme Court], in which the

13 Ogunwale v Syrian Arab Republic (2002) NWLR
Court reasoned that when there is no written agreement to arbitrate, it seeks to ascertain the parties’ intention to refer their dispute to arbitration by considering the whole of their communications and behavior.\textsuperscript{15} In the present case, SIMSA Company had not signed the charterparty, it appeared to the court from the exchange of telexes between the parties’ brokers that the charterparty was concluded “in accordance with” an earlier charterparty on a standard “pro-forma used by the charterers”, with some “modifications as was indicated in their agreement”. The Court ruled that the relevant charter-party contained an arbitration clause, hence SIMSA Company complied with the condition for enforcement that it supplied a valid arbitration agreement. The Court noted that a reference to a standard charter-party is usual in international maritime commerce. This principle is also applicable in the AA and most modern arbitration laws in the developing countries as would be discussed below.

\textbf{4.2.2. ACA Section 1 and AA section 5 Compared with other Modern Arbitration Laws in some developing countries}

As mentioned in chapter three of this thesis, the form of arbitration agreement enforceable under the Ghana Act\textsuperscript{16} which stated in section 2 subsection (1) of the Ghana Act that parties to a written agreement may provide that a dispute arising under the agreement shall be resolved by arbitration is similar to AA\textsuperscript{17} sections 5 and 6 and the ACA section 1; accordingly, a provision to submit a dispute to arbitration under subsection 2 may be in the form of an arbitration clause in the agreement or in the form of a separate agreement.\textsuperscript{18} To clarify the requirements for a valid arbitration agreement, subsection (3) explains that an arbitration agreement shall be in writing and may be in the form provided in the Fifth

\textsuperscript{15}Tribunal Supremo [Supreme Court], Civil Chamber, 26 February 2002, enforcement case no. 153 of 2001, the present case was decided in accordance with the [NYC 1958] (RCL 1977/1575 and ApNDL 2760);
\textsuperscript{16}Ghana Arbitration Act 2010 section 2; ACA section 1
\textsuperscript{17}AA sections 5 and 6; ACA section 1
\textsuperscript{18}Ibid
Schedule to this Act. Thus, for the purpose of this Act subsection 4 explains that an arbitration agreement is in writing if (a) it is made by exchange of communications in writing including an exchange of letters, telex, fax, email or other means of communication which provide a record of the agreement; or (b) there is an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other party. This is similar to section 1 of the ACA, in the sense that the wording and the principle are to give parties as much freedom as possible on how they wish to enter their arbitration agreements. The difference is that section 2 subsection 4 (a) of the Ghana Act clarifies that agreement to arbitrate entered into by email are also valid; unlike the ACA which required signature for the validity of an arbitration agreement. Furthermore, ACA has not included email as one of the means of communicating an arbitration agreement, but simply stated any other means of communication. This may be confusing. Further points that is worth mentioning is that the drafters of the Ghana Arbitration Act, the ACA, the AA and many other modern Arbitration laws use the word “Unless otherwise agreed by the parties” in almost all the sections of their respective Arbitration laws to show the degree of prominence given to party autonomy under the Act. In addition to that, the use of the term “Unless otherwise agreed by the parties” increases the certainty and predictability of these laws. Essentially, parties are at liberty to select certain disputes and agree that they should go to arbitration while others may remain for determination by the courts.

4.2.3 ACA Section 1 Compared with Kenya Arbitration Act 1996

Traditionally, in Kenya, an agreement to refer future disputes to arbitration was referred to as an Arbitration Agreement whilst an agreement made after disputes have arisen was

---

traditionally referred to as a submission or a submission agreement. But in light of the statutory definition that the distinction between submission and agreement is no longer relevant; the principle of the formal requirements under the Kenya Arbitration Act are set out under Section 4 of the Arbitration Act and the first thing the statute provides for is that an arbitration agreement may be in the form of an arbitration clause in a contract or it may be in the form of a separate agreement all together. So for example in a contract between the government and a building road contractor, the contract will set out what the works are and the instructions from the engineer and one of the clauses in that agreement may simply be the clause that says any or all the disputes arising from this contract shall be referred to Arbitration. That is one option. The other option is where the contract is silent on whether it should bind the parties to arbitration. The form requirements as that of other countries mentioned in this thesis are that an Arbitration Agreement shall be in writing. The requirements are further clarified by Section 4 (3) that an arbitration agreement is in writing if it contains a written document by the parties; thus, these include an exchange of letters; telex, telegram or other means of telecommunications which provide a record of the agreement; an exchange of statements of claim and defence in which the existence of the agreement to arbitrate is alleged by one party and not denied by the other party. Section 4 (4) … the reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the record is in writing and the reference is to make that arbitration clause part of the contract.

The above mentioned sections of the Kenyan Act\textsuperscript{21} are equivalent to ACA section 1 and the AA sections 5 and 6. They appear to aim at given parties wide scope of freedom on how they wish to enter their arbitration agreement. For example parties have the freedom to provide some essential details in their arbitration clauses like how the arbitrator is to be appointed,

\textsuperscript{21} Kenyan Arbitration Act 1996 section 4; Dore Isaak, \textit{The UNICITRAL Framework for Arbitration in Contemporary Perspective} (Graham & Trotman Limited 1993) 24
what qualifications the arbitrator should have, where the arbitration should take place, how
many arbitrators, what substantive law is to apply to that contract, what procedural law is to
apply to that contract etc.

4.2.4. ACA section 1, Indian Arbitration Act 1996 section 7, Egyptian Arbitration Law
Article 10 compared with NYC Article II

As mentioned earlier, the Indian Arbitration Act 1996 is also a good example of a modern
arbitration law in a developing country with effective provisions for the enforcement of
arbitration agreements and awards. The Indian Act has defined an arbitration agreement in
simplified wording. The Act stated in Section 7 that an arbitration agreement has to be in
writing, and may be even contained in an exchange of letters or any other means of
telecommunication which provide a record of the agreement. The agreement need not be
signed and the unsigned agreement affirmed by the parties’ conduct would be valid as an
arbitration agreement.\(^\text{22}\) An arbitration agreement would also be considered to be in writing if
there is an exchange of a statement of claim and defence in which the existence of the
agreement is alleged by one party and not denied by the other.\(^\text{23}\)

Comparing the principles, it could be asserted that the ACA, India Act, Egyptian Arbitration
Law, Ghanian Arbitration Act, Kenyan Act are all modern laws, similar to the Model Law.
With Egypt, the similarity is illustrated in the wording of Article 10 (1) of the Egyptian
 Arbitration Law which states that the arbitration agreement is an agreement by which the two
parties agree to submit to arbitration in order to resolve all or certain disputes which have
arisen or which may arise between them in connection with a defined legal relationship,

\(^{22}\) Indian Arbitration Act 1996 section 7; Supreme Court of India ruling in, I.T.C. Limited v George Joseph
Fernandes & Anr on 6 February 1989, instant case considering the issues raised, the Arbitration Clause and the
surrounding circumstances [488A-C] 3.1 in the instant case, the arbitration clause formed part of the agreement
cited 24-cited by 75-1989

\(^{23}\) Indian Arbitration Act 1996 section 7; Supreme Court of India ruling in Wellington Associate Ltd v Mr Kirit
Mehta on 4 April 2000
whether contractual or not; Article 10 (2) states that the arbitration agreement may be concluded before the dispute has arisen either in the form of a separate agreement or as a clause in a given contract concerning all or certain disputes which may arise between the two parties. In the latter case, the subject matter of the dispute must be determined in the “Request for Arbitration” referred to in paragraph 1 of Article 30 hereof. The arbitration agreement may also be concluded after the dispute has arisen, even if an action has already been brought before a judicial court, and in such case, the agreement must indicate the issues subject to arbitration, on penalty of nullity. Following this, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that such reference is such as to make that clause an integral part of the contract. The arbitration agreement must be in writing, on penalty of nullity. Thus, under the Egyptian Law as that of the other developing countries mentioned in this thesis, an agreement is in writing if it is contained in a document signed by both parties or contained in an exchange of letters, telegrams or other means of written communication.

The present researcher is of the view that the Egyptian Arbitration Law Article 10, NYC Article II, ACA section 1 and the Model law Article 7 have been worded broadly so that parties may have the autonomy to choose how they want to enter into their arbitration agreements and enforce their awards, only subject to mandatory rules and public policy of the seat of arbitration. Thus, as mentioned earlier, Article II(1) requires the Contracting States to recognize an arbitration agreement in writing and Paragraph 2 of Article II defines the term “agreement in writing” as “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”. The examples from Van den Berg show that this definition can be divided into two alternatives: First alternative is

---

24Egyptian Arbitration Law Article 10, NYC Article II, ACA section 1 and the Model law Article 7
that, an arbitration clause in a contract or a separate arbitration agreement, the contract or the separate arbitration agreement being signed by the parties; if they choose to do so and the second alternative is that an arbitration clause in a contract or a separate arbitration agreement contained in an exchange of letters or telegrams. With this principle, parties are free to choose either the first alternative or the second.

4.5. Van den Berg Analysis of Article II (2) NYC

Van den Berg is of the view that the definition of what constitutes a written arbitration agreement given in Article II(2) can be deemed an internationally uniform rule which prevails over any provisions of municipal law regarding the form of the arbitration agreement in those cases where the Convention is applicable.25 The above view may be right as the definition may prevail over the otherwise applicable law which may impose stricter requirements on the formal validity of the arbitration agreement (for example, where some domestic laws require that the arbitration clause be signed separately).

Although, according to Van Den Berg, it is increasingly questioned whether the text of Article II(2) also constitutes an international minimum requirement for the formal validity of the arbitration agreement in view of the rather demanding conditions resulting from its text. In particular, the requirement of an exchange in writing is felt to be no longer in conformity with international trade practices where contracts are frequently formed by tacit acceptance.

The author’s view is that the number of courts which either construe Article II (2) expansively or even state that it is also allowed to rely on national law for determining compliance with the written form of the arbitration agreement, is increasing.26 According to


the author, they are various approaches for adapting the requirements of Article II(2) to accommodate present day international trade practices that are summarized in the Commentary. The first alternative of Article II(2) requires that the contract including the arbitration clause or the separate arbitration agreement bear the signatures of the parties. The second alternative was added to make allowances for the practices in international trade at the time (i.e., in 1958). According to this alternative, it suffices that the contract including the arbitration clause or the separate arbitration agreement be contained in an exchange of letters or telegrams, without it being necessary that any of these documents is signed by the parties.

One of the uncertainties is that the courts in the Contracting States express different views as to when the exchange can be deemed accomplished. One view is that the document itself should be returned by the party to which it was sent to the party which dispatched it. Another view is that it suffices when a reference is made to the document in subsequent correspondence, such as a letter, facsimile, letter of credit, invoice, etc., emanating from the party to which the document was sent. The latter view would appear to be better suited for adapting the fairly strict requirements of Article II(2) to accommodate present day international trade practices. Van Den Berg thinks that these views would also correspond with the intent of the Convention’s drafters who, by inserting the second alternative in the

 Bonner R J *The Jurisdiction of Athenian Arbitrators*, (Chicago, The University of Chicago Press 1907)

 27 NYC Article II(2)
 28 Ibid
 32 Boyana T *Traditional Justice in Practice: A Limpopo Case Study* Institute of Security Studies, ISS Monograph Series No. 115 Pretoria 2005) 65
Convention’s text, wanted to make allowance for international trade practices. In any event, the acceptance need not concern the arbitration clause specifically; it suffices that the contract containing the clause be accepted.\textsuperscript{34}

The author is right that it is generally accepted that the expression in Article II(2) “contained in an exchange of letters or telegrams” should be interpreted broadly as to comprise also other means of communication, especially telexes.\textsuperscript{35} This is expressly provided in Article I(2)(a) of the European Convention on International Commercial Arbitration of 1961, which is in part almost identical to Article II(2) of the NYC. The relevant provision in the European Convention of 1961 states: “contained in an exchange of letters, telegrams, or in a communication by teleprinter”. Other means of telecommunication, such as facsimile, can also be brought under the expression “contained in an exchange of letters or telegrams”, although no case law has yet been reported thereon.\textsuperscript{36} See also Model law Article 7(2) mentioned earlier which provides in relevant part: “an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement”. With the advent of electronic commerce (“e-commerce”), the question is raised whether an arbitration agreement concluded by e-mail (or, for that matter, electronic contracting in general) meets the requirements of Article II(2) of the Convention. There is scant case law on that question. The prevailing view seems to be that an arbitration agreement concluded by e-mail can be brought under Article II (2) provided that there are signatures that are electronically reliable or the agreement is contained in an exchange of e-mail (or other form of electronic contracting) that is sufficiently recorded or can be proven to have existed in writing by other

\textsuperscript{34}Boule L & Rycroft A, Mediation: Principles Process, Practice, (Durban, Butterworths 1997) 27

\textsuperscript{35} Model law Article 7 (2)


117
means. Sales or purchase confirmations are frequently used in today’s international trade practice. It follows from what is observed above that an arbitration clause in a sales or purchase confirmation will meet the written form requirement of Article II(2) if:

(a) the confirmation is signed by both parties (first alternative); or

(b) a duplicate is returned, whether signed or not (second alternative); or, possibly,

(c) the confirmation is subsequently accepted by means of another communication in writing from the party which received the confirmation to the party who dispatched it.

A tacit acceptance of the confirmation is in principle not sufficient for the purposes of Article II(2), subject to the various approaches outlined above. The question of an arbitration clause in standard conditions and the written form requirement of Article II(2) is important as standard conditions are frequently used in practice, but is also rather complex. The question is not only to be considered in different settings (clause amongst the printed conditions on the back of a contract; clause in a separate, usually printed, the document to which the contract refers, etc.). It also bears consideration in connection with two main questions, that of adhesion contracts (protection of weaker parties) and of incorporation by reference (question when the “reference clause” or “incorporation clause” in the contract, referring to the external standard conditions, is sufficient).

With respect to the question of incorporation by reference of the arbitration clause in the standard conditions in the body of the contract, The test appears to be that the other party is able to check the existence of an arbitration clause. Thus, two categories of standard

---

conditions can be distinguished. First, standard conditions printed on the back of a contract. In that case, a general reference clause in the contract is as a rule held sufficient since the other party is considered to be able to check the back of a contract. Second, standard conditions in a separate document require a reference clause in which specific attention is called for the arbitration clause in the standard conditions (for example, “This Contract is governed by the General Conditions of Sale, including the arbitration clause contained therein, ...”). Here again, the other party is made aware of the existence of an arbitration clause and, hence, can be considered to be able to check it. There is no need to repeat the arbitration clause verbatim in the reference clause. This is the so-called specific reference. If, however, the standard conditions have been communicated to the other party, a general reference is usually deemed sufficient. Another exception is the case where the parties have a continuing trading relationship in which the same standard conditions are being used. In that case too, a general reference is as a rule held sufficient. A third exception seems to be the case where the standard conditions are so well known in the international trade concerned that any party participating therein can be deemed to be fully aware of these conditions, although case law is not yet developed in this respect.

4.6. The Model Law Article 7 (2) and NYC Article II (2)

The foregoing can also be viewed against the background of Article 7 (2) of the Model Law and ACA section 1 which provide in relevant part: “the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”
In the domestic legislation, there has been an interpretation of the construction of Article II (2) of the NYC which contains liberal and expansive description of the writing requirement.\(^{38}\)

In interpreting Article II of the NYC in the case of *Sphere Drake, Khan Lucas Lancaster Inc v Lark Int’l Ltd* in which the Court held that “an arbitration clause in a contract is sufficient to implicate the Convention. That is, an ‘agreement in writing’ does not necessarily have to be either signed by the parties or contained in an exchange of letters or telegrams, as long as the Court is otherwise able to find ‘an arbitral clause in a contract’.\(^{39}\) Accordingly, Article II (2) of the NYC has achieved greater uniformity in its application following a purposive rule interpretation given to Article II(2) and Article VII which state:

“that Article VII(1) of the Convention should be applied to allow any interested party to avail itself of the rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement”.\(^{40}\)

The present researcher’s view is that the purpose of uniformity in the interpretation and application of Articles II(2) and VII is to ensure the principle of party autonomy is respected in the seat of arbitration chosen by the parties. This thesis asserts that section 1 of the ACA is similar to the provisions of the Article 7(2) of the Model law as the ACA has given precedence to the principles of party autonomy as that of Article 7 (2) and Article II (2) and VII (1) of the NYC.\(^{41}\) Thus, the present researcher asserts that section 1 of the ACA is effective as Article 7 of the Model law and Articles II (2) and VII (1) of the NYC as they are adequate and predictable for the enforcement of arbitration agreements. See for example,

---


\(^{40}\) NYC Article VII(1); ACA Section 1; Model Law Article 7 (2)

\(^{41}\) Ibid
In view of rapidly evolving methods of recording the Court had made it clear that “writing” includes recording by any means. See also, *Aughton v MF Kent Services*; See *Schiff Foods Products Inc. v Naber Seed & Grain Co. Ltd.* The Court held that there was ample evidence of a contract between the parties and, in the absence of an expressed requirement for signatures to an arbitration agreement in the Model law, a liberal interpretation should be given to the requirement of an agreement in writing in the modern age of electronics and international business transactions. This case is yet another case in which the court applied parties' intention to determine the existence of an agreement to arbitrate irrespective of the fact the document was not signed by the parties.

As shown earlier in sections 4.1 and 4.2 and 4.3 one of the areas in which there is still confusion is a signature requirement in validating an arbitration agreement. The forthcoming section discusses the views of both the common law and civil law jurisdictions as a way of giving more light as to whether signature should really be a requirement or not in the formal validity of the arbitration agreement.

### 4.7 Learning from Examples of Christopher Kuner Comparative Analysis of “Writing” and hand “written Signature” Requirement

According to Christopher Kuner and Anja Miedbrodt; when considering the function of written signatures, it is important to distinguish between the concepts of a "writing" and of a "handwritten signature". In both the US and Germany, almost any perceivable evidence may be considered to be "written", including electronic evidence. However, "signature" is a legal term of art which involves application of the rules described below. A handwritten

---

43*Aughton v MF Kent Services* [1991] 57 BLR 1
44*Schiff Foods Products Inc. v Naber Seed & Grain Co. Ltd*
45See for example, [http://www.ilpf.org/digsig/survey.htm](http://www.ilpf.org/digsig/survey.htm); (Obtained October 2012); ICC Case no 5832, 115 Clunet 1198 (1998) 1202; Herrman, ‘The Arbitration Agreement as the foundation of Arbitration and its recognition by the Courts’ ICCA Congress series no 6, 41; 44; Reiner, ‘The Form of the Agent’s power to sign an Arbitration Agreement and Article II (2) of the NYC’ ICCA Congress series no, 82, 85
signature is intended to fulfill a variety of formal functions, such as the following that are often cited in the German legal literature: Finality function:

- The signature should make it clear that the signed document represents a completed declaration of will, and not just a draft which the signatory did not intend to be bound by.
- Cautionary function. A signatory should be made aware that by his signature he is entering into a binding transaction.
- Evidentiary function. A party should in case of dispute be able to use a signature for evidentiary purposes.

However, these functions are limited by a further important principle, namely that of party autonomy. That is, in most cases a signatory should be able to rely on an expression of his will (such as a signature) being respected and not invalidated by the legal system for failure to meet a handwriting requirement, as long as it is clear from the circumstances that he intended to be bound by it. The decisive question then becomes how a legal system balances the interests listed above, which can be competing. For instance, respecting the will of parties who have agreed, e.g., that an Oral agreement is sufficient to convey an arbitration agreement is clearly in a state of tension with the need to provide clear evidence of such an agreement and to warn parties against entering into such important transactions too lightly. It is therefore not surprising that many legal systems make enhanced evidentiary privileges or even legal validity for certain transactions dependent on the fulfilment of handwritten signature requirements. Achieving an appropriate balancing of these interests is more difficult when dealing with electronic authentication than in the case of traditional paper signatures. First of all, paper signatures have existed for thousands of years, while electronic authentication has

---

46 Herda, Elektronische Dokumente, Einfuhrund in die rechtliche Problematik, in: Bundesnotarkammer (ed), Oneline Law 83 (Prentice-Hall 1996) 21
only recently begun to be widely used. Thus, the experience that legal systems have built up regarding paper signatures is largely lacking with regard to electronic ones. Secondly, there is great uncertainty about how to balance the relative security risks of paper signatures versus those of electronic signatures. While it is clear that digital technology makes it possible to forge or manipulate electronic signatures on a scale impossible in the case of paper signatures, it is also clear that paper signatures have never been particularly secure, and that the same digital technology makes possible a degree of security unheard of in the case of paper signatures (e.g., through the use of encryption technologies). This has understandably led to uncertainty among users about whether electronic signatures are secure or not, which has held back their broad acceptance.

4.7.1 Learning from Christopher Kuner’s Analysis of Written Signatures in the Common Law (United States)

While the United States is actually composed of 51 legal systems (50 states and the federal government), it is possible to generalize to some extent about written signature requirements. Generally speaking, contracts and obligations do not have to be in writing unless the law requires otherwise.\textsuperscript{47} Other formal requirements in US law include the "contract under seal" and notarization\textsuperscript{48}, which, however, either have little practical importance nowadays (as in the case of the contract under seal), or are so easily satisfied that the justification for their continued existence is questionable (as in the case of notarization, which in US legal practice generally means nothing more than having a secretary certify a signature upon request). As a signature can be any mark on a message made "with the present intention to authenticate" it\textsuperscript{49}, in US law the emphasis is on whether the signer intended to be bound.

In the US, questions concerning the validity of handwritten signatures tend to arise most

\textsuperscript{47} Smedingholl (ed), Online Law 83 (Prentice-Hall 1996)
\textsuperscript{48} Perritt, Law and the INFORMATION Superhighway 386 (John Wiley & Sons 1996)
\textsuperscript{49} UCCS 1-201 (39)
frequently in the context of the so-called "Statute of Frauds", which is a remnant of the English common law that was incorporated into the Uniform Commercial Code that almost all US states have adopted. The Statute of Frauds provides that in order to be enforceable, certain types of contracts (such as those of a value more than $500) must be "in writing and signed by the party against whom the enforcement is sought". Within this context, courts have held such indications of intent as a telegraphed name, a fax, and a telex to be a "writing" or "signature". The key factors in the US decisions seem to be that, if the signature reflects the intent of the party, and it was recorded in a "tangible medium", then it will be found to be a legally-valid signature. Signature and writing requirements are also found in other specific areas where there is a particular need for evidentiary certainty, such as regarding the filing of papers in court. The functions of a signature referred to above in the context of German law are by no means unknown to US law. However, it is also clear that the trend has largely been away from written signature requirements. US law emphasizes the intent of the parties, rather than the security of the manner by which the signature is affixed, as long as certain minimum requirements (such as the use of a "tangible medium", which includes electronic media) are observed. Moreover, it is widely felt that the Statute of Frauds is no longer timely and should be repealed.

