THE DEVELOPING TRENDS IN COMMERCIAL ARBITRATION:

-DUTIES & RIGHTS OF ARBITRATORS AND PARTIES-

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1. Introduction

A remarkable relationship exists between the arbitration tribunal and its stakeholders in international commercial arbitration compared with other dispute resolution mechanisms. Throughout the past, various principles have been introduced to strike a balance between the jurisdiction of the tribunal and the rights and duties of the parties and arbitrators. The relationship between the arbitrators and the parties is a 'contractual' one and a one of 'status'.[1]

2. Sources of Jurisdiction

There are a number of methods through which an arbitral tribunal could receive its jurisdiction. Two of them are significant. Firstly, the jurisdiction could be stemmed from the arbitration agreement itself as a condition precedent to litigation.[2] Secondly, the source of jurisdiction could be either domestic laws or institutional rules. For instance, in certain jurisdictions despite the non-existence of an arbitration agreement between the parties to the dispute, Court has discretion to direct them to arbitration. Hence, absence of an arbitration agreement is no bar to prevent a tribunal to receive its jurisdiction. In order to grant powers to an arbitrator, the agreement to arbitrate does not necessarily be in writing.

According to United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, if the parties have already negotiated the terms of arbitration in any recorded manner, it is sufficient for the tribunal to start executing the rights granted to it by

[1]Michael J. Mustill and Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths 1989) 220.
[2]*Scott v. Avery* (1856) 5 H.L. Cas. 811.

the parties.[3] In other words, even if the underlying contract never exists, parties have a right to seek arbitration while arbitrators have a right to hear the matter. For instance, during contractual negotiations if the parties have discussed arbitration terms and if they were recorded in any manner , the arbitration agreement could survive.[4] This method has strengthened the right to arbitrate and application of the doctrine of separability, even where the underlying contract never exists.

If the arbitration tribunal receives its jurisdiction from an arbitration agreement then two conditions are to be satisfied. Firstly, parties should have had agreed to submit their dispute to arbitration rather than resorting to any other dispute resolution method, such as litigation, mediation or negotiation. Secondly, there should be a specific scope of matters which could be forwarded before the arbitration tribunal. The scope of matters to be arbitrated would be determined either subjectively or objectively. If parties themselves decide the scope of the arbitrability, then it is the 'subjective arbitrability' approach and whereas the 'objective arbitrability' means where the scope of arbitrability is determined by the law of the 'Seat' of arbitration.

Although parties could provide jurisdiction to the arbitration tribunal to decide certain matters through subjective arbitrability, these powers are always subject to the objective arbitrability. In other words, the law of the Seat could intervene in determining the jurisdiction of the arbitral tribunal. For instance, in some jurisdictions, insolvency or bankruptcy disputes could not be arbitrated. An argument could be advanced that the parties' discretion to determine the scope could be overridden by the law of the Seat. However, this argument becomes irrational, as consequently the law of the Seat, too, is decided by the parties. Therefore, parties could select the most suitable and convenient law as their Seat. Hence, it is clear that parties to dispute have an absolute discretion to determine jurisdiction of the arbitral tribunal in terms of arbitrability.

Furthermore, parties' legal capacity is significant in terms of the relationship with arbitrators. This has been described in various methods in different jurisdictions. For instance, according to Section 103 (2) (a) of the Arbitration Act 1996 of UK, legal incapacity would adversely affect a party who is attempting to enforce an arbitration award. In other words the recognition or the enforcement of the award may

[3]UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) (UNCITRAL Model Law), Option I, art 7 (3).
[4]ibid, art 7 (3).

be refused, if the person against whom it is invoked proves that a party to the arbitration agreement by virtue of the law applicable to him, has no capacity.[5]

