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The Legal Analysis of the Enforcement of an Arbitral Award

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Abstract

The essence of the introduction of Arbitration will be defeated, if the successful party' s right of arbitral award is not recognized and not enforceable, in a circumstances wherein the unsuccessful party refused to comply with it. The enforcement of arbitral award in Nigeria has a time limitation which must be enforced within six years for an agreement which is not under seal and time starts to run from the date of the original cause of action and not from the date of making of an arbitral award. It is therefore necessary that parties to an agreement follow all the due process of entering into an agreement, to prevent unforeseen and unredeemable circumstances. This article will re-introduce everything about arbitral award, so that parties to an agreement can be more careful in their dealings. In this article, types of award, legal requirements of an award, enforcement of an arbitral award, procedure for the application and for leave, recognition and enforcement will be discussed.

Keywords: Arbitral Award; Arbitration; Arbitrator; Final; Decision; Court; Jurisdiction.

1. Introduction

An Award [1] is a final determination of a particular issue of claim in the arbitration. i.e. the final decision of the arbitrator. An arbitrator is a person who is chosen to settle a disagreement or a controversy between people or groups. Arbitration is a process of settling an argument or disagreement in which the people or groups on both sides present their opinions and ideas to a third person or group. The award encompasses the whole of the arbitral process. It is akin to a judgement in a court of Law which is pronounced after consideration and determination of the facts presented before the court and settles all the issues in disputes.

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Reference [2] there are various cases that have considered and examined the nature of arbitral awards. It is then useful to note that such awards are *Sui generics*, having their unique elements. For the purpose of clarity, a number of keys elements will be considered.

2. Elements of an Arbitral Award

2.1. Made in writing

It has not always been an essential feature of awards that they are made in writing, particularly in disputes that occurred within the commodity and trade businesses; it was not unlikely that the umpire would decide an outcome and inform both parties on the spot; however, modern arbitration practice does not contemplate on oral awards as clearly stated under section 5 (26), of Arbitration and Conciliation Act and this is for a very good reason. Cordially, the formalization of award is now such that rules prescribed their content (dates and so on) and each arbitrator has to give reasons for his or her decision. Whenever an arbitrator is unable to sign the award, reasons should be given for that inability and the fact of the inability must be shown on the face of the award.

2.2. Decision

An award is a decision that disposes of all issues submitted by the parties. Single arbitrators will often reflect on material law and arguments made to them during the course of arbitration. A panel, on the other hand, will have to approach its decisions in a more deliberative manner. The chairman generally seeks the viewers of the other panel members, when consensus is reached, a decision will emerge. However, for situations in which unanimity cannot be achieved, most modern laws provide for majority voting. It is not inconceivable that the panel may vote in three different ways. The award must be a meticulously prepared report containing a narrative of the dispute, a recital of the parties, contentions and the conclusions of the arbitrator showing how he or she came to the decision. The award is made by the arbitrator and contains his or her final decision which is binding and enforceable on the parties.

2.3. Made by the Arbitrator

The Jurisdiction to determine disputes is conferred by the parties on arbitrators and not third parties. Therefore, however, forcefully they may be the decisions of assessors, experts or surveyors relied upon by arbitrators but cannot be relied on as awards. In other words, an award is a decision delivered by the body designated by the parties for dispute resolution.

2.4. Final

Preliminary orders or directions are not final decisions and consequently cannot qualify as awards. An award must also be final in the sense that it is not provisional but final and binding and nothing remains to be done to make it so. It also means that the award should dispose of all the issues without leaving any of them for a third party to decide [3].

2.5. Binding and Enforceable

The requirement for a binding decision is a constant refrain in arbitration rules. Indeed, the point of an agreement to arbitrate is to bring about a result that binds the parties [4]. The parties expect to be given a determination that affects one party or both parties and this must be reflected in the award. Even an award that gives declaratory reliefs binds the parties, although it might not lend itself to immediate enforcement because it does not direct any particular conduct. Arbitrators, therefore, have a duty to ensure that their awards are binding and ultimately enforceable. This is emphasized by *particular 35* of the International Chamber of Commerce Rules which provides that:

''in all matters...the arbitral tribunal shall act in the spirit of these rules and shall make every effort to make sure that the award is enforceable at law.''

