COURTS' ATTITUDE TOWARDS ANNULMENT OF NEW YORK CONVENTION ARBITRAL AWARDS: AN EVALUATION OF ENGLISH AND NIGERIAN COURTS APPROACH.

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Abstract

A party to arbitration has right to challenge an award if the party so chooses. A challenge may seek to vacate (annul or set aside), suspend, or remit the award to the arbitrator due to an error on the face of the award or due to an injustice in its rendering. The scheme for challenging an award is a vital aspect of the arbitration process and serves as a safeguard against corruption, arbitrariness, and bias, while also providing a mechanism for balancing the arbitral process. What is more critical in the annulment scheme, however, is the courts' attitude toward a challenge to an award. This article discusses the policy issues that English courts weigh when considering whether to annul an award. Additionally, it examines the question of annulment of awards on legal grounds, using English case law to indicate the approach Nigerian courts may take when asked to annul an award on the basis that the arbitrator's ruling on a legal point is clearly erroneous. It contends and concludes that Nigerian courts' pragmatic attitude to annulment claims based on arbitrator's misconduct and/or improper ordering of arbitral procedures or awards will increase the efficacy of international arbitration in Nigeria, just as it does in England.

Keywords

Courts' attitudes, annulment, arbitral awards, international commercial arbitration, English Arbitration Act 1996, Nigerian Arbitration and Conciliation Act and New York Convention.

Introduction

Arbitration as a confidential and private scheme of dispute ordering is predicated on the mutual approval of the parties to submit or refer their dispute to a neutral party, the arbitrator. By electing arbitration as their dispute resolution scheme, parties essentially relinquish their constitutional right to litigation.[1] The often quoted benefits of international arbitration include, but are not limited to, efficiency, neutrality of the forum for dispute settlement, finality of

1. Rowley, J. W. and Swaroop, S. (2009) 'The Role of Judiciary in International Arbitration- The Benefits of Support: Recent English Experience' *Business Law International,* Vol. 10, No. 3, pp. 272 – 279.

arbitral decisions, and enforceability of arbitral awards.[2] Arbitration also permits procedural flexibility by allowing parties the freedom to tailor the dispute resolution process to their needs and appoint arbitrator of their own choice.[3] In contrast, though in litigation [appellate] courts' judgments are final and binding, parties are not permitted to tailor rules of court to their own dispute resolution needs. Courts use established procedures and do not have discretion to modify the rules subject to the circumstances of individual parties. Sometimes disputes in court even last for decades and parties pay the cost financially plus time wastage. To this end, arbitration carries real commercial benefits for parties.[4] Thus, according to Born, enforceability of arbitral awards globally and the final and binding nature of arbitration contributes to its attractiveness to commercial parties, who usually expect swift conclusion of disputes.[5]

Generally, under the arbitral scheme, the arbitrator's obligation is to manage the arbitration proceedings from the commencement phase to the resolution phase. Once the dispute is resolved and an award appropriately made by the arbitrator, the award becomes definitive and binds the parties to the arbitral proceedings. This is because, most arbitration agreements, laws and rules specify that arbitration award resulting from arbitration under such agreements, laws or rules is 'final and binding on the parties.' However, it is nearly continuously probable that a party to the arbitration proceedings may challenge the award especially because no arbitration process guarantees due process and justice in every instance. Consequently, a party to an arbitral proceeding ought to have a chance to question the award if such a party has a reason to do. The intention and result of such vital challenge against the award may be to annul or suspend or remit the award back to the arbitrator as a result of an error on the face of the award or an injustice that influenced the arbitrator's decision.[6] If a challenge against the award results in annulment of the award, in law, it means that such award becomes ineffective and unenforceable against the award debtor, at least within the jurisdiction of the country where the award was annulled. Although, any party to the arbitration can challenge the award, or the

2. Born, G. B. (2015) *International Arbitration: Law and Practice*, 2nd ed., Kluwer Law International, pp. 8 – 17; Moses, M. L. (2012) *The Principles and Practice of International Commercial Arbitration*, 2nd ed., Cambridge University Press, pp. 2 – 4.
3. Blackaby, N., *et al*, (2015) *Redfern and Hunter on International Arbitration*, 6th ed., Oxford University Press, pp. 187 – 190.
4. Rowleyand Swaroop, supra note 1, p. 275.
5. Born, G. B. (2015) *International Arbitration: Law and Practice*, 2nd ed., Kluwer Law International, pp. 8 – 17; Moses, M. L. (2012) *The Principles and Practice of International Commercial Arbitration*, 2nd ed., Cambridge University Press, pp. 2 – 4.
6. Tweeddale, A. and Tweeddale, K. (2005) *Arbitration of Commercial Disputes: International and English Law and Practice*, Oxford University Press, pp. 372 – 373.

award debtor resist enforcement of the award, there are restricted grounds for such challenge or resistance against a valid award before a competent court as provided by the NYC, UNCITARL Model Law and various national arbitration laws.

The grounds and the challenge process of an award has been observed by Kerr as a "bulwark against corruption, arbitrariness and bias"[7] and according to Tweeddale and Tweeddale, they are essential part of the arbitral process because they offer a scheme for checks and balances."[8] Arguably, nonetheless, what is more crucial in the annulment scheme is courts' approach regarding a challenge to annul an award. Like domestic arbitral laws and policies, courts' attitudes regarding the setting aside or the enforcement of international commercial arbitration awards may signal a negative or positive perception of the courts' approach towards international commercial arbitration to parties that may intend to choose the country as a seat or enforcement forum. This may affect such country's economy one way or the other.[9] Admittedly, the interaction between domestic legal systems and private dispute ordering, such as national and international arbitration, varies. In some countries, the courts interfere with arbitral process, whereas in other countries the courts play a supportive role in the arbitral process.[10] Hence, this provokes queries as to the policy consideration domestic arbitration laws reflect and the stances of the domestic courts concerning annulment of arbitral awards.

