THE IMPACT AND APPLICATION OF THE UNCITRAL RULES IN DOMESTIC JURISDICTIONS

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Abstract

Globalization is a world wide economic phenomenon that made the world a global village and today, human relationships and business activities in the world of commerce are so intracticably related to each other that drawing a line of distinction and meeting point. between the two of them becomes very difficult. Same goes with laws and rules of international trade that govern those relationships. The United Nations General Assembly, conscious of these facts, attempts to work out a rule, laws or guidelines that would serve as a reference point to Nations in international business law practices while also guaranteeing the investor his investments in a fluid and volatile would of international commerce. This effort gave rise to the UNCITRAL RULES which amongst other things encourages the creation of flexible laws that encourage free flow of trade.

This paper will attempt to dissect these laws, examine the relationship between them in dispute resolution matters with a view to streamlining any conflict that may arise in the process so as to achieve the United Nations objective on International Trade Law and commerce.

Perhaps, a better approach to this study may require a *general definition* of what the concept, *Uncitral* means. This expose will assist a *first time* reader into *appreciating* and *juxtaposing*._ The central theme of the discourse, which usually, is a good *platform* for starting an academic discussion.

Uncitral is a acronym for United Nations Commission on International Trade, which was established by the General Assembly of the United Nations in 1966 vide Resolution 2205 (xxi) of 17 December 1966 (Net 2010). In establishing the commission, the United Nations General Assembly recognized that disparities in National Laws of different Countries governing International Trade created obstacles for free flow of trade.

Given these obstacles, the Commission was given a mandate to explore ways of progressively harmonizing and unifying laws of international trade to give room for flexibility and adaptability in international trade relations amongst Nations.
It is against this backdrop that the commission was formed. It is composed of sixty member states elected by the General Assembly. Nigeria is a member. Membership is

structured to include the various world geographical regions and their principal economic and legal systems (Net 2010).
Its terms of reference included amongst other things:
1. To resolve trade dispute within a reasonable time between parties to an international commercial law transaction.
2. To ensure that an arbitration clause is entrenched in commercial law agreement amongst Nations. That means that in event of any dispute arising there from the dispute is to be first referred to international commercial arbitration for settlement in the first instance before any other measure could be taken thereafter (Net 2010)

Uncitral rules has therefore developed the Model Law, the International commercial Arbitration law 1985 and UNCITRAL Arbitration rules (a term used here to include both the Model Law and Arbitration rules) in domestic jurisdictions. These rules raise a number of questions which inter alia, are:
(i) How far does the domestic laws of Nations accommodate the UNCITRAL rules?
(ii) What are the similarities and differences between the UNCITRAL rules and the domestic laws of different Nations and
(iii) How can the differences be reconciled?

In providing answers to these questions, the UNCITRAL rules and the Nigerian domestic law i.e, Arbitration and conciliation Act (2004) will be our reference guide. It therefore becomes imperative in the opinion of the writer that the convenient point to start from in addressing these issue will be examine to briefly Arbitration as a dispute resolution mechanism.

Arbitration

According to Halsbury's Laws of England (5th Edition) was described as the reference of a dispute or differences between (not less than) two parties for determination, after hearing both in a judicial manner, by a persons or persons other than a court of competent jurisdiction.

The Nigeria Arbitration law defines arbitration as a commercial arbitration whether or not administered by a permanent arbitral institution.

Nevertheless, Arbitration was lucidly defined by Delvin (Delvin 2010) as a generic term for a voluntary Process in which the parties to a conflict request the assistance of an impartial and neutral third party to make a decision for them regarding contentions issues. The outcome of the decision is usually binding by way of arbitral awards.

Arbitration is most suited in cases where the commercial transaction (whether national or international) is a bit intricate so that issues arising from the transaction may be better explained.

Arbitration Law and Practice under the Nigeria law are derived from five main sources, viz -

(i) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958;
(ii) United Nations Commission on International Trade Law 1985;
(iii) The UNCITRAL Arbitration Rules.
(iv) Constitution of the Federal Republic of Nigeria, 1999; and
(v) The Arbitration and Conciliation Act, 2004.

It is abundantly clear from the foregoing that the UNCITRAL Rules are substantially accommodated by the Nigerian domestic law as it is one of the main sources of the Nigeria Arbitration Law. Furthermore section 53 of the arbitration and Conciliation Act (2004) lends credence to this position, it provides that:

> "Notwithstanding the provision of this Act, the parties to an international commercial agreement may, agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the *UNCITRAL Arbitration Rules* or any other international arbitration roles acceptable to the parties".

It therefore stands to reason that if the UNCITRAL Arbitration Rules were not domesticated under the Nigerian law it would not be applicable in the Nigerian Jurisdiction.

Similarities Between the National Laws and the UNCITRAL Rules

(a) Section 1 of the Arbitration and Conciliation Act (2004) states that:

> "Every agreement shall be in writing in a document signed by the parties; or in an exchange of letters, telex, telegrams or other forms of communication which provides for a record of the arbitration agreement; or in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another".

And the main steps in a commercial arbitration are commencement, appointment of arbitrations, preliminary meeting, discovery and inspection, hearing, addresses, consideration of award, and enforcement of award. The steps are as guided by the UNCITRAL Model Rules and adopted by the local National laws such as our Arbitration and Conciliation Act (2004).

It becomes convenient for us to look again at the disparity and similarities between UNCITRAL Rules and Domestic Jurisdiction with a view to drawing a meeting point between both rules so as to harmonize areas of conflict to pave way for smooth business transaction.

(b) **Disparity Between National Law and UNCITRAL Model Law.**

Problems and undesired consequences, whether emanating from mandatory or non-mandatory provisions or from a lack of pertinent provisions, are aggravated by the fact that national laws on arbitral procedure differ widely. The differences are a frequent

source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. For such a party it may be expensive, impracticable or impossible to obtain a full and precise account of the law applicable to the arbitration (Net 2010).

Again, uncertainty about the local laws with the inherent risk of frustration may adversely affect not only the functioning of the arbitral process but also, the selection of the place of arbitration. A party may as well for those reasons hesitate or refuse to agree to a place which otherwise, for practical reasons would be appropriate in the case at hand and this provides problems in resolving issues that relates to international commercial transactions.

(c) **Resolution of the Differences**

The disparity between national laws may be reconciled if the choice of places of arbitration are widened and the smooth functioning of the arbitral proceedings would be enhanced if states were to adopt the Model Law which is easily recognizable, and meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different states and legal system.

Conclusion

From the foregoing, it is very obvious to state as earlier highlighted that a prudent and focused businessman must always, be conscious of growing his resources and wealth. That drives him to engage in commercial transaction, nationally or internationally. In this regard he must also be aware of the law governing his transactions including reference to arbitration. In International arbitration proceedings, where there is a uniformity of Law relating thereto, it removes the obstacles to free flow of trade which is to his advantage. Therefore the impact and application of UNCITRAL Rules in domestic jurisdiction will be most suitable to an international business man who operates in a Country that have adopted UNCITRAL Rules that gives room for certainty and uniformity of laws that governing international arbitration and as earlier stated the resultant consequence of these will be free flow of trade. Certainly where all jurisdictions have adopted UNCITRAL Rules, the free flow of trade will be a global phenomenon and in so doing the overriding objective of the United Nations Commission on International Trade Law must have been accomplished and that is the position of this writer.

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