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

(Part 2)

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ABSTRACT

The use of international commercial arbitration as the preferred method of dispute settlement in international commercial and investment transactions continues to gain traction. The ease of enforceability of international commercial and investment awards in domestic courts has, inter alia, significantly contributed to this. In this respect, the role that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been playing is tremendous. In Botswana, apart from the New York Convention, parties can also, under certain circumstances, invoke the provisions of the Judgments (International Enforcement) Act for the purpose of recognition and enforcement of foreign arbitral awards. Investment arbitral awards are also conveniently classified into ICSID and Non-ICSID awards; the former class of awards do not call the application of the New York Convention for their enforcement. Furthermore, the increasing propensity (by arbitration-friendly states) to grant recognition and enforcement of foreign arbitral awards, which are annulled or set aside in their country of origin is worth noting. Such practice, should the need arises in Botswana, could have been catered for under Article VII of the New York Convention, which provision, however, was omitted in the Implementation Act.

1. INTRODUCTION

A critical analysis of the application of the New York Convention in proceedings seeking for the recognition and enforcement of arbitration agreements and foreign arbitral awards in Botswana is dealt with in Part 1. This work (Part 2) broadly addresses, in section II, the pros and cons of resorting to the Judgments (International Enforcement) Act for the purpose of recognition and enforcement of foreign arbitral awards. In section III, attempt has been made to shed light on the nature of investment arbitration and the classifications thereof on the basis of the *modus operandi* for their recognition and enforcement in general and in Botswana in particular. Section IV deals with the omission in the Implementation Act of Article VII of the New York Convention. The challenges and far-reaching repercussions of the non-inclusion of said Article VII into the Botswana arbitral system in the light of the recent developments in the arbitral

practice and jurisprudence of granting recognition and enforcement of foreign awards, which are annulled or set aside in their country of origin, is explained. Finally, it wraps up with concluding remarks.

2. FOREIGN ARBITRAL AWARDS MERGING INTO FOREIGN JUDGMENTS

It is submitted that the Judgments (International Enforcement) Act 16 of 1981[1] is primarily intended to reciprocate the Administration of Justice Act 1920 and/or Foreign Judgments (Reciprocal Enforcement) Act 1933, which in turn is intended for the reciprocal enforcement of United Kingdom (England and Wales in particular) and Commonwealth judgments and arbitral awards. The Administration of Justice Act 1920 and Foreign Judgments (Reciprocal Enforcement) Act 1933 set out statutory conditions for recognition and enforcement of foreign judgments and arbitral awards.[2] The Acts contemplate money judgments and reciprocity.[3] It is noted that the English common law accorded recognition and enforcement of foreign judgments on the basis of *ex debito justitiae* and it is said that 'reciprocity has nothing to do with it'.[4]

Under the Botswana Judgments (International Enforcement) Act 16 of 1981 (hereinafter referred to as the 'Judgments Act'), foreign arbitral awards may also be recognized and enforced in Botswana. Like foreign judgments, this is executed by registration under the Act. The Act provides that a foreign award may be registered in the High Court at any time within six years after the date of the award if it has not been wholly satisfied and if at the date of the application for registration, it could be enforced by execution in the country of the award. No doubt that the Act is primarily intended to apply to the recognition and enforcement of foreign judgments. That notwithstanding, the Act is also made to cater for the equally important need of an award-creditor seeking recognition and enforcement of foreign arbitral awards in Botswana.

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[1] Judgment (International Enforcement) Act 16, 1981[Cap 11:04]. The full title of the Act, which entered into force on 25 September 1981, reads: 'An Act to consolidate and amend the law relating to the enforcement in Botswana of judgments given in countries which accord reciprocal treatment to judgments given in Botswana, for facilitating the enforcement in other countries of judgments given in Botswana and for other purposes connected therein'.

[2] The Act applies to Australia (except the Australian Capital Territory), Botswana, Cyprus, Falkland Islands, Ghana, Gibraltar, Honk Kong, Jamaica, Kenya, Malawi, Malaysia, Malta, Newfoundland, New Zealand, Nigeria, Saskatchewan, Singapore, Sri Lanka, Trinidad, Tanzania, Uganda, Zambia, Zimbabwe. For more on this, see E Scoles, P Hay, P Borchers and S Symeonides, *Conflict of Laws* (3rd edn, West Group 2000) 1198.

[3] ibid.

[4] ibid, 1196

Tucked away under section 2 (*sub-verbo* 'judgment'), arbitral awards are embedded within the definitional framework of the broader concept of 'judgment'. The term 'judgment' is defined, under section 2, to encapsulate 'arbitral awards' thus:

> "judgment" means a judgment or order given or made by a court in any civil proceedings or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party, and includes an award in proceedings on arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place. [Emphasis supplied].

