

ARBITRAL AWARDS AND SETTLEMENT OF DISPUTES IN NIGERIA*

Abstract

No doubt, as man exists and relates with his fellow man in the society disputes/differences are sure to arise at any stage of their relationship as they are part of human existence. These disputes or differences mostly arise out of or in the course of business, commercial, contractual, matrimonial, political, communal, industrial, international relationships, requiring the intervention of a neutral third party, if the parties involved are not minded to resort to self help or the courts to settle same. It is against this backdrop that parties, in the course of their business or contract relationships, may agree to refer any dispute or differences that arise between them to a neutral party, which could be a person or a number of persons called arbitrator(s) or arbitral tribunal, as the case may be, to settle such dispute or difference between them in a judicial manner and come up with a final decision called an arbitral award. When this is done, the arbitrator(s) or arbitral tribunal is *functus officio*. In this article, we are going to look at the meaning of awards, types of awards, contents of awards, and reasons/purposes for awards. The doctrinal research methodology is adopted; reliance is also placed on case laws.

Keywords: Arbitration, Awards, Settlement of Disputes, Nigeria

1. Introduction

The arbitrator or arbitral tribunal, after taking testimonies and hearing arguments and evidence, both oral and documentary from both parties who referred the dispute or differences to them, including their witnesses, at the conclusion of the proceedings, will carefully consider the totality of all the evidence placed and arguments canvassed before it and give a decision, which is called an arbitral award. The setting down of a valid arbitral award is a very crucial function of the arbitrator or arbitral tribunal, which when done, the arbitrator or arbitral tribunal is *functus officio* and the parties involved, having agreed to be bound by the arbitral award, could go ahead to enforce the said arbitral award. In this article, we are going to holistically look at the arbitral awards in the settlement of disputes in Nigeria.

2. Conceptual Clarifications

Alternative Dispute Resolution (ADR)

Black's Law Dictionary¹ defines Alternative Dispute Resolution as a procedure for settling a dispute by means other than litigation such as arbitration or mediation. Alternative Dispute Resolution could also mean techniques or process of settling disputes with the help of a third party outside the court room. Similarly, ADR refers to the methods of settling dispute(s) without recourse to litigation.

Arbitration

Arbitration is a procedure in which a dispute is submitted by an agreement of the parties to one or more arbitrators who make a binding decision. Black's Law Dictionary² also defined arbitration as a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. Arbitration is a dispute resolution mechanism which subsists in the voluntary referral or submission of a dispute by not less than two persons to a person or body of persons or to an institution or office for determination in a judicial manner where the person or persons or institution or office as the case may be, is not a court of competent jurisdiction.

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¹ B.A Garner (ed), *Black's Law Dictionary* 9th Edition (West Publishing Co. St Paul Minnesota, 2004), Pg 91.

² *Ibid*; at p. 119.

Arbitration Agreement

Arbitration agreement is an agreement by parties to submit to arbitration all or certain disputes which arose or may arise in the course of any transaction between them. It refers to a clause at the time of entering into any business or contract for parties to settle out of court, in the event of any disagreement. Arbitration agreement occurs when two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial or neutral person(s) in a judicial manner after putting evidence before them.

Arbitral tribunal

This is a panel of unbiased arbitrators/adjudicators, which is convened and sits to resolve a dispute or disputes between parties by way of arbitration. A person to whom a reference for arbitration is made is called an arbitrator.

Arbitral Proceeding

This means proceedings conducted by an arbitrator or arbitral tribunal for the settlement, by arbitration, of a dispute or disputes which has been referred to arbitration in the terms of an arbitration agreement.

Dispute

Dispute means any conflict or disagreement between persons, partners which arose in the course of engaging in any business transaction or having anything in common generally. A dispute also refers to an argument or disagreement between, for example, inhabitants of a particular locality or workers or employers or business partners etc.

Arbitrator

An arbitrator is a neutral third party that oversees the alternative dispute resolution method of arbitration. An arbitrator could also be defined as a person who has been officially chosen to make a decision between two people or groups who do not agree.³ It could also refer to an independent person or body officially appointed to settle disputes amongst persons.

