

## **DRAFTING OF ARBITRATION CLAUSES: PROBLEMS AND COMMON MISTAKES\***

### **Abstract**

*The arbitration clause is often infused in the contract at the last minute as the parties celebrate the conclusion of their negotiations. Usually little more than an afterthought, it deserves considerably more attention from a meticulous legal practitioner. Because the arbitration clause can become highly indispensable down the road if the parties' relationship deteriorates, legal practitioners arbitration have recognized that the clause should be shaped in a thoughtful and careful way to the transaction and the parties' needs for an economical and efficient dispute resolution process. The opportunity to do this is before the heat of battle, that is, during the drafting of the contract. The arbitration clause/agreement plays a vital role in the governance of arbitration. Where parties enter into contractual agreement, especially agreement of international nature, they are availed of inherent freedom to craft arbitration clauses/agreement based on the universal principle of the contracting parties' autonomy, hence, 'freedom of contract, therefore, it is at the very fulcrum of how the law regulates arbitration. What the contracting parties do provide in their agreement generally becomes the controlling law.'<sup>1</sup> Drafting of Arbitration Clauses especially in contracts can be quite daunting. A small mistake in drafting an arbitration clause, for example, can result in unnecessary costs and delays before arbitration or even a court battle over the interpretation of such arbitration clause. This is because arbitration clause is more often than not, intricately interwoven into the contract yet they remain a distinct and separate form of agreement from the main contract. This work therefore, looks at what arbitration clause/agreement entails and the problems associated with drafting arbitration clauses/agreements; at what point can it be said that agreement to arbitrate is valid; and whether the agreement—by its terms—applies to the type of controversy at issue between the parties etc. To achieve this, reliance will be placed on some key arbitral institutions that set International standard frameworks for arbitration rules as well as our domestic rule, the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004. By way of consolidation, the work will draw conclusion based on the knowledge gained from the literature. For ease of clarity, the phrase arbitration clause and arbitration agreement may be used interchangeably where necessary while keeping the meaning within the acceptable limit.*

**Keywords:** Arbitration Clauses, Problems, Common Mistakes, Nigeria

### **1. Introduction**

Arbitration clause has been given various definitions by various bodies, academics and institutions. An arbitration agreement is a written contract in which two or more parties agree to settle a dispute outside of court. The arbitration agreement is ordinarily a clause in a larger contract. The dispute may be about the performance of a specific contract, a claim of unfair or illegal treatment in the workplace, a faulty product, among other various issues. In general terms, arbitration, as a form of alternative dispute resolution (ADR), is a way to resolve disputes outside the courts. The dispute will be decided by one or more persons (the 'arbitrators', 'arbiters' or 'arbitral tribunal'), which renders the 'arbitration award'. An arbitration award is legally binding on both sides and enforceable in the courts.<sup>2</sup> Under the United Nations Commission on International Trade Law (UNCITRAL), standard arbitration rules are drafted to meet the parties' expectation. The UNCITRAL stipulates in the arbitration clause as 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.'<sup>3</sup> The International Chamber of Commerce (ICC), the largest and the most representative business organisation in the world, defined a standard ICC arbitration clause as 'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules'<sup>4</sup>

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<sup>1</sup> T. Carbonneau, (2003). The Exercise of Contract Freedom in the Making of Arbitration Agreement, *Vanderbilt Journal of Transnational Law*, vol. 36, pp. 1.189 – 1.232

<sup>2</sup> A. O'Sullivan S. M. Sheffrin, (2003). *Economics: Principles in Action*. Upper Saddle River, New Jersey: Pearson Prentice Hall. p. 324. ISBN 0-13-063085-3.