Following this introduction, section 2 of the paper examines how the nationality of an arbitral award is established. It briefly examines the relevant provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the NYC) and the UNCITRAL Model Law to determine how the nationality of an award is construed. Without assuming to be exhaustive, section 2 also discusses the English and the

7. Kerr, M. (1985) 'Arbitration and the Courts: The UNCITRAL Model Law', *International and Comparative Law Quarterly*, Vol. 34, No. 1, pp. 1 – 24 at p. 15.
8. Tweeddale and Tweeddale, supra note 6, p. 372.
9. Dietz, T. (2014) 'Does International Commercial Arbitration Provide Efficient Contract Enforcement Institutions for International Trade?' in Mattli, W. and Dietz, T. (Eds.) *International Arbitration and Global Governance: Contending Theories and Evidence*, Oxford University Press, pp. 168 – 195; Hale, T. (2014) 'What is the Effect of Commercial Arbitration on Trade?' in W. Mattli and T. Dietz (Eds.), *International Arbitration and Global Governance: Contending Theories and Evidence*, Oxford University Press, pp. 196 – 213; McConnaughay, P. J. (2013) 'The Role of Arbitration in Economic Development and Creation of Transnational Legal Principles' *Peking University Transnational Law Review*, No. 1, pp. 9 – 31.
10. Lew, J. D. M. (2009) 'Does National Court Involvement Undermine the International Arbitration Processes?' *American University International Law Review*, Vol. 24, No. 3, pp. 489 – 537; Ball, M. (2006) 'The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration' *Arbitration International*, Vol. 22, No. 1, pp. 73 – 94.

Nigerian courts' attitudes in determining the nationality of an arbitration award. Section 3 discusses the difference between annulment of an award and resisting enforcement or refusal to enforcement an award. Section 4 assesses courts' attitudes towards setting aside arbitral awards while section 5 examines common grounds for setting aside international commercial awards from the English and the Nigerian courts approaches. Section 6 provides the conclusion to the paper.

Determining the nationality of an award

To effectively challenge an international arbitral award, it is important to first establish the nationality of the award. To this end, the question to answer is, where was the award rendered? This is because, an award can only be effectively annulled by an authority of competent jurisdiction at the seat of arbitration, which is the country where the award was made. The provision of Article V (1) (e) of the NYC resonates, *inter alia*, with an award being "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". In effect, it seems that the provision of Article V (1) (e) of the NYC begs the question of determining the nationality of an award either by territorial consideration (the country in which that award was rendered), or applicable law consideration (under the law of which that award was rendered) but offers little or no assistance as to how the question may be answered. This creates conflicting judicial pronouncements and disparity in commentaries[11] although, the UNCITRAL Model Law offers some clarity to this end.

The provision of article 20 (1) of the UNCITRAL Model Law is to the effect that the seat of arbitration be determined as the country the parties stipulated in the agreement to arbitrate their dispute. However, where an agreement between the parties is lacking, the arbitrator is well placed to determine the seat of arbitration taking into consideration the facts of the case and the suitability of the seat to the parties.[12] This position was demonstrated in *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.*,[13] where the Indian Supreme Court rescinded

11. *Hendel, C. J. and Nogales, M. A. P. (2019)* 'Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations in Gomez, K. F. and Rodriguez, A. M. L. (Eds.) 60 Years of the New York Convention: Key Issues and Future Challenges, Kluwer Law International, chapter 12; *Zárate, J. M. A. and Valenzuela, C. (2019)* 'Recognition and Enforcement of Arbitral Awards Annulled in Their Own Seat: The Latin American Experience Interpreting the New York Convention's Sovereign Spaces' in in Gomez, K. F. and Rodriguez, A. M. L. (Eds.) 60 Years of the New York Convention: Key Issues and Future Challenges, Kluwer Law International, chapter 13.
12. Article 20 (1) of the UNCITRAL Model Law.
13. [2012] 9 SCC 522.

its previous judgment in *National Thermal Power Corp.*,[14] and held that Indian courts are not allowed to annul foreign arbitral awards. The apex Court reasoned that this will be the case even if the applicable law to the main dispute is Indian law. The court further clarified and rightly too, that deciding inversely would be incompatible with the provisions of article V (1) (e) of the NYC. The implication of the decision in *Bharat Aluminium Co.* case is that the arbitral award is considered rendered at the seat of arbitration chosen by the parties or established by the arbitrator where an agreement between the parties is lacking. In support of the territorial principle, Tweeddale and Tweeddale asserted that, "treating the seat of arbitration as the place where the award is made provides a relatively certain method of ascertaining the country in which to challenge an award."[15] Although, this position has been broadly submitted, it is nonetheless contentious whether parties are able to elect a procedural law other than that of the seat of arbitration.[16]

Regarding the applicable law principle, opinions are divergent as to whether the wording of article V (1) (e) of the NYC which provides, "… under the law of which, that award was made," refers to the procedural law or the applicable law to the agreement to arbitrate dispute (or even to the principal contract). For instance, Swiss Private International Law stipulates that parties to arbitration may, "subject the arbitral procedure to the procedural law of their choice."[17] On the contrary, in *Hitachi Ltd and Mitsui & Co. Deutschland v Rupali Polyster,*[18] the Pakistan Supreme Court took the position that the choice of law clause regulating the main agreement also establishes the applicable law to the arbitration agreement. In *Hitachi Ltd and Mitsui & Co. Deutschland*, the choice of law clause referred to Pakistan and on the bases of that, the apex Court ruled that the Pakistan court was empowered to decide an application to annul an award made in England.

14. In *National Thermal Power Corp. v The Singer Co.*, the Indian Supreme Court held that an award rendered in England was nonetheless a domestic Indian award, not subject to the NYC in Indian Courts. The court reasoned that the award was made pursuant to an arbitration agreement regulated by Indian law. India's enactment of the Model Law notwithstanding, the court further held that India is the proper forum for challenging awards rendered abroad. Thus, the court stated, at pages 407 – 409, that:
    > … the overriding principle … that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arsing under the arbitration agreement … An award is 'foreign' not merely because it is made in the territory of a foreign state, but because it is made in such a territory on an arbitration agreement not governed by the law of India.
15. Tweeddale and Tweeddal, supra note 6, p. 373.
16. Mann, F. A. (1992) 'Where is an Award Made?' in Mann, F. A. (Ed.), *Notes and Comments on Cases in International Law, Commercial Law and Arbitration*, Clarendon Press, p. 29; Sammartano, M. R. (1990) *International Arbitration Law*, Kluwer Law and Taxation Publisher, pp. 15 – 24.
17. Article 182, Ch. 12, Swiss Private International Law 1987.
18. (2000) Yearbook Commercial Arbitration, Vol. XXV, 486.

