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Enforcement of Arbitral Awards Made Under the New-York Convention in Nigeria Challenges and Remedies

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ABSTRACT: *The New York Convention of 1958 is a milestone in the development of international commercial arbitration. The Convention has cured the notorious insufficiencies of the 1923 and 1927 General Conventions on the execution of foreign arbitral award like the double exquatur where a party seeking enforcement had to obtain permission to enforce it. It also places the burden of proof on the resisting party as well as setting up grounds upon which the court may apply on its own initiative without regard to burden of proof. The New York Convention places a balance on issues that may lead to refusal of enforcement in a country especially where the subject matter is incapable of settlement by arbitration such as issues that are contrary to public policy of the country of enforcement. The inadequacy of Nigerian legislation was very paramount with emphasis to the declaration which it deposited with the United Nations Secretary General. The attendant problems that arise on the enforcement of New York Convention arbitral awards in Nigeria were discussed and remedial approaches suggested.*

I. INTRODUCTION

The New York Convention of 1958 is a milestone in the development of international commercial arbitration to which 120 states were parties to by 2002. It is the most important international instrument for international arbitration because it creates an environment for development of a suitable international legal infrastructure for international arbitration. It also ensures the enforcement of arbitral awards around the world. The instrument of New York Convention was adopted by the United Nations Conference on International Commercial Arbitration convened by the Economic and Social Council of the United Nations. The fortieth anniversary of the New York Convention was celebrated on 10th June 1998, and the then Secretary General of the United Nations, Kofi Annan, observed that the New York Convention which has been acceded to by many states, including the leading international trading nations was one of the most successful commercial law treaties (United Nations 1999). According to Kofi Annan, the development of international commercial arbitration began with the New York Convention, which originated in 1953 from a draft submitted by the International Chamber of Commerce (ICC) to the UN Economic and Social Council on International Arbitral Awards. The Council however limited its proposal to foreign arbitral awards.

The Council's proposal condemned the notorious insufficiencies of the 1923 and 1927 General Conventions on the Execution of Foreign Arbitral Awards like the *double exequatur* where before an award is enforced under the old system, the party seeking enforcement had to get *exequatur*; that is to say permission to enforce, in the country of the seat of the arbitration. It is only when he had received this permission that the party could proceed to the court of the country where enforcement was sought (to get its second permission for enforcement).The New York Convention does not impose such an onerous duty on the arbitration party, once the award is rendered, it can immediately proceed to the enforcement proper. The winning arbitration party seeking enforcement need only certain formal requirements for instance, he has to submit the arbitration agreement and the award. There is no need for the winning party to prove any positive criteria the arbitration award must meet. It is up to the losing party to prove criteria that is to say, the non-enforcement grounds.

The New York Convention has rendered both the Geneva Convention and Protocols ineffective to the recognition and enforcement of arbitral award made in the territory of a state other than the state where the recognition and enforcement of such award are sought, and arising out of differences between persons, whether physical or legal.

There are some innovations of the New York Convention over the Geneva Convention.

(i) The New York Convention eliminated the double exequatur or judicial approval of the arbitral awards by the country where they were issued and from the country where enforcement was requested (only the later authorization was retained).

(ii) The New York Convention reduced the grounds for refusing recognition and enforcement of foreign arbitral awards.
(iii) Finally, the New York Convention inverted the burden of proof on the party seeking recognition. Instead, it established that the grounds for rejecting recognition and enforcement of all award could only be raised by the party against which it was made (under the Geneva Convention the party seeking recognition has to justify it).

For Rt. Hon. Micheal Ken, the Convention is the bedrock of modern international arbitration, the foundation on which the whole edifice of international arbitration rests.

The New York Convention otherwise called Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies to some categories of awards according to its operational provisions
(a) The convention applies to the recognition and enforcement of arbitral awards made in a territory of a state other than the state where recognition and enforcement of such awards are sought and arising out of differences between person whether physical or legal.

