# The Principle of Party Autonomy in Arbitral Proceedings: A Myth or Reality?

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## Introduction

In arbitral enactments modeled after the UNCITRAL Model Law on International Commercial Arbitration (Model Law Jurisdictions)[2], two sections are considered to be the most important provisions, namely, the equal treatment of the parties[3] and the parties rights to determine the rules of procedure.[4] These provisions are so important that they are referred to as the "Magna Carta of arbitral procedure".[5] Accordingly Article 18 of the Model Law provides that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. This accords with the common law principle of natural justice and the constitutional principle of fair hearing.[6] However, in this article, the focus is not on the principle of fair hearing but the principle of party autonomy.

In arbitral proceedings, the agreement to arbitrate is so fundamental that it is indirectly enforced by stay of proceedings if instead of arbitrating one of the parties decides to litigate.[7] The importance of the principle of party autonomy is underscored by the fact that 14 out of 36 articles of the Model Law give the parties the right to determine the "rules of the game". The trade mark of these provisions is the use of the words "the parties are free to agree" or "unless otherwise agreed by the parties" or "subject to any contrary agreement by the parties". This is sometimes referred to as "two-level system" or a "default provision".[8] This is a way of drafting a provision where the first part of the article grants the parties general freedom in regulating an issue and the second part sets the default rules which apply only when no such party stipulation is made. Such default rule is usually worded thus: "failing such an agreement".

This article seeks to examine the principle of party autonomy and ascertain whether it is a myth or a reality. This is particulary important given that the powers of the courts to intervene

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2 Hereinafter referred to as "the Model Law". See UN General Assembly Resolution No. 40/72 of 11 December, 1985. Nigeria is a Model Law Country. See also Binder P, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (London: Sweet & Maxwell, 2000) pp 241-313.

3 See Article 18 of the Model Law and section 14 of the Arbitration and Conciliation Act, Cap 19, Laws of the Federation of Nigeria, 1990 (hereinafter referred to as "the Act"). The Act is based on the Model Law.

4 See Article 19 of the Model Law and section 15 of the Act.

5 See A/CN.9/264, Art 19, para. 1.

6 See section 36 of the 1999 Constitution of the Federal Republic of Nigeria.

7 See Article 8 of the Model Law and sections 4 and 5 of the Act. See also section 9 of the English Arbitration Act, 1996.

8 See Binder Op Cit at 71.

in arbitral proceedings have been curtailed.[9] Furthermore, while there are mandatory provisions that the parties cannot derogate from, there are also optional provisions.

## Principle of Party Autonomy

Article 19 of the Model Law provides thus:

> 1 *Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
> 2 *Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*[10]

In Nigeria, there is a distinction between domestic and international commercial arbitration while the Model Law covers international commercial arbitration only. Whereas sections 1 to 36 which are in Part I of the Act cover domestic arbitration, sections 43 to 54 which are in Part III cover international commercial arbitration. Accordingly section 15(1) of the Act provides thus:

> *The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to this Act.*[11]

while section 53 of the Act provides thus:

> *Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties.*

The combined effect of these provisions is that in Nigeria, the parties to domestic arbitration are bound to adopt the Arbitration Rules while in the case of international commercial arbitration, they have a choice of institutional rules. It is safe to assert, therefore, that in domestic arbitration, the principle of party autonomy as it relates to the choice of the applicable rules is circumscribed. This was alluded to by Orojo and Ajomo thus:

> *The effects of these provisions are first, that in domestic arbitration, the parties as well as the arbitral tribunal are bound by the provisions of the Arbitration Rules in the First Schedule. Thus, the much flaunted party autonomy in respect of arbitral procedure is very much more limited in domestic arbitration under our law than under the UNCITRAL Model Law. … It also follows that in a domestic arbitration, the parties are not free to adopt the Rules of arbitration institutions like the I.C.C. if the rules conflict with the Arbitration Rules in the First Schedule.*[12]

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9 Article 5 of the Model Law provides that in matters governed by this Law, no court shall intervene except where so provided in this Law. See also section 34 of the Act.

