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AN ASSESSMENT OF THE REQUIREMENTS OF EQUAL TREATMENT OF PARTIES IN ARBITRATION

Abdulrazaq Adelodun Daibu *

ABSTRACT

This article examines the principle of equal treatment of parties and its requirement in arbitration. The article also appraised the application and, non-compliance with same in the context of domestic, customary and Islamic arbitration, pin-pointing the areas of divergence of the concept in arbitration vis-à-vis litigation. The article contends that the requirement of equal treatment of parties is not only a legitimate entitlement of the parties but also a legal obligation on the arbitrator(s) therefore essential to the validity or otherwise of any arbitral proceedings.

I. INTRODUCTION

The advantages of arbitration over litigation in resolving disputes have resulted to the increasing reference of commercial related disputes to arbitration.¹ Advantages of arbitration include swiftness in conduct of hearings, minimal reliance on technicalities and privacy among others.² Arbitral proceedings are usually conducted by neutral third parties with a resultant binding award. The issue however is, whether the principle of equal treatment of parties which is a basic ingredient of the rule of natural justice is being observed in arbitration hearings because the principle is sacrosanct in all judicial and *quasi*-judicial proceedings in all legal system.³ Thus, an allegation of violation of breach of the principle of equal treatment of parties may invalidate an arbitral proceeding and render an award a nullity, for a claim of non compliance to the principle in arbitration is analogous to an allegation of breach of fair hearing.

II. CONCEPT OF EQUAL TREATMENT OF PARTIES

The concept of equality or equal treatment of parties is sometimes used interchangeably with equity or equality as it entails lack of unwarrantable discrimination or favour to parties in adjudicating process.⁴ Hence, equal treatment of parties within the context of arbitration embodies an obligation (which could be express or implied by law) imposed on the arbitrator to treat the parties equally and fairly.⁵ It is a fundamental requirement of law that a trial of facts must act fairly to all parties by treating them equally.⁶

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¹Akanbi M.M "Contending without being Contentious : Arbitrators, Arbitration and Arbitrability" (University of Ilorin Press, Ilorin. 2014) P.3; Asadinejad S. M. 'The Principle of Equal Treatment in Arbitration' *Journal of Basic and Applied Scientific Research* 2012 2 (7) p. 7312

²Abdulrauf L.A and Daibu A.A, 'Challenges of Section 20 of the Nigerian Admiralty Jurisdiction Act to International Arbitration Agreements' *Journal of Contemporary Law*, vol. 2, 2013- June 2014 p. 34; Olorunfemi J.O. 'The Effect of Arbitration Agreement on The Jurisdiction of The Court in Nigeria' *Nigeria Journal of Public Law* (2009) vol. 2 No.1 p. 310; Daibu A. A. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' *Life Juris Review* (2013) vol. 1, p. 56; Bukar B. A. 'Emerging Trends in Alternative Dispute Resolution: From Mono Door to Multi-Door' *Arbitration* (2013) Vol. 79 No. 1 p. 72; Asadinejad S.M. 'The Principle of Equal Treatment in Arbitration' p.7312; Akanbi M. M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Lambert Academic Publishing, Germany, 2012) p.47; Ajogwu F. *Commercial Arbitration in Nigeria: Law and Practice* (Mbeyi & Associates Nig. Ltd. Lagos 2009) p. 5 ; Orojo J. O. and Ajomo M.A. *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Nig. Ltd., Lagos 1999) pp. 42-46

³Daibu A.A, 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' p. 62

⁴See Ashouri M, *Human Rights and the Concept of Equality, Fairness and Equity* (University of Tehran Press, 2004) p.53

⁵Emilia O, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge, London 2010) p.144

⁶Akpata E. *The Nigerian Arbitration Law in Focus* (West African Books Publishers, Lagos, 1997) p.46

Without equal treatment of parties, disputes resolution systems would not be just as the rules of natural justice would have been discarded.⁷

An arbitral tribunal being a quasi judicial body saddle with the responsibilities of trial of facts between/among the parties before it is enjoined accord parties equal treatment in accordance with the rules of natural justice. To hear one party behind the other, presenting or receiving relevant documents and failure to notify either of the parties by an arbitral tribunal infringes the concept. Arbitrators are thus required to accord equal treatment to parties throughout an arbitration proceeding.⁸

The principle of equal treatment as imposed on the arbitrators by various arbitration rules and regulations has become the core of procedural law and, indispensable for fair adjudication⁹ and it is contained in virtually all arbitration rules and laws.¹⁰ It should be pointed however, that the principle as used in the context of this paper does not necessarily imply equality or non-discrimination in appointment of arbitrators as propounded in the English case of *Jivraj v Hashwani*¹¹ where it was held that, by virtue of Article 6(a) of Employment Equality (Religion and Belief) Regulations of 2003, it is illegal for an employer in the United Kingdom to discriminate against a person in the arrangements he makes for determining whom he should offer employment' on grounds of religion or belief, while Article 6 (c) of the same regulation makes it unlawful to 'refuse to offer [a person] employment' on such grounds.¹² The concept as used in context of this article relates to equality in the treatment of parties in arbitral proceedings, not to equality in the appointment of the arbitrators since that does not form part of the arbitral proceedings.

