DEVELOPING NIGERIA INTO AN INTERNATIONAL ARBITRATION CENTRE *

Introduction

International commercial arbitration is a daily occurrence in venues around the world. Many of such arbitration take place in venues such as London and Paris, even where the subject matter of the disputes and the parties thereto have no connection with the venue. For what seems an absolute eternity, Nigerian parties have been signing up to agreements containing arbitration clauses that make the seat of arbitration such exotic places like Seoul, Korea, Shanghai PRC and Dubai, UAE.

More than thirty years ago, the Nigerian government recognised that it was hardly in its interest to persist with such an arrangement. The agreements requiring arbitration in venues around the world were, in the main, agreements involving state and federal governments and their agencies. As a consequence of this realisation, the Nigerian government, as part of its involvement in the reform work of UNCITRAL in drawing up a Model Law of International Commercial Arbitration, and in the context of the work of the Asian-African Legal Consultative Organisation (AALCO), agreed with other members of the Organisation during its 13th Session held in Lagos in 1973, that apart from follow-up of the work of the UNCITRAL in the field of International Commercial Arbitration, the Organisation should also make an independent study of some of the more important practical problems relating to the subject from the point of view of the Asian-African region. Accordingly, the Secretariat prepared an outline of the study, which received favourable response from the Member States. The Secretariat thereafter prepared a detailed and comprehensive study and the Trade Law Sub-Committee considered this study during the Tokyo Session.

At the Tokyo Session (14th Session) held in 1974, AALCO endorsed the recommendations of its Trade Law Sub-Committee, that efforts should be made by Member States to develop institutional arbitration in the Asian and African regions. Thereafter, the Secretariat, following the mandate in the Tokyo Session, prepared a revised study on the same topic so as to enable the Trade Law Sub-Committee during the Kuala Lumpur Session, to formulate principles or model rules for consideration. At the Kuala Lumpur Session (16th Session) held in 1976, the Trade Law Sub Committee requested the Secretariat to undertake a feasibility study for establishing

regional arbitration centres in the Asian-African region, to be placed before the Baghdad Session.[1]

At the Baghdad Session (17th Session) held in 1977, discussions were focused on the Secretariat study, which envisaged (*inter alia*) the establishment of a network of Regional Centres for Arbitration functioning under the auspices of the AALCO in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized.

At the Doha Session in 1978, the Organization in order to promote the development of the Afro-Asian region decided to establish Regional Centres for International Commercial Arbitration as a viable alternative to the traditional institutions in the West. It was envisaged that the two centres would function as international institutions under the auspices of AALCO with the following objectives:

(a) Promoting international commercial arbitration in Asian and African regions;
(b) Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the two regions;
(c) Rendering assistance in the conduct of Ad Hoc arbitrations, particularly those held under the UNCITRAL Arbitration Rules;
(d) Assisting in the enforcement of arbitral awards; and
(e) Providing for arbitration under the auspices of the two centres where appropriate.

In pursuance of the above decision, an Agreement was concluded in April 1978 between the AALCO and the Government of Malaysia in respect of establishment of a Regional Centre for Arbitration in Kuala Lumpur. A similar Agreement was concluded in January 1979 with the Government of the Arab Republic of Egypt in respect of establishment of a Regional Centre for Arbitration in Cairo. The

1 The Secretariat study elaborated the two basic objectives of the AALCO's integrated dispute settlement scheme. In the first place, to establish a system under which disputes and differences arising out of transactions in which both the parties belong to the Asian-African and Pacific regions could be settled under fair, inexpensive and adequate procedures. Secondly, to encourage parties to have their arbitrations within the region where the investment made or the place of performance under an international transaction was a country within this region. The conclusions made in the study were in favour of establishment of six sub-regions, namely East Asia, South-East Asia, West Asia, North Africa and West Africa. It was, however, pointed out that scheme could initially work with two centres and other centres could be established in the light of experience and volume of work.

Agreements recognised the status of the Centres as intergovernmental organizations and conferred certain immunities and privileges for their independent functioning.

The Host Governments also offered suitable premises, financial grants and necessary staff to run the Centres. The Centres adopted UNCITRAL Arbitration Rules with suitable modifications and offered their services to any party whether within or outside the region for the administered arbitration and facilities for arbitration whether ad hoc or under the auspices of any other institution.

