'THE SEAT' OF ARBITRATION – APPROACH TO ARBITRAL PROCEEDINGS

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African countries not the least Nigeria, through both state entities and private companies, are finding themselves increasingly involved in international arbitration. And this is as it should be. With increasing attraction for investment and as the transaction landscape gathers, the dispute resolution industry grows proportionately.

At arbitration, an inherent and inevitable consequence of disputes with an international flavour is the interplay of relevant and applicable laws in the governing agreements, the arbitration agreements and the conduct of the proceedings. Nigerian courts have adopted a seat-driven approach to resolving the difficulties surrounding this interplay of laws in international arbitration.

It is widely accepted that there are three laws at play in international arbitration:

1. The proper law of the contract; otherwise known as the applicable law. This is the law that is applied in construing the substantive provisions of the main or underlying agreement between the parties.
2. The law governing the arbitration agreement; otherwise known as the internal procedural law or the 'lex arbitri' (Internal), This is the law that regulates the hearings and proceedings of the arbitral tribunal. It governs issues such as how to commence the proceedings, composition and appointment of the tribunal members, due process and the formal requirements of the award.
3. The curial or procedural law- the 'lex arbitri (external) is the law that governs the external relationship between the arbitral tribunal and the courts, concerning the exercise by the courts of their supervisory and support jurisdiction to the arbitral tribunal on matters such as granting of interim and preservative orders, securing the attendance of witnesses, removal of arbitrators and enforcement of the award.

In no other instance is the importance of these laws more evident than in the effect of determining the 'seat' of arbitration on the proceedings.

The 'seat'[1]

"...a legal construct, not a geographical location. The arbitral seat is the nation where an international arbitration has its legal domicile or juridical home".

It might be suggesting the obvious that this is not to be confused with the 'venue' of arbitration but it tragically does happen in several ways. The Nigerian Supreme Court recognised the distinction in *NNPC v LUTIN INV LTD*[2]. It emphasized the difference between 'seat' and 'venue' - 'except the parties so expressly agree in the arbitration agreement, the juridical concept of 'seat" connotes the administration of justice as far as the arbitration is concerned. It implies that there is a particular country (system of laws) with the responsibility to administer and control the arbitration, rather than render the arbitration 'stateless' or merely floating across international borders. 'Seat', therefore, gives the arbitration 'identity' or 'nationality"

But 'seat' *can* be safely confused with the 'place' of the arbitration

Regrettably agreements use the term 'seat' interchangeably with 'place', not in the sense of a physical or geographical place or venue, but as a juridical concept symbolizing the jurisprudential connection between the arbitration process and the system of laws of the nation or country regarded as the seat of the arbitration.[3].

Indeed, in the UNCITRAL Rules 'Model Law' and Article 1(2) and the Arbitration & Conciliation Act 1988 (Art.16), in Nigeria, 'place' is used instead of 'seat'.

Article 16 of the Arbitration & Conciliation Rules:

1. Unless the parties have agreed upon *the place* where the arbitration is to be held such *place* shall be determined by the tribunal having regard to the circumstances of the arbitration.

[1]Gary Born, 'International Commercial Arbitration' (Kluver Law International, 2nd Ed, 2014), @ p 1537

[2] (2006) 2 NWLR (PT.965) 506

[3] See: *SHAGANG SOUTH-ASIA V. DAEWOO LOGISTIC (2015) EWHC 194(COMM)*

2. The Arbitral tribunal may determine the location of the Arbitration within the *place* agreed upon by parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate having regard to the circumstances of the Arbitration.
3. The Arbitral tribunal may meet at *any place* it deems appropriate for the inspection of goods other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

Clearly Art 16 (1) must refer to the juridical seat as the place agreed or to be determined by the circumstances of the case in the absence of an agreement, indicative of the approach we shall see that has been adopted by the courts. Art 16 (2) while still using the word 'place' suggests the venue at the seat for hearing while Art 16 (3) deals with the power to move the proceedings for specific purposes.

Therefore, where an arbitration clause employs the word 'venue', it can only refer to the physical or geographical place that the parties have chosen for the arbitral proceedings to take place. See *NNPC v. LUTIN INV LTD (2006) 2 NWLR (PT. 965,) 506,* where the Nigerian Supreme Court interpreted 'place' to mean venue.

In *GARUDA INDONESIA v. BIRGEN AIR*[4] the Court of Appeal of Singapore held: "There is a distinction between "place of arbitration and the place where the arbitral tribunal carries on hearing witnesses, experts or the parties, namely, the 'venue of hearing'. The place of arbitration is a matter to be agreed by the parties. Where they have so agreed, the place of arbitration does not change even though the tribunal may meet to hear witnesses or do any other things in relation to the arbitration at the location other than the place of arbitration. It only changes where the parties so agree. While the agreement to change the place of arbitration may be implied, it must be clear. This is in the interest of certainty"

Courts are rightly hesitant to interfere with powers of arbitral tribunals unless it becomes necessary for the determination of other issues such as the grant of supporting injunctions or the

[4] [2002] SGCA 12

exercise of the courts supervisory jurisdiction in support or aid of the arbitral process.

