



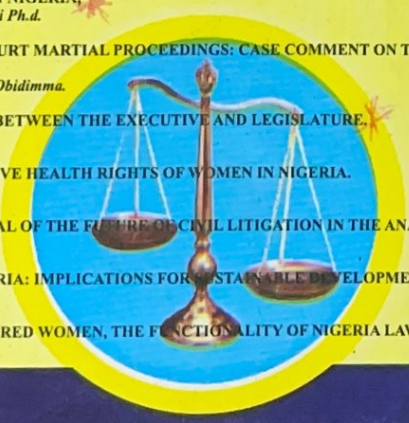
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List of Contributors

- **MASS MAST IN PLANNING AND ENVIRONMENTAL LAW MAZE: NEED FOR STRICTER GOVERNMENT REGULATION.**
Otubu Tunde.
- **CLOGS IN THE DEBT RECOVERY IN THE NIGERIAN MICRO FINANCE BANKS: SOURCING FOR LEGAL SOLUTIONS.**
Dr. Olokooba S.M. & Dr. Olatoke J.O.
- **E- SERVICE OF COURT PROCESSES IN NIGERIA: A BRIDGE TOO FAR.**
Okafor Chienye.
- **APPRAISAL OF JURISDICTIONAL ISSUES IN NIGERIA BANKRUPTCY LEGISLATION.**
Dr. Obidimma E. O. & Anushiem M. I.
- **WOMEN, ACQUISITION AND TRANSFER OF LAND IN NIGERIA: CURTAILMENT OR ACCOMMODATION?**
Attah Christiana.
- **CROSS EXAMINATION AND FRONT-LOADING SYSTEM IN NIGERIA.**
Dr. Kenen E.A.
- **A PURVIEW OF THE JURIDICION OF TAX APPEAL TRIBUNAL VIS-A-VIS THE EXCLUSIVE JURISDICTION OF THE FEDERAL HIGH COURT IN NIGERIA.**
Dr. John D.C.
- **THE PROTECTION OF THE MARINE ENVIRONMENT AND BIODIVERSITY IN NIGERIA: A CALL FOR AN URGENT LEGISLATIVE INTERVENTION.**
Dr. Ifemeje Sylvia. C. & Lawal Bose.
- **A LEGAL APPRAISAL OF THE NATIONAL HEALTH INSURANCE SCHEME.**
Ayanleye, O.A.
- **PROPERTY RIGHTS IMPLICATION FOR GARNISHEE PROCEEDINGS IN NIGERIA**
Ajape Taiwo Shehu.
- **A COMPARATIVE ANALYSIS OF LAGOS AND KWARA STATES CITIZEN'S MEDIATION CENTRE LAWS.**
Olufemi Abifarin.
- **AN APPRAISAL OF THE FUNCTIONS OF CAUSATION AS A BASIS FOR LEGAL RESPONSIBILITY IN ENVIRONMENTAL LAW:**
Dr Ikoni U.D.
- **AN OVERVIEW OF THE BASIS FOR THE REQUIREMENT OF CONSENT IN ALIENATION OF LAND RIGHTS IN NIGERIA.**
Dr. Ogiji L.O.
- **A CRITICAL APPRAISAL OF THE EFFECT OF THE THIRD ALTERATION ACT TO THE 1999 NIGERIAN CONSTITUTION ON THE JURISDICTION OF THE NATIONAL INDUSTRIAL COURT.**
Eze T.C. Esq.
- **A RE-EXAMINATION OF THE IMPACT OF THE DECISION OF THE SIERRA LEONE SPECIAL COURT IN PROSECUTOR V SAMUEL NORMAN ON AFRICA:**
Dr. Anwo, J. O., & Arowolo, G.A.
- **A CRITICAL ANALYSIS OF GENDER AND RIGHTS PROBLEMS: THE IMPORT OF THE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AS DEVELOPMENT STRATEGIES.**
Dr. Ikpeze O. V. C.
- **EXTRA TERRITORIAL PROTECTION AND ENFORCEMENT OF INDIGENOUS FORMS OF KNOWLEDGE AND CHOICE OF LAW DILEMMA: AN AFRICAN PERSPECTIVE.**
Kur F. Ph.D.
- **AN APPRAISAL OF THE GROUNDS FOR SETTING ASIDE AN ARBITRAL AWARD UNDER THE ARBITRATION AND CONCILIATION ACT.**
Abdulrauf Lukman Adebisi.
- **THE IMPERATIVE OF AN ATTITUDINAL CHANGE ABOUT THE PRACTICE OF LAW IN NIGERIA: A CRITIQUE OF THE INTERDEPENDENCE OF ADR AND THE JUDICIARY.**
Ahmad B A, Ibrahim F. A. & Bilikis Ayinla.
- **LEGISLATIVE PRIVILEGES AND IMMUNITY IN NIGERIA.**
Dr. Paschal Onyi Oguno & Chudi Charles Nwabachili Ph.d.
- **THE ROLE OF THE JUDGE - ADVOCATE IN COURT MARTIAL PROCEEDINGS: CASE COMMENT ON THE NIGERIAN ARMY V LT. PATRICK ODODO.**
Dr. Emmanuel O. C. Obidimma. & Dr. Angela Ebele Obidimma.
- **TOWARDS A FRICTION-FREE RELATIONSHIP BETWEEN THE EXECUTIVE AND LEGISLATURE.**
Ibraheem Ojo Tajudeen.
- **ABORTION: VIOLATION OF THE REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN NIGERIA.**
Umejiaku Nneka
- **THE FRONT LOADING CONCEPT: AN APPRAISAL OF THE FUTURE OF CIVIL LITIGATION IN THE ANAMBRA STATE HIGH COURTS.**
Iguh Amaka.
- **THE CONCEPT OF THE RULE OF LAW IN NIGERIA: IMPLICATIONS FOR SUSTAINABLE DEVELOPMENT.**
Dr. Kalu, Uwadineke.
- **FROM THE CASTLE DOCTRINE TO THE BATTERED WOMEN, THE FUNCTIONALITY OF NIGERIA LAW OF SELF DEFENCE.**
Dr. Esa O. Onoja.



