# IS THE COMMERCIAL COURT JEALOUS OF ARBITRATION?

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## 1. Introduction

Arbitration in Tanzania and the world generally has now come of age, despite the prevalent infrastructural, administrative, social, economic and judicial related setbacks bedeviling this alternative mode of settling disputes. Zeroing closer to home, it is noteworthy that an arbitration clause is now a common feature in most commercial contracts concluded after the liberalization and privatization of the Tanzania's economy in the 1990's. Currently there is an increasing number of cases being referred to arbitration unlike in the recent past. Arbitration, which is loosely known as "litigation in private or before a private chosen judge", has been a subject of numerous definitions. Marshall, for instance, defines arbitration as a reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by other person or persons, other than a court of competent jurisdiction[2]. Beinstein puts it differently thus: "Arbitration is a mechanism for resolution of disputes which takes place, usually in private, pursuant to an agreement between two or more

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[2] Enid A. Marshal, *Gill: The Law of Arbitration*,3rd Edn, at pg 1.

parties under which the parties agree to be bound by the decision given by a third neutral party according to law"[3].

In Tanzania, Arbitration is governed by the Civil Procedure Code, Cap 33 R.E. 2002(CPC) and the Arbitration Act, Cap 15 R.E. 2002 and rules made thereunder. Arbitration flourished as an alternative to litigation for arguably good reason i.e. arbitration has numerous advantages compared to litigation as will be seen herein below.

## 2. Advantages of Arbitration over Litigation

Arbitration can be speedier than litigation, and saves time, and sometimes costs. Further, arbitration guarantees confidentiality and unwanted publicity[4]. Flexibility as to venue, manner of conducting arbitration is also an important advantage taking into account simplicity and the less technical procedure of the arbitral process. In technical disputes, it is easy to choose an arbitrator with the requisite technical knowledge and special qualifications hence, parties' dispute will be determined by one of their own, who knows the nitty gritty of their business as parties choose member(s) of the arbitral Tribunal.

In addition to the above, arbitration is praised to be a more neutral process than court proceedings in multi party or state related disputes. In cases

[3] Beinstein, R. et all, *Handbook of Arbitration Practice*, 3rd edn. London,1988.
[4] Marshal,supra.

involving parties from different states, or states as parties, arbitration is essential as parties would require a neutral procedure or forum than the state courts. More so as the judiciary may not be or be seen to be wholly independent by parties hailing from outside the country. But all said and done, all is not rosy about arbitration, as this mode has its own follies as shown below.

## 3. Disadvantages of Arbitration over Litigation

In some cases, litigation is better than arbitration. Critics point to various weaknesses inherent in arbitration to vindicate this view. They say arbitration can be dilatory, and costly just like litigation. Newman[5], for instance, argues that litigation and arbitration will remain weak because they (a) polarise positions of parties (b) waste client's managerial time, (c) leave clients out of touch with their own dispute and turn them to be victims of the take over of the suit by the counsel and court/arbitrator (d) damage commercial relationship between the parties (e) are expensive and may involve long drawn out proceedings due to the use of deliberate delaying tactics by a defendant who knows how to play the system (g) the final result may be a pyrillic victory for the successful litigant with monies recovered representing a mere fraction of actual expenditure, a judgment or award that may be impossible to enforce (h) a belated realization by the

[5] Newman, Paul, *Partnering with Particular Reference to Construction. Arbitration*( ) 66 JCI Arb1 pg. 40.

plaintiff that the whole reason for the litigation or arbitration was the impecuniousness of the defendant.

Another disadvantage is that arbitration is unsuitable for cases in which all or one of the parties requires interpretation of a particular statute or law, or wish to litigate in order to avoid a pandora's box of similar claims in the future, or just want to stall and or prolong the dispute by way of elongating trial, and the consequential appellate avenues[6]. There is also one notable weakness, that is, the difficultly of joining third parties to arbitral proceedings/multiple parties, and the frequent difficulty to obtain interim preservatory orders pending reference to or finalization of arbitration[7]. Inability to create binding precedent is also cited as a weakness.

