Due process paranoia in arbitral proceedings: Myth or reality?

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by

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Abstract

Arbitration is a means of resolving disputes pursuant to an arbitration agreement. It is driven essentially by the "principle of party autonomy" under which the parties are free to agree on how the arbitral proceedings are to be conducted subject to mandatory legal provisions. The arbitral tribunal is duty bound to maintain a delicate balance between the parties, ensure procedural fairness and publish a legally enforceable award. Any infraction of this duty may lead to applications made to court to challenge the award. This creates apprehension, anxiety and fear in the mind of the arbitrator – due process paranoia. Is the paranoia real or imaginary?

1.0 Introduction

Arbitration is a means of resolving disputes pursuant to an arbitration agreement. One main principle that drives the agreement is the "principle of party autonomy" under which the parties are free to agree on how the arbitral proceedings are to be conducted subject to mandatory legal provisions.[2] It is also in exercise of this power that the parties constitute the arbitral tribunal to resolve their dispute.[3] Thus, the arbitral tribunal derives its powers from law, rules and the agreement of the parties. Where the parties belong to the same professional bodies, the rules of the bodies may also bind the parties.[4] Arbitral proceedings are guided by the principle of natural justice – hear the other side and give the parties equal opportunities to present their cases.[5] This means

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[2] For instance, parties are at liberty to choose rules of procedure applicable to the arbitral proceedings. Also, they are free to choose the number of arbitrators that constitute the arbitral tribunal and whether there would be an umpire or chairman. Further, the parties may decide determine the place and language of the arbitration; see United Kingdom Arbitration Act 1996, s 15(1) (hereinafter referred to as "the UKAA"); Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004, ss 16(1) and 18(1) (hereinafter referred to as "the ACA"). The ACA was initially promulgated as Decree No 10 of 1988. It contains the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976 (hereinafter referred to as "the Arbitration Rules 1976"); and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 (hereinafter referred to as the "New York Convention" or the "Convention") in its First and Second schedules respectively; United Nations Commission on International Trade Law (UNCITRAL) Model Law 1985, art 19(1) (hereinafter referred to as "the UNCITRAL Model Law 1985") and; International Chamber of Commerce (ICC) Rules of Arbitration, art 21 (hereinafter referred to as "the ICC Rules).

[3] See for example, UKAA, ss15 and 16; Malaysian Arbitration Act 2005, s 12; ACA, s 6 and; UNCITRAL Model Law 1985, art 10.

[4] Society of Maritime Arbitration Rules 2019, s 1.

[5] UKAA, s 33; ACA, s 14.

that the arbitral tribunal is duty bound to maintain a delicate balance between the parties in the course of the arbitral proceedings. Failure to do so may result in the award being challenged. Also, where a person who is approached to become an arbitrator, knows of any circumstances that may likely give rise to any justifiable doubts as to their impartiality and independence, they must immediately disclose such circumstances.[6] Where they fail to make such disclosure and proceed with the arbitration, the ensuing award may be challenged. The duty to disclose exists before, in the course of the arbitral proceedings and sometimes beyond – up till when there may be request for additional award or correction of award.

Another area where an arbitral award may be challenged is in the production or discovery of documents. Under domestic arbitration, there is always the possibility of an opposing party requesting the other party to produce certain documents related to the hearing. In the case of international arbitration, there is the International Bar Association Rules on Taking Evidence in International Arbitration, 2010 (IBA Rules), where there are provisions for discovery and production of documents under certain circumstances.[7] Failure to disclose may be interpreted as denial of fair hearing or that the production will be adverse to the interest of that party. Sometimes, it is difficult to draw a clear line between genuine procedural violation and dilatory actions based on simple infractions.

One of the reasons that parties resort to arbitration is informality, flexibility and speed. Although, the issue of costs of arbitration is debatable, it is also a reason for choosing to arbitrate disputes.[8] Paradoxically, where parties agree to settle by arbitration, there is an implied undertaking that they will respect the final award without delay,[9] while there is a duty on the arbitrator to write and publish a legally enforceable award. For some arbitrators, this necessarily entails upholding due process by employing their best endeavours to ensure that parties can present their case how they want to. [10] Thus, in performing this duty, the arbitrator has to consider any applications by the parties, whether for adjournment to amend pleadings or; extra time to respond to submission for costs, bearing in mind, the requirement to treat the parties equally and afford them enough opportunity to present their individual cases. In essence, the arbitrator must be able to strike a balance between the duty to write and publish a legally enforceable award and the duty to deal fairly in the conduct of arbitral proceedings.

