

# CUSTOMARY ARBITRATION, INTERNATIONAL ARBITRATION AND THE NEED FOR A LEX ARBITRI

## INTRODUCTION

**A**rbitration refers to the settlement of a dispute between two or more persons after hearing the parties in a quasi-judicial manner by persons other than a competent court. An exercise is not arbitration if it does not answer this definition.<sup>1</sup>

In the words of Professor Schmitthoff:

*“It is a truism to state that Arbitration is better than Litigation, conciliation better than arbitration and prevention of legal disputes better than conciliation”*<sup>2</sup>

This expression sums up the spirit behind arbitration, whether under customary law, statutory law (e.g. Arbitration and Conciliation Act)<sup>3</sup> or in International Law.

Generally, arbitration has a number of advantages. What appears to be the greatest advantage, however is that dispute resolution is amicably carried out without any court forcing a decision on the parties. The corollary to this is that parties to the dispute usually part as friends with one not having the feeling of a victor while the other does not feel vanquished. This is a major characteristic of customary arbitration, arbitration under the Arbitration and Conciliation Act, as well as international arbitration.

## CUSTOMARY ARBITRATION

Customary arbitration is not a new phenomenon in Africa as a whole. It is usually a means of resolving conflicts with a view to maintaining, harmony between parties in a dispute. In Nigeria, for example there is the head of family who in all intents and purposes heads a nuclear family consisting of a man, his wife or wives and children. Oftentimes, there are members of the extended family living in the same habitation.

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<sup>1</sup> Ezejiofor, Gaius, The Law of Arbitration in Nigeria, 1997, Page 3

<sup>2</sup> Prof. Schmitthoff, The Export Trade, 7<sup>th</sup> Edition Page 411

<sup>3</sup> Cap A18, Law of the Federation of Nigeria, 2004

From the head of family, in a graduated form, there is the clan head. This is the head of a group of persons related by pedigree through an ancient but traceable ancestor.

After this comes the village headship which in most cases is hereditary. In this case, by extension, the inhabitants of the village share a common ancestor. There is also the traditional ruler of the town who is assisted by eminent chiefs.

All the institutions stated above<sup>4</sup> play various roles in dispute resolution in what is usually referred to as customary arbitration<sup>5</sup>. It is the working of this phenomenon that we intend to examine, among others, in this paper.

## **OBJECTIVES AND DYNAMICS OF CUSTOMARY ARBITRATION**

### **OBJECTIVES**

One of the main objectives of customary arbitration is that peace and harmony should be restored between contending parties through compromise and reparation for the wrong committed. Notwithstanding this, there is an inherent belief in and commitment to good relationship even after the award of the arbitration has been made. In practice, this traditional concept looks beyond legal rights of the parties to see what type of relationship is likely to prevail between the parties after the award.<sup>6</sup>

Another objective of customary arbitration is the maintenance of peace between geographical entities. This situation may arise where there is a land dispute between villages. In this instance, the traditional ruler of the larger geographical entity together with his chiefs sits as a Panel of Arbiters.

It must be stated at this juncture that parties still take recourse to orthodox courts after customary arbitration award. Such award is not a judgment of the court of law and consequently, it is devoid of the force of law until it is so pronounced by a court of competent jurisdiction.

By all means, customary arbitration, notwithstanding its lack of force, has its own great advantages. For instance, it is quicker than orthodox litigation and equally less expensive. In point of fact, the whole process up to award can be completed in a day. Also, it takes cognizance of the convenience of the parties and their witnesses in fixing

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<sup>4</sup> i.e the Family, the clan Head, the village Head and the traditional ruler

<sup>5</sup> Defined in *Okereke & Anor V. Nwankwo & Anor* (2003) FWLR Pt. 158 at 1258 as an arbitration in dispute founded on voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of the community and the agreement to be bound by such decision or freedom to resile where unfavourably.

<sup>6</sup> John Wud Makec; *The Customary Law of the Dinka People of Sudan*. 1988, Page 221

the date, time and venue of hearing. In this respect, it is noteworthy that in the Eastern and Western parts of Nigeria, meetings for such purpose are held the day before market day. The rationale for this is that, at such periods, people come from the outskirts of the town to market their wares. It is almost certain that, parties, their witnesses and others will be present on such occasions.

