Anchoring Commercial Arbitration on Fundamental Principles

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Introduction

Commercial arbitration has its roots in history: it was unwritten and formless. It is a truism that the first contracts to be submitted to arbitration dealt with commodities. As the disputes involved in most cases perishable goods, they had to be settled rapidly and confidentially. What has emerged today as modern commercial arbitration is based on mercantile customs and usages – Mercantile Law (*lex mercatoria*). The law developed separately from common law. Disputes between merchants, local and foreign, were resolved at the fair or borough. As succinctly put by Smith & Keenan:

> *"Disputes between merchants, local and foreign which arose at the fairs where most important commercial business was transacted in the fourteenth century were tried in the courts of the fair or borough and were known as courts of pie powder' (*pieds poudres*) after the dusty feet of the traders who used them."*[2]

International Commercial arbitration as we know it, started between the two World wars. According to Eisemann, former Secretary General of the International Chamber of Commerce (ICC) Court of Arbitration, the first ICC arbitration he conducted, was spontaneous, without rules and horrendeously, without a fee. International Commercial arbitration was then a procedure whereby gentlemen would settle in a gentlemanly way disputes between gentlemen. The penalty for noncompliance was blackballing nothing more.[3]

In Nigeria and other African states, arbitration grew from customary law.[4] Arbitration or conciliation was used for resolving conflicts because of their emphasis on moral persuasion and their ability to maintain harmony in human relationships.[5] Indeed any conflict or dispute was seen as social disequilibrium and any dispute resolution mechanism adopted was an attempt to restore equilibrium. Today, in rural communities, this mechanism for resolving disputes still plays a prominent role.

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2. Smith, K and Keenan, D 1983 *English Law*, 7th edn, Pitman, London, p 10.
3. Lazareff, M S in Chapman, M J 1997, *Commercial and Consumer Arbitration: Statutes & Rules* , Blackstone Press Ltd, London.
4. See Holdworth 1964, *History of English Law*, vol. xiv, p 187.
5. Akpata, E O I 1997, *The Nigerian Arbitration Law in Focus*, West African Publishers Ltd, Lagos, p 1.

From this humble beginning, commercial arbitration has grown and today it is formalised and anchored on fundamental principles, namely, principle of party autonomy, principle of arbitrability, principle of separability, principle of judicial nonintervention and doctrine/principle of *kompetenz-kompetenz*. This article seeks to examine these principles.

Principle of Party Autonomy

In arbitral enactments modeled after the UNCITRAL Model Law on International Commercial Arbitration (Model Law Jurisdictions),[6] two sections are considered to be the most important provisions, namely, the equal treatment of the parties,[7] and the parties rights to determine the rules of procedure.[8] These provisions are so important that they are referred to as the "Magna Carta of arbitral procedure".[9] 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.[10] However, in this section of the 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.[11] 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".[12] 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".

Article 19 of the Model Law is an example of such provisions. It states 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.*

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6. 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 2000, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, Sweet & Maxwell, London, pp 241-313.
7. 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.
8. See Article 19 of the Model Law and section 15 of the Act.
9. See A/CN.9/264, Art 19, para. 1.
10. See section 36 of the 1999 Constitution of the Federal Republic of Nigeria.
11. 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.
12. See Binder, op. cit., p 71.

> *(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."*[13]

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 of the Act which are in Part I of the Act cover domestic arbitration, sections 43 to 54 of the Act 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"*,[14]

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."*[15]

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:

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13. See also section 15 of the Act.
14. This Schedule is substantially the same as the UNCITRAL Arbitration Rules. See UN General Assembly Resolution No. 31/98 of 15 December, 1976.
15. Orojo, J O, and Ajomo, M A 1999, *Law and Practice of Arbitration and Conciliation in Nigeria*, Mbeyi & Associates (Nigeria) Ltd, Lagos, p 166.

