

# MAKING OF ARBITRAL AWARD: THE SIGNIFICANCE OF TIME AND PLACE

BY

SOLOMON A.M. EKWENZE Ph.D\*

*The Market must be the place where those who wish to invest money and those who wish to raise it can come together.... The money flow can have no boundaries, no constraints - no flags, no Union Jack, no stars and stripes no Rising Sun\*\**

## 1. Introduction

We are undoubtedly in the 21st Century. Arbitration today and in the future will be heavily information - dependent especially in an age of satellite telecommunications. Proper definition and understanding of "making arbitral award" will enable us appreciate and utilize the gains of information technology and civilization over time. This will also enable us know the future of arbitration in the on-line regime.

Probably, we can expect changes to be brought about by the Internet and other new telecommunication technology. In the spirit of E-commerce, it is foreseeable that E-arbitrations may become a common occurrence with the diminishing impact of geographic considerations. Crowded conference rooms, cluttered with stacks of papers and exhibits will be a thing of the past. Instead, lawyers and arbitrators comfortable in their own offices (or wherever they may choose to be), will listen to witnesses testifying from their ships in the middle of Pacific Ocean view video conferencing. Trial bags will go the way of the buggy whip as voluminous evidence, will be contained on devices the size of a 20th Century credit Card, and accessible wherever you are. This article will throw some light. as to the legal effect of the arbitral award made by the arbitrators at their various places. This will be possible if we agree that it is not only the act of signing the award which constitutes making it.

It is when we appreciate that an arbitral award is valid even when signed at different places and times that we shall not see present and even future technological

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\* S.A.M. Ekwenze Ph.D, Professor of Law, Dean, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus, Email: [ekwenze4me@yahoo.com](mailto:ekwenze4me@yahoo.com); [solekwenze@ansu.edu.ng](mailto:solekwenze@ansu.edu.ng); Phone: +234-803-914-3119.

\*\* Normura, Stockbrokers of the World, Banking World Supplement, January, 1988, 5.

developments as fictitious nor imaginary. With proper stand by all arbitrators and lawyers; arbitrators should stand as giants among giants, colosus whose set goal is to be everything to everybody everywhere in the commercial business transaction. International Commercial arbitration should have a vision, a vision that should foresee what effect information technology in conjunction with communication could have in global economy.

## **2. Preliminary Issues**

Simply, we start by saying that arbitration is a method of resolving disputes between parties by a third party or tribunal as agreed by the parties. Put differently, arbitration is the reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. Although an arbitration agreement may relate to present or future differences, an arbitration is the reference of actual matters in controversy<sup>1</sup>.

Arbitration depends upon the agreement of the parties, but it is also a system built on law and which relies upon that law to make it effective both nationally and internationally. The Nigerian law of arbitration is as stated in *Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004*. Nigeria has also ratified and implemented several arbitral treaties and conventions. The person(s) to whom a reference to arbitration is made is called the arbitrator.<sup>2</sup>

### **a. Making**

To understand "making" of arbitral award and answering the question whether or not the arbitrators must sign the arbitral award at the same time and place, some basic terms should be appreciated. For instance 'Making' and what are the ingredients of making. Simply, making is the process by which something is made<sup>3</sup>.

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<sup>1</sup> K.S.U.D.B. v Fanz Const. Ltd (1991) 4 N. W.L.R. (pt. 142) 1 at 32 para. F; 33 para C.

<sup>2</sup> Ibid, 32 para. G.

<sup>3</sup> Bernard Cayne et al., *The New Lexicon Webster's Enayclopedic Dictionary of the English Language*, Delux Edition, 1993, 602.

The term 'made' as in *Section 26(1) of Arbitration Act Cap A18* with respect to arbitral award simply does not mean "created at the arbitral seat" it means "effected" or "executed". The term signed may have been eschewed or avoided because although an award may have to be signed by each of the three (3) arbitrators, or whatever odd number, it is not complete until the last of the arbitrators or majority of them would have signed giving the reason for the absence of any signature<sup>4</sup>.

**b. Mental Elements In Making**

From the foregoing we have noticed that some mental elements and actions are involved. This means that *mens rea* and *actus reus* are also relevant in civil actions. This is because before a person takes a step to do a thing or make a thing, he may in most cases task his mentality after which his intention manifests in the action he has taken. It is this action that will come out either as a criminal act or civil act. The determining factor is usually the state of mind with which the act is done. Lawyers have long found it convenient to distinguish the mental element for the purpose of exposition of the law and have called it '*mens rea*'<sup>5</sup>. The full Latin phrase is *Actus non facit reum nisi mens sit rea* 'an act dose not make a man guilty of a crime unless his mind also be guilty. It is not the *actus* which is *reus* but the man and his mind respectively<sup>6</sup>. In this case, we shall not use "guilt" because there is no crime in signing a document or award which one is legitimately expected to sign, but may use ".regret" to substitute "guilt".

