NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 518

COURSE TITLE: ALTERNATIVE DISPUTE RESOLUTION II

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MODULE ONE: ARBITRATION

UNIT I: GENERAL INTRODUCTION

1.0 INTRODUCTION

Alternative dispute resolution (ADR) includes domestic resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is seen as an alternative means of access to justice in the sense that the parties do not need to refer their disputes to the court of law. It includes arbitration, mediation, ombudsman schemes and conciliation.

2.0 OBJECTIVES

By the end of this unit, students should be to:

- Discuss the various ADR mechanisms
- Define arbitration
- Discuss the characteristics of arbitration
- Name and understand the duties of the various arbitral institution
- Understand the applicable laws

3.0 MAIN CONTENTS

3.1 ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

The term “alternative dispute resolution” is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full scale court processes. The process is less formal, less expensive and it saves time. Parties prefer ADR because it puts them in the driving seat by giving them the power to design the proceeding in such a way to suit their needs. It is categorized into non-binding and

binding forms of ADR. Any settlement reached under negotiation, mediation and conciliation are voluntary and non-binding while award rendered in an arbitration proceedings are regarded as binding.

3.2 DEFINITION OF ARBITRATION

Arbitration is a process controlled by one or more arbitrators. It provides a forum for the parties to present disputes to a neutral third party who is/are chosen by them to make a binding decision called an Award. In its origins, the concept of arbitration as a method of resolving disputes was a simple one:

> *"The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after courts have been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a disputes want to settle it with less formality and expense than is involved in a recourse to the courts".*

Fouchard, a distinguished French lawyer wrote of arbitration as an apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties.

Arbitration in the primitive years was governed by system of laws known as the *Lex Mercatoria*. The most common dispute among merchants in those days had to do with either the price or quality of the goods supplied and it is expected of them to submit such disputes to a neutral third party who would normally be a fellow merchant to assist them settle it amicably.

Furthermore, arbitration refers to the settlement of a dispute between two or more persons after hearing the parties in a quasi-judicial manner by persons other than a competent court. An exercise is not arbitration if it does not answer this definition.

In the words of Professor Schmitthoff:

> *It is a truism to state that*
> *Arbitration is better than*
> *Litigation, conciliation better*
> *than arbitration and prevention*
> *of legal disputes better than*
> *conciliation.*

Generally, arbitration has a number of advantages. What appears to be the greatest advantage, however is that dispute resolution is amicably carried out without any

court forcing a decision on the parties. The corollary to this is that parties to the dispute usually part as friends with one not having the feeling of a victor while the other does not feel vanquished.

3.3 CHARACTERISTICS OF INTERNATIONAL ARBITRATION

Fouchard described arbitration as an "*apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualifications is that of being chosen by the parties*." Under the French law, arbitration is traditionally defined as:

> *a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons - the arbitrator or arbitrators - who derive their powers from a private agreement not from the authorities of a state, and who are to proceed and decide the case on the basis of such agreement.*

Article 2 of the Geneva Protocol of 1923 provides that **"*arbitral procedure, including the constitution of the tribunal shall be governed by the will of the parties and by the law of the Country in whose territory the arbitration takes place.*"**

Article 1 (3) of the Model Law defines arbitration as international if:

(a) the parties to an arbitration agreement have, at the time of conclusion of that agreement, their place of business in different States; or

(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 agreement relates to more than one country.

Kerr, L.J. criticised this definition, saying it is confusing, unworkable and unnecessary, and will merely give rise to litigation at the outset. **Al-Baharna** criticised the comment given by **Kerr, L.J.,** on the definition given by the Model Law saying it seemed unfair to it. His Lordship was of the view that the Model Law was trying to offer an alternative route to States in their efforts to define "international arbitration".

From the above definitions, it is evident that for an arbitration proceeding to be valid:

- parties must have agreed to submit their dispute to an arbitral tribunal and failure to establish a valid agreement may result in an invalid arbitration.
- parties must have an arbitrator or arbitrators chosen by them or by any other means available where they have failed to do so.
- parties may have chosen a seat or place where their arbitration is to take place or may be chosen for them by the institution that governs the rules of arbitration where parties fail to.
- there is a laid down procedure for the enforcement of the award.

Sir William Searle Holdsworth was quoted as saying:

> *The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after the courts have been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle it with less formality and expense than is involved in a recourse to the courts.*
>
> Every day in the business world, contracts are signed by businessmen, corporations and even between states or private citizens and state. There is the tendency of disputes arising from such a contract and the parties would want to resolve this amicably and carry on with the earlier business relationship. In the case of early merchants, where business was based on unionism, disputes were settled amicably by subjecting parties to another merchant who was trusted with the ability to resolve the matter.

Parties have the choice to either litigate their dispute in the court of law or refer such disputes to an arbitral tribunal. When they choose arbitration, the national courts are enjoined to assume a *supervisory role* for the success of the arbitration. There are several reasons why parties choose arbitration over litigation and we shall be considering some of the reasons in brief.

(a) **Speed/Flexibility:** Arbitration puts the parties in the driving seat of the proceedings. Businessmen would not want to sit in a court for weeks or months in the name of settling a dispute when they could actually spend such time making money for their firms. They cannot force the court or judge to speed up things for them but this is possible in an arbitration proceedings. The freedom or "autonomy" of the parties gives them the opportunity to request for an accelerated or fast-track procedure.

(b) Confidentiality: Confidentiality is an essential matter for major firms who are involved in hi-tech, production, investment and research contracts. Whenever there is a dispute between them, they would not want to appear before the national court due to the issue of publicity. For this reason, they opt for a private dispute mechanism like an International Commercial Arbitration.

Recently, the issue of confidentiality came under criticism following the decision of the High Court of Australia in *Esso Australia Resources Ltd and Others v Plowman (Minister for Energy and Minerals) and others.* Scholars like *Paulsson* had actually suggested that the concept of confidentiality needs to be remodelled.

(c) Neutrality of Parties: Parties to a commercial contract and subsequently participants in the arbitration proceedings are usually from different countries or the nature of the dispute may be said to be a transnational contract. For this reason, they would need a neutral jurisdiction to arbitrate their dispute.

(d) Choice of Expert: When a matter is before a court, the judicial system would nominate, and by so doing, impose a judge on the parties but with arbitration, parties are free to choose who they believe has the required expertise to marshal their disputes to a convincing end. Parties are more relaxed with this choice.

(e) Enforcement of Award: This is by far the most important part of the arbitral proceedings because it will be a futile task if, after all the money, time and brains that have been put into the whole arbitration process an

award is set aside or annulled on the grounds provided for under *Article V of the New York Convention 1958.*

3.4 ARBITRAL INSTITUTION

There are quite a number of arbitration institutions around the world today and these institutions are saddled with the responsibility of overseeing the proceedings of the arbitration process. Examples of such institutions are *International Chamber of Commerce (ICC) Paris*, *London Court of International Arbitration, World Intellectual Property Organization (WIPO) Arbitration Center, International Centre for the Settlement of Investment Disputes (ICSID)* to mention a few. Each of the above institution has its own rules governing the administration of arbitration. The rules of these arbitral institutions have similar provisions with slight differences. The provisions are drafted in such a way to suit the arbitration proceeding that the institution would oversee.

The first court-connected ADR Centre in Africa was the *Lagos Multi-Door Courthouse (LMDC)* which was established in 2002. LMDC was initiated and founded by Kehinde Aina, a partner in the law firm of Aina, Blankson LP. He was inspired by the "multi-door" concept enunciated by Harvard Law Professor, Frank Sander at the Pound Conference. In 1996, Mr. Kehinde Aina established the *Negotiation and Conflict Management Group (NCMG)* as the non-profit, non-governmental organisation to midwife the promotion of ADR in Nigeria and the introduction of the Multi-Door concept into the Nigerian Judicial System. Other States such as Abuja, Kano, Akwa-Ibom among others have also adopted the "multi-door" concept.

3.3 ADVANTAGES OF INSTITUTIONAL ARBITRATION

- Automatic incorporation of the rule book of an arbitral institution is one of the principal advantages of institutional arbitration. A good example of this is the issue concerning number of arbitrators. Article 10 of the **UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL)** provides a way out for parties where such have failed to determine the number of arbitrators. It provides thus;

  (1) The parties are free to determine the number of arbitrators.

  (2) *Failing such determination, the number of arbitrators shall be three*.

Similar provision could be found in the **Section 6 of the Arbitration and Conciliation Act (ACA)** which provides that;

> *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 three.*

- Another advantage of institutional arbitration is the provision of trained personnel by the arbitral institution that the parties have chosen to oversee their dispute. The trained personnel bring with them their wealth of experience. They are well equipped to carry out secretarial and administrative duties for the parties.
- Furthermore, the trained personnel can also review the draft form of the award rendered by the arbitral tribunal before sending the final copy to the parties.

3.4 APPLICABLE LAWS

In the words of the learned scholars,

> "The resolution of commercial disputes is obviously a very crucial aspect of the operation of the national economy and of the judicial system."

Arbitration in Nigeria is governed by the **Arbitration and Conciliation Act.** The first indigenous statute on arbitration and conciliation was enacted during the military era in 1988. It was known as the Arbitration and Conciliation Decree 1988 and it came into effect on the 13th March, 1988.

A large portion of the provisions of ACA is based on the **UNCITRAL** which was designed to meet concerns relating to the current state of national laws on arbitration. It was chosen as the vehicle for the improvement and harmonization in view of the flexibility it gives to States in preparing new arbitration laws.

In 2009 Lagos State enacted its own state law called *Lagos State Arbitration Law 2009*. Some other applicable laws in Lagos State are

- The Lagos Multi-Door Courthouse Law 2007
- The Lagos Multi-Door Courthouse Code of Ethics for Arbitrators
- High Court of Lagos State Civil Procedure Rules (2004)

- Lagos Multi-Door Courthouse Guidelines for Court Referral to Alternative Dispute Resolution
- Lagos Multi-Door Courthouse Guidelines for Enforcement Procedure
- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) among others

4.0 CONCLUSION

ADR is a private method for settlement of disputes. It is less formal, less expensive and also saves time. The agreement of the parties to submit to arbitration is vital to the success of the arbitration proceeding without which, the whole process would be null and void.

5.0 SUMMARY

Alternative dispute resolution can save financial and emotional costs. Not only is litigation expensive and time-consuming, but it can be very stressful. You may feel that an important part of your life is on hold while you are waiting for a trial date, wondering and worrying about the outcome. If you have to deal with each other in the future, using an adversary process like litigation risks polarizing and embittering your relationship. The emotional wounds from fighting may never heal, and these wounds can complicate your future dealings and make it impossible for you to have a satisfactory relationship.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by ADR mechanism?
2. State the characteristics of arbitration
3. Mention the various institutional arbitration known to you.

7.0 REFERENCE/FURTHER READING

1. Redfern and Hunter, “Law and Practice of International Commercial Arbitration” (4th Edition Sweet & Maxwell 2004)
2. Ezejiofor, Gaius “The Law of Arbitration in Nigeria” 1997
3. The UNCITRAL Model Law
4. New York Convention
5. Orojo and Ajomo “Law and Practice of Arbitration and Conciliation in Nigeria” (1999) Mbeyi & Associates
6. Arbitration and Conciliation Act, Cap A18 Revised Edition (Laws of the Federation) Act 2004

UNIT II: INTERNATIONAL AND DOMESTIC ARBITRATION

1.0 INTRODUCTION

This unit considers the international and domestic nature of arbitration by looking at the definition of each.

2.0 OBJECTIVES

At the end this unit, you should be able to

a. Identify the international nature of arbitration
b. Understand what is meant by domestic arbitration
c. Distinguish between domestic and international arbitration.
d. Determine which claim falls under the definition of commercial.

3.0 MAIN CONTENTS

3.1 THE MEANING OF "INTERNATIONAL"

The term "international" is used to mark the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries and so are international or, in the terminology adopted by Judge Jessup, "transnational".

It is sometimes said that *every* arbitration is a 'national' arbitration, in the sense that it must be held in a given place and is accordingly subject to the national law of that place. Whilst this may be an interesting topic for debate, it is customary in practice to distinguish between arbitrations which are purely "do-mestic" and those which are "international" (because of the nature of the dispute, the nationality of the parties and some other relevant criteria).

There are good reasons for doing this. First, an international arbitration will usually have no connection with the state in which the arbitration takes place other than the fact that it is taking place on the territory of that state. Secondly, the parties will usually be corporation or state entities, rather than private individuals.

3.2 MEANING OF "COMMERCIAL"

It is generally agreed that arbitration is a particularly suitable approach for the resolution of disputes arising out of business relationships (as opposed, for instance, to domestic relationships). Contracts entered into by merchants and traders in their ordinary course of business are regarded as a commercial contract. The level of importance that is placed on the concept of commercial contract is very high in the civil law countries as regards arbitration. This is so because in some countries only disputes arising out of commercial contracts may be submitted to arbitration. Thus it would be permissible to hold an arbitration over a contractual matter between two merchants but not for a contract based on the determination of inheritance of the property of the deceased.

The fact that in some countries arbitration is only permissible in respect of commercial contracts, whilst in others there is no such limitation, was given international recognition many years ago. The **Geneva Protocol of 1923** obliges each contracting state to recognise the validity of an arbitration agreement concerning disputes that might arise from a contract "relating to commercial matters or to any other matter capable of settlement by arbitration". The words quoted indicate recognition of the distinction between "commercial" and other matters. The implication is that commercial matters are *necessarily* capable of being settled by arbitration under the law of the state concerned, in the sense that the state allows them to be settled by arbitration, whilst it may (or may not) allow other matters to be settled in that way.

Further emphasis is added to the distinction between "commercial matters" and "any other matter" by the stipulation in the Protocol that each contracting state may limit its obligations "to contracts that are considered as commercial under its national law". This is the so-called "commercial reservation", and it appears again in the New York Convention.

Furthermore, it may be important to know whether the legal relationship out of which the arbitration arose was or was not a commercial relationship. The question arises, for example, if it becomes necessary to seek recognition or enforcement of a foreign award in a state that has adhered to the New York Convention, but has entered the commercial reservation. It is necessary to look at the law of the state concerned to see what definition it adopts of the term "commercial".

Problem occasionally arise because courts of particular countries adopt a narrow definition of commercial, but the approach internationally is to define "commercial" so as to embrace all types of trade or business transactions. The Model Law went a step further in trying to resolve this by not defining the word but stating thus:

> *"The term "commercial" should be given a wide interpretation so as to cover matters arising out formal 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 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."*

It is advisable to adopt the provision of the Model Law as it provides parties with a wider interpretation of the term "commercial".

3.3 DOMESTIC ARBITRATION

Domestic arbitration usually involves claims by private individuals that may be small in amount, but are of considerable importance to those concerned. According to the **United Kingdom Arbitration Act 1996**, "domestic arbitration agreement" means an arbitration agreement to which none of the parties is –

(a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or

(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom,

and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.

The **Indian Arbitration and Conciliation (Amendment) Bill 2003** (IAC) defined domestic arbitration as an arbitration relating to a dispute arising out of legal relationship whether contractual or not, where none of the parties is:

i) An individual who is a nationality of, or habitually resident in, any other country other than India; or
ii) A body corporate which incorporate in any country other than India; or
iii) An association or a body of individuals whose central management and control is exercised in any country other than India; or
iv) The Government of a foreign country

It is worthy to note that ACA made no provision on the domestic nature of arbitration.