Courts' jealousy and tendency to readily intervene and set-aside arbitral awards, or refusal to stay suits in contravention of submission clause are also cited as a negative spots in the quest for arbitration in Tanzania. The latter weakness is the main preoccupation of this paper. In the coming parts, the author will thus endeavour to show, with reference to case law emanating from the Commercial Court and other courts, how the Commercial Court has been, in some ways, a hindrance to parties in their quest to pursue arbitration. At the outset, it should be pointed out that the

[6] This is undoubtedly unethical.
[7] See for example, Hodi Hotels ltd v. Jandu Plumbers, Misc. Commercial Application No. 15 of 2009

author is not 'sitting on appeal' over the court's decisions, but merely reflecting a pro-ADR practitioner's views over the court's approach in this subject.

## 4. Commercial Court's Practice as Regards Arbitration

One may safely say that in some cases the court has not been very supportive towards applications aimed at facilitating and enabling parties to pursue arbitration. Instead, in most cases, the court tends to be unusually technical, and refuse to relinquish jurisdiction even amidst clear contractual intentions to the contrary exhibited by parties. This can be seen in the court's practice regarding the following aspects:

### a. Taking a Step in the Proceedings[8]

In the event a party to an agreement with a clause to resolve disputes through arbitration decides to abrogate his undertaking and decides to take the dispute to the court, the other party is allowed at law to apply for stay of proceedings, with a view to refer the matter to arbitration. This power is adumbrated in section 6 of the Arbitration Act. That right is qualified, in that the applicant or defendants must not have filed a written statement of

[8] Section 6 of the Arbitration Act reads:

> "Where a party to a submission to which this Part applies, or a person claiming under him, commences a legal proceedings against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, **a party to the legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings; and the court**, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings."

defence or taken any step in the proceedings. What amount to step in the proceedings has taxed the minds of several courts, and there are a plethora of authorities on the interpretation of that phrase. Suffice to note that judges differ considerably as to the scope and extent of the provision and the kind of steps that are deemed to be capable of being interpreted as a waiver of the undertaking and desire to solve the dispute vide arbitration.

For instance, in the case of *Transnet vs Spoornet*[9], the plaintiff was suing on a contract, which has a submission clause, which mandate parties to pursue arbitration in the event of any dispute. Upon being served with a plaint and chamber application for interim injunction, the defendant refused to file his defence, noting that he intends to pursue arbitration and issued a notice to that effect, but filed a counter affidavit contesting the application for the issuance of interim injunctive orders[10], noting that the parties ought to go to arbitration and simultaneously moved the court for an order for stay of proceedings. Counsel for the Plaintiff opposed the application for stay arguing that the Defendant had already taken a step in the proceedings, disentitling her for an order for stay.

The Commercial Court indeed refused the application for stay on the ground that the defendant had already taken a step in the proceedings by filling a

[9] Commercial Case No. 55 of 2006.
[10] The defendant thought that issuance of the injunctive orders would prejudice its case, given the nature of the matter.

counter affidavit and arguing the application for interim INJUCTIVE ORDERS. This is a very unfortunate decision for the cause of ADR and arbitration in particular. In our view, a step in the proceedings should be limited to those steps which further or support the existence of the suit in court and not otherwise. A backward step is no effectual step. Disputing an application for interim injunction, without filing a defence, while making it clear all along that you intend to go to arbitration, is surely not a step in the proceedings. It is thus our humble conclusion that in this case, the Commercial Court has stifled the parties' desires to go to arbitration without a good cause. More so, considering the rationale behind section 6 of the Arbitration Act.

In our view, not every step taken in proceedings constitutes a waiver of right to pursue the matter through arbitration. In *Capital Trust Investment Ltd vs. Radio Design*[11] Jacob, J. noted that a party takes a step in the proceedings to answer the substantive claim when two conditions are fulfilled;

a) the conduct of the applicant must be such as to demonstrate an election to abandon its right to a stay in favour of allowing the action to proceed; and

b) the act in question must have the effect of invoking the jurisdiction of the court.

