A DISCUSS ON THE AWARD OF COST IN ARBITRATION[1]

By

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1. Courtesies

My lords, distinguished participants this Institute, the **National Judicial Institute** is the intellectual arm of the third arm (the Judiciary) of the Government of this country.. Among its statutory mandate as clearly indicated in the letter inviting me to this event is " ... to provide stimulating continuing education, as well as prepare judicial officers for the changing demands on the Judiciary in a rapidly-evolving society". The essence in a nutshell is to ensure a Judiciary with robust ideas and energy to discharge its onerous constitutional responsibility any day and any time and take its rightful place among the Judiciaries of the Comity of Nations. It is in the fulfilment of this mandate among others that this National Workshop is organised. I thank His lordship Hon. Justice R.P.I Bozimo, *OFR* the Administrator of this Institute for the honor of being invited to serve as a Facilitator.

2. Introduction

In the last couple of years, the British inherited adjudicatory system of dispute resolution through the Court system has ceased to be the lone method of resolving disputes. Quite a couple of other methods, notably Mediation, Conciliation, Negotiation, Med-Arb. and so on, have come up including Arbitration. While there are sharp differences between Litigation and Arbitration, it is beyond contention that

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1. Being the text of a paper presented on 19th September 2019 at the *National Workshop for Judges on Alternative Dispute Resolution* organised by the *National Judicial Institute, Abuja from 18th to 20th September 2019.*

2. Hon. Justice J. D. Peters was formerly a Senior Research Fellow and Head, Department of Public & Private Law, Nigerian Institute of Advanced Legal Studies, Lagos, a former *Research Assistant to the Hon the Chief Justice of Nigeria* was also at some point the Director of Studies, *National Judicial Institute, Abuja.* He is the author of four leading books on dispute resolution including *Alternative Dispute Resolution (ADR) in Nigeria: Principles and Practice, 2004;* 300 pages. ISBN 978-36948-7-1; Dele Peters; *What Is Alternative Dispute Resolution?* Dee-Sage Nigeria Limited, 2005, 49 pages. ISBN 978-36948-5-5; Dele Peters, *MEDIATION a practice guide* Dee-Sage Nigeria Limited, 2005 ISBN 978-36 948-9-8. Dele Peters, *Arbitration & Conciliation Act Companion Including Customary Arbitration (with cases from 1958-2005)* Dee-Sage Nigeria Limited Lagos, 2006, ISBN 978 – 38391 – 2 – 8. The views and opinion expressed in this paper are personal opinion of the writer and does not in any way represent the views of the *National Industrial Court of Nigeria.*

the latter has taken on quite a number of features of the former. One of such features of Litigation which has become prominent in Arbitration is Cost. This paper is a brief discussion on award of cost in arbitration. In doing this, the paper examines, *albeit* in brief, arbitration as a dispute resolution method, the general principle of cost following event, the American Rule on award of cost and award of cost in both domestic and international arbitration. The paper looks at the historical background or genesis of cost in litigation and argues that it would appear that it is for the same reasons that cost is awarded in arbitration. In addition, it is the position of this paper that while ordinarily speaking in litigation cost follows event, there are situations and circumstances when an arbitrator may not necessarily award cost to the winning party.

3. Arbitration as a Dispute Resolution Option[3]

The word "Arbitration" is often wrongly used. More often than not it is used with regards to labour and employment disputes. It is used at times by government officials, officials of labour union, politicians and the Press to describe the reference of a labour dispute by both employers and labour unions to a third party neutral (not being a judicial officer) for intervention. It is trite to say that such a procedure is not, truly speaking, an arbitration in the absence of an agreement between the parties. The starting point for an understanding of the meaning of "Arbitration" is perhaps the existing local legislation on the matter. Arbitration and Conciliation Act[4] is the main Nigerian statute dealing with Arbitration. According to its Long Title, it is –

> An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation, and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.