> *"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"."*[16]

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.[17] 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[18], 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.[19]

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 recognise 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.[20]

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

16. Binder, op. cit., p 129.
17. See sections 6, 7, 9, 13, 16,, 17, 18, 19, , 20, 21, and 22 of the Act.
18. Bernstein, R et al 1998, *Handbook of Arbitration Practice*, 3rd edn, Sweet & Maxwell, London, p 24.
19. See section 1 of the 1996 Arbitration Act (English).
20. Bernstein, loc. cit.

> *"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."*[21]

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".[22] 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."*[23]

The paramountcy of this principle cannot be overemphasised. 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,[24] and others that have limitations on modifications.[25] Alternatively, the parties can take a standard set of rules and supplement them with more detailed rules.[26]

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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21. Herrmann, G 1989, "The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions" in Sarcevic, P (ed), *Essays on International Commercial Arbitration*, Graham & Trotman, London, p 9. See also Marshall, EA 2001, *Gill: The Law of Arbitration*, 4th edn, Street & Maxwell, London, pp 24 and 27.
22. Goldstajn, A 1989, "Choice of International Arbitrations, Arbitral Tribunals and Centres: Legan and Sociological Aspects" in Sarcevic P (ed), Ibid. p 28.
23. Lew, Julian D M 1989 "Arbitration Agreements: Form and Character" in Sarcevic P (ed), op. cit., at 51.
24. For example the UNCITRAL Arbitration Rules.
25. For example the Rules of the ICC Court of Arbitration.
26. Herrmann, op. cit., p 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."*[27]

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".[28] 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.[29]

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.**[30] 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.**[31] This is a very important 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.**[32] 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.

d) **Power of Arbitral Tribunal to Order Interim Measures.**[33] 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.**[34] This has already been discussed.

f) **Place of Arbitration.**[35] This is an issue on which if the parties do not agree, can give rise to serious difficulties especially in relation to the recognition and enforcement of the award.

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27. See also Article 14 of the London Court of International Arbitration (LCIA) Rules, 1998.
28. Sutton, David St John et al 1997, *Russell on Arbitration*, 21st edn, Sweet & Maxwell, London, pp 23 and 80.
29. 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).
30. See Art 3 of the Model Law and section 56 of the Act. See also Art 15 of the LCIA Rules.
31. See Arts 10 and 11 Id and sections 6 and 7 Id.
32. See Art 13 Id and section 9 Id.
33. See Art 17 Id and section 13 Id.
34. See Art 19 Id and section 15 Id. See also Art 15 of the ICC Rules, 1998.
35. See Art 20 Id and section 16 Id. See also Art 16 of the LCIA Rules.

g) **Commencement of Arbitral Proceedings.**[35] 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.**[36] 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.**[37] 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.**[38] One of the striking features of arbitration is that the parties can decide that the proceedings will be on "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.**[39] 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 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.**[41] 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.**[42] One benefit derivable from arbitration that is not available in litigation is that the parties can determine the

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36. See Art 21 Id and section 17 Id.
37. See Art 22 Id and section 18 Id. See also Art 17 of the LCIA Rules and Art 16 of ICC Rules.
38. See Art 23 Id and section 19 Id.
39. See Art 24 Id and section 20 Id.
40. See Art 25 Id and section 21 Id.
41. See Art 26 Id and section 22 Id. See also Art 21, LCIA Rules.
42. See Art 28 Id and section 47 Id. See also Art 22.1(a), LCIA Rules and Art 17, ICC Rules.

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.*[43]

It should be noted that in Nigeria, the Evidence Act[44] does not apply to arbitral proceedings or before an arbitrator. Consequently, commercial arbitration in Nigeria allows for flexibility of procedure whilst avoiding the technicalities of the rules of evidence.[45]

Principle of Separability

An arbitration agreement can be seen as a special type of clause/agreement. It provides for how some or all disputes under the contract in which it is contained are to be resolved.[46] This raises the issue concerning the effect of such a clause when the main contract has either been performed or brought to an end by breach or declared void or voidable. It is now settled law that the clause survives the main contract under the principle/doctrine of separability or severability.[47] The principle is a legal fiction essential to the efficient working of the arbitral process and developed in England in a long line of landmark decisions. In *Heyman & Ors v Darwins Ltd,*[48] the House of Lords dismissed the theory that an arbitration clause is terminated by breach of the contract of which it was part and held thus:

> *"... what is commonly called a repudiation or a total breach of contract … does not abrogate the contract though all further performance of the obligations undertaken by each party in favour of the other party may cease. It (i.e. the contract) survives for the purpose of measuring claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of (this) contract have failed, but the arbitration clause is not of the purposes of the contract."*

The principle was also predicated on the presumption that the parties have agreed to one round of dispute resolution and that is, arbitration and not several. In *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*[49] it was held that the presumption "merely reassures one that the natural meaning of the words (of the arbitration agreement) produce a sensible and businesslike result". This is so because the arbitration clause is treated as a separate and independent agreement which generally survives the termination of the underlying contract.[50] Under the doctrine, the arbitration clause constitutes a self-contained

43. See also Idornigie, P O 2000, "Determining the Applicable Laws in Arbitral Proceedings", *MODUS International Law & Business Quarterly*, vol. 5, no. 3, September, pp 11-18.
44. See section 1(2)(a) of the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990.
45. cf section 15(3) of the Act.
46. *Union of India v Mcdonnell Douglas Corporation* (1993) 2 Lloyd's Rep 48.
47. See Sutton et al, op. cit p 33 and Marshal op. cit p 25. See also section 7 of the UK Arbitration Act 1996.
48. (1942) AC 356. See also Bernstein, et al, op. cit., p 27 and Sarcevic P, op. cit., p 55.
49. (1993) QB 701.
50. Sutton et al op. cit., p 57. See also *Heyman & Ors V Darwin Ltd*, Supra and Ezejiofor, G 1997, *The Law of Arbitration in Nigeria*, Longman PLC, Ikeja, p 67.

contract collateral or ancillary to the underlying or main contract.[51]

Other than case law, this doctrine has now been statutorily expressed. Accordingly Article 16(1) of the Model Law provides, in part, that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.[52] We humbly submit that the principle is fundamental to arbitral proceedings otherwise the whole purpose of resorting to the arbitration will be defeated if the contrary were the case. However, there seems to be a typographical error in section 12 of the Act. This is so because whereas Article 16 of the Model Law provides, in part, thus:

> *"... an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail* ipso jure *the invalidity of the arbitration clause."*

Section 12(2) provides, in part, thus:

> *"... an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail* ipso jure *the validity of the arbitration clause."*

It is obvious, therefore, that while the Article used the word "invalidity" as italicised, section 12(2) of the Act used the word "validity" as italicised. Bearing in mind that the jurisdiction of the arbitral tribunal is derived from this clause, it will amount to a derogation of the principle of separability if the invalidity of the contract affects that of the clause. They are clearly independent and separable. This subsection is in need of review to bring it in line with accepted principle in arbitral law and practice.

Principle of Arbitrability

This simply means the quality of being capable of resolution by arbitration.[53] The question of whether particular disputes can be referred to arbitration should not be confused with the question of what disputes fall within the terms of a particular arbitration agreement (scope of the reference). In challenging the jurisdiction of an arbitral tribunal, the ground of challenge could be that of arbitrability. In the words of Sutton *et al*:

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51. *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corporation* Ltd (1981) 1 Lloyd's Rep 253.
52. Section 12 of the Act and Section 7 of the English Arbitration Act 1996.
53. See also Asouzu, A 2001, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, Cambridge University Press, Cambridge, p 146; Binder, op. cit., at 21; and Marshall, op. cit., p 4.

> *"The issue of arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration, when the opposing party claims that the tribunal lacks the authority to determine a dispute because it is not arbitrable; second in the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction and third, on an application to challenge the award or to oppose its enforcement."*[54]

What this principle does is to circumscribe matters that are arbitrable and those that are not. These varies from country to country. For example, issues concerning the validity of patents and trademarks, and antitrust disputes are excluded from arbitration in Yugoslavia; in Austria, matters concerning bills of exchange, the validity of patents, bankruptcy, and attachment are not arbitrable.[55] According to section 35 of the Act, the Act shall not affect any other law by virtue of which certain disputes:

(a) may not be submitted to arbitration; or
(b) may be submitted to arbitration only in accordance with the provisions of that law or another law.