<sup>3</sup> UNCITRAL Model Law, Art. 6, 2006

<sup>4</sup> ICC Rules, Art. 1

In the Nigerian jurisprudence, The Supreme Court of Nigeria in *M. V. Lupex v. N. O. C. & S. Ltd*<sup>5</sup> defined arbitration clause as ‘a written submission agreed by the parties to the contract and, like other written submissions, it must be construed according to the language and in the light of the circumstances in which it is made.’ Also, the Supreme Court in *Nwanenang v. Ndarake & Ors*<sup>6</sup> defined arbitration as ‘a reference to the decision of one or more persons with or without an umpire of a particular matter in difference between the parties.’ Halsbury’s Laws of England defined arbitration as ‘the reference of a dispute or difference or differences between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.’<sup>7</sup> The above definition given by Halsbury’s Laws of England reflects and incorporates the correct and well articulate features of the arbitration agreement. The Halsbury’s laws show that Arbitration must be based on an agreement of the parties for it to be valid. The arbitration must be with reference to dispute or differences which have occurred or are to occur in the future, arbitration is not court in the legal sense and the arbitrators are under a duty to hear the parties and their witnesses fully before making an award. This definition lay to rest the argument whether arbitration is ADR or litigation. The Supreme Court of Nigeria in *NNPC v Lutin Investment Ltd*<sup>8</sup> affirmed and upheld Halsbury Laws as valid an acceptable working definition of definition of a valid arbitration agreement.

## 2. Model Arbitration Clause

Model Arbitration clause defines arbitration clause as any dispute, controversy, or claim arising out of, relating to, or in connection with this contract, including with respect to the formation, applicability, breach, termination, validity or enforceability thereof, shall be finally settled by arbitration. The arbitration shall be conducted by [one or three] arbitrators, in accordance with [identify rules] in effect at the time of the arbitration, except as they may be modified herein or by mutual agreement of the parties. The seat of the arbitration shall be [city, country], and it shall be conducted in the [specify] language. b. The arbitration award shall be final and binding on the parties. The parties undertake to carry out any award without delay and waive their right to any form of recourse based on grounds other than those contained in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 insofar as such waiver can validly be made. Judgment upon the award may be entered by any court having jurisdiction thereof or having jurisdiction over the relevant party or its assets.<sup>9</sup> It follows that no single arbitration clause is suitable for all contracts. The drafting of an arbitration clause/agreement for international contracts requires careful consideration of the nature of the contract, the parties to the contract, the types of disputes that might be expected to arise under the contract, and the jurisdictions likely to be involved in any dispute. Therefore, drafting an appropriate clause also requires an understanding of the circumstances that may call for special provisions, such as provisions addressing interim relief, confidentiality, and other important issues. It also follows that some essential elements of arbitration clause can be distilled from the above definitions. First, it provides for:

### Party Autonomy/Agreement to arbitrate

The flexibility and procedural freedom to tailor the dispute resolution process and appoint arbitrators who are knowledgeable in the subject matter of dispute. The composition of the arbitral panel is largely within the control of the parties. This, in fact, is one of the main attractions of arbitration - litigants don’t get to pick their judge, but disputants do get to pick their arbitrator! The parties need to agree on both the number of arbitrators and the qualifications of the arbitrator(s).<sup>10</sup> Fagbemi posits that a fundamental principle governing international arbitration agreement is that of party autonomy. It is the backbone or cornerstone of arbitration proceedings.<sup>11</sup> It is the freedom of the parties to construct their contractual relationship in the way they see fit.<sup>12</sup> It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organizations.<sup>13</sup> Party autonomy is an intrinsic attribute of Alternative Dispute Resolution which distinguishes it from traditional adversarial litigation. It is the principle that gives the parties to an arbitration proceedings the power and authority to decide within the confines of the law who, where, when and how the arbitral proceedings will be conducted. The agreement of the parties to

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<sup>5</sup> (2003) 15 NWLR (Pt. 844) 469 at 487

<sup>6</sup> (2013) LPELR 20720. *Agala v. Okusim* (2010) 10NWLR (pt. 1220) 412 at 488

<sup>7</sup> Halsbury’s Laws of England, 3rd Ed, 38.

