AN APPRAISAL OF THE ROLE OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

BY

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BEING A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES NASARAWA STATE UNIVERSITY KEFFI, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF A MASTER OF LAWS (LL.M) DEGREE

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DECLARATION

I hereby declare that this dissertation titled 'An Appraisal of the Role of Party Autonomy in International Commercial Arbitration' was written by me and it is a report of my research work. It has not been presented in any previous application for any Degree. All quotations are indicated and sources of information specifically acknowledged by means of references.

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CERTIFICATION

This dissertation titled 'An Appraisal of the Role of Party Autonomy in International Commercial Arbitration' meets the regulations governing the award of Master of Laws of the School of Postgraduate Studies, Nasarawa State University, Keffi, for its contribution to knowledge and literary presentation.

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DEDICATION

This dissertation is dedicated to Jesus Christ, the author and finisher of this study, to Him alone be the glory forever. Amen.

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LIST OF CASES

LIST OF STATUTES

LIST OF ABBREVIATIONS

BANI. . . . . .Indonesia National Board of Arbitration.

Cap. . . . . Chapter

Co. . . . . Company

(Comm). . . . . Commercial Court

Comm. J. . . . . Commercial Journal

ConL.J. . . . . Construction Law Journal

EWHC. . . . . England and Wales High Court

F.2d. . . . . .Federal Reporter 2nd Series United States.

HKLK . . . . . Hong Kong Laws

HLC. . . . . House of Lords Cases

HL Cas. . . . . .House of Lords Cases

ICC. . . . . .International Chamber of Commerce.

ICSID. . . . . .Convention on the Settlement of Investment Disputes Betweeen States and Nationals of Other States

LPELR. . . . . Law Pavilion Electronic Law Report

NWLR. . . . . Nigerian Weekly Law Report

QB. . . . . Queens Bench

S . . . . . Section

SC. . . . . Judgment of Supreme Court of Nigeria

UNCITRAL. . . . . .United Nations Commission on International Trade Law

U.S. . . . . The United States of America

WRN. . . . . Weekly Report of Nigeria

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ABSTRACT

Although disputes are bound to abound in international transactions, however, parties being the focal point in international commercial arbitration, have devised methods of resolving incessant disputes amicably without recourse to litigation. Party autonomy or freedom having being developed from the 19th century, has since gained enormous acceptance in the international commercial arbitration circle. Thus, party autonomy is a vital principle governing international arbitration agreement; hence, without party autonomy, there will be no international commercial arbitration. This study is focused on the role the parties play in international commercial arbitration, to what extent this role has achieved in the resolution of disputes involving international commercial transaction and whether the parties actually have absolute freedom to control the arbitration process in international commercial transaction. The doctrinal research method was used in this study in order to critically analyse and appraise the role of party autonomy in international commercial arbitration. Efforts have been made to derive our sources from the various studies of other scholars on this issue. This study finds out that parties have used their roles (which include the appointment of the arbitrators, choice of language, choice of place of arbitration and choice of applicable law) in the arbitration process to resolve disputes involving international commercial arbitration. It is also observed that though the parties have autonomy to decide how the arbitration should take place, this autonomy is not sacrosanct because the court can intervene to correct any anomaly. From the study, it is recommended that parties to an international commercial transaction should be enlightened by the drafters of the arbitration agreement to specifically spell out what they want as regards to the content of the arbitration agreement in order to avoid room for vague provisions.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

There are day-to-day challenges that usually occur between people in a given society. As a result, the government created an institutionalised system known as the court for settling disputes. However, there are some certain disputes that need not go through the rigours of the court process, hence the need for the introduction of alternative dispute resolution. Alternative dispute resolution refers to a procedure for settling disputes by means other than litigation.[1]Arbitration is one of the methods of alternative dispute resolution. Disputes are bound to abound in international commercial transactions. Hence, parties have devised methods of solving these incessant disputes amicably through arbitration without recourse to litigation. The increasing popularity of arbitration is due to its effectiveness in solving commercial and trade disputes.

Arbitration is the process of dispute resolution in which a neutral third party called the arbitrator renders a decision after hearing at which both parties have made representations.[2] It is a procedure for the settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is in general, final and binding on both parties.[3] Arbitration is favourable to parties because of its neutrality, confidentiality, speed, flexibility and the awards are easily enforced.[4]

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[1] < www.google.com> accessed 8 January 2020.
[2] T.O Dada, *General Principles of Law* (Lagos, T.O Dada & Co., 2008).
[3] J.O Orojo and M.A Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos, Mbeyi and Associates (Nigeria) Limited, 1999).
[4] Famsville Solicitors 'Nigeria: Enforcement of Arbitral Awards' (2018) <www.mondaq.com> accessed 6 August 2019.

When the business dispute is international in character and is to be resolved with the help of arbitration, it is known as international commercial arbitration.[5] Such international commercial transactions contain arbitration clauses or agreement which binds the parties. The arbitration agreement is a creation of contract between the parties. Hence, party autonomy is the heart and soul of each and every arbitration contract.[6] International commercial arbitration is the most popular method of dispute resolution in international commercial transactions which transcends national boundaries.[7] The keystone for arbitration is the agreement of the parties to resolve their disputes through arbitration.

Party autonomy started to develop from the 19th century[8] and has since gained widespread acceptance in international commercial arbitration. Party autonomy is a fundamental principle governing international arbitration agreement.[9] It is the fulcrum upon which international commercial arbitration stands. In other words, without party autonomy there will be no international commercial arbitration. Due to the principle of party autonomy, whatever decision the parties get from the tribunal is binding on them. In ***Ras Pal Gazi Construction Co. Ltd v FCDA,***[10] the Nigerian Supreme Court held inter alia that it is very clear and without any iota of doubt that an arbitral award made by an arbitrator to whom voluntary submission was made by the parties to the arbitration is binding between the parties.

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[5] Anurag K. Agarwal, 'Party Autonomy in International Commercial Arbitration', (2007) *Indian Institute of Management Ahmedabad, India Research and Publication Department* <www.google.com> accessed 8 October 2019.

[6] Ibid.

[7] Sunday A. Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality', <www.researchgate.net > accessed 9 October 2019.

[8] Ibid.

[9] Ibid.

[10] (2001) LPELR-SC 45/46.

According to Shadat,[11] party autonomy rule is based on the assumption that parties to an arbitration agreement are knowledgeable and informed and they use the doctrine responsibly. As a matter of principle the expression '*unless otherwise agreed by the parties*' is a frequent occurrence in many arbitral enactments, conventions and treaties or arbitral rules that gives the parties a great degree of autonomy-universally as an acceptable principle. Rene David[12] defined party autonomy as 'a device whereby the settlement of a question which is of interest for two or more persons is entrusted to one or more other persons the arbitrators who derive their power from a private agreement, not from the authorities of a state and who are proceeded and decided the case on the basis of such agreement'.

In international commercial arbitration, party autonomy entails that the parties are free to choose the law, procedure, any place as the seat of arbitration, arbitrators and almost everything related to the resolution of the disputes. In choosing the law for the proceedings, parties can choose any law they want for the settlement of their dispute. The applicable law can be a domestic legal system, non-state law or be a law that has no connection with the issue.[13] The role of party autonomy in international commercial arbitration entails the parties having freedom to choose how the dispute is resolved. This is the basic focus of this study. In ***Mastroboun v Shearson Lehman Hutton Inc.***[14] the Supreme Court of the United States stated inter alia that 'parties have a general freedom to restructure their arbitration agreement the way they see it appropriate... though with some limitation'. This is what this study tends to achieve.

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[11] Shadat S.M Mohmeded, 'Party Autonomy Doctrine is the Cornerstone of Arbitral Provisional Measures' (2016) 1(1) *International Academic Journal of Law and Society*,28-43< www.google.com >accessed 9 December 2019.

[12] Ibid.

[13] Masters Dissertation, '*Discretion of Arbitrators and Application of Mandatory Rules: Is the Doctrine of Party Autonomy in International Commercial Arbitration Concerning the Choice of the Substantive Law as Provided by the UNCITRAL Arbitration Rules, the ICSID Convention and the ICC Arbitration Rules Experiencing a Crisis?*<www.google.com> accessed 9 December 2019.

[14] 514 U.S 52 1995.

1.2 Statement of the Problem

It has been stated earlier that party autonomy is the fulcrum upon which international commercial arbitration stands. The idea behind party autonomy has been succinctly captured by Dursun[15] when he said thus:

> *Rationale for party autonomy is that the parties to an international commercial contract do not want to resolve their disputes through litigation since the court which is national of a party may be foreign of another party. In addition to this, the parties do not want to deal with procedural formalities. Consequently, the parties choose arbitration as a private dispute settlement and this they can conduct all proceedings of arbitration by taking into account their needs and desires such as they can arrange timetable of hearings, choose anyone as an arbitrator who have relevant expertise on specific requirement of the dispute.*

Parties can by agreement exclude the jurisdiction of the Court and can conduct the arbitral proceedings in whatever manner they like.[16] The question now is, have this been achieved by the parties? Though the above quotation is the rationale for party autonomy, but in reality this is downplayed because there is a tendency by the parties for the abuse of such powers as such the national courts at any point in time can intervene in the autonomy of the parties in international commercial arbitration. The national Courts intervention is an anomaly; they come in to intervene because of the parties' act or omission which is against the spirit of arbitration. Arbitration is usually a private affair, its confidentiality is supreme. The National

[15] Ar. Gor. Seyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent', <www.google.com >accessed 9 October 2019.
[16] Fagbemi (n 7).

Courts intervention is an anomaly that can be avoided if the parties do the right thing and follow the procedure as laid down by them in the arbitration agreement.

Nevertheless, the research questions arising from this study are:

1. Do parties have roles to play in international commercial arbitration?
2. Have parties used such roles in the arbitration process to resolve disputes involving international commercial transaction?
3. Are parties restricted in the application of their roles in the arbitration process to resolve disputes in international commercial transaction?

1.3 Aim and Objectives of the Research

This study aims at analysing the principle of party autonomy and its application in international commercial arbitration. Also, some concepts like arbitration, party autonomy and others will be analysed in its relation to international commercial arbitration. Thus, the objectives of this study are:

1. To determine the role the parties play in international commercial arbitration.
2. To determine to what extent this role played by the parties has been able to achieve the resolution of disputes in international commercial transactions.
3. To determine if the parties actually have absolute freedom to control the arbitration process in international commercial arbitration.

1.4 Scope and Limitation of the Study

It was noted earlier that parties take charge of the arbitration process in international commercial arbitration which is why arbitration is preferred over litigation in international commercial transactions. In party autonomy, the parties can by agreement exclude the jurisdiction of the court this is because the proceedings are private and confidential. Thus, the

scope of this study is to analyse the roles parties play before and during the arbitration proceedings. This study is however not without limitations. The study is limited by the fact that the author has had no personal involvement or experience in any arbitration matter and thus will conduct the study based on literature gathered.

1.5 Significance of the Study

Generally, the role of party autonomy in international commercial arbitration has been greatly misunderstood by all and sundry in the society. Most people think that since the parties are the alpha and omega in the arbitration process, they cannot be checkmated. This study tends to cure the misconception of the much talked about role of party autonomy in international commercial arbitration and see reasons for improvement of this principle in international commercial arbitration if need be. This study will expand the knowledge of parties to arbitration, arbitrators and those who are in dilemma of choice of arbitration over litigation as the mode of solving the dispute encountered in international transaction.

1.6 Research Methodology

The role of parties in international commercial arbitration has a great impact on the society. It is a sine qua non for an efficient and effective resolution of dispute in international commercial arbitration. As a result, it is imperative that it should be well adumbrated. The methodology utilised in this research is the doctrinal method of legal research. Doctrinal research is the research into doctrines which involves analysis of case laws, statutory provisions and legal rules. Efforts were made to derive sources from the various studies of other scholars on this issue. The doctrinal research method is adopted to critically examine the role of party autonomy in its relation to international commercial arbitration. Consequently, published texts, Law Reports, periodicals, institutional publication, seminar papers and other relevant materials or publications relating to this area of study have also been consulted and utilised.

1.7 Synopsis of Chapters

To effectively discuss the role of party autonomy in international commercial arbitration, this study is made up of five chapters.

Chapter one is the general introduction to the study and it contains background to the study; statement of the problem; research questions; aim and objectives of the study; scope and limitation of the study; significance of the study; research methodology and synopsis of the chapters.

Chapter two is the literature review and it deals with the conceptual framework which includes the definitions of concepts like arbitration, International commercial arbitration and party autonomy; review of previous studies and the theoretical framework, which entails the Jurisdictional theory and Contractual Theory.

