

Recognition & Enforcement of Arbitral Awards

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Content

- History
- Status & Approach of New York Convention (NYC)
- Precis
- Types of Awards
- Recognition
- Enforcement & Challenge
- Enforcement (Procedure)
- Enforcement Checklist
- Concluding Comments



History

Customary Law Arbitration:

'... parties to a dispute, even if through or by means of the intervention or persuasion of some third party or parties, in the ultimate result have themselves proprio motu (of their own accord or volition) not only agreed to refer their dispute to a person or persons agreed on by them to investigate the merits thereof fairly and impartially from their respective points of view and give a decision thereon, but also undertaken to abide by or accept the decision.'

Tanor v Dapomah [1960] GLR 241 per Adumoah-Bossman J (as he then was)

Customary Arbitration practised from time immemorial

Memorandum of the Attorney-General & Minister of Justice to the Alternative Dispute Resolution Bill (4 May 2009) refers to 'customary law arbitration... which we have been practising for years.'

Arbitration Ordinance, 1928 (Cap 16)

Reference and submission of disputes to local arbitration
Recognition of foreign arbitral matters covered by the **1923 Geneva Protocol on Arbitration Clauses**

Arbitration (Foreign Awards) Ordinance, 1928 (Cap 17)

Incorporated into municipal law, the provisions of the **1927 Geneva Convention on the Execution of Foreign Arbitral Awards**

Arbitration Act, 1961 (Act 38)

- Regulate the settlement of differences by arbitration
- Provided for the enforcement of awards, including foreign awards
- Incorporated 1958 New York Convention (NYC) as schedule
- **7 October 1961:** came into force in Ghana
- **9 April 1968:** formal accession to NYC
- **8 July 1968:** Came into force at international law with respect to Ghana by virtue of Article XII(2)

- **Note:** 1961 Act repealed both Cap 16 and Cap 17
- **Meaning:** 1923 Geneva Protocol and 1927 General Convention ceased to have effect within Ghana.
- **However, see Article VII(2) of the NYC:**
 - The Protocol and Convention '*shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.*'
- **When did Ghana become bound by NYC?**
 - 7 October 1961?
 - 8 July 1968?

Alternative Dispute Resolution Act, 2010 (Act 798)

- **PREAMBLE:** AN ACT to provide for the settlement of disputes by arbitration, mediation and customary arbitration, to establish an Alternative Dispute Resolution Centre and to provide for related matters.
- **DATE OF ASSENT:** 31 May, 2010.
- ADRA repealed 1961 Act

Status & Approach to NYC

Just like the 1961 Act, ADRA confirms parliament's ratification and the incorporation of NYC into Ghana law, without any reservations.

Interbeton v Kodua [2003–2005] 2 GLR 244 CA

A court is enjoined by law to resort to NYC, a schedule to the statute, because it is a '*part of our laws*.'

Republic v High Court (Commercial Division, Accra), ex parte Attorney-General (NML Capital Ltd and Republic of Argentina – Interested Parties) [2013–2014] 2 SCGLR 990

‘Treaties, even when... ratified by Parliament, do not alter municipal law until they are incorporated in Ghanaian law by appropriate legislation... [This] is reflective of the dualist stance of commonwealth common law courts and backed by a long string of authorities.’

Précis

‘Arbitral awards are not self-enforcing, and unless the losing party pays the award-debt voluntarily, the victorious party has to take enforcement steps in domestic courts, a process the parties might have sought to avoid by entering into the arbitration agreement in the first place.’

A A Ankomah: Recognition and Enforcement of Arbitral Awards: A Ghanaian and Nigerian Perspective, The Litmus Test: Challenges to Awards and Enforcement of Awards in Africa, The International Bureau of the Permanent Court of Arbitration (ed) (Regent Press Co, 2014) 153

Types of Awards

Ghana recognises both **LOCAL** and **FOREIGN** arbitral awards.

No reservations with respect to contractual or commercial disputes.

In contractual disputes, ‘the arbitrator shall apply the terms of the contract taking and consider the usages of the trade to which the contract relates.’

– **ADRA, s 48(4), Rules for the Award**

Balkan Energy (Ghana) Ltd v Republic of Ghana (PCA Case No. 2010-7) damages awarded for wrongful arrest of Claimant’s employee because it was ‘*interference with the ordinary conduct of the Claimants’ business.*’

ADRA does not apply to matters of

- (a) the national or public interest;
- (b) the environment;
- (c) the enforcement and interpretation of the Constitution; and
- (d) any other matter that by law cannot be settled by an alternative dispute resolution method.

Arguably, an Award arising out of any of the above cannot be enforced in Ghana under the provisions of the ADRA.

Status of foreign 'interim Awards,' eg, anti-suit injunctions?
Enforceable?

Recognition

NYC, Article III – ‘Each Contracting State shall **recognise** arbitral Awards as binding and **enforce** them in accordance with the rules of procedure of the territory where the Award is relied upon...’

Recognition: formal acknowledgement of the existence, validity, legal force and binding effect of an award.

Enforcement: the carrying out or execution of the award using available legal methods.

