

Appointment of Arbitrators: Law and Practice

M. M. Akanbi, Esq.

Muhammed Mustapha Akanbi, LL.B. (Ife), LL.M. (Lagos), ACI. Arb, Barrister-at-Law, is a Lecturer in the Department of Business Law, University of Ilorin, Nigeria.

Introduction

Disputes are an often unavoidable aspect of any legal relationship. To businesses they are a particularly insidious form of over-head. To individuals they are indicative of mistrust, anxiety and personal ill-feeling. It is therefore important that once a dispute looms, to find ways of minimizing its impact. Chief among these is the choice of an appropriate procedure for dealing with the dispute.¹

Traditionally, the act of dispute control has in most cases been the exclusive preserve of the courts, which have at its disposal, the full coercive power of the state to enforce decisions.² As a result of the various problems associated with the court system, litigants have had to seek alternative form of dispute resolution, one of which is Arbitration.

The umpire who presides in a court system is usually called a Judge, while in an Arbitration proceeding, the man who resolves the dispute is called an Arbitrator.

The theme of this paper is an examination of the practice and legal framework which regulate the appointment of Arbitrators.³

Meaning

Arbitration has been defined as the reference of a dispute or differences between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.⁴

Arbitration arises out of a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.⁵ Romilly, M.R. in *Collins v. Collins*⁶ defines arbitration as follows: "An arbitration is a reference to the decision of one or more persons either with or without an umpire, a particular matter in difference between the parties."

Inherent in all these various definitions are certain essential elements that must be present before a form of dispute resolution can be styled as

Arbitration. Firstly, there must be the existence of a dispute or parties should have envisaged the existence of a dispute in future. Secondly, the parties have voluntarily agreed to refer such existing dispute or future disputes to arbitration. Thirdly, the decision of the arbitrator (usually called an award) would be binding on the parties.

Legal Framework

Arbitration is contractual in nature. Thus, the relationship between the disputants and the arbiter is governed, to begin with, by the express and implied terms of the agreement to arbitrate.

In Nigeria, the law generally governing an arbitration is provided by the Arbitration and Conciliation Decree 1988, which has now been embedded in the Laws of the Federation of Nigeria 1990 (hereinafter referred as "the act").

The enactment of the Act derives from three main sources, namely (a) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, otherwise known as the New York Convention, (b) The Uncitral Arbitration Rules and (c) The Uncitral Model Law.

The New York Convention of 1958 — It is applicable more to International Arbitration agreement than to purely domestic agreement, it also relates to the recognition and enforcement of foreign awards. The New York Convention constitutes the second schedule to the act.⁷ **Uncitral Arbitration Rules** — These rules were drafted and approved for the purpose of harmonizing and unifying the laws of International Trade i.e. to essentially provide a unified approach to the basic steps to be taken in ad hoc arbitration. The Rules are more or less contained in the First schedule to the Nigerian Arbitration Act and applies to both domestic and international commercial arbitration.

The Uncitral Model Law — Basically, the Model Law came into being as a result of the need to liberalize international commercial arbitration by limiting the role of national courts and allowing the parties freedom to choose how their disputes would be determined. Most of the sections, of the Act are derived from the Model Law, for example section 7 to 33 of the model Law are provisions in respect of both domestic commercial arbitration and international commercial arbitration.

Generally, the Arbitration and Conciliation Act in terms of content, has all it takes to make a good law, considering the fact that, it is derived from very rich sources.

However, if arbitrators had to depend only upon the statutes for sole guidance on the conduct of arbitration, there would be ample opportunity for procrastination and uncertainty, it is for this reason that a number of

bodies have drawn up their own rules of conduct for a reference made pursuant to their rules.⁸

In particular, there are those produced by the Chartered Institute of Arbitration (1988 Edition), the London Court of International Arbitration (1985 Edition) and the JCT Arbitration Rules of 1988, coming back home, we have the Arbitration Rules of the Lagos Regional Centre for Commercial Arbitration, which serves, African countries south of the Sahara.⁹

The purpose of all these rules is to reduce or eliminate unnecessary delay, expense and to make the process of Arbitration compliant with emerging trends of the new international economic order.

