Arbitration, in one form or another has been with mankind from the beginning of time. One can say it has primordial origin. Learned Authors, Redfern and Hunter posit that in its origins, the concept of arbitration as a method of resolving disputes was simple:

“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 dispute want to settle them with less formality and expense than is involved in a recourse to the courts.”

Another distinguished French writer has described arbitration as an “apparently rudimentary method of settling disputes, since it consists of submitting to ordinary individuals whose only qualification is that of being chosen by the parties”. Rt. Hon. Lord Mustill notes that it is not difficult to visualize the rudimentary nature of the arbitral process in its early history. Two traders, in dispute over the price or quality of goods delivered, would turn to a third whom they trusted for his decision; or two merchants, arguing over damaged merchandise would settle their dispute by accepting the judgment of a fellow merchant;

“Commercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken so many forms, with mediation no doubt merging into adjudication. The story is now lost forever. Even for historical times it is impossible to piece together the details, as will readily be understood by anyone who nowadays attempts to obtain reliable statistics on the current incidence and varieties of arbitrations. Private dispute resolution has always been resolution private.”

The concept of Arbitration in recent time has become quite phenomenal. It has lost its early simplicity. It has assumed a form and character different from what it was normatively conceived to be. As the successive institution of dispute resolution, litigation becomes more complex, more legalistic and more institutionalized, just like the very human affairs it seeks to resolve. Despite the foregoing, the modern day arbitral process has not lost its essence. The fundamentals of two or more parties, whether in anticipation of dispute or already in dispute, agreeing to nominate another private person to resolve the issues between them by arriving at a decision, are still present. That private person is called an arbitrator. In the present day arbitral process, an arbitral panel will consist of one or more arbitrators (more often than not, three arbitrators) nominated for or on behalf of the parties. The task before the arbitral panel is to evaluate the evidence and the argument of the parties and then to arrive at a decision on the dispute. This decision is given in writing, in the form of an award.

Arbitration readily comes to the rescue on account of its simplicity as an alternative tool of dispute resolution. Of course, there are other modes of dispute resolution, which are: Negotiation, Mediation and Conciliation. Collectively, all the Alternative Dispute Resolution (ADR) methods are alternatives to litigation. An inquiry into the gradual

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1 Akpata Ephraim, “The Nigerian Arbitration Law in Focus” (1997), p. 1
3 Ibid. See also Fouchard, L’Arbitrage Commercial International (1965), pp. 1, 30 and 31 (translation by the authors)
4 Ibid. See also Mustill, “History and Background” (1989) 6 Journal of International Arbitration p.43
development of ADR methods as another window in the sphere of dispute resolution would reveal the following:

a. That the process of litigation has become more and more time consuming, expensive and unduly cumbersome because of the considerable rise in the number of cases in our courts;

b. That the commercial men and women would prefer a situation where their differences are settled in a friendly, congenial and business-like atmosphere;

c. That commercial men and women would prefer a situation where the matter in dispute is resolved by persons who are experienced and knowledgeable in the particular subject matter of the dispute and that those and more are lacking in court;

d. That some disputes are sensitive and of confidential nature and so disputants would wish to settle them in a private rather than in the glare of public proceedings in a court of law.

Distinct in classification is domestic arbitration from international arbitration. International arbitrations take place within a complex and vitally important international legal framework. Contemporary international conventions, national arbitration legislation, and institutional arbitration rules provide a specialized and highly supportive enforcement regime for most international commercial arbitrations and international investment arbitrations.

Recently, the practice of arbitration as means of settlement is gaining grounds not only among the lawyers, but among other professional such as Accountants, Insurance practitioners, Architects, Quantity Surveyors, Engineers, etc. Moreover arbitration is now a fertile area of practice for retired judges, diplomats, professors and indeed academicians;

The aim of this paper is to examine the practice of arbitration by the various practitioners in this paper referred to generally as arbitration-its essentials and efficacy as a method of dispute resolution, its history in Nigeria, Sources of Nigerian Arbitration Law, Types, Why Arbitration? Advantages and Disadvantages, Applicability of Evidence Act, Enforceability of Awards in Nigeria, Practical Challenges on the Issues of Arbitration, Cost of Arbitration and Time in Arbitration. The various positive and negative attributes of the practice of arbitration as will be highlighted in this discourse in respect of the various subheads will in this end determine whether as a tool for Alternative Dispute Resolution, this tool is still relevant.

WHAT IS ARBITRATION?

The word Arbitration is often wrongly used more often than not it is familiarly used with regards to labour and employment disputes. It is used at times by government officials, officials of labour union, politicians and the press to describe the reference of a labour dispute by both employers and labour unions to a third party neutral (not being a judicial officer) for intervention. It is trite to say that such a procedure is not, truly speaking, an arbitration in the absence of an agreement between the parties.

The starting point of an understanding of the meaning of “Arbitration” is perhaps the definition given by our existing local legislation on the matter.

Arbitration and Conciliation Act, CAP 18, LFN 2004 is the main Nigerian statute dealing with arbitration. According to its long title, it is an Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation, and to make applicable the Convention on the Recognition and Enforcement of Foreign Awards (New York Convention) to any award made in Nigeria or in any contracting state arising out of international commercial arbitration. This principal legislation was first enacted in 1988. In its interpretation section, Section 57 of the Arbitration and

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6 ibid

7 This principal legislation was first enacted in 1988
Conciliation Act defines ‘Arbitration’ to mean

“A commercial Arbitration whether or not administered by a permanent arbitral institution.”