Accordingly, the application of the Judgments Act is extended to the recognition and enforcement of foreign arbitral awards as well as to foreign judgments.[5] In this Act, therefore, the reference to 'judgment creditor'[6] and 'judgment debtor'[7] as defined under s 2 equally apply to 'award creditor' and 'award debtor' respectively. Foreign arbitral awards could, therefore, be duly granted recognition and enforcement in Botswana regardless of whether the arbitral award is concerning matters of commercial or non-commercial transactions insofar as there is reciprocity between Botswana and the country of the original court. This route is particularly of

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[5] There is no any other reference to 'arbitration' or 'arbitral process' in the entire text of the Act save the implied reference to the prorogation of forum-selection clauses or arbitration agreements, under s 7(3)(b) of the Act, which states thus: '[…] if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court'. It is not, however, clear why the grounds of refusal for recognition and enforcement of arbitral awards, which are enunciated under s 9(2) of the Administration of Justice Act 1920 (also equally applicable under the Foreign Judgments (Reciprocal Enforcement) Act 1933) were not incorporated into the Botswana Judgments Act. These grounds of refusal are:

(a) The arbitration lacked jurisdiction;
(b) The defendant had not validly submitted to the jurisdiction of the arbitrators;
(c) The defendant was not duly served with the process of the arbitration;
(d) The award was obtained by fraud;
(e) The defendant intends to appeal or has appealed against the award;
(f) The award was in respect of a cause of action which could not have been entertained in England on public policy grounds.

See Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2005) 881-882 (citing R Merkin, *Arbitration Law*, Chapter 17 at para 17.37).

[6] S 2 of the Act provides thus:
'Judgment creditor' means the person in whose favour the judgment was given and includes any person in whom the rights under the judgment have become vested by succession or assignment or otherwise".

[7] S 2 of the Act also defines 'judgment debtor' thus: 'judgment debtor 'means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable under the law of the original court'.

import to those Non-Convention states which nevertheless have established reciprocal enforcement of judgments with Botswana. Resort may also be had by award creditors who consider that this is more favourable legal regime, as envisaged under Article VII of the Convention, in the recognition and enforcement of arbitral awards than the New York Convention itself.

The practical application of this Act to foreign arbitral awards, however, begs more questions than answers. It is obvious that reciprocity is stipulated as a *sine qua non* for recognition and enforcement. Section 11 provides thus:

> If it appears to the President that the treatment in respect of recognition and enforcement accorded by the courts of any country to judgments given in the superior courts of Botswana is substantially less favourable than that accorded by the courts of Botswana to judgments of the superior courts of that country, the President may by statutory instrument order that except in so far as the President may otherwise direct, no proceedings shall be entertained in any court of Botswana for the recovery of any sum alleged to be payable under a judgment given in a court of that country.

From the afore-cited legal provision, it can be safely said, therefore, that the doctrine of reciprocity is deeply entrenched into the Act.[8] Apart from the requirements of reciprocity, Section 2 of the Act also requires that recognition and enforcement can only be granted '[…] if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place'. This can be effectuated into two ways: first, the arbitral award must have been merged into a court judgment. Second, the court of law of the place where the arbitral award was made has pronounced, in the light of a set of requirements, that the arbitral award is final and conclusive as if it were its own judgment. This is referred to as granting *exequatur,* following the award creditor's application for local execution or the award debtor's plea in the court of law to avail itself of the award as a defence based on which the court has granted it the *res judicata* effect.

[8] See also s 3 and 4 of the Act for similar requirements of reciprocity.

It is, however, trite that litigation and arbitration are subject to discreet principles which warrant separate treatment. [9] In this respect, there are certain disadvantages that come by as a result of these proceedings. Firstly, it should be carefully noted that award creditors would only wish to have their arbitral award merged into a judgment at a greater risk. This is so because arbitral awards, particularly commercial arbitral awards, are more mobile across borders than court judgments for recognition and enforcement.

Second, the granting of exequatur at the place of rendition also means that the enforcement process would be subject to the application of the *double exequatur*, whose abandonment was considered as one of the biggest successes of the New York Convention. Third, the court of rendition might have scrutinized the arbitral award in the light of a set of requirements for the local execution or enforcement thereof. In essence, these requirements are embedded in the local arbitration laws of the country of rendition. By some stroke of magic, the arbitration laws of the country of rendition and that of Botswana could be found to be the same.[10] The advantage is significant in that the High Court of Botswana need not inquire into those requirements if such are found to be the same. However, given that currently the arbitration law of Botswana is not yet modern, this is less likely to transpire. The likelihood is, therefore, that the High Court of Botswana is not able to scrutinize the arbitral award (now merged into foreign judgment) in the light of the mandatory arbitral rules of Botswana. This is because the Act allows the recognition and enforcement of foreign arbitral awards on the basis solely of the grounds which are applicable for the recognition and enforcement of foreign judgments. The grounds for challenging or resorting to the set aside recourse by the judgment debtor to the registration of the foreign judgments are enunciated under s 7(1) of the Act.[11] In a nutshell, the

[9] It is worthy to note that the EU Council Regulation on Jurisdiction and the recognition and enforcement of Judgments in Civil and Commercial Matters expressly excludes arbitration from the scope of its application. See Art.1(2)(d) of the Council Regulation (EC) No. 44/2001, 22 December 2000, OJ L 12, 16.1.2001, at 3

[10] This is, for instance, true of the current Botswana Arbitration Act of 1959 and the English Arbitration Act of 1950. The latter is now replaced with the English Arbitration Act of 1996.

