THE CHOICE OF FOREIGN LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: ISSUES AND PROBLEMS

Article · February 2022

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THE CHOICE OF FOREIGN LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: ISSUES AND PROBLEMS

Brown E. Umukoro

ABSTRACT

International Commercial Arbitration has begun to snowball with the increase in international trade and the crave for foreign investment. This trend is not without its problems. It has been observed that most investors involved in transnational businesses, in desiring to arbitrate outside the seat of the dispute, look forward to certain conveniences and comfort as the basis for choosing a particular set of laws or the laws of a particular country to govern the arbitration. This is done most time without necessarily giving a thought to the details of such laws or possible demerits inherent in the chosen law having regard to the nature of the business. This paper principally examines the issues and problems which are particularly associated with the choice of a foreign seat and foreign laws of arbitration. Some of these challenges include a situation where the State or the country where the arbitration is to be held has some national interest in the outcome of the award or is even a party to the arbitration or some of the laws are unfair having regard to the nature of the trade between the parties. Again, a country where the arbitration is to be held or whose laws are chosen by the parties may change her laws during the pendency or before the commencement of the arbitration against the original intendment behind the choice. In discussing these challenges, the paper focuses on the choice of laws of the United States and England as a case study against the background of arbitrations having substantial affiliation with Nigeria.

INTRODUCTION

The choice of which law to apply to arbitration is an issue more fundamental in international commercial arbitration than in domestic arbitration. In a purely domestic arbitration in Nigeria, the applicable law will usually be Nigerian law, unless otherwise expressly agreed by the parties. However, in international commercial arbitration, two or more different national laws or systems of law may be applicable to the substance of the transaction thereby requiring parties to agree on the law of which country should govern the arbitration. International arbitral rules generally allow parties to an agreement containing an arbitration clause to choose the substantive law that will govern the dispute.[1] The parties may agree on the substantive and the procedural law of a particular jurisdiction in the desire to obtain certain advantages and may specify in addition that "general principles of law"[2] shall apply in the belief that the choice will ensure neutral outcomes or secure special benefits. The parties may not consider if there are uncertainties in the content of the chosen

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1. A. Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, London 1986) 77-78 cited in General Principles of Law in International Commercial Arbitration <www.trans-lex.org/127400/> accessed 27 April 2016. (Hereinafter referred to as General Principles of Law)
2. Sometimes, in the desire to cover possible loopholes which may be present in the particular national laws, parties may decide further that general principles of law should apply. However, "when the parties clearly designate the substantive law of a particular jurisdiction, there is little room for the application of general principles of law. Nor would there be much justification for the imposition of such principles, as the agreement by the parties on an explicit, developed national law exhibits a common understanding of or familiarity with such law, as well as an intention to be bound specifically to a relatively inflexible standard". See 'General Principles of Law in International Commercial Arbitration' <www.trans-lex.org/127400/> accessed 27 April 2016

law or whether there are conflicts between the choice of law and certain mandatory rules of public policy which may affect the validity or the enforcement of the contract or the award.[3]

Most arbitration laws generally allow parties to a commercial agreement containing an arbitration clause to choose the substantive law (and even the procedural law) that will govern the resolution of any dispute arising from the agreement[4] but do not provide any solution to how arbitrators should resolve the issues of conflict between the choice of law of the parties and other systems of laws foreign to the law of the contract.[5] Thus, the "relationship between an arbitrator's duty to apply parties' choice of law and his duty to apply the relevant mandatory rules foreign to the substantive law of the contract remains controversial ..."[6] This article therefore examines how the expected outcome or intended benefit of a choice of foreign law of parties to international commercial arbitration in Nigeria[7] may be frustrated by some other prevailing systems of law e.g. the mandatory rules of public law and other general principles of law or public policy of the foreign country. The work further examines the seeming conflict between the law of the place of arbitration (*lex arbitri*) in Nigeria and in some other countries like the United States of America and England. It also discusses some conceptual aspects of the term international commercial arbitration and analyses certain theories which have been formulated in answer to the challenges of control by the dual systems of law in international commercial arbitration.

The Meaning of International Commercial Arbitration

There is no universally acceptable definition of the term "International Commercial Arbitration".[8] In attempting to underscore the import of the term Nwakoby and Aduaka[9] examine the words 'international' and 'commercial' separately and proceeded to adopt the meaning of international arbitration provided in the Arbitration and Conciliation Act.[10] Some scholars have however approached the task by considering the nature of the transaction. That is whether it is transnational (involving more than one country) as well as the nature of the parties to the transaction, particularly their nationality or habitual place of residence and where the party is a corporate entity, the place or the seat of its central control or management.[11] It has been further suggested that another factor for determining whether arbitration is international or not is by considering the tools which have been agreed upon to govern the dispute, i.e. the substantive and the procedural law. The effect of this proposition is that if the parties choose international norms rather than domestic laws of a particular state, then the arbitration is international.[12] It is observed that this approach will certainly present

3. Ordinarily, the idea behind the desire for a choice of law in international commercial arbitration is commendable. Choosing the law of arbitration "prevents the application of conflict of laws rules. Because no party can be sure of which conflict rule will apply in the event of a dispute [and] (unless the forum is contractually set) uncertainty can be great". See C.M. Gertz, 'The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage' (1991) 12(163) Northwestern Journal of International Law & Business 172-173
4. <http://www.punuka.com/uploads/arbitration_agreements.pdf> accessed 27 April 2016
5. M.R. Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?' (1992) 10(1) Beckley Journal of International Law, 60 <Http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1118&ConText=bjil> accessed 25 December, 2015
6. ibid 61
7. The challenge of choice of foreign law with respect to international commercial arbitration is not common to arbitrations in Nigeria as the difficulty which this paper seeks to address is transnational. This stems from the fact that legal systems vary from jurisdiction to jurisdiction and once there is a situation warranting the application of dual systems of law or laws of different nations, the challenge is that the outcome may not favour the original intention behind the choice of the parties
8. G.C. Nwakoby and C.E. Aduaka, 'Obstacles facing International Commercial Arbitration' (2015) 7(3) Journal of Law and Conflict Resolution 16. <http://www.academicjournals.org/journal/JLCR/article-full-text-pdf/DBCD59B54216> accessed 2 May 2016
9. ibid
10. CAP A18, Laws of the Federation of Nigeria, 2004
11. A. Redfern and M. Hunter *et. al., Law and Practice of International Commercial Arbitration*, (London: Sweet and Maxwell, 2004) 14 cited in Nwakoby and Uduaka, (n 8)
12. See R.J. Cole, 'Some Reflection on International Commercial Arbitration' (Unpublished LL.M Dissertation, University of South Africa, 2003)14. <Http://uir.unisa.ac.za/bitstream/handle/10500/1111/dissertation.pdf;Jsessionid=4367F1F54FC386 9D83971 36DC6346AA1?sequence=1>