Arbitration Agreement

A "reference" to arbitration may originate in one of the following ways:¹⁰

1. By agreement between the parties (voluntary) — a voluntary agreement will be made by the mutual consent of the parties to refer disputes when they arise, or in anticipation of the possibility of a dispute at a future time. This type of agreement may be made orally and informally. For example, where there is no arbitration agreement within the meaning of the act, it is open to the parties to enter into an ad hoc arbitration agreement in respect of that dispute. It has been argued that, it is often difficult to persuade the parties or for one party to persuade the other, to enter into any form of agreement once a dispute has arisen.¹¹
2. The second method by which a reference to arbitration may originate is by statute — as earlier on observed,¹² an arbitration agreement is a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

Under this method, an Arbitration Agreement may be in the form of "an arbitration clause" in a contract or in the form of "a separate agreement" but relating to the contract.¹³

If the Arbitration agreement is in the form of "an arbitration clause", the clause constitutes the submission to arbitration and all that should be necessary to perfect it is a deed of appointment of an identified individual, on the other hand, if a separate agreement is made after a dispute has arisen, then the disputants must execute a deed of submission.¹⁴

In either case, there must be a formal reference to the arbiter under the agreement to arbitrate on the precise matters in dispute.

Essentially, an Arbitration agreement must contain the following particulars/feature:¹⁵

- (a) it must be evidenced in writing.
 - (b) It must be signed by competent parties.
 - (c) It can be contained in an exchange of fax, telex letters or teleprinter or other means of telecommunication.
 - (d) It can be by exchange of points of claim and defence in which the existence of an Agreement is alleged by one party and not denied by another.
3. The third method by which a reference to arbitration may originate is by virtue of an order of the court¹⁶ — this is a process whereby a judge of the High Court may refer an action to an Official Referee, if the case involves technical evidence where the judge feels that an enquiry and report prepared by an official referee is necessary.¹⁷ It is submitted that this method of commencing arbitration violates an essential feature of arbitration in the sense that the parties are ordered by the court to compulsorily submit to arbitration, when in actual fact the process of arbitration should be a voluntary submission by the parties.

Appointment of Arbitrator

In order for arbitration to be effective, not only must the arbiter be carefully selected, the number of arbitrators must also be carefully decided. As regards the careful selection of the arbitrators, disputants should choose their own arbiter where possible, an arbitral appointing authority does not have the same degree of knowledge and understanding of the facts as the disputants and a mutually agreed appointee is more likely to command their respect and confidence.¹⁸ Be that as it may, if the disputants are unclear as to whom to appoint, they may seek nominees from arbitral institutions.

As regards the number of arbitrators the normal practice is to appoint a single arbitrator, the advantage here, is self-evident. Arbitration conducted by a sole arbitrator will be less expensive and will involve less delay. However for disputes having International flavour, the more usual procedure is to provide for the appointment of an arbitral tribunal of three arbitrators subject to the complex nature of a particular dispute, it is advised that two or three arbitrators should not be appointed to a case where one would do.

In treating the paper, our guide would be the ACA, 1990 LFN and also the Uncitral Arbitration Rules, which incidentally forms the first schedule to the Act, while constant references would be made to statutes of other jurisdictions and rules of other arbitral institutions as and when proper.

A reading of section 6 of the act would reveal that the number of arbitrators to be so appointed is subject to the determination of the parties it appears that the exception to this general rule is that in the event that the parties do not concur on a number, then three arbitrators would be appointed.¹⁹ The position in section 6 of the act cannot be said to be of universal application, for instance. The ICC Rules²⁰ provide that where the parties have not agreed upon the number of arbitrators, a sole arbitrator will be appointed unless the dispute is such as to warrant the appointment of three arbitrators." In the same vein, the LCIA Rules²¹ states that "A sole arbitrator will be appointed unless the court determines that in view of all the circumstances of the case a three-member tribunal is appropriate." Article 6 of the English Arbitration Act 1950 states that unless a contrary intention is expressed therein, every arbitration agreement shall, if no other mode of references is provided, be deemed to include a provision that the reference shall be to a single arbitrator.

Methods of Appointment/Procedure for Appointment

Section 7 of the act, deals with domestic arbitration, under this section, parties are allowed to specify the procedure to be followed in appointing an arbitrator.²²

(a) Mutual Agreement

One of the procedures that may be used is by MUTUAL AGREEMENT of the parties, a major attraction of this type of procedure is that it allows parties to submit a dispute to a judge of their own choice. Essentially, there are two requirements for the appointment of arbitrators by "Mutual Agreement." First, the parties must agree between themselves as regards the choice of the arbitrators to be appointed. Secondly, that the proposed arbitrator accepts the appointment.