<sup>8</sup> (2006) NSCQR 77 at 112

<sup>9</sup> Debevoise & Plimpton, *Annotated Model Arbitration Clause for International Contracts*, 2<sup>nd</sup> Edu New York Publications 2011

<sup>10</sup> UNCITRAL Arbitration Rules, Art. 1(2)

<sup>11</sup> S. A. Fagbemi, ‘The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?’ Vol. 6, Issue 1, *Journal of Sustainable Development Law and Policy*, 2015, page 222-246 at 224

<sup>12</sup> S. Abdulhay, *Corruption in International Trade and Commercial Arbitration*, London, *Kluwer Law International*, 2004, page 159

<sup>13</sup> M. Pryles,, ‘Limits to Party Autonomy in Arbitral Procedure’ *Journal of International Arbitration*, Vol. 23, No. 3, 2007

consensually execute the arbitration agreement with regards to its content is described as party autonomy. Whenever the parties to an international commercial arbitration exercise their right of autonomy, they are bound by such decision and can only exculpate themselves through mutual agreement.<sup>14</sup> Under the UNCITRAL Model Law which has been adopted, though with slight modifications, in several jurisdictions the principle of party autonomy is well recognized.<sup>15</sup> In Nigeria the certain provisions of the Arbitration and Conciliation Act (ACA) gives credence to the principle of part autonomy. Sections 6 and 7 (1) 2 (a) (i) (ii) and (b)<sup>16</sup> give the parties the power to choose the procedure for the appointment of arbitrators and the number of arbitrators. Section 9 (1)<sup>17</sup> gives the parties the right to determine the procedure to be adopted in challenging an arbitrator. Section 11<sup>18</sup> empowers the parties to appoint a substituting arbitrator in the event of a successful challenge of an arbitrator.

### **Number of Arbitrators**

The flexibility and procedural freedom to tailor the dispute resolution process and appoint arbitrators who are knowledgeable in the subject matter of dispute. The composition of the arbitral panel is largely within the control of the parties. This, in fact, is one of the main attractions of arbitration - litigants don't get to pick their judge, but disputants do get to pick their arbitrator! The parties need to agree on both the number of arbitrators and the qualifications of the arbitrator(s).<sup>19</sup> To allow more flexibility, sometimes the parties agree that they shall attempt, within a stated period of time after commencing the arbitration, to agree on a sole arbitrator, but if they fail to reach an agreement within such timeframe, the default mechanism will be a panel of three arbitrators.

### **Seat of the Arbitration**

Choosing an appropriate 'seat' or 'place' of arbitration is critical. The 'seat' or place of arbitration has been defined as the geographical location to which the arbitration is ultimately tied and which in the absent of the agreement otherwise prescribes the procedural law of the arbitration.<sup>20</sup> The seat of arbitration was also defined as the juridical connections which bind the parties to the arbitration and arbitrators, on one hand, to a state court forum and the national arbitration law, on the other hand.<sup>21</sup> The seat of arbitration is the jurisdiction where the parties intend the law of arbitration to apply in their arbitration agreement or the applicable procedural law of the arbitration (*lex arbitri*).<sup>22</sup> Selection of the Seat The selection of the seat of the arbitration, which need not be the place where the arbitration is physically held, is a critical choice. The seat selected should be one that is friendly to arbitration. It is generally the procedural law of the seat that is applicable to the arbitration and sets the baseline requirements. It is the jurisdiction that will deal with issues relating to the appointment of arbitrators, challenges to arbitrators, and jurisdiction over a party or a claim. Another important fact is that, although other courts may, in very limited circumstances, refuse to recognize and enforce an arbitral award, the seat of the arbitration is the only forum that can vacate the award. A seat should be selected that will recognize and enforce the agreement to arbitrate, not interfere in the arbitral process; assist the arbitration proceedings when necessary; and act expeditiously. In making this selection, the parties should also consider whether the law of the seat allows non-nationals to appear as counsel in an arbitration proceeding, specifies criteria for arbitrators to be qualified, determines the language of the arbitration, or requires any special procedures in the arbitration itself. The selection of an arbitration-friendly seat, versus one not-so-friendly, can make a huge difference in the efficiency of the arbitral proceedings and the enforceability of the award.