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TABLE OF CONTENTS

CLASS MAST IN PLANNING AND ENVIRONMENTAL LAW MAZE: NEED FOR STRICTER GOVERNMENT REGULATION.	1
<i>Otubu Tunde, LL.B, B. L., M. Phil., (Lecturer Dept. of Private and Property Law, University of Lagos)</i>	
CLOGS IN THE DEBT RECOVERY IN THE NIGERIAN MICRO FINANCE BANKS: SOURCING FOR LEGAL SOLUTIONS.	15
<i>Olokooba S.M. Ph.D, & Olatoke J.O. Ph.D. (Lecturers Fac. of Law Unilorin)</i>	
E- SERVICE OF COURT PROCESSES IN NIGERIA: A BRIDGE TOO FAR.	25
<i>Okafor Chienye. LL.B., LL.M., Lecturer, Faculty of Law Nnamdi Azikiwe University, Awka.</i>	
APPRAISAL OF JURISDICTIONAL ISSUES IN NIGERIA BANKRUPTCY LEGISLATION.	40
<i>Obidimma E.O.C Ph.D, B.A., LL.B., LL.M., Ph.D., Lecturer and Head of Department, Commercial and Property Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria & Anushiem M.I., LL.B., Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria.</i>	
WOMEN, ACQUISITION AND TRANSFER OF LAND IN NIGERIA: CURTAILMENT OF ACCOMMODATION.	52
<i>Attah Christiana, Lecturer, Benue State University Makurdi.</i>	
CROSS EXAMINATION AND FRONT-LOADING SYSTEM IN NIGERIA.	65
<i>Kenen E.A Ph.D. Senior Lecturer, and Dean, Faculty of Law, Benue State University, Makurdi.</i>	
A PURVIEW OF THE JURISDICTION OF TAX APPEAL TRIBUNAL VIS-À-VIS THE EXCLUSIVE JURISDICTION OF THE FEDERAL HIGH COURT IN NIGERIA.	74
<i>John D.C., LLB, LL.M, Ph.D, B.L, Lecturer, Dept. of Commercial Law, ABU Zaria.</i>	
THE PROTECTION OF THE MARINE ENVIRONMENT AND BIODIVERSITY IN NIGERIA: A CALL FOR AN URGENT LEGISLATIVE INTERVENTION.	94
<i>Ifemeje Sylvia. C., Associate Professor & Sub Dean, Faculty. of Law Unizik Awka & Lawal Bose, Lecturer Faculty of Law, LASU, Ojoo.</i>	
A LEGAL APPRAISAL OF THE NATIONAL HEALTH INSURANCE SCHEME.	106
<i>Ayanleye, O.A., Department of Business and Industrial Law, Faculty of Law, Olabisi Onabiko University, Ago-Iwoye, Ogun State, Nigeria.</i>	
PROPERTY RIGHTS IMPLICATION FOR GARNISHEE PROCEEDINGS IN NIGERIA	118
<i>Ajape Taiwo Shehu., (Senior Lecturer, Department of Public Law, Faculty of Law, University of Ilorin, Nigeria).</i>	

