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Determination Of Choice Of Laws In International Commercial Arbitration

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ABSTRACT
It is important to note that the determination of the law applicable to a contract without first taking into account the expressed will of the parties to the contract can lead to unhelpful uncertainty. For this reason among others, the concept of party autonomy to determine the applicable law is very paramount. The powers and authority of parties to a contract to choose the system of law that will govern their contractual relationship usually enhances certainty and predictability. The decision with respect to the determination of proper or applicable law plays an important role in the resolution of any dispute that may arise or exist between parties in their contractual agreement; quite often the parties' primary contractual arrangement usually recognizes that parties to a contract are usually in the best position to determine which set of legal principles is most suitable for their transactions hence this study.
Keywords: Determination, Choice, Laws, International Commercial Arbitration

INTRODUCTION

When parties enter into a contract that has connections with more than one state, usually the question of which set of legal rules or the laws that will govern their transaction necessarily comes up. An answer to this question is obviously important to a court or arbitral tribunal that will resolve any dispute between the parties and it is also important to the parties in developing their contractual agreements planning of the transactions and performing of the contract for them to know the set or system of rules that will govern their obligations.

However, the determination of the laws applicable to a contract without first taking into account the expressed will of the parties to the contract can lead to unhelpful uncertainty. For this reason, among others, the concept of "*party autonomy"* to determine the applicable laws was developed and thrived[1]. Party *autonomy*, which refers to the power of parties to a contract to choose the different system of law that governs their contract usually enhances certainty and predictability within the parties' primary contractual arrangement and recognizes that parties to a contract may be in the best position to determine which set of legal principles is most suitable for their transactions[2].

The proper or applicable law plays an important role in the resolution of any dispute that may arise or exist between the parties to the contractual agreement. In the words of our legal icon ***Prof. Greg Nwakoby*** applicable laws usually governs questions relating to interpretation of the contract, validity of the contract, rights and obligations of the parties, mode of performance of the agreement and consequences of breach of the contractual agreement by either of the parties[3]. *Article (33)(1)(2) and (3) of First Schedule of Arbitration Rules* expressly provides that the law designated by the parties as applicable law shall apply

[1] Introduction to the Hague Principles on Choice of Law in International Principles on Choice of Law in International Commercial contracts. Commercial Contracts paragraph 1.1 (https://www.hech.net/en/instruments/conventions/full-text/?cid=135 assessed on 10/9/2016.
[2] Ibid para. 1.2
[3] G.C. Nwakoby: *The Law and Practice of Commercial Arbitration in Nigeria 2nd Edition, Conflicts of Laws in International Arbitration Agreements and Proceedings* (Enugu, Snaap Press Nigeria Ltd: 2014) pp. 338-339.

to the substance of the dispute[4]. There are situations where the parties may fail to agree among themselves as to the law that will be governing any dispute that may arise during the course of their contractual relationship[5].

Such situation quite often arises in state contracts in including mostly natural resources, investment agreement, joint venture agreement between a state and a foreign private party[6]. In some of such instances the state will work against the laws agreed upon in the contractual agreement. An instance is the case of **Inmaris Peretroika v Ukraine[7].** The issues were claims of performance under direct and derivative rights under certain bareboat charter contract and related agreements concluded between the claimants and a state owned entity.

The summary is about claims arising out of a series of contracts concluded between state owned educational institution of Ukraine and the claimants concerning the use of a windjammer sail training ship and subsequent disagreement regarding the operation of the contracts, including financing options for the reconstruction of the ship not to leave Ukraine territorial waters until clarification of matters relating to its joint operation. In this case the Investment Dispute Settlement Tribunal decided the matter in favour of the investor contending that the Ukraine Government breached its contractual agreement on the Laws that should govern their relationship with the investor by the government change of instructional directive prohibiting the ship from leaving Ukraine territorial water until clarification on matters relating to joint operation is determined without regard to their contractual agreement with the investor who actually financed the ship reconstruction with the hope of using it for windjammer sail training.