The expression "*actus reus*" is much more recent, haying apparently been coined by *Kenny* in the first edition of his *Outline of criminal law* in 1901. Both *actus reus* and *mens rea* are used as analytical tools<sup>7</sup>.

An arbitrator could regret taking a particular decision to form part or all the parts of an award. He can withdraw or rethink based on the same set of facts or further facts. Provided he has not signed the award, it is still at the stage of *mens rea*. The point of regret could be retraced.

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<sup>4</sup> *Section 26(2) of Arbitration and Conciliation Act Cap A18 L.F.N.2004 Articles 31 and 32 of UNCITRAL Arbitration Rules Cap A18 L.F.N., 2004. See also Section 24(1) of the Act.*

<sup>5</sup> *This phrase derives from a maxim quoted by Coke in his Institutes ch. 1.*

<sup>6</sup> *Haughton v Smith (1973) 3 All E.R. 1109 per Lord Hailsbam L.C.*

<sup>7</sup> *Smith and Hogan, Criminal Law: Cases and materials, 3rd Edn, Butterworths, 1.*

When he signs the award and publishes it before he changes his mind, the *mens rea* and *actus reus* are complete. If there are certain grains of bias or guilt in his mind, he can now have guilty conscience. He may from that time fear accusations, may be visibly or otherwise. Application for stay or setting aside will then succeed, when proved<sup>8</sup>.

*Actus reus* includes, in the terminology not merely the whole objective situation that has to be proved in the court by the party adversely affected but also the absence of any ground of justification or excuse. By a little extension the issues of voluntariness will clarify bias as there may be undue influence. Again, the issue of justification and excuse may prevail on the level of expertise required for such arbitration and whether the arbitrator had the required level of expertise. Once the arbitrator used all his faculty and facility to make the award, he is free from guilty mind. Mental element cannot be substantiated by simply showing an intention to do a thing and no more. If the arbitrator believed (though under a mistake) in circumstances which would justify the degree of what he did, may be reaching the conclusion or/and signing the award, he lacked the *mens rea*.

In fact, it is said that if the Latin expressions (*men rea* and *actus reus*) are regarded merely as technical terms which do not in themselves necessarily import guilt, the difficulty of so using them disappears. Another aspect *is* a negative element. This negative element may arise from deliberate misrepresentation of facts by a party or fellow arbitrator(s). This means that defence which arbitrator has for signing and publishing an award may have mental as well as external elements.

A mistaken belief held on reasonable grounds in the existence of a circumstance is excusable. A person who foolishly believed that his victim was attacking him was in a different position from one who foolishly believed that the victim was consenting to what would, but for consent be an assault<sup>9</sup>. If the arbitrator by any means did not know that it was the award that he was signing may be due to alcohol, negative spiritual influence, automatism, (muscular movement or crooking of a finger), reflex action, spasm, blackout, unconsciousness he cannot be said to have signed or made the award

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<sup>8</sup> See Section 29 of the Act.

<sup>9</sup> *Albert v Lavin* (1982) A.C. 546 per Hodgson J at 562.

because he was not in control of his action. The implication is that he did not will the award<sup>10</sup>. He may plead *non-est-factum*.

However, when an arbitrator knows that he was not feeling well or that he always has attacks or moments of unconsciousness or gets drunk easily, he may not be given benefit of doubt. This is because a driver who falls asleep at the wheel is presently regarded as guilty of careless driving in the period before he falls asleep; he ought to stop at that time<sup>11</sup>.

If physical incapacity prevents an arbitrator from signing an award he could be excused because the law does not condemn a person for not doing what cannot possibly be done - unless, once again, it is in a relevant way his fault that he cannot possibly do it. Per chance, if all the arbitrators act with guilty conscience by conspiring to so do, each is blame worthy. In case they are members of an arbitral institution their names could be struck out, withdrawn or cancelled out of the list. But if they were independently chosen by the parties they may never again be chosen as arbitrators.

