ASCERTAINING THE EFFECT OF THE SEAT OF ARBITRATION ON THE ARBITRAL AWARD*

Abstract

This paper ascertained the effect of the seat of arbitration on the arbitral award using Article VII of the New York Convention as a reference point. The paper on the one hand examined the implication of Article V (1) (e) that gives the national court the discretion to enforce an award that has been set aside and on the other hand, the use of domestic standard(s) to either set aside an award. The paper adopted doctrinal research method. It was discovered that there no clear-cut doctrinal leadership under the Convention framework and in the arbitration jurisprudence of a few jurisdictions regarding the foregoing issues. It thus recommended theoretical guidance by way of a hybrid approach. This approach refers to the combined application of Articles V (1) (e) and VII of the Convention to protect the integrity of the arbitral award. The approach ultimately reconciles the territorialism/seat theory and delocalization theory of arbitration.

Keywords: seat of arbitration, arbitral award, national courts.

1. Introduction

The seat of arbitration is the legal venue or place of the arbitration. In other words, it is the jurisdiction which arbitration law otherwise called *lex arbitri* or *lex loci arbitri*[1] which the court invariably determines the legal framework or validity of the arbitral proceedings. Though the seat may be different from the venue or location[2] of the arbitration, both usually assume concurrence in the conduct of arbitral proceedings. Since most arbitration statutes stipulate that the venue will be taken into consideration for determining the appropriate court's jurisdiction in cases where the parties do not expressly agree on the seat of arbitration, it follows that the seat of arbitration and the venue are inextricably linked.[3] Consequently, the choice of arbitral seat is important because it determines the applicable arbitration law (*lex arbitri*) and the court with supervisory jurisdiction over the arbitral process. This applies in both recognition of arbitration agreements and arbitral awards.

Within the context of an arbitration agreement for instance, the arbitration law of the jurisdiction that rendered a jurisdictional decision **(**concerning the validity and scope of the arbitration agreement) regulates the arbitral procedure and provides the grounds upon which the court at the seat of arbitration may nullify the arbitration agreement. This suggests that if an aggrieved party decides to challenge the jurisdictional decision by commencing a subsequent proceeding in a non-seat court, the doctrine of *res*

*** NWEZE, Nnaemeka** is a Lecturer, Department of International Law and Jurisprudence, Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike, Ebonyi State, Nigeria. Email: nweze.nnaemeka@funai.edu.ng; orchid.org/0000-0001-9064-5731

[1] International commercial arbitration may raise the issue of applicability of various kinds of law. Those laws apart from the arbitration law, includes the substantive law that determines the merit of the parties' dispute, the substantive law that determines the validity and enforceability of the arbitration agreement and the conflict of law rule that applies in determining the applicability of the aforementioned laws. Gary B Born, *International Commercial Arbitration, Commentary and Materials* (2nd edn, Transnational Publishers Inc & Kluwer law International 2001) 524.

[2] Venue or location of the arbitration is the physical place where arbitral proceedings such as the hearing of witnesses, cross examination of the witnesses, examination of documents etc take place. The venue of arbitration is usually chosen for the convenience of the parties and the arbitral tribunal respectively.

[3] Gonzalo Vial, 'Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration' [2017] (50) 2 *International Lawyer* 332. Arbitration and Mediation Act, Section 32 AMA.

judicata ought to apply 'because no other court but the court of the seat of arbitration can review the jurisdictional decision of an arbitral tribunal.'[4]

In similar vein, the seat of arbitration being the place where an arbitral award is delivered suggests that its arbitration law that regulates the proceedings to vacate the award and listing the limited grounds a party must prove to succeed in a vacatur proceeding instituted before the court of the seat of arbitration. However, the question as to whether an award that has been set aside has a finality effect still raises unresolved doctrinal issues concerning the effect of Article VII (I) of the New York Convention.[5] Hence, the scope of this paper revolves around the foregoing issue since the author elsewhere has extensively discussed how jurisdictional decisions made at the seat of arbitration pre-empt the jurisdiction of national courts over a subject matter of arbitration agreement.[6]This paper aims at ascertaining the extent of the effect of the seat of arbitration on the arbitral award.