Sometimes, a provision may exist that if a dispute should arise between the parties, it should be referred to the arbitration of a named person, if eventually a dispute arises, the provision then operates as a choice by the parties of the named arbitrator and the only other requirement would be the acceptance by the proposed arbitrator. The use of this kind of provision in arbitration agreement has been criticised²³ for the simple reason that there is no guarantee that the person designated in the agreement to act as an arbitrator, will be willing and able to so act at the time when a dispute eventually arises for he may be too busy, ill or even dead nor is there any guarantee that the person chosen in advance will be suitable to adjudicate upon the kind of dispute which may arise.²⁴

It has equally been suggested that when appointment of arbitrator is to be by mutual agreement of the parties, it is preferable for the agreement to be reached after the dispute has arisen.²⁵

(b) List System

Another procedure that may be used in the appointment of arbitrators is the "List system", here each party compiles a list of three or four persons he considers as acceptable arbitrators, usually with a brief note of the relevant experience and qualifications of each, these lists are then exchanged in an attempt to reach an agreement. The advantage of this procedure is that, the exchange of lists helps to indicate the kind of person each party is looking for and so prepares the ground for possible agreement on the person to be appointed. The snag in this procedure is that it is desirable to check that the persons listed are available and willing to serve.

(c) Appointment by Existing Arbitrators

In case parties are not able to agree on the procedure to follow in the appointment of arbitrators as laid down under section 7(1), the Act provides for certain options, for instance in the case of an arbitration with three arbitrators,²⁶ the method to be followed is the procedure of appointing arbitrator by the existing arbitrators i.e. parties shall appoint one arbitrator each and the two thus appointed shall appoint the third. The advantage in this procedure is that the parties both feel that they have an insider in the panel, secondly, both of the party-nominated arbitrators are likely to have confidence in the skill and judgment of their chosen presiding arbitrator, otherwise they would not have chosen him.

(d) Appointment by the Court

However, problems might arise, if a party refuses to appoint his own arbitrator or if the two arbitrators appointed by both parties are unable to reach a consensus to appoint a presiding arbitrator. Section 7(2)(i)(ii) of the act provides for another procedure i.e. Resort to a National Court of competent jurisdiction on application of one party. This procedure has its limitation and can only be resorted to, if there is a deadlock under section 7(2)(a). The court in making the order of appointment must have jurisdiction and the power to make the appointment and once the court is validly cloaked with jurisdiction and power, the consent of the parties is not necessary.²⁷

Another instance, where resort can be made to the National Court is in the case of an arbitration with a single arbitrator wherein the parties fail to agree on who to appoint, then a party may within thirty days of such agreement apply to the court to make such appointment.²⁸

It should be noted that before a party can go to court to ask that the court appoint an arbitrator there must be in existence an arbitration agreement contained inside or relating to the contract.

It would be recalled that section 7(1) of the act allows parties to specify in the arbitration agreement the procedure to be followed in appointing an arbitrator. If indeed a procedure is specified and there is a breach of that procedure either by a party failing to act as required under the procedure or the two arbitrators fail to agree on who to be appointed as the presiding arbitrator or in the case of a third party, including an institution defaulting under the procedure, section 7(3) provides a remedy for the aggrieved party, to the extent that he may request the court to take necessary measure to correct the default subject to the appointment procedure not providing other means for securing the appointment.

Finally, the decision of the court under section 7 of the act is not subject to appeal and the court in exercising its power of appointment under the section shall have due regard to the arbitrator's qualification and such other consideration as are likely to secure the appointment of an independent and impartial arbitrator.²⁹ The issue of the arbitrator's qualifications would be adequately dealt with in a subsequent part of the paper.

(e) Arbitral Institutions/Professional Bodies

The procedure for appointing an arbitrator cannot be complete without making reference to professional bodies namely Trade Association, Professional Institutions and Arbitral Institutions more especially since they are major players in International Commercial Arbitration.

