The Recognition and Enforcement of Foreign Arbitration Agreements and Awards under the New York Convention in Botswana: A Reappraisal (Part 1)

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ABSTRACT

Alternative Dispute Resolution (ADR) methods play a significant role in the settlement of commercial and investment disputes. Arbitration, in particular, has been the most effective and efficient method for resolving disputes in international commercial and investment transactions. The ease and simplicity in the enforcement of arbitral awards across borders is notable in this respect. The New York Convention has significantly been lubricating the wheels of the system for cross-border mobility of arbitral awards in international business transactions. The New York Convention sets out uniform standards for the recognition and enforcement of international commercial and investment arbitral awards. Botswana is a party to the New York Convention as of 1977. In acceding to the Convention, Botswana has entered three reservations, namely, reciprocity, commercial and non-retroactivity. The non-retroactivity reservation may no longer have an adverse effect. The reciprocity and commercial reservation, however, have given rise to multiple enforcement regimes. Apart from the reservations, some of the provisions of the New York Convention have also been omitted and others inadequately captured in the implementing Act. In this respect, the impact of the afore-cited reservations in the application of the New York Convention in Botswana has been examined. In addition to the reciprocity requirement, section 3(3) of the implementing Act requires that an arbitral award from a convention state can be recognized and enforced in Botswana only if that state recognizes and enforces arbitral awards made in Botswana. It is submitted that this additional requirement may complicate the enforcement of arbitral awards in Botswana. The far-reaching ramifications thereof are dealt with in terms of the existing arbitral jurisprudence and practice. The new developments and its trajectories apropos Article VII of the

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New York Convention, which is not made applicable in Botswana, have been brought to the spotlight. Article VII has, in what seems a watershed departure, made possible the recognition and enforcement of foreign arbitral awards which are set aside (vacated) in their country of origin.

1. INTRODUCTION

In international commercial transactions, arbitration has been the most preferred means of settling disputes. There are several perceived and practical advantages that arbitration can ensure to the parties involved in disputes. In this regard, arbitration has been preferred as it ensures neutrality of the forum and, at times, even the applicable substantive law. The world-wide acceptance of arbitration as a suitable means of resolving disputes arising out of or in connection with international commercial and investment transactions has made it easy for award-creditors to obtain the recognition and enforcement of the arbitral awards. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 (or the New York Convention of 1958)[1] has played a significant role in this regard. It is trite fact that, in modern day arbitration, that arbitral awards travel across borders much conveniently than court judgments or conciliated, mediated or negotiated settlements.

The New York Convention is an international treaty to which currently almost 160 countries are party.[2] This makes it the convention with the largest number of country parties thereto than any other convention or treaty in the international business law area. In Botswana, it is implemented by virtue of the Recognition and Enforcement of Foreign Arbitral Awards Act 49 of 1977.[3] More than forty years have elapsed since the Convention has entered into force in Botswana and yet the jurisprudential and practical implications thereof have barely come to the academic and legal practitioners' spotlight. Consequently, relatively little has been written thereon. It is, therefore, intended in this modest work to shed some light on the peculiar features in the application of the New York Convention in Botswana. This paper examines the provisions of the Recognition and Enforcement of Foreign Arbitral Awards Act. It highlights

1 The text, CLOUT and the status thereof are available at <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards > accessed 29 October 2021.

2 Ibid.

3 Cap 06:02

the reservations entered into by Botswana in acceding the Convention and the practical and theoretical challenges in the implementation of such provisions in Botswana.

It is worthy to note that this work is not aimed at addressing the provisions of the New York Convention; nor is it purported to examine the refusal grounds[4] and the other procedural requirements, which are set out under the New York Convention, save where they have been resorted to for the purpose of contextually scrutinizing the provisions of the implementing Act. The literature relating to these requirements is extensive.

This paper briefly deals, in Part II, with the meaning of the terms 'recognition', 'recognition and enforcement' of arbitral awards and the proper deployment thereof. In Part III, it addresses the recognition and enforcement of international arbitration agreements in Botswana under the New York Convention. The two reservations, *reciprocity* and *commercial* reservations, which are entered into by Botswana and the consequential cleavage of arbitral awards making them amenable to multiplicity of enforcement regimes are explained in Part IV. Finally, the paper wraps up with concluding remarks.

2. 'RECOGNITION', 'RECOGNITION AND ENFORCEMENT' OF FOREIGN ARBITRAL AWARDS

In most cases, arbitral awards are voluntarily complied with by the award-debtors. The award-creditor may also be forced, at times, to settle at a discounted amount lest it should be drawn into litigation. In some circumstances, however, the award-debtor's recalcitrant position to comply with the terms of the arbitral award would but force the award-creditor to resort to judicial (or any other competent authority) assistance in obtaining recognition only or recognition followed by enforcement (ie, execution). Should the award-creditor find it necessary to do so, he/she may look for jurisdictions, other than the seat of arbitration, where adequate assets of the award-debtor could be realized.

4 The seven grounds of refusal for the recognition and enforcement of international arbitral awards under the New York Convention can be summed up thus: (i) incapacity and invalidity, (ii) lack of notice or fairness, (iii) arbitrator acting in excess of authority, (iv) the tribunal or the procedure not in accord with the parties' agreement, (v) the award is not yet binding, or has been set aside, (vi) subject matter not arbitrable, and (vii) public policy. See Margaret Moses, *Principles and Practice of International Commercial Arbitration* (CUP 2008) 208-219.

Such eventualities would necessitate the backing of a uniformly acceptable enforcement regime that lubricates the cross-border mobility of international commercial and investment arbitral awards. The New York Convention of 1958 has been accorded accolades for sufficiently catering for this function.[5]

In this respect, arbitral awards should be 'recognized' or 'recognized and enforced' by a competent court in the territory of a state other than the seat of arbitration. When a court 'recognizes' an award, it acknowledges that the award is valid and binding, and thereby gives it an effect similar to that of a court judgment.[6] However, 'enforcement' is the actual attachment process of the award-debtor's assets for the satisfaction of the terms of the arbitral award in accordance with the rules of the enforcement forum. Moses observed that ''enforcement' means using whatever official means are available in the enforcing jurisdiction to collect the amount owed or to otherwise carry out any mandate provided in the award'.[7] It should, therefore, be noted that, for some arbitral awards, which are in the nature of a declaratory relief, recognition is enough. On the other hand, arbitral awards granting monetary damages should be first 'recognized' and then 'enforced'.

3. RECOGNITION AND ENFORCEMENT OF ARBITRATION AGREEMENTS

3.1 Anti-suit injunction

It is noted that the New York Convention is a successor of both the Geneva Protocol on Arbitration Clauses in International Commerce of 1932 and the Geneva Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1927.[8] Article II(1) provides that each Convention State is bound to *recognize* an agreement in writing under which the parties undertake to submit

5 N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 634 (wherein the authors opined that '[T]he New York Convention has been rightly eulogized as 'the single most important pillar on which the edifice of international arbitration rests' and as a convention which 'perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law') citing Schwebel, 'A Celebration of the United Nations' New York Convention' (1996) 12 Arb Intl 823.