3. Contractual Relationship

The nature of the relationship between the arbitrator and the parties concerned is a 'contractual' one[6] where an agency could exist. For instance, once the arbitrators are appointed, they could act as agents of the parties concerned. Arbitrators execute a contract based on function for specific parties in private.[7] Hence, both the role of arbitrators and that of the arbitration tribunal are to determine the dispute according to the rules selected by parties on the merits of the case.[8] Therefore, in terms of the contractual relationship, an arbitrator is not expected to play the role of a judge who metes out justice.[9] The relationship between the parties and arbitrators commences by submitting the dispute for arbitration. However, there is an issue regarding the terms and conditions in such a contract, because there may be different methods of imposing duties upon their relationship. For instance, arbitration rules which parties have agreed upon might contain the duties which the arbitrator should perform. In addition, when appointing arbitrators, parties could also submit a Terms of Reference (TOR) which may also contain the duties and responsibilities of both arbitrators and the parties.

Moreover, there may be certain other expressed and implied conditions imposed upon the contract between arbitrators and parties by the operation of the domestic law.[10] Arbitrators are part of an arbitral set-up which could be an institution or an ad-hoc body. For instance, parties could select an institution such as the International Chamber of Commerce (ICC) as the tribunal to hear their disputes. In ad-hoc arbitration, parties could select a set of arbitrators according to their expertise in the related field or to their capability in resolving disputes.

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[5]Arbitration Act 1996 of UK, s 103 (2) (a).

[6]Nigel Blackaby, Alan Redfern and Martin Hunter, *Law and practice of international commercial arbitration* (5th edn, Sweet & Maxwell 2009) para 5.47.

[7]Lord Neuberger, 'Arbitration and the rule of law' (2015) 81 (3) Arbitration 276, 277.

[8]Joshua D. H. Karton, 'The Arbitral Role in Contractual Interpretation' (2015) 6 (1) Journal of International Dispute Settlement 4, 40.

[9] ibid 40.

[10]Blackaby, Redfern and Hunter (n 6) para 5.48.

4. Status-Based Relationship

The relationship between arbitrators and parties is a 'status', which is judicial in nature.[11] The meaning of the 'status' reflects that the arbitrator performs a role similar to that of a judge. Hence, under the concept of status, the arbitrator could have a considerable level of immunity which prevents him from being accused of his judgment or opinion. In other words, in certain jurisdictions, the arbitrator's liability could be limited regarding any procedural defects. For instance, Arbitration Act No. 11 of 1995 of Sri Lanka (the 1995 Act) mentions that an arbitrator shall not be liable for negligence in respect of anything done or omitted to be done by him in the capacity of an arbitrator, but shall be liable for fraud in respect of anything done or omitted to be done in that capacity.[12]

In the United States, arbitrators have immunity from legal proceedings against their conduct as arbitrators. According to English Arbitration Law in the United Kingdom, arbitrators would be liable for their conduct as arbitrators, only if they have worked in 'bad faith'.[13] Therefore, countries such as the USA and the UK which have a Common Law system tend to maintain a higher level of immunity for the conduct of arbitrators, whereas countries which have Civil Law jurisdiction have provided no such immunity compared with Common Law jurisdictions.[14]

Further, it is worth considering the approaches followed by the international arbitration institutions regarding the relationship between parties and arbitrators. The Introductory Note of the International Bar Association (IBA) Rules of Ethics for International Arbitrators mentions that there should be immunity for international arbitrators from being sued under domestic law.[15] In addition, due to the considerable 'status' of arbitrators, there are a number of moral and ethical obligations imposed upon them. For instance, an arbitrator has a duty to decline an appointment offer, to if he is unable to provide sufficient time and attention to the case.[16]

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[11]ibid para 5.47.
[12]Arbitration Act No. 11 of 1995 of Sri Lanka, s 45.
[13]Arbitration Act 1996 of UK, s 29 (1).
[14]Blackaby, Redfern and Hunter (n 6) para 5.53.
[15]International Bar Association (IBA) Rules of Ethics for International Arbitrators 1987, Introductory Note.
[16]K. Kanag-Isvaran and P.C. and S.S. Wijeratne (eds), *Arbitration Law in Sri Lanka*, (ICLP 2006) 56.