The success of these two Regional Arbitration Centres prompted the AALCO to establish two more centres, one in Lagos, and the other in Tehran. In 1980, an Agreement was concluded with the Federal Government of Nigeria for the location of a third Centre in Lagos. The Centre was formally inaugurated in March 1989. On 26th April 1999, Honourable Alhaji Abdullahi Ibrahim OFR (SAN), the then Attorney General and Minister of Justice, on behalf of Nigeria and H. E. Mr. Tang Chengyuan, the then Secretary-General of the AALCO, signed an Agreement which formalized the continued functioning of the Centre for a period of five years with effect from January 1999 to December 2004.[2]. An Agreement for the establishment of the Tehran Centre was concluded between AALCO and Islamic Republic of Iran in 1997 and the President of the Islamic Republic of Iran ratified the Agreement for implementation on 10 June 2003.

These efforts to make Nigeria a venue in which potential users of the arbitral process would readily accept, have met with very little success, and one continues to find arbitral provisions in commercial agreements, which seek to have arbitrations take place elsewhere, albeit that any dispute that might arise from the agreement would be a Nigerian dispute. Further, there does not appear to have been very many, if any, disputes brought to the Lagos Centre as a result of the AALCO agreements. Clearly, persons charged with making decisions on this issue continue to have the same concerns that militated against the choice of Nigeria as an arbitration venue in the first instance.

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2 Regional Centre for International Commercial Arbitration, 6th Floor, Marble House, 1 Alfred Rewane Road (Former Kingsway Road), Falomo, Ikoyi, Lagos, Nigeria. Fax: 00 234 1 2672385, email: lrcica@metrong.com

This paper seeks to look at the factors that have long militated against the choice of Nigeria as an arbitration centre, and to propose suggestions to address the position.

Basic Requirements of an appropriate International Arbitration Venue

Very often international arbitrations that take place all around the world could appear to a casual observer to proceed in a self-contained manner, independent of outside support or control. This is because they proceed in accordance with rules agreed by the parties or laid down by the arbitral tribunal. They usually take place in conference rooms or hotel suites and are devoid of all the paraphernalia of national court systems.

Such an appearance, however, conceals the reality. International commercial arbitration can only work effectively where it is supported by appropriate systems of laws and legal systems. A relatively simple and straightforward international commercial arbitration may require reference to as many as four different systems or rules of law. There will be the law that governs the recognition and enforcement of the arbitral agreement. Second, there is the law that regulates the actual proceedings themselves. Third, there is the law or set of rules that the arbitral tribunal must apply to the substantive matters in dispute. Finally, the law that governs recognition of the award must also be considered.

These laws may be the same. The law that governs the proceedings (usually the law of the place of the arbitration) may also be the law applicable to the substantive matters in dispute. Again, however, they might not be. The law that applies to the contract may not only be different, it might also come from a totally different system of law. For example, an arbitral tribunal sitting in Nigeria, governed by Nigerian law, as the place of the arbitration, may well be required to apply Nigerian law as the proper law of the contract. The proper law of the contract may not even be that of any given national system of law. It may be international law, a blend of national law and international law, or even an assemblage of rules of law. Finally, the system of law that governs recognition and enforcement may be different from that which governs the arbitral proceedings themselves.

In order to make Nigeria an attractive venue for use as an international arbitration centre, regard has to be had to all four possible systems of law, and ensure that all four meet what are generally regarded to be minimum international standards.

Law Governing Recognition & Enforcement of Agreement

Very many disputes referred to arbitration are determined with no more than a passing reference to the law. Such disputes tend to turn on matters of fact. In such cases, the task of the arbitrators is to resolve issues of fact. Once they have done so, they can make their awards, and they often do so without reference to any system of law or to any legal document other than the agreement between the parties to the disputes.

Notwithstanding the frequent absence of reference to any law in the process of rendering awards, the proceedings are indeed regulated by the law of the place of the arbitration. In addition to this, other (and possibly very different) laws may need to be taken into consideration as regulating matters such as the capacity of the parties to arbitrate, the validity of the reference to arbitration, the extent of the arbitrator's jurisdiction and the enforceability of the award.

In the words of the learned authors of a leading work on International Commercial Arbitration[3], "… any international commercial arbitration is a forensic minefield". The authors list five possible sets of law that may come into play during an international commercial arbitration:

- the law governing the capacity of the parties to enter into the arbitration agreement
- the law governing the arbitration agreement and the performance of that agreement;
- the law governing the existence and proceedings of the arbitral tribunal – the *lex arbitri*;
- the "proper law of the contract" – governing the substantive issues in dispute;
- the law governing recognition and enforcement of the award (which in practice may prove to be the law of more than one place)

Law Governing the Capacity to Arbitrate

Parties to a contract must have legal capacity to enter into that contract. If there is no such capacity, the contract is invalid. This position is recognised in both the New York Convention and the Model Law. Rules on capacity are not uniform. The law regulating capacity will be the law regulating the contracting party. This law may very well be different from the law governing the arbitration agreement.

