SCHOLEDGE INTERNATIONAL JOURNAL OF MANAGEMENT & DEVELOPMENT
VOL. 2, ISSUE 4 (APRIL 2015) ISSN-2394-3378

DETHRONING AN ARBITRATION AGREEMENT: IS YOUR COMMERCIAL ARBITRATION AGREEMENT VALID IN NIGERIA?

Oluwasegun Isaac Aderibigbe
LL.B (Hons), LL.M, M.PHIL, B.L. MNIM, ACIArb. (UK),
Law lecturer and Researcher, Faculty of Law, Bowen University, Iwo, Nigeria.

ABSTRACT

This topic subscribes very strongly to the quest for the enforcement of an agreement to arbitrate. Sometimes, when a dispute arises, it may not be easy to get an arbitration to take off, even where an agreement covering the dispute is in existence. This sort of situation may arise either because one of the parties is reluctant to arbitrate or because he ignores the agreement and commences an action in court against the other party on the very dispute which should be resolved by arbitration, thus the need for the enforcement of the commercial arbitration agreement. Findings show that the courts in developing countries such as Nigeria do not only recognize the place of arbitration in dispute settlement but also cloth arbitral awards with the garb of estoppels per rem judicatam thereby discouraging the dethronement of arbitration agreements.[1] Parties to disputes may therefore agree, or statute may stipulate, that such issues be referred to arbitration for resolution. Findings further show that an issue that will always arise is whether the vesting of jurisdiction in an arbitral tribunal constitutes an ouster of the court's jurisdiction. However, it is recommended that extensive and explicit provisions should be added to the various Arbitration legislations and rules of developing countries to ensure the enforcement of commercial arbitral agreements.

KEYWORDS: Arbitration Agreement, Commercial Arbitration

INTRODUCTION

Arbitration is a part of a wide range of Alternative processes designed to assist parties in settling their dispute in a less litigious environment or without the need for judicial proceeding.[2] Arbitration has been from time immemorial and no one knows exactly when it started. Its object is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.[3] There is no doubt that settlement is a desirable solution for business dispute of an international character.[4]

Traditionally in developing countries, the method of dispute resolution has been the exclusive preserve of the courts, which has at its disposal, the full coercive power of the state to enforce its decisions.[5] In recent times, the inevitable problems associated with the court system have contributed to the emergence of other Alternative Dispute Resolution methods such as Arbitration. Disputes are bound

[1] See *Okpuruwu v. Okpokam* (1988) 4 NWLR (pt. 90) 503, 561
[2] Aina, K., *Alternative Dispute Resolution Nigerian Law and Practice Journal*: Council of Legal Education, Nigerian Law School, Vol. 2, No. 1, (1998) p. 169.
[3] Section 1 (a) Arbitration Act 1996 of England
[4] Preamble to the International Chamber of Commerce Rules of Conciliation and Arbitration (ICC Rules) 1988
[5] Iman, W., *The Nigerian and International Arbitration Modern Practice* Journal of France and Investment Law, Vol. 3, No. 3, (1999) p. 1.

to arise in business relationships and commercial transactions. The concept of a free-market economy presents opportunities for clashes of interests and disputes in the pursuit of economic gains.[6]

An arbitration agreement is in the nature of an ordinary contract being a contract itself, and this however suggests that the enforcement of arbitration contracts is *ad idem* with the enforcement of an ordinary contract. It must satisfy the normal legal requirements of a contract such as consensus and mutuality, capacity and intention to be bound in order to be valid. Like any other contract, the terms must be clear and unambiguous as the court would lean towards a construction that will give effect to the intentions of the parties.[7]

The various Arbitration legislations and rules in developing countries such as Nigeria have not sufficiently provided for the formal validity requirement for arbitration agreement. These requirements are imperative and vital as they go to the root of every arbitration agreement and it also gives an arbitration tribunal jurisdiction. This paper will consider the formal validity requirements of arbitration agreements in commercial transactions for the enforcement of such agreement, it will assess provisions of the various Arbitration Legislation and Rules, identifying the inadequacies and current best practices in the provisions and provide plausible recommendations for reforms for the enforcement of arbitration agreements in view of the stated problems in developing countries.

CONCEPTUAL CLARIFICATIONS:

Arbitration is defined as a *'method of dispute resolution involving one or more neutral third parties which are agreed to by the disputing parties and whose decision is binding'*.[8] Section 6 Arbitration Act 1996 of England also defines arbitration as *an agreement to submit to arbitration, present or future disputes*. Arbitration is a procedure for settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general final and legally binding on both parties.[9]

This definition has been affirmed by the Nigerian Supreme Court of Nigeria, Ogbuagu JSC (as he then was) in ***NNPC v. Lutin Investments***[10] while adopting the position of Romily M.R. in ***Collins v. Collins***[11] defines Arbitration as *a reference to the decision of one or more persons either with or without an umpire, on a particular matter in difference between the parties*. From the foregoing it is pertinent to note that one essential factor to be considered is that the parties must have *voluntarily and mutually* agreed to refer such existing dispute or future dispute to arbitration.