Chapter three deals with the legal framework governing international commercial arbitration. It discusses Party Autonomy under the New York Convention 1958, Party Autonomy under the English Arbitration Act 1996; Party Autonomy under the Arbitration and Conciliation act 2004; Party Autonomy under the UNCITRAL Model Law 2006 and Party Autonomy under the International Chamber of Commerce Rules 2012.

Chapter four is the crux of the study. This Chapter examines international commercial arbitration in relation to party autonomy, the role of party autonomy in international commercial arbitration (which includes the seat or place of arbitration, the appointment of the arbitrarators; the language of the arbitration and the applicable Law) and the limitations to party autonomy in international commercial arbitration (viz-a-viz the appointment of arbitrators, interim measures; third parties and acting bonafide).

Chapter five is the concluding Chapter of the study. It deals with the summary of research findings, observations, recommendations, contribution to knowledge, suggested areas for further study and conclusion.

CHAPTER TWO

LITERATURE REVIEW

2.1 Conceptual Framework

2.1.1 Arbitration

The term arbitration has been described and defined by various scholars with each stating his/her own view. The Black's Law Dictionary defined arbitration as a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.[17]Arbitration is the settlement of disputes (whether of fact, law or procedure), between parties to a contract by a neutral third party (the arbitrator) without resorting to court action.[18] Arbitration is a method of dispute settlement using private entities known as arbitral tribunals.[19]

Arbitration is the process of dispute resolution in which a neutral third party called the 'arbitrator' renders a decision after hearing at which both parties have made representations.[20] Robert Heinlein in his book 'The Moon is a Harsh Mistress',[21] elevated the arbitrator's role to a critical factor in the government of his fictional society. The arbitrator become anyone the parties of a dispute could agree upon as been able to give a fair verdict. This ability to choose provided the parties with a sense of being able to control their destinies. It was not acquiescing to a jargon-rampant, mind blogging, illogical, irrational court system. It was not leaving a decision very important to the parties to an overstudied judge who had no greater agenda than to clear his docket as soon as possible.[22] In my own view, arbitration is a method of dispute resolution with minimal resort to litigation.

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[17] Bryan A. Garner, *Black's Law Dictionary* (9th ed., St Paul Minn.: West Pub. Co. 2009).
[18]<www.businessdictionary.com> accessed 18 June 2019.
[19]<http://www.dispute-resolution.hamburg.coom> accessed 18 June 2019.
[20] T.O Dada, *General Principles of Law* (Lagos, T.O Dada & Co., 2008).
[21]Dan Sewell Ward, 'Library of Halexandria' (2003) <www.halexandria.org> accessed 8 January 2020.
[22] Ibid.

Arbitration is used for the resolution of varieties of dispute like technology, shipping, engineering, oil and gas, industries, intellectual property, construction, banking, financial services, securities transactions, real estate, insurance claims, employment related issues amongst others.[23] Arbitration may be domestic or international. However, in this study, we will be dealing with the international aspect of arbitration.

There are differences between arbitration and litigation. Some of these will be discussed. For instance, litigation involves determining issues through a court while in arbitration, the two parties in a dispute agree to study with a disinterested third party in an attempt to resolve the dispute.

Also, the arbitration process is fairly quick. Once an arbitrator is selected, the case can be heard immediately. In litigation on the other hand, a case must wait until the court has time to hear it, this can mean many months, even years before the case is heard. The parties in the arbitration process decide jointly on the arbitrator, while in litigation, the judge is appointed and the parties have little or no say in the selection. Furthermore, in arbitration, the use of attorneys is at the discretion of the parties, while in litigation, there is extensive use of attorneys.[24]

Though arbitration is a form of alternative dispute resolution, it has some features that distinguish it from other forms of alternative dispute resolution. For instance, in arbitration, the 3rd party who is the arbitrator, decides the disputes before him, while in the other forms of alternative dispute resolution, the parties decide the disputes themselves with or without a 3rd party's input.

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[23] Sunday A. Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality', <www.researchgate.net >accessed 9 October 2019.

[24] Jean Murray, 'The Difference Between Arbitration and Litigation' (2018) <www.thebalancesmb.com> accessed 26 June 2019.

Also, arbitration procedure is more formal than the procedures in the other forms of alternative dispute resolution. Furthermore, in arbitration, an unsatisfied party can appeal against the arbitral award, while in the other forms of alternative dispute resolution, once a decision is reached, an aggrieved party cannot appeal against it.

According to Dada,[25] for a dispute to qualify for adjudication by a third party through arbitration procedure, it must possess the following essential characteristics: Firstly, there must be a dispute between the parties concerning some disagreement over a point of law or fact, the dispute or difference must be justiciable; the parties must voluntarily agree to resolve the dispute through third party mediation; the agreement to submit to arbitration must not be illegal; the parties must have inserted the ***Scott v Avery*** clause[26] in the said agreement mandating them to submit to arbitration in the present or future; there must be a formal reference of the dispute to the decision of the third party; that third party must expressly or impliedly be required to decide according to law, it must be a term of that contract that the award shall be final and binding and that the parties must act in good faith.

In ***Lucky Goldstar International (H.K) Ltd v Ng Moo Kee Engineering Ltd,***[27] the contract contained the following arbitration clause "[...] dispute or difference [...] shall be arbitrated in the third country, under the rules of the third country and in accordance with the rules of procedure on the International Commercial Arbitration Association [...]". The Plaintiff argued that the arbitration agreement should be considered null or inoperative since it referred to a non-existent institution and non-existent rules. The Court found that the parties' intentions were sufficiently clear through this pathological arbitration clause. It held inter alia that the fact that the clause referred to a non-existent organisation and rules, it was not enough to render the

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[25] Dada (n 20).

[26] (1856) 5 HL Cas.811. This rule states that when there is a contract between two parties, that the parties will submit any dispute between them to arbitration before taking any court action.

[27] (1993) 2 HKLK 73.

arbitration agreement inoperative or incapable of being performed since the arbitration could be held in any other country than the third country which could be chosen by the plaintiff.

According to Thomas,[28] referring matters to arbitration involves an acceptance of an abbreviated and more expeditious process but not an abandonment of fundamental procedural fairness. Comparatively uncomplicated but basically fair adjudicatory procedures are the essence of the bargain for arbitration and characteristically the underlying adjudicatory rationale of the process. The purpose of arbitration therefore is to achieve efficiency in the resolution of disputes.[29]

2.1.2 International Commercial Arbitration

International commercial arbitration is an alternative method of resolving disputes between private parties arising out of commercial transactions conducted across national boundaries that allow the parties to avoid litigation in national courts.[30] International commercial arbitration is a means of resolving disputes arising under international commercial contracts.[31] It is used as an alternative to litigation and is controlled primarily by the terms previously agreed upon by the contracting parties, rather than by national legislation or procedural rule.[32]

According to Black's Law Dictionary,[33] international commercial arbitration is an arbitration proceeding to handle matters that include conflict of laws that may arise between two parties of different countries or those where potential conflict of international law exist. In my humble view, I see international commercial arbitration as a type of international arbitration

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[28] Thomas E. Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' (1998) (22) *Tulane Maritime Law Journal,* 131-154 <www.google.com> accessed 27 January 2020.
[29] Ibid.
[30] <www.google.com> accessed 8 January 2020.
[31] Susan Gaultier,'International Commercial Arbitration'<www.nyuglobal.org > accessed 9 January 2020.
[32] Ibid.
[33] Bryan A. Garner, *Black's Law Dictionary* (8th ed., St Paul Minn.: West Pub. Co. 2004).

method whereby disputes involving commercial transactions are resolved at the international level in the presence of third parties who act as arbitrators and are chosen by the parties.

As earlier reiterated, there are two types of arbitration; the domestic and international arbitration. International commercial arbitration falls under international arbitration. The parties to international arbitration expect that by choosing arbitration as the dispute settlement method, that they would not be subject to formal and strict requirements of national courts.[34] In international commercial arbitration, the parties are free to choose the place of arbitration.[35] The parties often choose a neutral place which will most times be foreign to both of them to avoid any form of bias in the arbitration process.

The subject matter of international commercial arbitration are international companies with huge budgets, these disputes between international companies have some specific requirements[36] that can be resolved by people (arbitrators) who are expert in that field. International commercial arbitration is a flexible dispute settlement method that is why it is widely accepted at the international level.

To sum it up, Dursun[37] described international commercial arbitration as a drama in which the principle of party autonomy is the director of this drama. Normally, a director can determine actors and actresses, the scenarios and the other issues about the drama. Thus, the presence of party autonomy is a prerequisite for international commercial arbitration.

2.1.3 Party Autonomy

As earlier stated, party autonomy is the fulcrum upon which international commercial arbitration stands. Party autonomy refers to the power of the individual to choose between

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[34] Ar. Gor. Seyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent', <www.google.com > accessed 9 October 2019.
[35] Ibid.
[36] Ibid.
[37] Ibid.

different national laws but that choice has to be made among existing laws.[38] Party autonomy is the freedom of parties to consensually execute arbitration agreement.[39] It provides a right for the parties to international commercial arbitration to choose applicable substantive law and these laws when chosen shall govern the contractual relationship of the parties.[40] The promotion of party autonomy does not mean advocating absolute freedom of the parties in deciding the conduct of arbitration.[41] According to Lehmann,[42] through party autonomy, private individuals do not regain the power of self-legislation, only the power to adopt the appropriate existing legislation.

According to Ansari,[43] party autonomy is the backbone or a cornerstone of arbitration proceedings. Abdulhay[44] looks at party autonomy as the freedom of the parties to construct their contractual relationship in the way they see fit. In other words, the parties have the liberty to determine their arbitration agreement without any interference. It is this principle of party autonomy that determines the flexibility and confidentiality of the arbitral process.

Party autonomy simply means that the parties should be free to select the applicable procedure for arbitration between themselves and to select individual arbitrators if that is agreed.[45] It means that parties to the arbitration agreement exercise control over their own affairs. According to Nwakoby,[46] party autonomy implies that the parties to the arbitration agreement are being free to act independently and outside any strigent rules in any arbitration

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[38]Mathias Lehmann 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Law' (2008) (41) *Vanderbilt Journal of Transactional Law*, 381< www.google.com> accessed 9 December 2019.

[39] Fagbemi (n 23).

[40] Ibid.

[41] Anurag K. Agarwal, 'Party Autonomy in International Commercial Arbitration', (2007) *Indian Institute of Management Ahmedabad, India Research and Publication Department*<www.google.com>accessed 8 October 2019.

[42] Lehmann (n 38).

[43] Fagbemi (n 23).

[44] Ibid.

[45]<www.lawsinsider.com> accessed 9 January 2020.

[46] Greg C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd ed., Lagos, Snaap Press Nig. 2014).

matter in which they are involved. As such, party autonomy gives the contracting parties the power to fashion their own remedial process within the limits of public policy.[47]

2.2 Review of Previous Studies

The imperativeness of the role of party autonomy in international commercial arbitration has made many scholars to adumbrate on the principle of party autonomy. As a result, there are written materials in form of textbooks, articles, journals as well as public lecture notes on this issue. Since this is still a budding area, more online sources are available and within reach than textbooks. It is noteworthy to state that though most writers have written commendably on the role of party autonomy in international commercial arbitration, however, their interests have been directed at different epochs of the principle of party autonomy.

Nwakoby in his book,[48] discussed the principle of party autonomy in relation to commercial arbitration. He discussed about the role parties' play in the arbitration agreement viz-a-viz the appointment of arbitrators, choice of the place of arbitration, the choice of applicable law and the choice of the language of arbitration. However, he was more concerned with domestic arbitration in Nigeria, viz-a-viz the Arbitration and Conciliation Act 2004 than international commercial arbitration.

Shadat in his article[49] discussed the principle of party autonomy. He discussed the role played by the principle of party autonomy in granting arbitral measures with a view of providing recommendations when there is a lacuna in England Laws. He looked at some sources of party autonomy, case laws and party autonomy; advantages of party autonomy, limitations to party autonomy and theories advanced in support of party autonomy.

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[47] Nwakoby (n 46).
[48] Ibid.
[49] Shadat S.M Mohmeded, 'Party Autonomy Doctrine is the Cornerstone of Arbitral Provisional Measures' (2016) 1(1) *International Academic Journal of Law and Society*,28-43< www.google.com >accessed 9 December 2019.