This definition does not appear helpful. It only begs the question and leaves us with no answer as to what arbitration means. It is restrictive in that it applies to the settlement of commercial disputes only. However, Stroud’s judicial dictionary relying on Romilly M.R states that:

“An Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties.”

Again Halsbury’s laws of England, defines Arbitration as follows:

“An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than in court of competent jurisdiction.”

A person or persons to whom a reference to arbitration is made is called an arbitrator or arbitrators, as the case may be. His or their decision is called an award. One or more arbitrators may be constituted into an Arbitral Tribunal. The decision of such a tribunal is also called an Award.

HISTORY OF ARBITRATION IN NIGERIA

The concept of arbitration is not new in Nigeria. Arbitration and other alternative dispute resolution methods were used to resolve conflicts. Extra-judicial settlement of dispute has always been a feature of our indigenous customary law. Such settlements are accepted and enforced by the courts, provided they satisfy certain requirements. Every community in what has become the Federal Republic of Nigeria evolved their own extra judicial method of dispute resolution, with similarity in formula and process.

According to Akpata, JSC (of blessed memory), he posits: “It is not hazardous a guess, but being factual to say that the Anglo-saxons, the Romans and indeed every community that lived ‘under the sun’ in ancient times used arbitration or mediation or conciliation, in one form or another to, to resolve disputes. As stated by Holdsworth, “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 dispute want to settle them with less formality and expense than is involved in a recourse to the courts.”

However, with the advent of Colonialism by the British and the subsequent amalgamation of southern Nigeria and Northern Nigeria in 1914, Nigeria became a part of the British Empire and subject of the English legal system. The first formal statute on arbitration was promulgated for the entire country on 31st December, 1914, that is, the Arbitration Ordinance 1914 based on the English Arbitration Act 1889. Subsequently, the Ordinance was re-enacted as the Arbitration Ordinance (Act), Laws of the Federation of Nigeria and Lagos, 1958. This enactment were also adopted and formally incorporated by the four Regions comprising Nigeria at the time, namely: Northern, Western Eastern and the Southern Cameroons Region. Note that the Arbitration Ordinance (Act) 1958 provided only for local or domestic arbitration.

It wasn’t until the enactment of the Arbitration and Conciliation Decree, 1988 (which came into effect on 14th March), that Nigeria adopted the Convention on the recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the “New York Convention” relating to international commercial arbitration. It is pertinent to note at this juncture that Nigeria had adopted the New York Convention before the 1988 Act and enforcement of

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9 Ezejiofor, ibid p. 15
10 Ibid.
11 Ibid pp. 2-3
foreign arbitral award in an international arbitration made outside of Nigeria was only possible by the provisions of the Foreign Judgment (Reciprocal Enforcement) Act Laws of the Federation of Nigeria No. 31 of 1960, provided, amongst other things it was registered in a High Court in Nigeria.

Surprisingly, though the enactment of the Arbitration and Conciliation Act 1988 was late in coming, it is also eminent to note that a number of Nigerian companies and prominent legal practitioners have cut their teeth in both domestic and international commercial arbitration outside Nigeria. Arbitration practice and other alternative dispute resolution methods today is vibrant in Nigeria and has culminated in the establishment of several professional bodies i.e. the Chartered Institute of Arbitrators (Nigeria), Association of Professional Negotiators and Mediators. There is also the presence of several dispute resolution institutions with thriving patronage. For example, the Abuja Multi-Door Court is one of such.

DISPUTES THAT CAN BE REFERRED TO ARBITRATION

Not every dispute or difference can be referred to arbitration. Professor Ezejiofor succinctly encapsulated this fact, thus: "Disputes that can be referred must be justiciable issues which can be tried as civil matters. They must be disputed that can be compromised by way of accord and satisfaction. These include all matters in dispute about any real or personal property, disputes as to whether contract has been breached by either party thereto, or whether one or both parties have been discharged from further performance thereof. Terms of a deed of separation between husband and wife can be settled by arbitration. Since compromise by either spouse of suits for dissolution of marriage and other matrimonial actions are held not to be contrary to public policy or good morals, such references to arbitration have been held good. Issues in an action before a court can, if the parties agree, and with leave of the court, be referred. Specific questions of law, such as the construction of a document, may be referred to arbitration. On the other hand disputes arising out of illegal transactions cannot be referred. Thus, a difference relating to a contract which is illegal for being inconsistent with a government order cannot be referred. An award arising from such reference cannot be enforced and may be set aside. Disputes arising out of void transactions such as wagering and gaming contracts, cannot be referred. An indictment for an offence of public nature cannot be referred. It is a settled policy of the law that an arbitrator should not be empowered to settle a criminal charge which is a matter of public concern."

Elements of an arbitration agreement include:

AGREEMENT TO ARBITRATE

It is the foundation stone of every arbitration. The arbitration agreement is at the basis of every arbitration: it is pertinent to note that the arbitral tribunal's jurisdiction is derived solely from existence and validity of the agreement of the parties. If there is to be a valid arbitration, there must first be a valid agreement to arbitrate. The arbitration agreement is a private agreement whereby two or more parties agree that a dispute in connection with a particular legal relationship will be finally settled by one or more arbitrators. The arbitration agreement is proof that the parties have consented to resolve their dispute by arbitration and to remove their dispute from a state court system. Capacity to enter into an agreement to arbitrate is also co-extensive with the capacity to contract. Consequently, every person who is capable of entering into a contract may be a party to an arbitration agreement. Conversely, a person who has no capacity to contract cannot enter into an arbitration agreement and where capacity is qualified, the power to enter into an arbitration agreement is qualified to the same extent. For example, an arbitration agreement made by an infant binds him only if it relates to the supply of necessaries or to a reasonable contract of service, or otherwise for his benefit. Agreement to arbitrate may be contained in a clause in the original contract or maybe by a

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13 Ibid, p.4
15 Ibid, p. 2
16 Ezejiofor supra
17 Ibid.
separate agreement entered into by parties.