In its Interpretation Section,[5] the Act defines 'arbitration' to mean "a commercial arbitration whether or not administered by a permanent arbitral institution." This definition does not appear helpful. It only begs the question "what is arbitration?" and leaves us no wiser as to what arbitration means. Besides, it is restrictive in that it applies to the settlement of *commercial* disputes only. Even the Interpretation Act[6] does not provide any useful assistance in this regard. However, *Stroud's Judicial Dictionary*[7] relying on Romilly M.R.[8] states that:

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3. See Dele Peters; *Arbitration & Conciliation Act Companion Including Customary Arbitration (with cases from 1958-2005)* Dee-Sage Nigeria Limited Lagos, 2006, ISBN 978 – 38391 – 2 – 8.
4. Cap. 19, Laws of the Federation of Nigeria 1990.
5. Section 57(1) *ibid.*
6. Cap. 192 *Laws of the Federation of Nigeria* 1990.
7. Third Edition, Vol. 1 at page 180.
8. See *Collins v. Collins* 28 L.J. Ch. 186

> "Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference[9] between the parties."

Again *Halsbury's Laws of England*[10] defines arbitration as follows:

> "An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than in court of competent jurisdiction."[11]

Yet another author[12] explains arbitration from the point of view of agreement. According to him:

> "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 persons in a judicial manner, that is upon evidence before him or them, the agreement is called an arbitration agreement or a submission to arbitration. When, after a dispute has arisen, it is put before such person or persons for decision, the procedure is called arbitration, and the decision when made is called award."

Arbitration is the reference of a dispute or difference between two or more parties for [13] determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.[14] It is a mechanism for settling dispute between two or more parties by seeking and accepting a decision by a third party of their choice. An essential component of arbitration is an agreement to arbitrate, a submission to arbitration. Generally, the import is that the submission is voluntary, but there are cases where arbitration is imposed by statute, e.g. industrial arbitration under the Trade Dispute Act.[15]

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9. Emphasis (underline) added.
10. Third Edition Vol. 2.
11. *Ibid* at page 2 para. 2 See *also Russell on Arbitrations* Seventeenth Edition at page 3 where the author states that - "The essence of the sort of arbitration to which this book is concerned is that some dispute is referred by the parties for settlement to a tribunal of their own choosing instead of to a court."
12. Ronald Bernstein (ed.): *The Handbook of Arbitration* Sweet and Maxwell quoted by Onyeabo C. Obi: "Introduction to Arbitration Clauses" *Continuing Legal Education Association (Nigeria) Lecture Notes* - Nos. 3a and 3b at page 14.
13. See note 1 *supra.*
14. *Kano Urban Development Board v. Fanz Construction Company Ltd* (1990) 4 N.W.L.R.(Pt.142) at page 32.
15. Cap 432 *Laws of the Federation of Nigeria* 1990. See also Onyeabo C. Obi *op.cit* at page 14.

Professor Ajomo[16] differentiated arbitration into four categories. These are *Domestic*, *International*, *Institutional* and *ad hoc*. There is also what may be described as *Documents only arbitration*. A ***domestic arbitration*** is one between persons resident or doing business in the same country and the contract subject of arbitration is to be performed in the same country. Arbitration is said to be ***international*** if the parties to an arbitration agreement have their places of business in different countries or where the subject matter of the arbitration agreement relates to more than one country or where the parties expressly agree that any dispute arising from the commercial transaction between them shall be treated as an international arbitration.[17]

In ***Institutional arbitration***, parties provide in their contract for the arbitration to be conducted in accordance with the rules of a named arbitration agency or institution. Such arbitration agency or institution includes the International Chamber of Commerce (ICC) in Paris, the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), and the Arbitration Association of the Stockholm Chamber of Commerce, the Asia-African Legal Consultative Committee (AALCC) and the Regional Centres for Arbitration in Kuala Lumpur, Cairo and Lagos. It is worth noting that institutional arbitration is very common nowadays. An ***ad hoc arbitration*** arises where the parties in their contract agreement do not refer to arbitration rules of commercial arbitration administering agency or institutions but is entered into after a dispute has arisen. The parties to this type of arbitration usually establish their own rules of procedure that may be made to fit the facts of the dispute between them as the dispute arises.

