Oil and Gas Agreements and Dispute Arbitration: Discerning the Intentions of the Parties from the framework of the Agreement and the circumstances of the Dispute what the Arbitrators can do in interpreting the applicable Law in resolving Disputes

The General Introduction

International commercial Oil and Gas arbitration can be defined as commercial arbitration with caveat of a foreign element. This is usually the case where the parties to international petroleum contracts have diverse nationalities, subjects of different international legal systems hence having different applicable laws to them.[1]It is important to define some terms at the onset so as to provide concise explanation and thus assist with the understanding of the subject matter. The main thrust of this paper is the nagging question in International Commercial Oil and Gas Arbitration: "do arbitrators both in fact and in de'jure carry out both the concealed and expressed intentions of the parties to International Commercial Oil and Gas Agreements regarding the governing law of the Agreement?" The truth is that, given the legal framework and nature of International commercial Oil and Gas arbitration, it is often described as hosting the world in one particular circumstance. In other words, the parties to these agreements are usually a mini United Nations, different territorial and legal backgrounds and therefore different conflicting applicable laws.

The fact of the matter is that, parties in International Commercial and Oil and Gas Arbitration are entitled to choose the law to govern their transactions. However, in the absence of an express choice of law, the Oil and Gas Arbitral tribunal has the duty of choosing a 'system of law or set of rules to govern the contract'. As a prelude, it has to

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[1] See Article 1(3) of UNCITRAL Model Law on International Commercial Arbitration for more substance

determine whether it has a freedom of a choice system or it is simply bound to follow the conflict of law rules[2].

It suffices to say that, some International legal instruments such as Petroleum Agreements do require the court to apply the national law of the country which the transaction is more closely connected to[3], others, simply allow the Arbitrators to choose the law they deemed fit. This has resulted in the emergence of the 'direct choice' ("voiedirecte") doctrine. Albeit referred to as techniques of choosing substantive law, in reality such techniques do confer on Arbitrators the liberty to choose as they preferred based on instincts and disposition.[4]

While there might still be some restrictions on Arbitrators in International Commercial and Oil and Gas Arbitration as to the choice of law to apply, it can be said that most of the International instruments tended towards allowing the Arbitrators to apply the rules which seemed to them as appropriate.[5] This can arguably be said to confer excessive and disproportionate powers on the Arbitrators, which might at the end of the day undermine upholding the wishes of the parties. Therefore it becomes imperative the question whether "do arbitrators in International Commercial and Oil and Gas Arbitration give effect to the true and legitimate intention of the parties or do just simply impose their will".

The Parties Autonomies in International Commercial and Oil and Gas Arbitration

[2]Redfern, .A. and Hunter, .M. *Law and Practice of International Commercial Arbitration* (4th ed.) at p.114 (who are the publishers? Place of publication and year?)

[3] Rome Convention on the Law Applicable to Contractual Obligations, June 1980.

[4]Redfern& Hunter, op. cit., at 145.

[5] The Rome convention 1961 Art VII, Washington Convention Art.42(1) and UNCITRAL Rules Art33

Before any dedicated discourse on party autonomy, it would be important to provide a working definition of the term 'parties'. The 1996 Arbitration Act[6] defined the term 'party' in an arbitration agreement to 'includes any person claiming under or through a party to the agreement'. A further clarification would be required here. 'Person' for the purpose of the 1996 Act is not just limited to individuals but also to 'anybody of persons corporate'.[7]As Tweeddale, and Tweeddale noted, the phrase 'any person claiming under or through a party to an agreement' seemed to extend to circumstances where 'the interest of a party to an arbitration agreement has passed to some other person through death, bankruptcy, voluntary assignment and agency law'.[8]

In other words, party autonomy is the right of parties to choose what laws and legal jurisdiction to govern their agreement. It is now the acceptable practice for parties in international commercial agreements and the realm of oil and gas to choose the law to govern their agreement or any transaction for that matter. However, this of course is subject to doctrines of bona fide, legality and public policy objection[9]. Significantly however, international rules and conventions have given recognition to party autonomy, that is the freedom of parties to choose the applicable law to govern their agreement[10]. The Washington Convention for example stated that "the tribunal shall decide a dispute in accordance with such rules of law as may be agreed upon by the states."[11]

[6] See S82(2) of the Arbitration Act 1996.
[7]S61 Law Property Act 1925.
[8] Tweeddale, K., & Tweeddale, A., A practical approach to Arbitration Law at pg 86 (who are the publishers? Place of publication and year?)
[9]Redfern, .A. and Hunter, .M. Law and Practice of International Commercial Arbitration (4th ed.) at p.114 (see note 4 above for proper way of referencing).
[10] Art. 33.1 of UNCITRAL Rules provides "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute." The European convention of 1961, Art VII also makes reference to freedom of parties to choose laws to govern their agreements.
[11]Art (42) Washington Convention.