Further, if the sanity of an arbitrator is in doubt before or during an award, it is to be resolved by both the arbitrators and the parties. In case of conflict in the resolution then the court will be referred to for final determination. It is the court of law which can distinguish between that which is in accordance with the law and that which is contrary to law. The outcome will affect the award either way, that is, negatively or positively. It could be possible that either of the parties to commercial disputes is alleged insane. Perhaps the insanity or partial obliteration of memory or absent mindedness or suffering from arteriosclerosis or melancholia may have given rise to the dispute or result of the transaction which resulted in the dispute. The determination of insanity of any party or arbitrator is a matter of inquiry not a trial, so onus of proof is not applicable.

The point is that an award cannot be said to have been made when it is manifestly affected by any of the above mentioned diseases affecting the mind.

### **Must Arbitrators Sign An Award At The Same Time And Place?**

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<sup>10</sup> Roberts v Ramsbottom (1980) 1 W.L.R. 823 per Pace Neill J.; Watmore v Jenkins (1962) 2 Q.B. 572 at 586 per Winn J.

<sup>11</sup> Kay v Butterworth (1945) 173 L.T. 191.

It should be borne in mind that the agreement of the parties and the arbitration clause in the agreement determine so many things concerning the procedure, law or rules in arbitration. The arbitration clause also waives so many things in arbitration. It is in line with the discretion of the parties with respect to arbitration clause or a corollary that the Supreme Court also said that rigid application of court rules must be avoided<sup>12</sup>. Arbitration clause is autonomous from the arbitration agreement. It is provided in *Article 21 (2) of the UNCITRAL Arbitration Rules* -

*an arbitration clause which forms part of a contract and which provides for arbitration under the Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.*

This means that arbitration clause is both separable and severable from arbitration agreement<sup>13</sup>. The main contract concerns itself with the transaction between the parties while the arbitration clause concerns itself with eventual dispute arising from the contract. This autonomy keeps arbitration alive and makes the dispute that has arisen from the contract death with in the interest of justice and in the interest of commerce. Also, when the parties notice that the issue of signing of the award at the same time and place would constitute problem to their detriment, they address the issue to the best of their interest.

It is at the point of termination of contract that the arbitration clause rekindles, to substitute burning questions and issues for smouldering ones. This is why Lord MacMillian said in *Heyman v Darwins Ltd*<sup>14</sup>, that total breach of contract,

*...does not abrogate the contract though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of obligations undertaken by each party in favour*

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<sup>12</sup> *Afolabi v Adekunle* (1983) 2 S.C.N.L.R. 141; See also *Melifonwu v Egbunike* (2001) 1 N. W.L.R. (pt. 694) 271 at 281 para. D.

<sup>13</sup> *Prima Paint Corp. v Conklin Manufacturing Co.* 18 L.Ed. 2d 1276.

<sup>14</sup> (1942) A.C. 356 at 374.

*of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purpose of the contract have failed, but the arbitration clause is not one of the purposes of the contract.*

At the point when the contract is signed, the arbitration clause becomes effective and binding with all the ingredients of valid contract attaching to it but stays in abeyance till the need arises. It may never come up if there is no dispute, particularly when the parties go their respective ways satisfied with their contract.

On the other hand, the autonomy of the parties in the choice of the law applicable to the contract is one of the fundamental principles universally accepted in arbitration particularly international commercial arbitration. By the party's autonomy, parties are free to choose the "applicable law" or the "governing law" or the "proper law" of their contract. It is these that regulate the substance of their dispute and so governs the interpretation and validity of their contract. Also their rights, duties, immunities, liabilities, obligations and others as well as the mode of performance or consequences of breaches of the contract are determined by the party's autonomy.

The look-out and hope of parties to an arbitration is the award which should by all intents and purposes dispense justice to the extent that both parties should feel satisfied with the award. However, it is pertinent to state that there is no internationally accepted definition of the term award<sup>15</sup>. The definition which the learned authors *Redfern* and *Hunter* describe as "helpful but incomplete"<sup>16</sup>, is that of New York, Convention which stated as follows-

*The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted<sup>17</sup>*

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<sup>15</sup> *Redfern and Hunter, Law and Practice of International Arbitration, 2nd Ed. Sweet and Maxwell, 1991, 359.*

<sup>16</sup> *Ibid, 359*

<sup>17</sup> *New York Convention, Article 1(2)*

Apart from the above definition the next available definition of award is-

*Award means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case only if the arbitral tribunal terms its decision an award*<sup>18</sup>.

What is important to the parties to the arbitration is for the award to meet the needs and requirements of the parties. Generally an award must be unambiguous and dispositive and formulated in an imperative tone-

*We award "we direct", "we order"*<sup>19</sup>.

