IS THE ROLE OF PARTY AUTONOMY UNDER OHADA IN INTERNATIONAL COMMERCIAL ARBITRATION ABSOLUTE OR QUALIFIED?

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ABSTRACT

Modern day society has embraced alternative dispute settlement system with both hands. Standing out amongst all is the process of arbitration. You can ask why this different approach? Is it not an encumbrance to the legal system? The rationale working behind this popularity is the flexibility of the process of arbitration. This could only be secured due to the working principle of party autonomy**.** The principle of party autonomy, in a general sense, started to develop in the eighteenth century[i] and has been widely accepted throughout the world. It has been recognised by international conventions, arbitration rules, regulations[ii] and above all the OHADA Law[iii]. Party autonomy is one of the most attractive features of international arbitration. However, parties do not have absolute freedom to determine the arbitration process. This article examines the principle in context, its role and the extent on the one hand, and its derogations on the other hand.

Keywords**:** Party autonomy, international commercial arbitration, OHADA, *lex arbitri*, arbitration agreement, arbitration, Arbitral Tribunal, Arbitral Proceedings and National Courts

INTRODUCTION

International commercial arbitration is the most preferred alternative dispute settlement in recent years[iv]. One of the reasons behind this popularity is flexibility of the arbitral process. Basically, the principle which makes the arbitral process flexible is party autonomy. The principle of party autonomy, in general sense, started to develop in the nineteenth century[v]. Actually, party autonomy is based on choice of law in a contract[vi]. However, this principle has broader meaning in international commercial arbitration. In other words, the parties to the arbitration agreement are free not only to choose laws but also to conduct the arbitration process.

The Organisation for the Harmonisation of Business Law in Africa (hereinafter referred to as OHADA) was created on 17 October 1993 to foster economic development in Africa by creating a uniform and secure legal framework for the conduct of business in Africa: OHADA is an intergovernmental organisation for legal integration aimed at addressing the "legal and judicial insecurity in Member States". OHADA was established by the Treaty of Port Louis, Mauritius on 17 October 1993, and revised on 17 October 2008 in Quebec, Canada. Today, Cameroon, Chad, Congo and 14 other mostly francophone African states, are members.

At its meeting on 23 and 24 November 2017 in Conakry (Guinea), the OHADA Council of Ministers adopted major texts that boosted the Organisation's normative arsenal on alternative dispute resolution. These new OHADA instruments on arbitration update the laws in force; they aim to enhance transparency, swiftness and efficiency of arbitral proceedings of the CCJA arbitration centre[vii]. These new texts are likely to strengthen the confidence of local and foreign investors, and to significantly improve the business climate in the OHADA space. OHADA[viii]has created two different sets of legislation applicable to arbitration[ix]. We have on the one hand the new Uniform Act on the Law of Arbitration [x](hereinafter referred to as UAA) which lays down basic rules which are applicable to any arbitration where the seat of the arbitral tribunal is in one of the Member States. The UAA is based on the UNCITRAL model law. It supersedes existing national laws on arbitration but is subject to provisions of national laws which do not conflict with the UAA.

On the other hand, the Revised Rules of Arbitration of the Common Court of Justice and Arbitration (CCJA)[xi]which provides for institutional arbitration under the auspices of the

Common Court of Justice and Arbitration, in accordance with the CCJA's own Rules of Arbitration (Hereinafter referred to as the CCJA Rules).

The parties to an arbitration agreement waive the right to bring an action in court and exclude the jurisdiction of courts by this arbitration agreement[xii]. At the same time, this agreement is accepted as a primacy resource of arbitration. In this sense, it is a guideline of the parties and arbitral tribunal during the whole arbitration process. Furthermore, the 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. However, it should not be overlooked that the principle of party autonomy is not always a rule in international commercial arbitration[xiii]. In some circumstances, it may be subject to some restrictions[xiv].

Arbitration is an alternative dispute settlement based on the principle of party autonomy. It is important to examine this principle in order to understand arbitration as a whole. Thus, the principle of party autonomy will be dealt in this research paper. Firstly, party autonomy will be explained in the context of international commercial arbitration. Following that arbitration agreement as a reflection of party autonomy, applicable laws, composition of arbitral tribunal, other issues related to the conduct of arbitral proceedings and the role of national courts will be scrutinised separately[xv].

In this article, we intend to reflect on the principle of party autonomy under the OHADA Law and outline some of the aspects of the limits of party autonomy.

UNDERSTANDING THE PRINCIPLE OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

The principle of party autonomy allows the parties to determine all the essential elements of the arbitration. Thus, party autonomy is the fundamental principle of the arbitration. At the same time, this principle is the distinctive aspect of arbitration from other alternative dispute settlements, because the presence of party autonomy is the sine qua non for international commercial arbitration. On the basis of these arguments, the principle of party autonomy plays the most important role during the whole arbitration process[xvi].

The freedom of the parties to consensually execute an arbitration agreement is rooted in the principle of party autonomy. The arbitration agreement is the strongest evidence of party autonomy. This agreement is accepted as a primacy resource of arbitration. In the arbitration agreement parties are free to choose arbitration as their preferred form of dispute settlement, ie, parties can chose the venue of arbitration, conduct and tailor all proceedings according to their needs and specific requirements including the setting of procedural rules, the choice of arbitrators and the tribunal's competence and powers, agreeing on procedural aspects for the conduct of the hearings, arranging the procedural time-table and the language used during proceedings etc. Furthermore, parties are free to choose the applicable laws and control all major aspects of the arbitration[xvii].

Arbitration is quite popular method used for resolving international commercial disputes nowadays. Arbitration owes its reputation to the principle of party autonomy. This principle involves flexibility and confidentiality[xviii]. Flexibility is one of the advantages of arbitration. The parties to an international commercial contract do not want to resolve their disputes through litigation, since the court which is national for a party may be foreign for 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 thus, they can conduct all proceedings of arbitration by taking into account their needs and desires. They can arrange a timetable for hearings, choose anyone as an arbitrator, especially one who has relevant expertise on specific requirements of the dispute[xix].

Confidentiality is another advantage of arbitration [xx]. The subjects of arbitration are international companies with huge budgets. In connection with this, they may have important trade secrets. When these companies make an international commercial contract, this contract usually contains an arbitration clause for future disputes. The main reason for this clause is to protect trade secrets, because all proceedings are confidential in arbitration process unlike proceedings in a court. Furthermore, the parties can add express provision in order to reinforce this confidentiality[xxi]. It should not be forgotten that all these are consequences of party autonomy[xxii].

The basic difference between litigation and arbitration is that arbitration is a private dispute settlement based on the will of the parties[xxiii]. In this sense, according to the principle of party autonomy, the parties are free to choose applicable laws and conduct the arbitration process

taking into consideration the requirements of the dispute. In other words, the parties can control all details of arbitration[xxiv] .

Arbitration is rooted in the principle of freedom of contract[xxv] , because the parties can exclude the jurisdiction of courts and choose arbitration as dispute settlement method by means of arbitration agreement. Moreover, the freedom of contract enables the parties to plan all aspects of arbitration. On the basis of these arguments, it is undoubtedly that party autonomy is a reflection of freedom of contract and it is a key principle[xxvi] of arbitration.

The principle of party autonomy allows the parties to choose applicable law to substance and arbitration, to conduct the arbitration process such as appointment of arbitrator, arrangement of timetable, choice of place and language of arbitration. Related to this, party autonomy ensures that arbitration will proceed in accordance with the aspirations of the parties[xxvii]. However, this principle is not always unlimited. It may, sometimes be subject to mandatory rules of law of place or public policy rules of the law applicable to substance. These restrictions will be examined in the last part of this article.

The principle of party autonomy has been accepted and recognised by the OHADA instruments on arbitration. In respect to the constitution of the arbitral tribunal, arbitrators shall be appointed, revoked or replaced pursuant to the parties' agreement[xxviii]. 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 the dispute. 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. The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest[xxix].

Also, recognition and enforcement of the award can be refused if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties. As to the effectiveness of arbitral awards, it is important to point out that, the new UAA[xxx]revised rules of arbitration. The parties can now expressly waive their right to file an application to set aside an arbitral award (save where this would be counter to international public policy)[xxxi], and thereby becomes one of the rare texts as provided in French international arbitration law[xxxii]allowing such waiver, subject to international public policy[xxxiii].

THE ROLE AND EXTENT OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

Arbitration agreement[xxxiv]

The arbitration agreement is core element which reflects the autonomy of the parties. Essentially, the parties skip jurisdiction of the court by an arbitration agreement. Furthermore, the conduct of the arbitration process is decided using this agreement. Therefore, an arbitration agreement, either in the form of an arbitration clause or the form of a submission agreement, reflects the will and intention of the parties in all stages of arbitration[xxxv].

