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ROUND TABLE DISCUSSION

ON

"CURBING DELAYS IN COMMERCIAL DISPUTE RESOLUTION:

Arbitration as a Mechanism to Speed up Delivery of Justice"

ARBITRATION AS A MECHANISM TO SPEED UP CELIVERY OF JUSTICE

By

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By Mr. Justice Robert V. Makaramba

"Discourage litigation; persuade your neighbours to compromise whatever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost and time" by Abraham Lincoln (1861-1865)[1]

1.0 INTRODUCTION

This Paper discusses arbitration as a mechanism to speed up delivery of justice. It does not go into the practical minefields of arbitration, but confines itself to examining the practical advantages of resorting to arbitration as an alternative dispute resolution mechanism. It does not therefore analyze the details of the relevant arbitration law and rules.

The Paper is in five parts. Part one is a brief introduction. Part two gives a brief conceptual framework to arbitration. Part three is a brief discussion and historical account of the legal regime for arbitration in Tanzania Mainland. Part four examines the future of arbitration in Tanzania. Part five concludes.

2.0 CONCEPTUAL FRAMEWORK

Arbitration falls within the category of Commercial Dispute Resolution (CDR) component[2], which is comprised of the formal court system, alternative dispute resolution (ADR) techniques[3], and international arbitration.[4] ADR in the form of arbitration proceedings and court-annexed

[1] Born Feb 12, 1809, Abraham Lincoln was the 16th President of the United States of America On Good Friday, April 14, 1865, Lincoln was assassinated at Ford's Theatre in Washington by John Wilkes Booth, an actor, who somehow thought he was helping the South.

[2] "COMMERCIAL LAW HARMONIZATION AND BILATERAL ASSISTANCE" by Charles A. Schwartz available at http://www.uncitral.org/pdf/english/congress/Schwartz.pdf

[3] Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, early neutral evaluation, and conciliation. As burgeoning court queues, rising costs of litigation, and time delays continue to plague litigants, more governments have begun experimenting with ADR programs. Some of these programs are voluntary; others are mandatory. There are some more forms of Alternate Dispute Resolution like Evaluation, Early Neutral Evaluation, Neutral Fact Finding, Ombudsman etc practiced in other parts of the world.

[4] The resolution of disputes arising from international commercial disputes by arbitration is governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention – NYC). With the accession of Liechtenstein to the NYC on 7th July 2011, Liechtenstein becomes the 146th State

mediation (CAM) constitute one of the procedures in the three classical forms of third party intervention in dispute resolution, the judge in a domestic court or tribunal; the arbitrator; and the mediator (Makaramba, 2009). All these forms share a common feature, resolution of disputes by third party intervention after the dispute had become a significant bone of contention between the parties (Makaramba, 2009). The two main features of dispute resolution mechanisms, the process (third party intervention); and the timing, that is after the dispute has matured, which were also used by our ancestors, are still very much part of the modern landscape for dispute resolution in this country (Makaramba, 2009).

Arbitration is an alternative dispute resolution mechanism. It is touted as a mechanism for saving time and costs. One of its main attractions is the ability of parties to resolve disputes privately without the intervention of courts. This is called party autonomy and gives rise to "*arbitral justice.*" It means that the process of resolving disputes by arbitration is taken outside of the glare of the publicity that might arise in litigation before courts, or what we may call formal "*state justice*." There is however, an inherent conflict between the "*right to a judge*" in formal state justice as a content of the constitutional right to a "*fair and public hearing*" and the "*right to an arbitrator*" encompassed in the agreement on submission to arbitration, normally contained in the "*arbitration clause.*" The arbitration clause is a contractual document which is governed by the normal common law doctrines of "*freedom of contract*" and "*freedom of trade and commerce*."

2.1 Advatages of Arbitration and Litigation

ADVANTAGES	
Arbitration	**Litigation**
Speedier resolution; however, there can be exceptions due to multiple parties, arbitrators, lawyers and litigation	There is a large body of substantive law and procedure that exists which automatically controls the lawsuit and

party to the NYC. Tanzania ratified the NYC in 1965. Fifteen (15) and twenty nine (29) countries have enacted legislation based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, which provides a harmonized system of national legislation to regulate private arbitration processes – for further details visit the UNCITRAL Website at http://www.un.or.at/uncitral/english/status/index/htm. The Fourth Schedule to the Tanzanian Arbitration Act, [Cap.15 R.E. 2002], makes the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards and the 1923 Geneva Protocol on Arbitration Clauses, which was opened at Geneva on 24th September, 1923, part of the law of Tanzania and thus recognized as binding although these two Conventions have since been superseded by the New York Convention.

strategy	the parties don't have to create the rules that will govern the lawsuit
Less costly; however, there can be exceptions due to multiple parties, lawyers, arbitrators and litigation strategy	The judge, by law, must be impartial and the judge's paycheck is not dependent upon whether the parties ever use that particular judge in another matter. The judge is not personally affected by the outcome of the case;
Exclusionary rules of evidence don't apply; everything can come into evidence so long as relevant and non-cumulative	The place of the trial is in the courthouse and therefore neutral territory
Not a public hearing; there is no public record of the proceedings. Confidentiality is required of the arbitrator and by agreement the whole dispute and the resolution of it can be subject to confidentiality imposed on the parties, their experts and attorneys by so providing in the arbitration agreement	If a litigant is unhappy with a decision of the judge the possibility of an appeal exists
From defense point of view, there is less exposure to punitive damages and run away juries	
A party may record a lis pendens even if there if an arbitration pending by filing a law suit and then holding the case in abeyance until the arbitration is resolved	
The ability to get arbitrators who have arbitrator process expertise and specific subject matter expertise	
Limited discovery because it is controlled by what the parties have agreed upon and it is all controlled by the arbitrator	
Often, the arbitration process is less adversarial than litigation which helps to maintain business relationships between the parties.	
The arbitration is more informal than litigation	
The finality of the arbitration award and the fact that normally there is no right of appeal to the courts to change the award.	

2.2 Disadvatages of Arbitration and Litigation

DISADVATAGES	
Arbitration	**Litigation**
There is no right of appeal even if the arbitrator makes a mistake of fact or law. However, there are some limitations on that rule, the exact limitations are difficult to define, except in general terms, and are fact driven.	The time that it takes to get to trial, which while much better than the one year (CC) or five years (HCT), can still take a substantial time
There is no right of discovery unless the arbitration agreement so provides or the parties stipulate to allow discovery or the arbitrator permits discovery	The fear of lawyers of being accused of malpractice by their clients in not being 100% prepared, leaving nothing to chance, and thus have a possible liability for not taking the deposition of everyone who ever touched a piece of paper in the litigation all of which leads to

	overkill and abuse of the discovery process; this is commonly referred to as the scorched earth approach to litigation.
The arbitration process may not be fast and it may not be inexpensive, particularly when there is a panel of arbitrators.	The paper war between lawyers relating to motions/pos on an infinite variety of topics
Unknown bias and competency of the arbitrator unless the arbitration agreement set up the qualifications or the organization that administers the arbitration, has pre-qualified the arbitrator.	The large cost of legal fees in litigating a dispute
There are no assessors and from the claimant's point of view that may be a serious drawback.	The reasonable probability that you will not be able to go to trial on the date that is set by the judge because the judge's prior case is not over, or there is no courtroom available due to the priority of criminal matters, all of which results in the trial of the case being continued from time to time
An arbitrator may make an award based upon broad principles of "justice" and "equity" and not necessarily on rules of law or evidence	The ability of parties to appeal to a higher court after losing at the trial court level and the lack of finality
An arbitration award cannot be the basis of a claim for malicious prosecution.	The fact that neither the assessors or the judge may not have any knowledge nor experience with the subject matter of the dispute between the parties which results in the parties having to educate the judge as to the law and custom and practice.
The possibility of compromise or splitting of "baby awards"	The ability to appeal to a higher court adverse rulings on procedural issues