An award does not carry any element of sanction until a court of law breathes enforcement or sanction into it [5]. At the completion of the arbitration, an award is a toothless dog that cannot bite until a court of law gives it teeth. This has led some courts to conclude, as did the court in the case of ***Ofomata v Anoka & Ors*** (1974), 4 ECSLR 251 at 253 where the decision of arbitration lacks intrinsic or inherent force until pronounced upon by a competent judicial authority. A better approach was put forward by the Supreme Court in the case of ***Okechukwu V Etukokwu***, (1999), 8 NELR (pt 562) 513 at 529 - 530 in which the court held that an award is inherently binding. Section 31 (1) of ACA, LFN 2004, also provides that

''An arbitral award shall be recognized as binding and subject to this section and section 32 of the Act, shall upon application in writing to the court, be enforced by the court''

3. Types of Award

Award may be of several types as illustrated by the following:

3.1. Interim and Final Award

An Award is final if it determines all the outstanding issues in the arbitration. It is then final and binding being a complete decision on the matter dealt with in the arbitration. On the other hand, an interim Award may be made where the arbitrator in the course of the proceedings, determines matters which are susceptible to determination during the course of the proceedings and which once determined may save considerable time and money for all involved [6] Article 26 (2), of the arbitration rules, provide that: ''*the interim measures of protation taken by the tribunal may be established in the form of an interim award.*'' This is, however, a course which an arbitrator should embark upon only after careful consideration. Indeed, it has been suggested that it would be prudent for an arbitrator to follow the court practice of reserving interim awards for cases where the decision of the preliminary issue in one, will dispose of the case altogether.[6] An example of an interim award is an award on the jurisdiction.

3.2. Agreed Award

This is an award resulting from a settlement of the issues by the parties themselves just like consent judgement in litigation. Section 25 (1) of the Arbitration and Conciliation Act, LFN, 2004 provides that:

(a) If during the arbitral proceedings, the parties settle the disputes, the arbitral tribunal shall terminate the arbitral proceedings, and shall, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
(b) An award on agreed terms recorded under subsection (1) of this section shall:

(i) Be in accordance with the provisions of section 26 of this Act and state that it is such an award; and
(ii) Have the same status and effect as any other award on the merits of the case.

The arbitral tribunal may refuse to record the agreement if they have good reason to do so, for example, if the agreement is contrary to public policy, or otherwise unlawful or incapable of being enforced. Similarly, the tribunal may refuse where it suspects an ulterior motive [6]. Since the agreed Award has the same status, and effects as any other award on the merit, it is enforceable even though the tribunal has not actually made a decision but simply recorded agreed terms. An agreed award must state that it is an award of the tribunal although it need not state that it is an agreed award; The advantage of an agreed award duly recorded is that if the parties merely had an agreement, this is not enforcement without obtaining a court judgement. The status of such a bare agreement is not different from any other agreement on which court proceedings must be brought. But on agreement duly recorded as an award will be enforced as an award; Section 25(1) requires that the settlement of the parties shall be recorded in the form of an arbitral award on agreed terms and the Act went further by stating that it is such an award; If these requirements are not complied with, the purported agreed award will not enjoy the status and effect of an award. Thus, where an arbitrator merely records the settlement and the parties signed without more, without the tribunal stating that it is an award, it is submitted that this will not be an agreed award as conceived by the law [7].

3.3. Additional Award

Sometimes, an arbitral tribunal may be requested to make an additional award where, for example, evidence has been led in respect of a claim but no award was made. The making of such an additional award is now strictly regulated by statute. Section 28 (4) – (7) provides as follows:

(i) Unless otherwise agreed by the parties, a party may within thirty days of receipt of the award, request the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceedings but omitted in the award under sub-section 4.
(ii) If the tribunal considers any request made under subsection (4) of this section to be justified, it shall, within 60 days of the receipt of the request, make the additional award under sub-section 5.
(iii) The arbitral tribunal may, if it considers it necessary, extend the time limit within which it shall make an additional award under subsection (2) or (5) of this section as well as under sub-section 6.
(iv) The provision of section 26 of Arbitration Rules Act of this Act which relate to the form and contents of an award, shall apply to an additional award made under this section as well as under sub-section 7.

These provisions enable parties to ensure that the tribunal pronounces on all the issues before it and thus save them from having to start new proceedings in respect of such claims.

3.4. Convention Awards

Section 54 of the Act provides for the application of the convention on the recognition and enforcement of foreign Awards usually referred to as the New York Convention, 1958. The Convention is a set unit in the second schedule to the Act. Such foreign Awards, when governed by the Convention, are often referred to as *''Convention Awards.''* The convention applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such award is sought [8].