[11] See s 7(1) of the Act. It provides thus:

'On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment

(a) Shall be set aside if the registering court is satisfied –
  (i) That the judgment is not a judgment to which this Part applies or was registered in contravention of this Act;
  (ii) That the courts of the country of the original court had no jurisdiction in the case;
  (iii) That the judgment debtor, being the defendant in proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the

grounds for objecting the registration of any foreign judgment (including one into which a foreign arbitral award is merged) are that (1) the foreign judgment which is relied upon is beyond the scope of application of the Act; (2) the court did not have the jurisdiction in the case;[12] (3) there was lack of due process of law; (4) the judgment was obtained by fraud; and (5) the judgment is contrary to the public policy of the registering state (i.e., Botswana).

The aim of this modest work is not to expound the nitty-gritty of all or any of the afore-cited grounds of challenge for the recognition and enforcement of foreign judgments. It is, however, worthy to highlight the import of the extended application of a set of criteria (which are set out for the recognition and enforcement of foreign judgments) to foreign arbitral awards. Firstly, insofar as foreign judgments are concerned, it is clear that the Act applies only on the basis of reciprocity, meaning that the rendering court also accords reciprocal treatment to judgments of the courts of Botswana.[13] It is also trite fact that such reciprocal commitments (by way of treaties or otherwise) are not only limited in number but also in their restricted application to only a limited number of countries or geographical size. It is advisable that an award-creditor, who cannot prove the reciprocity requirement for the recognition and enforcement of arbitral awards may find it productive to merge it into a judgment of the rendering country where the rendering country is one falling under scope of the Act.

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country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;

(iv) That judgment was obtained by fraud;

(v) That the enforcement of the judgment would be contrary to public policy in the country of the registering court; or

(vi) That the rights under the judgment are not vested in the person applying for registration; or

(b) May be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

[12] It is interesting to note here that the registering court (High Court of Botswana) is enjoined to examine whether or not the original court had jurisdiction in the matter on the basis of the jurisdictional grounds enunciated under s 7(2) and (3) of the Act and not on the basis of the conflict-of-law rules of the country in the original court. This, in the writer's opinion, is indeed worrisome as it meant that the rendering court must have employed one of the basis of jurisdiction enunciated under the Act. The national bases of jurisdiction of the rendering court, if found inconsistent with or invalid under the Act, do not benefit from the recognition and enforcement of foreign judgments under the Act.

[13] See ss 3 and 11 of the Act (wherein it is stated that recognition and enforcement of foreign judgments would be accorded only when 'substantial reciprocity of treatment is assured as respects the enforcement in that country of judgments given in the High Courts of Botswana' and that such treatment may proportionately be withdrawn if the treatment is 'substantially less favourable than that accorded by the courts of Botswana to judgments of the superior courts of that country […]').

Indeed, it can be safely said that, as alluded to above, the restricted cross-border mobility of judgments, *inter alia*, is believed to have offered greater momentum for the espousal of arbitration as the most preferred alternative (to litigation) method for the settlement of international commercial and investment disputes. The question is: should an award-creditor (now turned into judgment-creditor) be allowed to invoke that the rendering court recognizes and enforces arbitral awards made in Botswana? To put it in simple terms, should the judgment-creditor be allowed to prove that the rendering country has an established record for recognizing and enforcing arbitral awards made in Botswana even though that country is not in the List, as stipulated in the Act? Furthermore, can the judgment-creditor produce a judicial practice or otherwise to prove that the rendering country has recognized or enforced or would recognize or enforce judgments made in Botswana? Ideally, given the national and global need for the liberalization of the arbitral system, insistence on the application of the reciprocity requirement, as is strictly required for judgments under the Act, would be unfair in these circumstances. It may, however, be equally argued that the High Court of Botswana does not have a leeway to depart from the terms of the Act. Thus, insofar as foreign arbitral awards-merged-into-judgments are concerned, it remains to be seen how the requirement of 'the scope of application' particularly relative to reciprocity (ss 3 and 11 of the Act) will play out at the High Court of Botswana.

