

## THE PHILOSOPHY OF ARBITRATION

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### ABSTRACT

*Arbitration provides a method of alternative dispute resolution accepted by most public and private entities internationally and locally. Parties in an agreement can choose to resolve any dispute by forming a private tribunal before an arbitrator of their choice. They may also choose to follow or discard any particular rule or law of their own country or choose that of another country or may even choose to follow international laws and rules. These choices are not without short comings due to the lack of uniformity as parties' intentions and choices vary from contract to contract. Judiciary on the other hand takes a passive approach and will be cautious when setting aside an award. The arbitral tribunal remains the sole determiners of questions of fact. Therefore, unless an error of law substantially affects the rights of parties, this particular jurisdiction is not lightly exercised by the courts. In general terms, therefore, the law of arbitration is the contract between the parties. However, the rules of natural justice bind all arbitration. This article will examine the law, if any, applicable to arbitration as most arbitral agreements conform to wishes of the parties. This paper seeks to expound the need for uniformity in arbitration regardless of the wishes of the parties to ensure checks and balances in an arbitral process. It cannot be denied that there exist no precedents binding an arbitral tribunal. Precedent on the other hand, forms the basis of jurisprudence and it cannot also be denied that there is a lack of jurisprudence in the arbitral arena. Jurisprudence has its importance in the development of arbitration. This article assumes that philosophy can shed light on the jurisprudence of arbitration and therefore fills the void and the lacking rules. It will be shown that by looking at arbitration with philosophical glasses can create a jurisprudence and uniformity much needed in arbitration.*

Key words: Arbitration, jurisprudence, philosophy.

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### Introduction

Consider a hypothetical situation wherein C Ltd, a company, contracts with F, a foreign country, to build a highway system according to certain specification within a specified time. C Ltd. however prefers to add a clause to have any dispute to be heard in another third country, T, for obvious reasons. C Ltd and F therefore signs a joint venture agreement with an arbitration clause fixing T as the arbitral tribunal and venue, in the event of a dispute.

This agreement gives T, a tribunal, the function, power and a reason to exist without which there can be no tribunal. In this instance, an arbitrator is frequently given additional powers which would not otherwise be open to him and are not open to a judge to exercise.

One principle is that parties should normally be held to their contractual agreements. Where the parties agree that any dispute or difference between them should be referred to arbitration the court should be willing to say by its decision what the parties have already said by their contract and prefer arbitration. The other principle is that a multiplicity of proceedings between C Ltd and F was highly undesirable.

The criteria for an arbitral system is therefore a contract between parties. The contracting parties in the contract, are entitled to dispute any such instruction and to refer to arbitration. Were it not for a contract such as this, clearly the contractor C Ltd, would have no right to dispute or litigate about any such instruction and, they cannot dispute such an instruction before a court. In this respect, it is right to say that as arbitral tribunal like T, has additional powers to a court.

Thomas Hobbes' theory of the law of nature in particular his sixteenth law of nature is that people who are unable to resolve a dispute between themselves should submit their arguments to the judgment of an arbitrator. The seventeenth law of nature is that in order for arbitration to be fair, the arbitrator of a dispute should not be a participant in the dispute. The eighteenth law of nature is that in order for arbitration to be fair, the arbitrator of a dispute should be able to be fair and impartial, and should not have any reason to favor one participant over another. The nineteenth law of nature is that in order for arbitration to be fair, the arbitrator of a dispute must also be fair and impartial in trying to resolve controversies about facts (Gaskin, J.C.A, 1996).

Following these laws of nature therefore C Ltd and F agrees to submit their arguments to the judgment of an arbitrator, T. In order for arbitration to be fair, C Ltd and F chose a third country T who is not a participant in their potential dispute. In this way T should be able to act in a fair and impartial manner, and should not have any reason to favor either C Ltd or F. Finally for arbitration between C Ltd and F to be fair, T must also be fair and impartial in trying to resolve their controversies.