### **Arbitrability—Who Decides the Scope of Arbitral Jurisdiction?**

The drafter should consider whether to include a provision stating that the arbitrators have the authority to determine their own jurisdiction. The precise application of this principle of 'competence-competence' varies from country to country. For the sake of clarity, 'Competence-competence' *Competence-competence* is a central principle of international commercial arbitration. It specifies that tribunal has the competence to decide its own jurisdiction. This principle is embedded in the UNCITRAL Model Law.<sup>23</sup> For this reason, a court will await the arbitral tribunal's

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<sup>14</sup> G. Cordero-Moss, 'Limits to Party Autonomy in International Commercial Arbitration' *Oslo Law Review* Vol. 1, 20 14, P. 47.

<sup>15</sup> Article 19(1) UNCITRAL Model Law provides thus '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.' Section 1 (b) of the UK Arbitration Act, 1996 has same provision.

<sup>16</sup> 1988 Cap. A18 LFN, 2010.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> UNCITRAL Arbitration Rules, Art. 7

<sup>20</sup> *Russell on Arbitration* 2003, para 2-209);

<sup>21</sup> Proudret & Besson, *Comparative Law of International Arbitration*, 2nd Edition, pg. 101);

<sup>22</sup> UNCITRAL Arbitration Rules, Art. 18

<sup>23</sup> Article 16 of the UNCITRAL Model Law

decision on its own jurisdiction before undertaking a review of that issue. In *Haas v. Gunasekaram*,<sup>24</sup> the Ontario Court of Appeal recently held that claims in tort and fraud, and resulting claims to set aside the agreement between the parties, were within the jurisdiction of the arbitral tribunal under an arbitration agreement. Accordingly, the court action between the parties was stayed. Section 35 of the Arbitration and Conciliation Act succinctly acknowledges the principle of arbitrability when it provides that ‘this Act shall not affect any other law by virtue of which certain disputes may not be submitted to arbitration; or may be submitted to arbitration only in accordance with the provisions of that or another law.’ Fagbemi argues that if every dispute was allowed to be capable of settlement through arbitration or any other ADR mechanism, the effect of this on the society will be adverse.<sup>25</sup> The rules of most arbitral institutions must specify that the arbitrators are empowered to determine their own jurisdiction, and several appellate courts in the United States have held that the adoption of these institutional rules in the arbitration agreement constitutes the requisite ‘clear and unmistakable’ delegation of this power to the arbitrators. However, to provide clarity on this issue and avoid a potentially long and costly detour into the courts at the commencement of arbitration, the drafter may consider incorporating into the arbitration agreement language that expressly delegates this power to the arbitrators.

### **Applicable Law, *Amiable Compositeur***

The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.<sup>26</sup> The tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so.<sup>27</sup> The provision whereby parties agree that the law of a particular jurisdiction will govern disputes arising under the contract. The clause in a contract may also expressly exclude the application of the conflicts of law provisions of the designated law. Clauses are generally enforceable, except when the dispute lacks a significant relationship to the chosen jurisdiction or they violate public policy.

### **Language of Arbitration**

From the definitions above, it does appear that parties always agree, at the onset, the language to be used for the arbitration. According to the UNCITRAL rules, it is stated, that subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings, if oral hearings take place, to the language or languages to be used in such hearings.<sup>28</sup>