3.4 INTERNATIONAL ARBITRATION

International arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creature of contract, i.e., the parties' decision to submit disputes to binding resolution by one or more arbitrators selected by or on behalf of the parties and applying adjudicatory procedures, usually by including a provision for the arbitration of future disputes in their contracts. The practice of international arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their disputes, generally without the formalities of their respective legal systems.

3.4.1 MAIN FEATURES OF INTERNATIONAL ARBITRATION

International arbitration has enjoyed growing popularity with businesses and other users over the past 50 years. There are a number of reasons that prompt parties to elect to have their international disputes resolved through arbitration. These include the desire to avoid the uncertainties and local practices associated with litigations in national courts, the desire to obtain a quicker, more efficient decision, the relative enforceability of arbitration agreements and arbitral awards (as contrasted with forum selection clauses and national court judgments), the commercial expertise of arbitrators, the parties' freedom to select and design the arbitral procedures, confidentiality and other benefits.

International arbitration is sometimes described as a hybrid form of dispute resolution, which permits parties broad flexibility in designing arbitral procedures. For example, the International Bar Association (IBA)'s Rules on the Taking of Evidence in International Commercial Arbitration, revised in 2010. These rules adopt neither the common law jurisdictions' broad disclosure procedures (Discovery), nor follow fully the civil law in eliminating entirely the ability to engage in some disclosure-related practices. The IBA Rules blend common and civil systems so that parties may narrowly tailor disclosure to the agreement's particular subject matter.

3.4.2 DISTINGUISHING "INTERNATIONAL" AND "DOMESTIC" ARBITRATION

One of the major features of Model Law (which was expressly designed to provide for international commercial arbitration) is that it imposes strict limit on the extent to which a national court may intervene in the arbitration proceedings. Many states, including Belgium, Brazil, Colombia, France, Hong Kong, Nigeria, Singapore, Switzerland and others, have adopted a separate legal regime to govern international arbitrations–recognising that different consideration may apply to such arbitrations.

Another reason for distinguishing between "international" and "domestic" arbitrations is that in some states, the state itself (or in most cases, entities of the state) may only enter into an arbitration agreement in respect of international transactions. Accordingly, it is necessary to know how such transactions are defined and whether an arbitration in respect of them would be considered as "international" by the state concerned.

A further reason, which in practice is perhaps the most significant, is that different nationalities, different legal backgrounds and cultures, different legal systems and different principles will almost certainly be encountered in international arbitrations.

Finally, states that make no formal distinction between "international" and "domestic" arbitrations in their legislation are forced to recognise the distinction when it comes to the enforcement of arbitral awards.

4.0 CONCLUSION

There is always the need to make a distinction between "international" and "domestic" arbitration. The nationalities, legal backgrounds, cultures and legal systems of the parties are vital in distinguishing arbitration. The provision of the

Model law on the definition of commercial has been instrumental in the resolving the disparity in the provision on matters that could be settled by arbitration in the various states.

5.0 SUMMARY

Not all matters are suitable for arbitration. Claims that are of an international nature must fall under the matters that are categorized as "commercial" under the laws of place and the most especially the Model Law.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by the word "international" in relation to arbitration?
2. What are the features of an international arbitration?
3. What are the distinguishing features between international and domestic arbitration?

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter, "Law and Practice of International Commercial Arbitration" (4th Edition Sweet & Maxwell 2004)
2. The UNCITRAL Model Law
3. New York Convention
4. Gary B. Born, "International Commercial Law" (2009)

UNIT III: ARBITRABILITY

1.0 INTRODUCTION

The focus of this unit is on matters that are arbitrable and those that are not.

2.0 OBJECTIVES

The student is expected at the end of this unit to:

- Define the term “arbitrability”
- Identify matters that are arbitrable and those that are not

3.0 MAIN CONTENTS

3.1 ARBITRABILITY DEFINED

Wiktionary defined arbitrability as the characteristics of being arbitrable. It is the ability of a matter to be arbitrated. The term “arbitrability” is used to determine whether the dispute under the arbitration agreement could be settled by arbitration. The international understanding of arbitrability stems from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which in Article II(1) provides that each contracting state shall recognize an arbitration agreement “concerning a subject matter capable of settlement by arbitration,” and Article V(2)(a) provides that an arbitral award may be refused recognition and enforcement if the “subject matter of the difference is not capable of settlement by arbitration under the law of that country.”

Outside the United States, the term “arbitrability” has a reasonably precise and limited meaning: i.e., whether specific classes of disputes are barred from arbitration because of national legislation or judicial authority. Courts often refer to “public policy” as the basis of the bar.

Thus, the subject matter of the claim is the key to "arbitrability" in international arbitration, and the question to be asked is, "under the law of the place of arbitration or the state where award enforcement is being sought, are the specific claims capable of settlement by arbitration or must they be resolved in a national court?"

3.2 NON-ARBITRABLE ISSUES

By their nature, the subject matter of some disputes is not capable of arbitration. In general, two groups of legal procedure cannot be subjected to arbitration:

- Procedures which necessarily lead to a determination which the parties to the disputes may not enter into an agreement upon: Some court procedures lead to judgments which bind all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. For example, until the 1980s, anti-trusts matters were not regarded as arbitrable in the United States. Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement upon these matters is at least restricted. However most other disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, nut the validity of a patent could not: As patents are subject to a system of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination.
- Some legal orders exclude or restrict the possibility of arbitration for reasons of protection of weaker members of the public, e.g. consumers. While arbitration agreements with customer are only considered valid if they are signed by either party, and if the signed document does not bear any other content than the arbitration agreement.

The ACA does not stipulate any particular subject matter that may not be referred to arbitration. The question of whether or not a dispute is arbitrable is therefore left for interpretation by the Courts. In **Ogunwale v. Syrian Arab Republic** the Court of Appeal held that the test for determining whether a dispute is referable to arbitration is that the dispute or difference must necessarily arise from the clause contained in the agreement. However not all disputes are necessarily arbitrable. Only disputes arising from commercial transactions are referable to arbitration. Disputes

not falling within the category of commercial disputes (e.g. domestic disputes) would not be arbitrable under the ACA, though they may be referable to customary arbitration.

Also, some matters are generally more suitable for litigation than arbitration. For instance, applications for immediate enforcement of right or preservation of res e.g. the enforcement of fundamental human rights, application for *anton pillar*, *mareva* and other injunctions are less suitable for arbitration than litigation. In addition, since an arbitrator has no statutory power of joinder under the ACA, multi party proceedings may be less suitable for arbitration unless the arbitration agreement makes specific provision for it.

An inquiry into the arbitrability of the subject matter of a dispute can arise at different stages of the arbitral process, both before the arbitral tribunal and in State courts in the context of post-award enforcement or setting-aside proceedings. The issues of arbitrability may therefore arise at least four stages:

- normally the issue of arbitrability is invoked by a party at the beginning of the arbitration, before the arbitral tribunal, which will have to decide whether it has jurisdiction or not;
- the issue of arbitrability may also be referred by a party to a State court which will be requested to determine whether the arbitration agreement relates to a subject matter which is arbitrable;
- the issue of non-arbitrability can be raised in setting aside proceedings before the State court, usually at the place where arbitral tribunal has its seat;
- non-arbitrability may also be invoked by the defendant before the court deciding on the recognition and enforcement of the award.

3.3 ARBITRABLE ISSUES

Where a judicial proceeding is commenced in a matter which is subject matter of an arbitration agreement, the judicial forum is bound to refer the matter for arbitration by the arbitral tribunal. This provision implies that if the matter is an arbitrable matter, and is covered by the arbitration agreement, the matter must be decided by arbitration rather than by adjudication. The underlying crucial issue for this provision is – what exactly is an arbitrable matter, or what are the limits to arbitrability?

The limit to arbitrability is a very significant topic in law relating to arbitration, and has been discussed world-over, including at the UNCITRAL itself. Courts in several jurisdictions have rendered rulings on arbitrability. Matters that can be settled by arbitration include:

- Basically all disputes of Civil or Quasi Civil nature involving Civil Rights fall within the jurisdiction of Arbitration.
- Almost all disputes – commercial, civil, labour and family disputes in respect of which the parties are entitled to conclude a settlement – can be settled by Arbitration.
- Disputes involving joint ventures, construction projects, partnership differences, intellectual property rights, personal injury, product liabilities, professional liability, real estate securities, contract interpretation and performance, insurance claim and Banking & non-Banking transaction disputes fall within the jurisdiction of Arbitration.
- It is expanding to the areas or construction health care, telecommunication, entertainment and technology based industries.

4.0 CONCLUSION

Not all claims are resolvable through arbitration. There are some claims that are set aside for determination by the national courts. The New York Convention also permits states to recognise an arbitration agreement concerning a subject matter capable of settlement arbitration.

5.0 SUMMARY

In this unit, we have been able to discuss matters that are suitable for arbitration and those that are not. It is very important for parties to consider the issue of arbitrability at the initial stage of their agreement and also when choosing the seat for the arbitration proceedings.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the term “arbitrability”?
2. Discuss the two group of legal procedure that cannot be subjected to arbitration.
3. An arbitration agreement was signed between ABC Ltd and XYZ Ltd to submit *any* dispute to arbitration. After one year, XYZ Ltd initiated criminal proceedings against ABC for corporate manslaughter. ABC Ltd filed a motion requesting that the matter be stayed because there was an arbitration

agreement between the parties to submit any dispute to arbitration. Advice XYZ Ltd

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter, “Law and Practice of International Commercial Arbitration” (4th Edition Sweet & Maxwell 2004)
2. The UNCITRAL Model Law
3. New York Convention
4. Laurence Shore, “Defining “Arbitration”, New York Law Journal
5. Arbitration and Conciliation Act Cap18 Laws of the Federation 2004

UNIT IV: INTERNATIONAL COMMERCIAL ARBITRATION

1.0 INTRODUCTION

International commercial arbitration is the process of resolving business disputes between or among transnational parties through the use of one or more arbitrators rather than through the courts. It requires the agreement of the parties, which is usually given via an arbitration clause that is inserted into the contract or business agreement. The decision is usually binding. This unit will present briefly the major international arbitral institutions and the resources found on their Web sites. It will also review commercial and private databases that provide primary and secondary sources of arbitration information.

2.0 OBJECTIVES

The objective of this unit is to enhance the knowledge of the student in the area of international commercial arbitration law.

3.0 MAIN CONTENTS

3.1 INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration is the binding resolution of the merits of business disputes between or among *transnational* actors through the use of one or more arbitrators rather than the courts.

3.1.1 REASONS FOR CHOOSING INTERNATIONAL COMMERCIAL ARBITRATION

The use of international commercial arbitration has grown for several reasons. One or more parties may distrust a foreign legal system or wish to avoid long delays in the court systems. They may desire resolution of the dispute by someone with expertise in their business. They may wish to exercise more control by specifying the rules that will govern the disputes. They may also wish to avoid the current problem of the lack of internationally recognised standards on the enforceability of foreign judgments.

3.1.2 INSTITUTIONAL VS. AD HOC

There are essentially two kinds of arbitration, ad hoc and institutional. Institutional arbitrations are entrusted to one of the major arbitration institutions to handle, while ad hoc arbitrations are conducted independently and without such an organisation, according to the rules specified by the parties and their attorneys.

3.1.3 STATE VS. PRIVATE PARTIES

Arbitrations may also be differentiated by those that involve states as a party, and those that do not. Special institutions are available for arbitrations in which states are a party. The Permanent Court of Arbitration in the Hague was formed to handle arbitrations exclusively involving states, but since 1992 has broadened its mandate to include disputes states and private parties, as well as disputes involving international organisations. The ICSID is concerned with disputes between a state and its foreign investors.

3.2 BASIC PRINCIPLES OF INTERNATIONAL COMMERCIAL ARBITRATION LAW

A basic principle in international commercial arbitration is that of party autonomy. It is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations.

Article 19(1) of the Model Law provides that

> "Subject to the provision of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings"

A broad and general provision is also found in section 1(b) of the Arbitration Act 1996 which states that the provisions of Part 1 of the Act are founded on stated principles including:

> "(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."

In relation to procedure, section 34(1) achieves a similar result to article 19(1) of the Model Law. Section 34(1) provides:

> "It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter".

4.0 CONCLUSION

The composition of most arbitration would involve parties from different cultural backgrounds, different legal system and so on. This makes the arbitration one of an international nature and which would require it to be treated as "foreign". As stated above, international commercial arbitration is the process of resolving business disputes between or among *transnational* parties through the use of one or more arbitrators rather than through the courts.

5.0 SUMMARY

In this unit, we have been able to discuss:

- What international commercial arbitration entails
- Reasons for choosing international commercial arbitration
- The basic principle of international commercial arbitration

6.0 TUTOR-MARKED ASSIGNMENT

1. Define international commercial arbitration.
2. What are the factors to consider in choosing international commercial arbitration?

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter
2. Model Law
3. Arbitration and Conciliation Act 2004

MODULE TWO: PROCEDURE IN ARBITRATION

UNIT I: ARBITRATION AGREEMENT AND SUBMISSION CLAUSE

1.0 INTRODUCTION

The basic legal requirement of an arbitration agreement under any arbitration law is that an arbitration agreement must be in writing or must be contained in a written document signed by the parties. In this unit, we would be looking at the definition of arbitration agreement as defined by the various rules on arbitration, categories, validity and factors amongst other issue that affect arbitration agreement.

International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the national courts will recognise and enforce.

2.0 OBJECTIVES

This unit focuses on an essential ingredient of arbitration proceedings which is the arbitration agreement and the submission clause.

3.0 MAIN CONTENTS

3.1 DEFINITION OF ARBITRATION AGREEMENTS

The arbitration agreement is the foundation of international commercial arbitration. It represents the wishes of the parties to submit their disputes to arbitration. **Section 1 of ACA** presupposes that arbitration must be consensual and indicates that an arbitration agreement may be either an express clause in a contract whereby parties agree to refer future disputes to arbitration or in a separate document (Submission Agreement) whereby parties agree to submit their existing dispute to arbitration. An arbitration agreement may also be inferred from written correspondence or pleadings exchanged between parties.

However, there are situations of non consensual or compulsory arbitration as depicted in statutes and consumer standard form contracts. For instance, under the **Pension Reform Act**, the regulator **National Pension Commission** (PENCOM) can refer any dispute to arbitration. Also under the **National Investment Promotion Act** (NIPA), any foreign investor who registers under the Act is automatically entitled to bring a treaty arbitration under the ICSID system. Arbitration provisions contained in such statutes are deemed to be binding on any person to whom they apply. The following additional legal requirements for a valid arbitration agreement can be distilled from the provisions of the ACA:

- The arbitration agreement must be in respect of a dispute capable of settlement by arbitration under the laws of Nigeria.
- The parties to the arbitration agreement must have legal capacity under the law applicable to them.
- The arbitration agreement must be valid under the law to which the parties have subjected it or under the laws of Nigeria. In other words, the agreement must be operative, capable of being performed and enforceable against the parties.

Under the New York Convention, each contracting states undertakes to recognise and give effect to an arbitration agreement when the following requirements are fulfilled:

- the agreement is in writing;
- it deals with existing or future disputes;
- these disputes arise in respect of a defined legal relationship, whether contractual or not; and
- they concern a subject-matter capable of settlement by arbitration.