more difficulty than it is meant to resolve. This is because the choice of law of the parties is not always sacrosanct. Where parties decide to choose a foreign law or international procedural laws or rules in respects of arbitration that is overtly domestic in all respect, the court or arbitral body may not accept or treat same in some jurisdictions as international arbitration. In the USA for instance, a choice of law may not be honoured if the transaction does not bear a reasonable relationship with the state or nation whose law have been chosen. "Ordinarily, the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs".[13] Thus, under the Uniform Commercial Code (UCC) of the United States, courts in the USA are more likely to uphold a choice of law (all other conditions being present)[14] if the transaction has some connections with the chosen jurisdiction. In the USA case of *Mell v Goodbody & Co*[15] the court in reiterating the principle of *reasonable relationship* under the UCC observed:

> Defendant's primary place of business is in New York; it is there that the major portion of the securities under the contracts were purchased and sold on the major exchanges. Plaintiff's collateral was kept in New York; defendant's central records of all its margin accounts were kept in New York; bills on margin accounts were made in New York; and it was in New York that defendant made its principal borrowings to cover its margin accounts. All of this is not to say that there were not also very substantial relationships with Illinois in these brokerage agreements. Yet the numerous and significant contacts with New York clearly satisfy the "reasonable relationship" test applicable in this choice of law situation.

In Nigeria, the Supreme Court has demonstrated that why the chosen law should govern the transaction, the choice of law of the parties is not conclusive. In *Sonnar (Nig.) Ltd. v Partenreedri M.S. Nordwind (owners of the M.V. Norwind),*[16] Oputa JSC (as he then was) stated:

> …nowadays a clause of the proper law by the parties is not considered by the court as conclusive… In this case, the rice was to be shipped from Thailand, the shippers are in Nigeria and the contract was to be performed in Nigeria by delivery in Lagos, Nigeria. The Bill of Lading was issued by a Liberian company. The whole transaction from beginning to end had little or nothing to do with Germany. Why then invoke German law as the proper law of the contract?

Both jurisdictions (Nigeria and USA) would not necessarily treat a transaction or arbitration as international merely because some foreign laws were chosen to govern the transaction if the transaction itself has no element of international trade. Thus, reliance on the choice of law in determining whether arbitration is international may not bring out the desired result in these jurisdictions and as such this approach is not a proper test.

In Nigeria, the Arbitration and Conciliation Act[17] provides a definition for some key terms including 'commercial' and when arbitration can be termed as international. Supposedly, this is aimed at

13. See Uniform Commercial Code 1952, § 1-105, Comment 1
14. Apart from the requirement that the transaction must have some connection with the chosen jurisdiction, the Supreme Courts of the USA has long before now laid down the law that parties in choosing the law to be applied to the transaction or in choosing the place of performance must act in good faith. In *Seeman v Philadelphia Warehouse Co.,* 274 U.S. 403 at 408, 47 S. Ct: 626, 71 L. Ed. 1123 (1927) the US Supreme Court held: "A qualification of these rules ...is that the parties must act in good faith, and that the form of the transaction must not "disguise its real character"... The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject"
15. 10 Ill. App. 3d 809, 295 N.E.2d 97 (1973) 812-13, 295
16. (1987) 4 NWLR (Pt 66) 520
17. Cap. A18 Laws of the Federation of Nigeria, 2004 (hereinafter referred to as ACA). The first legislation on arbitration in Nigeria is the Arbitration Ordinance, 1914 which later became an Act under chapter 13 of the Revised Laws of Nigeria, 1958. This was subsequently adopted as Law of the Regions and later, as Law in some States. In 1988 the Arbitration and Conciliation Decree was promulgated. This was revised in 1999 as Arbitration and Conciliation Act, Cap. 19 Laws of the Federation of Nigeria now Cap. A18, Laws of the Federation of Nigeria, 2004. See a short relay of the development of arbitration legislation in Nigeria in P.O. Idornigie, 'The Doctrine of "Covering the Field" and Arbitration Laws in Nigeria' (2000) 65 Journal of the Chartered Institute of Arbitrators 193

avoiding conceptual challenges as to what is commercial arbitration and what arbitration qualifies as international. Under the ACA[18] "commercial" means:

> all relationships of a commercial nature, including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.[19]

According to Gaius Ezejiofor,[20] "the definition covers a wide range of trade and business transactions and the list is not exhaustive". In understanding whether arbitration is international it must first of all be ascertained that the transaction is commercial. The meaning of what is commercial arbitration is therefore relevant to this discussion to the extent that a dispute must first of all arise from a commercial agreement before it can be considered as international or domestic. Besides, the issue of choice of law does not arise if what exists between the parties is anything short of commercial transaction.[21] Furthermore, the ACA only applies to commercial arbitration. Thus, matrimonial causes, disputes arising from tort or criminal law cannot be a subject matter of arbitration as they are not commercial disputes. Again, certain arbitration agreements which are usually found in memorandum of understanding between multinationals and their host communities to provide certain amenities and employment opportunity to community members as part of the company's corporate social responsibility do not fall within the scope of commercial arbitration. The list of transactions which the ACA recognises as commercial transactions impliedly excludes these relationships.

On the other hand, parties may despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.[22] The ACA,[23] for the avoidance of doubt however, has set out the nature of commercial transactions or arbitration which can be regarded as international: That is when-

a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different countries; or
b) one of the following places is situated outside the country in which the parties have their places of business-
   (i) the place of arbitration, if such place is determined in, or pursuant to, the arbitration agreement;
   (ii) any place where a substantial part of the obligation of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected; or
c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or
d) the parties, despite the nature of the contract, expressly agreed that any dispute arising from the commercial transaction shall be treated as an international arbitration."

