DETERMINING THE *LEX ARBITRI* IN INTERNATIONAL COMMERCIAL ARBITRATION FOR PURPOSES OF THE VALIDITY OF AN ARBITRAL AWARD

by

Aniekan Iboro Ukpe

1. Introduction

The mix of several systems of laws in international commercial arbitration[1] often makes it difficult to maintain the fine distinction between the rules of procedure as adopted by the parties and the tribunal on the one hand and the law of the place of arbitration, that is the *lex loci arbitri* on the other hand. The latter refers to the system of law that gives effect to procedural rules and is commonly equated to the law governing the arbitral process itself, the *lex arbitri,* in effect blurring the intellectually tasking and yet crucial distinction between the two.[2] This paper is basically an attempt at delimiting the distinction between the *lex loci arbitri* and the *lex arbitri*.

Although the paper bases on the premise that the *lex arbitri* must always be determined with deference to the proper *situs* of arbitration, yet it argues that except the *lex loci arbitri* is defined in such a manner that de-emphasizes the sanctity of the designated place or seat of arbitration to include a *de facto situs* well outside the intent and contemplation of the parties, the *lex arbitri* would have no real connection with the *lex loci arbitri*.[3] Section 2 attempts a delimitative description of *lex arbitri*. Section 3 sets out to determine the

[1] See Redfern, A and Hunter, M, et al, Law and Practice of International Commercial Arbitration (4th Edition) (London, United Kingdom: Sweet & Maxwell, 2004). pp. 2.

[2] Park, W., *The Lex Loci Arbitri and International Commercial Arbitration*, (1983) 32 I.C.L.Q 21 at 23 http://www.links.jstor.org/sici?sici=0020-5893(198301)32%3A1%3C21%3ATLLAAI%3E2.0.CO%3B2-4 (last visited 10 January 2007).

[3] The relevance of this distinction will become clearer in Section 4 when the paper demonstrates that reaping the fruits of a tortuous arbitral proceeding could very well solely depend on an apt determination of the *lex arbitri*, of course with due deference to the proper *lex loci arbitri*.

proper place of arbitration in a multi-seat arbitration. Section 4 reviews the validity of an arbitral award against the backdrop of the argument that only an award consistent with the *lex arbitri* as properly identified would merit enforcement under the New York Convention (NYC).[4] Section 5 surmises the paper position.

2. What is *Lex Arbitri?*

The expression 'lex arbitri' simply put refers to the law governing the arbitration. Three conceptual theories in arbitration would usually operate to determine what *lex arbitri* is or at least, generally accepted to be;

(i) The Jurisdictional theory

Basically, the law of a state wholly circumscribes arbitration like litigation. This theory projects the concept of state sovereignty above the consensual agreement of the parties. It emphasizes the State as the progenitor of the methods and procedures for dispute resolution, implicitly, affirming the *lex loci arbitri* as the law which governs the conduct of the arbitration and the status of arbitral awards.

(ii) Contractual theory

This theory suggests that the validity of an arbitral process is wholly dependent on the consensual agreement of the parties as to its conduct.[5] However, it is dependent on the assumption that an existing legal system

[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), 10 June, 1958, 330 UNTS 4739 (entered into force on 7 June 1959).
[5] SEEE v World Bank, Yugoslavia and France (1985) 82 ILR 59 at 69

confers such freedom to so agree on the parties.[6] Hence, it is not as independent of the *lex loci arbitri* as it first appears to be.

(iii) Party Autonomy

This theory emphasizes the entrenchment of arbitration in different legal systems, as a self-standing mechanism of its own that should not be subsumed under an inappropriate legal category. The theory projects the freedom of parties to choose a *lex arbitri*, while not disregarding the State as the precursor of that right.

