

## RECOVERY OF ARBITRATORS' FEES FROM DEFAULTING PARTIES: LEGAL AND CONTRACTUAL CHALLENGES\*

### Abstract

Arbitrators are trained experts and professionals who are retained to facilitate the arbitration process on behalf of parties. It is indubitable that valuable time, resources and effort is put in by arbitrators during arbitral proceedings. Pursuant to this, arbitrators are entitled to fees for the work done. The Arbitration and Conciliation Act incorporates the issue of arbitrator's fees in its provision on costs. Despite this however, the recovery of an arbitrator's fees is not always easy as there exist, challenges both contractual and legal which may impede the seamless recovery of an arbitrator's fees. This paper seeks to highlight these challenges and proffers recommendations on how to surmount these challenges.

**Keywords:** appointment of arbitrators, cost, payment of arbitral fees

### 1. Introduction

Disputes are inevitably part of human life as human activities sometimes may lead to such disputes. One of the ways used in settling this dispute is through arbitration where parties agree to submit the dispute to a third party and thus undertake to be bound by the decision of the third party. Arbitration is one of the alternative methods of dispute resolution (ADR) others include negotiation, mediation and conciliation. Arbitration is the fair resolution of a dispute between two or more parties by a person or persons other than by a court of law. The concept of arbitration as an alternative dispute resolution method (ADR) lies from the desire of parties to have a less formal and less expensive way of settling disputes in a shorter time.<sup>1</sup> One crucial aspect of arbitration is the appointment of an arbitrator. The selection of an arbitrator is critical for the reputation of an arbitral proceeding and because of the level of work put in by arbitrators they are entitled to their professional fees. The payment of an arbitrator's fees is an integral part of the arbitral proceedings. It is very rare to hear or see where arbitral proceedings was conducted free of charge. The duty to pay the arbitrators' fees rests on the parties and also depends on the provisions of the law guiding a particular arbitral proceeding. However, problems may arise where parties begin to dispute who should bear the cost of arbitrator's fees or where the party who is responsible outrightly refuses to pay or begins to shy away from his duties. It is particularly difficult to resolve the issue of payment of the arbitrator's fee when the proceedings have been concluded. Thus, the arbitrator or arbitrators will have to fall back on the law to recover their fees.

### 2. Appointment of Arbitrators

The appointment of arbitrators is usually the first step in the commencement of any arbitration proceeding. Parties to an arbitration agreement have the right to appoint their arbitrators or state the procedure of their appointment. It must be noted that it is not in all circumstance that the parties to an arbitration agreement name their arbitrators or state the procedure for their appointment. Section 6 and 7 of the Act<sup>2</sup> provides for the appointment of arbitrators. It states that: 'The parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be three' In addition, the Act recognizes the right of parties to determine the procedure for appointing the arbitrators where the parties have failed or neglected to appoint their arbitrators in the arbitration agreement. The parties may recommend that a procedure be adopted or that an institution should be notified to appoint three of its members as arbitrators. Where the parties failed to specify the procedure, the law in accordance with section 7(2)(a) of the Act is that in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed shall appoint the third. Where a party fails to appoint his arbitrator or where the two arbitrators appointed by the parties failed to agree on the appointment of the third arbitrator within thirty days, a party to the agreement shall apply to the court for the appointment of the arbitrator.<sup>3</sup>

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<sup>1</sup> Fabian Ajogwu, Commercial Arbitration in Nigeria: Law & Practice (Lagos: Centre for Commercial Law Development: 2009) p76

<sup>2</sup> Section 6 and 7 of the Arbitration and conciliation Act Cap A18 L.F.N. 2004

<sup>3</sup> Greg C. Nwakoby, The Law and Practice of Commercial Arbitration in Nigeria (2nd Edition) 2014. Pg 369-370,

