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**THE CHARTERED INSTITUTE OF ARBITRATORS
NIGERIA BRANCH
10TH ANNIVERSARY (1998 – 2008)**

NEW YORK CONVENTION 50 YEARS ON

Delivered By

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ABOUT THE AUTHOR

Chief Richard Akinjide, CON, SAN, FCIArb (U.K), FCE is a practising **Member** of the **Bar** of **England** and **Wales** with **Chambers** at **9 Lincoln's Inn Fields, London WC2A 3BP.** He practises also at **The Gambian Bar**. He specialises in **Oil and Gas, Companies and Banking Matters, Mergers and Acquisitions, Shipping, International Commercial Arbitration and International Law. He is a Fellow of the Chartered Institute of Arbitrators, United Kingdom (UK)**. He took **Silk** in **Nigeria as a Senior Advocate on January 12, 1978** and was **Called** to the **Nigerian Bar** in **March 1956**. **Member of Nigerian Federal Parliament 1959- 1966**, Member of the **International Law Commission of the United Nations in Geneva from 1981 – 1986, Federal Minister of Education 1965 -1966. Attorney-General and Minister of Justice of Nigeria 1979-1983**. He is the author of the 2nd **Edition** of **"Africa** and **The Development of International Law"** published by **Martinus Nijhoff** at **The Hague, The Netherlands (1988)** and selling worldwide. **Pro-Chancellor and Chairman of Council of the University of Jos 1976-79.**

He is an **active** member of the **Association of International Petroleum Negotiators (AIPN) in TEXAS, United States of America (USA)**. Cases he handled are reported in various **Law Reports in Nigeria, England, The Gambia** and in **International Law Reports**. He is a **specialist in Oil & Gas**.

He represented **Nigeria** as the **Co-Agent** and a **Counsel** in the case **Cameroon v Nigeria** at **The World Court, The Hague** for **about 8 (eight)** years involving **International Boundary Dispute** from **Lake Chad** to **The Atlantic Ocean**. He was a member for **four (4) years** of the team of **International Jurists** that drafted **The Law of The Sea-Convention** otherwise known as **"The Constitution of The Sea"** which is the **biggest Convention** ever sponsored by the **United Nations (UN)**.

Chief Richard Akinjide signed that **Convention** and **The Final Act** on behalf of **Nigeria at Montego-Bay, Jamaica. Publications** of **AKINJIDE & CO** series which started with **"Advocacy, Ethics and The Bar"** have now reached **31 (thirty-one)** issues and circulates world-wide. **Chief Richard Akinjide** established trusts in the **Universities of Ibadan, Jos and Cambridge (England)** and the **Nigerian Law School for Annual Prizes** in **Law. Five (5) of his children read law. Chief Richard Akinjide** was the **President** of the **Nigeria Bar Association (NBA) 1970-1973** and past **Chairman** of the **Nigerian Body of Benchers** and **a** past **Member of the Council of Legal Education. Visiting Lecturer** for the **LL.M Programme** in the **Alternative Dispute Resolution, International Commercial Arbitration etc, University of Ibadan. Awarded Commander of the Order of the Niger (CON) in 2002. Distinguished Fellow of the Nigerian Law School**. Honoured as **Fellow** of the **Babcock University Circle of Eminence (FCE) in 2007. He travelled extensively in all the continents of the world. He reads widely outside law**. He is a collector of Works and Arts in Nigeria, Europe and USA.

Hobbies:

Golf, Snooker, Gardening and Arts appreciation.

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NEW YORK CONVENTION 50 YEARS ON

By
Chief Richard Akinjide, CON, SAN, FCI Arb. (U.K), FCE.