The learned judge further noted that a party who has initiated an application for a stay does not take any step in the proceedings to answer the

[11] [2001] 3 All E.R. 756, Ch. Div. 62,

substantive claim "if he, simultaneously or subsequently, invokes or accepts the court's jurisdiction provided he does so only conditionally" upon the application for stay failing.

That decision was reviewed by Altaras in his paper titled *"A Step in the Proceedings: Capital Trust Investment Vs. Radio Design"*[12] who noted that if, however, the other application is made unconditionally then the defendant is likely to lose its right to a stay, "for it would then be blowing hot and cold"

The above view is quite progressive and supportive of arbitration, and is in sharp contrast with the view expressed in *Transet's case*, which apparently is supported by Georges C.J. who in *Motokov vs Auto Garage Ltd. And others, [1970] EA 249* at pg 252 held that "a step is no less a step, because it is sideways rather than forward".

**b. Issuance of Preservatory Orders Pending Commencement, or Disposal of Arbitration.**

There is another instance which shows the court's somewhat ant-arbitration tendencies. This relates to the question of issuance of preservatory orders pending arbitration. In *Nor Consult A/S vs TanRoads*[13], the applicant moved the Commercial court by way of a chamber summons supported by an

[12] (2002) 68 Arbitration, at pg 62-63
[13] *Misc. Commercial Application No. 10 of 2008*,

affidavit[14] under section 95 of the Civil Procedure Code, section 2(3) of the Judicature and Application of Laws Act, and under Article 26(3) of the UNICITRAL Rules of Arbitration.

A preliminary objection was raised to the effect that the applicant cited wrong provisions of the law in moving the court. The court agreed, and noted that the applicant ought to have cited section 3 of the Arbitration Act[15]. The learned judge noted "This section is a bedrock on which a process to access arbitration is based", and that it can be used to grant interim reliefs of protection. The application was thus struck out with costs.

Later the applicant filed a fresh application, that is Misc. Commercial Application No. 16 of 2008 this time by way of petition, citing section 3 of the Arbitration Act and Rule 5 of the Arbitration Rules[16]. The Court entertained the application, and set out a very progressive view as regards the role of courts in preserving the subject matter of arbitration. The

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[14] It is wrong to move the court by way of chamber summons and affidavit, instead of a petition as stipulated by Ruler 5 of the Arbitration Rules.

[15] Section 3,subtitled **Application of Part II,** provides:

> This Part shall apply 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:
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> Provided 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.

[16] Rule 5,subtitled Mode of application, provides:

> "Save as is otherwise provided, all applications made under the Act shall be made by way of petition."

decision in this case gives us the following principles, to mention just a relevant few:

(i) The court can entertain an application for the, and grant preservatory reliefs pending arbitration if moved under section 3 of the Arbitration Act, and Rule 5 of the Arbitration Rules.

(ii) In its supervisory role, courts may penalize and should endeavour to prevent parties from becoming mischievous, and exercise delaying tactics to stall or make impotent the dispute settlement process, noting that arbitration proceedings must be fast tracked, and that a show of professionalism and good faith is vital in this aspect.

(iii) The court can give timelines within which to access arbitration. In this case, the court gave parties 30 days within which all processes to accede to arbitration must be completed.

Notably, the above decision (Norconsult II) is very progressive, but I still think that although the procedure used is okay (in terms of originating documents), but the laws cited were/are inappropriate. I still think section 95 and Order XXXVII of the Civil Procedure Code, Section 21(d) of the Arbitration Act and Section 2(3) of JALA are the proper enabling authorities. Section 3 of the Arbitration Act is totally silent on the question of issuance of

preservatory orders in the absence of a suit or pending arbitration, and Rule 5 merely provides for the procedure for filing applications under the Act.

Since the issue of issuance of preservatory reliefs before the commencement of arbitration proceedings is not provided for by any law, resort to section 95 and Order XXXVII of the Civil Procedure Code, Section 21(d) of the Arbitration Act and Section 2(3) of JALA, is certainly justified in our humble view. Section 95, Order XXXVII and Section 2(3) were duly cited in the previous application (Norconsult I case) that was struck out on account of wrong citation of enabling provisions of the law.

