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Joseph Ayo Babalola
UNIVERSITY LAW JOURNAL



VOL.1 NO.1, 2014

A PUBLICATION OF
THE COLLEGE OF LAW
JOSEPH AYO BABALOLA UNIVERSITY

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OSUN STATE, NIGERIA

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Joseph Ayo Babalola University Law Journal, a Publication of the College of Law,
Joseph Ayo Babalola University, Ikeji- Arakeji, Osun State Nigeria

First Published 2014

Published by: ***Juniper Publications***

#87, Iliya Gambo Street, Kamazou – Kaduna

08069314000, 070577763388

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ADR Proceedings: Are Secretaries to Arbitral Tribunals Fourth Arbitrators?

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ABSTRACT

Alternative dispute resolution mechanisms have come to stay finally as proceedings of universal acceptability. They are operated as substitutes to the regular courtroom business of adjudication. Arguably, they are cheaper, faster and more prone, as a system, to the maintenance of harmony cord between litigants. ADR as a proceeding has gotten a number of typologies. Arbitration is one of them. On the composition of an arbitral panel, the modus operandi is for the parties (litigants) to agree on whatever number of arbitrators to be appointed. Where, however, there is no such agreement, the position in most legal regimes is that three arbitrators shall be deemed fit. The main issue in the study at hand is to consider the status of administrative secretaries attached to these arbitrators. Are they to function only as support staff throughout, or there exist situations where they can act as fourth arbitrators, discharging the real arbitral responsibilities of their superiors (appointed arbitrators), possibly, on account of busy schedules of the superiors? Answers to these questions and others alike are supplied in this work, and the essence is for a busybody type of arbitrator to caution in shifting responsibilities without restraint of any form. The implication of non-caution, which can be avoided if the hint in this paper is taken, is nullification of an arbitral award made at the end of such an exercise.

INTRODUCTION

The use of secretaries by arbitral tribunal appears to have an age long tradition in Switzerland. It was given legislative expression in the Swiss Concordat, Article 15 of which provides that 'with the agreement of the parties', the arbitral tribunal 'may designate a secretary'.¹ In France, a decision of the court of appeal in Paris in 1990 confirmed that an arbitral tribunal had the possibility of appointing a secretary.² Spanish law,³ Argentine Law,⁴ Brazilian law⁵ and the Nigerian law⁶ all envisage this possibility. Other laws arguably envisage the possibility⁷ as well.

The advantages offered from time to time by these secretaries are numerous and laudable. Paraphrasing Professor Pierre Lalive⁸ on the advantages of these secretaries, one would mention, among others, the economy of time and money in entrusting to a secretary-lawyer or non-lawyer some administrative tasks such as filing routine correspondence, communication with the ICC and the parties under the supervision and the responsibility of the arbitrator.

However, with the growing rate at which the use of secretaries in arbitral tribunals is permitted, tendency of some arbitrators delegating excessive roles to their secretaries is imminent. There is the feeling that some arbitrators, especially the lazy ones, may, as times go on, abandon their main duty to arbitrate and push same over to their secretaries to carry on. By the time this unpleasant practice sets

¹ Swiss International Arbitration Convention, 27th March, 29 August, 1969, Article 15

² Paris, 21 June 1990, *Campagne Honeywell Bull S.A. Vs. Compatacion Bull de Venezuela, CA*

³ Law No 36 1988 of 5 December, 1988, Act 20

⁴ Code of Civil & Commercial Procedure, Art. 749

⁵ Law No 9, 307 of 23 September 1996, Art. 13, paragraph (5)

⁶ See generally, the provisions of ACA, cap. A18, CFN, 2004

⁷ By way of example, S 29(2) of the English Arbitration Act, 1996 provides that the immunity of arbitrators applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

⁸ A staunch supporter of the use of secretaries.

in, a looming danger is not impossible to plague all. This is because, the secretaries, to whom those heavy arbitral duties may be assigned, are either inexperienced more often than not or experienced sparingly. In either ways, there is bound to be danger.

Where the secretaries are experienced, the danger looms because it is not their experience that confers an automatic appointment on them to act as arbitrators. Arbitrators are, rather, appointed on the basis of parties' agreement. Where experienced but unappointed, whatever role played by arbitral secretaries in making arbitral awards is bound to become an exercise in futility. Where, on the other hand, the so-called secretaries are inexperienced, the looming danger is even in double folds.

In this study, the writer's main obligation is to answer a question: whether secretaries to arbitral tribunals are another set of arbitrators? Though the answer is capital NO, a more intellectual approach to present an answer to this question has imposed on the writer the need to ask and answer some other questions on issues such as the statutory number of arbitrators and whether or not the use of arbitrators should be retained or negated. All these and others alike are answered in this paper one after the other.

HISTORICAL TITBITS ON ARBITRATION

Of all the multifarious mechanisms for alternative dispute resolution, arbitration, as at present, appears to enjoy the fastest growing wings. At both the international and domestic fora, arbitration, especially as a means of settling commercial disputes, has always been resorted to, over and above any other of its kind, by disputing parties.

Arbitration, as one of the ADR processes, makes it possible to resolve conflicts creatively and effectively, finding the process that best handles a particular dispute⁹. It is useful to settle many disputes that never get to court. It is a simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection and whose decision, based on the merits of the case, they agree in advance to accept as final and binding.¹⁰

Arbitration as a judicial system has been in use ever before the beginning of the English common law. This platitude, I suppose, was what influenced one court to refer to arbitration as the oldest known method of settlement of dispute between men.¹¹

Prophet Muhammed, may Allah be pleased with Him, was, for instance, both a judge and an arbitrator¹². Phillip II of Macedon, the father of Alexander the Great, in his treaty of peace with the city states of Southern Greece circa 337-338 BC, specified the use of arbitration in disputes between members over vexed territory.