An arbitration clause may provide that the appointment of an arbitrator(s) is to be made by a trade association or that the president or some other official of a professional institution is often named in arbitration clauses as the person who is to appoint a sole arbitrator, or the presiding arbitrator of an arbitral tribunal, on the other hand, arbitral institutions invariably have the power to appoint arbitrators under their own rules of arbitration. The ICC Arbitration Rules, for example provide that where there is to be a sole arbitrator, and the parties fail to nominate him within 30 days from the communication of the request for Arbitration to the other party, he will be appointed by the ICC court of arbitration. The rule also provides that where there is to be an arbitral tribunal of three arbitrators, the third arbitrator will be nominated by the ICC court of arbitration, unless appointed by agreement of the parties within a limited time.³⁰

The Arbitration Rules of the Lagos Regional Centre for Commercial Arbitration also provides that unless the parties have agreed otherwise or if the appointing authority designated refuses to act or fails to appoint the arbitrator, the centre shall be the appointing authority for the purpose of the Uncitral Arbitration Rules and the rules of the arbitration rules of the centre.³¹ The Rules went on to provide that pursuant to article 6 or 7(3) of the Uncitral Arbitration Rules and paragraph (1) of this Rule, the centre is

to appoint a sole arbitrator or the presiding arbitrator, the list of names to be communicated by the centre to the parties shall be drawn from the International Panel of Arbitrators maintained by the centre.

Rule 3(1) further provides that where, pursuant to article 7(2)(a) of this rule, the centre is to appoint the second arbitrator, the centre shall appoint the arbitrator from the International Panel of Arbitrators maintained by the centre.

It has been argued that arbitral institutions are to be preferred to professional bodies and trade associations because of their day-to-day involvement in and concern with international arbitration; they know what qualities to look for in the persons they nominate as arbitrators and they maintain up-to-date records of persons who are active as arbitrators in international arbitrations.³²

Appointment of Arbitrators Vis-à-Vis International Commercial Arbitration

As already stated in an earlier part of this paper, section 7 of the act deals with the appointment of arbitrators in domestic arbitration. In the case of international commercial arbitration, section 44 of the act is the relevant section dealing with appointment of arbitrators.

There is not much procedural variations in the appointment of arbitrators under section 7, which relates to domestic arbitration and section 44, which relates to international arbitration. For instance, the "List system" of appointing arbitrators is also provided for under section 44, whereby each party lists three or four persons he considers suitable for appointment, where a sole arbitrator is to be appointed by the agreement of the parties. Furthermore, the list system is also to be adopted by the "appointing authority" in appointing a sole arbitrator or a second arbitrator where the two arbitrators appointed by the parties have not agreed on the choice of the presiding arbitrators.

The only difference is that, if parties fail to agree on a sole arbitrator, or if a party fails to appoint an arbitrator, or if the two arbitrators appointed by the parties fail to agree on the third arbitrator, the appointment going by section 7, shall be made by the "Court", while under section 44, the appointment shall be made by the appointing authority".

Analyses of the Operative Phrase "The Appointing Authority" Under Section 44 of the Act

Section 44 of its own has not offered any definition as regards who or what institution constitutes the "appointing authority". A look at the

interpretation section³³ of the act also reveals nothing as regards the custodian of the role of "an appointing authority". The nearest in solving this problem can be found in section 54, which incidentally has no relevance to appointment of arbitrators, but deals with the application of the New York Convention³⁴ vis-à-vis the recognition and enforcement of foreign award.

Sub-section 2 of section 54 provides that in this part of this Act, "the appointing authority" means Secretary-General of the Permanent Court of Arbitration at the Hague."

How then can one reconcile this sub-section with the provision contained in section 44(6) of the act which provides thus "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".

One cannot but reach the inevitable conclusion that the question of parties "previously designating an appointing authority" would not arise if the Secretary-General is indeed the "appointing authority" as pronounced by Section 54(2) of the act. To designate is to indicate, name, appoint or nominate for duty or office and to this end, the writer is at one with the submission of the late jurist, Hon. Justice Ephraim Akpata JSC, that regarding the Secretary-General as the appointing authority in the face of section 44(6) is inherently contradictory of the sub-section.³⁵

Since the Nigerian arbitration law is also source from the Uncitral Arbitration Rules, one would do well to see what the position of the Rules is, as regards "appointing authority".

Article 6(2) of the Uncitral Arbitration Rules states inter alia... if no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate the "appointing authority".

