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DIVERSE INTERPRETATIONS OF THE NEW YORK CONVENTION AND THE EFFECTS ON FOREIGN ARBITRAL AWARDS IN NIGERIA

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Abstract

Despite the efforts made to facilitate the enforcement of foreign arbitral award, there remain issues that complicate the enforcement proceedings, as a result of its reliance on national rules for enforcement procedure. By virtue of Article III of the New York Convention, signatories to the Convention are obliged to enforce arbitral awards 'in accordance with the rules of procedure of the territory where the enforcement of award is sought. While one would have difficulty arguing that there is presently a crisis in international commercial arbitration, most scholars acknowledged that there is lack of consistency in the way in which international commercial awards can be challenged and enforced due to the influence of national legislatures and courts. It is worthy to consider the way in which national legislatures and courts are presently allowed to influence the outcome of international commercial disputes. This has resorted in unforeseen barriers to the enforcement of arbitral award globally and also considered the weak link in the chain of international dispute resolution.

Keywords: *Judicial Interpretation, New York Convention 1958, Awards, Enforcement*

1. Introduction

International commercial arbitration starts with a private agreement between the parties, continues by way of private proceedings, and ends with an arbitral award that is binding on the parties, which most national courts will recognise and enforce if necessary.¹ Therefore, national states and their legal systems play an important role in the international arbitral system. This paper attempts to examine the germane issue of the recognition and enforcement of international award. The purpose is to demonstrate that the winning party at international arbitration lacks the coercive powers required to enforce foreign awards against a losing party. Thus, have to invoke the powers of the state through its national rules to compel performance of foreign awards against the losing party. The paper deals with the framework for the recognition and enforcement of international commercial arbitration under relevant law.² Therefore, this paper critically reviews the principle underlying the recognition and enforcement of foreign arbitral award in Nigeria. The paper further examines the significant role of the courts in the enforcement proceedings of awards, the impacts of judicial involvement and its influences in the enforcement of foreign awards. Finally, this paper establishes a diverse interpretation of the provisions of the New York Convention and its adverse effects on the awards.

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¹ Chukwuemeka A., 'Arbitration and the ADRs as Panacea for the Ills in Administration of Justice in Third World Countries' (2006) 1 EBSU L. J, 102-140,120.

² Rhodes-Vivour A., 'Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform' (Paper Delivered at the NBA, Maiden Conference, Abuja, 2006).

2. Enforcement of Foreign Arbitral Awards under the Relevant Law

Multilateral Conventions such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June, 1958, (known as the New York Convention),³ and bilateral treaties such as the Treaty of Friendship, Commerce and Navigation between countries⁴ were signed and ratified to enable inter-jurisdictional awards to be made and enforced. Specifically, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June, 1958, (known as the New York Convention),⁵ is regarded as the most successful bilateral agreement worldwide with over 149 assenting parties. In fact, it is described by some scholars as the most significant and fruitful global Convention of the universe⁶ and as one of the foremost pacts in respect of commercial transactions⁷ in the area of international trade law. Since the New York Convention came into existence about 60 years ago, the principles of the Convention have aided the emergence of significant documents such as the UNICTRAL Law and several domestic guidelines on arbitration.⁸

The New York Convention came into existence as a result of the urgent need to ensure and guarantee the smooth enforcement mechanism of an award in a State other than the State where the award was delivered.⁹ In fact, a committee set up by the United Nations Economic and Social Council (ECOSOC) affirmed that it would indeed be appropriate to have an innovative Convention which look beyond the 1927 Geneva Convention¹⁰ in enabling the implementation and execution of foreign awards.¹¹ In effect, the two foremost aims of the New York Convention are to¹² facilitate the enforcement of foreign awards around the globe and to recognise and enhance the effectiveness of arbitration agreements.¹³

Although, Nigeria assented to the New York Convention on 17th March, 1970, no effort was made to domesticate the Convention into the Nigerian law until 1988 with the enactment of the

³United Nations New York Convention on Recognition and Enforcement of Foreign Arbitral Award 1958, 330 U.N.T.S. 38 (1959).

⁴For example, The Treaty of Friendship, Commerce and Navigation between Japan and the United States of America, Article 4(1953).

⁵United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards 1958 330 UNTS 38

⁶ Lew J.M.D, Mistelis L.A & Kroll S.M, *Comparative International Commercial Arbitration* (Kluwer Law Int'l, Hague, 2003)178.