Another great man of history, George Washington, was a staunch believer in arbitration. Despite all possible cautions, which he took in writing his last will and testament, he still saw the possibility of dispute eruption to its intent. For this eventuality, he specified arbitration as follows:

But having endeavoured to be plain and explicit in all the Devises-even at the expense of prolixity, perhaps of tautology, I hope, and trust, that no dispute will arise concerning them, but if contrary to expectation the case be otherwise from want of legal expression or the usual technical terms or because too much or too little has been said in any of the devises to be consonant with law, my will and direction expressly is that all disputes (if unhappily and should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding, two to be chosen by the disputants, each having the choice of one, and the third by these two -which three men thus chosen, shall unfettered by law, or legal constructions, declare their sense of the testator's intention; and such decision is to all intents and purposes to be as binding on the parties as if it had been given in the supreme court of the United States.

On so many occasions, international arbitration has been employed as a means of settling series of disputes between nations, and more often than not, these disputes are such that can lead to

⁹ See: Kehinde Aina in his paper titled: The Lagos Multidoor Court House, and the judge: a New Beginning (Vol. 5, Nos. 3-4). Modern practice journal of Finance and Investment Law, 2004).

¹⁰ Chappell, "Abitrate... and avoid stomach vicers" Art, meg. Nos 11-12, pp 6 & 7 (1944)

¹¹ See this in the case of *Mc AMINS vs PANHANDLE PIPELINE CO.* 23, CA 570, 574 (Kan City Ct. APP (1954)

¹² See the provision of Quran, Chapter 4, verse 65. See also the case of *LIBYAN AMERICAN OIL COMPANY VS LISYA* 1922, 62, ILR, 140 at 178.

outbreak of wars if not checkmated on time. Also, international commercial arbitration has been in use with increasing frequency.¹³

In Africa, the olden days' traditional way of dispute resolution was no less than an exact replica of the gist of the present day arbitral system. And to be specific the more, mediation, conciliation and arbitration, in particular, were all the various ways of dispute settlement in Nigeria, with particular reference to ancient Benin Empire. This was and still is because of the emphasis, in these various resolution approaches, on moral persuasion and their ability to maintain harmony in human relationship.¹⁴

THE APPLICABLE ARBITRAL LAWS

In Nigeria, the arbitration and Conciliation Act¹⁵ is the major piece of legislation on arbitration. On a cursory look into it, the Act will be discovered to be based heavily on the United Nations' Committee on International Trade Laws (UNCITRAL) Model Law of international commercial arbitration and other projects of UNCITRAL on dispute resolution. This same Act has also repealed the old 1914 arbitration ordinance, which was enacted for Nigeria during the time of Lord Lugard as the Nigerian administrator.

The Act, it should be noted, makes several innovations to the old 1914 ordinance, some of which are the extension of the Act to cover international transactions¹⁶ and the application of the convention on the Recognition of Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting state arising out of the international commercial arbitration. Nigeria acceded to this treaty on the 17th of March, 1970¹⁷. The convention itself was passed on June, 10th, 1958.

NUMBER OF ARBITRATORS

On the permissible number of arbitrators to take charge of any arbitral tribunal, reference can be made to a number of arbitration legislations both domestic and foreign. But for the purposes of this work, guidance shall only be sought in the provision of the Nigerian Arbitration and Conciliation Act,¹⁸ by quoting the very direct and relevant section therefrom. This, however, does not mean total preclusion from comparing any indigenous provision so quoted to similar provisions in the foreign arbitration laws. To this extent, S. 6 of the major arbitration law in Nigerian, the Arbitration and Reconciliation Act earlier referred to, provides thus:

The parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement but where no such determination is made, the number of the arbitrators shall be deemed to be three.

With the provision above quoted, it is clear that the number of arbitrators to constitute a given arbitral tribunal shall, first of all, be determined by the parties' agreement. It is when the parties have no agreement on the exact number that the statutory maximum of three arbitrators becomes the rule. This indigenous provision is in consonance with Article 10 OF THE UNCITRAL¹⁹ Model Law.

Furthermore, where parties choose to fix this number by agreement, the number can be anything. It can be one, two, three, four, five or any other figure whatsoever. This shall be so for as long as it represents the parties' mind set.

With the above having being explained, the position of primacy occupied by the agreement of parties in arbitration proceeding becomes crystal clear. Apart from the number of arbitrators, parties are also at liberty to determine the mode of arbitrators' appointment.²⁰

¹³ See: *How Arbitration works* by Frank El-Kouri & Edna Asper El-Kouri (4th edition, BWA books, Washington, DC) pp 2-3

¹⁴ See: Retired Justice of Supreme Court. Ephraim Akpata in his book "The Nigerian Arbitration Law in Focus" p.1

¹⁵ Cap. A 18, LFN, 2004. Initially, this Act was enacted as Decree No. 11 of 1988 with commencement date of 14th of March, 1988.

¹⁶ See sections 43-55 of the Act

¹⁷ See Segun Omoregie in "Judicial Review of Domestic Arbitral Awards -Some suggestions" Financial & investment law journal, Vol. 5, No. 2, April

2001 at p. 184.