With respect to the award, the Convention provides that the tribunal shall decide questions by an absolute majority of its members; that the award shall be in writing and shall be signed by the members of the tribunal who voted for it; that the award shall deal with every question submitted to the tribunal, and that it shall state the reasons upon which it is based. The specific character of this provision *Article 48* is particularly useful in view of the great variety in the law and practice of different states<sup>20</sup>. Some national systems of law require that all arbitrators should sign the award in order for it to be valid<sup>21</sup>. This is highly unsatisfactory, since in such cases a dissenting arbitrator may frustrate an arbitration simply by refusing to sign the award. Any country which contains such a mandatory rule without any means of "rescue" would be unsuitable for international arbitration<sup>22</sup>.

The rules of arbitration of the major international, arbitration institutions all deal expressly or impliedly with signature of the award. The I.C.C. Rules make it clear that the award must be signed, but that the award of a majority of the arbitrators, if there is

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<sup>18</sup> Broches, "Recourse Against the Award; Enforcement of the Award", *UNCITRAL's Project for a Model Law on International Commercial Arbitration, ICCA Congress series No.2* (1984), 208.

<sup>19</sup> *Ibid* f.n. 14, 388.

<sup>20</sup> A. Broches, *Sec. - Gen. of ICSID, Arbitration In Investment Disputes, The British Institute of International and Comparative Law, London, 1980, 6.*

<sup>21</sup> See *ICCA International Handbook on Commercial Arbitration; See Redfern and Hunter, Op cit, 387.*

<sup>22</sup> *This situation does not apply to countries such as Switzerland, which require an award to be signed but allow for the signature of the majority or the presiding arbitrator as the case may be: Swiss PIL Act, Chap. 12 Art. 189. Op cit, 387.*

no majority the award of the presiding arbitrator alone, is effective<sup>23</sup>. A similar provision, is found in the LCIA Rules<sup>24</sup>.

*UNCITRAL Model Law in Article 32(4) stated–*

*(4) An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state, the reason for the absence of the signature.*

The award cannot be made unless and until the last arbitrator has assented to the award by signing it. This is the earliest time when the award can be said to be 'made' and may determine where it is 'made'. It is not the act of signing the award which constitutes making it, although it may do so but the delivery of the award to the parties or a notification to them that it is ready for delivery.

What has to be looked for is the first point of time, at which the arbitrator's award could not be revoked or altered, the arbitrator has expressed his final determination and is *functus officio*. It is an interesting thought for an arbitrator to 'make' an award in Paris when the terms of reference require that the arbitration, which must include the award, “shall take place in London” may very well constitute technical misconduct which would justify setting it aside or procedural mishap justifying remission. In saying this, one has to have in mind that arbitrator(s) may be in an aeroplane in mid Atlantic and just state any place. When the arbitrators write mid – Atlantic as where the award was signed it may raise jurisdiction problems. This is because the parties never agreed and probably never contemplated mid Atlantic.

However, if the award is a Convention award and not a domestic award, no competent authority in any Convention country; since over 50 countries are parties to the Convention, could ever set aside or suspend a Convention award, even if the award were being enforced in the normal sense of the word in another Convention country.

It could still be argued that it is not where the arbitrator signed the award but where the award was published to the parties, is where the award was 'made'. This is because if a tree falls in a forest and no one hears the fall of the tree, the tree has not

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<sup>23</sup> *ICC Rules, Art. 19 and 23.*

<sup>24</sup> *LCIA Rules, Art. 16(1) (2) and (3).*

fallen to the best of knowledge of those concerned. Till that moment, an arbitrator could have changed his mind and hence was not *functus officio*. It is submitted that the award which was said to be made in Paris was made in London where-

- i. all the hearings took place and where the parties were domicile;
- ii. it was published to the parties;
- iii. the seat or centre of gravity of the arbitration was located.

It is crucial to bear in mind that an award is not an isolated event, but rather the culminating stage in a process of arbitration which has passed through a number of earlier phases, from which, it cannot properly be divorced. It would be highly unreasonable if an award could be capriciously transferred simply and solely as a result of the fortuitous circumstance of the place of signature of the award. In order to decide where an award is made, one must look at the arbitration as a whole; and not just at the place of signature, and the proper criterion is the Central point of the arbitration proceedings.