The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York Convention, which requires that an arbitration agreement be in writing. If the parties have agreed to arbitrate, but they entered into the arbitration agreement in a manner that does not meet the form requirement, any party may have grounds to object to the jurisdiction of the arbitral tribunal. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognised. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("*compromis*") or a future dispute ("*clause compromissoire*"). It follows the New York Convention in requiring the written form of the arbitration agreement but recognises a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing". The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of "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". It also states that "the reference in a contract to any document" (for example, general conditions) "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". It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made "by reference". The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are

intended to preserve the enforceability of arbitration agreements under the New York Convention.

In that respect, the Commission also adopted, at its thirty-ninth session in 2006, a "Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958" (A/61/17, Annex 2). The General Assembly, in its resolution 61/33 of 4 December 2006 noted that "in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely". The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the "more favourable law provision" contained in article VII (1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of 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".

3.2 CATEGORIES OF ARBITRATION AGREEMENTS

There are two basic types of agreement: the arbitration clause and the submission agreement. An arbitration clause looks to the future, whereas a submission agreement looks to the past. The first, which is most common, is usually contained in the principal agreement between the parties and is an agreement to submit *future* disputes to arbitration. The second is an agreement to submit *existing* disputes to arbitration.

Arbitration clauses are usually short, whilst submission agreements are usually long. This is not because of any particular legal requirement. It is simply a reflection of the

practicalities of the situation. An arbitration clause that deals with disputes which may arise in the future does not usually go into much detail, since it is not known what kind of disputes will arise and how they should best be handled. Indeed, although the parties to a contract may agree to an arbitration clause, they hope that there will be no need to invoke it. Usually they insert a short model clause, recommended by an arbitral institution, as a formality. By contrast, a submission agreement deals with a dispute that *has* in fact already arisen; and so it can be tailored to fit precisely the circumstances of the case. In addition to indicating the place of arbitration and the substantive law, it generally names the arbitrators, sets out the matters in dispute and even, if thought appropriate, provides for exchange of written submissions and other procedure matters.

Most international commercial arbitrations take place pursuant to an arbitration clause in a commercial contract. These clauses are often "midnight clauses", i.e. the last clauses to be considered in contract negotiations, sometimes late at night or in the early hours of the morning. Insufficient thought is given as to how disputes are to be resolved (possibly because the parties are reluctant to contemplate falling into dispute) and an inappropriate and unwieldy compromise is often adopted.

3.3 ENFORCEMENT OF THE ARBITRATION AGREEMENTS

Nigerian Courts have adopted a positive approach to the enforcement of arbitration agreements. A review of the decided cases shows a general recognition by Nigerian Courts of arbitration as a good and valid alternative dispute resolution mechanism. In **C.N. Onuselogu Ent. Ltd. v. Afribank (Nig.) Ltd,** the Court held that arbitral proceedings are a recognised means of resolving disputes and should not be taken lightly by both counsel and parties. However, there must be an agreement to arbitrate, which is a voluntary submission to arbitration.

Where there is an arbitration clause in a contract that is the subject matter of Court proceedings and a party to the Court proceedings promptly raises the issue of an arbitration clause, the Courts will order a stay of proceedings and refer the parties to arbitration. **Sections 6(3) and 21** of the Lagos State Arbitration Law 2009 which empowers the Court to grant interim orders or reliefs to preserve the res or rights of parties pending arbitration. Although the ACA in **section 13** gives the arbitral tribunal power to make interim orders of preservation before or during arbitral proceedings, it does not expressly confer the power of preservative orders on the Court and

section 34 of the ACA limits the Courts' power of intervention in arbitration to the express provisions of the ACA. The usefulness of section 6(3) of the Lagos State Arbitration Law 2009 is seen when there is an urgent need for interim preservative orders and the arbitral tribunal is yet to be constituted. Our experience in this regard is that such applications find no direct backing under the ACA and have always been brought under the Rules of Court and under the Court's inherent jurisdiction to grant interim orders. However, in **Afribank Nigeria Plc v Haco**, the Court granted interim relief and directed the parties to arbitrate under the provisions of ACA. Upon the publication of the award the parties returned to the Court for its enforcement as judgment of the Court.

The Courts in Nigeria are often inclined to uphold the provisions of sections 4 and 5 of the ACA provided the necessary conditions are met. A live case in point is the case of **Minaj Systems Ltd. v. Global Plus Communication Systems Ltd. & 5 Ors**, in this case, the Claimant instituted a Court action in breach of the arbitration agreement in the main contract and on the Defendant's application, the Court granted an order staying proceedings in the interim for 30 days pending arbitration. In **Niger Progress Ltd. v. N.E.I. Corp.,** the Supreme Court followed section 5 of the ACA which gives the Court the jurisdiction to stay proceedings where there is an arbitration agreement. In **The Owners of the MV Lupex v. Nigerian Overseas Chartering & Shipping Ltd**, 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. In **Akpaji v. Udemba**, the Court held that where a defendant fails to raise the issue of an 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.

3.4 THE PARTIES TO AN ARBITRATION AGREEMENT

The parties to a contract must have legal capacity to enter into that contract, otherwise it is invalid. The position is no different if the contract in question happens to be an arbitration agreement. The general rule is that any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement. Accordingly, the parties to such agreements include individuals, as well as partnerships, corporations, states and state agencies.

If an arbitration agreement is entered into by a party who does not have the capacity to do so, the provisions of the New York Convention (or the Model Law, where applicable) may be invoked either at the beginning or at the end of the arbitral process. If it is invoked at the beginning of the process, the party requesting for it would ask the competent court to stop the arbitration, on the basis that the arbitration agreement is null and void. Where the validity of the arbitration agreement is raised at the end of the arbitration process, the requesting party would ask that the competent court to refuse the recognition and enforcement of such an award, on the grounds that one of the parties to the arbitration agreement is "under some incapacity" under the applicable law.

In practice, the issue of incapacity rarely arises in international commercial arbitration.

3.5 SEPARABILITY

The doctrine of separability of the arbitration clause is both interesting in theory and useful in practice. It is also known as the doctrine or principle of autonomy or independence of the arbitration clause. Furthermore, separability means the arbitrability clause in a contract is considered to be separate from the main contract of which it forms part and as such, survives the termination of that contract.

It noteworthy to mention that arbitration agreement can be in form of an arbitration clause in a contract or in a separate agreement addressing disputes that have already arisen. The doctrine of separability is most relevant to arbitration clause in a contract an underlying contract.

At the outset it must be recognised that this doctrine is inextricably linked with the doctrine of *kompetence-kompetence* which empowers the arbitrator to decide his own jurisdiction in the first instance. While *kompetence-kompetence* empowers the arbitration tribunal to decide on its own jurisdiction, the doctrine of separability affects the outcome of this decision. The doctrine of separability is provided for under **section 12(2) of ACA**:

> *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.*

For arbitral tribunals whose seat is in Nigeria (including under domestic arbitration) the source of this doctrine is article 12(2) of ACA quoted above which is a mandatory provision. Parties cannot therefore as a matter of contract, derogate from this provision and agree otherwise.

Finally, separability thus ensures that if, for example one party claims that there has been a total breach of contract by the other, the contract is not destroyed for all purposes. Instead:
"It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

4.0 CONCLUSION

The importance of the arbitration agreement is very vital to the success of an arbitration proceeding. The arbitration agreement represents the wishes of the parties to submit future dispute to arbitration while submission clause attends to disputes that have already arisen.

5.0 SUMMARY

The focal point of this unit has been the issue of arbitration agreement and the submission clause. We have also been able to discuss categories, enforcement and validity among others of an arbitration agreement.

6.0 TUTOR-MARKED ASSIGNMENT

1. What is the difference between an arbitration agreement and a submission clause?
2. Define "arbitration agreement".
3. What is the legal requirement of an arbitration agreement under ACA?
4. Discuss the amendment to the requirement that an arbitration agreement must be in writing.

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter
2. UNICTRAL Model Law
3. New York Convention
4. Emilia Onyema, "The Doctrine of Separability under the Nigerian Law, July-September 2009 AJBPCI Vol.1 No.1

UNIT II: LAW GOVERNING ARBITRATION PROCEEDINGS

1.0 INTRODUCTION

Many disputes that are referred to arbitration are determined by arbitral tribunals with no more than a passing reference to the law. They turn on matters of facts: what was said and what was not said; what was agreed by the parties and what was not agreed by them; what was done and what was not done. When a case is before an arbitral tribunal, their first duty is to resolve the issues of facts, as best as they can. Once this has been done, only issues of contractual interpretation remain and if the words of the contract are not ambiguous, no reference to any underlying system of law is likely to be required.

Parties are free to choose the law applicable to the arbitration proceedings but where they have not pre-determined the law, the arbitral proceedings shall be governed by the ACA. **Section 15(1) and (2)** of the ACA provide that the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to the Act. Where the Rules contain no provision in respect of any matter, the arbitral tribunal may conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure a fair hearing. The ACA governs both the arbitral proceedings itself and the enforcement of the award. Since arbitration is a residuary matter under the 1999 Constitution, both the Federal and state governments can legislate on it. There are existing arbitration laws by Lagos State and the northern states of Nigeria. Lagos State Arbitration Law is perhaps the most developed and the state aims by this to make Lagos the centre for arbitration in Nigeria.

The ACA and the Rules made pursuant to it govern domestic arbitration and may be adopted in an international arbitration. Generally, the ACA and the Rules apply to any arbitration whose seat is Nigeria or which parties have agreed will be governed by the ACA. However, parties are free to choose the law applicable to the arbitration proceedings and may even choose the arbitration law of a different country or the rules of an international or foreign arbitral institution. Section 53 of the ACA provides that 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 rules acceptable to the parties. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which is incorporated as the Second Schedule to the ACA is applicable to the recognition and enforcement of arbitral awards arising out of international commercial arbitration.

2.0 OBJECTIVES

At the end of the unit, you should be able to:

- understand what lex arbitri is
- what are the content of the lex arbitri?
- understand the freedom the parties have in choosing the law that will govern the proceedings

3.0 MAIN CONTENTS

3.1 WHAT IS LEX ARBITRI?

The mix of several systems of laws in international commercial arbitration often makes it difficult to maintain the fine distinction between the rules of procedure as adopted by the parties and the tribunal on the one hand and the law of the place of arbitration, that is the *lex loci arbitri* on the other hand. The latter refers to the system of law that gives effect to procedural rules and is commonly equated to the law governing the arbitral process itself, the *lex arbitri*, in effect blurring the intellectually tasking and yet crucial distinction between the two.

The expression '*lex arbitri*' simply put refers to the law governing the arbitration. Three conceptual theories in arbitration would usually operate to determine what *lex arbitri* is or at least, generally accepted to be;

(I) THE JURISDICTIONAL THEORY

Basically, the law of a state wholly circumscribes arbitration like litigation. This theory projects the concept of state sovereignty above the consensual agreement of the parties. It emphasizes the State as the progenitor of the methods and procedures for dispute resolution, implicitly, affirming the *lex loci arbitri* as the law which governs the conduct of the arbitration and the status of arbitral awards.

(II) CONTRACTUAL THEORY

This theory suggests that the validity of an arbitral process is wholly dependent on the consensual agreement of the parties as to its conduct. However, it is dependent on the assumption that an existing legal system confers such freedom to so agree on the parties. Hence, it is not as independent of the *lex loci arbitri* as it first appears to be.

(III) PARTY AUTONOMY

This theory emphasizes the entrenchment of arbitration in different legal systems, as a self-standing mechanism of its own that should not be subsumed under an inappropriate legal category. The theory projects the freedom of parties to choose a *lex arbitri*, while not disregarding the State as the precursor of that right.

As evident in all the three theories, the *lex arbitri* would rarely ever be completely detached from the State or its legal system. The practical implication of this is evident in the decision of a foreign court to refuse recognition and enforcement to an award that fails to comply with the mandatory provisions of the *lex loci arbitri*. No precedent exists as to any mandatory content of a *lex arbitri*. While issues such as consumer protection, fees of arbitrators and forms of awards are becoming increasingly present in many laws that govern arbitration, the majority of legal systems and institutional rules provide for only a general framework, leaving the parties or the arbitral tribunal with so much leverage to draw up the details of the governing procedural rules.

3.2 CONTENT OF THE LEX ARBITRI?

Each state is availed the freedom of deciding for itself what laws it wishes to lay down to govern the conduct of arbitrations within its own territory. Some states will wish to build an element of consumer protection into their law, so as to protect private individuals. For example, **Section 6 of the Swedish 1999 Arbitration Act** provides that an arbitration agreement with a consumer involving goods and services for private use is invalid if made before a dispute arises.

The Model Law expressly provides that:

> *(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.*

It may be helpful at this point to give examples of the matters with which the *lex arbitri* might be expected to deal, although the exact position under the relevant *lex arbitri* should be checked, particularly where these legal provisions are mandatory. With this qualification, the *lex arbitri* is likely to extend to:

- The definition and form of an agreement;
- Whether a dispute is arbitrable under the *lex arbitri;*
- The constitution of the arbitral tribunal and any grounds for challenge of that tribunal;
- The entitlement of the arbitral tribunal to rule on its own jurisdiction;
- Equal treatment of the parties;
- Freedom to agree upon detailed rules of procedure;
- Interim measures of protection;
- Statements of claim and defence;
- Hearings;
- Default proceedings;
- Court assistance if required;
- The powers of the arbitrators, including powers to decide as "*amicable compositeurs*";

These are all important aspects of international commercial arbitration. There are three important points to note here. Firstly, there is an obvious prospect of conflict

between the *lex arbitri* and a different system of law that may be equally relevant. Consider, for example, the question of arbitrability that is to say, whether or not the subject-matter of the dispute is "capable" of being resolved by arbitration. The concept of arbitrability is basic to the arbitral process. Both the New York Convention and the Model Law refer explicitly to disputes that are "capable of being resolved by arbitration".

Secondly, the effective conduct of an international commercial arbitration may depend upon the provision of the law of the place of arbitration. One way of illustrating this dependence is by reference to any provisions of the local law for judicial assistance in the conduct of the arbitration. Where the arbitrators are faced with making orders on the preservation and inspection of property particularly that of a third party, they would need the assistance of the national courts to be able to enforce such an order that has been made by them.

Lastly, the choice of a particular place of arbitration may have important and unintended consequences. This is because the law of that place may confer powers on the courts or on the arbitrators that were not expected by the parties.

3.3 THE SEAT THEORY

In well-drafted international contracts, the arbitration clauses would state a particular location which would serve as the seat for the arbitration proceedings. By specifying the seat, this does not mean the physical seat or that the arbitration has to be held here. Rather, the choice of the seat signifies the adoption of the laws that govern arbitration at the chosen place. This is what is referred to as the "seat theory".

Where parties have not expressly chosen the law applicable to the arbitration, the law of the seat of arbitration would apply. Thus, where the seat of arbitration is Nigeria, the ACA and the arbitration Rules would govern the formation, validity and legality of the arbitration agreement as well as the entire arbitral procedure, unless parties have expressly stated otherwise.

When a particular place is mentioned in the arbitration agreement of parties, what this means is that they are deciding the juridical seat and *lex arbitri.* In *Bank Mellat v Helliniki Techniki*, **Kerr LJ** was quoted as saying that "*... jurisprudence does not*

recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law" rather the legal system offers a 'shoulder' for the arbitration proceedings to lean on. Furthermore, where parties fail to specify the seat, the court or the arbitral tribunal is empowered to choose for them. Example of this authority could be found in the ICC Arbitration Rules.