¹⁸ Cap. A18, LFN, 2004

¹⁹ The United Nations Committee on International Trade Law (UNCITRAL) commenced the task of drafting this model law in 1979 so as to liberalize international commercial arbitration by limiting the role of national courts and allowing the parties freedom to choose how their dispute should be determined. The law was finalized and adopted at the UNCITRAL'S 18th session in June, 1985. A resolution of the General Assembly of the United Nations recommending the Model Law.

²⁰ See S.7 (1) of Arbitration and Conciliation Act.

It should also be noted that where parties want to fix the number of arbitrators, their decision on the exact number needs not necessarily be inserted in the agreement. This can be decided after a dispute must have arisen. It is when the parties fail to come to decision either in the agreement or after the eruption of dispute that "the number of arbitrators shall be deemed to be three".

At this juncture, an oversight is noticed on the side of the drafters of the Act under reference. The oversight is the absence of time limit to be awaited following the failure to come to a decision, before the number of arbitrators shall be deemed to be three. Interestingly, the provision of Article 5 of the Arbitration Rules contained in the First Schedule to the Act²¹ however fills the gap. It states that "if the parties have not previously agreed on the number of arbitrators (i.e.) one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration, the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed."

However, notwithstanding, the provision of ACA above as to three arbitrators where there is failure to decide, caution should be exercised in coming to a general conclusion on the universal arbitral rule of using three arbitrators in all cases of failure to decide.

For instance, under Article 2, paragraph 5 of the International Chamber of Commerce (ICC) Rules of Conciliation and Arbitration,²² it is provided that:

Where the parties have not agreed upon the number of arbitrators, the court shall appoint a sole arbitrator, save where it appears to the court that the dispute is such as to warrant the appointment of three arbitrators.

Also, S. 3(2) of the London Court of International Arbitration (LCIA) Rules provides:

A sole arbitrator will be appointed unless the parties have agreed otherwise, or unless the court determines that in view of the circumstances of the case, a three-member tribunal is appropriate.

With the above two international arbitral provisions and others alike, one would now see the reason there should be exercise of caution in reaching an early conclusion on the issue of three arbitrators where no decision on the number is reached by the parties.

On the merits and demerits of one or more arbitrators, each class has gotten its own fair share. For instance, in sole arbitratorship, the arbitral fees and expenses to be paid are bound to be considerably less since there is only one arbitrator on ground. With one arbitrator, also, award are expected to be reached more quickly.

However, there is this presumption – whether rebuttable or not – that arbitral tribunal of three men has the proclivity of arriving at a better result.

Aside the issue of number of arbitrators, which has been somewhat discussed herein above as a sub-topic on its own, delving into other matters auxiliary to composition of arbitral tribunal (such as appointment of sole arbitrator and three arbitrators and the rest) shall, by the writer's design, take the form of verbatim reproduction at appropriate places of the relevant ACA provisions. The constructions of, and wordings in, these provisions are so seemingly simple and direct that to think of rendering further comment thereon may, except in a very few occasions, speak volumes of tautology.

APPOINTMENT OF ARBITRATORS²³

The relevant section on appointment of arbitrators has five subsections, five paragraphs and two sub-paragraphs. They are herein below produced in verbatim.

1. Subject to subsections (3) and (4) of this section, the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator.
2. Where no procedure is specified under subsection (1) of this section:
 - (a) in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third, so however that –
 - (i) If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so by the other party; or

²¹ The same Act under reference

²² 1988

²³ This is governed by the provision of S. 7 of ACA, Cap. A18 LFN, 2004.

- (ii) If the two arbitrators fail to agree on the third arbitrator within thirty days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement;
 - (b) In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the court on the application of any party to the arbitration agreement made within thirty days of such disagreement.
3. Where, under an appointment procedure agreed upon by the parties –
- (a) a party fails to act as required under the procedure; or
 - (b) the parties or two arbitrators are unable to reach agreement as required under the procedure; or
 - (c) a third party, including an institution, fails to perform any duty imposed on it under the procedure, any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment.
4. A decision of the court under subsections (2) and (3) of this section shall not be subject to appeal.
5. The court in exercising its power of appointment under subsections (2) and (3) of this section shall have due regard to any qualifications required of the arbitrator by the arbitration agreement and such other consideration as are likely to secure the appointment of an independent and impartial arbitrator.

APPOINTMENT OF SUBSTITUTE ARBITRATOR²⁴

The sole section that touches the appointment of substitute arbitrator has only one subsection and four paragraphs. It is hereunder reproduced.

1. Where the mandate of an arbitrator terminates:
- (a) under section 9 or 10 of this Act; or
 - (b) because of his withdrawal from office for any reason whatsoever; or
 - (c) because of the revocation of his mandate by agreement of the parties; or
 - (d) because of any other reason whatsoever, a substitute arbitrator shall be appointed in accordance with the same rules and procedure that applied to the appointment of the arbitrator who is being replaced.

APPOINTMENT OF SOLE ARBITRATOR²⁵

The section on appointment of sole arbitrator has attached to it ten distinct subsections and three paragraphs altogether. They are herein below quoted:

- 1. If a sole arbitrator is to be appointed, either party may propose to the other the name(s) of one or more persons, one of whom would serve as the sole arbitrator.
- 2. if within thirty days after receipt by a party of a proposal made in accordance with subsection (1) of this section, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority.
- 3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible; and in making the appointment, the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case, that is:
 - (a) at the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;
 - (b) within fifteen days after the receipt of the said list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbers the remaining names on the list in the order of his preference;

²⁴ This issue is covered by the content of S. 11 of ACA.