A COMPARATIVE ANALYSIS OF LAGOS AND KWARA STATES CITIZEN'S MEDIATION CENTRE LAWS.	129
<i>Olufemi Abifarin, Faculty of Law, Kogi State University, Anyigba.</i>	
AN APPRAISAL OF THE FUNCTIONS OF CAUSATION AS A BASIS FOR LEGAL RESPONSIBILITY IN ENVIRONMENTAL LAW:	139
<i>Dr Ikoni U.D, Faculty of Law, Benue State University, Markudi.</i>	
AN OVERVIEW OF THE BASIS FOR THE REQUIREMENT OF CONSENT IN ALIENATION OF LAND RIGHTS IN NIGERIA.	155
<i>Ogiji L.O. Ph.D, B.L., Lecturer, Faculty of Law, Benue State University, Makurdi, Nigeria.</i>	
A CRITICAL APPRAISAL OF THE EFFECT OF THE THIRD ALTERATION ACT TO THE 1999 NIGERIAN CONSTITUTION ON THE JURISDICTION OF THE NATIONAL INDUSTRIAL COURT.	170
<i>Mr T.C. Esq., B.SC, M.SC, LL.B, B.L, LL.M; Ag. Head, Department of Commercial & Property Law, ANSU, Igbariam.</i>	
A RE-EXAMINATION OF THE IMPACT OF THE DECISION OF THE SIERRA LEONE SPECIAL COURT IN PROSECUTOR V SAMUEL NORMAN ON AFRICA:	178
<i>Anwo, J. O., LL.B (Hons) ABU, B. L., LL.L. (Forte Hare, South Africa), Lecturer, Faculty of Law, Lagos State University, Ojo. Currently Senior Special Adviser to Osun State Governor on Legal Matters. & Arowolo, G. A. LL.B (Hons), Ife; B.L, LL.M. Lecturer, Faculty of Law, Lagos State University, Ojo.</i>	
A CRITICAL ANALYSIS OF GENDER AND RIGHTS PROBLEMS: THE IMPORT OF THE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AS DEVELOPMENT STRATEGIES.	191
<i>Ikpeze O. V. C. (Assoc. Professor of Law, Faculty of Law Unizik Awka)</i>	
EXTRA TERRITORIAL PROTECTION AND ENFORCEMENT OF INDIGENOUS FORMS OF KNOWLEDGE AND CHOICE OF LAW DILEMMA: AN AFRICAN PERSPECTIVE.	207
<i>Kur F. Ph.D., Lecturer, Department of Private and Public Law, Benue State University, Makurdi.</i>	
AN APPRAISAL OF THE GROUNDS FOR SETTING ASIDE AN ARBITRAL AWARD UNDER THE ARBITRATION AND CONCILIATION ACT.	222
<i>Abdulrauf Lukman Adebisi, (Lecturer University Of Ilorin)</i>	
THE IMPERATIVE OF AN ATTITUDINAL CHANGE ABOUT THE PRACTICE OF LAW IN NIGERIA: A CRITIQUE OF THE INTERDEPENDENCE OF ADR AND THE JUDICIARY.	233
<i>Ahmad B.A., (Ph.D (Malaysia), LL.M (Ife), BL (Abuja), Ibrahim T. A., LL.B. (UDUS), Lecturer, Faculty of Law, Unilorin & Bilikis Ayinla</i>	
LEGISLATIVE PRIVILEGES AND IMMUNITY IN NIGERIA,	245
<i>Paschal Onyi Oguno, Ph.D Senior Lecturer; Faculty of Law, Anambra State University, Igbariam Campus. & Chudi Charles Nwabachili, Ph.D, Senior Lecturer; Fac. of Law, Anambra State University, Igbariam Campus.</i>	

THE ROLE OF THE JUDGE – ADVOCATE IN COURT MARTIAL PROCEEDINGS: CASE COMMENT ON THE NIGERIAN ARMY V LT. PATRICK ODODO.	256
Dr. Emmanuel O. C. Obidimma, B.A., LL.B., B.L., LL.M., Ph.D., Senior Lecturer and Head of Department, Commercial & Property Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria. & Dr. Angela Ebele Obidimma, B.A., LL.B., B.L., LL.M., Ph.D., Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria.	
TOWARDS A FRICTION-FREE RELATIONSHIP BETWEEN THE EXECUTIVE AND LEGISLATURE.	262
Ibraheem Ojo Tajudeen, LL.B (Hons), B.L, LL.M (Ife) C.O.M, AMNIM, MBLAS, Notary Public, Acting Dean, Fac. of Law, Adekunle Ajasin University.	
ABORTION: VIOLATION OF THE REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN NIGERIA.	274
Umejiaku Nneka LL.M, Lecturer Fac. of Law Nnamdi Azikiwe University. & Nosike Onyeka, LL.B. B.L., Lectuer, Faculty of Law, UNIZIK.	
THE FRONT LOADING CONCEPT: AN APPRAISAL OF THE FUTURE OF CIVIL LITIGATION IN THE ANAMBRA STATE HIGH COURTS,	288
Igguh Amaka., LL.B, LL.M, Faculty of Law, Nnamdi Azikiwe University Awka	
THE CONCEPT OF THE RULE OF LAW IN NIGERIA: IMPLICATIONS FOR SUSTAINABLE DEVELOPMENT.	298
Dr. Kalu, Uwadineke, (Ph.D), Senior Lecturer, Faculty of Law, Nnamdi Azikiwe University Awka, Anambra State.	
FROM THE CASTLE DOCTRINE TO THE BATTERED WOMEN, THE FUNCTIONALITY OF NIGERIA LAW OF SELF DEFENCE.	328
Esa O. Onoja, BL (1991) Ph.D Lecturer, Department of Litigation, Nigerian Law School. Bwari-Abuja.	

AN APPRAISAL OF THE GROUNDS FOR SETTING ASIDE AN ARBITRAL AWARD UNDER THE ARBITRATION AND CONCILIATION ACT

Abstract

There is no doubt that arbitration is becoming one of the most efficient dispute resolution mechanism in contemporary time particularly in the commercial circle. Arbitration is a resolution of a dispute by a neutral third party in a judicial manner. The end result of arbitration is an award. An arbitral award even though expressed to be final and binding could be set aside on several well defined grounds some of which are specified in the Arbitration and Conciliation Act of 1988 (ACA). This paper appraises the various grounds for setting an arbitral award and in doing so these grounds are examined in a wider perspective, that is, beyond that provided in the ACA. The paper further makes comparison with similar provisions in arbitration laws of some selected jurisdictions so as to expose salient issues as regards grounds for setting aside an arbitral award. Finally, the legal effect of setting aside an arbitral award is considered.

