PROCEDURAL ASPECT OF ARBITRATION IN NIGERIA

By

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Abstract

Arbitration is one term that is frequently used in both legal and non legal settings and it is often used in both commercial and non commercial transactions. The paper discusses amongst other things, the procedural aspect of arbitration in Nigeria. It emphasises that the applicable law is the local law that operates in Nigeria. It also x rays the totality of the arbitral procedure at every stage. In conclusion, it shows that the procedure in arbitration is similar to that of litigation but the procedure is more flexible and simpler.

Keywords: Arbitration, Commercial Arbitration, Procedure, Alternative Dispute Resolution, Trade Dispute, Nigeria.

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Introduction

Arbitration is one of the various methods of dispute resolution and undoubtedly the most popular, it is defined as the reference of a dispute or difference between not less than two parties for determination, after hearing both side in the judicial manner, by a person or persons other than a court of competent jurisdiction[1]. Arbitration is thus a voluntary method of alternative dispute resolution which is applied to domestic and international contracts and is founded on the present future agreement of the parties to submit any dispute between them to arbitration and parties retain control of the process but not the outcome.

Arbitration in Nigeria could be mandatory or consensual. Mandatory arbitration is for instance provided for under the Trade Dispute Act[2] whereby industrial dispute are required to be referred to the Industrial Arbitration Panel before the National Industrial Court may have jurisdiction. Consensual arbitration arises where the parties to certain transactions drawn up an arbitration agreement or included an arbitration clause in their contract to resolve any dispute which may arise therefrom.

The basis for proceeding to arbitration is the arbitration agreement or the arbitration clause, which has been voluntarily executed by the parties. For example in Nigeria Arbitration and Conciliation Act[3] provides that "every arbitration agreement shall be in writing contained in a document signed by the parties or in exchange of letters, telex, telegrams or other means of communication which provides a record of the arbitration agreement or in an exchange of points or claim

[1] Halsbury's Laws of England 3ʳ edition volume 2 at page 2 Para 2.
[2] Cap. T18,Laws of the Federation of Nigeria 2004.
[3] Cap A 18, Laws of the Federation of Nigeria 2004.

and of defence in which the existence of an arbitration agreement is illegal by one party and not deemed by the other[4].

At common law, the parties could have an oral agreement to submit to arbitration and such arbitration agreement would be valid. But by virtue of the above provision, every arbitration must be in writing[5] this implies that an allegation of the existence of the arbitration agreement which is not deemed by the other party, will constitute a writing agreement.

The conduct of arbitration is of paramount importance to the parties. Before the Arbitration and Conciliation Act, the parties were, in particular in domestic arbitration, free to choose their rule of procedure, subject to any requirements of public policy by the law of the place of arbitration. However the position is now governed by Arbitration and Conciliation Act.

See 15 (1) of the Act provides that "the arbitration proceedings shall be in accordance the procedure constrained in the arbitration rules set out in the first schedule to this Act". Party who knows that any provision of, or requirement under, these rules has not been complied with yet proceed with the arbitration without promptly stating the objection of such non-compliance shall be deemed to have waived his right to objet[6]. Also sec 15 (2) which provides that "Where the rules refer to in subsection (1) of this section contain no provision in respect of any matter related to or connected with particular arbitral proceedings, the manner as it considers appropriate to as to ensure fair hearing".

[4] Sec I (1) (a-c) Arbitration and Conciliation Act 2004.
[5] ibid
[6] Arbitration and Conciliation Act Sec. 33, Arbitration rules 30.

Furthermore Article 1 of the Rules provides that "These rules shall govern any arbitration proceedings except that where any of these Rules is in conflict with a provision of this Act the provision of this Act shall prevail."

Article 15.1 provides that "subjects to these rules the arbitration tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated equally and that at any stage of the proceedings each party is given the opportunity of presenting his case." With regard to international commercial arbitration, section 53 of the Act provides as follows.

Notwithstanding the provision of the Act, the parties to an international commercial agreement may agree in writing that dispute 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 set or any other international arbitration rules accepted to the parties."