²⁵ The sub-topic above is well treated under the provision of S.44 of ACA

- (c) after the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties.
4. In making the appointment, the appointing authority shall have regard to such consideration as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.
 5. If three arbitrators are to be appointed, each party shall appoint one arbitrator; and the two arbitrators thus appointed shall choose the third arbitrator who shall act as the presiding arbitrator of the arbitral tribunal.
 6. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed, the first party may request the appointing authority previously designated by the parties to appoint the second arbitrator.
 7. If, within thirty days after the appointment of the second arbitrator, the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under subsections (1) to (4) of this section.
 8. When the appointing authority is requested to appoint an arbitrator pursuant to the provisions of this section, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract, and the appointing authority may require from either party such information as it deems necessary to fulfill its functions under this Act.
 9. where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.
 10. Except as otherwise agreed by the parties, no person shall be disqualified from being appointed as an arbitrator by reason of his nationality.

REPLACEMENT OF ARBITRATORS²⁶

The section on Replacement of Arbitrators is an inelaborate but clear section. To it are attached two sub-sections. The section and its subsections are reproduced hereinunder.

S. 46(1) Where an arbitrator dies or resigns during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in sections 44 and 45 of this Act that was applicable to the appointment or choice of the arbitrator being replaced.

S. 46(2) where an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in sections 44 and 45 of this Act shall apply.

DUTIES OF ARBITRATORS

As it is well known, reference to an arbitrator may take any of three different forms. First, it may emanate from "ad hoc arbitration agreement". This is where agreement to arbitrate is reached after the eruption of a particular dispute or set of disputes. This is otherwise called "submission agreement". The second form is when the agreement by the parties to arbitrate is inserted initially as a clause, "arbitration clause" in the contract. This is called contract containing an agreement to refer. The third

²⁶ The discussion on the issue above has been well rendered in S. 46 of ACA

mode is reference to an arbitrator after an action on the erupted dispute has been instituted in court.²⁷

However, it is important to state here that an arbitrator, appointed by whichever of the above analyzed forms, has on him, as a matter of responsibility, an array of duties to discharge. Among these duties, some are immediate following appointment while others are discharged later in the course of proceedings.

Among his first set of duties, an appointed arbitrator should, where he is favourably disposed to the appointment, take steps immediately to accept same. This is his first duty failing which shall render the appointment ineffective.²⁸

Thereafter, the appointed arbitrator shall discharge the duty of ensuring that his appointment is in order. If it is not, the arbitrator should strive to regularize it before proceeding with the reference. He should, in particular, seek to know that he is required to possess a particular qualification. Where there is such requirement and he does not satisfy same, it is for him to open up to the parties who may or may not decide to waive it. Where the arbitrator merely proceeds with the reference with no concern for this preliminary confirmation, he may, in the least, be said to be hazarding a risk which, possibly, could lead to the setting aside of any award which may be arrived at in the end.

The next duty is to ascertain the arbitral scope of work. By this, the arbitrator is to find out what sort of disputes he has been empowered to look into. It should, at this juncture, be stressed that the time when the arbitration agreement is reached often times helps in determining or revealing this scope. In other words, where *ad hoc* arbitration agreement is used, arbitrator's schedule of work is much likely restricted to those specified disputes that have arisen so far. Where, on the other hand, there is contract containing an agreement to refer, then, all sorts of disputes, which may in future ensue, are likely to fall within the confines of work of the appointed arbitrator.²⁹ Inclusion of a recital³⁰ in an arbitration agreement can also be of assistance in trying to find out the arbitrators scope of duty.

There is also the duty on the arbitrator to give advance notice to the parties of the date, time and place of hearing.³¹

Upon the commencement of the real arbitral proceedings, the arbitrator(s) shall arrange to translate oral statements made at the hearing and for a record of the hearing.³²

A very important duty for the arbitrator, while the proceedings are on and thereafter, is for him, where he is alone, or the tribunal of which he is a member, to hear all evidence tendered or sought to be tendered before it. It is a duty also in this line that arbitral tribunal's award should reflect a thorough evaluation of the evidence given and tendered.

In relation to the above duty, Per Denman C.T. has, although, suggested in a case³³ that the tribunal has discretion to determine the quantity of evidence it entertains, it appears the arbitral tribunal is better urged³⁴ to admit all evidence which seems material, even remotely, to the matter it is called upon to settle.

Another responsibility to be discharged by the arbitrator is employment of a shorthand writer who shall record the evidence in the proceedings and provide the employer with a transcript thereof. This is, however, only if the parties agree, for it does not seem that the tribunal has power to employ a shorthand writer or any other supporting officer whatsoever at the expense of the parties.³⁵

By and large, it should be pointed out that agreement of parties can at any time extend the horizon of work of the appointed arbitrators. This is because, parties agreement as severally said, plays a pivotal role in the institution of arbitration wherever it is practised. In the same manner, point should also be made that as important as the issue of parties' agreement, no arbitration process will be held valid if there is agreement by parties that arbitrators should, in the proceedings, not do away with the temptation to act impartially between the parties and to adopt procedures suitable to the circumstance

²⁷ See Prof. Gaius Ezejiofor, SAN, in his book titled: *The Law of Arbitration in Nigeria* pp. 65-66.
²⁸ See: *Russell on Arbitration*, 18th edition, pg. 212. see also the case of *Tradax Export A.A. VS. Volkswagen – Werk A.G.*, 1969, 2. Q.B. 599 at p. 607.