The place of arbitration<sup>25</sup> in the legal sense (also called 'seat' of arbitration) means that the arbitration law of the country where the arbitration takes place governs the arbitration (and that it is that place) which must be mentioned in the arbitration award as the place where, the award is made. The term 'made' as already stated, simply does not mean 'created at the arbitral seat' it means 'effected' or 'executed'. The term 'signed' may have been eschewed because although an award may have to be signed by each of three (3) arbitrators, it is not complete until the last of the arbitrators or majority of them would have signed giving the reason for the absence of any signature<sup>26</sup>.

In *Brooke v Mitchell*<sup>27</sup> the court held that an award is 'made and published' when the arbitrator, by some act, has expressed his final determination on the matters referred to him; and that the instrument was complete as an award, and the umpire could make no alteration in it after the execution of it; he was then *functus officio*, having declared his final mind.

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<sup>25</sup> Sections 16(2) and 26(3)(c) of Arbitration and, Conciliation Act Cap. A18 LFN, 2004.

<sup>26</sup> Section 26(2) of the Act, Articles 31 and 32 of UNCITRAL Arbitration Rules.

<sup>27</sup> 6M. & W. 473.

An award has all the legal attributes from the moment of execution and it has them irrespective of the knowledge of the parties. For where the award was made as in *Section 26(3)(c) of the Arbitration and Conciliation Act Cap A18 L.F.N., 2004* could be chosen using "an objective and easily applicable criterion".

In the case of *European Grain Ltd v Johnston*<sup>28</sup>, Lord Denning M.R raised the issue of proper conduct of arbitration. The facts of the case are that the buyer of wheat agreed to purchase from the seller 600 tonnes of wheat to be delivered in three equal monthly instalments of 200 tonnes. The contract of sale was subject to the arbitration rules of the United Kingdom Agricultural Supply Trade Association (UKASTA). The first two instalments were duly delivered, but on the third installment only 100 tonnes were delivered. A dispute arose as to the third installment, the sellers claiming payment for the 100 tonnes delivered and the buyer cross - claiming for the delivery of the outstanding 100 tonnes. The matter went to arbitration. The parties each appointed an arbitrator, who together appointed a third arbitrator as chairman. Before all the submissions had been made, the arbitrator appointed by the sellers, who was going abroad, wrote a letter to the chairman stating his views as to what the award should be an signed a blank award form.

The other two arbitrators took a different view from the arbitrator appointed by the sellers and, on agreeing as to the award, they filled in the blank award form with their decision and added their signature after that of the arbitrator appointed by the sellers. The award ordered the buyer to pay the sellers for the 100 tonnes received and further ordered, on the cross-claim, the sellers to pay the difference between the market price and the contract price in respect of the 100 tonnes undelivered. The buyer in accordance with the first part of the award, paid the amount due, which the sellers accepted. However, the seller then issued a notice of motion seeking to set aside the second part of the award, claiming, *inter alia*, that the arbitrators had wrongly purported to determine the buyer's claim in the buyer's favour without giving the sellers or the arbitrator appointed by them an opportunity to consider any evidence or documents in support of the claim. The judge dismissed the motion and the sellers appealed.

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<sup>28</sup> (1982) 3 *All E.R.* 1989.

The question which *Lord Denning* MR asked before dealing with it characteristically was: What is the effect of Mr Defoe (arbitrator appointed by the seller) signing the award in blank, and then going off to Australia?

To answer the question, the Lord Justice MR referred to *Russell on Arbitration* (19<sup>th</sup> edn., 1979) p. 247 which said-

*All must make award together. Where there are two or more arbitrators, all should execute the award at the same time and place. If they do not, the award may be invalidated, but as the objection is one of a formal character, if no other objection is shown, the court may remit the award to the arbitrators for correction.*

*All the arbitrators must act together. As they must all act, so they must all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of -them all.*

The statements credited to *Russell* were supported by the case of *Lord v Lord*<sup>29</sup> where each of two arbitrators signed the award but did so at a different time and place. In support of the case and statement, it was said-

*It is now clearly established that every judicial act, to be done by two or more, must be completed in the presence of all who do it: for those who are to be affected by it have a right to the united judgment of all up to the very last moment.*

*Lord Denning* MR then said that now "business convenience requires that a different rule should be laid down<sup>30</sup>. This judgment was delivered thirty four (34) years ago as it was delivered on 19th, 20th July, 1982. As at this time, Lord Justice Denning MR adverted, his mind to the use of telephone and telex by the arbitrators to exchange ideas .and agree as to their award. In this 21st Century, telephone and telex have been overtaken by the internet telephone, camera, e-mail, facebook and others which enables the parties to link themselves up as they are at many different countries as they are and see each other face to face, so read the psychology and countenance on each person's

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<sup>29</sup> (1855) 5 E & B. 404, 119 E.R. 531.