Awards are 'recognised as binding,' and upon applying to the High Court are enforced as if it was the decision-making court.

Where leave is so given, judgment may be entered in terms of the Award.

Strojexport v Edward Nassar & Co (Motors) Ltd [1965]

GLR 591 (High Court): an Award from a state that was non-reciprocal at the time the Award was given, will be recognised and enforced if at the time of enforcement, that state has become a reciprocal state.

Enforcement & Challenge (Domestic Awards)

ADRA, sections 57 & 58:

- leave of the High Court
- enforced as a judgment of the Court
- terms of award may be entered as a judgment of the Court
- leave will not be granted if arbitrator lacked 'substantive jurisdiction' to make the award, eg were conditions precedent to a referral observed? Was the arbitration covered by the arbitration agreement?

Court '**may**' (ie, has the power to) set aside if:

- party under disability/incapacity
- law applicable to the arbitration agreement not valid
- applicant not given notice of appointment of arbitrator or proceedings
- Applicant not able to present case
- award (or a part of it) dealt with a dispute either not within the scope of arbitration agreement or outside the agreement
- failure to conform to procedure agreed to by parties
- arbitrator had undisclosed conflict of interest

Court '**shall**' (ie, is required to) set an award aside if:

- subject-matter of the dispute not capable of being settled by arbitration (arbitrability?)
- award induced by fraud or corruption.

Application to set an award aside filed within 3 months of when applicant received the award, unless the Court orders otherwise, for justifiable cause.

OVERRIDING TEST: court to make orders that are '***just in the circumstances of the case.***'

Enforcement & Challenge (Foreign Awards)

ADRA, section 59: 3 conditions for mandatory (**'shall'**) enforcement

- award made by competent authority under the *lex fori*
- award made
 - in country with which Ghana has reciprocity,
 - under the NYC, **or**
 - under any other international convention on arbitration ratified by Parliament
- party seeking enforcement to produce to the Court
 - original award or duly authenticated copy with certified true translation in English where necessary, and
 - agreement pursuant to which award was made or duly authenticated copy

No enforcement where:

- appeal pending against award in any court at the seat of arbitration
- award annulled at the seat of arbitration. Note annulment, not pending application; but if NYC award, Court may adjourn on grounds of pending annulment proceedings and may order security (Article VI)
- party against whom award is invoked, not given sufficient notice to present case.

- party lacking legal capacity not properly represented in proceedings
- award does not deal with issues submitted to arbitration or contains a decision beyond scope of matters submitted

NOTE: A general right of appeal from the [High] Court lies to the Court of Appeal from an order granting or refusing enforcement.

Enforcement (Procedure)

1. Writ of Summons?

‘Subject to any existing enactment to the contrary,’ all civil proceedings to be commenced with a Writ of Summons

CI 47, order 2 rule 2

2. **Originating Notice of Motion?**

- Specialised process, generally adopted where a statute provides for an application to be made to the court, but does not provide for the manner in which it is to be made or there are no rules of Court governing the procedure.
- It is prepared like an ordinary motion in a pending action and must ask for the appropriate relief.
- It is moved by counsel, as in the case of any other motion, and evidence is normally given by affidavit.

CI 47 Order 19 Rule 1(2)

2. Originating Notice of Motion?

Examples:

- Judicial Review (CI 47 order 55)
- Habeas Corpus (CI 47 order 56)
- Companies Act, 2019 (Act 992) applications

3. Petitions

- Specialised process, written application in the nature of a pleading, setting the case and reliefs sought in detail.
- No prescribed forms; form is in fact well settled by long usage.

Examples:

- Divorce (CI 47, order 65 and Matrimonial Causes Act, 1971 (Act 367))
- Official winding up of companies (Corporate Insolvency and Restructuring Act, 2020 (Act 1015))

People's Popular Party v Attorney-General [1971] 1 GLR 138

HELD: when a statute provides for an application to the court without specifying the form in which it is to be made and the normal rules of court do not expressly provide for any special procedure, such an application may be made by an originating motion.

Endorsed and applied in **CHRAJ v E P Church [2001–2002] 1 GLR 356**

What is the nature of the relief that ADRA prescribes?

- **'Leave'**: securing a court's formal permission before taking a particular step or action in, usually in a case.
- In arbitration, the court's leave permits the party to have the arbitral award '*enforced in the same manner as a judgment or order of the Court to the same effect*'
ADRA, section 57(1)

- ‘***Leave***’ as the main or only relief appears to rule out Writs, which would trigger the full slew of pleadings and full hog of a trial with oral testimony, cross examination etc. Clearly, a Writ is not the requisite procedure.
- Petitions don’t apply because ADRA does not mention that form.

- That leaves us with just the Originating Notice of Motion. But where are the magic words '*apply*' or '*application*'? ADRA sections 57 and 59 on enforcement do not use either word
- **But:** throughout ADRA, nearly every resort to the court is prescribed to be made as an application (see ADRA sections 6, 18, 19(5), 26, 28, 39(2) & (3), 40, 56 and 58).
- **The key indicator:** *ADRA First Schedule, Article IV(1):*
'To obtain the recognition and enforcement mentioned in the preceding article, the party **applying** for recognition and enforcement shall, at the time of the **application**, supply...'