Also, Michal in her article,[50] looked at party autonomy in the procedure of appointing arbitrators, the limitations of party autonomy, whether the appointment of the sole arbitrator or three arbitrators makes the proceedings shorter. She discussed more on the independence and impartiality of the arbitrators. She said that there is still a level of independence of the arbitrators when she opined thus'... it turns out that notwithstanding the fact that arbitrators sometimes identify with the party that appointed them, the relations within the equilibrium of the arbitration tribunal are maintained and they are sufficient guarantee of an independent award'.[51]

In discussing party autonomy, Lehmann[52] tried to justify the theory of conflict of laws and its effect on party autonomy. He did not discuss the limits to party autonomy. According to him, to define party autonomy by its limits is to define a vacuum as being free from atmosphere. Far from being a vacuum, party autonomy is an important legal principle that has its roots in the recognition of individual freedom. He looked at party autonomy as being void from something but is justified in its own right.[53]

Kazutake in his article,[54] looked at party autonomy in relation to the consolidation of multiparty and classwide arbitration. He stated that party autonomy is recognised in multiparty arbitration because multiparty arbitration gives room for interested parties to agree to arbitrate in one arbitral procedure or their agreement are so construed.[55] However under governing law, when multiparty arbitration is enforced, it must be followed. But in other cases, the parties' agreement is respected. Also, classwide arbitration is the counterpart of class action in

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[50] Michal Malacka, 'Party Autonomy in the Procedure of Appointing Arbitrators' (2017) (17) (2) *International and Comparative Law Review*, 93-109 <www.google.com >accessed 9 December 2019.
[51] Ibid.
[52] Lehmann (n 38).
[53] Ibid
[54] Okuma Kazutake, 'Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration'(2003) (9) (9) *Annual Survey of International and Comparative Law* <http://digitalcommons.law.ggu.edu/annlsurvey/vol9/iss1/9> accessed 9 December 2019.
[55] Ibid.

litigation.[56] In classwide arbitration, many parties are involved in the proceedings and there are many issues to be resolved, so they decide on how they want the issues to be resolved thereby upholding party autonomy.

While Dursun in his article[57] described party autonomy in the context of international commercial arbitration. He also discussed arbitration agreement as a reflection of party autonomy, the applicable laws and issues related to the conduct of arbitral proceeding and the role of national courts. According to him, the source of powers of the arbitrators is the arbitration agreement. He looked at public policy and acting bonafide as the restrictions to party autonomy.[58]

Agarwal in his article[59] focuses on a plethora of judgment of various court primarily the U.S Supreme Court and the Supreme Court of India in determining the trend towards acknowledging party autonomy as one of the most important aspects of international commercial arbitration. Fagbemi in his own study[60] evaluated the practicability of the norms of party autonomy in international commercial arbitration. He also looked at the importance of arbitration agreement, rationale for party autonomy, concepts of party autonomy from various international perspectives, limitation to party autonomy. He was of the view that party autonomy should be streamlined through court intervention.

Jamshed[61] on the other hand in discussing party autonomy is of the view that the arbitration agreement reflects the position of the party who is economically dominant. He looked at the arbitration Law of England in relation to party autonomy. He concluded that since

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[56]Kazutake (n 54).
[57] Dursun (n 34).
[58] Ibid.
[59] Agarwal (n 41).
[60] Fagbemi (n 23).
[61]Ansari Jamshed, 'Party Autonomy in Arbitration: A Critical Analysis' (2014) 6(6) *Researcher*, 47-53 <http://www.sciencepub.net/rescarcher > accessed 10 January 2020.

the party autonomy is the basis for the arbitration, it cannot be discarded due to some irregularities in the arbitration proceedings.

From the foregoing, it is observed that though the different writers discussed party autonomy, they did not discuss in depth the role of party autonomy before and during the arbitration proceeding because it is not within their scope. However, I appreciate the writers for their courageous expression of their subjective insight and the numerous contribution to the principle of party autonomy in international commercial arbitration which has laid a foundation for the author of this study to undergo this research.

2.3 Theoretical Framework

A theory is a set of principles on which the practice of an activity is based.[62] It is a supposition or a system of ideas intended to explain something especially one based on general principles independent of the thing to be explained.[63] There are different theories that explain arbitration which invariably extends to party autonomy. Some of these will be discussed.

2.3.1 Jurisdictional Theory

Jurisdiction is the court's power to decide a case or issue a decree.[64] The jurisdictional theory explains the adjudicative nature of arbitration. It says that the arbitrator plays a quasi-judicial role which is akin to the role of a judge in a national court. A jurisdictional analysis of the legal nature of arbitration finds that an arbitrator performs public/judicial functions which a State allows within its territory by way of assignment or tolerance.[65] In other words, parties will benefit from the principle of party autonomy as far as the lex fori[66] allows. The connection

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[62]<www.google.com > accessed 13 January 2020.
[63] Ibid.
[64] Bryan A. Garner, *Black's Law Dictionary* (8th ed., St Paul Minn.: West Pub. Co. 2004).
[65]Nadia R. Salama, '*Nature, Extent and Role of Parties' Autonomy in the Making of International Commercial Arbitration Agreements*'(2015) Being a Thesis submitted to the University of Manchester for the award of a Degree of Doctor of Philosophy in the School of Law< www.google.com >accessed 9 December 2019.
[66]The law of the place of arbitration.

of the arbitral process with Sovereign States has an impact on the rights and obligations of the arbitrators.[67]

However, this jurisdictional theory tends to limit parties' autonomy because parties can refer to arbitration only to the extent that is expressly or impliedly allowed under the law of the place of arbitration.[68] This theory finds support in the fact that an arbitral award, unless voluntarily enforced by the parties is not self-executing and will most likely always need to be enforced by national courts.[69]

2.3.2 Contractual Theory

This theory sees the relationship between the parties and the arbitrators as a contract. In defining this theory, Prof Barraclough and Waincymer stated that 'the entire arbitral process, from setting up the tribunal to the arbitrators' powers and the binding effect of the award is seen as a product of the parties' agreement'.[70] The extent of powers of the arbitrators will depend on the will of the parties: they will decide what will their autonomy be and the arbitral tribunal will have the obligation to act accordingly.[71] In other words, the contractual school of thought relies on the contractual nature of arbitration and finds that the origin, existence and continuity of any arbitration depend on the parties' agreement to arbitrate.[72]

If the parties have not chosen any law, the arbitrators will have to find a law in a way that is relevant with the spirit and letter of the contract, to have a law that corresponds to the

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[67] Masters Dissertation, '*Discretion of Arbitrators and Application of Mandatory Rules: Is the Doctrine of Party Autonomy in International Commercial Arbitration Concerning the Choice of the Substantive Law as Provided by the UNCITRAL Arbitration Rules, the ICSID Convention and the ICC Arbitration Rules Experiencing a Crisis?*<www.google.com> accessed 9 December 2019.

[68] Salama (n 65).

[69] Ibid.

[70] Masters Dissertation (n 67).

[71] Ibid.

[72] Salama (n 65).

expectations and interest of the parties.[73] The tribunal can have great freedom to the extent the parties allows it.

[73] Masters Dissertation (n 67).

CHAPTER THREE

LEGAL FRAMEWORK GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION

This Chapter is concerned with the legal framework on International Commercial Arbitration with particular reference to the laws that supports party autonomy. In International Commercial Arbitration, party autonomy allows the parties' consent to use any of the National Arbitration laws in International Commercial Arbitration agreement. The need to avoid all the dramas usually associated with litigation proceedings has made parties to embrace a system which allows them to exercise their will and choose laws that are most favourable to them.[74]

Party autonomy has gained acceptance in international law and has received recognition in almost all jurisdiction. The principle gives freedom to parties to international commercial arbitration agreement to choose applicable substantive law and these laws when chosen govern the contractual relationship of the parties.[75] The parties may also choose to rely on trade usage, national rules of law, transnational law, lex mercatoria (the law merchant), general principles of law or general principles of international law.[76] Relevant provisions of some arbitration laws will be discussed in this Chapter.

3.1 Party Autonomy under the New York Convention 1958

This is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award. Before it came into existence, there was the Geneva Convention but there was

[74] Sunday A. Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality', <www.researchgate.net > accessed 9 October 2019.
[75] Ibid.
[76] Ibid.

still a need in the international business community for a truly international 'denationalised' convention to address the settlement of disputes in international trade.[77]

Thus in 1953, the ICC prepared the first draft of what is now referred to as the New York Convention which focused exclusively on the enforcement of international arbitration awards and aimed at allowing denationalised arbitral processes and arbitral awards not to be governed by national laws. The ICC draft was afterwards submitted to the United Nations Economic and Security Social Council (hereinafter referred to as ECOSOC) to scrutinise. In 1955 the ECOSOC came forward with a revised draft. The revised draft was subsequently sent for comments and inputs to a number of governments and organisations.

Both the ICC and ECOSOC drafts had already provided for the basis of a three-week conference that was attended by 45 States and was held at the headquarters of the United Nations in New York from May 20 to June 10. This conference was known as 'The Conference on International Commercial Arbitration of 1958'.[78] The main theme of the ICC draft and the ECOSOC draft was that they focused mainly on the recognition and enforcement of international arbitral awards but there was no serious attention to the enforcement of international arbitration agreements. It was only late in the Conference that it was observed that such approach was very limiting and that separating the arbitration agreements to be dealt with in a different protocol was not preferred.[79] Accordingly, when the proposal to extend the treaty from only the recognition of arbitral awards to also include international arbitration agreement was made, it was welcomed by many delegates. This proposal was referred to as the 'Dutch proposal' because it was made by the Dutch delegation. It was described first as 'a very

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[77] Nadia R. Salama, '*Nature, Extent and Role of Parties' Autonomy in the Making of International Commercial Arbitration Agreements*'(2015) Being a Thesis submitted to the University of Manchester for the award of a Degree of Doctor of Philosophy in the School of Law < www.google.com > accessed 9 December 2019.

[78] Ibid.

[79] Ibid.

bold innovation' and was eventually adopted and thus has since formed one of the essential characters of the Convention.[80]

On the 10th day of June 1958, the text of the New York Convention was approved by a unanimous vote but the Convention came into force on the 7th day of June, 1959.[81] It is an improvement on the Geneva Convention of 1927 because it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards.[82] The scope of application of the Convention is broader because it applies to both arbitration agreements and award. Unlike the Geneva Convention, the New York Convention shifts the burden of proving the validity or invalidity of the awards from the party seeking enforcement to the party resisting it.[83] More so, the New York Convention has eliminated the 'double exequatur'[84] that was required under the Geneva Convention according to which the award had to be confirmed at the seat of arbitration before being recognised across the globe.

The New York Convention 1958 has been described as the most important treaty in international trade law.[85] It has been ratified by 166 State parties, making it the most influential legally binding formal instrument in the field of International Commercial agreement.[86] The Convention initiates its articles by requiring each Contracting State to recognise any valid arbitration agreement that the parties have reached.[87] It is therefore in essence applicable to international arbitration agreement rather than to purely domestic arbitration agreement.[88]

The importance and role of the New York Convention to this study is specifically emphasised when one realises the prominence of the party autonomy principle under the

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[80] Salama (n 77).
[81] Fagbemi (n 74).
[82] Ephraim Apata, *The Nigerian Arbitration law in Focus* (Lagos, West African Book Publishers Ltd., 1997).
[83] Salama (n 77).
[84] It is decision conferring authority to execute a judgment or arbitral award.
[85] Salama (n 77).
[86] Ibid.
[87] Article II (1) of the New York Convention 1958.
[88] Apata (n 82).

Convention. Article II of the New York Convention has been described as 'the decisive threshold under the Convention'[89]. Article II (1)[90] provides thus:

> Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration[91]

Article II (2) further provides that 'the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'.

Article II (3) empowers 'the Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'.

More so, Article V (1) (d)[92] provides that:

> If the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place..., recognition and enforcement of the award may be refused.

[89] Salama (n 77).
[90] New York Convention 1958.
[91] Ibid
[92] Ibid.

Thus this Convention supports party autonomy. However, in describing the importance and role of the New York Convention, the Late Kofi Anan (a former Secretary-General of the United Nations at the time) expressed that the Convention:

> Has nourished respect for binding commitment, whether they have been entered into by private parties or governments. It has inspired confidence in the rule of law. And it has helped ensure fair treatment when disputes arise over contractual rights and obligations.[93]

3.2 Party Autonomy under the English Arbitration Act 1996

The English Arbitration Act 1996 is also known as the Arbitration Act 1996. It is a highly accessible statutory framework from both a linguistic and organisational standpoint.[94] It represents a substantial improvement over prior English Arbitration Statutes, including the 1979 Act. It intermediates between legal regulatory principles and the practical realities of the arbitral process.[95] The fundamental precepts of the 'world law' on arbitration- party autonomy, the validity of arbitration agreements, judicial assistance and cooperation, limited scrutiny of award, the requirement of basic procedural fairness and the need for finality and arbitral autonomy- are prevalent in this Act.[96]

This Act is very comprehensive. Its content is organised according to standard headings which mirrors the logical progression of the arbitral proceedings and consist of 110 provisions that regulate the various stages of the arbitral process and the relationship that exists between that process, the legal system and the right of contract.[97] This Act succinctly supports the

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[93] Salama (n 77).
[94] Thomas E. Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' (1998) (22) *Tulane Maritime Law Journal,* 131-154 <www.google.com> accessed 27 January 2020.
[95] Ibid.
[96] Ibid.
[97] Ibid.

principle of party autonomy in arbitration agreement. Some of the significant sections will be highlighted and appraised.