In *Hodi (Hotel Management) Company Ltd vs Jandu Plumbers Ltd*[17], the Commercial court noted that it can intervene to facilitate arbitration by taking interim measure of protection or conservatory measures to safeguard the subject of arbitration. The Court further noted that it has a supportive as well as a supervisory role in matters of arbitration. The court cited the case of *G. K Hotels & Resorts Vs Board of Trustees LAPF*[18], in support of these progressive pronouncements.

Despite acknowledging the above roles, the Court noted that there is no law in the country, including the Arbitration Act, which provides for a relief of

[17] *Misc. Commercial Application No. 15 of 1009*,
[18] *Misc. Commercial Cause No. 1 of 2008*

injunction pending reference to Arbitration, and undertook to bring this state of affairs to the attention of the responsible relevant Minister[19].

The court further noted that section 3 of the Arbitration Act is therefore the very foundation upon which a party wishing to access arbitration can come to the court seeking for conservatory or interim measures but only subject to there being a submission of reference to arbitration. In other words, access to court for interim or conservatory measures has to be proceeded by submission of reference to arbitration, the court surmised.

In the end, section 3 of Arbitration Act therefore presupposes the existence of arbitral proceedings. The court was thus satisfied that the application was premature and proceeded strike out the application for preservatory orders with costs.

From the above discourse, it is clear to us that Commercial Court's stance in the *Norconsult cases* and *Hodi case* is fundamentally inconsistent as regards the applicability of section 3 of the Arbitration Act. Reading the caselaw referred to herein above, one notes that in the *Norconsult* cases the court

[19] Note that section 21 of the Act provides that the High Court( and not the Minister) shall make rules. it says:

"The High Court may make rules as to–

(a) the filing of awards and all consequent or incidental proceedings;

(b) the filing and hearing of special cases and all consequent or incidental proceedings;

**(c) the staying of any suit or proceedings in contravention of a submission to arbitration; and**

**(d) the general conduct of all proceedings in court under this Act."**

found that interim preservatory orders pending arbitration are issuable under section 3 of the Arbitration Act, regardless of the pendency of arbitration proceedings or suit. This is clear at Pg 24 of the type script of *Norconsult I* ruling and at page 20-22 of the typescript of *Norconsult II* ruling, when the Learned Judge granted interim preservatory orders before arbitral proceedings were actually commenced, and gave parties 30 days within which to commence arbitration proceedings.

On the other hand, reading *Hodi's case*, one may note that the Commercial Court is apparently of the view that section 3 of the Act indeed empowers the court to grant interim reliefs, but there must be arbitral proceedings already in motion. With due respect, we think the learned deciders in both cases are misdirected in various ways and extents. In *Norconsult II case*, the ultimate conclusion is justified, but we have trouble with the reasoning leading to that conclusion. We shall endeavour to show why, and suggest a desirable position.

To us, section 3 presupposes the existence of pending arbitration, and that the matter submitted to arbitration must otherwise fall in the jurisdiction of the High Court, had it not been for the arbitration clause, for part 2 of the Arbitration Act to, and will apply. There is nothing magical about this section. Now a million dollar question is whether section 3 is or can be the

basis of an application for interim protection reliefs or conservatory measures. We think not. Here are our reasons;

Section 3 does not confer any rights. It does not create rights or empower courts to issue the reliefs in issue. It simply provides for the application of part 2 of the Arbitration Act. In the entire part 2 of the Act, and indeed the whole Arbitration Act there is no provision giving the court powers to grant interim reliefs in the absence of arbitration proceedings so it is untenable to say that section 3 of the Act can be used to empower the court to grant interim reliefs, whether before or after the commencement of arbitral proceedings or suit.