### **3. Problems associated with drafting Arbitration clauses**

I have highlighted at the introductory stage that there are a number of reasons why parties choose arbitration rather than court as the forum to resolve their disputes. One of the reasons is that when parties from different countries enter into a contract, if a dispute arises they may not feel comfortable going to the court in the other party’s country. As an alternative, parties may choose arbitration as a neutral forum for resolving disputes. Another rationale for opting for arbitration rather than courts is that arbitration is a private dispute forum compared to courts which are public forums. In order to ensure that parties’ agreement is carried to the latter, is often accompanied with a sound arbitration clause in the contract or outside the contract as the case may be. However, drafting of Arbitration clauses in contracts can be quite daunting. A small mistake, in drafting an arbitration clause, for example, can result in unnecessary costs and delays before arbitration or even a court battle over the interpretation of such arbitration clause. The problems associated with the drafting of arbitration clauses have triggered concerns in many sectors and institutions, not only in identifying what constitutes the essential features of an arbitration clause but how distinct and separate an arbitration agreement operate from the main contract. Incidences abound where most international companies slog it out in courts or in arbitral tribunals over technicalities or deficiencies arising from poorly worded arbitration agreements. Some companies, for instance, employ arbitration clause techniques to checkmate various class actions carried out by consumers. This was typified in the recent United States Supreme Court case which ruled that companies doing business with consumers may require arbitration to forbid class actions in their contracts, which are often of the take-it-or-leave-it basis. Similar problems associated with drafting arbitration clauses were encountered in an employer/employee arbitration agreement in the U.S. where the Supreme Court ruled that employers could block employees from banding together as a class to fight legal disputes in employment arbitration agreements<sup>29</sup>.

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<sup>24</sup> *Haas v. Gunasekaram*, 2016 ONCA 744

<sup>25</sup> C. Mbam, ‘Resolution of Political Parties Disputes through Arbitration and Alternative Disputes Resolution (ADR)’ *Journal of Arbitration*, Vol. 11, NO. 1, April, 2016, P. 216.

<sup>26</sup> UNCITRAL Arbitration Rules, Art. 35

<sup>27</sup> *Ibid*,

<sup>28</sup> *Ibid*, art 19

<sup>29</sup> *Epic Systems Corp. v. Lewis* 823 F.3d 1147 (7th Cir. 2016).

One common problem that parties face when including arbitration clauses in contracts is where clauses are drafted poorly thereby leading to a considerable amount of time lawyers spent fighting about the clause. In the worst case scenario, errors in arbitration clauses can lead to the clauses being unenforceable. Several common problems appear in poorly drafted arbitration clauses; one is that an arbitration clause names an arbitration seat or the place where the arbitration that do not exist. The provision whereby parties agree that any litigation resulting from a contract will be initiated only in a specific forum. The absence of specifying the forum may make the agreement enforceable unless the resisting party can show the forum to be unreasonable under the circumstances. In an American case between *Asoma Corp. v. SK Shipping Co.*, 467 F.3d 817, 822 (2d Cir. 2006), the Supreme Court has not been clear as to the proper mode for forum-selection clause and therefore declined jurisdiction. Another problem that frequently occurs is that part of the clause is omitted altogether, for example the name of the arbitration rules is missing or where the arbitration will take place is missing. An eminent scholar, W.W. Park had cautioned that ‘the cardinal rule of drafting an international arbitration agreement is to avoid the type of ambiguity and equivocation that will later delight a party wishing to drag its feet’.<sup>30</sup> Thirdly is the problem associated with the number of arbitrators that the parties or the personalities of the arbitrators in question. Usually, it is often safer for the parties to agree on the number of arbitrators they want to arbitrate on any eventual dispute that may arise out of the contract. More so, the parties may be specific on the quality of such arbitrators to be appointed, e.g. they may desire to have arbitrators who are knowledgeable in the specific areas of business and so on. Again, problems often abound where parties fail to consider the possible ease of enforcement. The question to be considered is whether the country of the ‘seat’ is party to the NY Convention? The reason is that it is often difficult to enforce arbitration agreement in a country that is not a party to the New York Convention as it would rob the country’s arbitral tribunal of its jurisdiction.<sup>31</sup> Another problem that the parties may encounter is the inability of the draftsman to specifically mention what would be the governing law of the contract. The Governing Law or Choice of Law clause specifies that the laws which the parties mutually agreed upon jurisdiction will govern the interpretation and enforcement of the terms of the contract. Therefore, controlling the governing law is an important objective for the parties because differences in local laws may control the outcome of a dispute. The beauty of the choice of law jurisdiction is that it need not be the same as the venue or choice of forum. The parties can even choose different jurisdictions depending on the type of dispute.