### **3. Cost of Arbitration**

The term cost of arbitration is an integral part of the award which binds the parties and an award is therefore not final without incorporating the cost. The general rule in arbitral proceedings is that cost follows the event.<sup>4</sup> Parties to arbitration agreement are not competent to agree as to the cost of arbitration but nothing in the Act prohibits them from stating who is to bear the cost of arbitration in their agreement. Such an agreement as to who bears the cost of arbitration is not one which the parties can determine. In most cases, the issue as to who bears the cost of arbitration is often left silent in the agreement and in such situations the arbitrators in determining the cost of arbitration also determine and fix which of the parties is to bear same. The fees of the arbitral tribunal shall be reasonable in amount taking into consideration the following factors:

1. The amount in dispute
2. The complexity of the subject matter
3. The time spent by the arbitrators
4. All other relevant circumstances of the cases

The statistics provided by the ICC International Court of Arbitration gives an insight into the components for the cost of arbitration.<sup>5</sup> By saying cost follows the event, the general principle and practice in arbitration is that the unsuccessful party in an arbitral proceeding shall pay all or substantial part of the arbitration cost to the other party.<sup>6</sup> Arbitration fees do not come cheap. Parties to an arbitration proceeding pay quite a number of fees which may include travel and other expenses incurred by arbitrators, cost of experts, fees for lodgings, venue for the proceedings etc. Usually, where the arbitral proceeding is conducted by or through an arbitral institution, (which is mostly the case in recent times) the arbitral tribunal fixes the cost of arbitration. Examples of such arbitration institutions which administer arbitration proceedings include; Chartered Institute of Arbitrators Nigerian Branch, Lagos Court of Arbitration, International Chamber of Commerce (ICC), the London Court of Arbitration etc. Although there is nothing stopping the parties in arbitration from stating who will bear the cost or how the cost will be borne, they cannot fix the cost itself nor what should be the arbitrator's fee. It is usually the arbitral tribunal that fixes the cost. In the event where the parties do not state expressly who bears the cost, it falls on the unsuccessful party to bear cost. Most times when this is the case, the party may contest the unfairness of paying the fees and cost. It is important to note that once an arbitrator agrees to arbitrate or be involved in an arbitration proceeding, it creates a contracted relationship where the parties are bound to pay the arbitrator's fees. Costs in arbitration can be categorized into two main groups:

- a) Arbitration Costs: This includes the arbitrators' fees, expenses for venue, transcribers, witnesses, administrative expenses etc.
- b) Legal Costs: This involves fees for legal representation, it also includes the cost given as an arbitral award.

The fees or costs described above can be assessed under three methods these methods include;

1. Ad Valorem Method: Under this method, the fees are fixed based on the calculation of the total amount claimed by the parties. That is, the tribunal fixes a percentage which is proportionate to the amount in dispute. For instance, the Lagos Chamber of Commerce International Arbitration Centre (LACIAC) Arbitration rules 2015<sup>7</sup> and the ICC rules has a scale of charges and schedule guiding how the fees are to be fixed. The fees are fixed taking into consideration the diligence of the arbitrators, time spent, the rapidity of the proceedings and the complexity of the dispute.<sup>8</sup>
2. The Time Spent or 'Per Diem' Method: Here the fees are fixed based on the time spent by the arbitrator i.e., the fees are payable on an hourly or daily rate. The registrars usually keep a time sheet log to monitor and accurately record the time actually spent on the proceedings.
3. The Fixed Fee Method: This arises where the arbitrators ask for a specific sum not minding the total sum the parties are claiming on the time spent on the case. It is usually done when the case is of a peculiar nature and of major importance. The problem with this method is that it is difficult to ascertain the duration of the proceeding and the extent of input the arbitrators will make. What happens is that the arbitrators make an estimate and quote a sum depending on the nature of the case.

### **4. Payment of Arbitrators' Fees and Applicable Laws**

The relevant provision on costs is Section 49 of the *Arbitration and Conciliation Act*.<sup>9</sup> It provides thus:

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<sup>4</sup> A. T. Bello, 'Cost Follows the Event in Arbitration: Its Paradigm and Relevance'. *Journal of Research and Development* Vol. 2, No. 1 (2014) available at [www.arabianjbm.com](http://www.arabianjbm.com) accessed on 2nd February, 2022 p.2

<sup>5</sup> Fabian Ajogwu Op.cit 76

<sup>6</sup> A. T Bello Op.cit 3

<sup>7</sup> Article 45, LACIAC Rules 2015 available at [www.laciac.org](http://www.laciac.org) accessed on 14th January, 2022