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18. Section 57(1) ACA
19. ibid
20. Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (Longman, Lagos 1997) 134
21. See the long title of the ACA which states that the ACA is to "provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation"
22. See 57 (2) (d) ACA. See G.G. Otuturu, 'Law and Practice of Arbitration in the Settlement of Disputes arising from Petroleum Operations: *Baker (Nigeria) Ltd. v Chevron (Nigeria) Ltd*.' (2005) 3(4) Nigerian Bar Journal, 43
23. s 57(2) of the Act

It should be noted that under paragraphs (a) and (d) of the above quoted section, parties[24] can decide to treat arbitration as international even though the subject matter of the dispute between them has no "external connection".[25] Most jurisdictions in recent time have refused to be bound by this kind of stipulation in deciding the applicable law of arbitration.[26]

Applicable Laws to International Commercial Arbitration

According to McCarthy Mbadugha[27] seven different systems of law may be relevant to International Commercial Arbitration. They are:

a) The law that determines the capacity of the parties
b) The law that determines the validity of the arbitration;
c) The law governing the arbitration itself and in particular the procedure;
d) The curial law or the law of the seat of the arbitration;
e) The law applicable to the substantive dispute;
f) The law of the place of enforcement; and
g) Where there is conflict of the applicable substantive law, the law under which that conflict is to be resolved.

The issue of the applicable law does arise in most international arbitration and according to Sutton, Kendall and Gill,[28] this can be of fundamental importance, because:

i) The parties are free to choose the applicable laws, whether or not they make an express choice.
ii) Different laws can operate simultaneously on different aspects of the arbitration;
iii) If the parties fail to make express choice and/or fail to make clear choices the matter will usually have to be investigated in the course of arbitration; and
iv) The result of that determination can have a radical effect on the outcome of the dispute.

The law governing performance obligations under the law of contract is known as the 'governing law' or the proper law of the contract. This law may be uncertain if the parties fail to make it express in which case the proper law is determined by the ordinary rules governing the ascertainment of the proper law of any contract and this is based on the Rome Convention on the Law Applicable to Contractual Obligations.[29] In essence, where the proper law of the contract is uncertain, relying on the Rome Convention, the applicable law is the law of the place where the seat of the arbitration is. In other cases, the common law test is: "with which system does the transaction have its closest and most real connection?"[30]

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24. The international nature of arbitration does not mean that the parties must necessarily be of different nationalities. It is sufficient if the arbitration involves any foreign element or the business dispute is of an "international character". See Art. 1(1) of the International Chamber of Commerce Arbitration Rules. Furthermore, section 53 of the Act allows parties to an international commercial agreement to agree in writing that dispute in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to the Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties
25. See Ezejiofor (n 20) 135
26. The courts in USA, England and Nigeria, as we shall soon see, will refuse to respect the choice of law of the parties under various circumstances, and subject the parties to the law of the seat as if the transaction is a domestic one
27. McCarthy Mbadugha, 'International Commercial Arbitration: Choice of Law/Venue Issues to Consider' (2006) 3 The Arbitration 1 at 8
28. See Sutton, Kendall and Gill, Russel on Arbitration (21st edn, Sweet & Maxwell, London 1997) 67
29. See the Rome Convention on the Law Applicable to Contractual Obligation of June 19, 1980. The Convention is applicable within European Member States. It is not applicable to arbitration agreement. The only relevance of this Convention to this discussion is that it forms a basis for determining the proper law of a contract subject matter of the arbitration. The Rome Convention has been given effect in England by the Contract (Applicable Law/Act 1990 for contracts made after April 1, 1991
30. See Sutton, et. al. (n 28) 69

Party Autonomy and the Choice of Law

It has been identified that one of the most distinguishing features between arbitration and regular court proceedings is the autonomy of parties to arbitration to determine the arbitrators, the applicable law and even the procedures to be adopted.[31] As rightly recognised, "the process (of arbitration) derives its force principally from the agreement of the parties, and in addition, from the State as supervisor and enforcer of the legal process".[32] To this extent, parties to international commercial arbitration have the autonomy to subject arbitration in one State to the law or the *lex arbitri* of another State[33] or agree that the arbitration be held in another State.[34] The term "party autonomy" has been defined as "the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations".[35] It is the "freedom of the parties to construct their contractual relationship in the way they see fit".[36]

In Nigeria, section 53 of the ACA recognises the autonomy of the parties to arbitration by providing as follows:

> Notwithstanding the provisions of this Act, the parties to an international commercial agreement may, agree in writing that dispute in relation to the agreement shall, be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties.

Section 47 of the ACA further provides:

> The Arbitral Tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance of the dispute.

From the above provisions, where the parties have expressly chosen the law, for example the law of Nigeria, as the law applicable to the substance of the dispute, the tribunal ordinarily ought to decide

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31. The United Nations Commission on International Trade Law (also referred to as the UNCITRAL Model Law), for instance, gives a good lead on the autonomy of the parties to arbitration. Under Articles 10 and 11 of the Model Law, autonomy is given to the parties to set up the arbitral tribunal. Under Article 13 of the Model Law, the parties are given autonomy for agreeing on the procedure under which an arbitrator can be challenged. Furthermore, under Article 19 parties are given autonomy for determining the procedure under which the arbitration is conducted. The Model law was adopted on June 21, 1985 as a result of a comprehensive study into the various arbitration laws throughout the world and it was intended to provide a model that could lead to greater uniformity. It is contained in United Nations document A/40/17, Annex 1. See Sutton, (n 28) 640. Party autonomy is a general principle of private International law which arbitrators should respect, though same is subject to limits imposed by other equally important general principles of law and public policy. See M.R. Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?' (1992) 10(1) Beckley Journal of International Law 63. <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1118&context=bjil> accessed 25 December 2015
32. J.O. Orojo and M.A. Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associate (Nig.) Ltd, Lagos 1999) 3
33. This practice is becoming very popular in International Commercial Arbitration as a result of the steps taken by the international community at setting up certain unified rules of procedures for arbitral proceedings. Example is the UNCITRAL Model Law
34. The agreement to hold arbitration in a neutral State may also be accompanied with the choice of a different procedural law
35. Redfern and Hunter, with Blackaby and Partasides, 'Law and Practice of International Commercial Arbitration' (4th edition, 2004) 315 cited in M. Pryles, Limits to Party Autonomy in Arbitral Procedure <http://www.arbitration-icca.org/media/4/48108242525153/media012223895489410limits_to_party_autonomy_in_international_commercial_arbitration.pdf> accessed 1 May 2016
36. J. Ansari, 'Party Autonomy in Arbitration: A Critical Analysis' (2014) 6(6) Researcher 48. <http://www.sciencepub.net/researcher/research0606/010_25323research060614_47_53.pdf> accessed 4 May 2016

in accordance with the relevant rules of law in force.[37] This is simply in line with the elementary principle of *pacta sunt servanda* in the law of contract. Where the law or legal system is so determined by the parties the law is usually construed as referring to the substantive law of that country and not its conflict of laws rules except otherwise expressed.[38]