6 Margaret Moses (n 4) 203 (wherein it is stated that 'a recognized award can be relied upon as a set-off or defense in related litigation or arbitration. The award has office legal states, so that issues determined by the award usually cannot be re-litigated or re-arbitrated').

7 Ibid.

8 N Blackaby and C Partasides (n 5) 70-72.

to arbitration, any or all differences which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a matter capable of settlement by arbitration.

The following four positive requirements must, therefore, be fulfilled for a Convention State to recognize an arbitration agreement:[9]

(1) The agreement is in writing;[10]
(2) These differences or disputes[11] arise in respect of a defined legal relationship, whether contractual or not';[12]
(3) It deals with existing or future disputes; and
(4) They concern a subject matter capable of settlement by arbitration. In other words, the subject matter of the disputes must be arbitrable.

The Act implementing the New York Convention in Botswana does not, however, contain the third and fourth requirements. It is not clear whether it was an intentional omission or an oversight on the legislator's part.[13] Insofar as the third requirement is concerned, the arbitration laws of Botswana envisage that an arbitration agreement may either contain an arbitral clause or a submission agreement.[14] The former is an arbitration agreement by the parties aimed at

9 Ibid 88-89

10 Article II(2) of the Convention states thus: '[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'. In this regard, it should be noted that parties' verbal agreements to submit disputes to arbitration or compulsory arbitration, which are imposed for dispute settlement on a certain trading activity by statutes finds no application under the New York Convention.

11 The Arbitration Act does not define what 'differences' or 'disputes' are. However, In *Building Construction 2000 v Ralebala* [2007] BLR 762 (HC) and *Glendinning Botswana v Portion 122 Millenium (Pty Ltd)* [2005]1 BLR 282 (HC), the court shed light on the basic requirements for determining whether there exists a 'dispute' between the parties, which the parties have agreed to refer to arbitration.

12 Non-contractual disputes may include pre-contractual claims, tort claims, equitable and restitutional remedies and statutory claims such as under competition law. See Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 1039; Simon Greenberg and others, *International Commercial Arbitration: An Asian-Pacific Perspective* (CUP 2011) 114 (wherein it is stated that contractual claims may give rise to non-contractual claims such as restitution, unjust enrichment, *culpa in contrahendo*, and torts, including statutory torts like antitrust or trade practice claims).

13 Similarly, according to Butler, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, which implemented the New York Convention in South Africa, 'is limited to the enforcement of foreign arbitral awards and, unlike the New York Convention, contains no provision for the recognition and enforcement of arbitration agreements subject to the Convention'. See David Butler, 'South African Arbitration Legislation – the need for reform' (1994) XVII CILSA 120.

14 The Act, under s 2, defines 'submission' thus: '[…] a written agreement, wherever made, to submit present or future differences to arbitration, whether an arbitrator is named therein or not'. The Act also defines 'arbitration' to mean any proceedings held pursuant to a submission. Accordingly, as in the New York Convention, verbal and compulsory arbitrations are not valid under the Botswana Arbitration Act.

resolving disputes which may arise in the future out of or in connection with the contract of which the arbitral clause is part,[15] and the latter is an arbitration agreement by which the parties, through the agreement, submit their existing disputes to arbitration. We can safely conclude, therefore, that there could have been no policy rationale for Botswana to deliberately reject this requirement. Thus, insofar as the first three requirements are concerned, all sit comfortably with the arbitral law and practice in Botswana.

What is confounding is the fact that the legislator, in trying to paraphrase, instead of adopting it as it is, omitted to encapsulate the phrase 'concerning a subject matter capable of settlement by arbitration' under Article II(1). The question is: what does the omission signify? And what are the consequences thereof? Is it possible to argue by any stretch of imagination that, by omitting the phrase (i.e., reducing the requirements), Botswana meant to commit itself to recognize arbitration agreements irrespective of the fact that the disputes concern subject matters incapable of settlement by arbitration? This might be justified by the fact that allowing arbitration to proceed between foreigners or parties involved in international business transactions in Botswana soil may help achieve the desire to promote arbitration as a preferable dispute settlement mechanism. It is also a positive step towards granting deference to the principle of party autonomy in international commercial contracts. Arguably such a liberal approach to arbitration could also significantly contribute towards transitioning Botswana to an arbitration hub in Southern Africa.

The counter-argument is, however, that nonarbitrabiliy is a public policy issue; it is an embodiment of a state's *order public* meant to grant exclusive jurisdiction to the state courts over any or particular disputes concerning the subject matter. It is submitted that arbitrability involves the determination of which types of disputes may be resolved by arbitration and

15 It is good to note that the validity or non-validity of the arbitral clause is independently treated from the main contract. This is the doctrine of *separability* or *severability*, owing to which an allegation of the invalidity of the main contract does not affect the validity of the arbitral clause. The survival of the arbitral clause, thus, enables the constitution of the arbitral tribunal, which decides on issues relating to the validity or invalidity of the main contract and the consequent remedies, if any. In many jurisdictions (particularly those which legislated their modern arbitration laws in terms of the UNCITRAL Model Law on International Commercial Arbitration (1985), the arbitral tribunal, on the basis of the *principle of competence de la competence* (competence-competence), may decide on its own jurisdiction, including the validity of the arbitral clause itself. The two arbitral principles - the principles of separability (severability) or *competence de la competence* – are not reflected under the Arbitration Act of Botswana. For more on this, see Baboki Dambe, 'Doctrine of Competence-Competence and the Botswana Arbitration Act of 1959: The Need for Reform' (2014) 18 UBLJ 85-116.

which belong exclusively to the domain of the courts.[16] In this line, it is noted that '[a] nonarbitrability doctrine generally reflects distrust in the capacity of arbitrators or the institution of arbitration to resolve appropriately disputes in these areas'.[17] This can be justified on the basis of several grounds, namely, that 'arbitrators need not be trained lawyers; arbitration generally does not provide for appellate review to correct mistakes (except where one of the limited grounds for setting aside exists); compulsory process is generally lacking; and, most significantly, arbitrators are beholden to the parties and derive their authority form the arbitration agreement'.[18] Furthermore, it is worthwhile to note, in particular concerning the last ground, that arbitrators can be expected 'to be heavily influenced by the parties' agreement in areas where mandatory law and concerns about unequal bargaining power would lead courts to give less – or no – deference to agreements that do not respect the public policy underlying mandatory law'.[19] In exercising the discretion for each state to decide which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policy, it is advised thus:[20]

> *The legislators and courts in each country must balance the domestic importance of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and the settlement of dispute.*

It is, however, gratifying to note that such limitations to the arbitrability doctrine is on the waning.[21] In this regard, this writer knows of no commercial matter, whose resolution is exclusively vested in the state courts in Botswana. In fact, it is good to note that the Arbitration Act is quite liberal towards arbitration in terms of subject matter arbitrability. Neither the New York Convention nor the Botswana Arbitration Act provides what is meant by arbitrabilty or non-arbitrabiliy. However, section 7 of the Act brings the issue of non-arbitrability into the spotlight. First, it entirely proscribes the submission of criminal cases to arbitration. This is understandable and seldom does it trigger any controversy.