⁷ Annan K., 'Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration' in *Enforcing Arbitration Awards under the New York Convention, Experiences and Prospects* (Paper presented at 'New York Convention Day' in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40th anniversary of the Convention on Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958, New York: United Nations) 2.

⁸ Sanders P., *Foreword in ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for judges* (International Council for Commercial Arbitration, Hague, 2011)7.

⁹ Ibid.

¹⁰ Geneva Convention on the Execution of Foreign Arbitral Awards (1927 Geneva Convention) 1927 92LNTS 301(1929-30)

¹¹United Nations Economic and Social Council, 'Report of the committee on the Enforcement of International arbitral awards.' <<http://daccess-ddsny.un.org/doc/UNDOC/GEN/N55/080/97/PDF/N5508097.pdf?OpenElement>> accessed 6 January 2017.

¹²Lew J.M.D, Mistelis L.A & Kroll S.M., *Comparative International Commercial Arbitration* (2003) 21.

¹³New York Convention 1958 330 U.N.T.S. 38(1959), Article III; Sanders P, 'The making of the Convention' in *Enforcing Arbitration Awards under the New York Convention, Experiences and Prospects*, (Paper presented at the New York Convention Day, 10 June 1998, United Nations Publications, 3(1999)) 4.

Arbitration and Conciliation Decree.¹⁴ Presently, the Convention is recognised in Section 54 of the Arbitration and Conciliation Act (ACA) and also, in the second schedule to the ACA.¹⁵ In Nigeria, an award-creditor can seek the enforcement order of an award under the New York Convention by bringing an application to the court after leave must have been obtained. The Convention enjoins every signatory State to deem arbitral awards as binding and enforceable subject to the enforcement procedure of the enforcing State.¹⁶ The New York Convention further mandates signatory States not to impose unnecessary conditions or excessive costs and the conditions for enforcing foreign awards should be on an equal level with the conditions for domestic awards.¹⁷ One interesting characteristic of the New York Convention is that, the award itself must be regarded and considered as being capable or worthy of enforcement.¹⁸ Therefore, the court must enforce the awards except where one of the grounds listed in Article V is proved. The question whether an award is domestic or foreign is importance because, in many jurisdictions, the enforcement procedures for foreign and domestic awards are distinct.

Article 1(1) New York Convention provides as follows:

This Convention applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their Recognition and enforcement are sought.

According to the cited provision, an arbitral award qualifies as foreign in two situations, that is, when the award is made in the territory of another State, or when it is not considered a domestic award in the State where recognition and enforcement is sought. The general rule in Article 1(1) is that the New York Convention applies to all foreign awards irrespective of the country where they were made. Therefore, a foreign award will be recognised and enforced by a signatory party to the Convention regardless of whether the award was rendered inside or outside the territory of another Contracting State. This presupposes that the award satisfies all the requirements laid down in the Convention.

It is usually argued that unlike a national court, arbitral tribunal has no role to play in the enforcement of its decision. Once the award has been rendered, arbitrators' duties end there, unless it requires making additional award, or to correct or interpret its awards.¹⁹ However, if the award-debtor fails to voluntarily comply with the award, in many countries it is possible to request the court to intervene after the award has become final. There are usually two procedural devices allowing national courts to act in the capacity of a control mechanism: the setting-aside and the enforcement procedure. Hence, this paper intends to examine the significant role of the courts in the enforcement proceedings of awards. For this reason, it is necessary to distinguish between recognition and enforcement.

¹⁴ Arbitration and Conciliation Decree No 11, 1988.

¹⁵ Idomigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (Lawlords Publishing, Nigeria, 2015) 156.

¹⁶ New York Convention 1958, 330 UNTS 38 (1959), Article III.

¹⁷ Lew J.M.D., Mistelis L.A & Kroll S.M, *Comparative International Commercial Arbitration* (2003) 694.

¹⁸ Ibid.

¹⁹ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, 2004).

2.1 Distinction Between Recognition and Enforcement of awards

Award may be recognised without being enforced.²⁰ If it is enforced, then it is necessarily recognised by the court which orders its enforcement. The precise distinction is said to be between "recognition" and "recognition and enforcement".²¹ Recognition usually arises when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. The party in whose favour the award was made will object that the dispute has already been determined, by producing the award to the court and ask the court to recognise it as valid and binding upon the parties in respect of the issues with which it dealt.²² The purpose of recognition is generally to act as a shield. It is used to block any attempt to raise objections in fresh proceeding issues that have already been decided in the arbitration that gave rise to the award whose recognition is sought.²³ A party who seek recognition of an award will generally do so because he needs to rely on the award by way of defence or set off, or in some other way in court proceedings.²⁴