Unfortunately, the possibility that an award may be challenged creates fear and apprehension in the minds of arbitrators. As a result, while conducting the arbitral proceedings, the tribunal is often mindful of these obligations to the parties as well as the possibility of court action to set aside the award or remit the award or declare the award to be of no effect, in whole or in part or to refuse

[6] ACA, s 8.
[7] International Bar Association Rules 2010, art 3(hereinafter referred to as "the IBA Rules") <www.ibanet.org> accessed 24 July 2020.
[8] However, arbitration is now seen as costly and, a first step to litigation due to frequent applications to court.
[9]See the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2013, art 34(2) (hereinafter referred to as "the Arbitration Rules 2013") and the Arbitration Rules 1976, art 32(2); see also the ICC Rules, art 35(6).
[10]Klaus Peter Berger and J. Ole Jensen, 'Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators' (2016) 32 Arbitration International 415, 420.

recognition or enforcement of the award or to challenge the jurisdiction of the arbitral tribunal. These concerns, lead to baseless or excessive suspicion of the motives of the parties when they make certain applications before the arbitral tribunal – the "due process paranoia" – fear and anxiety that arises from the belief that the tribunal may be challenged where they fail to pander to the whims and caprices of a mischievous party or parties who are abusing due process rights. This raises questions as to whether due process paranoia is a myth or a reality. Accordingly, the article will examine the phenomenon against the backdrop of national arbitration laws, arbitration rules, conventions and decided cases with a view to determining if indeed it exists. It will then proffer recommendations as appropriate.

2.0 Due Process Paranoia in Arbitral Proceedings

Most arbitration legislation and rules confer the tribunal with discretion to carry out the arbitral proceedings in the manner they consider fit.[11] However, this discretion is subject to the due process rights of the parties.[12] As parties may have peculiar needs and varying requests in the course of proceedings, it means the tribunal may find that it constantly has to exercise this discretion.[13] Very frequently, such requests may require an interruption of the timelines drawn up for the proceedings.[14] Requests may include, an application for extension of a deadline, request to amend pleadings, late introduction of a new claim, an application to file witness statements out of time, amongst others.[15] Whatever the request, arbitrators are often put in an awkward situation because they must ensure that they fulfil the duty to ensure efficient disposal of the proceedings while satisfying the obligation of granting the parties their due process rights.[16] This awkwardness is said to leave arbitrators confused and even apprehensive, because whichever duty they elect to sacrifice on the altar of the other, there would be consequences. This situation gives rise to due process paranoia.

The phrase, "due process paranoia" has been aptly described as 'a reluctance by tribunals to act decisively in certain conditions for *fear* of the arbitral tribunal being challenged on the basis of a party not having had the chance to present its case fully'.[17] The operative word is "fear". The word has been in existence from biblical times and the term "fear not" is used in the Holy Bible 365 times – ironically equivalent to a year.[18] As no arbitrator wants to render an award that will be invalidated by the court, this fear means that the tribunal is apprehensive of the extent of judicial intervention - will the court set aside or remit or refuse to enforce the award if the respondent's

[11] The parties may however agree otherwise; see for instance the ACA; the UKAA; Indian Arbitration and Conciliation Act (IACA) 1996, hereinafter referred to as "the IACA"; Arbitration Rules 1976; Arbitration Rules 2013 and; the ICC Rules.
[12] Berger and Jensen, (n 10) 419.
[13] Ibid 419
[14] Ibid 419
[15] Ibid 419
[16] Ibid 419.
[17] Queen Mary University and White and Case, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' 10 <http://www.arbitration.qmul.ac.uk/research/2015/> accessed 24 July 2020.
[18] See Isaiah 41:10, Isaiah 43:1, Joshua 1:9, 2 Timothy 1:7, John 14:27, Matthew 6:34, Psalm 27:1, Psalm 23:4, Psalm 34:4, Psalm 94:19, Psalm 103:17, Psalm 112:1, Psalm 115:11, Psalm 118:7, Romans 8:38-39 and Deuteronomy 31:6; see generally 'Fear Bible Verses' <https://www.biblestudytools.com/topical-verses/fear-bible-verses/> accessed 30 July 2020.

application for extension of time to reply the submission on costs is denied, even though an extension has been granted twice already? Will the refusal of the respondent's third request for adjournment amount to misconduct or serious irregularity even though they may be trying to thwart the arbitral process? Where these sort of questions weigh on the mind of arbitrators, the perception is that it results in excessive caution on the part of the arbitrator which could affect efficiency in the management of the proceedings, that is, speed and costs.[19] As such, the issue of due process paranoia is progressively gaining recognition.[20]

Similarly, due process paranoia is said to arise from certain concerns of the arbitrator. First, the arbitrator may be overly cautious in the conduct of arbitral proceedings because they consider it more cost efficient to grant what orders they consider fair and appropriate in the circumstances of the case and have the proceedings prolonged as a result, than have the parties re-litigate the dispute and incur additional costs because the award is set-aside or refused enforcement.[21] Second, the applicable rules mandate arbitrators to make certain orders,[22] and to avoid falling foul of these rules and risking invalidation of the ensuing award, the arbitrators comply even where it is not the reasonable thing to do take in the circumstances, thereby protracting proceedings. [23] Third, is the desire to protect the arbitrator's market reputation.[24] It goes without saying that an arbitrator whose awards are constantly set-aside or refused enforcement may struggle to get work in the future. Whatever the case, the common thread is the fear of having the award set-aside, refused enforcement or remitted. It is against this backdrop that the next section outlines legal basis upon which the courts may invalidate an award where parties have not been afforded their due process rights.