A philosophical jurist is generally a pragmatist. He is interested in the nature of law but only with reference to its use as a tool to serve society, and his examination into the law is always in connection with some specific problem of the everyday work of the legal order. The sociological jurists on the other hand, propose to study law in action on the basis of the hypothesis that the law in action bears some significant relationship to law in the books, and to proceed then to ascertain in what respects the hypothesis is or is not substantiated and requires qualification (Gardner, J. A., 1961). The philosophical jurist therefore looks at the arbitration clause and the law thereof. Whence the sociological jurists seek the hypothesis and links the clause to arbitral power.

## 2. History

"Cut the living child in two and give half to one and half to the other" (New King James Version, The Bible). These may just be the first decision if not the first recorded words of an arbitrator. Some legal historians have traced arbitration's beginnings all the way back to King Solomon. What led to such a peculiar decision maybe the peculiar facts that came before King Solomon.

The peculiar facts involve two prostitutes who came to King Solomon with each one claiming "The living one is my son; the dead one is yours." According to the king, "This one says, 'My son alive and your son is dead,' while that one says, 'No! Your son is dead and mine is alive.'" Then the king in all his wisdom said, "Bring me a sword." So they brought a sword for the king. He then gave an order to cut the child in two and give half to one and half to the other (New King James Version, The Bible).

Why did the women choose to arbitrate and not litigate this matter? Maybe it made no difference or maybe King Solomon was a wise judge or maybe that was the only way to have the matter resolved at that time. Whatever maybe the reason the women needed an independent, trusted and wise, to say the least, third party to resolve their dispute. So why not before a wise king who may have been a judge and an arbitrator. In this case it made no difference to them. But the fact that they appeared before a judge of their choice, made it an arbitration.

Therefore there is now a myth about arbitration and, the myth persists, usually in the following form: Arbitration? That's when you don't go to court, but pick somebody to decide the case informally, and you go and discuss it with the arbitrator and the arbitrator will usually "split the baby". However it may be suggested that the story of King Solomon's first arbitration does not support the arbitration myth. The obvious reaction of the woman whose son was alive was to plead and say, "Please, my lord, give her the living baby! Don't kill him!" But the first said, "Neither I nor you shall have him. Cut him in two!" Faced with this additional testimony, King Solomon modified his award. It is important to note what King Solomon did not do. He did not split the baby! (Goodman, A. H., 2004). What then is the reality of arbitration?

In coming to his decision, King Solomon may have considered the following possibilities:

- (1) follow the first woman's request and cut the baby to half and neither will have him;
- (2) follow the second woman's request and give the baby to the first woman;
- (3) follow neither of the request and give the baby to the second woman; or
- (4) follow neither of the request and give the baby to some other person.

In the philosophical stance the questions above show that, in arbitration, the players cannot eliminate possible outcomes. The players may say that they prefer some outcomes, but an arbitrator is not bound to follow what they say. In the baby custody dispute example, King Solomon, the arbitrator, can see that the mother is only playing a strategy when she says that the baby is not hers. From the responses of the two women, King Solomon can guess and then identify that the best solution is to give the baby back to its mother. In arbitration therefore, the arbitrator can eliminate some possible outcomes (Revesz, Peter Z., 2014). In deed King Solomon eliminated the rest and chose the third option and it is said that he had wisdom from God to administer justice (New King James Version, The Bible).

This case may be evident, that the world is ruled by such a wisdom or a Divine Providence. The whole community of the universe, on the other hand, is governed by Divine Reason. Wherefore the very idea or concept of the government of things in God the Ruler of the universe, has the nature of a law. It is of the type proper to be made laws or the norms. And since Divine Reason's conception of things is not subject to time but is eternal therefore it must be called eternal (Dawson, J. G. (Ed.), 1948).

For God to administer justice, legal philosophy requires the application of natural law. Therefore it is suggested that natural law forms the jurisprudence of arbitration. Though there be no application of precedents arbitrators are bound by the principles of natural law or rules of natural justice. In the legal philosophical sense these principles are basic and self-evident.