Second, s 7(1)(a)(ii) of the Act states in no uncertain terms that the rendering court must possess jurisdiction in the case. To this effect, s 7(2) of the Act sets out the acceptable bases of jurisdiction on the basis of which the rendering court must have asserted its jurisdiction. To be fair, these bases of judicial (territorial) jurisdiction are consistent with the prevailing jurisprudence on conflict-of-law rules. Undoubtedly, however, they found no application in the arbitral jurisprudence. One cannot, however, rule out the possibility that issues of arbitrability or non-arbitrability of the subject matter of the dispute may project itself as a jurisdictional issue. In this line, it would, for instance, be challenging for the courts of Botswana to register for recognition or enforcement of a foreign judgment (containing the terms of an arbitral award) which was based on a non-arbitrable subject matter in Botswana.[14] Neither is it unheard of for an arbitral award to be the result of an arbitral proceeding arising from or in connection to a subject matter which, under proper scrutiny, may be found to be non-arbitrable under the

[14] It should be noted that the subject matter of the dispute could be arbitrable in the rendering court.

arbitration laws (*lex arbitri*) of the rendering court or under the arbitration laws of a third country to which the parties had agreed to govern the arbitral procedure (i.e., *lex loci electionis*).

Third, the requirements whether due process of law was complied with in the judicial proceedings leading to the judgment may also be considered to be different from the standard requirements in an arbitral proceeding. In England, procedural defects, for instance, lack of adequate notice or insufficient opportunity to be heard may also be viewed under the public policy defense.[15] Be that as it may, it is indeed a matter of whether, on the one hand, the judicial proceedings have complied with the stringent and technical domestic rules and practices of procedure and evidence and, on the other hand, a liberal arbitral process the laxity of whose rules of procedure and evidence might range from empowering the arbitrators to act as *amiables compositeurs* or decide according to *ex aequo et bono* to what the arbitrators determine as 'appropriate'.[16] This should note, however, convey the message that the arbitral tribunal or an arbitrator can overlook the mandatory rules of arbitration centers or national arbitration laws, to which the parties have agreed to govern the arbitral process. It cannot be controverted, therefore, that the compliance or otherwise of the due process of law should be scrutinized in the light of the arbitral jurisprudence. However, the question remains whether the recognizing court should examine it in the light of the mandatory rules of the rendering state or the recognizing state. Unfortunately, the Act leaves us in limbo. In this regard, the recognizing court might choose to apply the arbitral rules of Botswana as it would have applied the acceptable bases of jurisdiction of Botswana in determining whether the rendering court had possessed jurisdiction over the case in relation to foreign judgments. This would, however, tend to subject the arbitral process to multiple arbitral systems the disadvantages of which much outweigh than its benefits – initially under the rules of the seat of arbitration (or the rendering state) and, then, under the rules of the recognizing state.

Fourth, The requirement, under s 7(1)(a)(iv) of the Act, is that a judgment obtained by fraud should not be registered in Botswana. Such a requirement should obviously straddle

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[15] E Scholes, P Hay, P Borchers and S Symeonides (n 1) 1209

[16] It should, however, be noted that the two basic natural justice tenets (the right to have impartial and independent decision-making (*nemo judex in causa sua)* and the right for a fair hearing *(audita alteram partem)*) must at all times be respected in an arbitral process in order for the arbitrator or arbitral tribunal to conduct the arbitral proceeding in judicial manner. This should note, however, convey the message that the arbitral tribunal or an arbitrator can overlook the mandatory rules of arbitration centers or national arbitration laws, to which the parties have agreed to govern the arbitral process.

between litigation and arbitration. The term 'fraud' has not, however, been brought to the spotlight as an independent ground for a set aside recourse or refusal for recognition and enforcement of foreign arbitral awards.[17] Under the South African and Botswana arbitration laws, it has, however, been encapsulated under one of the three grounds[18] for setting aside an arbitral award, that is to say, when an award has been *improperly obtained*. Ramsden noted that 'an award may be set aside where it is proved to have been based on fraud.'[19] It is noted that fraud is proved by the 'presentation of false documents or of the presentation of perjured witnesses and that the fraud procured the judgment'.[20] There is, therefore, an ample room for the court to examine the foreign arbitral award merged-into-foreign judgment in the light of the concept of fraud in the arbitral practice in South Africa and Botswana.

Finally, it is trite that the recognition and enforcement of foreign judgments and arbitral awards should not be contrary to the public policy of Botswana. Whilst it is for the enforcement court to define the precise meaning and contours of public policy,[21] it is noted that a judgment will, on the ground of public policy, be refused recognition where to do so would offend basic

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[17] Neither the New York Convention of 1958 nor the UNCITRAL Model Law on International Commercial Arbitration makes any specific reference to the term 'fraud' either as a ground for the set aside recourse or for refusing recognition and enforcement of arbitral awards. See Art. V of the New York Convention and Arts.34 (on set aside recourse) and Art.36 (on grounds for refusal of recognition and enforcement of foreign arbitral awards) of the UNCITRAL Model Law on International Commercial Arbitration. The requirement is borrowed *verbatim* from the Administration of Justice Act of 1920 (UK). Similar wording is deployed in the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK).