III. THE NECESSITY OF EQUAL TREATMENT OF PARTIES

Adherence to the principle of equality in arbitration could be said to be a foremost aspirations all societies¹³ as attainment of justice is practically impossible without the concept of equality. The requirement is so important in arbitral proceedings that, according to Redfern and Hunter 'if party autonomy is first principle to be applied in relation to arbitral procedure, equality of treatment is the second-and it is of the same importance.'¹⁴ Thus, the importance of strict adherence to the principle has thus been stressed in a number of national regulations, international documents as well as in most international arbitration rules.¹⁵ Indeed, the importance of the principle in arbitral proceeding has also been recognized by the arbitration laws of the World Intellectual Property Organization Article 38 of which provide that, "The court of arbitration should guarantee under every circumstance that the parties of litigation are treated equally and fairly and they're given appropriate opportunities to state their reasoning and claims".¹⁶

⁷Asadinejad S. M, 'The Principle of Equal Treatment in Arbitration' p.7312

⁸Asadinejad S. M, 'The Principle of Equal Treatment in Arbitration' p.7312

⁹Holtzmann, Howard M. and Neuhaus, Joseph E., (1994).A Guide to the UNCITRAL Model Law on International Commercial Arbitration, first edition, Boston, Kluwer law and taxation, 1994, p. 550

¹⁰See for instance Article 6(1) of ICC Rules which provides that 'As a fundamental provision impacting on the principles of procedural public policy of states, national courts enforce compliance not just to give effect to the arbitration agreement or assist the arbitral process but to protect its own fundamental principles and notions of justice; for the wording to the same effect, see also Article 1 a AAA Rules, Article 1 (3) Cairo Regional Centre Rules, Article 4 (2) CIETAC Rules, Article 1 (1) DIS Rules and Article 1 (3) Swiss Rules.

¹¹(2010) EWCA Civ. 712

¹²Rabinowitz L, 'Arbitration and Equality: *Jivraj v Hashwani*' Business Law International (2011) Vol.12 (1) p. 1.

¹³Ibid.

¹⁴Redfern A. and Hunter M, Law and Practice of International Commercial Arbitration (4th ed. Sweet & Maxwell, London 2004) p. 267

¹⁵See for example section 14 ACA; Article 18 of the Model Law; Article 15.1 UNCITRAL Arbitration Rules; Article 38(a) WIPO Arbitration Rules; Article 15(2) ICC Arbitration Rules; Article 14.1(i) LCIA Rules and Rule 42 ICSID Arbitration rules among others. It must be noted however that some of the instrument do not expressly mention 'equality of parties', it is submitted that the phrases; fairly, independent and impartial must encapsulate it.

¹⁶Article 38 World Intellectual Property Organization

The principle is so important that following the appointment of the arbitrators, the next most important thing to pay close attention to is the observance of the principle both in substantive and procedural matters of the proceedings. The manner of presenting arbitral processes must as a matter of course comply with the requirement of the principle.

A clear manifestation of non-compliance to equality, that is, hearing one party in the absence of the other, is regarded as misconduct in the British law. In *Bristol v Miskin & Son*,¹⁷ the arbitrator attempted to give an award without hearing the statements of one of the parties. The Court of Appeal considered the performance of the arbitrator a case of misconduct and a violation of the natural justice. Lord Denning MR stated in this regard that:

The courts should verify that judgment has taken place accurately so that the confidence of the individuals might be gained. The behavior of this arbitrator negated the trust of the parties or at least one party of the litigation and should be excluded for this reason.¹⁸

The requirement of the adherence to the principle of equal treatment subsists from the commencement of the proceedings until final determination of the matter. Thus non-compliance is considered as partiality.¹⁹ Thus an arbitrator must behave impartially and fairly.²⁰

In most laws on arbitration, the principle of equal treatment, those of independence and impartiality are stated in separate clauses²¹ though they are not unrelated to one another.²² A perusal of article 9 of UNCITRAL rules, the article 12 of the Model Law on UNCITRAL and Article 12 of Iran's International Commercial Arbitration Law, show that the principles separately stressed and underlined.²³ It is submitted that these two terms are different from each other and in some cases, completely separated. For example, an arbitrator may be independent, not having any financial or familial relations with the parties, and yet may have an inclination toward either of them and take sides.

IV. REQUIREMENT EQUAL TREATMENT IN DOMESTIC ARBITRATION

The practice of treating parties equally is an essential element of fair hearing which is a basic pillar of the rules of natural justice required of any system of justice.²⁴ Fair hearing is a fundamental issue in arbitral proceedings like any other adjudicatory process and this can only be achieved by giving the parties reasonable opportunity to present their cases.²⁵ In arbitration, the arbitrators assumes the role of an umpire and must therefore ensure that parties are accorded their constitutional right of fair hearing in accordance with the rules of natural justice.²⁶ As an unbiased arbiter he is expected to give a fair hearing to both parties and give award based on material evidence presented by the parties at the hearing.²⁷

¹⁷[1981] 1 Lloyd's Rep. 135 CA

¹⁸*Bristol v Miskin & Son* [1981] 1 Lloyd's Rep. 135 CA

¹⁹See Article 15 (2) of the arbitration rules of ICC

²⁰15 (2) of the arbitration rules of ICC

²¹Example S.7 of the Nigerian Arbitration Act provides for independence and impartiality of the arbitrators while section 14 provides for equal treatment of parties in the arbitral proceedings.

²²Asadinejad S. M. 'The Principle of Equal Treatment in Arbitration' p.7316

²³*Ibid.*; see also Redfern A. and Martin H., Law and Practice of International Commercial Arbitration, p. 220; Asadinejad S. M., 'The Principle of Equal Treatment in Arbitration' p.7316

²⁴Daibu A. A. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' pp. 62-63; Redfern A. and Hunter

M., Law and Practice of International Commercial Arbitration p. 267

²⁵Ajogwu F. Commercial Arbitration in Nigeria: Law & Practice, pp.123-124; Ezejiofor G. The Law of Arbitration in Nigeria

(Longman Nig Plc 1997) p. 75

²⁶Ajogwu F. Commercial Arbitration in Nigeria: Law & Practice pp. 123-1224

²⁷*Ibid.*

Fair hearing is constitutional provision in Nigeria.²⁸ The Constitution of the Federal Republic of Nigeria 1999 (as amended) is to the effect that in the determination of the civil rights and obligations of a person any question or determination by or against any government or authority, a person shall be entitled to fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.²⁹ Therefore, an arbitral tribunal being a quasi-judicial body must afford the parties fair hearing and equal opportunity of presenting their respective cases.³⁰