For the same reason no man in any cause ought to be received for arbitrator to whom greater profit, or honor, or pleasure, apparently ariseth out of the victory of one party than of the other; for he hath taken, though an unavoidable bribe, yet a bribe, and no man can be obliged to trust him. And thus also the controversy and the condition of war remain, contrary to the law of nature (Gaskin, J.C.A. (Ed.), 1996).

## 3. General Principles

Generally, the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. This safeguard of public policy is required to closely watch over public interest. Hence the general rule is, any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy. Public policy is a breach of the rules of natural justice which occurred during the arbitral proceedings.

'Public policy' is itself undefined and applies differently to different 'public' or society. What is against public policy in C Ltd's country may not be so in F. A contract which has a tendency to injure public interests or public welfare is obviously one against public policy in both countries. What constitutes an injury to public interests or welfare depends on the times and climes. The legislature often fails to keep pace with the changing needs and values nor as it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society.

Tribunals like that of T, are not held to observe any particular rules of procedure. Their decision shall be final and they shall act as friendly mediators. T as arbitrators are entirely unfettered by any legal considerations and must act only according to what they consider to be general principles of justice – having regard to that, the court should hesitate long, even if it had a discretion, to revoke the arbitration clause.

Further, arbitral tribunals are neither bound by previous tribunals nor are their powers curtailed by any law. This leaves the arbitral tribunal with no proper checks and balances to ensure justice is done. The obvious next question is 'does an arbitrator act arbitrarily when arbitrating?' A related question is 'Are arbitral tribunals bound by precedent'. A prelude to this question would be 'Do arbitrators create precedent?'. These form the centre of discussion in this article and seek to ponder the following :

- i. if there are no precedents, can C Ltd or F know the strength of their respective cases?
- ii. can jurisprudence as a legal philosophy be replaced with the philosophy of arbitration?

### 3.1 What is arbitration?

C Ltd and F, for instance, do not want their disputes to be the subject of over-elaborate procedures, which are time-consuming and expensive and divert resources away from the conduct of the parties' businesses. In general terms the law should not load men with burdens hard to bear, and in the particular circumstances of adjudication it is especially important that the control exercised by the courts should not place such requirements on adjudicators that it becomes difficult for them to resolve disputes rapidly by means of informal procedures, in favor of speedy resolution to enable continuation of a contract.

Whilst it is undesirable to introduce too much technicality, there should be clear rules as to when an arbitration is deemed to have commenced. There must, of course, be an arbitration agreement, that is a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

The dispute or difference must be one which is "real" and *bona fide* and a mere refusal to pay upon a claim for which the liability is admitted may not be a dispute or a difference within the meaning of an arbitration act of any one nation. In any event the word 'dispute' in an arbitration clause should be given its ordinary meaning, and was not confined to cases where it could not then and there be determined whether one party or the other was in the right, so that the fact that a person has no arguable grounds for disputing something does not mean in ordinary language that he is not disputing it.

The proposition must therefore be that if a claim between parties is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration.

Consider again the hypothetical two parties referring a dispute to T to arbitrate. The arbitrator has the authority to settle the dispute, for C Ltd and F had agreed to abide by his decision. Two features stand out. First, the arbitrator's decision is for the disputants a reason for action. C Ltd and F ought to do as T says because he says so. But this reason is related to the other reasons which apply to the case. It is not just another reason to be added to the others, a reason to stand alongside the others when one reckons which way is better supported by reason. The arbitrator's decision is meant to be based on the other reasons, to sum them up and to reflect their outcome (Raz, Joseph, 1986).

### 3.2 Why arbitration?

The philosophy of the reason to act in effect sums up the answer to 'why arbitration?'. Meeting a dead end in a contractual obligation with no possible solution in sight would see the arbitrator's role as a guiding light. However such a light is only beneficial if both parties, C Ltd and F, abide by the direction given. The light itself has no direction of its own and is considered fair to both parties. Therefore the arbitrator as adjudicator is seen as impartial with no possible gain from the outcome of either direction taken.