The autonomy of the parties to choose or agree on the law applicable to the arbitration is almost universally acceptable. In the USA and UK, like in other jurisdictions, the right of parties to arbitration to choose, agree or determine the arbitral rules of procedure is well recognised.[39] For instance, by section 34 of the English Arbitration Act of 1996 the parties to arbitration may agree to determine the procedure themselves or by reference to a set of Arbitration Rules.[40] In the United States, the principle of party autonomy in commercial transaction first emerged through the Uniform Commercial Code[41] in the following language:

> Whenever a contract, instrument, document, security or transaction bears a reasonable relationship to one or more states in addition to this state the parties may agree that the law of any such other state or nation shall govern their rights and duties. In the absence of an agreement which meets the requirements of this subsection, this Act governs.

In France, the provision is not different. Article 1494 of the French Civil Code provides for the conduct of international arbitrations as follows: "The arbitration agreement may, directly or by reference to the Arbitration Rules, determine the procedure to be followed in the arbitral proceeding…"

Although, parties have autonomy in arbitration, if the choice of law is intended to sabotage the provision of any national law or enforce an otherwise illegal transaction in the country of performance of the contract some jurisdictions will strike such choice down. The decision of a Federal Court in the Southern District of New York in *Lehman Brothers Comm. Corp v Minmetals Int'l Nonferrons Metal Trading Co*[42] is a good illustration of this. The dispute in Lehman arose out of foreign exchange and swap trading transactions during the years 1992 1994 between *Lehman Brothers Commercial Corporation (LBCC) and its affiliates and HU Xiangdong (HU) an employee of Non-ferrous Metal Trading Company in China (Non-ferrous)*. During the relevant period, (1992 1994), (HU) an affiliate of Non-ferrous entered into several foreign exchange transactions on behalf of Non-ferrous. A dispute soon arose over certain payments which were due to LBCC under the several contracts between the parties. These payments, save for the first instalment, were never made, thus resulting in LBCC bringing an action for breach of contract claims against Non-ferrous and its parent corporation.

In a summary judgment application, the court observed, that the contracts executed by the parties contained a clause designating New York law to govern their transactions. The court appeared to have no doubt that New York law was enforceable. Nevertheless, the court applying New York law found that the contracts were subject to potential unenforceability because their performance in China was illegal. The illegality arose from the fact that during the relevant period 1992 1994, Chinese law required state owned enterprises such as Non-ferrous to obtain a license from the *State*

37. See Idornigie, P.O. 'The Legal Regime of International Commercial Arbitration' (Unpublished Ph.D Thesis, Faculty of Law, University of Jos, 2002) 67
38. Section 47(2) of the ACA. See also Idornigie, ibid 68
39. Hacking, D. 'Arbitration Law Reform in Europe' (1999) 65(3) The Journal of the Chartered Institute of Arbitration 183-184
40. See also section 1042(3) of the German Arbitration Law of 1998
41. First published in 1952. See generally T.G. Ryan, 'Reasonable Relation and Party Autonomy under the Uniform Commercial Code' (1979) 63(219) Marquette Law Review 222 <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=2064&context=mulr>accessed 1 May 2016
42. 417 U.S. 506, 516 (1984) cited in Adewale Atake, 'Enforcing Choice of Law Clauses in Nigeria:[Pacta (will not be) Sunt Servanda] -Where the Transaction is Illegal' <http://www.mondaq.com/article.asp?article_id=25493&signup=true> accessed 4 May 2016

Administration Exchange Commission (SAEC) before engaging in foreign exchange transactions. Because Non-ferrous did not obtain any such license, (HU's) foreign exchange transactions and swap trading were illegal under Chinese law. The court thus held that a New York choice of law provision could not be used to circumvent the laws of a foreign country and was thus unenforceable.

While the choice of a foreign law is not in itself bad, the resultant challenges surrounding the choice are numerous. As stated by Redfern and Hunter,[43] the concept of subjecting arbitration in one State to the law of another State has been the subject of much theoretical discussion. Thus, while the parties have a very wide prerogative on the choice of which law to govern their transaction, their choice may suffer several setbacks especially if it conflicts with mandatory rules of the chosen jurisdiction.

Effect of Mandatory Legal Rules of Public Policy on the Choice of Law

Some rules are regarded as mandatory legal rules of Public Policy. They cannot be waived and parties choosing the law of the arbitration must give attention to such rules. The nature of mandatory rules is fully articulated in the UNCITRAL Model Law as follows:

> In addition to legal rules applicable by virtue of a choice of law by the parties, or by virtue of the rules of private international law, certain rules of an administrative or other public nature in force in the countries of the parties and in other countries (e.g. the country of a sub-contractor) may affect certain aspects of the construction. These rules, which are often mandatory, are usually addressed to all persons resident in or who are citizens of the State which issued the rules, and sometimes to foreigners transacting certain business activities in the territory of the State. They may be enforced primarily by administrative officials. Their purpose is to ensure compliance with the economic, social, financial or foreign policy of the State. The parties should therefore take them into count in drafting the contract.[44]

In the same vein, Article 7(1) of the European Convention provides that:

> When applying under this Convention the law of a country, effect may be given to mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.[45]

Generally, mandatory rules protect the social and economic interests of a society.[46] Some of the commonly cited mandatory rules are: "competition law, securities regulation, blockade or boycott law, currency control, confiscation, nationalisation",[47] or taxation law. These laws are put in place by state to protect the financial, social and economic goals of the state as well as the interest of the public and they bind any person within the state jurisdiction including foreigners doing business within the state. According to Baniassadi:

> One general principle of law that party autonomy must contend with is the conflict of laws principle which provides that certain mandatory rules must be applied in the territory where

43. Redfern and Hunter, (n 1) 84
44. UNCITRAL, Legal Guide on Drawing up International Contracts for the Construction of Industrial Works at 304, UN Doc. A/CN.9/SER. B/2 U.N. Sales No. E 87. V.10 (1988) cited in Baniassadi, (n 5) 64
45. European Convention on the Law Applicable to Contractual Obligations 1980 O.J.(L 266) 1
46. Baniassadi, (n 5) 62
47. ibid