2. Theories on Seat of Arbitration

Over the years, there has been a debate as to whether an award that has been set aside at the seat of arbitration precludes another national court from enforcing the award.[7] In other words, whether other national courts may recognize such an award notwithstanding that it has been set aside by the court of the seat. This raises the issue of two theories of arbitration known as the seat/territorialism theory and delocalization theory.

The territorialism theory on one hand posits that arbitration belongs to a particular legal order that gives the arbitral process its legal basis and precludes other national courts from enforcing an award that has been set aside by the court of the seat of arbitration. The delocalization theory on the other hand believes that arbitration does not belong to a particular jurisdiction or national framework but rather regulated by a transnational legal order like the New York Convention. For this reason, other national courts enjoy the discretion to determine whether or not to enforce such an award.

Notwithstanding the divergent views, it may be safe to say that Article V (1) (e) of the Convention has struck a balance between territorialism and delocalization theories of arbitration. Article V (1) (e) provides that recognition and enforcement of the arbitral award may be refused if the applicant proves that the award has been set aside by the court of rendition. It appears that the draftsman's intention behind the textual language of Article V (1) (e) is an attempt to ensure that the arbitral award set aside by the court of the seat of arbitration does not receive recognition and enforcement elsewhere unless the enforcement forum finds justifiable reasons and at the instance of an interested party to do otherwise. An interested party according to the more favourable regime of Article VII of the Convention may wish to enforce the award notwithstanding that it has been set aside by relying on a domestic law provision of the country where the award is sought to be enforced. Such domestic law it is safe to say must align with the Convention standard or ground for recognition and enforcement, suggesting that the more favourable regime complements the discretionary standard under Article V (I) (e) of the Convention. The combination of Article VII and V (I) (e) therefore is a safety device that seeks to guarantee the integrity of the award in recognition and enforcement proceedings thereby reconciling the

[4] Nnaemeka Nweze & Festus Okechukwu Ukwueze 'The Effect of Arbitral Jurisdictional Decision on National Courts' [2023] (16) (2) *Contemporary Asia Arbitration Journal* 207.
[5] Otherwise known as the more favourable regime.
[6] Ibid.
[7] Thomas E Carbonneau, 'Debating the Proper Role of National Law under the New York Convention' [1998] (6) *Tulane J of Int'l and Comp Law;* Maxi Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?' *J INT'L DISP. SETTLEMENT* [2013] 4(3).

seat/territorialism theory and delocalization theory of arbitration. Conversely the flipside of the combined application of both Article V (1) (e) and Article VII of the Convention raises the question of whether it is consistent with the spirit of international commercial arbitration for national courts to use domestic standard(s) that are not in line with the Convention standard to set aside an arbitral award? It appears that there is no case law jurisprudence in Nigeria regarding the effect of a seat on arbitral awards either within the context of seeking the enforcement of an award that has been set aside or the use of domestic standards to set aside an arbitral award.[8]

3. The New York Convention on Seat of Arbitration

Part II of the New York Convention discusses the relationship between the court of the seat that aside an arbitral award and the court of the forum where recognition and enforcement of the award is sought. Though there is no clear-cut doctrinal leadership under the Convention and in the case law jurisprudence of a few jurisdictions regarding the relationship between Article V (1) (e) and VII of the Convention, the paper nevertheless provides theoretical guidance to the effect that the relationship has a harmonizing effect on the territorialism theory and delocalization theory of arbitration.