> Section 1: the provisions of this Part are founded on the following principles, and shall be construed accordingly-
>
> (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.[98]

From the above, it can be seen that Section 1 of the Act enunciates the basic principles that underlies this Act and its regulation of arbitration. According to Thomas,[99] he described this Section as an exceedingly important and useful provision because it made clear both the regulatory objectives of the Statute and the policy of promoting the privatisation of adjudication through arbitration. Under this Section, a statutory policy favouring arbitration and the deregulation of arbitration emerges. This Section emphasise that parties have a basic right to pursue remedies outside of judicial adjudication provided that such recourse does not infringe upon vital social policies and compromise the fairness that is essential to the legitimacy of adjudicatory processes.[100]

Section 1(a) defines the recourse to arbitration as a means of adjudicating claims in a fair and impartial manner without incurring the expense and time commitment required by

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[98] Section 1(a) –(c) Arbitration Act 1996.
[99] Carbonneau (n 94).
[100] Ibid.

judicial litigation. Referring matters to arbitration involves an acceptance of an abbreviated and more expeditious process but not an abandonment of fundamental procedural fairness. Comparatively uncomplicated but basically fair adjudicatory procedures are the essence of the bargain for arbitration and characterise the underlying rationale of the process.[101]

While Section 1(b) announces the principle of party autonomy and provides for its nearly unrestricted scope of application. Here, the parties have the legal right to choose the means by which to resolve their disputes. The exercise of this right is subject 'only' to the limitations that arise from those 'safeguards' that 'are necessary in the public interest'. The possible recourse to the courts on preliminary questions of law and the right of appeal on a point of law seems to integrate substantive laws safeguard into the statutory standard.[102] However, both actions can be excluded by party agreement and are subject to a number of restrictions, making it unlikely that they could be used to pre-empt the reference to arbitration.

Section 1(c) buttresses the principle of arbitral autonomy and contractual freedom. It provides that judicial intervention in arbitration can only take place when it is specifically authorised by the Statute. The Act only allows judicial intervention when the parties cannot agree on a particular issue. As a matter of statutory policy, judicial activism as regards to arbitration or open-ended scrutiny of arbitration agreement and award is excluded. The courts must have an express statutory basis for questioning the recourse to arbitration or the results of the arbitral process.[103]

This study will therefore look at some important provisions in this Act[104] that illustrates that party autonomy is a paramount factor in arbitration of disputes under this Act. Section 3 of the Act defines 'the seat of arbitration' to mean the juridical seat of arbitration designated

[101] Carbonneau (n 94).
[102] Ibid.
[103] Ibid.
[104] The Arbitration Act 1996.

by the parties to the arbitration agreement; or by any arbitral or other institution or person vested by the parties with powers in that regard; or by the arbitral tribunal if so authorised by the parties; or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances. Section 7 provides that unless otherwise agreed by the parties, 'an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as distinct agreement.'[105]

Section 8(1) states that unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party. S. 8(2) provides that subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.[106]

By virtue of Section 14(1), parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Act and where no such agreement exist, the provision of the Act is applicable.[107]

Section 15 further states that parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a Chairman or Umpire. Subsection 2 provides that the number of arbitrators shall be two and the appointment of any even number of arbitrators shall be understood as requiring the appointment of an additional arbitrator as Chairman of the

[105] The Arbitration Act 1996.
[106] Ibid.
[107] Ibid.

tribunal, unless, of course where the parties agree otherwise. Where there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.[108]

Section 16(1) provides that the parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any Chairman or Umpire.[109]

Section 17(1) provides that unless the parties otherwise agree, where each of 2 parties to an arbitration agreement is to appoint an arbitrator and 1 party ("the party in default") refuse to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.[110]

Section 18(1) provides that the parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. It also states that 'there is no failure if an appointment is duly made under Section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside. Also Subsection 2 provides that if or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.[111]

By virtue of Section 23(1), the parties are free to agree in what circumstances the authority of an arbitrator may be revoked. Subsection 2 of this same section, provides that if or to the extent that there is no such agreement the following provisions apply....[112] Section 25(1) provides that the parties are free to agree with an arbitrator as to the consequences of his resignation as regards- his entitlement (if any) to fees or expenses, and any liability thereby

[108] The Arbitration Act 1996.
[109] Ibid.
[110] Ibid.
[111] Ibid
[112] Ibid.

incurred by him. Subsection 2 states that if or to the extent that there is no such agreement the following provisions apply....[113]

Section 30(1) states that unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration in accordance with the arbitration agreement. Section 35(1) provides that the parties are free to agree- that the arbitral proceedings shall be consolidated with other arbitral proceedings, or that concurrent hearings shall be held, on such terms as may be agreed. Subsection 2 states that unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolation of proceedings or concurrent hearings.[114]

Section 38(1) provides that the parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceeding. While subsection 2 of the said section states that unless otherwise agreed by the parties the tribunal has the following powers....[115] Section 39(1) states that the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.[116]

Section 41(1) states that the parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration. Its subsection 2 provides that unless otherwise agreed by the parties the following provisions apply....[117] Section 42(1) provides that unless otherwise agreed by the

[113] The Arbitration Act 1996.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.

parties, the Court may make an order requiring a party to comply with a peremptory order made by the tribunal.[118]

Section 45(1) provides that unless otherwise agreed by the parties, the Court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of Law arising in the course of the proceedings which the Court is satisfied substantially affects the rights of one or more of the parties.[119]

Section 48(1) states that the parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies. Subsection 2 of this same section provides that unless otherwise agreed by the parties, the tribunal has the following powers....[120] Section 52(1) states that the parties are free to agree on the form of an award.[121]

From the above, it is observed that most provisions begins with ***'unless otherwise agreed by the parties', 'parties are free to agree...,'*** which depicts party autonomy in the arbitration proceedings. In other words, this shows that the parties' decision and opinion in resolving their dispute through arbitration is not overlooked. It can also be said that the parties are to resolve their disputes themselves while the arbitrators are to serve as a guide in ensuring compliance with the agreement. It is only when the parties have not decided on a particular issue that the Act come in to resolve the issue, either by the provision in the Act or by a resort to the court.

[118] The Arbitration Act 1996.
[119] Ibid.
[120] Ibid
[121] Ibid.

3.3 Party Autonomy under the Nigerian Arbitration and Conciliation Act 2004

In Nigeria, arbitral proceedings is governed by the Arbitration and Conciliation Act[122] and the Arbitration Rules provided in the First Schedule of the Act.[123] The Act was enacted in Nigeria in order to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration.[124]

This Act encourages party autonomy in resolving their disputes through the arbitration process. Some of the provisions will be highlighted.

Section 2 of this Act provides that unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of parties or by leave of the Court or Judge.[125] Section 6 provides that the parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement but where no such determination is made, the number of arbitrators shall be deemed to be three.[126]

Section 9(1) provides that the parties may determine the procedure to be followed in challenging an arbitrator. Section 16(1) provides that unless otherwise agreed by the parties, the place of the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Its subsection 2 provides that notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties, the arbitral tribunal

[122] Cap A18 Laws of the Federation of Nigeria 2004.
[123] Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004.
[124] Preamble to the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004.
[125] Arbitration and Conciliation Act 2004.
[126] Ibid.

may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.[127]

Section 17 provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date the request to refer the dispute to arbitration is received by the other party.[128] Section 18(1) states that the parties may by agreement determine the language to be used in the arbitral proceedings, but where they do not do so, the arbitral tribunal shall determine the language or languages to be used bearing in mind the relevant circumstances of the case.[129]

Section 20(1) states that subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether the arbitral proceedings shall be conducted- by holding oral hearings for the presentation of evidence or oral arguments; or on the basis of documents or other materials; or by both holding oral hearings and on the basis of documents or other materials as provided in paragraph (a) and (b) of this subsection and unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested so to do by any of the parties.[130]

Section 20(5) states that the arbitral tribunal shall, unless otherwise agreed by the parties, have power to administer oaths to or take the affirmations of the parties and witness appearing.[131] Section 22(1) states that 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; require a party to give to the expert any relevant information or to procedure or provide access to, any documents, goods or other property for inspection. By

[127] Arbitration and Conciliation Act 2004.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid.

virtue of its subsection 2, unless otherwise agreed by the parties, if a party so request or if the arbitral tribunal considers it necessary, any expert appointed under subsection (1) of this section shall, after delivering his written or oral report, participate in a hearing where the parties shall have the opportunity of putting questions to him and presenting expert witnesses to testify on their behalf on the point at issue.[132]

Section 47(4) states that the arbitral tribunal shall not decide ex aequo et bono or as amiable compositeur unless the parties have expressly authorised it to do so. While subsection 5 of the same section states that in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade applicable to the transaction.[133]

Section 50(3) states that the parties can choose who the appointing authority will be.[134] Section 56(1) states that unless otherwise agreed by the parties, any communication sent under or pursuant to this Act shall be deemed to have been received- when it is delivered to the addressee personally or when it is delivered to his place of business, habitual residence or mailing address; or where a communication cannot be delivered under paragraph (a) of this subsection, when it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it.[135]

From the foregoing, it is observed that the Act recognises the principle of party autonomy by conferring on the parties the freedom to resolve by agreement the number of arbitrators and their appointment, place of arbitration and language to be used in the arbitral

[132] Arbitration and Conciliation Act 2004
[133] Ibid.
[134] Ibid.
[135] Ibid.

proceedings.[136] The freedom to choose the applicable law is very fundamental, the reason being that the dispute will be decided in accordance with the law chosen.[137] Thus, the parties are bound by the outcome of the arbitral proceedings. Also, we can notice the prevalent use of ***'unless otherwise agreed by the parties'*** in this Act. All these provisions points to the fact that party autonomy is the fulcrum of arbitration proceedings under this Act.

3.4 Party Autonomy under the UNCITRAL Model Law 2006

UNCITRAL means United Nations Commission on International Trade law which is a subsidiary body of the United Nations General Assembly. It was inaugurated on the 21st day of June, 1985 and was amended on the 7th day of July, 2006. Legislation based on the Model Law have been adopted in 69 States with a total of 99 jurisdictions. The Model Law was drafted and approved because of the need to liberalise international commercial arbitration by limiting the role of national courts and allowing the parties freedom to choose how their disputes should be determined.[138] It was also to provide for a framework for the conduct of international commercial arbitration so that in the event of the parties being unable to agree on procedural matters the arbitration would nevertheless be capable of being completed.[139]

The Model Law is intended to be a model of a national arbitration legislation with the purpose of further harmonising the treatment of international commercial arbitration in different countries.[140] In other words, it is also known internationally as a good model of a national arbitration law for countries to harmonise and promote its arbitral environment internationally. In the words of a UN Secretary- General's Report 'the ultimate goal of a Model

[136] Fagbemi (n 74).
[137] Ibid.
[138] Apata (n 82).
[139] Ibid.
[140] Salama (n 77).

Law would be to facilitate international commercial arbitration and to ensure its proper functioning and recognition.'[141]

It is seen as a soft-law legal instrument that is created with an objective of indirectly harmonising the legal practice on international commercial arbitration, as it provides a standard text which leaves countries with either the option to adopt it as it is, modify it or simply be inspired by it.[142] The adoption of the Model Law has therefore prompted an unprecedented harmonisation between national arbitration law and has accordingly, established great success behind creating this Model Law.[143]

However, Agarwal,[144] opined that the Model Law does not and was not meant to grant absolute autonomy to parties over the conduct of the arbitrators. It was meant to promote general autonomy to parties but balanced with safeguard in the form of mandatory provisions that could not be contracted out on the basis that these were considered to be essential to the arbitration agreement.[145]

In commenting on the success and role of the Model Law, the UNCITRAL Secretariat at the time explained that:

> The Model Law constitutes a sound basis for the desired harmonisation and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus

[141] Salama (n 77).
[142] Ibid.
[143] Ibid.
[144] Anurag K. Agarwal, 'Party Autonomy in International Commercial Arbitration', (2007) *Indian Institute of Management Ahmedabad, India Research and Publication Department*<www.google.com>accessed 8 October 2019.
[145] Ibid.