The adjudicator, T, is appointed by C Ltd and F to decide one or more disputes arising under their contract. His decision is binding on C Ltd and F by virtue of their agreement to that effect. Those are the essential features that characterise an arbiter. Generally speaking, therefore, the decisions of the adjudicator provide in practice the last word on the parties' rights and obligations. This clearly reflects the success of adjudicators in providing fair and rational solutions to a dispute.

On the other hand since there is a general arbitration clause, any dispute or difference between C Ltd and F is to go to T for arbitration. However if the dispute comes before a court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The parties cannot insist on the whole going to arbitration by simply saying that there is a difference or a dispute about it. If the court sees that there is a sum which is indisputably due, then the court can give judgment for that sum and let the rest go to arbitration. In other words the court takes a pragmatic approach.

Having regard to the essentially private nature of arbitration, C Ltd and F are, as a matter of law and a necessary incident of the arbitration contract, subject to an implied obligation of confidence not to make use of material generated in the course of the arbitration outside its four walls, even when required for use in other proceedings. That rule is subject to exceptions, for example where it was reasonably necessary for the protection of the legitimate interests of both C Ltd and F, ie for the establishment or protection of the party's legal rights.

### 3.3 How to arbitrate?

The rule that no man shall judge his own cause or *nemo iudex in sua causa* for instance has grounded natural justice and natural rules principles based on natural law. However, T, the arbitral tribunal appointed by C Ltd and F, may rule on its own jurisdiction. This would seem an exception to the general rule of natural justice and principles of *nemo iudex in sua causa* as the tribunal itself judges on its own jurisdiction.

The philosophy of this general rule is based on the sociological understanding that every man is presumed to do all things in order to his own benefit. Therefore neither C Ltd nor F is a fit arbitrator in his own cause, and if he were never so fit, yet, equity allowing to each party equal benefit, if one be admitted to be judge, the other is to be admitted also; and so the controversy, that is, the cause of war, remains against the law of nature (Gaskin, J.C.A. (Ed.), 1996).

The *audi alteram partem* rule, which is another component of the principles of natural justice and of procedural fairness, requires that a person who is a party to proceedings before a tribunal be informed of the proceedings and provided with an opportunity to be heard by the tribunal. Natural justice requires the respondents to have an opportunity to be heard before the court of arbitration whose award could affect their rights. In the circumstances the infringement of the *audi alteram partem* rule constituted an excess of jurisdiction giving rise to evocation.

Following these two laws of nature, arbitration as a private tribunal, T, is appointed by two parties, C Ltd and F, according to their needs and requirements. Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by that tribunal. The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration. The only restriction is that the dispute shall not be contrary to public policy. The courts on the other hand shall not intervene in any of the matters governed by the arbitration act.

In any event, T, as an arbitrator has no jurisdiction over disputes which were not in existence when he was appointed to act. The appointment defines his jurisdiction at the same time as creating it and cannot be taken to give him jurisdiction over something which does not at that time exist (Sutton, St. John & Gill, J, 1997). In other words T is bound by the agreement of C Ltd and F. Problems arise when a dispute is not within that envisaged by that agreement.

However, T may consider the generally accepted practice in industry in both countries of C Ltd and F and the whole agreement between them in reaching his decision. This phenomena of dispute within an industry or within a society has a co-relation with the socio economy and sociology of both these countries. An attempt is therefore to understand the philosophy of this sociology in a hope to expedite what is good in arbitration.

## 4. Judiciary And Arbitration

In this instance C Ltd and F chose arbitration as it is founded on the following principles-

- (a) the object of arbitration is to obtain the fair resolution of disputes by T, an impartial tribunal without unnecessary delay or expense;
- (b) C Ltd and F will be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and
- (c) the court should not intervene except as provided by legislation.