10 See also section 15 of the Act..

11 This Schedule is substantially the same as the UNCITRAL Arbitration Rules. See UN General Assembly Resolution No. 31/98 of 15 December, 1976

12 Orojo J O and Ajomo M A, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates (Nigeria) Ltd, 1999), p 166.

Does the restriction imposed by section 15(1) of the Act mean that in domestic arbitration the parties have no rights to determine the procedure to be followed? The effect of section 15(1) is that the parties are bound to adopt the procedural rules in the Schedule to the Act and are prevented from choosing their own self-drafted set of rules. Commenting on the effects of sections 15(1) and 53 of the Act, Binder stated thus:

> *Section 15(1) in combination with section 53 of the Federal Republic of Nigeria's Arbitration and Conciliation Decree 1988 compels the parties to use either the arbitration rules laid down in Schedule 1 to the Law, in the UNCITRAL Arbitration Rules or in "any other international arbitration rules".*[13]

Although section 15(1) appears restrictive, a cursory look at other provisions of the Act will reveal that some of them are based on the principle of party autonomy.[14] In other words, the "two-level system" is reflected in other sections dealing with domestic arbitration. The possibility of choosing the procedural rules that are to be applied by the tribunal constitutes one of the major attractions for parties contemplating resolving their disputes via arbitration. The provisions in the Act would seem to deny the parties this right. It is submitted, therefore, that the provisions in section 15(1) should be reviewed. In the case of *ad hoc* arbitrations, the parties can draft their own rules.

Under English Law, three general principles underlie the arbitral process[15], namely:

a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
c) in matters governed by this Part the court should not intervene except as provided by this Part.[16]

The most important of these principles is b) above dealing with the principle of party autonomy. These principles are however the foundation of Part I of the Arbitration Act, 1996. They underlie the arbitral process and are the touchstone by which any proposed use of any of the provisions can be tested by asking questions like whether the provisions recognize or derogate from the principle of party autonomy. Answers in accord with each of the above principles would suggest that the proposed use is acceptable. The principles are obligatory and apply to everything a tribunal does in the exercise of its function.[17]

Arbitration evolved from the practices of merchants who dealt in perishable goods while customary arbitration is part of our customary jurisprudence. Essentially they both evolve as private sector judicial proceedings with minimal intervention by the states. Giving the parties the rights to determine how the proceedings will be conducted is a re-statement of the private nature of the proceedings. Consequently, the Model Law and other enactments

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13 Binder Op Cit at 129.

14 See sections 6, 7, 9, 13, 16,, 17, 18, 19, , 20, 21, and 22 of the Act.

15 Bernstein, R et al *Handbook of Arbitration Practice* (3rd edn, London: Sweet & Maxwell, 1998), p 24.

16 See section 1 of the 1996 Arbitration Act (English).

17 Bernstein, Loc Cit.

modeled on it recognize and guarantee the principle of party autonomy. In commenting on this principle, Herrmann asserted thus:

> *The most fundamental principle underlying the Model Law is that of the autonomy of the parties to agree on the "rules of the game". Such recognition of the freedom of the parties is not merely a consequence of the fact that arbitration rests on the agreement of the parties but also the result of policy consideration geared to international practice.*[18]

Prior to the adoption of the Model Law, there were national procedural laws that were inappropriate or inadequate for international commercial arbitrations. Similarly one of the frustrations inherent in municipal laws is that such laws may have mandatory provisions that are not universal in nature. Such provisions produce unexpected and undesired consequences. The principle of party autonomy is intended to prevent such frustrations. Commenting on the importance of this principle, Goldstajn opines that the "Model Law is based on the principle of freedom of contract, according to which the parties are free to determine numerous terms of the contract".[19] Another distinguished scholar, Julian D M Lew has also acknowledged the importance of this principle. In her words:

> *Party autonomy gives the contracting parties the power to fashion their own remedial process within the limits of public policy. It follows from this principle that the arbitration agreement reflects the individual interests within the framework of bilateral and multilateral transactions, albeit agreed upon by both parties. For instance, a party from the Middle East may desire a provision calling for the appointment of at least one Middle Eastern arbitrator, such a provision would satisfy the individual interest and concerns of the party without prejudicing the other party.*[20]