Similarly, section 48(b)(i) and (ii) of the Act provide that an arbitral award may be set aside if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria or that the award is against public policy of Nigeria.[56] In *Kano State Urban Development Board v Fanz Construction Ltd*,[57] the Supreme Court comprehensively elucidated on the type of dispute or difference which the parties can refer to arbitration. Quoting from the *Halsbury's Laws of England*,[58] the Court held thus:

> *"The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction. Thus an indictment for an offence of a public nature cannot be the subject of an arbitration agreement, nor can disputes arising out of an illegal contract nor disputes arising under agreements void as being by way of gaming or wagering. Equally, disputes leading to a change of status, such as a divorce petition, cannot be referred, nor, it seems, can any agreement purporting to give an arbitrator the right to give judgement in* rem."

Consequently, none of the above matters can be subject of arbitration otherwise the award will be set aside or recognition will be refused.

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54. Sutton et al, op. cit., p 15.
55. Madl, F 1989, "Competence of Arbitral Tribunals in International Commercial Arbitration" in Sarcevic, op. cit., p 95.
56. See also section 52(b)(i) and (ii) of the Act and Article V.2 of the 1958 New York Convention.
57. Supra at 45.
58. 4th Ed, page 2565, paragraph 503.

Principle of Judicial Non-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".[59] 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.[60]

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."*[61]

In the following matters, the court can intervene: Stay of proceedings,[62] revocation of arbitration agreement,[63] appointment of arbitrator,[64] challenge procedure,[65] failure or impossibility to act,[66] competence of arbitral tribunal,[67] attendance of witnesses,[68] setting aside of award,[69] remission of award,[70] enforcement of award[71] and refusal of enforcement.[72]

While appreciating the importance of this provision, one is constrained to ask whether in a country like Nigeria with a written constitution and the powers and jurisdiction of the superior courts of record constitutional, this principle of non-judicial intervention can be strictly sustained. For example, section 7(4) of the Act provides that where there is default in the appointment of arbitrators and it is done by the court,[73] such a decision is final and not

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59. See section 34 of the Act. See also Sutton et al, op. cit., at 3.
60. See Idornigie, P O 2002, "The Relationship Between Arbitral and Court Proceedings", *Journal of International Arbitration*, vol. 19 no 5, October pp 44-459; Asouzu, op. cit., p 170; Sutton et al, op. cit., p 321 and 393; and Marshall, op. cit., p 24.
61. Orojo and Ajomo, op. cit., p 313.
62. See Art 8 of the Model Law and sections 4 and 5 of the Act.
63. See Art 6 Id and section 2 Id.
64. See Art 11 Id and section 7 Id.
65. See Art 13 Id and section 9 Id.
66. See Art 14 Id and section 10 Id.
67. See Art 16 Id and section 12 Id.
68. See Art 27 Id and section 23 Id.
69. See Art 34 Id and sections 29 and 30 Id.
70. See Art 34(4) Id and section 29(3).
71. See Art 35 Id and sections 31, and 51 Id.
72. See Art 36 Id and section 32 and 52 Id.
73. See section 57 of the Act for the definition of the court. It means the High Court.

subject to appeal. This is so because section 241(1)(a) of the Constitution of the Federal Republic of Nigeria 1999 provides that an appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right where the decisions of such courts, sitting at first instance, are final.[74]

In *Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Ltd*,[75] the Court of Appeal (Enugu Division) interpreted section 7(4) of the Act thus:

> *"Section 7(4) of the Arbitration and Conciliation Act, 1990, only renders non-appealable proceedings challenging the procedure for appointing arbitrators as specified in section 7(2) and 7(3) of the Arbitration and Conciliation Act, Laws of the Federation of Nigeria, 1990. Consequently, before the provisions of section 7(4) of the Arbitration and Conciliation Act, Laws of the Federation of Nigeria, 1990 can be invoked, the court must first be satisfied that the grounds of appeal and issues formulated for determination from the grounds of appeal relate to the appointment procedure as laid down by section 7(2) and 7(3) of the Arbitration and Conciliation Act, 1990 and not just matters that are peripheral to those specified therein."*

Thus, if the appointment procedure agreed upon by the parties does not provide any other means of securing the appointment, any of the parties to the arbitration may request the court to make the appointment and such appointment is final. In commenting on this provision, Orojo and Ajomo stated thus:

> *"This provision was made in a military regime when a Decree superseded the Constitution in the event of a conflict. It is doubtful if the provision will be valid in a civilian regime unless the Constitution is amended to provide for such exceptions."*[76]

While we share this view, we humbly submit that this is one area of the Act that needs urgent review. Although this provision was merely lifted from the Model Law,[77] its jurisprudential basis is questionable. In any case, the former Decree is now an Act of Parliament. Can the Nigerian parliament pass such a law and make the decision of the court final? We submit to the contrary. In England, sections 17(4) and 18(5) of the Arbitration Act, 1996 provide that in such situations, "the leave of the court is required for any appeal from a decision of the court under this section". It is our submission that the Act should be amended along the English provisions. Lately, the Nigerian courts have been very active in this area. In *Nigerian Agip Oil Co Ltd v Kemmer & Ors, supra*, it was held by the Court of Appeal (Port Harcourt Division) that in view of section 241 of the 1999 Constitution of the Federal Republic of Nigeria, which provides for appeals as of right from the decisions of the Federal High Court or a High Court to the Court of Appeal, the decision of a court appointing an arbitrator

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74. See also Idornigie, P O 2002, "The Default Procedure in the Appointment of Arbitrators: Is the decision of the Court appealable?", *Arbitration, The Journal of the Chartered Institute of Arbitrators*, vol. 68, no. 4, November, pp 397-403.
75. (2001) 8 NWLR (pt 715) 333 at 339. See also *Nigerian Agip Oil Co Ltd v Kemmer & Ors* (2001) 8 NWLR (Pt 716) 506 at 525-526.
76. Orojo and Ajomo, op. cit., p 121.
77. Article 11(5) of the Model Law.

is appealable. The effect of this decision is that section 7(4) of the Act is inconsistent with section 241 of the Constitution and therefore null and void.

Doctrine/Principle of *Kompetenz-Kompetenz*

In legal proceedings, the issue of jurisdiction is very fundamental. Where a court or tribunal lacks jurisdiction, the whole proceeding is a nullity. If it has jurisdiction, it has the necessary competence or authority to conduct the reference but should consider the extent of its powers when determining how it should conduct the reference. No wonder, therefore, that some writers are of the view that powers and jurisdiction are distinct but interrelated.[78] One of the specific powers of an arbitral tribunal is its competence to rule on its own jurisdiction. Accordingly, section 12(1) of the Act provides thus:

> *"An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement."*[79]

This issue is known as "competence-competence" or "*Kompetenz-Kompetenz*".[80] To enable the tribunal to fully exercise this power, the arbitration clause is separate from the arbitration agreement based on the doctrine or principle of separability.[81]

The arbitral tribunal can also rule on whether it is properly constituted and on what matters have been submitted to arbitration in accordance with the arbitration agreement. There can be an application challenging the scope of the reference or the jurisdiction of the arbitral tribunal. Consequently, such a challenge can be partial or total. If partial, it relates to some aspects of the claims but if total the whole basis upon which the arbitral tribunal is acting or is purporting to act is put into question. However, whether partial or total, the arbitral tribunal may either give summary ruling as a preliminary question or invite submissions from the parties on the issues and make an award on the merits and such ruling shall be final and binding.[82] It should be noted that a plea that the tribunal does have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such plea by reason that he has appointed or participated in the appointment of an arbitrator. On the other hand, if the plea is that the arbitral tribunal is exceeding the scope of its authority, such a plea may be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings.[83] If the tribunal rules that it has no jurisdiction, then the whole proceedings are at an end.