The effect of these provision are first that in domestic arbitrations, the parties as well as the arbitral tribunal are bound by the provisions of the Arbitration Rules in the first schedule. Thus, the much flaunted party autonomy In respect of arbitral procedure is very much more limited in domestic arbitration under our law than the UNCITRAL law. Article 19 of the model law provides that subject to the provision of the law "the parties are free to agree on the procedure to be followed by the Arbitral tribunal in conducting the proceedings". Under the Nigeria Arbitration law the parties are bound to adopt the arbitration rules in domestic arbitration.

Law of Arbitration

In domestic arbitration the applicable law is the relevant law of the country. But In the international commercial arbitration since there is no international code of

procedure, the need to consider the applicable law becomes more urgent in spite of this, the Arbitration and Conciliation Act makes little provision in this respect. Sec 47 (6) provides that.

> *If the arbitration law of the country where the award is made require that the award be filed or register by the arbitral tribunal, the arbitral tribunal shall comply with this requirement within the period of time by law.*

Importantly, in case of international arbitration, where the parties have not agreed on the arbitral procedure, recognition and enforcement of an award may be refused by the court on the ground that "arbitral procedure was not in accordance with the law of the country where the arbitration took place."[7]

A similar provision is contained in article V I (d) of New York convention 1958 on which section 52 of the Act is based. Article V (a) also provide that recognition may be refused if the arbitration agreement. "Is not valid under the law of the country where the award is made". Sometimes, the parties may specify both the proper law and the procedural law. In the *Compagnie d'Armament Maritime S. A v.*[8] *Campagnie Tunisienne de Navigation S. A.* the court observed that*:*

> *it is now open to question that if the parties to a commercial contract have agreed expressly upon the system of law of one country as the proper law of their contract, and have settled a different canal law by providing expressly that dispute under the contract shall be submitted to arbitration in another country, the arbitrators must apply the proper law which the parties have expressly agreed.*

[7] Arbitration and Conciliation Act, Sec 52 (2) (a) (vii) Red Fern & Hunter op cit p. 81.
[8] 1971 A C. 572 at p. 604.

Commencement of Arbitration

Notice of Arbitration

Section 17 of Arbitration and Conciliation Act of 1988 provides that:

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

See Article 3.1.3.3 and 3.4 of Arbitration Rules. Article 3.1 provides that the party initiating resource to arbitration that is the claimant shall give to the other party, the respondent a notice of arbitration. Art 3.3 provides that the notice of a arbitration shall include the following:

(a) Request that the dispute be referred to arbitration
(b) The name and address of parties
(c) A reference to the arbitration clause or the separate arbitration agreement that is invoked
(d) A reference to the contract out of or in relation to which the dispute invoked arises
(e) The general nature of the claim and an indication of the amount involved, if any;
(f) The relief or remedy sought
(g) A proposal as to the number of arbitration that is one or three if the parties have not previously agreed thereon.
(h) The notice of arbitration may also include the following.
    (i) The approval for the appointment of a sole arbitrator.

(ii) The notification of the appointment of an arbitrator where each party is to appoint one;

(iii) The statement of claim as provided in Arbitration Rules Article3.4.

Time Limit for Commencement

The commencement of litigation or arbitration is very important in determining the limitation of time as to the right to bring an action or claim. If time limit is not observed the right to action or claim may be lost. The importance of time of commencement is that the right to claim at all may be lost if time is not observed because time within which to bring an action or claim begins to run from the time when the right to the action or claim accrues. However where the arbitration agreements contain a *Scott v Avery Clause***,** time will only begin to run for the purpose of an action from the date when the award is made. The limitation law provides various period of time after which certain claims are barred. For example 6 years for claim in contract or lost and twelve years in respect of land.[9] The limitation law of the states provides that the law and any other enactment relating to limitation of action shall apply to arbitration as they apply to actions[10]. These limits are imposed to encourage the finality of litigation and claim, while in contractual ones; the intention is to avoid a situation where claims are perpetually hanging on a party. Under the rules of arbitration institution when time begins to run may be different, for example under the I.C.C. secretariat[11]. In I.C.S.I.D. it is when the request is notified to the other party[12]. A valid notice of arbitration serves