Arbitration Agreement is an agreement by the parties to submit to arbitration all disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[12] Generally, agreements to arbitrate are of two kinds: those which refer an existing dispute to arbitration, and those which relate to disputes which may arise in the future.[13] For the purpose of this paper I shall consider only the second class of arbitration agreement; those which relate to disputes which may arise in the future.

LEGISLATIVE PERSPECTIVE

The legislature all over the world has empowered the courts to order that the future conduct of the action shall be stayed, thus leaving the claimant with the choice between referring the dispute to arbitration, or abandoning his claim where it comes to the enforcement of the agreement against a party who has started an action in respect of a claim which ought to have been submitted to arbitration by virtue of an arbitration agreement.[14]

An example is section 4 and section 5 of the Arbitration and Conciliation Act CAP. A8 LAWS OF THE FEDERATION OF NIGERIA 2004. Section 9 of the Arbitration Act 1996 of England holds the

---

[6] Ajogwu, F., *Commercial Arbitration in Nigeria: Law & Practice, 2nd Edition, Mbeyi & Associates (Nig) Ltd, Lagos, p. 1.*

[7] Orojo J. O. And Ajomo, M. A, *Law and Practice of Arbitration and Conciliation in Nigeria*, Mbeyi & Associates (Nigeria) Ltd. (1999) P. 99

[8] Black's Law Dictionary, 1999, 7th Edition, p. 5.

[9] Orojo J. O. And Ajomo, M. A, Op cit. P. 3

[10] (2006) 2 NWLR (pt. 965) 506 at 542 - 543

[11] (1858) 28 Lj Ch. 184.

[12] Article 7, UNCITRAL Model Law 1985

[13] Mustill M.J and Boyd S.C, *The law and Practice of Commercial Arbitration in England*. Butterworths London and Edinburgh, 2nd Edition, (1989) p. 6.

[14] Ibid at p. 7

same position. In Nigeria the power of the court to protect an arbitration agreement does not depend on whether or not there is a *Scott v. Avery clause,*[15] which provides that the award of an arbitrator shall be a condition precedent to the enforcement of any right under the contract, for section 4 and 5 of the Act provide for stay of proceedings by court where an issue referred to arbitration is being litigated whether or not there is a *Scott v. Avery* clause.

The courts in Nigeria do not only recognize the place of arbitration in dispute settlement but also cloth arbitral awards with the garb of *estoppels per rem judicatam.*[16] Parties to disputes may therefore agree, or statute may stipulate, that such issues be referred to arbitration for resolution. The question that will always arise is whether the vesting of jurisdiction in an arbitral tribunal constitutes an ouster of the court's jurisdiction. This will however be discussed in the context of the decision of the Court of Appeal of Nigeria in *The M. V. Panormos Bay v. Olam (Nig.) Plc.*[17]

The first formal statute on arbitration was promulgated for the entire country on 31st December 1914, which 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. Then came the Arbitration and Conciliation Act, Cap A18, LFN 2004;[18] 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*.

ARBITRATION AGREEMENTS

An agreement to arbitrate is the foundation stone of every arbitration proceedings, it is the basis and the arbitral tribunal's jurisdiction is derived solely from the existence and validity of the arbitration agreement.[19] 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. It is proof that the parties have consented to resolve their dispute by arbitration and to remove their dispute from the regular court.

Generally, agreements to arbitrate are of two kinds:

A. Those which relate to disputes which may arise in the future[20].
B. Those which refer an existing dispute to arbitration.

ARBITRATION AGREEMENT IN NIGERIAN:

In Nigeria, under the Arbitration and Conciliation Act,[21] every arbitration agreement must be in writing. The written agreement may however take different forms. Arbitration Agreement in Nigeria is governed by the Arbitration Rules contained in the first schedule of the Arbitration and Conciliation Act.[22] These rules are a reproduction of the UNCITRAL Arbitration Rules made by the United Nations Commission on International Trade Law (UNCITRAL) which the United Nations General Assembly adopted in 1976.

FORMATION OF ARBITRATION AGREEMENTS:

Arbitration agreements could be in two forms: It may be drawn up separately and independently[23] or it may form part of the contract for the transaction between the parties[35] as clauses.[24]

Independent agreements: - This is an independent agreement of a commercial contract entered into by parties either domestic or international. It stipulates what step is to be taken, how it is to be taken and by whom it is to be taken, in the event of a dispute arising in the course of executing the contract between the parties.

---

[15] (1856) 5 H.L Cas. 811.
[16] See *Okpuruwu v. Okpokam* (1988) 4 NWLR (pt. 90) 503, 561
[17] (2004) 5 NWLR (Pt. 865)1
[18] This principal legislation was first enacted in 1988.
[19] Girsberger & Voser, (2008)"*International Arbitration in Switzerland*" p. 4
[20] Mustill M.J and Boyd S.C, Op cit. P. 6
[21] Cap A18, Laws of the Federation of Nigeria, 2004
[22] Cap A18, Laws of the Federation of Nigeria, 2004
[23] Severability
[24] Separability

Clause: - This is an integral part of most commercial contracts entered into by parties either domestic or international. It is the arbitration clauses that stipulate what step is to be taken, how it is to be taken and by whom it is to be taken, in the event of a dispute arising in the course of executing the contract between the parties[25].

