**COURSE TILTLE: ALTERNATIVE DISPUTE RESOLUTION**

**COURSE CODE: LPB 206**

**TOPIC: ARBITRAL AWARD**

1. **ARBITRAL AWARD**

**Introduction**

In an Arbitration Proceedings, the Tribunal is expected to achieve the purpose of settling the issues between the parties and arrive at a valid decision which shall be binding between the parties. This is the essence of the Proceedings in the first place i.e. to sufficiently dispense impartially with the issues between the parties and give a binding decision to end the proceedings. An Arbitral award is the final step in the proceedings.

The topic will focus on the definition of the concept in view (arbitral award), the various types in which it could occur, its formal requirements, the different forms of its reliefs, time limits, effect, differences between award and judgment with the procedure for recognition and enforcement of an award.

* 1. **DEFINITION OF ARBITRAL AWARD**

In order to really grasp the essence of an award, it is expedient to understand what the concept connotes and the purpose of making it, i.e. the object of an award. One will simply define award as the exercise of telling the parties precisely their respective rights and obligations are in the light of the decision reached by the tribunal on the subject matter between the parties and that these rights and obligations shall satisfy the requirement for enforceability under both international and domestic legislations.

An Arbitral Award is the **binding and final decision** made by a neutral third party in arbitration proceedings. In another light, it is the determination on the merits of the arbitration proceedings between parties to it.

***Note: It is referred to as an award where all the claims of the Claimants fails or non-monetary nature.***

Before the award can be drafted, the arbitrators have to decide upon what may be a number of important issues, the issues in the reference. They will make their decisions with care, based upon what they have learned from the parties and upon the application of the applicable law, which may have been researched by the parties or by the arbitrators themselves, but which will have been canvassed either at a hearing or in memorials of some kind.

These decisions, together with the reasons for them, are set out in the award, which may be declaratory, (i.e. a statement by the tribunal that such-and-such is so) but is more commonly mandatory, that is to say a direction that one or the other party do certain things, usually pay money in respect of the substantive issues decided and usually also pay money in respect of the costs of the arbitration process.

It is important to also note that awards are not only made for damages. Parties can, for example, obtain injunctions ordering or prohibiting the doing of an act, specific performance of a contract or the rectification or cancellation of a deed or contract.

* 1. **TYPES OF AWARD**

Although it is common to talk of arbitration award as a single concept, in most legal jurisdictions including Nigeria there are several sub‐categories of award. Under this heading, the discourse will consider seven (7) types of award in the following order:

**1.2.1** **Interim Award**: This is a temporary award the tribunal makes before a final decision in the proceedings. **Article 32 (the Rules) of the first schedule to the Arbitration and Conciliation Act** (**ACA**) states that:

*In addition to making a final award, the arbitral tribunal shall be entitled to make* ***interim****, interlocutory or partial awards…*

This award if issued by the tribunal though has not finally resolved all issues between the parties, it is however a final determination in respect of certain questions, issues or applications made by the parties. It is also important to note that **Article 26** of the Rules above permits the arbitrator to make interim award in relation to measures of protection.

An example of an interim award could be making a provisional order for the payment of money or the disposition of property between the parties. It could also come in form of an order for payment of cost of arbitration or for the preservation of evidence relating to the arbitration proceedings.

**1.2.2 Partial Award**: The term partial award means an award of only part of the claims or cross claims which are brought, or a determination of only certain issues between the parties. Importantly, this leaves it open to the parties to either resolve or to continue to arbitrate (or litigate) the remaining issues.

**Article 32** cited above, gives the tribunal the power to make a partial award in the following words:

*In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or* ***partial awards…***

In another light, it is an award dealing with only some substantive issues in dispute between the parties like issue of jurisdiction of the tribunal and when a decision is reached on this part of the arbitration proceedings, it is final and binding on the parties to it. The case of *Emirate Trading Agency V Sociedade de foment Industrial Private Ltd*[[1]](#footnote-1) is instructive on this reasoning.