16 N Blackaby and C Partasides (n 5) 123.
17 T Varady and others, *International Commercial Arbitration: Transnational Perspective* (West Group 1999) 221.
18 Ibid.
19 Ibid.
20 N Blackaby and C Partasides (n 5) 124.
21 T Varady and others (n 17).

Second, only matters relating to:

-status,

-matrimonial causes, and

-matters in which minors or other persons under legal disability may be interested

are non-arbitrable. Third, notwithstanding the foregoing preclusion, the aforecited matters may be submitted to arbitration *by special leave of the court*.[22] Whilst issues of incapacity and status are, as a matter of public policy, non-arbitrable in all jurisdictions, the fact that, in Botswana, there is still a room, albeit on the basis of judicial sanction/referral and perhaps stringent scrutiny, for these disputes, amongst others, to be settled by arbitration may mean that their non-arbitrability is not a reflection of a firm entrenchment of public policy. This clearly shows that Botswana pursues a liberal approach to the arbitrability of civil and commercial matters. That notwithstanding, we should not lose sight of the fact that, both in civil-law and common-law courts, issues of anti-trust (or competition law), securities transactions, the validity of intellectual property rights, bribery and corruption, bankruptcy (insolvency),[23] and administrative contracts may be non-arbitrable.[24] In this regard, it is worthy to mention that the issue of arbitrability may be raised at four points in the life of an arbitrated dispute, namely[25] (i) before a national court deliberating whether to enforce an arbitration agreement; (ii) before the arbitrators themselves as they try to decide the scope of their competence; (iii) before a court, generally in the country where the arbitration has taken place, in an action to set aside the award; and, (iv) finally, before a court asked to recognize and enforce the award.

It should, therefore, be noted that, despite the omission of the question of non-arbitrability in the implementation Act, there is no doubt that non-arbitrability stonewalls the effectiveness of arbitration agreements.[26]

22 See s 7 of the Act.

23 It is good to note that, under s 79(2) of the Insolvency Act 1929 of Botswana [Cap 42:02], the trustee may be authorized by a resolution of creditors to submit to arbitration 'any dispute concerning the estate or any claim or demand upon the estate, when the opposite party consents to arbitration'. Under the Companies Act 2008 [Cap 42:01], s 384(4)(d) also provides that, in the process of a company's winding up or judicial management, the liquidator, with the leave of the court or with the authority of a resolution of creditors and contributors, possesses the power to 'submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company'.

24 See also N Blackaby and C Partasides (n 5) 125-135; T Varady and others (n 17) 221.

25 T Varady and others (n 17) 221.

26 Note that non-arbitrability also prevents the recognition and enforcement of arbitral awards under the New York Convention as per Article V(2)(b).

3.2 The null and void, inoperative or incapable of being performed clause

Article II(3) of the New York Convention provides that the court of a convention state, when seized of a matter in respect of which the parties have made an arbitral agreement, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is *null and void, inoperative or incapable of being performed.* It should be noted that the court referred to under Article II(3) of the New York Convention should be one having jurisdiction on the matter. Furthermore, it is submitted that the court must construe the clause narrowly, having regard to the objective of the Convention – that is to say, promoting arbitration.[27]

Moses noted that an arbitration agreement could be considered null and void where there is lack of consent owing to fraud, duress, misrepresentation, undue influence, or waiver.[28] A lack of capacity by a party may also render an arbitration agreement null and void in circumstances where a state agency concludes an arbitration agreement without authority or necessary approvals from the powers that be.[29]

Arbitration agreements may also be inoperable for several reasons, namely, that the matter is *res judicata*; that the parties have revoked or caused to lapse the arbitration agreement; that the parties may have amicably settled the matter; and that the time limit within which a demand for arbitration should have been made has expired.[30]

Arbitration agreements are said to be incapable of being performed if the arbitral tribunal cannot be established in terms of the agreement.[31] The establishment of the arbitral tribunal may become impossible owing to circumstances such as where the arbitrator named in the agreement is deceased or unavailable at the time of the dispute or due to the fact that the place of

27 See also Peter Gillies, 'Enforcement of International arbitration Awards – The New York Convention' (2005) 9 Int'l Trade & Bus Law Rev 19, 25 (Wherein it is stated that in an American case, *Mitsubishi Motors Corp v Soler Chrysler Plymouth,* 723 F 2nd 155, 165 (1st Cir, 1983), the clause must be interpreted to encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale).

28 Margaret Moses (n 4) 32.

29 ibid. It should also be noted that pathological clauses (defective arbitration clauses) may serve as grounds for rendering the arbitration agreement null and void.

30 Ibid.

31 See also N Blackaby and C Partasides (n 5) 148.

arbitration was no longer available because of political upheaval in the country, or because the arbitration agreement was itself too vague, confusing, or contradictory.[32]

It is good to note, therefore, that when and if a disputing party to an international arbitration raises the defences available under Article II(3) of the New York Convention in seeking a stay of proceedings against a party, who wishes to commence litigation in Botswana, the High Court of Botswana should construe the grounds narrowly. It should also do so in a manner that promotes international commercial arbitration and that enhances international harmony and uniformity of interpretations in the application of the provisions of the New York Convention.[33]

4. THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

4.1 'Reciprocity' and 'Commercial' reservations

Due to the two reservations, namely, the reciprocity and commercial reservations, and other factors, foreign arbitral awards may be subject to several discreet recognition and enforcement legal regimes in Botswana. There are, thus, multiple approaches to the recognition and enforcement of foreign arbitral awards.

4.1.1 'Reciprocity' reservation

The recognition and enforcement of foreign judgments place stringent requirements, including the inescapable requirement of reciprocity. Such requirements have been jealously guarded by the recognizing courts in enforcement proceedings of foreign judgments. In the international arbitration practice, the requirement of reciprocity has been watered down in the recognition and enforcement of foreign arbitral awards. This has been particularly impacted

32 Margaret Moses (n 4) 32-33.

33 In this regard, the High Court of Botswana should be able to resist any temptation to act in terms of what David Butler states in respect to the South African context that the South African courts' 'comparatively wide discretion […] to refuse to uphold an arbitration agreement [in domestic arbitration] therefore also applies to an international arbitration agreement' because Act 40 of 1977 contains no equivalent provisions to Article II of the New York Convention.

by the adoption of the UNCITRAL Model Law on International Commercial Arbitration, which dispenses with the requirement of reciprocity for the recognition and enforcement of foreign arbitral awards.[34] Article 35(1) of the Model Law provides that the state enacting the Model Law will apply the provisions of Articles 35 and 36 to all arbitral awards, *irrespective of where they are made*. There is no reciprocity requirement. Arbitration legislations based on the Model Law have been adopted in 85 States in a total of 118 jurisdictions.[35]