3.0 Legal Safeguards for Due Process and Procedural Fairness in Arbitral Proceedings

Due process is a crucial part of arbitration.[25] In the words of Lord Denning

> 'So by 'due process of law' I mean the measures authorized by the law so as to keep the streams of justice pure: to see that trials and inquiries are fairly conducted; that arrests and searches are properly made, that lawful remedies are readily available; and that unnecessary delays are eliminated. It is in these matters that the common law has shown its undoubted genius.'[26]

[19] Remy Gerbay, 'Due Process Paranoia' (6 June 2016) <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/>accessed 2 August 2020.
[20]Leon Kopecky and Victoria Pernt 'A Bid for Strong Arbitrators' (15 April 2016) <http://arbitrationblog.kluwerarbitration.com/2016/04/15/a-bid-for-strong-arbitrator/<accessed2 August 2020>.
[21] Gerbay (n 19).
[22] Berger and Jensen (n 10) 415.
[23] Ibid.
[24] Gerbay (n 19).
[25] Jasmine Feng and Benjamin Teo, 'Judicial Support against Due Process Paranoia in Arbitral Proceedings' (16 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/16/>accessed 3 August 2020.
[26] Lord Denning *The Due Process of Law* (Butterworths 1985) v

It protects the parties from unfairness, circumscribes the tribunal's exercise of jurisdiction and ensures that all parties are afforded adequate opportunity to state their case. [27] Other than the agreement of the parties, arbitration conventions, laws and rules provide safeguards to ensure that there is procedural fairness in the conduct of arbitral proceedings. These instruments require fairness and equal treatment of the parties in the conduct of arbitral proceedings and also, provide grounds for the challenge of arbitral awards where unfairness or breach of due process rights by the arbitrator is alleged. Thus, they provide the legal basis for due process and procedural fairness in arbitral proceedings. Some of these instruments are discussed below:

3.1 The Arbitration Laws and Conventions

1) The United Nations Commission on International Trade Law (UNCITRAL) Model Law 2006

   The United Nations Commission on International Trade Law (UNCITRAL) Model Law 2006 (UNCITRAL Model Law) is an upgrade from the 1985 version. [28] It serves as a guide for countries in crafting their domestic arbitration law. It aims to harmonise international economic relationships between countries with varying legal, social and economic backgrounds with a view to facilitate settlement of disputes in international trade.[29] The Model Law has been adopted by many countries. Article 18 of the Model Law, imposes a duty on arbitral tribunals to treat each party equally and give them full opportunity to present their case.[30] Such duty entails *inter alia* allowing applications and granting requests of parties as is necessary to satisfy the principles of fair hearing and meet the justice of the case. Failure to do so may result in the set-aside of the ensuing award as provided by article 34(2)(iii) of the Model Law or refusal of recognition and enforcement under article 36(1)(ii). The duty to be fair also means disclosing any circumstances that may give rise to any justifiable doubts as to the arbitrator's impartiality or independence.[31] Under article 12, the arbitrator is required to make such a disclosure at the time the offer to arbitrate is made to them.[32] The duty subsists throughout the proceedings,[33]and in some cases beyond. Failure to make such a disclosure is subject to challenge.[34]

[27] Ibid.
[28]The UNCITRAL Model Law 1985 was revised in 2006.The revision made was with respect to the form of the arbitration agreement and interim measures. These amendments were the subject of due deliberation and extensive consultations with Governments and interested circles. The ACA does not incorporate these amendments as it is based on the 1985 Model Law.
[29] UNCITRAL Model Law, first preamble.
[30] UNCITRAL Model Law, art 18.
[31] UNCITRAL Model Law, art 12(1).
[32] UNCITRAL Model Law, art 12(1).
[33] UNCITRAL, Model Law, art 12(1).
[34] UNCITRAL, Model Law, art 12(2).

2) The Nigerian Arbitration and Conciliation Act (ACA) 1988

The Nigerian Arbitration and Conciliation Act (ACA) 1988 is modelled after the UNCITRAL Model Law 1985 (which was amended in 2006 with slight variations). The ACA mandates arbitral tribunal to observe the principles of natural justice in the conduct of proceedings by ensuring that both parties are treated equally and fairly. This obligation is captured in section 14 which provides that, '… the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.' This duty is reinforced by section 15(2) which vests in the tribunal, the powers to conduct the arbitral proceedings in the way it deems appropriate to ensure fair hearing. The powers conferred on the tribunal to carry out this duty is wide as it includes the power to determine the admissibility, relevance, materiality and weight of any evidence placed before it.[35]

The duty under section 14 means *inter alia* that the tribunal must not be involved in misconduct in any form as this could result in the set aside of the ensuing award. To be precise, section 30(1) of the ACA states that, 'where an arbitrator has 'misconducted' himself or where the arbitral proceedings, or award, has been improperly procured, the court may on the application of a party set aside the award.' Although the Act does not define the word misconduct, it has been held to include infraction of the right to fair hearing, exceeding of authority, inconsistent or ambiguous awards and irregularity in the proceedings, amongst others.[36] Thus, denying the party enough opportunity to state their case is misconduct which may result in a set aside. In international arbitration conducted pursuant to the ACA, the award can also be set aside under section 48(a)(iii) for the same reason. Further, a court may further to section 52(2)(a)(iii), refuse to recognize and enforce an award where the applicant proves that they were not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to state their case.