4. General Principle of Cost following Event[18]

In the conventional English Court system, it is trite that after parties have presented their case, the Presiding Judge delivers his Judgment. The Judgment is the decision of the Court being the outcome of the evaluation of the facts of the case and evidence led by either side. On the other hand *award* is the outcome of arbitral proceedings. Again upon delivery of Judgment in the conventional English Court, judicial authorities as well as Rules of Court allow the Court to award cost of proceedings to the wining party. The rationale usually is that cost follows event. In other words, that the wining party having been made to embark on judicial process in order to obtain redress is entitled to be compensated by award of cost for reasonable expenses incurred.

The practice of allocating costs and attorneys' fees between the parties to a dispute can be traced to Roman law, where the practice of requiring the losing party to pay the winning party's costs developed. Interestingly, in early ecclesiastical courts there were no fees for legal advice. However, under *legis actio sacramentum*, litigating parties deposited a sum of money in court to ensure legal proceedings were initiated with good cause. At the conclusion of the action, the deposit was refunded to the prevailing party, but the deposit of the losing party was forfeited to the temple. In addition,

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16. See generally M.A. Ajomo: *op. cit.* note 1 *supra.*
17. See section 57, *Arbitration and Conciliation Act Laws of the Federation of Nigeria, 2004.*.
18. See generally Bello Adesina Temitayo; Cost Follows the Event in Atbitration: Its Paradigm and Relevance, *Journal of Research and Development Vol. 2 No. 1 2014.*

where a defendant had denied the plaintiff's claims in bad faith, courts customarily doubled the amount of the judgment. During the Byzantine Empire, lawyers and judicial officials began charging fees for their services and courts started requiring the losing party to pay the costs of the prevailing party in cases involving frivolous litigation or bad faith. In 486 A.D., East Roman Emperor Zenon first announced the rule that the mere fact of losing was sufficient ground to impose an obligation upon the loser to pay the winner's costs[19].

In England, the rules on the awarding of cost and fees developed in law through piecemeal legislation and in equity through the exercise of the Chancellor's discretion[20].Today, this practice is known as the principle that costs follow the event or the English rule. There are several policies that support the principle that costs follow the event. These policies include (1) punishing the losing party, (2) indemnifying the winning party, and (3) deterring frivolous party for doing so is to indemnify the winning party[21]. *Dr. J. Gillis Wetter* and *Charl Priem* explained that the modem justification for the principle that costs follow the event is founded on the concept that if and to the extent that a claimant is entitled in law and justice to obtain a sum of money from another party, [a claimant] should not have to suffer any expense (beyond the cost of addressing a simple demand) for being awarded it. Conversely, if a respondent is exposed to a claim which at the end of the day is deemed not to be founded in law and justice, [a respondent] should not suffer any expense for defending the action[22]. It also has been asserted that the principle that costs follow the event advances the goal of deterring claims with little merit and bad faith litigation. This is based on the premise that a claimant, knowing that it must bear both its own costs and those of the other party should it lose, will not pursue low quality claims or institute a vexatious action. Similarly, the principle of costs follow the event discourages parties from exaggerating their claims and counterclaims and bad faith litigation. Some commentators have speculated that the principle of costs follow the event was originally penal in nature. They argue that courts awarded costs and fees in order to punish an unsuccessful plaintiff for bringing a false claim or to fine a losing defendant for unjustly refusing the plaintiff's rights. While the rationale for the practice of

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19. See John Yukio Gotanda; Awarding Cost and Attorney's Fees in International Arbtration, (1999) *Michigan Journal of International Law.* For a historical background on the practice of awarding costs and fees, *see* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting,* 47 LAW & CONTEMP**.** PROBS. 37, 40-44 (1984); Arthur Engelmann, *The Roman Procedure, in* A HISTORY OF CONTINENTAL CIVIL PROCEDURE 239, 279-82 (Robert Wyness Millar ed. & trans., 1927).

20. See John Yukio Gotanda; *ibid.*. See also ACCESS To CIVIL PROCEDURE ABROAD (Henk J. Sniijers ed. 1996.

21. Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview,* 1982 DUKE L.J. 651, 653-54.