Critical also to any arbitration clause is its scope, i.e. the categories of disputes or claims that will be subject to arbitration. Parties may agree to define the scope of the dispute as may arise out of the legal relationship between them. There are a handful of formulae that are frequently used to define the scope of arbitration clauses. There formulae include "any" or "all" disputes: (i) "arising under this agreement"; (ii) "arising out of this agreement"; (iii) in connection with this agreement"; and "relating to this agreement." Alternative formulations are also used including: (v) all disputes relating to this agreement, including any question regarding its existence, validity, breach, expiration; or (vi) "all disputes relating to this Agreement or the subject matter hereof.

Customary law arbitration is distinctive. Agreement to arbitrate is usually oral and its proceedings and decisions are not normally recorded in writing. Because of these factors, customary arbitration is not regulated by the Arbitration and Conciliation Act, which also dealt with written agreement to arbitrate. It was also not regulated by the repealed arbitration Act, which also dealt only with written agreements. It is, however, still popular among people in the villages and recognized by courts. If there is a disagreement as to whether there is in fact a properly constituted arbitration between the parties, the court makes a specific finding of fact on the question.

According to the West African Court of Appeal:

...Where matters in dispute between parties are, by mutual consent, investigated by arbitrators at a meeting held in accordance with native law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce such decision.

However, a decision or an award of a customary arbitration is not a judgment of a court of law. Consequently, it has no force of law and therefore cannot be enforced like such a judgment until it is pronounced upon by a competent court. But the court will not make such an approving pronouncement unless the award is specifically pleaded and proved in the proceeding before it, involving the parties to the arbitration, or their privies, when this is done, the award may be accepted as creating an estoppels by way of res judicata, provided that the person or body that conducted the arbitration is a judicial tribunal which hands down judicial decisions. For instance, in Ofomata & ors v Anoka & ors, supra, there was a dispute between the plaintiffs' and the defendants over a piece of land. The parties agreed that the elders of the village should settle the dispute by arbitration. The arbitrators took evidence from both parties, found that the land belonged to the plaintiffs and decided that if the defendants were not satisfied with the finding they should produce an oath to be sworn by some members of the plaintiff's family. No oath was agreed. It was held that the award was not final because it was conditional on the swearing of an oath, which might not take place. According to the court, the proper line of action would have been for the arbitrators to adjourn the award until the oath was sworn, the arbitrators should have supervised the oath swearing ceremony.

The above case can be contrasted with the case of Njoku v Nkeocha & ors. The plaintiff sued the defendants claiming title to two pieces of land, damages for trespass and injunction against further trespass. Evidence before the court revealed that the plaintiff's father had, some years earlier, claimed to be the owner of the lands, which he alleged were pledged to the defendants' father, who was then dead. The parties then mutually agreed to submit the dispute to arbitration before the elders, the amalas, and to be bound by their decision. The elders examined the case and came to the conclusion that the lands belonged to the defendants', but directed that if the plaintiff's father was not satisfied he would produce an oath to be

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18 Gary B. Born supra, p. 76
19 Ibid, p. 76
20 Ezejiorfor ibid p. 22. See also Ofomata & Ors v. Anoka & Ors (1974) 4 E.C.S.L.R. 251
21 Assampong v. Amuaku (1932) 1 W.A.C.A. 192 at p. 192 at p. 196
22 Ezejiofor, ibid p. 22
23 (1972) 2 E.C.S.L.R. 199
sworn by the defendants. If they did not die within one year after
the swearing, the lands would belong to the defendants, but if they
both died within the year, the lands would be lost to them in favour
of the plaintiff’s father. This decision was accepted by the parties.
The oath was produced and sworn as agreed and the defendants did
not die within the year. The plaintiff’s father accepted the decision
and no longer disputed the defendants’ ownership of the lands. On
his death, the plaintiff commenced the action, claiming the lands
all over again. It was held that the plaintiff, just like his father, was
bound by the decision of the arbitrators and was therefore enstopped
from reopening the case.

Customary law arbitration is also very fluid and gives the court a lot
of latitude and room to maneuver when dealing with these matters.
This of course presents its own challenges as well as the courts will
have to deal with each case as the circumstances presents and as
arbitration is not predicated on any clear rules of procedure.

PERSONS BOUND BY THE AGREEMENT

Only persons, natural and corporate, who are parties to the arbitration
agreement. Where the subject matter of reference is assignable,
such as where it is not of a personal nature, the assignee of the
party is bound.24 note that a third party to the arbitration agreement
cannot be joined in an arbitration proceedings. Death of party may
not terminate the arbitration agreement, as it can be enforce against
the assigns or privies of the deceased except where subject matter
of the dispute is dissipated as a result of death of the party e.g.
where cause of action arose from tort. In this case, the jurisdiction
of the arbitrator or arbitral tribunal is extinguished by the fact of
death of a party.

