

ANALYSIS OF THE LAW ON ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN MALAWI: A CALL FOR THE RATIFICATION OF THE NEW YORK CONVENTION

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Abstract

International arbitration becomes more attractive when parties are assured that they can easily enforce the arbitral awards in different countries. The New York Convention has made the enforcement of foreign arbitral awards easier. Unfortunately, Malawi is not yet a party to the New York Convention. Enforcement of foreign arbitral awards in Malawi can be done by using three different pieces of legislation: the British and Commonwealth Judgments Act of 1922; the Service of Process and Execution of Judgments Act of 1957 and; the Arbitration Act of 1967. The paper argues that the said pieces of legislation are restrictive, in terms of countries that they apply to as well as the types of awards that can be enforced, and lacks certainty and predictability. The pitfalls found under the Malawian enforcement regime are not available under the New York Convention. The paper argues that adopting the New York Convention would make Malawi more arbitration friendly.

Keywords: Malawi, Enforcement, Foreign arbitral awards, arbitration, New York Convention, International Arbitration

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INTRODUCTION

When parties have resorted to arbitration, one of the most crucial issues, on the minds of the parties, is the possibility of enforcement of the arbitral award. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention') has made it easier for parties to enforce foreign arbitral awards stemming from international arbitration. However, Malawi is not a party to the New York

Convention. This paper discusses the enforcement of foreign arbitral regime in Malawi and compares it to the procedure under the New York Convention. Firstly, the paper highlights the law on enforcement of foreign arbitral awards in Malawi. What follows is an exposition of the relevant articles of the New York Convention. The paper then proceeds with a comparative analysis between the law on enforcement of foreign arbitral awards in Malawi and enforcement under the New York convention. Lastly, the paper concludes by offering a few recommendations.

THE LAW ON ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN MALAWI

There are three legislations under which foreign arbitral awards can be enforced in Malawi: the British and Commonwealth Judgments Act of 1922, the Service of Process and Execution of Judgments Act of 1957 and the Arbitration Act number 26 of 1967¹. These three legislations are discussed below. It is also possible to enforce foreign arbitral awards under common law. In order to do this, the party intending on enforcing the foreign arbitral award is required to show the following three elements: that the award was made in accordance with the arbitration agreement; that the award is valid in accordance with the *lex arbitri*; and that the award is final and binding in accordance with the *lex arbitri*.²

a. Enforcement under the British and Commonwealth Judgments Act

The British and Commonwealth Judgments Act ('the commonwealth Act') defines judgment as including an arbitral award that is enforceable, in the country it was made, in the same manner as a judgment given by a court in that place.³ The application of the Commonwealth Act is on a reciprocity basis. It does not apply to all commonwealth

¹ Chapter 6:03 of the Laws of Malawi.

² Julian D.M. Lew, *The Recognition and Enforcement of Arbitration Awards in England*, *The International Lawyer*, Summer 1976, Vol. 10, No. 3 (Summer 1976), <http://www.jstor.com/stable/40705300> accessed on 6th September 2020. At 429.

³ Section 2 of the British and Commonwealth Judgments Act.

countries.⁴ The Judgment Extension Act of 1922 extended its application to Kenya, Tanzania, Uganda and Zambia.⁵ The application of the Commonwealth Act can still be extended to other countries by the President.⁶ However, to date, the president has not exercised this power.

Anyone who has obtained a binding,⁷ and capable of being enforced, arbitration award in the United Kingdom or the above-mentioned countries, can apply to have the arbitration award registered in the High Court of Malawi. The court may register the foreign arbitral award if it is just and convenient that it should be enforced.⁸ The application for enforcement is supposed to be done within twelve months.⁹

