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ARBITRATION AND THE PRINCIPLES OF NATURAL JUSTICE: THE DOCTRINES OF "NEMO JUDEX IN CAUSA SUA" AND "AUDI ALTERAM PARTEM" IN ARBITRAL PROCEEDINGS IN NIGERIA.

Introduction

There is no doubt that globally arbitration has become the quintessential vehicle for the resolution of disputes. Its efficiency, simplicity, flexibility, party autonomy and cost effectiveness are among the many reasons why arbitration is the preferred method of settling disputes all over the world especially among commercial businessmen. An unprecedented number of nations have adopted legislations and procedures that promote the use of Arbitration as an alternative means for resolving disputes. Arbitration in Nigeria is primarily governed by the Arbitration and Conciliation Act (ACA), a federal legislation enacted in 1988. The Act is largely based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 with minor differences.

Arbitration is one of the various methods of dispute resolution mechanism and undoubtedly the most popular; it is an agreement where 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 persons of their choice. Arbitration is a form of alternative dispute resolution (ADR) where the parties refer its dispute to one or more persons called 'arbiters' by whose decision, they agree to be bound.

The Arbitration and Conciliation Act (ACA) contains some mandatory legislative provisions which if not complied with may result in the successful setting aside of an arbitral award. The Act requires that an arbitral proceedings as well as the composition of an arbitral tribunal must meet certain minimum standards, which are considered to be indispensable characteristics of fair trial.

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In keeping with the amicable resolution function, an arbitrator has to maintain its impartiality and independence. A violation of any of the cardinal and universally accepted principle of arbitration may result in the removal of the arbitrator and possible annulment of any order reached by way of an award.

Arbitration is a mechanism for a speedy resolution of disputes between parties. It intends to ensure a fair and speedy trial of the dispute. Arbitral proceedings have supported the doctrine of fair hearing just to preserve its legitimacy, due process, and fair exercise. In other words, an arbitral proceeding must comply with the sacred principle of fair hearing, which includes the rights of a party to be represented by a counsel (if any), summon his witness(s), present his evidence, and challenge his opposition's witnesses and evidence. The principle of fair hearing must be observed and adhered to, in the preliminary meeting stage, pre-hearing stage and hearing stage of every arbitral proceeding.

In this article, we examine the practicability of the Principles of Audi Alteram Partem (Fair Hearing) and Nemo Judex In Causa Sua (Rule against Bias) in Arbitral Proceedings in Nigeria.

What is Natural Justice?

There is no precise and scientific definition of natural justice. However, the principles of natural justice are being acceptable and enforced. Different judges, lawyers and scholars define or describe it in various ways. In **Vionet v. Barrett (1885) 55 LJRD 39, Lord Esher MR** defined natural justice as 'the natural sense of what is right and wrong'. Later, in the case of **Hopkins v. Smethwick Local Board of Health (1890) 24 QBD 712**, he defined it as 'a fundamental justice'. In **Drew v. Drew (1855) 2 Macg 1.8, Lord Cranworth** defined it as 'a universal Justice'. **In James Dunber Smith v. Her Majesty the queen (1877) 3 614, Sir Robert P. Coller** defined it as 'the requirements of substantial justice'. In **Fairmount Investments Ltd v. Secretary to State for Environment (1976) WLR 1255, Lord Russell of Wilowan** described natural justice as 'a fair crack of the whip'.

In **Re R.N. (An infaot) (1967) (2) B. 617, 530p, Lord Parker C.J** defined it as 'a duty to act fairly'. **Geoffrey Lane L.J in Regina v. Secretary of State for Home Affiars Ex-parte Hosenball (1977) 1 WLR 766** described it as 'common fairness'. However, in a famous English decision in **Abbott v. Sullivan (1952) 1 K.B. 189 at 195**, it was stated that the principles of natural justice are easy to proclaim, but their precise extent is far less easy to define.