Yet another advantage is that the village sages are used as a panel as against one judge who may either sit in open court or in chambers. The village sages put their heads together to arrive at decisions (awards) that are generally favourable between the parties.

## **DYNAMICS**

Customary arbitration is popular among people in the villages and in the later part of this section it shall be shown that it is recognized by the courts. The procedure used in this form of arbitration is that agreement to conduct proceedings is oral and decisions are not normally recorded in writing. In other words it is not regulated by a statutory law, which only deals with written agreements.

Parties must choose their own arbitrators in disputes between them. Once they make such choices they are bound by the decision of the arbitrators and such decision will be enforced by the court. Indeed, in the Ghanaian case of *Assampong v. Kweku Amuaku & Others*,<sup>7</sup> Deans, J. at the West African Court of Appeal had the following to say;

“... where matters in dispute between parties are by mutual consent, investigated by arbitrators at a meeting held in accordance with natural law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce such decision”.<sup>8</sup>

The above dictum, despite the age is still valid. In *Dike v. Nwankwo*<sup>9</sup>, the Supreme Court of Nigeria came to the conclusion that once parties chose their own arbitrators to be judges in disputes between them, they cannot, when the award is good on its face, object

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<sup>7</sup> (1932)1 WACA 192

<sup>8</sup> at page 201

<sup>9</sup> (1932) 1 WACA 192 at page 201

to the arbitrators decision. This decision was followed in the case of *Ohanaka v. Achugwo*<sup>10</sup> where after a review of earlier cases on customary arbitration, the same court decided that the bindingness of customary arbitration is based on the consent of the parties or their agreement to be bound by the decision of the tribunal. That court noted further that the agreement or consent to be bound by the decision is a precondition and indeed a *sine qua non* for the bindingness of the decision.

The issue of bindingness raises estoppel. Once parties submit their matter in controversy to an arbitrator, in accordance with the customary law of the area, they are estopped from resiling from the award.<sup>11</sup> In fact in *Dike v. Nwonkwo*,<sup>12</sup> the Supreme Court noted that such arbitration remained valid and binding. Consequently, it will be repugnant to good sense to allow the loosing party to reject the decision of the arbitrator to whose jurisdiction he had submitted himself.

All these cases took their root from the case of *Oline v. Obodo*<sup>13</sup>. The facts in this case were that the plaintiffs and defendants jointly executed a lease in favour of a government corporation. Later, a dispute arose between them over the sharing of the rents accruing from the grants. The District Officer in the area wrote to the parties suggesting a certain Mr. Lawrence as an arbitrator.

The said Mr. Lawrence met the parties at the *locus* whereupon they both orally agreed to be bound by the arbiter's award. The parties and the arbiter went to the *locus in quo*, gave evidence and immediately the award was given. This award was reduced into writing. The defendants were not willing to abide by the terms of the award and it was on that score that the plaintiffs instituted an action against them.

The issue, treated by the then Federal Supreme Court of Nigeria, was as to the extent to which the parties could be bound by the arbitration award. The court in its wisdom decided *inter alia* as follows;

- a) There was evidence that the parties voluntarily agreed to submit their dispute to an arbitrator.
- b) Any award made by the arbitrator would bind parties
- c) Neither of the parties could contend that they were not bound.

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<sup>10</sup> (1997) 3 NWLR (Pt. 495) 574

<sup>11</sup> (1998) 9 NWLR (Pt. 564)37

<sup>12</sup> See *Anyobunsi v Uguwunze* (1995) 6 NWLR Part 401

<sup>13</sup> (1958) FSC 84

The purport of this decision rested on estoppel where the parties had submitted themselves to adjudication, the court in reviewing the award and the arbitration proceedings, will not allow any such party to renege. The rationale for this appears to be that once there is a voluntary submission to the jurisdiction of the arbiter, a party cannot thereafter repudiate such a decision.

The rule on voluntaries is not sacrosanct. As a fact, in some decided cases, it had been held that when arbitral awards are contingent upon certain factors any decision of the arbitrators was not final and to that extent, could not be enforced by the court. For example, in *Ofoma & Other v. Anoka & Others*,<sup>14</sup> there was a dispute between the parties over a piece of land. It was agreed that the elders should settle the dispute by arbitration. The elders after taking evidence found that the land belonged to the plaintiffs. Further to this, they decided that if the defendants were not satisfied, they should provide an oath to be sworn by the plaintiffs. The parties never met for the purposed of swearing. Upon these facts, the defunct East Central State of Nigeria High Court decided that the award was not final since it was upon the happening of an uncertain event, in this case, oath-taking. The court suggested a way out of the quagmire. It proposed that the arbiters should have adjourned the award until the oath was sworn and they should have personally supervised the oath-taking ceremony.