Despite the generally liberal approach to the admissibility in court of electronic signatures, concerns about the acceptance of such evidence in practice have led almost all US jurisdictions to pass or at least seriously contemplate legislation intended to facilitate their

---

50 UCCS 2-201 (1)
51 Hillstrom v Gosnay, 614 P.2d (mont. 1980)
53 See for example, New York CPLR 2101 (a), requiring with regard to court papers that “writing shall be legible and in black ink”.
54 See ABA Digital Signature Guidelines 3-4 (American Bar Association 1996), which refer (non-exclusively) to the following “general purposes” of signature: evidence, ceremony, approval, and efficiency and logistics; Fuller, Consideration in Form, (1941) 41 Columbia Law Review 799, 800
55 Baum & Ford, Secure Electronic Commerce 44 (Prentice-Hall 1997)
While such legislation typically deals with much more than the evidentiary status of electronic signatures, the uncertainty caused by evidentiary disputes has been one of the major motivations in enacting US digital signature laws.

7.4.2 Learning from Christopher Kuner’s Analysis of Written Signatures in the Civil Law (Germany)

The German law of written signatures is complex and cannot be discussed here in all its permutations. However, it is possible to distill some general principles. Under German law there are no formal requirements for a contract to be valid, unless explicitly provided for by law, and it is possible for the parties to agree that a signature will have a particular evidentiary value. The vast majority of commercial transactions in German law do not require a particular form of a handwritten signature, but such requirements do play a role in certain areas relevant to electronic commerce (e.g., in consumer credit transactions and in data protection law).

German law contains five types of signature requirements:

- those provided for by statute;
- agreement by the parties to apply statutory signature requirements;
- notary certification;
- authentication, which is generally performed by a notary; and
- record in a protocol of declarations concerning a court settlement, which is used in place of notary authentication.

---

56 See the list of requirements from Baum at [http://www.perkinscoie.com/resource/ecommerce/digsig/index.htm](http://www.perkinscoie.com/resource/ecommerce/digsig/index.htm) (obtained) December 2012
57 There are also over 3,000 written form requirements in German Law
58 Section 126 Civil Code (Bürgerliches Gesetzbuch or BGB)
59 Section 127 BGB
60 Section 128 BGB
61 Section 127 BGB
Where a written signature is required by statute, the document has to be signed by hand by the issuer with his name or a handwritten mark which is authenticated by a notary.\(^{62}\)

Signatures by stamp,\(^{63}\) typewriter, or by telegram or fax are not considered to be "handwritten" in this context. The rationale for such statutory signature requirements relates to the functions of written form described above. For example, § 566 BGB requires that a lease of real estate longer than one year has to be signed by hand to provide evidence for the content of the contract, while section 766 BGB provides that a surety bond requires a handwritten signature in order to warn the surety.\(^{64}\)

When no statutory signature requirements are applicable but the parties have agreed to apply them anyway, the statutory provisions concerning signature requirements are applied unless the parties have agreed otherwise. Thus, in this case the parties may derogate from the requirement of a handwritten signature, so that, for example, a transmission via telegraph between the parties would be sufficient. In this case, the consequences of a failure to satisfy the agreed-upon formal requirements are determined by the agreement between the parties, so that whether or not the agreement is rendered void depends on the circumstances in each case. By contrast, the failure to satisfy a signature requirement provided for by statute renders a transaction void in principle (not just unenforceable), nor may the parties derogate from the legal rules concerning statutory form. In some cases the failure to meet signature requirements may be cured, e.g., in the case of a conveyance of real estate by performance of the transfer and entry into the Land Registry (Grundbuch), or by performance of a gratuitous promise, or by a surety performing the obligation in question. But there is no general principle that the failure to satisfy signature requirements can be cured by performance.\(^{65}\) If notarial authentication is required by statute (e.g., of a company registration), the declaration

---

\(^{62}\) Section 126 BGB

\(^{63}\) Bgh njw 1970, 1978, 1080

\(^{64}\) BGHZ 24, 297, 301

\(^{65}\) Brox, Allgemeiner Teil des Burgerlichen Gesetzbuches 144, Rdn 246 (20\(^{th}\) ed Carl Heymanns 1996) 27
in question must be in writing and the signature or the manual sign has to be attested by a
notary, who authenticates only that the signature is actually that of the signatory. If notarial
certification is required by statute (e.g., for a gift or a conveyance of real estate, the signatory
will issue a written declaration to the notary, which will be read and approved; following this
ceremony, the notary will sign the minutes. Certification serves as proof that the declaration
was issued in front of a notary, and replaces the legal requirement of a handwritten signature
and notarial authentication.

A written signature satisfying the formal rules described above enjoys enhanced evidentiary
status under the Code of Civil Procedure ZPO, so that it is presumed that the signed
declaration was issued by the signatory. The practical result is that parties often attempt to
memorialize their understandings in a written document satisfying the formal requirements
(called an Urkunde), in order to gain the benefit of these evidentiary presumptions. Because of
the requirement of a handwritten signature and because of the lack of embodiment in a
tangible medium, it is generally held that an electronic document cannot be an Urkunde, meaning that it cannot enjoy the evidentiary presumptions described above. However, such
evidence can still be admitted as "visual evidence" (Augenscheinsbeweis) or "expert
evidence" (Sachverständigenbeweis), the weight of which is assessed by the court in its
discretion.

The capability of digital signatures to provide highly-secure evidence of integrity and
authenticity has made them the center of attention in Germany to provide an electronic
equivalent to written signature requirements. For instance, since 1990 it has been possible to
submit an application for a default summons (Mahnbescheid) without a handwritten

---

67 Robnagel, Die Sicherheitsvermutung des Signaturgesetzes, 1998 NJW 3312, 3314; Bizer & Hammer, Elektronisch signierte Dokumente als Beweismittel, 1993 DuD 619, 622
signature, if it is otherwise ensured that the application could not have been submitted without the intent of the applicant. And in 1993 a law to expedite administrative procedures (Registerverfahrenbeschleunigungsgesetz) was amended to allow local authorities to maintain the Land, Company, and other registries in electronic form.  

On August 1, 1997, the German Digital Signature Law (Signaturgesetz or SigG) came into force. The main legal innovation of the Digital Signature Law is that it provides that use of the technical standard defined by law will cause a digital signature to be "deemed secure", although the exact effect of this presumption in German law is unclear. There is no impediment to a court granting the same evidentiary value to other digital signature standards as to the statutory standard (for example, based on agreement by the parties); rather, the advantage at present to using the standard set forth under the Digital Signature Law is that users thereby enjoy a legal presumption without having to agree upon it in advance, which can also save costs by not requiring the court in each case to hear evidence about the security of the standard used. Additional legal advantages to using the statutory standard may arise in the future, as the government is presently examining the possibility of allowing fulfillment by electronic means of statutory signature requirements based upon use of the statutory digital signature standard.

4.7.3 Learning from Christopher Kuner’s Analysis of Policy Implications for Electronic Authentication

The differences in written signature requirements discussed above have already found expression in national and international policies on electronic authentication. For example, the German Digital Signature Law is based on a high security standard, which is at least

---

68 Ibid note 67
69 The German Digital Signature Law August 1 1997 (Signaturgesetz or SigG)
partially owing to the high level of security required to satisfy statutory signature requirements in German law and the intention to tie later relaxation of such requirements to the statutory digital signature standard. The connection between stringent written signature requirements and electronic signature regulation is also set forth in a German government paper on the "International Legal Recognition of Digital Signatures, which states in part: "In particular, a legal framework is necessary for the construction and erection of a (compatible) security infrastructure with a uniform organizational and technical security standard. The trustworthiness which is thereby attained offers the possibility of legally allowing a ‘digital form’ with digital signature as the equivalent to ‘written form’ with a hand-written signature. Another example is provided by Article 9 of the "Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market" (the "E-Commerce Directive"), which obligates the EU Member States to ensure the validity of electronic contracts in their respective legal systems, but leaves the issue of meeting formal requirements (such as those requiring signatures) by electronic means to the proposed EU Directive on Electronic Signatures. However, this latter Directive does not by itself provide harmonization, since it does not apply to "non-contractual formalities requiring signatures". The fact that both directives in effect leave the harmonization of a written signature requirements to the Member States indicates the sensitivity and difficulty of amending long-established written signature requirements in national law.

The US position, by contrast, has been based on principles that reflect the role of signatures in US law. For example, in early 1998 the US government proposed a "Draft International Convention on Electronic Transactions" to the Working Group on Electronic Commerce of the United Nations Commission on International Trade Law (UNCITRAL). The terms of the

---

proposed convention emphasize respecting the parties' agreement concerning the type of signature used, even to the extent of overriding applicable legislation. US state and federal legislation on electronic signatures also generally reflects the view under US law that electronic signatures should be considered equivalent to paper-based signatures, and that such equivalence should not be based on the security of electronic signatures.

These examples suggest that differences in the definition of "signature" are already influencing the course of national and international policies on electronic authentication. In particular, common law lawyers often see written signatures requirements as a formality that has been largely eliminated and remains only in a few isolated cases, while civil law lawyers often think of them in terms of security requirements that have a strong public policy aspect. Differing concepts of "signature" in the context of electronic authentication also seem influenced by the differing uses to which it is assumed this technology will be put, with US policymakers focusing on "low value" applications less concerned with identity (such as SSL certificates), while the German Digital Signature Law, by contrast, is based on a model that digital signatures will primarily be used to prove personal identity. It is therefore not surprising that policymakers from different countries often seem to have completely different concepts in mind when discussing the definition of a "signature".

The comparative analysis of the rules governing “signature” in above section shows that the issue of signature as a requirement of arbitration agreements in both the common law and civil law systems. Are ambiguities in laws requiring “signature” not one of the main the issues leading to courts intervention in Arbitral proceedings where the courts are got between staying or not staying an arbitration proceeding.

4.8. Comparing the ACA section 4, AA section 9 and NYC Article II (3)

The NYC is such that in enforcing arbitration agreements, courts are required to stay proceedings that are brought before them in violation of such agreements. This is provided
for in NYC Article II (3) and in the ACA section 4 where it stated that a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request not later than when submitting his first statement on the substance of the dispute, order or stay of proceedings and refer the parties to arbitration. The similar provision for a “stay” is also provided in AA 1996 section 9 (1) that a party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter; and section 9 (4) states that on an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed as in Channel Tunnel v Balfour Beatty.  

These provisions are founded under the principles of NYC Article II (3) which provides that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. This is if the arbitration agreement is an “international” agreement, in the sense that it involves a foreign element. As ruled by the Supreme in C.N. Onuselogu Ent. Ltd v Afribank (Nig.) Ltd., Nigerian courts have been applying the principles of the NYC to enforce international arbitration agreements by staying judicial proceedings if they were commenced in violation of the arbitration agreements. A good example is Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co. Ltd in which High Court of Hong Kong ruled that Arbitration is international if a substantial part of the obligations of the

---

71 Channel Tunnel v Balfour Beatty [1993] AC 334
72 C.N. Onuselogu Ent. Ltd v Afribank (Nig.) Ltd. (2005)
73 C.N. Onuselogu Ent. Ltd. V Afribank (Nig.) Ltd. (2005) 1 NWLR
commercial relationship between Hong kong companies is to be performed outside Hong Kong. Also, Katran Shipping Co. Ltd v Kenven Transportation Ltd, in which the Nigerian courts refused to intervene in the proceedings nor exercise discretion to intervene as this may result to a misinterpretation and misapplication of the NYC. But the Committee for the Reform of the ACA sees it differently.

4.9 The Report of the Committee for the Reform of The ACA

The Committee for the Reform of the ACA stated in its report of 2008 that there are contradictory terms in the ACA as section 4 of ACA provides that the court “shall” stay proceedings brought in violation of an arbitration agreement. But section 5 (2) provides that the court “may” stay proceedings brought in apparently the same circumstances. The Committee, in the same paragraph quoted above, thinks the term “shall” and “may”, may be misinterpreted as they are generally employed in statutory contexts to draw a distinction between mandatory and discretionary powers respectively. Whilst the Committee for the Reform of the ACA may be right that there could be contradictions if there is a legal proceedings that are brought in violation of arbitration agreements in which the courts applied sections 4 and 5 either together or interchangeably, notwithstanding the different standards (i.e. Obligation vs. discretion) that are inherent in the respective wordings of each section; there is no case law to show that the courts have applied sections 4 and 5 together. As shown in MV Lupex case, the Supreme Court has either applied each section as obligatory or discretionary, but not together or interchangeably as stated by the Committee for the Reform of the ACA.

---

74 Ibid
75 The Committee for The Reform of the ACA (2008) para 2 p 16; ACA Section 5 (2)
76 Committee Proposal for the Reform of ACA (2008) 16
77 MV Lupex v Nigeria Overseas Chartering and Shipping Ltd [1993]NSC 182
In their report, the Committee stated that sections 4 and 5 apply to separate and distinct situations, in that the “mandatory” stay in section 4 applies to “international” arbitration (which includes “foreign” arbitration) while the “discretionary” stay in section 5 applies to “domestic” arbitration.\(^{78}\) But, there does not appear to be a distinction between the two sections as the Committee suggested as the courts have not drawn this distinction in view of the fact there is no case law to support the Committee’s report on this point. This appears clearly from a historical and comparative evaluation of those provisions.\(^{79}\) This thesis submits that section 5 of the ACA is still effective. This was demonstrated in *Minaj Systems Ltd v Global Plus Communication Systems Ltd & 5 ors*, and *Niger Progress Ltd v N.E.I Corp and in Lupex*\(^{80}\) in which the Supreme Court held that it was an abuse of the Court process for the respondent to institute a fresh suit in Nigeria against the appellant for the same dispute during the pendency of the arbitration proceedings in London. Following this, in *Akpaçi v Udamba*,\(^{81}\) the Court held that where a defendant fails to raise the issue of arbitration clause and rely on same at the early stage of the proceeding but takes positive steps in the action, he would be deemed to have waived his right under the arbitration clause. Thus, the Court applied sections 4 and 5 effectively notwithstanding that section 5 is exactly the same as section 5 of the Arbitration Ordinance No. 47 of 1955 which was published as Chapter 13 of the Act of (1958). Furthermore; although, the above-mentioned section is a part of the older enactment which was in force prior to Nigeria’s ratification of the NYC, the provision of the section is still effective as it provides for a discretionary stay of judicial proceedings brought in violation of an arbitration agreement which can be done on the grounds of public policy considerations.\(^{82}\) The NYC treatment of stay of judicial proceedings compared to section 5

\(^{78}\) The Report of the Committee for the Reform of the ACA (2008) para 4, p 16  
\(^{79}\) Arbitration Ordinance No. 47 (1955)  
\(^{80}\) Minaj Systems Ltd v Global Plus Communication Systems Ltd & 5 ors 2008; Niger Progress Ltd v N.E.I Corp (1989); Lupex V.N.O.C [2003]  
\(^{81}\) Akpaçi v Udamba (2003) 6 NWLR (Part 815) 169  
\(^{82}\) Ibid
mentioned above, can be drawn from the purpose of the Convention which was to provide a common standard for the treatment of international arbitration agreements and awards by member countries. Thus, Article II (3) of the Convention sets a standard for the stay of judicial proceedings brought in violation of an arbitration agreement in favour of international arbitration agreements subject to public policy of the countries in question.\textsuperscript{83}

4.10 The Principles of the NYC Article II (3) Compared with the ACA Sections 4 and 5

The guiding principles of ACA in sections 4 and 5, are similar to those of NYC Article II (3) and the AA 1996 section 9 in the context of encouraging the courts of a contracting State to refer the parties to arbitration when dealing with an action in which the parties have made an agreement within the meaning of the Article, unless it finds that the agreement is null and void, inoperative or incapable of being performed. The text of the AA 1996 section 9 (1) states that a party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. This is reinforced by section 4 of the AA 1996 which stated that on an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. Under the ACA, sections 4 and 5 are applicable to similar situations: section 4 implements Nigeria’s convention obligations under the NYC, and applies the required stay standard to court proceedings brought in violation of an international arbitration agreement, and section 5 (provides for a discretionary approach to make room for public policy considerations) is the re-enactment of a provision that existed prior to Nigeria’s ratification of the NYC, but they are still adequate to domestic and international arbitrations in the sense that they are replicas

\textsuperscript{83} NYC Article II (3) similar to ACA 2004 sections 4 and 5
of NYC Article II in the context of staying legal proceedings in favour of parties agreement to arbitrate vis-à-vis party autonomy. The Committee for the Reform of the ACA uses the provisions in section 1 of the AA 1975 as an example of section 4 of the ACA, which employs the word shall) to which Mustill and Boyd gave their comments:

“that section 1 of the 1975 Act entitles a party against whom proceedings are brought in an English court in breach of an arbitration agreement which is not a domestic arbitration agreement to insist on the proceedings being stayed”.  

The Committee may be wrong in suggesting that Mustill and Boyd meant that no question of discretion can arise under section 1 of the AA 1975. The present researcher is of the view that the court’s discretionary powers are necessary in order to consider public policy issues. Although the stay is necessary but the court has power to impose terms as a condition of an order for a stay under the section. The present researcher asserts that the above is similar to section 4 (1) of the AA 1950 which like section 5 of the ACA, used the word “may”; although Mustill and Boyd’s view is that “the court has a general discretion…to stay proceedings brought in breach of a domestic arbitration agreement.” The underpinning principle is to ensure the enforceability of arbitration agreements, whether there are international or domestic or not. However, the present researcher noted that the ACA had included the two provisions of sections 4 and 5 without clarifying as that of the English legislature had made under section 1 of the AA 1975, that while one provision (section 4) was intended to apply to “international” arbitration agreements, the other (section 5) was intended for “domestic” agreements. This point can be demonstrated in the case of C.N. Onuselogu Ent. Ltd v Afribank in which the application of the discretionary standard by the
court of Appeal to an international arbitration agreement resulted in its ultimate decision to grant a stay.\textsuperscript{89} Notwithstanding the case of \textit{C.N Onuselogu} cited above, the present researcher submits that international arbitration agreements including those that select a foreign arbitration forum are enforceable in Nigeria, as contemplated by section 4 of the ACA, and as necessitated by Nigerian’s convention obligations under the NYC.\textsuperscript{90} The freedom that parties have in selecting a forum extends to the freedom in choosing of an arbitrator, as will be discussed in the forthcoming section.

\textbf{4.11 The provisions for the Choosing of Arbitrators}

It is normal to have three arbitrators; commonly, but not invariably, one will be chosen by each side and the third, who will be the chairman, will be chosen by the other two. Generally the parties are free to choose the arbitrators by agreement. They are free to determine the number of arbitrators to be appointed. The ACA section 6 and that of Article 15 of the Egyptian Law dealing with the composition of arbitrators are similar to Article 10(2) of Model law that stipulates a three-arbitrator model.\textsuperscript{91} Section 6 of the ACA’s provides that where the parties fail to make use of their right to determine the number of arbitrators in the agreement, the number of arbitrators shall be deemed to be three arbitrators. A Similar principle is found in Article 10 (2) of the Egyptian Law which states that the arbitral tribunal consists, by agreement between the parties, of one or more arbitrators; that in the absence of such agreement on the number of arbitrators, the number shall be three.

The present researcher is of the view that both ACA sections 6 and the Egyptian Arbitration Law Article 10 should be be reformed.\textsuperscript{92} The Kenya Arbitration Act section 11 and the AA

\textsuperscript{89}C.N. Onuselogu Ent. Ltd v Afribank (Nig.) Ltd (2005) NWLR
\textsuperscript{91}ACA section 6; Model law Article 10 (2)
\textsuperscript{92}ACA section 6 default number of arbitrators to be three; Egyptian Law dealing with the composition of arbitrators are similar to Article 10(2) Lagos State Arbitration Law 2009 section 7(3) is one (sole arbitrator)
section 15 (3), are good examples to adopt because of costs. Under Section 11 subsection 1 the parties are given the freedom to determine the number of their arbitrators, but failing such determination the number shall be one. The same is applicable in the AA section 15 (3) which states that if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator. As stated earlier above; this is more adequate as it will save costs in arbitration matters involving small amount of money and safeguard parties’ freedom to choose as they wish.

The AA section 15 (3) has retained the single-arbitrator model on the grounds that (1) a default provision which prescribes a three-arbitrator panel would produce unnecessary expense which undoubtedly the parties would want to avoid, and (ii) a single-arbitrator model will overcome the problem which might arise if there are more than two parties to the arbitration, as three arbitrators might then be inappropriate. Similar provision is made in Article 1451 of the French Decree which provides that an arbitral tribunal shall be composed of a sole arbitrator or an uneven number of arbitrators. By so doing, the parties are free to decide on the number of arbitrators they wish to have to resolve their dispute.

Thus the present researcher takes the same view that a single-arbitrator model with the parties freedom to increase the number as they choose would be most appropriate for both international and domestic arbitrations, particularly in a significant number of small claims disputes that will be generated by purely domestic transactions but with the exception of the provisions which apply specifically to only international arbitration. Moreover, parties in a large and complex transaction are more likely to take account of the factors that justify a three-arbitrator model and would have provided for such in their agreements; the overriding factors should be the parties’ choice. The present researcher argues that section 6 may not be quite adequate, where for example an arbitration proceeding involves small amount of

93AA 1996 section 15 (3) retains sole-arbitrator model
money, applying section 6 of the ACA may incur unnecessary expense and undermine the object of arbitration in terms of saving costs and freedom of parties to choose their own arbitrator under the principle of party autonomy. The present researcher therefore argued that section 6 of the ACA and Article 10 (2) of the Model Law are comparatively not adequate for the reasons cited above. The present researcher supports the view of a single-arbitrator model which is the model that takes into consideration the deadlock that may arise where the parties stipulate for even number of arbitrators in their agreement which explains that such agreement shall be deemed as requiring the appointment of an additional arbitrator as chairman of the tribunal with the recognition that the parties have the autonomy to add or subtract the numbers of arbitrators.

4.11.1 Learning from the Lagos State Arbitration Law 2009, section 7

Another good example is the Lagos State Arbitration law section 7 which provides for a single arbitrator, but leaves the parties to increase the number if they wish to do so.

The Lagos State Arbitration law gives the parties more freedom than ACA section 6 to agree on the number of arbitrators to constitute the Arbitral Tribunal and whether or not there is to be a presiding arbitrator or umpire. Absent an agreement by the parties on the number of arbitrators, it provides that the default number shall be a sole arbitrator. As stated earlier above, the present researcher agrees that the provision for a sole arbitrator as the default number is preferable to the default three-man panel provided for in the ACA, because in many cases, especially in domestic arbitration, the amount in dispute is so small that it is not cost effective to appoint three arbitrators. The different default provisions which depend on whether the arbitration is domestic (section 7, ACA) or international (section 44, ACA) should be brought together without differentiating the domestic and international arbitrations to make it more predictable and certain. Thus, making the court to get involved only when
specific assistance is needed by the tribunal as for example an assistance for the appointment of arbitrators.

4.12 Specific Court Assistance

For example, the principle is that where the arbitration agreement stipulates for three arbitrators but the parties have not agreed an appointment procedure, the court should be required to appoint an arbitrator for a party who fails to appoint his own arbitrator. This approach is in line with Article 6 and 11 of the Model Law which states that courts or other authority should render assistance and supervision to the tribunal if need be. These functions are referred to in Article 11(3) that where parties fail in such agreement, (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6.94

Comparatively, this is effective in the sense that where a party fails to appoint his arbitrator, the other party who has appointed his own arbitrator may serve written notice on the defaulting party that he intends to constitute his arbitrator into a sole arbitrator, if, within say seven days of receiving such a notice and the defaulting party has not appointed his arbitrator, the other party may appoint his arbitrator as sole arbitrator and the decision of such arbitrator shall be binding on both parties. This default mechanism is adequate to domestic arbitrations, but where in an international arbitration agreement the parties fail to agree a procedure for appointing an arbitrator and have not otherwise designated an appointing authority, the appropriate Arbitral institution or organization could act as the appointing authority.