SEAT OR PLACE OF ARBITRATION

The designation of the place or seat of arbitration is a very important
aspect of the agreement to arbitrate, especially in international
arbitration. It is the parties’ prerogative to choose for themselves the
lex situs of the arbitration either in an arbitration agreement or after
dispute has arisen.25 Its significance is, however, less emphasized
in domestic arbitration. This specifies the legal or juridical seat i.e.
the physical or geographical location where the arbitral tribunal will
seat, hear and render the award in arbitration. There are a number
of legal and practical consequences that follow from selection of an
arbitral seat, making this one of the most important aspects of any
international arbitration agreement.26 In determining the place of
award, parties must bear in mind the mandatory provisions of the
procedural law of the country to be chosen. This is because if the
award is to be valid the primary interest of the tribunal is to take
into consideration the procedural law of the place to be chosen
which it must adhere to, to ensure the enforceability of the award
in accordance with international conventions on the enforcement
of award.27 It must again be pointed out however that to ensure
that the award will be enforceable at law, the mandatory rules of
national law applicable to international arbitrations in the country
where the arbitration takes place must be observed, even if other
rules of procedure are chosen by the parties or by the arbitrator.
One must emphasize that the rules applicable to the proceedings are
distinct from the law applicable to the merits of the case.28 Some
jurisdictions have proved themselves to be unsuitable for problems
ranging from local laws putting unusual stringent formal requirements
on the arbitration agreement, Municipal law excluding foreign lawyers
or submitting them to cumbersome requirements such as visa or
work permit, etc. Parties may decide to leave it to the choice of
the arbitrators or the arbitral institution such as the International
Chamber of Commerce (ICC) Court of Arbitration, etc.

LANGUAGE OF THE ARBITRATION

It is significant in arbitration agreements to specify the language of
the arbitral proceeding and the award. This is the language in which the arbitral proceedings is to be conducted. Although sometimes overlooked, this is a point of vital importance, which can have a profound practical effect on the selection of the arbitrators and the character of the arbitral proceedings, particularly, in international arbitration, where the contract is in another language; or the arbitrators prefer a particular language different from the choice of the parties. Where parties fail to specify the language of the arbitration, arbitral institutional rules and national statutes usually provide for power of arbitral tribunal to choose any language of the arbitration. For example, the 2010 UNCITRAL Rules, Art 19; Art. 19, ICC RULES.

**APPLICABLE LAW IN ARBITRATION**

It is appropriate for the parties to a contract involving a foreign element to insert in their contract a "choice of law" clause, specifying the "proper law" of the contract, i.e. the system of law by which the parties intend the contract to be governed. This is the substantive law governing the subject matter of the contract and necessarily, the dispute. Arbitration agreements are universally regarded as presumptively "separable" from the underlying contract in which they appear. One consequence of this is that the parties’ arbitration agreement may be governed by a different national law than that applicable to the underlying contract. This can occur by the parties’ express choice of law or by the application of conflict-of-law rules (which may select different substantive laws for the parties’ arbitration agreement and their underlying contract). Alternatives to the Law governing an arbitration agreement are: (a) the law chosen by the parties to govern the arbitration; (b) the law of the arbitral seat; (c) the law governing the parties’ underlying contract; and (d) international principles. Arbitral proceedings are subject to legal rules governing both internal procedural matters and external relations between the arbitration and national courts. In most instances, the law governing the arbitral proceedings is the arbitration statute of the arbitral seat or the institution hosting the arbitration. E.g. ICC Rules, UNCITRAL Rules LCIA rules etc. Such procedural matters include appointment and qualification of arbitrators, fees, hearing, timelines etc.

**SOURCES OF ARBITRATION LAW IN NIGERIA**

The primary sources of the Nigerian law of Arbitration are the English common law, the Nigeria customary law and Nigerian statutes. The English common law and the doctrines of equity, together with English statutes of general application, were received into the country by the local legislations during the period of the colonial administration of the country. Although the continued reception of English statutes of general application into our legal system has ceased by virtue of our Nigerian legislations, English common law and doctrines of equity are still very much enforced in Nigeria. By extension, English common law principles of arbitration are applicable and form part of Nigerian law of arbitration. The Arbitration and Conciliation Act, 1988 is the principal Act regulating the practice of Arbitration in Nigeria. It is also instructive to note that it is the New York Convention, UNCITRAL Arbitration Rules and the UNCITRAL Model law that influenced the statute and practice of arbitration in Nigeria. Also, Decisions of English Courts and other similar jurisdictions on the provisions of arbitration statutes and law which are in pari material with the Arbitration and Conciliation Act, 1988 have continued to have great persuasive influence on our courts.

**TYPES OF ARBITRATION IN NIGERIA:**

Professor Ajomo differentiated arbitration in to four categories.

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29 Gary B. Born, ibid p. 79
31 Gary B. Born, ibid p. 81
32 Ibid
33 Ezejiofor, ibid pp. 15
34 Ibid
These are:

♦ Domestic
♦ International
♦ Institutional and
♦ Ad hoc. There is also what may be described as documents only arbitration.

**Domestic Arbitration** – is one between persons resident or doing business is the same country and the contract is subject to be performed in the same country and subject to the local statute. E.g. Arbitration and Conciliation Act, 1988.

**International arbitration** – arbitration is said to be international if the parties to an arbitration agreement have their places of business in different countries or where the subject matter of the arbitration agreement relates to more than one country or where the parties expressly agree that any dispute arising from the commercial transaction between them shall be treated as an international arbitration.