The Commonwealth Act provides that the judgment to be enforced has to be a money judgment from a superior court.¹⁰ For a foreign arbitral award, the court would be concerned with whether the award is for the payment of money and whether it is final, binding, and capable of being enforced in the country it was issued. The Malawi Supreme Court of Appeal in the case of *Bauman Hinde and Company Ltd vs David Whitehead and Sons (mw) Ltd*¹¹ held that foreign arbitral awards from the United Kingdom can be registered and enforced in Malawi under the Commonwealth Act. The Court stated that the effect of registration of a foreign arbitral award is to confer on the award the same force and effect, and to render it subject to the same control, as if it were a Judgment given in the registering court.¹²

⁴ Mumba, AVP. (2014) *The recognition and enforcement of foreign judgments in Malawi*, (LLM) [unpublished]: University of Johannesburg. Retrieved from <https://ujdigispace.uj.ac.za> Accessed on 7th September 2020.

⁵ Ibid

⁶ Section 10 of the British and Commonwealth Act.

⁷ The Act does not use the word binding. It says, 'a Judgment from a Superior Court'. A binding Arbitration award is equivalent, in this context, to a judgment of a superior court since an appeal is not possible.

⁸ Section 3 of the British and Commonwealth Act

⁹ ibid

¹⁰ Sections 2 and 3 of the British and Commonwealth Act

¹¹ *Bauman Hinde and Company Ltd vs David Whitehead and Sons (mw) Ltd*, MSCA Civil Appeal number 17 of 1998

¹² Ibid, at page 3.

b. Enforcement under the Service of Process and Execution of Judgments Act

The Service of Process and Execution of Judgment Act ('the Service Act') was passed during the Rhodesia and Nyasaland period. It was aimed at simplifying the process of service and enforcement of judgments and arbitral awards from Zambia and Zimbabwe.¹³

The definition of Judgment in the Service Act is similar to that in the Commonwealth Act. The definition includes arbitration awards which have become enforceable in the country they were made.¹⁴ However, the Service Act only applies to the enforcement of Judgments/Arbitral awards which are from Zambia and Zimbabwe. Further, the Service Act deals with money Judgments/Arbitral Awards only.¹⁵

c. Enforcement under the Arbitration Act

The Arbitration Act is the main legislation dealing with arbitration in Malawi. It applies to both domestic and international arbitration. Unfortunately, there has not been a lot of litigation in Malawi on enforcement of arbitration awards. There is therefore limited jurisprudence in this area.

The current leading case on enforcement of foreign arbitral awards in Malawi is Bauman v David Whitehead.¹⁶ The Supreme Court, in the Bauman case, commented on enforcement of foreign arbitral awards under the Arbitration Act. The case was dealing with the legislation of a foreign arbitration award under the Commonwealth Act. The Court's comments on the Arbitration Act were therefore obiter dictum. The Court briefly stated that based on sections 27 and 37 of the Arbitration Act, a foreign arbitral award can either be enforced by an action or with leave of the court, in the same manner as a local judgment.¹⁷ The court went further to state that where leave is given, a judgment may be entered in terms of the award and execution would then

¹³Supra note 4

¹⁴ Section 10 of the Service of Process and Execution of Judgment Act

¹⁵ Ibid

¹⁶ Supra note 11

¹⁷ Ibid

follow.¹⁸ The Court concluded by stating that regardless of whichever procedure the party enforcing takes, regard should be had to section 38¹⁹ of the Arbitration Act.²⁰

What is surprising is that the Court did not mention section 36 of the Arbitration Act. Sections 36, 37 and 38 of the arbitration Act are found on part III of the Arbitration Act. Section 36 provides that part III of the Arbitration Act applies to an award made after the 28th of July, 1924 and where the following three conditions are met: (1) the agreement that led to the award should be valid under the 1923 Geneva Protocol²¹; (2) the award must have been made between persons who are subject to the jurisdiction of different States and the said States must be formally recognized, by a notice published in the gazette by the Minister, as being parties to the 1927 Geneva Convention²²; and (3) the award should have been made in a country formally recognized, by notice published in the Gazette by the Minister, as a party to the 1927 Convention.