(b) It also applies to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

The term as used and construed in the Convention's provision 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. The Convention however provides that states may on the basis of reciprocity and commercial relationship apply the Convention's rules to awards made only in the territory of another contracting states though it will only be to differences arising out of legal relationships whether contracted or not but which are considered commercial under the national law of the state making such declaration. Although reciprocity and commercial reservation has been criticized as being inconsistent with the trend towards multilateralism prevalent in the world today, **Redfern and Hunter** on the other hand seem to have favoured it. Thus, the number of states that have adopted the Convention is growing continuously and stands as an advantage. The inherent problem with the term is that each state may determine for itself what relationship it considers commercial. This has created so many problems in the application of the Convention's awards. It is now difficult to have a uniform interpretation of the Convention's award sometimes even within the same state as in **Indian Organic Chemical Limited v subsidiary 1 (US) subsidiary 2 (US) and Chemtax Fibres Inc.** In this case, a party commenced legal proceeding notwithstanding the existence of an arbitration agreement. An application for a stay of proceeding was made under the relevant Indian legislation enacting the New York Convention. Thus India has entered the commercial reservation. The Bombay High Court held that, while the agreement under which the dispute arose was commercial in nature, it could not be considered as commercial under the law in force in India. According to the dicta, in my opinion, in order to invoke the provisions of the convention, it is not enough to establish that an agreement is commercial. It must also be established that an agreement is commercial. It must also be established that it is commercial by virtue of a provision of law or an operative legal principal in force in India.

This decision was however rejected by the High Court of Gujarat in the second case of **Union of India and others v Lief Hoegh & co (Norway) and others.**

The high court granted the application despite the existence of an arbitration agreement and on the question of whether or not the contract was commercial in nature, the judge was of the opinion that the term 'commerce' is a word of the largest import and taken in its sweep all the business and trade transaction in any of the forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries

He further added
that the view of the learned single judge of the Bombay High Court in **Indian Organic Chemical Limited's Case** has not been approved by the Division Bench of the Bombay High Court. The Division Bench after setting out the view of the judge in the aforesaid decision ultimately disagreed with it.The position under the New York Convention still remains that a state reserves that right to decide what it considers as commercial for

purposes of the commercial reservation. It is suggested that a second look should be taken at the convention. The commercial reservation should be expunged by the contracting states in an attempt made to define what is commercial for purposes of the Convention or to provide guidelines on how to determine what should be regarded as commercial for the purposes of the Convention.

The Convention imposes obligation on each contracting state to recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difference which has arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject capable of settlement by arbitration. The parties' agreement which must be in writing shall also include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained exchange of letters or telegrams. The Convention also mandates the courts of contracting states to recognize and enforce an arbitration agreement in writing unless it is null and void, inoperative or incapable of being performed. The New York Convention provides for both recognition and enforcement of award to which the convention applies;

> *Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory the award is relied upon, under the condition laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than one imposed on the recognition or enforcement of domestic arbitration awards.*

So far as recognition is concerned a contracting state is bound by the Convention to undertake and respect the binding effect of awards to which the Convention applies. Such award may be relied upon by way of defense or set off in any legal proceeding concerning the subject matter of the award commenced in the national court of the state concerned. So far as enforcement is concerned, a contracting state which is a party to the Convention undertakes to enforce awards to which the Convention applies in accordance with the real procedural rules. The harsh and difficult conditions shall not be imposed or applied beyond what is provided for in the procedural legal system of the country. Thus, the municipal law of the venue of enforcement would influence its enforcement procedure and may extend the grounds for refusal of recognition or enforcement set out in Article of the convention.

The formalities required for obtaining recognition and enforcement of award to which the New York Convention applies are supple. As provided in the New York Convention, the party shall at the time of filing his application for recognition and enforcement, supply the appropriate court with the following:

(i) The duly authenticated original award or a duly certified copy of it.
(ii) The original agreement referred to an **Article II** or a duly certified copy of it.

Where the award sought to be enforced or the agreement is not made in an official language of the country in which the award is relied upon, the party seeking enforcement will produce a translation of the document (agreement and award) into such language certified as correct either by a diplomatic or consular agent of the country to which that belongs or in such other manner as may be sufficient proof of its correctness according to the law. The party who is seeking for recognition and enforcement of the ward will in addition be required to supply the following documents to prove:

(a) That the award was rendered in pursuance of a valid arbitration agreement.
(b) That the award was made by an arbitral tribunal properly constituted.
(c) That the award is final.
(d) That the object of the award was capable of settlement by arbitration under the law of the state where it was made (that the object of the award is capable of accord and satisfaction).

Refusal of Enforcement of Award by the Party against Whom It Was Sought

The recognition or enforcement of the award made pursuant to the New York Convention may be refused at the instance of the party against whom it was sought if that party is able to furnish sufficient proof satisfactory to the appropriate authority in that case. The ground as contained in **Article V** of **New York Convention** was grouped in two distinct categories. The first category consists of grounds for refusal with respect to which the resisting party has the burden of proof. The second category is made up of grounds that the court may apply on its own initiative without regard to burden of proof.