It can be argued that the Pakistan Supreme Court's position in *Hitachi Ltd* appears to misconstrue the second limb of the text of article V (1) (e) of the NYC. It is submitted that the wording of article V(1)(e) of the NYC which provides *inter alia*, "under the law of which, [the] award was made", indicates the country whose law the procedural law of the arbitration applies. This is because the NYC evidently differentiates between the law governing the arbitration agreement and the law governing the procedure of the arbitration. In effect, the text of article V(1)(a) *inter alia* relates to the law governing the arbitration agreement, while the text of article V(1)(e) *inter alia* provides for the law governing the procedure of the arbitration.[19] Consequently, Born observed that:

> The correct interpretation of Article V (1) (e)'s second alternative is that it refers to procedural law of the arbitration, and not to other possible laws (such as the substantive law governing the parties' underlying dispute or the arbitration agreement) … that is evident from the phrase "under the law of which [the] award was made", which refers to the process of making the award (ie. the arbitral proceedings), rather than to the formation or validity of the arbitration agreement (much less the underlying contract).[20]

The attitudes of the English and the Nigerian courts in determining the nationality of an arbitral award will be discussed in turn in the following subsections respectively.

English courts' attitude

In England, the determination of the seat of arbitration is governed by the provisions of section 3 of the Arbitration Act 1996 (AA 1996). Under Section 3 of the AA 1996, the seat of arbitration implies the juridical place or country where arbitration is held and can be established via three approaches. In effect, the juridical seat of arbitration can be established as named by the parties, or by any person (arbitral or other institution) assigned by the parties with powers to do so, or by the arbitrator if empowered by the parties (or determined by the arbitrator in the absence of any such empowerment, having regards to the parties' agreement and all the relevant circumstances in doing so). Nonetheless, where parties and/or the arbitrator fails to discharge their duty under section 3(a)(b) and the first limb of (c) of the AA 1996, the court on an application brought by either party can nominate the seat of the arbitration taken into account

19. Scherer, M. (2005) 'The Recognition of Transnational Substantive Rules by Courts in Arbitral Matters', in Gaillard, E. et al (Eds.), *Towards a Uniform International Arbitration Law?*, Juris Publishing, pp. 91 – 334.
20. Born, G. B. (2012) *International Arbitration: Law and Practice*, Kluwer Law International, p. 309.

all the relevant circumstances.[21] This position is demonstrated in *U & M Mining Zambia Ltd. v Konkola Copper Mines Plc*[22] where the court held that a clause referring dispute to LCIA and further stipulating that "the place of the arbitration shall be England …" made it basic that the parties had chosen the place of the arbitration to be England.

In determining the seat of arbitration by the court, it remains to be answered whether common law rules will be considered giving the provisions of section 3(c) of the AA 1996. According to Merkin and Flannery, the proviso "having regard to the parties' agreement and all the relevant circumstances" under section 3 (c) of the AA 1996 indicates that English common law rules remain applicable to the examination of the place of the arbitration.[23] This is demonstrated in the case of *Naviera Amazonica Peruana SA v Compania International de Seguros de Peru*[24] where the court leaned on the premise that the seat of the arbitration will be decided in the dearth of any explicit selection of seat, by direct choice of procedural law. In effect, it will be read that arbitral award is made in England and Wales or Northern Ireland if the juridical place of the arbitration is specified or established as England and Wales or Northern Ireland. In effect, it is inconsequential where the award was signed, dispatched, or received by the parties.[25] Likewise, the provision of section 100 (2) (b) of the AA 1996 to the effect that "an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties" strongly emphases that the seat of arbitration is where the award is rendered, and on the other hand, dismantles the common law position of the relevance of the place of signing, dispatching, or delivering the award. Clearly, the effect of the text, "regardless of where it was signed, dispatched or delivered to any of the parties," included in both sections 53 and 100 (2) (b) of the AA 1996 is to outlaw the decision of the House of Lords in *Hiscox v Outhwaite*.[26]

21. Merkin, R. and Flannery, L. (2014*) Arbitration Act 1996*, 5th ed., Informa Law from Routledge, pp. 18 – 21.
22. [2013] EWHC 260 (Comm).
23. Merkin and Flannery, supra note 21, p. 17.
24. [1988] 1 Lloyd's Rep 116.
25. Section 53 of the AA 1996 also provides that:
    > Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, dispatched or delivered to any of the parties.
26. [1992]1 AC 562; [1991] 3 WLR 297. In Hiscox, an award was held to have been rendered in Paris, mainly because the award was signed in Paris, even though the arbitration was conducted in London and had no link with France.

Nigerian courts' attitude

The parties' freedom to choose the place of the arbitration, or the arbitrator's authority to establish or elect a seat of the arbitration, where the parties have not selected one, is regulated by the provisions of section 16 of the Arbitration and Conciliation Degree 1988, Cap A18 LFN 2004 (ACA).[27] Even so, section 16 of the ACA is silent as to what will happen in situations where an arbitrator fails to designate a seat in the dearth of parties' agreement to that effect. This creates a gap of identifying the place of arbitration and of course the nationality of the award for reasons of annulling the award. To fill such gap, this article submits that the effective place of the arbitration should be taken as the place of arbitration. The effective place of arbitration in such situation should be the place where all relevant actions in the arbitration proceedings happened. If the place where all relevant actions in the arbitration proceedings happened cannot be established then, the place where the last hearing of the arbitration was conducted should be designated as the effective place of the arbitration therefore, the seat of arbitration. This submission is fortified by a German case decided by Oberlandesgerich Dusseldorf (the Higher Regional Court of Dusseldorf).[28] In that German case, the place of arbitration was not stipulated by the parties neither was it designated by the arbitrators as required by article 20 (1) of the Model Law. The Higher Regional Court of Dusseldorf in deciding the seat of the arbitration held that, the seat of arbitration is the place where all relevant actions in the arbitration proceedings happened and, if this cannot be established then, the place where the last hearing of the arbitration was conducted.[29]

Annulment vs resisting enforcement of an award

This part discusses the difference between annulment of an award and resisting enforcement of an award. Although annulment of an award and resisting the enforcement of an award intersect, the two schemes are different. Consequently, Asouzu commented that though closely interconnected, the concepts of annulment of an award and the recognition and/or enforcement

27. Section 16 corresponds with article 20 of the UNCITRAL Model Law and according to Akpata, it is designed primarily for international commercial arbitration. Akpata, E. (1997) *The Nigerian Arbitration Law in Focus*, West African Bok Publishers Ltd., pp. 50 – 52.
28. Suit number 6 Sch 02/99, 23 March 2000; CLOUT Case No. 374.
29. Though not expressly stated, it appears that pursuant to section 47 (6) of the ACA, which makes reference to "the arbitration law of the country where the award was made…," Nigeria courts will hold that the nationality of an award is the law of the country where the award was made.

of an award are two separate processes.[30] The elementary rule is that any party to the arbitration may apply to a competent court at the seat of arbitration to annul the award if such party considers that it has reasonable cause to do so.[31] Nevertheless, legal proceedings to annul awards are most frequently sought by the award debtor – the unsuccessful party in the arbitration.[32] Whereas, to resist enforcement of an award, the award debtor effectively elects to defend the enforcement proceedings against it. Such legal proceedings is commenced by the award creditor - the successful party, against the award debtor in a country in which the award creditor believes that the award debtor has assets.