As evident in all the three theories, the *lex arbitri* would rarely ever be completely detached from the State or its legal system.[7] The practical implication of this is evident in the decision of a foreign court to refuse recognition and enforcement to an award that fails to comply with the mandatory provisions of the *lex loci arbitri*.[8] No precedent exists as to any mandatory content of a *lex arbitri*. While issues such as consumer protection, fees of arbitrators and forms of awards are becoming increasingly present in many laws that govern arbitration, the majority of legal systems and institutional rules provide for only a general framework, leaving the parties or the arbitral tribunal with so much leverage to draw up the details of the governing procedural rules.[9]

---

[6] Collier, J., and Lowe, V., The Settlement of Disputes in International Law, (First Published) (New York, United States of America: Oxford University Press Inc., 1999).
[7] Ibid, pp. 230 -231, see generally.
[8] See Article V (1) NYC, also BP v Libya (1973) 53 ILR 297 at 308 – 311.
[9] See UNCITRAL Model law, Article 19, For a judicial delimitation of *lex arbitri* see Per Steyn J., Smith Ltd v H & S International (1991) 2 Lloyd's Rep. 127 at 130, as cited in Redfern and Hunter (supra), p. 93.

3. Determining the Place of Arbitration in a Multiple Geographic Arbitration

3.1 The Seat Theory

The traditional 'Seat theory' follows that: 'the law of the arbitration is the law of the place of the arbitral proceedings; ***the lex arbitri*** is the ***lex loci arbitri***. Thus an arbitrator must bow to mandatory norms of the country in which he sits' (emphasis added).[10] Several institutional rules and various legal systems underscore this link between the place of arbitration and the law governing that arbitration.[11] The geographical place of arbitration is thus the factual connection between the arbitral proceeding and the *lex arbitri*. The Swiss Arbitration Act succinctly puts the importance of this geographical link; 'the provisions of this Chapter shall apply to any arbitration *if the seat of the arbitral tribunal is in Switzerland*…'[12] (*Emphasis added*). By implication, 'when one says that London, Paris or Geneva is the place of arbitration one does not refer solely to a geographical location, one means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland' as the case may be.[13] Thus we could see different parts of an arbitral proceeding take place in venues outside the designated Seat without necessarily meaning that the Seat or place of arbitration has changed.

3.2 Arbitral Proceedings in a Multi-Seat Arbitration

---

[10] Park, W., *The Lex Loci Arbitri and International Commercial Arbitration*, (supra).

[11] Article VII(2) NYC, Article 1(2) UNCITRAL Model Law, Swiss Private International law Act 1987, chapter 12, Article 176(1), English Arbitration Act 1996, Section 2. See bibliography.

[12] Swiss Private International law Act, (supra), see also Article 1(2) UNCITRAL Model Law, Article VIII(2) NYC.

[13] Reymond, C., '*Where is an Arbitral Award made?*' (1992) 108 L.Q.R. 1 at 3 <http://links.jstor.org/ sici?sici= 0020-5893(199207)41%3A3%3C637%3AWIAAAM%3E2.0.CO%3B2-3> (last visited on 10 January 2007).

This contemplates a situation where an arbitral tribunal holds its proceedings outside the designated seat of arbitration, with the result that the seat becomes a mere legal fiction, devoid of any practical or real connection to the arbitral proceedings itself. Possibly, the constitution of the tribunal might have taken place at its designated Seat and even one or two meetings may have been held there but on a whole, it cannot be said that the proceedings took place at the designated place of arbitration.[14] In such instances the courts have used a 'real connection' test to determine the proper place of arbitration and implicitly, the *lex arbitri*.[15] The court would consider issues such as where majority of meetings were held; where majority of witnesses reside etc. The *lex arbitri* will always be determined with deference to the place of arbitration, that is, the *lex loci arbitri* with which it has the 'closest and most real connection'; real connection being a question of mixed fact and law.[16]

Cases may arise where parties have chosen a *lex arbitri* that is not etched in the *lex loci arbitri*; as properly determined but on an entirely different legal system, or it may not even be based on any national legal system but is circumscribed by some international rules. It is submitted that such freedom of parties to choose and have applied a set of rules with no direct connection to the *lex loci arbitri*, would ordinarily be derived from the *lex loci arbitri* itself. Put differently, except the *lex loci arbitri* as properly determined permits such a choice, the parties may not so choose. Thus were any conflicts

