

**RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRAL
AWARD: NEW YORK CONVENTION IN FOCUS***

Abstract

An Arbitral Award is a decision of an Arbitral Tribunal delivered by the tribunal after its proceedings. The valid ingredients of a valid award are provided in section 26 of the Act which includes that the arbitral tribunal shall state the reasons for the award, the date on which the award was made, the place it was made, and it shall be written and signed by the arbitrators. The different types of awards are. Consent awards, final awards, interim awards, partial awards, interlocutory awards, self-executory awards, and additional awards. An award once it is rendered and published until it is set aside by a court of competent jurisdiction is final and binding on all the parties in the arbitration. The award shall be published to the parties alone. The award can only be made public with the consent of the parties to the arbitration agreement. This is because of the high level of confidentiality required in arbitration proceedings. Arbitration is an effective way to solve disputes, through which parties from different countries can be partially free from anyone's local jurisdiction. However, the recognition and enforcement of international arbitration awards still rely on national court system. International arbitration awards can be enforced in Nigerian through 5 methods but we are concerned with enforcement under the New York Convention.

Keywords: International Arbitral Award, Recognition, Enforcement, Arbitral Tribunal, New York Convention, Arbitration and Conciliation Act of Nigeria 2004.

1. Introduction

Awards are the decisions of arbitral tribunal. We have different types of awards, namely; final awards, partial awards, interlocutory awards, self-executory awards and additional awards.

An award must be made in the form established by law or the agreement of the parties and its content must be in accordance with the law.¹ which is *in pari materia* with Article 32 of our Act which provides in its subsection (1)-(4) that;

- 1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators.
- 2) The award shall state the reason upon which it is based, unless the parties agreed that no reasons are to be given, or award is an award on agreed terms under Article 30.
- 3) The award shall state its date and place of arbitration as determined in accordance with Article 20(1)

2. Publication of International Awards

The arbitrators are by law required to publish the award to the parties alone. The award can only be made public with the consent of the parties to the arbitration agreement so that confidentiality, privacy and business secrets of the parties would be protected: It should be noted that the award can only be made public with

- 1) The consent of the parties
- 2) Compulsion of law
- 3) Disclosure by leave of the court
- 4) Disclosure necessary for the purpose of protecting the legitimate interest of an arbitration party.

The award should take the form prescribed by the parties, the applicable law, or the practice of the Centre. Place of recognition and enforcement of award could be where the parties reside or where they have their business and assets. Recognition of an arbitration award means 'giving effect to the award to bar litigation on the same issues settled in arbitration' while enforcement means 'applying judicial remedies to ensure that the award is carried out'² In practice, if a court chooses to enforce a foreign arbitral award, it will first recognize the award then order the award's validity and binding effect on all parties. Recognition of an award is 'an integral part of enforcement', so recognition and enforcement are 'always inextricably linked'.³

3. Methods of Enforcement of International Arbitration Awards

International arbitration awards can be enforced in Nigerian through 5 methods and they are as follow:

- 1) Enforcement under the Foreign Judgments (Reciprocal Enforcement) Act Cap F35 LFN, 2004

* **By Ifeoma NWAKOBY, LLB (Hons), BL , LLM**, Lecturer, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam, Anambra State of Nigeria. Tel: +2347032939026, Email: ifeomanwakoby890@gmail.com; and

* **Chinwe ILOKA, LLB (Hons), BL, LLM, PhD**, Lecturer, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam, Anambra State Nigeria, Tel: +2348035696281, Email: chypat4@gmail.com.

¹ ICSID Convention, Rule 47; UNCITRAL Model Law, Article 31

² James H Carter, *Litigating in Foreign Territory: Arbitration Alternatives and Enforcement Issues*, Presentation Before the American Bar Association Center for Continuing Legal Education, National Institute, Doing Business worldwide (Feb. 8 – 10 1998) 7

³ Xiaoyang Zhang, *Settlement of Commercial Disputes with Foreign Elements involved in Arbitration: Legal Theories and Practice in the United kingdom* 12 fla. Journal of International Law 167,179 (1998)

- 2) Enforcement under the International Centre for the Settlement of Investment Disputes (ICSID) Convention of 1966
- 3) Enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards otherwise Known as New York Convention of 1958
- 4) Enforcement under Section 51 of the Arbitration and Conciliation Act of 2004.
- 5) Enforcement by Action at Common Law to enforce an International Award.