[18] S 33(1) of the South Africa arbitration law and s 13 of the Botswana arbitration law provide for the grounds of the setting aside recourse in arbitration practice. The grounds, as summarized by Ramsden, are:
'An arbitral award may be set aside where –

(a) Any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator; or
(b) An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
(c) An award has been improperly obtained.'

Peter A Ramsden, *McKenzie's Law of Building and Engineering Contracts and Arbitration* (7th edn, Juta & Co Ltd 2014) 261.

[19] ibid 269 (citing *Graaff-Reinet Municipality v Jansen* 1917 CPD 604).

[20] C Murray and others, *Schmitthoff: Law and Practice of International Trade* (12th edn, Sweet & Maxwell 2012) 632.

[21] Tecle Hagos Bahta, 'Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia', (2011) 5 *Mizan Law Review* 1, 133-135. The imprecise nature of the concept of 'public policy' has also been described in Kojo Yelpaala, 'Restraining the Unruly horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California', (1989) *Transnational Law* 379, 379-380, thus: 'It is vague, nebulous, intractable, and lacks meaningful and consistent contours that can guide its definition and application. Like a chameleon, it seems to be seriously influenced by its environment, surrounding circumstances, and, the purposes for its use'. See also N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 656-662.

norms or morality and justice.[22] In an arbitral setting, an English court decided that public policy in essence captures 'principles of morality of general application''.[23] In this regard, Professor John Kiggundu also notes that 'where the foreign judgment is repugnant to a distinctive public policy of a Botswana court, it will not be recognized or enforced'.[24] In South Africa, recognition and enforcement of a foreign arbitral award was refused on the ground of public policy (s 4(1)(a)(ii) of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977) where the arbitrator, in upholding his own jurisdiction, relied on a purported arbitration agreement which, according to the court, was not entered into by the parties.[25]

Suffice to say that, unlike in the realm of execution of foreign judgments, the recognition or enforcement of foreign arbitral awards has tended to divide the concept of public policy into *domestic and international public policy*. There is a growing traction in the arbitral jurisprudence that refusal to recognize or enforce foreign arbitral awards, under Article V(2)(b) of the New York Convention, should be based on international public policy and not purely on domestic public policy considerations.[26]

3. FOREIGN ARBITRAL AWARDS ON INVESTMENT MATTERS

3.1 Investment arbitration and commercial arbitration: Distinguished

Wilske, Railabe and Markert noted that '[i]nvestment arbitration refers to disputes between a host state and a private investor concerning the investment of the latter as protected by an investor-state contract, an investment law or a bilateral or multilateral investment treaty'.[27] It is noted that the 'three most distinctive features of this form of arbitration in comparison with international commercial arbitration are that (i) there is at least one state (or state entity) that is a party to the proceedings, whereas international commercial arbitration does not necessarily

[22] C Murray and others (n 20) 633

[23] Peter Gillies, Enforcement of International Arbitral Awards – The New York Convention, (2005) 9 Int'l Trade & Bus Law Rev 19, 39 (citing *Lamenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, 461, per Phillips J). It is also good to note that, as alluded to above, recognition and enforcement of arbitral awards under the New York Convention may be refused on a public policy ground as per Article V(2)(b) of the Convention.

[24] John Kiggundu, *Private International Law in Botswana: Cases and Materials* (Bay Publishing 2014) 365.

[25] *MV Cos Prosperity, Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another* 2012(3) SA 381(WCC).

[26] For more on this, see Mauro Rubino-Sammartano, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2001) 503-506.

[27] S Wilske and others, 'International Investment Treaty Arbitration and International Commercial Arbitration – Conceptual Difference or only a "status thing"? '(2008) 1 Contemp Asia Arb J 213, 215.

involve a state party; (ii) the legal rights invoked generally arise out of treaties and public international law, rather than from domestic law or contracts; (iii) in the case of the International Center for the Settlement of Investment Disputes (ICSID) arbitrations, the arbitral process is almost completely delocalized'.[28]

Wilske, Railabe and Markert also note, in what it seems to parallel the afore-cited remarks, that investment arbitrations are different from international commercial arbitration in that (i) the state (or state entity) is the respondent; (ii) the issues are to be decided in accordance with the treaty and the principles of public international law;[29] and (iii) a decision on the dispute could have a significant effect extending beyond the two disputing parties (a public or political concern).[30] It is, therefore, important to point out that arbitral awards resulting from investment arbitration and international commercial arbitration may be subject to discreet enforcement regimes.