First, Greetings. Happy Birthday. Many Happy return.
So the **New York Convention is 50 years old!** You have asked me to say a word or two on the occasion of this birthday celebration. I feel greatly honoured. But, I think, **Portia of the Shakespeare's Merchant of Venice** would have been a better person to play the role you have called on me to play. **C'est la vie.**

The New York Convention of 1958 is the most important development in International Commercial Arbitration this and the last century. It was adopted **on June 10, 1958** and came into force on **June 7 1959. It came into force in Nigeria in March 1972.** Well over **100 (one hundred) states** and all the **Members' States of the European Community (EC)** have acceded to or ratified the **Convention.** It must be noted, however, that not all the **Member States** which have signed **the Convention have effectively implemented it.** See **KERR "Concord and Conflict in International Arbitration" (1997) 13 Arb. Int. 121 at 130-131 and** the comprehensive study of the **Convention,** by **Van Den Berg: "The New York Arbitration Convention of 1958 (1981)."** The **Convention which is a significant improvement on the earlier international instruments in the field of arbitration, is designed to achieve two things:**

First, to ensure the respect of arbitration agreement.
Second, to provide a simple mechanism for the enforcement of foreign arbitral awards.

If the **Court accepts jurisdiction** over the substance of a dispute which the parties **agreed to refer to arbitration, the institution of arbitration is undermined.** There can be **no objection to the Court exercising its jurisdiction if and only if the parties to an arbitration agreement subsequently choose to litigate their dispute.**

The New York Convention is now an essential element of international arbitration. It permits parties from different trading nations to settle their business dispute in a neutral country with confidence. This is because an award made in a New York Convention state will be recognized in and enforced by any other New York Convention state in accordance with a consistent and predictable scheme stipulated in the Convention.

One of the aims of the **New York Convention** on the **Recognition and Enforcement of Foreign Arbitral Awards** is to **ensure the respect of arbitration agreements**. It is **now appreciated that a less interventionist approach is appropriate**. In **Hayter v. Nelson (1990) 2 Lloyd's Report 265 at 169, the Court stated the law as follows:**

> **"There is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them."**

In Nigeria, the **Convention is the Second Schedule of our Arbitration and Conciliation Act CAP A18 Vol. 1 Laws of The Federation of Nigeria (A18-35). But Section 54 of our Act should be carefully noted, to wit:**

It provides:
"54. **Application of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958**.

(1) **Without prejudice to sections 51 and 52 of this Act,** where the **recognition and enforcement of any award arising out of an international commercial arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Awards (hereinafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting State —**
(a) provided that, such contracting State has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention:
(b) that the Convention shall apply only to differences arising out of a legal relationship which is contractual.

(2) **In this Part of this Act, "the appointing authority" means the Secretary-General of the Permanent Court of Arbitration at The Hague."**

On the other hand **Section 51 of our own Act also provides:**

"Recognition and Enforcement of Awards –

(1) An arbitral award shall, irrespective of the country in which it is made, be recognised as binding and subject to this section 32 of this Act, shall, upon application in writing to the Court, be enforced by the Court.

(2) The party relying on an award or applying for its enforcement shall supply —

(a) the authenticated original award or a duly certified copy thereof;
(b) the original arbitration agreement or a duly certified copy thereof;
(c) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language."

We, therefore, have to interpret and apply our **Sections 51** and **54** together**.**
This **United Nations Convention represents a definite advance over the Geneva arrangements** in that it **facilitates to a considerable degree the enforcement of foreign arbitral awards. Firstly,** it **abolishes, in principle, the requirement of reciprocity,** although a **State may declare** that it will apply the Convention to awards made **only** in the territory of other **Contracting States (article 1 (3)).**
Secondly, it abolishes **the requirement of double exequatur** which in many countries is a serious obstacle to the enforcement of foreign arbitral awards: **(article V (1) (e)).**
Thirdly, it is no longer necessary for the recognition of an arbitration agreement or for the enforcement of an arbitral award that the parties should be subject to the jurisdiction of different contracting States (articles I (1) and 11 (1)).