The ICC Rules also contains a similar provision that stated that "the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal based on the merits of the disputes…"[12] Therefore, it could be argued that party autonomy having attained this level recognition both at the national[13] and international prisms, "operates as a right in itself[14]." Nevertheless, despite the recognition, party autonomy is still subject to some restrictions. Marc Blessing[15]sets out two main areas where the restriction to party autonomy is exercised namely; a choice in *fraudemlegis* and extraterritorial application.

The Jurisdictional Limits of Parties Autonomy in Oil and Gas Arbitration

Arbitration tribunals will not honour a choice in *fraudemlegis* regardless of the parties' intentions. For instance, where parties deliberately try to avoid an unfavourable law by choosing a particular rule or law to govern their transaction, the tribunal will not give effect to such choice of law.[16] Additionally, there are some laws that claim extraterritorial application; therefore, even where parties have made a choice of law such exterritorial laws might come into play to undo the claims of choice of law according to the wishes of the parties.[17]

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[12]ICC Arbitration Rules, Art.17.1.

[13]States like People's Republic of China, Taiwan, and South Korea, who before now had restrictions to contractual relationships are now fully party autonomy compliant i.e parties are given the freedom to choose the law to govern their agreement. SeeBlessing, M., Introduction to Arbitration-Swiss and InternationalPerspectives (Swiss Commercial Law Series; Vol. 10, 1999) 209.

[14]Footnote 10 supra.

[15]Blessing, *op. cit.*, at 209.

[16] Some countries may require a reasonable or legitimate reason for making a particular choice of law, the United States for example in their 2nd Restatement of conflict of laws. See footnote 14 above supra. Your footnote 14 does not talk of this.

[17] Rome Convention, Art.7, para. 1. talks about this area.

The Choice Regime for Applicable Law by the Parties to a Dispute

In the simplest form, the choice of applicable law by parties can be either express or implied, however, there are other forms of choices, but this is not within the scope of present discourse. As captured above, those germane to this discussion are the two most prominent choices. Express choice of law usually appears in the written petroleum contract while implied choice (tacit choice) of law is deduced from the words or acts which are evident in the intention and expectation of the parties[18]. The real problem arise where for some reasons; the parties have failed to choose which laws to govern their agreement. In the situation of such fundamental lacuna, the arbitrators would try to 'read the mind of the parties' or step into the shoes of the parties in order to ascertain what the parties really intended. However, this would amount to gambling, for instance, what are the chances that the arbitrator will arrive at a sound judgment based on the right analogy to reflect the real intentions of the parties in oil and gas commercial transaction.

At this juncture, it would suffice to argue that choice of law by parties is universal in international oil and gas commercial arbitration. The rationale for providing such choice of law clause in national and international petroleum agreement is to avoid the ugly scenarios of having to determine what the parties intentions were on the basis of the vagaries of discretions of the arbitrator[19]. The profound wisdom about this is that, it enables the parties to take charge of their contractual interpretation and the overall

[18]Lew, .J.D.M., Mistelis, .A.L., Kroll, .S.M., Comparative International Commercial Arbitration. pg 415 (who are the publishers? Place of publication and year?)

[19] The Arbitrators might reach decisions totally different from what the parties intended. For example silence might be construed to mean avoiding a national law, or not wanting to be subject to the other party's national law what is referred to as" implied negative choice" See Marc Blessing, Introduction to Arbitration (Swiss and International Perspectives) at pg 214

obligation regime under the terms, conditions and objectives of the contract. Choice of applicable law is simply the parties "choosing a system of substantive law to regulate their contractual relationship in Oil and Gas and International Commercial Arbitration in the same spirit of diverse commercial interests and in exercise of parties' autonomy".[20]

The International Commercial and Oil and Gas Arbitration and Arbitrator's Autonomy and Discretion

The task of the arbitration tribunal is to decide the matter before it based on the facts submitted to it. This obviously includes the agreement as to the applicable law if and when provided for by the parties to Oil and Gas as well as International Commercial agreements. It is pertinent to mention here that in the course of arbitration, the arbitral tribunal cannot transcend the power given to it by the parties to the dispute. It is the prerogative of the parties to submit to arbitration and most importantly to decide how their dispute should be resolved[21]. The general duties of Oil and Gas arbitral tribunal on the same alter of international commercial transaction is laid out in S33 (1)[22] of the Arbitration Act and are binding on the arbitrators. It will be of profound research interest to ascertain the quantum powers of appointed Oil and Gas arbitrators.