**Institutional arbitration** – international arbitrations may either be institutional or ad hoc. A number of organizations, located in different countries, provide institutional arbitration services, often tailored to particular commercial needs. The parties provide in their contract for the arbitration to be conducted in accordance with the rules of a named arbitration agency or institution such as the Permanent Court of Arbitration of the Peace Palace, Hague (which the Nigerian Act has designated as the Appointing Authority for International Arbitration in Nigeria in the absence of any express agreement to refer to any other Appointing Authority). International Chamber of Commerce (ICC) International Court of Arbitration in Paris, The London Court of International Arbitration (LCIA), the American Arbitration Association, the Stockholm Chamber of Commerce, the Asia-African Legal consultative committee (AALCC) and the Regional centre’s for arbitration in Kuala Lumpur, Cairo and Lagos. Also, locally, we have the Abuja Multi-Door Courthouse etc. There are also a number of regional or national arbitral institutions dealing with industry-specific matters (e.g. insurance or commodities or investment disputes etc. the International Centre for the Settlement of Investment Disputes “ICSID”. It is important that the institution does not by themselves arbitrate on the merits of the parties’ disputes. This is the responsibility of the particular individuals selected as arbitrators. Arbitrators are virtually never employees of arbitral institutions, but, instead are private persons selected by the parties. It is only where parties cannot agree upon an arbitrator, most institutional rules provide that the host institution will act as an “appointing authority” which chooses the arbitrators in the absence of the parties’ agreement.

**Ad hoc arbitration** – this arises where the parties in their contract agreement do not refer to arbitration under any rules of commercial arbitration administering agency or institution, but is entered into after a dispute has arisen. It is usually more flexible, less expensive (as it avoids substantial institutional costs) and more confidential than institutional arbitration. The parties to this type of arbitration usually establish their own rules of procedure that may be made to fit the facts of the dispute between them as the dispute arises. A lot of disputes referred for arbitration in Nigeria are ad hoc arbitration.

**Document only arbitration** – this type of arbitration is one in which the arbitrator or panel of arbitrators depend solely on the documents presented by the parties in resolving the dispute between advisers nor any oral submission or presentation is made. An important attraction of this type of arbitration is that it saves both time and money. Commodity agreements, construction contracts and consumer disputes are more suited for document only arbitration. It should be noted, however, that indeed any of the previously stated types of arbitration may be subject to “Documents only” arbitration.

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35 Orojo & Ajomo, “Law and Practice of Arbitration and Conciliation in Nigeria
36 Gary B. Born ibid, p. 64
37 See Part III of the Act.
38 Gary B. Born ibid, p. 65
Thus, strictly speaking” documents only” arbitration may not be regarded as a separate hybrid of arbitration as such.

Why Arbitration?

The question which is often asked is, why do parties, particularly in the business world, sometimes prefer arbitration to litigation in the ordinary courts of the land? These include the following:

1. Arbitration can be quicker than litigation. A court action involves conformity with laid down procedures, which cannot be circumvented by the parties and this takes time. Arbitration on the other hand, does not have to follow any laid down procedure.

2. Arbitration can be less expensive than litigation. Parties to court proceedings usually retain counsel who normally charges high fees. Moreover because litigation lasts longer it involves more costs to the parties. If a dispute is of a technical nature and a technically qualified arbitrator is appointed, he can conduct the arbitration effectively and quickly, without the involvement of lawyers. This saves cost, particularly if the parties agree that the dispute is to be settled on document, without a hearing. This expectation may now be a mirage as the practical reality on ground now indicates that arbitration has almost become an expensive financial enterprise.

3. Arbitration process permits some disputes to be resolved on document without a hearing. The procedure saves time and money.

4. Parties can represent themselves in arbitral proceedings. They can alternatively be represented by other persons of their choice, who may, or may not be lawyers. In contracts, non-lawyers have no right of audience in the court of law and representation therein is only by lawyers.

5. A party to a contract may not wish to be exposed to the decision of a single individual, who must have his weaknesses, should a dispute arise out of the contract. The desire can be realized by stipulating for an arbitration tribunal of three persons, one of whom is to be appointed by himself. This possibility is particularly important where the parties to the contract belong to different countries and cultures. Each party will then have the satisfaction that the tribunal includes at least one person who is familiar with his country and culture.

6. Arbitration is less formal than litigation, which takes place in the open court, before the whole world, so to say. Many ordinary people are frightened by court trials and detest the formality, solemnity and publicity associated with them. Arbitration, on the other hand, can be made very formal and confidential, and the parties are thus much more relaxed in arbitral proceedings.

7. Arbitration takes care of the convenience of the parties and their witnesses in fixing the date, time and place for hearing, this is, of course, not the case with normal court proceedings where what is paramount is the convenience of the court.

8. Arbitration allows for the selection of experts to look into dispute on matters in which they are proficient. Because of their expertise, they are better able than others to appreciate the issues involved and return verdicts which are likely to be satisfactory to the disputing parties. A judge on the other hand, deals with any dispute that is brought before him. It does not matter that he has no special knowledge of the issues involved. He must listen to the parties and their witnesses and do his best to hand down what he considers to be an equitable decision.

9. Arbitration is conciliatory in nature and contracts litigation, which has the connotation of a battle between the litigants. And at the end of the litigation, the relationship between the parties may never be cordial again.

10. The decision of an arbitral tribunal is final and binding on the parties. Consequently, an arbitral award is not subject to appeal, and most parties prefer to have final decisions
rather than face the prospects of appellate litigation.

**Advantages and Disadvantages of Arbitration**

- When the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed (as one cannot choose “the judge” in litigation)
- Arbitration is often faster than litigation in court
- Arbitration can be cheaper and more flexible for business
- Arbitration proceedings and an arbitral award are generally non-public, and can be made confidential
- In most legal systems, there are very limited avenues for appeal of an arbitral award, which can be either an advantage (in that the dispute is over and done with, period) or a disadvantage.