3.2 ICSID arbitral awards

Foreign investors in Botswana are entitled to submit their disputes for settlement to the ICSID[31] on the basis of international investment agreements (IIAs) or bilateral investment treaties (BITs)[32] or any contractual[33] or legislative commitment entered into with the foreign investor.[34]

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[28] Simon Greenberg and others, *International Commercial Arbitration: An Asian-Pacific Perspective* (CUP 2011) 478; incidentally, it is worthy to note that 'delocalization' is meant the detachment of arbitration proceedings from the national legal jurisdiction where they take place and it is jurisprudentially supported by the contractual theory *vis-à-vis* the jurisdictional theory. The latter stresses that the state within which the arbitration takes place has the power to control and regulate the arbitral process. See also Julian DM Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications 1978) 51-61.

[29] Ronald Brown, 'Choice of Law Provisions in Concession and Related Contracts' (1976) 39 Modern Law Review 625, noted that, in Clause 44 of the parties' agreement titled 'Governing Law and Contraventions', the parties agreed to the effect that '[…] any international arbitration tribunal […] shall apply the law of Botswana on the one hand and Public International Law and General Customary Law on the other hand, but in the event of a conflict between such two systems, shall apply only Public International Law and General Customary Law'.

[30] See S Wilske and others (n 27) 216-217

[31] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention or the Washington Convention). Available at https://icsid.worldbank.org/ > accessed 13 November 2024. Botswana is, as of 14 December 1970, a party to the ICSID Convention by virtue of the implementing statute, that is, the Settlement of Investment Disputes (Convention) Act [Cap 39:06]. It should be noted that the ICSID Centre is the main forum for resolving investment disputes.

[32] Botswana has signed nine Bilateral Investment Treaties (BITs), of which two have entered into force – Botswana-Germany BIT (in force as of 6 August 2007) and Botswana-Switzerland BIT (in force as of 13 April 2000). Other BITs, which are not yet in force, include those signed between Botswana and Belgium-Luxembourg Economic Union (BLEU), China, Egypt, Ghana, Malaysia, Mauritius, and Zimbabwe. Available at < https://investmentpolicy.unctad.org/international-investment-agreements/countries/26/botswana > accessed 13 November 2024.

An ICSID award, therefore, should be recognized and enforced in accordance with the mechanism that the Convention itself provides for under Article 54.[35] As per the ICSID system, thus, the ICSID Convention State is obligated to recognize the award as binding and proceed to enforce the pecuniary obligations as if the award were a *final judgment* of the court in the state. The respondent state cannot put forth any criterion whatsoever as requirement for the recognition and enforcement of an ICSID award.[36] It follows from this, therefore, that the New York Convention does not apply to ICSID awards. To this effect, Section 7 of the Settlement of Investment Disputes (Convention) Act of Botswana (that is to say, the implementing statute) stipulates thus:

> Award rendered in pursuance of the Convention shall be recognized as binding and the pecuniary obligations imposed by such awards shall be enforced as if such awards were judgments of the High Court that have become final by appeal or the expiration of time for appeal.

Section 8 of same also vests the power to recognize ICSID awards and to enforce the pecuniary obligations imposed by such awards in the Registrar of the High Court of Botswana. This would naturally oust the applicability of the New York Convention for ICSID awards. In

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[33] Ronald Brown (n 29) 629-631 (wherein it is stated that, in an agreement between the Government of Botswana and a group of foreign investors in connection with the establishment in Botswana of the Selebi Pikwe [sic] copper nickel mine (the Shashe Project), the parties agreed to submit to the jurisdiction of ICSID).

[34] See section 10 of the Settlement of Investment Disputes (Convention) Act (the Minister is authorized 'to enter into agreements with nationals of any other state, which is a party to the Convention, providing for the submission to the jurisdiction of the Center, for settlement by conciliation or arbitration, of any existing or future legal dispute between Botswana and any such national arising directly out of an investment').

[35] The relevant part of Art.54 of the ICSID Convention provides thus:

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State […].

(2) [….]

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

[36] In this respect, either party may only request for annulment of the ICSID award by an *ad hoc* annulment committee (an internal review or correction mechanism), under Art.52(1) of the ICSID Convention, on one or more of the following limited grounds:

(a) That the Tribunal was not properly constituted;
(b) That the Tribunal has manifestly exceeded its powers;
(c) That there was corruption on the part of a member of the Tribunal;
(d) That there has been a serious departure from a fundamental rule of procedure; or
(e) That the award has failed to sate the reasons on which it is based.

For more on this, see R Dolzer and C Schreuer, *Principles of International Investment Law* (2008) 279-285; Simon Greenberg and others (n 28).

this regard, it is good to note that the enforcement, under Article 54 of the ICSID Convention, is limited to 'pecuniary obligations' of the award, which precludes restitution or other forms of specific performance.[37]

3.3 ICSID (Additional Facility) and non-ICSID Arbitral awards on Investment matters

As indicated above, the jurisdiction of the Centre extends to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[38] This leaves us with the bifurcation of investment disputes into ICSID arbitrations, on one hand, and the ICSID (Additional Facility Rules) and non-ICSID investment arbitrations, on the other. The latter category of arbitrations give rise to arbitral awards whose recognition and enforcement in Botswana would call for the application of the provisions of the New York Convention.