As part of the duty to be fair, section 8(1) requires an arbitrator to ensure that they immediately disclose any circumstances likely to give rise to any justifiable doubts as to their impartiality or independence when approached to arbitrate in a matter. The duty subsists throughout the before and throughout proceedings,[37]and in some cases beyond. Failure to make such a disclosure is subject to challenge.[38] This provision is impair materia with article 12 of the UNCITRAL Model Law.

[35] ACA, art 15(3).
[36] *Taylor Woodrow (Nig.) Ltd v S.E. GMBH Ltd* (1993) 4 NWLR (Pt 286) 127.
[37] ACA, art 8(2).
[38] ACA, art 8(3)(a).

3) The United Kingdom Arbitration Act 1996

The United Kingdom Arbitration Act (UKAA) 1996 also incorporates provisions to promote procedural fairness. As with the ACA, section 33 of the UKAA mandates the tribunal to be fair and afford each party the opportunity to make their arguments. Under section 68, an award may be challenged on the ground of "serious irregularity" (misconduct) affecting the tribunal, the proceedings or the award. Such serious irregularity includes inter alia, failure by the tribunal to be fair and give each party reasonable chance of presenting their case;[39] the tribunal exceeding its powers;[40] failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties and;[41] failure by the tribunal to deal with all the issues that were put to it.[42] Where serious irregularity is proven, the court may remit the award to the tribunal, set it aside or declare the award to be of no effect.[43] It must be stated that the UKAA enjoins tribunals to avoid unnecessary delay or expense as part of the duty to be fair.[44]

4) The Indian Arbitration and Conciliation Act 1996

The Indian Arbitration and Conciliation Act (IACA) 1996 makes provisions for the application of the principles of natural justice in the conduct of arbitral proceedings. As with, the Nigerian ACA, the IACA is reflective of the UNCITRAL Model Law 1985. Therefore, sections 18 and 48(1)(b) of the IACA are *in pari materia* with sections 14 and 48(a)(iii) of the ACA, respectively.

5) The Australian International Arbitration Act 1974

The Australian International Arbitration Act (IAA) 1974 (as amended in 2011) incorporates the UNCITRAL Model Law 2006 and, elaborates upon its provisions.[45] As with its counterparts, it places a duty on tribunals to observe the principles of natural justice in deciding cases. For instance, it provides in 18C that, 'for the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case. afford parties enough opportunity to make their arguments.' Also, further to article 12 of the Model Law which provides for disclosure in cases where there may be justifiable doubts, the IAA provides that, 'there are justifiable doubts as to the impartiality

[39] UKAA, 68(2)(a) and 33(1).
[40] UKAA art, 68(2)(b).
[41] UKAA art, 68(2)(c).
[42] UKAA art, 68(2)(d).
[43] UKAA art, 68(3).
[44] ACA, art 33(1)(b).
[45] The Australian International Arbitration Act, 1974, as amended up to No. 5 of 2011; by the provisions of Schedule 2 to the 1974 Act, the UNCITRAL Model Law has force of law in Australia for international arbitration. However, there is a Commercial Arbitration Act, 2010 for the various states regulating domestic arbitration.

or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration'.[46]

6) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, deals with the enforcement, in the courts of one State, of an award issued in another State. It provides a framework for addressing the enforcement difficulties caused by dissimilarities between different legal systems which otherwise impedes the smooth flow of international commercial transactions.[47] Like the legislation discussed above, the Convention provides safeguards to ensure that procedural fairness is applied in the conduct of arbitral proceedings. Therefore, where enforcement is sought under the Convention, the courts may refuse to recognise and enforce the award under article V(1)(b) of the Convention, where it is shown that the party against whom the award is to be enforced was not given the opportunity to make their case during the proceedings giving rise to the award.

3.2 The Arbitration Rules

1) The UNCITRAL Arbitration Rules 2013

As with domestic arbitration laws and international conventions, the UNCITRAL Arbitration Rules 2013, require equality in the treatment of parties during arbitral proceedings. Article 17(1) of the Arbitration Rules 2013,[48] provide that, 'the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.' Under article 17(2) the tribunal, as soon as composed, is mandated to set a provisional timetable for the arbitration. It also has powers to, 'extend or abridge any period of time prescribed under these Rules or agreed by the parties'. Essentially, the Rules confer the tribunal with wide discretion and powers in the conduct of proceedings. This includes determining what orders and grants are necessary, and within what time limits. In the exercise of this discretion, the tribunal must ensure that the principles of natural justice are not breached. Also, article 11 of the Rules is reflective of section 8 of the ACA which deals with impartiality and independence of arbitrators.