The "seat of the arbitration" is defined as "the juridical seat of the arbitration" designed by the parties, or by an arbitral institution or the arbitrators themselves, as the case may be. The seat or place of arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which the arbitration is legally situated.

It should be noted that the seat of arbitration is intended to be its central point. The parties can decide to hold meetings or even hearing at a place which is different from the specified "seat". This does not mean that the "seat" of the arbitration changes with the change in location. The legal place of the arbitration remains the same even if the physical place changes from time to time unless of course the parties decide to change it.

3.4 WHAT IS DELOCALISATION?

The law governing the international commercial arbitration involves a complex interaction of various systems of laws and legal rules. One of these systems, the lex arbitri or curial law, concerns the existence and proceedings of the tribunal. This body of law is very important as it sets out a standard external to the arbitration agreement for the conduct of the arbitration. It is this body of law which empowers the exercise by the court of interim measures, supportive measures and controlling measures to assist arbitrations which have run into difficulties. Delocalised arbitration concern arbitration that are detached from the lex arbitri.

There have been various views towards the detachment of arbitration from the lex arbitri. **F.A. Mann**, an advocate of national law is of the view that the inclusion of an arbitration clause by parties in their contract can only be recognised as legal when read in line with the *lex fori* of the international private law of the seat that has been chosen by them. He believes that private international law is an "*offspring*" of a national law and since the law governing arbitration is based on it, the law of arbitration is definitely a national law.

He went further with the argument that the existence of the parties' autonomy is made possible by the municipal law and that every right that an individual has is "*derived from a system of municipal law which may conveniently and in accordance with tradition be called lex fori, though it would be more exact (but also less familiar) to speak of the lex arbitri or ... la loi de l'arbitrage."*
Highet like *Mann* also does not believe in stateless contractual agreements. In his book "*The Enigma of the Lex Mercatoria*", he was of the opinion that "*if the contract is stateless, it is not a contract and cannot be enforced."*

So far as international commercial arbitration is concerned, it would save considerable time, trouble and expense if the laws governing arbitration were the same throughout the world, so that there was so to speak a universal *lex arbitri*. There would then be a "level playing field" for the conduct of international commercial arbitration wherever they take place. He went further to say that the idea of a universal *lex arbitri* is as illusory as that of a universal peace.

This perceived influence by the *lex arbitri* has been criticised by writers and arbitrators who are of the view that there is the possibility of having an award which has no connection with the *lex arbitri*.

Taking a look at the provisions of the Model Law, it could be seen that the intervention of the court is curtailed. For instance, Art.5 provides that in matters governed by this Law, no court shall intervene except where so provided in this law. It should however be noted that several of the Articles contained in the Model Law contain directions to the national courts.

One of the proponents of this school of thought is **Paulsson**. He is of the opinion that if the detachment of the transnational arbitral process were denied, the choice of the place of arbitration has great significance. To him, parties seeking to rely on the award in other countries may be delayed or hindered by challenges to it before those courts. In *Gotaverken* v. *Libyan General National Maritime Transport Co.,* Paulsson remarked that an international arbitral award may be enforced, even if not subject by the *lex arbitri,* to the same appeal procedures as a domestic award.

Though Paulsson does not rule out the involvement of the national courts but he feels that if arbitration was delocalised, it would reduce the work load that arbitrators have to go through for instance the issue of forum shopping.

4.0 CONCLUSION

The discussion in this unit has been centered on the issue of laws that govern arbitration at the place of arbitration. We also considered the diverging views of various scholars and writers on delocalizing arbitration from the seat of arbitration.

5.0 SUMMARY

In this unit you have studied the following:

- Lex arbitri
- What to look out for in the lex arbitri
- Seat theory
- Delocalisation of arbitration from the seat

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the provision of Section 15 of ACA.
2. What are the content of lex arbitri?
3. What are the three conceptual theories in arbitration?

7.0 REFERENCES/FURTHER READING

1. Sanders (ed),
2. Highet, “The Enigma of the Lex Mercatoria”, 63 Tul. L. R. (1989) 615
3. Paulsson; “Delocalisation of International Commercial Arbitration: When and Why it Matters” (1983) 32 I.C.L.Q. 53
4. Redfern and Hunter, “Law and Practice of International Commercial Arbitration” (4th Edition Sweet & Maxwell 2004)
5. UNCITRAL Model Law

UNIT III: ESTABLISHMENT OF ARBITRAL TRIBUNAL

1.0 INTRODUCTION

The parties to an arbitration proceedings would need to agree on the number of arbitrator(s) to preside over their dispute. Where they fail to do so, there are provisions in various institutional rules to assist them in doing so. Also the provisions extend to the qualities, challenges and replacement of arbitrators.

2.0 OBJECTIVES

In this unit, students are expected to understand the following:

- Initiating arbitration proceedings
- Appointment of arbitrators
- Qualities of an arbitrator
- Challenging the appointment of an arbitrator
- Replacement of an arbitrator

3.0 MAIN CONTENTS

3.1 COMMENCEMENT OF AN ARBITRATION

Once the parties have decided to proceed with the arbitration and the required notice or request for arbitration has been delivered, the next step is to establish the arbitral tribunal.

A national court of law is a standing body to which an application may be made at almost any time, but an arbitral tribunal must be brought into existence before it can exercise any jurisdiction over the dispute and the parties. The contrast between the two is seen most clearly when a dispute has arisen, attempts at settlement have failed, and one of the parties decides that the time has come to pursue its legal rights. If the dispute is to be taken to court, the procedure is simple. The claimant need only issue a writ, file a complaint or initiate whatever form of originating process is appropriate to set the machinery of justice into operation.
It is different if the dispute is to be referred to arbitration. The claimant cannot bring his case before an arbitral tribunal or seek any measures of relief or other directions from that tribunal until it has been established. It usually takes time to establish an arbitral tribunal, particularly if this has to be done by agreement or if the appointment has to be approved by an arbitral institution. The appointment of the arbitral tribunal must be made without delay once the decision to arbitrate has been made.

3.2 APPOINTMENT OF ARBITRATORS

One of the advantages arbitration has over litigation is the freedom the parties have to choose who would oversee their dispute. **Section 6 of ACA** provides that 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 three.* The arbitral tribunal could either be a sole arbitrator or multi-arbitrator tribunal. The ICC Rules provide that where the parties have not agreed upon the number of arbitrators, a sole arbitrator will be appointed, unless "the dispute is such as to warrant the appointment of three arbitrators.

In the case of an arbitration with one arbitrator, where the parties fail to agree on the 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. Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under the procedure or the parties or two 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 subsections (2) and (3) of section 7 shall not be subject to appeal.

3.3 QUALITIES OF INTERNATIONAL ARBITRATORS

An arbitrator could be any natural person, the only general requirement being that the person chosen must have legal capacity.

There is nothing new in saying that the quality of arbitration depends very much upon the quality of the arbitrators, particularly in the international arbitration setting. The qualities of the arbitral tribunal are, evidently, of great importance, and have a direct influence in the outcome of the arbitration, and in the enforceability of the arbitral award rendered by the tribunal. Being independent and impartial, however, are not "qualities", but legal requirements of all significant international arbitration rules and arbitration friendly legislation. Therefore, appointing parties must have a clear understanding which personal and professional characteristics should international arbitrators have.

Aside from specific qualities such as (i) the potential international arbitration's listening and cross-cultural communications skills, (ii) people skills, (iii) reasoning skills, and (iv) legal skills and specialised expertise in the subject-matter of the arbitration.

3.4 CHALLENGE AND REPLACEMENT OF ARBITRATORS

The primary aim of the Model Law with respect to the challenge and replacement of arbitrators is to provide a degree of transparency: under Article 12, 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 could be challenged should he hold back any information that might affect his independent judgement. **Section 8 of ACA** provides that 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.

A party who challenges must given notice of the challenge to the challenged arbitrator, the other members of the arbitral tribunal (where there are more than one arbitrator) and the other party, notifying them of the reasons for the challenge.

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw from office, the decision may be taken by the appointing authority.

An arbitrator can be replaced in the event of a successful challenge, death or resignation and 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.

4.0 CONCLUSION

The arbitrator is not above the law. He is a product of the arbitration agreement between the parties ad can be removed if any of them objects his election. The arbitral institutions also assist the parties in the appointment, removal and replacement of an arbitrator. The qualities required of an arbitrator are also provided for in the arbitral rules. The importance of the provision of the institutional rules can't be overemphasised.

5.0 SUMMARY

The need for an unbiased umpire by the parties is very vital to the success of the arbitration proceedings. After reading through this unit, the student should be able to address the issues raised at the beginning of the unit.

6.0 TUTOR-MARKED ASSIGNMENT

1. What are the qualities of an arbitrator?
2. Discuss the primary aim of the Model law on the challenge and replacement of arbitrators
3. Discuss the provision of section 6 of ACA.

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter, "Law and Practice of International Commercial Arbitration" (4th Edition Sweet & Maxwell 2004)
2. ICC Arbitration Rules
3. Arbitration and Conciliation Act Cap 18 Laws of the Federation 2004

UNIT IV: ORGANISATION OF ARBITRAL TRIBUNAL

1.0 INTRODUCTION

There is much work to be done "behind the scenes" to ensure that an international arbitration runs smoothly. The arbitrators are generally of different nationalities, as are the parties, their advisers and experts. Indeed, it is not usual to find that, at a meeting or hearing in an international commercial arbitration, five or more different nationalities are represented. This mixture of nationalities is one of the most intriguing challenges involved in the practice of international commercial arbitration.

2.0 OBJECTIVES

In this unit, emphasis would be the practical aspect of the arbitration process. Among the issues to be discussed are administrative and procedural aspects of the proceeding.

3.0 MAIN CONTENTS

3.1 SCHEDULING HEARING

In arbitrations where the arbitral tribunal consists of more than a sole arbitrator, it is usually necessary for the members of the arbitral tribunal to meet from time to time for consultation amongst themselves. There is no law restricting the arbitral tribunal to the seat of arbitration for their meetings and consultations. The arbitral tribunal is free to meet at any place they feel would comfortable for all the parties. The arbitrators may be required, however, to meet at the seat of arbitration for the purpose of drafting or signing their award.

Unless the case is to be decided on the basis of documents only, there is also a need for the arbitrators to schedule a hearing, or series of hearing, at which the parties and their representatives are given the opportunity to tender evidence of their witnesses and their legal arguments. Witness hearing are generally but not always held at the seat of the arbitration; provision is sometimes made for the arbitral tribunal to take such evidence of the witness via video-conferencing.

In fixing a date for hearing, the presiding arbitrator in the case of a panel of more than one arbitrator generally fixes the date for the proceedings. He is expected to consult with his co-arbitrators so as to ensure that the date or the proposed dates are convenient for everyone.

The arbitrators must ensure that the date(s) chosen does not fail on a public holiday. There is no legal rule governing this but simply out of courtesy to all concerned. Another reason for this is it might be difficult or even impossible in some countries, to provide the necessary infrastructure needed for the hearing on a religious holiday or a family holiday.

3.2 ADMINISTRATIVE ASPECT

The place of arbitration is chosen before any hearing is held; but it is necessary to fix a specific venue in appropriate premises offered by an arbitral institution, conference centre or other suitable building.

In deciding on a venue, the primary consideration must be to find accommodation that is fit for the purpose. Two particular requirements stand out. First, the room or rooms chosen must provide adequate space not only for the arbitral tribunal but also for the parties and their lawyers; for the display of charts, drawings, plans and other documents, all of which may be voluminous; and for anyone else who is to assist in the conduct of the arbitration, including experts, stenographers and interpreters. In modern times, electronic aids of one kind or another are routinely deployed.

Secondly, so far as possible, the rooms chosen must be available for the purposes of the arbitration throughout the whole period of the hearing. It is both irritating and inconvenient when the hearing room (at a hotel, for example) must be completely cleared at the end of the day's proceedings, to make way for a dinner or other functions.

The arbitrators must ensure that there is provision for an extra room to hold or meet in caucus, witness hearing and other private discussion. It is also important to make arrangement for a waiting room to accommodate people before the proceedings will start.

Another important point to note is the provision of interpreters where some witnesses or parties may be unable to express themselves easily in the language of the arbitration since it's of an international nature. It has been observed that the use of an interpreter slows down the proceedings considerably. An example is a situation where the opposing party request that he engages the use of his own interpreter who is expected to check that questions and answers are being interpreted correctly.

The use of verbatim transcript is of great importance in international arbitrations. The level of comprehension of the members of the arbitral tribunal of the language of the proceedings varies; the use of a verbatim recorder would give everyone the opportunity of reverting to the records for clarification any matter.

3.3 FIXING FEES

The cost of bringing or defending a claim before an arbitral tribunal is likely to be considerably higher than that of bringing or defending the same claim before a national court. This is because, in addition to the usual expenses of litigation, it is necessary for the parties to pay the fees and expenses of the arbitral tribunal and the cost of hiring suitable accommodation for hearings.

In addition, where the arbitration is administered by an arbitral institution such as the ICSID, WIPO etc., the fees and expenses of that institution must be paid. This contrasts sharply with proceedings before a national court, where the court rooms, the attendants and the judges themselves are provided and paid for by the state. The parties often make no more than a nominal contribution to the state by way of a registration fee or other levy.

Where an arbitration is conducted under the auspices of an arbitral institution, it is not necessary for the parties to engage in any direct negotiations with the tribunal concerning the basis of its fees. These are generally fixed by the institution, sometimes acting independently, sometimes after consultation with sole or presiding arbitrators. The parties have no say in the matter. In an ad hoc arbitration however, it is necessary for the parties to make their own arrangements with the arbitrators as

to their fees. This should be done at an early stage in the proceeding, in order to avoid misunderstanding later. To avoid any suggestion of impropriety, any discussions with arbitrators concerning the amount to be paid to them should only take place in the presence of all the parties to the dispute, or their representatives.

4.0 CONCLUSION

The arbitrators/institutions are saddled with the task of putting everything in place for the smooth running of the arbitral proceedings. They relieve the parties of the administrative and procedure aspect of the arbitral process.

5.0 SUMMARY

In this unit, issues that were discussed include:

- Scheduling a place for hearing of the arbitration
- Picking a suitable date for the proceedings
- Fixing of fees among other issues

6.0 TUTOR-MARKED ASSIGNMENT

1. In choosing a date for arbitration proceeding, what would your advice be to the arbitrators.
2. What is expected of the arbitrators/institutional body on the organisation of arbitral proceedings?
3. Assuming you are pointed as an arbitrator, what would be your primary consideration in deciding the venue for the proceedings?

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter, “Law and Practice of International Commercial Arbitration” (4th Edition Sweet & Maxwell 2004)
2. UNCITRAL Model Law

MODULE THREE: CONDUCT OF ARBITRAL PROCEEDINGS

UNIT I: COMMENCEMENT PROCEDURE

1.0 INTRODUCTION

Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings. This is useful in that it enables the arbitral tribunal to take decisions on the organisation of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

2.0 OBJECTIVES

The focus of this unit would be on the following:

- Set of arbitration rules that would govern the arbitral proceedings
- Who are those saddled with the responsibility of choosing these rules
- Mode of communication – Language
- Where the proceedings would be held?