---

94 ACA section 7 and 44; Article 6 and 11 (3)
Notwithstanding there might be instances where specific assistance from the court might be required by the tribunal, the ACA section 7 restricts parties from unnecessary appeals to the courts.

4.13. ACA Section 7 (4) and the 1999 Nigerian constitution; what are the effects?

Whilst the provision for the appointment of arbitrators under section 7 (4) of the ACA provides that a decision of a court appointing an arbitrator under sub-section 7(2) and 7 (3) shall not be subject to appeal, the fact is that the 1999 Constitution of Nigeria has entrenched the scope and regulation of rights of appeal. The Committee had argued in page 20, paragraph 2 that the effect of the provisions of section 7 mentioned above has been to remove from the legislature, the power to restrict or regulate the exercise of rights of appeal in cases where, as a matter of policy, it should be otherwise desirable to impose restrictions or regulation. Furthermore, that since the ACA identifies various stages at which the courts can become involved with the arbitral process; it is inevitable that arbitration proceedings will themselves be frustrated by the exercise of unrestricted and unregulated rights of appeal from judicial decisions. The present researcher argues that although parties can appeal in view of the fact that 1999 Constitution of the Nigeria has entrenched the scope and regulation of rights of appeal, but that same right is given up the moment parties chooses arbitration method unless where, under an appointment procedure agreed upon by the parties, a party fails to act as required under the procedure or the parties or arbitrators are unable to reach agreement as required under the procedure or a third party, including an institution, fails to perform any duty imposed on it under the procedure, any party may request the Court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment. A decision of the Court under ACA section 7 (2)

---

95 ACA sections 7 (4) 7 (2) 7 (3); The 1999 Constitution of Nigeria Section 35 Right to Fair Trial and section241 (1) (a), (b) and (c); Committee’s Proposal for Reform of the ACA (2008) 20
96 Ibid
and (3) shall not be subject to appeal. This was illustrated in *Ogunwale v Syrian Arab Republic* that the right of appeal from a decision of the High Court appointing *vis a vis* section 241 (1) (a), (b) and (c) of the 1999 Constitution was already given up.\(^97\) The wording of ACA section 8 is clear that the arbitrator’s duty to maintain his impartiality and independence or his duty of disclosure is a mandatory provision from which the parties cannot derogate. This is similar to Article 12 (2) of 2008 arbitration rules of the Regional Centre for international commercial arbitration Lagos which provides that no arbitrator shall act in the arbitration as advocates of any part and no arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute.\(^98\) Thus, under section 30 (1) where an arbitrator has misconduct himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on application of a party set aside the award.

The present researcher argues that it is right for the Nigerian legislature to restrict on policy grounds, or regulate rights of appeal from judicial decisions in arbitration proceedings and that such legislative intervention is adequate when the parties gave up such constitutional rights of appeal upon entering an arbitration agreement. Although parties may still appeal if the grounds of appeal are satisfied; the present researcher disagrees with the Committee’s proposal for a general review of the concept of constitutionally entrenching rights of appeal as the rights of appeal have already been protected under sections 7 (2) (3) 30 (1) and Article 12.2 of the Arbitration rules of the Regional Centre for international commercial arbitration cited above. However, there are procedures in place to challenge an arbitrator.

---

\(^97\) *Ogunwale v Syrian Arab Republic* (2000) 9 NWLR

\(^98\) Regional Centre for International Commercial Arbitration Lagos Article 12.2 (2008)
4.14 Procedure for Challenging an Arbitrator

The grounds and procedure for challenging an arbitrator are largely the same in both domestic and international arbitration; section 30(2) of the ACA provides that an arbitrator who has misconducted himself may be removed by the court. This provision for the removal of arbitrators is located in close proximity to other provisions of the ACA that deals with the related subject of challenging arbitrators to clarify the context in which arbitrators can be challenged. Although the term misconduct is not fully described in section 30 (1) and (2) mentioned above, but they could be compared with the AA concept of “misconduct” as a ground for removal of arbitrators under AA section 24 (1), which states that a party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator, apply to the court to remove an arbitrator on any of the following grounds – (a) that circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality; (b) that he does not possess the qualifications required by the arbitration agreement; (c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so; (d) that he has refused or failed –

(i) properly to conduct the proceedings, or

(ii) to use all reasonable dispatch in conducting the proceedings or making an award,
and that substantial injustice has been or will be caused to the applicant.

These grounds for removing an arbitrator are enshrined in the Model Law Articles 6, 12 (2) and 14 (1) which provides that an arbitrator may be removed by a court because of impartiality, lack of requisite qualifications, physical or mental incapacity or failure to use reasonable dispatch in conducting the proceedings.
One other important aspect of the jurisdictional issues is, application of the doctrine of competence-competence, with which arbitrators have the autonomy to determine its own jurisdiction; this is stated in section 12(4) of ACA provides as follows:

“...The arbitral tribunal may rule on any plea referred to it under subsection (3) of this section [i.e. a plea as to its jurisdiction] either as a preliminary question or in an award on the merits, and such ruling shall be final and binding.”

As rightly put by Lew, Mistelis, and Kroll that if arbitrators could not determine questions as to their own jurisdiction, an uncooperative respondent could easily frustrate the parties’ autonomy or agreement to have their dispute decided by arbitration or at least create considerable delay by merely contesting the existence or validity of the arbitration agreement in court. Such a situation would seriously undermine arbitration as an effective means of private dispute resolution and deprive it of its attraction of i.e. party autonomy. The Model law Article 16(3) provides as follows:

“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 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”

The Committee on Reform of the ACA had argued there is a significant point of departure between section 12 of ACA and Article 16 of the Model Law in relation to judicial review of arbitrators’ jurisdictional decisions, and the effect of such review is that the arbitration proceeding would be stopped pending the review. The Committee argued that the provisions of the ACA show that, unlike the Model Law provision, section 12(4) of ACA does not provide for the continuation of arbitral proceedings while proceedings to review the arbitrators’ decision on jurisdiction are pending in court.

99 ACA section 12 (4)
100 Lew J, Comparative International Commercial Arbitration (Kluwer Law International 2003) p331
101 Model law Article 6
The Committee stated that the optimism that the final and binding clause in section 12 (4) of the ACA was sufficient to completely exclude the court’s review of arbitrators’ decisions on their jurisdiction, and therefore no need to provide for continuation of arbitral proceedings while court review proceedings are pending is a serious error and highly inadequate to arbitration practice, and party autonomy in general.  

The present researcher takes a different view from the above, because, generally, by virtue of section 12 (4) of the ACA, a ruling by the tribunal on its jurisdiction is final and binding and is not subject to appeal unless there is impartiality and unfairness in the handling of the proceedings. This is strengthened by section 34 of the ACA which provides that “A Court shall not intervene in any matter governed by this Act, except where so provided in this Act.” Following this, the only thing is that an aggrieved party who can prove circumstances of lack of impartiality or independence on the part of the tribunal can challenge the tribunal’s ruling in Court on the basis of section 8 (3) (a) of the ACA which provides that “an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.” But even so, the challenge should be first made to the tribunal itself unless the challenged arbitrator withdraws from office or the other party agrees to the challenge; see section 9 (3) ACA. Also the Court can address the issue of jurisdiction and competence of an arbitral tribunal after the award has been made and proceedings have been instituted for setting aside or refusal of recognition and enforcement of the ward. The AA 1996 section 30 (1) has such provisions that, unless otherwise agreed by the parties, the tribunal may rule on its own substantive jurisdiction, that is to:-

(a) whether there is a valid arbitration agreement

(b) whether the tribunal is properly constituted, and

102 Committee’s Proposal for Reform of the ACA (2008) 20; ACA section 12 (4)
103 ACA Section 34; ACA Section 8(3)
(c) what matters have been submitted to arbitration in accordance with the provisions of this part;

Subsection 2 AA provides that any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this part. This gives room to a party to challenge an arbitrator’s ruling directly in the court, unlike the ACA which states that the challenge should first be made to the tribunal. From the above analysis, the present researcher asserts that ACA section 2 is an effective piece of legislation with certainty and predictability than the principle under the AA 1996 which permits arbitrators’ decision on its own competence to be a subject of review. In a way, this provision undermines the provisions of AA section 1 (b) (c) objects of arbitration. Following this view, it could be asserted that the Courts in Nigeria have respect for arbitration method as a method of dispute resolution as would be shown in the forthcoming section.

4.15. The Courts Support for Arbitration

The discussions and analysis so far have shown that although certain sections of the ACA need to be reformed, the ACA is comprehensive, adequate, predictable and certain for the enforcement of arbitration agreements. This is further strengthened by the courts support and respect for party autonomy as illustrated in Lupex case in which the Court explained that one of the main principles of contract law applicable to arbitration agreements is that when parties enter into a binding and enforceable arbitration agreement they express their intention that all disputes between them be referred to and settled by arbitration.104 The present research supports the view that when parties make the choice of arbitration, they at the same time manifest a decision against dispute resolution by the competent state courts. This section of

the thesis demonstrates that with the acceptance of party autonomy the level of court intervention in Nigeria has significantly diminished over the years. The general trend is towards limiting court intervention to those cases where it is either necessary to support the arbitration process or required by public policy considerations. Accordingly, the Court’s respect for arbitration agreements means that no court proceedings on the merits of the dispute can be brought before the courts and that all disputes covered by that agreement are referred to arbitration. The exceptions are situations where court intervention and assistance is needed. That is for example, where the court is asked to assist with the appointment or removal of arbitrators and the collection of evidence and/or asked to order supporting or protective measures where the arbitrators lack coercive power. Ultimately, the courts have to give effect to and enforce the arbitration agreement and award if it is not complied with voluntarily. In addition to their supportive function, courts may also intervene to guarantee that the minimum requirements of procedural fairness are fulfilled and thus, exercise a supervisory function. The courts may be requested by one of the parties to remove an arbitrator for his lack of impartiality or may annul an award based on unfair procedure.

The NNPC case, is a good illustration of the view taken by the Nigerian courts on the issues of intervention where there is unfairness and impartiality in an arbitral proceeding. In this case, the appellant entered into an agreement with the 1st respondent on 23/12/92, which made provision for reference to arbitration in the event of any dispute arising between the parties thereto which dispute could not be mutually settled. A dispute arose between the parties and reference was then made to an arbitrator appointed by the parties and all
references were submitted and made to him in accordance with clause 2 of their agreement. In the course of the arbitral proceedings, the counsel for the appellant objected to the continuation of the proceedings on the grounds that: the agreement was entered between the appellant and Lutin Investment Limited Geneva Switzerland, but the party that initiated the arbitral proceedings was Lutin Investment of British Virgin Island, a complete stranger to the agreement; also that the said agreement provided for arbitration under the Nigerian law and therefore it was wrong to move the arbitration to London, England, for any reason.\footnote{NNPC case, 23/12/92}

The arbitrator, the 2nd respondent hereinafter hearing the submissions of counsel for the parties to the arbitration, overruled the objections of the appellant’s counsel. The appellant was dissatisfied with this ruling and consequently filed a civil summons against the respondents in the Federal High Court, Lagos claiming Declarations that the Arbitrator, is no longer considered reasonable, fair, impartial, suitable and qualified to continue with the arbitration proceedings; that the arbitrator acted without authority and beyond the scope of the agreement between the parties and against public policy when he ordered that the arbitration moves to and sit in London, at the expense of the parties, to take evidence from the claimant’s witness; and an order removing the arbitrator from the office to which he had been appointed and in which he had partially served.

The Court dismissed the appellant case, and the appellant appealed against the lower Court’s decision to the Court of Appeal which after hearing the appeal also dismissed the appeal as lacking in merit hence the further appeal to the Supreme Court.

The issues of appeal were (i) whether an arbitrator has the power to solely determine the venue of the arbitration proceedings? (ii) Whether the exercise of discretion by a sole arbitrator to hear witnesses outside Nigeria amounts to misconduct? (iii) On the jurisdiction
of an Arbitrator to decide only what has been submitted to him by the parties. The court held per Kalgo, that under the ACA section 16, the Arbitrator had unfettered discretion to decide where to sit in or outside Nigeria and to hear or take the evidence of witnesses. He had therefore not exceeded his authority.  

The above ruling was supported by the judgments of Onnoghen, and Ogbuagu in which the judge stated that.......by subsection (1) of section 16 of the ACA, the arbitral tribunal has the power to determine the place of the arbitral proceedings except where the parties agreed on a place. And subsection (2) of section 16 of the ACA says that excluding or in spite or irrespective of the provisions of subsection (1), the arbitral tribunal may still meet at a place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.

Accordingly, Section 16 of the ACA deals with two types of situations in the arbitral proceedings. Subsection (1) deals with determining or deciding the place where the arbitration shall take place and subsection (2) deals with the place where the arbitral tribunal may meet for the purposes set out in that subsection such as hearing evidence of the parties, their witnesses or the inspection of goods or documents relevant to the arbitration…

The present researcher asserts that the Court is right that since the ACA governs the agreement between the parties and nowhere in it did the parties agree on the place to conduct arbitral proceedings, the arbitrator (2nd respondent) has full and unfettered powers to determine or decide where the proceedings shall take place or continue pursuant to the provisions of Section 16 of the ACA. On the second issue Ogbuagu, concurring with the lead judgment of Kalgo), held that „……apart from the clear and unambiguous provisions of ACA Section 16 which the Judge was bound not to give any strained interpretation other than its

---

112 Ibid
113 ACA section 16
ordinary or literal interpretation, the Judge is right that it will look absurd and ridiculous if an Arbitral tribunal or a Sole Arbitrator, does not have a discretion as to where to sit and hear/take evidence of the parties and/or their witness/witnesses. Surely and certainly, by the 2nd respondent deciding (as he was entitled to do by statute and thus, had both the power/discretion and jurisdiction in this/that regard), to take a witness and some other witnesses outside Nigeria, it cannot and could not constitute a misconduct as was orally submitted to the court by appellant.

The judge is equally right that the application for his removal just because he exercised (rightly in the view of the judge), the discretion conferred on him by statute, was most discourteous of the respondent to say the least. According to the Judge, the mere suggestion/application that the arbitrator be removed because of an unfounded/baseless allegation of “misconduct”, in the Judge’s firm view was rather distasteful to any reasonable person, to think of it.

On the jurisdiction of the arbitrator to decide only what is submitted to him, the court held further (also per Ogbuagu,) that the arbitrator, who is not an umpire, has the jurisdiction, to decide only what has been submitted to him by the parties for determination.

On the issue of the discretion of the sole Arbitrator to decide the place of arbitration in the absence of express provision of the parties, the decision of the court again shows support for the arbitration process and a reluctance to set aside final awards. The courts’ view is supported by the rules of international Arbitration Institutions as for example, Article 14 of the International Chamber of Commerce (ICC) Arbitration Rules which state that in the absence of agreement of the parties about the place of arbitration, it will be fixed by the ICC Court. The above provision is also similar to Article 16 (1) of the London Court of Act

114 NNPC case 23/12/92; Court took examples from Article 14 of the International Chamber of Commerce (ICC) Arbitration Rules; Article 16.1 of the London Court of Act Arbitration Rules
Arbitration Rules which provides that in such instances, the place of arbitration will be London, unless the Arbitrator, for sufficient reason decides otherwise. Furthermore, on the issue of whether the exercise of the Arbitration to hear witnesses outside Nigeria constitutes misconduct, this was a discretion conferred on the arbitrator by law; therefore the Court is right that it could not interfere.\textsuperscript{115} This can be referred to decisions of the court in respect of judicial discretion in Dangote case of 2004, in which the Court stated that where the exercise of discretion by the arbitrator has not been manifestly wrong or fraudulent, it cannot be questioned by the court.\textsuperscript{116} The reasoning of the Judges reflects an attitude of permissiveness and support for the sanctity of the arbitration process.

Another perspective is that most appeals have terminated at the level of the Court of Appeal; or alternatively that there are only very few users of the process and consequentially only few appeals. Although there is no data to explain the dearth of appeals but the analysis of this section can be justified to say that parties who desire to arbitrate can be confident (looking at the decisions of the apex court) that any arbitration agreement and award of the arbitral tribunal will receive judicial support in Nigeria.

This is demonstrated by the limited number of appeals to the Nigerian apex court and the decisions thereon that, the courts are maintaining their role as prescribed by the ACA to intervene only in limited cases. The present researcher submits that the provisions of the ACA have no more inherent common law jurisdiction of the court to supervise arbitration outside the framework of the enabling law. According to Sutton, the principle of non-intervention was clearly stated by the House of Lords in the case of Lesotho Highlands v. Impreglio Sp, that the courts have been given the essential powers which they should have

\textsuperscript{116} Ibid
and as such they should limit their interventions only to cases expressly mentioned in the law.\footnote{117} 

4.16 The Roles of Courts in the Context of Intervention

To re-emphasise, the courts have different roles before, during and after the arbitral process; these include the power to stay proceedings in favour of arbitration, power to extend the time for commencing arbitration proceedings, or to appoint an arbitrator, or make an award, or decide the jurisdiction of the arbitral tribunal. The court also has the power to remove an arbitrator and order a replacement and to determine points of law. After the award has been published, the courts have the power to set aside an award on grounds stated in the national laws. It can also determine the costs of the arbitration and the arbitrator’s fees and expenses where the same is disputed. The decisions of the Supreme Court in the cases reviewed in this thesis show that the Nigerian courts have respect for party autonomy. The Limited Number of Arbitration Appeals relating to commercial arbitration decided by the Supreme Court illustrates that arbitration agreements are widely accepted as final and binding; an indication that, although certain sections of the ACA need to be reformed, the ACA is predictable and certain. A good example of some of the reasons why certain sections of the ACA should be reformed can be taken from the above cases and the issues of delays and the lack of immunity for arbitrators in Nigeria. As in the case cited above, an arbitrator was sued in court for his actions as arbitrator as the ACA has no provision for the immunity of arbitrators. Whereas, in Ghana for instance, the Ghana Arbitration Act, section 23 (1) provides that an arbitrator is not liable for any act or omission in the discharge of the arbitrator’s functions as an arbitrator unless the arbitrator is shown to have acted in bad faith.

(2) Subsection (1) applies to an employee or an agent of an arbitrator.

(3) This section does not affect a liability incurred by an arbitrator as a result of the resignation of the arbitrator.

The same is applicable in the UK, the AA section 29 (1) (2) states that an Arbitrator and his agent and employee are not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. This is the case in other jurisdictions with modern arbitration law, where arbitrators are immune for acts done or omissions in the discharge of their functions during the conduct of the proceedings except where the act or omission is shown to have been in bad faith.

In concluding this chapter, the enforceability of arbitral awards under the ACA, AA and the Model law is discussed, being that the ease of enforcement of foreign arbitral awards is a part of the criteria used in determining whether a jurisdiction has an adequate and effective Arbitration law and arbitration friendly or not. Thus, the forthcoming section discusses the enforcement of foreign arbitral awards in Nigeria with the aim of showing that, like the arbitration agreements, the ACA is a comprehensive body of law to enforce arbitral awards in Nigeria. In addition, it will also attempt to provide insight into the various provisions that are available in the ACA to avoid difficult challenges when enforcing foreign arbitral awards in Nigeria. Emmanuel Oki, believes that, despite the fact that Nigeria is a federal system of government, it has a unified system of enforcement of foreign arbitral awards.

4.17. Recognition and Enforceability of Arbitral Awards

According to case laws, a foreign arbitral award can be enforced in Nigeria by suing upon the award at common law.\textsuperscript{118} It is immaterial that the award was made in a country that has no

\textsuperscript{118}Toepher of New York v Edokpolo [2003]
reciprocal arrangement with Nigeria. But, where the award is made in a country that has no reciprocal arrangement with Nigeria, a party who seeks the enforcement of the award will bring a fresh action in Nigeria with the foreign award itself being the cause of action. In *Toepher of New York v Edokpolor (trading as John Edokpolor & Sons)* the Supreme Court of Nigeria held that a foreign award could be enforced in Nigeria by suing upon the award.\(^{119}\) To succeed in the action, the plaintiff must prove the existence of the arbitration agreement, the proper conduct of the arbitration in accordance with the agreement; and the validity of the award. The Defendant may, however, resist the enforcement of the award by challenging the conduct of the arbitration or the jurisdiction of the arbitral tribunal as was the case in *Baker Marine (Nig.) Ltd. v Danos & Curole Contractors Inc. And Sbokan v Ekwenibe & Sons Trading Co. Also followed by Ras Pal Gaz Const. Co v F.C.D.A.*\(^{120}\) But, where a party intends to bring such an action in the Federal Capital Territory, Abuja, the action may be commenced under the undefended list summary procedure. Similarly, where a party intends to bring the action in Lagos, the action may be commenced under the summary judgment procedure.

In accordance with Section 52 of the ACA.\(^{121}\) The NYC will apply to any award made in Nigeria or in any contracting state; provided that such contracting state has reciprocal legislation, recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the NYC.

Because, Nigeria made a reservation under NYC Article I (3) to the effect that the NYC applies only to differences arising out of a legal relationship which is contractual, any arbitral award which relates to a non legal dispute or which does not arise from a contractual

---

\(^{119}\) *Toepher of New York v Edokpolor (trading as John Edokpolor & Sons)* [2002]

\(^{120}\) *Baker Marine (Nig.) Ltd. v Danos & Curole Contractors Inc. And Sbokan v Ekwenibe & Sons Trading Co. Also followed by Ras Pal Gaz Const. Co v F.C.D.A.*

\(^{121}\) ACA section 52
relationship cannot be enforced in Nigeria under the NYC.\textsuperscript{122} The enforceability of arbitral awards in Nigeria as a party to the NYC was explained by the Nigerian Supreme Court in 1974 in the case between \textit{Murmansk State Steamship Line Vs Kano Oil Millers Limited}; in which the Claimant, a Russian company sought to enforce an arbitral award made by a Moscow arbitral tribunal against the Respondent Nigerian Company in Nigeria.\textsuperscript{123} As the award was as a result of a dispute arising out of a charter-party agreement between the Claimant and the Respondent whereby the Respondent was to provide a cargo of groundnuts for shipment in a ship to be provided by the Claimant; the Supreme Court refused enforcement on three grounds, namely:

1. That enforcement proceeding was statute barred; because the applicable limitation law provides for six years within which enforcement proceedings ought to commence; whereas enforcement was commenced eight years after;

2. That even if Nigeria became a party to the NYC on March 1972 according to the Claimant’s counsel, the action must fail because the Claimant commenced the action in February, 1972; and

3. That the Claimant did not seek leave of the relevant High Court in accordance with the applicable arbitration law relating to the enforcement of arbitral awards.\textsuperscript{124}

The above principle was followed in \textit{Baker Marine (Nig.) Ltd. v Danos & Curole Contractors Inc. And Shokan v Ekwenibe & Sons Trading Co}. Also followed by \textit{Ras Pal Gaz Const. Co v F.C.D.A}. It is also a compelling fact that a condition precedent to the application of the NYC by the Nigerian courts is that the NYC must be domesticated by a Nigerian statute so that it will become part of Nigerian Law. This had not been done in February 1972 when the Claimant commenced the action for enforcement. The NYC was domesticated in Nigeria in

\textsuperscript{122} NYC Article I (3)

\textsuperscript{123} \textit{Murmansk State Steamship Line Vs Kano Oil Millers Limited} [1974]

\textsuperscript{124} \textit{Baker Marine (Nig.) Ltd. v Danos & Curole Contractors Inc. And Shokan v Ekwenibe & Sons Trading Co. Also followed by Ras Pal Gaz Const. Co v F.C.D.A.} [1974]
1988; and it was only from 1988; that the NYC became part of the Nigerian law enforceable in Nigeria by Nigerian courts. On matters of recognition and enforcement, the Model Law is modelled on the almost universally accepted NYC (Article IV). However, it also complements and supplements the NYC: Article 35 provides that awards under the Model Law are considered binding and enforceable, irrespective of the country in which they are made. Also, in the UK, the provisions for the enforcement of an international arbitration award in England and Wales share common features with that of Nigeria. The only difference is that the Geneva Convention 1927 is still applicable in the UK, it is not in Nigeria. As that of Nigeria Enforcement of an arbitral award in England and Wales is dependant upon where the award was granted, that is countries that are signatories to the NYC. The process for enforcement applicable in any particular case is dependent upon the seat of arbitration and the arbitration rules that apply. Arbitral awards in England and Wales can be enforced under a number of different regimes:-

The NYC on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The Geneva Convention 1927) The Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. This section will only discuss the applicability of NYC in UK under the AA 1996.

