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THE DOCTRINE OF SEPARABILITY UNDER NIGERIAN LAW

Dr Emilia Onyema •

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INTRODUCTION

The doctrine of separability[1] is relevant to arbitration proceedings, both domestic and international. Arbitration is an alternative mechanism (to litigation) for the resolution of disputes primarily of a commercial nature, terminating in a final and binding decision enforceable like a judgment of a national court [2]. Arbitration is a private mechanism for the resolution of disputes but quite distinguishable from any private mechanism[3] of amicable settlement of disputes such as mediation or any of its variants [4]. In international commercial transactions, arbitration is reputed to be the preferred method of resolving disputes arising from such cross border or international commercial (and investment) contractual relationships.

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[1] Separability is also variously referred to as the doctrine or principle of autonomy or independence of the arbitration clause.

[2] Definitions or descriptions of arbitration vary but generally comprise of these attributes. The Court of Appeal in the customary arbitration case of *Raphael Agu v Christian Ozurumba Ikwibe* [1991] 3 NWLR (pt. 180) 385 at 417 gave the following definition: "Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties".

[3] These processes or mechanisms are procedural in nature as distinct from substantive matters.

[4] References under these amicable mechanisms all terminate in a settlement agreement which is not self-enforcing neither is such settlement agreement or record a 'final and binding' decision. The Supreme Court in *Ras Pal Gazi Construction Co Ltd v Federal Capital Development Authority* [2001] 10 NWLR (pt. 722) 559 distinguished between an arbitral award and such settlement agreements. The Supreme Court said, "In settlement proceedings the terms of settlement is not binding and enforceable until the court adopts it and makes it a judgment of the court" while "an (arbitral) award is at par with a judgment of the court", at pages 571-572

Commercial entities in Nigeria are involved in major and varied domestic, cross border, regional and international transactions and contracts worth billions of naira each year. Inevitably disputes arise from such transactions. Such disputes will have to be resolved in one forum (territorial jurisdiction) or another and through one dispute resolution mechanism or another (or a combination of such mechanisms.[5]) Arbitration offers the disputing parties the opportunity of resolving their dispute in a neutral venue by a panel of 'private judges' they select themselves[6]. However for the parties to exploit the benefits of arbitration[7] the dispute must be covered by an arbitration agreement.

For purposes of the issues examined in this article it is relevant to mention that arbitration agreements can be in the form of a pre-dispute clause in a contract or a separate submission agreement covering the disputes that have already arisen [8]. The principle of separability is most relevant to arbitration clauses contained in an underlying contract. The Supreme Court in *The Owners of the MV Lupex v Nigerian Overseas Chartering & Shipping Ltd*, defined an arbitration clause as, "a written submission agreed by the parties to the contract.[9]" This written submission refers to both pre-dispute clause and post-dispute agreements. The consent to submit any eventuating dispute to arbitration is fundamental in consensual arbitration references and so must be evidenced clearly. The importance of this evidence cannot be over-emphasised especially since opting to arbitrate a particular dispute operates as an ouster of the jurisdiction of the competent court over that particular dispute between the particular parties. Parties' right of access to Nigerian courts for the resolution of their dispute is one of the fundamental rights of every Nigerian, legal or physical, person which is constitutionally guaranteed[10]. So to waive this right, there must be

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[5] See Emilia Onyema, (2001) "The Use of Med-Arb in International Commercial Dispute Resolution", 12 (2) Am. Rev. Int. Arb 411, on the mechanism of med-arb in the resolution of international commercial disputes.

[6] It is debatable if arbitration as currently practiced (especially in international references) is cheaper and less time consuming than litigation. It is certainly not cheaper and less time consuming that mediation.

[7] These benefits include: privacy and confidentiality, private judges possibly with expertise in the subject matter of the dispute, finality of decision, and flexibility of the procedure.