In domestic arbitration, annulment and/or enforcement proceedings are brought in same country. However, in international arbitration, there is a difference in terms of the place where proceedings for annulment of an award and proceeding for enforcement of an award (and of course resistance against an award) are sought. Application for annulment of an award is normally brought before a competent court at the seat of arbitration. On the flip side, application for enforcement of an award, which then maybe be met with resistance, is always brought before a court of competent authority in another country other than the country where the award was rendered.[33] To this end, Asouzu remarked that in the majority cases in international commercial arbitration and in normal circumstances, application to annul and application to enforce arbitral award takes place in different jurisdictions at different times.[34] Nevertheless, in domestic arbitration, both applications are brought before a competent court in the country where the arbitral award was made.

The effect of annulling an award and the consequence of resisting enforcement of an award vary significantly.[35] For example, if an award is effectively annulled, it means that such award

30. Asouzu, A. A. (1995) 'The National Arbitration Law and International Commercial Arbitration: The Indispensability of the National Court and the Setting Aside Procedure', *African Journal of International and Comparative Law*, Vol. 7, No. 1, pp. 68 – 97.
31. Article 34 (2) (a) of the UNCITRAL Model Law "if the party making the application …" sections 67 (1), 68 (1) and 69 (1) of the AA 1996, "A party to arbitral proceedings may …" sections 29 (1), 30 (1) "a party" and section 48 (a) of the ACA, "the party making the application."
32. Morrissey, J. F. and Graves, J. M. (2008) *International Sales Law and Arbitration: Problems, Cases and Commentary*, Kluwer Law International, pp. 460 – 462.
33. van den Berg, A. J. (2014) 'Should the setting aside of the Arbitral Award be Abolished?' *ICSID Review*, pp. 1 – 26.
34. Asouzu, supra note 30, p. 77.
35. Thadikkaran, M. (2014) 'Enforcement of Annulled Arbitral Awards: What is and What Ought to Be?' *Journal of International Arbitration*, Vol. 31, No. 5, pp. 575 – 608.

loses its legal significance, at least, in the country where the award was made.[36] In effect, a refusal to enforce an award by a competent court would seem to be effective only in the country where such enforcement application was sought, same award may still be enforced against the award debtor in another country.[37] This principle reiterated in *Astro Nusantara International v PT Ayunda Prima Mitra*[38] where the Hong Kong Court of First Instance copiously stated that:

> The fact that an award has been refused enforcement by a court in another jurisdiction … is not a ground for resisting enforcement of the arbitral award… under the NYC…[39]

The Hong Kong court interpretation of Article V(1)(e) of the NYC is pragmatic and a reflection of the letter and spirit of the NYC. The court's interpretation of Article V(1)(e) clearly demonstrates the intention of the drafters of the NYC and reaffirms the legal position that an award annulled at the seat of arbitration may not lose its effectiveness and may be enforced against the award debtor in another country.

Courts' attitudes towards annulment of arbitral awards

Resulting from the stipulations of Article V(1)(e) of the NYC is the enforcing court's power to either refuse or grant an award creditor's application to enforce an award that has been annulled at the seat of the arbitration. Regardless of the court's discretion under Article V, the provisions of the NYC offer no assistance regarding the grounds that may be relied upon to annul an award at the seat of arbitration. To annul international arbitral awards, national courts will have to resort to their local laws. This position is demonstrated in *Shin-Etsu Chemical Co. Ltd v Aksh Optifbre Ltd. & anor*[40] where the Supreme Court of India stated that:

> …under the new law [Arbitration and Conciliation Act 1996] the grounds on which an award of an arbitrator could be challenged before the court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the Arbitrator or want of proper

36. However, in *Astro Nusantara International* [2015] the courts took a pragmatic view that an award annulled at the seat of arbitration remains effective.
Société *Hilmarton v Societe Omnium de traitement et de valorisation* (1994) Yearbook Commercial Arbitration, vol. XIX, p. 655; *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996).
37. Scherer, M. (2016) 'Effects of International Judgments Relating to Awards', *Pepperdine Law Review*, Vol. 43, pp. 637 – 646.
38. [2015] HCCT 45/2010 [28] (C.F.I.) (Legal Reference System) (H.K).
39. ibid
40. [2005] 1 NSC 417.

> notice to a party of the appointment of the Arbitrator or of Arbitral proceedings.[41]

The United States Court of Appeals, Second Circuit in *Yusuf Ahmed Alghanim & Sons WLL v Toys "R" Us, Inc*.[42] took the same view, thus:

> We read Article V (1) (e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to motion to set aside or vacate that arbitral award… There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law… The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with domestic arbitral law and its full panoply of express and implied grounds of relief.[43]

Although the NYC does not specifically limit the scope of national courts' assessment of awards in annulling trials, it is submitted that a court's attitude should be to interpret the Article V(1)(e) of the NYC as implicitly doing so. Admittedly, the NYC demands Member States to recognise arbitration agreement in accordance with article II of the NYC. Such recognition reflects article II and indicates parties' approval to a final and binding award and by implication some limitation on the court's power to review a valid award.[44] Conversely, to hold that the NYC does not impliedly foist restrictions on the annulment of awards at the seat of arbitration, would be to suggest that an annulling court is at liberty to subject all international awards made in its jurisdiction to *de novo* judicial review, at least in principle.[45] To this end, Born observed thus:

> …most national arbitration regimes have adopted broadly similar approaches to the grounds for annulment of international awards – generally, but not always, limiting such review to bases paralleling those for non-recognition of awards in Article V of the Convention.[46]

41. ibid
42. 126 F.3d 15, (2d Civ. 1997).
43. ibid, pp. 22 – 23.
44. Article II of the NYC requires Contracting States to recognise arbitration agreements.
45. Born, G. B. (2009) *International Commercial Arbitration*, Vol. II, Kluwer Law International, pp. 2556 – 2560.
46. Born, supra note 20, p. 311.