> certain activities are conducted or undertaken. This principle is based on the idea of national sovereignty and is designed to protect the public interest. Since this public policy justification calls for imposing certain controls over contractual relationships, the application of these controls may not be left to the parties' discretion.[48]

From the foregoing, it is obvious that international arbitral institutions fully recognise the role of mandatory rules of public policy of every country. The right to choose a foreign law by parties to arbitration implies that parties to an arbitration which is to be held in one country, may by their agreement, subject the arbitration to the law of another country, (e.g. parties to arbitration in Nigeria may choose the laws of USA or England as the applicable law without necessarily choosing the courts of the foreign country). A challenge may present itself when a party wants to go to court during the course of the arbitration, as to which court he should turn, Nigerian court -which is the court within the forum of the arbitration or the courts in the country whose laws have been chosen? Why parties have enjoyed the autonomy to make these choices, the latitude of parties in this regard has been referred to as forum shopping. This is the act of a party shopping for the forum, jurisdiction or court which is most favourable to him. According to Ferrani, forum shopping "is, if not a dirty word, at least a term with disparaging or pejorative connotations, indicating something that commentators and courts consider to be "evil" and, therefore, must be avoided"[49] Ferrani adds that:

> …forum shopping goes against the principle of consistency of outcomes, or, as one commentator puts it, "decisional harmony",[50] apparently a fundamental tenet of virtually any legal system, that forum shopping overburdens certain courts and creates unnecessary expenses as litigants pursue the most favorable, rather than the simplest or closest, forum, that forum shopping contrasts with the idea of a "level playing field"[51] in that it may distort the playing field, and that forum shopping may create a negative popular perception about the equity of the legal system.[52]

Some jurisdictions have put up certain laws to curb this trend for several reasons. Among the reasons mentioned by Ferrani above, the major challenge in forum shopping is that there is bound to be inconsistency of outcomes which most times turn out to be unfavourable to the party making the choice. Where a party chooses the law of a place and for some reasons shops for a court between the seat and the country whose laws are chosen, he may face some uncertainties as exemplified in some of the cases which are considered in this work.[53]

The *Lex Arbitri*

The phrase lex arbitri is a Latin maxim which means the law of the arbitration agreement. This law is different sometimes from the law of the contract. An English Judge gave a clear illustration of what is lex arbitri in the following words:

> What then is the law governing the arbitration? It is, as the present authors trenchantly explain,[54] a body of rules which sets a standard to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the

48. ibid
49. F Ferrani, 'Forum Shopping in the International Commercial Arbitration Context: Setting the Stage' at 1 <http://blogs.law.nyu.edu/transnational/wp-content/uploads/2013/10/Forum-Shopping-in-the-International-Commercial-arbitration-context-with-index.pdf> accessed 11 May 2016
50. G.P. Calliess, Introduction, in G.-P. Calliess ed., Rome Regulations. Commentary on the European Rules of the Conflict of Laws, 2011, at 6
51. G.D. Brown, 'The Ideologies of Forum Shopping Why Doesn't a Conservative Court Protect Defendants' (1993) 71 North Carolina Law Review 649, 668
52. Ferrani, (n 49) at 5
53. See *Baker Hughes Process Systems Ltd. (A Division of Baker Hughes Inc. of Delaware USA) v ABN Ltd,* infra (56), *WBA Ltd. v Zhejiang Group of Companies Ltd. & Anor,* infra (n 59), etc.
54. The reference was made to the previous edition of Redfern and Hunter. See Redfern and Hunter (n 1)

> rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitration (e.g. removing an arbitrator for misconduct).[55]

The arbitration law or the *lex arbitri* of one State in most cases differs from that of other States. This no doubt poses certain conflict between the *lex arbitri* and any other system of law that may be relevant to the arbitration. Although, parties may choose the law of arbitration or the *lex arbitri* of a country, they may not be very certain as to the result of the application of such laws or rules. This problem manifested itself in the case of *Baker Hughes Process Systems Ltd. (A Division of Baker Hughes Inc. Of Delaware USA) v ABN Ltd*.[56] In this case, a Nigerian Company, Andy Boyo Nigeria Ltd. (ABNL) was forced into partnership with a foreign firm, Baker Hughes Process Systems (BHPS) which claimed to be a division of Baker Hughes Elo allegedly incorporated in Bermuda by Baker Hughes Inc. of Delaware, USA. ABNL was forced into this partnership in order to secure a contract from Shell Development Company of Nigeria Ltd. (SPDC) at the request of the latter. Before agreeing to the partnership with ABNL, BHPS insisted that ABNL should first of all enter into a Joint Venture Agreement with her for the purpose of the partnership and that an arbitration clause be inserted into the Joint Venture contract which will provide that in the event of dispute arising between the partners:

i) No Nigerian Law will be applicable.
ii) The applicable law or laws would be that of Texas, one of the states in USA.
iii) The seat of any arbitration will be in Houston, Texas USA.

The contract was for the construction of a mobile crude oil production barge for ABNL. Dispute arose as to disbursements, remunerations and payments which necessitated BHPS to promptly call for arbitration in accordance with the Joint Venture Contract. At the time the arbitration was called BHPS had dissolved into Baker Hughes Inc. of Delaware through certain schemes of arrangement.

The Respondent (ABNL) as a Nigeria Company decided to rely on the provisions of the Companies and Allied Matters Act (CAMA)[57] which forbid a foreign Company from doing business in Nigeria except it is incorporated as a business concern in Nigeria or it is exempted from registration or incorporation under the appropriate provisions of CAMA. The Respondent also contested the validity of the juristic personality of the Claimant there being no evidence of incorporation either in Bermuda as it claimed or in USA or anywhere else. The majority of the arbitrators dismissed the Respondent's preliminary objection on the ground that CAMA was of no universal standard or applicability relying on the arbitration clause excluding the applicability of the laws of Nigeria. Unfortunately, the majority of the arbitrators did not consider the issue of the legal personality of the Claimant which, at least, must be part of the laws of Texas. While the exclusion of the provisions of CAMA in the face of the arbitration agreement does not pose any serious question[58] the opinion of the majority of the arbitrators with regard to the question of the

55. ibid 79
56. Unreported Case No. AAA50T 198005001 Award dated 26th July, 2004 copiously discussed in A.O. Giwa, 'Intrinsic and Extrinsic Factors as Causes of Bank Distress and Failures in Nigeria (2006) 1(1) Delta State University, Commercial & Property Law Journal 185 191
57. Section 53, Cap. C20 Laws of the Federation of Nigeria, 2004; Section 56 provides for exemption
58. Where parties to arbitration have freely exercised their autonomy in choosing a particular system of law, such parties are bound by their choice and a party cannot at the same time rely on the system of law of another country favourable to him

corporate personality of the Claimant creates more confusion in the law relating to the determination of the applicable law of arbitration where parties to the arbitration choose to be bound by a foreign law. The Nigerian court was moved by the clause forbidden the application of Nigerian laws even though the law on legal personality of a body corporate is almost the same everywhere. It is almost obvious that in choosing the laws of Texas, the Respondent did not wish to waive its right guarantee under the law of the arbitration or the *lex arbitri.* This is evident from the contention of the Respondent in invoking the provisions of CAMA, but the court did not agree with him.