Secondly, the New York Convention offers Convention States to allow the recognition and enforcement of foreign arbitral awards irrespective of the state where the arbitral award is made, be it in a Convention state or otherwise. In this regard, many states have ratified the Convention without registering the reciprocity reservation.[36] It can be said that the majority of the Convention States are willing to apply the New York Convention both to Convention and non-Convention States. That notwithstanding, Convention States commit themselves to extend the application of the New York Convention regardless of whether the non-convention state reciprocates. It is good to note, in this respect, that Lesotho, Rwanda, South Africa, Zambia, and Zimbabwe are some of the Southern African states which ratified the Convention without the reciprocity reservation. This is what is encouraged by the New York Convention. In this regard, it is observed thus:[37]

> *If this opening article* [Article I(1)] *stood without qualification, it would mean that an award made in any State (even if that State was not a party to the New York Convention) would be recognized and enforced by any other State that was a party, so long as the award satisfied the basic conditions set down in the Convention.*

It is trite that this practice places the non-convention states to become free-riders. To help minimize such practices, some Convention States have registered a reservation to the effect that, with regard to awards made in the territory of non-contracting states, these Convention States apply the Convention only to the extent to which a non-Convention State grants reciprocal

34 Art.34 of the UNCITRAL Model Law on International Commercial Arbitration.

35 Available at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status > accessed 5 October 2021.

36 Out of the total of 168 Convention States, eighty states have declared the reciprocity reservation. Available at <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 > accessed 5 October 2021

37 N Blackaby and C Partasides (n 5) 635.

treatment.[38] This reservation puts in place an additional requirement for the recognition and enforcement of an award that the Non-convention State does grant reciprocal treatment. Such a reservation, however, begs several questions which the Convention State should address in its implementing legislation: who bears the burden of proof? Should it be shouldered by the award-creditor or the award-debtor? Or should the enforcement court *ex officio* inquire into whether reciprocal treatment exists between the two states?

Botswana has approached the reciprocity reservation even in a more eccentric manner. Section 3(3) of the Recognition and Enforcement of Foreign Arbitral Awards of 1971 provides:

> *No arbitral award made in any country which is a party to the Convention shall be enforceable in Botswana unless a similar award made in Botswana would be enforceable in such country.*

Needless to say, the whole objective of the New York Convention is the establishment and promotion of a reciprocal recognition and enforcement system for arbitration agreements and arbitral awards amongst the Convention States. Thus, doubtless each Convention State is duty bound to recognize and enforce both arbitration agreements and foreign arbitral awards subject to the conditions set out in the Convention itself. This is particularly accentuated by Article III of the New York Convention where it clearly states that each Convention State should accord a national treatment to foreign arbitral awards.[39] In the light of the foregoing, it seems that there is no importance for the inclusion into the implementing legislation of the afore-cited paragraph 3 of Section 3. It would, however, be too simplistic to dismiss it as *pro non scripto*.

That notwithstanding, the application of the said provision in the recognition and enforcement of foreign arbitral awards has far-reaching consequences. Arguably, any state's accession or ratification to the New York Convention is a manifestation of its commitment to abide by the Convention. Therefore, insofar as there is no evidence to the contrary, it can safely be

38 This is referred to as reservation (b). See <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 > accessed 5 October 2021.

39 Article III of the New York Convention provides:
'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions 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 are imposed on the recognition and enforcement of domestic arbitral awards'.

assumed that the Convention State should provide reciprocal treatment to arbitration agreements and arbitral awards made in Botswana or in any other convention state.[40] However, in case the High Court of Botswana decides to run a foreign arbitral award by section 3(3) of the Act in its quest to examining whether reciprocal treatment exists between Botswana and a convention state whose arbitral award is submitted for recognition and enforcement in Botswana, then, it is submitted that such reciprocal treatment should be established by the convention state's statutes and judicial practice. It is trite that the jurisprudence of states is reflected in both its statutes and judicial practice. Hence both must be adduced to establish whether or not the convention state does accord, in its jurisdiction, recognition and enforcement of arbitral awards rendered in Botswana.

As discussed above, the disadvantages of the application of section 3(3) of the Act arguably far outweighs the non-application thereof in Botswana as it unnecessarily delays and complicates the process of recognition and enforcement of foreign arbitral awards in Botswana. Resort thereof may, however, be had in situations where a convention state has not passed an implementing statute[41] for the New York Convention or, if it has done so, are ignored by its local courts[42] and there is reasonable doubt that such state is generally regarded as having an unfriendly approach to international commercial or investment arbitration. In this respect, the High Court, supplied with proof of an arbitral practice, which conspicuously contradicts the convention state's international obligations under the New York Convention, could be vindicated in applying section 3(3) of the Act in its quest for real commitment by the convention state.

40 R.J.V. Cole, 'Botswana's Arbitration Legislation: The Path for Future Reform' (2007) 5 UBLJ 77, 84 (wherein the author states thus '[i]t is interesting to note that this section related to other contracting countries and one wonders on what basis such provision was necessary since the purpose of the Convention is to enforce awards emanating from contracting states in other contracting states').

41 Albert Jan van den Berg, 'Why are some Awards Not Enforceable?' in Albert Jan van den Berg (ed), *ICCA: New Horizon in International Commercial Arbitration and Beyond* (Kluwer Law International 2005) 316 (citing, *inter alia*, Bangladesh as a country lacking in the implementing legislation owing to which a Bangladeshi court refused to recognize and enforce an arbitral award made in another convention state).

42 Ibid (citing the Witwatersrand Local Division of the Supreme Court of South Africa holding in 1982 that the Convention was not applicable as "the necessary legislation requisite to make it operative and binding has apparently not been passed" and, accordingly, refused to enforce an award. However, South Africa had enacted the Recognition and Enforcement of Foreign Arbitral Awards Act in 1977 on 25 March 1977 (Act No. 40 of 1977, date of commencement 13 April 1977)). It should be noted, *en passant*, that currently the implementing legislation in South Africa is the new International Arbitration Act 15 of 2017 (date of commencement 20 December 2017).

Be that as it may, at first glance, it may be stated that section 3(3) could have made a lot more sense if it were drafted in a negation. Indeed, by resorting to twin principles of contextual and constructive interpretations, one would be highly tempted to re-draft the relevant legal provision thus:

> *No arbitral award made in any country which is not a party to the Convention shall be enforceable in Botswana unless a similar award made in Botswana would be enforceable in such country.* [Emphasis supplied].

This way, the Act could have clearly carried the message that Botswana would be willing to cater for the needs of non-convention states under the New York Convention only on a *quid pro quo b*asis. This counters the assumption that non-convention states are free-riders where convention states apply the New York Convention short of the reciprocity reservation. Section 3(1) of the Act clearly deals with the recognition and enforcement of arbitral awards *made in any country which is a party to the Convention.* Section 3(3) might have been conceived of as extending the application of the Convention to non-convention states with *a caveat* that, in return, those states should also be ready to grant reciprocal recognition and enforcement to arbitral awards made in Botswana.