The grounds for refusal by the resisting party are as follows:

(a) The parties to the agreement referred to in the Article II will under the law applicable to them, have some disability that the agreement is not valid under the law to which the parties have subjected it or failing

any indication thereon under the law of the country where the award was made. A person who is *Sui-Juris* can enter into arbitration agreement and where the person is an infant; his right to enter into arbitration agreement is limited just as in ordinary contract. The law applicable to the determination of capacity is the law of the person involved. A mentally unstable person is bound by a submission to arbitration unless it can be shown that the disorder made him incapable of entering into the contract and the other party is aware.

An agent's authority to enter into an arbitration agreement may be expressed or implied. The existence of such an authority in any situation will depend on the existing mode of conduct between the principal and the agent in their normal business relationship. To avoid any personal liability, an agent must ensure that he was properly authorized and while submitting, he must indicate that he is an agent failing which he will be personally liable .A solicitor has no implied authority to bind his client by a submission to arbitration. It is only a dispute referred that he has an implied authority to bind client in matters relating to the conduct of the proceeding. A personal representative may submit to arbitration dispute relating to the estate of the testator or interstate. Such reference if made without reservation implies that the personal representative has assets out of which an award may be satisfied. Corporation, sole or aggregate may submit to arbitration. A corporation can only validly contract under its common seal. A corporation sole, on the other hand has full contractual capacity and by implication arbitral capacity.

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrators or of the arbitration proceedings or was otherwise unable to present his case. The national court of state forum usually determines its own concepts of what constitute a fair hearing. All parties to the proceedings are entitled to be notified in writing of the appointment of the arbitrators and this must be done within a reasonable time. The reasons are to enable the parties raise objection against the appointment if they have any and to prepare for the proceedings. It will also assist the party to prepare his defense, fair hearing is a strong issue and if proved successfully by the resisting party, the award can be set aside.

(c) The award deals with matters not contemplated by or falling within the terms of the submission to arbitration, or that it contains decision beyond the scope of the submission made to the arbitration tribunal provided always that where the decision on what was submitted could be severed from what is not submitted, the court will severe the "baptized" portion of the decision from what was submitted.

Under the New York Convention, recognition and enforcement will be refused if the arbitration agreement is not valid under the law which the parties have been subjected to, falling any indication thereon, under the law of the country where the award was made.

(i) Where an award is made in excess of jurisdiction (*extra petita)***,** such an award may be recognized and enforced only on one condition, that the award is severable. In other words, the good part can be severed from the bad part. The good part will then be enforced and the bad part rejected. The New York Convention recognized this in Article v(1)(C). A similar provision can also be found in the UNCTTRAL Model Law and the Arbitration and Conciliation Act. Where the award is not severable; it follows that the court will refuse recognition and enforcement and set aside the entire award for lack of jurisdiction. But if the award is only in respect of incidental issues connected with the terms of reference, then it will be saved.

(ii) If the award fails to deal with all the matters referred to arbitration, the award is **"***infra petita***"**

A party aggrieved by the award may request a court not to recognize and enforce such an award. It has been argued that such an award should be held valid in respect of the points with which it deals. Redfern and Hunter however disagree with van de Berg. They are of the opinion that the significance of the point not considered has to be looked at in relation to the award as a whole. They contend that a situation could arise where the point overlooked could be of such importance that if they had been dealt with the whole balance of the award could be altered and its effect differed. The aggrieved party in such a situation would be entitled to have a right of recourse against the award. There is no reason why an award should be held valid in respect of certain points, because it will not be easy to divorce point from one another. In practice, it may be discovered that the issues considered by the arbitral tribunal may be interwoven and as such a decision on one affects the decision of the other. It is preferable to consider the issues considered by the arbitral tribunal collectively provided they come within the submission to arbitration. If an award is held valid on certain points as contended by *Van de Berg,* it may open the door for protracted litigation. This is because the aggrieved party would certainty appeal against it and would be prepared to fight to the highest court of the land. If at the end, the apex court sets aside the award, so must time and money would have been wasted. The parties are left with no option

than to commence proceedings afresh. The idea of arbitration being a quick way of resolving disputes is of course defeated.

(d) The **New York Convention** award may be refused recognition or enforcement if a party proves that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the law of the country where the arbitration took place. Parties to an arbitration agreement have the right to stipulate in their agreement, the qualification for anybody to serve on the arbitral tribunal, the number of arbitrators and the procedure for appointing them where the parties failed to agree as to these facts, the law of the place of arbitration shall be followed in appointing the arbitrators.