**1.2.3 Consent Award**: A consent award arises as a result of settlement between the parties. The parties agreed to some terms in the arbitration proceedings to be binding on them which is then incorporated into an award (without any reason been stated) that is enforceable.

This type of award is similar/likened to a consent judgment signed and filed in court as a judgment of the court pursuant to the amicable resolution of the dispute between the parties. The tribunal here does not consider the dispute on the merits; it however put the parties agreement into the shape of an award which is final and binding between the parties.

To this effect, **Section 25(1) of the ACA** provides that:

*25. (1) If, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the arbitral proceedings, and shall, if requested by the parties and not objected to by the arbitral tribunal, the settlement in the form of an arbitral award on agreed terms.*

**Section 25(2)** makes it clear that an agreed award is to satisfy the requirements of the form and contents of an award which is provided in **Section 26**. These requirements are that:

*26. (1) any award made by the arbitral tribunal shall be in writing and signed by the arbitrator or arbitrators.*

*(2) where the arbitral tribunal comprises of more than one arbitrator, the signatures of a majority of all the members of the arbitral tribunal shall suffice if the reason for the absence of any signature is stated.*

*(3) the arbitral tribunal shall state on the award-*

*(a) the reasons upon which it is based, unless the parties have agreed that no reason are to be given or the award is an award on agreed terms under section 25 of this Act;*

*(b) the date it was made; and*

*(c) the place of the arbitration as agreed or determined under section 16(1) of this Act which place shall be deemed to be the place where the award was made.*

*(4) A copy of the award made and signed by the arbitrators in accordance with and signed by the arbitrators in accordance with subsection (1) and (2) of this section, shall be delivered to each party.*

**1.2.4 Performance Award**: In most cases, awards in arbitral proceedings are usually made in money terms; however a party can be ordered to perform specific works, handover goods or rights. The award is always clear on what particular step to be taken or be performed in the circumstances of the dispute.

For example in a situation where an individual bought a Toyota car from a manufacturing company and the company fails to hand over the remaining documentations to the individual, if such an individual commences arbitration proceedings against the company, the company will be ordered to perform specifically its obligation which is to hand over the remaining documents to the Toyota Car. This in essence is a Performance award made by the tribunal.

**1.2.5 Draft Award**: This type of award which is not binding on the parties until it has been confirmed by the tribunal.

**1.2.6 Final Award**: this is the concluded decision of the substantive subject of the arbitral proceedings. It is the final decision on the merits between the parties to it. This type of award is usually in writing, containing signatures of all the arbitrators, reasons and date for an award and the place of arbitration.

The final award is the last step in the arbitration proceedings because it has exhaustively determines all the issues in controversy or dispute between the parties and the case of *Maritime International Nominees Establishment (MINE) v Republic of Guinea*.[[2]](#footnote-2) Once the tribunal finishes this step their duty becomes ***functus officio***. **Section 27(1) of ACA** provides that:

*27. (1) The arbitral proceedings shall terminate when the final award is made……..*

It is important to note however that the tribunal authority can be reactivated in certain instances. When for instance an order for the remittal of the award back to the arbitrator is made by the court under the provisions of **Sections 29(2) and (3) of the ACA** or should an additional award or correction of an existing award becomes necessary as stipulated under **Section 28(4).**

**1.2.7 Additional Award**: It is true to say that usually once the final award is made, the tribunal has no authority; however the parties can request an additional award be made on an undecided issue still in dispute.

**2.0 FORMAL REQUIREMENTS OF AN AWARD**

There is no straight jacket rule on the format of writing which an award should take; arbitrators are free to decide the style of writing for the particular case at hand. Hon. Lord Justice Donaldson said in *Bremer v Westzucker* [[3]](#footnote-3)that:

*“No particular form of award is required …….. All that is necessary is that the arbitrators should set out what on their view of evidence did or did not happen and should explain succinctly why in the light of what happened, they have reached their decision and what that decision is. This all that is meant by a reasoned award”*

The Nigerian Arbitration and Conciliation Act (ACA) and the Unicitral Rules prescribes vividly certain formal requirements which an award has to satisfy before it can be confirmed as valid and binding between the parties. These requirements are stated thus:

1. **Writing and Signature**: It is a mandatory and essential that a valid award must be in a written form where is will clearly show the respective rights and obligations of parties to the arbitration proceedings. Aside that it is been written down it must also be signed by the arbitrators.