We are concerned with enforcement under the New York Convention

4. Convention on the Recognition and Enforcement of International Arbitration Award (The New York Convention)

Compared with the enforcement of domestic international arbitral awards, the enforcement of international arbitral awards is much more complex and is commonly regulated by international treaties.⁴ Historically, many International Organizations have attempted to ensure the enforceability of arbitral awards by creating International Treaties. Among them, the New York Convention is currently the most important International Treaty concerning the recognition and enforcement of international arbitration awards.⁵ To some degree, the enforcement of international arbitration awards means the actual enforcement of the New York Convention.⁶ However, this does not discount the importance of other multilateral Conventions such as the UNCITRAL Model Law and the Convention on the Settlement of Investment Disputes of 1965.⁷

As early as 1953, to rectify the deficiencies in the Geneva Treaties⁸ and to further facilitate the enforcement of international arbitral awards, the International Chamber of Commerce devised a draft of the New York Convention and submitted it to the United Nations Economic and Social Council. The New York Convention was discussed in the United Nations International Commercial Arbitration Conference in New York in May 1958, officially passed on May 10, 1958, and took effect on July 7, 1959.⁹ It is currently the most important Convention in relation to the recognition and enforcement of international arbitral awards and has been hailed as the ‘cornerstone of current international commercial arbitration’.¹⁰ Until August of 1998, one hundred and forty – five state or areas acceded to the New York Convention,¹¹ demonstrating the states’ satisfaction. The New York Convention stipulates that international arbitral awards shall be enforced by each contracting state ‘in accordance with the rules of procedure of the territory where the award is relied upon.’¹² The reasons for refusing to enforce international arbitral awards are expressly limited to five grounds under the Article v.¹³ The New York Convention serves to ensure the enforcement of arbitration agreements, thus freeing arbitration from the limitation of laws and regulations applied in the arbitration place, and to promote the enforcement of an arbitral award, whether commercial or not,¹⁴ on an international scale.¹⁵ We can safely say without the New York Convention, there is no international commercial arbitration. There are 3 types of reservations that countries may apply:

- i) Conventional Reservation:- some countries only enforce arbitration awards issued in a convention member state
- ii) Commercial Reservation:- some countries only enforce arbitration awards that are related to commercial transactions
- iii) Reciprocity Reservation:- some countries may choose not to limit the convention to only awards from other contracting states, but may however limit application to awards from non-contracting states such that they will only apply it to the extent to which such a non-contracting state grants reciprocal treatment.

States may make any or all of the above reservations. Because there are two similar issues conflated under the term ‘reciprocity’ it is important to determine which such reservation (or both) an enforcing state has made.

⁴ Hu Li, *Enforcement of the International Commercial Arbitration Award* 57 (1st edn 2000)

⁵ Micheal . J. Mustil, *Arbitration: History and background*, *Journal of International Law* 41 (1987)

⁶ Li Supra

⁷ Hereinafter ICSID Convention

⁸ The Geneva Convention consisted of the 1923 Geneva Protocol on Arbitration Clauses (Geneva Protocol) and the Geneva Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) Although the Geneva Convention was replaced by the New York Convention, it marked the beginning attempt to unify and liberalize international commercial arbitration, and created the “Fundamental Underpinnings” of the New York Convention.

⁹ Li Supra p3

¹⁰ Albert J. Van Den Berg, *The New York Convention of 1958* (1981)

¹¹ Li Supra

¹² The New York Convention, Art. iii

¹³ The New York Convention, Art. v

¹⁴ However, the New York Convention permits contracting states make “commercial reservation”.

¹⁵ while the New York Concentrating states make “reciprocity reservation”, It intends to fascinate the enforcement of arbitral award all over the world

Nigeria is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958. Hence, the Convention applies in Nigeria. Section 58 of the Arbitration and Conciliation Act, 1990 domesticated the Convention. Nigeria has a reciprocal obligation under the Convention to recognize and enforce arbitral award granted in other co-signatory states. The New York Convention was ratified by Nigeria on the 17th day of March 1970. The New York Convention Subsequently became part of Nigerian Domestic Law, 1988 through the promulgation of the Arbitration and Conciliation Act of 1988.¹⁶The Convention obliges the courts of Signatory States to recognize and enforce arbitration agreements and awards in the territory of other states. National courts are thus required to recognize and enforce foreign awards without reviewing the arbitrators' decision except in a few exceptional instances.¹⁷A party desiring assurance that an award will be enforceable under the convention must ensure that the arbitration proceedings take place and an award made in a convention state. Recognition or enforcement may be refused or the award set aside only if at least one of the exceptional grounds stipulated in the Convention exists.¹⁸