In some situations the disagreement among the parties may occur as a result of conflicting interests between them. As stated by ***G. Jaenieke, an erudite jurist:***

> *While the host state is primarily interested in subjecting foreign investor to its natural Legal system because it wishes to retain the fullest legislative freedom in pursuance of its natural economic policies, the foreign investor is primarily interested in excluding the application of the law of the host state because he fears that the host state may use its sovereign legislative power to change the legal environment to the detriment of its investment[8].*

Where parties are not in agreement on their choice of the applicable law, the parties may prefer to leave the issue open so that the prospective arbitrator(s) in case of any dispute resulting from the agreement in future can adopt the applicable law to be used in the proceedings. Such amounts to why in recent times investment agreements and some international commercial arbitration agreements are silent on the issue of applicable law clauses[9].

1.2 System of Laws Relevant to Determination of Choice of Laws to Govern International Commercial Arbitration

In practice when parties enter into a contract that has connection with more than one state, the obvious question(s) usually are how to determine the relevant legal rules, instruments to guide their international commercial transaction engagements. The underlisted questions among others will usually be a willing guide for determination such as

= The law that determines the capacity of the parties

= The law that determines the validity of the arbitration agreement

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[4] Article 33(1)(2) and (3) First Schedule to the Arbitration and Conciliation Act *Cap A 18 Laws of the Federation of Nigeria 2004.*

[5] *G.C. Nwakoby Op. cit p.337*

[6] *ibid*

[7] (2008) Investment Dispute Settlement Navigator 15 of 26 March, 2012.

[8] G. Jaenieke "*Consequences of a Breach of an International Agreement Governed by International Law, by General Principles of Law or by Domestic Law of the Host state cited in Conflict of Law Issues in International Arbitration Practice and Trends" by Dr. A.F.M. Mniruzzaman" Arbitration International (LCIA) 1993, 371. Greg C. Nwakoby "The Choice of Place of Arbitration = The Issue of Applicable Law* UNIZIK Law Journal 2007.

[9] G.C. Nwakoby *Op.cit p. 337.*

= The law governing the arbitration itself and in particular the procedure to be adopted.
= The law applicable to the substance of the dispute and
= If there is a conflict of applicable substantive laws, the laws under which that conflict is to be resolved[10].

In general, parties cannot make a choice of the applicable law without first considering the capacity and this can be done by incorporating a company in a particular country. The parties generally need not make an express choice in relation either to the law governing the validity of the arbitrators agreement or the law governing the procedure of the arbitration itself[11]. This will usually follow naturally from the circumstances; the proper law of the arbitration agreement is generally that of the contract of which it forms part and the law governing the conduct of the arbitrators is generally that of the place of arbitration. It is important to note that in order to resolve the dispute as to the applicable law, the arbitrators have to adopt the most reasonable and satisfactory approach in determining the same.

Article 4 of the principles on choice of law in international contracts provides that parties may choose a law to govern their contract either expressly or tacitly. This provision was also in line with similar other international instruments[12]. The Hague Conference has promulgated the Hague Principles on Choice of Law in International Commercial Contract. The parties' choice of law must be distinguished from the terms of the parties' primary contractual arrangement, the main contract could be for instance, a sales contract, service contract or loan contract. It is important to note that parties may either choose the applicable law in their main contract or by producing a separate agreement on choice of law.

Express Choice of Law

Parties may expressly choose a law to govern their contract. An express choice of law agreement may be made before or at the same time as or after the conclusion of the main contract[13]. The term *"main contract"* refers to the contract for which the choice of law is made. Choice of law agreements are usually included as an express clause in the main contract by phrases such as the contract is "*governed by"* or "*subject to"* a particular law to meet the requirements of an express choice. Though *Article 4* of the convention rules allows for a tacit choice, the parties are advised to identify explicitly the law governing the contract.

> *Where party A and B conclude a contract, the choice of law agreement will provide thus "This contract shall be governed by the law of state A, "This is sufficient to constitute a choice of law by the parties, therefore as stated in Article 2 of the law of state X will govern the contract agreement*[14]

However, where

> *Party A and B conclude a contract and the choice of law agreement provides thus; "This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts". The UNIDROIT principles will then govern the contract 3*[15].

Obviously, *Article 28(1) UNCITRAL Model Law and Article 21(1) International Criminal Court Rules* commonly allows for the parties' choice of "*rule of law*[16]". In these instruments the term "*Rule of law"* was used to describe rules that emanate from state sources.