Stemming from the above, it is clear that under the Uncitral Arbitration Rules, the Secretary-General is not the appointing authority, but at best the authority to appoint the appointing authority in the event of a failure or default. One then wonders why the draftsmen of the ACA had to elevate the position of the Secretary-General to that of an appointing authority.³⁶

The Way Out

In most Arbitration system, deadlock arises when the parties cannot agree on the composition of the arbitral tribunal, though this is rarely the case where the parties have submitted their disputes to arbitration under the auspices of some of the world's major arbitral institutions, such institutions

have their own rules and inherent in these rules are mechanism for resolving the deadlocks. The problems are more apparent in ad hoc arbitration, to this end it is suggested that parties should designate the appointing authority as soon as they have agreed to arbitration, preferably before any dispute arises.³⁷

Arbitration Rules of Some Other Jurisdictions

How other arbitration rules of a number of other countries, professional institutions and arbitral institutions have been able to resolve deadlock, that may arise as a result of the parties inability to appoint a sole arbitrator or as a result of the existing arbitrator's failure to appoint a presiding arbitrator is the next issue to be touched upon in the paper.

By the Uncitral Arbitration Rules, the Secretary General of the Permanent Court of Arbitration at the Hague is the authority to appoint the appointing authority where there is a deadlock. In States adopting the Model Law in International Commercial Arbitration where there is a deadlock in the appointment of arbitrators, the appointing authority is the Court.³⁸ In fact in the first schedule to the Arbitration rules contained in the act, the appointing authority is specifically named as the Court,³⁹ and by virtue of section 57 of the act, a court has been defined to mean the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court.

In England, the (English) Arbitration Act 1950 (as amended) contains provision as regards the appointment of arbitrators in the event that the parties fail to reach consensus on one. For example if two arbitrators are to be appointed, one to be appointed by each party, if a party fails to appoint an arbitrator and the arbitrator's award would be binding on both parties.⁴⁰

Another instance under the English Arbitration Act of 1950 (as amended) is section 10, wherein the court is empowered to appoint arbitrator or umpires, in the event that there is a deadlock in the appointment of arbitrators. The said section further went on to state the various instances where this could occur.

In France, the French Code of Civil Procedure provides for a more straightforward way of resolving this problem, an appointing authority is expressly conferred with the power to appoint an arbitrator, if the need arises. Article 144 of the French Code of Civil Procedure provides that "If after the dispute has arisen, the Constitution of the arbitral tribunal encounters a difficulty due to the acts of one of the parties or with respect to the functioning of the method of appointment, the President of the Tribunal de Grande Instance shall appoint the arbitrator or arbitrators."

The situation in the Netherlands is similar to the French position. In the event of a stalemate, Article 1027 of the Netherlands Arbitration Act 1986,

alludes to the fact that the President of the District Court can be the appointing authority.

In Switzerland, the Court has been named as the appointing authority in the absence of any agreement by the parties as regards the appointment of arbitrators.⁴¹

In the United States, Section 5 of the Federal Arbitration Act 1925 also empowers the Court to designate and appoint arbitrators in the event that the parties are unable to appoint one.

Arbitral Institution

Almost all the major arbitral institutions have provisions in their rules which deal with the appointment of "appointing authorities" or the appointment of arbitrators in the event that a stalemate occurs which results in the parties being unable to appoint arbitrators by themselves.

For instance, under the rules of the London Court of International Arbitration (LCIA), Article 3.2 of the rules empowers the Arbitration Court of the LCIA to appoint arbitrators and such appointment will be made in the name of the Court by the President or any Vice-President of the Court.

Article 6(3) of the Rules of the American Arbitration Association International Rules allows the Administrator of the Association to appoint arbitrators and also designate the presiding arbitrators, if parties have not been able to mutually agree on a procedure for appointing the arbitrators.

Under the rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce — Paris, the position is similar to that of the LCIA, more particularly Article 2(3) and (4) provide that the Arbitration Court of the ICC shall appoint the arbitrators in the event of a deadlock.

A look at the Arbitration Rules of the Lagos Regional Centre for International Commercial Arbitration would reveal a very curious situation.