Like several other arbitration regulations,³¹ the Nigerian Arbitration and Conciliation Act³² which is the principal law regulating the practice of arbitration in Nigeria makes express provision for the requirement of equal treatment of parties in the arbitral process. The relevant provision of the Act provides: "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".³³

Under the Act, and like other arbitration regulations, it is a basic requirement that an arbitrator must treat the parties equally.³⁴ The tribunal must therefore observe rules as laid down for the administration of justice.³⁵ In the case of *Phipps v Ingram*³⁶ the dispute involving recovery of the price of a wheeled carriage which had been built under a written contract. The arbitrator viewed the carriage and took evidence from the defendant's witnesses but refused to examine the witnesses produced by the other party to the arbitration because it was considered unnecessary. The award was set aside.³⁷

Where there is breach of the principle equal treatment of the parties the fact that the aggrieved party continues to attend the proceedings may not amount to waiver, particularly if the breach amounts to a denial of the principle of natural justice.³⁸ An arbitral tribunal however need not follow strictly the procedure in a court of law in so far as the procedure adopted is in tandem with the practice of a particular trade in relation to which the procedure is being conducted and does not in any way lead to unfairness between the parties in the dispute³⁹ although there are certain minimum requirements of equal treatment of parties which must be strictly observed notwithstanding the practice of trade from which the dispute arose. The learned author of 'The Nigerian Arbitration in Focus'⁴⁰ seems recognized this fact when he opined thus, "It is instructive to note however that the tribunal may depart from the ordinary rules with consent of the parties. *But such departure should not defeat the principle of audi alteram partem*, unless the irregularity is shown not to have affected the result".⁴¹

²⁸Daibu A.A, 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' p. 66

²⁹Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

³⁰Brown D. 'Commercial Arbitration in Dubai' Arbitration (2014) vol. 80 No.2 p. 161

³¹New York Convention for Recognition and Enforcement of Award, UNCITRAL Model law and Model rule, English Arbitration Act, WIPO Arbitration rules etc.

³²Cap. A18 Laws of the Federation of Nigeria 2004 is the principal legislation regulating commercial arbitration in Nigeria; See s. 58 thereof.

³³Section 14 Arbitration and Conciliation Act LFN 2004. The Section encapsulates the *audi alteram partem*. This section is based on article 18 of the UNCITRAL Model law. See also Article 15(1) of both the UNCITRAL Arbitration Rules and the first Schedule to the Act: s.53.

³⁴Ibid.

³⁵Ibid.

³⁶(1853) 3 DOWL 669

³⁷Note however, that if the arbitrator refuses to accept the evidence of either parties and they raise no protest at the proceedings, they will be deemed to have waived their rights: *Riddle v Sutton* (1828) 6 Bing 200. See also Section 33(a) and (b) of the Arbitration and Conciliation Act LFN 2004

³⁸Akpata E, The Nigerian Arbitration in focus p.47; *Umar v Onwudiwe* [2002] 10 NWLR (Pt. 774) p.150; *African Assurance Corp. v Aim Consultant Ltd.* (2004) 12 CLRN pp. 107-124

³⁹Akpata E. *The Nigerian Arbitration Law in Focus* p. 47

⁴⁰Ibid.

⁴¹Ibid.

It follows from the above, that parties could consent to waive the requirement of equal treatment in certain circumstance, although such waiver must not touch the fundamentally requirement of natural justice,⁴² for the rules of natural justice or fair hearing is not only fundamental to arbitration but also a strict constitutional provision for any adjudicatory process.⁴³ In essence therefore, an arbitral tribunal does not have to follow the strict procedures of a court of law in so far the procedure adopted is not repugnant to natural justice.⁴⁴ An arbitrator may however not be seen to favour either of the parties,⁴⁵ otherwise the award would be set aside on appeal.⁴⁶ It must however be noted that where a party chooses not to utilize the opportunity accorded him to present his case or contradict his opponent case he cannot afterwards complain that he has been denied fair hearing.⁴⁷

V. EQUAL TREATMENT UNDER CUSTOMARY ARBITRATION

Prior to the advent of colonialism in Nigeria, various communities had their dispute resolution system otherwise known as customary arbitration or mediation governed by native law and customs.⁴⁸ Arbitration or mediation was being used to resolve conflicts due to the emphasis on moral persuasion and ability to maintain harmony in human relationship. The indigenous communities were mostly stratified along classes and practice slavery.⁴⁹ Hence, requirement of equal treatment of parties in dispute resolution was not pronounced. For instance, one can safely say that in the cephalous society predominantly found in the present day south-eastern Nigeria with a decentralized system of government but controlled through collective leadership,⁵⁰ observance of human rights and natural justice did not attract as much importance as it is now required.⁵¹ In cephalous societies, kings or emperors⁵² play the role of final arbiters in any dispute arising within their domains⁵³ though the role of the arbitrator in most cases are delegated to lesser chiefs or

⁴²Redfern A. and Hunter M, *Law and Practice of International Commercial Arbitration* pp. 199-201

⁴³Ajogwu F, *Commercial Arbitration in Nigeria: Law and Practice* p.119

⁴⁴Akpata E, *The Nigerian Arbitration Law in Focus* p. 47; Orojo J. O. and Ajomo M. A. *Law and Practice of Arbitration and Conciliation in Nigeria* pp.171-172

⁴⁵See Chung R.K.L, 'The Rules of Natural Justice in Arbitration' p.175; See *Flatamontos Maritimos S.A.V. EFF John International* (1997) 63 JCI Arb. 2(5) 18 at p.20

⁴⁶Taylor P, 'Adjudicators' Fees Where the Decision Is Unenforceable' *Arbitration* (2013) vol. 79 No.1 p. 105