In the author's view, it was a grave omission by the Supreme Court to clarify on the procedure of enforcement of foreign arbitral awards, under part III of the Arbitration Act, without bringing up section 36. Section 36 is relevant since it limits the types of foreign arbitral awards which can be enforced under part III of the Arbitration Act. Part III of the Arbitration Act was included as a way of domesticating the 1927 Geneva Convention. In fact, section 38, which the Supreme Court referred to as 'crucial', is simply a replica of articles 1, 2 and 3 of the 1927 Geneva Convention.

The obvious follow up question is whether foreign arbitral awards not meeting the requirements under section 36 can be enforced under the Arbitration Act? Unfortunately, the Courts in Malawi have not dealt with this issue. However, the English case of *Dalmia Cement Co. v. National Bank of Pakistan*²³ is very helpful on this point. The case was brought under the 1950 Arbitration Act of the United Kingdom

¹⁸ Ibid

¹⁹ Section 38 sets out the conditions for enforcement of foreign arbitral awards and it is discussed in detail later in this paper.

²⁰ Supra note 11.

²¹ Protocol on Arbitration Clauses Signed at a Meeting of the Assembly of the League of Nations Held on 24th of September 1923. The validity of the award is dealt with on Article 1 of the protocol.

²² Convention on the Execution of Foreign Arbitral Awards Signed at Geneva on 26th September 1927.

²³ *Dalmia Cement Co. v. National Bank of Pakistan* All ER (1974) at 189.

(‘the 1950 Act’). The said Act mirrors the Malawian Arbitration Act with negligible differences.²⁴ However, the relevant sections of the 1950 Act were word for word with the Malawian Arbitration Act.

The Court in the *Dalmia Cement case* was dealing with questions of enforcement of a foreign arbitral award. The award was made in Switzerland. One of the parties was from India and the other from Pakistan. Those are the only relevant facts for purposes of this paper. First, the Court found that the award could not be enforced under the 1950 Act equivalent of part III of the Arbitration Act. The reason was that the requirements under the section equivalent to section 36 of the Arbitration Act were not met. The Court held that there are three categories of arbitral awards under the 1950 Act: domestic awards; foreign awards meeting the requirements under the equivalent of section 36 (‘convention foreign awards’); and foreign awards not meeting the said requirements (‘non-convention foreign awards’). On the last category, the court had the following to say:

“..accordingly, to distinguish them from foreign awards stricto sensu, and also from English awards as defined above, I will refer to such awards for convenience as ‘non-convention awards’ ie awards made abroad and/or in arbitrations whose procedure is not governed by English law, but which are not ‘foreign awards’ as defined by s 35²⁵ of the 1950 Act.”²⁶

The Court proceeded to hold that the so called ‘non-convention awards’ can be enforced by applying for leave to enforce under the section equivalent to section 27 of the Arbitration Act.²⁷ The Court said it would be up to the court hearing the application to grant the leave or deny it based on the circumstances of the case. It further held that if leave to enforce is denied, the party willing to enforce the foreign arbitral award would then be left to his common law remedy of bringing an action on the award.²⁸

²⁴ The most obvious difference was the numbering of sections.

²⁵ Section 35 is the equivalent of section 36 of the Malawian Arbitration Act.

²⁶ Supra note 23

²⁷ Section 27 of the Arbitration Act, as well as the 1950 Act equivalent, provides that “an award on an arbitration agreement may, by leave of the court, 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.”

²⁸ Supra note 23

According to section 38(1) of the Arbitration Act, a 'convention foreign award' can only be enforced if it meets the following conditions: made in pursuance of an agreement for arbitration valid under the law governing it; made by a tribunal selected or agreed upon by the parties; made in conformity with the law governing the arbitration procedure; must have become final in the country it was made; must be in respect of a matter capable of being referred to arbitration under the Malawian law and the enforcement must not be contrary to public policy or the law of Malawi.²⁹ Failure to meet any of the above conditions can be a ground for resisting enforcement.