> on the principles and important issues of international arbitration practice.[146]

As to the principle of party autonomy, the entire scheme of the Model Law is designed to give wide scope and attention to this principle making it one of the most significant principle provided for.[147] In introducing the general principles and purpose of the Model Law, the General-Secretary in one of the United Nations Reports stated thus:

> Probably the most important principle on which the Model Law should be based is the freedom of the parties, in order to facilitate the proper functioning of international commercial arbitration according to their expectations. This would allow them to freely submit their disputes to arbitration and to tailor the 'rules of the game' to their specific needs.[148]

Also, Article 19 of this Law provides for the right of the parties to determine the form and procedure to be adopted in the arbitration proceedings in which they are involved. According to Hermann:[149]

> The most fundamental principle underlying the Model law is that of the autonomy of the parties to agree on the 'rule 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.

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[146] Salama (n 77).
[147] Ibid.
[148] Ibid.
[149] Greg C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd ed., Lagos, Snaap Press Nig. 2014).

Some of the provisions wherein the principle of party autonomy was addressed under this Law includes:

Article 3(1) provides that unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address, if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it. The communication is deemed to have been received on the day it is so delivered.[150]

Article 5 provides that in matters governed by this Law, no court shall intervene except where so provided in this Law.[151] Also Article 10(1) that provides that the parties are free to determine the number of arbitrator. Its subarticle 2 provides that failing such determination, the number of arbitrators shall be three.[152]

Article 11(1): No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties. Subarticle 2 provides that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraph (4) and (5) of this article. Subarticle 4 provides that where, under an appointment procedure agreed upon by the parties, a party fails to act as required under such procedure, or the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or a third party, including an institution, fails to perform any function entrusted to it under such procedure any party may request the Court or other authority specified in Article

[150] UNCITRAL Model Law 2006.
[151] Ibid.
[152] Ibid.

6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.[153]

Article 13(1) provides that the parties are free to agree on a procedure for challenging an arbitrator.... Article 17(1) provides that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures. Article 19(1) provides that 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. Subarticle 2 provides that 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.[154]

Article 20(1) provides that the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Subarticle (2) provides that notwithstanding the provisions of paragraph 1 of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or document.[155]

Article 21 provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commenced on the date on which a request for that dispute to be referred to arbitration is received by the respondent.[156] Article 22(1) provides that the parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing

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[153] UNCITRAL Model Law 2006.
[154] Ibid.
[155] Ibid.
[156] Ibid.

such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by arbitral tribunal.[157]

Article 26(1) provides that unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report it on specific issues to be determined by the arbitral tribunal; may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant document, goods or other property for his inspection. Subarticle 2 states that unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.[158]

Article 28(1) provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of law rules. Subarticle 2 provides that failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. Subarticle 3 states that the arbitral tribunal shall decide ex aequo bono or as amiable compositeur only if the parties have expressly authorised it to do so. Subarticle 4 states that in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.[159]

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[157] UNCITRAL Model Law 2006.
[158] Ibid.
[159] Ibid.

The UNCITRAL Model Law is known internationally as a good model of a national arbitration law for the countries to harmonise and promote its arbitral practices for a better arbitral environment internationally.[160] It has been adopted in a substantial number of jurisdictions and has inspired the language, style and simplicity of many other national arbitration laws. All the above provisions buttress the importance of party autonomy in international commercial arbitration under this Law. This Law is a good example for a national arbitration law that targets international commercial arbitration.[161]

3.5 Party Autonomy under the International Chamber of Commerce Rules 2012

The International Chamber of Commerce also known as the ICC came in force on the 1st day of January, 2012. The ICC Arbitration Rules provides for dispute resolution procedure similar to the New York Convention.[162] This procedure is to lead to a binding decision from the neutral arbitral tribunal appointed by the parties to the arbitration. The intention of the ICC Rules is to ensure transparency, efficiency and fairness in the dispute resolution process while allowing parties to exercise their choice over many aspects of the procedure.

One unique feature about the ICC Rules 2012 is that once the parties involved in international business transaction have elected to use this Rule, the parties are assured of a neutral framework for the resolution of cross-border disputes. The ICC Rules 2012 regulate the filing of claims, the constitution of the arbitral tribunals, the conduct of proceedings, the rendering of decisions and the determination of costs.[163]

While offering security and predictability, the ICC Rules 2012 also accommodate any preference parties in dispute might have with respect to certain aspects of the proceedings, such

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[160] Salama (n 77).
[161] Ibid.
[162] Fagbemi (n 74).
[163] <www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> accessed 30 April 2020.

as the choice of arbitrators, the place and the language of arbitration. The balance between flexibility and control has led to the popularity of the ICC Rules in the diverse legal, economic, cultural and linguistic settings of about 180 countries.[164]

Some of the provisions that supports party autonomy under this Rule will be succinctly highlighted.

Article 11(6) provides that in so far as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Article 12 and 13.[165] Article 20 provides that in the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard been given to all relevant circumstances, including the language of the contract.[166]

Article 21(1) states that the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. Subarticle 2 of this section states that the arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages. More so, subarticle 3 states that the arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.[167]

Article 28(1) states that unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or

[164] <www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> accessed 30 April 2020.
[165] International Chamber of Commerce Arbitration Rules 2012.
[166] Ibid.
[167] Ibid.

conservatory measures it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security been furnished by the requesting party....[168]

Under this Rule, it is observed that parties are free to determine the law to be applied by the arbitrators to the merits of the disputes. However, in the absence of any indication by the parties as to the applicable law, the arbitrators shall apply the rules of law which it determines to be appropriate as provided in Article 21(1) of this Rule.[169] This means that the parties have freedom to choose the law to be applied, it is only if they waive such rights that the arbitrators can do so on their behalf.

[168] International Chamber of Commerce Arbitration Rules 2012.
[169] Fagbemi (n 74).

CHAPTER FOUR

THE ROLE OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

It is trite that arbitration agreement is the strongest evidence of party autonomy because the parties choose the law and conduct the arbitration process independently by an arbitration agreement.[170] This Chapter is the crux of this study. It deals with the role of party autonomy in international commercial arbitration. In this Chapter, we will discuss international commercial arbitration and party autonomy, the role of party autonomy in international commercial arbitration and the limitations to party autonomy in international commercial arbitration.

4.1 International Commercial Arbitration and Party Autonomy

It is trite that for an arbitration to have international flavour, one or all of the key features need not be in the same jurisdiction. Some of the key features include the parties, law, venue and transaction. Arbitration agreement is the primary source of arbitration. An arbitration agreement is a written contract in which two or more parties agree to settle a dispute outside of the court.[171] Arbitration agreements represent the contractual foundation of any arbitration which mainly constitute the fundamental difference between any consensual arbitration and litigation.[172]

An overlooked significance of the arbitration agreement is the fact that it presents the parties with the instrument through which they can manifest and exercise an extensive part of their arbitral autonomy and tailor the features of their arbitral settlement at an early stage.[173]

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[170] Ar. Gor. Seyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent', <www.google.com >accessed 9 October 2019.

[171] <www.google.com> accessed 19 January 2020.

[172] Nadia R. Salama, *'Nature, Extent and Role of Parties' Autonomy in the Making of International Commercial Arbitration Agreements'*(2015) Being a Thesis submitted to the University of Manchester for the award of a Degree of Doctor of Philosophy in the School of Law< www.google.com >accessed 9 December 2019.

[173] Ibid.

As a result, the drafting of these agreements can radically affect the process and outcome of any international commercial arbitration.

In other words, it should be noted that a properly drafted arbitration agreement can positively produce a smooth process and an efficient outcome, a less carefully drafted arbitration agreement will most likely produce legal and practical complications while a badly drafted arbitration agreement will bring about an unenforceable agreement, or, even worse, an unenforceable arbitral award.[174] Thus, the awareness of the parties and the practicality of the choices they make in their arbitration agreement will enhance the effectiveness of an international commercial arbitration. In International commercial arbitration, there are two types of arbitration agreement: submission agreement and arbitration clause.[175]

Submission agreement is a separate agreement from the main commercial contract.[176] The subject matter of submission agreement is existing disputes. In other words, when a dispute arises, if there is no provision regarding dispute settlement method in the main contract, the parties can make a submission agreement.[177] While for arbitration clause, it is a part of the main commercial contract. In arbitration clause, the subject matter is future disputes. When the parties make a commercial contract, in general, the contract contains an arbitration clause.[178]

Both submission agreement and arbitration clause have some advantages and disadvantages. For instance, as reiterated above, the subject matter of submission agreement is existing disputes; hence the parties can make arbitration agreement by taking into account the requirements of the dispute.[179] This is the main advantage of submission agreement. On the

[174] Salama (n 172).
[175] Dursun (n 170).
[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] Ibid.

other hand, once dispute arises, it is difficult to agree on anything, even dispute settlement method. In this sense arbitration clause is more favourable.[180]

Where evidence supporting the existence of the arbitration agreement exists somewhere else other than the main contract, it cannot be ignored and an arbitration agreement must be enforced.[181] More importantly, it is much more relevant to focus on the parties' commercial relationship and any evidence that establishes this relationship than to focus on the material existence of a written main contract as the sole evidence of this commercial relationship. Eventually, an arbitration agreement is meant to refer the parties disputes to arbitration regardless of where this arbitration agreement is found, so long as there is compelling evidence to buttress the fact that it exists.[182]

Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration.[183] The principle of party autonomy as a key characteristic of arbitration means that parties must have substantial autonomy and control to decide how their arbitration are to be conducted without the court interfering except for the purpose of supervising and enforcement of the arbitral award.[184] It is a principle that has been endorsed not only in national laws but by international arbitral institutions and organisations.[185] The Supreme Court in Nigeria reiterated this in the case of ***MV Lupex v Nigeria Overseas Chartering and Shipping Ltd,***[186] where it held inter alia that an arbitration clause is a written submission agreed by the parties to the contract and like other written submissions, it must be construed according to its languages and in the light of the circumstances in which it is made.

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[180] Dursun (n 170).
[181] Salama (n 172).
[182] Ibid.
[183]< www.google.com> accessed 9 October 2019.
[184] Sunday A. Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality', <www.researchgate.net >accessed 9 October 2019.
[185] Ibid.
[186] (2003) 15 NWLR (pt 844) 569.

In International commercial arbitration, the intention of the parties are communicated through the contents of the arbitration agreement, thereby making the parties in charge or at the helm of their own affairs. The parties exclude the jurisdiction of the court by an arbitration agreement. They can conduct the arbitration process however they want by means of the arbitration agreement.[187] In the case of ***Lee C. Feil v MBNA America Bank,***[188] the District Court of Kansas ordered the parties to refer the entire matter to arbitration instead of the court, as they had agreed to submit all their claims to a binding arbitration. While in the case of ***Rodemadan India Ltd v International Trade Expo Centre Ltd,***[189] the Indian Supreme Court decided in favour of the arbitration agreement and appointed the Chairperson/ Presiding Arbitrator thereby upholding the validity of the arbitration agreement.

In international commercial arbitration, parties must show that they desire to submit the issue to arbitration. In an **ICC Case,**[190] three contracts were concluded between the parties, all of the same merchandise. All contracts containing the same conditions including an arbitration clause referring disputes to arbitration under the ICC Rules. Two contracts were signed by the parties except for one, but all were executed. However, before shipment took place under the third contract, the respondent cancelled it complaining about the quality of the merchandise and objected to the ICC jurisdiction over the third unsigned contract. The overall business relationship was as such to treat all 3 contracts as a whole and so consent was deemed to have been given to arbitrate disputes arising out of this relationship even under the unsigned third contract and the arbitral tribunal declared itself to have jurisdiction. This case shows that it only takes a strong evidence of the parties consent and intention to arbitrate for the arbitration agreement to become effective.

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[187] Dursun (n 170).
[188] Case No. 05-2459-JWL, decided on March 3 2006.
[189] Supreme Court of India, Arbitration Petition 25 of 2005 decided on April 17, 2006.
[190] ICC Case No. 3779 0f 1981.

It is true that an arbitration agreement is still an ordinary contract with a procedural rule and therefore if both parties explicitly and formally agree that they no longer wish to arbitrate their dispute, then such agreement would waive the arbitration agreement.[191] However, a party's refusal or non-cooperation in appointing the arbitrators does not render an arbitration agreement inoperative and also does not amount to a repudiation of the arbitration agreement. In the case of ***Premium Shipping Ltd v Sea Consortium Plc Ltd***,[192] the Court enforced an arbitration agreement even though the party who appointed an arbitrator claimed that it was not and never had been a party to the charter party in dispute or the arbitration clause contained within.