[8] See for example the requirements of article II(2) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) to which Nigeria is a contracting state since 15 June 1970 (New York Convention); article 7(1) UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law) which Nigeria adapted in drafting the Arbitration and Conciliation Act 1988 (ACA); section 1(2) ACA

[9] *The Owners of the MV Lupex v Nigerian Overseas Chartering & Shipping Ltd* [2003] 15 NWLR (pt. 844) 469 at 487

[10] See section 36 of the Constitution of the Federal Republic of Nigeria 1999. See also the decision of the Supreme Court in this respect but with reference to s.33(1) 1979 Constitution in *Bil Construction Co Ltd v Imani & Sons Ltd & Shell Trustees Ltd (a joint Venture)* [2006] 19 NWLR 1 at 12, "section 33(1) 1979 Constitution on fair hearing conferred on every citizen who had any grievance the right of Access to the courts and left the doors of the courts open to any person with the desire to ventilate his grievances..."

clear unequivocal evidence of such waiver. This evidence is best proved through a written agreement[11] clearly evidencing the consent of the parties to opt out of litigation before a national court and to submit the dispute to arbitration [12]. Thus the foundational requirement in consensual arbitration is the existence of a valid and enforceable arbitration agreement [13].

SCENARIO

It is important to set the discussions in this article in context. Thus a typical scenario is where parties conclude a contract over a defined legal relationship; and one of the clauses in this contract is an arbitration clause. Each party enters into the performance of its obligations under the contract. Some time thereafter a dispute arises between the parties on the contract. One party commences an action in the relevant High or Federal High court on a claim based on the contract. For purposes of this article, we shall assume that the subject matter of the contract is arbitrable under Nigerian law and the eventuating dispute is covered by the arbitration clause [14]. In this example, the other party is now faced with a dilemma: whether to commence arbitration as required by the arbitration clause or join in the litigation to defend its rights. The party who has commenced proceedings in court may have done so for strategic reasons even though he is fully aware of the existence of the arbitration clause. It appears (from the number of decided cases on this point) that this is a regular occurrence in Nigeria. One possible reason for this may be that one party realises that they have entered into a bad bargain which they need to get out of as quickly as possible; and envisage that a summary procedure in the courts will save it money, time and possibly it will get a declaration that the main contract is invalid and unenforceable under a relevant Nigerian law.

The core of this article addresses issues arising from such scenario and explores both Nigerian law and decisions of the higher courts in Nigeria on the acceptance (or otherwise) and application of the doctrine of separability (and the doctrine of competence-competence) in arbitration references connected to the country. It also examines the limits of this principle under Nigerian law. These issues are examined in three sections. Section one examines the meaning of and legal basis of the

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[11] Nnaemeka-Agu, JSC referring to the arbitration clause in *Commerce Assurance Ltd v Alhaji Buraimoh Alli* [1992] 3 NWLR (pt. 232) 710 at 722 said, "... but in order to be binding the arbitration provisions must be brought to the notice of both parties".

[12] This explains why the writing requirement for arbitration agreements in various arbitration-related conventions and national laws are of such importance. Examples of such laws are article II New York Convention, article 7 Model Law; section 1(1) ACA; section 5 English Arbitration Act 1996 (EAA)

[13] The arbitration agreement must be valid and enforceable under the law of Nigeria in domestic arbitrations and in international arbitral references, where the seat of arbitration is in Nigeria or Nigerian law is the proper law of the arbitration agreement.

[14] These assumptions are important since where the dispute is not arbtirable (for example matters falling within sections 1 & 2 Admiralty and Jurisdiction Act 1991 (AJA)) under Nigerian law the arbitration clause will be unenforceable for lack of jurisdiction on ground of public policy and where the eventuating dispute is not covered by the arbitration clause, it is also an issue of lack of jurisdiction since the parties will not have consented to submit the particular dispute to arbitration.

principle of separability generally and under Nigerian law; section two examines its limitations under Nigerian law while section three examines the doctrine of competence-competence under Nigerian law. Judgments of the higher courts are examined in support of the assertions made in this article. This article concludes that Nigerian law and judgements of the higher courts unequivocally (and within internationally recognised limits) accept and enforce the doctrines of separability and competence-competence.