It is important to assess the position and importance of the arbitration agreement in order to assess the role and extent of party autonomy, since arbitration agreement is core element of arbitration and it reflects the autonomy of the parties[xxxvi]. Firstly, the parties exclude jurisdiction of the courts by an arbitration agreement. Moreover, they can conduct the arbitration process however they want by means of arbitration agreement. In other words, it has a significant role in all stages of arbitration. Arbitration agreement is an agreement in which at least two parties decide to resolve their dispute through arbitration[xxxvii].

The parties can obtain the best result from arbitration if they have a well-drafted arbitration agreement. In this context, the parties should reflect their aspirations in arbitration agreement and this agreement should meet some validity requirements[xxxviii]. As the first requirement, the OHADA Law requires that arbitration agreement shall be in writing[xxxix] and signed by the parties. Actually the reason behind this requirement is self-evident. Arbitration agreement is regarded as being in writing if the content of agreement is recorded in any form; for instance, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy[xl].

As the second requirement, the dispute must arise out of a legal relationship whether contractual or not[xli]. Actually, there must be a contractual relationship between parties as a basis of arbitration. However, the dispute may sometimes be based on tort liability. In this context, the problem of whether arbitration agreement covers tort liability or not should be solved by taking into account intention of parties and content of arbitration agreement.

As the third requirement, the UAA[xlii] requires that, the subject matter of arbitration agreement must be capable of being settled by arbitration. The reason behind this requirement is that arbitration is private method with public consequences. In this sense, some disputes cannot be

resolved by arbitration because of "national legislation or judicial authority.[xliii] Merely national courts. According to reference of the courts, the issue of arbitrability[xliv]is based on public policy. Public policy of a country depends on social, political and economic situations of the country, thus public policy varies from country to country. In general, the disputes about family law and criminal law are regarded as a matter of public policy; hence these are not capable of settlement by arbitration.

As the fourth requirement, the parties to the agreement must have legal capacity to enter into the agreement[xlv].

As the fifth requirement, arbitration agreement must not be null and void, inoperative and incapable of being performed[xlvi].

In addition to these validity requirements, the arbitration agreement should contain some basic elements in order to obtain best result from arbitration. In this context, the parties should agree upon number of arbitrators and composition of arbitral tribunal, place and language of arbitration, the applicable law to the substance and arbitration, type of arbitration such as ad hoc or institutional arbitration. It should not be overlooked that only a well drafted arbitration agreement can reflect the aspirations of the parties[xlvii].

The last thing to be mentioned in this part is the doctrine of separability[xlviii].The arbitration clause is independent from the underlying contract. Nullity of the underlying contract does not affect the existence of the arbitration clause, which is determined based on parties' will and not on national law[xlix]. Apparently, arbitration agreement is a part of main commercial contract. However, according to this doctrine, arbitration clause is separate agreement. In other words, the main commercial contract is primary contract and the arbitration clause is secondary contract[l]. Related to this, the invalidity of the main contract does not affect the validity of arbitration clause[li]. The main aim of this doctrine is to provide sustainability of arbitration clause[lii]. In this sense, the doctrine of seperability[liii]preserves the autonomy of the parties. This doctrine is accepted by international rules such as UNCITRAL Rules[liv], UNCITRAL Model Law[lv]. Furthermore, separability of arbitration agreement is endorsed by English Law[lvi] as well.

It should be borne in mind that arbitration agreement is the first step of the arbitration process. A well drafted arbitration agreement can exclude the jurisdiction of the courts and reflect the real needs and desire of the parties. In this sense, as long as the parties fulfil the validity requirements of arbitration agreement and also agree on the basic elements of the agreement,

they can achieve the best outcome from the arbitration. It is obvious that the doctrine of party autonomy has been a recognized concept in commercial arbitration worldwide. Nevertheless, the question of the extent to which freedom and party autonomy interferes with international commercial arbitration remains a frequent point of disputes and discussions.

The principle of party autonomy allows the parties to design arbitration process however they want. Actually, this advantage is one of the attractive points of the arbitration. The parties to international arbitration expect that by choosing arbitration as the dispute settlement method, they would not be subjected to formal and strict requirements of national courts. In other words, they want to resolve their disputes through a flexible method and thus, they choose arbitration[lvii].

Applicable laws

- **The law applicable to arbitration agreement**

The law governing the arbitration agreement is one of the crucial points in determination of the extent of the party autonomy. Generally it is assumed that the law applicable to the substance chosen by parties will also govern the arbitration clause[lviii]. However, the doctrine of separability enables the arbitration clause to be governed by different law which applicable to substance. As abovementioned, there are a number of validity requirements for arbitration agreements and all these requirements can be subjected to different laws. Basically, when the parties choose a law applicable to arbitration agreement, this law will be applied firstly.

However, in some circumstances, the law of the place of arbitration (lex arbitri) has a dominant role[lix]because each country wants to govern the conduct of arbitration within its boundary[lx]. For instance, when a dispute arises from the issue of arbitrability[lxi], form and validity of the arbitration agreement, the arbitral procedure (i.e. hearings, court assistance, equal treatment of the parties etc.), in general, lex arbitri has a significant effect on the parties' choice of law. Other than these, when there is a dispute about capacity of the parties, in general, the dispute resolved by the law of the country where the party has its residence, domicile or permit[lxii].

- **The law governing the arbitration**

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they would not be subjected to formal and strict requirements of national courts. In other words, they want to resolve their disputes through flexible method and thus, they choose arbitration[lxiii]. According to UAA, if the composition of the arbitral authority or the arbitral procedure is not in accordance with the agreement of the parties, recognition and enforcement of the award may be refused[lxiv].

Arbitration is a method of dispute resolution conducted by private entities or individuals on the basis of the parties' agreement to arbitrate. To honour the autonomous dispute resolution mechanism, the state exercises limited control only to support arbitration, or to enforce or set aside an arbitral award under strict conditions. The private nature of arbitration based on the agreement of the parties justifies the arbitral tribunal rendering an award on the basis of the law chosen by the parties[lxv].

The principle of party autonomy enables the parties to choose any place as the seat of arbitration. As mentioned above, each country wants to control the conduct of arbitration within its territory and thus, in some situations, the law of the place of arbitration, in other words lex arbitri, has some mandatory rules. Even if the parties have express choice of law, the law governing the arbitration should be analysed by taking into account the choice of the parties and lex arbitri together. In this context, the place of arbitration and lex arbitri shall be our next interest.

- **The place of arbitration**

Parties to an arbitration are free to choose the place of arbitration. There is intervention by the courts, hearings and interim measures which affect an arbitration process. Thus parties are free to choose a neutral place to minimise interference. In international commercial arbitration, the parties are free to choose place of arbitration. In general, the parties choose a neutral place, since the place which is national for one party is foreign for another party. This freedom of the parties is accepted by the UAA[lxvi].

The law of the place of the arbitration has a significant impact on every stage of arbitration such as the laws governing the substance and arbitration, court intervention, hearings and interim measures etc. Thus, the parties to arbitration choose a place whose law has minimum effect on the arbitration. However, the extent of party autonomy can be visualised in regards of ***lex arbitri*** (i.e., law of the place of arbitration). The Party autonomy works here indirectly. Parties choose the *lex arbitri* by choosing the place of arbitration[lxvii]. This was the situation in

the case of *Commercial Bank of Cameroon (CBC) v. Kenmogne Nzudie Ebenezer*[lxviii]. In this case, the national court declared her incompetence when one of the parties petitioned her services in accordance to article 13 of the UAA contrary to the arbitration clause[lxix]. This was equally adumbrated in the case of *COFINEST SA v. Sokoundjou Rameau Jean Philoppe*[lxx]where the existence of an arbitraton clause rendered the judge of the national court incompetent to hear the matter in respect to the mortgage of a building.

- **Lex arbitri**

In international commercial arbitration, the law applicable to procedure, referred to as lex arbitri, often differs from the law applicable to the contract or to the arbitration agreement[lxxi]. Basically, the meaning of lex arbitri is the law of the place of arbitration. An English judge answered the question of lex arbitri by referring to the second edition of Redfern and Hunter's book. He stated that "a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration[lxxii]".

As mentioned in the definition, lex arbitri is a body of rules external to the wishes of the parties. In this sense, lex arbitri determines the extent of party autonomy. For instance, even if the parties have an express choice of law governing the arbitration, this choice may be subject to mandatory rules of lex arbitri. In other words, the choice of the parties is applicable as far as lex arbitri permits. As an illustration for this, Model law 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[lxxiii]"

In general, the parties do not choose lex arbitri directly. In other words, they choose lex arbitri indirectly by choosing the place of arbitration[lxxiv]. However, in recent years, the parties choose the place of arbitration by taking into account the law of this country, because lex arbitri has significant role in every stage of arbitration. For example, arbitration agreement binds only the parties of this agreement, thus the arbitral tribunal has no power to order and compel the attendance of third party as a witness. In this context, the arbitral tribunal needs the assistance of the court of the place of arbitration. Even if the parties confer such powers on the arbitral tribunal, the arbitrators may not exercise this power unless lex arbitri allows.