However, where a court is asked to enforce an award, it is asked not merely to recognise the legal force and effect of the award, but also to ensure that it is carried out, by using such legal sanctions available.²⁵ The court that is prepared to grant enforcement of an award will do so because it recognises the award as validly made and binding upon the parties to it and, therefore, suitable for enforcement. In this context, the terms recognition and enforcement do run together. One is a necessary part of the other.²⁶ The term 'enforcement' connotes giving legal force to an arbitral award.²⁷ Thus 'recognition' is the prerequisite condition for the execution of an award in Nigeria. This is provided for in Section 31 (1) of the ACA. Basically, courts can only enforce a 'recognised award' but awards can be recognised without necessarily being enforced by the courts.²⁸ Therefore, enforcement of award indicates both recognition and execution by the enforcing court and ensures that the award-debtor comply with the decision of the arbitrator to which he has subjected himself.²⁹

Impliedly, every award duly reached by the tribunal is presumed binding, enforceable and is expected to be complied to by the parties without delay.³⁰ This, in effect, means that where the award-debtor voluntarily conforms to the terms of an award, the issue of judicial intervention to enforce the award does not arise. The recalcitrant nature of the award-debtor necessitates the need for judicial intervention through the machinery of the court by the award-creditor. The intervention of the court is required because the arbitral award does not possess any form of

²⁰ An example is in *Dallal v Bank Mellat* (1986) Q.B where the English Court held that an award of the Iran-US Claims Tribunals was not enforceable under the New York Convention, but should nevertheless be recognized as the valid judgment of a competent tribunal.

²¹ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004)434.

²² Ibid, 434.

²³ Ibid, 435.

²⁴ Ibid.

²⁵ Ibid, 435.

²⁶ Ibid.

²⁷ Ibid, 435.

²⁸ Orojo J.O & Ajomo M.A, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi Associates, Nigeria, 1999) 57.

²⁹ Ibid.

³⁰ *Environmental Dev. Construction v. Umara Associates Nig* [2000] 4 NWLR (Pt 652) 305-306, paras H-A; *Ras Pal Gazi Const. Co v. FCDA* [2001]10 NWLR (Pt.722)574, paras F-H.

legal sanction.³¹ This was emphasised in *Ofomata & Ors v. Anoka & Ors*³² where the court observed that in the absence of a voluntary compliance with the award, a judicial enforcement order is required since an arbitral award lacks legal force unlike the court judgement. For this reason, the New York Convention as domesticated in section 54 of the ACA affords parties an opportunity to invoke the court for the enforcement of arbitral awards rendered in their favour.³³

2.2 Enforcement Procedures in Nigeria

Enforcement usually takes place against asset of the award-debtor. So, as a first step, it is necessary to trace the assets of the losing party. This is so because the titles to a losing party's assets or their proceeds are usually taken in the country in which these assets are located. This may involve selecting the most appropriate forum for the enforcement of the foreign award. There are four principal methods of enforcing arbitral awards against the losing party.³⁴ The first is where the award is deposited, or registered at the court or other authority, following which may be enforced as if it is a judgment of that country. The second is where the laws of the country of enforcement provide that, with the leave of the court, the award of an arbitral tribunal may be enforced directly without any need for deposit or registration. The third is where it is necessary to apply to the court for some form of recognition as a preliminary step to enforcement. The fourth is to sue on the award evidence of a debt, on the basis that the arbitration agreement constitutes a contractual obligation to perform the award (re-litigate). The New York Convention permits signatory States to explicitly declare to apply the Convention on reciprocity and/or to matters whether contractual or not.³⁵ The provision provides that:

*When signing, ratifying or acceding to this Convention, or notifying extension under Articles X hereof any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state. It may also declare that it will apply the Convention to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the state making such declaration.*³⁶

This informed the position of the Nigerian government in 1970 when assenting to the New York Convention to declare to the two reservations as provided in Article 1(3). This is explicitly stated in section 54 that without any sense of bias to sections 51 and 52, the Convention is applicable to foreign awards, provided reciprocal treatment exist between the State where the award was rendered and Nigeria where enforcement of such award is sought.³⁷ Likewise, the issues must emanate from a legal relationship that is contractual in nature only as provided in Section 54 of the ACA. In other words, Nigeria would only recognise and enforce awards made in a foreign State provided, an award made in Nigeria would enjoy the same treatment from that State as well. Thus, nationality of the parties is not the major consideration but the attitude of the

³¹ *Okechukwu v. Etukokwu* [91998] 8 NWLR (Pt. 526) 529-530.