1. THE DOCTRINE OF SEPARABILITY

As mentioned above the best proof of a party's consent to arbitrate a particular dispute is the production of a written arbitration agreement. The effect of the acceptance of the doctrine of separability is most evident when applied to arbitration clauses, making it appear as if it does not apply to submission agreements as well[15]. It is common knowledge that submission agreements are generally utilised where parties to a contract not containing an arbitration clause (or a clause that is null and void, inoperative or incapable of being performed [16]) wish to arbitrate current disputes emanating from the transaction. Not having an arbitration agreement but desiring to arbitrate the dispute that has eventuated, the parties can always conclude a submission agreement to arbitrate such disputes. This submission agreement just like the arbitration clause is still autonomous, separate or independent of the contract or agreement containing the underlying transaction between the parties. Thus this doctrine is relevant and applicable to both forms of arbitration agreements (as a clause or free standing agreement). The doctrine of separability is recognised under international conventions [17], national laws, arbitration rules [18] and international arbitral practice [19].

DEFINITION

At the outset it must be recognised that this doctrine is inextricably linked with the doctrine of competence-competence (examined in section three below) which empowers the arbitrator to decide his own jurisdiction in the first instance[20]. The doctrine of separability refers to the bifurcation of the arbitration clause and the

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[15] One reason for this is that all that is contained in the submission agreement is the arbitration agreement. It therefore is not drafted or evidenced as part of the main contract as to require it to be construed as separate or autonomous from the main or underlying contract, since it is 'physically' separate. This clearly exemplifies why this doctrine is a legal fiction.

[16] See article II(3) New York Convention

[17] See for example article V(3) European Convention on International Commercial Arbitration 1961 (European Convention)

[18] See for example, article 6(4) ICC Arbitration Rules 1998 (ICC Rules); article 23 LCIA Arbitration Rules 1998 (LCIA Rules); article 15 AAA International Arbitration Rules 2008 (AAA Rules).

[19] As early as 1975, this doctrine was recognised as a principle of the law of arbitration in *Texaco Overseas Petroleum Co v Government of the Libyan Arab Republic* (1975) 53 ILR 389

[20] Lew, Mistelis & Kroll, *Comparative International Commercial Arbitration* (Kluwer Law Int'l 2003) assert at page 334 that, "While competence-competence empowers the arbitration tribunal to decide on its own jurisdiction, separability affects the outcome of this decision."

underlying contract in which the clause is contained[21]. This doctrine was formulated to ensure that where there is any factor capable of vitiating the main or primary contract in which the arbitration clause is contained, the same shall not affect or vitiate the arbitration clause except where the same vitiating factor directly affects the arbitration clause. In this manner, the arbitration reference can commence and the arbitrators can then determine the question of the vitiating factors and their effect on the contract[22]. This is irrespective of the fact it is not necessary to show that the arbitration clause was separately contracted (by proving for example, the contractual elements of offer, acceptance, consideration and legal intention) This was thought necessary since a court investigating such vitiating factors on the validity of the main contract may enter into the merits of the dispute contrary to the agreement of the parties to have the arbitrator hear and determine the merits of the dispute.

The doctrine of separability is provided for under section 12(2) of Arbitration and Conciliation Act of Nigeria (ACA)[23]:

> For purposes of subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract...

For arbitral tribunals whose seat is in Nigeria (including under domestic arbitration) the source of this doctrine is article 12(2) of the ACA quoted above which is a mandatory provision. Parties cannot therefore as a matter of contract, derogate from this provision and agree otherwise.

The doctrine of separability is also recognised under various arbitration rules. Article 21(2) of the Arbitration Rules attached as the first schedule to the ACA provides:

> The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of this article, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

UNCITRAL Arbitration Rules 1976 in article 21(2) provides in relevant part and in the same words, "... an arbitration clause which forms part of a contract and which

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21 See Andew Tweedale & Karen Tweedale, *Arbitration of Commercial Disputes* (Oxford University Press 2007) paras.4.55 for a description of the principle of separability as a matter of law and not fact.