Another matter which impeached the myth about voluntariness was the Ghanaian case of *Kwasi v. Larbe*.<sup>15</sup> In this matter, the plaintiff instituted an action against the defendants for title to land and injunction thereon.

On the intervention of community elders, parties submitted to customary arbitration. At that point, the Court adjourned to allow for arbitration. After hearing the parties, the elders sent court messengers to visit the *locus in quo* in company with the parties. The plaintiffs went and showed their boundaries to the parties. The defendants refused to show their boundaries. After this exercise, a meeting with the arbiters was fixed. The defendants not only refused to attend but also informed the arbitrators that they had withdrawn from the arbitration. The arbiters nonetheless made an award, expectedly in favour of the plaintiff. The matter then went back to the Native Court for the enforcement of the award. This court made the award its judgement.

The matter went as far as the Privy Council where the nature of the proceedings before the elders and the right of the defendants to resile were considered. The council came to

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<sup>14</sup> Supra

<sup>15</sup> (1952) 13 WACA 76

the conclusion that the proceedings before the elders was an arbitration which went with the consent of the parties *ab initio*. It also decided that neither of the parties could resile from the award either before it was made or thereafter.

It would appear on the face of it that if the right to resile was part of the negotiation before the commencement of arbitration, then parties have the right to withdraw midstream through the arbitration. Consequently where such right exists, parties could resile. This issue was confirmed in *Ohiaeri v. Akabueze*<sup>16</sup> where the Supreme Court of Nigeria held inter alia that the constituents of a valid customary arbitration were express or implied intention to be bound by the arbitral award and non-withdrawal of the parties midstream.

The Supreme Court noted that in an arbitration matter, which is vested with judicial authorities the decision given in such arbitration is conclusive and unimpeachable once it is proved that it was in accordance with customary law and general usages.

### **Distillation of Judicial Authorities on Enforcement of Customary Arbitration**

The foregoing are the dynamics of customary arbitration. It would appear that judicial authorities have outlined certain conditions that must exist before a court will enforce a customary arbitration award.

- i. These conditions are as follows;
- ii. Parties must voluntarily submit to the judicial authority of the arbiters.<sup>17</sup>
- iii. Parties must either expressly or impliedly agree to be bound by the award of whenever any court is called upon to review customary arbitration award. This will remove the uncertainty as to laid down conditions for the judicial enforcement of such award<sup>18</sup>
- iv. The arbitration must be in accordance with the custom of the parties, their trade or business.<sup>19</sup>
- v. Parties could resile whenever the right to resile was part of the negotiation.

Once a court of law is satisfied that the above conditions are met by parties, it should further review the conduct of the arbiters themselves. In order words, where there is misconduct on the part of any of the arbiters, the Court should immediately set the award aside. Incidentally, not even the Arbitration and Conciliation Act of Nigeria defines

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<sup>16</sup> (1974) ECSR 251

<sup>17</sup> (1992) 2 NWLR (Pt. 221)1

<sup>18</sup> See *Egesimba v. Unuzuruke* (2002) 9-10 SC 1

<sup>19</sup> *Agu v. Ikewibe* (1991)3 NWLR (Pt. 180) 385 where the dictum of Ikpeazu J. in *Njoku v. Ekeocha* (1972)2 ECSR, the agreement between parties was cited with approval

misconduct. Being a term capable of wide import it is possible to suggest what may amount to misconduct as follows;

- a) Where arbiters have been influenced by pecuniary or other interests in giving their award.
- b) Where rules of natural justice, equity and good conscience have been breached. In this respect, parties must be given fair hearing and evidence must have been led to that effect. Also, witnesses must have been recorded exhaustively and in the open square
- c) Arbiters must not veer out of their terms of reference notwithstanding that the peculiarity of this type of arbitration is being conducted by persons who are not formally literate.
- d) The award must be shown to be without malice and not directed at third parties who were not parties to the dispute.