3.5. Interlocutory Award

Article 32 (1) of the Arbitration rules provides for the making of an interlocutory award. It states that *''in addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or partial awards.''* An interlocutory award is a decision on a procedural question; it is not a final decision and cannot be enforced as an award. An example is a procedural order made as to pleadings.

3.6. Partial Award

This is also provided for in Article 32 (1). In common countries such as Nigeria, such awards which are similar to interim Awards are used interchangeably, but in the civil law countries such as France, notably in Germany, a partial award is one which disposes of a part of a monetary, or other issues, in dispute leaving the rest to be dealt with subsequently. The partial award is final in respect of the issues so decided and may be enforced. It is different from an interlocutory award which is a procedural decision.

3.7. Default Award

Where the Respondent, without showing sufficient cause, fails to state his defence as required by the law, the arbitral tribunal will continue the proceedings to conclusion as provided under section 21(b) and make the award. Such an award is described as a default award; similarly, if any party fails to appear at the hearing or to produce documentary evidence, without showing sufficient cause, the arbitral tribunal may continue the proceedings and make an award. This also will be a default award. A party cannot say that he is not bound by the award if he resiled from the arbitration proceedings before the award was made.

4. Legal Requirements of An Award

Any award made by the arbitral tribunal must be in writing and signed by the arbitrators when the tribunal comprises of more than one Arbitrator, the signatories of a majority of its members suffice if the reason for the absence of any signature is stated [9]. The U.K. Arbitration Act, 1996, particularly section 52, sets out the following legal requirements for an award:

(i) The award must be in writing and signed by all of the arbitrators assenting to the award (dissenting arbitrators need not sign until the parties agree that they must)
(ii) The award must contain reasons for the award and state the seat of arbitration (the place where the arbitration took place).
(iii) The award must state the date on which it is made. This is important for the calculation of interest and determination of time limits.

A typical example of an award is drawn below [10]:

IN THE MATTER OF THE ARBITRATION LAW, LFN 2004

AND IN THE MANNER OF AN ARBITRATION

BETWEEN

ABC & CO. LTD CLAIMANT

AND

XYZ PLC RESPONDENT

AWARD

Recitals

(The background, preamble or some introductory material)

Description of the Parties

(Description are permitted, even advisable for better understanding of the award)

Agreement of Parties

(The agreement to arbitrate is the source of the arbitrator's jurisdiction. It must be plain to anyone who comes into contact with the award to see that on its face the award conforms to its sources of jurisdiction.)

Identify the arbitration clause

(The arbitration clause may or may not be treated separately from the above).

Notice of dispute or referral

(Being the initiation of proceedings and instrument of appointment of at least the arbitrator, the notice of arbitration is important for clarity and context.)

The Dispute

(As the parties have presented it)

Preliminary or Procedural orders and the meeting

(Restatement of time frames; adoption of rules; appointment of experts; evidential matters; types of statements to be exchanged; language; translations...)

Pleadings and statements exchange

(Details of exchange; pre-hearing review)

Admissions or issues settled

(Agreed bundles; agreements; abandonments; forbearances)

Hearing facts and issues in dispute

(Date and place, failure to attend representation of parties, sequential identification of witnesses, oral evidence or affirmation; inspection (including who was present); brief précis of submissions; opening and closing submission).

Findings, liability statement, decisions

(issues dealt with, common ground; undisputed facts; analysis; findings of fact; folding in such laws; application of law to facts; consideration of counterclaim and set; off rights; summary of decisions and reasons; effect of money paid either before commencement of or during arbitration).

Damages

(Consequential and/or contractual loss)

Interest

(Additional loss based on claim and counterclaim)

Costs

(possible recoverable costs; arbitrators fees; expenses charges of arbitral institutions; parties costs; costs to be paid in any event; limitation of recoverable costs; invoking of security for costs; effect of rejection of an offer of settlement; interest on unpaid costs).