22 Tweedale & Tweedale at para.4.55

23 Words to the same effect are contained in article 16(1) Model Law, article V (3) European Convention; article 41 (1) International Convention for the Settlement of Investment Disputes Convention, Washington DC 1965 (ICSID Convention) to which Nigeria is party since 14 October 1966; section 7 EAA; section 15 of the Draft Federal Arbitration and Conciliation Bill (Nigeria)

provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract.[24]"

JUSTIFICATION FOR THE DOCTRINE OF SEPARABILITY

The justifications for the doctrine are self-explanatory and may be summarised as follows:

- Respecting or upholding the autonomy of the parties who, having agreed on arbitration, do not wish to have part of their claim decided by arbitration and part by national courts. Where parties want this they use very clear words limiting the cope of the arbitration agreement.
- This doctrine prevents or checks the excesses of parties wishing to frustrate or delay the arbitral reference by pursuing claims before national courts that the underlying contract was void or vitiated by one factor or the other.
- This doctrine ensures that the same results are achieved whether the arbitration agreement is pre-dispute or post dispute.
- The doctrine ensures that when requested to determine whether an arbitration agreement is valid or not, the danger of the courts going into the merits of the dispute is greatly reduced since this will be contrary to the purpose of arbitration as an alternate forum to determine and decide the issues in dispute between the parties.

In summary on the justification for the doctrine of separability, Redfern & Hunter writes:

> Indeed it would be entirely self defeating if a breach of contract or a claim that the contract was voidable was sufficient to terminate the arbitration clause as well; this is one of the situations in which the arbitration clause is most needed[25].

EFFECT OF THE DOCTRINE OF SEPARABILITY

What then is the legal effect of this doctrine? The primary effect on any arbitral reference of the doctrine of separability is to use the words of Tweedale and Tweedale that, "the underlying contract containing the arbitration clause may be void but the arbitration agreement may survive.[26]" In this way, allegations of illegality of the main contract falling within the scope of the arbitration clause can be determined by the arbitrators[27]. According to Lew, Mistelis & Kroll:

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[24] See also article 15(2) AAA Rules 2008; article 21(2) Cairo Regional Centre Arbitration Rules 2007; article 5(4) CIETAC Rules 2005; article 5(4) ICC Rules; article 23(1) LCIA Rules; article 24(2) Lagos Regional Centre Arbitration Rules 2008; article 21(2) Swiss Rules 2006, to mention a few international arbitration rules.

[25] Alan Redfern & Martin Hunter with Nigel Blackaby & Constantine Partasides, *Law and Practice of International Commercial Arbitration* (4th ed., Thomson, Sweet & Maxwell 2004) para.3-60

[26] Tweedale & Tweedale, at para.4.55

[27] See the decision of Steyn J in *Harbour Assurance (UK) Ltd v Kansa General International Insurance* [1992] 1 Lloyd's Rep 81

> Without the doctrine of separability, a tribunal making use of its competence-competence would potentially be obliged to deny jurisdiction on the merits since the existence of the arbitration clause might be affected by the invalidity of the underlying contract[28].

The fundamental goal of the propagation of the doctrine of separability is to ensure that the agreement of the parties to arbitrate their dispute is honoured or enforced. Without the adoption of the doctrine of separability or autonomy of the arbitration agreement, this intention of the parties will be easily thwarted. This is so since allegation of any factor that may impugn the main contract taken before a national court may effectively equally render the arbitration clause of no effect and potentially deny or rob the arbitrators of their jurisdiction to hear the dispute[29]. This is especially so where the court may need to go into the merits of the dispute in its quest to determine the question of the validity of otherwise of the main contract. Thus national courts will find themselves having to determine such questions in complete disregard of the wishes of the parties when they concluded the contract as evidenced in the arbitration clause. According to the English Court of Appeal without the principle of separability the termination of the underlying contract would also terminate the parties' contractual right to arbitrate[30].

National courts in various jurisdictions have grappled with the application of this doctrine. The Court of Appeal, Bermuda in *SNE v Joc Oil* held that the effect of this doctrine is that the invalidity of the main contract, does not in principle, entail the invalidity of the arbitral clause so that the arbitral tribunal could take jurisdiction, declare the main contract invalid and decide the consequence of such invalidity, as long as the arbitration clause as a separate entity is valid[31]. In England the House of Lords came to the same conclusion in the recent case of *Fiona Trust & Holding Corporation & Others v Privalov & Others*[32]. Lord Hoffman said:

> In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause

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[28] Lew, Mistelis & Kroll, at page 334

[29] This in itself is a breach of the underlying or main contract between the parties and a breach of the contract of arbitration for which the party in breach maybe liable in damages. On this point see the Queen's Bench Division (England) decision of 13 November 2008 in *Delta Reclamation Ltd v Premier Waste Management Ltd* [2008] EWHC B16 (QB); and the Commercial Court (England) decisions of 21 November 2008 in *Kallang Shipping SA Panama v AXA Assurance Senegal* [2008] EWHC 2761 (Comm); and *Sotrade Denizcilik Sanayi VE Tikaret AS v Amadou Lo, The Duden* [2008] EWHC 2762 (Comm)

[30] See *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation* [1981] AC 909 at 980

[31] *Sojuznefteexport (SNE) v Joc Oil Ltd* (1990) XV Year Book Commercial Arbitration 384

[32] *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2008] 1 Lloyds' Rep 254

> should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction[33].