³² (1974) 4 ECSR 251.

³³ ACA Cap.A18 LFN 2004, Sections 31 and 51. Domestic awards can be enforced under Section 31(1) of the ACA.

³⁴ Orojo J.O & Ajomo M.A, *Law and Practice of Arbitration and Conciliation in Nigeria* (1999) 667

³⁵ New York Convention 1958, 330 U.N.T.S. 38(1959), art.1 (3).

³⁶ *Ibid.*

³⁷ ACA Cap.A18 LFN 2004, s. 54 (1)(a).

signatory States towards the enforcement of awards given in Nigeria.³⁸ Hence, one pertinent question is the significance of this reciprocity reservation to a nation like Nigeria that desires to attract foreign investors through Foreign Direct Investment.

With regard to contractual reservation, disputes not arising from contractual relationship is not enforceable under the provision of Section 54 of the ACA that domesticated the New York Convention.³⁹ This position has spawned different views among scholars who are of the view that by doing so, Nigeria is in violation of its treaty commitment agreed to under the New York Convention.⁴⁰ By adopting the two reservations under Article 1 (3), Nigeria obliged to adopt the provision in its entirety without deviation. Unlike Model Law, Conventions do not give room for diversity in their adoption.⁴¹ Thus, restricting the application of Section 54 to contractual disputes only is unjustified when the New York Convention actually intends its application to cover both contractual and non-contractual relationships.⁴² Notwithstanding this, the procedure for obtaining enforcement of an award under the Second Schedule of ACA is simple and it is the same with the procedures under Section 51 of the ACA.⁴³ However, where supporting documents are in other languages, the applicant is required to tender translated documents in the official language of the enforcing States.⁴⁴

The procedures to be followed in any given case vary from country to country and from court to court. What follows therefore, is a review of the principle underlying the recognition and enforcement of foreign arbitral awards in Nigeria. Also, the paper further examines the significant role of the courts and the impacts of judicial influence in recognition and enforcement of foreign awards.

3. The Inseparability of International Commercial Arbitration and Judiciaries

The dependence of the international arbitral award process upon national systems of law is most clearly seen in the context of the recognition and enforcement of international awards.⁴⁵ An arbitral tribunal is limited in the powers it can exercise, and these powers, although usually adequate for resolving a particular dispute, fall short of these coercive powers possessed by national courts.⁴⁶ The power to enforce an award against a losing party, by such summary method, is a power that forms part of the prerogative of the state. It is not a power that is possessed by the arbitrator and it is not a power the state is likely to delegate.⁴⁷ In consequence, the enforcement of awards must take place through the national court at the place of enforcement, operating under its own procedural rules. The procedures to be followed in any given case vary from country to country and from court to court. Thus, lack of uniformity in the

³⁸ McLaughlin J.T & Genevro, 'Enforcement of Arbitral Awards under the New York Convention- Practice in UC Courts' (1998) 3 Int'l tax & Bus Law, 249-272.

³⁹ Ezejiofor G., *Law of Arbitration in Nigeria* (Ikeja, Longman, Nigeria 2007) 178.

⁴⁰ Idornigie P.O., *Commercial Arbitration Law and Practice in Nigeria* (2015) 298.

⁴¹ Pierter S., 'Unity and Diversity in the Adoption of the Model Law,' (1995) 11(1) Arb Int'l, 1-48, 23.

⁴² New York Convention 1958, 330 U.N.T.S. 38(1959), Article 1 (3).

⁴³ Ibid, Article IV (1).

⁴⁴ New York Convention 1958, 330 U.N.T.S. 38(1959), Article IV (2).

⁴⁵ Weinberg K.S., 'Arbitration Procedures in the United States-German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes' (1994) 12 B.U Int'l L.J, 180, 192-93.