3.0 MAIN CONTENTS

3.1 SET OF ARBITRATION RULES

Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might

wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used either without modification or with such modifications as the parties might wish to agree upon. In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it may be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.

However, caution is advised as consideration of a set of arbitration rules might delay the proceedings or give rise to unnecessary controversy.

It should be noted that agreement on arbitration rules is not a necessity and that, if the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine how the case will be conducted.

3.2 LANGUAGE OF PROCEEDINGS

Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Possible need for translation of documents, in full or in part

Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings.

(b) Possible need for interpretation of oral presentations

If interpretation will be necessary during oral hearings, it is advisable to consider whether the interpretation will be simultaneous or consecutive and whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

3.3 PLACE OF ARBITRATION

a) Determination of the place of arbitration, if not already agreed upon by the parties

Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject matter in dispute and proximity of evidence.

(b) Possibility of meetings outside the place of arbitration

Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model

Law on International Commercial Arbitration "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 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

3.4 ADMINISTRATION SERVICES

Various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for

administrative services to be obtained from another source, often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.

Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal.

3.5 COST OF ARBITRATION

(a) Amount to be deposited

In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit.

The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether the deposit should be made by the two parties (or all parties in a multi party case) or only by the claimant.

(b) Management of deposits

When the arbitration is administered by an institution, the institution's services may include managing and accounting for the deposited money. Where that is not the case, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

If during the course of proceedings it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g. because the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert).

4.0 CONCLUSION

In reality, the simplicity of arbitration might really be likened to a fairytale. The modern process of arbitration has lost its early simplicity. It has become more complex, more legalistic, more institutionalized. Yet in its essentials it has not changed. The procedure that was discussed in this unit simply ensures that the posterity of the arbitral process. It is also important to note at this point that ACA did not make any specific provision on the issue of choice of rules.

5.0 SUMMARY

In this unit, we have been able to address the choice of arbitral rules that are available to the parties, language of the proceedings, administrative aspect of the proceedings among other issues.

6.0 TUTOR-MARKED ASSIGNMENT

1. What is your understanding on the subject of "Place of arbitration"?
2. Addax Petroleum Ltd and Ijaha Youth Movement have agreed to submit to the Lagos Multi-door Courthouse for the amicable settlement of their dispute. The representatives of Addax Petroleum speak French while the representatives of the Ijaha Youth Movement speak English. You have been appointed as one of the arbitrators. What would your advice be on the issue of the language of the proceedings?

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter, "Law and Practice of International Commercial Arbitration" (4th Edition Sweet & Maxwell 2004)

2. UNCITRAL Notes on Organizing Arbitral Proceedings, www.uncitral.org/pdf/english/texts/arbitration/arb-notes-e.pdf

UNIT II: COMMENCEMENT OF THE ARBITRAL PROCEEDINGS

1.0 INTRODUCTION

Arbitration is a private method of resolution, chosen by the parties themselves as an effective way of putting an end to disputes between them, without recourse to the courts of law. One of the reasons parties opt for arbitration is simply because their issues remains private and "secrets are kept safe from the prying eye of the public.

2.0 OBJECTIVES

At the end of this unit, the student is expected to

- Appreciate the importance of confidentiality to the parties.
- Understand the various mode of communication
- How to go about presenting written submission and documentary evidence

3.0 MAIN CONTENTS

3.1 CONFIDENTIALITY IN ARBITRATION

It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of

confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

3.2 MODE OF COMMUNICATION

To the extent the question how documents and other written communications should be routed among the parties and the arbitrators is not settled by the agreed rules, or, if an institution administers the case, by the practices of the institution, it is useful for the arbitral tribunal to clarify the question suitably early so as to avoid misunderstandings and delays.

Among various possible patterns of routing, one example is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters (e.g. dates for hearings), more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments.

(a) Telefax

Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a tele-facsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should be mailed or otherwise physically delivered, or that certain telefax messages should be confirmed by mailing or otherwise delivering documents whose facsimile were transmitted by electronic means. When a document should not be sent by telefax, it may, however, be appropriate, in order to avoid an unnecessarily rigid procedure, for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided that the document itself is received within a reasonable time thereafter.

(b) Other electronic means (e.g. electronic mail and magnetic or optical disk)
It might be agreed that documents, or some of them, will be exchanged not only in paper-based form, but in addition also in an electronic form other than telefax (e.g. as electronic mail, or on a magnetic or optical disk), or only in electronic form. Since the use of electronic means depends on the aptitude of the persons involved and the availability of equipment and computer programs, agreement is necessary for such means to be used. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

When the exchange of documents in electronic form is planned, it is useful, in order to avoid technical difficulties, to agree on matters such as: data carriers (e.g. electronic mail or computer disks) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into human-readable form; keeping of logs and backup records of communications sent and received; information in human-readable form that should accompany the disks (e.g. the names of the originator and recipient, computer program, titles of the electronic files and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identification of persons who can be contacted if a problem occurs.

3.3 WRITTEN SUBMISSIONS AND EVIDENCE

After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare for the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. In practice such submissions are referred to variously as, for example, statement, memorial, counter-memorial, brief, counter-brief, reply, rebuttal or rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

(a) Scheduling of written submissions

It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time limits, the arbitral tribunal may wish, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time-limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submissions be made after the hearings.

(b) Consecutive or simultaneous submissions

Written submissions on an issue may be made consecutively, i.e. the party who receives a submission is given a period of time to react with its counter-submission. Another possibility is to request each party to make the submission within the same time period to the arbitral tribunal or the institution administering the case; the received submissions are then forwarded simultaneously to the respective other

party or parties. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party or parties, which simultaneous submissions do not; thus, simultaneous submissions might possibly necessitate further submissions.

Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)

Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- Whether the submissions will be made as paper documents or by electronic means, or both;
- The number of copies in which each document is to be submitted;
- A system for numbering documents and items of evidence, and a method for marking them, including by tabs;
- The form of references to documents (e.g. by the heading and the number assigned to the document or its date);
- Paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- When translations are to be submitted as paper documents, whether the translations are to be contained in the same volume as the original texts or included in separate volumes.

4.0 CONCLUSION

Most participants at an arbitration proceeding would always want to have their proceedings behind closed doors. The nature of the claim in most cases would involve sophisticated contracts, paternity claims, trade secrets etc. Such claims are not suitable for open proceeding. Also there is the need to sort out the method of exchange of evidence (documentary or otherwise).

5.0 SUMMARY

In this unit, we have been able to discuss the following:

- Importance of confidentiality to arbitration
- Advantages of telefax and other electronic means over traditional means of communication
- Procedure for the exchange of evidence and written submission.

6.0 TUTOR-MARKED ASSIGNMENT

1. How important is the issue of “confidentiality” to the parties?
2. Argue for/against electronic means of communication.

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter, “Law and Practice of International Commercial Arbitration” (4th Edition Sweet & Maxwell 2004)
2. UNCITRAL Notes on Organizing Arbitral Proceedings, www.uncitral.org/pdf/english/texts/arbitration/arb-notes-e.pdf

UNIT III: COMMENCEMENT OF THE ARBITRAL PROCEEDINGS CONTD.

1.0 INTRODUCTION

Once the questions of procedure have been settled, the principal task of the arbitral tribunal is to establish the material facts of the dispute. It does this by examining the agreement between the parties, by considering other relevant documents (including correspondence, minutes of meetings and so on) and by hearing witnesses if necessary.

2.0 OBJECTIVES

The focus in this unit will be on another important aspect of the arbitral process which is the tendering of evidence by parties, the calling of witnesses where there is the need to do so amongst other issues.

3.0 MAIN CONTENTS

3.1 DOCUMENTARY EVIDENCE

(a) Time-limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time-limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to consult with the parties about the time that they would reasonably need.

The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence

Procedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties the manner in which it intends to proceed.

The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party 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 is free to draw its conclusions from the failure and may make the award on the evidence before it.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: (a) a document is accepted as having originated from the source indicated in the document; (b) a copy of a dispatched communication (e.g. letter, telex, telefax or other electronic message) is accepted without further proof as having been received by the addressee; and (c) a copy is accepted as correct. A statement by the arbitral tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time-limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

(d) Are the parties willing to submit jointly a single set of documentary evidence

The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the

documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order or subject-matter. It is useful to keep a table of contents of the documents, for example, by their short headings and dates, and to provide that the parties will refer to documents by those headings and dates.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field (e.g. public accountant or consulting engineer). The report may present the information in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

3.2 PHYSICAL EVIDENCE OTHER THAN DOCUMENTS

PHYSICAL EVIDENCE OTHER THAN DOCUMENTS

In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or observing the functioning of a machine.

(a) What arrangements should be made if physical evidence will be submitted

If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary

If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places, other arrangements to provide the opportunity for all parties to be present, and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties.

The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees made during an on-site inspection, as contrasted with statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

3.3 WITNESSES

While laws and rules on arbitral procedure typically leaves broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements

To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; and (c) the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify. However, it may not be necessary to require such a notice, in particular if the thrust of the testimony can be clearly ascertained from the party's allegations.

Some practitioners favour the procedure according to which the party presenting witness evidence submits a signed witness's statement containing testimony itself. It should be noted, however, that such practice, which implies interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper (see paragraph 67). Notwithstanding these reservations, signed witness's testimony has advantages in that it may expedite the proceedings by making it easier for the other party or parties to prepare for the hearings or for

the parties to identify uncontested matters. However, those advantages might be outweighed by the time and expense involved in obtaining the written testimony.
If a signed witness's statement should be made under oath or similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal.

(b) Manner of taking oral evidence of witnesses
(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted
To the extent that the applicable rules do not provide an answer, it may be useful for the arbitral tribunal to clarify how witnesses will be heard. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the party presenting the witness and then by the other party or parties, while the arbitral tribunal might pose questions during the questioning or after the parties on points that in the tribunal's view have not been sufficiently clarified.
Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made
Practices and laws differ as to whether or not oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths.
(iii) May witnesses be in the hearing room when they are not testifying
Some arbitrators favour the procedure that, except if the circumstances suggest otherwise, the presence of a witness in the hearing room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by

what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Other possible approaches may be that witnesses are not present in the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides the question for each witness individually depending on what the arbitral tribunal considers most appropriate. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.

(c) The order in which the witnesses will be called

When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to such matters as their recollection of the relevant events, their experience, qualifications or relation with a participant in the proceedings. In those legal systems such contacts are usually not permitted once the witness's oral testimony has begun. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g. certain executives, employees or agents) and for hearing statements of those persons and for questioning them.

EXPERTS AND EXPERT WITNESSES

Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in

addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert.

(a) Expert appointed by the arbitral tribunal

If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done, for example, without mentioning a candidate, by presenting to the parties a list of candidates, soliciting proposals from the parties, or by discussing with the parties the "profile" of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.

(i) The expert's terms of reference

The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time schedule. While the discretion to appoint an expert normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. It might also be useful to determine details about how the expert will receive from the parties any relevant information or have access to any relevant documents, goods or other property, so as to enable the expert to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. If no such provisions apply or more specific procedures than those prescribed are deemed necessary, the arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

If a party presents an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a

hearing, advance notice must be given or that the written opinion must be presented in advance, as in the case of other witnesses.

3.4 HEARINGS

(a) Decision whether to hold hearings

Laws on arbitral procedure and arbitration rules often have provisions as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings.

If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, on the one hand, that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments than on the basis of correspondence and, on the other hand, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings might delay the proceedings. The arbitral tribunal may wish to consult the parties on this matter.

(b) Whether one period of hearings should be held or separate periods of hearings

Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. In some cases issues to be decided are separated, and separate hearings set for those issues, with the aim that oral presentation on those issues will be completed within the allotted time. Among the advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Furthermore, separate periods of hearings may be easier to schedule, the subsequent hearings may be tailored to the development of the case, and the period between the hearings leaves time for analysing the records and negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only "target dates" as opposed to definitive dates. This may be

done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements; (b) questioning its witnesses; and (c) questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the respondent present their opening statements, arguments, witnesses and other evidence; and whether the respondent or the claimant has the last word. In view of such differences, or when no arbitration rules apply, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad lines.

(f) Length of hearings

The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than those practitioners who

prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

The arbitral tribunal should decide, possibly after consulting with the parties, on the method of preparing a record of oral statements and testimony during hearings. Among different possibilities, one method is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A further method, possible when a secretary of the arbitral tribunal has been appointed, may be to leave to that person the preparation of a summary record. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments

Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the other party or parties. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether submitting such notes is acceptable and the time for doing so.

In closing the hearings, the arbitral tribunal will normally assume that no further proof is to be offered or submission to be made. Therefore, if notes are to be presented to be read after the closure of the hearings, the arbitral tribunal may find

it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

4.0 CONCLUSION

As earlier stated in the introduction, the parties have the option of doing away with the calling of witnesses. During the proceeding, the parties exchange their statements of claim and defence and other evidence (documentary or otherwise). The arbitrators consider the evidence submitted by the parties and at the end give their judgment.

5.0 SUMMARY

In this unit, the following issues

- Documentary evidence presented by the parties
- Time limit for the submission of evidence
- Assessment of physical evidence other than documents
- The position on calling on witnesses
- Length of the hearing

6.0 Tutor-Marked Assignment

1. As an arbitrator, what would you consider in accepting documentary evidence?
2. Who is an expert witness?
3. Who sets the time limit for submission of documentary evidence and what are the issues to consider?

7.0 References/Further Reading

1. UNCITRAL Notes on Organizing Arbitral Proceedings, www.uncitral.org/pdf/english/texts/arbitration/arb-notes-e.pdf
2. Redfern and Hunter, “Law and Practice of International Commercial Arbitration” (4th Edition Sweet & Maxwell 2004)

UNIT IV: ROLE OF THE NATIONAL COURT

1.0 INTRODUCTION

The assistance of the national court is very important to the success of any arbitration. The parties in most arbitration choose the seat of arbitration which would be a neutral country. The country chosen is an entity on its own and has its own laws and regulations. For instance, a claim on the construction of a gambling centre can't be held in Saudi Arabia because it is contrary to their public policy. Also one party might require the assistance of the national court in compelling the other party to honour the arbitration agreement or the submission clause.

2.0 OBJECTIVES

The objective of this unit is to enlighten the student's knowledge on the role of the national courts in arbitration proceedings, jurisdiction and competence among other things.

3.0 MAIN CONTENTS

3.1 APPROACH OF NATIONAL COURT TO THE ENFORCEMENT OF ARBITRATION AGREEMENT

Nigerian Courts have adopted a positive approach to the enforcement of arbitration agreements. A review of the decided cases shows a general recognition by Nigerian

Courts of arbitration as a good and valid alternative dispute resolution mechanism. In ***C.N. Onuselogu Ent. Ltd. v. Afribank (Nig.) Ltd.*** (2005) 1 NWLR Part 940 577, the Court held that arbitral proceedings are a recognised means of resolving disputes and should not be taken lightly by both counsel and parties. However, there must be an agreement to arbitrate, which is a voluntary submission to arbitration.