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[10] R. Bernstain, J. Tackaberry and A.L. Marriot: Handbook of Arbitration Practice, *International Commercial Arbitration, Choice of Law (*London: Sweet and Maxwell in conjunction with the Chartered Institute of Arbitrators, 1998) p. 560 (10-97)
[11] *ibid*
[12] Article 4 Principles on Choice of Law in International Commercial Contracts, Introduction to the Hague Principles on Choice of Law in International Commercial Contracts 2015; *Article 7 Mexico City Convention; Article 3 Rome 1 Statute Regulation.*
[13] *Article 2(3) of the Principles on Choice of Law in International Commercial Contract on Hague Principles 2015.*
[14] *Article 2 of the Principles on Choice of Law in International and Commercial Contracts; Introduction to the Hague Principles on Choice of Law in International Commercial Contracts*
[15] *Article 3 ibid*
[16] *Article 280 UNCITRAL Model law, Article 21(1) International Criminal Court Rules.*

The opportunity to choose "*rules of law"* has not typically been given to parties litigating before national courts, however *Article 3* has broadened the scope of party autonomy as contained in *Article 2(1)* by providing that the parties may designate not only state law but also "*rules of law*" to govern their contract regardless of the mode of dispute resolution processes chosen[17].

Tacit Choice of Law

A choice of law may also be made tacitly. For a choice of law to qualify as effective under *Article 4*, such choice of law must be real although not expressly stated in the contract. There must be a real intention of both parties that a certain law shall be applicable. A presumed intention imputed to the parties does not suffice[18]. A tacit choice of law must appear clearly from the provisions of the contract or the circumstances. Parties have to take into account both the terms of the contract and the circumstances of the case; as either the provisions of the contract or the circumstances of the case may conclusively reveal a tacit choice of law[19]. Additionally, a choice of law can be asserted to have appeared from the provisions of the contract only when the inference drawn from the provisions that the parties intended to choose a certain law is strong. There is no fixed list of criteria that determine the circumstances under which such an inference if strong enough to satisfy the standard that a tacit choice must "*appear clearly"* rather, the determination is made on a case by case basis[20].

Choice of Court Clause and Tacit Choice of Law

The choice of law applicable to a contract and the choice of a forum for dispute resolution should be distinguished. In line with the provisions of *Article 4*, an agreement between the parties to confer jurisdiction on a court to determine disputes under the contract (a choice of court agreement) is not in itself equivalent to a choice of Law **see *Article 7(2) Mexico City Convention)*[21].** An instance is where parties may have chosen a particular forum because of its neutrality experience. The fact is that the chosen court, under the applicable private international law rules, may apply a foreign law and also demonstrate the distinction between choice of law and choice of court. However, a choice of court agreement between parties to confer jurisdiction on a court may be one of the factors to be taken into account in determining whether the parties intended the contract to be governed by the law of that forum[22].

> *Party A and B conclude a contract and include a choice of court agreement designating the courts to state X. In the absence of other relevant provisions in the contract or particular circumstance suggesting otherwise, this will be insufficient to indicate a tacit choice of the law of state*[23]

Arbitration Clause and Tacit Choice of Law

There exists important difference between choice of court clauses and arbitration clauses. *Article 4* adopts a unified general rule as to whether a choice of forum or arbitral tribunal necessarily entails a choice of law. An agreement between the parties to confer jurisdiction on a specified arbitral tribunal to resolve disputes under the contract is not the same as a choice of law. According to the second limb of Article 4, the choice of such an arbitral tribunal is also not a sufficient indicator, in itself of the parties' tacit choice of law. The parties may have chosen a tribunal because of its neutrality or expertise. The tribunal may

[17] *Artic 2(1) of the Principles on Choice of law in International Commercial Contracts; Introduction to the Hague Principles on Choice of Law in International Commercial Contracts.*
[18] *Article 4.6 of the Principles.*
[19] *Article 4.7 of the Principles.*
[20] *Article 4.8 of the Principles.*
[21] *Article 7(2) Mexico City Convention.*
[22] *Article 4(11) of the Principles on Choice of Law in International Commercial Contract; Introduction to the Hague Principles on Choice of Law in International Commercial Contracts 2015.*
[23] *Article 4(11) ibid.*

also apply a foreign law pursuant to applicable rules of private international law or the chosen arbitration rules. However, an arbitration agreement that refers disputes to a clearly specified seat may be one of the factors in determining existence of a tacit choice of law[24].