**Some of the disadvantages Include:**

- Arbitration may become highly complex arbitration may be subject to pressures from powerful law firms representing the stronger and wealthier party. Arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees often do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job.
- If the arbitration is mandatory and binding, the parties waive their rights to access the courts and have a judge or jury decide the case.
- In some arbitration agreements, the parties are required to pay for the arbitrators, which add an additional layer of a legal cost that can be prohibitive, especially in small consumer disputes in some arbitration agreement and systems, the recovery of attorneys’ fees is unavailable, making it difficult or impossible for consumers or employees to get legal representation; however most arbitration codes and agreements provide for the same relief that could be granted in court.
- If the arbitrator or arbitrator forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumers or employee. There are very limited avenues for appeal, which means that the erroneous decision cannot be easily overturned.
- Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.
- In some legal systems, arbitrary awards have fewer enforcement options than judgments; although in the united states arbitration awards are enforced in the same manner as court judgments and have the same effect.
- Arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of member or a small group of members in arbitration due to increasing legal fees, without explaining to the members the adverse consequences of inauspicious ruling
- Rule of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law, discovery may be more limited, in arbitration or entirely nonexistent.
- The potential to generate billings by attorneys may be less than pursuing the dispute through trial.
- Although grounds for attacking an arbitration award in court are limited efforts to confirm the award can be fiercely fought, thus necessitating huge legal expenses that negate the apparent economic incentive to arbitrate the dispute in the first place.
- The arbitral panel has limited powers which the arbitral tribunal may exercise. The tribunal must depend for its full effectiveness upon the underlying national system of law.39 It
has no power to compel attendance of witnesses or enforce its own orders or award.

♦ It is not possible to bring multi-party disputes together before the same arbitral tribunal. Unlike a court of law the tribunal has no power to order consolidation of disputes or action. Third parties who are not privy to the agreement to arbitrate cannot be joined in the arbitration.

APPLICABILITY OF EVIDENCE ACT.

The evidence which can be led at arbitration may be oral or documentary. It may also take the form of maps, diagrams or models illustrative of the property or thing in dispute. Such evidence may be tendered by the parties or their witnesses. S. 20 (5) of the Arbitration and Conciliation Act provides:

"The arbitral tribunal shall, unless otherwise agreed by the parties, have power to administer oaths to or take the affirmations of the parties and witnesses appearing."\(^{40}\)

In Nigeria, the provisions of the Evidence Act do not apply to proceedings before an arbitral tribunal and this is so by virtue of S. 1 (4) (a) of the Evidence Act unlike the English law where the arbitrators are bound by the rules of evidence which regulate court proceedings unless there are excluded by the parties, as they sometimes are. In Nigeria the Act provides that arbitral proceedings are to be in accordance with the arbitration rules scheduled thereto. If the rules are silent on any matter in the reference, the arbitral tribunal is empowered, subject to the Act, to conduct the proceedings in such a manner as it considers appropriate so as to ensure a fair hearing to the parties.\(^{41}\) The arbitral tribunal is required to do this with particular reference to the determination of the admissibility, relevance, materiality and weight of any evidence placed before it. Arbitral tribunals are therefore spared the trouble involved in determining whether or not a piece neither of evidence is admissible in accordance with the law of evidence nor are they expected to observe any other technical rules of law of evidence.\(^{42}\) An arbitral tribunal is therefore expected to handle pieces of evidence led before it in a judicial manner and as a body constituted by honest and intelligent individuals determined to do justice between the disputing parties. However, it is submitted that the courts will not sanction the admission of evidence which an arbitral tribunal, as a reasonable arbiter should have rejected. If it wrongly admits piece of evidence which is so fundamental that it goes to the root of the dispute which it is required to settle, the arbitrator becomes guilty of a legal misconduct for which the award will be set aside. In general, and provided that the arbitrator acts honestly and judicially, an award will not be set aside on the ground that he has let in evidence which is inadmissible in court trials.\(^{43}\)

ENFORCEABILITY OF AWARDS IN NIGERIA – PRACTICAL CHALLENGES

The party against whom an arbitral award is made may voluntarily obey the order and comply since the award is binding between the parties. Every arbitral award duly made is to be recognized as binding and is expected to be complied with. It is when it is not complied with that the question of enforcement by the winning party arises. The reality in Nigeria is that almost the enforcement of most awards are subjected to excruciating obstacles and resistance.

In Domestic Arbitral Award in Nigeria, Section 31 (1) ACA provides that an arbitral award shall be recognized as binding and shall upon application in writing to the court be enforced by the court. Recognition and Enforcement are not one and the same thing.\(^{44}\) An award may be recognized without being enforced. But an award enforced is an award recognized. For example, when an award is pleaded for the purpose of the defence of res judicata.

\(^{39}\) Redfern & Hunter, ibid p. 24
\(^{40}\) Ezejiofor, ibid p. 81
\(^{41}\) Ezejiofor, ibid p. 81
\(^{42}\) ibid
\(^{43}\) ibid
\(^{44}\) ibid
Two alternative methods of enforcement of domestic arbitral award are available to a successful party, thus:

a. By an application directly to enforce the award; or
b. By application to enter judgment in terms of the award and so to enforce the judgment by one or more of the usual forms of execution.

The procedure for obtaining enforcement of an award is set out in Section 31 (2) and (3) of the ACA. Thus the party wishing to enforce an award shall bring an application before the High Court, annexing:

a. The duly authenticated original award or duly certified copy thereof;
b. The original arbitration agreement or a duly certified copy thereof thereafter the party shall apply to the court for leave to enforce the award.