Arbitration Act 1996 Section 66 of the 1996 Act applies to all domestic and foreign arbitral awards. Sections 100 to 103 of the 1996 Act provide for enforcement of arbitral awards under the NYC 1958. Section 99 of the 1996 Act provides for the enforcement of arbitral awards made in certain countries under the Geneva Convention 1927. Under Section 66 of the 1996 Act, the court's permission is required for an international arbitral award to be enforced in the UK. Once the court has given permission, judgment may be entered in terms of the arbitral award and enforced in the same manner as a court judgment or order. Permission will not be granted by the court if the party against whom enforcement is sought
can show that (a) the tribunal lacked substantive jurisdiction and (b) the right to raise such an objection has not been lost. An arbitral award will be made under the NYC if it is made pursuant to an arbitration agreement in the territory of a state which is a party to the NYC—Appendix 1 on the NYC contains a list of the contracting states to the convention. An award is treated as being made at the seat of the arbitration in spite of where it was signed, sent from or delivered to. For example, if an award is made in Paris, the seat of the award is France. France is a party to the NYC and the award can therefore be enforced internationally as a NYC award. The procedure to apply for enforcement is the same as section 66 of the AA 1996. One of the big differences between the AA and the ACA in this context is that unlike the ACA, the AA section 58 (2) states that award does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part. Furthermore, AA section 67-(1) states that a party to arbitral proceedings may (upon notice to the other parties and to the tribunal apply to the court-

(a) Challenging any award of the tribunal as to its substantive jurisdiction; or

(b) For an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

There is no equivalence of the above in the ACA or the Model law. For example, ACA section 29 provides that a party who is aggrieved by an arbitral award may within three months from the date of the award or in a case falling within section 28 of the Act, from the date of the request for additional award is disposed of by the 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. Unlike the AA, and most likely the Egyptian Arbitration law, in the ACA and the Ghana Arbitration Act, there is no provision for review of an award, but provisions for a request within a stipulated period. As discussed earlier, in Africa, the
Egyptian Arbitration law is a good example of a modern Arbitration law with the capabilities of enforcing arbitral awards like that of Nigeria, UK and the Model law. But the procedure is complicated in the sense that they may be lengthy and may cause unnecessary delays. According to Article 55; all Arbitral awards rendered in accordance with the provisions of the present Egyptian Arbitration Law will have the authority of the res judicata and shall be enforceable in conformity with the provisions of this Law. Under Article 56 the Jurisdiction to issue an enforcement order of arbitral awards lies with the president of the court referred to in Article 9 of this Law or to the member of a court who has been mandated for this purpose by delegation from the president of the court. As most modern Arbitration law, the application for enforcement of an arbitral award must be submitted with the following:

(1) The original award or a signed copy thereof. (2) A copy of the arbitration agreement. (3) An Arabic translation of the award, certified by a competent organism, in case the award was not made in Arabic. (4) A copy of the procès-verbal attesting the deposit of the award pursuant to Article 47 of this Law. Although Article 57 permits the filing of an action for annulment under, it does not suspend the enforcement of the arbitral award, but the court may order a suspension if an applicant requests it in his application. Such a request must based upon serious grounds. The court shall rule on the request for suspension of the enforcement within sixty days of the date of the first hearing fixed in relation thereto. If a suspension is ordered, the court may require the provision of a given security or monetary guarantee. When the court orders a suspension of enforcement, it must rule on the action for annulment within six months of the date when the suspension order was rendered. But, under Article 58 the application for the enforcement of an arbitral award shall not be admissible before the expiration of the period during which the action for annulment should be filed in the court registry. The application to obtain leave for enforcement of the arbitral award according to this Law will not be granted except after having ascertained the following: (a) That it does
not contradict a judgment previously rendered by the Egyptian Courts on the subject matter in dispute; (b) That it does not violate the public policy in the Arab Republic of Egypt; and (c) That it was properly notified to the party against whom it was rendered. But, once the order is granted the leave for enforcement cannot be appealed. However, the order refusing to grant enforcement may be subject to a petition lodged, within thirty days from the date thereof, before the competent court referred to in Article 9 of this Law. This prohibition was held unconstitutional by the Supreme Constitutional Court of Egypt on the grounds that there should be equality between the rights of the parties [Challenge No. 92 of the judicial year 21, Session of 6 January 2001]. Accordingly, since the publication of this decision in the Official Gazette on 18 January 2001, the party against whom the exequatur is issued may challenge it before the competent court within thirty days of the date of the decision. There is no equivalence of the above in the ACA, AA or the Model law.

4.18. Refusal of Recognition and Enforcement

According to ACA section 52 (2) (a) (i)-(viii) and (b) (i) (ii) which is the equivalent of AA section 103 (a)-(f) and the Model law Article 34 (1) (2) (a) (i) –(iv) and (b) (i)-(ii) the courts may refuse recognition or enforcement of an award if the enforcing party suffers from incapacity, or the arbitration is invalid under the relevant or applicable law or for lack of proper notice of the arbitrator’s appointment or of the arbitral proceedings or a party’s inability to present his case or the award deals with an extraneous dispute or matters outside the scope of the submission or the arbitral tribunal was not properly constituted or its procedure was not in accordance with the parties agreement or the award had not become binding or has been set aside or suspended by the relevant court or if the award is contrary to the public policy of Nigeria. Murmansk did not offer the courts an excellent opportunity to examine any of the grounds for refusal of enforcement under the NYC Article V, because it was decided on other grounds other than those laid down by the NYC Article V for refusal of
recognition and enforcement. It is a logical conclusion from the court’s reasoning, that it would be frivolous to examine any of the grounds for refusal of enforcement under the NYC, Article V when the NYC itself was not yet applicable in Nigeria at the time the action for enforcement was commenced. With reference to section 51, the following documents shall accompany the written request to the court by a party seeking enforcement:

1. *The duly authenticated original award or a duly certified copy;*

2. *The original arbitration agreement or a duly certified copy, and*

3. *A duly certified transaction of the award, where it was not made in English language.*

Enforcement of arbitral awards under this section of the ACA is not dependent on reciprocity. Consequently, an award is enforceable in Nigeria as other countries. All the party seeking the recognition and enforcement of an award need to do is to apply in writing to the court and supply the necessary documents required as done in countries with modern arbitration laws. Similarly, in the UK, the recognition or enforcement of an award can be refused under section 103 (2) of the AA 1996, if it is proved that:

(a) a party to the arbitration agreement under the law applicable to him, was under some incapacity;

(b) the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

(c) the defendant was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present its case;

(d) the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;

(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such Continued on reverse.

In comparison, with Egypt which the Setting Aside of an Arbitral Award under Article 52 requires that: (1) Arbitral awards rendered in accordance with the provisions of this Law may
not be challenged by any of the means of recourse provided for in the Code of Civil and Commercial Procedures. (2) An action for the annulment of the arbitral award may be instituted in accordance with the provisions of the following two articles. But an annulment under Article 53 may only be possible if (a) there is no arbitration agreement, if it was void, voidable or its duration had elapsed; (b) If either party to the arbitration agreement was at the time of the conclusion of the arbitration agreement fully or partially incapacitated according to the law governing its legal capacity; (c) If either party to the arbitration was unable to present its case as a result of not being given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond its control; (d) If the arbitral award failed to apply the law agreed upon by the parties to govern the subject matter in dispute; (e) If the composition of the arbitral tribunal or the appointment of the arbitrators was in conflict with this Law or the parties’ agreement; (f) If the arbitral award dealt with matters not falling within the scope of the arbitration agreement or exceeding the limits of this agreement. However, in the case when matters falling within the scope of the arbitration can be separated from the part of the award which contains matters not included within the scope of the arbitration, the nullity affects exclusively the latter parts only; (g) If the arbitral award itself or the arbitration procedures affecting the award contain a legal violation that causes nullity. The court adjudicating the action for annulment shall ipso jure annul the arbitral award if it is in conflict with the public policy in the Arab Republic of Egypt.

Thus, Article 54 permits (1) The action for annulment of the arbitral award must be brought within ninety days of the date of the notification of the arbitral award to the party against whom it was made. The admissibility of the action for annulment shall not be prevented by the applicant's renouncement of its right to request the annulment of the award prior to the making of the arbitral award. (2) Jurisdiction with regard to an action for the annulment of awards made in international commercial arbitrations lies with the court referred to in Article
9 of this Law. In cases not related to international commercial arbitration, jurisdiction lies with the court of appeal having competence over the tribunal that would have initially had jurisdiction to adjudicate the dispute. Considering the lengthy process in the Egyptian Arbitration law concerning enforcement of an award, one can conclude that the AA, and the Egyptian Arbitration law have more intrusive provisions for the enforcement of arbitration awards than the ACA, the Ghana Arbitration Act and the Model law which according to the text of the law are more restrictive in the context of courts’ involvements.
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

International commercial arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.

The main aim of this research work was to provide an account of the ACA with references to selected Arbitration Laws in Africa by means of a basic comparison with the Model Law, the AA 1996 and the NYC and explain that although certain sections of the ACA need to be reformed, the Nigerian arbitral system is effective and user friendly, as those of their western counterparts. This was done to bring about a greater awareness that, although some sections of the Act need to be reformed, the Act is adequate, effective and predictable for the enforcement of arbitration agreements and awards.

First, the thesis started from the perspective that the ACA is based on the three general principles of Arbitration needed in any Arbitration Law for the upholding and enforcement of arbitration agreements and awards, which are the principles that reflect the object of arbitration. The principles were mentioned as being: the principle of fairness, impartiality and avoidance of unnecessary delay;¹ and the principle of party autonomy² and non unnecessary court intervention. The principle which was the focus of this thesis, and that works hand in hand with the other two principles mentioned above was the principle of party autonomy which reflects the basis of the Model Law and indeed much of the ACA, UK AA 1996, and

---

¹ AA 1996 section 1 (a)
² AA 1996 section 1(c); compared with Ghana Arbitration Act 2010 section 7 (5) and section 7(1); UNCITRAL Model Law Article 5 and 6; Arbitration and conciliation Act 2004 section 4(1); Arbitration Act of Kenya section 6
the NYC 1958 and many other modern Arbitration Laws\textsuperscript{3} as illustrated in this thesis. It was shown that quite recently the House of Assembly of the Lagos State enacted an Arbitration Law and established a Lagos State Court of Arbitration in its effort to make Nigeria a suitable and viable place of arbitration.

Accordingly, the Lagos state Arbitration Law made substantial changes to the legislative framework for conducting arbitration proceedings in Lagos State of Nigeria. These changes include a change to the requirement for a “Signature” in order to have a valid and enforceable arbitration agreements\textsuperscript{3}; agreement as to the appointment of Arbitrators, and where there is a default as to the appointment, the Lagos Law provides for the appointment of a sole arbitrator.

As this thesis illustrated, the enforceability of arbitration agreements and awards is one of the factors why commercial parties prefer arbitration to litigation\textsuperscript{4}; particularly in dealing with personal rights and status. Thus, it is clear that certainty, predictability and uniformity are essential and of necessity in commercial relations\textsuperscript{5}. This thesis examined, analysed and compared certain aspects of the ACA, Model law and the AA 1996 with each other to show that although a few sections of the ACA need to be reformed, the ACA and many Arbitration laws in Africa measure up with the Model law, the AA 1996, and the NYC 1958. This thesis has explained that the principle of party autonomy may be defined as freedoms that are permitted in arbitration agreements that focus on dispute resolution in international arbitration agreement between parties to a contractual dispute. Furthermore, party autonomy as of this thesis was defined as the freedoms or liberties to arbitration agreements in the

\textsuperscript{3} AA 1996 section 1 (b); compared with Ghana Arbitration Act 2010 sections 12 to 14
\textsuperscript{5} Lew J, Applicable law (Oceana Publishing 1998) p 17
context of freedom of choice of law and/or non-national rules, choice of trade custom and usages, choice of general principles of law to govern the arbitration proceedings. This includes the following: (1) freedom to determine the rules and procedures in arbitration, (2) determine costs of the arbitration,(3) choice of an arbitrator, (4) number of arbitrators,(5) language of contract arbitration,(6) seat of arbitration, (7) time of arbitration,(8) Institutional or Ad hoc arbitration,(9) qualification of Arbitrators’. And by simple definition, this thesis explained that ‘party autonomy’ in the context of international commercial arbitration agreement is built on the freedoms to make arbitration agreements between two or more parties that if any dispute arises from the main contract containing the arbitration clause, such dispute shall be settled through an international commercial arbitration tribunal instead of the national courts.  

This thesis explained that, if the alleged reason why the Arbitration Laws of the developing countries are rarely selected is due to (a lack of knowledge that the ACA and the Arbitration laws of many African countries are capable of enforcing arbitration agreements and awards or the fear that the legal framework for international commercial arbitration in developing countries (Nigeria) are hardly developed), that that is no longer the case. Nigeria and many other developing states are making themselves attractive and hospitable for the conduct of arbitration and the enforcement of arbitration agreements and awards. 

The East, Central and Southern Africa, Kenya and the Republic of South Africa and many other states have modernised their arbitration laws. South Africa and Zimbabwe have each adopted, to varying degrees, the Model Law as their national arbitration laws.

---


7 Chapters 1, 2 and 4 of this thesis

8 Chapters 2 and 4 of this thesis
The Arbitration Bill that adopted the Model Law for both domestic and International Commercial Arbitration in Zimbabwe was ready before the end of 1995 and was enacted by Parliament. In addition, Cote d’Ivoire, Tunisia and Algeria each enacted a modern law on arbitration in 1993, Egypt in 1994, and Kenya in 1995. There are also other states in Africa that have ratified some of the treaties to which Egypt, Nigeria and Djibouti are parties. The Ghana Alternative Dispute Resolution Act 2010, has done much to recognise the general principle of party autonomy, respecting and securing the ability of parties to use arbitration to which section 5 (1) of the (Ghana) Act expresses that a party to a dispute in respect of which there is an arbitration agreement may, subject to the terms of that agreement, refer the dispute to arbitration.\(^9\) The same is stated in sections 12 to 14, which provide that the parties are free to agree the identity and make-up of the tribunal, stipulate any requirements as to the arbitrator or arbitrators’ experience, qualifications or nationality, designate an appointing authority, determine the number of arbitrators (the default number being three which is similar to ACA section 6).\(^10\) Parties, freedom as provided in section 48 (1) (a) includes that the arbitral tribunal is required to decide the dispute according to the law “chosen by the parties as applicable to the substance of the dispute”.\(^11\) Thus, the freedom of the parties to decide the substantive law of the arbitration is expressly recognised under the Ghana Act. Accordingly, the legal situations in most of the above mentioned developing countries are positive and entirely different from what they were during the colonial era. The ACA and most of the above African arbitral laws were influenced by or represents and express adoption of the model dispute resolution regimes elaborated by UNCITRAL.\(^12\)

The principle of party autonomy within the limits of natural justice and public policy is being accorded a respected position in these laws as illustrated in chapters 3 and 4 of this thesis.

---

\(^9\) The Ghana Alternative Dispute Resolution Act 2010 section 5 (1)  
\(^10\) The Ghana Alternative Dispute Resolution Act 2010 section 12-14; ACA section 6  
\(^11\) The Ghana Alternative Dispute Resolution Act 2010 section 48 (1)  
\(^12\) Chapter 4 of this thesis
Interventions by the national court in the arbitral process are being limited to only those that are absolutely necessary to make the arbitral process effective or to maintain its integrity as a fair and just dispute resolution mechanism. Comprehensive and internationally accepted provisions relating to the challenge, recognition and enforcement of arbitral awards are enacted. International arbitral treaties are being implemented in national arbitration laws which also recognise the legality of institutional arbitrations.\(^\text{13}\)

Following the developments, there are functional arbitral institutions in Nigeria such as Lagos and other developing countries administering international commercial arbitration under internationally approved rules. The Asian African Legal Consultative Organisation Centres have also broad-based arbitral functions determined by the peculiar problems normally encountered by Asian-African countries in, and their shared concerns about international commercial arbitration.\(^\text{14}\) These Centres provide adequate, relatively inexpensive and fair procedure for the settlement of international commercial disputes within Nigeria and other African regions. The functions and activities are being carried out under the internally prescribed, comprehensive and flexible UNCITRAL Arbitration Rules (with certain specified administrative modifications and adaptations).\(^\text{15}\) These Rules safeguard party autonomy, procedural diversity, efficacy and neutrality as well as arbitrator’s independence and impartiality.

The examination and analysis conducted in this thesis show also that although some of the findings in the Report of National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria are theoretically correct but there not the true reflection of the ACA, particularly in its statement that (a) the defects in the ACA legal and institutional framework are such that they permit a high degree of judicial intervention in

---

\(^{13}\) AALCC, ICC, UNCITRAL Arbitration Rules; Nigerian Institute of Arbitrators, [www.lcia-arbitration.com](http://www.lcia-arbitration.com)

\(^{14}\) Ibid

\(^{15}\) UNCITRAL Arbitration Rules
arbitration proceedings contrary to what is permitted by well acceptable international standards;\(^\text{16}\) (b) that arbitration in Nigeria is a “first step toward litigation” rather than an “alternative to litigation”; (c) and that delays in the disposal of “arbitration applications”, in Nigeria means that applications for court support, court supervision or court enforcement in relation to the arbitration process means nothing else, but departure from international standards that are reflected in the Model Law on International commercial arbitration on enforcement of foreign arbitral awards, such as the failure to give effect to agreements to arbitrate on a mandatory basis.\(^\text{17}\) The level of analysis of the ACA contained in the Committee for the reform of ACA was not detailed and often cursory in nature. Moreover, the categories used to group provisions of the Model Law were inadequate and led to a number of pre-determined conclusions that the ACA is inadequate for the enforcement of arbitration agreements and awards.\(^\text{18}\)

This thesis has shown that the perceptions that Nigeria’s arbitral system is inadequate is not the true reflection of the ACA or the attitudes of Nigerian courts towards arbitration; it has been illustrated in chapter four that the ACA is comprehensive an adequate for the enforcement of arbitration agreements and awards. Accordingly, this conclusion will present the most important results that have emerged through the analysis and discussion in this thesis. Recommendations related to the enforceability of arbitration agreements under the ACA and safeguards for the principle of party autonomy and the role of national courts. The results and conclusion will hopefully show that ACA is adequate and predictable for the enforcement of arbitration agreements and awards; furthermore, provide a positive step in


bringing a better understanding that the ACA and Nigerian venues are user friendly, as opposed to views that the ACA is unfit to enforce arbitration agreements and awards.

Take for example the description and validity of arbitration agreements mentioned earlier in chapter four of this thesis which stated in ACA section 1 that the agreement must be contained in a document signed by the parties to the agreement, or must be contained in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement. The Model law, the AA, the NYC and all the Arbitration laws in Africa mentioned in this thesis have the same principles and share common features as they all recognise that parties to a contract may incorporate into their contract an arbitration clause contained in another document such incorporation by reference will be valid if the underlying contract itself is in writing.\(^\text{19}\) The “writing requirement” is based on Article 7 of the Model Law which, as mentioned in the earlier part of this thesis, states that parties are free to exercise their rights and power in shaping their contracts as they deem fit subject only to mandatory laws or public policy issues. As discussed in chapter four, the scope of signature requirement in arbitration agreement remains textually undefined. Although an attempt has been made to sculpt the concept through the jurisprudence of the Nigerian courts, there still exist few uncertainties in the areas of “signature” requirement.

While there are a few sections of the ACA where there could be uncertainties, so also is the AA and many others. This was illustrated in the judgment of the UK Court of Appeal in *Dallah v Government of Pakistan\(^\text{20}\)* which surprised the arbitral community when the Supreme Court upheld the judgment which was one of the only three instances in which an English court had refused enforcement of an arbitral award under the NYC.\(^\text{21}\) In the Appeal,

\(^{19}\) AA 1996 section 5 and 6; ACA 2004 section 1; Model law Article 7


Lord Mance held that the arbitral tribunal had improperly applied this standard when concluding that Pakistan was a party to the agreement. In the Court’s view, any other conclusion would mean that “many third persons were party to contracts deliberately structured so that they were not parties.” After a detailed examination of French and comparative law, the Court held that there was no “common intention” for Pakistan to be a party to the agreement. As such the exceptions of Section 103(2)(b) of the Arbitration Act 1996 and Article (V)(1)(a) of the NYC were applicable to deny the enforcement of the award.

This led Pakistan to apply to the French courts to annul the awards previously decreed against it as permitted in Article 1502(1) of the French Code of Civil Procedure. The Cour d’Appel concurred with the Supreme Court in recognising the courts’ inherent authority to review an arbitral tribunal’s conclusion on jurisdiction and applied the same standard for the law relating to non-signatories. But yet, the French Court applying contractual theory to the agreement concluded that Pakistan had intended to be a party to the agreement. The Court drew particular attention to the government’s involvement in the pre-contractual stages and its active role throughout the agreement. The government was seen to act “as if the Contract was its own; … this involvement… confirm[s] that the creation of the Trust was purely formal and that [the Government] was in fact the true Pakistani party in the course of the economic transaction.”