In one part of the Arbitration Rules i.e. Part II, Rule (3)(a), it provides that "unless the parties have agreed otherwise or if the appointing authority designated refused to act or fails to appoint the arbitrator, the Centre shall be the appointing authority for the purpose of the Uncitral Arbitration Rules and these Rules" — the simple meaning of the above provision is that in the event that parties are unable to agree on an appointing authority or an already appointed "appointing authority" fails to act, then the Centre assumes the role of appointing authority. Be that as it may, in another part of the Rules, more particularly Article 6(2) provides amongst other things that "... If no appointing arbitrator has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request then, either party may request the Secretary-General of the Permanent Court of

Arbitration at the Hague to designate an appointing authority" — the meaning to be deduced here is that in the event that parties are unable to agree on an appointing authority or an already appointed "appointing authority" fails to act, then a party may request that the Secretary-General names an appointing authority. Article 7(2)(a) also confers a similar duty on the Secretary-General. The question that thus agitates the mind is that if the Centre has been named as the appointing authority under the rules in the event of a deadlock, why then should the same rule empower the Secretary-General of the Permanent Court of Arbitration at the Hague as the authority to appoint the authority to name the appointing authority, this to the writer appears to be superfluous.

Qualification for Appointment as Arbitrators

Any natural person may be chosen as an arbitrator, the appointment of an arbitrator is a contract between the parties to the reference on the one hand and the arbitrators on the other. So the general rule is that a person cannot be appointed an arbitrator who suffers from any legal disability,⁴² such as minority,⁴³ and insanity.

There are various criteria to be considered in the appointment of Arbitrators, for ease of understanding the writer intends to treat some of the criteria under two sub-heads namely: Impartiality and Independence of Arbitrators and secondly other relevant consideration.

Impartiality and Independence of Arbitrators

Most arbitration rules usually provide that the Court or any other appointing authority in exercising its power of appointment shall have due regard to any qualification 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.⁴⁴

It is fundamental that an arbitrator must be and remain impartial and independent. The requirement of impartiality and independence is emphasised by the provisions of most Arbitration Rules, for instance the Uncitral Arbitration rules, provide for the challenge of an arbitrator's award, if circumstances exist which give rise to justifiable doubt as to the arbitrator's impartiality or independence.⁴⁵

The ICC Rules provide for the challenge of an arbitrator for lack of independence or otherwise.⁴⁶ The LCIA Rules specify that all members of the arbitral tribunal must remain independent and impartial and may not act as advocates of the parties.⁴⁷

The degree of bias might range from covert sympathy with the appointing party (which would be impossible to prove) to the overt taking

of instructions from the appointing party (which if discovered would be a ground for disqualification).⁴⁸

The concept of "partiality" arises when the arbitrator shows a bias either in favour of one of the parties or in relation to the issues in dispute, on the other hand the concept of "dependence" is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties whether financial or otherwise.⁴⁹

Grounds upon which a person can be disqualified from being appointed an Arbitrator:⁵⁰

A person is incompetent to act as an arbitrator on any of the following grounds:

- (a) If he shows interest in the subject matter of the dispute or becomes biased.
- (b) If he has any ill-feeling towards one of the parties.
- (c) If he has any secret interest in the subject matter.
- (d) If a person is indebted to one of the parties.
- (e) If the arbitrator shows any prejudice against any of the parties.
- (f) If there are circumstances which would suggest that the relationship between the arbitrator and a party to the reference is strained, for example, if there is any litigation between the arbitrator and any of the parties.
- (g) If corrupt receipt of money is obtained by the arbitrators from any of the parties.

It should be noted that it is not sufficient to prove bias by showing without more, that —

- (a) An arbitrator will decide questions as to his own.
- (b) An arbitrator will in substance be a judge in his own case.
- (c) An arbitrator has expressed his opinion on the matter in dispute.
- (d) Where a contract provides for the reference of a dispute to a named lawyer, it will not be a valid objection for the arbitrator that such lawyer is appointed by a solicitor of one of the parties in his professional capacity.

Disclosure

Incidental to the requirement of impartiality and independence is the duty of disclosure on the part of the proposed arbitrator to disclose all facts which could conceivably be considered to be grounds for disqualification, if no objection is made by the other party, rather he proceeds with the reference without any protest, a subsequent challenge during or after the proceedings would be unsuccessful.

Communication with the Parties

An independent and impartial arbitrator must not engage in any ex parte communication with the parties regarding the merit of the case during the course of the proceedings.⁵¹ Certain rules have been suggested which regulates communication between parties and arbitrator:⁵²

1. Neither party should engage in any verbal communication with the proposed arbitrator except in the presence of the other party.
2. Telephone messages should only be relayed through the arbitrator's Secretary.
3. Each party should immediately send a copy of any written communication with the arbitrator to the other party.