Investment treaties (and some investment legislations) offer a wide range of options for the investor to choose from as the investment settlement forum. For instance, in addition to ICSID and the municipal courts, Botswana offers the following *fora* to foreign investors in its BITs:

(i) ICSID Additional Facility,[39] and
(ii) *ad hoc* UNCITRAL Arbitration Rules of 1976.[40]

Arbitral awards resulting from ICSID Additional Facility (AF) rules, the *ad hoc* UNCITRAL Rules and any other institutional arbitration rules[41] are, unlike ICSID awards, reliant, for their recognition and enforcement, on the New York Convention. In this regard, Article 19 of the ICSID Arbitration (AF) Rules, for instance, stipulates that '[a]rbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and

[37] See also Simon Greenberg and others (n 28) 543
[38] ICSID Convention, art.25.
[39] Art.13(2)(b) of the Botswana- Belgium-Luxemburg Economic Union (BLEU) BIT (2006); and Art.10(2)(a) of the Botswana-Ghana BIT (2003). The Additional Facility (AF) Rules authorize, since 1978, the ICSID Secretariat to administer, *inter alia*, arbitration and conciliation for the settlement of disputes between states and foreign nationals that fall outside the jurisdictional ambit of the ICSID rules. The AF rules cater for investment cases in which either the investor's home state or the host state is not a party to the ICSID Convention.

[40] Art.13(2)(a) of the Botswana-Belgium-Luxembourg Economic Union (BLEU) (2006); Art.10(2)(b) of the Botswana-Ghana BIT (2003); and, art.9(3)(b) of the Botswana-China BIT (2000).
[41] The International Commercial Court of Arbitration (ICA) of the International Chamber of Commerce (ICC), and the Arbitration Institute of the Stockholm Chamber of Commerce are also listed as alternative *fora* in BITs.

Enforcement of Foreign Arbitral Awards'.[42] The concern is clear as the awards from ICSID AF rules are not beneficiaries of the automatic enforcement as is the *modus operandi* for ICSID awards. Thus, arbitral awards relative to investment disputes made under the auspices of the ICSID AF rules and other non-ICSID arbitral awards are subject to the conditions enunciated under the New York Convention for the recognition and enforcement thereof.

4. THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ANNULLED (SET ASIDE) IN THEIR COUNTRY OF ORIGIN

Recently, Article VII(1) of the New York Convention has given rise to an important development in the recognition and enforcement of foreign arbitral awards.[43] It has been possible in a couple of cases that foreign arbitral awards, which are annulled or set aside (vacated) in the country where the award was made, can nevertheless be enforced. In this respect, Article VII(1) of the New York Convention provides that:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article VII(1) of the Convention grants an award-creditor, who wishes to enforce the arbitral award in a Convention State, to rely on three possible set of options, namely, the Convention, the national laws, as well as other enforcement treaties. In other words, the Convention State in which recognition and enforcement of an arbitral award is sought may possess three sets of grounds based on which such recognition and enforcement of arbitral awards may proceed. It is, therefore, prudent for an award-creditor to examine whether the

[42] Available at < https://icsid.worldbank.org/sites/default/files/publications/en/afr.english-final.pdf > accessed 15 November 2024.

[43] See Georgios C. Petrochilos, 'Enforcing Awards Annulled in their State of Origin Under the New York Convention' (1999) 48 Int'l & Comp L Q 856, 856 (wherein it is stated thus: '[a]n important corpus of legal literature has accumulated in the last few years on the question whether it is possible or desirable to have an arbitral award enforced under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards despite the awards' having been annulled in the State where it was made').

national law of the enforcement forum[44] or one or more enforcement treaties to which the state is party is more favourable than the conditions set out in the Convention. It is in the light of this practical significance that the Recognition and Enforcement of Foreign Arbitral Awards Act, i.e., the implementing statute of the New York Convention in Botswana should have encapsulated Article VII to have the force of law in Botswana. The reason for the omission of the provision is not clear. Nevertheless, it would deprive parties of the right to rely on more favourable conditions for recognition and enforcement of arbitral awards either in a national law or in one or more enforcement treaties to which Botswana is a party.