The paramountcy of this principle cannot be over-emphasised. Parties are advised to take full advantage of this principle otherwise the provision of the law/rules will apply. In other words, the provisions of the law, and rules will apply if there is no agreement by the parties to the contrary. It is apposite to assert that where parties agree to adopt the rules of an established arbitral institution, they should bear in mind that there are those that can be modified in full[21] and others that have limitations on modifications.[22] Alternatively the parties can take a standard set of rules and supplement them with more detailed rules.[23]

Other institutional rules also provide for the principle of party autonomy. Accordingly Article 15(1) of the Rules of Arbitration of the International Chamber of Commerce (ICC) (1998) provide thus:

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18 Herrmann G "The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions" in Sarcevic P (ed) *Essays on International Commercial Arbitration* (London: Graham & Trotman, 1989), p 9.

19 Goldstajn A "Choice of International Arbitrations, Arbitral Tribunals and Centres: Legal and Sociological Aspects" in Sarcevic P (ed) Op Cit at 28.

20 Lew, Julian D. M. "Arbitration Agreements: Form and Character" in Sarcevic P (ed) Op. Cit at 51.

21 For example the UNCITRAL Arbitration Rules.

22 For example the Rules of the ICC Court of Arbitration.

23 Herrmann, op cit at 12.

> *The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, any rules which the parties or, failing them, the Arbitral Tribunal may settle, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.*[24]

We are reminded by Sutton *et al* that the rights to determine the rules of the game are not absolute and that they are subject to "such safeguards as are necessary in the interest of the public".[25] In other words, the autonomy is subject to mandatory provisions. For example the parties cannot derogate from the right to treat the parties equally and to give each party full opportunity of presenting his case.[26]

## Matters at the parties' option

As has been observed, the trade mark for determining matters at the parties' option is the use of the words "unless otherwise agreed by the parties" or "subject to any contrary agreement by the parties" or "unless a contrary intention is expressed therein" or "the parties may by agreement determine the …." or "the parties are free to agree" (indicating the parties' freedom of choice) and "failing such an agreement" (setting out the default provisions).[27] In accordance with the principle of party autonomy, the following are matters on which the parties may make agreements, otherwise the arbitral tribunal will make the choice for them. This is what the principle of party autonomy is all about.

a) **Receipt of Written Communication.**[28] The parties are free to agree on the manner of service of any notice or other written communications that are to be served in pursuance of the arbitration agreement.

b) **Appointment and number of Arbitrators.**[29] This is a very importance choice. If the parties fail to agree on the method of appointment, the fallback provisions will apply and if they fail to determine the number of arbitrators, the number shall be three.

c) **Challenge Procedure.**[30] There are grounds provided for challenging the appointment of an arbitrator. However the parties are free to agree on the procedure for challenging an arbitrator and if they fail, there are default provisions.

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24 See also Article 14 of the London Court of International Arbitration (LCIA) Rules, 1998.

25 Sutton, David St John et al Russell *On Arbitration* (21st edn, London: Sweet & Maxwell, 1997) pp 23 and 80.

26 Others include Statement of Claim and Defence (Art 23(1) of the Model Law, section 19 of the Act); Hearing and written proceedings (Art 24(2) and (3)of the Model Law , section 20(2), (3), (4), (5) and (6) of the Act), Court assistance in taking Evidence (Art 27 of the Model Law, section 23 of the Act); Settlement (Art 30(2) of the Model Law, section 25 of the Act); Form and contents of the Award (Art 31(1), (3) and (4) of the Model Law, section 26 of the Act); Termination of Proceedings (Art 32 of the Model Law, section 27 of the Act), and Correction and Interpretation of the Award/Additional Award (Art 33 of the Model Law, section 28 of the Act).

27 Binder, op cit at 71. See also Sutton et al op cit at 80. Instead of "default provisions", the learned authors used "fallback" provisions.