An award recognized by a court shall for all intent and purposes be treated as a judgment of that court. The court will give judgment in the terms of the award. And as stated in subsection (3) “an award may, by leave of court or a judge, be enforced in the same manner as a judgment or order to the same effect”.

International arbitral awards in Nigeria like domestic award are final and binding on the parties. The procedure for recognition and enforcement is the same except that where the award or arbitration agreement is not made in English language; a duly certified translation in to the English language must accompany the applicant for leave. Section 54 of the Arbitration and Conciliation Act, 1988 also makes the New York Convention on the recognition and Enforcement of Foreign Arbitral Awards applicable to Nigerian courts; it stipulates instances where the convention will be applicable in Nigeria.

Moreover, a foreign award may also be enforced in Nigeria under the provisions of the Foreign judgment (Reciprocal Enforcements) Act. Here, the award must have been recognized as a court judgment in the place of arbitration before being presented for registration. An ICSID Award is enforceable in Nigeria if a copy of the award is duly certified by the party seeking its recognition and enforcement. The award certified has effect for all purposes.

As simple as the procedure for enforcement of arbitral award may seem, it is not always an easy ride! Most often than not an unsuccessful party at arbitration dissatisfied with the award in a domestic or international arbitration may do either of the following: commence legal proceedings challenging the award, or prepares to oppose any action that may be brought to enforce the award. While Section 52 of Arbitration and Conciliation Act provides for refusal of recognition or enforcement of a foreign award and grounds for such refusal, Section 32 which provides for recognition or enforcement of a foreign award does not specify grounds for such refusal. However, in practice unsuccessful parties in domestic arbitrations have often appropriated the grounds mentioned in Section 52 to challenge the award. The grounds include incapacity of any of the parties, invalid arbitration agreement, improper notice of appointment of arbitrators or proceedings, jurisdiction of arbitrators, award going beyond scope of submission and composition of tribunal and procedure adopted by arbitrators.

It should be observed that enforcement by action on the award is a comparatively cumbersome procedure. It enables the party opposing the award to reopen the points which had been canvassed in the arbitral proceedings and thereby set up a new case for litigation. More often than not, these hearings are long drawn out thereby defeating one of the cardinal advantages modern day arbitration set out to exploit.

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44 Ibid
45 Akpata Ephraim, Ibid p. 92
46 Ezejiofor, Ibid p. 115
47 Ibid, p. 121
TIME AND COST OVER-RUN IN ARBITRATION

According to learned author, Dr. Klaus Sachs, term “Cost of Arbitration” is used in a broad sense to cover the procedural costs and the costs of the parties.48 Cost of arbitration, it should be remembered, include, such matters as the arbitrators’ fees, or remuneration, their out-of-pocket expenses, travelling allowances of witnesses and the cost of employing experts and secretarial staff to assist the arbitral tribunal.

The principal cost structure/items of any arbitral proceedings are:

PANEL

i. The arbitrators’ fees and expenses in conducting one proceedings and

ii. In institutional arbitrations, the costs and fees of the arbitral institution.

PARTIES

i. The lawyers’ fees and expenses

ii. The fees and expenses of party-nominated experts or expert witnesses and

iii. The parties internal and non-productive costs, such as the services of an in-house counsel

Locally, provisions pertaining to cost of arbitration are contained in sections 49 and 50 of Arbitration and Conciliation Act, 1988 which apply solely to which deals with domestic arbitration, contains no provision on cost of arbitration. It therefore appears that while the draftsmen carefully provide for cost of arbitration in respect of international arbitrations and deliberately deferred from making same provisions in relation to domestic arbitration. This is a glaring omission! Probably it was considered unnecessary or undesirable to have such a provision in the system of domestic arbitration set

or it was desired that the arbitrators to have somewhat flexibility or latitude in charging costs to meet the need or exigency of each particular case.

Section 49 (1) of the Arbitration and Conciliation Act is a rehash of the cost structure highlighted above and provides thus:

The arbitral tribunal shall fix costs of arbitration in its award and the term ‘cost’ includes only –

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the arbitral tribunal itself;

(b) The travel and other expenses incurred by the arbitrators;

(c) The cost of expert advice and of other assistance required by the tribunal;

(d) The travel and other expenses of witnesses, to the extent that such expenses are approved by the arbitral tribunal;

(e) The cost for legal representation and assistance of the successful party if such cost were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of cost is reasonable.

In Nigeria, the industry especially in Ad-hoc arbitrations has no clear template for fixing fees. Help has come however vide institutions like the Nigeria Chapter of the Chartered Institute of Arbitrators which has a scale of fees. Arbitrations conducted under the auspices of other institutions like the ICC, ICSID, PCA, LCIA, AAA all apply their scale.

In fixing arbitration fees, an ad valorem compensation method which makes reference to the amount in dispute may be adopted, a purely time based system may also be adopted or a combination of both value and time may be used, the ICC system in Appendix III to the ICC Rules of Arbitration such applies in some Nigerian arbitration takes into consideration, “the diligence of the arbitrator, the time spent, the rigidity of the proceedings and the complexity of the dispute.”