Recently, the **House of Lords in England** made what the **learned Law Lords called "a fresh start"** in the **interpretation and application of the arbitration clause.** It is in the case of **Fiona Trust & Holding Corporation and others v Privalov and others [2007] 2 ALL ER (Comm) 1053 – 1066:**

The owners of eight vessels which formed part of a Russian state-owned group of companies entered into charters on the Shelltime 4 form with eight charterers. Clause 41(b) of the form provided that: 'Any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree.' The owners alleged that the charters were procured by the bribery of the senior officers of the Russian state-owned group by the third defendant who controlled or was associated with the charterer companies. They purported to rescind the charters and commenced court proceedings for a declaration that the charters had been validly rescinded, submitting that they were entitled to rescind the charterparties, including the arbitration agreements, because the charterparties had been induced by bribery.
The charterers applied for a stay under the Arbitration Act 1996 on the basis that the matter should have been determined by arbitration. That application was refused by the judge at first instance but was allowed by the Court of Appeal. On the owners' appeal to the House of Lords, the House considered: (i) whether, as a matter of construction, the arbitration clause was apt to cover the question of whether the contract had been procured by bribery; and (ii) whether, assuming that the owners had an arguable case that the charters had been validly rescinded, they also had an arguable case that the arbitration agreement in cl 41 had been rescinded as well. The latter issue involved the interpretation of s 7 of the 1996 Act which referred to the principle of separability of an arbitration agreement from any agreement which it formed, or was intended to form, part of, so as to prevent its invalidity where the other agreement was found to be invalid.

(1) The House of Lords decided that the time had come for a fresh start to be made to the construction of arbitration clauses. Such construction should start from the assumption that the parties as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with that presumption unless the language made it clear that certain questions were intended to

be excluded from the arbitrator's jurisdiction. Clause 41 of Shelltime 4 contained nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation of anything else. Accordingly, it was apt to cover the question of whether the contract was procured by bribery. *AT & T Technologies Inc v Communications Workers of America (1986) 475 US 643, Threlkeld & Co Inc v Metallgesellschaft Ltd (London) (1991) 923 F 2d 245, Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.

(2) Section 7 of the 1996 Act was to be interpreted so that the main agreement and the arbitration agreement had to be treated as having been separately concluded and the arbitration agreement could be invalidated only on a ground which related to the arbitration agreement and was not merely a consequence of the invalidity of the main agreement. The doctrine of separability required direct impeachment of the arbitration agreement before it could be set aside. In the instant case there was an inference that the agent acting for the owners had been bribed to consent to the main agreement, but that did not show that he had been bribed to enter into the arbitration agreement. Accordingly the arbitration agreement had to be given effect and the charterers were entitled to a stay of proceedings. The appeal was therefore dismissed by the learned Law Lords.

In another case which came before our Supreme Court, the Writ of Summons issued on February 2, 1972, the arbitral clause and award were among the central issues considered by the Court presided over by the Chief Justice Elias in Murmansk State Steamship Line v Kano Oil Millers Ltd (1974) 9 NSCC 590-595. Could a claim for the enforcement of a foreign award be commenced in Court on the basis of a treaty to which Nigeria was not yet a party at the time of the contract giving rise to the claim? In order to sue on the award it must be shown that there is a law binding a Nigerian Court to entertain the claim. It is to the local enactment that we must turn in order to ascertain how this can be done in Nigeria. Chief Justice Elias delivered the well considered Judgment of the Supreme Court which, I must say, has done so much to enhance the intellectual reputation of the Bench and the Bar in Nigeria. In short, it must be established that the relevant International Convention has been domesticated by Nigeria.