Introduction

Arbitration awards are usually expressed as "final and binding and to be complied with without necessary delay"¹. Thus it is both legal and logical that having willingly chosen their arbitral tribunal and arbitrators, the parties should be bound by the decision reached by their chosen arbitrators.² An arbitral award is the outcome or result of an arbitral process. It is the decision of the arbitrators. It is a legal document which must contain enough information to enable the court, if necessary, to enforce it without further enquiry and for it to serve the purpose of *res judicata*³.

Thus once an arbitration award has been made, unless there is a good reason not to, the court would assist the enforcement of the award by permitting it to be converted into a judgment⁴. The principle underlying the doctrine of finality of an award are first, that the

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¹ C.J. Amasike, 'The Fundamentals and Overview of Commercial Arbitration in Nigeria', in Amasike C. J (ed) Arbitration and Alternative Dispute Resolution in Africa (The Regent, Abuja 2005) 25.

² Per Oredola JCA in Triana Ltd v. U.T.B. Plc (2009) 12 NWLR pt 1155 at 313 particularly at 343.

³ Fundamentals of Arbitration Law and Practice in Nigeria. Being a paper presented at the Professional Foundation Course on Alternative Dispute Resolution (ADR) organized by DCON Consulting in collaboration with Association of Professional Negotiators and Mediators, 2007.

⁴ A.S.Ogwuche, Compendium of laws under the Nigerian Legal System, (2nd ed, Maiyati Chambers 2008) 151.

parties have chosen their own judges whom they trust to judge fairly and justly and second, that the (arbitrators) will conduct the arbitration with fairness and regularity as the parties expect⁵.

However, in certain circumstance, the courts are forced to interfere in the arbitral process and set aside an award especially where a party can show that the arbitration has not been conducted with such fairness and regularity. The remedy of a dissatisfied party may be passive as where he waits until the other party tries to enforce the award and he can oppose it or active as where takes a positive step to set aside the award⁶.

It should be pointed out at this point that there is no right of appeal to the court on an arbitral award thus it is well established that there is no power of judicial review by the court to control arbitral proceedings however gross or unfair. Since the intention of the parties is that the award should be final, what the law permits is not an appeal but that in certain circumstance, the court on application by the party may intervene and set aside the award in the interest of justice⁷.

The object of this work is to examine the various grounds for challenge of an arbitral award and thus setting it aside under the Nigerian Arbitration and Conciliation Act (*hereinafter* ACA)⁸. In doing this, an explanation, if only briefly, is necessary for what is meant by 'challenging an arbitral award' and 'setting aside an arbitral award' before stating the several grounds for setting aside an award. This work will also examine the legal effect of an award that is set aside and finally possible defences to setting aside an award. In carrying out the above mentioned task, comparative analysis of provision of selected jurisdictions on setting aside an award will be made.

Challenge of an Arbitral Award and Setting Aside Arbitral Award

Setting aside an award is the power usually exercised by the court to invalidate or nullify an arbitral award because it has offended certain statutory or judicial requirements which will be elaborately discussed later in this work. Challenging an arbitral award is a party exercising his right of remedy for an award he feels erroneous or unjust. This invariably means challenging an award is the step by a party to get an award to be set aside. Challenging an award is usually a weapon a party relies on to have an award set aside.

Setting aside an award and challenging an award may sometimes be confused to be one and the same thing. This is especially so because both are based on the same grounds. However, it is submitted that both terms are not one and the same thing as challenging an award is the step taken by a party to have the award set aside.

It is further submitted that the act of challenging an award is usually an act exercised by the party to an arbitration agreement usually the losing party while setting aside an award is an act solely vested on the courts in the case of domestic arbitration or national court of the seat of arbitration in the case of international arbitration. This by parity of reasoning

⁵ J.O. Orojo J.O., & Ajomo M.A., *Law and Practice of Arbitration & Conciliation in Nigeria* (Mbeyi & Associates, Lagos. 1999) 269

⁶ M.J. Mustill., & S.C. Boyd *Commercial Arbitration* 2nd edition (Butterworths, London 1989) 546

⁷ Orojo J.O., & Ajomo M.A., *Law and practice of Arbitration & Conciliation in Nigeria* p275

⁸ Cap A18, Laws of the Federation of Nigeria 2004

implies that a party cannot *suo moto* have an award set aside without recourse to the court. Also, a court cannot set aside an award without the positive act of challenge by a party.

Of course, one of the natural consequences of a successful challenge of an arbitral award is having the award set aside. However, it is submitted that setting aside an award is not the only consequence of a successful challenge of an award. In some other cases, an award instead of being set aside could be remitted back to arbitration for the arbitrator to decide the matter again⁹. In this situation, the same arbitrators decide the matter and they do not have to start *de novo*. The object of remission is to return the award published to the arbitrator for an error to be corrected or for further information and a rightful decision to be given by the arbitrator¹⁰. This is unlike when an award is set aside where new arbitrators are appointed and the matter is started *de novo* in most cases¹¹. The legal effect of setting aside an award also fundamentally differs from remission. The effect of remission is that the award may be so altered that there is no more ground to set it aside¹².