22. *See* J. Gillis Wetter & Charl Priem, *Costs and Their Allocation in International Commercial Arbitrations,* 2 Am**.** Rev. Int. Arb. 249, 329 (1991); *see also* Graham J. Graham- Green, *Taxation of Costs in the Supreme Court,* 49 AirB. 319 (1984). Fall 1999**)** *Michigan Journal of International Law.*

allocating costs and fees may originally have been to penalize the losing party, today, it appears that the main reason for doing so is to indemnify the winning party.

In most jurisdictions, awarding cost in litigation often follows the principle that cost follows events. In some jurisdictions, the principle is already codified to the effect that costs are assessed against the losing party unless the Judge assesses the whole or a part of the burden against the other party in a decision with reason. Yet in some jurisdictions where there are no such legislation, Courts are endowed with discretion to determine whether to award cost to the successful party, but they often do so under the general principle that cost follows the event. Again while in some jurisdictions award of costs may be total against the losing party, in some others award of cost is in proportion to the extent of success recorded by the successful party. In many countries, however, awards of costs and fees are subject to a variety of limitations. For example, in Spain, costs that may be recovered by a successful party are limited to one-third of the amount claimed in the action. In addition, in England, Germany, and Switzerland, the amount of attorneys' fees is determined by a fixed fee schedule, which may not reflect the actual fees incurred. In some countries, courts may refuse to award costs or fees, or both, if the winning party acted in bad faith in the litigation.[23]

In our jurisdiction, the Rules of most superior Courts of record make provision for award of cost at the conclusion of litigation. The power to award or not to award cost is conferred on the Judge. It is a discretionary one. Usually the essence of awarding cost in litigation in Nigeria is never to punish the losing party[24] (this appears to differ materially from the historical emergence of the principle of costs following events in the English Court system) or to unduly enrich the wining party. There is unanimity of position on this by judicial authorities. In *Wema Bank Plc & Anor. v. Alaran Frozen Foods Agency Nigeria Limited & Anor*[25]. the Court of Appeal took time to espouse on award of cost in litigation as follows -

> "The law is trite that cost follows event and the Courts are empowered by the Rules to award cost. See the case of NNPC v. CLIFCO NIG. LTD. (2011)

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[23]. 30. *See* ELENA MERINO-BLANCO, THE SPANISH LEGAL SYSTEM 155 (1996) (noting that in Spain "[if] the judge makes a finding of bad faith **...** all costs shall be borne by the party litigating in bad faith"); Wetter & Priem, *supra* at 271 (stating that in Sweden expenses are not recoverable where a party shows bad faith); NEW CODE OF CIVIL. PROCEDURE IN FRANCE, at 143 (providing that in France "costs are assessed against the losing party unless the judge assesses the whole or a part of the burden against the other party, in a decision with reasons given").

[24]. *Emperion West Africa Limited v. Aflon Limited & Anor. (2014) LPELR-22975 (CA)* holding that "...although a court has the sole discretion to award cost, such award should not be made to serve as a punitive measure or as punishment. Rather it should merely serve as indemnity or to compensate the wrong party on the out of pocket expenses he/it incurred in the prosecution or attendance of the suit or to cushion the cost of litigation incurred by the successful party in the suit. *See PSO Olasipe vs. National Bank of Nigeria Ltd & Anor. (1985) 3 NWLR (Pt. 11) 147 at 152".*