To conclude, the present researcher takes the view that, like the model law, the AA, and the other countries that have adopted the model law, the guiding principles on which the ACA is based are (1) to settle disputes fairly, quickly and at low cost (2) the parties are generally free to agree how to settle their disputes (3) the courts will only intervene in the limited ways

---

prescribed by the Act. Accordingly, if a court is required to interpret the ACA these principles are used to settle ambiguities. The second of the principle which is party autonomy is recognised and respected by the courts as being that where two parties freely enter an arbitration agreement, there should be as few restrictions as possible on their freedom to formulate their own agreement, so that they can design a process which caters precisely for their needs. The ACA upholds this principle, only imposing compulsory requirements that ensure that arbitration remains a fair and efficient way to settle disputes. The third of the guiding principles recognised and respected by the courts is that they would not intervene in the arbitration process except where the Act allows them to. When courts do become involved they play a supportive role, upholding the arbitration agreement and facilitating the arbitration wherever possible. The effect of this principle is to reduce the number of applications made to the courts in the course of arbitration. An added benefit is that because the ACA specifies every instance where the courts may intervene, the parties may make a realistic assessment of the potential delays should they go to arbitration. Even where an application can be made to the courts, the arbitration may normally continue. This removes the incentive to apply to the court as a delaying tactic.

The acceptance and incorporation of these principles are in accordance with the model law and the NYC which Nigeria ratified in June 1970. For this reason the Nigerian courts respect and issue orders to enforce international commercial arbitration agreements and foreign arbitration awards rendered in any country that is party to the NYC; unless such arbitration agreement and/or award is contrary to Nigeria’s public policy as stated in ACA section 52. As discussed earlier, these requirements are consistent with a significant number of well accepted business practices and contemporary forms of business communications.  

23 C.N. Onuselogu Ent. Ltd. V Afribank Ltd. (2005) 1 NWLR; Model law Article 7; This is similar to SKandi International Insurance Company and Mercantile & General Company, st al. Supreme Court of Bermuda (Merrabux J) 21 January 1994, Published in English: [1993] No. 381; ACA 2004 Section 1 (a) (b) (c), C.N.
of the Model law and section 1 of the ACA are similar as they both reflect the needs of international commerce i.e. parties contractual intentions, parties right to choose the law of choice, parties right to design procedural rules according to their contract etc.\textsuperscript{24} The present researcher’s opinion is that the writing requirement is in line with contemporary practice. However, “signature” as a requirement in both the ACA sections 1(1) and (2) and the NYC Art. II is confusing and needs reforming, for example in computer software licensing agreements which, upon acceptance occurs when the offeree breaks the seal on the disk or CD-Rom container or click on an “I Agree” button on an initial screen with.\textsuperscript{25}

Under the provisions of sections 1(1) and (2) this form of acceptance (by conduct or performance) will not be sufficient to validate the parties' intention contained in the licensing agreement since there is no “signature” or “exchange.” In Bills of Lading, for example, they are rarely signed by both parties’ and are rarely “exchanged” as contemplated by section 1(1) of the Act.\textsuperscript{26} So also is maritime salvage agreements which would usually be concluded by VHF radio (i.e. oral offer and oral acceptance) by reference to the Lloyds Open Form (LOF) a standard industry set of terms and conditions which include an arbitration clause. Thus, because the underlying salvage agreement itself is oral, the reference to the LOF may not be sufficient to incorporate its arbitration clause under section 1(2) of the Act.

This thesis maintains that whilst the ACA is adequate to enforce arbitration agreements in many respects, “signature” as a requirement under section 1 (a) of the ACA should be amended or reformed in order that it may be in line with the provisions of the amended

\textsuperscript{24} Ibid
\textsuperscript{25} Ibid
\textsuperscript{26} Ibid
Article 7 (2) of the Model Law.\textsuperscript{27} The present researcher observed the judicial and legislative shifts in attitude in the relationship between the courts and arbitration. The cases decided by the Nigerian Supreme Court in the last decade reveal that the courts accept and respect arbitration as a legitimate dispute resolution mechanism which should receive judicial support. The courts have been slow in interfering with the decisions of the arbitral tribunal and the conduct of arbitration proceedings; preserving the essence of arbitration which is to have a private binding decision of a third party adjudicator(s) and that their decision should be final.

The decisions of the Nigerian Supreme Court in the cases discussed in chapter four are in line with what obtains in other jurisdictions such as England. In the case of \textit{Covington Marine Corps v. Xiamen Shipping Industry Co Ltd.}, the court took the view that the construction of an instrument was a question of law it then proceeded to review the findings of the arbitrators and overturned it. This of course differs from the Nigerian position. It is fair to conclude that the arbitration laws generally seek to strike a balance between the arbitral Authority on the one hand and the development of commercial law on the other hand, whilst maintaining the link between the courts and the tribunal. Where there is conflict however, it is submitted that the courts in Nigeria will more than likely lean in favour of party autonomy by upholding the decisions of the party-chosen arbitrator that is, the arbitral tribunal.

\textbf{5.1.1. Recognition and Enforceability of Arbitral Awards}

This research work, has also shown that a foreign arbitral award can be enforced in Nigeria by suing upon the award at common law as it\textsuperscript{28} is immaterial that the award was made in a country that has no reciprocal arrangement with Nigeria. But, that is where the award is made

\textsuperscript{27}Ibid
\textsuperscript{28}Toepher of New York v Edokpolor [2003]
in a country that has no reciprocal arrangement with Nigeria, a party who seeks the enforcement of the award will have to bring a fresh action in Nigeria with the foreign award itself being the cause of action. To succeed in the action, a plaintiff must prove the existence of the arbitration agreement, the proper conduct of the arbitration in accordance with the agreement; and the validity of the award. The Defendant may, however, resist the enforcement of the award by challenging the conduct of the arbitration or the jurisdiction of the arbitral tribunal. But, where a party intends to bring such an action in the Federal Capital Territory, Abuja, the action may be commenced under the undefended list summary procedure. Similarly, where a party intends to bring the action in Lagos, the action may be commenced under the summary judgment procedure. These are in accordance with Section 52 of the ACA. Thus the NYC will apply to any award made in Nigeria or in any contracting state; provided that such contracting state has reciprocal legislation, recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the NYC. The Model law Article 35 provides that awards are considered binding and enforceable, irrespective of the country in which they are made. It was shown that because, Nigeria made a reservation under NYC Article I (3) to the effect that the NYC applies only to differences arising out of a legal relationship which is contractual, any arbitral award which relates to a non legal dispute or which does not arise from a contractual relationship cannot be enforced in Nigeria under the NYC. Also, in the UK, the provisions for the enforcement of an international arbitration award in England and Wales share common features with that of Nigeria. The only difference is that the Geneva Convention 1927 is still applicable in the UK, it is not in Nigeria. As that of Nigeria Enforcement of an arbitral award in England and Wales is dependant upon where the award was granted, that is countries that are signatories to the NYC.
The Arbitration Act 1996 Section 66 of the 1996 Act applies to all domestic and foreign arbitral awards. Sections 100 to 103 of the 1996 Act provide for enforcement of arbitral awards under the NYC 1958. Section 99 of the 1996 Act provides for the enforcement of arbitral awards made in certain countries under the Geneva Convention 1927. Under Section 66 of the 1996 Act, the court's permission is required for an international arbitral award to be enforced in the UK. Once the court has given permission, judgment may be entered in terms of the arbitral award and enforced in the same manner as a court judgment or order. Permission will not be granted by the court if the party against whom enforcement is sought can show that (a) the tribunal lacked substantive jurisdiction and (b) the right to raise such an objection has not been lost. An arbitral award will be made under the NYC if it is made pursuant to an arbitration agreement in the territory of a state which is a party to the New York Convention. Just like Nigeria, an award is treated in the UK as being made at the seat of the arbitration in spite of where it was signed, sent from or delivered to. This is provided for in section 101 of the AA 1996, which states that an award subject to the NYC is recognised as binding between the parties and with the court's permission can be enforced in England and Wales in the same manner as a judgment or court order. One of the big differences between the AA and the ACA is that unlike the ACA, the AA section 58 (2) gives too wide a room to the extent that an award does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part. There is no equivalence of the above in the ACA or the Model law. The ACA section 29 which would have been the equivalence provides that a party who is aggrieved by an arbitral award may within three months from the date of the award or in a case falling within section 28 of the Act, from the date of the request for additional award is disposed of by the 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. Unlike the AA, and most likely the
Egyptian Arbitration law, in the ACA and the Ghana Arbitration Act, there is no provision for review of an award, but provisions for a request within a stipulated period. As shown earlier, in Africa, the Egyptian Arbitration law is a good example of a modern Arbitration law with the capabilities of enforcing arbitral awards like that of Nigeria, UK and the Model law. However, the procedure is complicated in the sense that they are lengthy and would cause unnecessary delays. According to Article 55; all Arbitral awards rendered in accordance with the provisions of the present Egyptian Arbitration Law will have the authority of the res judicata and shall be enforceable in conformity with the provisions of this Law. Under Article 56 the Jurisdiction to issue an enforcement order of arbitral awards lies with the president of the court referred to in Article 9 of this Law or with the member of a court who has been mandated for this purpose by delegation from the president of the court. However, as most modern Arbitration law, in Egypt, the application for enforcement of an arbitral award must be submitted with the following: (1) The original award or a signed copy thereof. (2) A copy of the arbitration agreement. (3) An Arabic translation of the award, certified by a competent organism, in case the award was not made in Arabic. (4) A copy of the procès-verbal attesting the deposit of the award pursuant to Article 47 of this Law. Although Article 57 permits the filing of an action for annulment under, it does not suspend the enforcement of the arbitral award, but the court may order a suspension if an applicant requests it in his application. Such a request must based upon serious grounds.

5.2. Refusal of Recognition and Enforcement

According to ACA section 52 (2) (a) (i)-(viii) and (b) (i) (ii) which is the equivalent of AA section 103 (a)-(f) and the Model law Article 34 (1) (2) (a) (i) –(iv) and (b) (i)-(ii) the courts may refuse recognition or enforcement of an award if the enforcing party suffers from incapacity, or the arbitration is invalid under the relevant or applicable law or for lack of
proper notice of the arbitrator’s appointment or of the arbitral proceedings or a party’s inability to present his case or the award deals with an extraneous dispute or matters outside the scope of the submission or the arbitral tribunal was not properly constituted or its procedure was not in accordance with the parties agreement or the award had not become binding or has been set aside or suspended by the relevant court or if the award is contrary to the public policy of Nigeria. Similarly, in the UK, the recognition or enforcement of an award can be refused under section 103 (2) of the AA 1996, if section 103 (2) is satisfied by the applicant. Considering the lengthy process in the Egyptian Arbitration law concerning enforcement of an award, one can conclude that the AA, and the Egyptian Arbitration law have more intrusive provisions for the enforcement of arbitration awards than the ACA, the Ghana Arbitration Act and the Model law which according to the text of the law are more restrictive in the context of court involvements.

5.3 Recommendation for reform

First, the ACA should be reformed to expand the description of ‘in writing’ for the purposes of the existence of the Arbitration Agreement; so that section 1 of the ACA,29 which in defining the term ‘writing’ appears to place much emphasis on a document signed by the parties or that is in a physical form should be broadened to ‘include data that provides a record of Arbitration Agreement or is otherwise accessible so as to be useable for subsequent use’. When reformed, this should include information generated, sent, received or stored by electronic, optical or similar means, such as, but not limited to, Electronic Data Interchange (EDI), electronic mail, telegram, telex or telexcopy. The present researcher believes that, this will bring arbitration in Nigeria more in line with the modern commercial practice by which contracts are entered into electronically.

29 ACA sections 1 (a)
5.3.1 The Court’s power to stay proceedings pending reference to arbitration

Although there is no case law to show there has been unnecessary court interventions under sections 4 and 5 of the ACA, the provisions of the sections are confused and contradictory and should be reformed; as it stands\(^{30}\) the Act provides that a court before which an action, which is the subject matter of an arbitration agreement is brought, shall, if any party so requests not later than when submitting his first statement on substance of the dispute, order a stay of the proceedings and refer the parties to arbitration.\(^{31}\) The same Act provides\(^{32}\) that if any party to an arbitration agreement commences any action in any court with respect to any matter subject of arbitration agreement, any party to the arbitration may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court may stay the proceedings if it is satisfied that there is no sufficient reason why the matter should not be referred to arbitration or that the applicant was, at the time when the action was commenced and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration.\(^{33}\) Clearly, the provisions of sections 4 and 5 are contradictory in two respects. First, in one breath the Act makes it mandatory for the court to stay proceedings, and in another breath it gives the court discretion on the matter.\(^{34}\) Second, while an applicant for a stay of proceedings under section 4 of the ACA may do so not later than when submitting his first statement on the substance of the dispute,\(^{35}\) under section 5 the application must be made after appearance and before delivering any pleadings or taking any other steps in the proceedings. The new provision should contain a mandatory provision requiring that a court before which an action is brought that is subject to an Arbitration Agreement shall, if a party so requests, not later than when

\(^{30}\) ACA sections 4 and 5
\(^{31}\) Ibid
\(^{32}\) Ibid
\(^{33}\) Ibid
\(^{34}\) Ibid
\(^{35}\) Ibid
submitting the first statement on the substance of the dispute, stay the proceedings so long as they concern the matter. The present researcher supports the view that the provisions of the power to stay of proceedings pending reference to arbitration is more acceptable and supportive of arbitration because it takes away the discretion given to the judge to decide whether or not to make an order to further stay further proceedings pending reference to arbitration.

The ACA strikes a balance between allowing the courts adequate powers to support arbitral proceedings on the one hand, and avoiding excessive court interference on the other. Indeed, limited court intervention in arbitral proceedings is widely recognised as a central underlying principle of arbitration law. Whilst the ACA as those of other Arbitration Laws in Africa identifies the circumstances in which the courts may intervene in an arbitral proceeding, it does not include a statement that the stated circumstances are exhaustive. The fact that the court’s powers of intervention under the ACA is not limited to expressly identified circumstances may leave open the risk of excessive court intervention. Under the Ghana Act section 40(1), on the application of a party the court may determine “any question of law that arises in the course of proceedings”, provided that the court takes the view that the question substantially affects the rights of the other party. Section 40(4) of this Act provides for a right of appeal against such determinations. The court’s wide powers under section 40(1) of the Ghana Act risk leading to a proliferation of costly and time-consuming applications. It is accepted that these potential negative effects are somewhat mitigated by the confirmation that while such an application is pending, the arbitral proceedings shall continue, and that the leave to appeal shall not be given unless the question is one of importance (or there is some other special reason). However, the key determining factor will be whether the courts limit their discretion to intervene under the Ghana Act section 40(1) to circumstances where there is a substantial and material question which cannot be adequately resolved by the arbitral
tribunal. Under section 58 (2) of this Act the courts may set aside the arbitral award where “there has been a failure to conform to the agreed procedure by the parties”. This is worded so as potentially to encompass not merely a failure by the tribunal, but also a failure by either party, to comply with the agreed procedure. Therefore the failure to comply with a procedural step (whether major or minor) during the course of the arbitration could give the Courts grounds to set aside an otherwise sound arbitral award. This may risk encouraging court applications by parties opposing arbitral awards, and necessitating detailed inquiry by the court into the parties’ compliance with arbitral procedure. It therefore appears that under the Ghana Act there is the potential for excessive court intervention in arbitral proceedings, which could potentially be exploited by parties aiming to prolong and frustrate the arbitral process or impugn an arbitral award. Whether these issues do in fact have a detrimental effect will depend on the approach which the courts take. Notwithstanding, the Ghana Act confers broad powers on the tribunal with regard to the conduct of arbitral proceedings whilst also providing that, in the exercise of these powers, the tribunal is subject to certain fundamental obligations. Section 31(1) serves to uphold the fundamental principle of fairness in the conduct of arbitration, obliging the tribunal to be “fair and impartial to the parties” and allow “each party the opportunity to present its case”. The Ghana Arbitration Act section 31(2) obliges the tribunal, subject to the other requirements of the Ghana Act, to conduct the arbitration so as to “avoid unnecessary delay and expenses and to adopt measures that will expedite resolution of the dispute”.

In conclusion, the Ghana Act has only recently come into force. The Ghana Act combines a comprehensive approach with innovative features, and its terms reflect the aim of seeking to provide for, and address, many of the difficult issues which commonly arise in connection with the arbitration. Moreover, despite the risk of unwarranted court intervention in some circumstances, and what may be one or two missed opportunities, the Ghana Act is an
effective and modern arbitration framework which compares favourably in many respects with the ACA, AA 1996, the Model law and many other Arbitration laws in Africa.

5.3.2. Number of arbitrators

The ACA should make provision that the parties are free to agree on the number of arbitrators to constitute the Arbitral Tribunal and whether or not there is to be a presiding arbitrator or umpire. Absent an agreement by the parties on the number of arbitrators, the ACA should make provision that the default number shall be a sole arbitrator. The provision for a sole arbitrator as the default number is preferable to the default three-man panel provided for in the ACA because in many cases, especially in domestic arbitration, the amount in dispute is so small that it is not cost effective to appoint three arbitrators.

5.3.3. Immunity of arbitrators

The issue of immunity of arbitrators generated a lot of controversy in the leading case of Arenson v Arenson. It is pertinent to note that arbitrator/s performs quasi-judicial functions. In order to sustain this status and attract persons of high integrity to act as arbitrators, the Act should expressly provide for their immunity as is now done in other jurisdictions. This is not to suggest that arbitrators should be granted absolute immunity but qualified immunity covering acts done or omitted to be done in the process unless actuated by malice or improper consideration. Such a provision will reinforce their independence and impartiality and protect them from unnecessary and unwarranted harassment. Furthermore, just like the American Bar Association Rules and that of the London Court of International Arbitrators, the immunity should also extend to the arbitral institutions and their employees. This will ensure that an arbitrator does not have to worry about the possibility of being sued or joined in the suit.

36 ACA section 6
37 Ibid
(usually in proceedings to set aside awards) in connection with his functions as an arbitrator. In the case of NNPC, the arbitrator was joined in an action to set aside an arbitral proceeding that went all the way to the Supreme Court. It was alleged that the arbitrator misconducted himself by conducting part of the proceedings outside Nigeria. Whereas, in Ghana for instance, the Ghana Arbitration Act, section 23 (1) provides that an arbitrator is not liable for any act or omission in the discharge of the arbitrator’s functions as an arbitrator unless the arbitrator is shown to have acted in bad faith.

(2) Subsection (1) applies to an employee or an agent of an arbitrator.

(3) This section does not affect a liability incurred by an arbitrator as a result of the resignation of the arbitrator.

The same is applicable in the UK, the AA section 29 (1) (2) states that an Arbitrator and his agent and employee are not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. This is the case in other jurisdictions with modern arbitration law, where arbitrators are immune for acts done or omissions in the discharge of their functions during the conduct of the proceedings except where the act or omission is shown to have been in bad faith. Nigeria should adopt Ghana Act section 23 or the UK AA section 29 as they will make arbitration under the system much more predictable.

5.4 Suggestion for further work

Since international commercial arbitration is a fast growing discipline; the Nigerian Law Reform Commission should be current with developments in other jurisdictions so that the ACA is reviewed regularly; thus a continual study should be commissioned by the Federal...
Law Commission to keep the Act in line with the law and practice in other jurisdictions along the lines recommended in this work. More particularly, the Commission should amend “signature” requirement in section 1; number of arbitrators in section 6; and make provisions for arbitrator/s immunity, bearing in mind its perception in both common law and civil law jurisdictions.

5.5 Contribution to Knowledge

Contrary to the general perception that the ACA and many Arbitration laws in Africa do not measure up to the standards set by the model law and the NYC because developing countries governments are reluctant to make adequate arbitration laws, being that arbitration method is not respected in African jurisprudence. This thesis analyzed the ACA and showed that it is an adequate piece of legislation that is adequate to enforce arbitration agreements and awards as that of the AA 1996, the Model law and the NYC. Furthermore, this thesis has shown that Nigerian courts have respect for arbitration method, and that the arbitral system is effective and user friendly as those of its western counterparts. In other words, this research work has contributed to the knowledge by promoting the thesis that the ACA is comprehensive, adequate, certain and predictable for the enforcement of international arbitration agreements and awards; and has effective safeguards for the principle of party autonomy as those of the other countries that have adopted the Model law and that of the UK and many others. Nonetheless certain sections of the ACA mentioned in this thesis need to be reformed. No other work about the ACA has comprehensively examined and analysed the ACA as has been put forward in this research work; consequently, the work is a source material in the area of international commercial arbitration law.
BIBLIOGRAPHY

JOURNALS


The National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria (2008)

Watner C, ‘The Voluntaryism and Arbitration’ (1997) The Voluntaryist Whole Number 84;


Eric Sherby, ‘A Different Type of International Arbitration Clause’ (2005) 1 Int Law News (American Bar Association) 10


Thomas Hobbes, discussions of natural rights; The 9th Amendment says: The enumeration in the Constitution, of certain rights
Peter De Cruz, Comparative Law in a changing world (second ed Cavandish Publishing Limited 1999) p 224
T. Hutchinson, ‘Research and Writing in Law’ (Law Book Co. NSW, Australia, 2006)
Helen, Comparative Research Methods, (The Institute for Advanced Legal Studies, London 2004)
The National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria (2005)
The National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria (2008)
G.G, Otuturu ‘Law and Practice of Arbitration in The Settlement of Disputes Arising From Petroleum Operations’ Vol. 3 No. 4


Unizik Law Journal.


C Watner, ‘Voluntaryist’ Number (1997) Number 84


Blanke G, Institutional versus Ad Hoc Arbitration: A Practical Alternative (Published on online: Academy of European Law, 2008)


Sanders, ‘Commentary on UNCITRAL Arbitration Rules’, II YBCA 172 (1977)


FA Mann, ‘Lex Facit Arbitrum’ (reprinted in Arb Inter 1986) 241, 244, 245


Sturges & Murphy, ‘Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act’ (17 Law & Contemp. Prob. (1952) 580

P.G Lim, ‘Means of Dispute Resolution in Malasia’ (58 JCIArb 1992) 34, 35


H Arfazadeh, ‘Settlement of International Trade Disputes in South East Asia: The experience of the Kuala Lumpur Regional Centre for Arbitration,’ (1 M.L.J. Cxxii 1992

J.M. Hunter, Judicial Assistance for Arbitrator in Contemporary Problems in International Arbitration, J. Lew ed (CCLS 1986) 195


Report of Institute of International Law, ‘Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities’ (64 II Yearbook 1992) 383

E Rabel; “The Conflict of Laws: A Comparative Study” 2nd. Vols. 2 and 3 1960-64


W.H. Hamilton, 'The Ancient Maxim Caveat Emptor’ (1931) 50 Yale Law Journal 133,
Kaplan N, ‘The Model Law in Hong kong: Two years On”, 8Arb. Int. 223 (192)


Eric Sherby, ‘A Different Type of International Arbitration Clause’ (2005) 1 Int Law News (American Bar Association) 10

Hoellering, ‘Comments on the Growing Inter-Action of Arbitration and Mediation’ in Van den Berg, ICCA Congress Series .