Where the arbitration clause is a part of the contract, it is nevertheless regarded in law as a separate contract. The English court in *Heyman v. Darwin Ltd*[26] held that "*an arbitration clause in a contract is quite distinct from the other clauses. The other clauses spell out the obligations which the party undertaken towards each other, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties, if any dispute arises with regards to the obligations which the one party has undertaken to the other such dispute shall be settled by a tribunal of their own constitution*".

The basic requirement of an arbitration agreement or clause is the reference of a dispute to arbitration, what will however determine the contents of an arbitration agreement will be whether the agreement is for an ad hoc arbitration or an institutional arbitration. The words by which the reference is made must be clear and express. Under the UNCITRAL Arbitration Rules, the following model Arbitration clause is recommended:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

The I.C.C recommends the following arbitration clause:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the I.C.C by one or more arbitrators appointed in accordance with the said rules.

A clause that may suffice is the *Scott v. Avery* clause. The *Scott v. Avery* clause provides that the award of an arbitrator shall be a condition precedent to the enforcement of any right under the contract. This is to the effect that a party will have no cause of action in respect of a claim falling within the clause, unless and until an award has been obtained.

In *Scott v. Avery* an Insurance Company inserted in all its policies a condition that when a loss occurred, the suffering member should give his claim and pursue his loss before a committee of members appointed to settled the amount; that if a dispute arose between them, the matter should be referred to arbitration, and that no action should be brought except on the award of the arbitration. In considering the scope of these provisions, the court held that the condition was valid and not illegal as ousting the jurisdiction of the courts.

The Supreme Court of Nigeria in ***Obembe v. Wemaboard Ltd***[27] also held that the arbitration agreement (clause) in that case was valid, the said agreement reads thus;

Any dispute or difference arising out of this agreement shall be referred to arbitration of a person to be mutually agreed upon or, (if failing in agreement), some person appointed by the president for the time being of the Institute of Consulting Engineers.

It should be noted that an arbitration clause will remain valid despite an allegation of illegality affecting the substantive agreement if it does not go to the root of the subject matter.[28] However it has been held that if the arbitration clause itself is illegal; then it will be void.[29] An arbitration agreement is a contract and like any other contract it cannot unilaterally be amended or altered by one of the parties. However, it is competent for all the parties to mutually agree to amend it at any time before the award is made. Such an amendment can validly be effected only by the parties and not by the arbitral tribunal.

It is worthy of note that there is no hard and fast rule as to what constitute an arbitration agreement, as we have seen from above, it may suffice just to insert a clause that says "*disputes to be*

[25] See generally Akinbote A, *Arbitration in Africa: The State of Arbitration in Nigeria.* Being a seminar paper presented at the 2008 Colloquiums of the Association for the promotion of arbitration in Africa held at Yaounde 14th – 15th January, 2009.
[26] (1942) A.C 356 at p. 373
[27] (1977) 5 S. C. at p. 129
[28] Orojo J. O. And Ajomo, M. A, Op cit. P. 101
[29] See *Ertel Bieber & Co., v. Rio Tinto* (1978) A. C 260, 291, H.L.

settled by arbitration". This clause is neither advisable nor desirable, although its defects of omission could be cured by the court if necessary.

Under the Nigerian rules, parties have unfettered powers to decide on several details of the arbitration agreement. The basic requirement of an arbitration agreement or clause is the reference of a dispute to arbitration, what will however determine the content of an arbitration agreement will be whether the agreement is for an ad hoc arbitration or an institutional arbitration. For *ad hoc* arbitration all important matters must be specifically provided for, while in an institutional arbitration it will suffice to adopt the procedure and rules of a specified arbitration institution.[30]

The following are some of the matters which need to be provided for:

- *Place or seat of arbitration*:
- *Applicable law*:
- *Arbitration procedure*:
- *Language of the arbitration*:
- The reference
- The parties
- The arbitrators

ENFORCEMENT OF CUSTOMARY LAW ARBITRATION IN NIGERIA

Under Customary Law arbitration in Nigeria and most African countries, an agreement to arbitrate is usually oral and its proceedings and decisions are not recorded in writing. Customary Arbitration in Nigeria is not regulated by the Arbitration and Conciliation Act which deals with only written agreements to arbitrate. It is however still popular in local areas.

If there is a disagreement as to whether there is in fact a properly constituted arbitration between the parties, the court will make a specific finding of fact on the question.[31] According to the West African Court of Appeal: "*...where matters in dispute between parties are, by mutual consent, investigation 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"*[32]

However, a decision or 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 a judgment until it is pronounced upon by a competent court which will not make such pronouncement unless the award is specifically pleaded and proved in the proceeding before it, involving the parties to the arbitration. When this is done, the award may be accepted as creating estoppels by way of *res judicata***.** Customary law arbitration is also very fluid and gives the court a lot of latitude and room to manoeuvre when dealing with these matters.