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3 Alan Redfern & Martin Hunter, International Commercial Arbitration, 1st Edn., p. 72

In Nigeria, the courts will consider applicable conflict of law rules to determine the appropriate law governing capacity. An example provided by Redfern and Hunter is of 17 year old resident of a country where the age of majority is 18 travelling to another country, where the age of majority is 16, and entering into an arbitration agreement. Because the law of the agreement is, usually, the place where it was entered into, he would not be able to avoid enforcement (by reason of lack of capacity) in his own country. Alternatively, in the case of a legal person such as a corporation, an act that is ***ultra vires*** the corporation remains so, regardless of to where its agents might travel. Thus, regard needs to be had to the law that created the contracting person.

Some national systems may impose restrictions on the capacity to arbitrate, such as restrictions on the capacity of states and state agencies to contract. In Nigeria, there is no such restriction, but a number of states do impose restrictions

Law Governing Arbitration Agreement

The arbitration agreement is the foundation of any arbitral process. It is usually a clause in a more general agreement, but occasionally takes the form of a submission agreement specially drawn up after a dispute has arisen.

Where the agreement is a clause in a more general agreement, it is recognised as being autonomous, albeit that it will be governed by the same law as that which governs the substantive contract. The position may not necessarily be the same where the arbitration agreement is a submission agreement drawn up after a dispute has arisen.

The validity of the arbitration agreement is crucial, and questions concerning it will fall to be determined under the law that governs that agreement. That law might well be different from that which governs the substantive issues, and may also be different from the *lex arbitri.*

Lex Arbitri

The law of the place where the arbitration takes place is extremely important because it will, if only in outline, regulate many aspects of the arbitral process. Regard must

be had to the usual rules and practice of the place in which the arbitration is held. This will likely include matters such as disclosure of documents, rules of evidence, freedom of the parties to be represented by counsel of their choice, and such matters.

One fairly regular feature of international commercial arbitration is that the arbitration takes place in a country that is not the place of business or residence of the parties to the dispute. Consequently, the law that governs the arbitration is likely to be different from the law that governs the substantive matters in dispute. Accordingly, if Nigeria were a venue for an international commercial arbitration, the arbitral tribunal may be required to apply the law of some other jurisdiction to the merits of the dispute. The relevance of Nigerian law to such arbitration would be that it is that law that would regulate the arbitral proceedings.

In many cases, the parties do not choose the place of arbitration. That decision is, very often, left to the arbitral tribunal. Where, for example, the appointment of a sole or presiding arbitrator is left to a third party, this selection is likely to depend on considerations that have no connection with the dispute between the parties. The dominant consideration will usually be that the arbitration should take place in a country that is neutral, in the sense that it is not the home of either of the parties. In such cases, it is evident that the chosen place of arbitration has nothing to do with the parties, or with the agreement under which the dispute arises. Such a choice has been described as "an accidental choice", and that it would be "capricious to hold that the law of the place of the arbitration was also, and necessarily, the law applicable to the issues in dispute"[4].

With the proviso that matters which one state regards as falling within its *lex arbitri* may not be so regarded by another, the *lex arbitri* of any state is likely to extend to the following matters:

- arbitrability;
- the validity of the arbitration agreement;
- the jurisdiction of the arbitrators;
- the appointment, removal and replacement of the arbitrators;
- challenge of arbitrators;

4 See Thomas, "Arbitration Agreements as a signpost for the proper law", [1984] *Lloyd's Maritime and Commercial Law Quarterly*, p. 141

- time limits;
- the conduct of the arbitration, including possible rules for the disclosure of documents (discovery);
- interim measures of protection;
- whether there is power to consolidate arbitrations;
- whether the arbitral tribunal is empowered to decide *ex aequo et bono*;
- the form and validity of the arbitral award; and
- the finality of the award (including any right of recourse against it under national law).[5]

Law Governing Substantive Issues

Once questions of procedure have been resolved, the principal task of the arbitral tribunal becomes the establishment of the material facts of the dispute. This is done by examining the agreement between the parties, considering other relevant documents, and by hearing other evidence. The arbitral tribunal will then build its award on this foundation of facts, making its decision on the basis of the applicable law or, occasionally, on the basis of what it considers to be fair and reasonable.