Part III of the New York Convention examines the use of domestic law provisions as grounds for setting aside an arbitral award according to the more favourable regime of the Convention. From the point of view of where such domestic law provision is not an international standard or consistent with the Convention standard, it may be safe to say that the threat of setting aside an arbitral award on parochial consideration is like a Sword of Damocles hanging over the award. For this purpose, the Arbitration and Mediation Act 2023 of Nigeria in its innovative provisions removed misconduct of arbitrators or where the proceeding or award was obtained by fraud as a ground for setting aside an arbitral award. The Act aligns with the international standard that the Model Law and the Convention promotes. It is the view of this paper that arbitrating parties should always endeavour to understand the procedural framework that regulates arbitration in a particular jurisdiction to determine at the outset whether their choice of seat would be tailored to promoting party autonomy and the efficient use of arbitration in the resolution of their dispute. Otherwise, the more favourable regime under the provisions of some national arbitration laws, may just be serving a superficial rhetorical appeal that does not align with the spirit of the Convention in setting aside proceeding.

Part IV of the New York Convention contains the Nexus between Article V (1) (e) and Article VII of the New York Convention. It appears that what has been accomplished in the field of international commercial arbitration over the last sixty-five years is a result of the genius of the New York Convention. The Convention though not a complete set of codes, has a unifying objective of ensuring that state parties promote the integrity of international commercial arbitration by recognizing arbitral awards that pass the procedural standards that the Convention stipulates under Article V (1) (a)- (d). Although the Convention does not enumerate grounds for setting aside arbitral awards, the Convention award may be set aside on similar grounds listed under Article 34 (2) of the Model law and cognate section in the majority of national arbitration laws. This is because the grounds listed for setting aside the award under the Model law are borrowed from the grounds upon which the award may not be enforced under Article V of the Convention. The word "may" under Article V (1) of the Convention indicates a relative degree of discretion which the enforcement forum may apply in deciding whether or not to give recognition to an award that has been set aside by the court of the seat of arbitration. At the instance of an interested party therefore, the provision of Article V (1) interrelates with the more

[8] Hence, the Nigerian courts could draw some lessons from the theoretical guidance this paper prescribes. This guidance is logically in keeping with the purpose of the more favourable regime in particular and the Convention in general.

favourable regime of Article VII of the Convention in promoting the unifying objective of the Convention.

4. Judicial Attitude on Enforcement of Award Set Aside yy Court of Seat of Arbitration

Judicial attitude towards enforcement of award set aside by the court of the seat of arbitration is not common but few jurisdictions have made decisional laws that are suggestive of their delocalized stance on the issue.

4.1 French Perspective

France has a delocalized view of arbitration. In France, an award that was set aside by the court of the seat of arbitration in some instances has been recognized and enforced by the court. Silberman[9] identifies this phenomenon as a matter of policy objective to the effect that 'the French perspective considers an arbitral award as unattached to any national legal order or any forum and having no nationality but as one capable of being accepted and enforced throughout the world.' Consequently, France has enforced awards that were set aside by the court of the seat or law of the place where the arbitration took place in a good number of cases.[10] Justification for the French position is based on Article 1514 of the *Code de Procedure Civil* which does not include an award that has been set aside or annulled as one of the numerous grounds listed under the code upon which an international award cannot be recognized or enforced. The rules of the Code of Civil Procedure supersede those of the New York Convention due to the "more favourable law" rule stated in Article VII(1) of the New York Convention. This is because the French system of enforcement and recognition is more lenient than the New York Convention. The New York Convention is therefore not as applicable in France as it is in other countries.[11]

4.2 American Perspective

The American courts have also recognized and enforced an award that was set aside by the court of the seat of arbitration. The case of *Chromalloy Aeroservices v Arab Republic of Egypt*[12] was arbitration between the American Company and the Egyptian Government in which an award was rendered in favor of the American party but was nullified by the Court of Appeal in Cairo on the ground that the arbitral tribunal applied the wrong substantive law.[13] Chromalloy brought an action to enforce the award in the Federal Court of Columbia and the award was enforced under the Convention and the FAA. The court reasoned that it had discretion under Article V of the Convention to enforce the award and that Article VII permits an interested party to seek enforcement under any other law or treaty regime (most favourable regime clause) applicable in the enforcing state. However, the Columbia Court did not ground its reason on the fact that the seat of arbitration where the award was set aside acted on parochial grounds or outside the scope of the Convention article V (I) (a)-(d) as rational for setting aside an award.