**Section 26 (1) of the ACA provides that:**

*26. (1) any award made by the arbitral tribunal shall be in writing and signed by the arbitrator or arbitrators.*

By extension under **Section 26(2)** provides particular reference to the issue of signatures of arbitrators and it states that:

*(2) Where the arbitral tribunal comprises of more than one arbitrator, the signatures of a majority of all the members of the arbitral tribunal shall suffice if the reason for the absence of any signature is stated.*

1. Reasons: This is another sacrosanct element under this heading without which an award will be in valid. The reason for an award gives the basis for the decision of the tribunal or the rationale behind the tribunal reaching a particular decision which will affects the rights and duties of parties to the proceedings. The provision of Section 26(3) is so instructive on the necessity of this requirement and the exceptions where it will be dispensed with and these is stated thus:

 *(3) the arbitral tribunal shall state on the award-*

*(a) the reasons upon which it is based,* ***unless the parties have agreed that no reason are to be given or the award is an award on agreed terms under section 25 of this Act;***

iii**. Date:** The date the award was made is so vital to the formal requirement of an award as provided under Section 26(3) (b). Although the Act is silent on the particular pattern which a date on an arbitral award should take, there is a presumption that the date will be regular lunar calendar date consisting of the day, the month and the year respectively.

iv.**Seat of Arbitration**: Section 26(3) (c) stipulates that the place of the arbitration as agreed or determined under the provision of Section 16(1) of the Act is to be stated. Section 16(1) provides for this in details thus:

 *16. (1) Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.*

**v. Publication**: **Section 26(4**) stipulates that a copy of the award as made and signed by the arbitrators and having fulfilled the requirements of sub-sections 1 and 2 of this section is to be delivered to each party.

1. **Difference Forms of Reliefs and Remedies in an Award**

When an arbitral tribunal decides issues between the parties, it usually makes an award which contains various remedies/reliefs that is to be given to the party in favour and against the losing party. Remedies/reliefs to be included in an award will essentially depend on the claims brought before the tribunal, the provision of the arbitration agreement between the parties, the substantive law of the arbitration and the applicable law to the seat of the arbitration. Some of these remedies are; monetary, declaratory, performance, injunctive and rectification.

**3.1**. **Monetary Award:** In a monetary award the arbitrator orders a party to pay some money to the other party. E.g. **The Defendant shall pay to the Claimant within 20 days of the date of this award the total sum of N200,000,000 (Two Hundred Million) in full and final settlement of the claims made in this arbitration.**

**3.2 Declaratory Award**: Under this type of remedy, the arbitrator makes a declaratory statement which resolves the issues between the parties and this he does by pronouncing with certainty the specific rights and obligations of parties to the proceedings.

Example: **I AWARD AND DECLARE THAT** the contract dated 7th day of February 2020 was validity performed on the 14th day of February 2020. (This is an example where it is in dispute between the parties whether the contract between the parties was validly perform to ensue any rights or duties thereof).

**3.3 Performance Award**: In an award of this kind, a party is mandated and ordered to perform strictly a particular contractual obligation which he is in default of. The award will clearly show the particular action to be performed (e.g. giving a document of a car to the claimant after the tribunal ordered the Defendant to do same due to default on his part), when the particular action is to be taken and how is to be performed.

**3.4 Injunctive Award**: In an injunctive award a party is ordered to perform a positive act or refrain from doing a specified thing relating to the subject-matter of dispute between the parties.

Example: **I AWARD AND DIRECT THAT** the Defendant shall renovate the building being damaged and shall pay to the Claimant the sum of N 10,000,000 (Ten Million Naira).