In view of the above lacuna, we think section 95 and Order XXXVII of the CPC, section 21(c) and (d) of the Arbitration Act and section 2(3) of JALA are crucial and can be applied to further the cause of arbitration, together with Rule 5 of the Arbitration Rules. Rule 5 merely provides for the mode of preferring applications in arbitration matters. It is not a jurisdiction creating provision. It is just like Order 43 Rule 2 of CPC. These two provisions are not power creating provisions. Hence, in our humble view if one fails to cite section 95 and Order 37 of the CPC (as there is no enabling law), section 21(c) and (d) of the Arbitration Act and or section 2(3) of JALA, then the

application will be incompetent for non or wrong citation of proper provisions of the law.

In other words, citing Rules 5 of Arbitration Rules or section 3 of the Arbitration Act without more is not a panacea either. The said Rule 5 and section 3 only need to be complied with, as they provide the vehicle/modality within which to access the court, but the court can not use them to grant interim preservatory orders. Other jurisdiction creating provisions i.e provisions conferring the court with power to give the orders sought must be cited. Indeed, the entire part 2 of the Arbitration Act do not contain provisions for the issuance of preservatory orders, whether before or after the commencement of arbitral proceedings. As such if the issue of non citation of proper law is anything to go by, no pre or post arbitration injunctive relief can be given by the court on the basis of section 3 of the Arbitration Act.

Mbwambo notes that whereas in England, India and Kenya, the law expressly provides for powers to issue preservatory measures *"The Ordinance does not give courts in Tanzania such power.* ***Yet, the position is still unclear from the Judge made law point of view"***[20]*.* He cited *Tanesco Vs IPTL case* in support of his point for a judge made law. Indeed

[20] Rosan Mbwambo, Efficacy and Adequacy of Arbitration law in Tanzania Mainland, Dissertation LLM, 2004

judges can rise to this occasion and make such law, instead declining jurisdiction. They can make such law formally(as the High Court) or through caselaw. This seems to rhyme with section 21 of the Arbitration Act, which says:

> *"The High Court may make rules as to–*
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> *(a) the filing of awards and all consequent or incidental proceedings;*
> *(b) the filing and hearing of special cases and all consequent or incidental proceedings;*
> ***(c) the staying of any suit or proceedings in contravention of a submission to arbitration; and***
> ***(d) the general conduct of all proceedings in court under this Act."***

One should, however, sound a caveat immediately. The author do not in any way submit or agree to submission to the effect that the commercial or other courts, as applicable, are not empowered to grant interim reliefs pending commencement of arbitration proceedings. I think they have that inherent power and should be quick to invoke it in furtherance of the cause of Arbitration and ADR generally. In *Covell Matthews Partnership vs TRC*[21]*, Katiti J, as he then was, and in Kobil Tanzania Ltd vs Mariam Kisangi*[22]*,* Massati J, as he then was, invoked inherent jurisdiction and gave various orders in arbitration related matters. So there is no question of reinventing the wheel here, as this has been the practice of the court.

[21] *Civil case No 106 of 1996*
[22] Misc. Commercial Application No12 of 2007

In *Kisangi's case*, the court grappled with the question of res subjudice, in particular the issue whether it can order a stay of petition to appoint an arbitrator, pending determination of a similar substantive suit in the Land Court in line with section 8 and section 95 of the CPC. The court held that the CPC is applicable in arbitral related applications. More so, when there is no specific remedy. The court reasoned thus:

> *"It has also been held that it is impossible for the legislator to contemplate all sorts of litigation and provide the procedure for them. In a situation where there is no procedure to cater for a certain situation, the court is obliged to use its common sense, justice, equity and good conscience and resolve the problem before it to further the interests of justice and prevent abuse of the process* ***(See SARKAR ON OCODE OF CIVIL PROCEDURE 10th ed. Pg. 9).*** *And that is the philosophy behind the court's inherent powers under s. 95 of the Civil Procedure Code Act 1966."*[23]

The court then concluded thus;

> *"From the above, it appears to me that although a petition is not a suit, it is nevertheless a civil proceeding, and in the absence of any provision for stay of such petition in the Arbitration Act, or which prohibits the application of the provisions of the Civil Procedure Code Act, the court is free to use the provisions of the Code in such exceptional circumstances. And it may do so under its inherent powers, if it is in the interests of justice or to prevent abuse of process."*[24]