<sup>8</sup> Fabian Ajogwu Op.cit 77

<sup>9</sup> Arbitration and conciliation Act Cap A18 L.F.N. 2004

- S.49 (1) 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 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 arbitral 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 such cost is reasonable.
- (2) The fees of the arbitral tribunal shall be reasonable in amount taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.
- (3) If an appointing authority has been agreed upon by the parties or designated by the Secretary- General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing his fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.
- (4) If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators; and if the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.
- (5) In cases referred to in subsection (3) and (4) of this section when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority, which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Also, Article 38(1) of the International Chamber of Commerce (ICC) Rules of Arbitration<sup>10</sup> states:

The cost of the arbitration shall include the fees and expenses of the arbitrator and the ICC administrative expenses fixed by the court, in accordance with the scale in force at the time of commencement of the arbitral proceedings, as well as the fees and expenses of any expert appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

Furthermore, Article 42 of the LCAIC Rules<sup>11</sup> and Article 48 of the Article 49 of the Arbitration and Conciliation Act<sup>12</sup> mandates that the arbitral tribunals must be reasonable in fixing and awarding of costs.

From the provisions of the laws above, it is clear that the payment of the fees of Arbitrators is sacrosanct. The normal practice by arbitral institutions is to request for deposits of cost from the two parties before the commencement of the proceedings. It is from the costs that Arbitrators are paid. Even where an arbitral award is set aside, the arbitrator is still entitled to his fees<sup>13</sup>. In practice, where an arbitral institution is handling an arbitral process, it is the institution which is responsible for collecting the arbitrators' fees. There are situations wherein the parties may have agreed upon arbitral institutions as the appointing authority. In such circumstance, the appointing authority or the arbitral institution may have a schedule of fees or scale of charges. Where this is the situation it is the schedule of fees that should guide the arbitral tribunal in fixing the fees or cost of arbitration. Where the arbitral tribunal has no schedule of fees, any party may request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily allowed in international cases, and if the appointing authority agrees to provide such information, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.<sup>14</sup>

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<sup>10</sup> ICC Rules of Arbitration 2021 <https://iccwbo.org/dispute-resolution-services/arbitration/rule-of-arbitration> accessed on 14th January 2022

<sup>11</sup> LACAIC Rules Article 42

<sup>12</sup> CAP A18 supra

<sup>13</sup> See the case of Victor Adegoroye, Mrs. Co, Graham-Douglas, Bank of Broston NA USA & 60rs (2005) 12 CLRN 99 (FHC)

<sup>14</sup> Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (1997) 193

### **5. Legal and Contractual Challenges of Recovering the Arbitrators' Fees**

Arbitrators are professionals who spend valuable time and apply expertise and skill to ensure the success of arbitral proceedings and as such are deserving of adequate remuneration as compensation for their work.

It should be noted that an arbitrator is not entitled to claim any payment until he makes an award because the remuneration paid to an arbitrator is for his award. However, the following should be noted-

- a. there is an implied duty on parties to pay an arbitrator on quantum meruit basis for an arbitration which is abandoned before award is made,
- b. An arbitrator may arrange with parties before he accepts to serve, to receive a payment on account even before the commencement of the proceedings, and to receive subsequent payments from time to time in case of prolonged proceedings,
- c. Where parties default in payment, an arbitral tribunal cannot withhold an award pending payment of fees because they are under obligation to deliver a signed ruling under section 26(4) of the Act, but can rely on the express or implied promise of the parties to enforce their claims.
- d. Where parties believe that the fees charged are excessive, they can apply to get the fees "taxed" (assessed for reasonableness) by an officer of the court and only the appropriate fee determined by the taxing officer will be paid, and any excess fee already will be recovered. But where the amount charged is outrageous, it may constitute a misconduct for which the award will be set aside.<sup>15</sup>
- e. Where an award is set aside by the court on grounds of misconduct of the arbitrator, any payment received shall be recovered because such payment was received for a consideration that has totally failed.<sup>16</sup>
- f. Finally, a person who has no jurisdiction to act as an arbitrator is not entitled to any remuneration<sup>17</sup>.