⁴⁷For instance if any of the parties fail to appear at the hearing or produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award. See section 21(b) and (c) of the Arbitration and Conciliation Act LFN 2004; see *Bill Construction Co. Ltd. v Imam of Sons Ltd* [2006] 19 NWLT (Pt. 1013) 1, at 14; *Bill Construction Co. Ltd. V. Imam of Sons Ltd* (2006) 19 NWLR (Pt. 1013) 1 at 14; *Stabilini Visiononi Ltd. v. Mallinson & Partners Ltd.* (2014) 12 NWLR (Pt.1420) 134 at 205

⁴⁸Akanbi M. M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Lambert Academic Publishing Germany, 2012), p. 58; Elias T.O. *The Nature of African law* (Manchester University Press 1956) p. 212; Kolajo A.A. *Customary Law in Nigeria through Cases* (Spectrum Books Ltd Ibadan 2000) p. 219; Ayinla L.A "ADR and the relevance of Native or Customary Arbitration in Nigeria" *University of Ilorin Law Journal* (2009) vol. 5 No. 1 p. 258; Oba A. A. "Juju Oath in Customary Arbitration and Their Legal Validity in Nigerian Courts" *Journal of African Law* (2008) vol. 52 No.1 pp. 142-143; Ayinla L.A "ADR and the relevance of Native or Customary Arbitration in Nigeria" *University of Ilorin Law Journal* (2009) vol. 5 No. 1 p. 258; Igbokwe V.C, 'Law and Practice of Customary Arbitration in Nigeria: Agu v Ikewibe and Applicable Law issues Revisited' p. 201; Emiola A. *The Principles of African Customary law* (2nd ed. Emiola Publishers Ltd Nigeria 2005) p.1; Akanbi M.M, 'A Critical Assessment of the History and law of Domestic Arbitration in Nigeria' in *The learned* (3rd ed. Kwara State College of Arabic and Islamic legal studies Ilorin 2006) pp.40-41; Ojogbo S. E, 'Legal Education as a Panacea for Peace, Security and Egalitarianism in Nigeria' *Ife Juris Review* (2014) vol. 2 pp. 373-374; Oba A.A. 'Juju Oaths in Customary law Arbitration and Their legal Validity in Nigerian Courts' p.140; Okekeifere A. 'The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Court' p. 103; See also Per Niki Tobi J.S.C in *Onyege v. Ebere* (2004) 6 SCNJ 126 at 143

⁴⁹Chukwuemerie A.I. 'A Synergy of Opposite: Effective Commercial Justice Rights and liberties in African Jurisprudence' in Chukwuemerie (ed.) *Growing The law, Nurturing Justice* (Law house books Port Harcourt 2005) p. 213

⁵⁰Ibid; see also Akanbi M.M, 'A critical Assessment of the History and Law of Domestic Arbitration in Nigeria.' 40-41

⁵¹See Chukwuemerie A.I. "Arbitration and Human Rights in Africa" *African Human Rights Law Journal* (2007) vol. 7 pp.107-111

⁵²Traditional kings are called 'Emir' in the Northern part of Nigeria save for the Sultan of Sokoto whose traditional title is 'Sultan' virtually all traditional kings in the north are Emir. In the western and southern part of Nigeria traditional kings are generally referred to as Oba although with different titles e.g The Alafin of Oyo, Oni of Ife, Oba of Benni, Oba of Lagos, Olubadan of Ibadan, Alake of Egba and Timi of Ede to mention a few.

⁵³Akanbi M.M. *A Critical Assessment of the History and law of Domestic Arbitration in Nigeria* p. 41

heads of families within the kingdom. The decisions of these lesser Chiefs are however subject to the king's court.⁵⁴

The requirement of equal treatment of parties was then not a principal aspect of customary arbitration as a slave for instance was for all intents and purposes an object or subject of ownership and property of his master and the therefore not entitled to some of the rights guaranteed by law.⁵⁵ Certainly, a slave had no enforceable right to fair hearing or right of equality as a free born before the law. Thus, where he had a matter to be adjudicated upon between him and a freeborn he could not demand equal treatment from the adjudicated body, be it a court or an arbitral tribunal.⁵⁶ Indeed, it was considered a rare privilege for a slave to appear before such body in a contest with a freeborn. A slave was not entitled to take part in appointment of arbitrators too. The usual practice was that he may only be able to complain in a matter to a party outside the master/owner's house or state his case in any dispute with an outsider through his owner.⁵⁷ And a case against him would also be made to or against his owner. His owner would therefore pursue a claim or defence for the slave in the owner's own name in any arbitral or court proceeding between the slave and a freeborn. The slave owner in such proceedings occupied a higher status than a next- friend would do in present day proceedings involving an infant.⁵⁸

In some communities in the southwest Nigeria and Benin Republic the king was conceived as capable of doing no wrong. A citizen no matter his social status could not maintain a civil claim of any kind against the king. The question of an arbitral proceeding between a citizen and the king and whether or not a tribunal sitting over same had to observe equal treatment of parties therefore could hardly arise. As between other free-borns however there was equality of rights with little exceptions.⁵⁹

Generally however, amongst the freeborn there was equality of persons before the law. And an arbitral tribunal just like a court-which could be the king's court, village Assembly, an age Grade Group etc. owed each litigant the duty of equal treatment and fair hearing.⁶⁰ The principle of equal treatment of parties was thus in existence among the free-born in African communities from time immemorial.

The indigenous communities in pre-colonial era believed in the spirit of Fair hearing. The Yoruba people of Western Nigeria would say: '*Agboejotenikanda agbaosikani*'⁶¹ The Effik of the Southern Nigeria will say '*moguniidikutisu ye edem*'.⁶² It would appear therefore that the principle of equal treatment of parties as

⁵⁴The king's Court serves as Appellate Court which can review the decision of the family heads, elders and chiefs at the instance of one of the parties. See Akpata E, *The Nigerian Arbitration law in focus* West African Books Pub. Ltd Lagos 1997, p.1 for an example in Benni Kingdom in the Southern part of Nigeria; see generally Emiola A, *The Principle of African Customary Law* (Emiola Pub Nig. 1997) p.1; Igboke V.C, *Dispute Settlement Among Ibo and Community Justice in North America* (1998) 10 RADIC Law p. 451; Akanbi M.M, *A Critical Appraisal of the History and Law of Domestic Arbitration in Nigeria* 41.