Let us survey, albeit in brief, position in other Jurisdictions. In the UK, in *Halki Shipping Corporation Vs. Sopex Oils Ltd (the Halki)*, it was held that "

[23] Ibid, at pg 7 of the typed script.
[24] Ibid,at pg 8

the arbitrators have power to make interim awards, and that the court is bound to grant a stay "unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred."[25]

Indeed, in the same spirit in *Villa Denizalik Sanayi Ve Ticaret As vs. Longen S.AC (the Villa)*,[26] it was held that the court may be prepared to support arbitration by appointing an arbitrator where that would give effect to an agreement to resolve disputes by arbitration.

In Singapore, the position is: court's powers to make interim orders should only be used in support of arbitration, and it will thus be mindful that its processes are not used to bypass an arbitral tribunal or abused to gain a procedural advantage. In particular, Wang Partnership LLP notes in its e-article titled "Interim Relief in Arbitration Proceedings: Courts to play a Supportive Role only" that:

> *"The primary source for interim relief should be the arbitral tribunal. Accordingly, help from the courts should only be sought when arbitration is inappropriate, ineffective, or incapable of securing the particular form of relief sought speedily. Such situations include the following:-*

[25] Timothy Jones, Judicial Interpretation of the Arbitration Act,1996,(1999) 65 Arbitration1,pg 35-31.
[26] Ibid.

*a)Where third parties over whom the arbitral tribunal has jurisdiction are involved.*
*b)Where matters are very urgent, or*
*c)Where the courts coercive powers of enforcement are required."*

**c. Certification of Submission**

Another, scenario in which the court has proved to be hindering the cause of arbitration, and ADR generally, and protecting its jurisdiction is exhibited in *Kobil Tanzania Ltd vs Mariam Kisangi* [27], where the court refused an application for stay of proceedings pending arbitration on the technical ground that the submission is not certified as per rule 8 of the Arbitration Rules[28] The Rules says:

*"Every petition shall have annexed to it the submission, the award, or the special case to which the petition relates or a copy of it certified by* ***the petitioner or his advocate*** *to be a true copy"*

In the case at hand, the petitioner had filed an Application by way of petition, supported with a verifying affidavit. The affidavit and petition refers to the submission clause, which was duly annexed. In her answer to the petition, and counter affidavit, the respondent did not dispute the existence or genuineness of the submission clause, but only put up a preliminary

[27] Misc. Commercial Application No. 4 of 2007
[28] The Commercial Court relied heavily in High Court Misc. Civil Cause No 142 of 2005: EADB vs Blueline Enterprises Ltd.

objection that the submission is not certified by the petitioner. The court agreed and struck out the application with costs. It should be noted that, the petitioner in this case, verified the contents of the petition (which includes all the annextures) to be true in the petition itself, and in the verifying affidavit. The validity/genuineness of the submission was not disputed at all and certification is all about showing authenticity and genuineness of documents. No one challenged the authenticity of the arbitration clause. Now one may ask: what does this decision serve in these circumstances?, more so when the law itself allows the petitioner himself to certify the submission. Isn't it a blow to arbitration? Why would the rollercoaster of arbitration and ADR generally be stopped on such a flimsy technical ground? While we appreciate in full the rationale of the requirement for certification, we are still of the view that it should be flexibly applied, more so when the parties clearly recognize the agreement in issue and do not doubt its authenticity.