⁴⁶ Phillip D., 'Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12(1) Nw J. Int'l L & Bus. 48-85, 50;

⁴⁷ Ibid.

enforcement procedures triggered inconsistency in the way in which international commercial awards can be challenged and enforced due to the influence of national legislatures and courts. It is worthy to consider the way in which national legislatures and courts are presently allowed to influence the outcome of international commercial disputes.⁴⁸

4. Diverse Interpretations of the New York Convention and its adverse Effects

Each country and its court adopt different enforcement procedures. The New York Convention is an international convention designed to ensure uniformity in respect of the recognition and enforcement of awards in most countries of the world. New York Convention provides for a presumption in favour of the successful party that the foreign award if final, binding, valid and regular. This is because no review of the foreign award on the merit is permitted. However, the presumption may be rebutted by the losing party by showing that the foreign award breached one of the seven grounds for refusal of recognition and enforcement of foreign awards.⁴⁹ The courts of a Contracting State must recognise and enforce such awards in accordance with its local procedural rules, unless there is a ground for refusal as provided in Article V of the Convention. Article V of New York Convention contains an exhaustive list of the grounds that may be invoked to prevent enforcement of an award.⁵⁰ Uniformity, therefore, might be expected in the practice of enforcement courts around the world. The true picture, however, is rather different. This is for two reasons.

First, as United Nations Commission on International Trade Law (UNCITRAL) recently reported that the place occupied by the New York Convention in each state's hierarchy of laws varies. Many states have reported to UNCITRAL that treaties, such as the New York Convention, prevail over any contrary provision of law.⁵¹ For some states, but not all, implementing legislation is required for the New York Convention to have legal effect, with some states having acknowledged that there are differences between their implementing legislation and the text of the New York Convention.⁵²

Secondly, national courts have taken different positions on how the text of the Convention should be interpreted. For some Contracting States, the New York Convention is to be interpreted according to Arts 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.⁵³ For other states, it is interpreted in accordance with the principles of their Constitutions or other sources of domestic law. Some national courts seek guidance for the interpretation of the New York Convention from court decisions, for others, precedents are not recognised. Some find the New York Convention helpful; for others, they are wholly irrelevant.⁵⁴ The result is that, there

⁴⁸ Ibid.

⁴⁹ New York Convention 1958, 330 U.N.T.S. 38(1959), Article V.

⁵⁰ Van den Berg A.J., 'Consolidated Commentary on the New York Convention' (2003) ICCA Yearbook of Commercial Arbitration XXVIII 501A; Radicati di Brozolo L.G., 'Arbitrage Commercial International et Lois de Commerce International', in *Collected Courses of the Hague Academy of International Law* (2006), Vol.315, 265.

⁵¹ UNCITRAL, 'Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Award', UN Doc A/CN.9/656 (June 5, 2008), 5.

⁵² Ibid, 7.

⁵³ Article 31(1) of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose. Article 32 sets out the circumstances in which regard may be had to supplementary means of interpretation.

⁵⁴ UNCITRAL, 'Report on the Survey Relating to the Legislative Implementation of the Convention on the

have been some surprising interpretations of the New York Convention, because of its reliance on national rules. Below is an illustration of this.

Under the New York Convention, recognition and enforcement of an arbitral award may be refused if the opposing party proves:⁵⁵

- (a) Incapacity of the parties or invalidity of the arbitration agreement; or
- (b) Improper notice of the arbitration proceedings⁵⁶ or Inability to properly present one's case; or
- (c) Arbitral award exceeds the scope of the arbitration agreement; or
- (d) Arbitration procedure or panel was not in accordance with the arbitration agreement or governing law; or
- (e) Arbitral award "has been suspended or set aside by a competent authority of the country in which, or under the law of which, the award was made; or

a. *Incapacity of the parties or invalidity of the arbitration agreement.*⁵⁷

Notwithstanding Art. V(1)(a) of the New York Convention stipulating that the validity of an arbitration agreement is to be determined in accordance with 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. There are reported instances where courts were called upon to enforce foreign awards (i.e. where the seat was not in India) applying Indian law as the default law applicable to an arbitration agreement.⁵⁸ The main controversy here usually relates to cases where the states or its agency is a party to arbitration. In these cases, capacity of the parties to enter the arbitration agreement may be vital to the whole process of arbitration.

b. *Improper notice of the arbitration proceedings*⁵⁹ or *Inability to properly present one's case.*⁶⁰ Thus, the award will not be enforced if the party did not receive proper notice, or if the arbitrations prevented a party from being able to present its case, that is, if the party was denied a fair hearing. The court of the forum place will naturally have its own concept of what constitutes 'a fair hearing.' It is submitted that the concept and standard of the fair hearing and due process of the country of enforcement is the benchmark for this purpose.⁶¹ One of the more famous examples of this is *Iran Aircraft Industries v Avco Corp.*,⁶² in which counsel were told to submit summaries of evidence, and then had the case decided against them because they had not produced original documents. The award in that case was not enforced.

Recognition and Enforcement of Foreign Arbitral Awards', UN Doc A/CN.9/656 (June 5, 2008), at pp.11-12.