3.5 Rectification Award: In a rectification award the arbitrator orders that a document shall be rectified, set aside or cancelled. Whichever is applicable in the circumstances. This type could occur while making an additional award or corrections to an award as provided under **Section 28 of the Arbitration and Conciliation Act.**

Example: **I AWARD AND DIRECT THAT** the agreement between the parties with particular reference to page 20 which contains the British Pound Sterling currency sign be changed to Dollar currency sign.

**4.0 TIME LIMITS, EFFECTS OF AN AWARD AND THE DISTINCTION BETWEEN AWARD AND JUDGMENT**

**4.1 TIME LIMITS OF AN AWARD**

Arbitration aims at the expeditious resolution of dispute when compared with litigation and so there is limits to which the proceedings should elongate to. Parties by themselves in their agreement do sometimes indicate time limits within which the arbitration proceedings between them must terminate and in such circumstance the arbitrator is expected to comply with the time frame so as to avoid any agreed effect of non-compliance impacting negatively on the proceedings or the validity of the award delivered.

It is important to note that where a time provision bars the rights to arbitrate on a dispute after a specific period, the resultant effect is that the arbitrator has no jurisdiction.

The Arbitration and Conciliation Act as well as the Unicitral Rules are silent as to the time limit which an arbitration proceedings should take where it is no stated in the agreement between the parties. However, recourse will be made to **Article 24 of the Rules of the international Chamber of Commerce (ICC), Court of Arbitration** which stipulates that the time limit within which an arbitral tribunal should render its final award shall be **six (6) months.**

**4.2 EFFECTS OF AN AWARD**

A valid award once delivered by the tribunal creates legal rights in favour of the successful party and obligations for the unsuccessful party and the parties are obliged to comply with the award of the arbitrator.

Aside that the award creates rights and obligations for the parties, the award is res judicata, meaning a matter adjudicated upon and accordingly the claimant is barred, irrespective of whether it was successful or not in the proceedings from bringing the same claim against the unsuccessful party in a subsequent arbitration or litigation proceeding.

Another effect is that the rights created by the tribunal can be successfully enforced in either a local or international court as the case maybe.

 **4.3 THE DISTINCTION BETWEEN AWARD AND JUDGMENT**

The Supreme Court has in the case of *Ras Pal Gazi Construction Company Ltd v. FCDA* [[4]](#footnote-4)pronounced that an arbitral award is at the same level with the judgment of the Court and that it has the same force of law and it is incapable of being interfered with except as provided under the Arbitration and Conciliation Act.

However in another case of *Agu v Ikwibe*[[5]](#footnote-5), the learned Honorable Justice Nnaemeka Agu JSC (Rtd) expressed thus:

 *It must be borne in mind that arbitrators are not a court. They are not backed by the Constitution with any judicial authorities as such. [[6]](#footnote-6)*

On this footing, the discourse will now critically examine the distinctions which exist between an arbitral award and judgment and these are stated under the following subheading thus:

1. **Source of Authority**: Arbitrators in a proceedings will clearly know that his authority is not derive from the state backed judicial system but conferred on it by the agreement of parties to the proceedings which is supported by relevant statue governing it. It is mandatory for the arbitrator to indicate the full information as regards his source of authority in his award. Whilst on the hand, a judge need not state how he comes to be adjudicating the matter between the parties nor where he derives his authority (since it originates from the basic law of the land which is the Constitution).
2. **Variation of Powers**: The powers and functions of judges with coordinate jurisdiction is the same across the federation and thus for instance a High Court of Ekiti State has the same power with the High Court of the Federal capital territory in Abuja. This is however not the case with an arbitration tribunal whose powers and functions may and do vary from one arbitration to another. The precise power and the function in any given circumstance would depend on the parties agreement, any applicable rules or relevant laws. He therefore has greater responsibility to identify the limits and extents of his powers and functions so as not to affect the validity of the award made under such proceedings.
3. **Detailed Analyses of laws and authorities**: An arbitrator is not called upon to make any detailed analyses of the legal principles canvassed before him or to review in any detail the legal authorities cited. His duty is to only briefly summarize the arguments put to him and expresses his legal conclusion in a way that makes it intelligible. However, a judgment is expected to be so detailed and well analyzed containing review of previous similar decisions and laws related to the case at hand.