- **The Choice Regime for Applicable Law by the Arbitral Tribunal**

The duty of the Oil and Gas arbitrator to determine the applicable law in a dispute where the parties to the disputes have made no provision as to the law to govern their agreement

[20]Lew, .J.D.M., Mistelis, .A.L., Kroll, .S.M., Comparative International Commercial Arbitration atpg 417 (who are the publishers? Place of publication and year?)
[21]S1(b) Arbitration Act 1996.
[22] The duties are twofold: a) Act fairly and impartially and adopt procedures suitable to the circumstance of the particular case.

can be described as arbitrator autonomy. In the same vein, it includes where parties have made a choice but arbitrators have to determine conflict of law issues first before application[23]. International Commercial arbitral tribunal choose applicable substantive law in two ways: directly and indirectly.[24] As observed above, direct choice entailed applying the law that seemed most appropriate or has the closest connection to the dispute. Indirect choice on the other hand, connotes the conflict of law rules.[25]

The Washington convention for example stated that in the absence of choice of applicable law by the parties, the tribunal must apply the law of the contracting state which is a party to the dispute and any other rules of international law as may be applicable.[26] Although this does not out rightly give the arbitral tribunal the 'free will' to choose as they please, it nevertheless recognises the duty of the tribunal in deciding a choice of law.

The Washington convention procedure is more related to the traditional approach mentioned above however, what we are concerned with at this juncture is the modern trend which allows arbitrators to choose applicable law with the conflict of law rules as the imperative guide[27] or the most recent approach allowing arbitrators to decide disputes 'in accordance with the rules they consider appropriate.'

[23]Lew, .J.D.M., Mistelis, .A.L., Kroll, .S.M., Comparative International Commercial Arbitration at pg 424 (who are the publishers? Place of publication and year?)
[24]Ibid.
[25] Direct choice is further divided into Limited voiedirecte and unlimited Voiedirecte. See Lew, .J.D.M., Mistelis, .A.L., Kroll, .S.M., Comparative International Commercial Arbitration atpg 434 for further elaboration. (who are the publishers? Place of publication and year?)
[26] Washington Convention Art42(1).
[27] See European Convention 1961, Art.V11, UNCITRAL Arbitration Rules, Art. 33 and Model Law, Art.28(2).

There seems to be a trend developing over the years from applying the law of the contracting state to applying the conflict of law rules and now country like France[28] allows total autonomy; to decide what is appropriate. One cannot help but to wonder what the next qualification might be? In all sincerity, the question still remains: is the legitimate expectation of parties being met by the Arbitral process.

The Specific Power Regime in International Commercial and Oil and Gas Arbitration

Arbitrators in Oil and Gas as well as International Commercial Arbitration will usually consider themselves ethically bound to apply the law chosen by the parties either expressly or tacitly. Additionally, they are also inclined to follow the guidelines contained in the ICC Rules or the UNCITRAL Rules to which the parties to the Oil and Gas Agreements as well as the subsequent dispute in question have subjected the arbitration to.[29]

The traditional approach to choice of applicable law by the arbitrator has given considerable credence to law of the state of the contracting parties where there was no choice by the parties. Perhaps, this can arguably be said to be a form of restriction on the powers of the arbitrator. The contemporary practices do nevertheless allow the arbitrator to directly apply the applicable law without reference to conflict of law rules, i.e somewhat, a modicum of discretion.

[28] Art. 1426 of the Code of Civil Procedure, Decree Law, No. 81-500 of May12, 1981, also see the Netherland Arbitration Act 1986.
[29] Jaffey, E., J., A., *Topics in Choice of law*, (British Institute of International and Comparative Law, 1999, London) 89.

