

ARBITRAL IMMUNITY*

Abstract

The issue which we intend to address in this matter is whether arbitrators who perform similar functions like judges and magistrates are immune for conduct, acts, and statements made in course of performing the duties of their office as decision makers. It is not denied that unsuccessful parties in arbitration may want or intend to embarrass the arbitrator(s) in legal challenges to the award by either joining them as defendants or respondents in application for the impeachment or setting aside of the arbitral award or by compelling them to be summoned as witnesses against the arbitral award. The arbitrators would almost always plead immunities but whether that will avail them is the question which this article is to address. This paper shows that it is in the interest of the parties and arbitration process that arbitrators should enjoy immunity to protect the dynamics of the ADR process.

1. Introduction

The unsuccessful parties in arbitration are mostly inclined to visit their failure, anger, or hardship on the arbitrator for perceived reasons of breach of contract, tort or negligence and breach of duty of care or inability to act without undue delay. The losing party may seek to join the arbitrator(s) in the suit or application for setting aside or impeachment of the arbitral award or seek to summon them as compellable witnesses to give evidence in such suits.

The hardship in such practice of suing arbitrators for acts, conduct, and statements made in course of arbitration is not only on the arbitrators but primarily on arbitration as alternative dispute resolution mechanism. This is because only a “fool” will accept to act as an arbitrator if he knows that he may be exposed to hardship and ridicule for merely acting as a decision maker for the disputants. Such an act if allowed may also intimidate the

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prospective arbitrators from handing down controversial awards notwithstanding the good reasoning behind such decisions.

Unfortunately, in Nigeria we have neither statutory nor judicial decision as to the immunity of arbitrators but scholars have expressed positive views on the matter. Literature in the area is rather very scarce and scanty. For this reason, we have to rely on decisions of court outside Nigeria. Our courts when confronted with such matters and issues will definitely search for judicial opinions and decisions of courts in other jurisdiction for guidance and may also rely on scholarly opinions for assistance. Judicial immunity generally is not absolute and so also immunity for arbitrators. Exceptions exist in arbitral immunity.

Meaning, Origin and Scope of Arbitral Immunity

We have seen some of the duties imposed on the arbitrator(s) by the arbitration law and the agreement of the parties. The next issue is to determine the effect or liability for breach of any of the duties and the possible immunity from damages. Legal right is an interest, or claim and the correlative of it is duty. Duty is a human action which is exactly conformable to the laws which required us to obey them. Duty may arise by the provisions of the law or agreement of the parties. Duty is a restriction upon freewill. It places a limit to human conduct. Duty is an act which one ought to do, an act the opposite of which would be a wrong.² The result of breach of duty is liability and the opposite of liability is immunity whereas the correlative of immunity is disability or exemption. Immunity is exemption or freedom from penalty, burden, or duty. Immunity is for the benefit of the person immune and for the general public.³

Arbitral immunity took its root from judicial immunity which had its origin sometime in the seventeenth century.⁴ The rule in judicial immunity is that judges are not liable for damages for their decisions. Judicial immunity applies to the judges' judicial acts. For the United States Supreme Court, "the judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, or alleged to have been done maliciously..."⁵ Judicial

² Black's Law Dictionary, Centennial Edition 6th Ed. 1891-1991, 505.

³ *Fawehinmi v. IGP* (2000)12 FWLR 2012-2019

⁴ *Floyd v. Barker* (1607)77 Eng. Rep. 1305, *The Marshalesa* (1612)77 Eng. Rep.1027. Dennis R. Nolan & Roger I. Abrams, "Arbitral Immunity" *Industrial Relations Law Journal*, Vol. 11, No. 2,1989, p. 228 at 229.

⁵ *Bradley v. Fisher* 80 US (131 Nall)335, 351 (1872).

immunity exists simply to protect those individuals holding judicial office and the purpose is primarily to protect litigants and the litigation process by ensuring judicial independence and decision finality. The fact of the immunity of judicial officer is not in doubt but what is in question is the extension of immunity to arbitrators who are not judicial officers but are performing similar jobs like judicial officers.

In some jurisdictions, the fact of the immunity of an arbitrator is certain as legislation created, established and supported it. For example, in United Kingdom, section 29(1) of the Arbitration Act 1996 expressly provided that, “an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his function as arbitrator unless the act or omission is shown to have been in bad faith”.