Read together with **PPP v AG** and **CHRAJ v E P Church**, the proper form of obtaining leave to enforce both domestic and foreign arbitral awards would be an originating notice of motion.

It is titled as follows:

In the Matter of the Alternative Disputes Resolution Act,
2010 (Act 798)

And

In the Matter of an Application under section 57 [*for
domestic awards*]/59 [*for foreign awards*] of Act 798 for the
Enforcement of an Arbitral Award Issued on [*provide date*]
and by [*details of tribunal*]

[*Name of Applicant*]

Versus

[*Name of Respondent*]

It is supported by a sworn affidavit that provides the evidential basis of the action, including all necessary and relevant exhibits that ADRA requires should be placed before the court.

It is moved by counsel, as in the case of any other motion.

Enforcing Checklist

1. Award Validity

- ☐ Confirm the award is **final and binding** under the rules/seat of arbitration
- ☐ Check if any **setting aside or annulment application** is pending at the seat of arbitration
- ☐ Ensure tribunal was properly constituted and had jurisdiction
- ☐ Confirm due process was observed (notice, right to be heard, etc)

2. Legal Framework

- ☐ Identify whether the enforcement country is a **party to the New York Convention**
- ☐ Review **local arbitration laws** (eg, UNCITRAL Model Law adoption, Municipal Arbitration Acts)
- ☐ Confirm the subject matter is **arbitrable** under local law.

3. Procedural Requirements

- ☐ File application for **recognition and enforcement** in the competent court
- ☐ Submit certified copy of the award and arbitration agreement (with **certified** translations if required)
- ☐ Check **time limits** for enforcement application under local law

4. Grounds for Refusal (Defensive Checklist)

- ☐ Was there incapacity of parties or invalid arbitration agreement?
- ☐ Lack of proper notice or inability to present case?
- ☐ Tribunal exceeded scope of submission?
- ☐ Improper tribunal composition or procedure?
- ☐ Award not yet binding or set aside at the seat?
- ☐ Enforcement would violate **public policy** of enforcing state?

5. Asset Identification & Execution

- ☐ Locate award-debtor's assets (real estate, bank accounts, shares, receivables)
- ☐ Confirm assets are within jurisdiction of enforcement court
- ☐ Assess whether assets are **immune from execution** (diplomatic property, military, central bank reserves)
- ☐ Consider urgent **asset freezing orders** or attachment to prevent dissipation

NOTE: Executing against Military Assets

NML Capital & Argentina Case

Argentine naval vessel (*ARA Libertad*) came to Ghana under a military exercise agreement between Ghana and Argentina. Attempt to execute a judgment obtained against Argentina in the American and UK courts over the vessel.

HELD: ‘...to attach a foreign military asset in Ghana in execution of a judgment debt obtained abroad, is against the fundamental public policy of Ghana, since it imperils, to a degree, the peace and security of Ghana ... [Even] a State’s sovereign right to waive its sovereign immunity in relation to its military assets, through a contractual provision, will not be recognised in Ghanaian common law because of the public policy implications outlined above.’

6. Sovereign & State-Owned Entities

- ☐ Verify if losing party is a **State or SOE**
- ☐ Assess whether **sovereign immunity** applies
(jurisdictional versus execution immunity)
- ☐ Identify **commercial assets** not protected by immunity

7. Practical & Strategic Considerations

- ☐ Prepare for **multiple enforcement actions** in different jurisdictions
- ☐ Budget for **time and costs** (legal fees, translation, court bonds, etc)
- ☐ Monitor risks of **local court bias, corruption, or political interference**
- ☐ Consider settlement leverage – sometimes the award's existence pressures payment

Concluding Comments

Arbitration, especially international arbitration, is **NOT INEXPENSIVE**.

Proper time to consider enforcement: Not at conclusion but before Notice of Arbitration is filed and proceedings start.

You must always consider the following:

- can you find the other party?
- does the party have any assets, and if so in which country(ies)?
- are those assets available for enforcement?

Recommendation: draft/enter into arbitration agreements with enforcement in mind.

MULTIPLE AWARD SYNDROME

- Risk of multiple arbitral proceedings and awards, arising from the same dispute?
- After award against a host nation under arbitration agreement in favour of a foreign-owned operating entity, can shareholders commence and sustain separate arbitral proceedings for "loss of investment" claims under Bilateral Investment Treaties ("BITs") against the same host nation?

MULTIPLE AWARD SYNDROME

- Is shareholder BIT claim separate and distinct from, and does not depend on, claims by operating entity resolved at arbitration?
- Watch: '**BIT-Shopping**' Investments in developing countries are being made through special holding companies established in countries that have BITs with the host country.
- Simply, is a BIT a potentially, thinly-masked poisoned chalice?

- In conclusion, the broad acceptance of NYC in Ghana makes resolving international disputes through arbitration (and getting paid!!) more certain now than ever.
- However, some uncertainties still remain, and a successful party must pay very close attention to potential grounds and arguments for refusing to enforce Awards in Ghana, and the specific procedural rules here before filing.



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