Resort to Article VII of the New York Convention has been particularly made by parties seeking to enforce an award which is set aside (annulled) at the place of arbitration.[45] This is because parties have found the enforcement provisions of local law more favourable than the rights granted under the Convention.[46] In essence, this allows award-creditors to have an arbitral award recognized and enforced in the enforcement forum notwithstanding the fact that the same award had been set aside in the seat of arbitration. At first sight, this may seem to fly in the face of Article V(1)(e) of the New York Convention – a ground for refusal to recognize and enforce if an award has *not yet become binding, suspended or set aside*. After all it is trite that the place of arbitration should be able to exercise its judicial oversight over arbitral processes that take place in its soil.[47] The crux of the matter is: what if in so doing, the seat of arbitration applies local idiosyncrasies or 'local standard annulments' which should only be given effect at local level but disregarded internationally.[48] In this regard, it is submitted that the courts of the seat of arbitration should exercise judicial oversight over the arbitral process in order to 'guard against

[44] M McIlwrath and J Savage, *International Arbitration and Mediation: A Practical Guide* (Walters Kluwer 2010) 348 (wherein it is stated that '[i]n many countries, the New York Convention is effectively the country's law on the recognition and enforcement of international arbitral awards. But a state may also have, alongside the New York Convention and any other relevant treaties to which it is party, its own municipal laws governing the enforcement of international arbitral awards').

[45] For more on this, see Gary H. Sampliner, 'Enforcement of Nullified Foreign Arbitral Awards: Chromalloy Revisited' (1994) 14 J Int Arb 3, 141-165; Georges R. Delaume, 'Enforcement against A Foreign State of an Arbitral Award Annulled in the Foreign State' *(*1997) Int'l Bus L J, 253-254; Eric A. Schwarz, *A Comment on Chromalloy: Hilmarton, a' l'americane* (1997) 14 J Int Arb 2, 125-135; Georgios C. Petrochilos (n 43) 856-888.

[46] ibid. This is, for example, the case under article 1502 of the French New Code of Civil Procedure, which does not support the suspension of the enforcement proceedings pending an action to set aside; nor does it allow a court to refuse enforcement on the ground that the award has been set aside elsewhere.

[47] Amazu A. Asouzu, 'The National Arbitration Law and International Commercial Arbitration: The Indispensability of the National Court and the Setting Aside Procedure' (1995) 7 RADIC 68, 68-97.

[48] N Blackaby and C Partasides (n 21) 651, citing Jan Paulsson, 'The case for disregarding local standard annulments under the New York Convention' (1996) 7 Am Rev Intl Arb 99.

lack of due process, fraud, corruption, or other improper conduct on the part of the arbitral tribunal'.[49] In this respect, France,[50] Belgium,[51] and the US[52] take the lead.

Whether Botswana should take this view is an entirely different issue. The implementing statute has, however, by advertent or inadvertent omission of Article VII, unnecessarily deprived parties to international arbitration of their right to resort to more favourable local laws, on the ground of which they would otherwise seek for the recognition and enforcement of foreign arbitral awards. Under Article VII, what the New York Convention does is to recognize 'explicitly that in any given country there may be a local law that, whether by treaty or otherwise, is more favourable to the recognition and enforcement of arbitral awards than the Convention itself'.[53] In this respect, the writer is of the opinion that this explicit recognition, as reflected with a mandatory nature under Article VII, should have been given effect in Botswana for arbitrating parties as it expands the available options.

5. CONCLUSION

International arbitration remains the most preferable dispute resolution mechanism both in international commercial transactions and foreign investments. The relative ease of enforceability of arbitral awards across borders, *inter alia*, places arbitration practice in a solid foundation. In Botswana, the Arbitration Act 1959 does not currently adequately cater for international commercial and investment arbitration. It has, however, been shown that parties to international arbitration may find it relatively easy to recognize and/ or enforce foreign arbitral awards on the basis of the New York Convention, the Settlement of Investment Disputes (Convention) Act and the Judgments (International Enforcement) Act. In this respect, attempt has been made to shed light on some of the basic principles which underlie the recognition and enforcement proceedings in Botswana and some of the *lacunae* that feature in such proceedings. In particular, the non-inclusion of Article VII of the New York Convention into the

[49] Ibid
[50] *Hilmarton Ltd v Omnium de Traitement et de Valorization (OTV)* (1994) Revue de' Arbitrage 327 (Wherein the French *Cour de cassation* granted enforcement for an award which had been set aside by the Geneva Court of Appeal, Switzerland).
[51] *Sonatrach v Ford, Bacon and Davis*, Brussels Court of First Instance, 6 Dec.1988, *Yearbook Commercial Arbitration* XV 1990), 370ff. For more on this, see M McIlwrath and J Savage (n 42) 356-357.
[52] *Chromalloy Aeroservices Inc v Arab Republic of Egypt* 939 F Supp 907 (DDC 1996) (Wherein the US Federal Court for the District of Columbia enforced an award that had been set aside by the Cairo Court of Appeal in Egypt).
[53] N Blackaby and C Partasides (n 21) 652.

Implementing Act and the legal repercussions thereof, the legal framework on the recognition and enforcement of investment arbitral awards, and the conundrum of attempting to obtain an arbitral award recognized or enforced under the Judgments (international Enforcement) Act have been brought to spotlight.