[9] See Limitation Law. Cap 70 of the Law of Lagos State 1973 Sec, 62.
[10] Ibid.
[11] See ICC Rules Article 4.2
[12] See ICS ID Rules of procedure Rule 6.1

to stop time from running against the claimant, that the fact that a notice is not given until after the expiration, it will not usually deprive the arbitrator of jurisdiction over the claim and that instead, it will form a ground of defence in arbitration and in the absence of reasons to the contrary, entitle the respondent to an award in his favour[13]. It is pertinent to note that a claimant must ensure the time (if any) that operate under the contract. He or she must do all the necessary things required by law to mark the commencement of arbitration. This may be by making a request for arbitration, calling on the other party to submit dispute to arbitral tribunal, if any, designated or to require him to appoint or agree with the appointment of an arbitrator if a sole arbitrator was agreed.

Administrative Agreement

Time and Place

The arbitrator decides place and time of the meeting with regard to the circumstances of the case[14] and the balance of convenience. Thus this will involve the consideration of the place where most of the interest and parties reside, the situation of the subject matter and available facilities. He arranges for the rooms, secretarial and other facilities.

Preliminary Meetings

Soon after the arbitral tribunal is instituted, a meeting is held by the arbitrator with the parties and their counsel if any. This is the meeting where the entire preliminary matters to assist the arbitral proceedings are discussed and implemented. Specific provision for such a meeting is not provided for by the

[13] Mustill and Boyd op. cit p. 13
[14] Arbitration and Conciliation Avt Sec. 16 (1)

Arbitration and Conciliation Act but it is usually held in practice. Also international and domestic arbitrations usually hold such a meeting. In ad-hoc arbitration, the meeting is convened by the sole administrator or the presiding arbitrator unless it is not practicable as at where the presiding arbitrator lives outside the country which is other than the venue. In domestic arbitrations where there is only a sole arbitrator and with good communication facilities it may be possible to make preliminary consultation without a formal meeting. We suggest that a meeting is necessary and very valuable for best results in preparing for the proceedings, though not holding the meeting may save costs. It is virtually inevitable in international commercial arbitration to hold the preliminary meetings especially where the parties and their counsel are from different legal backgrounds. This preliminary meeting will help to determine the framework and organization of the arbitral proceedings.[15] And arbitral tribunal with three arbitrators to meet first or communicate for introductions and arrangement of the preliminary meeting.

Pleadings

The claimants set out his case against the Respondent, on receipt of the claims the Respondent states which of the facts he admits and those which he denies. He states his case in answer to the claimants and if he has a counterclaim, he states it. The claimant will reply and admit or deny the allegations of the respondent on receipt of the respondent's counterclaim

In Nigeria the claimants claim and that of the respondents are made consecutively while in some countries they are made concurrently. The arbitration and Conciliation Act 1988 Section 19(1) provides that:

[15] Russell on Arbitration 21st ed p. 216. Red fen and Hunter op. cit. p. 312

> *The Claimant shall within the period agreed upon by the parties or determined by the arbitral tribunal, state the facts. Supporting his points of claims, the points at issue and relief or remedy sort by him, and the respondent shall state his points of defence in respect of those particulars, unless the parties have otherwise agreed on the required elements of the points of claim and of defence.*

Section 19(2) of the Act provides that "The parties may submit with statement under subsection (1) of this section all documents they consider to be relevant or they may add a reference to the documents or other evidence they hope to submit at the tribunal. The aim of pleading is to give notice of the case to be met which enables the parties to prepare his evidence and arguments on issues raised and save either party from being taken by surprise.[16] Therefore the averments and the denial should be clearly stated.

Points of Claims

The arbitral tribunal will order the points of claim to be filed in a period of time agreed by the parties or as fixed by the arbitral tribunal if the parties fail to agree at the preliminary meeting. The convenience of the parties and the need to facilitate the arbitral proceedings will be taken into account. Article 23 provides that points of claim and points of defence shall be communicated within 45 days. This time may be extended if needed be. The points of claim are served on the arbitral tribunal and the respondent and the points of claim should state the facts supporting the claim, the points at issue and the relief or remedy sought by the claimant.[17]

[16] *George v. Dominion Flours Mils Ltd* (1965) AD N.L.E. 71 at p.77
[17] Arbitration and Conciliation Act Sec. 19 (1)