5. The Grounds for Refusal of Enforcement of the Award

The recognition or enforcement of the award made pursuant to this Convention may be refused at the instance of the party against whom it is sought to be enforced if that party is able to furnish sufficient proof satisfactory to the appropriate authority and in this case, the court that;

- (1) The parties to the agreement referred to in the Article II were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon under the law of the country where the award was made.¹⁹ Capacity to enter into arbitration agreement is co-extensive with the capacity to enter into contract under the law. A person who is *sui juris* can enter into arbitration agreement and where the person is an infant; his right to enter into arbitration agreement is limited just as in ordinary contract.
- (2) The award will not be enforced if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case.²⁰ In this regard, the party against whom the award is sought to be enforced will be raising a defence under fair hearing. All the parties to the proceedings are entitled to be notified in writing of the appointment of the arbitrator and this must be done within a reasonable time. The essence is to enable the parties raise objection against the appointment if they have any and also to make them prepare for the proceedings of the arbitration within a good time.²¹
- (3) It will also be a ground for refusal of enforcement if the award deals with matters not contemplated by, or falling within the terms of the submission to arbitration, or that it contains decision beyond the scope of the submission made to the arbitration tribunal provided always that where the decisions on what is submitted could be severed from what is not submitted, the court will sever the 'baptized' portion of the decision from what was submitted.²²
- (4) The composition of the arbitral tribunal was not in accordance with the agreement of the parties, or was not in accordance with the law of the country where the arbitration took place. The parties to the arbitration agreement have the right to stipulate in their agreement the qualification for anybody to serve on the arbitral tribunal, the number of arbitrators, and the procedure for appointing them.²³ Where the parties failed to agree as to these facts, the law of the place of arbitration shall be followed in appointing the arbitrators.
- (5) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made.²⁴ This implies that the award must not have been annulled in the country in which it was made. Where the award has been annulled, invariably it shall not be enforced by the courts in Nigeria.
- (6) The subject matter of the difference is not capable of settlement by arbitration under the law of that country.²⁵ It is not all subject matters that can be subject to arbitration proceedings. Only matters which can be settled by accord and satisfaction can be subject matter of arbitration. Criminal matters, for example, cannot be subject matter of arbitration as they are subject matter of litigation before a competent court and also as criminal matters are expected to be prosecuted by the state for the common good of the public.

¹⁶E Dikey 'Facts and Myths on the Enforcement of Arbitral Awards in Nigeria) <<http://www.cdr-news.com/categories/Nigeria/facts-and-Myths-on-the-enforcement-of-foreign-arbitral-awards-in-the-enforcement-of-foreign-arbitral-awards-in-Nigeria-201>> accessed on 21st may, 2014.

¹⁷ New York Convention Art. 1 (1)(3s)

¹⁸ Art. V (1)(a-e), (2) (a-b)

¹⁹ New York Convention Art. Iv (1) (a)

²⁰ New York Convention Art. Iv (1) (b)

²¹ G C Nwakoby, 'The Law and Practice of Commercial Arbitration in Nigeria (2nd Ed, Enugu: Snaap Press Ltd, 2004) p 235.

²² New York Convention Art. Iv (1) (c)

²³ New York Convention Art. Iv (1) (d)

²⁴New York Convention Art. Iv (1) (e)

²⁵ New York Convention Art. Iv (2) (a)

- (7) The recognition of the award would be contrary to the public policy of that country.²⁶ We have both domestic and international public policy and any of them could be a ground for this purpose.

The object and purpose of the New York Convention is to ensure that agreement to arbitrate and the resultant awards (Foreign Awards) at any rate are recognized and enforced in Nigeria and those awards made in Nigeria, are recognized and enforced in contracting states. The New York Convention of 1958 is regarded as the most important International Treaty relating to International Commercial Arbitration. It is therefore in essence applicable to international arbitration agreement rather to purely domestic arbitration agreements. This Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies to two sets of arbitral awards, namely;

- a) Arbitral awards made in the territory of a state other than where the recognition and enforcement of such awards are sought and arising out of differences between persons, whether physical or legal.
- b) Arbitral awards not considered domestic awards in the state where their recognition and enforcement are sought.²⁷

The 'term' awards as used in the provision of the Convention includes not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.²⁸ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards constitutes the Second Schedule to the Arbitration and Conciliation Act and the legislation incorporated it in its section 54.