Principles of Natural Justice

The principles of natural justice have great significance in the study of administrative law. It is also known as substantial justice or fundamental justice or universal justice or fair play in action or due process. The principles of natural justice originated from common law in England and are based on two latin maxim – **Nemo Judex In Causa Sua**

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(No man shall be a judge in his own cause), and **Audi Alteram Partem** (hear the other side).

The principles of natural justice are rudimentary, elementary and fundamental rules of fairness and due process. They are rules of law to ensure fairness and justice to parties in every judicial or quasi-judicial proceedings. The rights of a person in judicial proceedings or quasi- judicial proceedings consist of three main sets or groups of rights – pre-trial rights, trial-rights and post-trial rights. These three sets of rights are mainly and collectively protected in the Constitution of the Federal Republic of Nigeria 1999 (As Amended). The two main requirements or ingredients of natural justice have been adequately incorporated in the Nigerian Constitution by the words 'fair hearing' (audi alteram partem), and 'Impartiality' (nemo judex in causa sua). **See Sections 36 and 17(2)(e) of the Constitution of the Federal Republic of Nigeria 1999 (As amended).**

The Doctrine of Audi Alteram Partem

Audi Alteram Partem means ''fair hearing' or 'hear the other side'. In the context of administration of justice, to hear a matter means to listen to a matter attentively, to consider, and decide it. In the case of **Akoh v.Abuh (1970) 1 WLR 937**, the Supreme Court stated that to hear a cause or matter means to hear, consider, and determine a matter. Hearing a matter can only be fair when all the Parties to a dispute are given an opportunity to confront the witnesses against him, have a fair opportunity to challenge the evidence presented by the other party, summon his witness and present his evidence.

Fair hearing is a fundamental, cardinal, and sacred prerequisite for a just determination of disputes between parties. Section 36 of the Nigerian Constitution has the relevant provisions for fair hearing. The fair hearing provision in the Nigerian Constitution is the machinery or locomotive justice, not a spare part to propel or invigorate the case of the User. It is not a casual principle of law available to a party to be picked up at Will in a case and force the Court to apply it to his advantage. Fair hearing is not a technical doctrine, but a rule of Substantial Justice.

The Doctrine of Audi Alteram Partem in Arbitral Proceedings.

Arbitral proceeding must be initiated. Once dispute arises, the party seeking arbitration proceeding has the duty to set it on motion by Notice of Arbitration known as Declaration of a Dispute. Even when an action has been commenced in court, the party interested in arbitral proceeding is to apply for stay of proceeding and issue Notice of Arbitration.

There are three stages in arbitral proceedings - Preliminary Meeting stage, Pre-hearing Review Stage, and Hearing Stage. In Preliminary stage, parties are invited to a preliminary meeting usually hosted by arbitrator(s) wherein the agenda for the preliminary meeting, number of witnesses and mode of presenting them at the hearing, the manner in which processes would be presented, applicable rules, directional orders, adjournment are been discussed by the parties. In Pre-hearing review

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stage, parties are expected to agree on payment of fees, filing and exchange of statement of case, fixing the venue and payment of deposit, narrowing and joining issues in dispute, confirming date, venue, and mode of hearing.

Proceedings at the hearing stage is based on the mode adopted by the parties and arbitral tribunal. It could be documents only or with witness and documents. Note that everything in trial applies only that arbitration proceeding is a private court. Evidence Act does not apply but the rules of evidence applies. No section is mentioned but the fact that an original document is not produced can be objected to. In Arbitration, witnesses are examined on oath, cross-examined and re-examined. Parties are also allowed to adopt their final addresses.

The major arbitration instruments have provisions for fair hearing or fair trial, as is the case with Article 18 of the UN Commission on International Trade Law (UNCITRAL), which provides that:

"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case"

Article 14 of the Arbitration and Conciliation Act has a similar provision. Article 14 of the Act provides that in any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party shall be given full opportunity to present his case. Arbitral proceedings is fair and just when a Party to a dispute is given an opportunity to confront the witnesses against him, has a fair opportunity to challenge the evidence presented by the other party, summon his witness and present his evidence. See Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended).