The OHADA Arbitration Act is potentially applicable for arbitrations with their seat in Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, the Democratic Republic of

Congo (ex-Zaire), the Ivory Coast, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, the Republic of the Congo (Congo-Brazzaville), Senegal, Chad and Togo.

The OHADA Treaty is one of the legal reforms in Africa aimed at promoting a stable business environment and the expeditious resolution of disputes, by harmonising commercial law within its seventeen (17) member States with a set of Uniform Acts. One of these Acts is the OHADA Uniform Arbitration Act, with provisions on the administration of arbitral proceedings and the execution of arbitral awards.

The most interesting feature of the Uniform Arbitration Act is that it has unified the arbitration laws of its signatories. The Act may apply to arbitrations which have their seat in one of the signatory States. Pursuant to Article 35[lxxv], which mentions that the Uniform Act applies to "*any arbitration"* in the signatory States, both international and domestic arbitrations are included within its ambit. These may be either institutional arbitrations administered by the Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage*), located in Abidjan, the commercial heart of francophone West Africa, or *ad hoc* arbitrations taking place in the OHADA member States[lxxvi].

The law applicable to the substance

Party autonomy is the fundamental principle of international commercial arbitration. One of the reflections of party autonomy is that the parties are free to choose the law applicable to the substance. The main attractive point of this principle is that the parties can choose any law which meet the specific requirements of the dispute. The parties can choose any national law, mandatory law, public international law and general principles of law, concurrent law, combined laws and the tronc commun doctrine, and transnational law as the applicable law to the substance[lxxvii].

In essence, the parties should choose the law applicable to the substance while they are making the contract[lxxviii]. However, today, the parties can make the choice of the law applicable to the substance when the dispute arises[lxxix].

As mentioned above, the arbitral tribunal shall apply the law chosen by parties as the applicable to the substance. In this sense, this is the duty of the arbitral tribunal. However, in some circumstances, the arbitral tribunal can abandon this duty[lxxx]. In other words, the principle of party autonomy is not always unlimited. It may be subject to some restrictions. If the parties' choice of law is contrary to public policy or not bona fide, this choice of law may be ignored.

Actually both of these grounds are not clear. Sometimes, the parties can choose a law in order to avoid mandatory rules of another law. In this context, the basic aim of these restrictions is to prevent such behaviours[lxxxi].

Bona fide is one of the universal rules, thus it has similar definitions in most countries. On the contrary, there is no general application of this principle. On the basis of these arguments, bona fide should be assessed in every case separately. As to public policy, it depends on social, economic and cultural situations of each country; hence, an issue which is in the scope of public policy in a country may not be a public policy issue for another country. In addition to this, public policy is a ground for refusing the recognition and enforcement of the award. At this point, the well-known case *Soleimany v Soleimany*[lxxxii]should be mentioned. In this case, a father and a son smuggled some carpets out of Iran under a contract. Actually, this smuggling was unlawful according to Iranian revenue laws. A dispute arose between them and then they decided to resolve this 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 on 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 and the Court stated that public policy did not allow the enforcement of an illegal contract[lxxxiii].

As a general review, the parties are free to choose the law applicable to the substance. However, this freedom is not always a rule. In some circumstances, it may be restricted. In general, the autonomy of the parties subject to some restrictions on the ground of bona fide and public policy. Actually, these grounds are not clear; hence these should be assessed case by case and by taking into account the applicable laws[lxxxiv].

Composition of the arbitral tribunal

Party autonomy can be an exercised in the appointment and organisation of arbitral tribunal. The principle enables the parties to determine any people who have relevant expertise as arbitrators. The will of the parties is envisaged in the form of an agreement which further agrees on the number and appointment procedure of the arbitrators. Moreover, the powers and duties of the arbitrators are attributed from the principles of party autonomy in arbitration. The respect of the will of the parties was observed in the case of *Société E.R.C (Etudes-Réalisations-Contrôles) S.A. v. VIMAT SARL*[lxxxv]where the Stage judge in compliance with the composition

of the arbitral tribunal exercised his power by obliging one party who was reluctant to appoint an arbitrator[lxxxvi].

The parties can exercise their autonomy in the appointment and organisation of arbitral tribunal[lxxxvii]. In this part, firstly, the appointment of the arbitral tribunal will be examined. Following this, powers and duties of the arbitrators will be scrutinised in terms of the party autonomy.

- **Appointment of arbitral tribunal[lxxxviii]**

One of the considerable advantages of arbitration is that the parties can choose the arbitrators [lxxxix]. In litigation, the parties have no chance to select the judges, thus an international commercial dispute may be resolved as a usual compensation case in a national court. However, the subjects of international commercial arbitration are international companies with huge budgets and in general; disputes between international companies have some specific requirements. Thus, this kind of dispute should be resolved by people who have relevant expertise. Arbitration and the principle of party autonomy enable the parties to select any people who have relevant expertise as arbitrators[xc].

The parties are free to agree on number and appointment procedure of the arbitrators. If the composition of the arbitral tribunal is not in conformity with the agreement of the parties, enforcement or recognition of the award may be refused. The parties can exercise this freedom through a third party. In other words, the parties can nominate a third party and this person can appoint the arbitral tribunal on behalf of the parties. The parties can expressly agree on the arbitrators in an arbitration agreement or another separate agreement.

Other than these methods, in case of an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint the third arbitrator. If one party fails to appoint an arbitrator within thirty (30) days of the receipt of the request for arbitration from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days (30) of their appointment, the appointment shall be made, upon the request of one party, by the competent jurisdiction in the Member State. In case of an arbitration with a sole arbitrator, and the parties are unable to agree on the choice of the arbitrator, the latter shall be appointed, upon the request of one party, by the competent jurisdiction in the Member State.

The decision to appoint an arbitrator by the competent jurisdiction shall be made within fifteen (15) days from when it was seized, unless the laws of a Member State foresee a shorter time period. This decision shall be subject to no appeal[xci]. In this situation, this appointment is within the jurisdiction of the national court of the place of arbitration. Actually, this option is one of the effects of lex arbitri on arbitration process.

As to arbitral institutions, each arbitral institution has its own rules about appointment of the arbitrators. In general, arbitral institutions appoint arbitrators if the parties cannot agree on the arbitrators. The arbitrators should have some qualifications. The parties can agree on some criteria in the arbitration agreement. However, firstly, the arbitrator should be a natural person[xcii]. In terms of CCJA appointment of arbitrators, appointment criteria have been changed to include the seat of arbitration and arbitrator availability[xciii].

The procedure for appointing the arbitrator(s), when handled by the Court, has been set out in greater detail and clarified in the Rules. The Secretariat General provides each party with an identical list drawn up by the Court with at least three names. Each party sends back to the arbitrator names listed in order of preference (striking out rejected names). After the time frame set by the Secretariat General has expired, the Court appoints the arbitrator or arbitrators based on the names approved on the aforementioned lists, and in keeping with the parties' order of preference. If appointments are not possible using this procedure, the revised Rules grant the CCJA a discretionary power to appoint one or more arbitrators[xciv]. Other than this, the arbitrators should be good at the language of the arbitration and the arbitrators should have relevant expertise, education and experience.

In addition to these qualifications, the arbitrators should be independent and impartial during the course of arbitration. The meaning of independence is that the arbitrators should not have any social, economic and personal relationship with the parties[xcv]. As to impartiality, the arbitrators should be biased towards the parties[xcvi]. The last thing to be mentioned in this part is challenge of the arbitrators. Basically, if the arbitrators are not independent and impartial during the course of arbitration, the parties can challenge them. In this aspect, challenge of the arbitrators can be accepted as a guarantee of the party autonomy, because a dependent and partial arbitrator does not fulfil the expectations and wishes of the parties. In other words, this arbitrator does not respect the autonomy of the parties[xcvii].

If the parties have some doubts about independence and impartiality of the arbitrators, they may challenge these arbitrators. The parties can apply for the court to remove an arbitrator if the arbitrator is not impartial, or does not possess the qualifications in the arbitration agreement, or is not capable of conducting the proceedings, or refused or failed to conduct proceedings or to make an award.

- **Powers and duties of the arbitrators**

➢ **Powers of the arbitrators**

The main difference between an arbitrator and a judge is that the parties to arbitration can confer some additional powers upon the arbitral tribunal. However, this is not possible for the judges. This distinction is one of the reflections of the principle of party autonomy in arbitration[xcviii].