Grounds for Setting Aside an Award

For a successful challenge of an arbitral award, a party will need to ascertain the grounds on which the challenge can be made under the law of the seat of arbitration¹³. In many countries, the grounds for such challenge are exhaustively stipulated within the countries arbitration legislation¹⁴. This is so especially for countries adopted the UNCITRAL Model law¹⁵. In other countries however, it is the courts that retains the inherent powers to oversee the arbitral process and thereby pronounce on several grounds for setting aside an arbitral award in their decision¹⁶.

In the countries that adopted the UNCITRAL model law, the sanctioned grounds of challenge will reflect those found in the New York Convention¹⁷. The grounds for challenge and thus setting aside an award fall into 4 main categories. 1. The jurisdictional grounds. 2. Breaches of natural justice. 3. Challenge on point of law and 4. Miscellaneous challenges¹⁸.

⁹ There is no general provision for remittance under the ACA however s29(3) may be used for similar purpose

¹⁰ F. Ajogwu, *Commercial Arbitration in Nigeria Law and practice* 166

¹¹ Ibid

¹² J.O. Orojo, & M.A. Ajomo *Law and practice of Arbitration & Conciliation in Nigeria* 273

¹³ A. Tweeddale & K. Tweeddale, *Arbitration of Commercial Disputes. International and English Law and Practice*, (Oxford University Press, London 2006) P379

¹⁴ Ibid

¹⁵ Example S.29, 30 and 48 of ACA 1988 and Article 1502 of the French New Code of Civil Procedure.

¹⁶ *Le Gros v. Housing Committee* 1974 JJ77, 86

¹⁷ A. Tweeddale & K. Tweeddale, *Arbitration of Commercial Disputes. International and English Law and Practice* 379

¹⁸ Article 42 of UNCITRAL Model Law on International Commercial Arbitration

The Arbitration and Conciliation Act (herein referred to as ACA) which invariably is also a derivative of the UNCITRAL Model law¹⁹ has provided for some specific grounds on which an award could be set aside. These grounds are contained in sections 29, 30 and 48. However, it is humbly submitted that these grounds are not as exhaustive as those provided for in the UNCITRAL model law. The issue then arises as to the enforceability of those grounds provided under the UNCITRAL model law but which are not contemplated by the ACA.

Different authors have different approach to the stating the grounds for setting aside an arbitral award²⁰. However, for the purpose of more clarity, the approach used by Tweeddale and Tweeddale, which followed the UNCITRAL style, will be adopted in this work²¹. In addition, more elaborate discussion will be made on the setting aside an award on the grounds of misconduct. This is not unconnected with the fact that it constitutes the main ground for challenge of an award and subsequent setting aside.

The Jurisdictional Grounds.

Like it is in litigation, jurisdictional issue is very fundamental in arbitration as it touches on the very essence of arbitration. Jurisdictional challenges focus on failures in the arbitral proceedings which results in the arbitral tribunal not having jurisdiction²². The grounds will be considered under the following subheads:-

a. Irregularity in the constitution of the arbitral tribunal

Arbitration agreement is mainly contractual thus the arbitral tribunal must be constituted in accordance with the agreement of the parties²³. If the arbitral tribunal is not constituted based on the agreement of the parties, it will lack jurisdiction to conduct proceedings or to make an award²⁴. This means it is a ground for setting aside an award. This ground is provided for under the UNCITRAL Model law. It has also been provided by the ACA. S48(a)(vi). The section provides that "*The court may set aside an arbitral award if the party making the application furnishes proof that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties*".

In some countries, the arbitral tribunal is vested with the powers to determine its own jurisdiction²⁵. However, in other countries, it is the courts with ultimate jurisdiction to determine issues relating to the jurisdiction of the arbitral tribunal. The court will usually

¹⁹ M.M.Akanbi, 'Nigeria's Commercial History-Quo Vadis Domestic Commercial Arbitration?' in *Current issues in Nigerian Jurisprudence* 44

²⁰ M.J.Mustill, & Boyd S.C. *Commercial Arbitration* 2nd edition Butterworths London 1989. P 546-570; Ajogwu F., *Commercial Arbitration in Nigeria Law and practice* 152-168; Orojo J.O., & Ajomo M.A., *Law and practice of Arbitration & Conciliation in Nigeria* 267-296.

²¹ A.Tweeddale. & K.Tweeddale., *Arbitration of Commercial Disputes. International and English Law and Practice*, 379

²² Ibid

²³ Ibid.