Where there is an arbitration clause in a contract that is the subject matter of Court proceedings and a party to the Court proceedings promptly raises the issue of an arbitration clause, the Courts will order a stay of proceedings and refer the parties to arbitration. Although the ACA in section 13 gives the arbitral tribunal power to make interim orders of preservation before or during arbitral proceedings, it does not expressly confer the power of preservative orders on the Court and section 34 of the ACA limits the Courts' power of intervention in arbitration to the express provisions of the ACA. The usefulness of section 6(3) of the Lagos State Arbitration Law 2009 is seen when there is an urgent need for interim preservative orders and the arbitral tribunal is yet to be constituted. Our experience in this regard is that such applications find no direct backing under the ACA and have always been brought under the Rules of Court and under the Court's inherent jurisdiction to grant interim orders. However, in ***Afribank Nigeria Plc v Haco*** the Court granted interim relief and directed the parties to arbitrate under the provisions of ACA. Upon the publication of the award the parties returned to the Court for its enforcement as judgment of the Court.

The Courts in Nigeria are often inclined to uphold the provisions of sections 4 and 5 of the ACA provided the necessary conditions are met. A live case in point is the case of Minaj ***Systems Ltd. v. Global Plus Communication Systems Ltd. & 5 Ors*** in which the author is involved at the time of this work. In this case, the Claimant instituted a Court action in breach of the arbitration agreement in the main contract and on the Defendant's application, the Court granted an order staying proceedings in the interim for 30 days pending arbitration. In ***Niger Progress Ltd. v. N.E.I. Corp.*** the Supreme Court followed section 5 of the ACA which gives the Court the jurisdiction to stay proceedings where there is an arbitration agreement. In ***M.V. Lupex V. N.O.C,*** 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. In ***Akpaji v. Udemba*** (2003) 6 NWLR (Part 815) 169 the Court held that where a defendant fails to raise the issue of an 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.

3.2 APPROACH OF NATIONAL COURT TOWARDS BREACH OF AN ARBITRATION AGREEMENT

The Nigerian Courts have a serious approach to the commencement of Court proceedings in an apparent breach of an arbitration agreement. Generally, where a party in Court proceedings raises the issue of an arbitration agreement promptly, the Court will uphold the arbitration agreement and stay proceedings pending arbitration. However, the Courts will usually require the requesting party not to have taken some positive steps in furtherance of the proceedings apart from appearance in Court. The Notice of Arbitration or any other evidence that arbitral proceedings have been set in motion will help to convince the Court that the party invoking the arbitration clause is serious and desirous of pursuing arbitration. But in the absence of that, the Courts are still inclined to stay proceedings in favour of arbitration upon being convinced that there exists a valid arbitration agreement. However, while some Courts treat an arbitration agreement as a compelling ground for a stay of Court proceedings, others treat it as discretionary. This point is illustrated by the cases of **M.V. Lupex V. N.O.C. (2003) 15NWLR (Part 844) 469 and K.S.U.D.B. V. Fanz Ltd. (1986) 5 NWLR (Part 39) 74**.

3.3 DETERMINING WHETHER A DISPUTE IS ARBITRABLE OR NOT

The ACA does not stipulate any particular subject matter that may not be referred to arbitration. The question of whether or not a dispute is arbitrable is therefore left for interpretation by the Courts. In ***Ogunwale v. Syrian Arab Republic*** (2002) 9 NWLR (Part 771) 127 the Court of Appeal held that the test for determining whether a dispute is referable to arbitration is that the dispute or difference must necessarily arise from the clause contained in the agreement. However not all disputes are necessarily arbitrable. Only disputes arising from commercial transactions are referable to arbitration.

Also, some matters are generally more suitable for litigation than arbitration. For instance, applications for immediate enforcement of right or preservation of *res* e.g. the enforcement of fundamental human rights, application for *anton pillar, mareva* and other injunctions are less suitable for arbitration than litigation. In addition,

since an arbitrator has no statutory power of joinder under the ACA, multi party proceedings may be less suitable for arbitration unless the arbitration agreement makes specific provision for it.

3.4 JURISDICTION AND COMPETENCE

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. 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*". However, 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. If the other party does not agree to the challenge and the challenged tribunal does not withdraw, the Court can address the issue at the instance of the challenging party.

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 award. Lack of jurisdiction is not expressly stated to be a ground for setting aside or refusal of recognition and enforcement of an award under the ACA so as to make it an issue which the Court can address, but it has been held to constitute misconduct on the part of the tribunal for which an award may be set aside under section 30 of the ACA.

Where the seat of arbitration is Nigeria, mandatory laws of Nigeria would prevail over any agreement of parties that is contrary to public policy or that will amount to a contravention of another relevant law within the jurisdiction. For instance a choice of foreign law as the law governing the contract which is perceived to be intended to evade tax laws, or as an outright breach of constitutional provisions may not be upheld. Similarly, as a matter of public policy, Courts in Nigeria even in applying foreign law as the law chosen by the parties, are not obliged to apply provisions of foreign law that are incompatible with their own mandatory rules or those of another country with which the contract is closely connected. The doctrine of

freedom of contract or party autonomy is exercisable to the extent of statutory restriction or intervention.

Under the ACA, parties are free to agree on the method of appointment of arbitrators but where they do not stipulate the method or the method chosen by them fails, the arbitrator(s) will be appointed by the Court. Section 7 of the ACA prescribes a default procedure. It provides that the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator. Where no procedure is specified, in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third but if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so by the other party or 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. In the case of an arbitration with one arbitrator, where the parties fail to agree on the 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. Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under the procedure or the parties or two 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 subsections (2) and (3) of section 7 shall not be subject to appeal.

The extent of intervention of the Courts is limited by section 34 of the ACA to the extent permitted by the ACA. The Court's power of intervention as permitted by the ACA is limited to such issues as appointment of tribunal or substitute arbitrators, removal of arbitrator on ground of misconduct, making of interim orders, compelling attendance of witnesses, enforcement and recognition of awards or refusal of same, setting aside of awards. By virtue of section 33 of the ACA, any procedural issues in arbitration ought to be raised before the tribunal and it is only if the tribunal fails to deal with the issues or does not adequately deal with them that the Court can be called upon to deal with the procedural issues after the conclusion of arbitral proceedings. This is usually done by way of an application to set aside the award in whole or in part or to refuse recognition and enforcement of same. In this regard Nigerian law is more in consonance with the Model Law and does not allow the **UK**

Arbitration Act 1996 procedure which allows intervention by the Courts on various questions of law decided by the tribunal.

Note that Order 52 rule 9 of the Federal High Court Rules 2009 allows an arbitrator or umpire upon any reference by an order of Court, if he thinks fit and in the absence of any contrary provision to state its award as to the whole or any part of it in the form of a special case for the opinion of the Court. But the Rules of Court are only binding on the Court that is subject to it.

4.0 CONCLUSION

The centre point of this unit has been the approach of the courts to issues concerning arbitrability of claims, jurisdiction, competence, enforcement and commencement of court proceedings in an apparent breach of an arbitration agreement.

5.0 SUMMARY

We have been able to discuss the following:

- Enforcement of arbitration agreement
- Commencement of proceeding in court for an apparent breach of arbitration agreement
- Jurisdiction and competence of the court
- Arbitrability of claims

6.0 TUTOR-MARKED ASSIGNMENT

1. What is the provision of ACA on arbitrability?
2. Discuss the decision of the court in M.V. Lupex v N.O.C. (2003) 15 NWLR (PT844) 469
3. "A ruling by a tribunal on its jurisdiction is final and binding and is not subject to appeal". Discuss

7.0 REFERENCES/FURTHER READING

1. Arbitration and Conciliation Act Cap 18 Laws of the Federation 2004
2. A. Idigbe, SAN and O. Foy-Yamah, "Arbitration Agreements" ICLG TO: INTERNATIONAL ARBITRATION 2010 www.punuka.com/uploads/arbitration_agreements.pdf

3. Redfern and Hunter, “Law and Practice of International Commercial Arbitration” (4th Edition Sweet & Maxwell 2004)

MODULE FOUR: ARBITRAL AWARD

UNIT I: MAKING Of AWARD

1.0 INTRODUCTION

The next issue to discuss is the award stage. After the parties have both presented their cases and called their witnesses if applicable. The arbitrators' task begins once the parties have closed their cases. They are expected to consider the evidence that the parties have submitted and make a judgment.

2.0 OBJECTIVES

In this unit, the following;

- Definition of an award
- Classification of awards
- The legal requirements of an award
- Lastly, the form of an award

3.0 MAIN CONTENTS

3.1 WHAT IS AN ARBITRAL AWARD?

An **arbitral award** (or **arbitration award**) is a determination on the merits by an arbitration tribunal, and is analogous to a judgment in a court of law. It is referred to as an 'award' even where the entire claimant's claims fail (and thus no money needs to be paid by either party), or the award is of a non-monetary nature. The award is the

final product of a great deal of work both by the arbitrators and by the parties and their legal teams.

Before the award can be drafted, the arbitrators have to decide upon what may be a number of important issues, the issues in the reference. They will make their decisions with care, based upon what they have learned from the parties and upon the application of the applicable law, which may have been researched by the parties or by the arbitrators themselves, but which will have been canvassed either at a hearing or in memorials of some kind. Those decisions, together with the reasons for them, are set out in the award, which may be declaratory, (i.e. a statement by the tribunal that such-and-such is so) but is more commonly mandatory, that is to say a direction that one or the other party do certain things, usually pay money in respect of the substantive issues decided and usually also pay money in respect of the costs of the arbitration process.

An international arbitration, even one concerning relatively small issues, will have been a considerable intellectual exercise, involving many skills and much effort on the part of all concerned. It is likely to have cost a considerable amount of money. The award is not merely the final product, it is the instrument by which the object of the arbitration, the proper decision of the Tribunal as between the parties, is to be given effect. The importance of the Award is self-evident.

What can be inferred from the foregoing paragraphs is that the parties are entitled to an award of good quality and that they are entitled to an award which achieves its purpose i.e. an award which works.

In general, that does not require an award to be made in some particular form or style (although it does perhaps call for a good standard of presentation). The matter came under review in the English jurisdiction following the Arbitration Act of 1979. The English jurisdiction is given to formality, but **Lord Justice Donaldson**, as he then was, gave useful guidance to practising arbitrators when he said "No particular form of award is required .... all that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen, and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. To repeat the close of the previous paragraph, an award that works. An award which works must be capable of giving effect to the arbitral decision in the jurisdictions in which it may have to be enforced.

3.2 NOMENCLATURE

Although it is common to talk of an arbitration award as a single concept, in most legal jurisdictions there are several sub-categories of award.

1. a **provisional** award is an award on a provisional basis subject to the final determination of the merits.
2. a **partial** award is an award of only part of the claims or cross claims which are brought, or a determination of only certain issues between the parties. Importantly, this leaves it open to the parties to either resolve or to continue to arbitrate (or litigate) the remaining issues.
3. an **agreed** award is usually in the form of a settlement between the parties of their dispute (the equivalent of a judgment by consent). But by embodying the settlement in the form of an award it can have a number of advantages.
4. a **reasoned** award is not a sub-category of award, but is used to describe an award where the tribunal sets out its reasoning for its decision.
5. an **additional** award is an award which the tribunal, by its own initiative or on the application of a party makes in respect of any claim which was presented to the tribunal but was not resolved under the principal award.
6. a **draft** award is not an award as such, and is not binding on the parties until confirmed by the tribunal.

3.3 LEGAL REQUIREMENTS

The legal requirements relating to the making of awards vary from country to country and, in some cases, according to the terms of the arbitration agreement. Although in most countries, awards can be oral, this is relatively uncommon and they are usually delivered in writing.

By way of example, in Nigeria, the following are requirements under the Arbitration and Conciliation Act 2004 which the award must comply with, unless the parties agree to vary them under section 26 of the Act:
(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.

Many countries have similar requirements, but most permit the parties to vary the conditions, which reflect the fact that arbitration is a party-driven process.

3.4 FORM

There is no particular required form for an award; it may be as well to offer first a frame work and then a checklist of features which may be present in a typical award. There is little jurisprudential basis for this, but it may be helpful. It is fairly natural for individuals to adopt a visual style close to that of the Court practice with which they are familiar. What follows is to a limited extent English, and may be more formal than is always necessary. The so-called recitals, for example, are only provided to make the award stand on its own and to facilitate enforcement.

What follows is divided into three parts:

- The recitals - the creation of the Tribunal and the preparation of the reference
- The reasons - the circumstances of the dispute, the choice of evidence and the decisions of the Tribunal
- The disposition - the Tribunal's directions which give effect to the award

Please bear in mind what the award is for. It has three purposes.

One is to tell the Parties what they must do. No details or explanations are needed for that.

The second is to explain why the decision has been made. The Parties will not need much more than a simple explanation, because each of them knows the circumstances of the matter, probably only too well.

It is the third purpose, that of consideration by an enforcing body or a Court of appeal, which demands, not formality, but sufficient information to enable the award to stand on its own.

4.0 CONCLUSION

The award is a determination on the merits by an arbitration tribunal. It is similar to the judgment of the court. The legal requirement of an award varies from jurisdiction to jurisdiction and the parties are allowed to vary the provisions of the rules in most jurisdiction.

5.0 SUMMARY

In summary, the following were issues that were discussed in this unit;

- What an award is?
- The provision of the ACA on what is required of any award
- The categories of award

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss three (3) sub-categories of an award
2. Discuss the provision of article 26 of ACA.
3. Mention the three (3) purposes of an award.

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter, “Law and Practice of International Commercial Arbitration” (4th Edition Sweet & Maxwell 2004)
2. Arbitration and Conciliation Act Cap 18 Laws of the Federation 2004

UNIT II: RECOURSE AGAINST THE AWARD

1.0 INTRODUCTION

It is common knowledge among lawyers from both common and civil law jurisdictions that the ever-growing case load of their national judiciary constitutes the main obstacle for an effective dispute resolution process. In Nigeria, litigation can take up to six years or more years particularly land matters before a definitive decision from the national court. Viewed against this background, arbitration as an alternative to litigation gains additional importance. This is especially true for recourse to municipal court against final arbitral awards and is of tremendous importance for the choice of the right *situs* and the ultimate enforcement of the award.[1]

2.0 OBJECTIVES

In this unit, the student is expected to understand the following;

- Importance of the arbitration clause in setting aside an award
- Application for Setting Aside As Exclusive Recourse
- Grounds for Setting Aside

3.0 MAIN CONTENTS

3.1 BACKGROUND

[1] See Iwasaki, *Selection of Situs: Criterias and Priorities*, 1 ARB. INT'L 57, (1986)

In an arbitration proceeding, there is an inherent conflict of interests involved which makes international commercial arbitration so difficult and problematic. On one side, there are the interests of the parties to a contract containing an arbitration clause.

The arbitration clause is expected to ensure an impartial, effective, knowledgeable, and above all speedy resolution to any conflict that might arise out of or relating to the contract.

Arbitration proceedings sometimes do rely on the national court for assistance. The powers vested in national courts by the national legislature are oftentimes needed throughout the arbitration proceedings to prevent frustration of the arbitration clause and to ensure recognition and enforcement of the ultimate award. The national courts' authority in this area ranges from enforcing the arbitration agreement and provisional measures, to nominating and replacing arbitrators, as well as the taking of evidence. Most States, however, do not lend their support to arbitral tribunals operating on their soil without claiming some degree of control over the conduct of these tribunals. The most important way to gain this control is to provide for recourse against the arbitral awards.