In view of contemporary level of civilization, customary arbitration proceedings should be formally recorded. It could even be in the local dialect or the language of the tribe. In any event, it should be recorded. It is the record of proceedings tendered in evidence that would be reviewed by the court and not fresh evidence.

Customary arbitration has a lot in common with international arbitration. The next section of this paper is intended to examine the nature of international arbitration.

### **International Arbitration**

International arbitration is one of the leading methods for resolving disputes arising from various international agreements and relationships. According to the *Oasis*<sup>20</sup>, arbitration is a process to resolve disputes for securities and future markets. *The History Channel*<sup>21</sup>, defines it 'as a submission of a dispute to a third, unbiased party for settlement. It may be personal litigation (legal action), a trade-union dispute, or an international dispute.'

From the above definitions, one would observe that arbitration is a *process* which is used *to resolve disputes* between *dissenting parties* and such disputes vary from one matter to the other and it could also be of a local or *international* nature.

Over the past five decades, international arbitration has been applied by businessmen, professionals, states, among others, in settling disputes. Some of the reasons that have been attributed to this are;

- a) Flexibility of the process

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<sup>20</sup> < <http://www.oasismanagement.com/glossary> >

<sup>21</sup> < <http://www.thehistorychannel.co.uk/site> >

- b) Neutrality of the arbitrators
- c) Arbitrators' expertise
- d) Inadequacy of local laws
- e) Confidentiality

### **Characteristics of International Arbitration**

**Fouchard** described arbitration as an “*apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualifications is that of being chosen by the parties.*” Under the French law, arbitration is traditionally defined as:

*a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons - the arbitrator or arbitrators - who derive their powers from a private agreement not from the authorities of a state, and who are to proceed and decide the case on the basis of such agreement.*<sup>22</sup>

Article 2 of the Geneva Protocol of 1923 provides that “**arbitral procedure, including the constitution of the tribunal shall be governed by the will of the parties and by the law of the Country in whose territory the arbitration takes place.**” (emphasis added)

Article 1 (3) of the Model Law defines arbitration as international if:

- (a) the parties to an arbitration agreement have, at the time of conclusion of that agreement, their place of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
  - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
  - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

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<sup>22</sup> Redfern and Hunter (trs), *Fouchard: Traité de L' Arbitrage Commercial International* (1964) 1, 30 - 31



(c) the parties have expressly agreed that the subject matter of the agreement relates to more than one country.

**Kerr, L.J.**, criticised this definition, saying it is confusing, unworkable and unnecessary, and will merely give rise to litigation at the outset.<sup>23</sup> **Al-Baharna** criticised the comment given by Kerr, L.J. on the definition given by the Model Law saying it seemed unfair to it. His Lordship was of the view that the Model Law was trying to offer an alternative route to States in their efforts to define “international arbitration”.

From the above definitions, it is evident that for an arbitration proceedings to be valid:

- parties must have agreed to submit their dispute to an arbitral tribunal and failure to establish a valid agreement may result in an invalid arbitration.<sup>24</sup>
- parties must have an arbitrator or arbitrators chosen by them or by any other means available where they have failed to do so.<sup>25</sup>
- parties may have chosen a seat or place where their arbitration is to take place or may be chosen for them by the institution that governs the rules of arbitration where parties fail to.<sup>26</sup>
- there is a laid down procedure for the enforcement of the award.<sup>27</sup>

**Sir William Searle Holdsworth**<sup>28</sup> was quoted as saying:

*“The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after the courts have been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle it with less formality and expense than is involved in a recourse to the courts.”*

Every day in the business world, contracts are signed by businessmen, corporations and even between states or private citizens and state. There is the tendency of disputes arising from such a contract and the parties would want to resolve this amicably and carry on with the earlier business relationship. In the case of early merchants where

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<sup>23</sup> Kerr, ‘Arbitration and the Courts: The UNCITRAL Model Law’ (1985) ICLQ Vol. 34 1-24 at p17

<sup>24</sup> New York Convention Article V (1)(a); Model law Art. 36(6)(a)(i)

<sup>25</sup> Model Law Article 11(2); International Chamber of Commerce (Rules of Arbitration) (“ICC”) Article 8

<sup>26</sup> Article 14(1) of the ICC which provides that the place of the arbitration shall be fixed by the Court unless agreed upon by the parties; Article 16 of the UNCITRAL Rules

<sup>27</sup> New York Convention Article V; Article 17 H of the Model Law

<sup>28</sup> A.L. Goodhart and H.G. Goodhart (eds), *Sir William Searle Holdsworth, History of English Law*, (7<sup>th</sup> rev. edn Sweet & Maxwell 1964)

business was based on unionism, disputes were settled amicably by subjecting parties to another merchant who was trusted with the ability to resolve the matter.