²⁴ Art 34(2)(a)(v) of the UNCITRAL Model Law. This article is related to Art 24 of the Model law thus a breach will lead to an award being set aside

²⁵ The concept of competence-competence provided for in s12 of ACA

examine *de novo the issue* and will not be bound by any findings made by the arbitral tribunal on the issue²⁶.

b. Capacity of the parties

Arbitration agreement is basically contractual in nature which means the conditions for the validity of a contract are also applicable under arbitration. The lack of capacity of a party to enter into the arbitration agreement may render the agreement void²⁷. If the arbitration agreement is void, then the tribunal lacks jurisdiction²⁸. However, most modern arbitration legislation favours arbitration and it is rare for an award to be successfully challenged solely on this ground²⁹. This ground has also been provided by the ACA in S48(a)(i). The act however failed to define or give examples of incapacity. It is humbly submitted that the incapacity under the ordinary rules of law of contract should be made applicable in this circumstance.

c. Irregularity in the conduct of the proceedings

Irregularity in the conduct of the proceedings that could lead to an award being set aside could be that of excess of jurisdiction or failure to address all issues referred to the arbitration.

Excess of jurisdiction occurs where the arbitral tribunal deals with issues to which it has not been referred³⁰. The UNCITRAL Model Law and the ACA provides that where the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, the award can be set aside³¹. An award is made in excess of jurisdiction if for example it grants reliefs or damages greater than that requested by the claimant. Orojo and Ajomo even went ahead to term this as an act of misconduct³². This is what is referred to as the principle of *ultra petita*³³.

The question could be asked that what if the decisions on matters submitted to arbitration can be neatly sifted from those not submitted? The ACA has provided that only that part of the award which contains decisions on matters not submitted to arbitration may be set aside³⁴.

²⁶ A. Tweeddale & K. Tweeddale, *Arbitration of Commercial Disputes. International and English Law and Practice* 379

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Art 34(2)(iii) of UNCITRAL model law and s29(2) & 48(a)(v) of the ACA

³² J.O. Orojo, & M.A. Ajomo, *Law and practice of Arbitration & Conciliation in Nigeria* p271 and 277

³³ Tweeddale A. & Tweeddale K., *Arbitration of Commercial Disputes. International and English Law and Practice* 379

³⁴ S48(a)(v) ACA

Failure to address all issues referred to arbitration has also been held to be a jurisdictional issue and thus may also be challenged and set aside³⁵. This is known as the principle of *infra petita*³⁶. Many countries adopt the approach that when the arbitral tribunal has given its final award, it is *functus officio*³⁷. Thus unless the national laws permit a party to apply to the tribunal for an amendment of the award, then there is no power to do so³⁸. This ground is neither provided under the UNCITRAL model law nor ACA. This may not be unconnected with the fact that most modern arbitration legislations will permit the parties to request additional awards from the arbitral tribunal where such matters have not been dealt with³⁹. It is submitted that the approach by the ACA is preferable as it is more in tandem with the basic philosophy of arbitration of ensuring speed and efficiency.

Another issue in this regard is the tribunal not addressing trifling or minimal ground based on the principle of *de minimis non curat lex*. It must be noted that an arbitral tribunal is not expected to address every argument put to it. The tribunal is expected to deal with issues put to it but not necessarily required to deal with each and every argument⁴⁰.

d. Arbitrability.

Not all kinds of disputes are arbitrable⁴¹. Where a dispute is not arbitrable based on the provisions of certain laws⁴², an award as a result of arbitration of such dispute is a ground for its challenge and thus setting aside. The issue of arbitrability may be linked to the subject matter of the dispute or the type of the contract. In *KSVDB v Fanz construction Ltd*⁴³ the Supreme Court, adopting the common law exposition held that the following categories of matters are not arbitrable: indictment of an offence of a public nature, disputes arising out of an illegal contract, disputes relating to change of status etc.

The ACA has also provided for setting aside an award on the ground of arbitrability. It provides that *...the court may set aside an arbitral award...if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria*

³⁵ J.O.Orojo ., & M.A.Ajomo ., *Law and practice of Arbitration & Conciliation in Nigeria* 271

³⁶ A.Tweeddale . & K.Tweeddale ., *Arbitration of Commercial Disputes. International and English Law and Practice* 383

³⁷ The English Arbitration Act 1996 in s68(2)(d) for example, provides that an award can be set aside where the arbitral tribunal fails to decide on all of the claims. The Swiss Private International Law Act (PILA) also has a similar provision in Art 190.2(c).

³⁸ Ibid.

³⁹ S28(5) ACA

⁴⁰ F.Ajogwu ., *Commercial Arbitration in Nigeria Law and practice* 166

⁴¹ M.M.Akanbi., 'Examining the Concept of Arbitrability under Nigerian Domestic Arbitration Laws' in *Nigerian Bar Journal* vol .3 No. 1 January 2005

⁴² Example s20 Admiralty Jurisdiction Act

⁴³ (1990) 4 NWLR 172

Breaches of Natural Justice.

The concept of Natural justice is at the very heart of the arbitral process and a breach of the concept will usually render an arbitral award void⁴⁴. The term 'natural justice' is synonymous with fair hearing, equality and lack of bias or impartiality. S14 of the ACA provides that "*in any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case*"⁴⁵

a. Human right legislations.

Every human right legislation like the Universal Declaration of Human right, International convention on Civil and Political Rights⁴⁶, African Charter on Human and People's Right⁴⁷ and even the Constitution of Federal Republic of Nigeria⁴⁸ provides that courts and tribunals ensure that everyone has a fair hearing in a public place.