In summary, the effect of this principle is that any factor that vitiates the underlying contract containing the arbitration clause does not automatically vitiate the arbitration agreement represented or evidenced in the clause contained in the main contract. So having said this, it becomes evident that there are two contracts or agreements in one. These are the main contract (regardless of the number of clauses) and the one (or more) clause evidencing the parties' agreement to arbitrate. This therefore means that these two contracts or agreements can potentially be governed by two separate and different laws. The effect of this doctrine or legal fiction is that each of these two contracts is independent of the other so that even though both can be vitiated by common factors, arguments in this respect must be raised independently in the recognition and application of the doctrine of seprability.[34]

2. LIMITATIONS TO THE DOCTRINE OF SEPARABILITY

The effect or reach of the doctrine of separability has limitations. Generally, any factor which vitiates the underlying or main contract and which vitiating factor also extends to the arbitration clause may equally invalidate the arbitration clause. Quoting Lord Hoffman again in *Fiona Trust* where he said:

> The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf that is an attack on both the main agreement and the arbitration agreement.[35]

Thus it is clear from this quotation that any factor that will vitiate any contract will vitiate an arbitration agreement (whether a clause or a free standing contract). However, for arbitration clauses such vitiating factor must affect the arbitration clause independently of the main or underlying contract. This implies that in the face

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[33] *Fiona Trust* at 257
[34] See Lew, Mistelis & Kroll, at pages 332-335
[35] *Fiona Trust* at p.257

of such vitiating factor, a claim can be filed challenging the validity of the arbitration clause itself either before the arbitral tribunal or a national court (this will depend on the nature of the factor and the stage in the arbitral proceedings and to some extent on the relevant national law) An example from our scenario above will be where one party alleges that it never contracted with the other party (possibly because a condition precedent for the commencement of the contract was not performed so that the contract never came into existence.[36]) This vitiating factor also affects the existence of the arbitration clause contained in the contract. So that the contesting party may either commence legal proceedings for a court order declaring the arbitration clause non-existent (as a separate head of claim) or take the same point before the arbitral tribunal as an objection to the jurisdiction of the tribunal.

Another vitiating factor that may affect the enforceability of both the underlying contract and the arbitration clause is arbitrability. Arbitrability refers to a situation where the subject matter of the dispute itself is not capable of settlement by arbitration under the applicable law[37]. Waller J in *Soleimany v Soleimany*[38]held that where the subject matter of the underlying contract is not arbitrable or is incapable of resolution by arbitration, this vitiating factor equally affects both the underlying contract and the arbitration clause contained in it. Waller J reasoned:

> There may be illegal or immoral dealings, which are from an English law perspective incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English law. The English court would not recognise an agreement between highwaymen to arbitrate their differences any more than it would recognise the original agreement to split the proceeds[39].

In the decision of the Federal High Court Abuja in *Nigerian Telecommunications Plc v Pentascope International BV Private Ltd*[40], Adah J refused to grant stay of proceedings on the grounds of illegality. In that case, Nitel alleged that Pentascope was not registered in Nigeria under the provisions of the Companies and Allied Matters Act 1990 (CAMA) and so pursuant to section 54 CAMA the agreement between the parties was illegal. Dr Idornigie in support of this judgment is of the

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36 For such a scenario see *Niger Progress Ltd v North East line Corporation* [1989] 3 NWLR (pt. 107) 86 where the contract never came into existence as the appellant failed to remit the initial monies to the foreign company.

37 Depending on the stage of the proceedings, this may be the law of the seat of arbitration, the law of the place of enforcement; the proper law of the underlying contract; the proper law of the arbitration agreement; or even the law of the parties.