In determining the seat of the arbitration, the starting point must be the arbitration clause where as in the case under consideration the clause reads for example:

27.2 "In the event of any dispute, question or difference between the parties to this Agreement arising out of the construction of or concerning anything contained in this Agreement or as to the rights, duties or liabilities under it whether during or after the determination of this Agreement, if it cannot be settled under Clause 27.1, shall upon notice to that effect being given to the other party be referred to arbitration. The parties agreed to select Singapore International Arbitration Centre (SIAC) to conduct the arbitration.

27.3 The parties hereby agree that this Agreement shall be construed in accordance with the Laws of the Federal Republic of Nigeria and agree to refer to Arbitration any dispute, differences, claim or demand arising out of this Agreement in accordance with clause 27.2 above."[5]

The 'seat' appears not to have been expressly selected neither has the applicable law. However because the law of the seat determines the applicable law, the determination of the seat assumes a very crucial factor before the court. In *CHANNEL TUNNEL GROUP LTD v. BALFOUR BEATTY CONSTRUCTION LTD*[6] it was held that the presumption in favor of the law of the seat was 'irresistible' in the absence of an indication of a contrary choice by the parties.

In *NAVIERA AMAZONICA PERUANA v. COMANIA INTERNACIONAL DE SEGUROS DEL PERU*[7],the English court laid down the 'closest and intimate connection' principle, to guide the courts in locating the seat of an international arbitration.

[5] As was considered in the decision under review See Zenith Global v Zhongfu (infra)

[6] (1993) AC 334

[7] (1988) 1 Lloyd's Rep

This 'closest and intimate connection' principle laid down in the NAVIERA AMAZONICA Case was correctly adopted by the Indian Supreme Court in *ENERCON INDIA LTD v ENERCON GMBH*[8]. In that case, the parties specified London as the venue of the arbitration, but did not specifically mention the seat. They stated that the applicable law shall be the law of India. The parties were German and Indian. The German argued that the seat was London, while the Indian contended that the seat was India. The Supreme Court of India, applying the 'closest and the intimate connection' principle, held that as India had a closer and more intimate connection with the contract, India and not London, was the seat of the arbitration. Their lordships remarked:

"...we are fortified in taking the aforesaid view since all the three laws applicable in arbitration proceedings are Indian laws. The law governing the contract, the law governing the arbitration agreement and the law of arbitration/curial law are all stated to be Indian. In such circumstances, the observation in Naviera Amazonica Peruana S.A. (supra) would become fully applicable,….In the present case, even though the venue of arbitration proceedings has been fixed in London, it cannot be presumed that the parties have intended the seat to be also in London. In an international commercial arbitration, venue can often be different from the seat of arbitration. In such circumstances, the hearing of the arbitration will be conducted at venue fixed by the parties, but this would not bring a change in the seat of the arbitration. This is precisely the ratio in Braes of Dounne, Therefore, in the present case, the seat would remain in India, "

In applying the 'closest and intimate principle' and arriving at its conclusion that India was the seat of the arbitration, and not London, the court was persuaded by the fact that the parties chose Indian law as the substantive law of the contract amongst others. The court also noted that everything about the contract, including its performance and eventual enforcement of the award would take place in India and not England. The court noted that apart from being merely the venue, England, had no other connection with the contract.

A Nigerian High Court in *ZENITH GLOBAL MERCHANT LIMITED v ZHONGFU INTERNATIONAL INVESTMENT (NIGERIA) FZE & ANOR*[9] employed the

[8] *(2014) 2 SCR* 891
[9] (2017) 7 CLRN 69 per Akinyemi J

above authorities and applied the 'closest and intimate connection' principle by observing that (in view of the clause set out in this article) the parties to the arbitration agreement are companies duly registered in Nigeria and that the content of the substantive contract was to be performed fully in Nigeria.

The court considered an arbitration agreement that read as follows:

> 'Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration in Singapore under the UNCITRAL Arbitration Rules in accordance with the SIAC Procedures for the Administration of International Arbitration in force at the date of this this Agreement. The language to be used in the course of the arbitration shall be English. And the arbitral award shall be final and binding on the parties'.

4. The court held: '...Nigeria has a closer and more intimate connection to the arbitration than Singapore, and is therefore the seat of the arbitration, while Singapore is no more that the venue of the Arbitration...the preponderance of facts and surrounding circumstances convince me that their intention was to choose Nigeria as the seat of Arbitration' thereby making Nigerian courts the courts with the power to exercise supervisory and support jurisdiction to the arbitral tribunal on matters such as granting of interim and preservative orders, securing the attendance of witnesses, removal of arbitrators and enforcement of the award.

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