In essence, the main source of the powers of the arbitrators is the arbitration agreement, thus, as first, it is needed to examine the arbitration agreement in order to determine the powers of the arbitrators. The parties may have conferred some powers upon the arbitrators expressly in the arbitration agreement[xcix]. However, it is very rare. As another option, if the parties adopt set of rules (i.e. UNCITRAL Rules, rules of the arbitration institutions) for conduct of the arbitration, it is needed to consider these rules in order to understand the powers of the arbitrators.

The powers which are granted by the parties or any set of rules are valid within the boundaries of lex arbitri. In other words, while the arbitrators derive their powers from the parties, the courts derive their powers from the States. On the basis of this argument, the courts have some coercive powers on property and people. However, the parties cannot confer such powers upon the arbitral tribunal. Even if the parties confer this kind of powers upon the arbitrators, it is not valid. Such powers can be granted merely by operation of law[c].

In this context, the arbitral tribunal can exercise these powers directly or by assistance of national courts. The arbitral tribunal may give directions to a party preservation for the purposes of the proceedings of any evidence in his custody or control and may order a claimant to provide security for the cost of the arbitration. Furthermore, the arbitral tribunal may take witness evidence; preserve the evidence; sale any goods the subject of the proceedings by the assistance of court

In general, the arbitral tribunal has the powers to conduct arbitration in such a manner as it considers appropriate, to determine the place and language of the arbitration if the parties fail to agree on, and to appoint experts. In order to determine the powers of the arbitral tribunal properly, the arbitration agreement needs to be examined. The law governing the arbitration and lex arbitri should be considered too. Even though the arbitration agreement is the main source of the powers of the arbitral tribunal, in essence, lex arbitri determines the limits of the powers of the arbitral tribunal.

- **Duties of the arbitrators**

The subject matter of the dispute may be very specific. In this context, as mentioned above, the parties can confer some specific powers on the arbitral tribunal. In relation to this, the parties can impose some specific duties upon the arbitral tribunal in order to obtain an enforceable award[ci].

These specific duties can be imposed before the appointment of the arbitral tribunal by the arbitration agreement. As another option, the parties can impose the duties upon the arbitral tribunal during the course of the arbitration process. However, in this option, they generally consult the arbitral tribunal. As an illustration for specific duties, the parties can agree on a time limit for making the award[cii].

In addition to this, there are some duties imposed by the UAA, more importantly is the arbitrator's obligation of independence and impartiality. The arbitrator is now required to inform the parties of any circumstances that would create a legitimate doubt in their mind throughout the arbitral proceedings. The party that intends to avail itself of its right to challenge the arbitrator shall have a 30-day delay to do so following that information. In the event of a challenge, the judge called upon to decide, must do so within a maximum period of 30 days. If the request for challenge is rejected, the most diligent party may refer to the Common Court of Justice and Arbitration (the "CCJA")[ciii] .

Through this mechanism, the OHADA legislator adopts an objective approach [civ] to the obligation of revelation that weighs on the arbitrator. In the absence of a definition of what may be a "circumstance likely to create in its mind a legitimate doubt", the arbitrator must disclose "all circumstances" without distinction. It is up to the parties to assess facts disclosed by the arbitrator and to exercise, where appropriate, their right to challenge[cv].

The independence and impartiality of an arbitrator clearly belong to ethical premises, ethical values of an arbitrator. In this context, it is appropriate to distinguish one concept from another. Impartiality is understood in a way that the arbitrator is not in favour of any of the parties and is not biased towards the subject of the dispute. Impartiality is difficult to prove because it represents the mental attitude of the arbitrator towards the parties to the dispute. Independence, on the other hand, requires that the arbitrator be in any relation to the parties to the dispute that could influence the arbitrator's decision. As regards to proving the absence of the arbitrator's independence, there must be an objective existence of a relationship between the arbitrator and the party[cvi].

Most rules of procedure of arbitration institutions include provisions on the arbitrator's duty to disclose any information that he or she believes might have an effect on independence and impartiality towards the parties in the dispute. The arbitrator must disclose such information no later than at his or her appointment. If they occur after the arbitrator's appointment, his or her duty is still valid. This institute, which serves primarily to maintain a good standard of independence and impartiality of an arbitrator, can be found in the model law UNCITRAL, more precisely in Article 12 (1). This model law has inspired many arbitration institutions[cvii].

The arbitrator is also supposed to conduct the proceedings with professional care. Although most international law related to arbitration does not place any special demands on the qualification of an arbitrator, the arbitrator must be able to ensure the smooth running of the proceedings, to perform procedural acts and to make the arbitration award. Failure to perform his or her duties during the arbitration may establish grounds for the arbitrator's removal[cviii].

The arbitrator should set a good example for society. This is demonstrated in the provisions of Article 4 of the Bangalore Principles stating that: "dignified representation in the exercise of the office as well as in private life is a matter of course for every judge[cix]. An arbitrator, as well as a judge, is one of the most respected professions and hence should set a good example to others.

Other issues relating to conduct of the arbitral proceedings

International commercial arbitration is a flexible dispute settlement method. The main difference between arbitration and litigation, the parties subject to the strict rules of national courts in litigation on the contrary, in arbitration, the parties are free to conduct of the arbitral proceedings. Actually, the basis of this freedom is the principle of the party autonomy. For

example, the parties can agree on dates of the hearings. The arbitral tribunal must conduct the hearings in accordance with the agreement of the parties[cx].

Under the UAA, parties are free to choose the procedural rules to be applied to their dispute. They may choose the rules of an arbitral institution or any other procedural law to govern their dispute[cxi]. If they choose an arbitral institution, they must follow all the rules of that institution, unless they have excluded some of these rules[cxii]. If the parties have not established the procedure to be followed, the arbitrators may proceed as they deem appropriate[cxiii].

Another point of interest relating to conduct of the Arbitral Proceedings is in respect for the pre-arbitration phase (the multi-third clause) The UAA requires the application of the provisions of a so-called multi-third clause which would be contained in an arbitration agreement[cxiv]. This clause provides for the respect of an amicable resolution step between the parties prior to the arbitration. It should be noted that the arbitral tribunal of its own cannot rule on this matter, one of the parties having to apply for it. In our view, this measure is not of great interest because the judge cannot raise it of his own and there is no sanction on the parties in the event of non-compliance with this clause. The parties may therefore stand for a multi-third clause in the convention and choose not to respect it and move directly to arbitration without the risk of any procedural defect.

- **The role of national courts**

In appearance, the parties to arbitration agreement can agree on everything about arbitration. Nevertheless, in some circumstances, the choices of the parties do not make any sense without support and supervision of the national courts. In this context, the role of national courts is one of the factors which determine the extent of party autonomy. However, the courts should not intervene in arbitration process at any time[cxv].

OHADA considers the circumstances in which domestic, local or national courts may support, intervene in or interfere with international arbitration proceedings (or the arbitral process) and identifies the limitations (or restrictions) on such courts powers[cxvi].

In general terms, national courts tend to play a limited role in relation to international arbitration proceedings or processes. Court intervention is usually kept to a minimum in order to respect the private nature of the dispute resolution mechanism chosen by the parties. The scope of court intervention is usually limited to the following areas:

- At the beginning of the arbitration, one of the parties to the arbitration agreement may bring an action before the court instead of arbitration[cxvii]. In this situation, the court shall decide the enforceability[cxviii] of the arbitration agreement at the request of one of the parties;
- granting emergency relief at an early stage in the arbitral process, eg to restrain or stay court proceedings brought in breach of the arbitration agreement (either domestically or, in certain circumstances, in other jurisdictions) or to prevent an arbitral tribunal from wrongly assuming jurisdiction over a dispute;
- providing support for the appointment of the arbitral tribunal;
- dealing with procedural issues during the arbitration proceedings, eg securing the attendance of witnesses at the hearing of the dispute;
- deciding challenges to or appeals in respect of awards on the grounds, for example, that the tribunal lacked substantive jurisdiction, and
- the recognition and enforcement of awards[cxix].

In international arbitration, the procedural law of the seat of the arbitration will set out the scope of the courts

LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

The principle of party autonomy allows the parties choose applicable law to substance and arbitration, to conduct the arbitration process such as appointment of arbitrator, arrangement of timetable, choice of place and language of arbitration as seen above. However, parties do not have absolute freedom to determine the arbitration process. The parties' autonomy is not without limitations and may be subject among others to certain safeguards as are necessary in the public interest and other restrictions. From the moment of negotiating an arbitration agreement up to the receipt of an arbitral award, the extent of the parties' autonomy differs substantially[cxx]. This section examines some of the aspects of the limits of party autonomy.

The arbitration agreement

The arbitration agreement plays a significant role in all stages of the arbitration as it reflects the autonomy of the parties. In the agreement the parties have the power to exclude the

jurisdiction of the courts, choose particular arbitrators and lead the arbitration in whatever way they want. The parties can opt for either ad hoc or institutional proceedings. This first choice obviously has a tremendous impact regarding the degree of autonomy and control by the parties[cxxi].