#### **4. Essential Features that Constitute Valid Arbitration Clause**

The arbitration clause is often infused in a contract at the last minute as the parties celebrate the conclusion of their negotiations. Usually little more than an afterthought, it deserves considerably more attention from a meticulous legal practitioner. Because the arbitration clause can become highly indispensable down the road if the parties’ relationship deteriorates, legal practitioners arbitration have recognized that the clause should be shaped in a thoughtful and careful way to the transaction and the parties’ needs for an economical and efficient dispute resolution process. The opportunity to do this is before the heat of battle. It is during the drafting of the contract. It is often the case that, to avoid drafting an inoperative arbitration clause, regard must be had of the essential elements that constitute a valid arbitration clause:

**Arbitration Agreement under the Act:** There are basically three different forms of arbitration agreement; the arbitration agreement made under the common law, customary law and the one made under the Act. The arbitration agreement under the common law and customary law are made orally as against the arbitration agreement made under the Act, which is usually made in writing for its validity and enforceability. The case of *Scott v. Avery* clause which provides that unless and until arbitration has been resorted to, the parties may not litigate the matter (named after the very old case of *Scott v. Avery* in which the clause and its effects were first examined by the courts).<sup>32</sup> The clause is indeed the preference of the spirit of Article 8 of the UNCITRAL Model Law and sections 4 & 5 of the Arbitration and Conciliation Act of Nigeria, an Atlantic Shipping Clause which required the parties to go to arbitration within a specified time frame or the right to arbitrate would abate by the effluxion of time, or a Union of India Clause named after the case in which the clause and its effects were first examined by the courts wherein the clause grants only one of the parties right of recourse to arbitration.<sup>33</sup> In Nigeria, the form and nature of arbitration agreement under the Act are set out in the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004. Section 1 of the Act requires that both parties will have to sign the agreement in accordance with the provisions of section 1 (a) of the Act for it to be valid and enforceable. It is important to state that it is not always that the parties must jointly sign the document of the arbitration agreement for it to be valid and enforceable. The requirement of the signature of the

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<sup>30</sup>W. W. Park, ‘When and Why Arbitration Matters’, in *The Commercial Way to Justice* 73 (G.M. Beresford Hartwell ed., 1997)

<sup>31</sup> Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators, 8 *Am. Rev. Int’l Arb.* 133 (1997), reprinted in [2000] *ADR Law J.* 19 (2000)

<sup>32</sup> (1856) 5 HL Cas. 811

<sup>33</sup> *Union of India v. Bhoriat Engineering Corp.* LLR Delhi Series (1971) Vol. 2, 57

parties on a single document will be dependent on the nature of the subject matter and the document of agreement involved.<sup>34</sup>

In a situation where the arbitration agreement is in the documents as set out in section (1) (b) & (c), it shall be enough if the documents evidencing arbitration agreement are signed by their respective parties. The reason for this is that the parties shall neither be expected to jointly sign a letter together nor be expected to jointly sign a common telex or fax document. The plaintiff and the defendant cannot jointly sign the statement of claim together. The nature of signature required will be dependent on the form and nature of the document of the arbitration agreement. On the other hand, courts can invalidate otherwise valid arbitration clauses where it is found that the agreement is a 'contract of adhesion.' In general, a contract of adhesion is a printed contract—often in small font—prepared by one party with superior bargaining power presented to the other party in a 'take-it-or-leave-it' manner. The nature of the contract is such that it raises questions as to whether the weaker party actually consented to its terms. In these cases, the courts look beyond a party's signature to determine if he or she truly consented to the arbitration clause. If an arbitration clause is adhesionsary, the court will not enforce it and will allow the weaker party to proceed with a lawsuit despite their apparent agreement to arbitrate.