⁵⁵ Pengelley N., 'The Convention Strikes Back: Enforcement of International Commercial Arbitration Awards Annulled Elsewhere' (2004) 8, Vindobona Journal of International Commercial Law and Arbitration, 195.

⁵⁶ *First State Insurance Co. v. Banco de Seguros del Estado*, 254 F.3d 354, 357 (1st Cir. 2001); *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992).

⁵⁷ *New York Convention 1958*, 330 U.N.T.S. 38 (1959), Article. V.

⁵⁸ *Oil and Natural Gas Commission (ONGC) v Western Company of North America* [1987] All India Reporter S.C. 674 and *National Thermal Power Corporation (NTPC) v The Singer Company* (1993) 18 Yearbook Commercial Arbitration 403; Paulsson J., 'The New York Convention in International Practice--Problems of Assimilation,' (1996) *ASA Bulletin* 101, 109.

⁵⁹ *First State Insurance Co. v. Banco de Seguros del Estado*, 254 F.3d 354, 357 (1st Cir. 2001); *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992).

⁶⁰ *New York Convention 1958*, 330 U.N.T.S. 38(1959), Article V(I) (b)

⁶¹ *Minmentals Germany v Ferco Steel*. XXIV (1999) Yearbook Commercial Arbitration 739; *Iran Aircraft Ind. v Avco Corp.* 980 F 2d 141 (2nd CIR. 1992)

⁶² 980 F.2d 141 (2d Cir. 1992)

c. *Arbitral award exceeds the scope of the arbitration agreement:*⁶³

In the Hong Kong Court of Appeal refused to enforce an award rendered in Malaysia in relation to a sale and purchase contract which incorporated an arbitration agreement extending to quality or other disputes arising under these contract regulations on the basis that the tribunal did not have jurisdiction to consider issues relating to the agreed price.⁶⁴

d. *Arbitration procedure or panel was not in accordance with the arbitration agreement or governing law:*⁶⁵

The parties' agreement is paramount in this respect, while the law of the place of arbitration is a default provision in case where the parties fail to have an agreement on the composition of the arbitral tribunal or arbitral procedure.

d. *Arbitral award has been suspended or set aside by a competent authority of the country in which, or under the law of which, the award was made:*⁶⁶

Article V (1) (e) of the NYC provides that an enforcement court *may* refuse to recognise and enforce an award that has been set aside by a competent authority at the seat of the arbitration. Two important issues are raised by this ground.⁶⁷ The first issue relates to involvement of the seat of arbitration in setting aside the arbitral award. That is, whether an award that has been set aside and unenforceable by the country of origin may still be enforced by another country. Courts in France, Belgium, Austria and the United States have all recognised awards even though they have been set aside by courts at the seat of the arbitration (thereby suggesting that arbitral awards have an existence, autonomous from their seats, i.e. delocalised),⁶⁸ whereas many other courts, including some in the United States, have refused to enforce annulled awards.⁶⁹ Second, is the meaning of the word 'final' as contained in the Geneva Convention of 1927. One argument is that, the word 'binding' means 'final' as used in the earlier Conventions to mean that the arbitral award is accepted as final and binding upon the parties under the law of the place of arbitration. The other and better argument is that, an award is binding if it is not open to appeal either by the rules of arbitration or by an application of the court.

⁶³ New York Convention 1958, 330 U.N.T.S. 38(1959), Article V (1) (c); *CBS Corp. v. WAK Orient Power and Light Ltd.*, 168 F.Supp. 2d 403, 412 (E.D.Pa.2001).

⁶⁴ *Tiong Huat Rubber (SND) BHD Factory v Wah-Chang International Company Ltd and Wah-Chang International Corp Ltd* (November 28, 1990) (unpublished) excerpted in (1992) 17 Yearbook Commercial Arbitration 516; Paulsson J., 'The New York Convention in Practice - Problems of Assimilation,' (1996) *ASA Bulletin* 101,112.

⁶⁵ *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).

⁶⁶ *Ibid*; New York Convention 1958, 330 U.N.T.S. 38(1959), Article V(1)(e)

⁶⁷ *Hilmarton Ltd v Omnium de traitement et de valorisation (OTV)* [1994] *Revue de l'Arbitrage* 327, English excerpts in (1995) 20 Yearbook Commercial Arbitration 663; *Chromalloy Aeroservices Inc v Arab Republic of Egypt* (1997) 22 Yearbook of Commercial Arbitration 1001.