Dispute Resolution

Dispute resolution is the process of resolving disagreements or differences arising from certain transactions between persons. Dispute resolution can also be seen as the process of resolving controversies which arose between persons and which if left unresolved parties may resort to litigation.

Award

An award is the decision or judgment rendered by the arbitrators resolving the matter submitted for their consideration at the end of their deliberations. Therefore, an award means a final decision which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question for substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.⁴ As a matter of fact, neither the Act nor the Rules defined what an award is.

3. The Making of the Award

The Act or the Rules did not specify when award would be made after the commencement of arbitration. However, parties can incorporate in the arbitration agreement the time within which an award would be made, in which case, the arbitral tribunal will follow it unless the tribunal did not meet up, then they can extend the time, with the consent of the parties. The extension can be retrospective in nature,⁵ but where the parties did not give consent, section 15 of the Act allows the arbitral tribunal to conduct the proceedings in such a manner as it considers appropriate so as to secure fair hearing. This means that the arbitral tribunal should make an award within a reasonable time and not any time it pleases. If there is unexplained delay in making an award by the arbitral tribunal, section 10 of the Act empowers the parties to terminate the mandate of the arbitral tribunal. Section 25 of the Act provides that any

³ <https://dictionary.cambridge.org> assessed on August 11, 2023.

⁴ Broches, 'Recourse Against the Award; Enforcement of the Award' UCITRAL'S Project for a Model Law on International Commercial Arbitration, ICCA Congress Series No. 2 (1984) p. 208.

⁵ *Knowles & Sons Ltd v Bolton Corpn.* (1990) 20 B. 253.

decision, including an award of an arbitral tribunal made up of more than one arbitrator is by a majority of all its members unless the parties agree otherwise. In a situation where there is an impasse owing to the fact that the arbitral tribunal could not secure a majority vote, the Act did not make provision as to what to do in the circumstance. However, Article 34 of the Spanish Arbitration Act of 1988 provides that the arbitration award as well as any agreement or resolution of the arbitral group will be decided by a majority vote, with the vote of the Chairman breaking the votes. If there is no majority agreement, the award will be rendered by the Chairman.⁶ Obviously, there is a lacuna in our Law in this regard for which action should be taken.

4. Types of Awards

Final Award

A final award is that which conclusively decides all the issues submitted to the arbitral tribunal. It is conclusive on all the matters submitted before the panel. Once an arbitral tribunal makes a final award, the tribunal becomes *functus officio* and ceases to have any jurisdiction and competence to deal with the dispute.⁷

Interim Award

An interim award is a type of award which the arbitral tribunal makes in the course of the proceedings, pending the final determination of the issues in dispute. It is described as a useful weapon in the armory of an arbitral tribunal, in the sense that it enables the arbitral tribunal to save considerable time by determining certain issues in the course of the proceedings instead of waiting until the end of the proceedings.⁸ All decisions taken by the tribunal in respect of such issues such as its jurisdiction, competence of any of them to be appointed as an arbitrator and the protection of the *res* during the matter before the tribunal are interim awards because they are made in the course of the arbitral proceedings. They are also final because they are conclusive of the issues decided. One disadvantage of an interim award is that it could cause delay as any of the parties may challenge the interim award, for example, on jurisdiction, to have it set aside.

Partial Award

This is an award which disposes of one or more issues in the matter between the parties, such as payment on account to be made in respect of a particular claim or claims. Partial awards do not deal with the substantive issue before the tribunal but with matters connected to the main issue.⁹

Interlocutory Award

This type of award refers to the decision of the arbitral tribunal on procedural matters. Such awards may better be called an arbitral tribunal order or a procedural order instead of an award because it usually comes in the form of directory procedure of the arbitral proceedings. Hence, Alan Redfern and Mantin Hunter stated thus:

The term 'award' should be reserved for decisions by the arbitral tribunal which finally determines the issues with which they deal. This involves distinguishing between awards (which are concerned with issues) and procedural orders and directions (which are concerned with the conduct of the arbitration). Procedural orders and directions help to move the arbitration forward - they deal with such matters as the exchange of written evidence, the production of documents and the arrangement of the conduct of the hearing. They do not have the status of awards and they may perhaps be called into question after the final award has been made.¹⁰

⁶ B.M Cremades, *Arbitration in Spain*, La Ley: Butterworths, 1991, pp. 78 & 154.