190


BOOKS


S Asante *Proper Law and Social goals in Ghana* (Accra: Ghana University Press 1975)


Peter De Cruz, *Comparative Law in a changing world* (second ed Cavandish Publishing Limited 1999)


T. Hutchinson, ‘Research and Writing in Law’ (Law Book Co. NSW, Australia, 2006);

Helen, *Comparative Research Methods*, (The Institute for Advanced Legal Studies, London 2004)


M Sage, and R Morehouse, *Beginning Qualitative Research* (Falmer Press 1994)


J Mahoney, & G Goertz, *A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research*, *Political Analysis* (Saga Publication 2006)


P Sanders, *Years of Arbitration Practice* (Kluwer Law International 1999) at p.12-30  


K P Berger, ‘*International Economic Arbitration*’ (Kluwer1993)  


G Naon, *Choice of law problems in International Commercial Arbitration* (RCDI 9 (2001))


I McLeod, *Classification of English Law* (Macmillan 2008)


Plender, Richard and Wilderspin, *The European Contracts Convention: The Rome


H Crowter, Introduction to Arbitration (LLP Reference Publishing 1998)

Sander P, “Six Years of Arbitration Practice Comparative Study” 1994)


Blanke G, Institutional versus Ad Hoc Arbitration: A Practical Alternative (Published on online: Academy of European Law, 2008)

Abraham C, Importance of Institutional Arbitration in International Commercial Arbitration, Symposium on Need for Speed: International Institutional Arbitration (Federation House, New Delhi, India, November 22, 2008)

Sanders, Commentary on UNCITRAL Arbitration Rules( II YBCA 172 1977)


F Goldman *International Commercial Arbitration* (Dalloz 1965)


Lew J, Applicable law (Oceana Publishing 1998)


CASES

Assurance Limited v Alli [1992] 3 NWLR PT. 232, 710,


C.N. Onuselogu Ent. Ltd. v Afribank (Nig.) Ltd. (2005) 1 NWLR

C.N. Onuselogu Ent. Ltd. v Afribank (Nig.) Ltd. (2005) 1 NWLR; ACA Section 1(a)

C.N. Onuselogu Ent. Ltd. v Afribank (Nig.) Ltd. (2005) 1 NWLR

The Eastern Saga [1988] 2 Lloyd’s Rep 373

Dolling-Baker v Merrett [1990] 1 WLR 1205, 1213;

Hassneh v Mew [1993] 2 Lloyd’s Rep 243

The Eastern Saga [1988] 2 Lloyd’s Rep 373

Dolling-Baker v Merrett [1990] 1 WLR 1205, 1213

Hassneh v Mew [1993] 2 Lloyd’s Rep 243

C.N. Onuselogu Ent. Ltd v Afribank (Nig.) Ltd. (2005) 1 NWLR

MISR (Nig) Ltd. v. Oyedele [(1966) 2 ALR (Comm.) 157]

NNPC v. Lutin Investments Ltd [2006] 1 SCM 46 at 72)


Kano State Urban Development Board v Fanz Construction Co. Ltd [1986] 5 N.W.L.R.

QH Tours Ltd &Anor v Ship Design & Management (Aus) Pty & Anor

Crmnikwos v Roth, Schmidt & Co. (1922) 2 KB 478; T.E

Ekwueme v Zakari (1972) 2 E.C.S.L.R 631


Vita Food v Unus Shipping Co Ltd [1993] AC 277

Bonython v Commonwealth of Australia [1951] AC 201 219
Bhatia International v Bulk Trading SA [2002] INSC 132;

Venture Global Engineering v Satyam Computer Services Ltd [2008] INSC 40);

Yograj Infras Ltd v Ssang Yong Engineering & Construction Co Ltd [2011] INSC 769

Heavy Industries Ltd v Oil and National Gas Commission

Dalima Dairy Industries Ltd v National Bank of Pakistan

Norske Atlas Insurance Commune Ltd v London General Insurance Company Ltd


Southland Corp. v. Keating [2006] Seventh Circuit Court of Appeals


Southland Corp. v. Keating [2006] Seventh Circuit Court of Appeals

Indian High Court decision in CDC Financial Services (Mauritius) Ltd v BPL Communications (1996)

The Indian Supreme Court decision in CDC Financial Services (Mauritius) Ltd v BPL Communications [1996]

Sukanaya Holdings v Jayesh Pandya (1996)

MV Panormos Bay v Plam Nig. Plc (2004) 5 NWLR (Part 855) 1 at 14;

Tawa Petroleum v MV Sea Winner 3 NSC 25

Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc., 473 US 614 (1985)

MV Panormos Bay v Plam Nig. Plc (2004) 5 NWLR (Part 855) 1 at 14;

Tawa Petroleum v MV Sea Winner 3 NSC 25

C.N. Onuselogu Ent. Ltd. V Afribank Ltd. (2005) 1 NWLR

C.N. Onuselogu Ent. Ltd. V Afribank Ltd. (2005) 1 NWLR

C.N. Onuselogu Ent. Ltd. V Afribank Ltd. (2005) 1 NWLR

M.V. Panormos Bay v Plam Nig. Plc (2004) 5 NWLR (Part 855) 1 at 14;
Tawa Petroleum v M.V Sea Winner 3 NSC 25

Ogunwale v Syrian Arab Republic (2002) NWLR


Aughton v MF Kent Services [1991] 57 BLR 1

Schiff Foods Products Inc. v Naber Seed & Grain Co. Ltd

Channel Tunnel v Balfour Beatty [1993] AC 334

C.N. Onuselogu Ent. Ltd v Afribank (Nig.) Ltd. (2005)

C.N. Onuselogu Ent. Ltd. v Afribank (Nig.) Ltd. (2005) 1 NWLR

MV Lupex v Nigeria Overseas Chartering and Shipping Ltd [1993] NSC 182


Niger Progress Ltd v N.E.I Corp (1989)

Akpaji v Udemba (2003) 6 NWLR (Part 815) 169

C.N. Onuselogu Ent. Ltd v Afribank (Nig.) Ltd (2005) NWLR

C.N. Onuselogu Ent. Ltd v Afribank (Nig.) Ltd (2005) NWLR


Ogunwale v Syrian Arab Republic (2000) 9 NWLR

Niger Progress Ltd v N.E.I. Corp (1989) 3 NWLR (Part 107) 68;

MV Lupex v N.O.C. (2003) 15 NWLR (part 844) 469

Thyssen Canada Ltd v Mariana Maritime SA, Federal Court of Canada, Trial Division (Blais J) 7 May 1999, published in English: [1999] FCJ No. 675
Sfrribank Nigeria Plc v Haco Suite No LD/275/2008

Lupex v N.O.C (2003) 15 NWLR (Part 844) 469

Minaj Systems Ltd v Global Plus Communication Systems Ltd & 5 Ors Suite No LD/275/2008

NNPC case, 23/12/92

NNPC case 23/12/92


Lesotho Highlands v. Impreglio Sp. [2006] 1 AC 221

Toepher of New York v Edokpolor [2003]


Allianz Spa (formally Riunion di Sicurta Spa) v West Tankers Inc [2009] All Er (Common) 435

C.N. Onuselogu Ent. Ltd. v Afribank Ltd. (2005) 1 NWLR

C.N. Onuselogu Ent. Ltd. v Afribank Ltd. (2005) 1 NWLR

M.V. Panormos Bay v Plam Nig. Plc (2004) 5 NWLR (Part 855) 1 at 14;

Tawa Petroleum v M.V Sea Winner 3 NSC 25

Ogunwale v Syrian Arab Republic (2002) NWLR;

C.N. Onuselogu Ent. Ltd v Afribank (Nig.) Ltd. (2005)

C.N. Onuselogu Ent. Ltd. v Afribank (Nig.) Ltd. (2005)


Frontier Oil Limited v Mai Epo Manu (MEM) Oil Nigeria Ltd [2005] 2

NNPC v Lutin Investment Limited (2004)
INTERNET SOURCES

http://members.aol.com/vlntryst/wn84.html (obtained 07/07/2007)
estewart@lawlibrary.ie visited (2008)
bulletin@iccwbo.org; www.iccbooks.com (obtained 28 March 2006)
http://www.capmag.com/article.asp?ID=2051 (Obtained 26/01/09
bulletin@iccwbo.org; www.iccbooks.com
www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html;
www.lcia-arbitration.com
ICC; www.iccwbbo.org/index_court.asp
www.crica.org.eg; www.klrca.org; www.gafta.com; www.fosfa.org
<www.internationaladr.org>;
www.iccwbbo.org/court/arbitration/id400/index.html (obtained 06/11/08;
www.uncitral.org/uncitral/case_law.html (obtained 06/11/08)
www.icsid.worldbank.org/ICSID/RulesMain.jsp (Obtained 06/11/08)
http://www.kluwerarbitration.com
www.lcia-arbitration.com
www.alukooyebode.com/ADR/Discussion%20paper.htm (obtained) 23/04/2008
APPENDIX 1

ACA

Part I

Arbitration

Arbitration agreement

1. (1) Every arbitration agreement shall be in writing contained-

(a) in a document signed by the parties; or

(b) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or

(c) in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and denied by another.

(2) Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contact is in writing and the reference is such as to make that clause part of the contract.

2. Unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of parties or by leave of the court or judge.

3. An arbitration agreement shall not be invalid by reason of death of any party thereto but shall, in such an event, by enforcement by or against the personal representative of the deceased.

4. (1) A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request not later than when submitting his first statement on the substance of the dispute, order or stay of proceedings and refer the parties to arbitration.

(2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.

5. (1) If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.
(2) A court to which an application is made under subsection (1) of this section may, if it is satisfied-

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

(b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

**Composition of Arbitral Tribunal**

6. The parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be there.

7. (1) Subject to subsection (3) and (4) of this section, the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator.

(2) Where no procedure is specified under subsection (1) of this section-

(a) in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third, so however that-

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

(ii) if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement;

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

(3) Where, under an appointment procedure agreed upon by the parties-

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

(b) the parties or two arbitrators are unable to reach agreement as required under the procedure; or

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

(4) A decision of the court under the subsections (2) and (3) of this section shall not be subjected to appeal.
(5) The court in exercising its power of appointment under subsection (2) and (3) of this section shall have due regard to any qualifications required of arbitrator by the arbitration agreement and such other consideration as are likely to secure the appointment of an independent and impartial arbitrator.

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

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

(3) An arbitrator may be challenged-

(a) if circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or

(c) if he does not possess the qualifications agreed by the parties

9. (1) The parties may determine the procedure to be followed in challenging an arbitrator.

(2) Where no procedure is determined under subsection (1) of this section, a party who intends to challenge an arbitrator shall, within fifteen days of becoming aware of the constitution of the arbitral tribunal or becoming aware of any circumstances referred to in section 8 of this Act, send the arbitral tribunal a written statement of the reasons for the challenge.

(3) Unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

10. (1) The mandate of the arbitrator shall terminate-

(a) if he withdraws from office; or

(b) if the parties agree to terminate his appointment by reasons of his inability to perform his functions; or

(c) if for any reason he fails to act without undue delay.

(2) The fact that-

(a) an arbitrator withdraws from office under subsection (1) of this section or under section 9(3) of this Act; or

(b) a party agrees to the termination of the mandate of an arbitrator, shall not be construed as implying the existence of any ground or circumstances referred to in subsection (1) of this section or section 8(1) of this Act.

11. Where the mandate of an arbitrator terminates-
(a) under section 9 or 10 of this Act; or

(b) because of his withdrawal from office for any reason whatsoever; or

(c) because of the revocation of his mandate by agreement of the parties; or

(d) because of any other reason whatsoever,

a substitute arbitrator shall be appointed in accordance with the same rules and procedure that applied to the appointment of the arbitrator who is being replaced.

**Jurisdiction of Arbitral Tribunal**

12. (1) An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.

(2) For purposes of subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.

(3) In any arbitral proceedings a plea that the arbitral tribunal-

(a) does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such plea by reason that he has appointed or participated in the appointment of an arbitrator;

(b) is exceeding the scope of its authority may be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings,

and the arbitral tribunal may, in either case, admit a later plea if it considers that the delay was justified.

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

13. Unless otherwise agreed by the parties, the arbitral tribunal may before or during an arbitral proceedings-

(a) at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute; and

(b) require any party to provide appropriate security in connection with any measure taken under paragraph (a) of this section
Conduct of Arbitral Proceedings

14. In any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.

15. (1) The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the first schedule to this Act.

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

(3) There power conferred on the arbitral tribunal under subsection (2) of this section, shall include the power to determine admissibility, relevance, materiality and weight of any evidence placed before it.

16. (1) Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.

17. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received by the other party.

18. (1) The parties may by agreement determine the language or languages to be used in the arbitral proceedings, but where they do not do so, the arbitral tribunal shall determine the language or languages to be used bearing in mind the relevant circumstances of the case.

(2) Any language or languages agreed upon by the parties or determined by the arbitral tribunal under subsection (1) of this section, shall, unless, a contrary intention is expressed by the parties or the arbitral tribunal, be the language or languages to be used in any written statement by the parties, in any hearing, award, decision or any other communication in the course of the arbitration.

(3) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal under subsection (1) of this section.

19. (1) The claimant shall, within the period agreed upon by the parties or determined by the arbitral tribunal, state the facts supporting his points of claim, the points at issue and the relief at remedy sought by him, and the respondent shall state his point of defence in respect of those particulars, unless the parties have otherwise agreed on the required elements of the points of claim and of defence.
(2) The parties may submit with their statements under subsection (1) of this section, all the documents they consider to be relevant or they may add a reference to the documents, or other evidence they hope to submit at the arbitral proceedings.

(3) Unless otherwise agreed by the parties, a party may amend or supplement his claim or defence during his course of the arbitral proceedings if the arbitral tribunal considers it appropriate to allow such amendment or supplement having regard to the time that has elapsed before the making of the amendment or supplement.

20. (1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether the arbitral proceedings shall be conducted-

(a) by holding oral hearings for the presentation of evidence or oral arguments; or

(b) on the basis of document or other materials; or

(c) by both holding oral hearings and on the basis of documents or other materials as provided in paragraphs (a) and (b) of this subsection,

and unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested so to do by any of the parties.

(2) The arbitral tribunal shall give to the parties sufficient advance notice of any hearing and of any meeting of the arbitral tribunal held for the purposes of inspection of document, goods, or other property.

(3) Every statement, document or other information supplied to the arbitral tribunal shall be communicated to the other party by the party supplying the statement, document or other information, and every such statement, document or other information supplied by the arbitral tribunal to one party shall be supplied to the other party.

(4) Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

(5) The arbitral tribunal shall, unless otherwise agreed by the parties, have power to administer oaths to or take the affirmations of the parties and witnesses appearing.

(6) Any party to an arbitral proceedings may issue out a writ of subpoena ad testificandum or subpoena ducestecum, but no persons shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

21. Unless otherwise agreed by the parties, if, without showing sufficient cause-

(a) the claimant fails to state his claim as required under section 19(1) of this Act, the arbitral tribunal shall terminate the proceedings; or

(b) the respondent fails to state his defence as required under section 19(1) of this Act, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations; or
(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award

22. (1) Unless otherwise agreed by the parties, the arbitral tribunal may-

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) require a party to give to the expert any relevant information or to produce or provide access to, any documents, goods or other property for inspection.

(2) Unless otherwise agreed by the parties, if a party so request or if the arbitral tribunal considers it necessary, any expert appointed under subsection (1) of this section shall, after delivering his written or oral report, participate in a hearing where the parties shall have the opportunity of putting questions to him and presenting expert witnesses to testify on their behalf on the point at issue.

(3) The arbitral tribunal shall not decide ex aequo et bono or as amiable compositeur unless the parties have expressly authorised it to do so.

(4) The arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade application to the transaction.

23. (1) The court or the judge may order that writ of subpoena ad testificandum or of subpoena duces tecum shall issue to compel the attendance before any arbitral tribunal of a witness wherever he may be within Nigeria.

(2) The court or a judge may also order a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before any arbitral tribunal.

(3) The provisions of any written law relating to the services of an execution outside a State of the Federation of any such subpoena or order for the production of a prisoner issued or made in civil proceedings by the High Court shall apply in relation to a subpoena or other issue or made under this section.

Making an Award and Termination of Proceedings

24. (1) In an arbitral tribunal compromising more than one arbitrator, any decision of the tribunal shall, unless otherwise agreed by the parties, be made by a majority of all its members.

(2) In any arbitral tribunal, the presiding arbitrator may, if so authorised by the parties or all the members of the arbitral tribunal, decide questions relating to the procedure to be followed at the arbitral proceeding.

25. (1) If, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the arbitral proceedings, and shall, if requested by the parties and not objected to by the arbitral tribunal, the settlement in the form of an arbitral award on agreed terms.
(2) an award on agreed terms recorded under subsection (1) of this section shall-

(a) be in accordance with the provisions of subsection 26 of this Act and state that it is such an award; and

(b) have the same status and effect as any other award on the merits of case.

26. (1) any award made by the arbitral tribunal shall be in writing and signed by the arbitrator or arbitrators.

(2) where the arbitral tribunal comprises of more than one arbitrator, the signatures of a majority of all the members of the arbitral tribunal shall suffice if the reason for the absence of any signature is stated.

(3) the arbitral tribunal shall state on the award-

(a) the reasons upon which it is based, unless the parties have agreed that no reason are to be given or the award is an award on agreed terms under section 25 of this Act;

(b) the date it was made; and

(c) the place of the arbitration as agreed or determined under section 16(1) of this Act which place shall be deemed to be the place where the award was made.

(4) A copy of the award, made and signed by the arbitrators in accordance with and signed by the arbitrators in accordance with subsection (1) and (2) of this section, shall be delivered to each party.

27. (1) The arbitral proceedings shall terminate when the final award is made or when an order of the arbitral is issue under subsection (2) of this section.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when-

(a) the claimant withdraws his claim, unless the respondent objects thereto and arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute; or

(b) the parties agree on the termination of the arbitral proceedings; or

(c) the arbitral tribunal finds that continuation of the arbitral proceeding has for any reason become unnecessary or Impossible.

(3) Subject to the provisions of section 28 and 29(2) of this Act, the mandate of the arbitral tribunal shall cease on termination of the arbitral proceedings.

28. (1) Unless another period has been agreed upon by the parties, a party may, within thirty days of the receipt of an award and with notice to the other party, request the arbitral tribunal-
(a) to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature;

(b) to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers any request made under subsection (1) of this section to be justified, it shall, within thirty days of receipt of the request, make the correction or give the interpretation and such correction or interpretation shall form part of the award.

(3) The arbitral tribunal may, on its own volition and within thirty days from the date of the award, correct any error of the type referred to in subsection (1)(a) of this section.

(4) Unless otherwise agreed by the parties, a party may within thirty days of receipt if the award, request the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceedings but omitted from the award.

(5) If the arbitral tribunal considers any request made under subsection (4) of this section to be justified, it shall, within sixty days of the receipt of the request, make the additional award.

(6) The arbitral tribunal may, if it considers necessary, extent the time limit within which it shall make a correction, give an interpretation or make an additional award under subsection (2) or (5) of this section.

(7) This provision of this section 26 of this Act, which relate to the form and contents of an award, shall apply to any correction or interpretation or to an additional award made under this section.

**Recourse Against Award**

29. (1) A party who is aggrieved by an arbitral award may within three months-

(a) from the date of the award; or

(b) in a case falling within section 28 of this Act, from the date of the 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.

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

(3) the court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award.
30. (1) Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on application of a party set aside the award.

(2) An arbitrator who has misconducted himself may on the application of any party be removed by the court. Recognition and Enforcement of Awards

31. (1) An arbitral award shall be recognised as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.

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

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

(b) the original arbitration agreement or a duly certified copy thereof.

(3) An award may, by leave of the court or a judge, be enforced in the same manner as a judgement or order to the same effect.

32. Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. General

33. A party who knows-

(a) that any provision of this Act from which the parties may not derogate; or

(b) that any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to non-compliance within the time limit provided therefore shall be deemed to have waived his right to object to the non-compliance.

34. A court shall not intervene in any matter governed by this Act except where so provided in this Act.

35. This Act shall not affect any other law by virtue of which certain disputes-

(a) may not be submitted to arbitration; or

(b) may be submitted to arbitration only in accordance with the provisions of that or another law.

36. Notwithstanding the provisions of this Act the arbitral tribunal may, if it considers it necessary, extend the time specified for the performance of any act under this Act.

Part II

Conciliation
37. Notwithstanding the other provisions of this Act, the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation under the provisions of this part of this Act.

38. (1) A party who wishes to initiate conciliation shall send to the other party a written request to conciliate under the provisions of this Part of this Act.

(2) Any request sent under subsection (1) of this section shall contain a brief statement setting out the subject of the dispute.

39. The conciliation proceedings shall commence on the date the request to conciliate is accepted by the subject of the dispute.

40. Where the request to conciliate under section 38 of this Act has been accepted, the parties shall refer the dispute to a conciliation body consisting of one or three conciliators to be appointed-

(a) in the case of one conciliator, jointly by the parties;

(b) in the case of three conciliators-

(i) one conciliator by each party, and

(ii) the third conciliator jointly by the parties.

41. (1) The conciliation body shall acquaint itself with the details of the case and procure such other information it may require for the purpose of settling the dispute.

(2) The parties may appear in person before the conciliation body and may have legal representation.

42. (1) After the conciliation body has examined the case and heard the parties, if necessary, it shall submit its terms of settlement to the parties.

(2) If the parties agree to the term of settlement submitted under subsection (1) of this section, the conciliation body shall draw up and sign a record of settlement.

(3) If the parties do not agree to the terms of settlement submitted under subsection (1) of this section, they may-

(a) submit the dispute to arbitration in accordance with any agreement between them; or

(b) take any action in court as they may deem fit.

(4) Nothing done in connection with the conciliation proceedings shall affect the legal rights of the parties in any submission to arbitration or any action taken under subsection (3) of this section.
Part III

ADDITIONAL PROVISIONS RELATING TO INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

Application of this Part of this Act and Composition of Arbitral Tribunal, etc.

43. The provision of this Part of this Act shall apply solely to cases relating to international commercial arbitration and conciliation in addition to the other provisions of this Act.

44. (1) If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom will serve as the sole arbitrator.

(2) If within thirty days after receipt by a party of a proposal made in accordance with subsection (1) of this section the parties have not reached agreement on the choice of a sole arbitrator shall be appointed by the appointing authority.

(3) The appointing authority shall, at the request of one of the parties appoint the sole arbitrator as promptly as possible; and in making the appointment the appointing authority shall use the following list procedure, unless both parties agree that the list procedure should not be used or unless the appointing authority determines in its discretion that the use of the list procedure is not appropriate for the case, that is-

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

(b) within fifteen days after the receipt of the said list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preferences;

(c) after the expiration of the above named period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the list returned to it and in accordance with the order of preference indicated by the parties.

(4) In making the appointment, the appointing authority shall have regard to such consideration as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well as the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

(5) If three arbitrators are to be appointed, each party shall appoint one arbitrator; and the two arbitrators thus appointed shall choose the third arbitrator who shall act as the presiding arbitrator of the arbitral tribunal.

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

(8) When the appointing authority is required to appoint an arbitrator pursuant to the provisions of this section, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract, and the appointing authority may require from either party such information as it deems necessary to fulfil its functions under this Act.

(9) Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

(10) Except as otherwise agreed by the parties, no person shall be disqualified from being appointed by reason of his nationality.

45. (1) A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment and circumstances likely to give rise to justifiable doubt as to his impartiality or independence.

(2) An arbitrator, once appointed or chosen, shall disclose such circumstances as referred to in subsection (1) of this section to the parties unless they have already been informed by him of those circumstances.

(3) Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.

(4) A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

(5) A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after circumstances mentioned in subsection (1) to (4) of this section become known to that party.

(6) The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal and the notification shall be in writing and shall state the reason for the challenge.