[46] IAA, art 18A
[47] M.B. Holmes, 'Enforcement of Annulled Arbitral Awards: Logical Fallacies and Fictional Systems' (2013) 79 Arbitration 244.
[48] Arbitration Rules 2013, art 17(1)

2) The UNCITRAL Arbitration Rules 1976 (Arbitration Rules of the ACA)

Similarly, the UNCITRAL Arbitration Rules 1976 highlights the duty on the arbitrator to be impartial and independent in conducting the arbitral proceedings. Under article 10(1) of the Rules, an arbitrator may be challenged where circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

3) The International Bar Association (IBA) Rules, 2010

As mentioned above, the tribunal has wide powers and discretion conferred on it by the agreement, the applicable laws and rules. One of such powers relates to the production of documents. For instance, under article 3 of the International Bar Association (IBA)Rules, the tribunal has to powers to order parties to produce documents provisions and within a specified time limit. Within the deadline specified by the tribunal, parties are mandated to, 'submit to the arbitral tribunal and to the other parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another party.'[49] Also, article 9(1) empowers the tribunal, 'to determine the admissibility, relevance, materiality and weight of evidence tendered by the parties'. Further, article 9(5) provides that where a party, without satisfactory explanation and without previous objection to the production of a document requested, fails to produce the document, the tribunal may conclude that such document would be unfavourable to that party's case.[50]

4) The International Chamber of Commerce (ICC) Rules 2017

To ensure fairness, the International Chamber of Commerce (ICC) Rules 2017 provide for disclosure where there are circumstances that may call into question the impartiality and independence of the arbitrator.[51] They also provide for arbitrator challenge and the procedure for same, where there is an allegation of bias. Accordingly, article 14(1) of the ICC Rules provides that, 'a challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.' Also, where the Rules are silent on the modalities for dealing with a given matter arising in the course of the proceedings, article 42 requires the court and the arbitral tribunal to act in the spirit of the Rules and make every effort to ensure that the award is enforceable in law.

[49] IBA Rules, art 3(1).
[50] IBA Rules, art 9(5).
[51] ICC Rules, art 11(2) and (3).

5) The London Court of International Arbitration Rules (LCIA) 2014

The London Court of International Arbitration Rules (LCIA) 2014 also stresses the duty on arbitrators to be impartial and independent and to make disclosure where justifiable doubts exist. [52] A breach of this duty may lead to a challenge and subsequent revocation of the arbitrator's appointment by the court.[53] Under article 32.2, all participants in the process, including the tribunal are to, 'act at all times in good faith, respecting the spirit of the arbitration agreement, and shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat'.

6) The International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules 2006

In order to ensure that parties have adequate opportunity to present their case, the International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules 2006[54] makes allowances where parties comply with the tribunal's directions outside the specified time limit, unless the tribunal decides otherwise. Accordingly, rule 26(3) provides that, 'any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in *special circumstances* and after giving the other party an opportunity of stating its views, decides otherwise…'[55] As with, the IBA Rules, the ICSID Arbitration Rules, 2006 also empowers tribunal to order the production of documents. It can also order the production of witnesses and experts.[56] Under 34(3) of the ICSID Arbitration Rules, parties are required to cooperate with the tribunal where order for production is made. The tribunal is also required to take formal note of any failures by the parties to comply with its order to produce.

7) The Singapore International Arbitration Centre (SIAC) Rules 2016

Like the ICC Rules, rule 41.2 of the Singapore International Arbitration Centre (SIAC) Rules 2016[57] requires the tribunal to act in the spirit of the Rules when dealing with matters

[52] Hereinafter referred to as "the LCIA Rules".
[53] LCIA Rules, art 10.1.
[54] Hereinafter referred to as "the ICSID Arbitration Rules".
[55]Emphasis added; in *Pezold/Border Timers v Zimbabwe* (ICSID Case No. ARB/10/15, Award, 28 July 2015); the respondent raised certain jurisdictional challenges and new defences after the set time limit had elapsed and also, submitted that retaining an external counsel at a late date is sufficient to justify a finding of "special circumstances" within this rule. The tribunal found that "special circumstances" existed because the claimant's delay in bring ancillary claims partly caused the problem but that, 'the issue is not the respondent's right to be heard, but rather the parties equal right to due process and fair procedure, which includes respect for the time limits fixed by the tribunal for each step in the proceedings'; see also *Abaclat v Argentina* (ICSID Case No. ARB/07/05 , 4 February 2014), where the respondent's request for file a rejoinder was rejected by the tribunal as it was inappropriate. However, in *Glamis Gold v USA* (UNCITRAL), Award, 8 June 2009, in applying article 24 of the UNCITRAL Arbitral Rules, the tribunal extended the document production period due to the extensive nature of the document production process and the desire to have evidence available to the parties prior to their memorial submissions.
[56] ICSID Arbitration Rules, r 34(2)(a).
[57] Hereinafter referred to as "the SIAC Rules".

arising during arbitral proceedings, which are not covered by the Rule. Further, it stresses the tribunal's duty to ensure fairness, speed and economy in the conduct of the arbitration. [58] In order to ensure that arbitrators deal fairly, the Rules also provide in rule 14.1 for a challenge where justifiable doubts exist as to their impartiality or independence.

8) The American Arbitration Association (AAA) Rules 2013

Pursuant to the duty to be fair to the parties, rule 18(a) of the American Arbitration Association (AAA) Rules, 2013[59] require the arbitrator to be independent and impartial in the conduct of proceedings. Under rule 18(a)(i), an arbitrator that falls short of this requirement will be disqualified.