3.2 TRANSNATIONAL COMMERCIAL ARBITRATION: A DEFINITIONAL APPROACH

In contrast to the term “commercial,” which is given wide meaning in most of the laws and the Model Law, it is necessary to find at least a rudimentary definition of “transnational” or “international” arbitration, since most of the state laws distinguish between domestic and international arbitration and apply the liberal provisions of their laws only to the latter with domestic arbitration remaining under more stringent control of the national courts.

What exactly constitutes this international character of the arbitral proceedings is still disputed among courts, practitioners, and the national legislatures. The new laws can be divided into three categories. The first category consists of those laws that provide an entire legal framework for international arbitration. The second category includes laws enacted with special provisions for recourse to national courts in international arbitrations. The last category covers the laws that make no distinction at all between national and international arbitration on their soil.

The Model Law, in its efforts to reach maximum acceptability in the international community, combines all the above approaches and focuses *alternatively* on the place of business or seat of arbitration or place of performance or agreement of the parties. *Paragraph 44 of the Explanatory note by the UNCITRAL secretariat* talks about the disparity found in national laws as regards the types of recourse against an arbitral award available to the parties. This presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based. That situation which is of considerable concern to those involved in international commercial arbitration is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made.

3.3 APPLICATION FOR SETTING ASIDE AS EXCLUSIVE RECOURSE

The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) of the Model Law provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award. In regulating "recourse" (i.e., the means through which a party may actively "attack" the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings. Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

3.4 GROUNDS FOR SETTING ASIDE

The Model Law as a further measure of improvement has an exhaustive list of grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows:

- lack of capacity of the parties to conclude the arbitration agreement;

- lack of a valid arbitration agreement or inability of a party to present its case;
- lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case;
- the award deals with matters not covered by the submission to arbitration;
- the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law

Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

The approach under which the grounds for setting aside an award under the Model Law parallel the grounds for recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva 1961). Under article IX of the latter Convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

4.0 CONCLUSION

After the arbitrators give their judgment, the next step is to either approach the national court for recognition and enforcement or apply for the award to be set aside. There are provisions for grounds which are to be proven by one party in order for an award to be set aside.

5.0 SUMMARY

In this unit, we have been able to discuss the following;

- Model Law approach to setting aside an award
- Grounds for setting aside an award
- New York Convention's position on recourse against an award

6.0 TUTOR-MARKED ASSIGNMENT

1. What are the grounds to be proven in setting aside an award?
2. Defining the following "commercial" "transnational" and "international".

7.0 REFERENCES/FURTHER READING

1. UNCITRAL Notes on Organizing Arbitral Proceedings, www.uncitral.org/pdf/english/texts/arbitration/arb-notes-e.pdf
2. Redfern and Hunter, "Law and Practice of International Commercial Arbitration" (4th Edition Sweet & Maxwell 2004)

UNIT III: RECOGNITION AND ENFORCEMENT OF THE AWARD

1.0 INTRODUCTION

In this unit, we would be discussing recognition and enforcement of awards. We would also be considering the uniformity and procedural conditions of recognition and enforcement of award.

2.0 OBJECTIVES

The student is expected to

- Discuss the uniformity of award
- Distinguish between foreign and domestic awards
- Understand the procedural conditions of recognition and enforcement of an award

3.0 MAIN CONTENTS

3.1 UNIFORMITY IN THE TREATMENT OF ALL AWARDS IRRESPECTIVE OF COUNTRY OF ORIGIN

By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between “international” and “non-international awards instead of relying on the traditional distinction between “foreign” and “domestic” awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of

convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of "international" awards whether "foreign" or "domestic", should be governed by the same provisions.

By modeling the recognition and enforcement rules on relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

3.2 PROCEDURAL CONDITIONS OF RECOGNITION AND ENFORCEMENT

Under article 25 (1) any arbitral award, irrespective of the country in which it was made, shall be recognised as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition and enforcement may be refused). Based on above consideration of limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalise formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

4.0 CONCLUSION

The Model Law distinguishes between "international" and "non-international awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. The New York Convention is seen as the ground norm for the recognition and enforcement of awards.

5.0 SUMMARY

In this unit, we have been able to discuss the position of the Model Law and the New York Convention on uniformity of award irrespective of where it is made.

6.0 TUTOR-MARKED ASSIGNMENT

1. What is the importance of the place of arbitration?
2. What do you understand by the word “reciprocity”?
3. Discuss the provisions of article 35(2) of the Model Law.

7.0 REFERENCES/FURTHER READING

1. New York Convention 1958
2. Redfern and Hunter, “Law and Practice of International Commercial Arbitration” (4th Edition Sweet & Maxwell 2004)

UNIT IV: GROUNDS FOR REFUSAL

1.0 INTRODUCTION

Although the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention. However, the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.

2.0 OBJECTIVES

The objective of this unit is to consider the various grounds for refusing an award under the New York Convention.

3.0 MAIN CONTENTS

Recognition and enforcement of arbitral awards may in principle be granted by courts anywhere. In countries outside the place where the award was made, enforcement is usually based on the New York Convention. The legal effect of a

recognition and enforcement of an award is in practice limited to the territory over which the granting court has jurisdiction.

National courts are required under Article III to recognise and enforce foreign awards in accordance with the rules of procedure of the territory where the application for recognition and enforcement is made and in accordance with the conditions set out in the Convention.

National laws may apply three kinds of provisions to enforce awards:

- a specific text for the implementation of the New York Convention;
- a text dealing with international arbitration in particular;
- the general arbitration law of the country.

3.1 REQUIREMENTS TO BE FULFILLED BY PETITIONER (ARTICLE IV)

The petitioner has the burden of proof and has the duty to submit documents listed in article IV of the New York Convention. The petitioner only has to submit *prima facie* evidence. This phase is controlled by a pro-enforcement bias and practical mindset of the enforcement court.

3.1.1 WHICH DOCUMENT?

When reviewing a request for recognition and/or enforcement of the award, courts verify that the petitioner has submitted at the time of the application:

– The duly authenticated original award or a duly certified copy thereof (Article IV (1) (*a*));

– The original agreement referred to in Article II or a duly certified copy thereof (Article IV (1) (*b*)); and

– Translations of these documents into the language of the country in which the award is relied upon, where relevant (Article IV (2)).

3.1.2 AUTHENTICATICATION AWARD OR CERTIFIED COPY (*Article IV (1) (a)*)

The authentication of an award is the process by which the signatures on it are confirmed as genuine by a competent authority. The purpose of the authentication of the original award or a certified copy of the award is to confirm that it is the

authentic text and has been made by the appointed arbitrators. It is extremely unusual that this poses any problem in practice.

The Convention does not specify the law governing the authentication requirement. Nor does it indicate whether the authentication requirements are those of the country where the award was rendered or those of the country where recognition or enforcement is sought. Most courts appear to accept any form of authentication in accordance with the law of either jurisdiction.

Another issue to discuss is the certification of copy of the award, the purpose of a certification is to confirm that the copy of the award is identical to the original. The Convention does not specify the law governing the certification procedure, which is generally deemed to be governed by the *lex fori*.

The categories of persons authorized to certify the copy will usually be the same as the categories of persons who are authorized to authenticate an original award. In addition, certification by the Secretary-General of the arbitral institution that managed the arbitration is considered sufficient in most cases.

3.1.3 ORIGINAL ARBITRATION AGREEMENT OR CERTIFIED COPY (Article IV (1) (b))

This provision merely requires that the party seeking enforcement supply a document that is prima facie a valid arbitration agreement. At this stage the court need not consider whether the agreement is “in writing” as provided by Article II (2) or is valid under the applicable law.

The substantive examination of the validity of the arbitration agreement and its compliance with Article II (2) of the Convention takes place during phase II of the recognition or enforcement proceedings.

3.1.4 AT THE TIME OF THE APPLICATION

If the documents are not submitted at the time of application, courts generally allow parties to cure this defect in the course of the enforcement proceedings.

Italian courts, however, consider that the submission of the documents is a prerequisite for commencing the recognition or enforcement proceedings and that if

this condition is not met, the request will be declared inadmissible. The Italian Supreme Court has consistently held that the original arbitration agreement or a certified copy thereof must be supplied at the time of filing the request for enforcement of an award; if not, the request is not admissible. This defect can be cured by filing a new application for enforcement.

3.1.5 TRANSLATIONS (Article IV (2))

The party seeking recognition and enforcement of an award must produce a translation of the award and original arbitration agreement referred to in Article IV(1)(a) and (b) if they are not made in an official language of the country in which recognition and enforcement are being sought (Article IV(2)).

Courts tend to adopt a pragmatic approach. While the Convention does not expressly state that the translations must be produced at the time of making the application for recognition and enforcement, a number of State courts have, however, required translation to be submitted at the time of making an application.

3.2 GROUNDS FOR REFUSAL (ARTICLE V) - IN GENERAL

This phase is characterised by the following general principles:

3.2.1 NO REVIEW ON THE MERITS

The court does not have the authority to substitute its decision on the merits for the decision of the arbitral tribunal even if the arbitrators have made an erroneous decision of fact or law.

The Convention does not allow for a *de facto* appeal on procedural issues; rather it provides grounds for refusal of recognition or enforcement only if the relevant authority finds that there has been a violation of one or more of these grounds for refusal, many of which involve a serious due process violation.

3.2.2 BURDEN FOR RESPONDENT OF PROVING THE EXHAUSTIVE GROUNDS

The respondent has the burden of proof and can only resist the recognition and enforcement of the award on the basis of the grounds set forth in Article V(1). These grounds are limitatively listed in the New York Convention. The court can refuse the recognition and the enforcement on its own motion on the two grounds identified in Article V(2).

3.2.3 EXHAUSTIVE GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT

In summary, the party opposing recognition and enforcement can rely on and must prove one of the first five grounds:
(1) There was no valid agreement to arbitrate (Article V(1)(*a*)) by reason of incapacity of the parties or invalidity of the arbitration agreement;
(2) The respondent was not given proper notice, or the respondent was unable to present his case (Article V(1)(*b*)) by reason of due process violations;
(3) The award deals with a dispute not contemplated by, or beyond the scope of the parties' arbitration agreement (Article V(1)(*c*));
(4) 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 (Article V(1)(*d*));
(5) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in the country in which, or under the laws of which, the award was made (Article V(1)(*e*)).

These are the only grounds on which the respondent can rely. Further, the court may on its own motion refuse the recognition and enforcement on the grounds mentioned below. However, in practice, the respondent invokes these grounds as well:
(6) The subject matter of the arbitration was not arbitrable under the law of the country where enforcement is sought (Article V(2)(*a*));
(7) Enforcement of the award would be contrary to the public policy of the country where enforcement is sought (Article V(2)(*b*)).

3.2.4. NARROW INTERPRETATION OF THE GROUNDS FOR REFUSAL

Bearing in mind the purpose of the Convention, namely to "unify the standards by which ... arbitral awards are enforced in the signatory countries", its drafters intended that the grounds for opposing recognition and enforcement of Convention awards should be interpreted and applied narrowly and that refusal should be granted in serious cases only.

Most courts have adopted this restrictive approach to the interpretation of Article V grounds. For example, the United States Court of Appeals for the Third Circuit stated in 2003 in *China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp.*:

> "Consistent with the policy favouring enforcement of foreign arbitration awards, courts strictly have limited defences to enforcement to the defences set forth in Article V of the Convention, and generally have construed those exceptions narrowly."

One issue that is not dealt with in the Convention is what happens if a party to an arbitration is aware of a defect in the arbitration procedure but does not object in the course of the arbitration. The same issue arises in connection with jurisdictional objections that are raised at the enforcement stage for the first time.

The general principle of good faith (also sometimes referred to as waiver or estoppel), that applies to procedural as well as to substantive matters, should prevent parties from keeping points up their sleeves.

3.2.5 LIMITED DISCRETIONARY POWER TO ENFORCE IN THE PRESENCE OF GROUNDS FOR REFUSAL

Courts generally refuse enforcement when they find that there is a ground for refusal under the New York Convention.

Some courts, however, hold that they have the power to grant enforcement even where the existence of a ground for refusal of enforcement under the Convention has been proved. They generally do so where the ground for refusal concerns a minor violation of the procedural rules applicable to the arbitration – a *de minimis* case – or the respondent neglected to raise that ground for refusal in the arbitration.

3.3 GROUNDS FOR REFUSAL TO BE PROVEN BY RESPONDENT (ARTICLE V(1))

3.3.1 INCAPACITY OF PARTY AND INVALIDITY OF ARBITRATION AGREEMENT (ARTICLE V(1)(A))

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

3.3.2 INCAPACITY OF PARTY

The types of issues arising under this ground include the "incapacity" defences, such as mental incompetence, physical incapacity, lack of authority to act in the name of a corporate entity or a contracting party being too young to sign (minority).

In addition, the term "incapacity" in the context of Article V(1)(a) is interpreted in the sense of "lacking the power to contract". For example, this may arise where the applicable law prohibits a party, such as a State owned enterprise, from entering into an arbitration agreement for certain types of potential disputes: e.g., in some jurisdictions, a State-owned enterprise may be prohibited by law from entering into an arbitration agreement in a contact relating to defence contracts.

It must be noted that States, State-owned entities and other public bodies are not excluded from the scope of the Convention purely by reason of their status. The expression "persons, whether physical or legal" in Article I(1) of the Convention is generally deemed to include public law entities entering into commercial contracts with private parties. Courts virtually always deny the defence of sovereign immunity raised by a State against enforcement of an arbitration agreement and recognition and enforcement of an arbitral award by relying on the theory of restrictive immunity and waiver of immunity.

One example is the 2010 Hong Kong case of *FG Hemisphere*, requesting the recognition and enforcement of two foreign arbitral awards against the assets of a Chinese State-owned enterprise (CSOE), namely entry fees due by CSOE to the Democratic Republic of the Congo in consideration of certain mineral rights (the CSOE Assets). The Chinese Government argued that it currently applies, and has consistently applied in the past, the doctrine of absolute sovereign immunity, and thus the CSOE Assets were immune from enforcement. However, the Court of Appeal held that Hong Kong courts apply the doctrine of restrictive immunity and as a consequence the portion of CSOE Assets that were *not* intended for sovereign purposes were not immune from execution.

The Convention does not indicate how to determine the law applicable to the capacity of a party ("the law applicable to them"). This law must therefore be determined by applying the conflict-of-laws rules of the court where recognition and enforcement are sought, usually the law of the domicile of a physical person and the law of the place of incorporation of a company.

3.3.3 *Invalidity of Arbitration Agreement*

Article V(1)(*a*) also provides a ground for refusal where the arbitration agreement "referred to in article II" 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". This ground for refusal is commonly invoked in practice. Respondents frequently argue under this ground that the arbitration agreement is not formally valid because it is not "in writing" as required by Article II(2). A related ground for refusal of enforcement that may be raised is that there was no agreement to arbitrate at all within the meaning of the Convention. Other common examples of the defences that may be raised under this ground include claims of illegality, duress or fraud in the inducement of the agreement.

From time to time a respondent may rely on this ground where it disputes that it was party to the relevant arbitration agreement. This issue is decided by the court by re-assessing the facts of the case, independent of the decision reached by the arbitrators. For example, in the *Sarhank Group* case, the respondent argued that there was no signed arbitration agreement in writing between the parties. The United States Court of Appeals for the Second Circuit held that the district court incorrectly relied on the arbitrators' finding in the award that the respondent was

bound by the arbitral clause under Egyptian law, which applied to the contract. Rather, the district court should have applied United States federal law to this issue when reviewing the award for enforcement. The Court therefore remanded the case to the district court "to find as a fact whether [the respondent] agreed to arbitrate ... on any ... basis recognized by American contract law or the law of agency".