2.3 Consensual Nature of Arbitration, Party Autonomy and Severability

Arbitration is a consensual dispute resolution mechanism by a private third party intervention outside of the courts. Explaining the consensual nature of arbitration, Lord Hoffmann in ***Fiona Trust & Holding Corporation & ors v. Yuri Privalov and Others***[5] had this to say:

> *"**Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement.** Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which*

[5] Judgment by The Supreme Court of Judicature Court of Appeal (Civil Division), London Case No. [2007] EWCA Civ 20, Rendered in January 2007, and Judgment by The House of Lords of Appeal, London Case No. [2007] UKHL 40, Rendered in October 2007

they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language … If one accepts that [consensual dispute resolution outside of the national courts] is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts … If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention."[6] *(the emphasis is mine).*

The critical point to emphasize here is that the consensual nature of arbitration arises from its dependency upon the intention of the parties as expressed in their agreement. It is therefore only the agreement which can tell what kind of disputes the parties intended to submit to arbitration. The parties are free to agree on the procedure the arbitral tribunal is to follow in dealing with their dispute. This is what is called party autonomy, which is cardinal principle in commercial arbitration. Essentially, it is the right of self-determination. The principle of party autonomy is captured well under Article 19(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law in the following terms:

"Subject to the provisions of this Law, ***the parties are free*** *to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."(the emphasis is mine).*

It is well established and settled principle that the agreement to arbitrate, typically a clause in the larger commercial agreement (the arbitration clause), is separate and distinct (or severable) from the contract in which it is contained. It may even survive the failure of the underlying contract.[7] This is the principle of severability. It will apply whether the main contract is avoided,

[6] Arbitration Law Reports and Review (2006) ArbLR 25; 2006(1): 347-365

[7] See Tanzania Motor Services Ltd and Presidential Parastatal Sector Reform Commission Versus Mehar Singh T/A Thaker Singh Civil Appeal No. 115 of 2005 (CAT at Dodoma) (Unreported) By Lubuva, J. A., Mroso, J. A. And Nsekela, J. A. see also Heyman v Darwins Ltd [1942] AC 356, 399 per Lord Porter; Union of India v E B Aaby's Rederi A/S [1975] AC 797 Viscount Dihorne, at p. 814, and Lord Salmon, at p. 817, (they said they could not see the difference between them). Nevertheless, in Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd [1988] 2 Lloyd's Rep 63, 67; and Harbour Assurance Co (UK) Ltd v Kansa General International Insurance

a voidable contract is rescinded, or the main contract is discharged by performance, frustration or breach. The principle of severability is captured well under section 7 of the English Arbitration Act 1996 as follows:

> *"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, nonexistent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."*

According to Lord Hoffmann in ***Fiona Trust & Holding Corp v. Privalov (supra)***, the main issue for consideration by a court when determining matters concerning arbitration agreement is whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by courts.

The ***law governing the arbitration agreement*** and the ***law of the place where the arbitration is to be heard*** (***lex arbitrii***) however, must be distinguished. The relevant procedure for regulating the arbitral proceedings may be agreed upon by the parties. In doing so, the parties may adopt a set of arbitration rules, for example the arbitration rules of the International Chamber of Commerce (ICC) or of the London Court of International Arbitration (LCIA) if it is an international commercial arbitration or in the case of domestic arbitration, the rules of the National Construction Council of Tanzania. In the absence of an agreement however, the law of the lex arbitri applies and determines any procedural questions.

The arbitration agreement is a bilateral contract between the parties to the main contract. The general principles of the law of contract therefore apply. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that

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Co Ltd [1993] QB 701; Premium Nafta Products Limited (20th Defendant) and others (Respondents) v. Fili Shipping Company Limited (14th Claimant) and others (Appellants) [2007] UKHL 40 (House of Lords.

status. Whilst perhaps correct, the point needs a little further explanation here. It cannot be right that the "Arbitral Tribunal" becomes a party to the arbitration agreement for all purposes for, if there were a subsequent dispute, it could not be sensibly argued that the same "Arbitral Tribunal" must determine it.

2.4 Kinds or Categories of Arbitration

There are essentially two kinds or categories of arbitration, ad hoc and institutional.

2.4.1 Ad Hoc Arbitration

Ad hoc arbitration is conducted independently and according to the rules specified by the parties and their attorneys. The parties therefore agree to execute the arbitral process themselves by appointing the arbitrator and attending to the necessary administrative requirements before and during the hearing. The parties then conduct the arbitration under the procedural rules designated by the contractual arbitration clause; or, more often than not, by the rules agreed to once the dispute has arisen. On its face, ad hoc arbitration may seem to be less expensive and more flexible, which is why it is touted as the cheaper option because no administrative fees are paid for the referral. However, counterarguments suggest that the absence of facilitative processes may cause the parties to incur unforeseen expenses exceeding the administrative fee.

2.4.2 Institutional Arbitration

An institutional arbitration is one that is entrusted to one of the major arbitration institutions to handle. It provides an independent, neutral set of rules that already exist. It requires that an institution provide services that are critical to ensuring that the arbitration proceeds smoothly. For example, the International Court of Arbitration (ICA)[8] decides on the number of arbitrators and their fees, appoints the arbitrators, ensures that the arbitration is being conducted according to International Chamber of Commerce Rules, determines the place of arbitration, sets time limits, and reviews arbitral awards. In addition, an arbitral body will ensure controlled costs, since it will have a pre-determined framework of charges. An arbitral body sets forth a set of arbitration rules that governs the potential arbitration. It may also issue a model arbitration clause that can be incorporated into the contract or business agreement when the transaction is made.

In institutional arbitration, the specialist institution generally administers the arbitration under its own rules, unless it agrees to do so under another set selected by the parties. The arbitration institution appoints the tribunal and, in most cases, acts as the intermediary between the parties and the tribunal until the hearing commences, undertaking all necessary administrative arrangements. In choosing an arbitration institution however, parties must ensure that its procedural rules are compatible with the laws of the ***lex arbitri,*** that is, the place where the arbitration is to be held or seat of arbitration for that matter.

In recent years institutional arbitration has grown fast. One reason for such growth is that there are now many arbitral bodies, and parties can select one that is best suited to their needs. Some organizations welcome any type of dispute. In contrast, there are organizations that specialize in particular types of disputes, such as those involving investment disputes[9] or that focus on a particular topic, such as intellectual property disputes.[10] Some arbitral bodies

[8] Available at http://www.iccwbo.org/court/arbitration/id4400/index.html

[9] International Centre for Investment Dispute Settlement (ICSD)

[10] The WIPO Convention, the constituent instrument of the World Intellectual Property Organization (WIPO), was signed at Stockholm on July 14, 1967, entered into force in 1970 and was amended in 1979. WIPO is an

specialize in disputes in particular industries.[11] This clearly shows that arbitral awards may be issued by a number of institutions, which may complicate research in this particular area. Another factor in selecting an institution is the nature of the party; one institution may be open only to states or member governments, while another may be available to any entity or individual.