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which the award was made. Under the New York Convention, an award can be considered as binding "at the moment on which it is not longer open to a genuine appeal on the merits to a second arbitral instance or court in those cases where such means of recourse are available" but where the award made have been annulled in the country in which it was made, such an award will not be enforced because it has breached the provisions of the Convention as contained in **Article (e).**

Further the recognition and enforcement of **New York Convention** award can be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of the country. It is not every dispute that can be referred to arbitration. It is only disputes that can be tried as civil matters that can be referred. The concept of arbitrability relates to public policy limitations upon arbitration as a method of settling disputes. Each country may therefore in accordance with its own economic and social policy, decide which matters may be settled by arbitration and which may not. In international cases, arbitrability involves a balancing of compelling policy considerations. A balance has to be achieved between the importance of reserving matters of public interest to the courts against the public interest in the encouragement of arbitration in commercial matters if an arbitration agreement covers matters that cannot be settled by arbitration either under the law of the place of arbitration, or under the law of the place where recognition and enforcement is sought, the agreement becomes ineffective and will therefore as a consequences be unenforceable. The primary concern of aribtrability is that of whether a dispute is capable of settlement by arbitration under the law.

That is to say, is the dispute one which only the courts can adjudicate upon or is it one which the relevant national law allows arbitrators to resolve? Such disputes must be capable of being compromised by way of accord and satisfaction. Instances are all matters in dispute affecting real or personal property, disputes as to whether a contract has been breached by either party or whether one or both parties have been discharged from further performance thereof. Other disputes which may be referred to arbitration include, the terms of a deed of separation between husband and wife compromise by either husband or wife for dissolution of marriage and other matrimonial action, also issues in action before a court of law can, with the consent of the parties and leave of the court be referred to arbitration specific question of law such as the referred to arbitration.

On the other hand, disputes arising out of illegal transactions cannot be referred to arbitration. An award arising from such a reference is not enforceable and may be set aside. Equally a difference relating to a contract which is illegal for being inconsistent with government order cannot be enforced. Similarly a charge of fraud is not abitrable. This is because only a court with the proper jurisdiction can hear a criminal charge as such a matter is of public concern. Public policy limitations on arbitrability do not mean however, that the tribunal must always refuse to consider any issue which relies on a forbidden field. It is often a matter of the tribunal accepting the law in respect of the issue as that law has been determined by the state involved.

(b) The recognition and enforcement of the award would be contrary to the public policy of that country. Public policy is not defined by the Act. It is however been stated by the **Black's Law Dictionary** to mean:

Community sense and common conscience extended and applied throughout the state to matter of public morals, health, safety, welfare, and the like. It is that general and well settled public opinion relating to man's plain, palpable duty to his man, having regard to all circumstances of each particular relation and situation

Public policy can be considered under two headings namely:

(a) Domestic public policy

(b) International public policy

Domestic public policy: The requirement of public policy varies from one state to another. It is possible to envisage a dispute which may not be contrary to public policy in one state while being contrary to public policy in another. For instance, an award in a dispute between a wine producer and a distributor may not be enforceable in a strict Islamic country in which the production, sale or consumption of alcohol in prohibited.
International Public Policy: There is no doubt that the domestic public policy of a state differ. There is therefore a great possibility that an award, which a state may set aside for being contrary to its public policy, may be regarded as unimpeachable by another state. It was this problem that France had in mind and consequently developed the concept of International Public Policy which is embodied in the French Code of Civil Procedure. Under the code, an international award may be set aside if the recognition and execution is contrary to International Public Policy.

The Nigerian Situation

In the Nigerian context, Nigeria acceded to the New York convention on March, 17 1970 but it was not domesticated in accordance with the provision of the constitution until the enactment of the Arbitration and Conciliation Act in 1988. **Section 54** of the **Arbitration and Conciliation Act** pursuant to which the **New York Convention** entered into the Nigerian legislation enactment provides in ***Section 54 (1)***that
without prejudice to section 51 and 52 of the Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the convention on the Recognition and Enforcement of foreign awards (hereinafter referred to as "the Convention") set out in the second schedule to this Act shall apply to any award made in Nigeria or in any contracting state.

(a) Provided that such contracting state has reciprocal legislation recognizing the enforcement of arbitral award made in Nigeria in accordance with the provisions of the convention.
(b) That the Convention shall apply to differences arising out of legal relationship which is contractual.