The Supreme Court held in ***Ohiaeri v. Akabeze***[33] that a valid customary arbitration is manifest where;

a) The parties voluntarily submitted to the arbitration
b) The parties beforehand agreed expressly or by implication to be bound by the arbitral decision or award
c) None of the parties withdrew from the arbitration midstream
d) None of the parties rejected the award immediately it was made
e) The arbitration was conducted in accordance with the custom of the people, and
f) The arbitration handed down a decision or an award which is final.

THE JURISDICTION OF THE COURT IN NIGERIA AND THE ARBITRAL PROCESS: THE INTERPLAY

It is settled that an adjudicator must exude judicial or quasi-judicial powers in order to exercise jurisdiction in the function of adjudication; it is also trite that arbitration being a process by which a dispute is resolved in a judicial manner by a person or persons other than the regular court need to possess jurisdiction. It is the arbitration agreement that confers jurisdiction on the arbitrator.

[30] Orojo J. O. And Ajomo, M. A, Op cit. P. 104
[31] See *Ofomata & Ors v. Anoka & Ors* (1974) 4 E.C.S.L.R 251
[32] *Assampong v. Amuaku* (1932) 1 WACA 192 at page 196
[33] (1992) 2 N.W.L.R (Pt. 221) 1 see also *Okere v Nwoke* (1991) 8 N.W.L.R (Pt. 209) 317

It is worthy of note that judicial powers differs from jurisdiction. Jurisdiction is the authority to exercise judicial powers in assuming control and conducting a hearing in a matter, however they are mutually exclusive; judicial powers is valid only where jurisdiction vests.[34] Where a panel has no jurisdiction it would cease to have the competence to exercise judicial powers.

In the Nigerian case of *Bronik Motors Ltd. V. Wema Bank*,[35] Idigbe, JSC (as he then was) captured this distinction thus: "*I find myself, however, in agreement with the submissions in reply to learned counsel for the respondent that although the terms 'judicial power' and 'jurisdiction' are frequently used interchangeably and jurisdiction is defined as the power to hear and determine the subject matter in controversy between the parties to a suit, there is a clear distinction between the two concepts, and that 'jurisdiction' is the authority of a court to exercise judicial power which is the totality of powers a court exercises when it assumes jurisdiction and hears a case*".

In the case of arbitration, it is the fulfilment of the formal validity requirement for an arbitration agreement that confers both judicial powers and jurisdiction on the arbitral panel and further empower the court of law to enforce the arbitration agreement.

In recent times all over the world, a great deal of rapport has developed between the regular courts and the function of arbitration,[36] parties to a dispute are at liberty to choose via an arbitration agreement the private machinery of arbitration for the resolution of their dispute.

Under section 4 of the Nigerian legislation,[37] where the request is made not later than when the applicant submits a statement on the substance of the dispute, the court shall stay proceedings in the matter. In section 5, the court will stay proceeding and refer the matter to arbitration where it is furnished with proof that the matter before it constitutes the subject matter of an arbitration agreement between the parties, provided that a request to do so was made after appearance and before the applicant (who must be a party to the arbitration agreement) delivers pleadings or take a step in proceedings.[38]

The court must also be satisfied that there is no reason not to refer the matter to arbitration in accordance with the agreement of the parties and that the applicant was at the time the action was commenced and is still ready and willing, at the time of the application, to do all things necessary to ensure the proper conduct of the arbitration.

It is worthy of note, that taking steps in a proceedings is to indicate an intention that such a party desires that the action should proceed and that the matter should not be referred to arbitration.[39] Here, such a party would be adjudged to have waived his right to arbitration and the court would not only have the jurisdiction but a duty to settle the dispute between the parties.[40]

It is also possible to invite the court to compel parties to respect an arbitration agreement to refer the dispute to arbitration where there is a *Scott v. Avery clause*[41] in the agreement thereby enforcing the arbitration agreement**.** An arbitral process may also be invoked through the inclusion of the *Atlantic shipping clause*[42] into the agreement. Where this clause subsists, the parties are required to commence arbitration within a stipulated time, which is set out in the agreement of the parties, the right to action only arises where the parties default in commencing arbitration within the set period, however, an action commenced prior to the expiration of such period becomes incompetent unless the right to arbitration is waived.[43]

From the foregoing, the powers of the court and arbitral tribunal to enforce arbitration agreement are limited by the Nigerian legislation. Firstly, under the statute, unless the issue of jurisdiction is raised not later than the time of submitting the points of defence the court will not entertain the application.[44] This is in my opinion against the spirit of natural justice, equity and good conscience, the Arbitration and Conciliation Act need not peg the time within which the issue of jurisdiction should be raised. In litigation the issue of jurisdiction can be raised at any stage, even in the