**Arbitrability:** The capacity and jurisdiction of the arbitrator (s) or the arbitral tribunal to undertake arbitration with respect to any matter referred to them is the core element of arbitrability. Arbitrability is a jurisdictional matter. Thus arbitrability relates to whether or not arbitrators that are chosen by the parties have the authority to determine a dispute. It could also depend on whether a party or parties have agreed to have certain dispute between them resolved or determined through arbitration. Essentially, issues that border on arbitration require conditions that must be fulfilled and met before arbitration proceedings to go forward. It relates to such issues as whether there was an agreement between the parties to arbitrate. This was clearly decided in the case of *Equitable Res Inc v. United Steel Workers Int.*<sup>35</sup> Also whether arbitration clause forms part of the main transactional contract, whether the claim is statute barred, failure to satisfy a condition precedent before submitting to arbitration, whether the agreement is valid and enforceable in accordance with law<sup>36</sup> whether the parties had consented by way of executing and appending their signature to the agreement,<sup>37</sup> whether the agreement covered a particular dispute being referred,<sup>38</sup> and whether on the basis of public policy and legislation a dispute with respect to a particular subject matter can be referred to arbitration<sup>39</sup>. However, only disputes and differences affecting peoples civil rights and obligations which can be compromised by way of accord and satisfaction may be referred to arbitration.<sup>40</sup>

### **Arbitrability and Party Agreement**

As this work earlier highlighted, arbitration agreement forms the fulcrum, nucleus and the legal foundation of every arbitral proceedings. The legal underpinning of this assertion is that where parties failed to enter into an arbitration agreement before the commencement of the arbitration, then the subject matter of arbitration cannot go further. It is also instructive that, where there is lack of consensus from both parties, any arbitral award rendered without the arbitration agreement of the parties is null and void and cannot be enforced in law. This was demonstrated in the case of *Chidi Ekwueme v. Sani Zakari*,<sup>41</sup> the court ruled that what went on between the parties and their five mutual friends was not arbitration hence the decision cannot be enforced as an arbitral award as there was no arbitration agreement between them to arbitrate.

Mbadugha argues that an arbitration agreement could be incapable of performance or unenforceable if, for instance, a designated appointing authority is non-existent, or is wound up or dead and could no more appoint an arbitrator pursuant to the parties' agreement.<sup>42</sup> In support of this well-known principle, the US Supreme Court stated in the case between *AT & T Techs. Inc. v. Communications Workers of Am.* that, 'Every student of arbitration knows that arbitration is a matter of contract law. This means, ordinarily, that 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'<sup>43</sup> Although an *obiter dictum*, the pronouncement formed the fulcrum that helped to shape the ruling of the apex court on arbitrability.

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<sup>34</sup> *Re Thompson* (1894) QB 462. *Tinplate Co. v. Hughes* (1891) 60 LJ 189

<sup>35</sup> *Equitable Res Inc v. United Steel Workers Int. Union, Local 8-512*. 621F 3rd 538, 550 6th Cir 2010.

<sup>36</sup> *AT&T Techs Inc v. Comm Workers* 475 US 643 1986. Cox 533 F. 3d 1114.

<sup>37</sup> *John Wiley & Sons Inc v. Livingston* 376 US 543, 547 (1964)

<sup>38</sup> *Sherer v. Green Tree Servicing LLC* 548 F. 3d 379, 381 (5 Cir 2008).

<sup>39</sup> *B. J. Export & Chemical Co. Ltd* (2002) LPELR 12175

<sup>40</sup> *United World Ltd Inc v. M. T. S Ltd* (1998 (10NWLR (Pt. 568) 106

<sup>41</sup> *Chidi Ekwueme v. Sani Zakari* (1972) ECSLR

<sup>42</sup> J. N. M. Mbadugha, op. cit. P 7

<sup>43</sup> *AT & T Techs. Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986)