To enforce an award in Nigeria following the provisions of section 54, it must be proved and shown that such a contracting state has a reciprocal legislation authorizing the recognition and enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention. The important aspect of Section 54 refers to provision in **subsection 1(b)** which made reference to "contractual" legal relationship instead of commercial legal relationship whether contractual or not. This provision seems to have a little variation in terms of the declaration which Nigeria as a state deposited with the United Nations Secretary General in accordance with the provisions of **Article 1(3)** of the **New York Convention**. The said **Article 1(3)** provides that:

> *when signing, ratifying or acceding to this convention or notifying extension under **Article x** thereof any state may on the basis of reciprocity declared that it will apply the convention to the recognition and enforcement of award made only in the territory of another contracting state. It may also declare that it will apply the convention only on difference arising out of legal relationship whether contractual or not, which are considered as commercial under the national law of the state making such declaration.*

In line with the provisions of **Article 1(3)** of the convention, Nigeria made its declaration which is deposited with the United Nations Secretary General. The declarations read:

> *In accordance with **paragraph 3 of Article 1** of the **New York Convention** (earlier stated) the Federal Military Government of the Federal Republic of Nigeria declares that it will apply the convention on the basis of reciprocity to the recognition and enforcement of awards only in the territory of the state party to this convention and to differences arising out of legal relationships, whether contractual or not which are considered as commercial under the laws of the Federal Republic of Nigeria*

A critical look at the above declaration reveals that Nigeria is in breach of her international obligation when it enacted in **section 54 1(b) of the Arbitration and Conciliation Act**that the **New York Convention** shall have effect only on awards arising from contractual relationships. The implication of this thesis follows the legal maxim **"***expression uniusest exclusion alterius"* that all other forms of awards such as those arising out of tort are legally barred. It is reasonably foreseeable that where the issue of the Convention applying to only contractual relationship becomes a problem in any proceeding for the enforcement of an award in Nigeria, a serious minded counsel or advocate can effectively persuade the court to give effect to the obligation undertaken by Nigeria when she acceded to the Conventions. In such circumstance, a Judge may choose to enforce the award pursuant to the declaration deposited by Nigeria and in accordance with the provision of the Convention in the second schedule of our Act. Amazu Asouzu stated that: The Judge though bound to apply municipal law,

may lift the veil of enactment to see what international arbitral obligations were undertaken and what was implemented by the Decree, appropriate comparism between the Convention in the second schedule of the Decree, Nigeria's declaration to **Article 1(3)** of the Convention and its implementation by **section 54 1(b)** could be made in order to reveal the inconsistency further and thus to discern and fully implement Nigerian international arbitral obligation. This will promote justice in dispute situation and fidelity to commitments undertaken at the international level.

II. CONCLUSION

Problems of Enforcing the New York Convention Arbitral Award in Nigeria and Other African States.

The application of the New York Convention in Nigerian courts and other countries of the world have met several obstacles. Only a few states in the developing countries are parties to the Convention. Amongst some of these contracting states, the Convention has not been legislatively implemented.

Another serious problem in the interpretation of the New York Convention is wrong or defective implementation of the Convention by municipal legislation. Some countries have refused to recognize and enforce an arbitral award on the application of a successful party on the wrong impression that the Convention has not been domesticated as in the Nigeria case of **Murmansk State Steamship line v Kano Oil Millers.**

Kano State Urban Development Board v Fan Construction Coy Ltd, City Engr. Nigerian Ltd v Federal Housing Authority.

The legal draftsmen in some domestic legislation have drafted the laws in such ambiguous manner by giving the impression that the official declaration which each contracting state made pursuant to **Article 1(3)** of the Convention was erroneously made. An instance of such incidence is the provision of Nigerian **Arbitration**

and Conciliation Act. Section 54 1(b) CAP 19 LFN 1990 now CAP A18 LFN 2004.

Other problems confronting the application of the Convention is the narrow scope of many national arbitration laws of contracting states. An instance is the manifestation in section 54 1(b) of the Nigerian Arbitration Act. Some judges and legal practitioners are unfamiliar with the current application, relevant working materials and updated information concerning the Convention, especially in Africa and other developing and underdeveloped countries of the world.

RECOMMENDATION

This problem confronting the applicability of New York Convention is not peculiar to Nigeria but also prevails in most African and other developing countries of the world.

(i) In future there is need for authorities concerned to review the provision of **Section 54 of the Nigerian Arbitration and Conciliation Act.** The review recently done on the Act did not help matters as nothing was included or deleted from the former provision. As the interpretation and distinguishing of the difference will always create room for some parties to dishonor their earlier agreement or creation of multiple appeals during enforcement of arbitral awards.

(ii) There is urgent need to create a forum for correspondence training of arbitrators or people involved in arbitration processes especially as it concerns the arbitral institutions and the Conventional arbitration bodies.

(iii) It keeps no one in doubt that lack of well-developed infrastructural facilities is largely is partly responsible for the poor applicability of international arbitration activities.

(iv) Finally, at the international sphere, there is urgent need to put in place an international acceptable legislation to check the way and manner the national law interferes with arbitral awards recognition and enforcement.