

THE DUTIES OF ARBITRATORS

BY

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Introduction

Parties to arbitral proceedings generally expect an arbitrator to organize and control the arbitration process efficiently, minimize costs, accord fair and equal treatment to the parties, and to ultimately resolve the issues in dispute by making an effective and binding award. To enable the arbitrator meet these expectations he has certain duties towards the parties from whom he/she derives jurisdiction. This paper examines in duties of an arbitrator, the sources of which are threefold. These are (i) the agreement of the parties; (ii) rules and laws of arbitration and (iii) ethical rules.

(i) Duties Imposed by Parties in the Arbitration Agreement

The parties may impose specific duties on the arbitrator either in the arbitration agreement or in any subsequent agreement. Such duties may be imposed either before the arbitrator is appointed or after her appointment. It is important for a prospective arbitrator to look carefully at the agreement to ascertain whether it contains duties that she may not be able to fulfil in the event that she is appointed arbitrator.

As a matter of courtesy, parties should consult the arbitrator prior to the imposition of any additional duty after appointment. Where the arbitrator

finds that she is unable to perform such a duty and the parties insist on its performance, the arbitrator may have to offer her resignation.

(ii) Duties Imposed by Applicable rules or law

Where arbitration is conducted under international or institutional rules of arbitration, the applicable rules impose specific duties on the arbitral tribunal in addition to those imposed by the parties. Some of these duties are:

(a) Duty to Be and Stay Impartial and Independent:

The impartiality and/or independence of an arbitrator are essential features of this quasi-judicial process. The long-standing norms that no one should be a judge in his own cause and that justice should be seen to be done apply equally to arbitration. The arbitrator must avoid communicating with one party without the knowledge of the other. Under section 8 of the ACA and Articles 9 and 10 of the Arbitration Rules, arbitrators have a duty to be impartial and independent. Impartiality requires that an arbitrator neither favors one party nor be predisposed as to the question in dispute. Independence on the other hand requires that there should be no such actual or past dependant relationship between the parties and the arbitrators which may affect, or appear to affect the arbitrators' freedom of judgment.

(b) Duty of Disclosure:

Section 8(1) of the ACA provides that the arbitrator has a duty to disclose all relevant facts which are likely to give rise to any justifiable doubts

about her independence and impartiality¹. The Arbitrator must discharge this duty of disclosure at the earliest opportunity, usually at the time of her interview by the parties before the confirmation of her appointment.

The arbitrator's duty of disclosure extends to all information which could be relevant. The duty continues after the appointment of the arbitrator and subsists through out the proceedings.

Where an arbitrator has fulfilled her duty of disclosure, a party cannot challenge the award on the basis of the fact disclosed as such party would be held to have waived his rights and submitted to the jurisdiction of the Arbitrator.

The threshold or test for what amounts to lack of disclosure was decided in that case of ***AT & T Corporation vs. Saudi Cable Company***² to be the "real danger of bias" as opposed to a "reasonable suspicion threshold". The court held that an inadvertent non disclosure of a fact which might have affected the appointment process is not sufficient to lead to a real danger of bias.

(c) Duty to Effectively Resolve the Dispute between the parties by Rendering a Valid Award

An arbitrator must take into consideration, issues which may threaten the validity of the award. She must ensure that her award does not contain decisions on matters which are beyond the scope of submission to arbitration and that the conduct of the reference is not afflicted with

² [2000] 1 All ER (D) 657

technical or actual misconduct, as otherwise the court may set aside such an award³. The concept of "misconduct" is not defined in the ACA, and its scope has been developed by judicial authorities on a case by case basis. The following is an illustrative list of what has been held to constitute "misconduct" in the context of arbitral proceedings:

- (i) Where the arbitrator fails to comply with the term, express or implied of the arbitration agreement;
- (ii) Where the arbitrator makes an award which on ground of public policy ought not to be enforced;
- (iii) Where the arbitrator has been bribed or corrupted;
- (iv) Where the arbitrator makes mistake as to the scope of authority conferred by the agreement;
- (v) Where the arbitrator fails to decide all the matters referred to her;
- (vi) If the award is inconsistent or ambiguous;
- (vii) Where the arbitrator breached the rules of natural justice;⁴
- (viii) Where the arbitrator makes an error of law that is apparent of the face of the award, but only if the point of law erroneously decided was not specifically referred for the decision of the arbitrator;⁵
- (ix) Where the arbitrator wrongfully admits and acts on evidence which goes to the root of the question submitted to him⁶. However where, in deciding as to admissibility, the arbitrator acts honestly and judicially, then if while so acting he decides erroneously that evidence is or is not admissible, that in itself is