ACCORDINGLY AND IN FULL AND FINAL SETTLEMENT OF THE DISPUTE HEREIN BETWEEN THE PARTIES WE MAKE AND PUBLISH THIS FINAL AWARD AS FOLLOWS:

1. The claimant is awarded under the first three heads of damage the sum of ₦14,000.00 together with interest thereon in the sum of ₦1,200,440.
2. The Respondent pays the above (damages plus interest) to the claimant within 28 days of the issue of this award.
3. The Claimant is awarded under the fourth head of damages, the sum of ₦3,112,000 together with interest thereon in the sum of ₦500,000.00
4. The Respondent pays the above sum of (fourth head of damages plus interest within 28 days of the issue of this award).
5. The Respondent pays the claimant interest of 6% on the above damages from the date of the award until payment.
6. All orders as to costs are reserved.
7. The Respondent makes its representation as to cost in writing within 14 days and the claimant makes its representation as to cost, 14 days thereafter.

RESERVED MATTERS

(Matters left to a subsequent award such as unassessed or claimed costs)

MADE AND PUBLIHED IN LAGOS, NIGERIA, BEING THE SEAT OF THIS ARBITRATION

_____

Signed

ARBITRATOR – (CHAIRPERSON)

ARBITRATOR

ARBITRATOR

(Date)

5. Enforcement of an Arbitral Award

Ideally, at the end of the arbitration, one or more of the parties will emerge successfully. Indeed, a good award will categorically state the steps to be taken, including payments to be made. It will establish liability and make a consequential order that follows the decision. An award, though it is like a judgement in that they are both adjudicatory, cannot be executed like the judgement of a court. It does not mean, of course, that a party cannot obey the direction in an award. The party against whom the award is made may voluntarily obey the order and comply since the award is binding as between the parties and their agents. Every arbitral award dully made is to

be recognized as binding and is expected to be complied with. It is when, it is not comply with, that the question of enforcement by the winning party arises [11]. While an award may be recognized without being enforced, e.g where it is successfully pleaded as *res judicata*, an award can only be enforced, e.g recognized as binding. In this connection, section 31 (1) ACA provide that

''An arbitral award shall be recognized as binding and subject to this section and section 32... Shall upon application in writing to the court be enforced by the court.''

The provisions for recognition and enforcement of award are contained in sections 31 and 51 of the Arbitration and Conciliation Act. While section 31 applies to domestic arbitral awards, section 51 applies to international arbitral awards. Section 31 (3) is the traditional provision for summary enforcement. While Section 51, of the Act, is taken from Article 35 of the UNCITRAL model law on International Arbitration. The provisions of section 31 (1) and (2) on the one hand and of section 31 (3) on the other hand are designed to perform the same function. There are two methods of enforcement of award available in the country, namely Summary Enforcement of Award and Enforcement by Action. For the purpose of this paper, I shall consider the domestic awards and then the foreign awards

5.1. Enforcement of Domestic Awards

(1) Summary enforcement of an award under section 31. Section 31 of the Arbitration and Conciliation Act provides as follows:

(i) An Arbitral Award shall be recognised 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,
(ii) The party relying on an award or applying for its enforcement shall supply:

(a) The duly authenticated original award or a duly certified copy thereof;
(b) The original arbitration agreement or a duly certified copy thereof.

(iii) An award may by leave of the court or a judge be enforced in the same manner as a judgement or order to the same effect.

However, subsections (1) and (3) of this section are designed for the same purpose and so appear to be, an unnecessary duplication. They both require an application to the court for enforcement. This is the common method of enforcing awards including agreed awards which order section 26 of the Act as deemed to be awarded.

5.2. Procedure for Application and for Leave

The application in each case is made ex parte, by originating summons, but the court may order that notice be given. In this connection, it is important to note the decision of the **Supreme Court in *Kotoye V Central Bank of Nigeria*** (1989), 1 NWLR (Pt 98) pp.419 where it was stated that an application to the Court in a civil matter

must always be subject to the provisions of a fair hearing under section 33 (1) of the 1999 constitution (as amended). Thus, if the court is of the view that the interest of the respondent is involved to the extent that an order made against him is ex parte without giving him a hearing before the decision is made, then it will offend his constitutional right of fair hearing, and then the court will order the other party to be served with the application. The application is supported by an affidavit which will exhibit particulars prescribed by section 31 (2) and 51 (2); namely;

(a) The duly authenticated original award or duly certified copy thereof; and
(b) The original arbitration agreement or a duly certified copy thereof.
(c) Where the award or arbitration agreement is not in the English language, a certified translation in English-language.