With regard to the arbitration agreement, the "party autonomy" is not synonymous with "unlimited power" or "complete autonomy". Already at this stage party autonomy is limited despite the widespread opinion that contracts are self-sufficient and together with arbitration they create a "closed circuit" that eliminates national laws. Disputes about family and criminal law, grant of patents etc cannot be subject to an arbitration agreement, as these are matters of public policy[cxxii] and can only be resolved by national courts even if the parties wish otherwise.[cxxiii]

Although the parties are free to agree on the law applicable to arbitration and the arbitration agreement, this choice may be subject to the restrictions of law at the place of arbitration. (The "*lex arbitri*") based on every state's right to regulate any legal activity within the boundaries of their own country. The "*lex arbitri*" may confer freedom of the parties to establish the relevant procedural rules (as for example article 35 of the UAA). But this may be further regulated by institutional rules which the parties may have incorporated in their arbitration agreement[cxxiv].

Another restriction in relation to the arbitration agreement is the fact that some disputes are not capable of being resolved by arbitration and this is also one of the validity requirements of arbitration agreement. Thus, as mentioned above, the disputes about family and criminal law, grant of patents etc. are not resolved by arbitration, because, these are public policy matters and can be resolved by merely national courts[cxxv].

Applicable laws

Basically, the parties can choose any system of law as the applicable to the substance. However, this choice must not be against bona fide and public policy[cxxvi]. In general, this kind of issue arises during the enforcement or recognition of the awards. Moreover, the parties are free to agree on the law applicable to arbitration and arbitration agreement. Nevertheless, this choice may be subject to the restrictions of law at the place of arbitration, lex arbitri, since every state wants to regulate any legal activity within the boundaries of their own country. Another reflection of lex arbitri is that the parties can confer some powers upon the arbitral tribunal as

possible as lex arbitri allows, because some powers could not be exercised by the arbitral tribunal. They can be exercised by national courts. In relation to this, the role of national courts is another restriction on party autonomy. Furthermore, the parties can conduct the arbitration process however they want. Nevertheless, the conduct of arbitral proceedings must not be against public policy and this conduct may be limited on the ground of third parties[cxxvii].

Natural justice is a further limitation to party autonomy because if the parties' agreement violates natural justice, it cannot be enforced. Another restriction is imposed by the role of national courts because they follow the procedural law of the country concerned even if not agreed to by the parties[cxxviii].

Appointment of the arbitral tribunal

As soon as the arbitration proceedings are initiated, the parties lose at least part of their autonomy, and the issue arises of who really owns the arbitration proceedings. The further the arbitration proceeds, the more limits party autonomy encounters[cxxix].

The appointment of the arbitral tribunal may be one of the most important stages in the arbitration and also for the parties' autonomy. To begin with, whether an arbitrator has a Common Law or Civil Law background will have also an influence how the arbitrator will conduct the proceedings and also what view an arbitrator takes on party autonomy. After the tribunal is constituted, the parties themselves cannot unilaterally change the terms of the arbitration agreement without the consent of the arbitral tribunal.

- **Lex Arbitri**

Another limitation to party autonomy after the establishment of a tribunal is the "*lex arbitri*". It is the law of the seat of arbitration which can have great influence over certain procedural issues in arbitral proceedings as well as the conflict of law rules applicable to an international arbitration[cxxx].

Under the "*lex arbitri*" the parties can confer some powers upon the arbitral tribunal as may be allowed by the "*lex arbitri*", because some powers could not be exercised by the arbitral tribunal. They can be exercised by national courts only. The role of national courts is another restriction on party autonomy.

- **The Arbitration Hearing**

At the hearing stage the parties lose a big part of their autonomy and the tribunal acquires paramount autonomy. Regarding the parties' contract which forms the core of each dispute there are usually terms in a contract that are rooted in the applicable law and that are beyond the parties' autonomy. There is a tension between the will of the parties in arbitration and the necessity to act within the framework set by national laws and eventually also international conventions, if the enforceability of the arbitral award is to be reserved. That is, contract terms do not always have an absolute meaning with legal effects flowing directly from the words and recourse to a (national) legal framework may be required to interpret the terms and to define their legal effects.

- **Equal treatment equal opportunity**

In conducting the arbitration proceedings, arbitrators must treat the parties equally and give them the same opportunity to present their case[cxxxi]. Violation of this principle is a ground for setting aside an award[cxxxii].

The parties are sufficiently autonomous to agree on their own arbitration procedure. Nevertheless, it cannot be implemented so as to violate provisions related to equal treatment of the parties themselves. Sometimes, the rules chosen by the parties can be interpreted in a way leading to unfair treatment. Then it becomes the duty of arbitrators and even national courts to preserve the basic attributes of arbitration proceedings and to restrict party autonomy. Nevertheless, such limitations have been widely accepted by the experts'[cxxxiii].

Equal treatment is one of the fundamental principles of law. In the scope of the arbitration, as a matter of principle, the parties are free to agree on the conduct of the arbitration. However, this agreement must not include any provisions against equal treatment. This is widely accepted like public policy as well. The recognition or enforcement of the award may be refused if the party against whom the award is invoked was unable to present his case[cxxxiv].

- **The issues relating to third parties**

The arbitration agreement applies only to parties which are a part of it. Therefore, parties cannot agree on something that would have a negative impact on a third person. Even the arbitration court usually has little power to require a third person to appear as a witness or to file documents or deposit any amount. Although there already exist a standard exemption from

this limitation for the arbitration tribunal. The arbitration tribunal can obtain this right by the approval and on the basis of legal assistance from the part of national courts[cxxxv].

Actually, the arbitration agreement binds only the parties. In other words, the parties cannot agree on anything which can affect third parties directly. For instance, even if the parties have conferred such power upon the arbitral tribunal, the arbitrator cannot compel third parties to attend the hearings as witnesses. In this point, the arbitral tribunal needs to seek the assistance of national courts[cxxxvi].

- **Post-award**

After the tribunal delivers the award, it ceases to have any legal control, except for minor rectifications. It is now for the parties to take up the autonomy from here, and they have to either opt to comply with the award or resist enforcement by seeking to annul it. At this stage also, the parties' autonomy may be restricted through the applicable law in case the award is refused enforcement, if the award violates public policy of the country where the award is going to be enforced[cxxxvii].

CONCLUSION AND RECOMMENDATIONS

Within the context of international commercial arbitration, the principle of party autonomy has always been the bedrock of arbitration agreements. This is an acknowledgement that parties are well suited to determine fundamental aspects of arbitration such as the place of arbitration, the applicable law, the language of the arbitration, the composition of the arbitral tribunal, and the confidentiality of the proceedings. Though not absolute, party autonomy in international commercial arbitration plays a key role in the predictability and legal certainty of the award, and more conspicuously, in determining the applicable substantive law.

The principle of party autonomy is a strong weapon in the hands of parties to arbitration. The OHADA Law as seen above supports the principle of party autonomy. The principle is widely accepted in international commercial arbitration as a key element in all arbitration agreements and as an effective tool in promoting and protecting the interests of parties to commercial arbitration. While so much has been said in retaining this principle in commercial arbitration, it is noted that "party autonomy" is not synonymous with "unlimited power" or "complete autonomy", as this will lead one to conclude that party autonomy is a principle with no

flexibility. To this end, party autonomy, as the word connotes, is a fundamental principle in international commercial arbitration, with significant practical applicability.

Nonetheless, the principle is not unlimited and, as discussed in this article, it is subject to restriction in some circumstances. For instance, to checkmate the excesses of parties to commercial arbitration, courts have been given power to intervene where the procedures adopted by parties or the resulting award therefrom are contrary to public policy. In principle, the court always intervenes to ensure that the arbitration agreement is valid and in accordance with the law which governs it and that the parties' agreement is not contrary to public policy. Again, the violation of the principle of natural justice and non-arbitrability of arbitration agreement among other things are factors evolved to act as checks and balances on the principle of party autonomy, thus restricting them from executing agreement that may affect public interest. Unless the parties to the arbitration comply with the essential validity of arbitration agreement, as highlighted in this article, the functional application of the doctrine of party autonomy may be in theory rather than in practice.

In order to streamline the principle of party autonomy viz-a-viz the court's intervention in deserving cases, the following recommendations are essential. First, in as much as it is practicable, parties' agreement should supersede and must be given priority at all times. Hence, the intervention of the courts should be limited to situations where parties' agreement is unenforceable by any standard or where it is intended to be used as an instrument of fraud.