[34] See *Awosile v. Sotumbo* (1992) 5 NWLR (Pt. 243) 514
[35] (1983) 6 SC 356; (1983) 1 SCNLR 296 at p. 301
[36] C. A Obiozor, *Does an arbitration clause or agreement oust the jurisdiction of the courts? A review of the case of The M. V. Panormos bay v. Olam (Nig.) Plc.* Nigerian bar journal, vol. 6, No. 1 July 2010, p. 166
[37] ACA 1988
[38] See *O.S.H.C. v. Ogunsola* (2000) 4 NWLR (Pt. 687) 431
[39] See *Unife v. Fawehinmi Construction Co. ltd.* (1991) 7 NWLR (Pt. 201) 26
[40] See *K.S.U.D.B v. Fanz Const. Ltd* (1990) 4 NWLR (Pt. 142) 1 at 50
[41] (1856) 5 H.L Cas. 811.
[42] *Atlantic Shipping and Trading Co., v. Louis Dreyfus & Co.,* (1922) 2 A. C 250
[43] See *Pinnock Bros v. lewis & Peat Ltd.* (1923) 1 KB 690.
[44] Section 1 (1)

Supreme Court,[45] it is considered a fundamental issue which the court can raise *suo motu*, and determine it.[46]

Secondly, a plea that an arbitral tribunal exceeds the scope of its authority may be raised in the course of proceedings, as soon as the matter, which is alleged, to be beyond the scope of authority arises. However the tribunal may in either case admit a later plea if it considers that the delay in raising it was justified.[47] The scope of the arbitral process is usually stipulated in the arbitration agreement; there is therefore no reason why the tribunal should wait for a party to make a plea of objection to jurisdiction before advising itself on the limits of its jurisdiction.

Thirdly, the arbitral tribunal may rule on any objection as to its jurisdiction by way of interim award or reserve its decision pending the final award. The decision of the tribunal on such matter shall be final and binding.[48] This in my opinion is wasteful and defeats the purpose of arbitration. In choosing arbitration over litigation, parties look forward to prompt settlement of disputes, this is not achieved by vesting the tribunal with the option of postponing a ruling on the question of its competence till the time of the award.

A paramount question that arose in the Nigerian case of *The M. V. Panormos Bay V. Olam (Nig.) Plc.*[49] was *"can parties to an arbitration agreement be prevented from enforcing the agreement on the ground that it ousts the jurisdiction of the court?* In this case the respondent filed an action against the appellant for special and general damages for loss of some bags of rice which were covered by a bill of lading under a contract of carriage of goods. Clause 7 of the bill of lading stipulated that any dispute arising under the bill of lading would be referred to arbitration in London. A dispute arose on the bill and the respondent filed an action on the matter.

When the appellant was served with the respondent's writ, he brought an application praying the court to stay proceedings in the matter and relied on clause 7 in the bill of lading. The respondent opposed the application by relying on section 20 of the Admiralty Jurisdiction Act, 1991[50] which vests admiralty jurisdiction in the Federal High court and stipulates that any agreement by any person or a party to any cause, matter or action, which seeks to oust the jurisdiction of the Court shall be null and void, if it relates to any admiralty matter falling under the Act.

The court held that the application for stay of proceeding failed as section 20 of the Admiralty jurisdiction Act constitutes a statutory limitation to the enforcement of the purported arbitration agreement contained in the bill of lading, it was further held that section 20 nullifies the arbitration agreement.

Stricto sensus, the Court of Appeal answered the aforementioned question to the affirmative. It therefore remains the law today, that parties to an arbitration agreement can be prevented from enforcing the agreement on the ground that it ousts the jurisdiction of the court in Nigeria.

In my humble opinion I will hope that the Supreme Court will reverse this decision in the nearest future for the following reasons:

The decision is contrary to the principle of Stare decisis. In a plethora of decisions including *AIDC v. Nigeria L.N.G. Ltd*[51], the Supreme Court had rejected the view that an arbitration agreement ousts the jurisdiction of the court. Also in *M. V. Lupex v. Nigerian Overseas chartering & Shipping Ltd*[52] the Supreme Court affirmed the binding nature of arbitration agreements and made an order for stay of proceeding of the action which was brought in derogation of such agreement, the subject matter was however admiralty and the respondent was a public limited company in Nigeria and the execution of and default arising under the general contract of the parties took place in Nigeria. The decision of the Court of Appeal can therefore be considered to be reached *per incuriam*.

Secondly, it seems as if the Court of appeal misconstrued the notion of stay of proceedings. The mechanism of stay of proceedings came as a reprieve to the attitude of common law which holds that an agreement to submit a dispute to arbitration does not outs the jurisdiction of the court as either of the parties may, prior to the submission of the dispute commence legal proceedings on the subject matter of

[45] See *Bakare v. A.G Federation* (1990) 9 SCNJ 43
[46] See *Oloba v. Akereja* (1988) 7 SCNJ 56
[47] Section 12 (3) (a) and (b)
[48] Ibid., section 12 (4)
[49] (2004) 5 NWLR (Pt. 865)1
[50] Now Cap A5 Laws of the Federation of Nigeria, 2004
[51] (2000) 4 NWLR (Pt. 653) 494
[52] (2003) 15 NWLR (Pt. 844) 469

a submission.[53] The intervention by way of stay of proceedings operates to re-direct a party to an arbitration agreement who disregards the agreement by commencing an action on the subject matter of the arbitration agreement. The arbitration agreement does not in any way challenge the jurisdiction of the court, in reality it is the court that exercises jurisdiction to enforce the arbitration agreement by making an order for stay of its proceedings.