- **Direct Determination of the Substantive law in International Commercial and Oil and Gas Arbitration**

Direct determination allows the arbitral tribunal to choose the applicable law without reference to any conflict of law rules. The procedure has found legislative accommodation in modern arbitration laws and rules of industrial practices in France and the Netherlands[30]. There are two terms associated with direct determination in Oil and Gas disputes: Limited *voiedirecte* and unlimited *voiedirecte*. While the former can be limited to trade usages, contractual agreements and national laws, the later is unlimited because the arbitral tribunal may apply any applicable rule or standard of common practices in the Energy industry.

As observed above, the modern national legal jurisdictions that have adopted the direct application approach specifically includes France and the Netherland. The French Code of Civil Procedure for example provides that where the parties to a dispute failed to choose an applicable law, the arbitrators 'shall resolve the dispute in accordance with the rules of law he or she considered appropriate'. Recent arbitration rules also reinforced this thought system, for instance, the ICC rules stated that 'In the absence of any such agreement [with regard to the rules of law to be applied by the arbitral tribunal], the Arbitral tribunal shall apply the rules of law which it determines to be the most appropriate'.[31]

What then is meant by appropriate in the circumstances of oil and gas disputes? It seems the word 'appropriate' has been left to the discretion of the arbitrator. The reality of the

[30] France NCPC Art.1496 and Netherlands CCP Rules Art 17(1) and footnote supra 23 at pg 434
[31] Art 17 ICC Rules and footnote 23 supra pg434. The LCIA Rules Art 22(3) also contains a similar provision.

Arbitrators from diverse backgrounds meant that what is 'appropriate' will differ from arbitrator to arbitrator depending on their background if law jurisdiction and the perspectives of the dispute in question. It is possible that arbitral processes based on too much discretion could lead to dissatisfaction of the legitimate expectation of the parties to oil and gas disputes. This is true because, in the general uncertainty of procedure and so much reliance on individual syllogism about what he or she thinks is appropriate, it could be argued that the arbitrator could possibly manipulate the fundamental issues of the dispute for determination. In the same vein, he/she could actually suffer total disconnection with the imposing reality of the case or gets easily dissuaded by personal predilection or sentiments to infer and interprets certain facts of the case not as intended by the parties just because by his jaundiced mindset it seemed just and equitable.

At this juncture, it would be imperative to also state that despite the different choice procedures, "the arbitral tribunal will always seek and try to apply the law (or if permitted, the rules) which it considers to be appropriate in the circumstances of the case, whether the choice is reached through conflict rules or directly could after all be of less importance."[32] Therefore, whatever method the arbitral tribunal adopts has to represent the pre-eminent position of the applicable law: it ultimately decided was the 'appropriate'.

Applicable General principles of Law in International Commercial and Oil and Gas Arbitration

[32]Redfern & Hunter, op. cit., at 146.

- A general principle of law constitutes "the general principles of law considered, recognized in the international intercourse by civilized nations of the organized international community".[33] Professors Redfern, Bridge as well as Philip Sands of the Institute of Advanced Legal Studies London have argued that general principles of law represent a source of law rather than a system of law. It is a valuable source of law at the very foundation of international practice and jurisprudence. "Unfortunately, the manner in which they have been used by international arbitrators has left so much to be desired and thus the founded criticisms about its genuine purpose regime and best of intentions.[34]

Therefore, the sole arbitrator in Oil and Gas Disputes or the *Petroleum Development* arbitration would always readily set aside a discomfiting law of a state concerned in favour of general principles of law on grounds of the tantalizing premise in international law that the state could not "reasonably be said to exist"[35]. That was exactly what happened during the award (decision) in the *Sapphire* arbitration where the sole arbitrator set aside Iranian law the *tronccommun* law which ordinarily should have bound the arbitrator in the first place.

The analogy of these series of cases brings us back to the terminological as well as conceptual dilemma about the term "appropriate". It is a permitted premise from the perspectives of *Sapphire and Petroleum Development arbitration* above, that the tribunal remarkably though curiously ignored the laws of the state concerned during its interlocutory deliberations on the suspicious grounds that it did not consider such laws

[33]International court of Justice Statute Art. 38. 1.(c)
[34]Redfern & Hunter, op. cit., at 114
[35]*In Petroleum Development (Trucial Coast) Ltd v. The sheikh of Abu Dhabi* (1952) 1 I.C.L.Q. 247 at 250.