Parties have the choice to either litigate their dispute in the court of law or refer such disputes to an arbitral tribunal. When they choose arbitration, the national courts are enjoined to assume a *supervisory role* for the success of the arbitration. There are several reasons why parties choose arbitration over litigation and we shall be considering some of the reasons in brief.

(a) **Speed/Flexibility:** Arbitration puts the parties in the driving seat of the proceedings. Businessmen would not want to sit in a court for weeks or months in the name of settling a dispute when they could actually spend such time making money for their firms. They cannot force the court or judge to speed up things for them but this is possible in an arbitration proceedings. The freedom or “autonomy” of the parties gives them the opportunity to request for an accelerated or fast-track procedure.<sup>29</sup>

(b) **Confidentiality:** Confidentiality is an essential matter for major firms who are involved in hi-tech, production, investment and research contracts. Whenever there is a dispute between them, they would not want to appear before the national court due to the issue of publicity. For this reason, they opt for a private dispute mechanism like an International Commercial Arbitration.

Recently, the issue of confidentiality came under criticism following the decision of the High Court of Australia in *Esso Australia Resources Ltd and Others v Plowman (Minister for Energy and Minerals) and others*.<sup>30</sup> Scholars like Paulsson<sup>31</sup> had actually suggested that the concept of confidentiality needs to be remodelled.<sup>32</sup>

(c) **Neutrality of Parties:** Parties to a commercial contract and subsequently participants in the arbitration proceedings are usually from different countries or the nature of the dispute may be said to be a transnational contract. For this reason, they would need a neutral jurisdiction to arbitrate their dispute.

(d) **Choice of Expert:** When a matter is before a court, the judicial system would nominate, and by so doing, impose a judge on the parties but with arbitration,

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<sup>29</sup> Article 9 of the LCIA Rules <[http://www.lcia.org/ARB\\_folder/ARB\\_DOWNLOADS/ENGLISH/rules.pdf](http://www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf)>; also an example of a case where the fast-track procedure was applied was the dispute in the mid-1990s between a Formula 1 motor racing team and FIA which regulates the Formula 1 championship.

<sup>30</sup> (1995) 128 ALR 391

<sup>31</sup> Paulsson and Rawling, ‘The Trouble with Confidentiality in (1995)’ 11/3 Arbitration International 303

<sup>32</sup> WIPO Arbitration Rules, Arts 52, 73—76 are the only rules that provide for the protection for confidentiality; cf. AAA International Arbitration Rules, Art. 35.

parties are free to choose who they believe has the required expertise to marshal their disputes to a convincing end. Parties are more relaxed with this choice.

**(e) Enforcement of Award:** This is by far the most important part of the arbitral proceedings because it will be a futile task if, after all the money, time and brains that have been put into the whole arbitration process an award is set aside or annulled on the grounds provided for under *Article V of the New York Convention 1958*.

### **International Commercial Arbitration**

International commercial arbitration is a mechanism through which commercial disputes have been determined over the years. It is regarded as 'private dispute resolution forum' which is chosen by the disagreeing parties to resolve any dissension between them without looking to the courts of law. It is also said to be private in the sense that the parties are allowed the freedom to choose how the session/procedure is to be conducted and what it entails, the law that will govern their disputes and so on. Ironically, parties may still need the judge's gavel to enforce the outcome of the forum.

Arbitration proceedings are governed by various regional and international treaties as well as national laws. Due to the fact that each state is sovereign, laws are bound to vary from one jurisdiction to another. Accordingly, national courts are enjoined to allow arbitration autonomy but there is still the need for the parties to make recourse to the national courts for the recognition and enforcement of their award. The applicable law to apply here is said to be the "*lex arbitri*" or "*curial law*" which simply means the law of the seat of arbitration.

Some scholars, writers and arbitrators<sup>33</sup> have also tried to detach arbitration from the law of the seat of arbitration. This has led to award from arbitral tribunal being annulled or set aside on the ground that it is a 'stateless', 'floating', 'unrecognised' or 'unenforceable'.