⁶⁸ Paulsson J., 'The Case for Disregarding LSAS' (local standard annulments) under the New York Convention,' (1996) 7 American Review of International Arbitration 99; and *Chromalloy Aeroservices Inc v Arab Republic of Egypt* (1997) 22 Yearbook of Commercial Arbitration 1001. Pinsolle P., 'The Status of Vacated Awards in France: the Cour de cassation Decision in Putrabali' (2008) 24 Arbitration International 277.

⁶⁹ *Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd* [2000] *Revue de l'Arbitrage* 135, in which the US Second Circuit refused to enforce an Award that had been set aside by the court of the place of arbitration. Similarly, the United States Court of Appeals for the District of Columbia in *Termorio SA and Lease Co Group, LLC v Electranta SP* 487 F.3d 928 recently refused to recognise an Award set aside in Columbia, available at <http://bulk.resource.org/courts.gov>. (last accessed, June 30, 2022).

The most controversial provision of the New York Convention is Art. V (2) (b), which provides that recognition and enforcement of an arbitral award may be refused if the competent court finds that:

i. The Subject Matter is not Arbitrable

The notion of arbitrability characterises the ability to submit the subject-matter of a dispute to arbitration.⁷⁰ Nevertheless, the authors of the New York Convention accepted the risk of national bias and a degree of uncertainty resulting from the divergence in the definition of the disputes capable of resolution by arbitration.⁷¹ In civil law jurisdictions in general, arbitrability is often broadly defined in a statutory provision, subject to specific exclusions for areas such as, residential leases and labour law, even though the Model Law is silent on this issue. For instance, section 177(1) of the 1987 Swiss Private International Law Act states that any dispute that involves an economic interest (that can be assessed in monetary terms) is arbitrable.

ii. The Enforcement of the Award is Contrary to Public Policy

The clear trend has been for national courts to apply public policy from an international perspective, which focuses on the forum state's most basic notions of morality and justice. Yet, in one case, a Turkish court refused to recognise awards rendered in Zurich on the basis that the tribunal's (perceived) failure to comply with the parties' choice of procedural law constituted a violation of public policy.⁷² Moreover, the legislatures of some states appear to have empowered their courts to refuse to recognise or enforce award on broader grounds than merely public policy. While it may be just a matter of language, Japanese legislation, for instance, applies the test of "public policy or good morals" in the enforcement process;⁷³ Vietnamese legislation requires that an award should not be contrary to the basic principles of Vietnamese law;⁷⁴ and in China, the public policy defence may be used to protect what some might regard as purely local interests.⁷⁵

However, it could be argued that, interpretation of Convention sometimes depends on the discretion of the judge in the country where enforcement is sought to grant recognition and enforcement.⁷⁶ The courts' decisions tend to leave some discretions when a ground for refusal is found as to whether or not to enforce the award, even if the ground for refusal is the public

⁷⁰ Fortier L.Y., 'Arbitrability of Disputes' in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Brinner* (Paris: ICC Publishing, 2005) 269 et seq. (with a separate discussion on arbitrability in Canada); McLaughlin J. T., 'Arbitrability: Current Trends in the United States,' (1996) 59 Alb. L. Rev. 905; Schwartz E. A., 'The Domain of Arbitration and Issues of Arbitrability: The View from the ICC' (1994) 9 ICSID Rev. Foreign Inv. L.J. 17; Kirry A., 'Arbitrability: Current Trends in Europe' (1996) 12 Arbitration Int. 373; Rogers A., 'Arbitrability' (1994) 10 Arbitration Int. 263.

⁷¹ Ibid.

⁷² *Osuuskunta Matex VS v TEK General Directorate*, 4th Commercial Court of Ankara, File No.94/662, Decision No.95/140 (unreported).

⁷³ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004) 459.

⁷⁴ Paulsson, 'The New York Convention in International Practice--Problems of Assimilation' (1996) 101-102.

⁷⁵ Rather than refer to 'public policy,' Chinese law refers to the 'social and public interest,' Chang W.S., 'Enforcement of Foreign Arbitral Awards in the People's Republic of China,' ICCA Congress Series No.14 (1998), 473.

