ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS: THE ISSUE OF *LEX MERCATORIA*

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Abstract

Lex Mercatoria is the Latin expression for a body of trading principles used by merchants throughout Europe in the medieval. Literally, it means "|merchant law". It evolved as a system of custom and practice, which was enforced through a system of merchant courts along the main trade routes. It emphasized contractual freedom, alienability of property, while shunning legal technicalities and deciding cases ex aequo et bono. The methodology adopted is doctrinal. The research found out that there is serious controversy over the existence, the credibility and even the validity of lex mercatoria. Some scholars are of the opinion that Lex Mercatoria is a stateless law and as such do not exist or, where it exists, should not be applied by arbitrators. Another group of scholars believe that stateless law is not the same with lawless law, and as such, Lex Mercatoria awards are enforceable in Nigeria. The research concluded that since there is no recent reported case on this, it is expected that the Courts in Nigeria on the basis of Article 42(1) of ICSID Convention and Section 47(1) of the Arbitration and Conciliation Act, will enforce lex mercatoria awards. The research recommended that the Courts should honour the parties' choice of extra-legal standards since lex mercatoria is not binding in honour but

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in law. The research concluded that the grounds on which the Court can refuse the enforcement of awards rendered based on lex mercatoria is on the issues of misconduct, lack of fair hearing, public policy and error of law.

Keywords: enforcement, international arbitral award, *lex mercatoria*, icsid convention and arbitration and conciliation act.

1.0 Introduction

Generally, *Lex Mercatoria* simply put is the Law Merchant or Commercial Law, that is, it is that system of laws that is adopted by all commercial nations and constitutes a part of the law of the land[1]. Customs of the trade are subset of *lex Mercatoria* which includes conventions and customary law. The customs of the trade is that part of the *Lex Mercatoria* derived from common practice and usage within specified industries and trade.

The purpose or essence of *Lex Mercatoria* is to regulate international commercial transactions by a uniform system of law which avoids vagaries and hardships of different national systems in commercial or trade matters within a particular group of Merchants, traders and businessmen.

There has been serious controversy over the existence, the credibility, and even the validity of *Lex Mercatoria*, but this has not absolutely affected its appeal as substantive law to arbitration. Most opponents of *Lex Mercatoria* are of the view that it does not represent a discrete

[1] Black's Law dictionary, 6th ed (821)

body of law, since there are now more sophisticated laws and techniques for resolving disputes which are more likely to arise in international commercial matters. Others do agree that if *Lex Mercatoria* does exist, it exist as an amalgam of most globally accepted principles which govern international commercial relations, public international law, certain uniform laws, general principles of law, rules of international organizations, customs and usage of international trade, standard form contract and arbitral case law[2]. Despite this hostility, awards rendered by arbitrators based on *Lex Mercatoria* have been enforced by national courts. Lex mercatoria has been the only choice when no single national law is acceptable.

2.0 The Elements of Lex Mercatoria

Lex Mercatoria rules apply where the parties have by their agreement authorized the arbitrators to apply them. In such case, there is no national law, the mandatory rules of which must be applied to the contract and in which case, the arbitrators have the right to apply such combination of rules as seems just in the circumstance taking into cognizance the rules of the trade or business[3].

The elements of *Lex Mercatoria* are inexhaustive. Some of the key elements are as follows:

(1) Uniform Law: There are uniform laws which have been adopted for international trade. Where there are uniform Laws which the

[2] Ole Lando "The Lex Mercatoria in International Commercial Arbitration", Interventional and Comparative Law Quarterly 1985, Vol. 34, 747 at 748; Greg. C. Nwakoby, "Lex Mercatoria Arbitration Practices & the New York Convention – The Nigerian Position", M.J.N 2002, 206.

[3] Ibid.

courts which are connected with the parties or subject matter of the dispute in a similar matter would be guided by these uniform laws which have been adopted for international trade.

(2) Public International Law: This is one of the important sources of the law merchant or *lex mercatoria*. The rules of public international law on treaties have been applied to contracts between a government enterprise and a private party. The ICSD Convention, for example provides for the settlement of investment disputes between states and nationals of others states. Article 42 of the Convention provides that, in the absence of a choice of law by the parties, the arbitral tribunal shall, *inter alia*, resort to such rules of international law as may be relevant and applicable. These rules of public international law may also be applied in disputes between private enterprises. Public international law, by its very nature, is a very important source of *Lex Mercatoria,* which arbitrators called upon to decide a matter, may apply where there is no agreement among the parties as to the applicable law.