2.5 International Commercial Arbitration

Defining international commercial arbitration is not easy. Assistance however, can be sought from Article 1(3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, adopted on June 21 1985[12], under which an arbitration is international if:

- the agreement is concluded when the parties have their places of business in different countries;
- one of the following places is situated outside the country in which the parties conduct business: (i) the place of arbitration, if determined in, or pursuant to, the arbitration agreement; or, (ii) any place where a substantial part of the commercial relationship's obligations are to be conducted or the place with which the subject matter of the dispute is most closely connected; or
- the parties have expressly agreed that the subject matter of the agreement relates to more than one country

It is worth noting that the UNCITRAL Model (on the basis of which Tanzania could consider modeling its law) was mainly intended to enable various countries to have a common model for 'International Commercial Arbitration.' It was not therefore intended to be applicable also to

intergovernmental organization that became in 1974 one of the specialized agencies of the United Nations system of organizations and has its own Rules of Arbitration for settling IPR Disputes.

[11] An example is the American Arbitration Association (AAA) ((http://www.adr.org), which has different sets of special rules governing disputes in different subjects.

[12] United Nations Document A/40/17, Annex I.

cases of purely domestic arbitration between nationals. The UNICTRAL Model Law recommends that the term 'commercial' be interpreted broadly so as to cover all commercial relationships, whether contractual or not. There is however, no universal definition of an 'international' arbitration. Recourse must therefore be had to the relevant national law when seeking to enforce an award.[13] Under the New York Convention, contracting states are allowed to limit their obligations under either Treaty to contracts, which are considered as commercial under their national laws. Article 1(3) of the NYC allows a state to enter declarations – reciprocity or commercial or both – when becoming a party. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any 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 may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as "commercial" under the national law of the State making such declaration. With respect to the commercial declaration, it has rightly been stated that:

> ***"For a State whose legal system does not include generally accepted definition of what constitutes a commercial matter, the application of this reservation may create some problems. Even within such legal systems, the reference to commercial matters will rarely appear as being completely devoid of meaning, and the reservation will therefore find some application."***

What is "commercial" may therefore constitute a problem before many African state courts. This is so because the decision whether or not a transaction is commercial is solely on a state by state basis. And national laws in Africa may be diverse.[14] Under the NYC, a state may not only enter a commercial declaration; it may also define what is "commercial."

In summary we can say that international commercial arbitration is an established method of resolving trade or commercial disputes between or among transnational parties through the use

[13] Redfern & Hunter, ***Law and Practice of International Commercial Arbitration*** (Second edition, Sweet & Maxwell London, 1991) pp 19-20

[14] See for example what constitutes a "commercial list" under the Commercial Division of the High Court of Tanzania Rules (1999 as revised) and the various judicial interpretations accorded to that Rule by the Commercial Court.

of one or more arbitrators rather than through the national courts. It therefore requires the agreement of the parties, usually given via an arbitration clause inserted into the commercial contract or trade agreement. The decision which is rendered by an international commercial arbitration institution is usually binding.

Many international agreements, treaties, and conventions facilitate the use of arbitration as a method for resolving disputes. Other agreements address the enforcement of arbitral awards. Previously, there were a few countries with well-developed arbitration practices and sympathetic national laws. Interference with arbitration by the courts was a well-founded fear in many countries. Conversely, the necessary actions on the part of the national legal system in compelling witnesses and enforcing judgments were not always available. However, as the number of international commercial disputes have mushroomed, so too did the use of arbitration to resolve them.

The non-judicial nature of arbitration makes it both attractive and effective for several reasons. There may be distrust of a foreign legal system on the part of one or more of the parties involved in the dispute. In addition, litigation in a foreign court can be time-consuming, complicated, and expensive. Further, a decision rendered in a foreign court is potentially unenforceable. On the other hand, arbitral awards have a great degree of international recognition. For example, more than 140 countries have agreed to abide by the terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[15]

Another reason for choosing arbitration is that the process is administered by a panel of arbitrators who are agreed upon by both parties. These arbitrators may have specialized competence in the relevant field. Arbitral awards are usually final and binding, which avoids a drawn-out appeals process. In addition, the confidentiality of the arbitration process may appeal to those who do not wish the terms of a settlement to be known. This is the biggest obstacle to researching international commercial arbitration: as its popularity grows, so does its interest to

[15]Available at http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/ known as the New York Convention (NYC) done at New York, 10 June 1958 330 UNTS 38 and entered into force on 7 June 1959 and ratified by Tanzania in 1965 but yet to bring it in force.

outside parties. However, because many awards are not made public, it can be frustrating to search for information.

3 THE LEGAL FRAMEWORK FOR ARBITRATION IN TANZANIA MAINLAND

3.3 A Brief Overview

The legal framework for arbitration in Tanzania Mainland is governed by two main pieces of legislation, the Civil Procedure Code[16] and the Arbitration Act[17] together with the Arbitration and the Arbitration Rules.[18] There is also a separate and distinct legal regime for arbitration in labour matters and for land matters at the lower levels.

The Civil Procedure (Arbitration) Rules are contained in the Second Schedule to the Civil Procedure Code. The Code which is pari materia with the Indian Civil Procedure Code of 1809, was received in the Tanganyika Territory by way of India during the British colonial rule. Tanzania Zanzibar, a constituent of the "union" also has its own Civil Procedure Decree, which also traces its origin from the Indian Civil Procedure Code. The Arbitration Act of Tanzania Mainland traces its origins in the colonial Arbitration Ordinance, which was promulgated by the British colonial government in 1957. The historical origins of the Civil Procedure Code and the Arbitration Act, may account for the existence of two separate legal regimes on arbitration in this country, the Civil Procedure (Arbitration) Rules are contained in the Second Schedule to the Civil Procedure Code, which governs the enforcement of domestic arbitration and the Arbitration Act and its Rules for the enforcement of domestic awards and enforcement and recognition of foreign awards.

As I intimated to earlier in this paper, I do not intend to go into the practical minefields of arbitration. In the same vein I do not intend to discuss in detail the provisions in the Civil Procedure (Arbitration) Rules which are contained in the Second Schedule to the Civil Procedure

[16] Cap.33 R.E. 2002

[17] Cap. 12 R.E. 2002

[18] GN No. of 1957

Code or the Arbitration Act and its Rules. I shall however, only make some general observations as regards the shortcoming in some of the provisions for the purpose of informing the discussion on the practical problems judges and practitioners may encounter in applying those provisions.

3.4 THE CIVIL PROCEDURE (ARBITRATION) RULES

(i) Order of reference to arbitration in a suit

The Civil Procedure (Arbitration) Rules make provisions for reference to arbitration in "***a matter in difference between parties in a suit***."[19] The Rules therefore only come into play where there is a "suit" already filed in court and a matter in difference between the parties arise in that suit which merits to be resolved by arbitration. In my considered view, if this procedure is resorted to by parties it could serve a lot of the parties' and the court's time. Where the court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration, and no application has been made to set aside the award in a suit or the court has refused such application, after the time for making such application has expired, "***the court shall proceed to pronounce judgment according to the award.***"[20] The Rules explicitly bars any appeal against a decree from a judgment pronounced on an award in a suit except where the decree is "***in excess of, or not in accordance with, the award.***"[21]

(ii) Order of Reference on Agreements to Refer to Arbitration

The Civil Procedure (Arbitration) Rules also provide for reference on agreement to refer to arbitration by way of ***"application in court***" [Rule 17(1)]. Reference on agreement to refer to arbitration presuposses the existence of an agreement between persons involved in a suit in court to refer their differences to arbitration prior to fling the application. Upon the application being filed in court, it has to be numbered and registered "***as a suit***" [Rule 17(2)].