## **RESOLVING DISPUTES**

### **The "Seat Theory"**

In well-drafted international contracts, the arbitration clauses would state a particular location which would serve as the seat for the arbitration proceedings. By specifying the seat, this does not mean the physical seat or that the arbitration has to be held here.

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<sup>33</sup> Paulsson, Goode, Goldman are some of the pro-delocalisation activist.

Rather, the choice of the seat signifies the adoption of the laws that govern arbitration at the chosen place. This is what is referred to as the “seat theory”.

When a particular place is mentioned in the arbitration agreement of parties, what this means is that they are deciding the juridical seat and *lex arbitri*.<sup>34</sup> In *Bank Mellat v Helliniki Techniki*<sup>35</sup>, **Kerr LJ** was quoted as saying that “... *jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law*”. Rather, the legal system offers a ‘shoulder’ for the arbitration proceedings to lean on.

Where parties fail to specify the seat, the court or the arbitral tribunal is empowered to choose for them. Example of this authority could be found in the ICC Arbitration Rules.<sup>36</sup>

### **Significance of the lex arbitri**

The *lex arbitri* is the law of the place where arbitration is to take place and the opportunity of having to apply it to the arbitral proceeding does not automatically regulate the entire proceedings of the arbitral tribunal as it mostly permits ample space for the application of the rules of other legal systems. The scope of its application is basically determined by the *lex arbitri*. The existence and the measure of the freedom of the parties in respect of the regulation of the arbitration proceedings are determined by the *lex arbitri* which should be taken as the starting point.<sup>37</sup>

### **Autonomy of the Parties**

Party autonomy is regarded as a vital factor of arbitration. Arbitration is selected and structured for authority and procedure by an agreement of the parties. If contractual parties do not select arbitration, their contractual disputes are to be settled by the court.<sup>38</sup> An agreement to submit disputes to arbitration is a vital element for the success of arbitration. Parties, as stated earlier, in this essay, have the power to determine the *modus operandi* of the proceedings from the choice of the seat of arbitration, choice of

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<sup>34</sup> Art 31(3) of the Model Law provides that “the award shall be deemed to have been made at the place”. Place here means the seat of the arbitration and *lex arbitri* means the mandatory rules of law that is to be applied to the arbitration at the seat of arbitration.

<sup>35</sup> [1984] 1 QB 291

<sup>36</sup> Art 14.1

<sup>37</sup> Klaus Peter Berger, *International Economic Arbitration, Studies in Transnational Economic Law* (Deventer, Netherlands; Boston, Kluwer Law and Taxation Publishers, 1993) 478 and 479

<sup>38</sup> Okuma Kazutake, ‘Arbitration and Party Autonomy’, (LLM thesis, University of Western Cape 2004) <<http://www.seinan-gu.ac.jp/jura/home04/pdf/3801/3801okuma.pdf>>

law<sup>39</sup> to be applied to the arbitration among other considerations. The question is, can they actually do without relying on the national courts of the seat of arbitration or could it be said that the autonomy of the parties is without limits? This shall be considered in the next heading.

### **Role of National Courts**

International Arbitration is not a separate, free-standing system of justice. It is a system established and regulated pursuant by law. It necessarily bears a close relationship to a nation's courts and judicial system. Under the laws that govern arbitration, the courts have an important role to play in making systems of arbitration work.<sup>40</sup> Before the commencement of the arbitration, parties may need to approach the court to compel one of the parties to honour the agreement to submit to arbitration, appoint the arbitral tribunal where it is not provided for by the parties. Upon the conclusion of the arbitration, the arbitral tribunal normally becomes *functus officio*. The winning party might need to request for the assistance of the court for recognition and enforcement of the award and the losing party who seeks to challenge the award would have to do so at the place where the award was rendered.<sup>41</sup>

Furthermore, the law governing the seat of arbitration varies from one jurisdiction to another. A State, in protecting its national interest, and for regulatory measures, prohibits the arbitration of some disputes. Such disputes that are not capable of settling by arbitration are reserved for deliberation by the Courts.<sup>42</sup> This has received support from the various institutional instruments like the New York Convention.<sup>43</sup>

The issue of the autonomy of the parties has generated a lot of controversies between writers and arbitrators. Some, like **Paulsson**,<sup>44</sup> believe this is the case while **Mann**<sup>45</sup> does not consider this to be true. There is the school of thought that advocates the delocalisation of arbitration while another with exponents like Mann believes there is no such thing as delocalisation.