General grounds for annulment

Before the birth of the UNCITRAL Model Law of 1985, domestic arbitration laws provided dissimilar grounds for annulment of arbitral awards.[47] Obviously, that shifted with the launch of the UNCITRAL Model Law of 1985. Undeniably, the UNCITRAL Model Law became very popular with about 72 countries in a total of 102 jurisdictions implementing or incorporating into their arbitration laws the letter and spirit of the UNCITRAL Model Law.[48] Article 34(2) of the UNCITRAL Model Law sets out the grounds on which arbitral awards may be annulled. These grounds are exhaustive and are invalidity of the arbitration agreement, lack of due process in the arbitral proceedings, excessive authority over relief sought, irregularity in the constitution of the arbitral tribunal; irregular procedure or a breach of the relevant arbitral rules or law, inarbitrability of the subject-matter of the arbitration, or the award offends the public policy of the seat of arbitration. Albeit the application of the UNCITRAL Model Law is not consistent from country to country. It is observed that though England is not one of the countries that have put into effect the UNCITRAL Model Law, the legal basis for annulling an award, especially sections 67 and 68 of the AA 1996 replicate the legal basis stipulated under article 34(2) of the UNCITRAL Model Law. Nevertheless, same cannot be said of Nigeria as the ACA, which is the arbitration law, implements the UNCITAL Model Law 1985.

English court's attitude towards annulment of arbitral awards

The English AA 1996 provides for three main legal conditions for annulling an arbitral award and these conditions are lack of jurisdiction, serious irregularity, or error of law. Under the AA 1996, for a party to effectively sue against an arbitral award pursuant to any of the three legal grounds, such party must satisfy three conditions. First, the party must demonstrate to the court that it has exhausted all internal remedies with the arbitration process, if any. Secondly, the party will have to satisfy the court that it has exhausted its right as stipulated under section 57 of the AA 1996, and lastly, the party must bring such challenge or action within 28 days from the date the arbitral award was rendered.

47. van den Berg, supra note 33, p. 15.
48. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [accessed 15/10/2022].

Absence of fundamental jurisdiction

The stipulations of section 67 of the AA 1996 are to the effect that an arbitral award may be challenged in court by a party to the arbitral hearings on bases that the arbitral tribunal lacked substantive competence to determine the dispute between the parties. In deciding whether an arbitral tribunal had authority in determining issues brought before the tribunal, the courts are inclined to consider the provisions of section 30 of the AA 1996 which concerns the tribunal's competence to rule on its own jurisdiction.[49] In effect, the issues the court is sought to determine concerning the arbitral tribunal's authority are the validity or otherwise of the: arbitration agreement, constitution of the tribunal, notice of arbitration filed and served (and whether such notice is capable of bringing about a valid arbitration proceedings) and of course, whether the arbitral tribunal decided issues which were not submitted or referred to the arbitration by the disputants. The justification for the court to determine one way or the other whether an arbitral tribunal had authority to decide the disputes brought before it, is largely because arbitration is a contract and parties must commonly decide to settle their dispute by arbitration.[50]

Republic of Serbia v Imagesat International NV[51] exhibits well the justification that arbitration is a contract and parties must commonly decide to settle their dispute by arbitration. In *Republic of Serbia*, the High Court considered an application pursuant to section 67 of the AA 1996 regarding the substantive jurisdiction of an International Chamber of Commerce (ICC) arbitral tribunal. In reaching its ruling, the court relied on *Azov Shipping Co. v Baltic Shipping Co.*,[52] and took the view that if the seat of the arbitration is England and Wales or Northern Ireland, the court will examine the issue of jurisdiction brought under sections 32 and 67 of the Act as a full review. Although, the court dismissed the application, it held that in considering an application in accordance with section 67, "it is for the court to determine whether the arbitrator had jurisdiction and whether he was correct in deciding that he did." Ensuing from the case of *Azov*, the court held that the arbitrator's decision concerning its jurisdiction is only provisional. Thus, if an application to set aside an award is hinged on the substantive competence of the arbitrator, it seems a full review of the arbitrator's decision by the court is inescapable.[53]

49. *Chung v Silver Dry Bulk Co Ltd [2019] EWHC 1147* (Comm)
50. Merkin and Flannery, supra note 21, p. 101.
51. [2009] EWHC 2853 (Comm).
52. [1999] 1 LR 68.
53. In *Habbas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm) and *Norscot Rig Management PVT Ltd. v Essar Oilfields Services Ltd.[2010]EWHC 195 (Comm)*, respectively, though the cases were dismissed, the court considered the effect of section 67 of the AA 1996 and had no reservations for conducting a full review of the jurisdiction challenges.

Recently, in *Chung v Silver Dry Bulk Co Ltd*[54] the English Commercial Court granted an application challenging the substantive jurisdiction of an arbitral tribunal appointed after the dissolution of the defendant corporation. The question the court was invited to determine among other issues was whether the notice of arbitration filed by defendant could commence a valid arbitration against Homer Hulbert Maritime Co. Ltd **(**HH**),** represented in the court proceedings by Mr Chung as trustee of the dissolved HH, HH having been dissolved and wound up eight months before the commencement of the arbitration proceedings. The Court stated *inter alia* that:

> "… if HH did not exist, [the arbitration clause] could no longer operate: HH could not appoint an arbitrator, no notice of arbitration could be sent to it and no arbitrator could be appointed in default of a response, since HH was no longer in a position to appoint its own arbitrator or to respond to the notice. Accordingly, if HH had ceased to exist, [the arbitrator] could not be validly appointed and the tribunal was not properly constituted…"[55] [Emphasis are mine]

Respecting whether the challenge would fall within the scope of section 67 of the AA, the Court reasoned that such challenge should relate to the decision of the arbitrator with regard to *"substantive jurisdiction"*, as stipulated in section 30(1) of the AA, which incorporates the questions of whether a binding arbitration agreement exists[56] and whether the arbitrator is properly constituted.[57] Consequently, the Court held that the challenge fell within the ambit of section 67 of the AA. In effect, the challenge relates to the consideration by the arbitral tribunal of its substantive jurisdiction with regards to section 30(1)(b) and/or within section 30(1)(a) of the AA. Clearly, this case reinforces the position that in order to challenge an award on the grounds of an arbitrator's lack of "substantive jurisdiction" pursuant to section 67 of the AA, the challenging party will need to satisfy the court that one of the elements of section 30(1) of the AA exist.