The court however would not be deprived, by the power which the parties had given to their arbitrator to open up, review and revise certificates, opinions and decisions of the architect, of its ordinary power to determine the rights and obligations of the parties and to provide them with the usual remedies.

It follows therefore, the fact that arbitration proceedings are pending between C Ltd and F is clearly not in itself any ground for preventing the courts from becoming seized of the same dispute in an action. On the other hand the current practice was for claims which are covered by an arbitration clause, but which are said to be indisputable, are frequently put forward in an arbitration, and then also pursued concurrently by an attempt to obtain summary judgment in the courts. The claimant however can, obtain an order for payment in such cases by either means. The co-existence of both avenues towards a speedy payment of an amount which is indisputably due being well recognised.

Courts are also not bound by the language used and what is described as an expert determination is in reality an arbitration. Further, arbitration as a means of resolving disputes must also be distinguished from other processes such as valuation or certification. Therefore a process involving a reference to a person described as an “arbitrator” may not be an arbitration but a reference to a valuer to make a determination in accordance with that person’s skill and knowledge.

An arbitration clause in an agreement between C Ltd and F may give T, the arbitrator, the power to ‘open up review and revise any certificate’ of an architect in their highway project. This special power was confined to T, the arbitrator, on whom it had been conferred by the arbitration clause. It could not be exercised by the courts. The arbitration clause, which gave power to an arbitrator to open up, review and revise a certificate, showed beyond doubt that the certificates in such cases were not conclusive and, the certificates not being conclusive, the court was not obliged to treat them as if they were.

#### 4.1 Judicial powers

In principle, in an action based on contract the court can only enforce the agreement between the parties. It has no power to modify that agreement in any way. It is, therefore, not necessary to imply any term.

An arbitral award however may be set aside by the High Court only if the party making the application provides proof that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.

Inasmuch as the courts must embrace the principles of finality of awards, party autonomy and minimal court intervention in the context of the UNCITRAL Model Law legal regime, the courts cannot allow an award to stand in the face of a clear excess of jurisdiction and a breach of the equally important principle that arbitration proceeding is consensual and the mandate of the chosen arbitrator has to be limited to the terms of the submissions and the agreed issues. The arbitrator should also not be seen as introducing a ‘new difference’ which was irrelevant to the issues as submitted and agreed between the parties.

If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, *prima facie* the court would enforce the resulting award. If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, on the basis of facts not placed before the arbitrators, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular.

#### 4.2 Precedents in arbitration

The lack of precedent or the non existence thereof can be a problem specially when C Ltd or F is looking for a guide before beginning a dispute or as an authority to support their claim. The claim that arbitrators do not create precedent recurs throughout the arbitration literature. Yet this claim conflicts with a small but growing body of evidence that, in some arbitration systems, arbitrators frequently cite other arbitrators, claim to rely on past awards, and promote adjudicatory consistency as an important system goal. Thus, although not every system of arbitration generates precedent, some clearly do (Weidemaier, C, 2010).

Uses of precedent as authority should be distinguished from its use as an informative analogy. In the case of the latter ‘precedent’ refers to the use of prior awards and their reasoning as persuasive for the matter at issue, not to a doctrine of strictly-binding case law such as implied by the common law doctrine of *stare decisis* (Posner, Richard A, 2000).

Jurisprudential conflict is also one of the driving forces behind the development of a system of precedent because it enables tribunals to engage in a critical discourse about the proper interpretation of investor rights in view of different perspectives. The normative impact on tribunal decision-making, precedent has following uses (Schill, Stephan W, 2011):

- (1) precedent as a source of cautions analogizing with earlier decisions;
- (2) precedent as a means of clarifying treaty provisions;
- (3) precedent as an abbreviation of reasoning;
- (4) precedent as a standard-setting device; and
- (5) precedent as an instrument of system-wide law-making.