²⁹ See generally the case of *Forwood vs. Watney* (1880) 49 L.J.Q.B.
³⁰ See *Thompson vs. Anderson* L.R. 9 Eq. 523. See also: *Charleton vs. Spencer* (1842) 3, Q.B. 693

³¹ See Article 25(1) of the *Uncitral Arbitration Rules*
³² See Article 25(3) of the *Uncitral Arbitration Rules*

³³ *Nichalls vs. Warren* (1844) 6 Q.B. 615 at pg. 618. The Judicial suggestion in this case is consonance with the provision of S. 15(3) of ACA, Cap. A 18. LFN, 2004.

³⁴ Among the decided cases which lend credence to the urge are: *William v. Wallie & Conx* (1914) 2 K.B., 478 and *Phillips vs. Ingram* (1853) 3 Dowl. 669.

³⁵ See *Russell on Arbitration*, 18th ed., pa. 129.

of the particular case so as to provide a fair means for resolving the dispute.³⁶

The duty on the arbitrators to act impartially is a duty that goes to the root of natural justice. It entails, among others, refusal by the arbitrators to be biased as well as their need to ensure that the parties before them are accorded equal treatment and that each party is given full opportunity of presenting his case.³⁷ It is perhaps in order to observe the above duty that the arbitral tribunal is required to adjourn, when a party surprisingly appears by counsel, so as to give the other party opportunity to brief his own counsel too if he wishes. Failure to so do may, as can be inferred from the case of *WHARTLEY VS. MORLAND*³⁸ make the award, if given, to be set aside.

For sometime now, duties of arbitrators as a sub-topic have been the writer's preoccupation. That is done in order to present a background which will make it possible to judge whether by their calling, arbitral administrative secretaries can also discharge all or any of the arbitrators' duties listed above. But before coming to this analytical arena, it is deemed fit and proper to pulse a bit and see through some of the administrative duties which are there for arbitral secretaries to discharge from time to time in arbitral tribunals.

DUTIES OF ARBITRAL SECRETARIES

It may not be a subject of argument that participation of secretaries in the arbitral process is within the contemplation of so many national laws. However, it is unpleasant to discover that majority of the so called national laws do not bother to streamline or delimit the roles of these secretaries.

Nevertheless, kudos should go to the KC's note of October 1st, 1995 on this issue. The note is intended to lay down the policies and practices of the ICC's court in respect of the use by arbitral tribunals of administrative secretaries. Under the sub-heading 'duties', the Note provides that:

The duties of the administrative secretary must be strictly limited to administrative tasks. The choice of this person is important, such person must not influence in any manner whatsoever the decisions of the arbitral tribunal. In particular, the administrative secretary must not assume the functions of an arbitrator, notably by becoming involved in the decision-making process of the tribunal or expressing opinions with respect to the issue in dispute.

Such is the ICC's position which, to date, has remained unbending. It is thus clear that by the ICC's stand, any activity other than the purely administrative³⁹ is outlawed. To this extent, one can, at least, as at present, conclude that the ICC's position takes a far more extreme position than that of its nearest equivalent. UNCITRAL'S Notes on Organizing Arbitral Proceedings' ('the UNCITRAL Note'). At section 4, entitled 'Administrative services that may be needed for the arbitral tribunal to carry out its functions, the UNCITRAL note chooses not to prejudge the issue, but rather to leave it to the participants in the particular arbitration.⁴⁰

Granted that the UNCITRAL note on the issue is more liberal and less prohibitive than its equivalent, the ICC Note, one still really needs to answer the question: which out of the two 'Notes' better safeguards the impartiality of the arbitral awards. Before answering the question either way, it is imperative to beam search lights into other judicial fora so as to see how judicial assistants are being used thereat.

To start with, it is instructive to note that legal assistants are used by justices at all levels of the US federal judiciary, the European court of justice, the English court of Appeal and, of closest relevance,

³⁶ In England, for instance, the need by arbitrators to observe the duties is codified in S. 33 of the Arbitration Act, 1996.

³⁷ This is the provision of S. 14 of ACA, LFN 2004 which 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.

³⁸ (1833), 2. Bowl, p. 249.

³⁹ i.e. dealing with letters and telephone calls, typing, keeping records, arranging meetings etc. See: Oxford Advanced Learners Dictionary (6th ed., Oxford University Press, 2000) p. 1062.

⁴⁰ Section 4, paras 26 and 27 of the UNCITRAL Note provides that: "Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar clerk, administrator or rapporteur) who carries out the tasks under the direction of the arbitral tribunal... to this extent, the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in view, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to the professional functions of the arbitrators. Such a role is in the view of some commentators inappropriate or appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure the secretary does not perform any decision-making function of the arbitral tribunal.

the Iran –US claims tribunal. While all the jurisdictions herein above mentioned express conviction in non-assumption by the assistants of the decision-making function, none of them prohibits assistance being rendered by secretaries in the decision-making process. On the contrary, each of them explicitly envisages the legal assistant playing a role both in the reaching of a decision, for instance, by conducting legal research on the issues in dispute and expressing a decision by producing first drafts of judgment.