It should be noted that once the parties have agreed to get the disputes resolved through arbitration, the Courts shall ensure that the disputes are resolved through arbitration and arbitration only.[193] This was reiterated in the case of ***Kamdhenu Cooperative Group Housing Society Ltd v Messrs Vardhman Contractors and Builders Private Ltd and Anor.***,[194] where the Delhi High Court held inter alia:

> It is not a case where the respondent was not aware of the arbitration proceedings but for the reasons best known to the respondent, the respondent chose not to contest the matter .... In my considered view the respondent deliberately took an uncooperative stand in deciding to stay away from the arbitration proceedings and must bear the consequences thereof.[195]

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[191] Salama (n 172).
[192] (2011) EWHC 540.
[193] Anurag K. Agarwal, 'Party Autonomy in International Commercial Arbitration', (2007) *Indian Institute of Management Ahmedabad, India Research and Publication Department*<www.google.com>accessed 8 October 2019.
[194] Delhi High Court, Cs (Os) No. 2458A of 1996, decided on February 16, 2006.
[195] Ibid.

The doctrine of seperability also supports party autonomy. Generally, arbitration agreement is a part of the main commercial contract. This doctrine of seperability posit that arbitration clause is a separate agreement. The main commercial contract is the primary contract and the arbitration clause is the secondary contract.[196] Thus, if the main contract is invalid, it does not affect adversely the validity of the arbitral clause.

In the case of ***Teledyne Inc. v Kone Corp,***[197] even though the Defendant denied the very existence of the main contract, it nonetheless, thought to refer to the terms of the arbitration agreement within. The Plaintiff as a result, argued that the Defendant cannot refer to an arbitration agreement in a contract which it denies its very existence. In justifying the Defendant's position, the Court explained that because the Defendant did not make an 'independent challenge' to the arbitration provision separately, the determination of whether the contract is valid and enforceable lies within the arbitrator's jurisdiction.

Also in the case of ***Prima Paint v Flood and Conklin,***[198] the Plaintiff filed an action in Court for rescission of a consulting agreement on the basis of fraudulent inducement of the contract which contained an arbitration agreement. The Plaintiff's main contention was that the Defendant had entered into a consulting agreement and had represented itself as solvent and able to perform its contractual obligations, where in fact, it was insolvent and planned to file for a bankruptcy agreement shortly after executing the consulting agreement. The Defendant however, responded by submitting the issue to arbitration, while the Plaintiff sought to stop the Defendant from proceeding with the arbitration. The court ruled in favour of the Defendant and explained that the claim of fraudulent inducement of contract is aimed at the main contract and

[196] Dursun (n 170).
[197] (892 F.2d) 1404 (9th Gr. 1989).
[198] 388 U.S 395, (1976).

not at the arbitration agreement, and that there is no evidence to support that the parties have intended to withhold this issue from arbitration.

In the above case, even though the Plaintiff was misrepresented and deceived by the Defendant's ability to carry out its contractual obligations, the Plaintiff was not misrepresented as regards the effect and nature of the arbitration agreement in that contract. In other words, where the consent to contract was undeserved and impeached, the consent to arbitrate was perfectly valid and there was no evidence to indicate otherwise. Therefore, the doctrine of seperability applied here and the arbitration agreement survived the fraud in inducement of the underlying contract.

Some group of commentators find the New York Convention 1958 to be indifferent to the doctrine of seperability. They ground their arguments on the simple fact that the Convention has failed to bring any direct reference to the doctrine of seperability[199]. The Convention's clearest position toward seperability lies in Article V(1)(a) where it provides that arbitration agreement could end up being subjected to different laws than that of the underlying contract which is one of the main consequences of seperability.[200]

Another group of commentators are of the opinion that the New York Convention 1958 adopts the doctrine of seperability by implication, by arguing that both Article II(1) and Article II(2) imply the seperability of arbitration agreement since they attract certain legal rules that only apply to the arbitration agreements and not to the underlying contracts.[201] They also claim that Article V(1)(a) could have the effect of subjecting the arbitration agreement to a law other than that governing the main contract since the provision allows for the application of a specific

[199] Salama (n 172).
[200] Ibid.
[201] Ibid.

national law to the arbitration agreement as distinct from the underlying contract either by the choice of the parties or the application of a certain choice of law rule.[202]

However, the main aim of this seperability doctrine is to provide sustainability of the arbitral clause.[203] In this sense, this doctrine preserves the autonomy of the parties and it has been accepted by international rules like the UNCITRAL Model law.[204] Additionally, many judicial decisions of different jurisdictions that adopted the UNCITRAL Model law have been consistent with this analysis. That is, holding arbitration agreements seperable and giving them effect notwithstanding the invalidity of the underlying contract.[205]

4.2 The Role of Party Autonomy in International Commercial Arbitration

One of the core aim of this study is to promote the exercise of party autonomy in international commercial arbitration. It is important for parties to be fully engaged in drafting of their international arbitration agreement. As one commentator stated thus:

> To all those whose responsibilities include the drafting of arbitration clauses: please express yourself with at least a minimum of clarity and ensure that you are well acquainted with arbitral institutions. How much more prudent it is to seek the advice of a specialist rather than run the risk of making crude mistakes that can land one in lengthy costly procedures before the arbitration proper has even begun.[206]

Thus, all the choices made by the parties in the drafting of their arbitration agreement can drastically influence the style, length, complexity, cost and efficiency of their arbitral

[202] Salama (n 172).
[203] Dursun (n 170).
[204] Ibid.
[205] Salama (n 172).
[206] Ibid.

settlement.[207] More so, choices and general behaviours of the parties at the negotiation phase of their contractual agreement will be significantly relied upon where there is any attempt either before a national court or an arbitral tribunal to find out what the actual intentions of the parties are.[208] These choices are the role the parties play in the international commercial arbitration agreement.

In international commercial arbitration, the role of the parties entails that the parties are free to choose the law, procedure, any place as the seat of arbitration, arbitrators and almost everything related to the resolution of the disputes. The parties also decide the language or languages to be used in the arbitral proceedings. The language shall be used in all aspects of the arbitration process. A look will now be had on the role of party autonomy in international commercial arbitration.

4.2.1 The Seat or Place of Arbitration

Some Acts like the Arbitration Act 1996 refer to it as the 'seat of arbitration', while some like the UNCITRAL Model Law 2006, the Arbitration and Conciliation Act 2004 refer to it as the 'place of arbitration'. However, in this study, the two terms will be used interchangeably. The importance of the seat of arbitration cannot be overemphasised.

The Arbitration Act 1996[209] provides that the seat of arbitration means

> The juridical seat of the arbitration designated by the parties to the arbitration agreement or by any arbitral or other institution or person vested by the parties with powers in that regard, or by the arbitral tribunal if so authorised by the parties, or determined, in the absence of

[207] Salama (n 172).
[208] Ibid.
[209] Section 3 of the Arbitration Act 1996.

any such designation, having regard to the parties agreement and all the relevant circumstances.

The seat of arbitration is simply the place wherein the arbitration proceedings is to be held as provided for in the arbitration agreement. The seat of arbitration is identified entirely by reference to the parties' agreement and not by the geographical location of the arbitration, example locations of hearings and meetings.[210]

In international commercial arbitration, the parties have the right to determine the rules of the game in respect to the determination of the venue for arbitration.[211] They have the freedom to choose the seat/place of arbitration. Generally, the parties choose a neutral place since the place which is national for one party is foreign for another party.[212] The Model Law[213] provides that 'the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties'. Thus the Model Law supports the freedom of the parties to choose their place of arbitration.

According to Salama,[214] she opined that the choice of the arbitral seat during the negotiation of any international arbitration agreement is one of the most overlooked influential aspects over the course of arbitral procedures. The import of a wise choice of an arbitral seat generally has two aspects: one of logistical convenience and the other is of a legal effect.[215]

The logistical convenience mainly relates to issues of technical support, cost and practical facilities in general. The legal effect of the choice of an arbitral seat can very much

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[210] Salama (n 172).
[211] Greg C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd ed., Lagos, Snaap Press Nig. 2014).
[212] Advocate Rajveer, 'Party Autonomy in International Commercial Arbitration' (2018) (9) (10) *International Journal of Scientific and Engineering Research* < http://www.ijser.org > accessed 8 January, 2020.
[213] Article 20(1) of the UNCITRAL Model Law 2006.
[214] Salama (n 172).
[215] Ibid.

influence the procedures followed in the arbitral process, the law applicable to the arbitration agreement and other legal aspects such as the interactions between national Courts and the arbitral tribunal.[216] In other words, the law of the place of the arbitration has a significant impact at every stage of the arbitration such as the laws governing the substance and arbitration, Court intervention, hearings and interim measures.[217]

The parties can determine the seat of arbitration by designating or specifying it in their agreement or in their notice of submission to the arbitration, that is, in their submission agreement.[218] Most times, the main problem in the choice of place of arbitration occurs during the negotiation of the arbitration agreement where parties may unwisely fail to assign a place for their arbitration or at worse, choose one recklessly.[219]

According to the Arbitration and Conciliation Act 2004[220] and the UNCITRAL Model Law,[221] the arbitral tribunal may hold meetings or proceedings in other places than the place designated as the place of arbitration taking into account the convenience of the place chosen to the parties and the arbitral tribunal. However, where the parties in their agreement made the place of arbitration to be exclusive, the arbitral tribunal cannot change it without the consent of the parties. Where the forum is not exclusive, the arbitral tribunal has the right to change it and notify the parties accordingly.[222]

In the case of ***NNPC v Lutin Investment Ltd & Anor***,[223] the Nigerian Court of Appeal, decided inter alia that the arbitral tribunal which transferred its sitting to London for purposes of obtaining the evidence of two key witnesses of the applicant acted within the provisions of

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[216] Salama (n 172).
[217] Rajveer (n 212).
[218] Nwakoby (n 211).
[219] Salama (n 172).
[220] Section 16(2) of the Arbitration and Conciliation Act 2004.
[221] Article 20(2) of the UNCITRAL Model Law 2006.
[222] Nwakoby (n 211).
[223] (2001) 50 WRN 81 at 83.

Section 16(1) and Section 16(2) of the Act,[224] since the two key witnesses fled Nigeria to London where they now reside.

In ***Shashoua v Sharma,***[225] the parties concluded a Shareholders agreement that was governed by the Indian Law and included an arbitration clause that provided for ICC arbitration and stated that 'the venue of arbitration shall be London, United Kingdom'. When a dispute arose between the parties, an ICC tribunal was constituted and an award was issued against the defendant. In order to resist the enforcement of the award, the defendant argued that English Courts had no jurisdiction to grant leave to enforce the award since to them, India was the actual seat of arbitration because Indian Law applied to the Shareholder's agreement. However, the English Court found that the parties arbitration agreement provided enough evidence that the seat/place of arbitration was intended to be in London.

The practical importance of choosing the place of arbitration is manifested in the need to facilitate hearings and meetings between parties and the tribunal.[226] A convenient choice of the place of arbitration would also improve upon issues of technical support, accommodation and transportation which will most likely be a matter of concern for the parties, arbitrators, witnesses and any expert needed for the settlement of the dispute. The convenience and practicality of the location of a place can offer a cost-effective settlement and aid accelerating the arbitral process.[227]

When there is an issue regarding the arbitration agreement, the national court in the place of arbitration can intervene. In the case of ***PT Perusahaan Dagang Tempo v PT Roche Indonesia***[228] the parties entered into distribution agreements, the most recent of which

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[224] Arbitration and Conciliation Act 2004 Cap A18 Laws of the Federation of Nigeria 2004.
[225] (2009) EWHC 957 (Comm J).
[226] Salama (n 172).
[227] Ibid.
[228] Decision of the District Court of South Jakarta (Pengadilan Negeri Jakarta Selatan) No. 454/Pdt. G/1991/PN. Jak. Sel, 30 May, 2000.

contained a termination clause allowing the parties arbitration in Jakarta under the Rules of Arbitration of the Badan Arbitrase Nasional Indonesia (BANI- Indonesian National Board of Arbitration). In August 1999, the Defendant issued a written notice of termination effective from February 2000 to the Claimant who had then brought an action to the South Jakarta District Court claiming that the Defendant could not terminate the agreement without the consent of the other party. The Defendant opposed the lawsuit claiming that the court had no jurisdiction and that the parties should be referred to arbitration in Jakarta before BANI. The Court rejected the Defendant's objection and accepted jurisdiction on grounds that partial termination was 'an act of tort' which was not arbitrable, hence fell in the jurisdiction of national courts. The court explained that only 'technical business issues' were arbitrable and since the dispute only focused on legal issues, it fell into the jurisdiction of the court.