[19] Rule 1(1)

[20] Rule 16(1)

[21] Rule 16(2)

(iii) Arbitration without the Intervention of Court

Rule 20 of the Civil Procedure (Arbitration) Rules deals with the filing of award in a matter referred to arbitration "***without intervention of court***."In order for the Court to intervene under Rule 20, there has to be a matter already referred to arbitration without its intervention, and an award which has been made, which is now sought "***to be filed***" in court. Rather strangely however, Rule 20 of the Civil Procedure (Arbitration) Rules does not limit the opportunity to file the application to file the award only to the person who is "***a party to the agreement to refer to arbitration.***" It widens the opportunity to "***any person interested in the award***", which escapes any definition under the Rule and thus a recipe for confusion. The legal net cast by the Rule is too wide, since "***any person interested in the award***" would mean any person interested in having the award filed in court. The award is filed in Court to seek enforcement by the judicial process of an award made by agreement of the parties without the intervention of the court. The award may impact not only the parties to the agreement to arbitrate but to other interested parties as well. Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where there are no grounds for making an order of remittance or reference or for setting aside the award, the Court will make an order for the "***award to be filed***," and proceed to "***pronounce judgment***" and a decree to follow. The law expressly bars appeal from such decree expect "***in so far as the decree is in excess of or not in accordance with the award***."[22]

Rule 20 of the Civil Procedure (Arbitration) Rules concerning the filing of award in a matter referred to arbitration without intervention of court is also a fertile source of confusion. There are more or less similar provisions in the Arbitration Act and the Arbitration Rules, which regulate the procedure for filing, recognition and enforcement of domestic and foreign arbitral awards in matters referred to arbitration without the intervention of the court.

We should think seriously if it serves any useful purpose to continue having in place two separate schemes for the filing and enforcement of domestic arbitral awards. The need for

[22] Rule 21(2)

harmonizing these two legal regimes and put in place a single legal regime for filing and enforcing domestic awards made with or without the intervention of the court cannot be overemphasized.

(iv) Application for Stay of Suit

There are two provisions for application of stay of suit, where there is agreement to refer to arbitration and where there is submission agreement. Rule 18 of the Civil Procedure (Arbitration) Rules provides for stay of suit where there is "***an agreement to refer to arbitration.***" It stipulates as follows:

> *"Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may,* ***at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the court to stay the suit****; and the court, if satisfied that there* ***is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration****, and* ***that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,*** *may make an order staying the suit."(the emphasis is mine).*

Two conditions are precedents for Rule 18 to apply. There has to be an agreement between the parties to refer to arbitration and the instituted suit has to be "***in respect of any matter agreed to be referred****."* The powers of the Court to make an order for stay of a suit under Rule 18 are discretionary as it has to be satisfied that, firstly, there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration. Secondly, the applicant was, at the time when the suit was instituted and still remains, ready and willing "*to do all things necessary to the proper conduct of the arbitration*."

Another provision for stay of a suit is found under section 27 of the Arbitration Act, which deals with stay of court proceedings in respect of matters to be referred to arbitration under submission to arbitration by providing as follows:

> *"Notwithstanding anything in Part II, if any party to a submission made in pursuance of an agreement to which the Protocol on Arbitration Clauses of 1923 which is set forth in the Third Schedule hereto applies or any person commences any legal proceedings in any*

> *court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to these legal proceedings may,* ***at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings apply to that court to stay the proceedings*** *and that court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."*

The application to stay a suit under Rule 18 of the Civil Procedure (Arbitration) Rules is made "***at the earliest possible opportunity and in all cases where issues are settled at or before such settlement.***" Under section 27 of the Arbitration Act, the application is for to stay of the "legal proceedings" and is made "***at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings***."

3.5 THE ARBITRATION ACT AND ARBITRATION RULES

The Arbitration Act provides for "***arbitration of disputes***." The Act does not define what kind of disputes are amenable to arbitration but provides further that it applies "***only to disputes which, if the matter submitted to arbitration formed the subject of a suit, the High Court only would be competent to try***." The Act does not distinguish between commercial and non commercial disputes. There is a proviso in the Act that:

> "***in regard to disputes which, if they formed the subject of a suit would be triable otherwise than by the High Court, the President may, with the concurrence of the Chief Justice, confer the powers vested in the court by this Part either upon all subordinate courts or any particular subordinate court or class of court.***"

That the conferment of powers on subordinate courts has to be made by the President with the concurrence of the Chief Justice is peculiar enough. That the vesting of powers otherwise exercisable by the High Court on subordinate courts has not been done to this date is rather telling. Consequently, only the High Court has jurisdiction over disputes concerning all commercial arbitral awards. The idea to confer such powers on subordinate courts at least at the level of Resident and magistrate courts should further be explored and implmented.

The term "submission" is defined under the Arbitration Act to mean a "***written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not***." The term "award" is not defined under the Act. Neither does the Act make a distinction between domestic and foreign awards. The Act brings under one roof the filing, recognition and enforcement of domestic and foreign arbitral awards. This has been a source of confusion among legal practitioners particularly with respect to the procedure for filing such awards and the grounds for setting aside arbitral awards. The Arbitration Act make elaborate provisions on ***(a) arbitration by consent out of Court; (b) agreement to refer future disputes to arbitration; (c) and enforcement of domestic and recognition and enforcement of foreign awards and (d) grounds for setting aside such awards.*** I do not intend to go into the details of these provisions.

3.5.1 Recognition and Enforcement of Foreign Arbitral Awards Under the Arbitration Act

The Arbitration Act does not give force of law in Tanzania to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which Tanzania ratified more than forty seven years ago. In Tanzania Mainland, the recognition and enforcement of foreign awards falls under PART IV of the Arbitration Act, which contains "PROVISIONS RELATING TO THE CONVENTION SET FORTH IN THE FOURTH SCHEDULE." Section (1) of the Act stipulates as follows:

> *"(1) The provisions of this Part apply to any award made after 28th July, 1924–*
>
> *(a) in pursuance of an agreement for arbitration to which the Protocol set out in the Third Schedule applies; and*
>
> *(b) between persons of who are subject to the jurisdiction of any State which is a party to the Convention on the Execution of Foreign Arbitral Awards which Convention is set out in the Fourth Schedule to this Act; and an award to which the provisions of this Part apply, is in this Part referred to as "a foreign award."*
>
> *(2) This Part shall not apply to any award made on an arbitration agreement governed by the law of Tanzania."*

The Arbitration Act expressly excludes from application Part IV of the Act to an arbitration agreement governed by the law of Tanzania. It is a settled principle of law which I alluded to

earlier in this Paper that the "*arbitration agreement*" is separate from the contract forming the subject of the arbitration. Rule 1 of the Protocol on Arbitration Clauses, which is contained in the THIRD SCHEDULE to the Arbitration Act, recognizes the validity of agreement to submit existing or future differences between parties, by stipulating as follows:

> *"1. Each of the Contracting States recognises* ***the validity of an agreement whether relating to existing or future differences between parties****, subject respectively to the jurisdiction of different Contracting States by which the* ***parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or any*** *other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.*
>
> *Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed."(the emphasis is mine).*

Rule 1 of the Protocol on Arbitration Clauses, which recognizes the validity of agreement by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with contract relating to commercial matters or whether relating to existing or future differences between parties, brings into play section 29 of the Act relating to the effect of a foreign awards. Section 29 of the Act stipulates as follows:

> *"(1) A foreign award shall, subject to the provisions of this Part, be enforceable in the High Court either by action or under the provisions of section 16 (sic! 17) of this Act."*

There are two ways under the Act in which a foreign award may be enforced by the High Court. It could be either by action or under the provisions of section 17 of the Act, on enforceability of an award as a decree. Section 17 of the Act provides as follows:

> *"17.(1) An award on a submission on being filed in the court in accordance with this Act shall, unless the court remits it to the reconsideration of the arbitrators or umpire or sets it aside,* ***be enforceable as if it were a decree of the court****.*
>
> *(2) An award may be conditional or in the alternative.*
>
> *(3) Any foreign award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made and may*

> *accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings; and any reference in this Part to enforcing a foreign award shall be construed as including references to relying on an award."*

Section 17 of the Act therefore brings under one roof for purposes of enforcement as if it were a decree of a court, a foreign award as is the case for domestic award. The most interesting part of the Act perhaps is with regard to the grounds for "*resisting the enforcement of a foreign award*" and for "*contesting the validity of the award.*" The former are covered under section 30(1)(a) to (e) of the Act and the latter under section 30(2)(a) to (c).