Paulsson[14] posits a sequel to *Chromalloy's* decision that when Van den Berg claims that an award set aside in its nation of origin cannot be enforced because of Article V (1) (e) of the New York Convention,

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[9] Linda Silberman, 'The New York Convention after Fifty Years: Some Reflections on the Role of National Law' [2009] (38:25) *GA J Int'l & Comp. L* 29. See also Carbonneau (n 6) 281, 282.

[10] *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 (QB) (Eng), *Pabalk v Norsolor, Putrabali case.*

[11] https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/france<accessed 15 May 2024.

[12] 939 F Supp 907 (DDC 1996).

[13] Non-Egyptian law.

[14] Jan Paulsson, Rediscovering the NY Convention: Further Reflections on Chromalloy, 12 Mealey's Int'L Arb Rep 20, 24 (1997).

he is mistaken. In actuality, a State bound by the Convention according to the learned author prohibits its courts from enforcing a foreign award in violation of it.[15] Instead, if such a court declined to implement the agreement without citing one of the few circumstances listed in Article V (1), which would be considered a violation.[16] The takeaway is that neither the Convention framework nor the French nor American case law jurisprudence provides the required doctrinal guidance on the rationale behind the combined provisions of Articles V (1) (e) and VII of the Convention. In that respect, this research provides theoretical guidance which shall be analyzed but interrelated with the Nigerian perspective.

4.3 Nigerian Perspective

In as much as it could be researched, no case law in Nigeria determined the inclination of the Nigerian court over an award that has been set aside at the seat of arbitration. This situation raises intriguing questions on how the Nigerian court may treat an award that has been set aside at the place of rendition. Would the Nigerian judge understand to what extent a party relying on the more favourable regime may exercise his right of enforcement of the award in the absence of the Convention? Does the discretionary standard the Convention Article V donates to national court suggest that a Nigerian court for instance would regard only the provisions of AMA and no other Nigerian substantive law as having a controlling role in the proceeding for the recognition of an award that has been set at the seat of arbitration? This will be discussed in turn, from the arbitral proceeding point of view and essentially under the theoretical leadership by way of a "hybrid approach" in the recognition and enforcement of award that has been set aside.

Arbitration and Mediation Act[17] from the point of view of arbitral proceedings favours a delocalized arbitration and the aim is to promote the practice of international commercial arbitration in line with the Convention standard. The AMA is deep and broad and embodies the different stages of arbitration proceedings and the interaction that almost always exists between the arbitration system, the courts in Nigeria and the principle of party autonomy. Even where Nigeria is not chosen as the seat of arbitration, it may not dispense with the application of AMA as the *lex loci arbitri* as the Act provides that the Nigerian court can always assist arbitration proceedings that are not seated in Nigeria or that have yet to be seated in a particular country.[18] Thus, the court from a delocalization point of view of arbitration[19] can grant an order to stay judicial proceedings pending arbitration[20] or make an order of interim measure of protection,[21] in addition to other judicial rulings, which are essential to the conduct of international arbitration. The AMA therefore makes the importance of the *lex loci arbitri* readily available for the benefit of the arbitration system of dispute resolution in general and the arbitrating parties in particular.[22]

[15] Ibid.
[16] Ibid.
[17] AMA.
[18] AMA, section 1 (7).
[19] Michael Mustill, 'The New Lex Mercatoria: The First Twenty-Five Years' [1988] (4) *Arbitration International* 86 (stating that theory of delocalized arbitration is a legal fiction.) For discussions on theory of delocalization, see Paulsson Jansen, 'Delocalization of International Commercial Arbitration' [1983] (32) *International & Law Quarterly* 53; Zahera Saghir & Chrispas Nyombi, 'Delocalization in International Commercial Arbitration: A Theory in Need of Practical Application' [2016] (8) *International Company and Commercial Law Review* 269.
[20] AMA, section 5.
[21] AMA, section 19.
[22] AMA, section 32 is another significant new provision. The section defines the "seat of arbitration" as the juridical seat for determining the *lex arbitri* or the curial law of the place of arbitration. It also provides the pecking order of authority in the determination of the seat of arbitration. Just like major international texts that govern international arbitration and many modern national commercial arbitration laws, section 32 gives the parties the regulatory authority to determine the seat of arbitration and other issues that might arise in arbitration.[22] When