5. Duties and Rights of Arbitrators and Parties

There are a number of duties and rights vested in arbitrators and parties, which could be derived either from parties' 'consensus' or from the '*lex arbitri'* or from arbitration rules[17] or ethics.[18] For instance, an arbitration institute such as ICC has defined their own set of duties which an arbitrator is obliged to follow in ICC arbitration proceedings. Since the '*lex arbitri'* stems from the 'Seat of Arbitration', it could impose duties connected to the validation of arbitration agreement, appointment and removal of arbitrators, natural justice rules, recourse against arbitration, recognition and enforcement of agreement and rendering of the award.

However, the 'consensus' of the parties is significant here, because even the law of the 'Arbitration Seat' is determined by the agreement of parties. It is well worth analysing the ever-present duties and the rights of stakeholders in international commercial arbitration and understand the firmness of their attachment.

a) Right to Appoint Arbitrators

Parties have a right to appoint arbitrators, and to determine the number of personnel needed for the hearing. They shall be free to agree on a procedure for appointing the arbitrators subject to the provisions of the Arbitration Act No. 11 of 1995 of Sri Lanka.[19] In addition, parties have a right to appoint an arbitrator in case of a default of either. In the instance of a sole arbitrator if the parties are unable to agree on the person, then such arbitrator shall be appointed on the application by a party by the High Court.[20]

In an arbitration consisting three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed, shall appoint the third arbitrator. If a party fails to appoint the arbitrator within sixty days of receipt of a request to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within sixty days of their appointment, then the appointment shall be made upon the application by a party, by the High Court.[21]

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[17]Blackaby, Redfern and Hunter (n 6) para 5.46.
[18]ibid para 5.43.
[19]Arbitration Act No. 11 of 1995 of Sri Lanka, s 7 (1).
[20]ibid s 7 (2) (a).
[21]ibid s 7 (2) (b).

If parties have opted to settle their dispute at an arbitration institution, they could then delegate the right to appoint arbitrators to that institution. For instance, if the parties have nominated ICC as the institution to settle their dispute, then the ICC has the right to appoint the arbitrators and consequently form the tribunal. However, in a 'ad-hoc arbitration', parties themselves could appoint the arbitrators to the tribunal. When appointing arbitrators, certain institutions permit the parties to select their arbitrator from a list. For instance, according to Organization for the Harmonization of Corporate Law in Africa (OHADA) Arbitration Rules, parties could select the arbitrator from such a list.[22]

Arbitration tribunal receives its jurisdiction once it is appointed and therefore, the appointment is a key right vested in parties. At the time of dispute, even if one party refuses to participate in the process of appointment of an arbitrator, the other party could continue the process and form the tribunal, provided that both parties have agreed to settle their dispute by way of arbitration. In order to avoid such issues, default procedures have been laid down in certain arbitration rules such as appointing an arbitral referee. In the case of **Honeywell International Middle East Ltd v. Meydan Group LLC**,[23] the Court held that it was possible for a tribunal to hear the matter in the absence of the participation of one party.

In Sri Lankan Arbitration Law, there is no provision as to who should or should not be an arbitrator. The parties may by agreement require that an arbitrator shall have particular qualifications and expertise relevant to the nature of the dispute.[24] However, in certain jurisdictions the parties' right to appoint arbitrators is subject to their Domestic Law. For instance, in Scotland, a person should be 16 years old or above to be appointed as an arbitrator.[25]

The jurisdictional relationship between a party and the tribunal does not commence merely by the appointment of arbitrators. In order to initiate such a relationship, the appointment must be properly informed to the other party. In other words, parties have a right to be informed of the appointment made by the other. Therefore, the right to appoint arbitrators is essentially followed by the duty to inform the other.