As to the grounds for "***resisting the enforcement of a foreign award,***" section 30 of the Act stipulates as follows:

> *"30(1) In order that* ***a foreign award may be enforceable*** *under this Part, it must–*
>
> *(a) have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;*
>
> *(b) have been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;*
>
> *(c) have been made in conformity with the law governing the arbitration procedure;*
>
> *(d) have become final in the country in which it was made; and*
>
> *(e) have been in respect of a matter which may lawfully be referred to arbitration under the law of Tanzania, and* ***its enforcement must not be contrary to the public policy or the law of Tanzania.*** *(the emphasis is mine).*

As to the grounds for "***contesting the validity of the award***," section 30(2) of the Act provides as follows:

> *"30(2) Subject to the provisions of this subsection, a foreign award* ***shall not be enforceable*** *under this Part if the court is satisfied that–*
>
> *(a) the award has been annulled in the country in which it was made; or*
>
> *(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case or was under some legal incapacity and was not properly represented; or*
>
> *(c) the award does not deal with all the "questions referred" or contains decisions on matters beyond the scope of the agreement for arbitration:*

Provided that if the award does not deal with all the "questions referred" the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

(3) If a party seeking ***to resist the enforcement of a foreign award*** *proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b) and (c) of subsection (1) of this section, or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2) of this section entitling him* ***to contest the validity of the award*** *the court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal."*

The effect of a party successfully "resisting the enforcement of the award" on grounds (a), (b) and (c) of section 30(1) or on grounds (b) and (c) of section 30(2) is for the court either to refuse to enforce the award or adjourn the hearing until after the "*expiration of reasonably sufficient period to enable that party to take the necessary steps to have the award annulled by the competent tribunal*." If a party succeeds to prove grounds (d) and (e) of section 30(1) and grounds (a) of section 30(2), this will mean that the court will to refuse to enforce the award.

The most distrubing aspects of the Arbitration Act is having two sets of grounds for contesting of a foreign award, one set comprising grounds ***to resist the enforcement of a foreign award*** parate and another containing grounds for ***contest the validity of the award.*** It is quite relieving that under the New York Convention, the two sets of grounds have been combined within some modification and form one set of grounds for the court to refuse recognition and enforcement of foreign award as we shall shortly see in the following section.

In terms of section 30(1)(e) of the Arbitration Act, the Court may refuse to enforce a foreign award if its enforcement is contrary to the public policy or the law of Tanzania. It is worth noting that the public policy or the law mentioned as a ground for resisting the enforcement of a foreign award is that of Tanzania. The recent decision of the High Court in the case of ***Tanzania Electric Supply Company Ltd and Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania)***[23]***,(famous as the DOWANS case)*** addressed among other matters the public policy ground for refusing enforcement of arbitral award. The award whose enforcement was being

[23] Misc. Civil Application No. 8 of 2011, High Court of Tanzania, Dar es Salaam District Registry, an unreported decision of Hon. Mushi, J. of 28/09/2011

resisted the Dowans case was of the International Chamber of Commerce (ICC). The Petitioner, TANESCO sought to resist the enforcement of the Final Award on among other grounds that, misconduct of the arbitrators by erroneously interpreting some of the provisions in the Public Procurement Act, 2004, and that, they had failed to interpret the law on prohibition and public policy, and that, the tender the subject of the contract giving rise to the contested arbitral award was improperly secured in breach of internationally accepted norms against improper influence in securing tenders.

In Dowans case, the enforcement of the ICC Final Award was therefore being resisted by TANESCO on among other grounds that, its enforcement is contrary to public policy. The learned trial judge Hon. Mushi, J. having revisited a host of decisions from within and without this jurisdiction and submissions of Counsel before dismissing the petition with costs in his 89 page judgment, stated as follows at page 88 of the typed judgment:

> *"Thus, taking into consideration the well established principles of law regarding arbitration proceedings in this country (and elsewhere within the common law jurisdictions), I find it* ***would not be proper for this court to interfere with the findings of the ICC's Arbitral Tribunal****, for, in doing so, it would amount to* ***re-opening*** *and* ***re-arguing*** *of* ***the issues of fact and issue of law that the parties, by their own agreement, submitted to the ICC Arbitral Tribunal for its consideration and decision.****" (the emphasis is of the Hon Judge in the decision).*

The learned trial judge at page 88 of his judgment also urged both parties in the petition to "receive" this "simple message":

> *"Indeed in the same quest for having "****finality to disputes/arbitral awards****" (observed in the foregoing authorities), is embodied in our* ***Civil Procedure Code*** *(Cap 33 RE 2002) and for that matter, the* ***Arbitration Act*** *(Cap15). Both pieces of legislation provide for* ***arbitration****, as an* ***alternative mechanism*** *for dispute (especially – commercial disputes) resolution, out of court litigation, with the view that, parties,* ***on their own agreement****, would reach an* ***amicable*** *and* ***speedy*** *solution of their disputes, and that the solution would be* ***final*** *and* ***binding*** *upon them. Therefore, it is my decided opinion that, it is one aspect of our "public policy" towards the need to having* ***finality of disputes and arbitral commercial awards****. It is my hope that, both the parties (and GOT, for that matter) in this Petition, would receive that simple message." (the emphasis is that of the Hon Judge in his judgment).*

Aside from the dismissal of the petition with costs and the simple message to the parties on finality of arbitral awards and sanctity of agreement to arbitrate, the decision is now a subject of

an appeal to the Court of Appeal of Tanzania and therefore it is sub judice. That is all what I can say about the case for the moment.

3.5.2 Recognition and Enforcement of Foreign Arbitral Awards Under NYC

It is my considered opinion that if Tanzania had modernized its law by incorporating the provisions of the New York Convention particularly Article V on the grounds for refusing the recognition and enforcement of arbitral award, perhaps the Court in the Dowans case would have had the opportunity to explore case law on the interpretation of the NYC.

There are several mechanisms by which foreign arbitral awards may be enforced. Countries may agree bilaterally to enforce arbitral awards, sometimes through a treaty of friendship, commerce, and navigation or through a bilateral investment treaty (BIT), or a multilateral agreement may be implemented. One such is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention limits the grounds upon which arbitral awards may be attacked. Under the NYC the grounds for a court to refuse recognition and enforcement of foreign award are stipulated in Article V as follows:

> *"ARTICLE V*
>
> *1. Recognition and enforcement of the award **may be** refused, at the request of the party against whom it is invoked, only if that party **furnishes** to the compctent authority where the recognition and enforcement is sought, **proof** that:*
>
> *(a) The parties to the agreement referred to in article II were, under the law applicable lo 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; or*
>
> *(b) The party agaimt whom the award is invoked was not given proper notice of the appointmenl of the arhitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
>
> *(c) The award deals with a difference not contempleted by or not falling within the terms of the submission, or it contains decision on matters beyond the scope of the agreement to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not let become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or uder the law of which, that award was made.

*2) Recognition and enforcement of an arbitral award **may also be** refused if the competent authority in the counry where recognition and enforcement is sought **finds** that:*

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country." (the emphasis is mine).