Enforcement of 'convention foreign awards' can also be refused if the court is satisfied of any of the following: that the award has been annulled in the country it was made; that the party whom it is sought to enforce the award was not given sufficient notice of the arbitration proceedings or he was under some legal incapacity and not properly represented; or the award does not deal with all the facts or contains decisions on matters beyond the scope of the agreement for arbitration.³⁰

As shown above, there are two categories of foreign arbitral awards capable of enforcement under the Arbitration Act. Since 'non-convention foreign awards' do not fall under part III of the Arbitration Act, the conditions under section 38 cannot strictly apply to them. The court would have a wide discretion on whether leave to enforce a non-convention foreign award should be given or not.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

The New York Convention entered into force on 7 June 1959.³¹ About 165 countries are members of the convention.³² However, Malawi is not a member. The New York Convention applies to the recognition and enforcement of arbitral awards made in a country different to the one in which enforcement is being sought and to arbitral awards which are not regarded as domestic awards in the country where enforcement is being

²⁹ Section 38(1) of the Arbitration Act

³⁰ Section 38(2) of the Arbitration Act

³¹ https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards accessed on 11 September 2020.

³² <http://www.newyorkconvention.org/list+of+contracting+states> accessed on 11th September 2020

sought.³³ When signing or ratifying the New York Convention, parties can enter any of the two types of reservations available: the parties can declare that the convention will only apply on a reciprocity basis; and/or that the convention will only apply to commercial arbitration.³⁴

When enforcing the foreign arbitral awards, the party seeking the enforcement is required to supply the court with the following: duly authenticated original award or duly certified copy;³⁵ original or duly certified copy of the arbitration agreement;³⁶ and certified translation of the award or the agreement if they are not made in an official language of the country in which the award is relied upon.³⁷ The certification of the documents is supposed to be done by an official or sworn translator or by a diplomatic or consular agent.³⁸

Recognition or enforcement of a foreign arbitral award under the New York Convention can be refused if the resisting party can prove any of the following: that the parties to the arbitration agreement were under incapacity or that the agreement is not valid under the law the parties have subjected it or under the country the award was made;³⁹ that the party resisting the enforcement was not given a proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present his case;⁴⁰ that the award deals with issues not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration⁴¹; that the composition of the arbitral authorities of the arbitral procedure was contrary to the agreement of the parties or contrary to the law of the country the arbitration took place⁴²; or that the award has not yet become binding on

³³ Article I(1) Of the New York Convention

³⁴ Ibid, article I(3)

³⁵ Ibid, article IV(1)(a)

³⁶ Ibid, article IV(1)(b)

³⁷ Ibid, article IV(2)

³⁸ Ibid

³⁹ Ibid, article V(1) (a)

⁴⁰ Ibid, article V(1)(b)

⁴¹ Ibid, article V(1)(c)

⁴² Ibid, article V(1)(d)

the parties or has been set aside by a competent authority in the country the award was made.⁴³ Enforcement can also be refused if the subject matter of the difference is not capable of settlement by arbitration in the national law⁴⁴ or if the enforcement of the award would be contrary to the public policy of the enforcing country.⁴⁵

COMPARATIVE ANALYSIS OF THE LAW ON ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN MALAWI AND ENFORCEMENT UNDER THE NEW YORK CONVENTION

The New York Convention simplifies enforcement of foreign arbitral awards. Unless a member State entered a reciprocity reservation, a foreign award from any country can be enforced. In fact, the reciprocity reservation is no longer a huge barrier since a lot of countries have signed up to the New York Convention. On the other hand, foreign awards from only 5 countries can be enforced in Malawi under the Commonwealth Act. The Service Act allows enforcement of foreign awards from two countries only. Further, only money foreign awards can be enforced under the Commonwealth Act and the Service Act. This leaves the Arbitration Act as the only legislative avenue for enforcement of all non-money foreign arbitral awards as well as all foreign awards from countries not covered by the Commonwealth Act and the Service Act.