5. The Theoretical Guidance

Considering the innovative provisions of the AMA, the Nigerian court it is safe to say may enforce an award that has been aside in another country if the court adopts a "hybrid approach". This means that the court might regard an arbitral award that has been set aside as one that fundamentally belongs to the court of the seat. This would preclude the Nigerian court or other national courts that adopts the approach from enforcing that same award barring exceptional circumstances. A good example of such an exceptional circumstance is where the enforcement forum recognizes such an award on the ground that the court of the seat of arbitration relied on a parochial domestic standard to set aside the award. Even though section 58 of the AMA[23] gives the Nigerian court the discretion not to recognize an award that has been set aside, the Nigerian court may follow the *Chromalloy* path to enforce such an award if it was set aside outside the remit of the Convention standard.

In all, the "hybrid approach" places premium on giving due regard to the authority of court of the seat that set aside the award but without undermining the complementary role of the enforcement forum in determining the rationality or the basis upon which the award was set aside. The "hybrid approach" ought not to recognize an award that was set aside on the basis of certain domestic law provisions that conflict with the Convention standard(s). This underscores the importance of the seat of arbitration on the one hand and the role of the enforcement forum in ensuring that the award was set aside on the transnational prerequisite for recognition and enforcement set by the Convention on the other hand. In other words, the objective of the more favourable regime is to give recognition and enforcement of the award if the court of the seat of arbitration did not rely on any of the grounds listed under article V (1) (a) to (d)[24] of the Convention in setting aside the award. This protects the integrity of the award and ensures that the court of the seat of arbitration would not be successful probably in its parochial attempt to protect a local interest.

It is not in doubt from the legislative history of the Convention that national courts are not restrained from applying domestic law to set aside an arbitral award.[25] The question therefore is to determine to what extent the provision of national arbitration law may supplement the provisions of Article V (1) (a) -(d) of the Convention in setting aside a non-domestic award. Is it correct to argue that the applicability of a domestic law provision in setting aside an arbitral award is interference in the transnational standard for the recognition and enforcement of an international arbitral award?

parties fail to either determine the seat or to exercise the freedom of regulating the rights they create in their contract, the arbitral institution or persons who have the imprimatur of the parties to superintend the arbitration or the arbitral tribunal with the consent of the parties can perform that function. The arbitral tribunal in the light of the foregoing may designate any place in Nigeria as the seat of arbitration or such other country depending on the relevant circumstances of the transaction. The relevant circumstances of such transaction include the country that has the closest connection to the transaction and the agreement of the parties regarding the applicable substantive law and procedural law to govern the contract and the arbitration respectively. Therefore, the Nigerian arbitration statute for the first time recognizes the utmost importance of party agreement in the determination of certain issues in arbitration and also acknowledges the secondary role of the seat if the parties neither designate nor authorize the institutional procedures or person to make that determination.

[23] Unlike Article 1514 of Code of Civil Procedure of France.

[24] The grounds include lack of capacity, lack of valid arbitration agreement, inability of a party to present its case or lack of notice of the arbitration procedure, the award contains decision outside the scope of what the parties submitted to arbitration, the composition of the tribunal or the arbitral procedure not in accordance with the agreement of the parties.

[25] Carbonneau (n 6)285.