On the other hand, the case of *WBA Ltd. v Zhejiang Group of Companies Ltd. & Anor*,[59] presents a sharp contrast to the case above. In this case the contention was on the power of the arbitrators to order for security for cost. In this case, an *ad hoc* arbitration was held in London between a Nigerian Company and two Chinese Companies. The choice of law of the arbitration was the English Arbitration Act 1996. The Claimant was particularly influenced in this choice because by section 38(3)(a) & (b) of the English Arbitration Act 1996 the power of an arbitration to order security for costs cannot be exercised if the Claimant is either a foreigner National/Resident or Company. Both parties were foreign nationals. On the other hand, there is no specific provision under the Nigerian Arbitration and Conciliation Act which provides for security for cost. Unfortunately too, the arbitrators did not feel bound by the said sections of the English Act. The arbitrators eventually made an order of security for cost and because the Nigerian Claimant could not comply with the order his claim was dismissed. The essence of the choice of English law was defeated by the result of the arbitration. What is more, the House of Lords has also held that the English High Court has a discretion to order security for costs in the case of an international arbitration taking place in England, but otherwise having no connection with England.[60]

Given the uncertainties surrounding the choice of foreign laws and the fact that the choice of the parties is not always sacrosanct, certain theories have been formulated by scholars in an attempt to address the application of the dual system of law to international commercial arbitration. Some of these are the delocalisation theory and the theory of the law of the seat.

The Delocalisation Theory

The delocalisation theory[61] advocates for the detachment of international commercial arbitration from the control of the law of the place where it is held. The idea is that instead of a dual system of control, first by the *lex arbitri* and then by the Courts of the place of enforcement of the award, there should be only one point of control, which is, that of the place of enforcement.[62] This theory is

59. Cited in McCarthy Mbadugha, (n 27) 10
60. See *S A Coppee Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd*. (1995) 1 AC 38. cf: *Bank Mellat Helleniki Techniki* SA (1948) Q.B. 291 where the same House of Lords per Robert Golf L.J. stated that "If parties simply choose to arbitrate here as a matter of convenience … the policy that historically underlies an order for security for costs by a foreign litigant appears to me to be in most cases inapplicable". See generally, David Altaras, 'Security for Cost' (2003) 69(2) Journal of the Chartered Institute of Arbitration 8189 and D. Akpedeye and B.E. Umukoro, 'Non-arbitral Court and Security for Cost in Arbitration Proceedings in Nigeria' in (F Emiri & G Deinduomo eds) Law, Oil and Contemporary Development Issues in Nigeria, (Malthouse Press Ltd., Lagos 2008) 409-418
61. This theory was invoked by a group of jurists in the 1960s. See Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 I.C.L.Q 358; Bernimi, 'The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trial of the New York Convention's Ambit and Workability in the Art of Arbitration (Liber Amicorum for Pieter Sanders) (1982) 50, p. 58. See also Hong-Lin Yu, 'Defective Awards must be Challenged in the Courts of the Seat of the Arbitration A Step Further than Localization' (1999) 65 (3) Journal of Chartered Institute of Arbitration 195
62. It is obvious that an arbitral award is the end product of every arbitration. The award could be rendered invalid or unenforceable by the provisions of local laws or laws of the place of arbitration such that parties to the arbitration are not only going to contend with the law of the place of enforcement but also with the law of the place of arbitration where both are different. Where an arbitrator has delivered an award, the delocalisation theorists expect that the legal machinery for the control should remain in the place of enforcement to avoid impeding the enforcement of the arbitral award

founded on certain arguments: first, that International Commercial Arbitration is self-regulatory as the parties are autonomous and free to choose any set of procedural rules to follow. According to Herrman:[63]

> The most fundamental principle (of the Model Law) is to recognise the freedom of the parties with minimal restrictions. Whether by reference to standard (institutional or *ad hoc*) rules is one of agreements, the parties could effectively tailor the rules of the game to their particular case and needs, unimpeded by peculiar local rules on procedure, including evidence.

Furthermore, the arbitral tribunal also has the power to fill any gaps in these rules by giving procedural directions. All these sets of rules are what constitute "the law of the arbitration."

Second, it is the argument that International Commercial Arbitration should only be controlled at the place of enforcement of the award notwithstanding the place of the arbitration. Proponents of delocalisation theory are of the view that International Commercial Arbitration should not be subjected to legal controls which vary from country to country.[64] These theorists maintain that the control mechanism should only be exercised by the country where the recognition or enforcement of the award is sought. The objective is to eliminate potential obstacles which may arise as a result of the different restraints imposed by different laws.[65]

This theory as sound as it seems completely undermines the principle of party autonomy which is the most distinguishing factor in the idea behind arbitration. If every arbitration must be decided based on the law of the place of recognition or enforcement of the award, then parties need not choose any law. The choice of law, all things being equal, is usually part of the contract. Expectations of investors are reflected in the choice of parties and some investors may not venture into some transactions if they cannot control the outcome of the business in the event of a dispute.

The Theory of the Law of the Seat

As a direct opposite of the delocalisation theory, the strength of the 'seat' theory[66] is that "it gives an established legal framework to an International Commercial Arbitration so that, instead of "floating in the transnational firmament unconnected with any municipal system of law",[67] the arbitration is firmly anchored in a given legal system that will both assist and, to some degree, control it.[68] The 'seat' theory places so much premium on the law of the place where the arbitration takes place. This invariably means that where parties have chosen to arbitrate in a particular country they should be taken in the absence of agreement to have accepted also the laws of that country as the law of the arbitration or the *lex fori*. This has never been completely practicable. According to Redfern and Hunter:

> It is sometimes said that parties who have chosen a particular place of arbitration have chosen the law of that place, the lex arbitri as the procedural law that will govern their arbitration.