Philosophically however, this problem of precedent seems to exist only when one compares a tribunal with a court. Both dwells with its own short comings and both need the other for proper the administration. Therefore the lack of precedent does not mean there is problem for a tribunal rather it may be the solution sought by the system. Some associate arbitration with confidentiality and secrecy and assert a conflict between these characteristics and the production of law. Thus, whatever else arbitration may be, it is not ‘law’—the kind of findable, studiable, arguable, appealable, restateable kind of law that courts produce (Weidemaier, C, 2010).

That being so the question hinges on how would the parties like C Ltd and F expect to know the chances or speculate the outcome before an arbitration process begins. The objectives of speculative philosophy among others is to take over the results of the various sciences, to add to them the results of the religious and ethical experiences of mankind, and then to reflect upon the whole. The hope is that, by this means, we may be able to reach some general conclusions as to the nature of the universe, and as to our position and prospects in it (Broad, C. D, 1923).

The first speculative principles bestowed on us by nature do not belong to a special power, but to a special habit, which is called the understanding or rational intuition of principles. These first practical principles, bestowed on us by nature belong to a special natural habit. This is said to be the law of our mind or the norm of our rational intuition, because it is a habit containing the precepts of the natural law, which are the first principles of human actions or attitude (Dawson, J. G. (Ed.), 1948).

## 5. Illegal And Void Contract

There are two general principles in relation to illegal contracts: The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it.

Where there is prima facie evidence from one side that an arbitration award is based on an illegal contract, the enforcement judge should inquire further to some extent. Thus he should inquire whether there is evidence on the other side to the contrary; whether the arbitrator has expressly found that the underlying contract is not illegal; whether there is a fair inference that he reached such a conclusion; whether there is anything to suggest that the arbitrator was incompetent to conduct such an inquiry; and whether there may have been collusion or bad faith, so as to procure an award despite illegality.

The effect of illegality on a contract may be threefold. The first, if at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is enforceable at the suit of the party having that intent. The second effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely on his own illegal act. He may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract *ab initio*, and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.

The court declines to enforce an illegal contract, not for the sake of the defendant, nor for the sake of the plaintiff. The court is 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.

There are material distinctions between awards and foreign judgments. First, an award can only be valid if the arbitrator had jurisdiction founded on a contract between the parties. If that contract is itself invalid the award will be unenforceable.

However the contract between C Ltd and F maybe void for several reasons. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract and to ask, whether the rule strikes down the arbitration clause as well. There may be cases in which the policy of the rule is such that it would be liable to be defeated by allowing the issue to be determined by a tribunal chosen by the parties. This may be especially true of contracts *d'adhesion* in which the arbitrator is in practice the choice of the dominant party.

Where it is alleged that an underlying contract is illegal and void and that an arbitration award in respect of it is thereby unenforceable the primary question is whether the determination of the particular illegality alleged fell within the jurisdiction of the arbitrators.

Thus, saying that arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be, the same is true of allegations of fraud. In deciding whether or not the rule of illegality also strikes down the arbitration clause, it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. The purpose and policy of a rule or rules of illegality and the commercial reasons for an arbitral clause depends on the sociological difference that exist within a society.

## 6. Public Policy

When an arbitration agreement has been construed and no breach of the agreed procedure found there may nevertheless arise a second and quite separate question: that is, whether, as a matter of public policy, a particular award, made pursuant to that agreed procedure, ought not to be enforced and ought, therefore, to be set aside; for T's award, unless set aside, entitles either C Ltd or F, whichever the beneficiary maybe, to call on the executive power of F, the state, to enforce it, and it is the function of the court to see that that executive power is not abused.

Public policy is the only rule that can overrule the intentions of the parties. Therefore the only rule that binds C Ltd and F is that which is based on public policy. What is for or against public policy would have to be first considered. Slavery for instance is

against public policy though prostitution may be against public policy in C Ltd and F's country but not in T's country. In this sense, the possession of all things in common and universal freedom are said to be of the natural law, because, to wit, the distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life (Dawson, J. G. (Ed.), 1948).