Also, under the various Arbitration legislations all across the world, parties are at liberty to choose their *locus arbitri* or forum for arbitration, especially in international arbitration. It does not however matter that the dispute involves admiralty or not. The only situation where the court should assume jurisdiction is where the arbitration agreement is silent on the forum for arbitration which is not the situation in the case under review.

Finally, that an agreement which expressly ousts the jurisdiction of the court is void, illegal and contrary to public policy, nevertheless, an arbitration agreement, per se, does not amount to a challenge or ouster of the jurisdiction of the court, more so that parties can insert a *Scott v. Avery clause*[54] in the agreement which will provide that the award of an arbitrator shall be a condition precedent to the enforcement of any right under the contract.

FORMAL VALIDITY REQUIREMENTS IN NIGERIA

An arbitration agreement is in the nature of an ordinary contract being a contract itself. It must satisfy the normal legal requirements of a contract such as consensus and mutuality, capacity, intention to be bound etc. to be valid and enforceable. Like any other contract, the terms must be clear and unambiguous as the court would lean towards a construction that will give effect to the intentions of parties.[55] Some of the formal valid requirements in Nigeria are as follows: it must be written or oral, parties must have consensus and mutuality, parties must have capacity to contract and intention to be bound, the dispute must be Arbitrable and the subject matter of the contract must be legal.

A. IT SHOULD BE WRITTEN OR ORAL

In Nigeria, the agreement must be in writing, the UNCITRAL Rule which has been replicated in the Nigerian Rules supports this position. However, under the Arbitration Act 1996 and the Common Law of England it could be in writing or made orally. The Rules of the LCIA also suggests that the arbitration agreement may be in writing.[56] Under the ICC rules where there is an agreement in writing to arbitrate, the parties will be deemed thereby to have submitted ipso facto.[57]

Article 1 of the AAA Rules provides that parties shall be deemed to have made these rules a part of their arbitration agreement whenever, in a collective bargaining agreement or submission, they have provided for arbitration by the American Arbitration Association or under its rules. These rules and any amendment thereof shall apply in the form obtaining when the arbitration is initiated. The parties, by written agreement, may vary the procedures set forth in these rules. This also suggests that an arbitration agreement under its rule should be in writing to be valid.

B. THERE MUST BE CONSENSUS AND MUTUALITY

Consensus ad idem must be present and the parties should have the same right to refer disputes to arbitration. The Court in *Pittalis & Ors v. Sherepettin*[58] held that there is no mutuality where the agreement gives one party alone the right to refer the dispute to arbitration. A clause providing for this is often referred to as the ***"Union of India Clause"*** from the case of *Union of India Clause v. Bhorat Engineering Corp.*[59] In that case a clause in an agreement provides as follows: "*...in the event of any dispute or difference between the parties, the contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference be referred to arbitration; such demand for arbitration shall specify the matter which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration*". It was held that while this clause was not itself an arbitration agreement, it

[53] See *Obembe v. Wemabod Estate Ltd* (1977) 11 NSCC 264, 271
[54] (1856) 5 H.L Cas. 811.
[55] Orojo J. O. And Ajomo, M. A, Op cit. P. 99
[56] See the preamble to the LCIA
[57] See Article 8
[58] (1986) 1 QB 868
[59] LL.R Delhi Series (1971) Vol. 2, p. 57.

provided a valid option which when exercised will result in an arbitration that will be fully mutual because either party can then make the reference.

The Rules of the LCIA is replete as it's preamble provides that "*Where any agreement, submission or reference provides in writing and in whatsoever manner for arbitration under the rules of the LCIA or by the Court of the LCIA ("the LCIA Court"), the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules ("the Rules") or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration. The Rules include the Schedule of Costs in effect at the commencement of the arbitration, as separately amended form time to time by the LCIA Court*".

C. THERE MUST BE AN INTENTION TO BE BOUND BY PARTIES

This is one of the formal requirements of an arbitration agreement, the parties must intend that they will incur liabilities or acquire rights as a result of the arbitration; none of the parties should therefore go back on the terms of the arbitration agreement.

D. CAPACITY OF PARTIES

This is the legal ability of a person to enter into a contract with another person. The aim of the law is to protect a class of people who due to their peculiar circumstances are considered vulnerable to being exploited.[60] An arbitration agreement is a contract on its own just like the substantive agreement. Therefore the parties to the arbitration agreement must have contractual capacity, this is important, not only for the arbitration procedure but for the enforcement of the award.