In light of the foregoing, it is safe to say that it would defeat the purpose of the Convention if according to the more favourable regime of Article VII, the court of the seat of arbitration invokes the provisions of its domestic arbitration law that conflicts with the Convention standard under Article V (1) (a)-(d) to set aside an award. Otherwise, the applicability of domestic law provision based on Articles V (1) (e) and VII of the Convention could be a sword of Damocles against the arbitral award and would suggest in the minimum that the country that impeached the award might be in breach of its treaty obligation. There is a paucity of case law in national arbitration jurisprudence of the majority of countries as to the question of whether the domestic law of a country that rendered a Convention award can apply to issues of enforcement under the Convention setting aside procedure. This question, however, has been answered in American decisional law.

6. The *Toys "R" Us* Case

In *Alghanim v Sons v Toys "R" Us*(Toys "R" Us)[26] a trademark agreement where an American company Toys R US permitted a Kuwaiti company Alghanim to use its trademark. Alghanim complained to Toys "R" Us that it suffered loss, thus sought for renegotiation of the contract which was rejected by the American who consequently terminated the contract. The American initiated arbitration under the American Arbitration Association (AAA) whereupon the tribunal awarded Alghanim $46 million (plus interest for loss of profit) for breach of contract. Upon application to the US District Court in New York to enforce the award under the New York Convention, Toys "R" Us sought to vacate the award on FAA section 10 grounds (specifically on irrationality and manifest disregard of the law which are only applicable to domestic arbitration). The district court affirmed the award. On appeal, the Second Circuit, the court observed that FAA section 10 conflicts with the Convention grounds under article V but held that the Convention permits national courts to apply the provisions of its domestic arbitration law to set aside non-domestic awards. Hence, in setting aside the award, the Court allowed FAA section 10 to apply.

The decision in Toys "R" Us is indicative of the importance of the enactment of modern arbitration law that would align arbitral practices with the international standard that encourages the use of arbitration in resolving international commercial disputes. It is not in doubt that the American law on arbitration is archaic and in dire need of revision. In contrast, Nigeria has enacted a new arbitration law that is in line with the international standard that the Convention, the UNCITRAL Model Law and Rules on arbitration promote. These legislative instruments provide the use of international standards rather than domestic grounds for setting aside an international arbitral award.

In keeping with the international standard, the Nigerian court in effect may not have to undergo the rigours of adopting a less technical approach to the interpretation of Article V (1) (e) of the Convention assuming the award was sought to be set aside on the grounds of misconduct of arbitrator or that the award or proceeding was improperly procured. These domestic standards which could constitute grounds for setting aside domestic arbitral awards under section 30 of the previous Arbitration and Conciliation Act, Cap A18, 2004 have been repealed under the AMA.

7. New Ground for Setting Aside Award under Arbitration and Mediation Act 2023

The Arbitration and Mediation Act, of 2023 under section 55 provides two significant changes for setting aside arbitral awards in Nigeria. It removes "misconduct of arbitrators"[27] and "arbitral proceeding or award improperly procured"[28] under the previous legislation as grounds for setting aside

[26] 126 F 3d 15,16 (2d Cir 1997).
[27] ACA s 30
[28] Ibid.

awards seated in Nigeria. The grounds for setting aside award under the new statute though substantially similar to those under the New York Convention and the UNCITRAL Model Law also has an innovative provision somewhat similar to section 68 (2) of the English Arbitration Act. It provides under section 55 (5) that the losing party in arbitration must not only prove one or more of the grounds for setting aside the award but he must also show that such ground(s) has caused or will cause him substantial injustice. The term substantial injustice though not defined within the new legislation, should be a question of fact which no gainsaying suggests that the arbitral tribunal breached any of the substantive or procedural ground(s) as listed under section 55 (3) of the Act, a cognate section to Article 34 (2) of the Model Law. If the Nigerian court finds that there has been a breach of those ground(s), it can under section 55 (5) choose to either remit the award back to the tribunal for consideration or set aside the whole award or part of it.