It is most reasonable to grant immunity to an arbitrator as a decision maker performing similar functions like judicial officers. The arbitrators like judges must be free from fear of liability or harassment in order to exercise their responsibility with complete impartiality. The English courts had in so many cases decided in favor of immunity.⁶ The English courts took into consideration the fact that the functions perform by the arbitrators are comparable with that of the judicial officers and this is known as the principle of “functional comparability.” Another factor which the United States Supreme Court for considered before it willingly recognized judicial immunity for the arbitrator is that the safeguards built into judicial process tend to reduce the need for private damages action as a means of controlling unconstitutional conduct, safeguard as insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the “correctability” of error on appeal.⁷ However, arbitral awards are not subject to appeal in which case the issue of “correctability” of the arbitral award on appeal does not apply. What was granted by the United State Supreme Court was quasi judicial immunity for the arbitrator and the reason for this is because arbitrators are not judicial officers in the constitutional sense. In the United States, both the Supreme Court and other Courts including the Federal district courts have recognized quasi judicial immunity for the arbitrators. In *Hill v. Aro Corp*, the Federal District Court in Ohio said in 1987 that;

...if national policy encourages arbitration and if arbitrators are indispensable agencies in furtherance of that policy, then it follows that the common law rule protecting arbitrators from suit ought not only to be affirmed ,but ,if need be,

⁶ *Baez v. Economou* 438 US 478, 511 (1978) cited in Dennis R. Nolan & Roger I. Abrams “Arbitral Immunity”, *Butler v. Pachman* 424 US 409, 423 n.2 (1976). *Wasy Inc. v. First Boston Corp* 813 F.2d (9th Cir. 1987).

⁷ Dennis R. Nolan & Roger I. Abrams, “Arbitral Immunity” *IRLJ*, 234.

expanded. The immunity rule was sound when announced by two state supreme courts over eight years ago, it is still sound today.⁸

The immunity of arbitrators in the United States is one based on public policy reason as supported by scholars and decisions of superior court. Double succinctly put the issue in the following words;

The concept of immunity of the judiciary from civil liability is firmly rooted in legal doctrine. Resting upon consideration of public policy, its purpose is to preserve the integrity and independence thought required by members of the judiciary. This immunity is not limited to judges but extends also to arbitrators acting in a quasi-judicial capacity. In as much as the function of arbitration tribunals is similar to the courts, and the duties of the arbitrator required the exercise of his independent judgement, arbitrators enjoy immunity from court action for their activities in arriving at their award. Were the law otherwise, the losing party could in every case expose an arbitrator to vexation and hazards of lawsuits. Any such action could only be destructive to the arbitrator's independence and to the discharge of his duties.⁹

Immunity and Contractual Relationship

From the foregoing discussions so far, it is established that quasi judicial immunity for arbitrators exists though in Nigeria, the matter is not settled as there exists neither legislation nor judicial decision on the matter. It is expected that Nigerian courts will follow the rest of the world when a situation or any matter on the issue confronts our courts.

The issue of judicial immunity has not been without opposition on all fronts. This is because the duties of the arbitrator involve some element of contract and tort. The arbitrator has a duty to act with due diligence, duty to act with care and judicially. The arbitrator has a duty to make final

⁸ 263 F. Supp 324, 326 (N.D. Ohio 1967) cited in Dennis R. Nolan & Roger I. Abrams, "Arbitral Immunity" *IRLJ*, 236.

⁹ Domke on *Commercial Arbitration*, p. 351 cited in J.O. Orojo & M.A.Ajomo, *Law and Practice of Arbitration & Conciliation in Nigeria*, 1999, p.162.

award after arbitral proceedings. The parties who appointed the arbitrator expected him to exercise due diligence and care in undertaking the duties of his office. It is for this reason that some scholars have argued that where the arbitrator breaches this duty of care imposed on him, then action will lie in tort for negligence particularly where damages have also occurred or where parties have suffered damages. Some had argued that the duty of care imposed on the arbitrator is a moral one and not legal. If the duty of care is one found on law, it follows without more that sanction must follow on the breach of the duty.¹⁰ The relationship between the parties and the arbitrator is a legal relationship and not a moral one. However, whether the duty is moral or legal, the most important question to address is whether an enforceable legal contract of service or for service exists between the arbitrator and the parties giving rise to moral or legal duties. Though an arbitrator is not a judicial officer in the constitutional sense, his appointment is one of a decision maker. There is actually no contract of service or for service between the arbitrator and the parties for he is merely appointed to perform the work of a decision maker.