⁷ G.C. Nwakoby, *The Law and Practice of Commercial Arbitration* (1st ed), Snaap Press Ltd, Enugu, 2005, p. 1.

⁸ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, London: Sweet and Maxwell, 3rd ed., 1999, paras 8-34.

⁹ G. Ezejiofor, *The Law of Arbitration in Nigeria*, Longman, 1997, p. 94.

¹⁰ A. Redfern And M. Hunter, n.5 paras 8-07.

Self Executory Award

This type of award is declaratory in nature and is often referred to as a declaratory judgment. It is not such an award as parties can execute against the other. Most times, where there exists a self-executory award, there must be an incidental claim following it, which will make the award one which could be executed. It is worthy of note that this type of award was not provided for by the Act.

Additional Award

An additional award is one made by the arbitral tribunal at the request of any of the parties before it after the final award has been made and the tribunal is *functus officio*. This request is often made upon discovery by the party that there were issues omitted by the tribunal as provided by the Act. An additional award cannot stand on its own, it is part of the final award.

Default Award

A default award is one made when the tribunal proceeded with the matter *ex parte*, that is, when a party, especially the respondent, fails to participate in the proceeding from the beginning, or withdraws midway. When this happens, the Act empowers the arbitral tribunal to continue with the proceedings and make an award.

Consent Award

This an award made by the arbitral tribunal on agreed terms between the parties to it, to settle the dispute between them in the course of the proceedings. When such settlement following the agreement between the parties occurs, the tribunal shall terminate the proceedings and upon request by the parties, if accepted by the tribunal, the tribunal shall record the terms of settlement as the terms of the arbitral award on agreed terms. This type of award is envisaged and recognized under section 25 of the Act.

Contents of an Award

An award must be made in the form established by law or an agreement of parties, and its content must also be in accordance with the law. The content of an award according to law, makes for its validity, if not, it would be invalidated. The content of an award is broadly divided into two namely, the formal requisites and the substantive requisites.

5. Formal Requisites

This part is further sub divided into two – the recitals and the operative part.

The Recitals

The recitals are the introductory part of the award. Recitals help to explain the operative part of the award and show that the arbitral tribunal has the authority to award as it has done and that it has fully performed its duty.¹¹ The recitals provide the preliminary explanation of the difficult part of the award. Hence, recitals should be full and clear. However, recitals are not essential; their inclusion in an award is at the discretion of the arbitral tribunal. An incorrect, incomplete recital or recitals fraught with mistakes and errors cannot be vitiated but such pitfalls could lead to a misconstruction of the award.

The Operative Part

This part of the award contains the findings and decision of the arbitral tribunal as regards the matters in dispute referred to it. The operative part is the essential part of an award and can validate the award even without recitals. Section 26 (3) (a) of the Act requires that the reasons upon which the award is based must be stated clearly in the award unless parties agreed otherwise. The following make-up the operative part of an award:

¹¹G. Ezejiofor, n. 5 p. 95.

Execution: The award must be signed by the arbitrator(s). If the arbitral tribunal is constituted by three arbitrators, the signature of the majority of them is enough to validate the award provided that the reason for the absence of any signature is stated in the award. This is as provided in section 26 (c) & (2) of the Act.

The date and place of the award: The date and place of the award must be stated in the award as provided by Section 26 (3) (b) & (c).

Delivery and Publication: The Act in Section 26 (4) requires that a copy of the signed and dated award must be delivered to each party. This delivery constitutes publication.

Correction and Interpretation: Upon delivery and publication of the award to parties, the arbitral tribunal is *functus officio* unless where it becomes necessary for any award, in this case, section 28 of the Act empowers the arbitral tribunal to do so upon request by any of the parties after notifying the other party after 30 days of receiving a copy of the award. It is only the type of correction permitted by the Act that the arbitral tribunal can effect. For example, errors in computation, clerical or typographical errors. Section 28 (4) and (5) of the Act empowers the arbitral tribunal to make an additional award in a situation where it inadvertently omitted some claims presented to it. But this can be done upon application by any of the parties within 30 days.