It is important to stress that lawyers now produce tons of documents, analyse huge amounts of information as part of the proceedings, interview dozens of witnesses and experts, conduct extensive legal, forensic and painstaking research and prepare comprehensive and voluminous submissions. All these take a lot of time. On the other hand, one can also observe that parties' spend much energy and time on fierce battles on procedural issues: they challenge the jurisdiction of the tribunal; they claim the extension of the arbitration clause to a non-signatory party; they make challenges against an arbitrator; they introduce requests for various interim relief; they request the production of documents; they file applications for the exclusion from the file of privileged documents; they submit applications for security for costs; and so forth. In some cases, these actions may be legitimate for the proper defence of the case, but often they are used as tactical maneuvers. Whatever the motives, these procedural battles resemble more and more traditional litigation and are a serious challenge to the smooth conduct of arbitration proceedings.

Most of the above challenges posed to the proceedings are counsel related. That is not to completely absolve arbitrators themselves of blame in cases of delay. Arbitrators’ unavailability has become a usual cause of delay in proceedings. In addition, experience has shown that in some cases, party nominated arbitrators do not have the requisite training and or experience to handle the conduct of proceedings thereby resulting in undue delay.

Another aspect of cost over-run is traceable to the unrestrained use of three arbitrators in some proceedings when the amount in dispute or issues clearly doesn't warrant or justify it. The simple solution to this is to adopt the Swiss model which insist that a minimum threshold amount be fixed for arbitration which must take place under the auspices of a sole arbitrator instead of a three man panel to save cost and expense.

**POWER OF ARBITRAL TRIBUNAL TO ORDER INTERIM MEASURE OF PROTECTION**

Before the enactment of the 1988 Arbitration Act, the practice in matters of interim measures of protection was for parties to have recourse to the courts for assistance. However by Section 13 of the 1988 Arbitration Act, the arbitral tribunal has now been empowered to order interim measures of protection. See Section 13 (a) & (b).

"13. Power of arbitral tribunal to order interim measure of protection.

Unless otherwise agreed by the parties, the arbitral tribunal may before or during an arbitral proceedings –

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

(b) Require any party to provide appropriate security in connection with any measure taken under paragraph (a) of this section.

As gratifying as this provision may seem, it is still fraught with challenges. Section 13 obviously contemplates some circumstances where difficulties in compliance may arise and is a kick in device requiring a party to provide appropriate security obviously in time.

Looked at from whatever angle, the word “ORDER” as used in Section 13 of the Act contemplates enforcement. That being so, it is caught or expected to subject to implement action vide the New York Convention on the enforcement of foreign judgments (for the purpose of international arbitration) and the Sheriff and Civil Process Act for the purpose of domestic arbitration.

**OVER-REGULATION OF ARBITRATION**

As noted previously in this paper, modern day arbitral process has lost its early simplicity. It has become more complex, more legalistic, more institutionalized. Some people now posit that arbitration increasingly resembles litigation and one wonders whether arbitration

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49 Sachs in LoukasA. Mistelis & Julian D. M. Lew, ibid, p. 113.
has not now become more procedural than substance. Particularly, arbitral institutions have over the years evolved rules of procedure somewhat akin to High Court procedural rules. More regard is now given to form rather than content. Furthermore, the change of the size and complexity of the disputes that are nowadays brought before arbitral tribunals (both domestic and international) have also changed the characteristics of arbitral proceedings. They have become more and more similar to litigation, and by that I mean common law style litigation and thereby very costly.51

MULTI-PARTY ARBITRATION

There are an increasing number of multi-polar cases, with more than two sides to a dispute, whether because of diverging respondents or a desire to join the proceedings as third party. As currently constituted, our Arbitration law and rules can hardly accommodate this development especially because of the requirement that the arbitration clause be in writing. Furthermore, an agreement to arbitrate being one found on contract is subject to the doctrine of privity of contract. Arbitration is consent based.

It is important that our system create greater flexibility in a multi-party context as this will affect the cost of arbitration because the current cost system is based most often than not, on a two sided arbitration. Further, unlike a court of law, arbitral tribunal has no power to order consolidation of actions. There are so many cases in which at least one of the parties to an arbitration is content that this should be so, since the intervention of third parties is not always welcome; But leaving such cases aside, an arbitral tribunal cannot usually order consolidation of actions even if this would seem to be necessary or desirable in the interest of justice.52

For example, an international construction project in which the employer has any complaints regarding the work done, he must arbitrate against the main contractor, who must then seek to recover from the sub-contractor or supplier concerned with the defective work, by way of separate arbitration. It is often considered that in such a situation, it would be desirable if all the parties could be brought into the same set of arbitral proceedings, so as to save time and expense and avoid the risk of inconsistent awards.53

It is high time to revisit this issue and structure a new regime permitting interested third parties to join arbitration subject to non contentious conditions.

CONCLUSION

In spite of all the attendant problems associated with arbitration practice in Nigeria today, arbitration has come to stay as a veritable tool for alternative dispute resolution. The practice is vibrant and it has received growing patronage in recent times. Its pros by far outweigh its cons. The shortcomings though significant are amenable, and as various arbitration practitioners continue to gain experience by exploiting the advantages of arbitration, it is anticipated that healthier arbitration practice and norms will continue to evolve until the newer and faster procedural methods take the centre stage. Also, it is anticipated that cost and time effective principles will at the long run be adopted by practitioners and arbitral institutions. Finally, in Nigeria, arbitration is still very relevant as a dispute resolution mechanism especially in domestic and international commercial transactions, and if its advantages are properly harnessed, will decongest the perpetually congested cause lists in our courtrooms, dispense quick justice and fast track growth, development, commerce and confidence in the Nigerian economy in the new world order.

50 Redfern & Hunter, ibid p. 3
51 Sachs in LoukasA. Mistelis & Julian D. M Lew, ibid, p. 115
52 Redfern & Hunter, ibid p. 25
53 Ibid, p. 184