38 *Soleimany v Soleimany* [1999] QB 785 in this case the English courts applied English public policy as the place where enforcement of the award was sought.

39 *Soleimany v Soleimany*, at page 797. This decision was despite the fact the transaction was valid and arbitrable under the proper law of the contract.

40 *Nigerian Telecommunications Plc v Pentascope Int'l BV Private Ltd* (unreported) Suit No: FHC/ABJ/CS/36/2005 discussed in, Paul Obo Idornigie (2005) "Separability Circumscribed by Arbitrability", 71(4) Arbitration 372

view that such matters of illegality should not be left to the arbitrators to determine. This is because (among other reasons given) arbitral tribunals hardly decline jurisdiction[41]. A contrary view is expressed in this article which disagrees with the decision of Adah J in this case. It is argued in this article (supported by the House of Lords decision in *Fiona Trust*) that such matters affect the jurisdiction of the arbitral tribunal and so in accordance with the provisions of the ACA, the learned judge ought to have (on the facts of the case) stayed proceedings and referred the parties to arbitration. The argument on illegality ought to have been taken before the arbitral tribunal in the first instance which will then make that determination. The parties can always agree that the arbitral tribunal should make the award on jurisdiction first and before entry into the merits of the dispute. In *Nitel v Pentascope*, the provisions of CAMA allegedly breached are mandatory and so the arbitral tribunal may have come to the same conclusion as the judge [42]. Arbitral tribunals cannot be deprived of the powers given to then by statute just because it is likely that the tribunal may not decline jurisdiction in appropriate circumstance.

Thus in the contest of Nigerian law where the subject matter of the underlying contract is not arbitrable, then both the main contract and arbitration agreement contained in it will be void for illegality or on the grounds of public policy. However, the objection to jurisdiction on the grounds of illegality should be raised before the arbitral tribunal in the first instance[43].

These issues all act as limitations on the application of the doctrine of separability, thus empowering a party to set up such vitiating factor as a ground for the non recognition and enforcement of the arbitration clause as well as the underlying contract. Some of these vitiating factors when successfully argued will have the effect of nullifying the arbitration clause only but will not affect the right of the parties to resubmit their dispute to arbitration by concluding a submission agreement. An example is where the main contract is in existence and the subject matter of the contract is arbitrable but the arbitration clause was invalidated for mistake or misrepresentation, or declared to be inoperative or incapable of being performed. However where the vitiating factor affects both the arbitration clause and the main contract, for example where one party lacked contractual capacity to conclude both the main contract and the arbitration clause, then the parties cannot conclude a submission agreement to resubmit the particular transaction to arbitration.

In summary, where the subject matter of the underlying contract is capable of settlement by arbitration under Nigerian law and the contract is in existence, the

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41 Paul Obo Idornigie at page 376

42 This assertion is dependent on the applicable law and the seat of arbitration.

43 Dr Idornigie at page 377 only defers on this conclusion. See the decision of the Court of Appeal in *G&C Lines & Others v Hengrace Nig Ltd & Others* [2001] 7 NWLR (pt 711) 51 where the court listed Some matters that are not arbitrable under Nigerian law.

doctrine of separability will apply to enable the arbitrators enter into the reference and determine the merits of the dispute.

3. DOCTRINE OF COMPETENCE-COMPETENCE

The doctrine of competence-competence is the basis on which arbitrators are empowered in the first instance to determine their jurisdiction whether or not to hear the dispute. The source of this power of arbitrators is statutory, codified in various arbitration laws. The primary advantage of these two doctrines applied together is most evident where one party alleges that the underlying contract is invalid and the arbitrators take jurisdiction (separability) and determine the issue of the validity or otherwise of the underlying contract (competence-competence.) In this way the intention of the parties to arbitrate disputes arising from the contract is fulfilled and one of the primary advantages of arbitration, that of decongestion of court lists is achieved. The parties go to the arbitrators to determine the question of jurisdiction and where they are dissatisfied with the decision of the arbitrators can then appeal to the competent national court for a final determination of the question.