Generally, all individual is prime facie capable of being a party to an arbitration agreement provided that he has contractual capacity, however, certain individuals have limited restricted capacity and they include:

An Infant: In Nigeria an infant is any one below the age of 18years.[61] At common law, the age for majority is 21years; every person below is regarded as an infant. The law protects this class of people who due to their peculiar circumstances are considered vulnerable to being exploited. In *Labinjo v. Abake*[62] where the plaintiff sued to recover from the defendant a minor, Nigerian girl, the sum of $48.185 being the balance due to the plaintiff for the goods sold and delivered to the defendant. The defendant pleaded the *Infant Relief Act 1874* under which a contract to supply goods for trading purpose to an infant is void against the infant and the seller is precluded from suing for the price. The court held that the Infant Relief Act 1874 applies to Nigeria. The claim was therefore dismissed.

It should be noted that an infant is permitted to enter into certain valid contracts, but note that all other contracts will either be voidable or totally void. Examples of valid contracts by an infant includes a contracts for necessaries suitable to his condition and status of life and for the personal consumption of himself or his family, another is beneficial contract of service which is of advantage to the infant that he should be trained for his future trade or profession and to obtain a means of livelihood, such contract could be of apprenticeship, service, education and institution.

In *Clements v. London & North Western Railway Co.*,[63] the court held that the infant's promise to accept the terms of an insurance scheme to which the company contracted with him and to forgo any claim he might have against the company under the Employers' Liability Act 1880 was valid and beneficial to him. Also in *Slade v. Metrodent Ltd,*[64] an infant apprentice sued his master for not instructing him properly, he argued that because he is an infant, he was not bound by a clause in the contract that the dispute should be submitted to arbitration first. The court once again affirmed that the arbitration clause was binding on the infant because the agreement was generally beneficial to him.

A Person of unsound mind and an intoxicated person: The mentally disordered person is bound just like the infant in a contract for the supply of necessaries but for every other kind of contract he will generally not be bound except during his lucid intervals. The position for an intoxicated person is the same with that of an insane person.

[60] Owolabi N.B and Badmus M.A, 1999, *Nigeria Business & Co – operative Law,* Printarts limited, p. 23.
[61] See generally, 1999 Constitution of Nigeria (as amended in 2011)
[62] (1924) 5 NLR. 33
[63] (1894) 2 Q.B 482
[64] (1939) 2 K. B 206

A bankrupt: A bankrupt may enter into a contract including an arbitration agreement but the estate passes to his trustee in bankruptcy subject to the bankruptcy law of the country.[65] It should be noted that in England a bankruptcy order does not have the effect of discharging an existing arbitration agreement or of revoking the authority of an arbitrator appointed by the bankrupt.[66] But the arbitration agreement is not binding on or enforceable by his trustee unless:

- The trustee adopts the contracts containing the arbitration agreement, or
- Applies with the consent of the creditors committee, or by any party to the agreement other than the bankrupt to the bankruptcy court that the agreement be referred to arbitration.

The State: For a developing country like Nigeria, there are no restrictions to it as a State or its Agency being a party to an arbitration agreement, this is because of its economic activities including international projects which are undertaken by the State or its Agencies, but in other states like the United states, the state or State Agency cannot enter into an arbitration agreement without the approval of the appropriate authority.[67]

Where the state freely enters into contracts, the state or its Agency is not allowed to claim immunity against arbitration. The English court in *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria*[68] rejected a claim of immunity. In that case the action followed the "Cement Armada" of 1974/75 in Nigeria when cement was imported indiscriminately and without any control or regulation thus creating almost a total congestion and blockage of the Lagos ports. In one of the actions against the Central Bank of Nigeria as an agent of the Nigerian Government, liable for the claim for loss incurred by the foreign exporters, it was contended on behalf of the Central Bank of Nigeria that it was entitled to claim sovereign immunity as such agency. Lord Denning M.R in his judgment observed, inter alia as follows: "*... if a government department goes into the market places of the world and buys boots or cement as a commercial transaction that government should be subject to all the rules of the market place*".

Thus, where a Government or a Government Agency enters into an international commercial contract containing an arbitration clause, it will be bound by the clause like any other person. Lord Denning also observed in *Rahimtoola v. The Nizam of Hyderabad*[69] "*It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law*". The only exception is that the process of execution and attachment of state property for the enforcement of an arbitration award, unless that property is in use or intended for use for commercial purpose.[70]

Corporations Aggregate: The corporate legal personality a company assume after incorporations has conferred on it the necessary capacity to contract, but where a corporation enters into an arbitration agreement and it later winds up, any arbitration in which it was involved lapses absolutely and cannot be revived . For the arbitration agreement to be valid it must conform to the rules which normally regulate transactions by the corporation; for example, if the corporation can only validly contract under its common seal, the submission must be under seal in other to be binding.[71]