Once the party seeking the recognition succeeds in fulfilling the conditions set out above, the matter is at an end. This is because the burden of proof under the Convention unlike under the Geneva Convention of 1927 is shifted from the person seeking the enforcement to the party against whom the enforcement is sought. In accordance with the provisions of Article IV of the Convention set out above, all that the party seeking the enforcement must do is to supply the arbitration agreement and the award. It is then up to the other party to prove the existence of one of the grounds for refusal of recognition or enforcement set out in Article V (1) of the Convention.

6. The place for Application for Recognition and Enforcement of International Arbitration Award

Application for the recognition or enforcement of an award is to be made to the High Court and by virtue of section 57 of the Act, 'court' means the High Court of a State, the High Court of the Federal Capital Territory Abuja, or the Federal High Court. By role of National Court in the recognition or enforcement of an arbitral awards is an indispensable one. Place of recognition and enforcement of award could be where the parties reside or where they have their business or assets.

7. Enforceability of International Commercial Arbitration Awards in Nigeria

The provision of section 51 of the Act²⁹ of Nigeria made international arbitration awards enforceable in Nigeria subject to the Provisions of section 32 of the same Act. It should be noted that a foreign award under this convention may be enforced by leave of court or Judge, and by application to court. A party seeking to enforce a foreign award pursuant to this convention shall at the time of filing his application for recognition and enforcement supply the appropriate court with the following:- (1) The duly authenticated original award or duly certified copy of it; (2) The original agreement referred to in Article 11 or a duly certified copy of it. Where the award sought to be enforced or the agreement is not made in an official language of the country in which the award is relied upon, the party seeking to enforce it must produce a translation of these documents (agreement and award) into such language certified as correct either by a diplomatic or consular agent of the country to which that belongs or in such other manner as may be sufficient proof of its correctness according to the law.³⁰

Owing to the principle of territorial sovereignty, an award made in one country cannot, in the absence of international agreement have any legal force in another. The attitude of the Nigeria courts has been to permit the successful party to bring his application or action in Nigeria on the international arbitration awards. The Nigerian courts have based their enforcement of the international arbitration awards solely upon the ground of comity (reciprocity). Section 51³¹ provides *inter alia* that: 'An arbitral award shall, irrespective of the country in which it is made, be recognized as binding and subject to this section and section 32 of this Act shall, upon application in writing to the court, be enforced by the court'. It must be mentioned that unlike the provision in the New York Convention where reciprocity of treatment between Nigeria Courts and the Superior Courts of the country where the award was made is required before an award could be enforced if it is an international award, section 51 of

²⁶ New York Convention Art. Iv (2) (b)

²⁷ New York Convention Art. 1 (1)

²⁸ New York Convention Art. 1 (2)

²⁹ Arbitration and Conciliation Act Cap A18 LFN, 2004

³⁰ New York Convention Art. Iv

³¹ Arbitration and Conciliation Act Cap A18 LFN, 2004

the Act failed to make provision for reciprocity of treatment between Nigerian courts and the Superior Courts of the country where the award was made.³²

It is worthy to note that enforcement pursuant to section 51 of the Act is made subject to section 32 of the Act. This is an inelegant drafting as it sees unreasonable to make the enforcement of international award subject to refusal under domestic provision in the same piece of legislation when there is a similar provision for the same within the international part of the same legislation. Section 32 of the Act which is within the domestic part is on the grounds for refusal of enforcement of domestic awards whereas section 52 is on grounds for refusal of enforcement of international awards. Why then was section 32 mentioned in section 51 instead of section 52?

Unfortunately too, section 52 of the Act provides thus,

Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award; the court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse to recognize or enforce an award ...³³

In accordance with section 52 of the Act which is based on Article V of the New York Convention and Article 36 of the UNCITRAL Model Law, any of the parties to the arbitration agreement may request the court before which the application is made to refuse the recognition and enforcement of the award. The application for refusal could be made on the grounds aforementioned in this work.³⁴ Another basis for enforcement of foreign awards in Nigeria is the issue of the 'Doctrine of Obligation' which unfortunately has not enjoyed general acceptance and there is not yet any legislation in Nigeria supporting it. This doctrine of Obligation can only be involved where the issue of reciprocity has been fully satisfied.

³² G C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd Ed, Enugu: Snaap Press Ltd, 2004) p 256

³³ Arbitration and Conciliation Act Cap A18 LFN, 2004, S.52 (2)

³⁴ *Ibid* p 6-8