1. **RECOGNITION, ENFORCEMENT AND SETTING ASIDE AN AWARD**

When the arbitral tribunal finishes his duty which includes giving copies to the parties and becomes *functus officio,* the burden thereafter lies on the successful party to make application to the court to recognize and enforce the arbitral award. In the same vein, the unsuccessful party will also want to frustrate such recognition and enforcement by making similar application for it to be set aside for a particular ground or the other. This section of the discourse will focus on what recognition and enforcement connotes and on what ground will make the Court set aside an award.

* 1. **RECOGNITION AND ENFORCEMENT OF AWARD**

The concept recognition of an award is the declaration of the validity of the award. It means the procedure by which the arbitral award is made valid by the order of court through the application of the unsuccessful party challenging it. While enforcement entails the procedure through which the respective right in an arbitral award is affirmed and carried out.

The recognition of an award is on its own a defensive process which usually arises where the unsuccessful party commences an action in respect of the same subject or behaves as if no valid arbitral award has been rendered. In such a situation, the successful party in whose favour the award was made will apply to the court to recognize the arbitral award declaring it valid and binding on the unsuccessful party in the arbitration.

What a court does in this situation is to only determine the legal force and effect of the award and not to see it to been carried out.

* 1. **PROCEDURE FOR RECOGNITION AND ENFORCEMENT OF AN AWARD**

The successful party as stated above is the person seeking for the recognition of the award made by the arbitral tribunal and also for its enforcement. To duly effect this action, the party shall supply:

1. A duly authenticated original award or its certified true copy
2. Original arbitration agreement or certified true copy of same
3. Where the award or arbitration agreement is not made in the English Language, a duly certified translation thereof into theEnglish Language[[7]](#footnote-7)
	1. **SETTING ASIDE AN AWARD**

For an award to be valid and enforceable, the formal requirement provided under Section 26 must be satisfied. In the event that is not adhered to, it makes the award invalid and sets in motion the ground for challenging or setting it aside.

Section 29 of the ACA covers issues of setting aside of domestic award and stipulates that an aggrieved party may apply to set the award aside within a period of three months from the date of the award or from the date of a request for additional award. By virtue of the provision of Section 29(2), the court may set the award aside if proof is furnished that the award contains decision on matters beyond the scope of the submission.

It is also important to note that by the provision of Section 30 ACA, an award may be set aside instances of misconduct by arbitrators.

Also, under Section 29(3) it allows the court to stay proceedings (Where appropriate) to afford the arbitral tribunal an opportunity to resume the proceedings or take such other action to eliminate the ground for setting aside of the award.

In addition to the above, under Article 48 of the ACA, an award may be challenged on the following grounds:

*48. The court may set aside an arbitral award-*

*(a) If the party making the application furnishes proof-*

*(i) that a party to the arbitration agreement was under some incapacity,*

*(ii) That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria,*

*(iii) That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or*

*(iv) That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or*

*(v) That the award contains decisions on matters which are beyond the scope of submission to arbitration, so however that the if decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside, or;*

*(vi) That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or*

*(vii) Where there is no agreement between the parties under subparagraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act; or*

*(b) if the court finds-*

*(i) that the subject-matter of the dispute is not capable of settlement by arbitration under laws of Nigeria; or*

*(ii) that the award is against public policy of Nigeria.*

1. (2015), EWHC 1452 (Comm) [↑](#footnote-ref-1)
2. ICSID Case No. ARB/84/4 [↑](#footnote-ref-2)
3. (1981) Lloyd’s Law Reports Vol.2 at page 132 [↑](#footnote-ref-3)
4. (2001) 10 NWLR part 722 page 559 at 572 paragraph D-F [↑](#footnote-ref-4)
5. (1991) 3 NWLR Part 180 at 420 [↑](#footnote-ref-5)
6. This clearly show that there are some distinction between an arbitral award and judgment of the Court. [↑](#footnote-ref-6)
7. Section 31 and 51 Arbitration and Conciliation Act [↑](#footnote-ref-7)