[25]. *(2015) LPELR-25980 (CA)*

LPELR-2022 (SC); MUDUN & ORS. V. ADANCHI & ORS. (2013) LPELR-20774 (CA); OLOKUNLADE V. SAMUEL (2011) 17 NWLR (PT. 1276) 290. It is at the discretion of the court to award cost. The ultimate requirement is that such discretion must be exercised judicially and judiciously. In the case of NNPC v. CLIFCO NIG. LTD. (supra) Rhodes-Vivour, J.S.C. 26 paras E-G postulated: "The award of cost is entirely at the discretion of the court, costs follow the event in Litigation. It follows that a successful party is entitled to costs unless there are special reasons why he should be deprived of his entitlement. In making an award of costs the court must act judiciously and judicially. That is to say with correct and convincing reasons. See Anyaegbunam v. Osaka (1993) 5 NWLR Pt. 294 p. 449; Obayagbona v. Obazee (1972) 5 SC p. 247 "Thus, since cost follows events in litigation, a party need not ask for cost before it can be awarded. That is why it is at the discretion of the court. Whether or not the award of cost is arbitrary is dependent on the peculiarity of each case. The only circumstance under which an appellate court will interfere with the award of cost is when such award is so high or low that there was an entirely extraneous estimate of damages. See OGUNSAKIN V. EDU LOCAL GOVT. AREA KWARA STATE & ORS. (2011) LPELR-8816 (CA) The Court awarded N600,000 to the Respondents-N350,000.00 in the main suit and N250,000.00 in the counterclaim. The award is supported by law because the counterclaim is a separate suit from the main claim. The award of cost is completely a matter within the discretion of the trial judge as cost follow events".

5. The American Rule

It is worthy of note that while the principle of cost following event is adhered to in litigation in most countries, the United States does not apply that principle. Rather, parties in litigation most generally bear their cost of litigation including their attorney's fees. This practice which appears peculiar to the United States has become known as the *American Rule.*[26] The history of the American rule is somewhat unclear. Professor John Leubsdorf argues that the American rule evolved because of the collapse of attorney fee regulation in the first half of the nineteenth century.[27] He notes that, in the colonial period, statutes regulated lawyers' fees and provided for the prevailing party to recover costs and fees. However, after the *American Revolution*, Lawyers were liberated from government control and were able to charge clients with a large degree of discretion[28]. According to the learned scholar, "once these limits were evaded or repealed, the American rule became institutionalized because attorneys no longer had to push to recover their fees from the defeated party." Another theory, set forth by Professors Ronald Braeutigam, Bruce Owen, and John Panzar, posits that the American rule may have been adopted to reduce lawyer fees[29].

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[26]. See Mutanga, supra.

[27]. See John Leubsdorf; *Toward a History of the American Rule on Attorney Fee Recovery,* 47 LAW & CONTEMP. PROBS. 9 (1984).

[28]. *Ibid* at 13.

[29]. *See* Ronald Braeutigam, et al.; *An Economic Analysis of Alternative Fee Shifting Systems,* 47 LAW & CONTEMP**.** PROBS. 173 (1984).

According to them, Lawyers in colonial American were regarded with suspicion, as disreputable practitioners of an unnecessary trade. If so, and if early policymakers regarded the "American rule" as likely to reduce overall expenditures on lawyers, then adoption of the rule can be explained in terms of its anticipated economic effects. That is, the early American attitude toward Lawyers would logically have supported the adoption of the rule if it were thought that the result would be a reduction on the overall social expenditure on Lawyers. The United States Supreme Court adopted the *American rule* in 1796 and put forward three main reasons in support of it. Firstly, that in many cases the result of the litigation is uncertain and, as a result, it is unfair to penalize a losing party by assessing costs and fees for merely defending or prosecuting a lawsuit. Secondly, that if losing parties were forced to bear their opponents' costs and fees, "the poor might be unjustly discouraged from instituting actions to vindicate their rights and finally that claims for costs and fees would likely increase "the time, expense and difficulties of proof' in any given case and "would pose substantial burdens for the administration of justice.

6. Award of Cost in Domestic Arbitration

The principle of cost following events appear to be followed and practised in arbitration. The rationale is simply to reimburse the winning party of the reasonable expenses incurred in the arbitral proceedings. Upon conclusion of arbitral proceedings and making of an award, Cost is usually awarded. Simply put cost within the context of arbitration may be explained as the financial implication of the arbitral intervention in resolving the dispute brought by the parties. The imperative of cost, even in arbitration may be diverse. The need to reimburse a winning party for the money spent in the course of the proceedings. That is the cost of filing and retaining experts who render professional services. There is also, especially in institutional arbitration that is arbitration conducted by institutions such as *the Lagos Court of Arbitration, the Chartered Institute of Arbitrators, International Chamber of Commerce* etc the need for the institutions concerned to charge for the use of its facilities and personnel. These fees may be fixed in proportion to the sum of money involved in the dispute (*Ad valorem),* or may be fixed payable per day (*per diem)* or an omnibus sum may be fixed payable without recourse to the amount of money involved or the length of time it takes to complete the arbitration.