The issue of payment of arbitrators' fees is of great importance not just to the parties and the entire proceedings. It could make or mar the arbitration process. Redfern and Hunter express this concern thus;

The question of establishing effective arrangements with regard to fees and expenses is as important for the arbitrators as it is for the parties. The fact that the arbitrators can become *functus officio* instantly at the joint will of the parties emphasizes the importance for arbitrators to obtain adequate security for payment of their fees and expenses...<sup>18</sup>

From the above, question arises: How can arbitral tribunals or arbitrators recover their fees when a party or parties refuse to pay? Should the arbitrators' fees be collected before and after proceedings? The answer lies in the earlier established principle that once arbitrators accept their appointment to serve in a tribunal, there is a contractual and legal obligation on the party whose responsibility it is to bear cost to pay. The Arbitration and Conciliation Act tried to lift this burden by providing for deposits on costs of arbitration. The purpose of depositing costs is for the arbitral tribunal to be able to carry out their duties efficiently. The cost paid is used for setting up the venue, inviting experts when need be, and other administrative expenses. It is within that cost so paid that the fees of arbitrators are included. Thus, when this is done, it is easy for arbitrators to recover their fees. The Act further made provision on what should happen where deposit is not made in full. The Act provides thus:

If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or the other of them may make the required payment; and if such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.<sup>19</sup>

The intent of the above section is clear and laudable. The arbitral tribunal cannot be expected to continue proceedings when one or both parties have shown unwillingness to fulfill their obligations. A party, who refuses to deposit the cost as required, is likely not to honor the arbitral award when given.

Unfortunately, the last arm of the proviso stated earlier also gives room for another challenge the arbitrators may face. A party who feels he has a bad case may deliberately fail to meet up with his cost deposit obligations to frustrate the proceedings. Hence, when the proceeding is suspended or terminated, it leaves the arbitrators vulnerable in receiving payment for time already spent on previous proceedings.

Another challenge this scenario may create is where a party who wants the arbitral proceeding to go on until the end decides to make the full deposit for costs and fees at the refusal of the other party, that other party may allege that there is an element or likelihood of bias in favour of the party who made full payment. When this is the case,

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<sup>15</sup> Re Probble & Robinson (1892) 2 QB 164.

<sup>16</sup> Re Hall & Hinds (1821) 2 M & G 847.

<sup>17</sup>O.D. Amucheazi, Lecture Note on: Commencement of Arbitral Proceedings, Arbitral Proceedings and Professional Remuneration of Arbitrators, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria.

<sup>18</sup> Redfern and Hunter, Law & Practice of International Commercial Arbitration (4th Edn) 178' cited in Fabian Ajogwu Supra 80

<sup>19</sup> S.49 & 50 Arbitration and Conciliation Act, Cap A18 LFN 2004

it may become discouraging for the arbitral tribunal to continue proceeding, because it gives room for the aggrieved party to challenge the decision of the arbitral tribunal when an award is made.

Also, one or both parties may raise objections as to the fees of arbitrators being too high. The question arises whether such objection is capable of creating a prejudice in the mind of arbitrators against such party? What happens when an award is made against such party in all fairness and the party contests the award on grounds of prejudice?

There is no denying that cost of arbitration has become expensive in recent times. In the case of *Corona v Amherst Partners*<sup>20</sup> it was held that the demanded fees by the arbitral tribunal should be reasonable and not outrageous. This position was given credence at Article 48 of the Arbitration and Conciliation Act which provided that the Arbitral tribunal in fixing its cost should be reasonable, taking into consideration the nature of the case, the time and resources spent or expected to be spent on the proceeding, and the diligence of the arbitrators. Although, the courts and statutory authorities have asked that arbitration fees and costs be reasonable and majority of arbitral tribunals have complied with this, yet this does not stop parties from complaining. To further settle the issue of complaints against high cost of arbitration fees, the Supreme Court of Nigeria in the case of *Commercial Insurance Limited v Alli*<sup>21</sup> pronounced that parties to a dispute have a choice. They may resort to the normal machinery of justice by going to regular courts of law and have their dispute determined or they may choose an arbitrator to adjudicate between them. The Court further stated that parties cannot turn back to complain about the high cost of arbitration or the award itself when both parties went into the agreement to be bound by the outcome of the arbitration with their eyes open.<sup>22</sup> In addition, the Supreme Court in the *Commercial Insurance Ltd* case further reiterated that the arbitrators' fee shall not be tampered with no matter what happens with the arbitral award.