Serious irregularity

The effect of Section 68 of the AA 1996 *inter alia* is that a challenge of serious irregularity attaches to the tribunal, or the arbitration trials, or to the arbitration award. Consequently, the existence of any one or more of the practical bases listed in section 68 (2) (a) to (i) of the Act

54. *[2019] EWHC 1147* (Comm)
55. *ibid, para. 36.*
56. Section 30(1)(a) of the AA
57. Section 30(1)(b) of the AA

will be judged to have occasioned serious irregularity, provided that they triggered or will trigger significant prejudice to the applicant. The practical bases as listed under section 68 (2) of the AA 1996 are full-scale and substantially the same with section 103 practical bases for declining enforcement of foreign arbitral awards in England. These practical bases for refusing enforcement, at the minimum, reflect article 34 (2) of the UNCITRAL Model Law practical bases for annulling arbitral awards. In addition, section 68 (2) of the AA 1996 sets a rigours evidentiary bar in the way of a party seeking to annul an award to fulfil.[58] Nevertheless, the Departmental Advisory Committee on Arbitration (DAC) in its report stipulate the upper limit on how to surmount the bars and the attitude the courts are to adopt in determining a request brought in keeping with section 68. The relevant part of the report states thus:

> The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus, it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The test is not what would have happened had the matter been litigated. To apply such, a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short [section 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.[59]

In *Lesotho Highlands v Impregilo SpA*[60] Lord Steyn noted that the prerequisite of 'serious irregularity' demands a high threshold, and it must be proven that the irregularity occasioned or would occasion considerable prejudice to the claimant. Lord Steyn further accentuated that these conditions were "designed to eliminate technical and unmeritorious challenges". Therefore, the irregularity objected to must relate to the exhaustive catalogue of classifications under section 68 (2) of the Act. Another English case that demonstrates the high evidentiary test which an applicant seeking to annul an arbitral award must satisfy for an application under

58. Harris, B. et al (2014) *The Arbitration Act 1996: A Commentary*, 5th ed., Wiley Blackwell, pp. 336 – 337.
59. The Departmental Advisory Committee on Arbitration (DAC) Report on Arbitration Bill 1996, para. 280.
60. [2005] UKHL 43; [2005] 3 WLR 129 at paras. 28 and 29.

section 68 of the AA 1996 to be successful is *the Secretary of State for the Home Department v Raytheon Systems Ltd.*[61]

In *the Secretary of State for the Home Department v Raytheon Systems Ltd,* the claimant contracted with the defendant company to design, develop and deliver a new e-border equipment that will reform border control in the UK. The principal contract stipulated that dispute between the parties will be settled by arbitration. The claimant terminated the contract, and a dispute arose regarding the legal responsibility for the termination of the contract. Pursuant the arbitration clause, the dispute was referred to arbitration by the claimant and the arbitrators rendered a partial award and afterwards amended the award twice via a memorandum. The arbitrators ruled that the claimant wrongfully ended the contract between the parties. Costs more than £126 million plus approximately £60 million as interest was granted against the claimant (but in favour of the defendant). The claimant objected the partial award and requested the court to annul the award in accordance with the provisions of section 68 (2) (d) of the AA 1996. The claimant argued that the arbitral tribunal had failed to deal with two issues of liability and three issues of quantum in respect of the £126 million awarded. It further argued that those issues had been put to the tribunal and were critical to the determination of the arbitration. The court quoting with approval the House of Lords case of *Lesotho Highlands v Impregilo SpA*[62] noted that section 68 of the AA 1996 reflects "internationally accepted view that the court should be able to correct serious failures to comply with the due process of arbitral proceedings." The court further remarked that courts should strive to uphold arbitral awards and should not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults on award with the objective of upsetting or frustrating the process of arbitration."[63]

However, on what will constitute substantial injustice under section 68 of the Act, the court in *The Secretary of State for the Home Department* reiterated that there was a 'high threshold' to be met to establish that a failure to address an issue amount to a serious irregularity causing substantial injustice to the applicant. The court reasoned that there would be a failure to deal with an issue where the determination of that issue is essential to the decision reached in the award. The court then added that:

61. [2014] EWHC 4375 (TCC).
62. Supra note 60.
63. Quoted the judgement in *Fidelity Management v Myriad International* [2005] 2 Lloyd's Rep. 508.

> An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes.[64]

Relying on *Vee Network Ltd v Econet Wireless International*,[65] the court held that in order to satisfy the substantial injustice test, a claimant do not need to demonstrate that it would have succeeded on the issue which the tribunal failed to deal with. Nonetheless, it is necessary for the claimant to show that, "…[its] position was reasonably arguable; and had the tribunal found in [its] favour, the tribunal might well have reached a different conclusion in its award."[66] In the final analysis, the court found in favour of the claimant.

Appeal on point of law

An award may also be set aside by the court if satisfied that the decision of the arbitrator on a legal point is evidently wrong. In this context according to the decision in *London Underground Ltd v City Link Telecommunications Ltd*,[67] the test is not based on the probable conclusion of a court but on the expected decision of a reasonable arbitrator. Challenging the award on point of law is stipulated under section 69 of the AA 1996 and an application to the court on point of law can be brought if the parties agree or with the leave of the court.

Where parties do not agree, the court will not grant leave for an appeal unless it is satisfied that the four elements or questions necessary for such grant of leave to appeal are established. To grant leave for an appeal, the court must be satisfied firstly, that the question will significantly affect the rights of one or more parties. Secondly, that the question is one that the arbitrator was asked to determine. Thirdly, that premise on the arbitrator's finding of fact, the arbitrator's decision is evidently wrong. In the alternative, the question is one of general public importance and the decision of the arbitrator is open to doubt. Lastly, that it is just and proper in all the circumstances for the court to hear the appeal. Where the appeal is allowed, the court has the power to confirm the award, or vary the terms of the award, or remit the award in whole or in part to the arbitrator for reconsideration, or set aside the award in whole or in part. Nonetheless, the court shall only set aside an award in whole or in part, where remission would be

64. Supra note 61.
65. [2005] I Lloyd's Rep 192.
66. ibid
67. [2007] EWHC 1749 (TCC).

inappropriate. However, remission may be inappropriate where, for example, following the appeal, the outcome of the case, if remitted, is obvious and to remit the award would merely increase the cost.[68] To this end, it seems that there is an obvious bias in favour of remission than other remedies available to the party challenging the award. In *Vrinera Marine Co. Ltd v Eastern Rich Operations Inc.*[69] the court gave indication that remission is preferred over setting aside, thus:

> … the drafting of subsection (7) discloses a bias in favour of remission of an award no doubt on the well-established principle enshrined in section 1 of the Act that it is for the parties' chosen tribunal to determine its disputes and section 69 gives the court the limited jurisdiction to address questions of law not fact. On the other hand, the matter remains one for my discretion provided I am satisfied that to remit the award would be "inappropriate". Section 1 of the Act also, of course, entitles the court to take account of delay and expense.[70]

Nevertheless, English courts will not remit, or set aside, or vary the terms of an award on the basis of an entirely hypothetical matter in regard of which the court has no evidence before it. In *MRI Trading AG v Erdenet Mining Corp. LLC*,[71] the claimant challenged the award on point of law pursuant to section 69 of the AA 1996. The defendant in its submission urged the court to remit the award to the arbitrators because the conclusion reached by the arbitrators is, or might be, justified by reasons not set out in the award. The court in setting aside the award stated that:

> … a party who wishes to contend that an award should be upheld for reasons not expressed (or not fully expressed) in such award is required to file a respondent's notice at the stage of the application for permission to appeal in accordance with CPR PD 62 para 12.6 … it would be wrong in principle and certainly "inappropriate" … to order remission on the basis of entirely speculative matters in respect of which the court has no material before it and which, if such matters were to be relied upon to seek to uphold the award, should have been included in a respondent's notice served in accordance with the rules and within the appropriate time limits in opposition to the original application for leave to appeal.[72]

68. Harris, et al, supra note 58, p. 372.
69. [2004] EWHC 1752 (Comm).
70. ibid
71. [2012] EWHC 1988 (Comm).
72. ibid

On appeal, the Court of Appeal upheld the decision of the High Court and took the view that the arbitrator's decision on the issue was such that no reasonable tribunal could reach.[73] *MRI Trading AG* highlights the attitude of the court as to whether a court will set aside or remit an award to the arbitrator when it finds that the decision of the arbitrator on a question of law was manifestly wrong. First, it demonstrates that the CPR PD as rules of court is made to be obeyed and no favour would be shown for not obeying same. The respondent's notice in accordance with the CPR PD 62 para 12.6 is a key factor as to how the court will exercise its discretion on the issue of remission or annulment of an award.

Nigerian courts approach on setting aside arbitral award

The grounds for setting aside arbitral awards are stipulated under sections 29, 30 and 48 of the ACA. Under section 29 (2), a party may apply to court to set aside an award where the award is beyond the scope of matters submitted or referred to arbitration. Under section 30 (1), an award may also be set aside on the application of a party where the arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured. Other grounds which range from incapacity of a party to the arbitration agreement, to the award been against public policy of Nigeria are listed under section 48 of the Act. The section 48 grounds are substantially the same with article 34 (2) of the UNCITRAL Model Law. These grounds are also similar to section 52 and article V of the Second Schedule to the ACA grounds for resisting enforcement of international arbitral awards in Nigeria.

Opinion differs as to whether sections 29 and 30 of the ACA can be relied upon by a party seeking to set aside an international commercial arbitral award rendered in Nigeria. According to Akpata, sections 29 and 30 of the Act pertain solely to domestic commercial arbitration.[74] He based his argument on the fact that the ACA is divided into four parts and sections 29 and 30 which are under Part I solely regulate domestic arbitration.[75] However, Idornigie contends that although the provisions of Part III of the Act relates to international commercial arbitration, the import of section 43 is that Part III provisions are in addition to Part I provisions which

73. *MRI Trading AG v Erdenet Mining Corp. LLC* [2013] EWCA Civ 156.
74. Akpata, supra note 27, pp. 84 – 90.
75. Part I of the Act which is sections 1 – 36 regulates domestic Arbitration, Part II which is sections 37 – 42 relates to Conciliation, Part III which is section 43 – 55 concerns Additional Provisions Relating to International Commercial Arbitration, and Part IV which is section 56 – 58 deals with Miscellaneous matters.

regulate domestic arbitration.[76] From the provisions of section 43 of the Act, Part III applies solely to international commercial arbitration and conciliation in addition to the other provisions of the Act. While Part III of the Act cannot apply to other provisions of the Act, other provisions of the Act can apply to matters relating to Part III. Therefore, the better view is that sections 29 and 30 are applicable, in an appropriate case, to an application to set aside an international arbitral award rendered in Nigeria.

Misconduct as a ground

The first limb of section 30 (1) of the ACA stipulates that the court may set aside an award where an arbitrator has misconducted itself. However, the problem with the section is that it lacks clarity on how 'misconduct' should be interpreted or what constitutes 'misconduct' for purposes of setting aside an award in Nigeria. As a result of this gap, courts have resorted to the definition of 'misconduct' under common law and have given the term a wide meaning. The Supreme Court in *Taylor Woodrow (Nig.) Ltd. v Suddeutch Etna-Werk GmbH*[77] stated:

> The word misconduct is not defined in law nor is it stated therein what would amount to misconduct on the part of an arbitrator to necessitate the setting aside of his award. It will be necessary therefore, to fall back on the common law to determine what constitutes misconduct.[78]

The Supreme Court in *Taylor Woodrow Ltd* relied on the reasoning of the authors of the Halsbury's Laws of England, 4th edition, and gave an exhaustive definition of misconduct. In *A. Savoia Ltd v A. O. Sonubi*[79] the Supreme Court followed its decision in *Taylor Woodrow Ltd*. and stated that misconduct may be said to have arisen:

> (a) Where the arbitrator fails to comply with the terms, express or implied, in the arbitration agreement
> (b) Where, even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of public policy ought not be enforced;
> (c) Where the arbitrator has been bribed or corrupted;
> (d) Technical misconduct, such as where the arbitrator makes a mistake as to scope of the authority conferred by the agreement of reference. This, however, does not mean that every irregularity of procedure amount to misconduct;

76. Idornigie, P. O. (2015) *Commercial Arbitration Law and Practice in Nigeria*, Law Lords Publication, pp. 274 – 275.
77. [1993] 4 NWLR (Pt. 286) 127.
78. ibid
79. [2000] 12 NWLR (Pt. 682) 539.