Article V(1) of the NYC uses the phrase "***may be***" and "***may also be***" in Article V(2). According to of Art. V(1) of the Convention, the party against whom the award is sought to be enforced has to furnish to the competent authority where the recognition and enforcement is sought, proof of the existence of any of the grounds stipulated under Art,V(1)(a) to (e) of the Convention. Under Art. V(2) of the Convention however, the competent authority in the counry where recognition and enforcement of the award is sought will only refuse its recogntion and enforcement if "it finds" that any of the grounds stipulated under Art.V(2)(a) to (b) of the Convention exist. In my considered opinion the most reliable means for the competent make a finding as to the existence of the ground for refusing the recogntion and enforcement of the award under Art. V(2) of the Convention, is by being availed of such information by the party seeking to resist the enforcement of the award.

A number of African, including Tanzania,[24] who are members of the Commonwealth and ex-colonies of the UK are Contracting States to the NYC. However, some of these states including Tanzania have yet to take legislative measures necessary to make the NYC enforceable

[24] Tanzania ratified and acceded to the NYC on 13th October 1964 and made declarations pursuant to Article 1(3) of the Convention on reciprocity. The NYC entered into force for Tanzania on the 12th January 1965.

by their courts.[25] The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration. The Convention is therefore recognized as a foundation or cornerstone of international commercial arbitration. It requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and to recognize and enforce awards made in other States, subject to specific limited exceptions.

The continued use of archaic and obsolete provisions in the Arbitration Act and the Civil Procedure (Arbitration) Rules in the Second Schedule to the Civil Procedure Code, has contributed to the narrow scope of arbitration law in Tanzania Mainland with a negative impact on the practice of arbitration in the country. Other reasons include the following:

- The unfamiliarity of the majority of judges and legal practitioners in the country with the New York Convention as engendered by the general lack of relevant information and materials on arbitration.
- The possible negative implications of the commercial and reciprocity declarations which Tanzania like other contracting states to the NYC are allowed to make.
- Tanzania is also a Contracting Party to ICSID Convention and other international arbitration treaties.[26]
- Failure of Tanzania as a Contracting State to the NYC to domesticate it at the national level.

3.5.3 The Recognition and Enforcement of Foreign Arbitral Awards: A Brief Historical Account

[25] Report of Secretary General "Study on the Recognition and Enforcement of Foreign Arbitral Awards (A/CN.9/168) of 20 April 1979 www.newyorkconvention.org/.../42_1979-a-cn-9...

[26] As of 12 March 2001, only 27 out of 53 states in Africa have become parties to the New York Convention – total parties worldwide stands at 125. As of 21 September 2000 42, African states parties to the ICSID – total parties stands at 132. NYC is therefore not applicable in 27 African states, namely: Angola, Burundi, Cape Verde, Chad, Comoros Island, Congo, DRC, Equatorial Guinea, Eritrea, Ethiopia, Gabon, The Gambia, Guinea-Bissau, Liberia, Libya, Malawi, Namibia, Rwanda, Sao Tome and Principe, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania (Mainland and Zanzibar), Togo and Zambia.

Let me albeit very briefly give a historical explanation to the current legal regime in Tanzania for the recognition and enforcement of foreign awards. This is traceable to the colonial origins of the Arbitration Act (previously the Arbitration Ordinance of 1957) which recognizes the 1923 Geneva Protocol[27] and the 1927 Geneva Convention[28], which were both concluded under the auspices of the League of Nations and at the instigation of the International Chamber of Commerce. The 1923 Geneva Protocol and the 1927 Geneva Convention are set out in the Fourth Schedule of Part IV of the Arbitration Act, titled "PROVISIONS RELATING TO THE CONVENTION SET FORTH IN THE FOURTH SCHEDULE." The two Geneva Arbitration Conventions became applicable to some African states through their varying ratification or accession by the colonial powers in Africa. These treaties are still be applicable in a few African states, including Tanzania Mainland and Tanzania Zanzibar.

(i) The 1923 Geneva Protocol

Each of the colonial powers in Africa, to varying degrees, became a party to the 1923 Geneva Protocol and extended or excluded its application to their colonies, protectorates or other territorial possessions. Much earlier on 27th September 1924, the UK ratified the 1923 Geneva Protocol declaring that it applies only to Great Britain and Northern Ireland and, consequently, does not include any of the Colonies, Overseas Possessions or Protectorates under is Britannic Majesty's sovereignty or authority or any territory in respect of which His Majesty's Government exercises a mandate. However, the UK's exclusion did not apply to some territories on whose behalf the Protocol was separately and subsequently adhered to.[29]

In Africa, the territories on whose behalf the 1923 Geneva Protocol was separately adhered to by the UK were: Southern Rhodesia (Zimbabwe) (18 December 1924); the Colony and Protectorate of the Gambia; Gold Coast (including Ashanti, the Northern Territories of the Gold

[27] The 1923 Protocol on Arbitration Clauses (the 1923 Geneva Protocol) 27 LNTS 157 (1924) entered into force on 28 July 1924 in accordance with its Article 6.

[28] The 1927 Convention on the Execution of Foreign Arbitral Awards (the 1927 Geneva Convention 92 LNTS 301 (1929-30) entered into force on 25 July 1929 in accordance with its Article 8.

[29] Amazuru A. Asouzu, "International Commercial Arbitration and African States: Practice, Participation and Institutional Development", Cambridge University Press, 0521641322

Coast and Togoland)(Ghana); the Colony and Protectorate of Kenya; Mauritius; Northern Rhodesia (Zambia); **Zanzibar (12 March 1926) and Tanganyika (on 17 June 1926)**[30]; and Uganda (on 28 June 1929). Thus in Africa, the 1923 Geneva Protocol never applied to Botswana, part of Cameroon under British Mandate, Lesotho, Nigeria, Sierra Leone, South Africa, Sudan and Swaziland. Malawi (former Nyasaland) must also be in the latter group as the Geneva Treaties were never extended to it as a dependency of the UK nor did independent Malawi take any steps to join the Treaties. However, rather surprisingly, the 1967 Malawi Arbitration Act, enacted after Malawi's independence purported to implement the Geneva Treaties.[31]

(ii) The 1927 Geneva Convention

The 1927 Geneva Convention was linked to, and to some extent reinforced the scope of, the 1923 Geneva Protocol. Thus, the 1927 Geneva Convention applied in "High Contracting States" to arbitral awards made pursuant to a Protocol arbitration agreement provided the award was made in a territory of one of the High Contracting Parties and between persons who were subject to the jurisdiction of one of the High Contracting Parties (Art.1). The 1927 Geneva Convention applied only to an award made after the coming into force of the 1923 Geneva Protocol (Art.6) and was opened to all signatories of the 1923 Geneva Protocol and members or non members of the League of Nations on whose behalf the 1923 Geneva Protocol had been ratified (Art.7). An enforceable award under the 1927 Geneva Convention was one that was final in the country in which it has been made in the sense that its validity was not being challenged there [Art.1(d)].

The 1927 Geneva Convention, unlike the 1923 Geneva Protocol, did not apply to colonies, protectorates or territories under the suzerainty or mandate of any High Contracting Party unless they were specifically mentioned. However, the application of the 1927 Geneva Convention to one or more of such colonies, protectorates or territories to which the 1923 Geneva Protocol

[30] Although Tanganyika and Zanzibar merged in 1964 to form the United Republic of Tanzania, the two constituent entities of the Union continued to apply the inherited colonial pieces of legislation.