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[22]Organization for the Harmonization of business law in Africa (OHADA) Arbitration Rules 1999, art 3.2.
[23][2014] EWHC 1344 (TCC).
[24]Kanag-Isvaran and Wijeratne (n 16) 38.
[25]Arbitration (Scotland) Act 2010, s 7, sch 1 part 1, r 4.

b) **Right to Revoke the Authority**

Parties could revoke the authority granted to an arbitrator if they come to understanding that he is not suitable or capable to hear the matter before him. Each party could challenge the appointment of any arbitrator, even one's own appointee with no exception. The rationale behind this right is the concept of equal treatment in the procedure. In the UNCITRAL Model Law, both parties have an equal right to present their case before the tribunal.[26] Thus, if the parties have reasons to believe that they would not have a fair hearing before the tribunal, they have a right to challenge the arbitrators.

Article 12 of the UNCITRAL Model Arbitration Law has introduced certain grounds such as lack of impartiality or independence[27] or lack of qualifications, agreed to by the parties,[28] which could be emphasized by the parties if they challenge the appointment of the arbitrators. According to the Arbitration Act No.11 of 1995 of Sri Lanka, parties have a right to make an application to Court for the removal of arbitrators. For instance, if an arbitrator unduly delays the discharging of the duties of his office, the High Court may, upon an application by a party, remove such arbitrator and appoint another in his place.[29] However, if the parties have so agreed, such removal and appointment shall be made by an arbitral institution.[30]

Further, the mandate of an arbitrator shall be terminated, if such arbitrator becomes unable to perform the functions of his office or for any other valid reason fails to act without undue delay or dies, or withdraws from office or if the parties agree on termination.[31] The other jurisdictions seem to have similar features in this regard. For instance, in the UK, the authority given to arbitrators could be revoked by the parties,[32] and parties have a right to make an application to the Court to remove arbitrators if there are circumstances to doubt the impartiality of the arbitrators,[33] or if the arbitrator

[26]UNCITRAL Model Law, art 18.
[27]ibid art 12 (1).
[28]ibid art 12 (2).
[29]Arbitration Act No. 11 of 1995 Sri Lanka, s 8 (2).
[30]ibid, s 8 (2), proviso.
[31]ibid s 8 (1).
[32]Arbitration Act 1996 of UK, s 23.
[33]ibid s 24 (1) (a).

does not have the qualifications required by the arbitration agreement,[34] or if the arbitrator is physically incapable,[35] or if he refuses to conduct the proceedings in a reasonable manner.[36]

However, the circumstances mentioned in the said Section 24 of the British Arbitration Law,[37] do not include the term 'independence'. This indicates that, the English Law has not adopted certain requirements of UNCITRAL Model Law such as lack of independence of arbitrators as a ground to challenge their appointment. On the other hand, Sri Lankan Arbitration Law has adopted the lack of independence as a circumstance for removal of arbitrators. Therefore, there are distinct approaches followed by different jurisdictions.

c) **Duty to Determine the Method of the Proceedings**

Arbitration tribunal is duty bound to deal with any dispute in an impartial, practical and expeditious manner.[38] The tribunal has a duty to afford all the parties an opportunity of presenting their respective cases in writing or orally, and to examine all documents and other material furnished to it by the other parties or any other person.[39]

The International Arbitration Rules of the International Centre for Dispute Resolution (ICDR) have conferred a wide authority and discretion upon the arbitration tribunal to determine the method to be adopted for the proceedings in terms of equality and fairness of the hearing.[40] Singapore International Arbitration Centre (SIAC) in its Arbitration Rules state that the arbitrators have a responsibility to consult the parties for the purpose of determining the most suitable method to conduct the arbitration proceedings in terms of a fair hearing.[41]

Considering the cost arising out of a long, time-consuming proceeding, both parties and as well as the arbitrators have a responsibility for each other to manage their case efficiently and in an expeditious manner. A significant responsibility is vested in the arbitrators to manage the cost and the length of

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[34]ibid s 24 (1) (b).
[35]ibid s 24 (1) (c).
[36]ibid s 24 (1) (d).
[37]ibid s 24.
[38]Arbitration Act No. 11 of 1995 of Sri Lanka, s 15 (1).
[39]ibid s 15 (2).
[40]The International Centre for Dispute Resolution (ICDR), Arbitration Rules 2014, art 20 (1).
[41]The Singapore International Arbitration (SIAC) Centre Rules 2016, art 19.1.