The Court per Hon. Justice Mustapha held:

...As I stated earlier, the Arbitrator whether or not the Arbitral Award is set aside is entitled to his fee. The Arbitrator has ordered that the plaintiff/claimants shall pay the costs of arbitration in the sum of USD70, 000. This court will not interfere with this figure. But having set aside the award, it becomes indefensible to maintain that costs should be borne only by the plaintiffs/claimants. All the parties in this suit must therefore bear the costs of the arbitration...<sup>23</sup>.

In order to avoid the issue of contesting the high cost of arbitration fees or which party bears the cost, it is advisable that arbitration agreements or arbitration clauses in normal contract should specifically provide that both parties bear the cost of arbitration fee. Of course, this will be different from the normal arbitral award against any party. Having this clause in place solves the issue of unfairness in the arbitration cost.

Finally, most enabling authorities on arbitration proceedings have granted the right and authority to fix remuneration and cost of arbitration on the arbitral tribunal. It is however unfortunate that the High Court Laws of most states also confer authority to fix remuneration of arbitrators on regular courts. For instance, the High Court Laws of Enugu State and Anambra State respectively<sup>24</sup>, provide that the remuneration to be paid to an arbitrator in an arbitral proceeding shall be fixed by the court. These provisions are unfortunate for obvious reasons. First, it contravenes the provision of the Arbitration Act. Secondly, they failed to provide criteria which will be used in determining such costs and fees<sup>25</sup>. Therefore, we now have courts in certain jurisdictions interfering with Arbitration costs and the Arbitrator's fees, imposing what should be the reasonable costs on the Arbitral tribunals.

It will be very much easier if all the courts in the country conform to the provisions of the Federal Legislation on Arbitration and the International Rules which are applicable in Nigeria. Allowing and making different provisions as regards remuneration of Arbitrators gives parties leeway to avoid their responsibilities. There is need for uniformity in laws as regards recovery of arbitrators' fees and these laws should be specific on how the fees can be recovered. On their part, courts should endeavour to limit themselves to and uphold the provisions of the law.

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<sup>20</sup> NO D040084 Cal. 4<sup>th</sup> APP Dist. April 1, 2003

<sup>21</sup> (1992) 3 NWLR (Pt 232) 710

<sup>22</sup> Rhodes-vivour Adedoyin, *Commercial Arbitration Law and Practice in Nigeria through the Cases*. (South African: Lexis Nexis (pxy) Ltd 2016) pg 348

<sup>23</sup> *Commercial Insurance Ltd. v Alli* supra

<sup>24</sup> See Sections 49(3) of the High Court Laws of Enugu State Cap 92 Of 24 and 50(3) of the High Court Laws of Anambra State Cap 66 of 1991

<sup>25</sup> Greg C. Nwakoby (incomplete reference)

## **6. Conclusion**

The importance of arbitration fees in arbitral proceedings cannot be overemphasized. Even though the available statutes like the Arbitration and Conciliation Act and the ICC Rules provided for the payment of arbitrators' fees, the laws are still silent on mode of recovering these fees in the event of default by the parties. Sometimes arbitrators or the arbitral tribunals are left with the option of seeking recourse in the courts which ironically defeats the purpose of arbitration. It is recommended that parties to arbitration are committed to discharging their financial obligations to the arbitral tribunal. The provision of the law that parties to arbitral proceedings should make cost deposits before the commencement of proceeding is laudable and should be strictly implemented. In fact, it will be better if the position of law on who bears the cost is reviewed to include both parties. However, this should be differentiated from the arbitral awards. Also, parties are encouraged to make specific provisions in the arbitration agreements as to whom the question and burden of cost is discharged.