In Nigeria, a clearly distinct approach from the ones explained is the practice. Registrar/secretaries, and court clerks attached to Nigerian judicial officers are not allowed to have such over-bearing influence. They are rather there at the beck and call of their superiors rendering ordinary non legal services of 'do this and that'. For clearer understanding, it is considered apposite at this juncture to sojourn a bit into each of the aforementioned foreign jurisdictions and see better how the thing works there in reality.

CLERKS TO US JUSTICES

In the summer of 1875, Horace Gray, then a recently appointed Chief Justice of the Massachusetts Supreme Court, became extra ordinarily occupied with increased workload. As a sort of assistance, he started hiring law school graduates on the recommendation of his half-brother, John Chipman Gray, Harvard Law Professor. This practice was followed by enough of his successors by the 1930s and today, it has become an adopted practice of virtually all levels of the US federal judiciary. Today, supreme court justices are each entitled to four law clerks, circuit court judges to three, and district court judges to two.⁴¹

Aside the broad range of functions to assist his judge⁴², the law clerk has no statutorily defined duties. In 1977, the US federal judicial centre attempted a definition of a clerk's duties by publishing its law clerk handbook. The following general job description is what the authors could only agree on:

The clerk serves at the direction of the judge and performs a broad range of functions. Clerks are usually assigned legal research, drafting, editing, proofreading and verification of citations. Frequently, clerks also have responsibility for library maintenance, document assembly, service as courtroom crier and some personal errands for the judge. Clerks often attend conferences in chambers with the attorneys in a case and also engage in conferences and discussions with the judge regarding pending cases.⁴³

Quite above the purely administrative, law clerks are openly involved in the process by which US justices reach, and record their decisions. For instance, William Rehnquist, the Chief Justice of the US Supreme Court, once described how he, like several other court clerks, used to doctor chief justice Jackson's judgments when he was under the latter as a clerk in the early 1950s.

William Rehnquist, although, recognizes that the practice of assigning the task of writing supreme court opinions to law clerks fresh from law school can raise eyebrows, nevertheless, he sees the practice to be entirely proper.⁴⁴ William Rehnquist sees this as proper perhaps because of some safeguard which he had already put in place as a Chief Justice. The safeguards are obvious in his description of the detailed instructions that he gives to his clerks from time to time. He concludes the description as follows:

The justice must retain for himself control not merely of the outcome of the case, but of the explanation for the outcome.⁴⁵

REFERENDAIRES AT THE EUROPEAN COURT OF JUSTICE

Judges of the European Court of Justice (ECJ) have been employing, for more than 40 years ago, legal assistants known as referendaires in their local language. By 1990, each judge employed three referendaires for an average length of service of five years.⁴⁶

Unlike clerks to US justices, referendaires are often experienced lawyers and jurists in their own

⁴¹ See J. Daniel Mathoney's Law Clerks: For better or for worse? In 54 Brooklyn Law Review, 1998, pg.321.

⁴² In the case of Fredonia Broadcasting Corp. vs. RCA Corp. 569 F. 2d 251, 255 (5th circuit, 1978)

⁴³ See A. Dileo and R. Rubin. law clerk handbook: a handbook for Federal District and Appellate law clerks (1977).

⁴⁴ See William H. Rehnquist, The Supreme Court: How it Was. How it Is (Williams/Morrow Co. 1957) pp. 299-300.

⁴⁵ bid at p. 300

⁴⁶ Sally J. Kenny, "Beyond principals and agent: Seeing Courts as organizations by comparing Referendaires at the European Court of Justice and Law Clerks at the US Supreme Court in (2000) 35

right, with detailed knowledge of European law. They are therefore typically required to become involved integrally in each stage of the decision-making process. While recognizing the substantive drafting role played by referendaires at the ECJ, one commentator has remarked that:

When one calculates the hours the ECJ members spend in order proceeding, entertaining visitors and maintaining connections between the national judiciary and legal profession, it is hard to imagine how the report would ever be written if the member did not have the assistance of their referendaires.⁴⁷

LEGAL ASSISTANTS TO THE IRAN –US CLAIMS TRIBUNAL

Mr. Arangio-Ruiz once described the substantive role performed by 'legal assistants' to the Iran-US claims tribunal to include 'the making of abstracts of pleadings and other submissions, as well as the preparation of draft decisions for the arbitrators'⁴⁸

JUDICIAL ASSISTANTS AT THE ENGLISH COURT OF APPEAL

Lord Justice Otton in 1997 set up the English judicial assistant scheme which is based loosely on the US system of court clerks. As designed, the primary aim of the scheme is to respond to the ever mounting number of applications to the court of appeal. As in USA, assistants are actually called upon to help judges in the decision-making process.⁴⁹

Typically, assistants' time is split between producing bench memoranda, simplifying parties' submissions and carrying out research for their judge. Welcoming the substantive nature of the assistance offered to the court, the annual review of the Court of Appeal's civil division of 2000 concluded that:

Quite apart from the help that members of the scheme give to members of the court, participation in the scheme is now widely recognized as a very valuable part of the development as lawyers of young barristers and solicitors.⁵⁰

ASSISTANTS TO THE JUDICIAL OFFICERS IN NIGERIA

Nigerian judicial officers too are not left out in the use of assistants while carrying out their duties as judges or justices as the case may be. What may perhaps appear as a difference here is the restrictive nature of what the assistants can do. Numerically, herein below listed are the general administrative duties being performed by assistants to Nigerian judicial officers.