As regards the impartiality and independence of the potential arbitrators, the arbitrator should have no interest directly or indirectly or even remotely in the subject matter of disputes or in the parties. The interest in order to affect the appointment must not be remote or contingent or it must not possibly affect the mind or the action of the arbitrator.⁵³

Other Considerations

1. **Nationality:** Ordinarily, the nationality of a sole arbitrator, or of the presiding arbitrator, should be irrelevant and what should count is the qualification, experience and integrity of the proposed arbitrator. Nevertheless a number of Arbitration Rules have incorporated the practice of appointing a sole arbitrator or presiding arbitrator of a different nationality from that of the parties to the dispute. For instance section 44(4) of the act provides amongst others that "the appointing authority shall take into account the advisability of appointing an arbitrator of a nationality other than the nationality of the parties." It must however be noted that sub-section (10) provides that except otherwise agreed by the parties, no person shall be disqualified from being appointed as an arbitrator by reason of his nationality. Under the ICC Rules⁵⁴ and the LCIA rules,⁵⁵ there are provisions which stipulate that the sole arbitrator or presiding arbitrator should be chosen from a country other than the countries of the parties. It should be noted however that this general rule is subject to the objection of parties if mutually agreed.

Although the aim of choosing an umpire belonging to a different country from that of the parties is to guarantee the impartiality and independence of the Arbitral tribunal, it has however been noticed that this practice may be counter productive.⁵⁶ For instance, in a

dispute between a Swiss Company and a French Company, where the law applicable to the dispute is the law of Switzerland, it seems sensible that the person chosen as the sole or presiding arbitrator should be a Swiss lawyer, yet the insistence on a so-called "neutral" nationality ensures that the one person who cannot be chosen (unless otherwise agreed by the parties) is a Swiss lawyer.

2. **"Mutual Agreement of the Parties"** — Parties may agree on the kind of arbitrator to be chosen in the event of a dispute arising. In particular, parties may stipulate in the contract that only persons "engaged or who have been engaged in the trade" may be chosen as arbitrators. It has been argued earlier on in the paper that it is unwise to make an advance determination of any specific qualification which should be possessed by an arbitrator, rather the choice should be made when a dispute has arisen.⁵⁷
3. **Restriction imposed by the applicable law** — the applicable law governing the arbitration system may stipulate that for a particular type of dispute, a particular choice of arbitrator should be made. For instance where a dispute is of a legal nature, the law may stipulate that a lawyer must be appointed as arbitrator.⁵⁸ The merit of this is to ensure that a round peg is put in a round hole i.e. Experts are to be put on the job.
4. **Professional Qualifications i.e. Education and Training** — It is usual to appoint as arbitrators, persons experienced in the law and practice of arbitration especially when it involves the appointment of a sole arbitrator, where the arbitral tribunal is to consist of three arbitrators it is sufficient that at least one member of the tribunal should be a lawyer. In fact most Arbitral institutions maintain a list of people experienced in arbitration from which the arbitrators may be selected and the list usually contains seasoned lawyers, retired jurists and university professors of law.
5. **Experience and Exposure** — Closely related to the qualification above, is the Experience and Exposure of the proposed arbitrator in the practice of the arbitration system, especially as regards International Commercial Arbitration.

An arbitrator must always up-date himself to meet up with the modern trends in International Trade and must also have a grasp of the principles of International Law.
6. **Language** — It is desirable that an arbitrator has an adequate working knowledge of the language in which the arbitration is to take

place, this is to obviate the necessity of having to engage an interpreter. Translating oral evidence accurately into another language is a very difficult task and it may lead to a misrepresentation of the evidence. Also the cost of engaging an interpreter might add considerably to the expense of the arbitral proceedings.

Conclusion

The focus of the paper has been an analysis of the law and practice relating to the appointment of the Arbitrator and Arbitral tribunals. Unlike, the court system, where the appointment of the judge is determined by the State, the arbitrator's appointment is derived from a complex amalgam of a host of influences such as the act of the parties (which is primary), the Arbitration agreement (which is contractual), Arbitral laws and rules of arbitral institutions (where applicable).