It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from place to place, from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the arbitration act, contract act and Constitutional provisions of any one region. The logical solution for this is a set of common rules based on the sociology of a society since people are regarded as equals.

When, at the stage of enforcement of an award, it is necessary for the court to determine whether the arbitrators had jurisdiction in respect of disputes relating to the underlying contract, the court must consider the nature of the disputes in question. If the issue before the arbitrators was whether money was due under a contract which was indisputably illegal at common law, an award in favor of the claimant would not be enforced. This is because it would be contrary to public policy that the arbitrator should be entitled to ignore palpable and indisputable illegality. If, however, there was an issue before the arbitrator whether the underlying contract was illegal and void, the court would first have to consider whether, having regard to the nature of the illegality alleged, it was consistent with the public policy which would, if illegality were established, impeach the validity of the underlying contract, that the determination of the issue of illegality should be left to arbitration. If it was not consistent, the arbitrators would be held to have no jurisdiction to determine that issue.

The English courts, for instance, would not enforce an arbitration award, whether foreign or domestic, if enforcement would be contrary to English public policy. Such policy would not allow the parties to conceal, through the procurement of an arbitration, that one of them sought to enforce an illegal contract, since a private agreement could not override the court's concern to preserve the integrity of its process. Thus, where considerations of public policy were involved, the interposition of an arbitration award did not isolate the successful party's claim from the illegality which gave rise to it. Although the arbitration clause was valid, however the award referred on its face maybe an enterprise with an illegal object which the English court viewed as contrary to public policy.

There may also be a distinction between a specific reference on a question of law, and a question of law arising for determination by the arbitrator in the decision of the dispute. It is essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. The authorities make a clear distinction between these two cases, and, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.

An error in law on the face of the award means one can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which can then be said is erroneous. It does not mean that if in a narrative a 'reference is made to a contention of one party, that opens the door to setting first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound.

## 7. Jurisprudence As Legal Philosophy

In general, arbitration does no more than provide an alternative method of resolving disputes and it is hoped that it is simpler, quicker and cheaper than resorting to a court of law. The tribunal is expected to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

The philosophy of arbitration follows that benefits should be centered rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to motion. For an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity (Dawson, J. G. (Ed.), 1948).

An offshoot to the philosophy of arbitration, the philosophy of contract, links the relationship between philosophical and economic theories of law. Efficiency is foremost in economic contract theories and seeks to promote individual autonomy and advances social welfare (Kraus, Jody S, 2004). Natural law theory relies on the implausible descriptive sociological claim that human beings are equally devoted to and united in their conception of aims that is the pursuit of knowledge and justice to their fellow men other than that of survival (Hart, H.L.A, 1958).

Arbitration clause in a contract is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde* (in all circumstance); but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.

In English law the principle of separability of an arbitration clause contained in a written contract could give jurisdiction to an arbitrator under that clause to determine a dispute over the initial validity or invalidity of the written contract provided that the arbitration clause itself was not directly impeached. Furthermore, an issue as to the initial illegality of the contract was also capable of being referred to arbitration, provided that any initial illegality did not directly impeach the arbitration clause. In every case the logical question was not whether the issue of illegality went to the validity of the contract but whether it went to the validity of the arbitration clause.

There is however no general rule that, where an underlying contract is illegal at common law or by reason of an English statute, an arbitration agreement, which is ancillary to that contract is incapable of conferring jurisdiction on an arbitrator. The arbitrator can determine disputes arising within the scope of the agreement including disputes as to whether illegality renders the contract unenforceable. Whether such an agreement to arbitrate is capable of conferring such jurisdiction depends upon whether the nature of the illegality is such that, in the case of statutory illegality the statute has the effect of impeaching that agreement as well as the underlying contract. In the case of illegality at common law, public policy requires that disputes about the underlying contract should not be referred to arbitration.