The opportunity for the losing party in arbitration to successfully prove a violation of substantive or procedural standards to the attention of the Nigerian court is a significant feature of the arbitral process. However, the threshold is high and the chances for success are expectedly low. Thus, the 2023 Act was designed to position the Nigerian court to defer considerably to the legal and factual decisions of the arbitral tribunal thereby reducing its intervention in the parties' agreement to arbitrate.

In all, the decision of the Second Circuit in Toys "R" Us does not reflect the fundamental enforcement goal and the underlying policy that the Convention regulates. The Convention recognizes the use of domestic laws or standards only to advance or promote the objective of the Convention. Otherwise, 'other contracting States are free to recognize arbitral awards that are annulled based on idiosyncratic or discriminatory local procedural requirements'[29] under Article VII more favourable right provision. Nigeria has gotten it right with the enactment of the AMA. A losing party in arbitration seated under the AMA may not seek to annul the award based on the misconduct of the arbitrator or that the arbitral proceeding or the award was improperly procured. The slippery nature of those grounds may provide wiggle room for the exercise of judicial discretion that may give room for parochial inclinations to fester. This would expectedly manifest itself in developing countries where judicial independence and corruption is rife. Given the absence of uniformly favourable provisions for setting aside arbitral awards under national laws and the likelihood of inconsistent interpretation of the Convention by courts of state parties, it is therefore advisable for commercial parties to have a good knowledge of the seat of arbitration and how its arbitration law, in particular, may govern the arbitral process to give it a delocalized character.

8. Factors to Consider in Selecting a Seat of Arbitration

Beyond the issues which the preceding parts of this paper have discussed, other factors contracting parties should bear in mind while making a contract to arbitrate or when selecting a seat of arbitration. First, the contracting parties should ensure that it does not enter into a contractual relationship with a state party in its official capacity as a sovereign. This is to forestall the chances of such a state party setting aside the award on public policy grounds or raising a defence of sovereign immunity or act of *jure imperri*as a ground to refuse recognition and enforcement of the award. This ground is after all a valid defense under the Convention Article v (2) (b). It is therefore advisable for contracting parties to expressly waive sovereign immunity status in their contract from the word go. This is important because national courts may defer to defence of sovereign immunity or resist enforcement of the award on the ground of public policy.

[29] Gary Born, 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' [2009] (30) *U Pa J Int'l L* 1019.

Second is the need for contracting parties to understand the chosen seat of arbitration especially the relevant provisions of its *lex arbitri*or the law that would regulate the conduct of the arbitration. For instance, French law on international arbitration which is still largely regulated by domestic law provisions does not give state establishments or 'public collectivities and "public establishments'[30] the legal capacity to arbitrate. Therefore, a foreign party who is not aware of such provision may suffer the consequences that the award if made in his favour may be set aside or not be enforced in France on grounds of public policy under article V (2) (a) of the Convention. Again, before now, a compromise clause or the agreement to submit future disputes to arbitration is not permitted under the repealed article 1006 of French law except in commercial cases only.[31]

In England, a foreign commercial party should be mindful that the English court retains the jurisdiction to review awards on points of law unless the parties have agreed otherwise. In light of the above, parties should endeavour to exercise autonomy under section 69 of the English Act by expressly providing in their contract the exclusion of the right of appeal to an English court to review an award on point of law especially where the tribunal's decision is challenged for being manifestly wrong.

In Nigeria, if an award on the face of it is manifestly a travesty of justice on the ground of error in point of law or fact, there is no right or leave of appeal against the award in Nigerian court. The law in Nigeria regarding such awards was demonstrated in the case of *NITELv Okeke*[32] where the Supreme Court held that 'even where the court finds merit in an application to set aside an award, its jurisdiction is limited to setting aside the award and remitting it to the arbitrator for reconsideration.'

In jurisdictions like Singapore, case law reveals that Singaporean court do not set aside or annul award even in the face egregious errors committed by the arbitral tribunal.[33] Finally, because the seat of arbitration determines the court that would supervise the arbitral proceedings, parties should exercise due care in selecting a seat whose court is impartial and is also reputed for enforcing arbitration agreements and awards even against its national.