(7) When an arbitrator has been challenged by one party, the other party may agree to the challenge and the challenged arbitrator may also, after the challenge, withdraw from his office; but the fact that the other party agrees to the challenge or that the arbitrator withdraws does not imply acceptance of the validity of the grounds for the challenge.

(8) Where the other parties agree to the challenge or the challenged arbitrators withdraws, the procedure provided in section 44 of this Act shall be used in full for the appointment of the
substitute arbitrator, even during the process of appointing the challenged arbitrator a party had failed to exercise to appoint or to participate in the appointment.

(9) If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made-

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by the authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing as provided for in section 44 of this Act.

(10) If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in section 44 of this Act and in this section except that, when the procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

46. (1) Where an arbitrator dies or resigns during the course of an arbitral proceeding, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in section 44 and 45 of this Act that was applicable to the appointment or choice of the arbitrator being replaced.

(2) Where an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in section 44 and 45 of this Act shall apply.

Making of Awards and Termination of proceedings

47. (1) the arbitral tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance of the dispute.

(2) Any designation of the law or legal system of a country shall, unless otherwise expressed, be construed as directly referring to the substantive law of that country and not to its conflict of law rules.

(3) Where the laws of the country to be applied is not determined by the parties, the arbitral tribunal shall apply the law determined by the conflict of the law rules which it considers applicable.

(4) The arbitral tribunal shall not decide ex aequo et bono or as amiable compositeur unless the parties have expressly authorised it to do so.

(5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade applicable to the transaction.
(6) If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the arbitral tribunal shall comply with this requirement within the period of time required by law.

48. The court may set aside an arbitral award-

(a) If the party making the application furnishes proof-

(i) that a party to the arbitration agreement was under some incapacity,

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

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

(iv) That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or

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

(vi) That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or

(vii) Where there is no agreement between the parties under subparagraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act; or

(b) if the court finds-

(i) that the subject-matter of the dispute is not capable of settlement by arbitration under laws of Nigeria; or

(ii) that the award is against public policy of Nigeria.

49. (1) The arbitral tribunal shall fix costs of arbitration in its award and the term "cost" includes only-

(a) the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself;

(b) the travel and other expenses incurred by the arbitrators;

(c) the cost of expert advice and of other assistance required by the arbitral tribunal;
(d) the travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal;

(e) the cost for legal representation and assistance of the successful party if such cost were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such cost is reasonable.

(2) The fees of the arbitral tribunal shall be reasonable in amount taken account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

(3) If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing his fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

(4) If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators; and if the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

(5) In cases referred to in subsection (3) and (4) of this section when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amount of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comment it deems appropriate concerning the amount of such deposits and supplementary deposits.

50. (1) The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the cost referred to in paragraph (a), (b) and (c) of this section 49(1) of this Act.

(2) During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

(3) If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the authority consents to perform the function, the arbitral tribunal shall fix the amount of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

(4) If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or other of them may make the required payment; and if such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
(5) After award has been made, the arbitral tribunal shall render an account to the parties of the deposits received and return any unexpended balance to the parties.

**Recognition and Enforcement of Awards**

**51.** (1) An arbitral award shall, irrespective of the country in which it is made, be recognised as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.

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

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

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

(c) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.

**52.** (1) Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award.

(2) The court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to recognise or enforce any award-

(a) if the party against whom it is invoked furnishes the court proof-

(i) that a party to the arbitration agreement was under some incapacity, or

(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made, or

(iii) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or

(iv) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or

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

(vi) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, or
(vii) where there is no agreement within the parties under sub-paragraph, that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place, or

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

(b) if the court finds-

(i) that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or

(ii) that the recognition or enforcement of the award is against public policy of Nigeria.

(3) Where an application for the recognition of an award has been made to a court referred to in subsection (2)(a)(viii) of this section, the court before which the recognition or enforcement is sought may, if it considers it proper, postpone its decision and may on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

**Application of Arbitration Rules set out in the First Schedule**

53. Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rule acceptable to the parties.

**Application of Convention on the recognition and Enforcement of Foreign Arbitral Awards**

54. (1) Without prejudice to section 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Awards (hereafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting state:

(a) provided that such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention;

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

(2) in this part of this Act, "the appointing authority" means the Secretary-General of the Permanent Court of Arbitral at The Hague.

**Conciliation**

55. Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be settled by Conciliation Rules set out in the Third Schedule to this Act.
PART IV
MISCELLANEOUS

56. (1) Unless otherwise agreed by the parties, any communication sent under or pursuant to this Act shall be deemed to have been received-

(a) When it is delivered to the addressee personally or when it is delivered to his place of business, habitual residence or mailing address; or

(b) Where a communication cannot be delivered under paragraph (a) of this subsection, when it is sent to the addressee’s last known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it.

(2) A communication shall be deemed to have been received on the day it is delivered under subsection (1) of this section.

(3) The provisions of this section shall not apply to communications in court proceedings.

57. (1) In this Act, unless the context otherwise requires-

"arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

"arbitration" means a commercial arbitration whether or not administered by a permanent arbitral institution;

"commercial" means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road;

"court" means the High Court of a State, the High Court of a Federal Capital Territory, Abuja or the Federal High Court;

"Judge" means a Judge of the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court;

"party" means a party to the arbitration agreement or to conciliation or any person claiming through or under him and

"parties" shall be construed accordingly.

(2) An arbitration is international if –

(a)the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different countries; or
(b) one of the following places is situated outside the country in which the parties have their places of business:

(i) the place of arbitration if such place is determined in, or pursuant to the arbitration agreement,

(ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or

(d) the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.

(3) For the purposes of subsection (2) of this section:

(a) if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference shall be made to his habitual residence.

(4) Where a provision of this Act, other than section 47 of this Act, leaves the parties free to determine a certain issue, such freedom include the right of the parties to authorise a third party, including an institution, to make that determination.

(5) Where a provision of this Act:

(a) refers to the fact that parties have agreed or that they may agree; or

(b) in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in the agreement.

(6) Where a provision of this Act, other than section 21(a) or 27(2)(a) refers to a claim, such claim includes a counter-claim, and where it refers to a defence, such defence includes a defence to such counter-claim.

58. This Act may be cited as the Arbitration and Conciliation Act and shall apply throughout the Federation

Schedules

First Schedule

Arbitration Rules

Section 1 Introductory Rules

223
Scope of Application

Article 1
1. These Rules shall govern any arbitration proceedings except that where any of these Rules is in conflict with a provision of this Act, the provision of this Act shall prevail.

NOTICE, CALCULATION OF PERIODS OF TIME
Article 2

1. For the purpose of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee’s last known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official days or non-business days occurring during the running of the period of time are included in calculating the period.

NOTICE OF ARBITRATION

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

(a) a demand that the dispute be referred to arbitration

(b) the names and addresses of the parties;

(c) a reference to the arbitration clause or the separate arbitration agreement that is invoked;

(d) a reference to the contract out of or in relation to which the dispute arises;

(e) the general nature of the claim and an indication of the amount involved, if any;

(f) the relief or remedy sought;
(g) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The Notice of Arbitration may also include:

(a) the proposals for the appointment of a sole arbitrator;
(b) the notification of the appointment of an arbitrator referred to in Article 7;
(c) the statement of claim referred to in Article 18.

REPRESENTATION AND ASSISTANCE

Article 4

The parties may be represented or assisted by legal practitioners of their choice. The names and addresses of such legal practitioners must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

SECTION 11- COMPOSITION OF THE ARBITRAL TRIBUNAL

NUMBERS OF ARBITRATORS

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

APPOINTMENT OF ARBITRATORS (ARTICLES 6 TO 8)

Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator.

2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the court.

3. The court shall, at the request of one of the parties appoint the sole arbitrator as promptly as possible; and in making the appointment the court shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the court determines in its discretion that the use of the list-procedure is not appropriate for the case:
(a) at the request of one of the parties the court shall communicate to both parties an identical list containing at least three names;

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

(c) after the expiration of the above period of time the court shall appoint the sole arbitrator from among the names approved on the lists return to it and in accordance with the order of preference indicated by the parties;

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

4. In making the appointment, the court shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator; and the two arbitrators thus appointed shall chose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within thirty days after the receipt of a party’s notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed the first party may request the court to appoint the second arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the court in the same way as a sole arbitrator would be appointed under Article 6.

Article 8

1. When a court is requested to appoint an arbitrator pursuant to Article 6 or Article 7, the party which makes the request shall send to the court an affidavit together with a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The court may require from either party such information as it deems necessary to fulfil its functions.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names and addresses shall be indicated, together with a description of their qualification.

CHALLENGE OF ARBITRATORS (ARTICLE 9 TO 12)
Article 9

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose their circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.
2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who tends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in article 9 and 10 became known to that party.
2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reason for the challenge.
3. When an arbitrator has been challenged by one party, the other party may agree to the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in Article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made-

(a) when the initial appointment was made by the court, by the court;

(b) when the initial appointment was not made by court, but an appointment authority has been previously designated, by that authority;

(c) in all other cases, by the court as provided for in Article 6.

1. If the court sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided
in Articles 6 to 8 except that, when this procedure would call for appointment by the court, the appointment of the arbitrator shall be made by the court which decided on the challenge.

REPLACEMENT OF AN ARBITRATOR

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 6 to 8 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the proceeding articles shall apply.

REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR

Article 14

If under articles 11 and 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated at the discretion of the arbitral tribunal.

SECTION 111- ARBITRAL PROCEEDINGS

GENERAL PROVISIONS

Article 15

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

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearing or whether the proceedings shall be conducted on the basis documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by the party to the other party.

PLACE OF ARBITRATION
Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the place agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or document. The parties shall give sufficient notice to enable them to be present at such inspection.

LANGUAGE

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used at such hearing.

2. The arbitral tribunal may order that any document annexed to the statement of claim or statement of defence, and any supplementary statement documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENT OF CLAIM

Article 18

1. Unless the statement of claim was contained in the notice of the arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

(a) the names and addresses of the parties
(b) a statement of the facts supporting the claim;

(c) the point at issue;

(d) the relief or remedy sought.

3. The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

STATEMENT OF DEFENCE

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particular (b), (c) and (d) of the statement of claim (Article 18, paragraph 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decide that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of Article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

AMENDMENTS TO THE CLAIM OR DEFENCE

Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 21
1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of this article, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

FURTHER WRITTEN STATEMENTS

Article 22

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

PERIODS OF TIME

Article 23

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the tribunal may extend the time limits if it concludes that extension is justified.

EVIDENCE AND HEARINGS (ARTICLE 24 AND 25)

Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defence, and to the arbitral to the tribunal may, if it consider it appropriate, require a party to deliver to the tribunal and the other party within such a period of time as the arbitral shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
2. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statement made at a hearing and for a record of the hearing of either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.

4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witnesses or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are determined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

INTERIM MEASURES OF PROTECTION

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the cost of such measures.

3. A request for interim measures addressed by any party to court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.

EXPERTS
Article 27

1. The arbitral tribunal may appoint one or more experts to report to it in writing, on specific issues to be determined by the tribunal. A copy of the expert’s term of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decisions.

3. Upon a receipt of the expert’s report the arbitral tribunal shall communicate a copy of the report to the parties who shall have the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied on his report.

4. At the request of either party the expert, after delivering the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either parity may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

DEFAULT

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

CLOSURE OF HEARINGS

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

233
2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to re-open the hearings at any time before the award is made.

WAIVER OF RULES

Article 30

A party who knows that any provision of, or requirement under, these rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

SECTION IV
THE AWARD/DECISIONS

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions for procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

FORM AND EFFECT OF THE AWARD

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.
APPLICABLE LAW, AMIABLE COMPOSITEUR

Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction.

SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable ground for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where the arbitral award on agreed terms is made, the provisions of Article 32, paragraph 2 and 4 to 6, shall apply.

INTERPRETATION OF AWARD

Article 34

1. Within thirty days after receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within forty-five days after receipt of the request. The interpretation shall form part of the award and the provisions of Article 32, paragraph 2 and 6, shall apply.

CORRECTION OF AWARD
Article 36

1. Within thirty days after receipt of award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of Article 32, paragraphs 2 and 6, shall apply.

ADDITIONAL AWARD

Article 37

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request of an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of Article 32, paragraphs 2 to 6, shall apply.

COSTS (ARTICLES 38 TO 40)

Article 38

The arbitral tribunal shall fix the cost of arbitration in its award.

The term "costs" includes only-

(a) the fees of the arbitration tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with Article 39;

(b) the travel and other expenses incurred by the arbitrators;

(c) the cost of expert advice and of other assistance required by the arbitral tribunal;

(d) the travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal;

(e) the cost for legal representation and assistance of successful party if such cost were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such cost is reasonable.
Article 39

The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

Article 40

1. Except as provided in paragraph 2, the cost of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such cost between the parties if it determines that apportionment is reasonable taking into account the circumstances of the case.

2. With respect to the cost of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of arbitral proceedings or makes an award on agreed terms it shall fix the cost of arbitration referred to in Article 38 and Article 39, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under Articles 35 to 37.

DEPOSIT OF COSTS

Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the cost referred to in Article 38, paragraphs, (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If the required deposits are not paid in full within thirty days after the receipt of the requests, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

4. After the award has been made, the arbitral tribunal shall render an account to the parties of the deposits received and return any unexpected balance to the parties.
SECOND SCHEDULE

CONVENTION OF THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS JUNE 10, 1958

Article 1

1. This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such award are sought, arising out of difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitration awards" shall include not only awards made by arbitrator, appointed for each case but also made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered commercial under the national law of the State making such declaration.

Article 11

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

APPENDICES

2. The term "agreement in writing" shall include an arbitral clause in a contract or in an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article 111

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition enforcement of arbitral
awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of application supply:

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

(b) the original agreement referred to in Article 11 or a duly certified copy thereof

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that-

(a) the parties to the agreement referred to in Article 11 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforcement; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that-
(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of award, order the party to give suitable security.

APPENDICES

Article VII

1. the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31st December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or thereafter becomes a party to the Statute of the International Court of Justice, or any other state to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in Article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
Article X

1. Any State may, at the time of signature, ratification or accession, declare that his convention shall extent to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day or receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibilities of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

1. In the case of a federal or non-unitary state, the following provisions shall apply-

(a) with respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) with respect to those articles of this Convention that come within the legislative jurisdiction of the constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) a federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

APPENDICES

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under Article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A contracting State shall not be entitled to avail itself of the Present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in Article VIII of the following:

(a) signature and ratifications in accordance with Article VIII;

(b) accessions in accordance with Article IX;

(c) declarations and notifications under Articles I, X and XI;

(d) the date upon which this Convention enters into force in accordance with Article XII;

(e) Denunciations and notifications in accordance with Article XIII.
1. This Convention, of which the Chinese, English, French, Russian, and Spanish texts should be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in Article VIII.

THIRD SCHEDULE

CONCILIATION RULES

APPLICATION OF THE RULES

Article 1

(1) These Rules apply to conciliation of disputes arising out or relating to a contractual or other legal relationships where the parties seeking an amicable settlement of their dispute have agreed that the Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of this Act any law from which the parties cannot derogate, that provision prevails.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 2

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it is confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATION
Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

APPOINTMENT OF CONCILIATOR

Article 4

(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular-

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliators; or

(b) the parties may agree that the appointment of one or more conciliator be made by such institution or person.

In recommending or appointing individuals to act as conciliators, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator.

SUBMISSION OF STATEMENT TO CONCILIATOR

Article 5

(1) The conciliator upon his appointment, request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.
(3) At any stage of the conciliation proceedings the conciliators may request a party to submit to him such additional information as he deems appropriate.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

(1) The conciliator assists the parties in an independent and an impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the party may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposal for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES
**Article 9**

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator after consulting with the parties having regard to the circumstances of the conciliation proceedings.

**DISCLOSURE OF INFORMATION**

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substances of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate.

**CO-OPERATION OF PARTIES WITH CONCILIATOR**

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with request by the conciliator to submit written material, provide evidence and attend meetings.

**SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE**

Article 12

Each party may, on his own initiative of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

**SETTLEMENT AGREEMENT**

Article 13

(1) When it appears to the conciliator that there exist elements of a settlement, which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observation. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.
(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement. If requested by the parties the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

CONFIDENTIALITY

Article 14

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

(a) by the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated on the date of the declaration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.

COSTS

Article 17
(1) Upon termination of the conciliation proceedings, the conciliator fixes the cost of the conciliation and gives written notice thereof to the parties.

The term "costs" include only:

(a) the fee of the conciliator which shall be a reasonable amount;

(b) the travel and other expenses of the conciliator;

(c) the travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(d) the cost of any assistance provided pursuant to Articles 4, paragraph 2(b), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different appointment. All other expenses incurred by a party are borne by the party.

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the cost referred to in Article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits, in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this Article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpected balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The conciliator shall not be presented as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDING

Article 20
The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(a) views expressed or suggestion made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of a conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

APPENDIX  2

UNCITRAL MODEL LAW

UNCITRAL Model Law on International Commercial Arbitration 1985; with amendments as adopted in 2006. The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and countertrade.
GENERAL PROVISIONS

Article 1.

Scope of application

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States. (2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State. (Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006) (3) An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or Article headings are for reference purposes only and are not to be used for purposes of interpretation.

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road. (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.
(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2:

Definitions and rules of interpretation

For the purposes of this Law:

(a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;

(b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

(c) “court” means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 2 A. International origin and general principles (As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, there should be regard to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3:

Receipt of written communications (1) Unless otherwise agreed by the parties: (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it; (b) the communication is deemed to have been received on
Article 4

Waiver of right to object: A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided thereof, within such period of time, shall be deemed to have waived his right to object.

Article 5: Extent of court intervention In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6: Court or other authority for certain functions of arbitration assistance and supervision. The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

ARBITRATION AGREEMENT

Article 7:

Definition and form of arbitration agreement (As adopted by the Commission at its thirty-ninth session, in 2006) (1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telex copy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option 2

**Article 7:**

Definition of arbitration agreement (As adopted by the Commission at its thirty-ninth session, in 2006) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
Article 8:

Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9:

Arbitration agreement and interim measures by court:

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

COMPOSITION OF ARBITRAL TRIBUNAL

Article 10:

Number of arbitrators:

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.
Article 11:

Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12:

Grounds for challenge:

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.
Article 13:

Challenge procedure:

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14:

Failure or impossibility to act:

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specifi
Article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15:

Appointment of substitute arbitrator:

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

JURISDICTION OF ARBITRAL TRIBUNAL

Article 16:

Competence of arbitral tribunal to rule on its jurisdiction:

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. 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 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.

INTERIM MEASURES AND PRELIMINARY ORDERS (As adopted by the Commission at its thirty-ninth session, in 2006) Section 1. Interim measures

Article 17:

Power of arbitral tribunal to order interim measures:

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

**Article 17 A:**

Conditions for granting interim measures:

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

   (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

   (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

**Section 2: Preliminary orders**

**Article 17 B:**
Applications for preliminary orders and conditions for granting preliminary orders:

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

**Article 17 C:**

Specific regime for preliminary orders:

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.
(4) A preliminary order shall expire after twenty days from the date on which it was issued by
the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or
modifying the preliminary order, after the party against whom the preliminary order is
directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement
by a court. Such a preliminary order does not constitute an award.

Section 3: Provisions applicable to interim measures and preliminary orders

Article 17 D:

Modification, suspension, termination:

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary
order it has granted, upon application of any party or, in exceptional circumstances and upon
prior notice to the parties, on the arbitral tribunal’s own initiative.

Article 17 E:

Provision of security:

(1) The arbitral tribunal may require the party requesting an interim measure to provide
appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide
security in connection with the order unless the arbitral tribunal considers it inappropriate or
unnecessary to do so.

Article 17 F:
Disclosure:

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal’s determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G.

Costs and damages:

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Article 17 H:

Recognition and enforcement:

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.
(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure. (3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

**Article 17 I:**

**Grounds for refusing recognition or enforcement**

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
(ii)

The arbitral tribunal’s decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or (iii)

The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own
powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

**Article 17 J:**

Court-ordered interim measures:

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of their place.

The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

**CONDUCT OF ARBITRAL PROCEEDINGS**

**Article 18:**

Equal treatment of parties:
The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

**Article 19:**

Determination of rules of procedure:

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

**Article 20:**

Place of arbitration:

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

**Article 21:**
Commencement of arbitral proceedings:

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22:

Language:

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23:

Statements of claim and defence:

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may
submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

**Article 24:**

**Hearings and written proceedings:**

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

**Article 25:**

**Default of a party:**

Unless otherwise agreed by the parties, if, without showing sufficient cause,
(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

**Article 26:**

Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

**Article 27:**

Court assistance in taking evidence
The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28:

Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29:

Decision-making by panel of arbitrators
In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30:

Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31:

Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

**Article 32:**

**Termination of proceedings**

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

**Article 33:**
Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) 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. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.
RE COURSE AGAINST AWARD

Article 34:

Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or
the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of
this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.

RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35:

Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language. (Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

**Article 36:**

Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

APPENDIX 3

English Arbitration Act 1996

Introductory

General principles

The provisions of this Part are founded on the following principles, and shall be construed accordingly—

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the court should not intervene except as provided by this Part.

2 Scope of application of provisions

(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

(2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—

(a) sections 9 to 11 (stay of legal proceedings, &c.), and

(b) section 66 (enforcement of arbitral awards).

(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—

(a) section 43 (securing the attendance of witnesses), and

(b) section 44 (court powers exercisable in support of arbitral proceedings); but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

(4) The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where—

(a) no seat of the arbitration has been designated or determined, and

(b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so.

(5) Section 7 (separability of arbitration agreement) and section 8 (death of a party) apply where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.

The seat of the arbitration

3 In this Part “the seat of the arbitration” means the juridical seat of the arbitration designated—
(a) by the parties to the arbitration agreement, or

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances.

**Mandatory and non-mandatory provisions**

4 (1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the “non-mandatory provisions”) allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

(4) It is immaterial whether or not the law applicable to the parties’ agreement is the law of England and Wales or, as the case may be, Northern Ireland.

(5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

For this purpose an applicable law determined in accordance with the parties’ agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.

5 **Agreements to be in writing**

(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions “agreement”, “agree” and “agreed” shall be construed accordingly.

(2) There is an agreement in writing—

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

**The arbitration agreement**

Definition of arbitration agreement

(1) In this Part an “arbitration agreement” means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

**7 Separability of arbitration agreement**

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

**8 Whether agreement discharged by death of a party**

(1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.

(2) Subsection

(1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.

**Stay of legal proceedings**

**9 Stay of legal proceedings**

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

10 Reference of inter-pleader issue to arbitration

(1) Where in legal proceedings relief by way of inter-pleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief shall direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed.

(2) Where subsection (1) applies but the court does not direct that the issue be determined in accordance with the arbitration agreement, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall not affect the determination of that issue by the court.

11 Retention of security where Admiralty proceedings stayed

(1) Where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest—

(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or

(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

(2) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order as would apply if it were held for the purposes of proceedings in the court making the order.

Commencement of arbitral proceedings

12 Power of court to extend time for beginning arbitral proceedings
(1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant’s right extinguished, unless the claimant takes within a time fixed by the agreement some step—

(a) to begin arbitral proceedings, or

(b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun, the court may by order extend the time for taking that step.