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<sup>39</sup> UNCITRAL Arbitration Rules, Art.33.1; ICC Arbitration Rules, Art.17.1

<sup>40</sup> Markham Ball, 'The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration' (2006) *Arb Intl*, Vol. 22 No. 1 74 - 93

<sup>41</sup> The New York Convention is the most recognised instrument for the recognition and enforcement of award.

<sup>42</sup> For this, recourse could be made to two American cases on antitrust law; *American Safety Equipment Corp. v J. P. Maguire & Co.* 391 F.2d 821, 826 (2d Cir. 1968); *Cf Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.* 473 US 614, 628 (1985)

<sup>43</sup> Art.V(2)(a)&(b) of the NYC 1958; Art.2 of the Geneva Protocol of 1923

<sup>44</sup> Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin'. *The International and Comparative Law Quarterly* April 1981; suggest that arbitration should be detached from the law of seat of arbitration, Fouchard/Gaillard/Goldman, *Traité de l'arbitrage international*, Paris (1996)

<sup>45</sup> Mann, "Schiedsrichter und Recht", in: *Festschrift Flume* (1978)

## **Converging Points between Customary Arbitration and International Arbitration**

Arbitration is developing into a veritable source of dispute resolution. It has always been a more economical and friendly method of resolving dispute both in traditional and modern setting and it was after the advent of colonialism that statutory arbitration was evolved wherein certain provisions of the statutes started regulating arbitration.<sup>46</sup> Prior to the arrival of the colonial master's law, Africans had settled their disputes via customary arbitration with the villagers bringing their marriage disputes, land matters among others before the elders or king with a view to reaching amicable settlement.

Customary Arbitration as earlier stated in the beginning of this article is a process that is based on our traditions and enabled by our Customary Laws and practices. It is a valid form of arbitration and may be at the instance of the parties, by invitation from the chief or by recommendation of family elders or others. The customary arbitration settlement may be recorded and filed in Court or the House of Chiefs.<sup>47</sup>

Under the 1992 Ghanaian Constitution, customary law is defined as “the rules of law which by custom are applicable to particular communities in Ghana”.<sup>48</sup> One of the earliest comments on the essentials of a binding customary arbitration was made by Ollenu J. in the seminal case of *Budu II v Caesar*<sup>49</sup> as follows;

“...in customary law, there are five essential characteristics of arbitration, as opposed to negotiation for a settlement, viz.

- i. a voluntary submission of the dispute by the parties to arbitrators for the purpose of having the dispute decided informally, but on its merits;
- ii. a prior agreement by both parties to accept the award of the arbitrators;
- iii. the award must not be arbitrary, but must be arrived at after the hearing of both sides in a judicial manner;
- iv. the practice and procedure for the time being followed in the native court or tribunal of the area must be followed as nearly as possible;
- v. publication of the award.”

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<sup>46</sup> Ariyoosu D.A., ‘Customary Arbitration as a Dispute Resolution Mechanism and Its Operational Framework as Estoppel Per Rem Judicatam’ (2008) UILJ Vols. 3 & 4

<sup>47</sup> <http://www.adrghana.com/customary-arbitration/>

<sup>48</sup> Article 11(3) of the 1992 Constitution of the Republic of Ghana

<sup>49</sup> [1959] GLR 410

In the Nigerian case of **NNPC v Lutin Investment Limited**<sup>50</sup>, arbitration was defined as

*...the reference of a dispute(s) between not less than two people for determination after hearing both sides in a juridical manner, by a person or persons who is not an umpire but has been chosen by the parties to determine the dispute(s). If he decides something else he will be acting outside the scope of his authority and consequently the whole of the arbitration proceedings will be null and void and of no effect. This will affect the validity of any award rendered by such a person(s).*

From the discussions above, one would observe that there are similarities between customary arbitration and international arbitration. Qualities similar to both are

- Voluntary submission of disputes by parties to arbitration
- Prior agreement by parties to accept the final award
- Choice of arbitrators
- Flexibility of the arbitration process
- A mindset of settling the dispute amicably

### **Lex Arbitri and Delocalisation**

**F.A. Mann**, an advocate of national law, is of the view that the inclusion of an arbitration clause by parties in their contract can only be recognised as legal when read in line with the *lex fori* of the international private law of the seat that has been chosen by them.<sup>51</sup> He believes that private international law is an “*offspring*” of a national law and since the law governing arbitration is based on it, the law of arbitration is definitely a national law.