> *Where parties A and B conclude a contract under which they agreed that all disputes arising out of or in connection with the contract are to be submitted exclusively to arbitration in state X under the rules of DEF Chamber of Commerce, in the absence of other relevant provisions in the contract or particular circumstances suggesting otherwise, this will be insufficient to indicate a tacit choice of law of state X*[25].

Certain circumstance(s) may be used to impute the intention of the parties in respect of a choice of law, such as the parties' conduct and other factors surrounding the conclusion of the contract may be particularly relevant and such principle may also be applied in the context of related contracts[26].

> *In the course of their past dealings, parties C and D did consistently made express choice of the law of state X to govern their contracts. If the circumstances do not indicate that they intended to change that practice in the current contract, a court or arbitral tribunal could conclude from these circumstances that the parties clearly intended to have the current contract governed by the law of state X even though such an express choice does not appear in that particular contract*[27].

However, where parties conclude a contract drafted in the language of a certain state; but the contract does not use the legal terminology characteristic of that states' legal system, it will be presumed that in the absence of any other circumstance, that the use of the particular language of a state would not be sufficient to establish a tacit choice of law[28]. The reason being that such principles do not take a position as to procedural issues in particular, instead they take evidence and the standard and mode of proving a tacit choice of law heavily on the burden or onus of proof[29].

Circumstances Indicating an Implied Choice of Law

Quite often the circumstances of a case may be an indication to reveal the likely intention(s) of the parties to a contract with respect to a choice of law. The parties' conduct and other factors surrounding the conclusion of a contract may also be of great relevance where in the course of their previous engagements parties had constantly made express choice of law of a particular state to govern their contractual transaction. If the circumstances do not indicate that they intend to change that practice under the present or current transaction, a court or arbitral tribunal can conclude from these circumstances that the parties clearly had intended to adopt their current contract to be governed by the law of the state which they had been using even though there were no express choice or an indication that they intend to adopt same.

Where however, the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention may be inferred from the terms and nature of the contract, and from the general circumstance of the case, such inferred intention may be adopted as a yardstick to determine the parties' likely intentions of the proper law of the contract[30]. In the words of **Redfern and Hunter**, there is a certain artificiality involved in selecting a governing law for the parties and attributing it to their tacit or implied choice particularly where it is apparent that the parties themselves gave no thought to the question of governing law, their reason being that as provided in *Article 3 paragraph 1 of*

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[24] *Article 4(12) of the Introduction to the Hague Principles on Choice of Law in International Commercial Contracts 2015.*
[25] *Article 4(12) ibid.*
[26] *Article 4(13) of the Principles.*
[27] *Article 4(13) ibid.*
[28] *Article 4(14) ibid.*
[29] *Article 9(1)(f) ibid.*
[30] Diecy and Morris, The Conflict of Laws (7th ed 1958) cited with approved *by Lord Wilberforce in Compagnic d' Armament Maritime SA v Compagnic Tunisianne de Navigation SA*. (1971) AC. 572,595. The Conflict of Law is now on 11th ed 1987. See also Admin Rasheed Shipping Corporation v Kuwait Insurance Co (1984) AC 50.

the Rome Convention, a choice of law must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case; this in their view makes it clear that a tacit or implied choice must only be found where it is reasonably clear that it is a genuine choice by the parties[31].

Choice of Forum as Choice of Law

Among the numerous processes and procedures of determining the choice of law, one of the most widely accepted forms for attributing choice of law to the parties where they have not made any express choice is the process of basing it on a choice of forum by the parties. Where parties make no definite or express choice of law but stipulate that any dispute that arises between them shall be litigated or arbitrated in a particular country, it is often assumed that they intend the law of that country to apply to the circumstance of their disputes. This is expressed as *qui indicem forum elegit ius;* a choice of forum is a choice of law. This presumption held sway for a very long time and at a point was described by **Lord Samond L.J in the case of Tzortzis v Monark Line A/B** as "irresistible"[32] though, it has come to be recognized that a particular forum may have been chosen because of numerous reasons unconnected with the law of that forum. Factors considered include geographical location and convenience to the parties, neutrality of venue, logistics, high reputation or arbitration services or some other reason(s). On account of the above factors the choice of a particular forum is now considered as merely another general connecting factor which may be of relevance in the circumstance of a particular case[33].