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78. Sutton et al, op. cit., p 145, and Orojo and Ajomo, op. cit., p 144.
79. See also Article 16 of the Model Law, Article 21 of the Arbitration Rules and section 30 of UK Arbitration Act, 1996.
80. See also Binder, op. cit., p 109.
81. Supra and section 12(2) of the Act.
82. See Section 12(4) of the Act.
83. See Section 12(3) Id.

If a tribunal lacks the jurisdiction to hear the dispute, what are the options open to the respondent? The respondent may boycott the entire proceedings in which case the tribunal will proceed *ex parte* and when an award is made, he will seek to set it aside on grounds of lack of jurisdiction, or he may challenge the jurisdiction of the arbitral tribunal or ignore the arbitral tribunal and have recourse to the court to resolve the issue of jurisdiction or continue with the proceedings and impeach the award. It is humbly submitted that the best course of action open to the respondent when the tribunal lacks jurisdiction is to raise the issue forthwith and insist that the plea be fully argued before the tribunal and that its decision should be made into an interim award. If the decision goes against him, as it is wont to, he should continue to participate in the proceedings and impeach the award or resist attempts at enforcement.[84] However, what a party cannot do is to participate fully in the proceedings without raising any plea and seek to challenge the tribunal's jurisdiction after the award has been made.

In the absence of any contrary agreement between the parties, the other specific powers of an arbitral tribunal include determination of the place of arbitration,[85] the language of the arbitration,[86] the admissibility, relevance, materiality and weight of any evidence placed before it,[87] interim measures of protection as it may consider necessary in respect of the subject matter of the dispute,[88] correction and interpretation of the award,[89] granting of additional award,[90] fixing the costs of the award,[91] the appointment of one or more experts,[92] the general conduct of the of the arbitration,[93] and extension of time.[94]

Conclusion

In this article it is obvious that arbitral proceedings are anchored on fundamental principles, namely, that of party autonomy, separability, arbitrability, judicial non-intervention and *kompetenz-kompetenz*. While the principle of party autonomy is a re-statement of freedom of contract, that of separability raises the question of what happens to an arbitration clause if the main contract in which it is contained is brought to an end by repudiation, frustration or similar cause. Does the arbitration clause survive or does it come to an end? It is settled law that the clause survives as the main contract and the arbitration

84. See also Ezejiofor, op. cit., p 71.
85. Section 16 of the Act.
86. Section 18 Id.
87. Section 15 Id.
88. Section 13 Id.
89. Section 28 Id.
90. Section 28 Id.
91. Section 49 Id.
92. Section 22 Id.
93. Section 14 Id.
94. Section 36 Id.

clause are independent and self-contained though the arbitration clause is collateral or ancillary to the main contract.

The issue of what kind of dispute may be subjected to arbitration is very fundamental. The type of disputes that are arbitrable varies from jurisdiction to jurisdiction. It is important, therefore, that a dispute is arbitrable otherwise the resulting arbitral award will be unenforceable. On the issue of judicial nonintervention, parties resort to arbitration as a means of resolving their disputes. Thus, arbitration is not in competition with, or challenge to, or an ouster of court's jurisdiction. However, there is clear relationship between them. This is to ensure that the arbitral system functions effectively and efficiently.

In civil proceedings, the issue of jurisdiction is very fundamental. This is so because the whole proceedings will be a nullity if the court lacks jurisdiction. Similarly, in arbitral proceedings, the arbitral tribunal is empowered to inquire into whether it has jurisdiction to determine a dispute. This is known as *kompetenz-kompetenz* . The arbitral tribunal can also rule on whether it is properly constituted. On any of these grounds, it can be challenged. Such a challenge may be partial or total. Where an arbitral tribunal lacks jurisdiction, the challenge or plea must be raised immediately. A party cannot participate fully in arbitral proceedings without raising any plea and seek to challenge the tribunal's decision after the award has been made.