⁵⁵Chukwuemeire A.I. "*Arbitration and Human Rights in Africa*" *African Human Rights Law Journal* (2007) vol. 7 pp. 107-110

⁵⁶Chukwuemeire A.A, '*A Synergy of Opposites: Effective Commercial Justice, Rights and Liberties in African Jurisprudence*' p. 214

⁵⁷Ibid

⁵⁸For instance in Yoruba land in Western part of Nigeria and Benin Republic, the '*Aare Ona Kankafu*', the overall warlord of the race seem to have a social status above those of the other free born, and have some rights above those of other people but far less than the Oba. See Chukwuemeire A.I, '*A Synergy of Opposites: Effective Commercial Justice, Rights and Liberties in African Jurisprudence*' p. 215

⁶⁰Chukwuemeire A.I. "*Arbitration and Human Rights in Africa*" *African Human Rights Law Journal* (2007) vol. 7 p.110

⁶¹*He is wicked who ever pass judgment on the basis of one-sided evidence:* See Adewoye O. "proverbs as a vehicle of juristic thought among the Yoruba (1987) 3 & 4 *Obafemi Awolowo law Journal*, p.6; Ayinla L. A. "Fair hearing: is it a magic wand to cure all ills in all mellius?", *University of Ilorin law journal* (2006) vol 2 at p. p. 52; Oseni U. A. "The inextricability of law and morality; An Appraisal of the Nigerian Legal system" *The Jurist (Law Students' Society University Of Ilorin 2003)* vol. 8 p.126

⁶²I wish to see face {or front} and back i.e. to hear both sides of dispute: see Oseni U.A. '*The Inextricability of Law and Morality: An Appraisal of the Nigerian Legal System*' p.126

embodies in the principle of natural justice was to an extent recognised in the indigenous communities⁶³ as the foregoing indicate an acknowledgment of the principle of natural justice in those communities. It follows that if an arbitral tribunal or arbitrator rendered an award in breach of the sacred principles of equal treatment of the parties and fair hearing in a material way, the aggrieved party could complain to that very tribunal or a higher tribunal under the custom and such an award may be set aside.⁶⁴

It is important to add however that, in most communities other than matrilineal societies the rights of woman were severely restricted while the right of equal treatment of parties was not really respected though in areas of life where women have recognized rights, they are entitled to as much rights as men especially with respect to appearance before courts and tribunals for settlement of disputes.⁶⁵ They also generally have rights to fair hearing and equal treatment in any disputes with other persons in most areas. In like manner strangers may not be entitled to the same rights as indigenes as they could be denied their rights as a matter of fact, most people that were forced into slaveries were strangers captured in war or other circumstances.⁶⁶

In modern customary African societies the principle of equal treatment has an enhanced status. The institution of slavery has long been abolished and regulation of the society has shifted from that of status or classes to equality of all persons before the law.⁶⁷ There may well still be a few restricted places where by virtue of native law and custom the king in theory still does no wrong, but even in such places the king can now be proceeded against both as an institution and as a person in the courts set up by the state. Hence one can safely conclude that the observation of the principles of equal treatment of parties is a *sine qua non* for the exercise of adjudicatory power under customary law.

VI. APPLICATION OF 'EQUAL TREATMENT' IN ISLAMIC LAW

In spite of the unending debate as to whether Islamic law is part of customary law⁶⁸ the principle of equal treatment of parties under Islamic law is herein considered separately. Under Islamic law, the need to comply with the principle of equality between parties to arbitration cannot be over emphasized. The principle stems from the deep-seated principle of equality of men irrespective of colour, race, language or nationality in Islam.⁶⁹ The objective of the principle is to liberate people from slavery and domination by others but making all subservient to God alone.⁷⁰

As in other principles of procedural law, the above principle of Islamic law relates to liberty of man⁷¹ for in Islamic law, observance of the principle of equality is a foremost index of Islamic arbitration because in that law, the arbitrator plays the role of a judge and therefore, the role of the arbitrators should conform to that expected of the judge, particularly that discrimination should not be exhibited in relation to the parties. Imam Ali opinion aptly underscores the imperative of the adherence to the principle of equality when he opined:

⁶³ Ayinla L.A 'Fair hearing: Is it a Magic Wand to Cure all Ills in all Milieus?' pp.52-53

⁶⁴ Daibu A.A. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' p.73

⁶⁵ Chukwuemere A.I. "Arbitration and Human Rights in Africa" *African Human Rights Law Journal* (2007) vol. 7 p.110

⁶⁶ Ibid

⁶⁷ Daibu A.A., 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' p. 73; See also section 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides for right against discrimination by reason of tribe, religion, Sex, Political affiliation or belief; See also the cases of *Asika v Atuanya* [2008] 17 NWLR (Pt. 1117) 489, 512-517; *Adejuge v Ologunja* [2004] 6 NWLR (Pt. 868) 46 at 64

⁶⁸ For a more detailed analysis on the controversy and arguments see Oba A.A., 'Juju Oaths in Customary Law Arbitration and their Legal Validity in Nigerian Courts' p.139-158; Ladapo A.O., 'Where does Islamic Arbitration Fit into the Judicially Recognized Ingredients of Customary Arbitration in Nigerian Jurisprudence' in *Customary Arbitration in the Nigerian Jurisprudence* available online at <<http://www.ajol.info/index.php/ajcr/article/viewFile/39427/59591>> accessed on 20th July, 2012. p. 103-129

⁶⁹ See Asadinejad S.M., 'The Principle of Equal Treatment in Arbitration' p.3; see also Mawdudi A.A, *Human Rights in Islam* (1976 The Islamic Foundation, Leicester) p. 21

⁷⁰ Ibid.