The paper also dealt with the "quantity and quality" of the arbitrators to be appointed, quantity as regards the number of arbitrator to be appointed and quality as regards the qualification and kind of persons to be so appointed as arbitrators. The paper also discussed the various ways and procedures whereby an arbitrator could be appointed.

The paper further proffered solution for resolving deadlock that may arise in the appointment of an arbitrator or arbitral tribunal as the case may be.

Finally, a comparative study of how the various arbitral rules of some other jurisdictions and arbitral institutions have eliminated the deadlock that may arise in the choice of an arbitrator was made.

NOTES

1. Robert Morgan, An Introduction to the Law and Practice of Arbitration in Scotland, Published in the Scottish Law Gazette September 1992.
2. Imam Wilson, The Nigerian Courts and International Arbitrations, Published in Modern Practice Journal of Finance and Investment Law Vol. 3 No. 3 1999 p. 618
3. Halsbury's Law of England 4th Edition Vol. 2, Paragraph 521.
4. Section 32 (English) Arbitration Act 1950
5. (1858) 28 LJ Ch 184.
6. Section 54(1) ACA 1990 LFN
7. Simon J. A. Toosoon, Organising and Administering on Arbitration — Are the lawyers getting the right perspective? Published in the Journal of the Chartered Institute of Arbitrators, May 1993.

8. The rules are similar to the UNCITRAL Rules of 1976 with necessary modification and adaptation.
9. Op. cit Note 7
10. Ibid
11. Op. cit Note 4
12. Section 1, ACA 1990 (Cap 19) LFN
13. Op. cit Note 1
14. Op. cit Note 12
15. Op. cit Note 7
16. For example: The drawing up of Valuation Reports by Estate Valuers
17. Op. cit Note 1
18. Art 5, Arbitration Rules issued under the auspices of the Lagos Regional Centre for International Commercial Arbitration.
19. Art. 2 Paragraph 5 of the 1988 International Chambers (ICC) Rules of Conciliation and Arbitration.
20. London Court of International Arbitration.
21. Section 7(1)
22. Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (2nd Ed. 1991) p. 207 Pub. by London Sweet & Maxwell.
23. For example, a person may have been designated in advance as an arbitrator because of his knowledge of a particular trade or profession, when a dispute eventually arises it may turn on a question of law, on which the award of a lawyer would be preferable to that of a commercial man.
24. Op. cit Note 22.
25. Section 7(2) (a) (i)
26. Op. cit Note 22
27. Section 7(2) (b)
28. Sections 7(4) & (5)
29. Art. 2, 2.4 and 3 of the ICC Rules
30. Op. cit Note 18, Part II Rule (3)
31. Op. cit Note 22 pg. 207
32. Section 57
33. The New York Convention is contained in the 2nd Schedule of the Act.
34. Ephraim Akpata, The Nigerian Arbitration Law in focus 1977 p. 109 Pub. West African Book Publishers Ltd., Lagos.
35. Sc 54(2)
36. Minabere Idu-George; International Commercial Arbitration 1996, pg. 144 Pub. by Sbctiden Book Company, New Delhi.
37. Art 6 & 11 of the Model Law

38. Art. 6 & 7

39. Section 7 (English) Arbitration Act 1950 — note however that the High Court may set aside an appointment made in pursuance of this section.

40. Art. 179.2 Switzerland Private International Law Act 1987.

41. Roy Chowdhury and Saharay, *Arbitration* (1979) p. 105 Pub. by Eastern Law House, Calcutta.

42. Some legal systems may not insist upon legal capacity e.g. the controversy as to whether or not an infant may be appointed an arbitrator under English Law — see also Alan Redfern and Martin Hunter (*Supra*) pg. 213.

43. Section 7

44. Art. 10

45. Art. 2 (8)

46. *Op. cit* Note 22 pg. 219

47. *Ibid* pg. 220

48. *Op. cit* Note 41 pps 106 - 107

49. *Op. cit* Note 22 pg. 224

50. *Op. cit* Note 7

51. *Op. cit* Note 41, pg. 108.

52. Art 2.6

53. Art 3.3

54. *Op. cit* Note 22 pg. 224

55. *Op. cit* Note 2.3

56. This is the position in Spain. See also *Arbitration Law in Europe* (1981) ICC Publication No. 353 p. 113, 119.