To sum it all, Nwakoby,[229] posits that in deciding the place of arbitration, the legal, political, economic and social factors surrounding the perceived arbitral forum must be taken into consideration. Legally, the mandatory rules of procedure of the venue and the worldview of the place must be given serious consideration so as to ensure that the worldview of the place is not unnecessarily restrictive and parochial.[230]

4.2.2 The Appointment of the Arbitrators

The appointment of the arbitrators is also a vital role in the arbitration process. It is the right of the parties to an arbitration agreement to appoint their arbitrators or prescribe the procedure for the appointment of the arbitrators.[231] In other words, the parties are free to appoint whom to decide on their issue. Most times, the parties may decide to appoint either one, three or five arbitrators in the arbitral panel. In other cases, when the parties did not decide

[229] Nwakoby (n 211).
[230] Ibid.
[231] Ibid.

the number of arbitrators, the law which they choose to apply in the arbitration process can decide the number of arbitrators to be appointed in the arbitration panel. For example, Section 6 of the Act[232] provides that 'the parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made; the number of arbitrators shall be deemed to be three.'

Also, the Arbitration Act 1996[233] provides that 'the parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a Chairman or Umpire'. It also provides that, 'if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator'[234]. The UNCITRAL Model law[235] provides that 'the parties are free to determine the number of arbitrators'.

Some jurisdictions have prohibited the composition of even number of arbitrators in the arbitral tribunal. This is because even-numbered tribunal may pose a risk of a deadlock situation from which the arbitrators cannot make any progress which will make them unable to resolve the dispute.[236] Also, the fear of producing a pure compromise decision is a driving force that makes many jurisdictions as well as Conventions to prohibit even-numbered tribunals.[237] Little wonder then that the Arbitration Act 1996 provides that 'unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be 2 or any other even number shall be understood as requiring the appointment of an additional arbitrator as Chairman of the tribunal'.[238]

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[232] The Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004.
[233] Section 15(1).
[234] Section 15(3).
[235] Article 10(1) of the UNCITRAL Model Law 2006 (as amended).
[236] Salama (n 172).
[237] Ibid.
[238] Section 15(2) of the Arbitration Act 1996.

It is also the right of the parties to choose the procedure for appointment of the arbitrators. Section 16(1)[239] of the Act provides that 'the parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any Chairman or Umpire'. Also, the Arbitration and Conciliation Act[240] provides thus '..., the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator'. Article V(I) (d)[241] discusses the appointment of the arbitral tribunal. It provides that the composition of the arbitral tribunal must be in accordance with the agreement of the parties or the law of the country where the arbitration is taking place, that is, if such agreement does not exist. If this procedure is not followed the enforceability and recognition of the arbitral award may be revoked.[242] In other words, improper composition of the tribunal is when the composition of the tribunal deviates from the agreement of the parties or the law of the place (that is, when the parties fail to make such agreement).[243]

Improper composition of the arbitral tribunal could take many forms. It could be when one party single-handedly dominate the appointment of the arbitral tribunal;[244] or the appointment of an arbitrator by a different appointing authority other than the one agreed upon by the parties; the award made by a sole arbitrator instead of 3 arbitrators which the parties agreed upon or the participation of an arbitrator who lacks legal capacity.[245] Legal capacity is a very important requirement in the appointment of arbitrators since many jurisdictions require that either expressly or impliedly, a person should have legal capacity in other to be appointed as an arbitrator.[246]

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[239] The Arbitration Act 1996.
[240] Section 7(1).
[241] New York Convention 1958.
[242] Salama (n 172).
[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] Ibid.

Any arbitrator in an international commercial arbitration is subject to imperative requirements of impartiality and independence that are normally required and enforced by internal arbitral institutions, international arbitration conventions and national arbitration laws.[247] Thus, a prospective arbitrator when approached in connection with an appointment as arbitrator, is to disclose all circumstances which may lead to justifiable doubts as to his impartiality and independence.[248]

The court held inter alia in the case of ***Amec Civil Engineering Ltd v Secretary of State of Transport,***[249] that impartiality is the watchword of all tribunals including arbitrators. Thus, an arbitrator may be challenged by either party to the agreement or even by all parties if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.[250]

4.2.3 The Language of the Arbitration

The parties also have the freedom to choose the language of the arbitration. The parties may by agreement designate the language or languages to be used in the arbitral proceedings but where they fail to do so, the arbitral tribunal shall determine the language or languages to be used.[251] Article 20,[252] provides that 'in the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract'. Article 22(1)[253] provides that 'the parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings....' Also, the Arbitration and Conciliation Act 2004[254]

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[247] Salama (n 172).
[248] Nwakoby (n 211).
[249] (2005) 21 ConLJ 640 at p.657.
[250] Article 12(2) of the UNCITRAL Model Law 2006.
[251] Nwakoby (n 211).
[252] ICC Rules 2012.
[253] UNCITRAL Model Law 2006.
[254] Section 18(1).

provides thus 'the parties may by agreement determine the language to be used in the arbitral proceedings, but where they do not do so, the arbitral tribunal shall determine the language or languages to be used bearing in mind the relevant circumstances of the case'.

The language chosen shall be used in all aspects of the arbitration process.[255] According to Nwakoby,[256] this implies that in such situations, interpreters and translators knowledgeable in the language chosen must be employed, thus increasing the cost of the arbitration. Most times, English and French languages are been used as the chosen languages for the arbitration proceedings. Where the main contract refers to 2 languages, it is essential that the parties assign the particular language for the arbitration, or else, it may be conducted in both languages which will give room for significant increase in the cost, time and complexity of any international commercial arbitration to the detriment of the parties.[257]

It is advisable for parties when choosing the language of the arbitration, to take into consideration the language of the main contract, in order to avoid any form of ambiguity that may arise. Thus, it is of great significance that the parties in clear terms provide for the language of their arbitration in their agreement.[258]

4.2.4 The Applicable Law

The choice of the applicable law is the most crucial point in the determination of the extent of party autonomy.[259] The applicable law is the law agreed upon by the parties or the law identified as the governing law by the arbitral tribunal in the absence of the agreement of the parties in respect of same.[260] Generally, it is presumed that the law applicable to the

[255] Section 18(2) of the Arbitration and Conciliation Act 2004, Article 22(1) of the UNCITRAL Model Law 2006.
[256] Nwakoby (n 211).
[257] Salama (n 172).
[258] Ibid.
[259] Dursun (n 170).
[260] Nwakoby (n 211).

substance chosen by the parties will also govern the arbitration clause. However, this presumption is a rebuttable presumption because the doctrine of seperability enables the arbitration clause to be governed by different law which is applicable to the substance.[261]

In international commercial arbitration, the choice of applicable law issues has always proven to be problematic and full of uncertainty. The Court in the case of ***Scherk v Aberto-Culver Co.***,[262] opined that 'uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive law and conflict-of-law-rules'. This sort of uncertainty and complexities behind the choice of applicable law issues contradicts with the ideals and expectations of parties to international arbitration which mainly comport predictability and efficiency.[263]

Article 19(1)[264] provides for the choice of law. It states that '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'. According to the Arbitration and Conciliation Act 2004,[265] 'the arbitral tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance of the dispute'.

Salama[266] is of the opinion that Article V (I) (a)[267] recognises the parties' choice of an applicable law in a less indirect way by providing that the recognition and enforcement of the award might be refused if the parties' arbitration agreement is not valid according to the law chosen by the parties to govern their agreement (failing which according to the law of the place where the award was rendered).[268]

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[261] Dursun (n 170).
[262] 417 US. 506 (1974) at p.516-517.
[263] Salama (n 172).
[264] UNCITRAL Model Law 2006.
[265] Section 47(1).
[266] Salama (n 172).
[267] The New York Convention 1958.
[268] Salama (n 172).

The issue of the applicable law may arise at the three different stages which are: the drafting of the arbitration agreement stage, the stage of the arbitral proceedings and at the stage of the enforcement of the award.[269] However, this study is concerned with the drafting of the arbitration agreement and the arbitral proceedings stage. Parties usually disagree on the issue of the applicable law at the time of drafting the arbitration agreement and as such parties may agree to let sleeping dog lie and allow the arbitral tribunal to decide it.[270]This usually occurs where one of the parties is a sovereign nation. This is because while the host State is primarily interested in subjecting the foreign investor to its national legal system because it wishes to retain the fullest legislative freedom in pursuance of its national economic policies, the foreign investor is primarily interested in excluding the application of the law of the State because he fears that the host State may use its sovereign legislative power to change the legal environment to the detriment of its investment.[271]

The parties can choose any national law, mandatory law, public international law, general principles of law, concurrent law, combined law, the tronc commun doctrine and transnational law as the applicable law to the substance.[272] The law of the place of arbitration and the law as chosen by the parties are the governing law in the arbitration. Basically, when the parties choose a law applicable to the arbitration agreement, this law will be applied first. However, in some scenarios, the law of the place of arbitration, also known as lex arbitri has a dominant role to play because the country wants to govern the conduct of arbitration within its boundary.[273]

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[269] Nwakoby (n 211).
[270] Ibid.
[271] G. Jaenieke, 'Consequences of a Breach of an International Agreement Governed by International Law, General Principles of Law or by Domestic Law of the Host State' in Greg C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd ed., Lagos, Snaap Press Nig. 2014).
[272] Dursun (n 170).
[273] Ibid.

The law of the place of arbitration is a body of rules which sets a standard external to the arbitration and the wishes of the parties, for the conduct of the arbitration. It can also be defined as a body of rules that is external to the wishes of the parties.[274] Thus, even if the parties have an express choice of the law to be applied to the arbitration, this choice may be subject to the overriding mandatory rules of lex arbitri. In other words, the choice of the law of the parties is applicable as far as lex arbitri allows.[275]

Generally, the parties do not choose lex arbitri directly. They choose lex arbitri indirectly through the choice of the place of arbitration. However, in recent years, the parties choose the place of arbitration by taking into cognisance the law of the country because lex arbitri has significant role to play in every stage of the arbitration process.[276] For instance, it is a notorious fact that arbitration agreement binds only the parties to the agreement, thus the arbitral tribunal has no power to order and compel the attendance of third parties as witnesses. Hence, the arbitral tribunal needs the assistance of the Court of the place of arbitration.[277] Even if the parties confer such powers on the arbitral tribunal, the arbitrators may not exercise this power unless the lex arbitri permits it.

In the case of ***Autopistas v Argentina***,[278] the arbitral tribunal stated that the wording 'rules of law' allows the parties to agree on a partial choice of law and in particular to select specific rules from a system of law. In ***World Duty Free v Kenya***,[279] the arbitral tribunal affirmed that an agreement which contains two choice of law clauses designating different laws but whose effect contain significant similarities can be applied. Also in the case of ***Kaiser***

[274] Dursun (n 170).
[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] ICSID Award, 23 September 2003.
[279] ICSID Award, 4 October 2006.

Bauxite v Jamaica,[280] the arbitral tribunal stated that parties can select in their agreement the law of the host state in combination with principles of international law.

The lex arbitri deals with general issues such as equal treatment, fair dealing, arbitrability, court intervention, the constitution of the arbitral tribunal. Sometimes, it contains some detailed procedural law.[281] Even though the lex arbitri includes some procedural provisions, it should not be confused with procedural rules. The procedural rules contain which rules to be followed during the course of arbitration.[282] They are a set of rules chosen by the parties or the arbitrators which represent the provisions of the arbitration agreement that govern issues like the number of the arbitrators, the arbitral seat and any reference to institutional rules.[283]

Where the parties are completely silent as to the applicable law to their arbitration, difficulties may arise as the matter will either be decided by the national Courts or the arbitration. Salama in her study,[284] opines that the best solution for this dilemma is for a national Court or arbitral tribunal to apply a validation principle. A validation principle mainly looks at all the possible applicable laws to the arbitration and designates the one that gives validity to the arbitration agreement.[285] This approach relies its applicability on the genuine intentions of the international business parties who can be presumed to have intended that their arbitration agreement be enforced.

Where the parties make an explicit choice of applicable law in their arbitration agreement, parties can either choose a national law or a non-national legal system, or to use a non-national legal system in conjunction with a national law.[286] When choosing a national law,

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[280] ICSID decision on jurisdiction on 6 July 1975.
[281] Dursun (n 170).
[282] Ibid.
[283] Salama (n 172).
[284] Ibid.
[285] Ibid.
[286] Ibid.

parties should seek certain qualities of the law applying to their agreements. These include, the familiarity and neutrality of that law, the enforceability provided under the law to international arbitration agreements and future awards, the regulation of confidentiality under the certain national law and the stability and commercial sophistication of the chosen law.[287]

Where the parties are silent as to the law applicable to their arbitration but have managed to expressly agree on the law applicable to their main contract or have expressly assigned a seat for their arbitration, in this scenario, the law chosen in the main contract or the law of the seat of arbitration can function as an implied choice of the parties to the law applicable to their arbitration agreement.[288] In all, it is advisable for the parties to choose the law applicable to the substance while they are in the contract stage.