the arbitration proceedings.[42] Hence, arbitrators are duty bound to conduct the arbitration proceedings in a most suitable method[43] to avoid time consuming delays. Therefore, they have the discretion to continue the proceedings of the arbitration in an appropriate manner.[44]

However, when deciding the method of arbitration procedure, they have to consider equality. For instance, a reasonable opportunity must be provided to both parties to present their case and to ascertain whether the process is fair and efficient.[45]

d) **Duty of Impartiality**

Once the arbitrators are appointed, they have a duty to act impartially during the arbitration proceedings. They have a responsibility to carry out their functions to a consistently high standard in terms of probity, efficiency, fairness, honesty and lawfulness.[46] If a person is requested to accept his appointment as an arbitrator, he shall first disclose circumstances, if any, which likely would give rise to justifiable doubts as to his impartiality or independence, and shall from the time of appointment and throughout the arbitral proceedings, disclose without delay any aforesaid circumstances to all the parties and also to the other arbitrators, unless they have already been so informed by the arbitrator.[47]

The appointment of an arbitrator could be challenged if any circumstances exist to give rise to justifiable doubts as to his impartiality or independence.[48] Hence, a party could challenge the appointment of arbitrators before the arbitral tribunal, within thirty days of his becoming aware of the circumstances which would give rise to doubts concerning the arbitrator's impartiality or independence.[49] If the party challenging the appointment is dissatisfied with the order of the tribunal on such application, he may within a period of thirty days of receipt of the decision, make an appeal against that order to the High Court.[50]

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[42]David W. Rivkin and Samantha J. Rowe, 'The role of the tribunal in controlling arbitral costs' (2015) 81(2) Arbitration 116, 130.
[43]Blackaby, Redfern and Hunter, (n 6) para 5.49.
[44]UNCITRAL Arbitration Rules 2013, art 17 (1).
[45]ibid art 17 (1).
[46]Lord Neuberger, Keynote speech, (2015) 81 (4) Arbitration 427, 430.
[47]Arbitration Act No. 11 of 1995 of Sri Lanka, s 10 (1).
[48]ibid s 10 (2).
[49]ibid s 10 (3).
[50]ibid s 10 (4).

In **Sierra Fishing Company & Others v. Farran & Others**, the Court had accepted the application for a removal of an arbitrator on the basis of reasonable doubts concerning his impartiality.[51] In **Sutcliffe v. Thackrah**, the Court held that the arbitrator has an implied duty to conduct the arbitration proceedings impartially.[52] As held in **AMEC Civil Engineering Ltd v. Secretary of State for Transport**, impartiality becomes one of the key characteristics expected of the arbitrator.[53] The International Bar Association (IBA) guidelines on Conflicts of Interest in International Arbitration, mention that all arbitrators have a duty to act impartially and independently from the time of their appointment until the final award or the termination of the proceedings.[54]

According to Arbitration (Scotland) Act 2010, arbitrators have a duty to disclose if there is any conflict of interest relating to their status of impartiality or independence.[55] This approach is fairly different compared with English Arbitration Law which has no duty to disclose such interests.[56] There could be situations where arbitrators would have been bribed, and awards rendered in favour of that party. For instance, in Switzerland, if the arbitrators are unable to consider the important evidence attributing to an act of bribery, then such a reason could be taken as a ground to set aside an arbitration award.[57]

Furthermore, if an arbitrator believes that he has any matters related to such issues, then he must immediately disclose that to the parties. If a party wishes to challenge the appointment of an arbitrator, then notices must be sent duly, after it has been notified or after the circumstances were known. Once the parties were informed of such a situation, they have a responsibility not to cause any delay if they wish to challenge the appointment; as they would be prevented by the principle of '*estoppel*' or '*waiver*' if attempted to set aside the award at a later stage.