sufficiently adequate. It is pertinent to ask whether in international practice, the rejective views of an arbitral tribunal which considered the *lex loci dilicti* to be inadequate automatically makes it so. The truth is, every deliberations of the tribunal must be driven by genuine interpretation of the law in the context and general spirit of honesty of purpose. In classical jurisprudence, Father Hargastrom and Inhering were of the forceful view that every law must have a purpose and it is from that purpose regime that it drives its binding quality and social legitimacy.[36]

Additionally, it is astounding that many jurisdictions do not have the appetite to subject the award (the decision) of Oil and Gas arbitral tribunal to judicial review possibly because of litigation fatigue and general imposing consequences of the outcome of such exercise. Without prejudice, this might the crucial mis-opportunity to set records straight especially regarding errors in the interpretation of the substantive law and this would have aided the growth and progressive development of international jurisprudence. With the benefit of hindsight, such reluctant attitude does promote sacred cow mentality syndrome among Oil and Gas arbitrators. The cascade implications are immense because some arbitrators found incentives " to be less thorough with the analysis of the applicable law and the justice of the circumstances of the case even if at the deficit of justice."[37]

It is pertinent to allude here that the doctrine of *Kompetenz-Kompetence (compétence-compétence),* which means "jurisdiction on jurisdiction" is by all account less important

[36]Whitecross, (state the initials)*A Textbook of Jurisprudence*, (London: Kluwer 1977) 246.
[37]Sammartano, R. Mauro., *The Decision-making Mechanism of the Arbitrator vis-a-vis the Judge*, in Journal of International Arbitration 169 (Vol.25, No.1, Netherlands: Kluwer Law International, February 2008).Reference this properly.

within the general scheme of justice of applicable Law in the circumstances of Oil and Gas arbitration. In its basic literally context, it connotes that Oil and Gas arbitrators may during interlocutory deliberations decide on grounds of own self authority to proceed with proceedings even while questions have been raised challenging the tribunal's jurisdiction.[38]Conversely, it could suggest that proceedings must be concluded and award given before the aggrieved party could have the opportunity to challenge even the most basic of issues concerning the jurisdiction of the tribunal. To say the least, this is unfortunate and certainly not a good omen in course of a desperate quest for justice by the aggrieved through the non-pacific method of oil and gas arbitration. It is the viewpoint of this research that the foregoing represents just a narrow but specific problem associated with oil and gas arbitration especially regarding the fundamental question of the actual powers vested in the oil and gas arbitral tribunal.

CONCLUSION

It is the point of view of this research that, the arbitrator in Oil and Gas as well as International Commercial Arbitration requires certain degree of freedom in order to act effectively. Having reckoned that, there should be limits of discretions in terms of how far the arbitrator can go. Similarly, words such as appropriate and adequate which have wide ranging definitions should be construed strictly or alternatively provide a working definition to avoid scenarios where the arbitrator goes completely outside the realm of

[38]Park, W., William, *Arbitraljurisdictioninthe UnitedStates:whodecideswhat?*inInternationalArbitration LawReviewat pg 4 year and volume number?

recognized interpretation. In the same vein, it is pertinent to state that, the outcome of the dispute arbitration is to a degree predictable; however, the vagaries of procedural and substantive laws have grossly undermined that certainty. This is because, arbitration portends a situation whereby somebody outside the contractual agreement is invited by way of arbitration to resolve a dispute on the basis of perceived intentions of the parties through determination of what seemed appropriate in the circumstances of the dispute.

Albeit, it could be argued by cynics that definitions could be rigid, nonetheless, it beholds not to allow unfounded swing of the balance in the other direction. In other words, the imperatives of pragmatism should not allow contemporary approach to be too flexible. A delicate balance of sort has to be found without denigrating both the fundamentals of the International Commercial as well as Oil and Gas Agreements on the one hand and the dynamic of the causes of the dispute on the other hand. Having said that, it is superimposed imperative that in the course of dispute and most importantly its resolution that the arbitrator retains certain degree of freedom to determine the best applicable law though not without limits of flexibility in place.

Characteristically, it is the fundamental finding of this research that in International Commercial as well as Oil and Gas arbitrators need and do wield excessive powers. However, the new trends in modern practices does favour the limitation of such excessive discretion in order to avoid a situation whereby the arbitrators will be re-negotiating national and international commercial as well as oil and gas agreements instead of focusing on the primary objective of the Arbitral process which is resolution of disputes.