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63. Gerald Herrmann, 'The Role of the Courts under the UNCITRAL Model Law' cited in Greg Chukwudi Nwakoby, Contemporary Problems in International Commercial Arbitration in Nigeria (2004) 2(3) Nigerian Bar Journal 333
64. See Redfern and Hunter, (n 1) 89 90
65. See Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Award' (1989) 63 Tul. L.R. 647 cited in Hong-Lin Yu, (n 61) 197
66. The seat or forum or locus arbitri of the arbitration is where the arbitration is to be held. The theory of the law of the seat which lays emphasis on the law of the place of the arbitration influenced the wording of the Geneva Protocol to the New York Convention of 1958. Article 2 of the Protocol provides that a tribunal procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place"
67. See *Bank Mellat v Helliniki*, (n 60)
68. See Redfern and Hunter, (n 1) 92

> This seems rather like saying that a motorist who has chosen to visit France has chosen to obey French Law. It is true that a motorist who takes a car to France becomes subject to French Law as to wearing a seat belt, as to giving way to traffic from the right and so on but this is not because he has chosen French Law. What he has done is to choose to go to France and in so doing, he has become subject to French Law to the extent that it chooses to regulate his activities.[69]

No doubt, parties who have chosen to take their arbitration to a foreign or neutral country may have done so for a reason.[70] By doing so they might not have necessarily intended the application of the law of that place to their relationship.[71] For instance, under the UNCITRAL Rules, "unless parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration".[72] The major constraint that the law of the seat theory poses is that reference to the law of the place of the arbitration is invariably reference to a particular national system of law which may not be very attractive or suitable to the parties.[73] This is why the delocalisation theory propounds to detach the law of the arbitration from the law of the seat. It is also not uncommon to see that the State or country where the arbitration is to be held has some national interest in the outcome of the award. Such a country may even be a party to the arbitration or her laws may contain certain provisions which are unfair having regard to the nature of the trade between the parties. As noted "A national legislature might, for example, impose import restrictions that substantially affect the contractual rights of private parties. Thus, if an arbitral tribunal applies the law of such a nation in a dispute between the government and a private party, it may include as part of the applicable laws the decrees or legislations imposing import restrictions, resulting in an automatic finding for the government.[74] Worst still, such a country may change her laws during the pendency or before the commencement of the arbitration to her benefit and to the disadvantage of the other party.[75]

Besides, some national laws may not be sufficiently developed to provide a basis for international transactions and even where they are sophisticated, the national system may be more suited for domestic transactions.[76] "Some national laws may promote the national interest at the expense of private parties while political realities in some nations may make resort to national law unacceptably risky from the standpoint of a private contracting party, even though the law is acceptable at the time of contracting.[77]

It is worthy of note that parties to an arbitration can almost obviate all the problems which the law of the seat of the arbitration poses by expressly choosing the law that will guide the arbitration.[78] In

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69. ibid 83 84
70. Parties may decide to choose to arbitrate in a neutral country for economic factors which may be freedom to transfer fund to and fro the country, political factors such as general acceptability to the parties of the country as a result of absence of stringent restriction on the entry of the parties, their lawyers and witnesses into such country. Apart from the political and the economic attractiveness of such country, it is not unlikely that such parties may not have considered the legal implications of choosing the country in question
71. Redfern and Hunter, (n 1) 78
72. See Article 16(1) of the UNICITRAL Arbitration Rules
73. The suitability of a particular place for an international arbitration depends in part on whether there is an adequate infrastructure to accommodate the parties. However, the most important consideration is usually the legal environment. This is relevant to the conduct of the arbitration and to the enforceability of the award. See Redfern and Hunter, (n 1) 284
74. Redfern & Hunter, (n 1) 78-79
75. National laws frequently restrict international transactions by imposing grain embargoes, import quotas, trade boycotts, and currency restrictions. See ibid 77-78
76. General Principles of Law (n 1)
77. ibid
78. Failure to make a clear choice of the place of the arbitration in the arbitration agreement can create ugly result. See *Burhinia Corp. v China National Machinery & Equipment Import & Export Corp*; 819 F. 2d 247 cited in Redfern and Hunter, (n 1) 284

doing this parties must however comply with the mandatory rules and principle of public policy of the seat of arbitration to ensure a valid award. According to Delaume:

> Except in those situations in which compliance with mandatory rules is required, the parties are generally free to choose by way of express stipulation the law applicable to their relation. In the overwhelming majority of cases, the law applicable is the domestic law of a specific country to which the contract bears some connection or the law of a 'third' country selected for reason of expertise (such as English law in regard to maritime matters) or of 'neutrality' (such as Swedish, Swiss or French law)…[79]

The Position in Nigeria

In Nigeria, "parties to an International Commercial agreement may, agree in writing that disputes in relation to the agreement shall, be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to the Arbitration and Conciliation Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties".[80] The law in Nigeria to a very reasonable extent has a relaxed attitude towards arbitrations held in the country.[81] Under the Act, an arbitration tribunal is allowed to apply the law designated by the parties as applicable to the substance of the dispute[82] and the parties are also allowed to choose any international arbitration rules acceptable to them.[83] Like the UNCITRAL Rules, the arbitration rules in Nigeria also recognise that the parties can choose a place where the arbitration is to be held.[84] It is only when the parties fail to do this that the arbitration tribunal is saddled with the responsibility of determining such place and this is to be done having regard to the circumstances of the arbitration.[85] What was not clear at a time was whether the law in Nigeria could allow parties to adopt local rules or national rules of procedure of other State other than international arbitration rules having regard to the restrictive provisions of section 53 of the Act. The ACA having recognised that parties to International Commercial Arbitration can choose both the substantive law and any international procedural rules of their choice, it cannot in another breath impede the autonomy of the parties to choose any rules of procedure acceptable to them whether international or otherwise.