Article 18 provides inter alia, that the statement of claim shall include the names and addresses of parties[18] and a copy of the contract and of the arbitration agreement if not contained in the contract shall be annexed to the points of claim.[19] The claimant may annex to his statement of claim all documents that are relevant or may add a reference to the document or other evidence he will submit at the proceedings.[20]

Default of Claimant

If the claimant default by failing to communicate his claim within time and does not show reasonable cause for such a default, the arbitral shall order the termination of the proceedings.[21]

Points of Defence and Counterclaim

They are filed after the receipt of the points of claim. The statement of defence in writing must be communicated to the claimants and each of the arbitrators[22]

In the statement defence, the respondent may include counterclaim if any for purpose of set – off. Relevant documents may be attached. If the respondents fails to communicate his statement of defence to the arbitral tribunal and the claimant within the period fixed without reasonable cause the arbitral tribunal shall order that the proceedings be continued.[23]

[18] Arbitration Rules Art 19.1
[19] ibid At 18.1
[20] Arbitration and Conciliation Act Sec. 192 Arbitration Rules Act 18.3
[21] Arbitration Rules Art 18.3 Sec. 21 (a) Arbitration Rules Art 28.1
[22] Arbitration Rules Act 19.1
[23] Arbitration and Conciliation Act Sec. 21 (b) arbitration Rules Art 28.1

Amendment of Claim and Defence

Either party may amend or supplement his claim or defence during the arbitral proceedings unless the parties agreed otherwise. If arbitral tribunal considers that an amendment will be prejudicial to the other party because it is made out of time it may refuse it.

Receipt of Written Communication

Unless otherwise agreed by the parties, any communication sent under the Act is deemed to be received when it is delivered personally to the address or to his business place or residence or mailing address, or by registered post to his last known address. Such communication is deemed to be received on the date of delivery.[24]

Pre-Trial Meeting

A conference is held before hearing commences after the completion of the pleading. This is called the Pre-Trial meeting or Conference. This assists the parties and the tribunal to prepare for trial, save time and costs. The date of the meeting should be well chosen and should not be too close to the trial or too early. The notice of the meeting will specify the agenda of the meeting matters to be discussed at the pre trial meeting vary from tribunal to tribunal and may be as follows:

(a) Settlement of issues and clarification of issues presented and relief sought
(b) Identification of any issues which may require to be dealt with as a preliminary question
(c) Whether there are any moves for settlement and the status of such moves;
(d) Whether there are any moves for settlement and the status of such moves;

[24] Arbitration and Conciliation Act sec.56

(e) Whether any further written statements e.g. reply or a rejoinder is required

(f) Proof of evidence

(g) Whether experts are to be appointed.

(h) Determining what documents will require translation

(i) Fixing a schedule for hearings.[25]

There is no provision for pre-trial meeting under the I.C.C. Rules but Article 18 provides for the drawing up of Terms of Reference which are basically settlement of issues, which have some of the characteristics of a pre-trial meeting.

Settlement of Issues

This is the identification of issues which the arbitrator is called upon to resolve, so it is very important aspect of arbitral process because the goal of a successful arbitration is the resolution of issues in dispute between the parties. The Act has no provisions for the settlement of issues but in practice taking a cue from the court's practice settlement of issues has become an accepted practice in the arbitral process. The settlement of issues comes after the pleading has been completed and where necessary, further particulars have been or discovery of documents made. The usual procedure for settlement of issues is as follows:

(a) The arbitral tribunal orders each party to formulate the issues in dispute according to his own perception, deliver a copy to the tribunal and a copy to the other party.

(b) The parties are directed to meet and agree on a common list if possible if they agree on all issues, they will sign a list of issue and deliver a copy to the arbitral tribunal. If they agree on some issues and not on other they will sign a list of agreed issues and deliver a copy to the arbitral tribunal.

[25] The list is based on the internal guidelines if the Iran- VS claims tribunal as set out in red fern and Hunter op.cit at page 347

Each party will deliver a copy of issues not agreed to the tribunal and the other party. If all the issues are not agreed, then they will send a copy of the issues to the tribunal and also a copy to the other party.