**c) Honouring the Principle of Sanctity of Contract.**

Of importance in this discourse, is the principle of sanctity of contract. Our argument is, refusal of stay of proceedings on technical grounds run counter to the principle of sanctity of contract as the court will, in effect, be seen to enable the plaintiff to evade a contractual obligation. This is not a good

policy. In *Covell Matthews Partnership vs TRC*[29], Katiti J, as he then was, noted:

> *"It would seem also to be the Court's policy, to encourage arbitral process, depending on the wording of the arbitral agreement, and the effectual interpretation thereof, because either in law, without arbitral process, conditions precedents being fulfilled, the cause of action is yet complete, see Halsbury's Laws of England – Third Edition Vol. I pages 17 and 18, or for special regard for the sanctity of the parties solemn contract, in that very direction. For the latter case, I get persuasive comfort, from the case of,* ***MICHAEL COLODE TZ AND OTHERS Vs. SERAJUDDIN CO. 1963 AIR SC 1044,*** *which commenting on similar subject, inter alia observed:*
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> > *"where a party to an arbitration commences an action, for determination of the matter agreed to be referred, under an arbitration agreements, the court normally favours a stay of the action, leaving the plaintiff, to resort to the tribunal, chosen by the parties, for adjudication.* ***The Court in such cases, is unwilling to countenance, unless there are sufficient reasons, a breach of the solemn obligation to seek resort, to the tribunal selected by him, if the other party thereto, still remains ready, and willing to do all things necessary, for the proper conduct of arbitration*** *……. When the Court refuses to stay the suit, it declines to hold the party to his bargain, because of special reasons which make it, inequitable to do so. The court ordinarily desires the parties to resort for resolving disputes, arising under a contract, to the tribunal contemplated by them, at the time of the contract. That is not because, the Court regards it self bound to abdicate its Jurisdiction, in respect of dispute within its recognisance, it merely seeks to promote the sanctity of contracts, and for that purpose, stay the suit"*[30].

Further, such refusal also diminishes the spirit of, and the ever increasing morale and urge to pursue ADR, as arbitration is one of the ADR mechanisms. Again, Katiti, J had this to say on this aspect:

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[29] *Civil Case No 106 of 1996*.
[30] Ibid. pg 6-7.

> *"But, the parties here do not seem to be unappreciative of this arbitral agreement at all. On my part, upon serious consideration, of the matter, and considering the currency of the usefulness of the alternative dispute settlement process, that is having significant in road in our Judicial system now, and while I concede that otherwise, this Court has seisin of the dispute, I am engagingly overwhelmed, by the question whether the arbitral agreement, should be thrown into the ocean with a sinker. I confess fully, that the agreement was negotiated by serious people, who knew what they were doing, and why they did so, and in this submissions, the learned Counsels, did not seem to be at war against it, and though of course already, they have crossed the Rubicon, and not making, a new arbitral agreement either."*[31]

The above passages say it all.

## 5. Recommendations

In view of the above discussion, we put forward the following recommendations:

i. The Arbitration Act is very skeletal, hence the need for amendments to make it comprehensive. We urge the relevant bodies to align it with the UK Arbitration Act, 1996, which is comparatively more comprehensive, in as far as local conditions allows.

ii. The relevant body should be moved to formally make rules as per section 21 of the Act.

iii. Courts are urged to be more supportive of arbitration and other ADR modes.

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[31] Ibid. pg 7.

iv. The Arbitration Act applies to the High Court only, hence there is a need to allow its application in the District and Resident Magistrate's Courts so as to give effect to parties contractual intentions even in claims falling outside the pecuniary threshold of the High Court. This can be done by the President of the URT with the concurrence of the Chief Justice as per the proviso to section 3 of the Act, which reads:

> *"Provided 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."*

**6. Conclusion.**

In view of the increasing trend exhibited by businessmen in preferring arbitration instead of litigation, and the practical difficulties of obtaining preservatory orders pending the initiation of and or disposal of arbitration proceedings, courts are urged to be flexible, quick, less technical and careful to issue orders/reliefs geared to support the subject matter of, or the journey to arbitration. The cumulative effect of the treatment of points 4(a), (b), (c) and (d) above may give the impression that the commercial court is somewhat jealous of its jurisdiction, hence its frequent inability to give in to parties' requests for assistance to access arbitration on the basis of technical grounds. By supporting arbitration,

the court will not only give effect to the parties' contractual intentions, but also lend support and credence to ADR, and consequently reduce case backlogs and afford the court more time to engage in other pressing matters, while retaining its supervisory role/power over arbitration which has to be exercised judiciously as well.