1. To take care of the court's diary
2. To arrange ahead of each court sitting day, the day's case files and to bring same to the court room before the commencement of the day's proceedings.
3. To act as court criers by raising up voice calling "court" for the sitting audience in the court to stand up once and for all as a mark of respect for the judge as he comes into the courtroom through his chambers.
4. To bring the causes' list prepared for each day into the court room
5. To call each case in the order on the cause list or out of turn where such arrangement is allowed.
6. To open files for processes on newly instituted cases assigned to the court of which he is a clerk/assistant.
7. To receive and keep in appropriate files subsequent copies of court processes filed by either of the parties in an already instituted case.
8. To bring such filed process to the notice of the judge/justice(s) in charge of the court.
9. To guide both the parties and the judge as to the available days suitable for adjournments.
10. To Whom It May Concern: be on ground in the court on call-over dates so as to attend to parties or their counsel who may want to take dates for cases which must have fallen on the court holidays.

⁴⁷ Ibid at p. 611.

⁴⁸ Iran-United States Claims Tribunal Reports (Cambridge, Grotious Publications Ltd, 1992) vol. 27, no. 18 at p. 333.

⁴⁹ See Victoria MacCallum's 'seeing justice up close' in law society Gazette, 25 January, 2001, p. 40 et seq.

⁵⁰ Ibid.

What may perhaps be added to the above list is the duty of the assistants to the Nigerian Supreme Court Justices to be engaged, at times, in ascertaining various citations and conducting few legal researches here and there.

ARE SECRETARIES TO ARBITRAL TRIBUNALS FOURTH ARBITRATORS?

It is without doubt that no arbitral law, be it foreign or domestic allows secretaries to arbitral tribunal to become another set of arbitrators. Going by their official schedule of works, arbitral secretaries are merely employed to be of help to arbitrators in administrative services. These services, as already explained above, include but are not limited to, keeping proper official records, securing appropriate venues where meetings can be held and running some errands for their bosses. These, without mincing words, are some of the administrative jobs of arbitral secretaries. It is therefore clear, going by the above, that secretaries to arbitral tribunals are not fourth arbitrators. They should therefore not arbitrate.

However, one may not seem to have done justice to the question in the sub-heading under reference if same is answered, like it has been done, without any recourse to how the secretaries are really used by arbitrators in actual practice.

According to Professor Pierre Lalive⁵¹, the concept of junior lawyers serving 'apprenticeships' in real life arbitration is a principal justification for the use of secretaries. The professor's point here is ostensibly clear and seemingly simple. His explanation is that secretaries to arbitral tribunals should be allowed to exist so as to acquire experience which will equip them too with the necessary know-how to become qualified arbitrators in future. Here is the beginning of the problem, the fear and the concern. The problem begins to loom here because, as put by Constantine Partasides⁵² in a similar article⁵³ to the topic at hand, apprentices in most trades learn not only by observing but by doing. It is actually this notion about what an average apprentice does that has led to the very fear and concern that the concept has been invoked to ease.

In international arbitration, the issue of the role of secretaries has recently become the subject of animated discussion at more than one international arbitral conference, including the LCIA Young International Arbitration Group Conference that took place in the Hague on 15th of September, 2000 (attended by many young practitioners who have acted as secretaries to tribunals) and the DIS annual workshop which took place in January, 2001, (attended by numerous arbitrators).

But back to the question of how are the arbitral secretaries used in real practice, it appears no single answer can be posited confidently. This is because the way they are used varies from one arbitrator to another. There are arbitrators who restrict their secretaries' jobs purely to the administrative. There are others who go further – some much further.

For instance, a former Secretary-General of the (ICC) court once reported that the court, at one time, required a tribunal to replace a lawyer-secretary to the tribunal where he drafted the award in place of his boss on the day a discernment of the boss was affected by the consumption of a non-negligible quantity of alcohol.⁵⁴

The above episode depicts an example of an arbitral secretary who went over and above his boundary and drafted the award in place of his boss. Although the secretary in this example had to draft the award in order to disallow the alcoholic consumption of the arbitrator from having influence on the award, the fact remains that such a secretary did exceed his secretarial roles.

Another example of an overbearing arbitral secretary could be found in the Iran-United States claim Tribunal.⁵⁵ It was the particular arbitrator's contention in the tribunal that it was physically impossible for him to have sufficiently studied the documentary record pertaining to his large number of pending cases and, as a result, he had to rely on his legal assistant. The name of this arbitrator was Mr. Gaetano Arangio-Ruiz.

In these two cases above, one would require no further evidential proof to establish excessive

⁵¹ While writing in 1995 and he had to summarize the advantages the secretaries offer

⁵² Constantine Partasides is a senior associate at Fresh-fields Bruckhaus Deringer based in Paris and a member of the firm's International arbitration group. Although, he principally appears as counsel in international arbitrations, he has served as a secretary to tribunal in both institutional and ad hoc arbitration

⁵³ The article is entitled: The fourth Arbitrator? The role of secretaries to tribunal in international arbitrations.

⁵⁴ See Constantine part asides in his article on the fourth arbitrator... in *Arbitration International Journal*, Vol. 18, No. 2, LCIA 2002, pg. 150.

⁵⁵ See the documents relating the challenge of this practice published in the Iran-United States Claims Tribunal Reports (Cambridge, Grotius Publications Ltd, 1992), Vol. 27 pp 291-336.

role being played by the arbitral secretaries. It can thus be concluded that in arbitral tribunals where this excessive secretarial role is the practice, administrative secretaries are really performing the function of arbitrators. In the same token, the roles being played by clerks to US justices, referendaires at the European Court of Justice and Judicial assistants at the English Court of Appeal are to say the least, over and above their confines.