The *Arbitration and Conciliation Act* is the statutory authority respecting the practice of arbitration in Nigeria. With respect to issue of cost, the Act provides in Section 49 that the arbitral tribunal shall fix costs of arbitration in its award. Within the meaning of this section, the term “costs” includes only -

(a) the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself;
(b) the travel and other expenses incurred by the arbitrators;
(c) the cost of expert advice and of other assistance required by the arbitral tribunal;
(d) the travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal;

(e) the costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.

The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case[30]. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that, it considers appropriate in the circumstances of the case[31]. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may, at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees, which is customarily followed in international cases in which the authority appoints arbitrators; and if the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall, take such information into account, to the extent that it considers appropriate in the circumstances of the case[32]. In cases referred to in subsections (3) and (4) of this section, when a party so requests that the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority, which may make any comment it deems appropriate to the arbitral tribunal concerning the fees[33].

Once an arbitral tribunal is established to hear a case, it may request each party to the proceedings to deposit an equal amount as an advance for the costs referred to in paragraphs (a), (b) and (C) of section 49 (1) of the Act[34]. Where the need arises during the course of the arbitral proceedings, the arbitral tribunal may request supplementary deposits from the parties[35]. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall, fix the amount of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits[36]. If the required deposits are not paid in full within thirty days after the receipt of the requests, the arbitral tribunal shall so inform the parties in order that one or other of them may make the required payment; and if such payment is not made, the arbitral tribunal may

[30]. S. 49(2), *Arbitration & Conciliation Act, Laws of the Federation of Nigeria, 2004.*
[31]. S. 49(3), *Ibid.*
[32]. S. 49(4). *Ibid.*
[33] . S. 49(5).
[34]. S. 50(1).
[35]. S. 50(2).
[36]. S. 50(3).

order the suspension or termination of the arbitral proceedings[37]. After the award has been made, the arbitral tribunal shall render an account to the parties of the deposits received and return any unexpended balance to the parties[38].

It is important to bear in mind that some institutions such as the Chartered Institute of Arbitrators have their own rules which regulate among others issues relating to Cost and fees of the Arbitrators. As regards the fees of an arbitrator, there is a consensus on the fact that an arbitrator is at liberty to negotiate his fees or charges with his client he is appointed. However once an arbitrator is appointed the agreement of both parties to the arbitration is required before an arbitrator can negotiate his fees with a party. The rationale for this is that once appointed an arbitrator puts on a quasi judicial garment and hence precluded from any unilateral negotiation for his fees. Where however an arbitrator is appointed before agreement on his fees, he is nonetheless entitled to a reasonable fees for his services.

7. Award of Cost in International Commercial Arbitration

As already noted, most jurisdictions apply the principle that cost follows event. Yet not all these jurisdictions follow or employ the same method for awarding cost in arbitrations. In international arbitration or international commercial arbitration, arbitrators are confronted with series of issues among which three stand out. The first is that arbitrators must consider whether they have the authority to award cost and fees, if any; if the answer to this is in the affirmative, they must consider how they should allocate the cost between the parties; and finally there is also the issue of how much should be awarded as cost.