For Mustill and Boyd, it would be wrong to define the relationship between the arbitrator and the parties in contractual terms. The learned authors went further and stated thus,-

... with a little ingenuity a contract between these two persons could undoubtedly be devised. We suggest, however that this would be a mistake. To proceed by finding a contract and then applying to it the ordinary principles of law of contract will not produce a reliable answer unless a contract really exists to be found. Even in the extreme case of massive reference, a professional arbitrator for a substantial remuneration, we doubt whether a businessman would, if he stopped to think, concede that he was making a contract when appointing the arbitrator. Such an appointment is not like appointing an accountant, architect or lawyer. Indeed, it is not like anything else at all.¹¹

¹⁰ Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed., Butterworths, London, 1989, p. 222-223

¹¹ *ibid.* 223.

Unfortunately, the contractual approach has been adopted in some jurisdictions like in Australian Law which adopted the position that the relationship between the arbitrator and the parties is one of contract. This was also followed by the Dutch Law.¹² The Australian Law maintained the posture that the relationship between the arbitrator and the parties is a contractual one in which the arbitrator receives remuneration from the parties. It was also argued that there is no reasonable basis pursuant to which arbitration should be immune whereas other professionals including lawyers are exposed to risk and liabilities without exemption. The fact remains that arbitrator does not perform similar duties with these other professional. On functional comparability, an arbitrator performs similar duties with judges and magistrates. A lawyer does not render any decision in his client's matter and in which case he does not perform any function similar to that of the arbitrator or the judges. In fact a lawyer enjoys immunity for any statement or acts done while presenting his client's case in the court.

In all the cases wherein a party raised the issue of contractual relationship¹³ or tort to find an arbitrator liable, the courts decided in favor of quasi arbitral immunity.¹⁴ This is because the duty an arbitrator has based on functional comparability with judicial officers is for him to make an award.

Exceptions for Arbitral Immunity

As usual, legal rules have their exceptions and so also the quasi judicial immunity of the arbitrator has its own exception as it is not absolute but has its limitations and qualifications. There is no immunity for an arbitrator who failed in making an award after hearing the parties. As a judge has the duty to render judgment after hearing the parties in court so also an arbitrator has a similar duty to render a final award after hearing the parties. In *Graphic Arts Int'l Union, Local 508 v. Standard Registered Co.*¹⁵, the court found the arbitrator liable for the harm he caused the parties by nonperformance of the contractual duties of his office in that he failed completely in making an award. This was upheld by the court in *Baar v. Tigerman*¹⁶ where the parties appointed Tigerman as an arbitrator through the American Arbitration Association to resolve a dispute

¹² Melis, *A Guide to Commercial Arbitration in Austria*, 1983, p. 16-17. *Arbitration Law in Europe*, 1981, ICC Publication No. 353 page 285

¹³ *Hill v. Aro Corp.*, 263 F. Supp. 324 (N.D. Ohio 1967). The action based on contract will only succeed where the arbitrator fails to make an award after the arbitration had reached the conclusion of hearing. In this circumstance, the arbitrator has failed to perform the imply duty in his appointment that he is to publish an award. He cannot be said to be enjoying functional comparability with the judicial officers as judicial officers do not fail to deliver judgment after hearing the parties.

¹⁴ *Bullock v. Donohiko*, 80 C. 696(1901), 711 December 1980); *Larry v. Penn Truck Aids Inc.* 94 F.R.D. 708 (E.D. Pa. 1982); *Corbin v. Washington Fire & Marine Ins Co.* 278 F. Supp. 393 (DSC), *aff'd* 398 F. 2d 543 (4th Cir. 1968). In all, the dissatisfied parties advanced contract case legal principles wherein they could nail the arbitrators for breach of duty under tort. The courts dismissed actions based on tort against the arbitrators. The arbitrators enjoy quasi arbitral immunity for negligence, fraud, misrepresentation, defamation, etc).

¹⁵ 103 L.R.R.M. (BNA) 2212 (S.D. Ohio 1979) cited in Dennis R. Nolan & Roger I. Abrams (*supra*) p.252.