[31] See Patchett, Recognition, p.243 quoted by Amazuru A. Asouzu, "International Commercial Arbitration and African States: Practice, Participation and Institutional Development", Cambridge University Press, 0521641322. See also the case of ***Kassamali Gulamhusein Co. (Kenya) Ltd v. Krytatas Brothers Ltd [1968] 2 ALR Comm. 350***, a case arising from Kenya, but useful in understanding the Malawian situation.

applied could be effected at any time by a declaration by a High Contracting party (Art.10). Some contracting states with territorial possessions in Africa made such declarations. The UK ratified the 1927 Geneva Convention on 2 July 1930. It subsequently acceded on behalf of some territories in Africa.[32] Thus if the 1923 Protocol and the 1927 Convention are, or if any of them is or was, applicable or inapplicable to any African state, it was largely due to the action or inaction of the imperial powers. However, when Tanzania (then Tanganyika) gained its independence from the British colonizers in 1961 it inherited the colonial arbitration law "lock, stock and barrel." The colonial Arbitration Ordinance[33], now re-baptized the Arbitration Act[34], is still in force in the country.

It is worth noting here that the 1958 NYC has a superseding effect on the earlier Geneva Treaties, the 1923 Geneva Convention and the 1927 Geneva Convention, which as I said are still binding law in Tanzania Mainland under the Arbitration Act. Tanzania like many other states has joined the NYC, but without domesticating it. As more states join the NYC, its geographical coverage has also increased tremendously. The legal uncertainty in so far as Tanzania is concerned is whether the ratification of the NYC by the United Republic of Tanzania in 1965, which understandably also encompassed Tanzania Zanzibar, created the same legal obligation towards domestication of the NYC given that the legal system in the United Republic of Tanzania is separate and distinct. Tanzania Mainland and Tanzania Zanzibar each has a separate law on arbitration, which bear their origins in the colonial piece of arbitration legislation the hitherto two independent entities inherited from the British colonial government upon attaining their independence in the 1960s.

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[32] These were Gold Coast (Colony, Asante, Northern Territories, Togoland under British Mandate)(now in Ghana); Kenya, ***Tanganyika Territory and Zanzibar (now Tanzania since 1964);*** Uganda Protectorate (26 May 1931); Mauritius (13 July 1931) and Northern Rhodesia (13 July 1931) (Zambia). These entities were also covered by the 1923 Protocol, except for Southern Rhodesia (Zimbabwe) which was only covered by the 1923 Protocol.

[33] Cap.15

[34] Cap.12 R.E. 2002

4.3 Domestication of Private International Law Treaties

The foregoing discussion leads to one major conclusion, that, the Arbitration Act and its Rules are fairly outdated. The Arbitration Act still embodies provisions of the 1923 Geneva Protocol and the 1927 Geneva Convention, incorporated in the Second Schedule to the Civil Procedure (Arbitration) Rules, which have been superseded by Art.VII(2) of the New York Convention, which stipulates thus:.

> *"2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention."*

Despite the fact that Tanzania ratified the NYC almost 50 years ago, it has yet to incorporate the provisions of the NYC on the recognition and enforcement of foreign arbitral award in its law. It is worth noting here that the NYC is an international treaty falls within the ambit of private internbational law. The issue is whether courts in Tanzania can enforce the provisions of the NYC despite not being legislated. This question does not find easy answer since although it is now settled that a judge may take recourse to principles of public international law found in treaties and public customary international law as a guide to interpreting national law. Tanzanian courts have held that the Constitution incorporates the Universal Declaration of Human Rights as well as other global and regional human rights treaties, which courts should consult when interpreting provisions in the Bill of Rights and Duties.[35] It is not yet settled whether recourse

[35] There is a host of case law where reference to international human rights treaties is made including JOHN MWOMBEKI BYOMBALIRWA V REGIONAL COMMISSIONER AND REGIONAL POLICE COMMANDER, BUKOBA ANOTHER [1986] TLR 73, 84; LEGAL AND HUMAN RIGHTS, LAWYERS' ENVIRONMENT ACTION TEAM (LEAT) AND NATIONAL ORGANISATION FOR LEGAL ASSISTANCE V THE ATTORNEY GENERAL High Court of Tanzania, at Dar es Salaam (Main Registry), Misc Civil Cause No 77 of 2005 (unreported) 39; DIRECTOR OF PUBLIC PROSECUTIONS V DAUDI PETE [1993] TLR 22, 34-35; PASCHAL MAKOMBANYA RUFUTU V THE DIRECTOR OF PUBLIC PROSECUTIONS, Miscellaneous Civil Cause No 3 of 1990 (unreported); N.I.N. MUNUO NG'UNI V JUDGE-IN-CHARGE AND THE ATTORNEY GENERAL [1998] TLR 464.; CHIKU LIDAH V ADAMU OMARI High Court of Tanzania, at Singida, Civil Appeal No 34 of 1991 (unreported) 8; BAWATA AND 5 OTHERS V REGISTRAR OF SOCIETIES AND 2 OTHERS, High Court of Tanzania at Dar es Salaam, Misc Civil Cause No 27 of 1997

could be had by courts to private international law principles to interpret local statute dealing with private law matters such enforcement and recognition of foreign arbitral award.

4.4 Duality in Arbitral Laws

The issue is whether in the event Tanzania decides to enact its new arbitration law, it should have two separate and distinct arbitral laws, one addressing matters of enforcement of domestic awards and another for the recognition and enforcement of foreign arbitral awards or should have only one statute covering both. The trend in some parts of the world including Australia, Mauritrius and South Africa is to have separate legal regimes on arbitration. A good example here is the 1974 International Arbitration Act of Australia[36], whose long title tells it all:

> ***"An Act relating to the recognition and enforcement of foreign arbitral awards, and the conduct of international commercial arbitrations, in Australia, and for related purposes."***

Closer here to home, is the Republic of South Africa, where domestic arbitration is governed by the 1965 Arbitration Act[37] and supplemented by the 1977 Recognition and Enforcement of Foreign Arbitral Awards Act.[38] Unfortunately, these two pieces of legislation are incompatible with the prospect of South Africa being an attractive venue for international commercial arbitration, a dream befeating sharing with Tanzania. In 1998, the South African Law Commission proposed a Draft International Arbitration Bill[39] and recommended that South Africa adopt the UNCITRAL Model Law with the minimum changes possible for international arbitrations only[40] that is, leaving the Arbitration Act for domestic arbitrations. The Report summarized[41] the aims of the law as to:

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[36] Act No. 136 of 1974

[37] 42 of 1965

[38] 40 of 1977

[39] Law Commission: "Project 94 - Arbitration: An International Arbitration Act For Africa Report", July 1998

[40] Ibid. paragraphs 1(1) to 1(14) and 2(1) to 2(16).

[41] Ibid. paragraph 2(7).

- liberalize international arbitration by limiting the role of national courts and emphasizing party autonomy by allowing parties to choose how disputes are determined;
- establish basic mandatory provisions to ensure fairness and due process;
- provide a framework for conducting international commercial arbitrations so that, in the event of parties being unable to agree on the procedure, arbitration can still be completed; and
- incorporate provisions to aid the enforcement of awards and to clarify controversial practical issues.

In its Report, the South African Law Commission also recognized that the adoption of the law - with alterations restricted to those which are essential for its effective implementation - would assist in promoting South Africa as an attractive jurisdiction for international arbitrations.

Sight however, should not be lost of considering that in the desirability of allowing disputes to be determined within a particular jurisdiction, an important factor is the extent to which domestic legislation allows local courts to intervene and thereby obstruct and delay the process.[42] The principle adopted to reduce potential intervention to the absolute minimum necessary (while balancing this against the necessary supportive powers desirable for the courts to retain)[43] would, if adopted, promote the choice of Tanzania as a user-friendly seat of arbitration to potential participants. Foreign legal practitioners would not be dissuaded from recommending Tanzania as they would be familiar with the UNCITRAL Model Law and thus comforted by knowing that the potential for intervention by local courts, with whose procedural processes they would be unfamiliar, would be restricted.