As mentioned in section one above the effect of this doctrine is to ensure that the gains of the legal fiction of the doctrine of separability of the arbitration clause are consolidated by giving the arbitral tribunal the power to determine its jurisdiction to hear the dispute submitted to it in the first instance. It is the national court that is empowered to finally determine the jurisdiction of the arbitral tribunal. Again through the application of this principle, the legal effects of the principle of separability is achieved since as mentioned in section two above, the autonomy of the arbitration clause ensures that it (and by extension the arbitral reference) is 'protected' from any invalidity affecting the main or underlying contract. The direct application of this advantage of the doctrine of separability ensures that an arbitral tribunal is constituted in the first instance to determine the issues alleged to invalidate the main or underlying contract.

Section 12(1) ACA provides:

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

Article 21(1) of the Arbitration Rules attached as the first schedule to the ACA provides

> The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of separate arbitration agreement.

On determining jurisdiction, Orojo and Ajomo are of the view in support of competence-competence, that,

> It is the duty of the tribunal to ascertain for itself whether or not it has jurisdiction in the matter... Once it is satisfied that it has jurisdiction, it can proceed with the arbitration, leaving either party to challenge it if so desired. Where it finds that it has no jurisdiction, it should so rule and inform the parties and withdraw[44].

The depth of review a national court should undertake before it declines jurisdiction or stays its proceedings and refer the parties before it to arbitration varies. In one extreme is the position adopted by the French courts where once faced with a dispute covered by an arbitration clause, the court must decline jurisdiction even where there is no arbitral tribunal in existence, except "the arbitration agreement is manifestly null and void."[45] If there is difficulty with constituting the arbitral tribunal, the French courts will assist with the appointment of the arbitrators so they can entertain the application (even if this involves a question affecting the validity of the arbitration agreement or jurisdiction of the arbitral tribunal) in the first instance. The other end of the spectrum is the position of the courts of the United States who will examine the arbitration clause to ensure there is a valid reference to arbitration and over an arbitrable [46] matter before they will stay their jurisdiction and refer the parties to arbitration. This position is taken by the United States courts on the reasoning that an arbitration agreement is construed as a contract and will be so assessed and moreover the courts will finally determine questions of jurisdiction.[47] Most other jurisdictions are somewhere in the middle of this spectrum. National courts in most jurisdictions will generally refer the parties to arbitration or deny jurisdiction where they are satisfied that there is an arbitration agreement. This is the position taken by English courts.[48]

In Nigeria where a court is faced with a claim covered under an arbitration agreement the following sections of the ACA become relevant for its consideration:

Section 2:

> 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 Judge.

Section 4

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[44] J.O. Orojo & M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates 1999) page 169

[45] Article 1458, Book IV, French Code of Civil procedure 1981

[46] Arbitrability is a broader concept in US law and arbitral jurisprudence. It embraces all matters affecting the jurisdiction of the arbitrators.

[47] See: *Prima Paint Corporation v Flood & Conklin Mfg Co*, 87 S Ct 1801; *First Options of Chicago v Manuel Kaplan & MK Investments Inc*, 115 S.Ct 1920, 1943 (1995)

[48] See again the House of Lords decision in *Fiona Trust v Privalov*

(1) A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.

(2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.

Section 5

(1) If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, to the court to stay the proceedings.

(2) A court to which an application is made under subsection (1) of this section may, if it is satisfied-

a. That there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

b. 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,

Make an order staying the proceedings.

The Arbitration Rules attached as the First Schedule to the ACA on its part provides in article 21:

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of this article, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction

4. In general the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

It is clear from these quoted sections of the ACA that for a party to take advantage of the doctrines of separability and competence-competence, such party must not have

taken steps in the proceedings filed before the court.[49] A party will be deemed to have taken steps in the proceedings where he enters into the reference before the court, for example filing a defence to the claim.[50] The Court of Appeal in *Kano State Urban Development Board v Fanz Construction Company Ltd* held that a party must apply for stay of proceedings after entry of appearance but before delivery of pleadings.[51] This is because a party who takes steps in the proceedings before the court can no longer apply for the matter to be referred to arbitration. Such a party will be treated as having waived or repudiated the arbitration agreement. [52] However the application to stay the proceedings itself in favour of arbitration does not amount to taking steps in the proceedings.[53]

The decision of the Supreme Court in *MV Lupex* succinctly encapsulates the treatment by Nigerian courts of the doctrine of separability:

> So long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed to by them.