9) The Japan Commercial Arbitration (JCA) Rules 2019

The Japan Commercial Arbitration Rules (JCA) 2019 also emphasizes the obligation on arbitrators to be impartial and independent in the conduct of arbitral proceedings. [60] Article 24 of the Rules state that, 'a person who is not impartial and independent shall decline to accept an appointment as an arbitrator or make a disclosure and that an arbitrator shall be, and remain at all times, impartial and independent during the arbitral proceedings.'

From the foregoing, it is evident that there are ample arbitral instruments that not only ensure that there is procedural fairness in arbitral proceedings, but also ensure that tribunals and their awards are adequately protected when they seek to do justice between the parties by exercising their wide discretion. Thus, this raises the questions - why should arbitrators be apprehensive of the reaction of the parties or courts to their awards? Is there reasonable justification for such apprehension in practice? Against this backdrop, the article will look at judicial attitudes towards allegations of breach of due process rights by tribunals, with specific reference to applications for set-aside and refusal of recognition and enforcement of awards.

4.0 Judicial Approach to Allegations of Breach of Due Process Rights

Where there is an allegation that there is lack of due process in the arbitral proceedings or that any of the aforementioned instruments have been breached, the award is usually challenged stating such facts. The challenge could be an application to set aside the award in part or whole or declare it illegal and unenforceable. Under Nigerian law, the usual grounds on which a set-aside application may be based is that the arbitrator has misconducted themselves under section 30 of the ACA. Unfortunately, the word 'misconduct' is not defined in the ACA, but in case law.[61] In

[58] SIAC, r 41.2.
[59] Hereinafter referred to as "the AAA Rules"; AAA, r 18(a).
[60] Hereinafter referred to as "the JCA Rules".
[61] *Taylor Woodrow (Nig) Ltd v S.E. GMBH Ltd,* (1993) 4 NWLR (Pt 286) 127; see also J Olakunle Orojo and M Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nig) Limited 1990) 273, Paul Oboarenegbe Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Law Lords Publications 2015) 279.

English law, such application is normally brought under section 68 of the UKAA.[62] The challenge could also come in the form of an application to the court to refuse to recognize and enforce the award. In Nigeria, an application for refusal is made under sections 48 and 52 of the ACA, while in English law, such applications are brought pursuant to section 103 of the UKAA. Where the allegations are proven the court may set aside; refuse to recognize and enforce or; remit the award depending on the applicant's prayer. In this section, the courts' attitude towards such applications is examined with a view to determining whether they (the courts) fuel "due process paranoia" or reassure arbitrators.

1) Due Process as Basis for Applying to Set Aside an Award

In the United Kingdom, the courts would not normally set aside an award because the tribunal has been "excessively robust" in taking case management decisions like refusing to accept new evidence or denying an application for extra time.[63] However, set aside applications have been upheld where arbitrators have misconducted themselves such that the principles of natural justice are breached as a result. Some examples include where arbitrators exceed their jurisdiction,[64] where they deviate from agreed procedure without prior warning to the parties,[65] or even where they fail to carry the parties along as was the case in *Fleetwood Wanderers Ltd (t/a Fleetwood Town Football Club) v AFC Fylde Ltd*.[66] In this matter, the English High Court found that the sole arbitrator's conduct in carrying out independent investigations following the substantive hearing in the arbitration, amounted to a serious irregularity under section 68 of the AA. In reaching this decision, the court reasoned that had the arbitrator notified the parties of the outcome of their investigation, they (the parties) would have sought to make further representations which would have led to a different outcome. Thus, in failing to communicate their findings to the parties, the arbitrator breached the duty to act fairly and to allow parties the opportunity to present their case. Accordingly, the award was remitted to the arbitrator under 68(3) for reconsideration.[67] A finding of serious irregularity was also made in *Oldham v QBE Insurance (Europe) Ltd*,[68] where the arbitrator rendered an award before the deadline given to the claimant to reply the respondent's submissions on costs expired. The court held that the failure to allow the claimant to respond to the case put to them on costs denied them the opportunity to present their and was thus, a serious irregularity under section 68.[69]

[62] See Nigel Blackaby and Constantine Partasides QC, *Redfern and Hunter on International Arbitration* (OUP, 6th edn 2015) 586 and David St John Sutton, Judith Gill QC and Matthew Gearing QC, *Russell on Arbitration* (Sweet & Maxwell, 24th edn 2015) 505
[63] Gerbay (n 19).
[64] Ibid.
[65] Ibid
[66] [2018] EWHC 3318 (Comm).
[67] See also *K v A* [2019] EWHC 1118 (Comm), where the English Court held that there was a serious irregularity when the GAFTA Board of Appeal found K liable based on an interpretation of a clause in the contract which had not been argued by A.
[68] [2017] EWHC 3045.
[69] See also *K v P* [2019] EWHC 589 (Comm).