Closer scrutiny would, however, evince that this is a tenuous argument because, by entering the reciprocity reservation, Botswana has made it abundantly clear that the application of the New York Convention only extends to convention states. Thus, the literal interpretation and application of s 3(3) of the Act would indeed run counter to the ideals of the New York Convention. It may also engender cumbersome procedural and evidentiary challenges not only in Botswana but also in other convention states, which may wish to reciprocate and only be willing to apply the Convention against Botswana as per Article XIV of the Convention, which provides that "[a] Contracting State *shall not* be entitled to avail itself of the present Convention against another Contracting State *except to the extent that it is itself bound to apply the Convention*". [Emphasis supplied].

4.1.2 'Commercial' reservation

The New York Convention allows another reservation. It stipulates, under Article

I(3) that a Contracting State may "declare that it will apply the Convention only 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". The Convention does not, however, provide for the definition of what 'commercial matters' are. It is, thus, left for the recognition or enforcement forum to determine what is commercial. Unfortunately, there is no doubt that such practices have given rise to divergent views on the meaning of 'commercial matters'. Attempt has been made to mitigate these divergences by including a definition of what commercial matters are in the UNCITRAL Model Law on the International Commercial Arbitration. This definition is, however, incorporated as a foot note of Article 1 of the Model Law rather than in the substantive provisions. It provides thus:[43]

> *"The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction agreement; commercial representation or agency factoring; leasing, construction; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."*

The New York Convention does not define the meaning of the term 'commercial'. Convention States are, thus, expected to define the scope of commercial in the implementing statute. For instance, largely inspired by and short of mirroring the afore-cited definition, the Egyptian Arbitration Law of 1994 provides thus:

> *"Arbitration is commercial within the scope of this Law when the dispute arises over a legal relationship of an economic nature, whether contractual or non-contractual. This comprises, for example, the supply of commodities or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial,*

43 Available at <www.uncitral.org> accessed 13 October 2021.

touristic and other licenses, technology transfer, investment and development contracts, banking, insurance and transport operations, natural wealth, energy supply, laying of gas or oil pipelines, building of roads and tunnels, reclamations of agricultural land, protection of the environment and establishment of nuclear reactors."

It should be noted that the Model Law and the Egyptian Law's definitions of 'commercial matters' are meant to be illustrative and intended to be all-inclusive.[44] A different approach is followed by the South African International Arbitration Act 15 of 2017. Article 7 of the Act provides thus:

7-Matters subject to international commercial arbitration

(1) *For the purposes of this Chapter, any international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration, unless –*

(a) *Such a dispute is not capable of determination by arbitration under any law of the Republic; or*

(b) *The arbitration agreement is contrary to the public policy of the Republic.*

(2) *Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.*

The South African International Arbitration Act does not directly define what 'commercial' matters are.[45] Section 7 of the Act deals with the matters subject to international commercial matters. It provides thus:

7. Matters subject to international commercial arbitration

(1) *For the purpose of this Chapter, any international commercial*

44 Amazu A. Asouzu, 'The Egyptian Law Concerning Arbitration in Civil and Commercial Matters' (1996) 8 RADIC 144, 144-145.

45 Note that the Act is a legal instrument adopting the UNCITRAL Model Law on International Commercial Arbitration in South Africa. Simultaneously, as alluded to above (n 33) it is also the implementing statute for South Africa of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958).

dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration unless –

(a) *Such a dispute is not capable of determination by arbitration under any law of the Republic; or*

(b) *The arbitration agreement is contrary to the public policy of the Republic.*

(2) *Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.*

From the afore-cited provision of the South African International Arbitration Act, it is clear that any 'international commercial dispute' may be submitted to arbitration provided the disputes are related to matters or rights which the parties are entitled to *dispose of* by agreement, i.e., *dritto disponibili*. The freedom of the parties to arbitrate over international commercial matters which they can dispose of by agreement is only circumscribed by two conditions; namely, the *nonarbitrability* of the subject matter as prescribed by law and when such agreement is contrary to the South African *public policy*.[46] The Act, however, does not contain a definition of what 'commercial' matters are. Indeed, South Africa did not enter the commercial reservation under the New York Convention.[47] As the Act adopts UNCITRAL Model Law wholesale, subject only to the provisions of the Act, one may conclude that the definition of 'commercial' matters under the Model Law might have been incorporated as part of it. This argument is particularly augmented in light of the fact, under section 8 of the Act, that it is provided that courts and arbitral tribunals, in interpreting the Act, may resort to materials, including relevant reports of UNCITRAL and its secretariat.

It is noted that, as each state has to provide the meaning of the term 'commercial', the reservation has proven difficult both in the application of the New York Convention and in adopting a uniform interpretation of the

46 See sections 7(1)(a) and (b) of the Act.

47 See http://uncitral.org > accessed 21 October 2021.

Convention.[48] In this respect, despite entering the commercial reservation, the implementing Act of the New York Convention in Botswana does not define 'commercial' matters. Neither has it been defined in any of the legislative enactments nor is there any case-law in this respect.[49]

4.1.3 Multiplicity of the Enforcement Legal Regime

The two reservations[50] (ie, *reciprocity* and *commercial*) that Botswana has entered in acceding to the New York Convention and other causes have engendered a multiple of enforcement regimes in Botswana. In sum, an award-creditor may have to wade through the murky mud of determining the specific enforcement regime to which the award-creditor should resort to for a successful recognition and enforcement: domestic (civil or commercial) arbitral awards; foreign arbitral awards on civil matters; foreign arbitral awards on commercial matters (from non-convention states); foreign arbitral awards on commercial matters (from convention states); foreign arbitral awards (civil and commercial), which can be subject to the International (Reciprocal) Enforcement of Judgment Act, and arbitral awards rendered under the auspices of ICSID, ICSID (Additional Facility) Rules, or non-ICSID investment arbitration.

I now, therefore, turn to address the issue of multiplicity of the enforcement regime, which, unless and until properly taken care of by the legislature, may impede legal certainty and predictability in the arbitration system in Botswana.

48 N Blackaby and C Partasides (n 5) 636.

49 However, in *Bah v Libyan Embassy* 2006 (1) BLR 22 (IC), the court held that employment contract is considered as a private (commercial) act of a sovereign (*jus gestionis*) to which jurisdictional immunity does not extend unlike a public act of a sovereign (*jus imperii*). For more on this, see O.B Tshosa, 'Immunity of Diplomatic Missions in Botswana in Light of *Amadou Oury Bah v Libyan Embassy*' (2008) 7 UBLJ 173-183.

50 The reservation on the *non-retroactive* application of the New York Convention that Botswana also entered must have fallen into desuetude as there can be no foreign arbitral award rendered prior to the entry into force of the Convention and yet has not been enforced or prescribed. This, therefore, precludes the further cleavage of foreign arbitral awards into pre or post-Convention awards. See section 3(1) of the Recognition and Enforcement of Foreign Arbitral Awards, which, in its relevant part, stipulates that only 'arbitral awards made after the coming into force of this Act' may become binding and enforced in Botswana. It is good to note that it does not refer to the *non-retroactive* application of the Convention on arbitration agreements. Nor is its non-application extendable to foreign arbitral awards, which are rendered on the basis of arbitration agreements concluded prior to the coming into force of the Convention in Botswana.