Notwithstanding section 53 ACA, it is now clear that parties transacting business in Nigeria can pick foreign laws to govern their arbitration but in doing so must not attempt to circumvent the law and must show sufficient connection between the chosen jurisdiction and the performance of the contract. *In Sonnar (Nig.) Ltd. v Partenreedri M.S. Nordwind,*[86] the Plaintiffs were Nigerian companies claiming damages for breach of contract arising from non-delivery of par boiled long grain rice shipped to Lagos from Bangkok. The 1st Defendant carried on its business as ship owners in Germany. The 2nd Defendant which was based in Liberia issued the bill of lading. The 3rd

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79. Passage from Delaume, Transnational Arbitration, Part II, Chapter VII at p. 2 quoted in Hong-Lin Yu, (n 61) 201
80. See Section 53 ACA
81. In the past, it has been said that… "the notion that there is a system of international justice will not be shared by some countries, notably those of Africa…, who still see arbitration as a foreign judicial institution which is imposed on them". See Extract from an intervention by Mbaye, Judge of the International Court of Justice, published in 60 Years of ICC Arbitration A Look at the Future, ICC Publication No. 412 at p. 295, 1984 cited by Redfern and Hunter, (n 43) 289. This position has changed. Many African countries do not only have a well established local mechanism for the control of arbitral proceedings but also have adopted international rules of procedures for this purpose
82. See Section 47(1) ACA
83. ibid Section 53
84. ibid First Schedule, Article 15(1). This is similar to Article 16 (1) of the UNCITRAL Rules
85. Such circumstances the tribunal may consider include the nationalities of the parties, the geographical convenience of the country to the parties, or the nature of trade or business which gave rise to the dispute, and even the usual residence (or place of business of) the parties to the dispute because of the need to cut down as far as possible on the expenses and inconveniences of travelling
86. ibid (n 16)

Defendant sold the rice and was based in Thailand. By the agreement of the parties in the Bill of Lading "any dispute arising under this bill shall be decided in the country where the "Carrier" has his principal place of business and the law of such country shall apply except as provided elsewhere herein".

The Plaintiffs proceeded to the Federal High Court in Nigeria. In an application challenging the jurisdiction of the Federal High Court of Nigeria and the applicable law to govern the dispute, both the lower court and the Court of Appeal gave effect to the choice of law clause based on the maxim *pacta sunt servanda*, that is, parties are bound by their contract. Dissatisfied with the judgment of the Court of Appeal, the Plaintiffs then appealed to the Supreme Court. At the Supreme Court, the appeal was allowed on the basis that the transaction was more significantly connected to Nigeria, and as such Nigerian law ought to apply; said Oputa, JSC. (as he then was) in that case:

> What is the relevance of German law to a Liberian ship owner and a Nigerian Shipper? I see none. It is also conceded that when the intentions of the parties to a contract as to the law governing the contract are expressed in words, this expressed intention is general and as a general rule determines the law of the contract. But to be effective, the choice of law must be real, genuine, bonafide, legal, and reasonable. It should not be capricious and absurd. Choosing German law to govern a contract between a Nigerian shipper and a Liberian ship owner is to my mind capricious and unreasonable. Luckily, nowadays a clause of the proper law by the parties is not considered by the court as conclusive… In this case, the rice was to be shipped from Thailand, the shippers are in Nigeria and the contract was to be performed in Nigeria by delivery in Lagos, Nigeria. The Bill of Lading was issued by a Liberian company. The whole transaction from beginning to end had little or nothing to do with Germany. Why then invoke German law as the proper law of the contract?"

It is observed that this decision of the Nigerian Supreme Court is novel in the array of judicial authorities regarding parties' autonomy with respect to the choice of foreign law. The requirement that "the choice of law must be real, genuine, bona fide, legal, and reasonable… not be capricious and absurd" further compounds the existing uncertainties surrounding the law on how the choice of law of parties to arbitration is to be resolved. Apart from the fact that neither the ACA nor any existing applicable rules of arbitration in Nigeria stipulate such requirement, these conditions are themselves an open door to serious conceptual difficulties. First, it is difficult to ascertain what the Court meant by a bona fide or even capricious choice. Second, the fact that the choice must be reasonable raises the issue of what standard the Court used or will be using in determining reasonability of the choice. Is a choice necessarily unreasonable merely because there is no affiliation between the law and the seat of the arbitration? It does not appear so. With respect, the position of Oputa JSC in the above case is a very hard knock on the universally recognised principle of party autonomy and should be reviewed whenever the opportunity presents itself.

CONCLUSION

Today, many countries are trying to create a friendly and an enabling environment for International Commercial Arbitrations conducted within them. This notwithstanding, countries (especially the US, England and Nigeria) have been more willing to exercise some judicial control over the integrity of arbitral proceedings conducted within their territories sometimes contrary to the agreement of the parties. The Delocalisation and the Law of the Seat theories examined above do not specifically respond to the challenges of investors as far as the issue of choice of law is concerned in international commercial arbitration. Given the absence of an established general

principle of law in the event of conflict of laws, cases most times have been treated based on the exigency and need of time, as against the wish of the party. It is argued that the provisions of the various international arbitration rules still appear insufficient. It is advocated that there should be a comprehensive code or set of rules at the global plane on the resolution of conflict of laws which will apply to international commercial arbitration in the event of clash between the choice of the parties and other systems of law. There is too much disharmony in the line of case law in Nigeria and in the two other countries examined above. For instance, while the English arbitration law does not recognise an application for security for cost if foreigners are involved, there being a long line of cases decided on that, the English courts are minded sometimes not to follow that part if the foreigners choose England merely for convenience.[87]

Parties wishing to exercise the choice of a foreign law should therefore not only be concerned with the political and social attractiveness of the country where they desire to have the arbitration conducted but also be concerned with the entire laws of the place as far as international and local commerce is concerned. Investors who are thinking of choosing foreign law or foreign venue as a seat of arbitration are advised to engage the services of experts to ensure that their choice of law or seat is compatible with their expectations. In this regard, parties can be properly guided on whether or not they may be bound by the laws of the place, the extent to which they may be bound by the law of the seat and whether there is any system of law that may seriously frustrate the outcome of the choice.[88]

87. *Bank Mellat Helleniki Techniki*, (n 60)
88. Even in countries with relatively free market economies, national laws often impose restrictions on international transaction. Since such restrictions are imposed through the mechanism of national law, contracts which are governed by that law may well be affected, even though these developments were never contemplated by the parties. See Redfern and Hunter (n 1) 101. Some other countries impose restrictions on who can be appointed as arbitrator. For instance, in Spain, an arbitrator must be a lawyer except he is acting as amiable compositeur. See Spanish Arbitration Act 1988, Art 12. In Saudi Arabia, a foreigner may not be an arbitrator. Thus, there may be a great difficulty when a non-Saudi law is to be applied or where a party to the dispute does not understand the local language. This, no doubt, involves great expenses of translation.