Frequently, the arbitral tribunal will not need to go outside the confines of the agreement between the parties in order to determine the dispute. However, agreements intended to create legal relations do not exist in a legal vacuum. They are supported by the law applicable to the contract. Changes in this law may bring about changes to the contract itself. So, it will not necessarily be enough to know what agreement the parties have made, it will also be essential to know the law applicable to that agreement. The most common situation is for the parties to choose the applicable law at the time of making the contract. However, where they fail to do so, identifying the proper law of the contract may become a very complicated process, outside the purview of this paper, and for which there is, in any event, inadequate time to consider here.

Law Governing Recognition & Enforcement of Award

The law that governs the recognition and enforcement of arbitral awards in Nigeria is the Arbitration and Conciliation Act[6], which, by incorporating the provisions of the 1958 UNCITRAL Convention on the Recognition and Enforcement of Foreign

5 Taken from a list contained in Redfern & Hunter, "International Commercial Arbitration"
6 Cap. A18, Laws of the Federation of Nigeria 2004

Arbitral Awards, also deals with awards made outside Nigeria. The provisions concerning the recognition and enforcement of awards made in Nigeria are based upon the UNCITRAL Model Law. These provisions are the product of a United Nations agency, and enjoy broad international acceptance. They deal adequately with most of the foregoing matters. However, the weak point is where the legislation needs to fall back upon the provisions that provide for support from the courts.

Our courts are, undoubtedly, the weakest point in addressing these matters. The first problem is that, in spite of some very good initiatives aimed at improving the knowledge and understanding of arbitration by the judiciary, there remains some alarming ignorance of arbitration, its nature and processes on the part of too many members of the judiciary. Continuing education of judicial officers will, eventually resolve much of this problem, if not completely eliminate it.

The next, and more substantial, problem is the procedure that all courts in Nigeria use. Nigerian courts manage time in an abysmally poor manner. Proceedings continue to be conducted with judges having to record their own proceedings long hand, resulting in advocates having to resort to giving dictation when making submissions. A number of jurisdictions have, by the use of written submissions, reduced this problem. However, not all jurisdictions offer the use of written submissions. Our judges also continue to be so overworked that they do not have the ability to respond appropriately to time sensitive matters.

Finally, the liberal rights of appeal conferred under the Nigerian Constitution, coupled with the length of time it takes for appellate matters to go from one tier to another, cannot but make Nigeria an unpopular place to attempt litigation, talk less of arbitration.

Other Factors

There are, of course, a number of other factors that need to be addressed, if Nigeria were ever to become an acceptable centre for international commercial arbitration. Nigeria's infrastructure must be significantly improved, so as to make the country an attractive place to visit. Improvements in the conduct of border control personnel needs to continue. Facilities at our international airports need to be enhanced so that they meet minimum international standards. Nearly everybody will have a tale of

waiting in hot baggage halls, as luggage crawls past on the carousel. Nigeria needs to be a place to which people are not averse to coming.

In addition, appointing authorities need to be convinced of the availability of qualified arbitrators available within the jurisdiction. The presence in Nigeria of well regarded professional organisations championing arbitration is important here. The International Chambers of Commerce Court of Arbitration is a frequent appointing authority, for example. It works closely with a number of arbitration associations, such as the organisation to which I belong, and of which I am currently the Chair of the Nigerian Branch, the Chartered Institute of Arbitrators. Unfortunately, the credibility of Nigerian arbitrators has not been helped by the decision taken a few years ago by an organisation, which started life as the Association of Nigerian Arbitrators (and which had as one of its objectives the fostering of close ties with the Chartered Institute of Arbitrators), to adopt the name "Chartered Institute of Arbitrators – Nigeria". This decision was taken after the Nigerian Branch of the Chartered Institute of Arbitrators came into being, and notwithstanding that many of the leading lights of that organisation were, at the time the decision was taken, also members of the Chartered Institute of Arbitrators, a body that came into existence almost a century ago, in 1915. Efforts are ongoing to resolve this issue in an appropriate manner. Nevertheless, when Nigerian arbitrators act in such a manner, it cannot assist the efforts being made to promote arbitration in Nigeria and Nigeria as a suitable venue for international commercial arbitration.

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Babajide O. Ogundipe
Sofunde, Osakwe, Ogundipe & Belgore
7th floor
St. Nicholas House
Catholic Mission Street
P. O. Box 80367, Lafiaji
Lagos

Tel.: + 234 1 263 1184
Fax: + 234 1 263 4980
boogundipe@sooblaw.com
www.sooblaw.com

Chairman, Nigerian Branch, Chartered Institute of Arbitrators.