(c) The parties and the arbitral tribunal will meet to agree on the list of issues. The agreed issues and the issues not agreed by each part will form a list of issues. The list of issues forms a part of the terms of Reference which is a document drawn up by the tribunal and signed by the parties of the tribunal[26]. It is pertinent to note that the I.C.C arbitration the pleadings are filled with the I.C.C court which in turn send them to the arbitral tribunal. The terms of Reference are drawn up after the pleadings are received and before the case proceeds.

This is the first meeting of the tribunal under the I.C.C rules while it is the second meeting on the ad-hoc arbitration which is the meeting for settling list of issues which may be held at a pre-trial meeting where matter relating to trial is reviewed and decided.

The arbitral process is facilitated by the history of issues for determination which helps the parties and the tribunal to concentrate on the real issues and avoid matters not in dispute and irrelevant.

Trial in Arbitration

Like a court proceeding, arbitration involves a hearing, for example in commodity or quality arbitration, a formal hearing may not be necessary, unless the parties agreed otherwise. The tribunal decides on the conduct of proceedings. Arbitration and Conciliation Act by its section 20 (1) provides that the proceedings may be conducted in the following ways:

[26] I. C. C Arbitration Rules Art. 18

(a) By holding oral hearings for evidence presentation or oral arguments or

(b) On the basis of documents or other material or

(c) By holding oral hearing or on the basis of documents or other materials as provided in paragraphs (a) and (b) in this section".

The general practice of arbitration in Nigeria is to have oral hearing and also production of documents like the courts. Arbitration Rules Art. 15. 2 provides that after the completion of the pleadings, admission, discovery and interrogatories the arbitrator may find that it is needless for the oral hearing becouse all the facts required for a decision have been presented and only legal submission is necessary, in such a case, if no party requires oral hearing, the arbitrator may conduct the proceedings on the basis of documents only.

Arbitration with Hearing

Preliminary matters:

(a) Notice of date, time and place

The parties must be giving adequate notice of hearing or meetings of the tribunal held to inspect documents, goods and other property[27]. Notice must specify the date, time and place of such hearing or meeting.[28]

(b) Witness

Each party must at least 15 fifteen day before hearing send the names and address of the witness he intends to call; the language the witness will give their testimony.[29]

These statutory requirements are limited in scope as the parties may agree that the proof of the evidence shall be by affidavit.

(c) Exchange of proof of evidence

[27] Arbitration Rules Art 25.1
[28] Arbitration Rules Art 25.1
[29] Ibid At. 25.2

Proof of evidence may be exchange simultaneously or consecutively. In consecutive exchange the arbitral tribunal directs the claimant to serve his proof first and the respondent serve his proof after the receipt of the claimant's proof to give respondent time to react to the claimant's proof. In simultaneous exchange the tribunal directs the two parties to exchange the proof at a particular time.

(d) Attendance and representation

Arbitration is a private dispute and the proceedings are private.

Article 25. 4 of the rules provides that the hearing shall be in camera unless parties otherwise agree. Russell on the arbitration opined, "Arbitration is a private tribunal for the settlement of disputes. The public therefore may not be admitted if the admission is objected to by either of the parties or the arbitrator[30] Those who attend the arbitral trial are the parties to the disputes. The lawyer or the other representative of the other party, who may be the Engineer or the Architect or any other profession or person and a short hand writers or any other note taker, the parties to the disputes—where the party is a company, a representative who is an officer or servant of the company is appointed to attend. If the parties have been duly giving the hearings notice and fail to appear without showing sufficient cause for not attending, the arbitral tribunal may proceed with the arbitration.[31]

Privacy and Confidentiality

An arbitrator has no power to compel witness to answer questions that are confidential. The arbitrator has no power to disclose confidential information obtained in the course of arbitration, not even to a partner or his employer.

[30] Russell on Arbitration 21st Edition p. 239

[31] Arbitration rules 28.2

Adversarial and Inquisitional Systems

In arbitration trial is divided into the adverse and inquisitional system.