28 See Art 3 of the Model Law and section 56 of the Act. See also Art 15 of the LCIA Rules.

29 See Arts 10 and 11 Id and sections 6 and 7 Id.

30 See Art 13 Id and section 9 Id.

d) **Power of Arbitral Tribunal to Order Interim Measures.**[31] Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection of the subject matter of the dispute as the tribunal may consider necessary.

e) **Determination of the Rules of Procedure.**[32] This is of fundamental importance and if the parties fail to agree on this, the arbitral tribunal will conduct the arbitration in such manner as it considers appropriate. The principle of party autonomy is derived from this provision. It is noteworthy that in Nigeria, in domestic arbitration, the right to choose is restricted while in international commercial arbitration, parties are bound to adopt institutional rules unless the arbitration is *ad hoc*.

f) **Place of Arbitration.**[33] This is an issue on which if the parties do not agree, serious difficulties may arise especially in relation to the recognition and enforcement of the award.

g) **Commencement of Arbitral Proceedings.**[34] This section provides a means of establishing when arbitral proceedings have been commenced, both for the purposes of the arbitration itself and for periods of limitation. The date of commencement is established by reference to the date of service of notice of arbitration or the date when a request to appoint a tribunal is made to an appointing authority.

h) **Language.**[35] The parties are free to determine the language(s) to be used in the arbitral proceedings, failing which the arbitral tribunal shall determine the language(s),

i) **Statements of Claim and Defence.**[36] Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

j) **Hearing and Written Proceedings.**[37] One of the striking features of arbitration is that the parties can decide that the proceedings will be on a "documents only" basis and without oral hearing/argument. If there is no contrary agreement by the parties, the arbitral tribunal will determine this.

k) **Default of a Party.**[38] In civil proceedings, there are usually periods for filing pleadings and various consequences follow any default in filing them. Similarly in arbitral proceedings, unless otherwise agreed by the parties, if, without showing sufficient cause the claimant fails to file his point of claim, the arbitral tribunal shall terminate the proceedings. However, where the respondent fails to communicate his

31 See Art 17 Id and section 13 Id.

32 See Art 19 Id and section 15 Id. See also Art 15 of the ICC Rules, 1998.

33 See Art 20 Id and section 16 Id. See also Art 16 of the LCIA Rules.

34 See Art 21 Id and section 17 Id.

35 See Art 22 Id and section 18 Id. See also Art 17 of the LCIA Rules and Art 16 of ICC Rules.

36 See Art 23 Id and section 19 Id.

37 See Art 24 Id and section 20 Id.

38 See Art 25 Id and section 21 Id.

statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations. Where any party fails to appear at a hearing or produce documentary evidence, the tribunal may continue the proceedings and make an award on the evidence before it. It is therefore left for the parties to agree on the consequences of any default otherwise the default provisions will apply.

l) **Expert Appointed by the Arbitral Tribunal.**[39] Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal.

m) **Rules Applicable to the Substance of the Dispute.**[40] One benefit derivable from arbitration that is not available in litigation is that the parties can determine the applicable law. Consequently the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties, failing which the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable bearing in mind *lex mercatoria*.

It should be noted that in Nigeria, the Evidence Act does not apply to arbitral proceedings or before an an arbitrator.[41] Consequently commercial arbitration in Nigeria allows for flexibility of procedure whilst avoiding the technicalities of the rules of evidence.[42]

## Mandatory Provisions

Certain terms of arbitration agreements in Model Law jurisdictions cannot be excluded. Their trademark is the use of the word "shall". The following are the mandatory provisions that the parties cannot derogate from:

a) **Equal Treatment of Parties**[43] The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. This is the common law principle of natural justice and constitutional right to fair hearing. The parties are also free to chose any person to represent them at the hearing.

b) **Points of Claim and of Defence**[44] The parties are obliged to file their pleadings within the period of time agreed to by them or as determined by the arbitral tribunal.

c) **Hearing and Written Proceedings**[45] The arbitral tribunal is duty-bound to give sufficient advance notice of any hearing and of any meeting for the purpose of inspection of goods, other property or documents, and any documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party.

39 See Art 26 Id and section 22 Id. See also Art 21, LCIA Rules.

40 See Art 28 Id and section 47 Id. See also Art 22.1(a), LCIA Rules and Art 17, ICC Rules.

41 See section 1(2)(a) of the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990.

42 cf section 15(3) of the Act.

