

Enforcement of foreign arbitral awards in Kenya

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1. Introduction

International and domestic arbitration is subject to the provisions of the Arbitration Act.¹ Recognition and enforcement of foreign arbitral awards is also governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).² The Act has domesticated the provisions of the New York Convention, especially with instances when a court may decline to recognize and enforce an award.³ Each contracting State is required to recognize foreign awards as binding and enforce them in accordance with the domestic rules and procedure as long as it meets the conditions set out in the Convention.⁴

There are requirements that a foreign arbitral award has to meet for it to be recognized in a Kenyan Court.⁵ These are:

- a) It has to be in writing and signed by the Arbitral Tribunal;
- b) Reasoned;⁶
- c) Must state the juridical seat of the arbitration;
- d) Dated;
- e) Published i.e. issued to the parties

2. Procedure for Lodging an Application for Enforcement of an Arbitral Award

a) Domestic Award

It is fully governed by the Arbitration Act of 1995 and the Arbitration Rules of 1997. A successful party is required to approach the High Court's Admiralty and Commercial Division for enforcement of an award by way of a miscellaneous application.⁷ The party is required to attach a

¹ Section 2, Arbitration Act, Laws of Kenya (No. 4 of 1995).

² The Convention was passed by the United Nations General Assembly on 10th June, 1958. Kenya ratified the treaty on 10th June, 1989 with the reservation that it would only enforce judgments of reciprocating States.

³ Supra note 1, Section 32.

⁴ These conditions are set out under Article 4 of the Convention, as domesticated through Section 36 (2) of the Arbitration Act.

⁵ Supra note 1, Section 36 (2). This applies to awards made by permanent arbitral bodies to which the countries which are parties to the Convention have submitted.

⁶ Unless it is exempted under Section 31 of the Act. The provision provides for consents reached by parties.

⁷ Supra note 3, Section 27.

certified copy of the signed award. If there is no challenge, the court may proceed to adopt the award and enforce as its own decision.

A party may oppose such application by citing any grounds as set out under Section 37 of the Act. These grounds are:

- a) Incapacitation of either party at the time of entering the agreement;
- b) Under the substantial law applicable to the contract, the agreement was invalid;
- c) Non-adherence to the rules of natural justice (fair hearing) at the time of the hearing;
- d) The Arbitral tribunal's lack of jurisdiction on certain matters addressed in the award;
- e) Unprocedural appointment of the arbitral tribunal
- f) Award has been set aside or suspended by a court or authority at the place where it was made;
- g) If it is discovered that the award was procured through bribery, undue influence, corruption in the procurement of the award;
- h) The award is against Kenyan public policy;
- i) The subject matter is incapable of being arbitrated in Kenya.

It is imperative to note that it is only on these express instances that a court may set aside an arbitral award. This reduces the influence of courts in arbitration proceedings as courts are not allowed to vet the merits of arbitral awards.

b) Foreign Arbitral Awards

The enforcement and recognition of foreign arbitral awards is governed by the Foreign Judgments (Reciprocal Enforcement) Act⁸ and the New York Convention. The Act applies to judgments which include arbitral awards made by foreign courts and in force in the country where they were made, as if they were made by courts of the same status as the Kenyan ones.⁹

⁸ Cap. 43, Laws of Kenya.

⁹ Supra note 7, Section 3.

A successful party may apply to the High Court for recognition and enforcement of an award. This should be done within six years from the date of that judgment, or in the case of an appeal, six years from the date of the last judgment.¹⁰

*In Tanzania National Roads Agency v Kundan Singh Construction Limited (2013) eKLR*¹¹

the applicant entered into an agreement with the respondent for upgrading of several sections of road network in Tanzania. The agreement provided that disputes arising from performance of the obligations of the contract could be resolved through the Dispute Resolution Board. Appeals would lie with the Stockholm Chamber of Commerce (SCC) for Arbitration and the law governing contract would be Tanzanian contract law. A dispute arose and it was referred to the DRB, appealed at the SCC and all through, the outcome was in favour of the applicant. The applicant sought to enforce the award in Kenya. The Kenyan High Court granted the respondent's application to have the recognition and enforcement of the award set aside on grounds that SCC relied on English contract law instead of Tanzanian contract law, which could change the bearing of the determination.

3. Enforcement of arbitral awards in the East African Community

The Treaty for the Establishment of the East African Community gives the East African Court of Justice the jurisdiction to be an arbiter in instances where the parties have ceded to the court.¹² As such, the parties will have been deemed to have the award enforced expeditiously and shall be subject to the laws of the country in which such enforcement is sought.¹³ Further, party states have undertaken to refrain from acts that would undermine the enforcement of an arbitral award issued from bodies or authorities from other party states.¹⁴

¹⁰ Supra note 7, Section 5.

¹¹ Misc. Civil Application No. 171 of 2012.

¹² Treaty for the Establishment of the East African Community, Article 32.

¹³ Rule 36 of the East African Court of Justice Arbitration Rules, 2012.

¹⁴ Supra note 13, Article 34.

4. The Role of the Nairobi Centre for International Arbitration in the Enforcement of Foreign Awards in Kenya

The preamble to the establishing Statute provides that it is ‘*An Act of Parliament to provide for the establishment of regional center for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes.*’¹⁵ In the context of the enforcement of foreign arbitral awards, Section 5 mandates the Centre with:

- a) cooperating with other regional and international Centers and international bodies;
- b) provide advice and assistance for the enforcement and translation of arbitral awards; and
- c) provide procedural and technical advice to disputants.

It is on the strength of this provision that the Centre continues to maintain cordial relations with the China Africa Joint Arbitration Centre (CAJAC), holding the status of CAJAC-Nairobi.¹⁶ CAJAC is a multilateral partnership between Chinese and African arbitral Centers to administer disputes involving Chinese and African parties.¹⁷ This was necessitated by the increased trade between China and African countries in the last three decades.¹⁸

5. Conclusion

Enforcement of awards remains a sticky patch in international commercial arbitration. This is out of the appreciation of the different legal systems and applicable laws in various jurisdictions. Though international instruments have made a commendable attempt to alleviate the challenges, some are still outstanding.

While not ceding the country’s sovereignty, it is upon bodies such as the Centre to provide amiable environment for the enforcement of such awards. It is also upon stakeholders such as the Judiciary to create a friendly environment and appreciation for arbitration as this is the first port of call for applications for enforcement of foreign awards.

¹⁵ Preamble to the Nairobi Centre for International Arbitration Act (No. 26 of 2013).

¹⁶ I-Arb Africa, *Enforcement of Foreign Awards*, available on <https://www.iarbafrica.com/en/resources/enforcement> (accessed on 22nd June 2023).

¹⁷ Ibid.

¹⁸ Prince Kanokanga, *The China Africa Joint Arbitration Centre (CAJAC)*, *The Pretoria Law Review*, Issue No. 16 (2022) at page 145.

Case Law

1. *Tanzania National Roads Agency v Kundan Singh Construction Limited (2013) eKLR*
2. *Christ for All Nationals v Apollo Insurance Co. Limited (2002) 2 EA 366*
3. *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited (2017) eKLR*
4. *Cortec Mining Limited and Stirling Capital Limited v Republic of Kenya*
5. *CMC Holdings & Another v Jaguar Land Rover Exports Limited*