Does it require any form for validity?

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties. It does not need to be in writing, drafted in a particular language or attested by witness[34]. It is still valid even where parties had agreed on a particular choice of law or orally. The Hague principle on rules of choice of law in international commercial contracts is very clear, that the principle is purely a substantive rule of Private International Law. This is adjudged on the following grounds: firstly, that the principle of party autonomy indicates that in order to facilitate international trade, a choice of law by the parties should not be restricted by formal requirements.

Secondly, that most legal systems do not prescribe any specific form for the majority of international commercial contracts including choice of law provisions **see Article II CISG, Article 1(2) (First Limb) UNIDROIT Principles and Article 3, 1&2 UNIDROIT Principles.**

Thirdly, that many private international law codifications employ comprehensive result oriented alternative connecting factors in respect of the formal validity of a contract (including choice of law provisions) based on an underlying policy of favouring the validity of contracts[35]

The fact that the principles are created for commercial contracts transactions obviates the need of the first criteria subjecting the choice of law to any formal requirements or other similar restriction for the protection of presumptively weaker parties such as the consumers.

Apart from the fact that **Article 5** concerns only the formal validity of a choice of law, other components of the contract must comply with the formal requirements of at least one law whose application is authorized by the applicable private international law[36]. It is important to note that any law chosen by the parties also governs the formal validity of the main contract[37].

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[31] A Redfern and M. Hunter, *Conflict Rules and the Search for Applicable Law supra* p123.
[32] [1968] 1 WLR 406; 112 S.J 108 [1968] 1 All ER 949
[33] Campagnic Armament Maritime [1971] AC 572, 596.
[34] Article 5(2) principles supra.
[35] *Article 5.3 Hague Principles on Choice of Law in International Commercial Contracts 19th March, 2015. Article 13 Mexico City Convention, Article 11(1) Rome 1Statute Regulation.*
[36] *Article 9(2).*
[37] *Article 9(i)(e).*

Consider the Instant Situations for clarity

= Where two parties A and B enter and conclude a contract which states that it is to be governed by the law of state Q, the main contract is formally valid in terms of the law of state P, such contract is formally valid.

= Where two parties conclude a contract and an implied choice of the law of state Q appears clear on the basis of certain provisions in the contract or the circumstances of the case. In such situation the main contract would be formally valid in terms of the law of state Q. Such type of contract is valid.

Conflict Rule

Under the international commercial contracts there are various systems of law which may govern a contract agreement where there is no express or implied choice of law. Such laws include the law of the place where the contract was consummated which is called (*Lex Locus contractus*) the law of the place where the contract is to be performed (*Lex Locus solutionis)*; and if one of the parties to the contract was a state or state entity the national law of the state concerned.

However, where an arbitral tribunal is faced with the problem of choosing between these different laws; it must first decide if it has a free choice or whether it will adopt and follow the conflict of law rules of the seat of arbitration (**the conflict of Laws rules of the *Lex fori*[38])** Each of the developed national systems of law usually contains its own rules for the conflict of law which sometimes is called private international law. This conflict of law rules will usually serve *inter alia* to indicate which Law is to be chosen as the law applicable to a contract where the parties have failed to make a choice and where more than one law may be involved[39]. The determination and importance of applicable or choice of law in every contract transaction to guide the parties in resolution of dispute(s) that may arise will usually consider the following questions[40]:

i. The interpretation of the contract
ii. The validity of the contract
iii. The rights and obligations of the parties
iv. The mode of performance of the agreement
v. The consequences of breach of the agreement by either of the parties[41]

In the words of our erudite scholar Nwakoby, the issue of the choice or applicable law to both the arbitration agreement and the procedure in determining the substantive matter may arise at three distinct stages. The first being at the stage of drafting of agreement, the second being during the stage of arbitral proceedings before the arbitral tribunal and the third being during enforcement or impeachment of the award[42].