43 See Art 18 Id and section 14 Id.

44 See Art 23(1) Id and section 19(1) Id.

45 See Art 24(2) and (3) Id and section 20(2), (3), (4), (5) and (6) Id.

d) **Court Assistance in Taking Evidence**[46] An arbitral tribunal does not have the power to require the attendance of a witness who refuses to attend and give evidence. A party may however use the available court procedure to issue either *subpoena ad testificandum* or *subpoena duces tecum* to require the attendance of witness before the tribunal. A court can also issue *habeas corpus ad testificandum* where necessary.

e) **Settlement**[47] If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and an award on agreed terms shall be made in accordance with the provisions of article 31 dealing with the form and contents of award.

f) **Form and Contents of Award**[48] It is a fundamental requirement of an award that it shall be in writing and signed by the arbitrator(s). The award shall state the reasons upon which it is based, state its date and place of arbitration and a copy shall be delivered to each party. If all these requirements are not met, they constitute grounds for setting aside an award.

g) **Termination of Proceedings**[49] Where the claimant withdraws his claim or parties agree on the termination of the proceedings or the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible, it is mandatory that the arbitral tribunal shall issue an order for the termination of the proceedings.

h) **Correction and Interpretation of the Award/Additional Award**[50] If within 30 days of the receipt of an award and with notice to the other party, a party requests the arbitral tribunal to correct an award or give an interpretation of a specific point or part of the award or to make an additional award, if the arbitral tribunal considers the request justified it shall within 30 days of the receipt of the request make the correction or give the interpretation and within 60 days make the additional award. Such award shall conform to the form and contents of an award.

## Extent of Court's Intervention

Article 5 of the Model Law provides that "In matters governed by this Law, no court shall intervene except where so provided in this Law".[51] When it is realized that arbitral proceedings do not have court-like powers, the importance of this provision will be appreciated. Despite the attempts to free arbitration from court processes, ultimately the municipal laws are usually relied on either as a default provision or for the setting aside or recognition and enforcement of arbitral awards. Traditionally, the court's role has been both supportive and supervisory: and so it remains. The supportive powers are well and comprehensively set out in the Act.

46 See Art 27 Id and section 23 Id.

47 See Art 30 Id and section 25 Id.

48 See Art 31 Id and section 26 Id.

49 See Art 32 Id and section 27 Id.

50 See Art 33 Id and section 28 Id. See also Art 27, LCIA Rules and Art 29, ICC Rules.

51 See section 34 Id.

The import of article 5 of the Model Law is to reinforce the principle of party autonomy subject to mandatory provisions. In the words of Orojo and Ajomo:

> *The essence of commercial arbitration is to avoid court proceedings in the resolution of commercial disputes. The parties, having chosen their judges ought to stick to them and abide by their decision and it negates the arbitral process if the court can interfere freely in the process.*[52]

In the following matters, the court can intervene: stay of proceedings[53], revocation of arbitration agreement[54], appointment of arbitrator[55], challenge procedure[56], failure or impossibility to act[57], competence of arbitral tribunal[58], attendance of witnesses[59], setting aside of award[60], remission of award[61], enforcement of award[62] and refusal of enforcement[63].

## Conclusion

From the foregoing it is obvious that the principle of party autonomy is not a myth but a reality. Arbitral proceedings are characterized by this principle. It is more pronounced in Model Law jurisdictions where out of 36 articles in the Model Law, the principle is enshrined in 14 articles. If one deducts from the remaining provisions all those which relate to the internal organization or implementation of the Model Law and those dealing with mandatory provisions, the balance tilts heavily in favour of the principle of party autonomy. It therefore behooves on the parties to take advantage of the principle to tailor-make the arbitral proceedings to suit their purpose.

Arbitral proceedings are essentially consensual. They derive from the agreement of the parties to arbitrate. The principle of party autonomy ensures that the parties themselves agree on the rules of the game otherwise the arbitral tribunal or a third party will determine the rules.

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52 Orojo and Ajomo, op cit at 313.
53 See Art 8 of the Model Law and sections 4 and 5 of the Act
54 See Art 6 Id and section 2 Id.
55 See Art 11 Id and section 7 Id.
56 See Art 13 Id and section 9 Id.
57 See Art 14 Id and section 10 Id.
58 See Art 16 Id and section 12 Id.
59 See Art 27 Id and section 23 Id.
60 See Art 34 Id and sections 29 and 30 Id.
61 See Art 34(4) Id and section 29(3).
62 See Art 35 Id and sections 31, and 51 Id.
63 See Art 36 Id and section 32 and 52 Id.