(3) General Principles of Law: This is also an important source of the law merchant or *Lex Mercatoria* which is recognized by the commercial nations. Some examples of them include the rules of *Pacta Sunt Servanda* and the principles which empower a party to a contract to terminate it in the case of substantial breach by the other party. An arbitrator would normally apply the general principles, if identified, and they produce a common solution to problems similar to the ones in issues in the arbitration. This law merchant or *Lex mercatoria* is not 'world law' and it need not be the same all over the world. In searching for the applicable laws when confronted with a problem, an

arbitrator is expected to confine himself and his investigation to those legal systems which are connected with the subject matter of the disputes. The duty of an arbitrator in applying *Lex mercatoria* is not a timid one. He must be creative and dynamic for him to do justice in applying *lex mercatoria*[4].

Other elements of lex mercatoria are; Customs and Trade Usage; Standard form Contracts, and Report of Arbitral Awards.

It is important to note that there are two ways by which parties can choose lex *Mercatoria* as the applicable law in their own agreement or contract. The first is by *express choice* whereas the second is by *implied choice*.

It is also worthy of note that when parties select *Lex mercatoria,* the arbitrator becomes duty bound and obliged to base his decision on the law Merchant even if equity would lead to a different result[5]

Enforceability of Arbitration Awards based on lex Mercatoria

There are divided opinions as to the enforceability of arbitration awards rendered upon *Lex Mercatoria* elements.

Some scholars are of the opinion that Lex Mercatoria is a stateless law and as such does not exist or, where it exists, should not be applied by arbitrators. Another group of scholars believe that stateless law is not

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[4] G C Nwakoby, "*The Law and Practice of Commercial Arbitration in Nigeria"*, 2nd Ed (Enugu: Snap Press Ltd 2004) Pg 271.

[5] E Lowenfield, *"Lex Mercatoria: An Arbitrator's View",* Arbitration International LCIA, 1990, 133 at 145.

the same with lawless law, and as such, *Lex Mercatoria* awards are enforceable in Nigeria.

According to Lord Mustil, *Lex Mercatoria* is not law at all. He is of the opinion that arbitrators should not apply it, unless parties have agreed as to that, and an agreement by parties to submit disputes to *Lex Mercatoria* is void, and also an arbitration awards rendered by arbitrators upon *Lex Mercatoria* should not be enforced by our courts[6] The position generally in England before 1978 was not to enforce arbitration award based on *Lex Mercatoria*. In *Orion Compania Expanola de sequros V Belfort Maatschappij Voor Algemene*[7]

Verzekgringreen, the respondent, a Belgium insurance company, filed a motion to set aside an arbitral award made by the umpire in favour of the claimants. The respondents sought to set aside the award on the premise that the award was based on equitable standard. The claimants however, argued that the court should not exercise its discretion to set aside awards on the ground that the parties have agreed or contracted on equitable standard and also that the court should respect the contractual terms of the parties by refraining from renewing the umpires equitable construction of the contract or to treat the equitable construction as a question of law. The court per Magaw, J. stated thus:

> It is the policy of the law in the conduct of arbitration, arbitrators must in general apply a fixed and recognizable system of law, which primarily and normally would be the law of England, and that they cannot be allowed to apply

[6] M Mustill and S Boyd: The Law and Practice of Arbitration in England, 2nd ed., (London: Butterworth Co. Ltd, 1991, 80-82.

[7] (1962) Lloyds Report 251.

> some different criterion such as the view of the individual arbitrator or umpire on abstract justice and equitable principles, which of course does not mean "equity" in the legal sense of the word at all[8]

In *Maritime Insurance Co. Ltd v Assecuranze Union Von,* the court per Lord Gooddard, J held that the English law should be applied by the English arbitral tribunal in deciding disputes. See also the case of *Zarnikow v Rotl, Schmmitt & Co.*[9]

It is however, not the correct view that Lex Mercatoria is no law at all. It is also not correct to declare that Lex Mercatoria a does not exist in any sense useful for the solving of commercial disputes. The national courts can exercise supervisory jurisdiction or authority over awards rendered on the basis of Lex Mercatoria.