5. DOMESTIC ARBITRAL AWARDS

These awards are governed by the Arbitration Act of 1959. In this respect, section 4 of the Arbitration Act of 1959 provides thus:

> 'A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the Schedule, so far as they are applicable to the reference under the submission'.

Consequently, section 13 of the Schedule to the Arbitration Act of 1959 provides for the finality of domestic arbitral awards. It states thus: 'The award to be made by the arbitrator, arbitrators or umpire shall be in writing, and shall, if made in terms of the submission, be final and binding on the parties and the persons claiming under them respectively'. [Emphasis supplied]. From this, it is evident that there is even no recourse for appeal by the award-debtor and, hence, the arbitral award attains the status of *res judicata* between the parties; the fact that the arbitral award is 'final and binding' insulates the possibility of re-litigation on the merits of the case in the court of law. Consequently, section 20 of the Arbitration Act of 1959 provides for the mechanism by which domestic arbitral awards may be enforced in Botswana. It provides thus:

> *An award on a submission may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.*

I should, however, hasten to state that the award-debtor may, should it be aggrieved, avail itself of the set aside recourse enunciated under section 13(2) of the Arbitration Act of 1959. Section 13(2) sets out only two grounds for the setting aside of an arbitral award by the High Court.[51] These are:[52]

(1) That an arbitrator has misconducted the arbitral proceedings;[53] or,

51 The court that is designated to deal with arbitration matters in Botswana is the High Court of Botswana as stated under s 2 *sub verbo* the word 'Court' of the Arbitration Act of 1959.

52 See also *Complant Botswana (Pty) Ltd v Hutchings, Arbitrator and Another* 2012 (2) BLR 517 (HC) (wherein the two grounds for set aside recourse are further retrenched and the court rejected any other ground when petitioned to set aside an arbitral award on grounds of gross irregularity. Makhwade J. noted thus: 'Gross irregularity was not a ground for the review of arbitral awards in Botswana law and the court could not import into its law a provision that was not there. That is the function of the legislature. Cases dealing with gross irregularity had no application in the law of Botswana').

53 In *Champion Construction (Pty) Ltd v Allen and another* [2006] 2 BLR 56, the court, in *dictum*, stated that '[t]he word 'misconduct' was to be understood in the sense of some wrongful, dishonest or improper

(2) That an arbitration or award has been improperly procured.[54]

It is also good to note that section 13(2) is only a permissive provision; the High Court may, thus, still refuse to set aside the award notwithstanding the fact that the arbitration agreement or award is tainted with the afore-said anomalies. This is particularly so, in our opinion, whenever the court is convinced that one or both of the grounds, despite their presence in the arbitral proceedings, did not infest the arbitration agreement or arbitral award to the extent of warranting the setting aside of the arbitral award.

It is worthy to note, at this juncture, that the domestic arbitral award may result from commercial or civil transactions. In this regard, there has been no ground provided under the Arbitration Act for the bifurcation of arbitral awards into commercial and civil arbitral awards. The application of the Arbitration Act of 1959, as the *lex arbitri* of all arbitrations whose seat of arbitration is in Botswana, does not even call for the compartmentalization of disputes into commercial and civil (non-commercial). It is, therefore, safe to conclude that the Act applies for the resolution of disputes arising from both commercial and civil transactions.

6. FOREIGN ARBITRAL AWARDS

In a similar fashion, as alluded to above, foreign arbitral awards may either be resulting from civil or commercial matters. Unlike in the domestic setting, however, the classification of foreign arbitral awards into commercial and non-commercial is essential; it is the touchstone for determining the application or otherwise of the New York Convention of 1958. As is discussed below, foreign arbitral awards arising only from or in connection with commercial matters are subject to the New York Convention owing to the commercial reservation, which Botswana has registered upon accession. It is, therefore, necessary to

conduct; a *bona fide* mistake whether of law or of fact on the part of the arbitrator could not be relied upon as a ground for setting aside the award'. See also *Southern District Council v Vlug and Another* [2010] 3 BLR 315 and *China Jiangsu International Botswana (Pty) Ltd v Vlug and another* (Misca 50/10), unreported.

54 In *Southern District Council v Vlug and another* [2010] 3 BLR 315, the court succinctly set out the application of the two grounds for set aside recourse by requiring the award-debtor 'to show the arbitrator's conduct of the proceedings to have been wrongful, dishonest or improper, and that test will be the same, whether the issue for determination is whether an arbitrator 'misconducted the proceedings', or 'misconducted himself' in relation to his duties as an arbitrator'. [Emphasis supplied].

briefly outline the differences.

6.1 Foreign arbitral awards on civil matters

Foreign arbitral awards on civil matters could be enforced under the Judgments (International Enforcement) Act by properly qualifying them as foreign judgments by virtue of section 2(3) of the Act. We are, however, left in limbo as to which legal regime governs the recognition and enforcement of those arbitral awards other than those which can be merged into judgments as per this Act. In this regard, mention can be made of foreign arbitral awards pertaining to maintenance orders. These are excluded from the ambit of the Judgments (Reciprocal Enforcement of Maintenance) Order.[55]

6.2 Foreign arbitral awards on Commercial Matters

These foreign arbitral awards are amenable to the New York Convention in Botswana with the *caveat*, *inter alia*, that the reciprocity requirement is also satisfied; these awards are also referred to as Convention awards. Such arbitral awards can further be classified into foreign arbitral awards and non-domestic arbitral awards on the basis of the approach to the 'internationality' of arbitration by the recognition state.

6.3 'Non-domestic' arbitral awards

Article 1(1) of the New York Convention makes it clear that it applies to both 'foreign' and 'nondomestic' awards, providing that it governs "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 [i.e., foreign awards] … [and] "to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought [i.e., nondomestic awards].

The implementing Act has given the force of law in Botswana of the following provisions of the New York Convention:

(i) Section 2 and 3 of Article II

55 Judgments (International Enforcement) Act [Cap 11:04], ss 13-22.

(ii) Article III
(iii) Article IV
(iv) Article V; and
(v) Article VI.

By so doing, under Section 4 of the Act, the legislature either advertently rejected Article I(1) of the New York Convention or inadvertently left it out from having a force of law in Botswana. In an attempt to capture the essence of Article I(1), however, the Act introduced Section 3 which provides in part thus:

(1) *Subject to the provisions of subsection (2) and (3) any arbitral award made […] in any country which is a party to the Convention shall be binding and may be enforced under the provisions of the Arbitration Act and the laws of Botswana.*
(2) *The provisions of this section shall only apply to awards arising out of legal relationships, whether contractual or not, considered as commercial under the laws of Botswana.*
(3) *No arbitral award made in any country which is a party to the Convention shall be enforceable in Botswana unless a similar award made in Botswana would be enforceable in such country.*

Under the second limb of Article I (1) of the New York Convention, a *nondomestic award* should have been one which is made in Botswana and because of its international nature would fall under the New York Convention for its recognition and enforcement. This category of foreign awards are the result of Article I(1) of the New York Convention, which states thus: "It shall apply to arbitral awards *not considered as domestic awards* in the State where their recognition and enforcement are sought". This are called nondomestic arbitral awards. John Fellas states that:

> "Article I(1) of the Convention makes clear that it applies to both 'foreign' and 'nondomestic' awards, providing that it governs " 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 [i.e., foreign arbitral awards'] … [and] "to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought [i.e., nondomestic awards]."[56]

56 John Fellas, 'Enforcing New York Convention Awards in the United States: Getting it Right' (2018) 259 New York Law Journal 4.