In Nigeria, England, and most commonwealth countries, United States and Scandinavian countries embrace the adversarial procedure where the parties present their cases for arbitrators to decide. The inquisitorial system is used in the rest of Europe, where the arbitrators makes his own investigation with the assistance of parties and their lawyers. However the arbitral tribunal may in certain circumstances exercise a wide discretion as to which procedure to adopt.[32] Therefore the procedure in such a case may be adversarial or inquisitorial or partly one and partly the other this is more often happen in International arbitrations where parties are from different legal system.

Intervention by Arbitrator

In court or in arbitration the ideal procedure at a hearing is for parties to give evidence and submissions without intervention from the court or the arbitrator thereby leaving the conduct of the case to the parties and their counsel or representative. In practice there are situations where it is necessary for the arbitrator to intervene in the interest of the proceeding. It has been suggested that the arbitral tribunal may intervene in the following circumstances

(a) When wanting to reach a decision on a point of law or fact not put to the tribunal so that parties can comment on it.

(b) To obtain comment of the parties when he is proposing to make a finding based on his knowledge

(c) Putting question to witness to get an answer to question put to him to save time. This question is put after the witness has answer the question of the other party and must not pre-empt or anticipate the other parties questions.;

[32] Arbitration and conciliation Decree 1988 Sec. 15 Arbitration Rules Art 15

(d) To make sure that he understood the party's submission and to give opportunity to comment on any doubt which the arbitrator may have.

Arbitrator should not enter into any controversy with counsel, parties or witness and should not descend into the arena.

Lord Denning M.R in *Jones v Natural Coal Board*[33] where he said inter alia:

> *Justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations. If a judge should himself conduct the examination of witnesses he, so to speak, descends to the arena and is likely to have his visions clouded by dust of conflict.*

The Supreme Court of Nigeria advice in the case of *Nwafor Ejike v Nwokeocha & Ors*[34] where it said inter alia that:

> *The trial judge is rarely to interfere except for holding a legitimate balance between the parties and seeing that the conduct of the case of each side is done in accordance with the rules and standards laid down by the law. A judge who takes over from counsel the conduct of the case of either party to the conflict, is no more an impartial judge by a combatant in the fray, unworthy of his appointed seat*.

These advices should apply to the arbitrator in the arbitral proceedings conducted under the adversarial system.[35]

Order of Proceedings at the Hearing

In Nigeria and in England and most common law countries the following has been suggested as the procedure.[36]

[33] (1952) 2 WLR 760 at 776
[34] (1984) 12 S.C 301 at 312
[35] See further Burstein op. cit pg. 1962-192

(a) Opening Statement of the Claimant

This is the statement by the Claimants counsel or the claimant himself if he is not represented by a counsel.

(b) Evidence of Claimant

The claimant or his counsel calls the witness and examines him – in – Chief. After this the witness is cross-examined by counsel to the respondents/or the respondent or the respondent himself where he is not represented. Where the evidence is by affidavit the witness may not be called unless the other party wishes to cross – examine him. As such the witness is cross-examined by the respondent or his counsel. Here the cross-examination like the courts is to test the veracity and value of the facts testified to by the witness and to test his credibility.

After the cross – examination the witness is re-examined by the claimant or his counsel. The evidence of the witness is concluded at this stage. Other witness of the claimants will also be called and dealt with as above. The claimant closes his case with the last witness. The Respondent will open his case by calling his witnesses one after the other who will follow the procedure above that is each of the witnesses will be examined in – Chief, Cross – examined and re-examined. The respondents then close his case. The Respondent or his counsel will make his submission summarizing the evidence and drawing attention to matters of special importance to the arbitral tribunal in coming to a decision. The claimant or his counsel too will make his closing submission and also call attention to any special point or issues.

[36] Ibid at pg. 187.

Arbitration without Hearing

Some arbitration are held without oral hearing but held on the basis of documents only. The parties submit all necessary documents sufficient for arbitral tribunal to make a decision. This procedure is commonly used in commodity contract where dispute is about quality and condition; it is also used in consumer dispute settlement.

This procedure is cost and time saving, as only limited oral evidence is given or not at all. If one party, duly invited to produce documentary evidence fails to do so within the time limit without showing cause for such default the arbitral tribunal under Sec. 1 (c) of the Act make the award on the evidence before it.