Given that arbitration is different from Litigation, which is naturally subject to principles of fair hearing, it is imperative that arbitral tribunals are equally bound to adhere to such principles. Despite the autonomy and character of arbitration, arbitral proceedings are but a mere component of the law and legal system and arbitrators are authorities dispensing the law.

Fair hearing aims to secure the interests of the parties and the proper administration of justice in arbitration. In addition to 'equality' and the 'right to present one's case', as enunciated in Article 14 of the Arbitration and Conciliation Act, other provisions in the same Act spell out further fair hearing principles. Determining whether or not proceedings are fair, according to decided cases, must be assessed by reference to the proceedings as a whole, albeit that a substantial departure in one element of the proceedings (eg. the right of the parties to present their case) is sufficient to bring about a breach.

Effect of violation of Audi Alteram Partem Rule

Any party alleging breach of fair hearing has the burden to prove the breach, and he must do so in the light of the facts and circumstances leading to the alleged breach. This is because the facts only, determine acts, which constitute

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non-compliance with the principles of fair hearing.

The effect of a successful argument that an appellant's right to fair hearing has been violated or breached is to set aside or nullify the decision complained of, by the appellant.

The Doctrine of Nemo Judex In Causa Sua

Nemo Judex In Cause Sua (no one should be judge in his own case) is a widely known principle, which captures one of the two pillars of natural justice. Much of the confidence in the judicial as well as the arbitral process rests upon this maxim, which strives to assure impartiality in the decision making process. The underlying principle is that no person can objectively judge a dispute in which the person is a party or has a substantial interest, or has a substantial connection to any of the parties to the dispute or where the person's interest may influence the outcome, or to be seen to have influenced the outcome of the decision. The doctrine of independence and impartiality of judges and arbitrators alike is an integral feature of the justice system and a recognized fundamental principle in arbitration.

The doctrine is popularly known as the rule against bias. It is a minimal requirement of the natural justice, which stipulates that the authority giving decision must be composed of impartial persons acting fairly, without prejudice or bias. The doctrine, which was brought into common legal parlance by **Lord Chief Justice Hewart in R v Sussex Justices Ex-Parte McCarthy (1924) 1 KB 256**, instructs that "justice should not only be done but should manifestly and undoubtedly be seen to be done". In Nigeria, the constitutional provisions governing Nemo Judex In Causa Sua are Sections 36 and 17(2) (e) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended).

Important Principles for Testing Nemo Judex In Causa Sua or Rule against Bias

There are at least four tests, which decision makers need to pass in order to ensure that decisions made do not cast doubt regarding their validity. At the same time, unbiased decision maker indicates that justice will not only be served but will be seen to be done appropriately. Some of the important principles for testing bias are discussed below.

Pecuniary Interest: In order to test a degree of bias, there is a need to determine if a decision maker has pecuniary interest in the matter under consideration. In fact, **Roux, Brynard, Botes and Fourie (1997)** argued that whenever a decision maker has financial interest in the matter, it is appropriate to make a declaration thereof followed by recusal from decision-making processes. In other words, any person who has financial interest in relation to a matter under consideration should avoid participating in decision-making process. **Zubair and Khattak (2014)** opined that the existence of financial interest in relation to a matter is adequate to disqualify a decision maker.

Personal Interest: Personal bias emanates from "personal relation of

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friendship or animosity or profession" in which case a decision maker's judgement could be highly influenced by whether or not he or she likes the other person who may be affected by the decision.

Subjective Bias: Subjective bias may arise when an individual in decision-making position has had unsavory experience with people in their private interactions. This suggests that previous unpleasant interactions may tend to influence the decision maker to arrive at an unfavorable decision against the other people.