⁷⁶ Park W.W., 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63(3) Tul. L. Rev., 647-709, 678.

policy. The enforcing authorities, therefore, are granted with discretion, which depends on particular circumstances. The legal effect of the New York Convention and its interpretation by enforcement courts has been left in the hands of each Contracting State, with the result that the prospects for recognition and enforcement will sometimes depend on the location of the assets being pursued. Nevertheless, these grounds for refusal of recognition and enforcement of foreign arbitral awards are of considerable importance. They represent an internationally accepted standard and Model law adopts the same grounds for refusal of recognition and enforcement of an arbitral award, irrespective of the country in which that award was made.⁷⁷ Six of these seven grounds for refusal are also set out in Model Law as grounds for the setting aside of an arbitral award by the national court of the place of arbitration.⁷⁸ However, the grounds for the refusal of the recognition and enforcement set out in the New York Convention and in the Model law are exhaustive. They are the only grounds on which recognition and enforcement may be refused.

In considering recognition and enforcement of international arbitral awards, it is usual to think first of enforcement under the New York Convention, or possibly the Washington Convention because of the significant number of states that are parties to these Conventions. Even though the New York Convention is very unlikely to be the sole international instrument adopted by the country of enforcement in most cases, the Convention may be superseded by such other instruments only where the latter provide for more favourable methods of enforcement. In other words, any other multi- or bilateral treaties, as well as local law, may have priority over the provisions of the New York Convention, only to the extent that they provide for more favourable methods of enforcement and not where they impose further restrictions on recognition and enforcement of foreign arbitral awards. A series of cases in France, Belgium, the United States and elsewhere have shown how, in practice, local law may be more favourable to the recognition and enforcement of such awards than the provisions of the NYC.

It should be noted that there is a defence which may be used by a state or state agencies against the recognition and enforcement of a foreign award. It is called state or sovereign immunity. This ensures that the state, as sovereign, does not subject to jurisdiction of another state. This sovereign immunity may be waived by the state or the state agency submits to arbitration. That is, the state is bound by any agreement it enters in order to arbitrate contractual differences. However, a state waiver of its immunity to arbitrate does not extend to execution of the arbitral award resulting from the arbitration agreement.⁷⁹

4. Conclusion

From what has been discussed above, involvement of the national courts in the recognition and enforcement stage is necessary in the context of the international commercial arbitration. This is because the arbitrators lack coercive power possessed by the national court at the place of enforcement to ensure performance of an arbitral award. It is therefore submitted that the winning party shall 'invoke the powers of the state, exercised through its national courts in order to obtain a hold on the losing party's assets or in some other ways to compel performance of the awards.' The main controversy in international commercial arbitration relates to whether there

⁷⁷ UNCITRAL Model Law 2006, art.36

⁷⁸ Ibid, Article 34.

⁷⁹ Bernini and Van den Berg, 'The Enforcement of Arbitral Awards against State- the Problem of Immunity from Execution' in Lew(ed), *Contemporary Problems in International Arbitration* (1986) 359.

should be involvement or intervention of the national legal systems in arbitration as the process of resolving international commercial disputes. It is submitted that national courts should have some controls over arbitral proceedings if only to guard against lack of due process, fraud, corruption or other improper conducts on the part of the arbitral tribunal. Hence, the issue is not whether the national legal systems should be involved in international arbitration but the extent in which national Courts can have control in arbitration. This is the reason enforcement stage is considered the weak link in the chain of international arbitration because the concept of party autonomy including that of arbitrators falls short of the coercive powers required to proceed against the assets of the losing party unlike the first two stages where the parties may do away with the control or involvement of the state.⁸⁰

It has been suggested that, the more challenging option is to establish an International Arbitration Court of Appeal and Enforcement by way of a United Nations Convention.⁸¹ The Appeal and Enforcement Court would have the authority to consider the issues now considered by courts at the seat of the arbitration as well as the matters considered by courts at the place of enforcement. Once an award had received the imprimatur of the Appeal and Enforcement Court, it would be automatically enforceable upon registration in accordance with national procedures. No review of the award by national courts would be allowed. This new system would reduce the risk of national courts, from imposing their own will on the outcome of an international dispute, thereby adding to the delay, cost and uncertainty of the process.⁸²

⁸⁰ Asouzu A. A., *International Commercial Arbitration and Africa States Practice, Participation and Institutional Development* (2011) 456; Rhodes-Vivour A., 'Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform' (2006); Salacuse J., 'Direct Foreign Investment and the Law in the Developing Countries' (2000) 392.

⁸¹ Holtzmann H, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in *Internationalisation of International Arbitration* (The LCIA Centenary Conference 1995) 109; Schwebel S M, 'The Creation and Operation of an International Court of Arbitral Awards,' in *Internationalisation of International Arbitration* (The LCIA Centenary Conference 1995) 115.

⁸² Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (2004) 462 -466.