¹⁶ 140 Cal. app. 3d 979, 211 Cal. Rptr. 426 (1983) cited in Dennis R. Nolan & Roger I. Abrams (*supra*) 252

involving partnership agreement. The Tigerman held fifty three days of hearing from 1976 to 1980 wherein the final briefs were submitted by 18th July, 1980. By the rules of American Arbitration Association, Tigerman was under a duty to deliver final award within thirty days after the last briefs were submitted but a month passed without the final award being made. Tigerman failed to deliver final award even after an extension of time was given till 30th November, 1980 by the parties. When Tigerman failed to deliver final award months after, the parties revoked his mandate and sued Tigerman and AAA. The trial court dismissed the case but the appellate court at California reversed the decision stating that arbitral immunity concerns alleged misconduct in arriving at a decision and did not control a case wherein no award was made at all or failure to make award. According to the Court of Appeal of California, “Arbitration is preferable to litigation because of its speed and certainty. ... but granting immunity for failure to make an award runs directly counter to these policy considerations.” Arbitrators enjoy immunity in making of award and in undertaking the duties of their office but there is no way an arbitrator who fails to make an award should expect to be immune for failure to perform. Immunity as we know it exists for the parties and the public. It is impossible to extend immunity in favor of an arbitrator who failed to perform his duty as the parties received no benefit at all. It becomes obvious from the above statement and case cited that the only contractual duty the arbitrator has which is similar to that of a judicial officer is to render an arbitral award. Immunity of arbitrator will be raised where after making a final award one of the parties draws a sword to challenge the award and includes the arbitrator as a necessary party in the suit for impeachment of the award.

Arbitrators enjoy quasi immunity in being compellable witnesses to be summoned to testify about facts considered before arriving on their awards. This is because where an arbitrator is made a compellable witness in the suit or application for impeachment of an award, it implies that no award shall be final. Summoning an arbitrator as a compellable witness may involve time and cost. Arbitrators are serious businessmen and as time is money, the time wasted in attending to witness summons is not remunerated. In certain situations and circumstances, the arbitrator may need the services of a lawyer when summoned before the court to testify. Who is to pay for the services of the lawyer in such situation? Arbitral immunity exists to ensure finality of arbitral awards, to protect arbitral independence, and facilitate the recruitment of arbitrators. Compelling arbitrators to testify in courts will certainly affect all the three essence of arbitral immunity listed above. In *Gramling v. Food Machinery & Chemical Corp*¹⁷, an application for an order to compel all the arbitrators

¹⁷ 151 F. Supp. 853 (W.D.S.C. 1957)

to testify in application to set aside an award was flatly refused and quashed.

However, as in every good legal rule exceptions exist. Where a person seeking to impeach an award on the premise that the award went beyond the scope of what was submitted, there is no reason why the arbitrator who is in custody of the document of the arbitral submission may not be allowed to testify in the matter if the party is required to proof the scope of what was submitted. This has no harm on the arbitrator. The arbitrator is a possible and even compellable witness in circumstances where the court only needs to see the transcripts, and exhibits submitted to him during hearing. The reason for this is that the arbitrator is the only in custody of the transcript as they are his own documents but this may be relaxed in circumstances where the party requiring the attendance of the arbitrator as a witness has a certified true copy of the transcripts being sought to be tendered in the court. The arbitrator may also be required to testify in circumstances where a prosecutor seeks evidence as to an incriminating statement made to the arbitrator by a witness during arbitral proceedings. Where the stamen is contained in a transcript, the arbitrator need not testify as certifying the transcripts may suffice.¹⁸

Conclusion

The immunity of judicial officers is not in doubt as there are statutory and judicial decisions on the matter. However, the issue of quasi judicial immunity for arbitrators poses some problems as it has not received statutory backing in some countries even when courts in most countries have decided in favor of the same. Like in Nigeria, there is neither a statutory provision nor a judicial decision in support of quasi judicial immunity for arbitrators. As the courts in Britain and United States have decided in favor of the same we expect that the Nigerian courts will follow the decisions of these courts even though their decisions are mere persuasive and not binding on our courts.

Quasi judicial immunity for the arbitrators exists to ensure the finality of arbitral awards, to protect arbitral independent, protection of public interest, and to facilitate the recruitment of arbitrators as only “fools” will accept to serve as arbitrators if knowing that their acceptance of the appointment to act as arbitrators may likely expose them to lawsuits and unnecessary expenditure and time wastage. Quasi judicial immunity will not avail an arbitrator who fails to make an award after hearing the parties and receiving their final briefs on the matter. This is because the immunity of arbitrators is one based on the principles of functional comparability of arbitrators and judicial officers as performing similar functions. But functional comparability will not avail an arbitrator who has failed to perform his duty. Arbitrators just like all other citizens are liable for any crime committed by them and an arbitrator may be compel to testify or produce documents or transcripts of the arbitral proceedings particularly where a prosecutor needs them to establish the testimony of a witness in arbitration wherein crime was established.

¹⁸ Dennis R Nolan & Roger I Abrams (*supra*) p. 257 - 258.