The rule against bias was originally founded on a principle of fairness and accuracy in decision making, but it is now founded on the idea that to allow a biased tribunal to make a decision would be to undermine public confidence in the system. Clearly, this indicates that public confidence in judicial or quasi-judicial proceedings can be affected tremendously if individuals who appear to be biased are allowed to participate in decision making processes. However, since the exact state of decision maker's mind may be difficult to determine, it remains an onerous and tedious exercise to prove allegations to subjective bias against a decision maker. Moreover, when allegations of subjective bias arise, the court may only make inferences based on the decision maker's conduct to determine the degree of biasness during decision making.

Prejudice: Prejudice may arise due to various factors: firstly, a decision maker could be given information prior to the commencement of a decision making process, which may negatively influence the outcome in which another person is ultimately affected. Secondly, the decision-making proceedings may be conducted in an environment, which disadvantage another person due to some discomforts created by such an environment.

The Doctrine of Nemo Judex In Causa Sua in Arbitral Proceedings

The principle of Nemo Judex in Causa Sua in this context connotes that an arbitrator should not be a judge in his own cause, i.e an arbitrator presiding over a dispute should not have substantial interest with the dispute or any of the parties to the dispute to the extent of influencing the outcome or to be seen to have influenced the outcome of the award. The requirement of disclosure in arbitration proceedings has now formed an integral part of the proceedings in order to ensure fairness and transparency. Various arbitration rules provide for obligation of an arbitrator to disclose and the effect of non-disclosure. **Article 12 Uncitral Rules** for example provides that an arbitrator may be challenged if circumstances exist that give rise to justiciable doubts as to the arbitrator's impartiality or independence. See also **Section 8(3) of Arbitration and Conciliation Act.**

In the context of challenging an arbitrator or an award for lack of "independence" or impartiality, courts have come to different conclusions as to whether arbitrators are subjected to the same requirements of independence and impartiality as Judges. While the US Supreme Court held in **Commonwealth Coatings v. Continental Casualty Co**

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(1968) 393 US 145, 149 that arbitrators should submit to stricter requirements than courts, since there is no appeal against their awards.

However, impartiality must be distinguished from neutrality as is provided in some types of arbitration such as party-appointed arbitration, i.e., arbitrators do not have to be neutral. This does not imply that those arbitrators can be biased. It only means that from the legal, social and cultural background they may be favourably disposed towards the appointing party, which may even be necessary to fulfil the special functions of a party appointing an arbitrator. It is the writer's position however that as long as this proximity is not allowed to dictate the outcome of the proceedings the so-called lack of neutrality should not impair the impartiality.

Duty of an Arbitrator to Disclose Circumstances likely to give rise to Impartiality or Bias

Generally, the duty to disclose extends to all information, which an arbitrator has knowledge of, in relation to the dispute. The big question is what information is relevant and what is sufficient to justify an objection to the arbitrator. Due to different perceptions as to what facts may be relevant, some institutions prescribe in details, what types of information is required. Extensive guidelines can be found in **Article 4.2 of the IBA Rules of Ethics of International Arbitrators**. Disclosure factors are generally professional and personal contacts, which the arbitrator has with either or both of the parties. Clearly, if the arbitrator has advised, represented or worked with a party, even many years previously, this might be considered relevant and capable of affecting an award if not disclosed.

Non-disclosure of facts has been considered to justify the challenge of an arbitrator. **See Section 8 of the Arbitration and Conciliation Act.** In the judgment of the Court of Appeal of Nigeria, Lagos division per **Ogakwu JCA in Addax Petroleum Exploration (Nig) Ltd v. Peacegate Oil & Gas Limited (unreported) in CA/L/765/2014 delivered on the 10th of March, 2017**, expounded this doctrine. The facts culminating to this appeal was a successful challenge by the respondent at the trial Court in respect of an arbitral award. The arbitrator had disclosed at the preliminary stages of the proceedings his involvement with the appellant as counsel previously, and asked to disqualify himself subject to the agreement of the parties. The parties unanimously expressed their confidence in the arbitrator to proceed with the conduct of the proceedings. The Proceedings continued and the award was rendered in favour of the respondent. The respondent in a volte-face approached the trial Court to set aside the award on the ground that the participation of the arbitrator who indicated that he had acted for the appellant in the arbitration breached the Nemo Judex in Causa sua rule of natural justice.