By 1978 the English court of Appeal began to enforce arbitration award based on Lex Mercatoria. In Eagle star Insurance Co. ltd virtual Insurance co Ltd (1978)[10]. Liyod's Report 357 the court upheld an arbitration clause which was drafted in the form of equitable standard. In Rakoil case[11] the court Per Donaldson, M.R held that the parties can validly provide for some other systems of law, that an arbitration tribunal can apply. That the parties have the right and discretion to decide, that a particular system of law or principle of international law

[8] Ibid 6
[9] (1922) 2 KB 478
[10] (1978) Llyod's Report 357
[11] (1989) XIV YB Com. Arb. 111

should govern part or a whole of their legal relationship and the arbitral tribunal in England should apply it.

Donaldson, M.R went on to propose a three-part test which the courts are to apply in order to determine the validity of the contract and the enforceability of the resultant award.

Firstly is to determine whether the parties intend to create legally enforceable rights and obligations. If the intention of the parties is to create legally enforceable rights and obligations, the state should not interfere.

Secondly is to determine whether the resultant agreement is sufficiently certain to constitute a legally enforceable contract.

Thirdly is to determine whether it will be contrary to public policy to enforce the resulting award using the state machinery and legal force. In RAKOIL case the court adopted these three-part tests. In Pabalk Ticaret Limited Sirketi (Turkey) v Norsolor S.A France[12] the arbitral tribunal applied lex Mercatorian in the interpretation of the contract and rendered an award on the basis. The supreme court of Austria zip held the award as enforceable. See also fougerolle (French) v Banque de pronche orient (Lebanon) (1982) Rev. Arb. 183.

The application of lex Mercatorian by arbitrator's in accordance with party agreement or where parties have failed to state the applicable law is recognizable by law. Article 42(1) of the ISCID Convention

[12] (1984) 1X YB Com. Arb 109

provides that arbitral tribunal has to decide disputes in accordance with such rule of law as may be are agreed by the parties. The parties can on their own agree on a non- notional law and such agreement base on non- national law is valid and legal. Section 42(1) of the ICSID Convention further provides that in the absence of such by the parties, the tribunal shall apply the law of the contracting state which is a party to the dispute and such rules of international law as may be applicable.

However, from the aforestated, it is quite unfair for a national court to refuse the enforceability of award rendered on the basis of Lex Mercatoria simply because, as some have argued, that Lex Mercatoria is no law at all, in that it is imperfect and in a fluid state. The fact is that most legal systems are imperfect because they have failed to provide predicted answers to some legal questions, but yet they are recognized and enforced by courts.

In Nigeria, there is not yet in the most recent times a reported case of any award rendered on the basis of Lex Mercatoria. It is expected that the courts in Nigeria on the basis of Article 42 (1) of ICSID convention and S.47 (1) of the Arbitration and conciliation Act will enforce Lex Mercatoria awards. Section 47(1) of the Arbitration and conciliation Act provides that the tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance in dispute" Section 47(3) and (4) of the Act make provision for conflict of law rules and also for ex aequo et bono or amiable compositeur Section 47(5) of the Act also provides that "in all cases, the tribunal shall decide in accordance with the terms of the contract and shall take account of the

usages of the trade applicable to the transaction.[13] The import of Section 47 of the Act is that even when parties have agreed to a national law, the arbitrators shall in deciding according to the agreed law, have eyes on the usages of trade applicable to the transaction. It then follows that Lex mercatoria awards are enforceable in Nigeria.

As to the mode of enforcing Lex mercatoria award, the successful claimant has a right to apply to the court in accordance with the provisions of the Arbitration and Conciliation Act and also in accordance with other applicable laws in respect of arbitration practice in Nigeria, including the provisions of international conventions to which Nigeria had acceded. Lex mercatoria award can also by enforced by action or by mere registration of the award in the court. Where the award is one within ICSID provision, the award shall be enforced at the supreme court of Nigeria accordingly.

Lex mercatoria is not binding in honour but in law. It is duty of the courts to honour the parties choice of extra-legal standard, such as usages of trade to govern the substance of their disputes. The only grounds on which the court can refuse the enforcement of awards rendered based on Lex mercatoria are on issues of misconduct, lack of fair hearing, public policy and error in law. It is worthy of note that Lex mercatoria only frees the arbitrator form is strict rules of interpretation. This freedom conferred on the arbitrator by Lex mercatoria system does not in any way its rules and the resultant award to be lawless[14]

[13] The Arbitration and Conciliation Act Cap A18 LFN, 2004,S. 47(5)

[14] Home insurance Co & St. Paul and Marine Insurance Co. Administration Asigururie. De Stat