Interlocutory Orders

In the course of the proceeding the arbitral tribunal may have to make various interlocutory orders for the smooth running of the proceedings. These orders may include, order for protection of property; order for security, order for deposit of costs, order for extension of time etc.

Termination of proceedings

Arbitral proceedings may be terminated in any of the following circumstances

(a) When the proceedings are concluded an award is made or order of termination is issued by the arbitral tribunal.[37]

(b) When the claimant withdraws his claims and respondent does not object. The respondent may however object to the withdrawal and if the tribunal finds that there is legitimate interest of his requiring that a final settlement of the dispute

[37] Arbitration and Conciliation Act Sec. 27 (1)

be obtained; it will uphold the objection and order the proceedings to continue.[38] A withdrawal will not sustain a plea of rest judicator.

(c) Where the parties agree on the formulation of the arbitral proceedings; the arbitral tribunal is bound to order the termination.[39]

(d) When the arbitral tribunal observe that the continuation of the arbitral proceedings has for any other reason become unnecessary or impossible[40]. The tribunal shall inform the parties of its intention to terminate the proceedings and afford them an opportunity to comment[41].

(e) By settlement where before the award is made, the parties agree on settlement of the dispute, the tribunal must either order the termination or if requested by both parties and accepted by the tribunal record the settlement in form of an award on agreed terms[42]. The arbitral tribunal is not obliged to give reasons for such awards.[43] Copies on the order of termination or of the arbitral award on agreed terms must be sent to each party[44].

It is noted that power to terminate arbitration is vested on the arbitral tribunal, not in court. Section 34 of the Arbitration and Conciliation Act provides that "*a court shall not intervene any a matter governed by this Act except where so provided in this Act*". Therefore, any argument at common law as to whether or not a court can terminate arbitration by injunction is irrelevant in Nigeria.

[38] Ibid. Sec. 27 (2)
[39] Ibid. 27(2) b.
[40] Ibid Sec.27 (c)
[41] Arbitration Rules Art 34.2
[42] Ibid. Art 34.1
[43] Ibid.
[44] Ibid. Art 34.3

Award

The essence of the arbitration is the award, which resolves the dispute. It is binding on the parties and is enforceable as a judgment after registration. Its form, contents and validity are regulated by the Act.[45]

An arbitral award is a determination on the merits by an arbitration tribunal in an arbitral proceeding and it is likened to a judgement in a court of law. In an arbitral proceeding it is expected that the panel would deliver its award upon conclusion of proceedings. The term award has no acceptable definition neither in international convention nor in the model law, but its nature is determine in its recognition and enforceability.[46] In law arbitral award lacks enforcement or enforceability nor carry any element of sanction until a court of law confer enforcement or sanction on it.[47]

Consideration of Evidence and Decision

The arbitrator is to make a finding of fact in contested issues. He must decide after weighing the evidence on both sides what he accepts as facts of the case. Where the facts are agreed by admission, such agreement constitute the facts of the cases but where the facts are not agreed the arbitrator has to assess the evidence on each part and come to a decision. This is the most difficult aspect of the adjudication. This can only be acquired and perfected by experience. MC Kenna J an English judge gave the benefit of his experience on the bench on this regard. He said inter alia "This is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to other facts as seems very likely to be true, as for example, those recorded in contemporary documents or spoken to by individual witnesses, like the policemen giving evidence in a running down case

[45] Arbitration and Conciliation Act Sec. 31
[46] Arbitration and Conciliation Act See 31(1), *Okechukwu v Etukokwu* (1998) 8 N.W.L.R.(pt.562) 513-530.
[47] *Ofomata and ors v Anoka and ors* (1974) 4 ECSLR. 25. *Okpuruwu v Okpokam* (1988) 4N.W.L.R. (pt 90) 554.

about marks on the road. I judge a witness to be unreliable if his evidence is, in any respect, inconsistent with these undisputed or undisputable facts or, or course, if he contradicts himself on important points. I rely a little as possible on such deceptive matters as his demeanour when I have done best to separate the true from the false by theses move or less objective test. I say which story to me is more probable; the plaintiff's or the defendant's.[48]

In *Ayina v Sapara*,[49] the court in considering this point, observed that the demeanour of a witness is to be tested by the documents and probabilities in the case. The lesson here is why the demeanour of a witness should be observed it should not be used as the main determinant of this credibility. The nature of his evidence the other available evidence and all the surrounding circumstance should be taken into account in determining the veracity of his evidence.