In the courts of other climes, awards have been set aside for similar reasons. The Malaysian Court of Appeal in *Thai-Lao Lignite and Hongsa Lignite v Laos,*[70] for instance, set aside an award on the grounds that the tribunal had exceeded its jurisdiction under section 37(1)(a)(iv)(v) of the Malaysian Arbitration Act 2005 which is akin to section 68(2)(b) of the English Arbitration Act and article 34(2)(iii) of the UNCITRAL Model Law. According to the court, the tribunal had mixed together claims that arose under two distinct agreements which were each governed by separate legislation. As it was unclear which portions of the award related to claims under which contract, the whole award had to be invalidated. The Nigerian courts have also set aside arbitral awards on similar grounds. For instance, in *Araka v Ejeagwu* [71] the Supreme Court held that 'if the arbitrator makes an award on a matter which the parties have not asked him to arbitrate upon, the arbitrator would be acting beyond his powers and his decision may be set aside.'[72] Also, in *United Nigeria Insurance Co v Adene,*[73] the Supreme Court of Nigeria held that an allegation that the arbitrator misconducted himself or erred in law is not ground for refusing leave to enforce an award, or a defence to an action to enforce the award. The proper course in such circumstance is to apply to set aside the award or remit it to the arbitrator.

However, the courts have been known to show intolerance for meritless and frivolous set-aside applications that allege lack of due process. An illustrative case is *Asset Management Corporation of Nigeria (AMCON) v Qatar National Bank QNB,*[74] where the English High Court dismissed AMCON's set aside application which alleged that the arbitral tribunal had failed to address all the issues put to it. The case arose from a share purchase agreement governed by Nigerian law. Under the agreement AMCON undertook to sell preference shares in Ecobank to QNB. Subsequently, a dispute arose when the parties were unable to agree whether the Ecobank's Articles of Association required that a preference dividend had to be declared by the board of the bank before it fell due for payment. In construing the relevant provision of the articles, the tribunal found that dividends fell due for payment at the time it is declared. AMCON sought to set the application aside on the grounds that the tribunal, in reaching its decision, did not apply relevant principles of Nigerian law nor deal with the claimant's submissions on the importance of a Nigerian legislation to the construction of the article under review, amongst others. In its ruling, the court found that the section 68 application was without merit and was indeed, an attempt to appeal against a finding of fact which was not allowable under the English Arbitration Act. As per the court, the application was 'another example of a dissatisfied party to an arbitration seeking to challenge an Award in circumstances where statute does not allow it.' [75]

[70] Oral decision, Malaysian High Court, 27 December 2012.
[71] (2000) 12 S.C. (Pt I) 99.
[72] See also *Kano State Urban Development Board (1990) 4NWLR (Pt 142) 37*; *Commerce Assurance v Alli,* (1992) 3 NWLR (Pt 232) 710 *Arbico (Nig.) Ltd v Nigerian Machine Tools Lim*ited (2002) 15 NWLR (Pt 789) 7; see also ACA, s 29(2).
[73] (1971) NSCC 159 at 163.
[74] [2018] EWHC 2218.
[75] [2018] EWHC 2218.

Generally, where applications for set-aside have alleged that case management decisions taken by the tribunal in the course of proceedings amounted to a breach of due process, the English courts have shown reluctance to grant such applications. [76] In fact, as indicated above, the position in the United Kingdom appears to be that arbitrators should not shy away from being too robust in their case management decisions, if it is necessary to meet the justice of the case. Some examples of cases where the English courts have refused to find serious irregularity alleged to be caused by excessive case management by the tribunal include, *Konkola Copper Mines Plc v U & M Mining Zambia Ltd*,[77] where an application to adjourn a hearing was denied; *Bromley Park Garden Estate Ltd v Mallen*,[78] where the tribunal refused to substitute oral submissions for written-counter submissions and; *TAG Wealth Management v West,*[79] where the claimant's claim was struck out by the tribunal having unnecessarily delayed proceedings for five years.

2) Due Process as Basis of Refusal to Recognize and Enforce an Award

As is the case with set-aside applications, it is rare for the courts of the United Kingdom to refuse to enforce an award, whether under the New York Convention or the UKAA, because the tribunal has been too cautious in taking case management decisions.[80] Refusals are more common where a breach of rules of natural justice is proven, for instance where the applicant has been denied the opportunity to argue their case. [81] In *Kanoria v Guinness & Anor*,[82] the respondent sought refusal of enforcement because they did not have the opportunity to present their case due to a life threating ailment. The English court found that in denying the respondent the opportunity to state their case, the tribunal breached of the principles of natural justice. Thus, the court refused enforcement under section 103(2)(c).[83] Similarly, in *Malicorp Ltd v* Egypt,[84]where the tribunal granted remedies on grounds that did not constitute part of the pleadings, the court refused enforcement. The French courts have also refused enforced for a similar breach. In *Societe Overseas Mining Investments Ltd v Societe Commercial Carribean Nique*,[85] the French Court of Appeal refused enforcement because the tribunal failed to invite the parties' submissions on a ground which had not been pleaded, but was considered in the award.

[76] Gerbay (n 19).
[77] [2014] EWHC 2374 (Comm).
[78] [2009] EWHC 609 (Ch).
[79] [2008] EWHC 1466 (Comm).
[80] Remy Gerbay and Bada Al Raisi, 'Due Process Paranoia (Part 2): Assessing the Enforcement Risk under the English Arbitration Act' (20 February 2017) <http://arbitrationblog.kluwerarbitration.com/2017/02/20/>accessed 2 August 2020.
[81] Ibid.
[82] [2006] EWCA Civ 222.
[83] See also *Cukurova Holding AS v Sonera Holding BV* [2014] UKPC 15.
[84] [2015] EWHC 361 (Comm).
[85] Case No. 08-23901/, Paris Cour de Cessation, Ch.1ere, 25 March 2010.