³ Sections 29 (2) and 30 of the ACA

⁴ *Arbico Nigeria Limited v Nigeria Machine Tools Ltd* (2002) 15 NWLR 1

⁵ *Taylor Woodrow Nigeria Ltd v Etina Werk GMBH* (1993) 4 NWLR 127

⁶ *KSUDB v Fanz Construction Company Limited* (1990) 4 NWLR 1; *Compt. Comm. & Ind. Ltd v OGSWC* (2002) 9 NWLR 629

not misconduct and as with other mistakes his award will not be set aside on that ground unless the error appears on its face.⁷

If the arbitrators exceed their authority the consequence may be that the award will be set aside by an aggrieved party who can show that the award deals with a dispute not falling within the terms of submission to the arbitrators. However, if the decisions on the matters falling within the arbitrators jurisdiction can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside⁸

While an arbitrator has a duty to ensure the validity of an award, it is not one the arbitrator's duties to ensure the enforceability of an award. This is because the requirement for enforcement differs from country to country and the arbitrator cannot know in which country the award will be enforced.

(d) Duty to be Physically and Mentally Capable of Conducting the Proceedings

An arbitrator must be physically and mentally capable of performing her duties in relation to the reference. The parties may agree to terminate the appointment of an arbitrator by reason of her inability to perform her functions⁹.

⁷ *KSUDB v Fanz Construction Company Limited* (1990) 4 NWLR 1; *Compt. Comm. & Ind. Ltd v OGSWC* (2002) 9 NWLR 629

⁸ *Bellview Airlines Limited v. Aluminium City Limited* (2005) 7 CLRN pages 143 to 159

⁹ Section 10(1) (b) of the Arbitration and Conciliation Act 1988

(e) Duty to Adopt Procedures Suitable to the Circumstances of the Particular Case

As part of the arbitrator's duty to conduct the reference with reasonable skill and diligence, she must adopt a procedure that is tailor-made for the particular type of dispute she is confronted with. The duty to adopt procedures that are suitable for the circumstances of the particular case is reinforced by provisions which give the arbitrator the power to determine the manner in which the reference is to be conducted, subject only to any agreement of the parties and mandatory provisions of law. Thus Article 15(1) of the First Schedule to the ACA provides that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

(f) Duty to conduct the arbitration fairly and without undue delay:

The first duty of the arbitrator under this head is the duty to treat both parties fairly and equally and ensure that each party is given full opportunity of presenting his case.¹⁰ Section 14 of the ACA which is based on Article 18 of the Model law and Article 15(1) of the UNCITRAL Arbitration Rules provides that:

In any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.

¹⁰ Section 14 Arbitration and Conciliation Act, Cap. A.18 LFN 2004

In the case of *Umar v. Onwudiwe*¹¹ the Court of Appeal held that the arbitrator's duty to conduct the arbitration fairly means that the arbitrator must, among other things, (a) hear both sides and consider all material issues in the case before reaching a decision and (b) give equal treatment, opportunity and consideration to all concerned.

The arbitrator's duty to allow the other party to present his case is based on the fundamental principle of *audi alteram partem*¹² which must be observed by persons with judicial and quasi-judicial functions. The best guideline that an arbitrator can follow in this regard is to allow a party reasonable time to present his case and respond to the case of the other party.

Where existing workload will not permit an arbitrator to discharge his functions expeditiously, he should either reject the appointment or at least disclose these facts to the parties so that they can decide whether or not to appoint him.

(g) Duty to keep the arbitration confidential

It is an implied term of the arbitration agreement that the proceedings will be private and confidential. Article 25(4) of the Arbitration Rules provides that hearings shall be held in *camera* unless the parties agree otherwise. The arbitrator therefore has a duty to preserve the confidential and private nature of the proceedings. She is not allowed to communicate any details or names without the parties consent.