Motanga noted, and rightly too, that if the parties adequately addressed these issues in their agreement, the arbitrators would simply abide by the voluntary agreement of the parties. To be enforceable the agreement on cost must be clear and unambiguous. Where however parties fail to address issue of cost in their agreement or where provision in relation to cost in the parties' agreement is ambiguous, the arbitrators often rely on the applicable national law of the parties. For example, in *Triumph Tankers Ltd. v. Kerr McGee Refining Corp.,* the tribunal awarded costs and fees to claimant based on section 1964(c) of the *Racketeer Influenced and Corrupt Organizations Act (RICO),* which expressly permits a party prevailing under the Act to recover all costs of the suit, including reasonable attorneys' fees. Similarly, in *Final Award No. 6962,* the tribunal applied both the arbitral rules and the applicable procedural law to resolve the claim for costs and attorneys' fees. In that case, the governing arbitral rules, the *Arbitration Rules of the International Chamber of Commerce (ICC),* gave the tribunal the power to award costs and fees, but did not specify the method for doing so. The tribunal thus looked to French law, which was the governing substantive and procedural law. Because *Article 696* of the *French New Code of Civil Procedure* adheres to the principle that costs follow the event, the Panel ordered the losing party to bear all of the arbitral costs.

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[37] S. 50(4)

[38]. S. 50(5).

Arbitrators will normally and ordinarily award cost within the context of the ***rules of the arbitral body*** under which they operate and which rules confer on them authority to do so. Most of these rules proceed on the issue of award of cost on the basis of the general principle that cost follows event. The rules of most widely used arbitral institutions including the rules of the *United Nations Commission on International Trade Law (UNCITRAL)* confer authority and power on arbitral tribunal to award cost. UNCITRAL Rules, art. 40 provides that "the costs of arbitration shall in principle be borne by the unsuccessful party" and, with respect to the costs of legal representation, the tribunal "shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable. *Tinuade Oyekunle & Bayo Ojo*[39] noted that *ICC Scale of Fees* provide for a minimum and maximum rate while in some other arbitrations, rates are calculated on daily or hourly basis as the case may be. The arbitral rules of the *United Nations Economic Commission for Europe* provides inter alia that the costs of arbitration shall be borne equally by both parties and each shall bear its own legal expenses. Under the *American Arbitration Association International Arbitration Rules*, Article 31,[40] the tribunal shall fix the costs of arbitration in its award and may apportion such costs between the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case. In like manner, *Article 28.4 (1998)* of the *London Court of International Arbitration (LCIA) Rules* provides that unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should follow the result of the award or arbitration except where it appears to the Arbitral Tribunal that in the particular circumstances this approach is inappropriate.[41]

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[39]. *Handbook of Arbitration and ADR Practice in Nigeria*, LexisNexis, 2019.

[40]. Reprinted *in* 22 Y.B. COM. ARB. 303, 317 (1997) .

[41]. See also *International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings,* R. 28 (1984) (giving the tribunal the discretion to allocate costs and fees between the parties); *ICC Rules, supra,* at art. 31 ("[T]he final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."); *World Intellectual Property Organization (WIPO) Arbitration Rules* art. 71, *reprinted in* 20 Y.B. COM. ARB. 340, 367 (1995) (providing that the "Tribunal shall fix the costs of the arbitration" and "shall, subject to any agreement of the parties, apportion the costs of the arbitration"); *United Nations Commission on International Trade Law Arbitration Rules* art. 40, *reprinted in* 15 I.L.M. 701 (1976) [hereinafter UNCITRAL Rules] (providing that "the costs of arbitration shall in principle be borne by the unsuccessful party" and, with respect to the costs of legal representation, the tribunal "shall be free to determine which party shall bear such costs or may apportion such cost between the parties if it determines that the apportionment is reasonable; Rules of Arbitration and Conciliation of the International Arbitral Centre of the Federal Economic Chamber of Vienna art. 19, *reprinted in* 18 Y.B. COM. ARB. 206, 215 (1993) (stating that the costs of the arbitration shall be "fixed by the Secretary" and not the tribunal and providing that the tribunal "shall decide the proportions in which these costs as well as the costs duly incurred by the parties in respect to legal

Where lacunae exists in the agreement of the parties, t*he national laws* and *the rules of the arbitral body* respecting the award of cost, some arbitral tribunals sometimes resort to the use of the of *the principles of fairness and reasonableness*. *Motanga* in his treatise pointed out that the advantage of applying the principle of fairness is that it allows arbitrators to tailor the awards of cost and fees to the circumstances of each case but that this flexibility makes it possible the awards will vary from case to case because individual perceptions of what is fair and reasonable can differ significantly.