The applicant must also make full disclosure of any matters which he knows may affect the granting of the leave to enforce the award [12]. The court will normally grant the leave or application unless it has reason under section 32 to refuse the enforcement of the award. Section 31 (3) of the Act provides that if leave is given, it is usually given on terms that the award may be enforced in the same manner as a judgement or order of the court to the same effect and that this means, that all the methods of enforcing a judgement of the court are then available to enforce the award including an injunction.

5.3. Objection to Enforcement Of An Award

Section 32 of the Arbitration and Conciliation Act provides that:

''Any of the parties to an arbitration agreement may request the court to refuse recognition or enforce of the award''

A person who wishes to object to the recognition or enforcement of the award can apply to the court at any time after the award is made, especially as the application and order for enforcement may be made *ex parte.* As will be noted, section 32 does not provide any guide to the court as to what to take into account in refusing recognition or enforcement. It is noteworthy that although no guidance is given in this section on the refusal of recognition and enforcement of domestic awards, section 52 sets down a long list of grounds for refusal of recognition or enforcement since no specific grounds are set out in section 32, then the court should be free to use its discretion which must be judicially and judiciously exercised. With regard to section 26 of the repealed English Arbitration Act, 1950 which is in *pari mathia* with our section 31 (3), it has been suggested that the main defence when the successful party brings an action on the award or applies under the summary procedure under section 26 is that the arbitrator had no jurisdiction to make the award, or to make some part of it.

Other grounds that may be taken into consideration are as follows:

(1) That there was no valid submission; so that the entire arbitration or some part of it was a nullity.
(2) That the arbitrator was disqualified in that he did not possess such membership of a specific association, or

(3) That the award, though valid when made, has leased because it has subsequently been discharged, e.g. by a subsequent agreement between the parties. The grounds listed in section 51 can also be of a guide to the court, as to whether or not to refuse recognition or enforcement under section 31.

In law and practice of Arbitration and Conciliation in Nigeria, the learned authors listed eight cases when an award will not be enforced as a judgement pursuant to section 26 of the Act. These are;

(a) When the arbitration agreement is by parole;
(b) When the award is merely declaratory;
(c) Where there is real ground for doubting the validity of the award;
(d) Where the award is lacking in clarity;
(e) In some cases where the award is a foreign awards;
(f) Where the court cannot give judgement to the same effect;
(g) Where the ward is made in foreign currency and;
(h) Where the award is made under a statute which expressly provides how it is to be enforced.

5.4. Enforcement by Action on The Award

The basis of this action has been explained as follows:

''Parties to an arbitration agreement impliedly agree to perform a valid award. If the award is not performed, the successful claimant can proceed by action in the ordinary courts for breach of this implied promise and obtain a judgement for the amount of the award, or damages on failure to perform the award. It may also, in appropriate cases, decree specific performance of the award, or make a declaration that the award is valid, or as to its construction and effect''

Although the enforcement by summary application is by the commonest method of enforcement and is intended to provide a quicker method than that of action, yet the method of action on the award remains available in an appropriate case, especially when the summary method is for any reason not available. Thus, on the being that the arbitration agreement contains an implied obligation to perform the resulting award, any failure to do so is a breach of the arbitral agreement in page 303, and the successful party would be entitled to bring an action in respect of such breach and to obtain a judgement in the terms of the award this is a common-law action and it has also been suggested that the essential elements for the claimant to plead and prove are:

(a) An arbitration agreement;
(b) That a dispute has arisen which falls within the arbitration agreement;
(c) The appointment of an arbitral tribunal in accordance with the agreement
(d) The making of the award pursuant to the arbitration agreement; and
(e) Failure of Respondent to perform the award.

5.5. Defences to an Action On The Award

The court has the discretion to accept or reject a defence against the action. Any defence that shows that there is a fundamental breach of natural justice or that shows that it will be unjust to enforce the award will be good ground for the court to refuse the enforcement. Thus, it will be good defence to the action to enforce an award that the award is void for failure to comply with some formal or substantial requirement, or that it was made in excess of jurisdiction, or that it has been set or remitted or that the authority of the arbitrator was validly revoked before he made his award.

5.6. Enforcement of Foreign Award

Before the Arbitration and Conciliation Act, the two methods of enforcing foreign awards were by registration under the foreign judgements (reciprocal enforcement) Act and under the New York Convention, 1958. Section 2 and 4 of the Foreign judgements (Reciprocal Enforcement) Act, provides in effect, that a foreign award may be registered in the High court at any time within six years after the date of the award, if it has not been wholly satisfied and if at the date of the application for registration, it could be enforced by the execution in the country of the award. With the Act, there is no need for registration, for section 51, makes it clear that such an award shall be recognized as binding and shall be enforced by the court on an application under section 51.