The fundamental issue as regards arbitration is that parties usually want to take the advantage of the feature of privacy and confidentiality that goes with the arbitral process and thus agree to conduct their proceedings in private. This means that can an award be set aside because it was not conducted in public? It is submitted that an award will not be set aside on that basis because arbitral clauses creates an exception to the general rule that dispute must be resolved by way of public hearing. This view finds support in the in the European case of *Deweere v Belgium*⁴⁹ where the court stated that this exception 'which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the European Convention on Human Rights.

It is pertinent to note that parties can agree to exclude the right to a public hearing but they cannot exclude the right to fair hearing⁵⁰.

b. Bias and impartiality

The award of a bias and impartial tribunal is capable of being challenged and thus set aside. Arbitral tribunals are not entitled to make an award based on their own knowledge without giving the parties an opportunity to present their case. The natural consequence of an award which violates this principle is that it will be set aside if challenged.

⁴⁴ A.Tweeddale & K.Tweeddale, *Arbitration of Commercial Disputes. International and English Law and Practice* 385

⁴⁵ See Also Article 18 and 34 of the UNCITRAL Model law

⁴⁶ Art 11

⁴⁷ Art

⁴⁸ S36

⁴⁹ Application No 6903/75 in twee 385

⁵⁰ A.Tweeddale & K.Tweeddale, *Arbitration of Commercial Disputes. International and English Law and Practice* p385

Miscellaneous challenges

Arbitration laws usually make provisions for challenging an award. These grounds may be limited or extremely broad⁵¹. The grounds for challenge may range from errors in the form of the award to matters of public policy. In some instances, parties will be able to exclude the relevant provisions, however, in most other cases, the requirement form part of the mandatory laws of a country.

a. Public policy

An author states that public policy can never be exhaustively defined⁵². Public policy concerns the body of principles that underpin the operation of legal system in each state⁵³. For an award to be set aside on the grounds of public policy, a party needs to show that there is some element of illegality or that the enforcement of the award would be clearly injurious to public good or possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised⁵⁴. Examples of public policy issues are such as whether a gambling contract can be enforced, whether an agreement based on an illegality is enforceable and agreement ousting the jurisdiction of the court. In the case of *KlifcoNig Ltd v NNPC*⁵⁵ Oguntade JSC stated that a provision in a reference completely ousting the jurisdiction of the court will be illegal and void as contrary to public policy and thus entitle to be set aside.

b. Contradictory decisions

An award must be unambiguous and clear. If an award is unclear and ambiguous, it is capable of being challenged and consequently set aside. Where an award contains contradictory decisions then a court has discretion whether to remit the award to the arbitral tribunal or set it aside. In most cases, the court will consider the extent of the inconsistency or uncertainty in the award⁵⁶. This ground is a very important one which makes one wonder why the drafters of the ACA failed to include it in the provisions of the act.

c. Time limit for making an award

Some arbitration laws or rules of arbitration agreed by the parties may specify a time limit under which the arbitral tribunal must make its award⁵⁷. If the parties have agreed that certain rules which stipulate a time period for making an award or have agreed between themselves a period, then the arbitral tribunal is bound by such agreement a violation of which could lead to an award being set aside. Under the English Arbitration Act, the

⁵¹ A. Tweeddale . & K. Tweeddale ., *Arbitration of Commercial Disputes. International and English Law and Practice* 392

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ (2007) 11 NWLR (pt 1045) n 385

⁵⁶ 394

⁵⁷ Example under Art 24 of the ICC rules of arbitration, the tribunal has 6 months to make an award from the last date of signature of the terms of Reference.

tribunal is required to conduct the proceedings in accordance with the agreement of the parties⁵⁸. There is no provision on time limit neither in the ACA or the Arbitration rule. It is submitted that this is a lapse because one of the reason why parties resort to arbitration is the speedy dispensation of justice.

Setting Aside on the Grounds of Misconduct

These grounds constitutes the major ground for setting aside an award and that is why it is singled out and treated separately. According to Orojo and Ajomo, this ground has also been seriously abused by lawyers in Nigerian whose clients lose out in an arbitration to rush to court to apply to set aside the award on the specious ground of the misconduct of the arbitrator⁵⁹. The learned author further states that this practice is often merely aimed at delaying the finality of the award, thus destroying one of the most important advantages of the arbitration process⁶⁰.

The ACA did not define what amounts to misconduct⁶¹ however, it has been said⁶² that one of the most helpful definition of "misconduct" in this context is that of Atkin J. in *William v. Wallis & Cox*⁶³ where he said misconduct is "...such a mishandling of the arbitration as is likely to amount to substantial miscarriage of justice"⁶⁴. The Supreme Court in the case of *Taylor Woodrow (Nig) Ltd. V. S.E.GMBH*⁶⁵ considered what amounts to act of misconduct by an arbitrator that will warrant an award to be set aside. Since, there acts that amounts to misconduct was not stated in the ACA, the court fell back the common law. In falling back on the common law, the court quoted with approval the statement of the law in Paragraph 622 of Volume 2 of the 4th Edition of the Halsbury's law of England⁶⁶. The examples listed by the authors after stating that not every irregularity of procedure amounts to misconduct are.