This is a vital point aimed at striking a balance between the rights of parties and arbitrators. In order to make arbitrators more responsible towards the parties, there are certain precautionary measures that have been adopted. For instance, according to ICC Arbitration Rules prior to the beginning of the

[51][2015] EWHC 140 (Comm).
[52][1974] AC 727.
[53][2005] EWCA Civ 291.
[54]International Bar Association (IBA) guidelines on Conflicts of Interest in International Arbitration, 2014 Part I (1).
[55]Arbitration (Scotland) Act 2010, s7, sch 1, r 8.
[56]Rom K.L. Chung, 'Conceptual framework of arbitrators' impartiality and independence', (2014) 80 (1) Arbitration 2.
[57]Antonio Musella and Ziva Filipic, 'International arbitration and alternative dispute resolution' (2015) 4 International Business Law Journal 381, 386.

arbitration process, the arbitrators have to sign a statement admitting their availability, impartiality and independence.[58]

e) **Duty to Behave in Good Faith**

Once appointed, arbitrators have a duty to behave in good faith during the arbitration proceedings.[59] They are liable for fraud in respect of anything done in the capacity of arbitrator.[60] This indicates that in terms of the relationship between the arbitrators and the parties, the duty of '*bona fide'* (good faith) is significant.

f) **Right to Receive Remuneration**

Arbitrators have a right to receive remuneration for the services rendered by them: the parties have a duty to pay the agreed remuneration according to the decided payment method. In Arbitration Act No. 11 of 1995 of Sri Lanka, remuneration has been referred to as compensation. The parties shall be jointly and severally liable for the payment of reasonable compensation to the arbitrators constituting the arbitral tribunal for their work and disbursements.[61]

The final award shall order the payment of compensation to each of the arbitrators, with legal interest calculated, with effect from the date of expiration for a period of one month from the date on which the award was delivered.[62] The arbitral tribunal may order the payment of deposit of security by the parties for the payment of the compensation of arbitrators, in such sum and within such period as may be specified in the order.[63] If the arbitrators are not properly paid then they have a right to terminate the arbitral proceedings.[64]

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[58]International Chamber of Commerce (ICC) Rules of Arbitration 2017, art 11 (2).
[59]The London Court of International Arbitration (LCIA) Arbitration Rules 2014, art 14.5.
[60]Arbitration Act No. 11 of 1995 of Sri Lanka, s 45.
[61]ibid s 29 (1).
[62]ibid s 29 (2).
[63]ibid s 29 (3).
[64]ibid s 29 (5).

6. Recent Developments

In the analysis of the duties and rights of arbitrators and the respective parties, London Centenary Principles of Arbitration 2015 introduced by the Chartered Institute of Arbitrators could be considered as a sound set of guidelines. Accordingly, tribunals have to 'recognise and respect the choice of the parties.[65] In order to make this recognition, a tribunal needs to make sure that the proceedings are fair and just,[66] and limit Court intervention,[67] while striking a balance between confidentiality and transparency.[68]

These Principles have defined the judicial nature of the tribunal. Hence, when exercising jurisdiction, a tribunal should respect the parties' choice by being 'independent', 'competent' and 'efficient' during the proceedings.[69] In other words, the arbitral tribunal has a significant responsibility to maintain its jurisdiction and to carefully balance the rights and duties of both arbitrators as well as the parties while resolving the dispute.

7. Conclusion

Arbitrators receive their jurisdiction either by agreement of parties as a condition precedent to litigation or by the application of domestic laws and institutional rules. A unique relationship exists between the arbitrators and the parties in a nature of a contract and that of status. Their duties and rights are mentioned either in the agreement to arbitrate or in arbitration law of the Seat or rules and ethics. The UNCITRAL Model Law, Rules of Arbitration and other international and national legislation have introduced various principles to strike a balance between the jurisdiction of the tribunal and the rights and duties of the parties and arbitrators. These laws, rules and principles could be effectively utilized to support and facilitate proceedings of international commercial arbitration more successfully.

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[65]Chartered Institute of Arbitrators (CIArb) London Centenary Principles 2015, principle 1.
[66]ibid ,principle 1 (a)
[67]CIArb London Centenary Principles 2015, principle 1 (b).
[68]ibid , principle 1(c).
[69]ibid principle 2.