He went further with the argument that the existence of the parties’ autonomy is made possible by the municipal law and that every right that an individual has is “*derived from a system of municipal law which may conveniently and in accordance with tradition be*

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<sup>50</sup> (2006) 25 NSCQR 77 at 111-112

<sup>51</sup> Mann (n 26) 596

called *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri* or ... *la loi de l'arbitrage*.”<sup>52</sup> (emphasis added)

**Hight** like *Mann* also does not believe in stateless contractual agreements. He was quoted as saying that “*if the contract is stateless, it is not a contract and cannot be enforced.*”<sup>53a</sup>

He further said that so far as international commercial arbitration is concerned, it would save considerable time, trouble and expenses if the laws governing arbitration were the same throughout the world, so that there was so to speak a universal *lex arbitri*. There would then be a “level playing field” for the conduct of international commercial arbitration wherever they take place. He went further to say that the idea of a universal *lex arbitri* is as illusory as that of a universal peace.<sup>53b</sup>

This perceived influence by the *lex arbitri* has been criticised by writers and arbitrators who are of the view that there is the possibility of having an award which has no connection with the *lex arbitri*.

Taking a look at the provisions of the Model Law, it could be seen that the intervention of the court is curtailed. For instance, Art.5 provides that in matters governed by this Law, no court shall intervene except where so provided in this law. It should however be noted that several of the Articles contained in the Model Law contain directions to the national courts.<sup>53</sup>

One of the proponents of this school of thought is **Paulsson**.<sup>54</sup> He is of the opinion that if the detachment of the transnational arbitral process were denied, the choice of the place of arbitration has great significance. To him, parties seeking to rely on the award in other countries may be delayed or hindered by challenges to it before those courts. In *Gotaverken v. Libyan General National Maritime Transport Co.*,<sup>55</sup> Paulsson remarked that an international arbitral award may be enforced, even if not subject by the *lex arbitri*, to the same appeal procedures as a domestic award.

Paulsson however does not rule out the involvement of the national courts but he feels that if arbitration was delocalised, it would reduce the work load that arbitrators have to go through for instance the issue of forum shopping.

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<sup>52</sup> Sanders (ed), “*Lex Facit Arbitrum*”, in *International Arbitration: Liber Amicorum for Martin Domke* (1967) 160

<sup>53</sup> Article 6,8,9,11,12,15,16,17,27,34,35 and 36 of the UNCITRAL Model Law

<sup>54</sup> Paulsson (n 1); “Delocalisation of International Commercial Arbitration: When and Why it Matters” (1983) 32 I.C.L.Q. 53

<sup>55</sup> *Libyan Maritime Co. v. Gotaverken* Artnda L Com d'Appet de Paris (Feb. 21, 1980), reprinted in (1980) 107 J. Dr. Int. 6# and [1980] *Revue del'Arbitrate*524.



With these points of intersection between customary arbitration and international arbitration, it appears that there is the imperative need to draw out internationally accepted rules (and possibly law) from these areas of intersection. In other words, having reached a maturity point, in order to provide universal rules, nations should attempt a codification of arbitration decisions and rules that may be distilled from both customary arbitration rules and processes as well as those existing in international law.

If this arrangement is followed, there may not be the need for enforcement by national courts as state parties to the internationally accepted code will be guided and bound by this statute. That is the *lex arbitri* that must be looked forward to at this age and time.

### **Conclusion**

The will and intention of the parties in arbitration proceedings is the amicable settlement of their disputes and the most important stage of any arbitration proceedings is the enforcement of the award. Upon the conclusion of the arbitration proceedings, the winning party armed with the arbitral award, would need to enforce the arbitral award against the other party. It is also not uncommon for the losing party to have his assets located in countries other than that in which the award was rendered. The victor here would need to approach the national court in those jurisdictions to obtain an order to enable him levy judgment on his assets.

The need for a delocalisation and codification of customary arbitration is more important now that the world is turning into a global village. The only solution is to have a *lex arbitri* distilled from customary arbitration and international arbitration.