There are also ample cases where applications for refusal of recognition and enforcement of an award on grounds of lack of due process have failed. An example is *Minmetals Germany v Ferco Steel,*[86] where the applicant's request for refusal on grounds that the award was based on evidence gathered through the tribunal's own investigations was denied on the grounds that the applicant declined the opportunity to request disclosure when it arose during the arbitral proceedings. According to the English court such an application would fail where a party, as in this case, misused the opportunity duly afforded it. The US District Court took a similar approach in *Jorf Lafar Energy Co. SCA (Morocco v AMCI Export Corporation (US)*[87] where the applicant refused the opportunity to file witness statements at the commencement of the arbitral proceedings.

From the cases examined, it appears that the courts would not normally set aside or refuse to enforce an award where the action (the procedural unfairness) complained of is not so serious as to deny the parties equal and adequate opportunities to argue their case. Thus, if the tribunal, in acting, has properly considered the issues and struck a balance between the duty to conduct proceedings efficiently and the duty to deal fairly between the parties then it may be difficult for the court to make a finding of breach of due process rights. Notwithstanding, due process paranoia is a reality for every arbitrator who wants to render an award that is legally enforceable.

5.0 Recommendation and Conclusion

In order to reduce the fear and anxiety that arises from due process paranoia, the article proffers the following recommendations:

1) The arbitral tribunal must ensure that a preliminary meeting is held for the parties to agree a timetable for the filing of processes including witness statements, expert reports and written addresses.
2) In the procedural order (or terms of reference, in the case of ICC Arbitration), the arbitral tribunal must make sure that timelines are clearly spelt out. Where there is possibility of delays, the defaulting party should consult with the opposing party and if an extension is agreed, the arbitral tribunal should be informed. In consequence, applications will only be made to the arbitral tribunal where there is a disagreement.
3) In the course of the hearing, case management conferences[88] should be adopted bearing in mind that there must be an end to litigation.
4) Every application for amendment of pleadings, filing of additional witness statements or expert reports, extension of time, amongst others should be carefully considered and ruled upon.
5) In the final award, the tribunal must ensure that all requests for production or discovery of documents, extension of time, challenge of arbitrators, jurisdictional challenges,

[86] (1999) XXIV YBCA 739.
[87] (2007) XXXII YBCA 713.
[88] See ICC Commission Report – Controlling Time and Costs in Arbitration <www.iccwbo.org> accessed 24 July 2020, arts 19-40.

among others and the rulings on them are captured in the procedural history (interlocutory procedural matters).

6) Arbitral tribunals should be guided by instruments like the Queen Mary Survey of 2015 on costs and time.
7) The participants in the process, the parties and arbitrators alike, should be aware that fair hearing does not mean indefinite hearing.
8) Whether the arbitration is domestic or international, parties should be encouraged to adopt the IBA Rules to assist in the production and discovery of documents.
9) As earlier stated, article 9 of the IBA Rules, deal with admissibility and assessment of evidence. Where a party fails without satisfactory explanation to produce any document requested in a request to produce to which it has not objected in due time or fails to produce any document ordered to be produced by the arbitral tribunal, the tribunal may infer that such document would be averse to the interests of that party. Arbitral tribunals must be firm in applying this article in order to ensure due process in arbitral proceedings.

Conclusion

It is axiomatic that every arbitrator would like to write and publish a legally enforceable award and not one that will be set aside or denied enforcement. This is an implied duty and consistent with Rule 42 of the ICC Rules which provides in part '*that the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.*' Indeed Art 32.2 of the LCIA Rules is more forceful. It provides, among others, that '*the arbitral tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement and shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat.'*[89] All these provisions create the paranoia. Thus the paranoia is not merely a myth but a reality.

Polit has aptly described the word 'fear' thus:

> *One of the strongest emotions that drives our actions and thoughts is fear. Each and every one of us experiences or expresses some elements of fear at different points in our lives. The influence of fear is so powerful in us that someone once said "the only thing to fear is fear itself". Whether we admit it or deny it, everyone lives with some type of fear. This ranges from the fear of the unknown, the fear of failure, the fear of other people, the fear of being or acting different, the fear of being misunderstood, the fear of insecurity, the fear of superstitions and the fear of societal or conventional conceptions. Some people live most of their lives in fear of something.*[90]

[89] See also SIAC, r 41.2
[90] See Rev Fr Patrick Polit in 'Dangers of Fear in a Christian Life' being a presentation on 'Reflection' at the programme of the Catholic TV, Nigeria on Africa Independent Television (AIT) on 28 July, 2020.

However, as an arbitrator, the counsel is that the arbitrator should fear not for the laws, rules and articles are at our disposal to use efficiently and effectively. This is probably why in terms of applications to set aside an award or refusal of enforcement, success rate is low as the threshold is high and costs potentially substantial. This was amply illustrated in *AMCON v Qatar Bank*.