The Court of Appeal in upturning the decision of the trial court relied and reproduced in extenso the decision of **Okoro JCA** (as he then was)

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in **Kano State Urban Development Board v. Fanz**. The Court observed from the face of the records that the arbitrator informed the parties that he acted for the Appellant in a dispute, in which case he would disqualify himself from acting as an arbitrator. The respondent's counsel expressed confidence and stated that the respondent did not object to the arbitrator acting as an arbitrator in the disclosed case. The court of appeal therefore held thus **"Justice is rooted in confidence and confidence is destroyed when right-minded people go away thinking that the judge was biased. This is a pointer to the fact that the respondent reposed confidence in the process that resulted in the award, which it enforced. The law remains that in arbitration proceedings, the general rule is that the parties choose their arbitrator or arbitrators to judge both as to decisions of law and facts in the dispute between them. Thus where as in this case an award is prima facie good on the face of it, as evidenced by the facts that the respondent has enforced part of the award, it does not lie in the mouth of one the parties to object simply because the award is not his favour"**.

The law is that facts that have been disclosed at the appointment stage cannot be relied on at a later stage to challenge the arbitrator or the award. Parties have to raise their objections immediately or they are considered to have waived their rights to rely on them. See the Case of **Oduneye v FRN (2014) 13 NWLR Pt 1425 at 545 at Page 586.**

Effects of Violation of the Doctrine of Nemo Judex In Causa Sua

When Nemo Judex In Causa Sua is violated by an arbitrator, any decision delivered in form of an award must be set aside. This is simply because the above-mentioned maxim demands that arbitrators should discharge their responsibilities without any prejudice. In other words, decisions that are made by arbitrators have to be fair, reasonable, and consistent with legal prescripts.

Section 8 (3) (a) of the Arbitration and Conciliation Act provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party who intends to challenge an arbitrator on ground of bias or impartiality must send the arbitral tribunal a written statement of the reasons for the challenge, within 15 days of becoming aware of the likelihood of the bias.

Conclusion

Arbitration is a mechanism for the speedy resolution of disputes between the Parties. It intends to ensure a fair hearing and speedy trial of the dispute giving the finality of the decision as compared to litigation. The arbitration proceedings have evolved the principle of natural justice as quintessential in order to preserve its legitimacy and fair exercise. However, parties unsatisfied with the award passed by the arbitrator can challenge the award under the guise of breach of natural justice. It is the duty of the arbitrator to ensure that all parameters of natural justice are followed in the adjudication process. The arbitral proceeding must be fair, just,

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reasonable, and in accordance with the principle of natural justice.
The principle of natural justice should always be observed in arbitral proceedings. However, the parties should avoid bringing hollow, procedural or technical errors, once the award has been passed. The purpose of arbitration is to resolve the dispute efficiently and expeditiously.

The legitimacy and integrity of any system that adjudicates the rights and duties of persons would be evaluated by reference to the standards required by the principles of natural justice. Arbitration is becoming more popular as a system of dispute resolution because of the exponential increase of cross-border transactions that are a feature of globalization. Now arbitrations take place in countries that lack a well-developed arbitration culture. Courts in some of these countries have yet to develop a coherent body of law that clarifies and gives effect to the principles of natural justice. Moreover, important values protected by natural justice principles cannot be compromised despite the peculiar nature of arbitration.

The doctrine of natural justice pervades the procedural law of arbitration as its observance is the pragmatic requirement of fair play in action. Procedural fairness and regularity are indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. The doctrine of natural justice seeks not only to secure justice but also to prevent miscarriage of justice.

It is the duty of the parties to agree on a procedure, and if the parties are silent, then the arbitrator has to prescribe the procedure. The procedure so prescribed, however, should be in consonance with the principles of natural justice. The violation of principles of natural justice would amount to unfair proceedings. The arbitral tribunal discharging quasi judicial functions is expected to be fair and impartial in the arbitral proceedings.

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