The intention of C Ltd or F to create a private tribunal to substitute a government set tribunal in F, is based on the philosophy that certain rules bind certain parties by an agreement to be bound. Parties to this agreement seek a resolution without being subjected to laws or procedures normally applicable to parties unwilling to face the tribunal of resolution. These parties seek government bodies as a logical choice, where the unwilling party is forced to face off in court. Since C Ltd or F are willing parties, the first step to resolution is to form a dispute resolution tribunal headed by a neutral person or persons like T.

Any dispute can be submitted to third-party arbitration; but under a governmental system, in disputes between a citizen and the state, the state – which as a monopoly of course recognises no judicial authority but its own – necessarily acts as a judge in its own case (Roderick T. Long & Tibor R, 2008). Therefore for obvious reasons C Ltd prefers T to F as an arbitral tribunal. Since natural reason dictates matters which are according to the right of nations, as implying a proximate equality, it follows that they need no special institution, for they are instituted by natural reason itself (Dawson, J. G. (Ed.), 1948).

Following the theory of Market Anarchist (market anarchy), the choice of T as the venue and tribunal of arbitration designates the process by which two agencies C Ltd and F pre-negotiate a set of common rules in anticipation of cases where a customer from each agency of C Ltd and F is involved in a dispute. Courts in comparison are government set tribunals and subject to certain rules and regulations. A market anarchist' objection to government is simply a logical extension of the standard libertarian objection to coercive monopolies in general. First, from a moral point of view, among people regarded as equals it cannot be legitimate for some to claim a certain line of work as their own privileged preserve from which others are to be forcibly excluded; we no longer believe in the divine right of kings, and on no other basis could such inequality of rights be justified. Second, from an economic point of view, because monopolies are insulated from market competition and hold their customers by force, they lack both the information and the incentive to provide consumers with fair, efficient, and inexpensive service. The anarchist accepts these arguments, and merely asks why they should apply with any less force to the provision of legal services (Roderick T. Long & Tibor R, 2008).

## 8. Conclusion

In the epistemological stance the criterion for arbitration to exist are:

- (a) there is a dispute or a difference formulated between the parties;
- (b) the dispute or difference has been remitted to an arbitrator;
- (c) the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and
- (d) the parties have agreed to accept his decision.

When two parties agree to submit their differences to the adjudication of a third, and when that third party consents to give his services for the determination of those differences, the result is to set up a conventional tribunal which stands in a very peculiar, and in some respects a very difficult, position.

The famous Judgment of Solomon is often referred to as one of the earliest uses of arbitration. This arbitration clearly identifies the hallmarks of arbitration: flexibility, fairness and an expeditious outcome, with the experience and wisdom of the king as arbitrator, utilized to apply principles of equity and law, to resolve the case (Turner, William C, 2011).

On the one hand, an arbiter carries on his shoulders all the obligations of justice which rest upon a regularly constituted Court of law. On the other hand, he is dispensed - in his own discretion - from the observance of those well-trying forms of procedure which, in the case of an ordinary Court, provide the instruments by which the judicial function is performed and the means whereby the circumstances of a dispute are adequately and fairly ascertained, and which also afford to the parties invaluable safeguards and guarantees for the full and fair presentation of their contentions. When an arbitration is informally conducted, the arbiter is deprived of these aids to a just and even-handed inquiry into the disputes submitted to him; yet he is all the time under the strictest obligation to see that the proceedings, however informal, are so conducted that the substantial conditions of "fair justice between man and man" are never infringed.

The natural participation of Divine Wisdom is that there is in us the knowledge of certain general principles and part of it is speculative reason. This is not proper knowledge of each single truth, such as that contained in the Divine Wisdom. Likewise in

relation to the practical reason, man has a natural participation of the eternal law and certain general principles, but not as regards the particular determinations of individual cases, which are, however, contained in the eternal law or eternal norm (Dawson, J. G. (Ed.), 1948).

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