1. If the arbitrator or umpire fails to decide all matters which were referred to him.
2. If by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference.
3. If the award is inconsistent, or uncertain, or is ambiguous or even if there is some mistake of fact, although in that case, the mistake must be either admitted or at least beyond reasonable doubt.

⁵⁸ S68(2)(c) of the English Arbitration Act

⁵⁹ J.O.Orojo, & M.A.Ajomo, *Law and Practice of Arbitration & Conciliation in Nigeria* 274

⁶⁰ Ibid., at 275

⁶¹ S30 ACA

⁶² M.J..Mustill & S.C. Boyd *Commercial Arbitration* p.550.

⁶³ (1914) 2 K.B. 497 at p.485

⁶⁴ S68 of the U.K Arbitration Act, 1996 uses the term "serious irregularity affecting the tribunal, the proceedings or the award" instead of "misconduct". Subsection 2 sets out a list of kinds of irregularity that can justify the setting aside of an award.

⁶⁵ (1993) NWLR 127; (1993) N.S.C.C 415

⁶⁶ J.O.Orojo, & M.A.Ajomo, *Law and Practice of Arbitration & Conciliation in Nigeria* p.276

4. If there has been irregularity in the proceedings e.g. where the arbitrator failed to give the parties notice of time and place of the meeting or where the arbitrators refused to hear evidence of a material witness
5. If the arbitrator or umpire has failed to act fairly towards both parties
6. If the arbitrator or umpire refuses to state a case himself
7. If the arbitrator or umpire delegates any part of his authority
8. If the arbitrator or umpire accepts the hospitality of one of the parties being hospitality offered with the intention of influencing his decision.
9. If the arbitrator or umpire acquires an interest in the matter of reference or is otherwise an interested party.
10. If the arbitrator or umpire takes a bribe from either of the party.

The following have however been held not to constitute misconduct: inadequate evidence, error of fact, error of law, delay of the arbitrator misunderstanding submission of a counsel⁶⁷.

The legal issue as regard setting aside of an award on the grounds of misconduct is that what criteria will the courts in Nigeria use to determine acts of misconduct since acts of misconduct has not been provided in the ACA. It is submitted that the court will have recourse to the principles of common law since they still form part of the corpus of Nigerian jurisprudence.

Legal Effect of Setting Aside an Arbitral Award

According to Mustill and Boyd, Where an award or part of an award is set aside by the court, the order of the court not only annuls the award but also disposes of the reference so that the whole arbitral process has to be recommenced. The learned authors', further state that the effect of such award which is set aside is that it has no legal effect so that the position is the same as if the award had never been made. This consequently means that no court will enforce such award.

As regards the faith of the arbitration itself, Orojo and Ajomo are of the view that it will depend on the grounds for which the award is set aside⁶⁸. Thus if the award is set aside on a ground which fundamentally affects the validity of the arbitration agreement so as to render the agreement null and void, the arbitration cannot neither be recommenced and then losing party cannot litigate. If on the other hand, the award was set aside for procedural defect, then the arbitration agreement subsist and remains effective and thus the agreement can be resubmitted to arbitration⁶⁹.

Defences to an Application for Setting Aside an Award

Quite a number of defences are available to an application to have an award set aside. One of such defenses is an agreement to oust the jurisdiction of the court. In some countries, parties are permitted to oust completely the jurisdiction of the court to set aside an award in certain instances⁷⁰. This is however not a defence in Nigeria. Another defence is where a party has acted in a way that is inconsistent with the challenge that it

⁶⁷ Ibid at 285

⁶⁸ J.O. Orojo, & M.A. Ajomo, *Law and Practice of Arbitration & Conciliation in Nigeria* 290

⁶⁹ Ibid

⁷⁰ Article 1717(2) of the Code of Judicature of 19 May 1998 of Belgium.

subsequently makes. This is the defence of waiver and estoppel. Also, the party seeking to set aside the award may not be able to make out all the grounds that justify the setting aside⁷¹. Furthermore, there may also be procedural defences such as breach of time for application to set aside an award⁷² and the requirement to exhaust all remedies prior to applying to set aside an award and finally, it may sometimes be the case that although a technical procedural breach has occurred the breach is considered to be *de minimis* not substantial.

Conclusion

This paper has examined the various grounds for challenge of an arbitral award and thus setting it aside under the ACA. An exposition of what is meant by 'challenging an arbitral award' and 'setting aside an arbitral award' was done so as to bring about greater clarity in our submissions. The grounds of setting aside an award under the ACA was also examined by a little bit of criticisms and comparative analysis with the provision of arbitration laws in other jurisdictions. This work also examined the legal effect of an award that is set aside and finally possible defences to setting aside an award.

The paper has highlighted the fact that the Nigerian arbitration law is not exhaustive enough its provisions on grounds for setting aside an award. It is finally submitted that it is left for the court to interpret the provisions broadly and in certain circumstances borrow from the provisions of arbitration laws in other jurisdictions.

⁷¹J.O.Orojo, & M.A.Ajomo, *Law and Practice of Arbitration & Conciliation in Nigeria* p.290

⁷² S28 ACA for example provides that an application for setting aside an award must be made within 3 months either from the date of the award or, where an additional award has been made by way of correction or interpretation under s28, within 3 months of the date when the request for additional award was disposed by the arbitral tribunal.