Second, in cases where the parties cannot establish the applicable procedural rule but require the consent of the arbitral tribunal, the arbitral tribunal should be cautious before it seeks to impose a rule at variance with that agreed upon by the parties. To this extent, in deciding whether to make an order in terms of the parties' agreement, the tribunal should carefully consider the reasons underlying the parties' agreement in so far as it is aware of them.

Also, since it is private complaint that usually sets court's intervention in motion, courts must be circumspect in intervening in the matter unless the applicant convinces the court of the injustice he has suffered or may suffer under the arbitral agreement executed by the parties.

Furthermore, as concerns the appointment of arbitrators, from now on, in the event of disagreement by the parties on the appointment of the arbitrator, the competent judge in the State Party shall have a period of 15 days to appoint an arbitrator, unless a shorter period is established. This decision is free of appeal. It should be noted that with the exception of the

time limit for appointment, this system of recourse to the judge in case of difficulty in the appointment of arbitrators is not new and was already in place in the former UAA. In our view, the OHADA legislator should have taken advantage of this reform to clarify the concept of "competent judge in the State party" so as to facilitate the updating of laws and codes of judicial organisation in the various States parties.

Finally, in respect to the impartiality of arbitrators and CCJA, previously, the nationality of a member of the tribunal or the CCJA was not a hindrance in itself to his participation in an arbitral proceeding. The court was just required to take into account the nationality of the parties to appoint the arbitrators. Henceforth, the members of the Court having the nationality of a State directly involved in an arbitral proceedings must depart from the formation of the court in the case in question and the president of the court is obliged to proceed to their replacement. This measure raises a number of questions: what about the arbitrator himself who would have the nationality of a State directly involved in an arbitral proceeding? What also happens if the implication of the State in the arbitral proceedings is carried out in an indirect way? The new CCJA Rules did not answer these two questions making the reform incomplete. Indeed, if the OHADA legislator's wish was to prevent conflicts of interest, the nationality of the arbitrator should have constituted a cause of challenge per se. By way of comparison, the ICC rules of arbitration establish that the sole arbitrator or the president of the arbitral tribunal must be of a different nationality from that of the parties.

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ENDNOTES

[i] Robinson v. Bland (1760) I Wm. BI 234. z Burr 1077; Ar.Gör.Seyda Dursun, A critical Examination of the role of party autonomy in international commercial arbitration and assessment of its role and extent, https://www.researchgate.net/publication/265025271, consulted on 14/04/2021.

[ii] eg, the UNCITRAL Model Law, New York Convention, the Arbitration Rules of the International Chamber of Commerce (ICC), the English Arbitration Act 1996 etc.

[iii] The Organization for the Harmonization of Business Law in Africa ('OHADA') is an intergovernmental organisation for legal integration aimed at addressing the "legal and judicial insecurity in Member States". OHADA was established by the Treaty of Port Louis, Mauritius on 17 October 1993, and revised on 17 October 2008 in Quebec, Canada. Today, Cameroon, Chad, Congo and 14 other mostly francophone African states, are members.

[iv] See Wilson, Levi Onyeisi Odoe. "Party Autonomy and Enforceability of Arbitration Agreements and Award as the Basis of Arbitration" Thesis Submitted for the Degree of Doctor of Philosophy at the University of Leicester, 2014, p. 48. See also Michael Pryles, "Limits of Party Autonomy in Arbitral Procedure" < media/0/ >accessed 30 May 2015, Parties to civil litigation did not have all these opportunities. For instance, in court actions, parties are limited by the substantive law and procedural rules under which their claim is subsumed. Essentially, the applicable law and rules of court determine which court is vested with jurisdiction to entertain civil actions. 3 One fundamental principle of litigation is publicity of trial. The Constitution of the Federal Republic of Nigeria 1999 (as amended), s 36 (1) provides inter alia that any proceeding whether civil or criminal shall be held in the open court. The objective of this principle is to satisfy the concept of fair hearing that justice must not only be done, it must be seen to have been done. In the case of Alhaji Gaji v The State [1975] NNLR 98. The Nigeria Supreme Court held that: The test of fair trial must rest on the fair view of a dispassionate visitor to the court who had watched the entire proceedings and it is not possible to say in this case that such a visitor could or would have taken the view that the trial of the accused was anything but fair.

[v] See Dicey, Morris and Collins. *The Conflict of Laws*, 14th edn, Sweet & Maxwell, vol 2, 2010, para 32-004.

[vi] Ibid para 32-004.

[vii] The new OHADA arbitration framework, published on 15 December 2017 in the Official Journal of OHADA, came into force on 15 March 2018. In accordance with the revised arbitration framework, the Uniform Act on Arbitration Law ('Uniform Act') and the Rules of Arbitration of the Common Court of Justice and Arbitration ('CCJA Rules') replace previous versions dated 1999 and 1996 respectively. This reform aims to make the OHADA region a more attractive business environment through an efficient dispute resolution offering.

[viii]Organization for Harmonisation of Business Law in Africa.

[ix]Article 21 of OHADA Treaty on the Harmonisation in Africa of Business Law, signed in Port Louis on 17 October 1993, as revised in QUEBEC ON 17 October 2008.

[x]Uniform Act of 23 November 2017 on the Law of arbitration.

[xi]Arbitration Rules of the CCJA of 23 November 2017

[xii]See Andrew, Tweeddale and Keren, Tweeddale. *Arbitration of Commercial Disputes*, Oxford University Press, 2007, p. 256.

[xiii]Ibid

[xiv] See Ar. Gör. Şeyda Dursun, "A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent", *Yalova Üniversitesi Hukuk Fakültesi Dergisi*, 2012, p.2.

[xv] In the context of party autonomy, the parties can choose applicable laws and conduct the arbitration process such as the determination of the composition of the arbitral tribunal, language of arbitration, place of arbitration etc.

[xvi] See Michal, Malacka, "Party Autonomy in the Procedure of Appointing Arbitrators", *International and Comparative Law Review*, vol. 17, no. 2, 2017, pp.93-95.

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[xviii] See Michal, Malacka. "Party Autonomy in the Procedure of Appointing Arbitrators" *International and Comparative Law Review*, supra pp. 93–109.

[xix] See Yeshnah, Devi Rampall and Ronan, Feehily. «The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium", *Harvard Negotiation Law Review*, vol. 23, p.345.

[xx] According to article 14 of the CCJA rules, arbitration proceedings are confidential. Arbitrators, experts, counsels, any person involved in the arbitration process, and all the work of the Court pertaining to arbitration proceedings are also subject to confidentiality. However, this provision might conflict with article 49 of the Treaty on immunity and privileges. As arbitrators designated by the Court enjoy diplomatic immunity, they would not be punished if they did not respect their obligation of confidentiality.

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[xxvi] The Bay Hotel and Resort Limited v Cavalier Construction Co. Ltd. [2001] UKPC 34, 16 July 2001, PC.

[xxvii]See Charles, Chatterjee. "The Reality of Party Autonomy Rule in International Arbitration", *Journal of International Arbitration 20(6)*, 2003, pp. 539-560.

[xxviii] See article 6 of the UAA

[xxix] An arbitration agreement is primarily a substantive contract between the parties to international commercial arbitration. The agreement is central to arbitration proceedings; hence, its importance has been attributed to many factors. First, it reflects the party autonomy to settle their disputes through arbitration rather than the court of law. Second, the essential rule of the principle of arbitration is that where two parties freely enter into an arbitration agreement, there are few restrictions on their freedom to formulate their own terms of the agreement or to design a process, which caters precisely to their needs. Third, an arbitration agreement precludes judges from resolving the conflicts that the parties have agreed to submit to arbitration. If one of the parties files a lawsuit in relation to those matters, the other may challenge the court's jurisdiction on the grounds that the jurisdiction of the courts has been waived

[xxx] The texts of November 2017 are the latest expression of the rationale underlying the creation of OHADA. OHADA updates its law on arbitration and implements a new act on mediation

[xxxi] See article 25 para 3.

[xxxii] French Code of Civil Procedure, section 1522.

[xxxiii] See Sunday, Akinlolu. Fagbemi. "The Doctrine of Party Autonomy In International Commercial Arbitration: Myth Or Reality? « *AFE BABALOLA UNIVERSITY: J. OF SUST. DEV. LAW & POLICY VOL. 6: 1:* 2015, p. 244.

[xxxiv] See Elizabeth, Shackelford. "Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration", *University of Pittsburgh Law Review*, vol. 67, 2006, pp. 897-900.

[xxxv] The Nigeria Arbitration and Conciliation Act, 1988 (ACA) s 2 (the Act has been incorporated as Cap A18, Laws of the Federation of Nigeria, 2004 (ACA 2004), which provides thus: "unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court or a judge".

[xxxvi] See Okezie, Chukwumerije. *Choice of Law in International Commercial Arbitration*, Westport, Connecticut: Quorum Books, 1994. P.30.