As plausible as the foregoing considerations might be, the ultimate result or fate of an award that has been set aside or annulled lies with the forum where recognition and enforcement of the award is sought.

[30] Thomas E Carbonneau, 'The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity' [1980] (55) (1) *Tulane Law Review* 9; William W Park, 'The *Lex Loci Arbitri* and International Commercial Arbitration' [1983] (32) *International Comparative Law Quarterly* 23.

[31] However, decisional law in France is to the effect that such clauses in international cases are enforceable by French courts and accordingly have not been interpreted as a violation of French public policy. *Roze et al c Victory Hill Gold Mining Company.*

[32] [2017] 9 NWLR (Pt 1571) 439.

[33] Mitsui Engineering & Shipbuilding Co Ltd v Easton Grahan Rush (Mitsui Engineering) [2004] 2 SLR (R) 14; Tjong Very *Sumito v Antig Investments Pte Ltd* [2009] 4 SLR (R) 732. Michael Hwang SC and SU Zihua, 'Egregious Erros and Public Policy: Are the Singapore Courts Too Arbitration Friendly?' in Michael Hwang SC (eds), *Selected Essays on International Arbitration* (Academy Publishing 2013) 43. Errors in point of law or fact are excluded as grounds for setting aside an award under the present Singaporean Arbitration Law. See also errors in point of law or fact are not listed as grounds for setting aside award under UNCITRAL Model Law art 34 and New York Convention art V respectively. The US Federal Arbitration Act does not include error of law as grounds for setting aside the award. However, the Supreme Court in America once considered manifest disregard of the law as the basis for vacating awards in *Hall Street Associate LLC v Mattle Inc* 522 US 576 [2008].

9. Conclusion

An arbitral award that has been set aside is a foreign judgment that implicates not just the different substantive laws of the enforcement forum, such as the Sovereign Immunities Act, other statutory provisions and the common law, but also the applicability of these laws to the recognition and enforcement of the foreign judgment. Though it deserves to permit a forum with the discretion to determine whether or not it would recognize and enforce an award that has been set aside or annulled at the country of origin, such determination ought to be benchmarked on the national arbitration law of the enforcement forum instead of its general substantive laws. Again, such domestic law standards must be consistent with the Convention standard listed under Article V (1) (a)-(d). The drafters of the Convention are therefore quite in order to have included article V (1) (e) as a discretionary standard in proceedings for the recognition and enforcement of arbitral award. It has been argued and correctly too that the secondary jurisdiction or forum where enforcement is sought has a more legitimate interest in the award than the primary jurisdiction that annulled the award in the first instance.[34]

More serious concern than the issue of enforcing an award that has been set aside is the concern of applying domestic standard(s) that is at variance with the Convention standard in setting aside an arbitral award. Given the lack of uniform grounds for setting aside an arbitral award under national arbitration laws, commercial parties may be more circumspect in selecting a seat which law aligns with the Convention standard for setting aside. The new Nigerian arbitration regime is a good example in that regard. However, assuming the losing party in arbitration has assets outside the seat of arbitration, the fate of the award that was set aside outside the scope of the Convention standard may still lie with the jurisdiction where recognition and enforcement of the award is sought. However, it is expected that the Nigerian court and other national courts would adopt the "hybrid approach" in determining the enforceability of an award that was set aside by the court of the seat of arbitration.

From the point of view of seat/territorialism theory of arbitration, this contribution concludes that an arbitral award that was set aside by the court of the seat of arbitration may not be enforced by another national court except where the award was set aside on grounds that are inconsistent with the Convention standard. Putting it differently and from the delocalization perspective of arbitration, the seat of arbitration does not have an absolute controlling role on the arbitral award it has set aside except it has done so on international grounds that conform to the tenets of international commercial arbitration which the Convention regulates.

[34] This was aptly captured by Emmanuel Gaillard, 'The Enforcement of Awards set Aside in the Country of Origin' [1999] (14) *ICSID Rev* 16.