As I intimated to earlier in this Paper, the existing legislation on arbitration in Tanzania Mainland, the Civil Procedure (Arbitration) Rules and the Arbitration Act are geared mainly towards servicing domestic arbitrations. The law affords too great an opportunity for procedural

[42] Ibid.

[43] Ibid.

intervention by the courts - obviously an undesirable characteristic for parties unfamiliar with the Tanzania legal process. The primary aim of the New York Convention, to which Tanzania is a Contracting Party, deals specifically with the recognition of foreign arbitral awards and the indirect enforcement of international commercial arbitration agreements.

As I alluded to earlier in this Paper, the Arbitration Act of Tanzania, largely a relic of the past, does not domesticate the NYC. In terms of facilitating the recognition and enforcement of foreign awards it has therefore become a hinderance. It applies only to the domestic enforcement of awards obtained in foreign jurisdictions as was the case in the Dowans case. An anomalous position arises due to the potential of such awards to enjoy greater enforceability within Tanzania than awards emanating from international commercial arbitrations held in Tanzania itself, as the latter are also governed by the Arbitration Act, which allows domestic courts in certain circumstances to intervene and set aside an award or to refuse its enforcement, and arguably defeat the object of the New York Convention. Just as a practical example, when a party to an arbitration agreement which is subject to the New York Convention brings proceedings regarding a dispute, the court must stay proceedings at the request of any party so that the dispute can be arbitrated. The stay of court proceedings is not compulsory when the arbitration agreement is "***null and void, inoperative or incapable of being performed.***"[44] The Arbitration Act of Tanzania and the Civil Procedure (Arbitration) Rules fall short of this obligation. They do not provide for the compulsory stay of court proceedings in such circumstances. Accordingly, courts possess discretion under the Civil Procedure (Arbitration) Rules, and the Arbitration Act as to whether to stay court proceedings subject to a valid arbitration agreement.

I propose that Tanzania adopts a separate Arbitration Act to govern the enforcement of domestic arbitration, and another law modeled on the UNCITRAL Model Law to apply to international arbitration. The assimilation of the UNITRAL Model Law into the proposed Tanzania's international arbitration legislation would address the uneasiness created by the failure of the Government of Tanzania to enact national legislation effecting the provisions of the

[44] The New York Convention Article II(3)

New York Convention[45], and thus creating international concern regarding the national courts' broad discretion as to whether to enforce an arbitration agreement.

It is high time also that the existence of parallel arbitration rules in the Civil Procedure (Arbitration) Rules and the Arbitration Rules for the enforcement of arbitral awards be done away with by consolidating and streamlining the separate rules into the proposed new legislation to govern the enforcement of domestic arbitral awards.

The domestication of international rules on commercial arbitration relates to the whole issue of divergence of opinion as regards the dualist/monist effect. This duality is particularly haunting to courts in common law countries. The most viable option for avoiding this problem is enact a new arbitration statute with provisions that are more favourable than, yet compatible with, the New York Convention, for the recognition and enforcement of arbitral awards.[46] The trend now is for African states to enact arbitration laws which are more favourable than the NYC for the recognition and enforcement of arbitral awards. Nigeria, Egypt and Tunisia have each adopted the UNICTRAL Model Law with elaborate definition of what might be a "commercial" transaction. The 1996 Zimbabwean Arbitration Act goes further and is applicable to any dispute that can lawfully be arbitrated. The advantage of the UNICTRAL Model Law is that it applies irrespective of the place in which the arbitral award was made.[47] Third generation arbitration laws in Africa have for avoidance of doubt enumerated what should be regarded as being in conflict with public policy for the purposes of setting aside or refusing to enforce or recognize an arbitral award.[48] The 1996 Zimbabwe Arbitration Act for example provides as follows:

"An award is in conflict with public policy if:

[45] NYC Art. II

[46] See also the South African draft International Arbitration Act, 1998 Schedule 1 Art.34(5) and 36(3); Bermuda International Conciliation and Arbitration Act 1995 s.27; Singapore International Arbitration Act 1994 s.84; Australia International Arbitration Amendment Act 1989 s.19; Maltese Arbitration Act 1996, Art.58 and India Arbitration and Conciliation Act 1996 ss. 34(2)(b)(ii) and 48(2)(b).

[47] Art.35 and 36 of the Model Law and refer to the law in Nigeria and Kenya

[48] South Africa Law Commission: "Project 94 - Arbitration: An International Arbitration Act For Africa Report", July 1998

a) The making of the award was induced or effected by fraud or corruption; or

b) A breach of the rules of natural justice occurred in connection with the making of the Award (Art. 34(5) and 36(3).”

As I pointed out earlier in this Paper, the Arbitration Act,[49] which governs the recognition and enforcement of domestic and foreign arbitral awards does not define what a ‘foreign arbitral award’ is. A foreign arbitral award would therefore mean an award (i) made outside Tanzania the enforcement of which is permissible in terms of the Arbitration Act. In 2011, Pakistan enacted a specific law, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, which requires the courts to refer disputes to arbitration where there is a valid arbitration agreement and limits the grounds for setting aside awards to those set out in Article V of the Convention. Section 8 of the new Pakistan act brings on board the incosistency principle by providing as follows:

> “*if there is any inconsistency between this Act and the Convention, the Convention shall prevail*.”

The New York Convention is widely recognized as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and to recognize and enforce awards made in other States, subject to specific limited exceptions.

5 CONCLUSION AND RECOMMENDATIONS

In this paper we have discussed various issues regarding the role of arbitration as an alternative dispute resolution mechanism. An aggrieved party to an international or transnational agreement may theoretically utilize national courts or international arbitration. A claimant contemplating litigation abroad may be concerned about being unable to brief lawyers of the same nationality, or that the language of the court and the contract may differ so that essential documentation and evidence may need to be translated, with the possibility of misinterpretation or misunderstanding. Therefore, the prospect of bringing a claim arising from an international

[49] Cp.15 R.E. 2002

business transaction before a foreign court may lack appeal. Such legitimate concerns are motivating the increasing trend (in countries such as Germany, the United Kingdom, France and Switzerland) of revising national laws in order to minimize the impact on international commercial arbitrations, as well as the desirability of adopting a uniform process for determining disputes.

The flexibility of arbitration is advantageous compared with the relatively regimented procedural court practices implemented in different jurisdictions. The need to combine the best features of different procedural systems is necessary when creating a set of rules agreeable to legal scholars of so-called 'common law' and 'civil law' countries.

There has been a universal trend to adopt new and/or to revise existing legislation for international arbitration. The UNCITRAL Model Law has been a major impetus behind this. In Africa, where British colonization inevitably resulted in many southern African countries initially basing their arbitration statutes, to varying extents, on English legislation, the law's influence is seen by its adoption (with minor changes) in Kenya, Zambia and Zimbabwe, its adaptation in Egypt, Nigeria and Tunisia, as well as its influence in Mozambique and Uganda. The aims of a law based on the UNITRAL Model Law should be to:

- liberalize international arbitration by limiting the role of national courts and emphasizing party autonomy by allowing parties to choose how disputes are determined;
- establish basic mandatory provisions to ensure fairness and due process;
- provide a framework for conducting international commercial arbitrations so that, in the event of parties being unable to agree on the procedure, arbitration can still be completed; and
- incorporate provisions to aid the enforcement of awards

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