⁷¹ Damad M., Ayatollah Seyed Mostafa, *The Rules of Jurisprudence* (3): Judicial section, (1st ed. The Center of Dissemination of Islamic Sciences Tehran 1998) cited in Asadinejad S. M., 'The Principle of Equal Treatment in Arbitration' p. 3

while meeting them, talking to them and wishing every one of them, whether rich or poor, big or small you should behave as if they are your equals so that important persons of your State may not presume to derive undue advantage out of your uncalled for servile behavior and poor people may not lose hope in your justice and sympathy.⁷²

In addition Imam Malik has admonished that whoever judges should *'behave equally with the parties in terms of pointing to them, looking at them and sitting between them'*.⁷³ It was also reported that when Umar, the second caliph wanted to adjudicate between Imam Ali and a plaintiff, requested Imam Ali to shoulder to shoulder with the complainant to which Imam Ali rejected in the presence of the plaintiff on the ground that there should be no superiority for him over the other party in all regard.⁷⁴

The principle of equality at all stages of arbitral proceedings is so important that an arbiter is encouraged to pay due attention to his voice tone when speaking to the parties as they should be taken as all equal. According to Imam Ali,⁷⁵ raising the tone of voice may cause the arbitrators dismissal.⁷⁶ For instance, while justifying the dismissal of Abul-Aswad Douli who was one of the loyal comrades and prominent scholars, Imam Ali said that he was dismissed for raising his voice over that of the customer.⁷⁷ Non compliance to the principle can also lead to the nullification of the award.⁷⁸ Thus, an arbitrator is obliged or must relate equally to the parties to arbitration.⁷⁹ However, some scholars don't consider as compulsory and mandatory equality between the Muslims and the pagans and are of the opinion that equality between Muslims and Pagans is only recommended but never obligatory.

VI. EFFECTS OF NON-COMPLIANCE WITH THE PRINCIPLE

Most domestic arbitration laws do not make express and sometimes copious provisions on the effect of non-compliance with the principle of equality in the treatment of parties to arbitral proceedings. A perusal of the provisions of the New York Convention of 1958 on the Recognition and Enforcement of Awards show that it non-compliance renders nullity an Award made from such proceedings, just as article 5(1) (b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards also considered such non-compliance as so grievous as to lead to nullification of Award.⁸⁰

However, as fundamental as the principle is in an arbitral proceedings where a party neglects or fail to make objection within reasonable time he may be stopped from protesting against the award on that ground.⁸¹ Therefore the implication of violation of the requirement of equal treatment of parties in arbitration is a gross breach of right to fair hearing which can make the resultant award unenforceable and liable be set aside by court on appeal.⁸² Where however, a party was given the opportunity to present his case or contradict his

⁷² Nahjul Balagha, (1995) translated by Shahidi, Seyed Ja'far, (2nd ed., Tehran, Elmi Farhangi Publications, 1998). p. 320; see also Asadinejad S. M, 'The Principle of Equal Treatment in Arbitration' p.7314

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⁷⁴ Ibid.

⁷⁵ The 4th and the last Caliph of Islam after Abubakar, Umar and Uthman.

⁷⁶ Ibid.

⁷⁷ Nouri Tabarsi, Mirza Hossein, (1988). Mustadrak al-Wasail wa Mustabit al-Masail (2nd ed. Al ul-Bayt Institute for le-Ihya al-Tarath, Beirut.

⁷⁸ Ibid.

⁷⁹ It should be pointed however, that vast majority of Muslim scholars does not consider observance of the principle as mandatory but rather only recommended between Muslims and the pagans litigants.

⁸⁰ Daibu A. A. "Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria" p. 74

⁸¹ Redfern, Alan and Martin Hunter, *Law and Practice of International Commercial Arbitration* p.71; see generally, Flatamontos Maritimos S.A.V. EFF John International (1997) 63 JCI Arb. 2(5) 18 at p. 20.

⁸² Daibu A. A. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' p.68; Tailor P. 'Adjudicators' Fees Where the Decision is Unenforceable' Arbitration (2013) vol. 79 No.1 p.105; See also the cases of *Hookway & Co. Ltd v Isaacs or* (1954) 1 Lloyd's Rep. 491; *Phipps v Ingram* (1853) 3 DOWL 669; *Whartley v Morland* (1833) 2 Bowl 249. Note however, that if the arbitrator refuses to accept the evidence of either parties and they raise no protest at the proceedings, they will be

opponent case and he fails or neglect to avail himself with the opportunity, such a party cannot afterwards complain that his right to fair hearing has been is denied.⁸³

An arbitrator who knows any circumstance(s) likely to give rise to reasonable doubt as to his impartiality is under obligation to disclose such circumstance to the parties before his appointment.⁸⁴ The duty to so disclose continues after appointment and throughout the proceedings,⁸⁵ this is because failure to so disclose can be a ground to challenge him.⁸⁶ It would seem advisable that a person(s) approached in connection with an appointment as arbitrator should not accept same if he is aware of circumstance that may lead to suspicion of bias or doubt as to its impartiality and independence. Where however such circumstance arises after he has already been appointed, then he should honourably resign to avoid eventual challenge on the arbitral award.⁸⁷

In United Kingdom the court may by an order remove an arbitrator if circumstance exist that give rise to reasonable doubts as to his impartiality or failure to conduct arbitral proceedings properly thereby causing substantial injustice to a party.⁸⁸ There is no similar provision under the Nigerian Arbitration and Conciliation Act, as the Act merely provides that an arbitrator can be challenged on ground of impartiality and independence.⁸⁹ However, by section 30 (2) of the Nigeria's Act, an arbitrator can be removed on the ground of misconduct. Misconduct in this sense covers a wide range of irregular behaviour including unequal treatment of parties.⁹⁰ It is therefore submitted that although the consequence of breach of equal treatment of parties is not expressly provided for under the Act, it only provides remedy for breach of the rules of natural justice and since equality of parties is an integral part of the rules of natural justice well provided for under the Arbitration and Conciliation Act a party denied of equal treatment in an arbitral proceedings can invoke the applicable section⁹¹ to set aside the award,⁹² he may also request that the court refuse recognition or enforcement of the arbitral award.⁹³

VII. CHALLENGES OF 'EQUAL TREATMENT' AND PARTY AUTONOMY

The requirement of equal treatment of parties in arbitration has undergone some fundamental challenges and hitches especially because of the fact the arbitration is strictly contractual based on the agreement of the parties to the arbitration contract.