6. Substantive Requisites

For an award to be valid, it must be certain, consistent, possible, unambiguous, uncontradictory, unconditional and unimpeachable. It must decide only matters submitted to it. No technical expressions are necessary.¹² The following forms the substantive requisites of an award:

- i. The award must be final in that it must settle all the issues raised under the arbitration agreement so that parties to the dispute will be able to know their position without resorting to further legal inquiry.¹³
- ii. The award must be certain. It must be expressed in a clear language such that no doubt can arise as to the meaning of its provisions or as to the nature and extent of duties imposed by it on the parties.
- iii. The award must be consistent and not ambiguous or contradictory.¹⁴
- iv. The award must be legal and capable of performance in the sense that the award must be physically possible for the parties to perform without contravening the law. The award should not be contrary to public policy.
- v. The award must be directed to all the matters referred. This means that the award must determine all the differences which parties by their agreement referred to arbitration otherwise, it will be bad and unenforceable.¹⁵
- vi. An award may and should contain directions which are necessary for its performance, but such directions should not be contrary to the law. For example, a direction that will lead to trespass by the party trying to carry out the direction.¹⁶ However, if the award specifically requires that directions be given and the arbitral tribunal fails to give such directions, the award shall be bad for want of finality.¹⁷
- vii. Reliefs Granted: The arbitral tribunal may grant reliefs in form of orders, declarations and/or damages against the offending party. Such reliefs which can form part of the award include:
 - a. Payment of the sum of money as general damages;
 - b. Declaration as to any matter to be determined in the proceedings;
 - c. Order a party to do or refrain from doing something (an injunctive relief);
 - d. Order the specific performance of a contract;
 - e. Order the rectification, setting aside or cancellation of deed or other document;
- viii. Costs: This can either be in respect of debt or damages. The arbitrator or tribunal, like a regular court, cannot grant more than the relief sought.

¹² *Eardley v. Steer* (1835) 4 Dowl. 423; 4 L.J. Ex. 293.

¹³ *Samuel v. Cooper* (1835) 2 A & E, 752.

¹⁴ *Storke v. De Smith* (1738) Willes 66.

¹⁵ *Bradford v. Bryan* (1741) Willies 268.

¹⁶ *Turner v. Swainson* (1836) M & W 572; 5 L.J. Ex. 266.

¹⁷ *Johnson v. Wilson* (1741) Willes 248.

7. Reason for the Award

Section 32 (3) of the Act provides that the arbitral tribunal shall state the reasons upon which the award is based or arbitrator is required to state the reasons for the award by incorporating same in the award, making the reason(s) part of the award. This will enable the parties, especially the losing party to have a rational explanation for the decision. However, the arbitrators need not furnish reason in the following circumstances;

- i. Where the dispute is solely concerned with an issue or issues of facts;
- ii. Where the arbitrator has decided the issues of fact in such a way that the questions of law raised by the dispute have become academic; and
- iii. Where neither party had given notice that a reasoned award would be required before the award was made.

The importance of stating the reason in the award is to show that the arbitrator or arbitral tribunal applied their minds to the matter and took all the materials put before them into consideration before arriving at a decision so that the decision cannot be said to be arbitrary.

8. Conclusion

Arbitral awards are final and binding decisions in an arbitration with respect to all the issues referred to the arbitral tribunal. They determine the rights and liabilities of the parties to the arbitration, setting out the recovery that each party is entitled to. The making of an award renders the arbitral tribunal *functus officio* and the enforcement of an arbitral award depends on its validity. Hence, if an arbitral award is lacking in any of the formal and substantive requirements of an award, it is invalid and therefore, unenforceable by the parties. In the event that the award made by an arbitrator or arbitral tribunal is unenforceable, it means that all that transpired, giving rise to the award is a waste of precious time, money and energy, which no doubt, was not contemplated by the parties before referring their dispute to arbitration. Arbitrators are advised to be on their guard to avoid this painful eventuality.