[14] See ICC Case No. 10623, as cited in Redfern and Hunter, (supra) p.102, footnote 45.
[15] James Miller & Partners Ltd. V Whitwort Street Estates (Manchester), Ltd. (supra), per Lord Wiberforce, also see Kaj Hober, *Sweden: The Place of Arbitration – Still a Legal Fiction*, Int. A.L.R. 2006, 9(2), N18 – 20, Case Comment on Swedish Court of Appeal decision in Titan Corp. v Alcatel Cit SA (Unreported, February 28, 2005). http://www.uk.westlaw.com/search/default.wl?spa=ukatdun-000 &rs=WLUK6.11&fn=_top&sv=Split&db=ICA-JLR&vr=2.0&rp=%2fsearch%2fdefaultwl&mt= Westlaw International> (last visited on 4 January 2007).
[16] *ibid*

arises between the *lex loci arbitri* and such international rules, the former would prevail.[17] This is the connection between the *lex loci arbitri* and a seemingly unrelated set of governing procedural rules.[18]

4. Validity of an Arbitral Award

The validity of an arbitral award is determined by its compliance with certain requirements of the NYC as to form and content.[19] Both the form and content of an award are primarily dictated by the arbitration agreement and the *lex arbitri* and tribunals are bound to comply with such mandatory provisions.[20] The *lex arbitri* ensures that an award complies with all the formal requirements as to its validity and consequently, to merit recognition and enforcement under the NYC. It provides the principal safeguard against scenarios that could result in a successful challenge of the arbitral award.[21] As a corollary, the non-compliance of an arbitral proceeding with the *lex arbitri* would constitute a ground for the refusal of recognition and enforcement of an award by a foreign court.

4.1 Where Should an Award be Made?

For purposes of enforceability under the NYC, it would appear that the proper place where an award should be made is at the place of arbitration,

---

[17] Union of India v McDonnell Douglas Corp. (1993) Lloyd's Rep. 48.
[18] See Mann, F. in Paulsson, J., *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, (1982) I.C.L.Q. 358 at 360.< http://www.links.jstor.org/sici?sici=0020-5893(198104)30% 3A2% 3C 358%3AAUADFT%3E2.0.CO%3B2-5 > (last visited 10 January 2007).
[19] NYC, Article V(1). The NYC is the principal legislation on the recognition and enforcement of arbitral awards made in a State other than the State where enforcement is sought.
[20] See The Swiss Private International Law Act 1987, Ch. 12, Art. 189, English Arbitration Act 1996, S. 52.
[21] See Noah, R., *Enforcement and Annulment of International Arbitration Awards in Indonesia*, (2005) 20 A.M.U.I.L.R. 359. < http://www.uk.westlaw.com/search/default.wl?spa=ukatdun-000&rs=WLUK 6.11&fn=_top&sv=Split&db=ICA-JLR&vr=2.0&rp=%2fsearch %2fdefault.wl&mt =Westlaw International> (last visited on 4 January 2007).

as properly determined.[22] The bindingness of an award must derive from a national system, a *lex loci arbitri*, which in turn defines the *lex arbitri*.[23] This ensures the continued link between the award and the rest of the arbitral proceedings. As Mann puts it, the award;

> '...is no more than a part, the final and vital part of a procedure which must have a territorial central point or seat. It would be very odd, if possibly without the knowledge of the parties or even unwittingly, the arbitrators had the power to sever that part from the preceding procedure and thus give a totally different character to the whole.'[24]

5 CONCLUSION

The fact that the validity of an arbitral award may just depend on simple compliance with the *lex arbitri* underscores the value in its apt identification. While it is correct that the *lex arbitri* must be determined with deference to the *lex loci arbitri,* it is unsafe to unreservedly equate the *lex arbitri* to the *lex loci arbitri* without a prior proper determination of the place of arbitration, particularly in a multi-seat arbitration. The Seat theory that equates *lex arbitri* to *lex loci arbitri* can only be correct to the extent that it contemplates a *de facto* place of arbitration well outside the contemplation of parties.

---

[22] Article V(1)(e), also English Arbitration Act 1996, S. 2
[23] Paulsson, J., *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, (supra) pp.360 - 361
[24] Mann, F., *Where is an Award Made*?, (1985) 1 Arbitration International 107