Though, parties are free to choose or determine the applicable law to guide their contract transaction, arbitration agreement and proceedings at the arbitral tribunal, where however they failed to agree among themselves as to the law that will be governing their contract transaction and any dispute that may arise during the course of their contractual relationship as is often the case in state contracts mostly natural resources agreement, joint venture agreements between a state and a foreign private party largely due to conflicts of interest as opined by our erudite jurist scholar G. Jaemieke had earlier stated.

Such alleged breaches by the parties were the issues canvassed in the following cases;

Grot and Ors v Moldova[43] this is where an investors; rights of lease agreement for agricultural land that was concluded with landowners for a 3 years period, claim arising out of alleged unlawful determination of the lease agreement for agricultural land concluded by the claimants with the landowners in two

[38] A. Redferm and M. Hunter; *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell Publishers; 1991) p 125.

[39] A RedFerm and M. Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell Publisher; 1991) p. 124.

[40] Ibid.

[41] G.C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* 2nd Edition (Enugu; Snaap Press Nig Ltd, 2014) p338-340.

[42] G.C Nwakoby ibid p336.

[43] (2016) 8 of 176 11A *Breaches/Investment Dispute Settlement Navigator*- http://investmentpolicyhub.unctad.org/ISDS.

villages in the North East of Moldova. A year after the agreement had been concluded; the respective local city revoked the registration of the agreements due to the claimant's alleged non-performance of their obligations and registered lease agreements with a different lessee for the same plots. Such actions amount to arbitrary, unreasonable and or discriminatory measures against the interest of the investors. It is important to note that in such instance the cause of justice may turn in favour of the state especially where the investor has not performed his own obligation due to either insolvency as in the case of **CEAC v Montenegro**[44] where the arbitral tribunal at the original proceeding decided in favour of the state but on further appeal declined on issue of jurisdiction.

However, in the case of **Flemingo Dutyfree v Poland**[45] the arbitral tribunal decision was in favour of the investor and the breaches discovered were unfair and equitable treatment/mini standard of treatment including denial of justice. In other instances both the state and investor do come to a compromise and the matter settled as in the case of **Iberdrola v Bolivia**[46]**.** The arbitral tribunal proceedings were discontinued when both parties agreed on the terms.

Where the parties are not in agreement in their choice of the applicable law or that there arises an issue(s) with respect to the chosen law to guide their contractual transactions, the parties often prefer to leave the issue open so that it would be determined by the prospective arbitrators in case of any dispute resulting from the agreement in future. This reason accounts for why many of the more recent investment agreements and most international commercial arbitration agreements are silent on the issue of applicable or choice of law clause. However, in order to resolve the dispute as to the applicable law, the arbitrator has to adopt the most reasonable and satisfactory approach in determining the same. It is important to state that the subject matter leaves no one in doubt that whoever, whether, the parties as the contractual laws allow them the autonomy, the arbitrators, the arbitral tribunal that determined the applicable or choice of law which governs a contractual or investment agreement, international commercial arbitration agreement, the determination of applicable laws stands very vital and plays an important role in the interpretation of such an agreement and the rights and obligations of the parties following therein[47].

Arbitrators' Task in Determining the Applicable or Choice of Law in International Commercial Arbitration

Where the task of determining the applicable or choice of law is rested on the arbitrators, as stated earlier, resort may be to adopt a conflict of law rules which the arbitrators may deem fit or appropriate[48]. The Nigerian extant law has provided in section *47(3) of Arbitration and Conciliation Act* that where the law of the Country to be applied is not determined by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable. Supporting this provision of our extant law was UNICITRAL Model Law *Article 28(2)* which provides that failure to make any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.

In the opinion of *Nwakoby*, arbitrators' approach in determining the applicable or choice of law shall resort to conflict of laws rules in resolving the issues as it concerns government and non-government party agreements. In his view, the difference created by the adaption of the conflict of laws, rules have principally led to two theories "localization" and "delocalization or denationalization"[49]. Arbitrators in choosing the applicable or choice of law may have recourse to the law of the place of arbitration (*Lex Fori)* brought to state court for setting aside of the award. This statement finds support with the provisions of *Article V(i)(a) of the New York Convention*. However, there are other groups of