(e) Where the arbitrator fails to decide all the matters which were referred to him;
(f) Where the arbitrator or umpire has breached the rules of natural justice;
(g) If the arbitrator or umpire has failed to act fairly towards both parties, as for example:
i. By hearing one party but refusing to hear the other; or
ii. By deciding the case or a point not put by the parties.[80]

Improper procurement of arbitral proceedings or award

With regards to the second limb of section 30(1), the ACA is also silent on what will amount to improper procurement of arbitral proceedings or award. In *Aye-Fenus Ent. Ltd. v Saipem (Nig) Ltd.*,[81] the appellant contracted to supply skilled and unskilled workers to the respondent for a drilling project on Perro Negro Rig V. Dispute arose when the appellant alleged a breach of contract resulting from the respondent's failure to pay the appellant a total debt of N24, 473,070.47. The respondent counterclaimed the sum of $672,546.00 alleging that it was loss incurred by them because of the strike action and hostage taking embarked upon by the workers supplied by the appellant. The dispute was referred to arbitration and the arbitrators rendered their award in favour of the appellant. Dissatisfied, the respondent applied to the High Court to set aside the award on grounds that the arbitral proceedings and the award were improperly procured. The High Court granted the application, and the award was set aside. On appeal, the Court of Appeal in construing the text "arbitral proceedings or award … improperly procured…" held that:

> An arbitral award will be set aside where the arbitration has been improperly procured, e.g. where the arbitrator has been deceived or material evidence has been fraudulently concealed.[82]

Also, in *Arbico (Nig.) Ltd. v Nigeria Machine Tools Ltd.*[83] dispute arose between the parties from a construction contract, and the dispute was referred to arbitration. The respondent and the appellant made various claims and counterclaims, respectively. The arbitrator incorporated the appellant's counterclaim in his determination of the respondent's claim. The arbitrator reasoned that the counterclaim was based on whether there was a breach of the termination

80. ibid
81. [2009] 2 NWLR (Pt. 1126) 483.
82. ibid
83. [2002] 15 NWLR (Pt. 789) 24.

clause in the contract, which was also an issue in the main claim. The arbitrator rendered his award in favour of the respondent. Dissatisfied, the appellant applied to the High Court of Lagos State to have the award set aside. The appellant argued that the arbitrator's refusal to determine its counterclaim separately amounted to misconduct, alternatively, that the arbitral proceedings or the award was improperly procured. The respondent also applied to the same court for the enforcement of the award. The High Court rejected the appellant argument and dismissed its case. On appeal, the Court of Appeal upheld the decision of the High Court and unanimously dismissed the appellant's appeal on all grounds. The court reasoned that misconduct does not necessarily mean wilful misconduct or an act of wickedness, but rather conduct in the sense of mistaken conduct. The court reaffirmed the principles of misconduct as laid down by the Supreme Court in *Taylor Woodrow Ltd*., and stressed that, aside the courts' wide powers, courts would be reluctant to interfere with an arbitrator's jurisdiction as the sole judge of law and facts, except it is compelling to do so. Eneh JCA stated that:

> The court in spite of its wide powers has to bear in mind that the parties before it have provided in their agreement to have their dispute or difference referred to the arbitrator against the regular courts… and it has to show reluctance to interfere with the arbitrator's jurisdiction as the sole judge of law and facts unless it is compelled to do so… the stridency of this position is also cognisable from the letter and spirit of the Arbitration and Conciliation Act.

From case law on the meaning of misconduct of the arbitrator, improper procurement of arbitral proceedings or award under section 30 of the ACA, Nigerian courts have wide powers to set aside an award. Notwithstanding this wide power, Nigerian courts have demonstrated a readiness to support arbitration by refusing to set aside awards on mere allegations of misconduct, or arbitral proceedings or award been improperly procured. To this end, the attitude of Nigerian courts towards setting aside arbitral awards can therefore be summarised as pragmatic. It can be argued that this is because the arbitration agreement demonstrates the parties' intent to comply with the terms of a valid award as final and binding on them. This is evident from Ogundare JCA remark in *Clement C. Ebokan v Ekwenibe & Sons Trading Co.*,[84] thus:

> I would observe that we must not be over ready to set aside awards where parties have agreed to abide by the decision of a

84. [2001] 2 NWLR (Pt. 696) 32.

> tribunal of their selection, unless we see that there has been something radically wrong and vicious in the proceedings.[85]

Conclusion

The issue examined in this article is the English and Nigerian courts' policy considerations for setting aside an arbitral award. Under the AA 1996 and ACA, the grounds for setting aside are limited and the courts are precluded from setting aside an award based on completely speculative matter in regard of which the court has no evidence before it. It was demonstrated in the article that both English and Nigerian courts show sensitivity in upholding arbitral awards. This it was argued is because the arbitration agreement demonstrates the parties' intention to comply with the decision of the arbitrator as final and binding on them. To this end, the AA 1996 stipulates three grounds for challenging an award namely, want of jurisdiction, serious irregularity, and error of the law. The Act allows parties to contract out of the right to appeal the award for errors of law. However, the AA 1996 does not allow parties to opt out of the provisions on the challenge of arbitration awards rendered on the procedural defects of want of jurisdiction and serious irregularity. Similarly, under the ACA, the grounds for setting aside arbitral award in Nigeria are misconduct relating to the arbitrator and improper procurement of the arbitral proceeding or award. Other grounds range from incapacity of a party to the arbitration agreement to, the award being against the public policy of Nigeria. Although, the Nigerian courts have wide discretion to set aside arbitral awards, this article contend that, the courts have shown support to uphold arbitral awards where *prima facie*, the award appears to be valid on its face. From the examination of the Nigerian courts' approach, it is difficult to say whether an award could be set aside However, it remains to be seen whether the Nigerian courts would set aside an arbitral award if satisfied that the decision of the arbitral tribunal on a legal point is evidently wrong as demonstrated by English courts in *MRI Trading AG v Erdenet Mining Corp. LLC*.[86]

85. *Clement Ebokan* [2001] supra. Also, in *Guinness Nigeria Plc. v Nibol Properties Ltd*. [2015] 5 CLRN, Candide-Johnson J of the High Court of Lagos State remarked that: "I am in total agreement… that there is a live judicial policy of ascribing priority to the upholding of arbitral awards, by the regular courts, as a mainstream ADR procedure in the administration of justice for resolving disputes and that there is a narrow compass that attracts the courts to override this policy by setting aside an award. This argument is valid and is pivotal for a court to keep in mind in these types of matters for the reasons espoused in the case law…"
86. Supra note 68.