On the other hand, the practice at the Nigerian judicial fora appears, with all honesty, to be within the permissible secretarial job confines. List of what and what secretaries do to assist the judicial officers they are attached to is already given. These duties, as far as they can be seen in practice, do not appear to be in excess on the side of the administrative secretaries. As it is in the judicial fora in Nigeria, the same thing is also the practice in the arbitral tribunals within the country. This notwithstanding, a note of caution should still be sounded so that secretaries in the arbitral tribunals in the country do not and are not made to ever exceed their limit.

ANY JUSTIFICATION FOR EXCESSIVE SECRETARIAL ROLES

In places where administrative secretaries attached to arbitral tribunals are allowed to play roles in excess of their administrative work schedules, proponents may want to justify allowance of the excessive role and raise the issues of the arbitrators' increasing volume of work and the need for the arbitral secretaries to act as apprentices in preparation for their qualification as future arbitrators. These two reasons, with due respect to whom ever may hold to them, are too far from being compelling. They can be debunked.

First, the issue of arbitrators work volume is not an excuse at all in this content. This is because arbitrators, quite unlike the normal court judges, do have control over the number of tribunals upon which they chose to sit. Who therefore should be blamed if not the arbitrator for accepting an appointment which he could have refused if has no requisite time and attention to devote to it.

In accepting appointment, an arbitrator necessarily accepts a duty not to delegate that mandate⁵⁶. Although the IBA's rule 'Rules of Ethics for international Arbitrator' makes no express reference to such a duty, it is implicit throughout. Notably, Articles 2-3 require a prospective arbitrator to accept an appointment only if:

he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.⁵⁷

On the issue of arbitral secretaries being allowed to play excessive roles on account of grooming them to become experienced future arbitrators, the present writer associates himself with Constantine part aside's idea already analyzed somewhere above, that arbitral process is unlike other trades and professions where apprentices learn the job by doing. An administrative secretary in an arbitral tribunal will be said to have become actively involved in the making of the award if he should be permitted to play the traditional roles of an apprentice who learns by doing.

Another reason to support part aside's idea above is the issue of parties agreement as the foundation of all arbitral processes. By this, what is intended is that parties agreements in all arbitrations occupy a primacy of place in the determination of the validity or otherwise of majority of steps taken in arbitral processes. To this extent therefore, allowing an arbitral secretary, who is not envisaged at all by the parties, to take part in the making of an award is tantamount to appointing an arbitrator without the knowledge of the parties who, under normal circumstances, should be the appointers.

CONSEQUENCES OF SECRETARIES' EXCESSIVE ROLE

By agreement of the parties, arbitrator's unauthorized power to delegate duties excessively to their secretaries can be revoked under the provision of the Arbitration and Conciliation Act, cap. A 18, LFN, 2004⁵⁸ or by court. Where the revocation is to be effected by the court, this by either of the parties.

⁵⁶ Eric Schwartz has referred to 'a broad international consensus that the arbitrator's mandate is a personal one and is not to be delegated to another person. See "the rights and duties of ICC Arbitrators" in 1995 ICC international court of arbitration Bulletin, special supplement. The status of the Arbitrator' p. 86

⁵⁷ See the IBA's rules "Rules of Ethics for International Arbitrators" prepared by committee. D of the IBA's section on Business Law (and published in 1987 xii YB com. Arb).

⁵⁸ S. 30 (2)

Where such excessive power is to be revoked by the court, it is on the basis of same being a misconduct on the side of the particular arbitrator who willingly allows such secretarial excess. This now brings to fore the issue of the meaning of misconduct?

Throughout the provisions of ACA, no attempt is made on defining what misconduct is. However, a useful hint is given at common law. This can be found in the Supreme Court's decision in the case of TAYLOR WOODROW (NIG) LTD VS. S.E. GMBH.⁵⁹

The hint in the case above seems to be similar, in all respect, to one of the ten examples of misconduct given in the Halsbury's laws of England⁶⁰. The particular example is as it relates to where there is evidence of over reliance on secretary's use by an arbitrator. Where this can be established, any of the parties is free under S. 30 (2) of ACA to apply to court for revocation and removal.

Where, however, the secretary's excessive role is completely played unchecked and eventually, award, based on that, is made and given, the award may still be bedeviled by another consequence of setting it aside.⁶¹

Still on the consequences of allowing secretarial roles in arbitral tribunals, it is important to state here that existence of such fact can lead to successful challenge of the delegating arbitrator's jurisdiction.

CONCLUSION

In view of all that has so far been said, the writer shall not hesitate to support continuous use of administrative secretaries in arbitral tribunals. This is because of a number of useful services (earlier mentioned) they offer from time to time to arbitrators.

Nevertheless, caution should always be exercised in allowing them play roles which, unconsciously, would make them take part in the making of awards. To this extent, they may be used to conduct legal research on cases which go either in support or against particular issues. Their secretarial duty should be understood to be restricted to checking these cases up.

⁵⁹ 1993, a, NWCR (Pt. 286) p. 127

⁶⁰ See it in paragraph 622 of vol. 2 4th ed.

⁶¹ See SS 29 (1) & (2) 48 (a) and 30 (1) of ACA, Cap. A18 LFN 2004. See also the case of KSUDP vs FAN 2 Construction Comp. Ltd. (1990) NWCR, pl. 142 at 43.