[44] (2014) 17 of 176 11A *Breaches/Investment Dispute Settlement Navigator* – http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches.
[45] 2014 (18 of 176)
[46] 2014 (19 of 176)
[47] *Section 52(a)(ii) of Arbitration and Conciliation Act Cap A18 LFN 2004, Article V((I)(a)(i) of the UNCITRAL Model Law.*
[48] P.S. A. Smedresman, "*Conflict of Laws in International Commercial Arbitration Awards"* Arbitration International (L.C.I.A) Vol 12 No 3, 1996 269 @ 281.
[49] G.C. Nwakoby; "*The Law and Practice of Commercial Arbitration in Nigeria"* (Enugu: Snaap Press Nig Ltd; 2014) p 342.

commentators who felt that the law of the place for the enforcement and setting aside should apply. This also has the support of *Article V(2) of the New York Convention*. There also exists another class of scholars who believe that neither the law of the place of arbitration nor that of the place of enforcement and impeachment should apply rather that the arbitrators should apply the law which has the closet connecting relationship with the subject matter nor the parties called delocalization theory[50].

The ranging arguments in support or against any of these theories cut across the views of numerous scholars. **Jan Paulsson**[51] was an advocate of localization, so also is **Hirsh's** view on the Place of Arbitration and the *Lex Arbitiri*[52] which also was the basis for the decision in the case of **Hamly & Co v Talisker Distilleney**[53]**.**

Though, the preference of delocalization ranks high among the scholars, Professor **William W. Park** was one of the major opponents of the theory. It is important to note that it has been established that delocalization theory in determining the applicable legal system or rules of arbitral proceedings is preferred to localization theory.

The next issue is the right or freedom of the arbitrators in establishing the conflict of law rules in Nigeria. **Section 47(1) of the Nigerian extant law** provides that 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.

However, the freedom of the arbitrators to choose the conflict of laws rules is in line with the ideal of denationalization of arbitration. The reason for which parties to arbitration agreement choose an international arbitration in place of trial in the ordinary court of the country is precisely to avoid the vagaries and rigidity of the national court in the matter of conflict of laws as well as the overall settlement of the dispute. Such was not only recognized in our extant law on **Section 47(3) of Arbitration and Conciliation Act** but also by international legal instrument and legislations on **Article 13(3) of ICC Court Rules and Article 33(1) of UNICITRAL Model Law**[54]. In the celebrated case of **B.P. v Libya, Lagergren** decided to apply the Danish conflict of laws rules in the determination of the dispute not because they were the *Lex Locus/locci Arbitri* but because the arbitrators found that Danish conflict of law rules were convenient in view of the arbitration's close connection with Danish law which would ensure the effectiveness of the award bearing a national character.

CONCLUSION

Redferm and Hunter were of the view that in a decision as to the law to be applied in the absence of any choice of law by the parties, the arbitral tribunal is entitled unless otherwise directed by the rules under which the arbitral tribunal is conducting its proceedings to select any of the systems or rules of law upon which the parties themselves might have agreed, if they had chosen to do so.

Though there are no universally accepted rules in determining the choice or applicable law, the rules in the law of international commercial arbitration contract systems of law do insist that in making the choice an arbitral tribunal shall follow the rules of conflict of laws of the seat of the arbitration. However, the modern approach usually adopted by most international conventions is to give a considerable latitude to the arbitral tribunal in making the choice of law, whilst still insisting that they do so by way of appropriate or applicable conflict rules; considering the fact that parties *ab initio* had entrusted their confidence in the arbitrators and the arbitral tribunal to resolve their disputes.

Finally, in course of determining the choice of applicable laws it is of utmost importance to consider the following as a guide; the validity of both the contract and arbitration agreement, the interpretation of the contract, the parties' obligations and rights, the level and scope of intervention to be allowed to the national courts, the mode of enforcement of any award to be made by the arbitral tribunal, the processes of arbitrators' appointment and the powers accorded to the arbitrators and limits.

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[50] G.C. Nwakoby.

[51] J. Paulson, *"The Extent of Independence of International Arbitration The Law of The State" I.C.L.O Vol. 32 1983* p141.

[52] Hirsh "*The Place of Arbitration and Lex Arbitiri" Arbitration Journal 1979* p 43.

[53] (1927) A C 604

[54] *Section 47(3) Arbitration and Conciliation Act Cap A18, Article 13(3) ICC Court Rules , Article 33(3) UNICITRAL Model Law.*