4.3 Limitations to Party Autonomy in International Commercial Arbitration

It is a general rule that the arbitral tribunal shall be independent of national courts and the parties are vested with freedom to dictate the procedure to be followed by the tribunal.[289] This rule is captured in the guiding principle of party autonomy as reflected in most sections of the various Acts and Conventions considered in Chapter 3 above. The court in the case of ***Lignes Aeriennes Congolaises (LAC) v Air Atlantic Nigerian Limited (AAN),***[290] stated inter alia that an arbitration clause in an agreement generally does not oust the jurisdiction of the court or prevent the parties from having recourse to the court in respect of dispute arising therefrom.

It is a notorious fact that where there is no restriction on a particular thing, the misuse or abuse of such will be inevitable. In international commercial arbitration, the promotion of

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[287] Salama (n 172).
[288] Ibid.
[289] Anthony I. Idigbe, "Court Control of Arbitral Process" *Being a Paper presented at the Nigerian Bar Association section on Business Law 2-Day Studyshop on ADR as an Alternative and Expeditious and Cost Effective Means of Dispute Resolution, on 5th July, 2006.*
[290] (2006) 2 NWLR (pt. 963) p.49 at 73.

party autonomy does not mean advocating for absolute freedom of the parties in deciding the conduct of arbitration. Thus, there is the need to limit party's autonomy in international commercial arbitration to avoid the abuse of such. This is where the courts and other variables come to act as limitations. Some of the limitations to party autonomy includes:

4.3.1 Appointment of Arbitrators

Generally, in international commercial arbitration, parties must agree as to the appointment of arbitrators but where there is a disagreement, an arbitration institution or the court can intervene in appointing arbitrators upon the request of a party.[291] The law abhors vacuum that is why the courts will appoint arbitrators once the parties are unable to do so. For instance, Section 7(3) of the Arbitration and Conciliation Act[292] thus:

> Where, under an appointment procedure agreed upon by the parties-
>
> (a) A party fails to act as required under the procedure; or
>
> (b) The parties or two arbitrators are unable to reach agreement as required under the procedure; or
>
> (c) Third party, including an institution fails to perform any duty imposed on it under the procedure
>
> Any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment[293]

[291] Fagbemi (n 184).
[292] Cap A18 Laws of the Federation of Nigeria 2004.
[293] See also Section 7(2) of the Arbitration and Conciliation Act 2004.

4.3.2 Interim Measures

An interim measure is an action taken to last for a short period pending the determination of a substantive matter. The court can order the interim measures upon request by the parties if it is compatible with an arbitration agreement and where it is ascertained that the object of the dispute is a perishable item and it is better to dispose of it to convert to money.[294] For instance, Section 13 of the Act[295] provides thus:

> Unless otherwise agreed by the parties, the arbitral tribunal may before or during an arbitral proceedings:
>
> (a) At the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute and
>
> (b) Require any party to provide appropriate security in connection with any measure taken under paragraph (a) of this section.[296]

It is important to state here that the arbitral tribunal has no coercive power to enforce the above section.[297] It therefore, relies on the national court to exercise such powers and thus assist the arbitral process.[298]

4.3.3 Public Policy

Public policy is another limitation to party autonomy. Public policy is dynamic in nature and it varies with time and place. Most countries have accepted it as its fundamental principle, hence, any violation of it will make the order or award null and void.

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[294] Fagbemi (n 184).
[295] Arbitration and Conciliation Act 2004.
[296] Ibid.
[297] Ibid.
[298] Idigbe (n 289).

In *Egerton v Brownlow*,[299] the House of Lords described public policy as a principle of law which holds that no subject can lawfully do that which has the tendency to be injurious to the public or against public good.

In *Bharat Heavy Electricals v C N Garg*,[300] the Indian Supreme Court interpreted 'contrary to public policy' to mean any agreement that is against the fundamental policy of the country, interest of the country, morality, justice and legal norms.[301] Thus the term public policy has been generally accepted as any conduct which violates fundamental conceptions of legal order in the country concerned.

This was also reiterated in the case of *Soleimany v Soleimany*,[302] where a father and a son smuggled some carpets out of Iran under a contract. This smuggling was unlawful according to the Iranian revenue laws. A dispute arose between them and they decided to resolve the dispute through arbitration. They submitted their dispute before the Beth Din which applied Jewish law. According to Jewish Law, even if the contract was illegal, it had no effect to the rights of the parties. After the award was made, one of the parties applied to the English Court of Appeal in order to obtain the enforcement of the award. However, the English Court of Appeal refused this application on the ground of public policy. The court stated that public policy did not allow the enforcement of an illegal contract.[303] In other words, if the decisions reached by the parties is contrary to public policy, the court can annul it. This is a good ground for challenging an award and thus makes the award unenforceable.

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[299] (1853) 4 HLC 1.
[300] (2001) CLA-BL Supp. (Snr) 6 Delhi.
[301] Fagbemi (n 184).
[302] (1999) QB 785.
[303] Dursun (n 170).

4.3.4 Third Parties

The issues relating to third parties constitute another limitation to party autonomy.[304] Generally, the arbitration agreement binds only the parties. Thus the parties cannot agree on anything which can affect the third parties directly. Where parties have conferred such power upon the arbitral tribunal, the arbitrators cannot compel the third parties to attend the hearings as witnesses.[305] In other words, even if the third parties play active roles in the construction projects and have substantial legal and financial interest therein, they cannot take part in the arbitral proceedings between two parties who have consented to an arbitration agreement, thus, they are not bound by the arbitration agreement.

For instance, in the case of ***Peterson Farms Inc. v C&M Farming Ltd***,[306] the international Chamber of Commerce, UK which was the arbitral tribunal ruled that group companies as third parties can be bound by the arbitration agreement if it is in accordance with the common intent of the contracting parties. However, this decision was challenged on appeal before the UK Commercial court, which thus set aside the decision of the arbitral tribunal. The court held inter alia that there is no 'group companies' doctrine under the English Law and third parties do not become bound by arbitration agreement even if the contracting parties intended so.

In ***African Insurance Development Corporation v Nigeria Liquified Natural Gas Limited,***[307] the court held inter alia that a third party who was not privy to a contract cannot ordinarily be held responsible for damages incurred by default of one of the parties nor subject to the arbitration clause in such agreement he never had the privilege to consent to.

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[304] Fagbemi (n 184).
[305] Ibid.
[306] (2004) EHWC 121 : (Comm).
[307] (2000) LPELR-210 (SC)

4.3.5 Acting Bonafide

To act bonafide means to act without an intention to deceive. In international commercial arbitration, parties to the arbitration are of necessity expected to choose the law applicable to the substance of their transaction while executing the contract and the arbitrator(s) have the duty to apply the chosen law to the substance. Where the choice of law is not made bonafide, the arbitrator(s) may disregard this duty. In other words, if there is an intention to deceive, then the arbitrator(s) may disregard this duty and not apply the law as chosen by the parties. This is also another limitation to party autonomy.

CHAPTER FIVE

CONCLUSION

5.1 Summary of Research Findings

In today's globalised world with rapidly increasing cross-border movement of people, goods, services and information; various new legal problems evolve which cannot be single-handedly dealt with by a single State.[308] To tackle these problems with a global dimension, regional organisations or international judicial bodies gradually constitute 'hard law' whereas 'soft law' is nowadays frequently employed to implement governance tailored to the actual circumstance of individual States or to create autonomous norms to accommodate various needs of markets.[309] As such, arbitration comes in handy and thus is chosen to resolve such disputes in order to preserve friendly relationships and encourage bilateral trades even after the disputes is settled. Party autonomy revolves around arbitration as the parties in the arbitration are free to agree on how their disputes are resolved, subject only to such safeguards as are necessary in public interest.

After a careful study, it was found out that parties in international commercial arbitration have very important roles to play at the formation of the arbitration agreement stage and the arbitral proceedings stage. Without these roles been performed, the essence of arbitration is lost. However, parties to international arbitration are subject to certain restrictions in the performance of their roles in order to avoid the abuse of such roles. The Court thus acts as checks and balances on the role of party autonomy which is very commendable. However,

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[308] Yuko Nishitani 'Party Autonomy in Contemporary Private International Law- The Hague Principles on Choice of Law and East Asia' (2016) (59) *Japnese Yearbook of International Law*, 300-344 < www.google.com> accessed 21 April 2020.

[309] Ibid.

it should be noted that the control of the Courts over the arbitration cannot be so tight so as to defeat the very essence of arbitration: which is having the dispute resolved in a private manner.

5.2 Observations

From the totality of the study, it is observed that though the parties have autonomy to decide how the arbitration should take place, this autonomy is not sacrosanct. Whenever the parties are not acting bonafide, the court can intervene to correct such anomaly. Also, the court's intervention is not rigid. The court will always look at the arbitration agreement to infer the import of the agreement before it decides on any issue involving the parties to the arbitration agreement.

International commercial arbitration is a dispute settlement process that is famous for being a fast, effective, party-oriented mechanism that is designed to avoid the routine and complexity of national adjudication. Unfortunately in the present times, international commercial arbitration processes are described as over-lawyered, over-sophisticated and desperately overloaded with unnecessary detailed regulations that is sometimes difficult to differentiate it from national court's procedures.[310] It is thus observed that a step back to the status quo of arbitration's original consensual nature and reliance on the parties' arbitral freedom of choice can mitigate these complications that may arise in the settlement of international commercial disputes through arbitration.

It is noteworthy to state that the parties usually accept the decisions of the arbitrators; that is why there are few cases of appeal against arbitral award in court in comparison to the number of litigation matters in Court. Also, parties in commercial transactions are gradually embracing arbitration in solving international commercial disputes in order to avoid enmity

[310] Nadia R. Salama, '*Nature, Extent and Role of Parties' Autonomy in the Making of International Commercial Arbitration Agreements*'(2015) Being a Thesis submitted to the University of Manchester for the award of a Degree of Doctor of Philosophy in the School of Law< www.google.com >accessed 9 December 2019.

among parties which is counterproductive in the business world and continue the cordial relationship already established between parties.

5.3 Recommendations

From the foregoing, the following recommendations are made:

1. Parties to an international commercial transaction should be enlightened by the drafters of their arbitration agreement to specifically spell out what they want to be contained in their arbitration agreement. They should not leave any part of their agreement vague in order to avoid a wrong interpretation of the arbitration agreement.
2. The checks and balances applied by the court to checkmate the party's autonomy in international commercial arbitration should be greatly encouraged.

5.4 Contribution to Knowledge

There is no doubt that party autonomy has been in existence since the advent of international commercial arbitration. This study pertains to the analysis of the role of party autonomy in international commercial arbitration and the limitations thereof. This study has made a number of contribution to the expansion of knowledge, especially as it relates to how the parties apply their role in the arbitration agreement; and also the restrictions placed on those roles during the arbitration process.

5.5 Suggested Areas for Further Studies

In view of the fact that this study like every other study has its limitations, it is hereby suggested that further research should be conducted in the following areas:

1. The differences between the freedom allowed to commercial parties under institutional arbitration in comparison to ad hoc arbitration.

2. The role of party autonomy at the award stage of the arbitration process and the problems encountered at the enforcement of the arbitral award.
3. The limitation of the arbitrators in international commercial arbitration.

5.6 CONCLUSION

In a 2015 survey of Queen Mary School of International Arbitration, it was stated that 'the dynamic and party-driven nature of international arbitration allows for dispute resolution process that its users can tailor to their ever-changing needs'[311]. For a process that is constantly identified through how much it is party-oriented and through the amount of freedom and flexibility it offers to its parties, there is limited academic commentaries to assist international business parties in making the most suitable choices they can in order to achieve an effective arbitral settlement.[312] This is quite intriguing as it is observed in this study that most national and international arbitration laws, rules and conventions persistently provides for the parties freedom to make their choices in their arbitration agreement without ascribing the best technique to do so. Such burden is therefore left squarely on the shoulders of practitioners and Scholars to exapantiate upon.

This study in an attempt to demonstrate and analyse the possible ways by which international business parties can tailor their arbitral settlement through their arbitration agreement in order to achieve a more cost-efficient, speedy and effective process and outcome, has analysed the role of party autonomy in the making of international commercial arbitration while taking into consideration the limitations in order to discover the best techniques in making arbitral-settlement decisions. Arbitration agreement and the types of arbitration agreement were equally described. The author thus opines that parties to international commercial disputes should be furthermore enlightened so that there would not be any need

[311] Salama (n 310).
[312] Ibid.

for national court's interference; which invariably devalues the privacy status of the arbitration process.

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