3.3.4 LACK OF NOTICE AND DUE PROCESS VIOLATIONS; RIGHT TO A FAIR HEARING (Article V(1)(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."

Article V(1)(b) provides for the ground for refusal that the party against whom the award is invoked was not given any, or any fair, opportunity to present his case because: (i) he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings; or (ii) was otherwise unable to present his case.

This ground, however, is not intended for the court to take a different view to that of the tribunal on procedural issues. What has to be shown is that the party resisting enforcement somehow was deprived of its right to have its substantive case heard and determined by the arbitral tribunal.

3.3.4.a RIGHT TO A FAIR HEARING

Article V(1)(b) requires that parties be afforded a fair hearing that meets the minimal requirements of fairness. The applicable minimum standards of fairness were described by the United States Court of Appeals for the Seventh Circuit as including "adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator". Thus the arbitrators have a broad discretion as to how they may conduct proceedings, etc.

3.3.4.b LACK OF NOTICE

It is unusual for a party not to be given notice of the appointment of the arbitrator or of the arbitration proceedings. If a party has actively participated in an arbitration, it is impossible for it to complain later that notice was inadequate.

In proceedings where the respondent defaults, on the other hand, proof of notice must be given serious attention at all stages.

There can be no notice, for example, where one party has changed address without informing the other party or is located in a part of the world where faxes or other means of communication cannot be reliably received. In those cases, the arbitrators and the claimant in the arbitration should do all that is reasonably possible to bring the existence of the arbitration and the appointment of the arbitral tribunal to the attention of the respondent and to have independent evidence of such efforts. If they fail to do so, enforcement of the resulting award may be denied.

Default, however, may be simply the choice of the party. Where actual notice of an arbitration has been received by the respondent but the respondent fails or refuses to participate in the arbitration, courts hold that there is no violation of due process under Article V(1)(*b*). If a party chooses not to take part in the arbitration, this is not a ground for refusing enforcement.

3.3.4.c *DUE PROCESS VIOLATIONS: "UNABLE TO PRESENT HIS CASE"*

The well-known United States case of *Iran Aircraft Industries v. Avco Corp*. is an example of where recognition and enforcement were refused because the respondent was unable to present its case. After consulting with the chairman of the tribunal (who was subsequently replaced), the respondent had decided on the chairman's advice not to present invoices to support an analysis of damages by an expert accounting firm. The respondent relied only on its summaries – but indicated that it was prepared to furnish further proof if required. The tribunal eventually refused the damages claim on the basis that there was no supporting evidence. The United States Court of Appeals for the Second Circuit denied recognition and enforcement of the award on the basis that the losing party had been unable to present its case on damages.

A number of awards have been refused recognition and enforcement where the arbitrators have failed to act fairly under the circumstances. Examples of these include:
– The Naples Court of Appeal refused enforcement of an Austrian award on the ground that one month's notice given to the Italian respondent to attend the hearing in Vienna was insufficient because during that time the respondent's area had been hit by a major earthquake;
– The English Court of Appeal upheld a decision refusing to enforce an Indian award on the ground that the serious illness of one of the parties, unsuccessfully raised by the party during the hearing when seeking an adjournment, meant that it was unrealistic to expect him to participate in the arbitration including to file a defence;
– The Hong Kong High Court refused enforcement of an award holding that the China International Economic and Trade Arbitration Commission (CIETAC) had not given the respondent an opportunity to comment on the reports from the expert appointed by the arbitral tribunal.

Examples of unsuccessful objections founded on lack of due process include:
– The arbitrator refusing to reschedule a hearing for the convenience of a witness for the party opposing enforcement;
– The tribunal refusing to grant an adjournment and denying additional discovery;
– The tribunal refusing to grant further adjournments and to stay the arbitration because of bankruptcy proceedings;
– The tribunal ruling on presumptions and burden of proof;
– The tribunal allegedly relying on new legal theories in the award that were not previously argued;
– The tribunal curtailing the cross-examination of a witness;
– The parties not attending hearings because they feared arrest in the forum State; and
– A company representative being unable to attend the hearing because he could not obtain a visa.

3.3.5 GROUND 3: OUTSIDE OR BEYOND THE SCOPE OF THE ARBITRATION AGREEMENT (*Article V(1)(c)*)

"The award deals with a difference 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."

The grounds for refusal provided under Article V(1)(*c*) are that the award:
– Deals with a difference or dispute not contemplated by, or not falling within, the terms of the parties' submission to arbitration, or
– Contains decisions on matters beyond the scope of the parties' submission to arbitration.

The grounds in Article V(1)(*c*) embody the principle that the arbitral tribunal only has the jurisdiction to decide the issues that the parties have agreed to submit to it for determination.

In determining what the parties have submitted to the arbitral tribunal, regard must be had to the arbitration agreement and the claims for relief submitted to the arbitral tribunal by the parties. The language of the arbitration agreement that sets out what the parties have agreed to submit to the arbitral tribunal for determination is critically important; issues must remain within that scope.

Model clauses published by arbitral institutions are typically drafted to give the arbitral tribunal very broad jurisdiction to determine all disputes arising out of or in connection with the parties' substantive agreement (usually a contract). Ripeness and similar issues are usually a matter of admissibility (not jurisdiction) and therefore not reviewable by courts.

The court has discretion to grant partial enforcement of an award if the award is only partly beyond the jurisdiction of the arbitral tribunal, provided that the part falling within the jurisdiction of the arbitral tribunal can be separated. This appears from the proviso at the end of Article V(1)(*c*) ("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 matters submitted to arbitration may be recognized and enforced").

GROUND 4: IRREGULARITIES IN THE COMPOSITION OF THE ARBITRAL TRIBUNAL OR THE ARBITRATION PROCEDURE (*Article V(1)(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."

Article V(1)(*d*) has two types of potential violations, concerning:
– the composition of the arbitral tribunal;
– the arbitral procedure.

IV.4.1. *Composition of the Tribunal*

The first option of Article V(1)(*d*) is applicable if a party is deprived of its right to appoint an arbitrator or to have its case decided by an arbitral tribunal whose composition reflects the parties' agreement.

Cases where one party refuses to appoint an arbitrator and the arbitrator is then appointed by a court, or where arbitrators are successfully challenged and replaced in accordance with the applicable rules chosen by the parties and the applicable law, would not succeed under this ground.

Article V(1)(*d*) provides that a court must first look to see:
1. If the parties have agreed on the composition of the arbitral tribunal;
2. If they have, what they have agreed must be determined;
3. Whether that agreement has been violated;
4. Only if there is no agreement between the parties on the composition of the arbitral tribunal should the court apply the law of the country where the arbitration took place to determine if it was not in accordance with the agreement.

For example, the parties might have designated an appointing institution to appoint the chairman or arbitrator in the arbitration clause, but in fact someone else appoints the arbitrator. A similar problem arises if the arbitrator is to be chosen from a certain group of people, but then is chosen from another group. In this case the court should, however, examine carefully whether it is really necessary to refuse enforcement because the party opposing recognition and enforcement of the award was deprived of its rights, or whether, in essence, it got a fair arbitration procedure with only a minor procedural deviation. This is an illustration of the type of case in which the court can decide to grant enforcement if the violation is *de minimis.*

IV.4.2. *Arbitral Procedure*

The Convention does not intend to give the losing party a right to an appeal on procedural decisions of the arbitral tribunal. This option of Article V(1)(*d*) is not aimed at refusing to recognize or enforce an award if the court called upon is of a different legal view than the arbitrators, regarding, for example, whether or not to hear a witness, to allow re-cross examination or how many written submissions they would like to allow.

Rather, this second option of Article V(1)(*d*) is aimed at more fundamental deviations from the agreed procedure, which include situations in which the parties agreed to use the rules of one institution but the arbitration is conducted under the rules of another, or even where the parties have agreed that no institutional rules would apply.

IV.5. GROUND 5: AWARD NOT BINDING, SET ASIDE OR SUSPENDED (*ArticleV(1)(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, that award was made."

Article V(1)(*e*) provides for refusal of recognition and enforcement of an award if the respondent proves that the award has either:
– Not yet become "binding" on the parties, or
– Has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

IV.5.1. *Award Not Yet Binding*

The word "binding" was used by the drafters of the New York Convention in this context rather than the word "final" (which had been used in an equivalent context in the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards). The use of the word "binding" was intended to make it clear that a party was entitled to apply for recognition and enforcement of an award once it was issued by the arbitral tribunal. This meant that this party did not need to obtain *exequatur* or leave to do so from the court of the State in which, or under the law of which, the award was

made (known as a *double exequatur*), as was required under the 1927 Geneva Convention.

The fact that no double *exequatur* is needed under the Convention is universally recognized by courts and commentators.

Courts differ, however, as to how to determine the moment when an award can be said to be "binding" within the meaning of Article V(1)(*e*). Some courts consider that this moment is to be determined under the law of the country where the award was made. Other courts decide this question independent of the law applicable to the award and hold that foreign arbitral awards are binding on the parties when ordinary means of recourse are not, or are no longer, available against them.45 This means that the award is no longer open to an appeal on the merits, either to an appellate arbitral instance or to a court. In this context, courts sometimes rely on the agreement of the parties. If the parties have chosen to arbitrate under the rules of the International Chamber of Commerce, for example, the ICC Rules of Arbitration provide at Article 28(6) that: "Every Award shall be binding on the parties."

IV.5.2. *Award Set Aside or Suspended*

(i) *Award set aside*

Depending on the jurisdiction, this procedure may also be called "vacatur" or "annulment" procedure.

The courts having jurisdiction to set aside an award are only the courts of the State where the award was made or is determined to have been made, i.e., where the arbitration had its seat. These courts are described as having "supervisory" or "primary" jurisdiction over the award. In contrast, the courts before which an award is sought to be recognized and enforced are described as having "enforcement" or "secondary" jurisdiction over the award, limited to determining the existence of Convention grounds for refusal of recognition or enforcement.

In order for the objection that the award has been set aside to succeed, in many countries the award must have been finally set aside by the court having primary jurisdiction. An application to set aside the award does not suffice. This prevents the losing party from being able to postpone enforcement by commencing annulment proceedings.

The situation where an application to set aside or suspend the award has been made is covered by Article VI, which provides that in this case the enforcement court may adjourn the decision on the enforcement of the award if it considers it proper. The application must have been made, however, to the competent court referred to in Article V(1)(*e*), i.e., the court of primary jurisdiction.

(ii) *Consequences of being set aside*
Notwithstanding that an award has been set aside in the country in which, or under the law of which, the award was made, a court in another country may still grant recognition and enforcement outside the New York Convention regime. France is the best-known example of a jurisdiction that has declared an award enforceable notwithstanding the fact that it had been set aside in the country of origin. France does so, not on the basis of the New York Convention, but on the basis of French law, by opting out of the New York Convention through Article VII(1), the more-favourable right provision. This provision allows courts to apply an enforcement regime that is more favourable to enforcement than the New York Convention, that is, that can lead to recognition and enforcement when the Convention would not.

(iii) *Award "suspended"*
Article V(1)(*e*) also provides that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has been "suspended" by a court in the country where, or under the law of which, the award was made. As seen above in this paragraph IV.5.2 at

(i), Article VI of the Convention provides that a court may adjourn its decision on enforcement if the respondent has applied for suspension of the award in the country of origin.

The "suspension" of an award is not defined in the Convention. Courts have generally construed this term to refer to suspension of the enforceability of the award by *a court* (thus not by operation of the law, for example pending an action to set aside) in the country of origin.

3.4 GROUNDS FOR REFUSAL TO BE RAISED BY THE COURT *EX OFFICIO* (ARTICLE V (2))

Article V(2) of the Convention provides:

> "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."

The grounds in Article V(2) protect the public interests of the State in which enforcement is sought and, accordingly, the court can rely upon them *ex officio*, following an application that has been made for recognition and enforcement of an award. Typically, the party resisting recognition and enforcement will also invoke these grounds when it believes that they are relevant.

V.1. GROUND 6: NOT ARBITRABLE (*Article V(2)(a)*)

In summary, the "not arbitrable" ground for refusal under Article V(2)(*a*) is available where the dispute involves a subject matter reserved for the courts. For example, clearly criminal cases are non-arbitrable; similarly, cases reserved exclusively for the courts of a jurisdiction are non-arbitrable, including:
– divorce;
– custody of children;
– property settlements;
– wills;
– bankruptcy; and
– winding up of companies.

The modern trend is towards a smaller category of disputes being reserved solely to the jurisdiction of courts, as the result of a number of factors, including the trend toward containing costs, a greater openness of many courts to accept that the parties' agreement to arbitrate should be respected and the support of international arbitration by national legislation. In this respect it should also be noted that "not arbitrable" has a different meaning in an international as opposed to a domestic context.

Whether a subject matter of an arbitration is non-arbitrable is a question to be determined under the law of the country where the application for recognition and

enforcement is being made. The non-arbitrability should concern the material part of the claim and not merely an incidental part.

V.2. GROUND 7: CONTRARY TO PUBLIC POLICY (Article V(2)(b))

Article V(2)(b) permits a court in which recognition or enforcement is sought to refuse to do so if it would be "contrary to the public policy of that country".

However, Article V(2)(b) does not define what is meant by "public policy". Nor does it state whether domestic principles of public policy, or public policy principles based on the international concept of public policy, should apply to an application for recognition and enforcement under the New York Convention. The international concept of public policy is generally narrower than the domestic public policy concept.

Most national courts have adopted the narrower standard of international public policy, applying substantive norms from international sources.

The recommendations of the International Law Association issued in 2002 (the "ILA Recommendations") as to "Public Policy" are increasingly being regarded as reflective of best international practice.

Among the general recommendations of the ILA Recommendations are that the finality of awards in "international commercial arbitration should be respected save in exceptional circumstances" (Clause 1(a) of the General Section) and that such exceptional circumstances "may in particular be found to exist if recognition or enforcement of the international arbitral award would be against international public policy" (Clause 1(b) of the General Section).

Clause 1(d) of the ILA Recommendations states that the expression "international public policy" is used in them to designate the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).

The ILA Recommendations state (per Clause 1(d)) that the international public policy of any State includes:
(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;
(ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "*lois de police*" or "public policy rules"; and
(iii) the duty of the State to respect its obligations towards other States or international organizations.

Example of refusal of recognition and enforcement under Article V(2)(*b*) is:
– The Court of Appeal of Bavaria refused recognition and enforcement of a Russian award on the ground of public policy because the award had been made after the parties had reached a settlement, which had been concealed from the arbitrators.

4.0 CONCLUSION

Survey of the exclusive grounds for the refusal of a request for the recognition and enforcement of an arbitral award and the principles according to which these grounds should be interpreted reflects the pro-enforcement nature of the Convention that is to be respected and applied judiciously by the courts.

5.0 SUMMARY

In summation, we have been able to consider the grounds for refusal for the recognition and enforcement of an arbitral award.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss three grounds for refusal for the recognition and enforcement of an award as provided for under the New York Convention.

7.0 REFERENCES/FURTHER READING

1. New York Convention 1958
2. Redfern and Hunter, "Law and Practice of International Commercial Arbitration" (4th Edition Sweet & Maxwell 2004)