Section 51, of the Arbitration and Conciliation Act, provides as follows:

(1) An arbitration 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 upon application in writing to the court be enforced by the court.
(2) The party relying on an award or applying for it enforcement shall supply:

(a) The duly authenticated original award or a duly certified copy thereof; and
(b) The original arbitration agreement or a duly certified copy thereon;
(c) Where the award or arbitration agreement is not made in English-language a duly certified translation thereof into English-language.

5.7. Procedure for Enforcement

The procedure for enforcement is the same as for a domestic award in section 31, i.e. by a motion *ex parte* supported by an affidavit which *inter alia* exhibits the arbitration agreement and the award or certified true copy of each under Arbitration and Conciliation Acts, section 51 (2) (a) & (b) and a translation into English where appropriate under section 51 (2) (c).

6. Grounds for Refusing Recognition or Enforcement

Section 52 (1) of the Act provides that;

''Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award''

This section then proceeds to set down in details the grounds on which the court may refuse to recognize or enforce an award.

''where recognition or enforcement of an award is sought, or where an application for refusal of recognition or enforcement thereof is brought; and this is irrespective of the country in which the award is made under Section 52 (2)*''* based on the following;

(1) Incapacity of a party to the arbitration agreement. This arises if, under the law governing the agreement, one of the parties such as a corporation has no capacity to enter into such agreement. This must, of course, be proved to the satisfaction of the court and foreign expert evidence may be required.
(2) Arbitration agreement not valid. Where the parties had indicated in their agreement the applicable law, then the agreement must be valid according to that law. If no law is indicated, the arbitration agreement must be valid under the law of the country where the award was made. Failing any of these, the award can be refused recognition or enforcement.
(3) Absence of proper notice of appointment of arbitrators or of the proceedings. The failure to give proper notice of the appointment of an arbitrator or of the arbitral proceedings or any default that otherwise prevents a person from being able to present his case will be grounded for the refusal of recognition or enforcement.
(4) Award dealing with disputes not contemplated by parties. Here, the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration under S. 52 (2) (a) (iv). The recognition or enforcement will be refused because the arbitrator has no power to make such an award.
(5) Award beyond the jurisdiction of the tribunal. Recognition and enforcement will be refused if the award contains decisions on matters which are beyond the scope of the submission to the arbitration. If, however, the decision on matters submitted to arbitration can be separated from those not submitted to arbitration may be recognized or enforced.
(6) Composition of arbitral tribunal or procedure contrary to agreement of parties. If the composition of the arbitral tribunal, or the tribunal procedure was not in accordance with the agreement of the parties, then recognition or enforcement will be refused under Section 52 (2) (a) (vii).
(7) Composition of the tribunal or procedure contrary to law. Where there is no agreement between the parties as to the composition of the tribunal or as to the arbitral procedure, then the composition of the tribunal and the arbitral procedure must be in accordance with the law of the country where the arbitration took place, otherwise, recognition or enforcement may be refused.
(8) Award not binding, set aside or suspended. Recognition or enforcement of an award may be refused if it is proved that the award has not yet become binding on the parties or has been set aside under Section 52 (2) (a) (viii) or suspended by a court of the country in which or under the law of which the award was made. Furthermore, section 52 (3) provides that were an application for the recognition or enforcement of an award has been made to a court under this paragraph, the court before which the recognition or enforcement is sought may; if it considers it proper, postpone its decision and may on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(9) Subject matter not arbitrable i.e. that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria. For example, disputes arising from a criminal conspiracy cannot be settled by arbitration under the Nigeria law. If an award is made in respect of such a matter, it will not be recognized or enforced.

(10) Against public policy. Enforcement or recognition may be refused if such recognition or enforcement will be contrary to the public policy of Nigeria. For example, an award, on an arbitration agreement to resolve the difference in a narcotic drug transaction will be clearly illegal and contrary to public policy.