[xxxvii] Arbitration may be either institutional, that is, conducted under the auspices of an arbitration centre that administers the arbitration in accordance with its own rules, or ad hoc, that is, conducted without the assistance of an arbitration centre and in accordance with any rules that the parties or the arbitral tribunal may choose to apply, subject to any mandatory rules laid down by the applicable law.

[xxxviii] See Dicey, Morris and Collins, *The Conflict of Laws*, 14th edn, London: Sweet & Maxwell, supra para. *32-004.*

[xxxix] See Article 3-1 of the UAA

[xl] See Richard, Boivin et al. "L'arbitrage international en Afrique: quelques observations sur l'OHADA", *Revue générale de droit*, Document généré le 29/12/ 2021 à 14:53, p.5.

[xli] See also the New York Convention, art II (1).

[xlii] Article 2

[xliii] See Laurence, Shore. "Defining 'Arbitrability'", New York Law Journal (15 June 2009) http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf consulted on 10 March 2021 at 8am

[xliv] The term arbitrability refers to the fitness of a particular dispute between parties to be the subject of arbitration proceedings.

[xlv] See article 4 of the UAA

[xlvi] Ibid

[xlvii] See Homson Reuters Practical Law. DAC Report on Arbitration Bill 1996 [online]. uk.practicallaw.thomsonreuters.com, 1996. Accessible at ., Section 100 et seq. The 1996 DAC Report on the English Arbitration Bill: The Last Part. Arbitration International, 1999, Vol. 15, No. 4, pp. 413–433

[xlviii] See Samuel, Adam. "Separability of arbitration clauses - some awkward questions About the law on contracts, conflict of laws and the Administration of justice", https://www.biicl.org/files/4160_separabi.pdf, consulted on the 28/12/2021 at 12 noon.

[xlix] The separability doctrine is found in article 4 para 1 and 2 of the UAA. Similar provisions are found in article 16 (1), second and third sentence.

[l] Ibid

[li] See Samuel, Adam. "Separability of Arbitration Clauses - Some Awkward Questions about the Law on Contracts, Conflict of Laws and The Administration of Justice", 16 <http://www.adamsamuel.com/pdfs/separabi.pdf >accessed 12 March 2011, supra

[lii] Ibid 16.

[liii] Separability is a legal doctrine that allows an arbitration agreement to be considered entirely separately from the underlying contract in which it is contained. ... It follows that, in order to render an agreement to arbitrate unenforceable, the arbitration agreement itself must be directly impeached.

[liv] UNCITRAL Rules (as revised in 2010), art 23.

[lv] Model Law, art 16 (1).

[lvi] English Arbitration Act 1996, s 7; Furthermore see, Fiona Trust & Holding Corp v Privalov (2007) UKHL 40.

[lvii] Party autonomy is a recognized concept in commercial arbitration worldwide. The traditional aspect of international arbitration where three arbitrators are appointed has been subject to criticism in the past as well as today.

[lviii] Union of India v McDonnel Douglas Corp [1993] 2 Lloyd's Rep 48.

[lix] See Peter, Klaus Berger. "Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?" (From Albert Jan van den Berg (ed), International Arbitration 2006: Back to Basics? ICCA Congress Series 2006 Montreal 13 (Kluwer Law International 2007) pp. 301 – 334), 2http://law.queensu.ca/international/globalLawProgramsAtTheBISC/courseInfo/courseOut lines/commercialArbitration2010/Berger2006.pdf > accessed 13.04.2011, at 1pm.

[lx] Ibid 20. Also see C v D [2007] EWCH 1541.

[lxi] Arbitrability relates to whether it is or it is not appropriate to resolve an issue by the means of the arbitration proceedings, or whether it is possible to resolve it through arbitration. However, this is not purely a legal issue and therefore it is certainly also a question of party autonomy.

[lxii]See Mistelis, Loukas A. Arbitrability - International and Comparative Perspectives. Is Arbitrability a National or an International Law Issue? In MISTELIS, Loukas A., BREKOULAKIS, Stavros L. Arbitrability: International & Comparative Perspectives. Kluwer Law International, 2008, p. 6; in more detail: DI PIETRO, Domenico. General Remarks on Arbitrability under the New York Convention. In MISTELIS, Loukas A., BREKOULAKIS, Stavros L. Arbitrability…, pp. 85–87

[lxiii] The principle of party autonomy is also endorsed by Model Law art 19.

[lxiv] See article 31 para 2

[lxv] See Yuko, Nishitani. "Party Autonomy in Contemporary Private International Law: The Hague Principles on Choice of Law and East Asia", published in: *Japanese Yearbook of International Law*, Vol. 59, 2016, p.13.

[lxvi] See articles 2, 6 and 13.

[lxvii] See Pierre, Boubou & Etienne, Mbandji Mbena. *Code Annoté des Procédures Civile, Commerciale et de Droit Coutumier devant les Jurisdictions Camerounaises et la CCJA, du Pluralisme Juridique au Pluralisme Judicaire*, Édition Veritas, Douala, 2022, p. 152.

[lxviii] The High Court of Mifi, judgment no. 79/civ of the 1st of August 2006, Ohadata J-07-70.

[lxix] Where parties agreed to submit their disputes to the arbitral tribunal

[lxx] The High Court of Bafoussam, judgment no. 33/civ of the 3rd of April 2007, Ohadata J-08-149

[lxxi] International Trade Centre, prepared by Herman Verbist and Jean François Bourque, Settling Business Disputes: Arbitration and Alternative Dispute Resolution, 2nd edn, https://www.un-ilibrary.org/content/books/9789210578615, consulted on the 25/12/2021 at 4pm, p. 59.

[lxxii] See Paul Smith Ltd -v- H & S International Holdings Inc [1991] 2 Lloyd's Rep 127 <http://www.swarb.co.uk/lisc/Arbit19911991.php > accessed 14 March 2011.

[lxxiii] Model Law, art 19(1)

[lxxiv] See Jean-François, Poudret and Sébastien, Besson. *Comparative Law of International Arbitration*, 2nd Edition, Sweet & Maxwell, 2007, para 113.

[lxxv] This Uniform Act shall be the arbitration law in the Member States. It shall apply only to arbitral proceedings commenced after its entry into force.

[lxxvi] See Ulrich, Schroeter. «Ad Hoc or Institutional Arbitration¾A Clear-Cut Distinction? A Closer Look at Borderline Cases" 10(2) CONTEMP. ASIA ARB. J. 141, 2017, p.1.

[lxxvii]See Peter, North Machin and James, Jeffrey Fawcett. *Cheshire and North private international law* 11th ed., / P.M. North and J.J. Fawcett. London: Butterworths, 1987, p. 449.

[lxxviii] See Katherine, Lynch. The Forces Of Economic Globalization: Challenges To The Regime Of International Commercial Arbitration (Kluwer Law International, 2003), Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration (Sweet and Maxwell, 2004), and David W Leebron, "Lying Down with the Procrustes: An Analysis of Harmonization Claims" in Jagdish N. Bhagwati, Robert E. Hudee (ed.), Fair Trade and Harmonization: Pre Requisite for Free Trade?, (MIT Press, 1997).

[lxxix]See Kennedy, Gastorn. "Examination of Arbitration Related UNCITRAL Texts and Their Adoption by African States", https://www.aalco.int/Speech%20by%20SG%20at%20CIRCICA.pdf, consulted on the 02/01/2022 at 6am.

[lxxx] See Rachel, Engle. "Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability" 15 *Transnat'l Law*, 2002, pp. 323 and 341.

[lxxxi]See Margaret, Janeen Carruthers. "Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages", *The International and Comparative Law Quarterly*, Vol. 53, No. 3, 2004, pp. 691-711

[lxxxii] [1999] QB 785.

[lxxxiii] Ibid at 800 "The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it. In the present case the parties were, it would seem, entitled to agree to an arbitration before the Beth Din. It may be that they expected that the award, whatever it turned out to be, would be honoured without further argument. It may be that the plaintiff can enforce it in some place outside England

[lxxxiv] See Ar. Gör. Şeyda Dursun, "A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent", Yalova Üniversitesi Hukuk Fakültesi Dergisi, supra p.175.

[lxxxv] The Court of First Instance of Douala, Ordonnance de référé no. 140 of 4th December 2000.

[lxxxvi] See Pierre, Boubou and Etienne, Mbandji Mbena. *Code Annoté des Procédures Civile, Commerciale et de Droit Coutumier devant les Jurisdictions Camerounaises et la CCJA, du Pluralisme Juridique au Pluralisme Judicaire*, supra p. 351.

[lxxxvii] Parties' choice on arbitral tribunal constitution is more flexible in the UAA than it is in the CCJA rules where parties might have to choose an arbitrator from the roster provided by the CCJA. The arbitral tribunal can be composed of either one or three arbitrators. Article 5 of the UAA gives two scenarios for the appointment of arbitrators.