¹¹ [2002] 10 NWLR Pt. 774 p. 150; *African Assurance Corp. v. Aim Consultant Ltd.* (2004) 12 CLRN p. 107-124

¹² A latin phrase that means, literally, 'hear the other side' or 'hear both sides' and is deep-rooted principle of natural justice

Arbitrators must consider all aspects of an arbitration to be confidential. These include the records of the arbitration hearing and the award.

(h) Duty to consider relevant circumstances when determining the language to be used at the arbitral proceedings.

It is important to specify the language of the arbitration in international commercial arbitrations. This is because the parties may be nationals of different countries with different languages. Section 18(1) of the ACA empowers the arbitral tribunal to choose the language or languages for the arbitral proceedings bearing in mind the circumstances of the case in the event that the parties do not agree on the language to be used in the arbitral proceedings.¹³

(i) Duty to communicate expert report to the parties¹⁴

Section 20(4) of the ACA imposes on the Arbitrator the duty to communicate to the parties any expert report or evidentiary document upon which the arbitral tribunal may rely in making its decision. Incidental to this *duty is another duty to give the parties reasonable opportunity to comment on any information, opinion or advice given by experts or legal advisers.* The essence of this duty is to further ensure that the parties are treated fairly and equally.

(j) Duty not to decide ex aequo et bono or as amiable compositeur unless authorised by parties¹⁵

¹³ Article 17 of the Arbitration Rules (1st Schedule) to the ACA also has similar provisions.

¹⁴ Section 20(4) Arbitration and Conciliation Act, Cap. A18, LFN 2004

¹⁵ Section 22(3) Arbitration and Conciliation Act, Cap. A18, LFN 2004

By virtue of sections 22(3) and 47(4) of the ACA, the arbitral tribunal must not decide “*ex aequo et bono*” or as *amiable compositeur* unless authorised by the parties. This means that the arbitral tribunal must not waive the strict legal rules of interpretation except as authorised by the parties. The essence of this provision is to discourage arbitrators from resorting to extra legal arbitration and thus prevent arbitrariness in resolving disputes

In the case of *Orion Espanola De Seguros vs. Belfort Maatshappy Voor Algemene Verzeekgringeen*¹⁶ it was held that arbitrators must in general apply a fixed and recognisable system of law and that they cannot be allowed to apply some different criteria such as the view of the individual arbitrator or umpire on abstract justice or equitable principles.

*(k) Duty to draw up an award in the prescribed form*¹⁷

An award must conform to the prescribed form as provided by the arbitral law of the country where the arbitration takes place. Section 26 of the ACA provides the form for an award.¹⁸ Section 26(4) of the ACA also makes it mandatory for the arbitrator to deliver copies of the award to each party.

*(l) Duty to take into account relevant consideration when fixing the arbitrators fees.*¹⁹

Section 49(2) of the ACA provides with respect to international commercial arbitrations that the arbitral tribunal shall be reasonable in

¹⁶ [1962] 2 Lloyd's Report 257, 264

¹⁷ Section 26 of the ACA

¹⁸ Section 26 (3) of the ACA

¹⁹ Section 49(2) of the ACA

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.

International or institutional rules of the Arbitral Tribunal also impose specific duties on the arbitral tribunal in addition to or as a complement to the duties already imposed by the parties themselves and the arbitral laws of the country where the arbitration takes place.

(iii) Ethical Duties.

It is generally considered that an arbitrator has certain moral or ethical duties towards parties involved in the proceedings. One of such is his obligation to decline to accept an appointment if, as a prospective arbitrator, he is manifestly unable to give the case sufficient time and attention.

Some Arbitral institutions have their established code of ethics. For instance the American Association of Arbitrators (AAA) has its Code of Ethics for Arbitrators in Commercial Disputes²⁰. The International Bar Association (IBA) has also published Rules of Ethics for International Arbitrators²¹. The code of ethics can be imposed on an arbitral tribunal by agreement of the parties.

Conclusion

In ensuring that an Arbitrator performs all her duties, it may also be useful for the arbitrator to draw up a checklist of her specific duties. The checklist

²⁰ AAA's Code of Ethics for Arbitrators in Commercial Disputes was issued in 1977 and was amended in 2004 to reflect modern practice.

²¹ The IBA Rules of Ethics for International Arbitrators is attached to this paper.

will differ from case to case to allow the impact of different rules and laws of arbitration.