<sup>30</sup> *European Grain Ltd v Richard Johnston* (1982) 3 All E.R. 989 at 992 para. D.

face. The arbitrators can also have on their respective computer monitors their proposed award. E-mail can be equally used or the worldwide web site to communicate.

Then, whenever an agreement or award or any other document or thing is to be done by two or three jointly, the practice is for one or the other to draw up a draft and send it to the other or others for their consideration and comments. One or other may suggest amendments and send it back. So it goes to and fro until the draft is agreed/accepted. Then a legible final copy is made for signature. It is then sent round and signed by each separately. Once all have signed, it becomes the final document. It is quite unnecessary for them all to meet together to sign it. When each appends his signature, he expresses his assent to it and then, as soon as the others sign, it becomes final. Whenever all have signed, each must be regarded as having assented to it, even though each signed it at a different time and place from others. That principle applies to an award of arbitrators just as it does to a written agreement or any other document to be executed by two, three or more people.

However, those who are to be affected by it have a right to the united judgment of all up to the very last moment, but that is easily secured. If one of those who signed first should change his mind, then he can in these days by the latest internet device tell or notify the others about it before they sign. The document can then be held up. Any necessary amendments are made until by the latest technology all agree. Once they agree, the document is signed by the last one. It is then final, even though each has signed separately at a different time and place.

It was held in the *European Grain Ltd v Johnston (Supra)* that since there was no agreement by the arbitrators as to award rather than the seller's nominated arbitrator, signed both literally and figuratively, *carte blanche* so left the decision to the others without himself taking his proper part in it; it is improper. The award has every ground for it to be set aside. One of the reasons for setting aside the award is based on the fact that the award was not made and published.

An award could be made and published on-line provided that it is "reasoned award". By this, it means an award which all that are necessary are that the arbitrators should set out what, on their view of the evidence did or did not happen and should

explain succinctly why, in the light of what happened, they have reached their decision and what that decision is<sup>31</sup>. Because a speaking award is of more use to the parties than a silent one.

The award is made and published when the arbitrator by some act, has expressed his final determination on the matter referred to him<sup>32</sup>. Publication means publication to the parties, that is, when they have notice of its contents and are therefore in a situation to move to set it aside. In order to decide where an award is made, one must look at the arbitration as a whole, and not just at the place of signature, and the proper criterion is the Central point of the arbitration proceedings<sup>33</sup>. An arbitral award is 'made' when the arbitrator had become *functus officio* as having irrevocably made his final determination.

An award is not "an event", it is only a "culminating stage" in the sense that it could not be produced without reference to and through the medium of evidence previously tendered and facts adduced. Of course it cannot be divorced from the arbitration because it represents the conclusion of it. But it is with the making, not the evolution of the award that the Act is concerned, and that has nothing to do with where the arbitration takes place.

From the moment of execution of an award it has all the legal attributes of an award; and it has them irrespective of the knowledge of the parties<sup>34</sup>.

#### **4. Conclusion**

It is not the act of signing the award which constitutes making it, although it may do so, but the delivery of the award to the parties or a notification to them that it is ready for delivery. 'Where the parties were notified of the award could be even more capricious than where the award was signed. The award made should not beguile anyone or be a slouch to the technological developments in Information Technology and Communication which should be utilized by arbitration to its advantage.

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<sup>31</sup> *Beresford-Hartwell, Reasoned Award, Arbitration, Vol. 54 No.1, Feb. 1988, 36 at 44.*

<sup>32</sup> *Per Alderson B in Brooke v Mitchell (supra) at 478.*

<sup>33</sup> *Per MC Cowan LJ in Hiscox v Outhwaite (1991) 2 W.L.R. 1321 at 1337 para H.*

<sup>34</sup> *Hiscox v Outhwaite (supra) at 1338 para G.*

What we have to look for is the first point of time; in a time - graph, (at the apex) at which, the arbitrator's award could not be revoked or altered, the arbitrator has expressed his final determination and is *functus officio*. Where an award states that it is dated or signed in a particular place that is the place where it had been made<sup>35</sup>. If no such statement is included, it should be taken to be made in the place where it is made available to the parties or from which it is sent to the parties. What is essential is that the award was reached by the arbitrators *ex aequo et bono* (in justice and good faith).

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<sup>35</sup> Ibid at 1339 para H.