[lxxxviii] The new UAA establishes strict deadlines for the composition without forgetting to reaffirm the principles of independence and impartiality that must be respected by any arbitrator.

[lxxxix] See article 5 and 6 of the UAA supra

[xc]See Ar. Gör. Şeyda Dursun, "A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent", Yalova Üniversitesi Hukuk Fakültesi Dergisi, supra pp.175-177.

[xci] See article 6 of the UAA

[xcii] Article 5 of the UAA

[xciii] article 3.3§1 of the CCJA Rules

[xciv] article 3.3§2 of the CCJA Rules

[xcv] See Emilia, Onyema. "Selection of Arbitrators in International Commercial Arbitration", *International Arbitration Law Review*, Vol. 8, No. 2, 2005, p. 47

[xcvi] Article 9 of the UAA

[xcvii] It remains true that the selection of private decision-makers naturally links with choosing people from the same business and professional community as the one that relates to the parties and their representatives, which raises tension between the two principles: party autonomy during the selection of arbitrators of one's choice on the one hand, and the concept of judicial justice, independence and impartiality on the other.

[xcviii]See Pierre, Liber Amicorum Karrer. "The Powers and Duties of an Arbitrator", pp.1-16, https://www.lalive.law/wp-content/uploads/2019/10/Shaughnessy__Tung_9789041184139_Flyer.pdf, consulted on the 29/12/21 at 10pm.

[xcix] Ibid

[c] Ibid

[ci] See Babatunde, Fagbohunlu."The Duties of Arbitrators", http://www.nigerianlawguru.com/articles/arbitration/THE%20DUTIES%20OF%20ARBITRATORS.pdf, consulted on 29/12/21 at 9pm.

[cii] Ibid

[ciii] Section 8 of the AUA

[civ] It opposes the subjective approach which assumes that the arbitrator must be able to assess the desirability of a particular circumstance without the failure of revelation being able to cause its revocation.

[cv] See Lew, Julian, Mistelis, Loukas, Kroll, Stefan. Comparative International Commercial Arbitration. Kluwer Law International, 2003, pp. 260–270. The same opinion expressed by Gary Born: BORN, G. International Commercial Arbitration Vol. I. Aalphen aan den Rijn: Kluwer Law International, 2009, p.1473.

[cvi] Ibid

[cvii]See Moses, Margaret. L. *The Principles and practice of international commercial arbitration* 1st ed. Cambridge: Cambridge University Press, 2008, pp. 130–132.

[cviii] See Michal, Malacka. "Party Autonomy in the Procedure of Appointing Arbitrators*" International and Comparative Law Review*, 2017, vol. 17, no. 2, p.98.

[cix] The Bangalore Principles of Judicial Conduct, from 25–26 November 2002, Section 4

[cx] See Jonathan, Bashi Rudahindwa. "International Commercial Arbitration in Africa: The Organisation for Harmonisation of Business Law in Africa (OHADA) sets the tone" LLM thesis, Indiana University School of Law-Indianapolis, 2011, p55.

[cxi] The choice of the rules of procedure to be followed is provided in article 14 of the UAA.

[cxii] This rule is provided in article 10 of the UAA.

[cxiii] Article 14 of the UAA. Similar provisions are found in article 19 (2) of the UNCITRAL Model Law

[cxiv] Section 8-1 of the UAA states to this effect that "In case of an agreement imposing upon the parties to follow a preliminary phase for the settlement of the dispute prior to any arbitration, the tribunal shall, upon the request of one of the parties, examine if this condition has been met and as the case may be, shall mandate the completion of this preliminary phase. If this preliminary phase has not been initiated, the arbitral tribunal shall suspend the procedure for a time period which it deems appropriate, to allow the most diligent party to initiate this phase. If this preliminary phase has effectively been initiated, the arbitral tribunal shall take note, as the case may be, of its failure".

[cxv] See Jonathan, Bashi Rudahindwa. "International Commercial Arbitration in Africa: The Organisation for Harmonisation of Business Law in Africa (OHADA) sets the tone" supra p. 42.

[cxvi] Ibid p.43.

[cxvii] See Redfern and Hunter, para 7.10; David St John Sutton and Judith Gill, Russell on Arbitration (Twenty-Second Edition, Sweet & Maxwell, 2003) para 7-005.

[cxviii]See Lucien Mathieu, N'Gouin Claih. "L'execution des sentences arbitrales et les voies de recours", at p.5 (www.ohada.com, Ohadata D-07-11)

[cxix] See Jonathan, Bashi Rudahindwa. "International Commercial Arbitration in Africa: The Organisation for Harmonisation of Business Law in Africa (OHADA) sets the tone" supra, p.61.

[cxx] See Andreas Respondek, Carolin Nemec, Assesorin et al, "Limits to Party Autonomy in International Commercial Arbitration", The Singapore Law Gazette, https://lawgazette.com.sg/feature/limits-to-party-autonomy-in-international-commercial-arbitration/, consulted on 26/12/2021 at 2pm, pp.1-5.

[cxxi] Ibid p.2.

[cxxii] Public policy can influence party autonomy in three ways: rst, the freedom of the parties can be limited by the rules governing the arbitrability of the arbitration agreement, second, an award can be set aside if it violates public policy and third, if the award infringers public policy its recognition and enforcement

[cxxiii] See Ar. Gör. Şeyda Dursun, "A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent", Yalova Üniversitesi Hukuk Fakültesi Dergisi, supra p.179.

[cxxiv] See Sunday, Akinlolu. Fagbemi. "The Doctrine of Party Autonomy In International Commercial Arbitration: Myth Or Reality? « AFE BABALOLA UNIVERSITY: J. OF SUST. DEV. LAW & POLICY VOL. 6: 1, supra, p. 245.

[cxxv] See Okezie, Chukwumerije. *Choice of Law in International Commercial Arbitration*, Westport, Connecticut: Quorum Books, supra. p.30.

[cxxvi] Also, this choice of law must not be against “bona fide” and “public policy”. Whether this choice is in breach of “bona fide” or “public policy” is again defined by national law. Therefore, the choice of law is not completely unrestricted.

[cxxvii] The most commonly encountered restriction on party autonomy is public policy. This restriction is derived from that every State has the right to exercise full and permanent sovereignty over its country. Thus, each state can govern any arbitration process in within the boundary of their country. The concept of public policy depends on the social, economic and cultural conditions of each country; hence the content of this concept should be determined case by case. Generally, the arbitrators consider that public policy is taken into account in the country where the award is likely to be enforced. However, they should not restrict their opinions in such a way. International arbitration implicates more than one nation thus, the public policy of all interested nations should be considered. For instance, Public policy can be considered during the arbitral proceedings prior to the recognition or enforcement of an award.

[cxxviii] See Giuditta, Cordero-Moss. "Limits to Party Autonomy in International Commercial Arbitration", *Oslo Law Review*, 2014, Issue 1, 47-66 http://dx.doi.org/10.5617/oslaw979, consulted on 22/11/2020.

[cxxix]Ibid.

[cxxx] See Nadia, Ramzy Salama. "Nature, Extent, and Role of Parties' Autonomy in the Making of International Commercial Arbitration Agreements"; consulted on 16.09.2019: https://www.research.manchester.ac.uk/portal/files/54580628/FULL_TEXT.PDF

[cxxxi] Equality of treatment and equal opportunity of parties to present their case are provided in article 9 of the UAA. During proceedings, this principle gives to both parties the chance to present their case and challenge the other party's arguments. The same principle is provided in article 18 of the UNCITRAL Model Law.

[cxxxii] Violation of the principle of contradictory is listed as one of the ground for setting aside an award in article 26 of the UAA.

[cxxxiii] UNCITRAL. UNCITRAL Model Law on International Commercial Arbitration 1985 [online]. uncitral.org, 1985 [cit. 1 July 2017]. Accessible at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf>, Article 28, UNCITRAL. UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 [online]. uncitral.org, 2008 [cit. 1 July 2017]. Accessible at < http://www. uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>., Article 35, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded on June 10, 1958 in New York; order of the Ministry of Foreign Affairs No. 74/1959 Coll., Article V 1d and the UNCITRAL Rules recognizing it as binding provisions that should not be departed from.

[cxxxiv] Ibid

[cxxxv] See Michael John, Mustill. "Comments and Conclusions in Conservatory Provisional Measures in international Arbitration", 9, *Joint Colloquim. ICC Publication*, 1993, p. 118.

[cxxxvi] Ibid

[cxxxvii] See Jonathan Bashi Rudahindwa. "International Commercial Arbitration in Africa: The Organisation for Harmonisation of Business Law in Africa (OHADA) sets the tone"supra, p.62.