Despite this principle in arbitration, however, there is a well-established body of law which authorises a court to make arbitration provisions binding even on parties who never signed an arbitration agreement and also to allow these 'non-signatories' to compel arbitration with those who have signed an arbitration agreement. This body of law finds its source in two areas. First, courts have relied upon common law contract and agency principles to extend the both the obligation and the opportunity to arbitrate to non-contracting parties. Secondly, some courts have relied upon the strong public policy consideration in favouring arbitration. In accordance with this policy, the parties' intentions 'are generously construed as to issues of arbitrability,' In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>44</sup> the court ruled that any 'ambiguities as to the scope of the arbitration clause itself' must be resolved in favour of arbitration. Where arbitration is commenced after the time specified then the matter is not arbitrable as the arbitral tribunal lacks capacity to arbitrate for them. The federal High Court stated in the case of *City Engineering v Federal Housing Authority* where parties agreed to arbitrate but the matter became statute barred it would rob the court of its jurisdiction to entertain the matter.<sup>45</sup> Of course, these rules are not without their limits, as the presumption of arbitrability may be overcome with 'clear evidence' that the parties did not intend a claim to be arbitrable.<sup>46</sup>

## **5. Conclusion**

The development in international trade and commerce has led to considerable expansion of the scope of matters capable of settlement by arbitration. In spite of sustained scholarly activity on arbitrability, the debate on what is arbitrable remains highly controversial but also relevant in many jurisdictions of the world, including Nigeria. Arbitrability has the concomitant effect on the validity of an arbitration agreement. It has the potential of stripping an arbitrator of jurisdiction, or derail enforcement of an award. Given the significance of the concept, therefore, it is vital that parties involved in international transactions do not speciously extrapolate knowledge of what pertains in other jurisdictions of the world. The Nigerian courts have continued to play supportive role in ensuring that arbitral process in Nigeria is strengthened and empowered to perform its role in dispute resolution. The Courts have continued to act as a pillar to the arbitral process and have used its coercive force to ensure that parties do not only submit themselves to the arbitral process as provided for in their agreement but ensure that decisions reached are enforced as if they were the judgments of the Courts. The Nigerian Courts have a serious approach to the commencement of Court proceedings in an apparent breach of an arbitration agreement. Generally, where a party in Court proceedings raises the issue of an arbitration agreement promptly, the Court will uphold the arbitration agreement and stay proceedings pending arbitration.

Section 5(2) (a) of the Arbitration and Conciliation Act provides that where the court is satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, the court may make an order staying the proceedings. The Notice of Arbitration or any other evidence that arbitral proceedings have been set in motion will help to convince the Court that the party invoking the arbitration clause is serious and desirous of pursuing arbitration. But in the absence of that, the Courts are still inclined to stay proceedings in favour of arbitration upon being convinced that there exists a valid arbitration agreement. However, while some Courts treat an arbitration agreement as a compelling ground for a stay of Court proceedings, others treat it as discretionary arbitration. The Nigerian Supreme Court in *Owners of M.V Lupex v. Nigerian Overseas Chartering and Shipping Ltd.*<sup>47</sup> held that where parties have agreed to refer their dispute to arbitration, the Court has a duty to enforce the agreement of the parties by staying any proceedings commenced in Court contrary to the arbitration agreement. In conclusion, I can say that an universal arbitration clause as a solution for every problem does not exist, but there are some essential ingredients, 'key clause' of an arbitral agreement that may avoid spending a lot of money and time in the arbitral process: the clause in which the arbitration is chosen to be the method to resolve the disputes between contracting parties; the clause in which the parties choose between Ad hoc or Institutional Arbitration; the clause in which is being defining the scope of arbitration; the clause in which the parties desire that the arbitral award be 'final and binding' form them; the clause in which the parties choose the place of arbitration; the clause in which the parties choose the language of arbitration; the clause in which the parties choose the composition of the Arbitral Tribunal; the clause in which the parties choose the applicable law.

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<sup>44</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985),

<sup>45</sup> *City Engineering v. Federal Housing Authority* (1997) 9NWLR (Pt. 520) 244.

<sup>46</sup> *Harvey v. Joyce*, 199 F.3d 790, 703 (5th Cir. 2000).

<sup>47</sup> *M.V Lupex v. Nigerian Overseas Chartering and Shipping Ltd.*, (2003) 15 NWLR (Pt 844) 469