The requirement of equal treatment would however undergo fundamental challenges in the face of the essential feature of commercial arbitration which is party autonomy. The requirement that the parties must be equally treated operates as a restriction on party autonomy⁹⁴ for there is a situation in which the arbitration

deemed to have waived their rights: *Riddle v Sutton* (1828) 6 Bing 200; see also Section 33(a) and (b) of the Arbitration and Conciliation Act LFN 2004.

⁸³Daibu A. A. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' p.69; *Bill Construction Co. Ltd. V. Imam of Sons Ltd* [2006] 19 NWLR (Pt.1013)1 at 14; *Stabilini Visiononi Ltd. v. Mallinson & Partners Ltd.* (2014) 12 NWLR (Pt.1420) 134 at 205

⁸⁴Sect 8(1) and Sect 45(1) of Arbitration and Conciliation Act LFN 2004; Brawn D, 'Commercial Arbitration in Dubai' Arbitration (2014) vol. 80 No.2 p.163

⁸⁵See sections 8(2) and 45(2) Arbitration and Conciliation Act LFN 2004.

⁸⁶Sections 8(3) and 45(3) *ibid*

⁸⁷Daibu A.A. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' 74.

⁸⁸Sect 24(1)UK Arbitration Act 1996

⁸⁹Daibu A.A. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' 74.

⁹⁰Daibu A.A. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' p. 74; Chung R.K.L 'The rules of Natural Justice in Arbitration' p. 170; Tailor P. 'Adjudicators' Fees Where the Decision Is Unenforceable' Arbitration (2013) vol. 79 No.1 p. 105.

⁹¹See sections .5, 8 & 32 (2) of the Arbitration and Conciliation Act LFN 2004 respectively; Brawn D. 'Commercial Arbitration in Dubai' Arbitration (2014) vol. 80 No. 2 p.163

⁹²Section 30(1) Arbitration and Conciliation Act LFN 2004

⁹³*Ibid.* section 32

⁹⁴*Ibid.* 267

agreement provides that only one party should be heard based on the agreement of the parties, what then is the fate of such arbitration agreement? The UNCITRAL secretariat recognized the challenge and in its report leading to the model law, it was observed that:

It will be one of the more delicate and complex problems of the preparation of a model law to strike a balance between the interests of the parties to freely determine the procedure to be followed and the interests of the legal system expressed to give recognition and effect thereto.⁹⁵

While the unique nature of arbitral proceedings has brought about this challenge, the contractual feature of arbitration also makes the realization of the requirement of equal treatment of parties a challenge.

VIII. EQUAL TREATMENT' AND OPTION TO RESILE

Option to resile is one of the essential elements of customary arbitration. It entails the right of the parties to withdraw from the arbitral proceedings or to reject the resultant award on certain grounds such as breach of the rules of natural justice (which include unequal treatment of parties), bias on the part of the arbitrators among other grounds. Before a party to a customary arbitration can refused to comply with the decision of the customary arbitrators, such an award must be manifestly contrary to the facts or tainted by arbitrator bias.⁹⁶ This however varies from custom to custom and, if permitted, within which time frame can a party raise objection to such bias or breach of the rules of natural justice? Can a party wait till the end of the proceedings only to raise such issue after an award more so when it is unfavourable? Will it be equitable to keep quiet and raise issue of unequal treatment of parties when the other party seeks to enforce the award? What should the procedures to be followed are challenges to the application of the requirements of equal treatments of parties.

Under *Shariah* arbitration or *Tahkim*, particularly of the Maliki School, once parties voluntarily submit to arbitration, they cannot withdraw at any stage thereafter.⁹⁷ Also where an award is delivered, parties are bound by it⁹⁸ and such an award is enforceable as a judgment of a court.⁹⁹ The exception being, where an award is contrary to tenets of Islam, then a Qadi before whom the award is brought for enforcement may set it aside.¹⁰⁰ It is submitted that the above exceptions is insufficient and ought to include breach of the rules of natural justice and unequal treatment of parties in the conduct of arbitration under *tahakim*. A situation where bias is alleged or manifestly occurs should be a ground to set aside the award of such arbitration.

IX. EQUAL TREATMENT' AND VOLUNTARY SUBMISSION

Voluntary submission is another essential ingredient of an arbitral hearing, it is indeed the basis of arbitrators jurisdiction or competence and one of the essential elements of customary arbitration which Nigerian courts use to determine the validity or otherwise of customary arbitration. The word voluntary connotes something "done by design or intention."¹⁰¹ Voluntary submission therefore implies that a party entered into the arbitration agreement based on his own free will force from any quarters.

⁹⁵UN doc. A/CN.9/207, para. 21.

⁹⁶Daibu A.A. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' pp. 72-73; Igbokwe V. C. 'The Law and Practice of Customary Arbitration in Nigeria: *Agu v Ikewibe* and Applicable Law Issues Revisited' Journal of African Law, vol. 41, No.2 (1997) p.214.

⁹⁷*Jika v Jika* [1991] 3 NWLR (Pt.182)708 at 714.