In their respective implementing statutes, Convention States should prescribe the conditions under which arbitral awards made in their soil can be considered as nondomestic arbitral awards. The nondomestic arbitral awards are a class of arbitral awards, which may be eventuated due to the fact that some states do accord nationality not only on the basis of the geographical criterion but also on a procedural basis. The latter means that arbitral awards made in a Convention State may be considered 'foreign arbitral award' for the purpose of recognition and enforcement of arbitral awards under the New York Convention, simply because the arbitral proceeding took place under the procedural rules of another state. This is the procedural criterion. Rubino-Sammartano noted that:[57]

> *Confirmation of the procedural criterion can be found in the New York Convention, which, in addition to the first class of awards (those made in other states) treats as foreign a second class of awards, even if made in a state, are the results of proceedings governed by a procedural law different from the law of that state.*

Indeed, this is not at all unheard of as arbitrating parties may choose arbitration rules of a state other than the state where the arbitration proceedings take place. In other words, the *lex arbitri* is not necessarily the *lex loci arbitri*. The contracting parties may find it more suitable to have their arbitration proceedings governed under the law of arbitration of a third-country whose nationality some states are willing to accord to the arbitral award. One would, thus, expect that Botswana's implementing Act should have encapsulated when and how international commercial arbitration which take place in Botswana may, under certain circumstances, be considered as *nondomestic* awards and hence falling under the ambit of the New York Convention for their recognition and enforcement in Botswana. Currently, there are no criteria for determining which arbitral awards are *nondomestic*, *foreign* or *domestic* arbitral awards in Botswana. Thus, the possibility of ascribing nationality to arbitral awards either on the basis of the procedural criterion or the arbitrators' nationality criterion cannot be envisaged. Thus, by omitting the second limb of Article I(1) of the New York Convention, the Act leaves concerned parties in limbo as to the legal status of these kinds of international arbitration awards.

In the absence of legislation, judicial activism should be charting the future.

57 Mauro Rubino-Sammartano, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2014) 956

In so doing, if, for the purpose of Article I(1) of the New York Convention, nondomestic arbitral awards should include those awards made on the basis of arbitral proceedings which take place in Botswana and whose arbitral proceedings were governed by foreign arbitration law, which the arbitrating parties have chosen, it would mean that Botswana could conveniently attract more arbitrations to take place within its jurisdiction. Until Botswana enacts a new modern arbitration legislation, it is natural that arbitrating parties would opt for arbitration laws, which are modern, predictable and certain. This is particularly so when Botswana possesses arbitration centers[58] which conveniently caters for arbitrating parties in international commercial and investment arbitration. In addition to the appointed arbitrators being foreign nationals, such arbitrations may involve the application of substantive foreign laws, i.e., the laws chosen by the parties other than the laws of Botswana. This would, thus, necessitate the need to categorize such arbitral awards as *nondomestic.*

6.4 Foreign (non-convention) arbitral award

There are a set of arbitral awards that come under the ambit of this category. These awards are not to be treated under the New York Convention for the recognition and enforcement of foreign arbitral awards owing to the fact that, in ratifying the New York Convention, Botswana has registered the two reservations, namely the *reciprocity* and *commercial* reservation. Primarily, these awards include:

(1) Foreign awards which are made in a non-Convention State;
(2) Foreign awards in matters of non-commercial (civil) matters, irrespective of where such awards are made (that is to say, whether they

58 Unfortunately, para 2 of Article I of the New York Convention is omitted in its entirety. Nor is there any mention of the fundamental distinction between institutional arbitration and *ad hoc* arbitration in the Arbitration Act. The omission is less likely to have any impact on the recognition and enforcement of foreign arbitral awards under the Convention in the courts of Botswana. The fact that there is yet no arbitration institution in Botswana is, however, worrisome in the light of the fact that institutional arbitrations offer significant advantages in conducting arbitral processes. 'Institutional arbitration' means that the parties choose to conduct their arbitration procedure in accordance with the rules of, and with the assistance of, an arbitral institution. The advantages of institutional arbitration over *ad hoc* arbitration lies on the services offered by the institutions- namely, availing ready-made arbitral rules, setting in motion the arbitration, fixing and supervising time limits, deciding on challenges and replacements of arbitrators, supervising the process in the absence of a party, scrutinizing and notifying the award, administering advances on cost and paying arbitrators, support staff, and availing premises (hearing rooms, secretarial support, etc…). For more on this, see UNCTAD/WTO - International Trade Center, *Arbitration and Alternative Dispute Resolution: How to Settle International Business Disputes* (Geneva 2001) 60-61.

are made in a Convention State or otherwise);

(3) Foreign awards which are made in a Convention State where it is not proved that reciprocity exists between the rendition state and Botswana.[59]

(4) Foreign arbitral awards which are made in Convention States where the award-creditor, however, elects to invoke the application of Article VII; this is because the award-creditor seeks recognition and enforcement under Article VII for the reason that such enforcement requirements are more favourable to him. It should, however, be noted that, as we shall address it later, this evokes no difficulty in Botswana as it is not made part and parcel of the applicable provisions in Botswana.

The New York Convention allows a Convention State to register a reciprocity reservation on whether the State would to limit the application of the New York Convention only to Convention states or be willing to extend the application thereof to non-convention states. If the Convention state does not register the reciprocity reservation, it means that the state is willing to recognize and enforce arbitral awards rendered in non-convention states on the same conditions as provided under the New York Convention. This entitles non-convention states to benefit from the Convention without being parties thereto. However, the rationale for doing so mainly arises out of the concern that the requirement of reciprocity is a retaliatory measure against the state which, sometime in the past for unfounded reasons, refused to recognize and enforce the arbitral award rendered in the country which seeks to retaliate. Indeed, this has been proven to have inflicted more harm upon private commercial entities than on the alleged culprit states. Imposing retaliatory measures on individuals and private commercial entities for an alleged wrong committed by the state machinery does not make it right. It is not wise to punish individuals and private commercial entities for the wrongs committed by the state which may or may not be the state of nationality of the individual or private commercial entity seeking the recognition and enforcement of the arbitral award. The ward-creditor seeking the recognition and enforcement could actually be the national of the state where recognition and enforcement is sought. Thus, majority of the convention states have considered it apt that the requirement of reciprocity in arbitration be abolished.