The Arbitration Act complicates things by creating a distinction between 'convention foreign awards' and 'non-convention foreign awards'. The reciprocity requirement found under part III of the Arbitration Act makes it difficult for a lot of foreign awards to qualify as 'convention foreign awards.' Not only are the States involved supposed to be members of the 1927 Geneva Convention, but the Minister must recognise them as such. Such form of local recognition is not required under the New York Convention. In fact, the Convention prohibits the imposition of more onerous conditions than those applicable to the enforcement of domestic awards.⁴⁶

⁴³ Ibid, article V(1)(e)

⁴⁴ Ibid, article V(2)(a)

⁴⁵ Ibid, article V(2)(b)

⁴⁶ Ibid, article III

The Arbitration Act does not provide much guidance on enforcement of ‘non-convention foreign awards’. The Arbitration Act simply provides that a party can apply for leave to enforce.⁴⁷ This lack of guidance creates uncertainty. Basically, the Courts have a wide discretion to allow or deny enforcement. To some extent, this uncertainty also applies to ‘convention foreign awards’. Section 38(3) of the Arbitration Act provides that the court can refuse enforcement (of convention foreign awards) or adjourn the hearing if other grounds, other than those specifically provided in the Act, are proven. This means that the grounds for refusing enforcement of convention foreign awards are not exhaustive. Meanwhile, the New York Convention stipulates exhaustive grounds under which enforcement can be denied. This provides certainty and a certain level of consistency.

Further, the New York Convention is more flexible as regards burden of proof. The enforcing party is only required to produce original or authenticated copies of the award and arbitration agreement.⁴⁸ However, a party enforcing under Part III of the Arbitration Act is expected to do more. On top of producing original or authenticated copies of the award and the arbitration agreement, the party is expected to prove that the award is final⁴⁹ and that it is a foreign award.⁵⁰ The party is further required to prove that the following conditions are satisfied; that the award was made in pursuance of an agreement for arbitration valid under the law governing it; that it was made by a tribunal selected or agreed upon by the parties and that it was made in conformity with the law governing the arbitration procedure.⁵¹ It is likely that the Court would expect similar proof, if not more, when called upon to enforce ‘non-convention foreign awards’ under the Arbitration Act.

CONCLUSION AND RECOMMENDATIONS

The legislative regime on enforcement of foreign arbitral awards in Malawi is very archaic. The Commonwealth Act and the Service Act are both limited in terms of applicable countries as well as the types of awards capable of enforcement. The

⁴⁷ Section 27 of the Arbitration Act

⁴⁸ Article IV(1) of the New York Convention

⁴⁹ Section 39(1) (b) of the Arbitration Act

⁵⁰ *Ibid*, section 39(1)(c)

⁵¹ *Ibid*

Arbitration Act is free from these two limitations; however, it possesses its own pitfalls. The Arbitration Act creates uncertainty by giving the courts too much discretion. The burden of proof placed on the enforcing party by the Arbitration Act is too much. It is quite fatuous that the Arbitration Act is still based on the 1927 Geneva Convention which was replaced by the New York Convention in countries that have signed up to the latter convention.⁵²

It is easy to enforce a foreign arbitral award under the New York Convention than it is under the Arbitration Act. The New York Convention has been said to manifest a general pro-enforcement bias.⁵³ Malawi, in its current state, could be said to be arbitration unfriendly. This unfriendliness could be one of the explanations for limited case law on enforcement of arbitration awards. There is a need for Malawi to sign up to the New York Convention. Further, the Arbitration Act must be replaced with legislation that embodies the principles of the New York Convention. Preferably, Malawi should adopt the UNCITRAL Model Law on International Commercial Arbitration.

⁵² The Geneva Convention is still a valid convention for parties who were parties to it and have not yet signed up to the New York Convention.

⁵³ *Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A.*, 613 F. Supp. 2d 1362 (S.D. Fla. 2009)