⁹⁸This may not be farfetched from the fact that parties in most cases are reluctant to contest such an award since it is anchored on religious tends and is deemed as a sacred duty to be complied with. Akanbi M.M, 'Constitutionality of Customary Arbitration in Nigeria: An Appraisal *Okpowuru v Okpokam*' (a work in progress with the author but kindly made available to these authors) p.7.

⁹⁹This is because an arbitrator has no such powers of enforcement. Zeyad, Alqurashi, Arbitration under the Islamic Shariah, p.19.

¹⁰⁰Sahcht Joseph, An Introduction to Islamic Law (Clarendon Paperbacks, Oxford 1996) p.189

¹⁰¹Black's Law Dictionary(8th edition) p.1605

Voluntary submission has been said to be the basis of arbitration and it is universal to the concept of arbitration under all legal system.¹⁰² While this might be true of conventional arbitration, it is doubtful if the same can be said of customary arbitration as customary arbitration is not founded on the basis of a formal contract but social device for the maintenance of a stable and harmonious society.¹⁰³

Voluntary submission under customary arbitration must be by a body of persons recognized as having judicial authority under the custom of the parties.¹⁰⁴ For a customary arbitral award to be upheld by the court therefore, the tribunal must be a body of persons having judicial authority. The question then is what body of person could be said to wield 'judicial authority'?

The requirement seems to be very vague and that could be the reason why it is not contained in many of the recent decisions on the elements or characteristics of customary arbitration.¹⁰⁵ Unfortunately, the courts in some other cases have continued to pronounce that submission to elders or Chief is an ingredient for the validity of customary arbitration.

With respect, position seems to be a generalization which is incongruous with the facts and realities of most arbitral customs. It would seem that the requirement of voluntary submission is akin to the common law system of arbitration which regards private agreement of parties freely entered into by parties as sacred.

The position of voluntary submission under customary arbitration has more features of litigation than arbitration. A typical customary arbitral processes in most Nigerian societies starts with a complaint by an aggrieved party to the appropriate authority after which the other party is summoned¹⁰⁶ or invited by a prospective arbitral tribunal based on a complaint made by an aggrieved party and he responds to a meeting by a traditional summons to which a threat of sanction for failure to show up is attached, this in the sense of arbitration does not translate into a voluntary submission.¹⁰⁷ The question thus is "can a submission after a summons be termed voluntary submission?" can he refused to attend such summon or invitation? It is submitted that attending and or responding to such invitation is an obligation on the party so invited as well as a signification of voluntary submission to the invitation of elders which is inherent to the customary practice of the Nigerian society. And such elders must listen to the parties afford the equal opportunities of presenting their respective cases.

The position for *Tahkim* under Shariah is different, as submission is the basis of arbitration under the *Shariah* and thus must be mutual and emanate from the volition of all the parties. The *Shariah* prescribes that

¹⁰²Ladipo O. A, 'Where does Islamic Arbitration Fit Into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence?' p.115

¹⁰³Akanbi M.M, *Domestic Commercial Arbitration in Nigeria: Prospect and Challenges* p. 151

¹⁰⁴This ingredient was laid down in the case of *Inyang v Essien* (1977) NSCC p. 464

¹⁰⁵See *Achor v Adejoh* [2010] 6 NWLR (Pt.1191) 537 at 569; *Okereke v Nwanko* [2003]9 NWLR (Pt. 826) 592; *Egesimbe v Onwuzurike* [2002] 15 NWLR (Pt.791)

¹⁰⁶*Agwu v Ikewibe* (1991) 3 NWLR (Pt. 180) 385 where Nnamaka Agu JSC (as he then was) in his dissenting opinion picked on the portion of the plaintiff's pleadings where it was averred that the plaintiff 'summoned' the defendant before the chiefs and elders of the parties' community and he reasoned that the word 'summoned' employed in the pleadings, drafted by a lawyer, must have been deliberate, and should be interpreted technically because it originated from the old common law writ of summons. His Lordship went further to opine that since the word summons connotes a command to appear, a subsequent submission to such summons could not be voluntary. He however concluded that the arbitral panel in question, even if it had purported to summon the defendant, had no power to do so. Also in *Yaw v Amobie* (1958) 3 West African Law Report p. 406 at 408; where it was held that it is very rare for two people who are quarrelling to meet and agree together that they would submit their dispute to arbitration. The usual thing is that one party makes a complaint to somebody, the other party is sent for, and if he agrees, the party to whom the complaint is made arbitrates upon the dispute.

¹⁰⁷Emiola A. *The Principles of African Customary Law* (Emiola Pub, Nigeria 1997) pp. 37-38. In *Asare v. Donkar & Serwah II* (1962) 2 Ghana Law Reports, p.176 at 179-180. The Ghanaian Supreme Court found objectively from the evidence adduced that the party summoned responded to a chief's call out of respect, but that he never agreed to submit the dispute to arbitration by that chief.

disputing parties are free to appoint any arbitrator of their choice and in fact parties may agree that a party to the dispute arbitrates, thereby relying on that party's conscience to do justice.¹⁰⁸

X. CONCLUSION

The foregoing has been an examination of the concept and requirement of equal treatment of parties in arbitral proceedings under the Act, as well as in customary and Islamic arbitrations. The article reveals and emphasis the need for treating parties to arbitration equally as stipulated in most arbitration regulations and, the need for arbitrators to avoid any circumstances that may give rise to doubts as to their impartiality and independence. The paper discusses, in material detail the effect of non-compliance with the principle of equal treatment of parties as well as the challenges bedeviling the requirement in arbitration. It is submitted that though implication of non-compliance is not provided for in arbitration regulations, the inclusion of the word 'shall' in the Section 14 of the ACA implies that non-compliance to same is of essence to validity of arbitral proceeding.

¹⁰⁸Zeyad, Alqurashi, 'Arbitration under the Islamic Shariah,' Oil, Gas & Energy Law Intelligence, 2003 vol. 1, p.2 cited in Ladapo O. A. Customary Arbitration in the Nigerian Jurisprudence, p.16