6.1. Recognition and Enforcement Under The New York Convention

This is the convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, and it is generally referred to as the New York Convention, 1958.[13] Nigeria is a signatory to the convention having acceded to it on 17th March, 1970. The Convention has XVI articles. According to article 1.1 of the convention which state that:

''The convention shall apply to the recognition and enforcement of territorial awards made in the territory of a state other than the state where the recognition or enforcement of such awards are sought and arising out of the difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought under Arbitration and Conciliation Act, Section 54 (1) (a) for reciprocity provision.*''*

For the avoidance of doubt, Article 1.2 provides that the term ''Arbitral Awards'' includes not only awards made by the arbitrator appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

Article 1.3 provides that

''in signing or ratifying or acceding to the convention, a state may, on the basis of reciprocity declare that it will apply the convention to the recognition and enforcement of awards made only in the territory of another contracting state.''

It is now reflected in section 54 of the Act that awards made in a country not a party to the Convention or giving reciprocal treatment to Nigerian awards, cannot enjoy in Nigeria the recognition and enforcement provided under the convention. However, each award may be recognized and enforced under section 51 of the Arbitration and Conciliation Act.

6.2. Refusal of Recognition and Enforcement Under The New York Convention

The recognition and enforcement of an award may be refused at the request of the party against whom it is involved, if that party established before the court any of the grounds for such refusal as set out in Article v. The grounds for refusal are *inpari* material to those required under section 51 of the Act and in the ones contained in Article V, 1 (a) to (e) and v. 2 (a) and (b) as follows:

(i) 1 (a) incapacity of one of the parties or invalidity of the agreement under the applicable law.

(ii) 1 (b) Absence of proper notice of appointment of arbitrators or the proceedings or otherwise precluded the party from presenting his case.

(iii) 1 (c) Award dealing with differences not contemplated, or those beyond the scope of the submission.

(iv) 1(d) Composition of an arbitral tribunal, or the arbitral proceeding not in accordance with the agreement.

(v) 1 (e) Award not yet binding on parties, or which has been sustainable or suspended.

(vi) 2 (a) The subject matter of the difference is not arbitration under the laws of the country where recognition or enforcement is sought.

(vii) 2 (b) Recognition or enforcement will be contrary to public policy.

The English position is that the making of an arbitral award gives rise to a new cause of action immediately the unsuccessful party fails to comply with the terms of the award. It is expected that the courts in Nigeria will follow the decisions of the English Court in ***Agromet*** **and** ***IBSSL*** cases which represent the correct position of the law. Foreign arbitral award are enforceable in Nigeria pursuant to the provisions of the Arbitration and Conciliation Act Cap A18, New York Convention, ICSID Convention, and Foreign Judgment (Reciprocal Enforcement) Act Cap F 35 Laws of the Federation of Nigeria, 2004. More support for enforcement of foreign awards was given to Nigeria's efforts at creating an enabling environment for the enforcement of foreign arbitral awards when Nigeria became a party to the New York Convention in 1970; which was domesticated in Nigeria in 1988 through a local legislation. The New York Convention appears to be the most widely accepted piece of legislation in the area of enforcement of foreign arbitral awards; globally. A progressive development of the laws on enforcement of foreign arbitral awards in Nigeria can be gleaned from the early Common Law position which required a party seeking enforcement to sue upon the award. This would entail proof of the existence of the arbitration agreement, the proper conduct of the arbitration in accordance with the agreement and the validity of the award. It appears that in order to ameliorate the hardship on parties seeking enforcement under the Common Law, the Reciprocal Enforcement of Judgment Act 1922 was promulgated. This Act improved on the Common Law procedure of suing upon the award by prescribing simple registration of the award in the High Court by the successful party seeking enforcement. However, it is of limited application, in the sense that it is restricted to reciprocal enforcement to the United Kingdom and other parts of Her Majesty's Dominions and Territories under Her Majesty's protection. The limited application of the Reciprocal Enforcement of Judgments Act 1922 appears to have triggered the promulgation of Foreign Judgments (Reciprocal Enforcement) Act 1961 which extended the benefit of enforcement to countries other than the United Kingdom and its Dominions and territories (now commonwealth countries); as well as extended the limitation period of enforcement from 12 months to six years. Due to the compelling influence of the UNCITRAL Model Law 1985 and UNCITRAL Model Rules 1975 in the field of international arbitration, Nigeria adapted both legislations in 1988.The result being that Nigeria created another window in the enforcement of foreign arbitral awards in the Arbitration and Conciliation Act 1988. The 1988 Act allows for the enforcement of foreign arbitral awards in Nigeria, irrespective of the country the award was made; because the enforcement of awards under the Act 1988 does not

depend on reciprocity.

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