The Court then adopted the two reasons that favour the grant of a stay as contained in the book, *The Nigerian Arbitration Law* by Ephraim Akpata, JSC:

> Section 4(2) ACA may make the court's refusal to order stay ineffective as the arbitral proceedings may nevertheless be commenced and continued and an award made by the arbitral tribunal maybe binding on the party that has commenced an action in court; and the court should not be seen to encourage the breach of a valid arbitration agreement particularly if it has international flavour... A party to an arbitration agreement will in a sense be reprobating the agreement if he commences proceedings in court in respect of any dispute within the purview of the agreement to submit to arbitration[54]

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[49] See the decision of the Supreme Court in *Niger Progress Ltd v North East Line Corporation* [1989] 3 NWLR (pt 107) 68 at 91-92

[50] See the decision of the Court of Appeal in *Brigadier G.T. Kurubo & Baltic Engineering (Nig) Ltd v Zach-Motison Nigeria Ltd* [1992] 5 NWLR (pt 239) 102

[51] *Kano State Urban Development Board v Fanz Construction Company Ltd* [1986] 5 NWLR (pt 39) 74 and on appeal to the Supreme Court [1990] 4 NWLR (pt. 142) 1

[52] This is a very reasonable presumption since arbitration is a contract mutually concluded by the parties which they can terminate through mutual consent, which can be evidenced by one party commencing proceedings in court and the other party joining in and participating in the proceedings.

[53] See the decision of the Supreme Court in *Fawehinmi Construction Co Ltd v Obafemi Awolowo University* [1998] 6 NWLR (pt 553) 171 at 183

[54] *The Owners of the MV Lupex v Nigerian Overseas Chartering & Shipping Co Ltd* [2003] 15 NWLR (pt 844) 469 at 490-491

CONCLUSION

This article clarifies that the obligation on any national court in a litigation before it that is covered by an arbitration agreement is to either stay its proceedings and refer parties to arbitration or deny jurisdiction.[55] This is so that the parties can comply with the terms of their agreement and the arbitrators themselves can determine the question of their jurisdiction or validity of the arbitration agreement or substantive contract in the first instance. This requirement does not fully oust the jurisdiction of national courts as it is the courts that will finally determine these questions where a party is dissatisfied with the decision of the arbitral tribunal on this point.

Where this procedure is adopted as the policy of the courts in Nigeria then counsel who couches his application in a manner as to manipulate the processes of the court in this regard, will still be caught out and so knowing that this is a policy issue, counsel will be forced to take the proper cause of action in the face of a contract containing an arbitration agreement which his clients now no longer wish to arbitrate but to litigate. Parties must be held to their agreement if they are to be taken seriously and it is the role of the courts in Nigeria can assist with ensuring this is so by enforcing valid arbitration clauses in any contract.

The doctrines of separability and competence-competence are fully provided for under the arbitration law of Nigeria, its purport is fully appreciated by Nigerian judges and they are enforced by the courts of Nigeria in appropriate cases. It therefore behoves the practitioners who in the guise of alleging the invalidity of the underlying contract takes the point before the relevant High or Federal High court, in complete disregard of the arbitration clause contained in the contract, to appreciate that the proper course of proceeding is to argue the alleged invalidity before the arbitral tribunal as envisaged by the parties in concluding the arbitration agreement and the mandatory provisions of the ACA in recognition of the doctrines of separability and competence-competence. Iguh, JSC in *MV Lupex* concludes:

> In my view, the statutory discretion of the court under sections 4 and 5 of the Arbitration and Conciliation Act for the stay of court proceedings in favour of arbitration may not be exercised to refuse a stay with a view to favour the allegation of a party that litigation within jurisdiction is more convenient than arbitration as expressly agreed to by the parties. The law is also settled that the mere fact that a dispute is of a nature eminently suitable for trial in a court is not a sufficient ground for refusing to give effect to what the parties have, by contract, expressly agreed to.[56]

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[55] Article II (3) New York Convention requires the courts of its contracting states in such circumstance to refer the parties to arbitration except it find that the arbitration agreement is null and void, inoperative or incapable of being performed.

[56] *The Owners of the MV Lupex v Nigerian Overseas Chartering & Shipping Co Ltd* at page 491