8. Award of Cost in Customary Arbitration

This brief discussion on award of cost will not be complete without a comment or two on customary arbitration and the award of cost under it, if any. It is now beyond controversy that before the arrival of the British in the geographical entity now known as Nigeria there were traditionally accepted and functional methods of dispute resolution among the people. One of such methods is Customary Arbitration[42]. Simply put, Customary Arbitration is an arbitration conducted by a body of men (not being a judicial body) in accordance with the customs, traditions and usages of the disputants. It is essentially a native arrangement by selected elders of the community who are versed in the customary law of the people and take decision which are mainly designed and aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment. Customary arbitration received for the first time a special focus by the apex Court in Nigeria in *Agu v. Ikwebe[43]*. Unlike in the conventional arbitration, customary arbitrators are not "professional" in the sense that their livelihood is not dependent on monetary gain or financial reward they receive from presiding over arbitration. Indeed as *Tobi JSC (of blessed memory)* pointed out in *Ufomba v. Ahuchaogu[44]* -

> *''* they are selected elders of the community who are versed in the customary law of the people and take decisions which are mainly designed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment."

In customary arbitration no fees are charged by the arbitrators who in any event see their role as one of peacemakers rather than a money making one. Secondly, the venue of the arbitration will ordinarily be the residence of the Head of the Family or residence or Palace of the Traditional Ruler of the community. In other words, no fees are charged for the use of the venue. Thirdly, the need for a legal representation is equally dispensed with. Thus, no cost is incurred by either side for legal services. The bottom line of all this is that there was never any need to ask for or award cost in

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representation and any further expenses for due prosecution of legal claims shall be borne by the parties.

42. For a detailed discussion on *Customary Arbitration*, see Dele Peters; Arbitration & Conciliation Act Companion Including Customary Arbitration (with cases from 1958-2005) Dee-Sage Nigeria Limited, Lagos, 2006.

43. *(1991)13 NWLR (Pt. 180) 385.*

44. *(2003)8 NWLR (Pt. 821) 130.*

customary arbitration. There may be, but this writer is not aware of any judicial authority on award of cost in customary arbitration. The absence of award of cost in customary arbitration is not in the least surprising bearing in mind its very nature.

9. Conclusion

This paper is a brief discussion on award of cost in arbitration. We have examined award of cost not just in domestic arbitration and international commercial arbitration but also in customary arbitration. While we hold that award of cost appears not to be part and parcel of customary arbitration it is nonetheless a prominent feature of both domestic and international commercial arbitration. It is worthy of note that although the concept of cost following events emanated from litigation it has continue to feature very prominently in arbitration. Notwithstanding this however, there are situations where an arbitrator may not follow the concept of cost following event in deciding whether or not to award cost to the successful party. For instance in *Westland Helicopters Limited v. Arab Organisation for Industrialisation*[45] a party who delayed an arbitral proceedings which lasted 13 years was mandated to pay cost of 18 Million Pounds. Again, where the successful party raises issues or makes allegations which have failed, he may not only be deprived of some or all of his costs, but may be ordered to pay the whole or a part of the cost of the unsuccessful party.[46]

Again, I cannot but express my profound gratitude to the Administrator of the Institute for this opportunity. I thank the Director of Studies, our amiable Hajia Titi Kawu for recommending that I be accorded this honour. I say a big *Thank You* to the entire staff of the Institute for keeping the flag flying. My lords distinguished participants, it may be that I have not met your reasonable expectation in this paper. I however hope that I have sufficiently aroused your lordships' interest in the subject of this discuss to engender robust exchange of ideas during discussion session so as to fill in noticeable gaps in this presentation.

Thank you, my lords, for your kind attention.

[45] . 80 ILR (1987-10-23).

[46]. See *Phonographic Performance Limited v. Rediffusion Music Limited (1999)2 All E.R 299* per *Lord Woolf MR.*