In England any winding up of a company does not discharge an arbitration agreement to which it is a party, nor revoke the authority of an arbitrator by it, unless and until the agreement is disclaimed by the liquidator with the leave of court. The liquidator may, with the sanction of the court or the committee for inspection in the use of a winding up by the court, bring or defend arbitration proceedings in the name and on behalf of the company.[72] The administrator and administrative receiver have the power to bring or defend arbitration proceedings in the name of and on behalf of the company and to refer to arbitration any question affecting the company.[73]

E. DISPUTE MUST BE ARBITRABLE:

[65] Orojo J. O. And Ajomo, M. A, Op cit. P. 110
[66] See *Hemsworth v. Brian* (1845) 1 CB 131
[67] Orojo J. O. And Ajomo, M. A, Op cit. P. 111
[68] (1977) All E. R 881
[69] (1958) A. C 379
[70] See Section 13, State Immunity Act 1978
[71] Russell on *Arbitration. 20th ed. P. 34*
[72] Mustill M.J and Boyd S.C, Op cit. P. 153
[73] See Section 14 and 42, Insolvency Act of 1986

Under Common Law, an undisputed claim cannot be the subject matter of arbitration, there must however be a dispute to be referred. This is simply to the effect that the agreement must not cover matters which by the law of the state are not allowed to be settled privately or by arbitration usually because this will be contrary to public policy.

The dispute must be a dispute that can be compromised by way of accord and satisfaction. These includes all matters in dispute about any real or personal property, dispute as to whether a contract has been breached by either party, or whether one or both parties have been discharged from further performance thereof. It should also be noted that the kind of remedies which an arbitrator can award is limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state.[74]

For example a criminal matter does not admit settlement by arbitration; neither wills or matrimonial matter of general interest, where rights of others are involved or a status matter such as the winding up of a company, or bankruptcy. The arbitrator cannot impose a fine or term of imprisonment, commit a person for contempt or issue a writ of subpoena.[75]

F. LEGALITY OF THE CONTRACT

Generally, dispute arising out of an illegal contract cannot be referred to arbitration; this is because the illegality goes to the root of the validity of the arbitration agreement.[76] Where the original contract is illegal the arbitration clause will also be illegal as the arbitrators will not have jurisdiction to entertain such a dispute arising from the illegality and where the contract subsequently becomes illegal under the substantive law governing the contract or the law of the place of performance the arbitrator must take notes of the point and rule upon it but he is, not deprives of jurisdiction,[77] unless the effect of the illegality is not merely to make performance of the contract unlawful but to render the whole contract *void ab inito*.

CONCLUSION & RECOMMENDATIONS

From the foregoing, it is trite that the basic requirement of an arbitration agreement or clause is the reference of a dispute to arbitration, what will however determine the contents of an arbitration agreement will be whether the agreement is for an ad hoc arbitration or an institutional arbitration.

The Supreme Court of Nigeria in *Royal Exchange Assurance v. Bentworth finance (Nig.) Ltd*[78] held that "*an arbitration clause in a written contract is quite distinct from the other clause. Whereas the other clauses in a written contract set out obligations which the parties undertake towards each other, the arbitration clause merely embodies the agreement of both parties that if any dispute should occur with regard to the obligations which the other party has undertaken to the other, such dispute should be settled by a tribunal of their own constitution and choice. The appropriate remedy therefore for a breach of a submission is not damages but its enforcement*".

The aggrieved party may bring an action for a breach of the agreement to arbitrate, or to stay proceedings in accordance with the law or proceed *exparte*[79] where an arbitrator has already been appointed or request the court to appoint arbitrators.

It is also settled, that the party seeking to enforce an arbitration agreement must have fulfilled all conditions precedent[80]; the Supreme Court of Nigeria in *F.I Group Corporation v. Bureau of Public Enterprises*[81] stated that "*it is trite that a person seeking to enforce his right under a contractual agreement must show that he has fulfilled all the conditions precedent and that he has performed all those terms which ought to have been performed by him*". This however, is apt for the enforcement of all arbitration agreement.

It is therefore trite that the various Arbitration legislations and rules in developing countries particularly Nigeria have not sufficiently provided for the formal validity requirement for arbitration agreement which make such arbitration agreements enforceable. These requirements are imperative and vital as they go to the root of every arbitration agreement and it also gives an arbitration tribunal

[74] Mustill M.J and Boyd S.C, Op cit. P. 149
[75] Either Atestificandum or Duces tecum
[76] See the dictum of Lord Denning in *UAC v. Macfoy;* "*you cannot put something on nothing, it will not stand*"
[77] See *Heyman v. Darwins Ltd* (1942) A. C 3556
[78] (1976) 11 S.C 96
[79] *Wood v. Leaks* (1806) 12 Ves. 412
[80] *He who comes to equity must come with clean hands*
[81] Suit No. SC 12/2008. (2012) LPELR – SC 12/2008 delivered on on Friday the 6th day of July, 2012.

jurisdiction. It is therefore recommend that extensive and explicit provisions should be added to the various Arbitration legislations and rules of developing countries. Consequently foreign parties must endeavour to consider the validity requirements before entering into an arbitration agreement in Nigeria or with a Nigerian.