59 This is so categorized owing to section 3(3) of the implementing Act.

In Botswana, a different route has been pursued. Not only has Botswana registered the reciprocity reservation to the New York Convention but also sought to make sure that each and every Convention state must be proven to have recognized and enforced an arbitral award rendered in Botswana or is willing to do so in the future. In effect, the commitment to recognize and enforce arbitral awards rendered in Botswana by the convention states does not suffice. A party who seeks for the recognition and enforcement of an arbitral award made, for instance, in Zimbabwe must show that Zimbabwe, in addition to its standing commitment by virtue of its being a party to the New York Convention, has in the past recognized and enforced an award made in Botswana or is willing to do so in the future. Thus, Botswana is only willing to recognize and enforce foreign arbitral awards of commercial matters made in the convention country which country is known to enforce Botswana arbitral awards (i.e., the country should not only be a convention state but also known to have enforced or to potentially enforce Botswana's arbitral awards).

This position has been espoused under Section 3(1) of the Act where it is stated thus:

> *Subject to the provisions of subsection (2) and (3) any arbitral award made […] in any country which is a party to the Convention shall be binding and may be enforced in Botswana in accordance with and subject to the provisions of the Convention in such manner as an award may be enforced under the provisions of the Arbitration Act and the laws of Botswana.* [Emphasis supplied].

Section 3(3) of the Recognition and Enforcement of Foreign Arbitral Awards Act provides thus:

> *No arbitral award made in any country which is a party to the Convention shall be enforceable in Botswana unless a similar award made in Botswana would be enforceable in such country.* [Emphasis supplied].

The question that follows from this is that: why would the High Court of Botswana doubt the standing commitment of a Convention state to recognize and enforce arbitral awards made in Botswana? Is it not implicit that any convention state would be committed to do so once it has become a party to the Convention? In this regard, the hope is that the High Court of Botswana would

in practice relax the requirement as it is burdensome to parties involved in the international commercial arbitrations.

Be that as it may, it is imperative to question as to how the High Court is to be informed of the fact that a 'similar award made in Botswana would be enforceable' in the convention state in whose locality the arbitral award for which recognition and enforcement is being sought is made. Obviously, the fact that that state is a party to the New York Convention should have been a conclusive proof that it would recognize and enforce awards made in Botswana as the Convention obligates the state to do so. Pursuant to section 3(3) of the Act, however, this is not a conclusive proof.

In light of this, what follows from this is – who should shoulder the burden of proving that fact? Should it be imposed upon the award-creditor or the award-debtor? Or should it be left to the High Court of Botswana for *ex officio* enquiry? Indeed, if retaliating against the state which does not recognize and enforce arbitral awards made in Botswana is the ultimate objective, then, it is reasonable to impose it upon the award-creditor – the award-creditor should show cause as to why the High Court should not refuse to recognize and enforce the arbitral award by proving the innocence of the Convention State in which the arbitral award is made. Eventually, however, imposing this onus of proof upon the award-creditor would fall foul of the pro-enforcement bias which Convention States have been willing to accord the New York Convention. Furthermore, by placing an extra burden upon the award-creditor, it makes recognition and enforcement of foreign arbitral awards more cumbersome for arbitrating parties in international commercial arbitration than it is for domestic arbitration.[60]

In such a situation where either the award-creditor or the award-debtor is faced with the *onus provandi,* there are two ways of approaching it. Firstly, the party should make an attempt to prove it through a legislative commitment by the state declaring that it would enforce similar arbitral awards made in Botswana in particular or in one or more countries including Botswana in general. This commitment by the state could also emanate from bilateral or regional agreements relating specifically to recognition and enforcement of foreign arbitral awards or a treaty of judicial assistance on arbitration and judgments. Secondly, the party should make a foray into the case-laws of the

60 See Article III of the New York Convention.

country in a bid to fumble on one or more cases by which the courts of the state had recognized and enforced arbitral awards made in Botswana. This would require meticulous investigations into the practice of the state where the award is made. This is, however, easier said than done. Given the fact that arbitration is still in its infant stage in Botswana, it could prove to be too ambitious to attempt to find many countries to which an arbitral award made in Botswana might have been exported.

Indeed, the reciprocity reservation has a different purpose altogether than what is contemplated under the Act. As it is clear from the reading of Article I(3) of the Convention, signing, ratifying or acceding to the Convention simply means that the Convention state commits itself to 'apply the Convention to the recognition and enforcement of awards made only in the territory of another Convention State'. It cannot and should not be utilized for the purpose of laying down grounds upon which any Convention state would require proof that another Convention state would enforce similar arbitral awards made in that state. Thus, the purpose of declaration of reciprocity reservation pursuant to Article I(3) is enunciated as follows:

> *With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment.*

The reciprocity requirement under the Convention is, therefore, intended to govern the system of recognition and enforcement of arbitral awards between a Convention state and a Non-convention state; it is not intended to apply to arbitral relationship between Convention states. Botswana espouses a liberal economic policy and shares more or less similar legal system with its neighbouring countries which have ratified the New York Convention short of any reservation.[61] One would, thus, be left in limbo as to why Botswana has chosen this cumbersome course of action in ratifying the New York Convention.

7. CONCLUSION

The Recognition and Enforcement of Foreign Arbitral Awards Act of Botswana

61 South Africa, Lesotho, Zimbabwe, and Zambia have all ratified the Convention without any reservation unlike Botswana which has ratified the Convention with both reservations (a) and (b) on commercial matters and reciprocity requirement respectively. See < http://www.uncitral.org > accessed 21 October 2021.

implemented the New York Convention in Botswana. In so doing, the Act, instead of implementing the Convention's provisions wholesale, it chose to do so on a selective basis. In the process, I believe, a lot has been lost in transition. The Act, for instance, did fail to bifurcate foreign arbitral awards into 'foreign awards' and 'nondomestic' awards as envisaged under Article I(1) of the New York Convention. Secondly, the Act failed to recognize that arbitrations may take place under the auspices of a permanent institution or an ad hoc arbitral tribunal as envisaged under Article I(2) of the New York Convention. It also failed to impose upon the courts of Botswana the duty to 'recognize' arbitration agreements as envisaged under Article II(1) of the Convention. Furthermore, the implementing act, by entering the two reservations (that is, *reciprocity* and *commercial* reservation) unnecessarily engendered multiple enforcement regimes to co-exist in Botswana.

Finally, the additional requirement of reciprocity, under section 3(3) of the implementing Act, does not comfortably sit with the pro-enforcement principles enshrined under the New York Convention. It requires, in my opinion, that either the parties or the court *ex officio* must prove that the convention state, for whose arbitral award recognition and enforcement is sought in Botswana, has either practically granted recognition and/ or enforcement of arbitral awards made in Botswana or jurisprudentially commits to do so. This, as discussed above, severely complicates the application of the New York Convention in Botswana and, coupled with the multiple legal regimes made to govern several disparate arbitral awards lends itself to uncertainties and lack of legal security in international business transactions. It is, therefore, high time that Botswana modernized its domestic and international commercial arbitration laws.