Should we discuss the **New York Convention without saying something about oil and gas? I think not. Oil and gas provide about ninety-five per cent of Nigeria export.** It is unthinkable that most of the **oil and /or gas contracts will be signed without arbitration clause. Our Gulf of Guinea is the new Persian Gulf.**

One of the **most attractions for the crude found in the Gulf of Guinea is the quality of the oil itself.** In **industry parlance,** the **crude found** in the **Gulf of Guinea** is known as **"light" or "sweet"** meaning **it is viscous and low in sulfur** and therefore easier and cheaper to refine than the **Middle East crude. One third of the world's new oil discoveries since the year 2000 have taken place in Africa. Of the eight billion barrels of new oil reserves discovered in 2001, seven billion were found in Africa — and in West Africa in particular.** In the years between **2005 and 2010, 20 per cent of the world's new production capacity is expected to come from Africa. And there is now a contagious feeling in the oil and gas industry that no one really knows just how much oil might be in Gulf of Guinea — particularly in Nigeria and our off-shore.**

Nigeria is the largest oil and gas producer in Africa. Therefore, the **New York Convention is sine qua non. Arbitration! Arbitration! Arbitration!** Why? Just read how **Nicholas Shaxson, who is a specialist in the Dirty Politics of African Oil, put it:**

"Resources like oil and gas should be a blessing for countries that produce it. Norway, and Britain seem to have done well out of their oilfields, but in Africa the record is different. Producing oil seems to be a bit like taking cocaine: if you are already healthy it might invigorate you, but if you are weak or sick, as many African countries are, it can do you serious harm. For most of the countries in this book, oil and gas account for over 90 per cent of exports.
Oil can also be a bit like heroin: the injection of cash from each cargo delivers a feeling of well-being, but the effect over time is addiction. Just as heroin addicts lose interest in work, health, family, and friends and focus increasingly on the next fix, so politicians in oil-dependent countries lose interest in their fellow citizens, as they try to get access to the free cash. Some countries, like Indonesia, have managed and even broken the addiction, but again the record in Africa is dismal."

The three most corrupt nations in the world, internationally classified, are Nigeria, Chad and Equitorial Guinea. They are all Oil Producing African States.

The **United States imports more crude oil from West Africa than from Saudi Arabia and Kuwait** combined. **Angola is China's largest supplier of oil and gas**. The **European Union imports about 25 per cent of its oil and gas from Africa**. **Seven Sisters**? What **Seven Sisters**? Where are they now? **The old oil and gas Seven Sisters used to control the world oil and gas.** No longer. **They featured in many oil and gas international commercial arbitrations. But they have been supplanted by the New Seven Sisters**. Who are they? **They are:**
Saudi Aramco, Russia's Grazprom, China's CNPC, NIOC of Iran, Venezuela's PDVSA, Brazil's Petrobra's and Malaysia's Petronas. They **control one-third of the world's reserve and one-third of the world's production**. No wonder they feature so much in settlements connected with the **New York Convention**. The **Middle East and Asia now dominate the economy of the world!**

The heart and kernel of any commercial arbitration proceedings are that the arbitrator's decision is through process/procedures that are fair and transparent. Once those conditions are fulfilled, the parties must accept the arbitrator's decision for better or for worse. That is the jurisprudence now universally accepted.

I think the **50 years Anniversary celebration of the New York Convention will not be complete without some mention of Mediation. Mediation** is now trying to have a life of its own and it is **already playing useful role in commercial dispute resolutions.** There is even now **Mediation Advocacy** as a subject in **Critical Thinking.** There is also **Mediation in Intellectual Property, Technology and Related Disputes.** For those interested, I refer you to two books:

(a) Mediation Advocacy by Andrew Goodman and Alastair Hamilton. Publisher: XPL Law, 2006, £36, ISBN 1 85811 363 2,
And;

(b) A Practical Guide to Mediation in Intellectual Property, Technology and Related Disputes by John Lang. Sweet & Maxwell, 2006, £79, ISBN 9780421938601

My first major International Commercial Arbitration Brief was in **1970 acting for** a **United States International Contractor** as the **Claimant in a major engineering contract in Nigeria involving** a major **River Dam** and a **major Bridge — all** in **USA Dollars.**
Again, many thanks for this opportunity to say a few words at our Great Anniversary.

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