(2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.

(3) The court shall make an order only if satisfied—

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired.

(5) An order under this section does not affect the operation of the Limitation Acts (see section 13).

(6) The leave of the court is required for any appeal from a decision of the court under this section.

13 Application of Limitation Acts

(1) The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings.

(2) The court may order that in computing the time prescribed by the Limitation Acts for the commencement of proceedings (including arbitral proceedings) in respect of a dispute which was the subject matter—

(a) of an award which the court orders to be set aside or declares to be of no effect, or

(b) of the affected part of an award which the court orders to be set aside in part, or declares to be in part of no effect, the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.

(3) In determining for the purposes of the Limitation Acts when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement applies shall be disregarded.

(4) In this Part “the Limitation Acts” means—
(a) in England and Wales, the M1 Limitation Act 1980, the M2 Foreign Limitation Periods Act 1984 and any other enactment (whenever passed) relating to the limitation of actions;

(b) in Northern Ireland, the M3 Limitation (Northern Ireland) Order 1989, the M4 Foreign Limitation Periods (Northern Ireland) Order 1985 and any other enactment (whenever passed) relating to the limitation of actions.

14 Commencement of arbitral proceedings

(1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.

(2) If there is no such agreement the following provisions apply.

(3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.

(4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.

The arbitral tribunal

(1) The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire.

(2) Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.

(3) If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.

16 Procedure for appointment of arbitrators

(1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.

(2) If or to the extent that there is no such agreement, the following provisions apply.
(3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.

(4) If the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.

(5) If the tribunal is to consist of three arbitrators—

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.

(6) If the tribunal is to consist of two arbitrators and an umpire—

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.

(7) In any other case (in particular, if there are more than two parties) section 18 applies as in the case of a failure of the agreed appointment procedure.

17 Power in case of default to appoint sole arbitrator

(1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”) refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(2) If the party in default does not within 7 clear days of that notice being given—

(a) make the required appointment, and

(b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.

(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may (upon notice to the appointing party) apply to the court which may set aside the appointment.

(4) The leave of the court is required for any appeal from a decision of the court under this section.
18 Failure of appointment procedure

(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.

There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.

(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

(3) Those powers are—

(a) to give directions as to the making of any necessary appointments;
(b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
(c) to revoke any appointments already made;
(d) to make any necessary appointments itself.

(4) An appointment made by the court under this section has effect as if made with the agreement of the parties.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

19 Court to have regard to agreed qualifications

In deciding whether to exercise, and in considering how to exercise, any of its powers under section 16 (procedure for appointment of arbitrators) or section 18 (failure of appointment procedure), the court shall have due regard to any agreement of the parties as to the qualifications required of the arbitrators.

20 Chairman

(1) Where the parties have agreed that there is to be a chairman, they are free to agree what the functions of the chairman are to be in relation to the making of decisions, orders and awards.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) Decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chairman).
(4) The view of the chairman shall prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority under subsection (3)

21 Umpire

(1) Where the parties have agreed that there is to be an umpire, they are free to agree what the functions of the umpire are to be, and in particular—

(a) whether he is to attend the proceedings, and

(b) when he is to replace the other arbitrators as the tribunal with power to make decisions, orders and awards.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The umpire shall attend the proceedings and be supplied with the same documents and other materials as are supplied to the other arbitrators.

(4) Decisions, orders and awards shall be made by the other arbitrators unless and until they cannot agree on a matter relating to the arbitration.

In that event they shall forthwith give notice in writing to the parties and the umpire, whereupon the umpire shall replace them as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator.

(5) If the arbitrators cannot agree but fail to give notice of that fact, or if any of them fails to join in the giving of notice, any party to the arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court which may order that the umpire shall replace the other arbitrators as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

22 Decision-making where no chairman or umpire

(1) Where the parties agree that there shall be two or more arbitrators with no chairman or umpire, the parties are free to agree how the tribunal is to make decisions, orders and awards.

(2) If there is no such agreement, decisions, orders and awards shall be made by all or a majority of the arbitrators.

23 Revocation of arbitrator’s authority

(1) The parties are free to agree in what circumstances the authority of an arbitrator may be revoked.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) The authority of an arbitrator may not be revoked except—
(a) by the parties acting jointly, or

(b) by an arbitral or other institution or person vested by the parties with powers in that regard.

(4) Revocation of the authority of an arbitrator by the parties acting jointly must be agreed in writing unless the parties also agree (whether or not in writing) to terminate the arbitration agreement.

(5) Nothing in this section affects the power of the court—

(a) to revoke an appointment under section 18 (powers exercisable in case of failure of appointment procedure), or

(b) to remove an arbitrator on the grounds specified in section 24.

24 Power of court to remove arbitrator

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

(b) that he does not possess the qualifications required by the arbitration agreement;

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

(d) that he has refused or failed—

(i) properly to conduct the proceedings, or

(ii) to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.
(6) The leave of the court is required for any appeal from a decision of the court under this section.

**Resignation of arbitrator**

(1) The parties are free to agree with an arbitrator as to the consequences of his resignation as regards—

(a) his entitlement (if any) to fees or expenses, and

(b) any liability thereby incurred by him.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court—

(a) to grant him relief from any liability thereby incurred by him, and

(b) to make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(4) If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief as is mentioned in subsection (3)(a) on such terms as it thinks fit.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

**26 Death of arbitrator or person appointing him**

(1) The authority of an arbitrator is personal and ceases on his death.

(2) Unless otherwise agreed by the parties, the death of the person by whom an arbitrator was appointed does not revoke the arbitrator’s authority.

**27 Filling of vacancy**

(1) Where an arbitrator ceases to hold office, the parties are free to agree—

(a) whether and if so how the vacancy is to be filled,

(b) whether and if so to what extent the previous proceedings should stand, and

(c) what effect (if any) his ceasing to hold office has on any appointment made by him (alone or jointly).

(2) If or to the extent that there is no such agreement, the following provisions apply.
The provisions of sections 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment.

The tribunal (when reconstituted) shall determine whether and if so to what extent the previous proceedings should stand.

This does not affect any right of a party to challenge those proceedings on any ground which had arisen before the arbitrator ceased to hold office.

His ceasing to hold office does not affect any appointment by him (alone or jointly) of another arbitrator, in particular any appointment of a chairman or umpire.

28 Joint and several liability of parties to arbitrators for fees and expenses

The parties are jointly and severally liable to pay to the arbitrators such reasonable fees and expenses (if any) as are appropriate in the circumstances.

Any party may apply to the court (upon notice to the other parties and to the arbitrators) which may order that the amount of the arbitrators’ fees and expenses shall be considered and adjusted by such means and upon such terms as it may direct.

If the application is made after any amount has been paid to the arbitrators by way of fees or expenses, the court may order the repayment of such amount (if any) as is shown to be excessive, but shall not do so unless it is shown that it is reasonable in the circumstances to order repayment.

The above provisions have effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

Nothing in this section affects any liability of a party to any other party to pay all or any of the costs of the arbitration (see sections 59 to 65) or any contractual right of an arbitrator to payment of his fees and expenses.

In this section references to arbitrators include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators.

29 Immunity of arbitrator

An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).
Jurisdiction of the arbitral tribunal

30 Competence of tribunal to rule on its own jurisdiction

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

31 Objection to substantive jurisdiction of tribunal

(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal’s jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the tribunal’s substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).
32 Determination of preliminary point of jurisdiction

(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. A party may lose the right to object (see section 73).

(2) An application under this section shall not be considered unless—
(a) it is made with the agreement in writing of all the other parties to the proceedings, or
(b) it is made with the permission of the tribunal and the court is satisfied—
(i) that the determination of the question is likely to produce substantial savings in costs,
(ii) that the application was made without delay, and
(iii) that there is good reason why the matter should be decided by the court.

(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.

(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

The arbitral proceedings

33 General duty of the tribunal

(1) The tribunal shall—
(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

34 Procedural and evidential matters

(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include—

(a) when and where any part of the proceedings is to be held;

(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;

(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;

(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;

(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

(h) whether and to what extent there should be oral or written evidence or submissions.

(3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).

35 Consolidation of proceedings and concurrent hearings

(1) The parties are free to agree—

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

(b) that concurrent hearings shall be held, on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.
36 Legal or other representation

Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.

37 Power to appoint experts, legal advisers or assessors

(1) Unless otherwise agreed by the parties—

(a) the tribunal may—

(i) appoint experts or legal advisers to report to it and the parties, or

(ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

(2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.

38 General powers exercisable by the tribunal

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.

(2) Unless otherwise agreed by the parties the tribunal has the following powers.

(3) The tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is—

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings—

(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or
(b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.

(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.

(6) The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.

39 Power to make provisional awards

(1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.

(2) This includes, for instance, making—

(a) a provisional order for the payment of money or the disposition of property as between the parties, or

(b) an order to make an interim payment on account of the costs of the arbitration.

(3) Any such order shall be subject to the tribunal’s final adjudication; and the tribunal’s final award, on the merits or as to costs, shall take account of any such order.

(4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.

This does not affect its powers under section 47 (awards on different issues, &c.).

40 General duty of parties

(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

(2) This includes—

(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).

41 Powers of tribunal in case of party’s default

(1) The parties are free to agree on the powers of the tribunal in case of a party’s failure to do something necessary for the proper and expeditious conduct of the arbitration.

(2) Unless otherwise agreed by the parties, the following provisions apply.

(3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay—
(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim.

(4) If without showing sufficient cause a party—

(a) fails to attend or be represented at an oral hearing of which due notice was given, or

(b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.

(5) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.

(6) If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.

(7) If a party fails to comply with any other kind of peremptory order, then, without prejudice to section 42 (enforcement by court of tribunal’s peremptory orders), the tribunal may do any of the following—

(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;

(b) draw such adverse inferences from the act of non-compliance as the circumstances justify;

(c) proceed to an award on the basis of such materials as have been properly provided to it;

(d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

Powers of court in relation to arbitral proceedings

Enforcement of peremptory orders of tribunal

(1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.

(2) An application for an order under this section may be made—

(a) by the tribunal (upon notice to the parties),

(b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or
(c) where the parties have agreed that the powers of the court under this section shall be available.

(3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal’s order.

(4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal’s order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

43 Securing the attendance of witnesses

(1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.

(2) This may only be done with the permission of the tribunal or the agreement of the other parties.

(3) The court procedures may only be used if—

(a) the witness is in the United Kingdom, and

(b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.

(4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.

44 Court powers exercisable in support of arbitral proceedings

Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are—

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—

(i) for the inspection, photographing, preservation, custody or detention of the property, or
(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

**Determination of preliminary point of law**

(1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.

An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.

(2) An application under this section shall not be considered unless—

(a) it is made with the agreement of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied—

(i) that the determination of the question is likely to produce substantial savings in costs, and

(ii) that the application was made without delay.

(3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.
(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6) The decision of the court on the question of law shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.

**Rules applicable to substance of dispute**

(1) The arbitral tribunal shall decide the dispute—

(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or

(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.

(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.

(2) The tribunal may, in particular, make an award relating—

(a) to an issue affecting the whole claim, or

(b) to a part only of the claims or cross-claims submitted to it for decision.

(3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award.

**48 Remedies**

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.

(2) Unless otherwise agreed by the parties, the tribunal has the following powers.

(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
(4) The tribunal may order the payment of a sum of money, in any currency.
(5) The tribunal has the same powers as the court—
(a) to order a party to do or refrain from doing anything;
(b) to order specific performance of a contract (other than a contract relating to land);
(c) to order the rectification, setting aside or cancellation of a deed or other document.

**49 Interest**

(1) The parties are free to agree on the powers of the tribunal as regards the award of interest.
(2) Unless otherwise agreed by the parties the following provisions apply.
(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—
(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;
(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.
(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).
(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.
(6) The above provisions do not affect any other power of the tribunal to award interest.

**50 Extension of time for making award**

(1) Where the time for making an award is limited by or in pursuance of the arbitration agreement, then, unless otherwise agreed by the parties, the court may in accordance with the following provisions by order extend that time.
(2) An application for an order under this section may be made—
(a) by the tribunal (upon notice to the parties), or
(b) by any party to the proceedings (upon notice to the tribunal and the other parties), but only after exhausting any available arbitral process for obtaining an extension of time.
(3) The court shall only make an order if satisfied that a substantial injustice would otherwise be done.

(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by or under the agreement or by a previous order) has expired.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

51 Settlement

(1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.

(2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.

(3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.

(4) The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award.

(5) Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply.

52 Form of award

(1) The parties are free to agree on the form of an award.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.

(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

(5) The award shall state the seat of the arbitration and the date when the award is made.

53 Place where award treated as made

Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties.

54 Date of award
(1) Unless otherwise agreed by the parties, the tribunal may decide what is to be taken to be the date on which the award was made.

(2) In the absence of any such decision, the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them.

55 Notification of award

(1) The parties are free to agree on the requirements as to notification of the award to the parties.

(2) If there is no such agreement, the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made.

(3) Nothing in this section affects section 56 (power to withhold award in case of non-payment).

56 Power to withhold award in case of non-payment

(1) The tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators.

(2) If the tribunal refuses on that ground to deliver an award, a party to the arbitral proceedings may (upon notice to the other parties and the tribunal) apply to the court, which may order that—

(a) the tribunal shall deliver the award on the payment into court by the applicant of the fees and expenses demanded, or such lesser amount as the court may specify,

(b) the amount of the fees and expenses properly payable shall be determined by such means and upon such terms as the court may direct, and

(c) out of the money paid into court there shall be paid out such fees and expenses as may be found to be properly payable and the balance of the money (if any) shall be paid out to the applicant.

(3) For this purpose the amount of fees and expenses properly payable is the amount the applicant is liable to pay under section 28 or any agreement relating to the payment of the arbitrators.

(4) No application to the court may be made where there is any available arbitral process for appeal or review of the amount of the fees or expenses demanded.

(5) References in this section to arbitrators include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators.
(6) The above provisions of this section also apply in relation to any arbitral or other institution or person vested by the parties with powers in relation to the delivery of the tribunal’s award.

As they so apply, the references to the fees and expenses of the arbitrators shall be construed as including the fees and expenses of that institution or person.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

(8) Nothing in this section shall be construed as excluding an application under section 28 where payment has been made to the arbitrators in order to obtain the award.

57 Correction of award or additional award

(1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may on its own initiative or on the application of a party—

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt within the award. These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.

(4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.

(5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.

(6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.

(7) Any correction of an award shall form part of the award.

58 Effect of award

(1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.
(2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

**Costs of the arbitration**

(1) References in this Part to the costs of the arbitration are to—

(a) the arbitrators’ fees and expenses,
(b) the fees and expenses of any arbitral institution concerned, and
(c) the legal or other costs of the parties.

(2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration (see section 63).

**60 Agreement to pay costs in any event**

An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.

**61 Award of costs**

(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.

(2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

**62 Effect of agreement or award about costs**

Unless the parties otherwise agree, any obligation under an agreement between them as to how the costs of the arbitration are to be borne, or under an award allocating the costs of the arbitration, extends only to such costs as are recoverable.

**63 The recoverable costs of the arbitration**

(1) The parties are free to agree what costs of the arbitration are recoverable.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit. If it does so, it shall specify—

(a) the basis on which it has acted, and

(b) the items of recoverable costs and the amount referable to each.

(4) If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may—
(a) determine the recoverable costs of the arbitration on such basis as it thinks fit, or
(b) order that they shall be determined by such means and upon such terms as it may specify.

(5) Unless the tribunal or the court determines otherwise—

(a) the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and
(b) any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

(6) The above provisions have effect subject to section 64 (recoverable fees and expenses of arbitrators).

(7) Nothing in this section affects any right of the arbitrators, any expert, legal adviser or assessor appointed by the tribunal, or any arbitral institution, to payment of their fees and expenses.

64 Recoverable fees and expenses of arbitrators

(1) Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.

(2) If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties)—

(a) determine the matter, or
(b) order that it be determined by such means and upon such terms as the court may specify.

(3) Subsection

(1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

(4) Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.

65 Power to limit recoverable costs

(1) Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.
(2) Any direction may be made or varied at any stage, but this must be done sufficiently in
advance of the incurring of costs to which it relates, or the taking of any steps in the
proceedings which may be affected by it, for the limit to be taken into account.

**Powers of the court in relation to award Enforcement of the award**

(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the
court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person
against whom it is sought to be enforced shows that the tribunal lacked substantive
jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

(4) Nothing in this section affects the recognition or enforcement of an award under any other
enactment or rule of law, in particular under Part II of the M5 Arbitration Act 1950
(enforcement of awards under Geneva Convention) or the provisions of Part III of this Act
relating to the recognition and enforcement of awards under the New York Convention or by
an action on the award.

**Challenging the award: substantive jurisdiction**

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal)
apply to the court—

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in
whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the
restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while
an application to the court under this section is pending in relation to an award as to
jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its
substantive jurisdiction, the court may by order—

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.
(4) The leave of the court is required for any appeal from a decision of the court under this section.

**Challenging the award: serious irregularity**

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.
The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

**Appeal on point of law.**

Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

(1) An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.
(7) On an appeal under this section the court may by order—

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court’s determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

Challenge or appeal: supplementary provisions

(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award—

(a) does not contain the tribunal’s reasons, or

(b) does not set out the tribunal’s reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.
(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

The power to order security for costs shall not be exercised on the ground that the applicant or appellant is—

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).

This does not affect the general discretion of the court to grant leave subject to conditions.

The following provisions have effect where the court makes an order under section 67, 68 or 69 with respect to an award.

(2) Where the award is varied, the variation has effect as part of the tribunal’s award.

(3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.

(4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award.

72 Saving for rights of person who takes no part in proceedings

(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, or

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,

by proceedings in the court for a declaration or injunction or other appropriate relief.
(2) He also has the same right as a party to the arbitral proceedings to challenge an award—

(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or

(b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him; and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

73 Loss of right to object

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award, does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal’s substantive jurisdiction on any ground which was the subject of that ruling.

74 Immunity of arbitral institutions,

An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.

(2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator.
(3) The above provisions apply to an employee or agent of an arbitral or other institution or person as they apply to the institution or person himself.

75 Charge to secure payment of solicitors’ costs. The powers of the court to make declarations and orders under section 73 of the M6 Solicitors Act 1974 or Article 71H of the M7 Solicitors

(Northern Ireland) Order 1976 (power to charge property recovered in the proceedings with the payment of solicitors’ costs) may be exercised in relation to arbitral proceedings as if those proceedings were proceedings in the court.

76 Service of notices

The parties are free to agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post—

(a) to the addressee’s last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or

(b) where the addressee is a body corporate, to the body’s registered or principal office, it shall be treated as effectively served.

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

(6) References in this Part to a notice or other document include any form of communication in writing and references to giving or serving a notice or other document shall be construed accordingly.

77 Powers of court in relation to service of documents

This section applies where service of a document on a person in the manner agreed by the parties, or in accordance with provisions of section 76 having effect in default of agreement, is not reasonably practicable.

(2) Unless otherwise agreed by the parties, the court may make such order as it thinks fit—

(a) for service in such manner as the court may direct, or

(b) dispensing with service of the document.

(3) Any party to the arbitration agreement may apply for an order, but only after exhausting any available arbitral process for resolving the matter.
(4) The leave of the court is required for any appeal from a decision of the court under this section; parties are free to agree on the method of reckoning periods of time for the purposes of any provision agreed by them or any provision of this Part having effect in default of such agreement.

(2) If or to the extent there is no such agreement, periods of time shall be reckoned in accordance with the following provisions.

(3) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(4) Where the act is required to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date.

(5) Where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded.

In relation to England and Wales or Northern Ireland, a “public holiday” means Christmas Day, Good Friday or a day which under the M8Banking and Financial Dealings Act 1971 is a bank holiday.

Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of this Part having effect in default of such agreement.

This section does not apply to a time limit to which section 12 applies (power of court to extend time for beginning arbitral proceedings, &c.).

(2) An application for an order may be made—

(a) by any party to the arbitral proceedings (upon notice to the other parties and to the tribunal), or

(b) by the arbitral tribunal (upon notice to the parties).

(3) The court shall not exercise its power to extend a time limit unless it is satisfied—

(a) that any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted, and

(b) that a substantial injustice would otherwise be done.

(4) The court’s power under this section may be exercised whether or not the time has already expired.

(5) An order under this section may be made on such terms as the court thinks fit.
(6) The leave of the court is required for any appeal from a decision of the court under this section.

Notice and other requirements in connection with legal proceedings

in this Part to an application, appeal or other step in relation to

legal proceedings being taken “upon notice” to the other parties to the

arbitral proceedings, or to the tribunal, are to such notice of the

originating process as is required by rules of court and do not impose

any separate requirement.

(2) Rules of court shall be made—

(a) requiring such notice to be given as indicated by any provision of this Part, and

(b) as to the manner, form and content of any such notice.

(3) Subject to any provision made by rules of court, a requirement to give notice to the

tribunal of legal proceedings shall be construed—

(a) if there is more than one arbitrator, as a requirement to give notice to each of them; and

(b) if the tribunal is not fully constituted, as a requirement to give notice to any arbitrator who

has been appointed.

(4) References in this Part to making an application or appeal to the court within a specified

period are to the issue within that period of the appropriate originating process in accordance

with rules of court.

(5) Where any provision of this Part requires an application or appeal to be made to the court

within a specified time, the rules of court relating to the reckoning of periods, the extending

or abridging of periods, and the consequences of not taking a step within the period

prescribed by the rules, apply in relation to that requirement.

(6) Provision may be made by rules of court amending the provisions of this Part—(a) with

respect to the time within which any application or appeal to the court must be made, (b) so as

to keep any provision made by this Part in relation to arbitral proceedings in step with the

corresponding provision of rules of court applying in relation to proceedings in the court, or

(c) so as to keep any provision made by this Part in relation to legal proceedings in step with

the corresponding provision of rules of court applying generally in relation to proceedings in

the court.

(7) Nothing in this section affects the generality of the power to make rules of court in this

Part shall be construed as excluding the operation of any rule of law consistent with the

provisions of this Part, in particular, any rule of law as to—
(a) matters which are not capable of settlement by arbitration;

(b) the effect of an oral arbitration agreement; or

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.

(2) Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award “arbitrator”, unless the context otherwise requires, includes an umpire; “available arbitral process”, in relation to any matter, includes any process of appeal to or review by an arbitral or other institution or person vested by the parties with powers in relation to that matter; “claimant”, unless the context otherwise requires, includes a counterclaimant, and related expressions shall be construed accordingly; “dispute” includes any difference; “enactment” includes an enactment contained in Northern Ireland legislation; “legal proceedings” means civil proceedings in the High Court or a county court;

“peremptory order” means an order made under section 41(5) or made in exercise of any corresponding power conferred by the parties; “premises” includes land, buildings, moveable structures, vehicles, vessels, aircraft and hovercraft; “question of law” means—

(a) for a court in England and Wales, a question of the law of England and Wales, and

(b) for a court in Northern Ireland, a question of the law of Northern Ireland; “substantive jurisdiction”, in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.

(2) References in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement.

(2) They apply to arbitral proceedings commenced on or after that date under an arbitration agreement whenever made.

(3) The above provisions have effect subject to any transitional provision made by an order under section 109(2) (power to include transitional provisions in commencement order)