Taking a decision on the Evidence

The arbitrator is to consider the evidence of the parties on any issue and take a decision. On this, the Supreme Court in *Mogaji and Ors v Odofin* **[50]** gave the advice thus,

> *…before a judge whose evidence is adduced by the parties before him in a civil case comes to a decision as to which evidence to believe or accept and which evidence he rejects he should first of all put the totality of the testimony adduced by both parties on the imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weight them together. He will then see which is heavier, not by the number of*

[48] Paper read at University College Dublin Feb. 21 1973 printer in Ir. Jur and quoted in Bern Stain op cit p. 122.
[49] (1968) 2 ALL N. L. R. 130
[50] (1978) 6 S.C. 91 at 94.

> *witnesses called by each party, but by quality of probative value of testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the balance of probabilities. Therefore in determining which is heavier the judge will naturally have regard to whether the evidence is admissible, relevant, credible, conclusive and more probably than that given by the other party. Finally after invoking the law, if any, that is applicable to the case, the trial judge will come to his final conclusion based on the evidence which he has accepted.*

Sometimes where the affidavits of the parties are conflicting, oral evidence will be needed to clear the conflict as it is done in the courts. The arbitrator or judge cannot pick one of them.[51]

Arbitral Procedure in a Nutshell

The procedure for conducting arbitration is spelt out in the Arbitration Rules to be found in First Schedule to the Arbitration and Conciliation Act.[52] The procedure of arbitration is less formal than that of litigation; the two procedures are similar because they are both adjudicatory and the major difference is that the disputant have consensually chosen their own private judge called the arbitrator. Arbitration Rules provide for matters concerning the composition of the Arbitral tribunal, in term of number of arbitrators, their appointment, remuneration, challenges of arbitrators and their replacement.

Arbitration commences with a notice to commence an arbitration being sent by an aggrieved party to the other party's, and substituted services are allowed where

[51] *Akinsete v Akosile* 1966 1 ALL NR 142 al 148. *Olu Ibukan v Olu – Ibukun* 1974 2. Sc 41.
[52] Cap A18 LFN 2004.

necessary. The procedure of arbitration is not publicized while that of litigation is publicized. In arbitration the parties are free to choose the applicable law either substantive or procedural, bearing in mind their mutual convenience and interest. The arbitral tribunal can be quicker reaching a decision than court of law in view of relative informality and simplicity of the procedure as well as the availability of the arbitrators who will not complain of congestion of matters as in courts. Parties can represent themselves or be represented by any person of their choice who needs not to be a lawyer. In court proceedings as a rule, only a lawyer can represent a litigant.[53] Thus the arbitration may be less expensive to the litigant.

Conclusion

Given the informality and flexibility of arbitration, it is not surprising that different arbitrators may take widely varying approaches in some key areas for example some arbitrators apply at least some form of the hearsay rule while others exclude virtually nothing on hearsay ground some arbitrators limit discovery to these bare essentials while others are more permissive. Uncertainly abrupt which approach the arbitrators will take can lead to delay.

The law imposes specific duties on the arbitrators as to award as the tribunal must itself make the award in writing. An award is a final determination of a particular issue of claim in arbitration which is the final decision of the arbitrator in the settlement of the dispute[54]. The award may be contrasted with procedural orders and directives in the course of the proceedings. Thus the decision on the pleadings

[53] It is a Constitutional Right for a litigant to defend himself by a legal practitioner, section 36(6)(b) and such a legal practitioner must be one who is not under any disability of any nature, i.e. he must be entitled to practice as a barrister solicitor whose name is enrol in the Supreme Court of Nigeria, *Awolowo v Usman Sarky* (1966) 1 ANLR 178.

[54] See Domke on commercial arbitration page 419.

or admissibility of evidence will be a procedural order and a decision on jurisdiction.

The procedure in arbitration is similar to that of litigation but the procedure is more flexible and simpler. The parties are given some latitude which in litigation is hardly permitted.